

Appellate Mediation—“Settling” the Last Frontier of ADR

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I. INTRODUCTION

No one can deny any longer the profound effect alternative dispute resolution (ADR) has had on civil litigation in this country over the last twenty years; certainly the effect has been no greater than in California. Arbitrations, mediations, mini-trials, use of special masters, and references, both under court auspices and privately, have changed the way attorneys and most of corporate America view civil disputes. This has led to veritable uprootings from the bench and bar by seasoned attorneys and judges who have replanted themselves as providers of private neutral services in this burgeoning field. It has also instigated widespread modification of court rules needed to fold ADR procedures into traditional civil dispute adjudication, and has expanded the legal lexicon sure to delight any philologist by the inclusion of such tantalizing phrases as “facilitative mediation,” “‘baseball’ settlements,” and “stipulated reversals.”

In the closing years of the last century, the American appellate judicial process has remained the last frontier of ADR. Until the last decade or so, only the antediluvian settlement conference was available to help parties settle cases on appeal, and then only in the infrequent instance where the parties voluntarily requested one. To the contrary, appellate settlements were viewed as an oxymoron: conventional wisdom questioned how someone could expect civil litigants to resolve their legal differences after pursuing formal adjudication so doggedly through the judicial system, and particularly when one party has been declared a winner at the trial level. But perhaps fueled by the heady success of ADR at the trial level, and driven by ponderous appellate backlogs and

changing mindsets about the use of courts to resolve all forms of legal disputes, ADR encampments have been erected by appellate judges and practitioners around the country, most in the form of mediation programs, the form examined in this Article.

This Article explores several pioneering efforts to settle this last frontier of ADR. It begins in Part II with a description of California's historical flirtation with appellate mediation. The effort has blossomed into an enduring relationship producing several permanent, and mature, appellate mediation programs, including one in the First District where the Author's own court is located. Part II also discusses the programs implemented by these California sibs, not only to highlight their commonality, but also to illuminate differences. These similarities and differences become important when a critical gaze is cast at the performance results of these California appellate mediation programs.

Part III looks at the most developed appellate mediation programs in other jurisdictions, including one in the federal court system. This examination compares the mediation program models adopted by appellate courts in New Mexico, Oregon, Hawaii, Michigan, and the federal Ninth Circuit to those in California, and contains a statistical analysis of results reported by these programs.

Finally, Part IV discusses the perceived advantages of the most important and common programmatic features. These include making participation in court-sponsored appellate mediation mandatory, diverting cases into mediation before briefing, using dedicated, experienced staff to manage the court's program, relying on trained, experienced mediators, and using case selection criteria rather than relying on random case selections. The Article goes on intrepidly to offer conclusions about what types of appeals seem to settle most often, and why. Part IV concludes with a short discourse on the future of appellate mediation for the American system of appellate justice.

How appellate mediation is actually conducted is beyond the scope of this Article. Indeed, while there is little published on the topics explored in this Article, there already exists a robust body of published books and articles discussing and comparing the methods and tools employed during appellate mediation sessions.¹ Suffice it to say that the strategies

1. See generally DEBORAH M. KOLB & JUDITH WILLIAMS, EVERYDAY NEGOTIATION (2003); MEDIATION: THEORY, POLICY AND PRACTICE (Carrie Menkel-Meadow ed., 2001); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS:

and techniques used during the course of mediation can be sophisticated, complex, and diverse, and of necessity are strictly employed on a case-by-case basis.² Currently, there is no empirical way to quantify these variables in assessing the strengths or weaknesses of a single appellate mediation program. For our purposes, it will be assumed that, over time and a large sampling of cases, each program will bring to bear comparable mediator resources relying on proven mediation methodologies.

II. THE CALIFORNIA EXPERIENCE

A. *Pioneering Riverside*

The age of appellate mediation³ in California is young, spanning little more than a decade. Without question, the progenitor of this movement is the program commenced in 1991 in Division Two of the Fourth Appellate District (“Riverside”), under the tutelage of then recently appointed Presiding Justice Manuel Ramirez. Like many appellate courts in California, and indeed throughout the nation, Riverside was experiencing a burgeoning case backlog, caused in large measure by a

PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (2d ed. 1996); THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999). A recent search (Jan. 27, 2005) on Westlaw’s journal and law review database produced 1457 articles with “mediation” in the title.

2. As an example, the two most common styles of mediation used (either at the trial or appellate levels) are known colloquially as “evaluative” and “facilitative” forms of mediation. In evaluative mediation, the neutral plays an active role in suggesting what are realistic goals and risks faced on appeal. This may include the expression of opinion by the mediator concerning the eventual outcome on appeal, as well as the risks and costs of going forward. Mediators using this approach will often incorporate the standard of review in case assessment as well as historic reversal rates, and this information should be included in the mediator training, if offered. An evaluative approach is used less often than the facilitative approach, and the former appears to be most appropriate, if at all, in cases where counsel representing the parties is relatively inexperienced in appellate practice, or, conversely, the mediator has substantial appellate experience and is recognized for having such.

More commonly used is the facilitative approach. Modern mediation training supports the view that settlements are much more often reached when the parties find their own solution after engaging in their own risk/benefit analysis. This is why cases have a higher likelihood of settling where the dispute involves wasting assets, or where parties have economic ties beyond the matter in dispute. *See infra* Part IV. For a more detailed discussion about these alternative mediation styles, see generally Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

3. There have been several *settlement conference* programs in the First, Second, and Third Districts, which antedate the Riverside mediation program. However, none of these early approaches employed the systematic, modern mediation model, which is the focus of this Article. *See* NANCY NEAL YEEND, STATE APPELLATE ADR: NATIONAL SURVEY WITH IMPLEMENTATION GUIDELINES apps. D-5A to -5D (2d ed. 2002).

population explosion within that appellate jurisdiction.⁴

Borrowing from a local trial court settlement program, in January 1991, Riverside recruited sixty attorney volunteers to serve as mediators in an effort to attack the backlog of fully briefed cases. Using temporary funds, Division Two hired a coordinator to help with the logistics of arranging for the mediations and to handle the necessary, and inevitable, paperwork. In May, Riverside sponsored an orientation training session with the selected volunteers, which focused on appellate standards of review, stipulated reversals and dismissals,⁵ and programmatic issues.⁶ Fully briefed civil cases were screened, and appropriate cases selected, thereby making participation mandatory in order to generate a critical mass of cases for the program. Early annual disposition rates of 45% and 25% were encouraging, particularly when considering the absence of any cultural acclimatization to appellate mediation, and a dearth of experience.⁷

Permanent funding began in 1992, which enabled Riverside to hire a Settlement Conference Coordinator and an office assistant. The program continued in its initial form for the ensuing four years and achieved increased disposition rates of around 40%. 1997 proved to be a watershed year for the Riverside program, when it received California's prestigious Ralph N. Kleps Improvement in the Administration of the Courts Award, and the focus shifted from selecting fully briefed cases to diverting cases before briefing.⁸ The decision to assign cases into the program before briefing stemmed from an evolved belief that the advantage to mediation in potentially saving the parties the expense of briefing substantially outweighed any advantage to deferring talks until the issues on appeal had been thoroughly explored in writing.

In recent years, the Riverside program's day-to-day functioning has been delegated to the Settlement Conference Coordinator who, together with the Presiding Justice, screens all filed civil appeals, based in part on

4. Manuel A. Ramirez, *Volunteer Attorney-Mediators Settle Appeals*, 13 CAL. LITIGATION 34 (2000). Increases in California's population, rising expectations of the public in seeking solutions to social problems in the courts, and technology advances have been discussed as early as 1971 as being the root causes of seemingly intractable court backlogs and delays in dispositions. See Shirley M. Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 902-05 (1971).

5. See, e.g., *Neary v. Regents of the University of California*, 834 P.2d 119, 120 (Cal. 1992).

6. Ramirez, *supra* note 4, at 35.

7. *Id.* at 36.

8. *Id.*

the confidential Settlement Conference Information Forms (SCIF) submitted by the parties, and selects those cases, which will be *invited* into the program. A three-member group consisting of the Presiding Justice, the Coordinator, and the court's Principal Attorney, now provides needed support to the attorney mediators. The Coordinator assigns the attorney mediators for each of the cases selected per month, handles the logistical issues and documentation, and *hosts* the mediation (virtually all mediations take place in the well-appointed conference center at the court). Because mediations currently occur before the parties are put to the expense of briefing, mediators are provided with Settlement Conference Statements describing the background of the case and explaining the issues on appeal. Approximately ten to fifteen cases each year are assigned to a justice on the court to mediate in circumstances where members of the attorney mediator panel have conflicts of interest.⁹

As of the end of 1999, the Riverside program resolved a total of 333 cases through mediation, which represents a settlement rate of approximately 40%. Despite these impressive results, Riverside feels somewhat constrained by its inability to sponsor formal training for its volunteer mediators.¹⁰

As noted, in recent years, Riverside has focused its program to provide mediation services before the expensive process of briefing has concluded. 2001 data from that court reveals that the time from filing a notice of appeal to mediation is 120 days. This is substantially below the average of 260 days from notice of appeal to the completion of briefing.¹¹

B. First District Court of Appeal Mediation Task Force

In the meantime, courts elsewhere in California were pursuing more conventional methods to confront expanding appellate caseloads and to lessen delays. For example, during fiscal year 1996–1997, there were 1347 civil appeals filed in the First District, 383 of which, or 28%, were dismissed for one reason or another before disposition by opinion.¹² To contend with this expanding caseload, the court for the past eight years

9. *Id.* at 36–37.

10. *Id.* at 36–38.

11. 2002 Appellate Justices Inst., *Settlement Conference Program Materials: "Current Developments: Appellate Mediation"* (Apr. 25, 2002) (on file with author).

12. Report and Recommendations from Task Force on Appellate Mediation, to Chief Justice Ronald M. George, Chairperson of the California Judicial Council 13 (Jan. 29, 1998) (on file with author) [hereinafter Report and Recommendations]. The actual reduction by dismissal falls into the twenty to twenty-five percent range. The main reason for this development is the fact that some of the 383 terminated appeals return after defects in the original filings are cured. *Id.* (citing Letter from Ron Barrow, Clerk of the First District Court of Appeal, in response to inquiry by the task force).

has maintained a delay reduction program. During that period, the record preparation time in civil cases was reduced by 54% percent while the time to decision was also reduced, and growth in the pending caseload contained. Without these achievements, there likely would have been undesirable increases in the following three categories: record preparation, time to decision, and backlog of cases.¹³

Despite these successes, in July 1997, and at least in part because of the commendable results in Riverside, Chief Justice Ronald George commissioned a task force on behalf of the Judicial Council of California with the following charge:

[T]o determine whether to propose inauguration of an experimental mediation program in the First District. If that determination is affirmative, the task force can also identify key program elements of the program, including which categories of cases to include or exclude; what percentage of the caseload [of the First District] to include; whether participation is voluntary or mandatory; what qualifications and certification to require of mediators; steps required to mesh mediation with existing case processing and other court initiatives and times standards for processing cases through mediation.¹⁴

Consistent with the Judicial Council's request that the initial report of the task force be presented by the end of October, the members went immediately to work investigating the needs of the court and examining existing programs, such as those in Riverside, Oregon, Hawaii, and the federal Ninth Circuit. The task force made site visits to Oregon and the Ninth Circuit to confer on all aspects of their mediation programs. In Salem, Oregon, extensive consultations included meetings with appellate justices, the program administrator, appellate counsel, who also volunteer as mediators, and the law professor who conducted the court's training program. The programmatic features of the mediation programs in each of these jurisdictions are discussed in detail in the following Part of this Article.

After the information gleaned from the task force's excursions to Oregon and the Ninth Circuit was digested and supplemented by data from the programs in Hawaii and Riverside, the task force prepared a report to the Judicial Council concerning its findings and recommendations. This was done with the transmittal of a report dated January 29, 1998¹⁵ to the Chief Justice of California.

13. Report and Recommendations, *supra* note 12, at 13–14.

14. Letter from Chief Justice Ronald George, California First District Court of Appeal, to Associate Justice Ignazio Ruvolo (July 14, 1997) (on file with author).

15. Given the extensive efforts undertaken by the task force, the Judicial Council extended the deadline for submission of the task force's report for ninety days.

The report generally concluded that the introduction of mediation at the appellate stage of litigation in the First District was a natural evolution of existing ADR programs at the pretrial level, which had the potential to enhance justice by furnishing an alternative to adversarial resolution of civil disputes. Thus, the task force's broadest recommendation was that the Judicial Council approve and fund the implementation of a two-year experimental or pilot mediation program for the First District.

The task force concluded that an appellate mediation program offered the prospect of conserving judicial resources by increasing the number of negotiated settlements, and by eliminating or refining issues in those remaining cases that require judicial consideration. In addition, the experiences of other appellate courts appeared to confirm that mediation reduced delays and expense for the parties by allowing for intervention early in the appellate process, most often before record preparation or briefing. These were the views expressed during the site visits, with particular emphasis by those associated with the Oregon program. The collective view of the task force was that appellate mediation had the potential to produce similar benefits in California, and therefore a fully funded pilot program deserved testing in the First District.

In concluding that appellate mediation deserved experimentation, the task force recommended that the experimental program include the operational components described below.

*1. Cases Should be Assigned for Inclusion Into the Program
Both Based on Predetermined Selection Criteria
As Well As On a Random Basis*

The task force rejected the notion that certain types of cases should be categorically excluded from the program. Because appellate mediation was at an early stage of development nationally, the task force felt there was insufficient statistical data available to predict reliably which cases, by type, were likely to do well in mediation. Thus, exclusion was rejected in favor of permitting all civil cases to be candidates for mediation. "Categorization of this type, if eventually adopted in California, should be based on mediation experience, accumulated and evaluated during the recommended experiment, rather than on a policy hunch made without the benefit of empirical data."¹⁶

The task force did not recommend following the practice then in place in Oregon, which also was used during the first few months in Hawaii's program, that all cases be assigned to the program on a random basis. The task force noted that while the use of random selection had

16. Report and Recommendations, *supra* note 12, at 5.

“egalitarian underpinnings,” it was concerned that the limited resources of the program not be consumed in trying to resolve cases that were not strong candidates for mediation, assuming cases that are more appropriate candidates could be identified. While perhaps intuitive, because there was an absence of data indicating that prescreened and selected cases were demonstrably better prospects for successful mediation, the task force recommended that both systems for case selection be used initially. “This multi-pronged approach is unprecedented and will contribute new knowledge about the comparative feasibility and impact of various selection techniques in appellate mediation.”¹⁷

2. Participation in the Program Should Be Mandatory

The task force considered whether the pilot program should be a voluntary program, activated only when one or more parties requested mediation. It was observed that voluntary participation appeared to be the prevailing practice in some federal appellate courts and in other California ADR programs, including the First District’s existing settlement conference program. However, the First District’s experience from its own voluntary settlement conference program indicated that very few litigants volunteered to participate in ADR at the appellate level. Furthermore, participation was mandatory in the two most mature and successful state programs then in existence (Courts of Appeal in Oregon and Hawaii), as well as the two most prominent federal programs (Ninth and District of Columbia Circuits). Accordingly, based on that experience, the task force rejected a voluntary, self-selecting system.

Nevertheless, the task force anticipated that requests for mediation might be made in cases that are not selected for inclusion for whatever reason. To the extent these requests could be accommodated without outstripping the capacity of the program, the task force concluded that the program director should make these decisions on a case-by-case basis, taking into account the profile of individual cases and the availability of mediators.

17. *Id.* at 5–6. Once performance statistics from the experimental program became available, the First District ultimately abandoned the practice of assigning cases into the program on a random basis.

3. *Mediation Should Be Conducted Prior to Preparation of the Record or Briefs with Minimal Disruption of the Appellate Process*

The task force felt that every effort should be made to complete mediation early, and within the confines of existing appellate procedures and deadlines. Moreover, it was believed that mediation prior to record preparation and briefing would likely be the key to reducing litigant expense. In those cases that are resolved by mediation, the parties would be spared the most burdensome costs of appeal, incurring only the relatively modest expense of participating in the mediation process. The task force was advised during the site visits that these potential savings also motivated litigants in those jurisdictions to consider seriously a mediated settlement.

With this in mind, the task force recognized that the greatest challenge to meshing mediation with existing appellate procedures involved synchronizing it with the preparation of the record on appeal. According to applicable California Rules of Court, from the date of filing the notice of appeal, an appellant had only ten days to file a further notice directing the clerk of the trial court and the court reporter to prepare their respective transcripts on appeal.¹⁸ This notice must be accompanied by a deposit of funds for the cost of the reporter's transcript.¹⁹ The rules further direct that the reporter "shall begin work on the transcript immediately" and complete it within thirty days after receipt of the notice.²⁰ In practice, because of extensions allowed by the court, during fiscal year 1995–1996, the median time in the First District for preparation of the record in civil appeals was seventy-six days, and in ten percent of the cases record preparation exceeded 161 days.²¹

This record preparation time suggested two possible scenarios to the task force. In the first, record preparation would proceed concurrently with the mediation process, with the goal of completing mediation before substantial investment was made in preparing the record. If the case settled, no further work on the record would be necessary, yielding whatever savings might accrue. If the case did not settle, there would be no disruption whatsoever in the appellate process. In the second scenario, the court would, if requested by a party, order that the record preparation be deferred until completion of mediation. If the case settled, the parties would avoid any expense for record preparation. However, under the second scenario, if the case did not settle, there

18. CAL. R. CT. 4(a).

19. *Id.* at 4(b).

20. *Id.* at 4(a), (d) (repealed 2002).

21. Report and Recommendations, *supra* note 12, at 7 (citing Court of Appeal, First Appellate District, "Delay Reduction 1988–1996" (1997) Exhibits AA & BB).

would be some modest delay in proceeding with the appeal. The question did not appear to implicate briefing, because an appellant's opening brief was not due until thirty days after receipt of the record, and in practice was customarily extended for an additional sixty days by stipulation.²² Therefore, it did not appear that briefing schedules would ordinarily have to be expanded to accommodate the mediation program.

Rather than urge procedures that would either routinely grant mediated cases an extension of time for record preparation or prohibit such relief, the task force favored proceeding on an ad hoc basis until testing indicated what practice should be implemented by rule in the First District, if any. In taking no position on this question, the task force expressed optimism that prompt selection of cases for mediation, accompanied by equally prompt notice to the parties and assignment to a mediator, would produce a mediation session within existing deadlines in a substantial majority of cases.

4. *Use of Volunteer Attorney Mediators Trained at Court Expense*

The task force concluded that the program's potential would be strengthened if the persons conducting mediations had significant knowledge of and experience in appellate litigation. This conclusion was based, in part, on the expectation that party attorneys attending mediations in many cases will often be trial counsel, an assumption borne out by the Oregon experience. The task force felt that a seasoned appellate practitioner could facilitate mediation in these circumstances by providing, where appropriate, an *evaluative* assessment of the appellant's likely chances of gaining a reversal of the judgment.

The task force also felt that the court should expend special effort to ensure that its panel of mediators was of the highest quality, both to optimize mediation results, as well as to build the prestige and acceptance of the program. Therefore, the task force urged the court, through the director of the experimental program, to arrange for and endorse a course of education and specialized training to equip mediators with the tools to conduct effective appellate mediation sessions.

It was contemplated that mediator training would be offered at court expense and with no cost to the participants, other than the estimated five days required to complete the course. As a further incentive, the task force urged that the course be registered with the State Bar of

22. CAL. R. CT. 15(a), (b).

California so the attorney/students could receive continuing education (MCLE) credit for attending. In return, the attorney mediators would be obligated to accept a fixed range of mediation assignments from the program director. While no specific number of mediations was recommended, the task force believed that whatever that level might be, education in exchange for mediation services, enriched by the prestige of being chosen as a court mediator, would allow the program to avoid the expenditure of substantial public funds for mediator services during the experimental period.

*5. The Court Should Appoint an Attorney As Director
to Administer the Program and Report to the
Task Force and Its Chairperson*

The task force was impressed by the need for administrative supervision of the program's operations and the collection of valuable evaluative data.²³ The day-to-day presence and supervision by a lawyer-administrator appeared to be an important ingredient to the success of both the Oregon and Ninth Circuit programs. The task force considered the possibility of delegating these managerial responsibilities to a justice of the court or staff member but ultimately rejected this approach to avoid disruptions in existing duties. Thus, the recommendation was made that a full-time program director be hired to tackle the broad array of necessary administrative duties and to supervise the capture and compilation of data.

The task force envisioned that the following responsibilities would be assigned to an administrator: (1) recruitment, selection, and training of the mediation panel, (2) design and implementation of a case selection system that encompasses selection by assessment, random selection, and selection by case complexity, (3) assignment of mediators, (4) mediation scheduling, (5) evaluation of mediators and the program, (6) guarding of confidentiality, and (7) adjustments required during the appellate process for individual cases.

In addition, the task force recognized that the director would be required to work in close collaboration with the court and its clerk in revising the court's appellate docketing statement, since the current version contained insufficient case information to allow assessment of the case's suitability for mediation. To obtain needed information, the docketing statement was to be augmented, and a separate intake form entitled "Case Screening Form" created, which was designed to capture

23. As one can infer from gaps in the information available for this Article, some programs have been required to limit the resources devoted to the collection of data, thereby making the process of drawing conclusions about the reasons for programmatic success somewhat more conjectural than might be desirable.

additional information helpful to the case assessment process. These operational details had high priority and were ones that required the concerted effort of the clerk and the director. In addition, a second area of collaboration would require access to and modification of the court's information database regarding caseload and case processing in the First District. It was noted that information that would be important for mediation was not readily available in the then-existing database. For example, the court's system treated all civil cases as a single group without segregating case categories, such as torts, by subject matter, which is a caseload refinement that might be useful to the mediation program. Finally, it was expected that the court and director would collaborate in drafting appropriate provisions in the rules of the First District to accommodate mediation.

As to the day-to-day operations of the program, the task force recommended that the director be responsible for such additional external and internal housekeeping matters as reports to the task force, First District, Judicial Council, mediators, and bar organizations. The director would also need to manage the program budget as well as arrange appropriate logistical support including staff, facilities, equipment, communications, and consultants as needed.

The task force predicted that the program and director, when fully operational, would be capable of providing mediation in as many as 30% of the First District's new civil filings, or approximately 400 cases per year. This volume of activity was expected to provide sufficient experience and data to make valid assessments at the conclusion of the experimental period. In addition to assessing the effectiveness of the mediators, the experimental nature of the program necessitated assessment of actual results so they could be compared to program goals, and the program itself could be evaluated based on continuation, modification, expansion, or termination.

The promise, as well as the challenge of appellate mediation, was to increase dispositions beyond the 28% range of dismissals that were already occurring in the district without judicial intervention. Experience in other jurisdictions provided the basis for optimism. Thirty-nine percent of the cases mediated in Oregon were being settled, 38% in Hawaii, and in the Ninth Circuit—more than 60%. Even assuming some of the cases selected for mediation might otherwise settle on their own, the task force hoped that such settlements would occur sooner and at less cost to the litigants.

C. Results of Two-Year First District Pilot Program

The Judicial Council incorporated the proposals of the task force into its approved plans and authorized the Director of the Administrative Office of the Courts to implement them. Governor's 1999–2000 budget contained a request for funding, which the Legislature appropriated for a two-year pilot program to commence on July 1, 1999 and to extend through June 30, 2001.²⁴

During the period July 1, 1999 through January 31, 2000, the following steps were taken: staff were hired, mediation trainers retained, mediators recruited and trained, and program rules adopted. Operations began in February 2000 with the first submissions of appeals to mediations. The first mediations took place in March 2000.²⁵ At the conclusion of the two-year pilot program, there were 146 trained mediators on the Court's panel, in addition to retired justices who have donated their time to the program.²⁶

Thirteen hundred twenty-eight civil appeals were assessed as candidates for mediation from February 1, 2000 through the end of the pilot period on June 30, 2001. Two hundred eighty-eight cases (22%) were submitted to the program. The most frequent case categories of the cases diverted into the program were, in descending order, business/contract, employment, real estate, personal injury, family law, probate, and insurance. Appeals most often involved judgments following court trials, followed by summary judgments, jury trials, and miscellaneous orders. Appeals were submitted from eleven of the twelve counties in the First District. The most frequently submitted appeals were from the counties of San Francisco, Alameda, Contra Costa, San Mateo, Marin, and Solano.²⁷

Factors considered in assigning cases to mediation included the identification of the parties, the subject matter of the appeal, the source of the judgment, whether there were ADR processes before the appeal, whether the case involved issues of first impression, and whether there was an ongoing relationship between the parties. Although participation was formally mandatory for the selected appeals, the Administrator generally was unwilling to submit a case if one or more parties resolutely opposed mediation.²⁸

24. TASK FORCE ON APPELLATE MEDIATION, MANDATORY MEDIATION IN THE FIRST APPELLATE DISTRICT OF THE COURT OF APPEAL: REPORT AND RECOMMENDATIONS iii (2001), available at <http://www.courtinfo.ca.gov/reference/documents/mediation.pdf> (last visited Feb. 22, 2005) [hereinafter RUVOLO, MANDATORY MEDIATION]. Although the task force's report was submitted in February 1998, it was determined that other pressing needs of the judiciary that year prevented funding for an appellate mediation program for the fiscal year commencing July 1998.

25. *Id.*

26. *Id.* at 6.

27. *Id.* at 8–9.

28. *Id.* at 19.

Two hundred seventeen cases were mediated during the pilot period. The settlement rate for mediated cases was 43.3%.²⁹ The time from notice of appeal to resolution was reduced from approximately fourteen months to about four months, saving parties from costly briefing in almost all cases.³⁰

The subject matters of most settled appeals included, in descending order, family law, probate, business/contract, personal injury, real estate, and employment. Resolution was achieved in appeals normally resulting from administrative mandamus, orders, court trials, jury trials, demurrers, and summary judgments, also in descending order. Successful disposition rates by case category were astonishingly high. For example, family law cases had a settlement rate of 65%, probate a rate of 53%, followed by business/contract disputes (47%), and personal injury and real estate cases (43%). The lowest rates were in employment cases (30%) and insurance cases (20%).³¹

Statistically, the program reported that settlements were highest among those categories of cases appealed following trial verdicts (44%), while settlements of summary judgments and appeals from demurrers were somewhat lower (39% and 40%, respectively).³²

The task force's report on the pilot period also concluded that a major reason for the success of the program was that court intervention often led to the initiation of negotiations between parties who otherwise would not attempt resolution once a case was on appeal. Cases that had little or no prior exposure to ADR generally fared better in the program. The report noted that normally cases involving legal questions of first impression would not do well in mediation. This was largely because at least one of the parties desired an appellate decision to provide precedent and guidance in future cases. This gave the prospect of an opinion commercial value in and of itself, independent of the value of the case being appealed. Consistent with the author's observations, the report noted that insurance companies and other parties who litigate frequently were most likely to place value on an appellate decision. Nevertheless,

29. *Id.* at 9.

30. *Id.* at 11.

31. *Id.* at 8, fig. A.

32. *Id.*, fig. B. The settlement rates were the same regardless of whether the verdicts were rendered by juries or trial judges. While administrative mandamus cases could boast a settlement rate of 80%, statistically these were a small group of cases, creating doubt in the reliability of this percentage as a true indicator of how those cases might be expected to fair in the future. *Id.*, fig. B.

in a few cases, the fear of a possible adverse opinion actually encouraged settlement.³³

As a direct or indirect result of the mediation program, settlements were achieved before, during, and after mediation sessions, although most occurred during the mediation. It was learned that, except for meeting at oral arguments, counsel had much less opportunity for direct, personal interaction at the appellate level than at the trial stage. As a result, there were very few natural stages in the appellate process where the parties had the opportunity to broach the subject of settlement. By initiating the process and making it mandatory, the onus of taking the first step was removed from counsel, while a forum was provided to explore ways to end the dispute more cheaply and quickly than by appellate decision.³⁴

Cases that resolved after the mediation session usually involved case dynamics that demanded some additional time for reflection. Sometimes this benefited counsel, and sometimes the parties themselves required time to incubate the seeds of settlement planted by the mediator. For this reason, follow up by mediators after a seemingly unsuccessful session bore fruit in some cases.³⁵

A significant number of the settlements encompassed disputes in addition to the submitted appeal. This means that the mediation not only resolved the submitted appeal, but also has settled related appeals, trial court proceedings, or even matters not yet in litigation. Typical examples of this were instances where attorney fees issues were still pending in the trial court while the appeal was being prosecuted by the losing party. Other examples included prospective claims arising under the similar contract provisions or indemnity claims in personal injury cases.³⁶

The mediation program achieved substantial savings for the parties as well as for the court, primarily by assisting the parties to settle before briefing. In settled mediated cases, counsel estimated the cumulative savings of attorney's fees and costs to exceed \$7.1 million. Per case savings in attorney fees averaged from \$45,367 for appellants to \$21,269 for respondents. Cost savings per case approached \$10,000. The investment made by even those cases that did not resolve appears to have been worth the expenditure. On average, attorney fees in nonsettled cases were \$2989 for appellants and \$2402 for respondents, covering the time devoted to the mediation process. Yet, even after the costs of unsuccessful

33. *Id.* at 10.

34. *Id.* at 11.

35. *Id.*

36. *Id.*

mediations were offset, the estimated net savings to parties participating in the mediation program exceeded \$6.2 million.³⁷

Less definitively, the task force concluded that mediation tended to be beneficial even for cases that did not settle by highlighting the strengths and weaknesses of each party's position. Consequently, the parties were more focused in pursuing the appeal to a conclusion. This normally resulted in better briefs and oral arguments, which benefited both the parties and the court.³⁸ Furthermore, evaluations by participants of the mediation process, the mediators, and program administration were generally quite positive. The great majority of parties and counsel indicated they would use the process and the mediators again. The evaluations and commendations received from mediation participants suggested that the mediation program had met its goals of reducing costs, the time to resolution, and the adversary nature of litigation, and increasing litigant satisfaction with the judicial process.³⁹

In addition to recommending that the First District program be authorized and funded on a continuing basis, the report also offered several recommendations for future operation of the program in the First District, and, indeed, in other appellate courts considering a similar program. Specifically, the report suggested that the program retain its mandatory component. Making participation mandatory ensured that opportunities to resolve cases on appeal were explored, particularly given the appellate context where the parties and counsel have little chance to interact. The task force also discovered that there were a significant number of cases where counsel wished to mediate, but the clients were reluctant to do so. Exercise of the court's power to order a case into the program provided those cases with the opportunity to take part in the program.⁴⁰

The continuing partnership between the volunteer attorneys and the court was prominently discussed in the pilot program report. The report

37. *Id.* at 12. While it was noted that the court also was the beneficiary of cost savings derived from the program, no attempt to quantify these savings was made in the pilot program report. However, when one considers that 92 of 213 cases diverted into the two-year program settled and that the average chambers produces almost that number of written opinions per annum, one can safely estimate that at least theoretically the cost, or output resources, of one-half of a judicial chambers, including staff, was saved each year of these first two years in operation, less the cost of operating the program. *See id.* at 9.

38. *Id.* at 13.

39. *Id.* at iv.

40. *Id.* at 19.

correctly attributed much of the program's success to the mediators' skills, which were materially enhanced by the court-sponsored appellate mediation training, and which all mediators, other than retired justices, were required to attend. The report noted that high-quality training played a "pivotal role" in the success of the program, and urged that future funding for this purpose be provided for the First District, or for other courts choosing to replicate the program.⁴¹

Furthermore, the report recognized that there were limits on the extent to which the court could continue to expect pro bono participation by volunteer attorney mediators. While pro bono work was the model for several court-sponsored ADR programs at the time, anecdotal evidence suggested that, on appeal, there were many litigants who could, and would, pay for high quality mediator services. This ability to pay was enhanced by a realization that many mediating parties were corporations and public entities who were represented by well-compensated counsel and derived great monetary benefit from the efforts of the pro bono mediators. There was also a growing awareness that the proliferation of pro bono ADR programs throughout the state and federal court systems meant that the First District was literally competing with other courts for scarce mediator talent. Lastly, a legitimate question was raised as to how long a wholly pro bono court sponsored program would be able to attract the services of successful mediators who were establishing lucrative ADR practices as an adjunct to, or substitute for, traditional law practice.

All of these factors informed the recommendation that the pro bono commitment for panel mediators be reduced from necessary preparation plus six hours of mediation time to preparation and four hours of mediation.⁴²

D. Results of the First District Program 2001–2003

1. July 2001–June 2002

While the two-year pilot program was a success, the first full year of permanent operations yielded even more impressive results. First, the program administrator recruited fifty-eight additional volunteer mediators who successfully completed the court-sponsored mediator training. This raised the complement of mediators to a panel of 197, which included five appellate jurists retired from the First District.⁴³

41. *Id.* at 20.

42. *Id.* at 20–21.

43. Annual Report, July 1, 2001–June 30, 2002 from John A. Toker, Mediation Program Administrator, to Hon. Ignazio Ruvolo, Chair, First District Mediation

Also, the program administrator began hosting “brown bag lunches” twice each year to which panel mediators were invited. The purpose of the meetings was to bring the mediators and the program administrator together in an informal forum to discuss issues of relevance and interest to the program. For example, matters discussed included the operational results from the pilot program, problems in ensuring that parties were represented at mediation sessions⁴⁴ by persons having appropriate settlement authority, ethical standards enacted by the Judicial Council for neutrals participating in court-sponsored ADR programs, modification of the pro bono requirement for mediators, and attorney client conflicts which might develop during mediation.⁴⁵

Nine hundred and fourteen civil appeals were assessed by the program administrator, and 215, or 24%, were selected for mandatory mediation.⁴⁶ Based on a number of factors, including increased mediator experience, more administrator experience in screening cases (thereby honing his powers of prognostication), a downturn in California’s economy, and, perhaps, growing acceptance of mediation at the appellate level, the program attained the astonishing settlement rate of 61%, compared to 43% during the pilot period. Experience in operating the program was also evident from the fact the number of cases placed into the program equaled that for the entire two-year pilot period, while settlements for this one-year period (98.5 cases)⁴⁷ was greater than the total number of settled cases during the significantly longer pilot period (94 settlements). Additionally, more of the settlements during 2001–2002 were global in nature, and included twenty-nine trial court proceedings and fourteen matters not yet in litigation.⁴⁸

The categories of cases successfully settled, in descending order, were: probate (72%), employment (69%), business litigation (65%), personal injury (62%), and family law (58%). Real estate litigation proved to be particularly difficult to settle that year (20%). As to the type of trial

Committee 2 (July 19, 2002) (on file with author) [hereinafter 2001–2002 Annual Report].

44. While the First District serves the trial courts in twelve counties in Northern California, mediation sessions are invariably conducted in person, either in San Francisco, or in the county from which the appeal originated.

45. 2001–2002 Annual Report, *supra* note 43, at 2.

46. *Id.*

47. The fractional figure represents the assignment of 0.5 for cases in which a partial settlement was achieved. *Id.* at 4.

48. *Id.*

court proceedings involved, the highest rate of settlement occurred in appeals from miscellaneous orders, including petitions to confirm arbitration awards, attorney fee and cost motions, motions to set aside defaults and to disqualify counsel, and anti-SLAPP appeals (69% settlement rate).⁴⁹ Settlement of appeals from summary judgments also enjoyed a high resolution rate (62%).⁵⁰ This last statistic is not surprising because appeals from summary judgments have a high reversal rate, and, therefore, respondents are not in a very secure position. Thus, this more volatile type of appellate case is likely to make the respondent somewhat more flexible in looking at settlement options.⁵¹

Demurrers did not fair as well in mediation (33%), nor did cases appealing administrative mandamus decisions (25%).⁵² Both of these procedural categories might be expected not to do well because demurrers typically involve resolution of legal issues, often times in cases of first impression, and the parties can be expected to put value on the ultimate appellate opinion, particularly if at least one of the parties is an institutional litigant. Appeals from government agency decisions likely involve disputes where the public entity has little flexibility, and the range of realistic alternatives to a judicial decision is narrow.

Other potentially important statistics gleaned over the year included the following: (1) the average time devoted to a case by the mediators

49. *Id.* at 3. An acronym for Strategic Lawsuits Against Public Participation, anti-SLAPP motions may be brought where a defendant claims that the lawsuit had been brought for purposes of stifling the defendant's exercise of First Amendment rights of speech and petition. CAL. CIV. PROC. CODE § 425.16 (West 2004). If successful, the defendant is statutorily entitled to recover attorney fees. This enhanced remedy gives the anti-SLAPP motion considerable bite, and it is no wonder that in the last several years, California appellate courts have been inundated with appeals involving the granting or denial of such motions.

50. 2001–2002 Annual Report, *supra* note 43, figs. A & B. This differed from the experience during the pilot period where 39% of the appeals from summary judgments were settled. *See* MANDATORY MEDIATION, *supra* note 24, at 8, fig. B.

51. 2001–2002 Annual Report, *supra* note 43, at 3, 5. Summary judgments have had a reversal rate in California of 20% over the last three years. JUDICIAL COUNCIL OF CAL., 2003 COURT STATISTICS REPORT 28, tbl. 6 (2004). The phenomenon of high reversal rates for trial court summary judgments is off topic. However, having reviewed the records of hundreds of such appeals, it is the Author's view that this reversal rate, at least in part, results from a procedural tension that exists between the two levels of courts. Often, trial courts will default to the dismissal of a palpably marginal case. The trial judge may think it better to dismiss and allow the appellate courts to send the case back to the trial court if the trial judge errs in making that judgment, rather than squander scarce court time in trying a seemingly meritless case. On the other hand, appellate courts are not usually sympathetic to the practical stratagems, which might be in play in considering summary judgment motions at the trial court level. Instead, the reviewing courts will pedantically apply the stringent rules governing summary judgment motions with indifference to the ultimate merit of the case. Inexorably this difference in viewpoint results in high numbers of reversals.

52. 2001–2002 Annual Report, *supra* note 43, at 3.

was 9.7 hours, including preparation time; (2) the average number of mediation sessions was 1.2; (3) the average mediation fee per case was \$739; this resulted from the reduction of pro bono hours required per case from six to four hours; (4) the primary mediation style used in the mediations was facilitative (76%) rather than evaluative (24%); this style was stressed during mediator training, and was obviously showing results; and (5) 94% of the cases involved the same attorneys who represented the party in the trial court; this was a reflection of the fact that mediations were taking place early in the appellate process, certainly before the matter was referred to appellate counsel, yet another money-saving feature of the program.⁵³

One conclusion learned from the first three years of mediation was that, in contrast to the experience at the Ninth Circuit and in Hawaii, the likelihood of settlement in the First District program was substantially reduced if the parties, as well as counsel, did not personally attend the mediation. Where a party is not a natural person, attendance by a representative possessing actual authority to settle the case on behalf of that party proved to be imperative.⁵⁴ So important was this finding that a change in the First District's mediation rule⁵⁵ was enacted, which enabled the court to impose monetary sanctions for the failure of counsel or an authorized party representative to attend the mediation session.⁵⁶

Another obstacle to settlement revealed itself in several of the unsuccessful cases that year—conflicts between the party's interest and the fee interest of counsel. The problem encountered arose in contingent fee cases where nonmonetary compensation was offered as part of the consideration. For example, the former employer in an employment case might offer an apology for poor conduct or a letter of recommendation as part of the settlement. In some cases, the attorney's investment of time and costs could exceed the realistic settlement value of the case. As noted, the First District tried to address this obstacle by including conflicts of interest as a topic for discussion with the mediators at one of the two brown bag lunches held during the year.⁵⁷

53. *Id.* at 8.

54. *Id.* at 6.

55. CAL. 1ST DIST. CT. APP. R. 3.5(d)(8).

56. 2001–2002 Annual Report, *supra* note 43, at 6.

57. Memorandum from John A. Toker, Mediation Program Administrator, to First District Mediators 2 (May 16, 2002) (on file with author).

2. July 2002–June 2003

During 2002–2003, the administrator reviewed 849 appeals. Of those, 166 (20%) were submitted to mediation. The most frequent subjects were business/contract, attorney fees, family law, real estate, probate, employment, and personal injury, while settlement rates, in descending order, were highest in probate (85%), real estate (79%), personal injury (67%), family law (63%), and attorneys' fees disputes (61%).⁵⁸ While summary judgments led the type of trial court proceedings likely to be settled, there was not as significant a difference in this settlement rate over other types of dispositions as there had been in the preceding year.⁵⁹

The settlement rate in 2002–2003 was 58%. There were eighty-one full settlements, one partial settlement (resolution of one or more issues),⁶⁰ and fifty-eight appeals in which there was no settlement. Eight additional cases settled before a scheduled mediation session. Perhaps of greater importance, half of the eighty-one full resolutions in 2002–2003 were global settlements. The statistics indicated that in global settlements other appeals (eight), related trial court proceedings (twenty-five), or matters not yet in litigation (eight), were resolved along with the appeal referred to mediation.⁶¹

The timing of settlements is important to program success, since it has been repeatedly shown that earlier resolutions yield the greatest savings to the parties. Thus, it was gratifying to learn from the reports of counsel that 95% of settlements in 2001–2002 were achieved prebriefing. Moreover, as in 2001–2002, the median time from the filing of a notice of appeal to disposition by mediation was 5.4 months (161 days), compared to a median time of 13 months (390 days) for disposition by opinion.⁶² The median time from notice of appeal to *settlement* was even less, at 3.5 months (104 days).⁶³

58. Annual Report, July 1, 2002–June 30, 2003 from John A. Toker, Mediation Program Administrator, to Hon. Ignazio J. Ruvolo, Chair, First District Mediation Committee 1, 8 (August 20, 2003) (on file with author) [hereinafter 2002–2003 Annual Report].

59. *Id.* 100% of appeals from demurrers and administrative mandamus were settled, however the number of cases involved (one and two, respectively) is too small to be statistically meaningful. *Id.* at 8.

60. *Id.* at 2. A partial settlement is counted as half of a full settlement.

61. *Id.*

62. *Id.* The data provided by the Administrative Office of the Courts suggests that the median time in the First District from the filing of the notice of appeal to disposition by opinion in 2002–2003 was 390 days, which represents a slight reduction from 397 days in 2001–2002. The median time in fiscal years 1997–1998 through 2000–2001 averaged 418 days (13.9 months). Therefore, the improvement in the last two fiscal years appears to confirm that the mediation program likely is contributing to the court's efficiency. *Id.* at 2 n.2.

63. *Id.* at 2–3. The period from the filing of the notice of appeal to settlement is

The average time devoted to a case in 2003 expanded to 9.3 hours, including preparation time (3.0 hours), session time (5.8 hours), and follow-up time (0.5 hours). Remaining relatively constant to prior years were the average number of mediation sessions (1.1 sessions), the average mediator fee (\$571), and the fact that the primary mediation style of the mediators in 67% percent of the cases was facilitative rather than evaluative.⁶⁴

Several significant operational changes made in 2003 warrant mention. First, rule changes were implemented, reflecting a maturing of the process. Specifically, the First District now requires its mediators to adhere to the Judicial Council's ethics rules, which were enacted to apply to trial court-sponsored ADR. At the same time, a complaint procedure was put into place enabling grievances about the conduct of mediations to be aired. Lastly, rules were strengthened requiring counsel of record and persons with full settlement authority to attend the mediations.

While no incidents sparked the first two programmatic changes, there continued to be some isolated instances where the parties, insurance representatives, or counsel did not appear to participate fully in the mediation process. Although the program remained formally mandatory, as noted, case selection normally did not include those cases in which the parties or counsel were firmly opposed to mediation. Therefore, there appeared to be few occasions where it could be expected that the participants would fail to engage in the process in good faith. Nevertheless, several orders to show cause were issued during the course of the year. In a few circumstances monetary sanctions were imposed for violations of mediation rules. These violations included the failure of a party to attend the mediation by a representative possessing full settlement authority, and the cancellation of a mediation session without prior approval of the program administrator.

In the area of mediator relations, the First District continued its brown bag lunch series by hosting speakers on a number of informative topics.

less than to disposition because of the time required to formalize and to execute agreements reached through mediation and for abandonment by the appellant or cross-appellant or dismissal by the court. In a number of cases, settling parties fail to file an abandonment, which delays disposition significantly. *Id.* at 2 n.3.

64. *Id.* at 5–6. On January 12, 2004, Mr. Toker reported on program operations for the six months July–December 2003. During that time, seventy-three cases were mediated, resulting in thirty-five full, and two partial settlements for a disposition rate of 49%. Thus, since the commencement of the First District's program the court has realized an average settlement rate of 54%.

For the first time, the court sponsored a fourteen-hour advanced mediation training, which was attended by more than fifty panel mediators. The training focused on topics that have proved challenging for the mediators, particularly obtaining the attendance of all decisionmakers, dealing with difficult parties and counsel, using caucuses (private meetings with each side) effectively, utilizing the standards of review and reversal rates in risk analysis, and preparing for and breaking settlement impasses. The training also included a detailed discussion concerning the Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases adopted by the Judicial Council, which, as noted above, the First District adopted for its program by court rule. Lastly, the court began to use email as the routine form of communication with panel mediators to increase the speed of communications while lowering costs.

The last significant development was the experimental use of mediators to assist the program administrator in conducting case screening or assessments. The mediation program had been designed with a capacity to divert as many as one-fourth of the First District's annual civil caseload into mediation, or about four hundred cases each year.⁶⁵ Once the program became fully operational, however, only about two hundred cases per year were being selected for the program. One of the reasons for this shortfall from the design parameters is that the original proposal was to select a sizeable portion of cases on a random basis. Obviously, random selection requires virtually no screening or administrative attention beyond facilitating selection of the mediator and setting the mediation date. However, once the First District abandoned random selection in favor of the more labor-intensive criteria-based selection process, administrative time per case increased significantly. Therefore, the Mediation Committee concluded that the capacity of the program might be increased if the program administrator could rely on the assistance of panel mediators to help in the screening process.⁶⁶

Accordingly, on an experimental basis, a volunteer mediator is now asked to contact the parties in a few cases and discuss the interest of the parties and counsel in mediation. During the course of that contact, the assessment mediator obtains further information concerning the case, identifies decision makers, assesses the type of mediator best suited for the case, and determines counsel's availability for a mediation session. This information is reported to the program administrator with the assessor's recommendation as to whether the case should be submitted to mediation. Thus, the mediator assessments supplement those performed

65. FIRST DIST. MEDIATION COMM., SUMMARY MINUTES 1 (June 5, 2002).

66. Memorandum from John A. Toker, Mediation Program Administrator, to First District Mediators (Nov. 13, 2002) (on file with author).

by the mediation program administrator in an effort to increase the number of appeals assigned to mediation. Unfortunately, the extent to which this goal is being achieved has yet to be reported.

E. Summary Program Results

Like all of the programs examined prior to the commencement of its own program, the First District's four-year experience reveals that tremendous benefits were realized from the program's operations. As of the end of June 2003, 3079 civil cases have been assessed and 639, or 21%, selected for mediation. Approximately 500 cases have completed their mediations, and 268 have settled, for an overall settlement rate of 55%.⁶⁷

Based on the attorney and party evaluations received, it is estimated that mediation program operations have saved the parties an estimated *net* savings of \$13,636,500. The reasons for the success of this program, as well as the intangible benefits realized by the litigants, are discussed in Part IV of this Article.

III. APPELLATE MEDIATION IN OTHER JURISDICTIONS

The following review of appellate mediation programs in other states, and in the federal judicial system, reveals that California is not the only jurisdiction where appellate mediation has taken root and proved successful in helping litigants settle their disputes in a nonadversarial setting. Virtually all of the programs examined make party participation mandatory, and most use selection criteria to choose cases for inclusion in the program. However, other programs have been very successful while relying on in-house mediators exclusively, while others conduct virtually all mediations via teleconference or video.

A. Oregon

The Oregon Court of Appeals program had been operating for two years when the First District visit took place. Funding for those first two years came from the State Justice Institute, which enabled the Oregon Court of Appeals to employ a half-time administrator, and a program evaluator. The initial mediator panel consisted of thirty attorney volunteers

67. 2002–2003 Annual Report, *supra* note 58, at 1–2.

who received court-sponsored and funded mediation training through the University of Willamette School of Law. To help compare results, the program included cases selected at random, as well as screened cases selected because they appeared to represent good candidates for mediation.

By 1998, the Oregon program had expanded to include a panel of sixty to eighty neutrals, and 240 to 300 civil cases annually were being diverted into mediation. Further, the state legislature provided permanent funding for the program, as well as legislative assistance by enacting a rule of procedure staying for 120 days all appellate deadlines for cases selected for inclusion into the program.⁶⁸

During this initial phase, the emphasis for case selection shifted from random selection to a more criteria-based process. Litigation involving governmental agency decisions was generally excluded from the program, due, in part, to statutory changes. Selection criteria centered around the willingness of parties to engage in mediation, the assessment by counsel as to the potential of the case for settlement, the extent to which the subject of the litigation involved an industry wide practice, the need to rely on statutory interpretation to resolve the case, and the strength of existing applicable precedent to decide the appeal.

A challenge faced in Oregon, which was shared by many jurisdictions employing a similar mediation model, was how to encourage the involvement of attorney volunteers in a pro bono program that inevitably competed for contributions of scarce nonbillable attorney time with a wide array of other pro bono programs. The Oregon Legislature provided a solution that helped alleviate the recruitment dilemma by mandating parties in cases directed into the program to share a flat fee of \$500 per case (\$300 for workers compensation appeals).⁶⁹

As noted, the Oregon program provided funding for an evaluator to examine the results of the program following its first two years of operation. During this period, the evaluator concluded that the program achieved a full settlement rate of 43% and an additional partial settlement rate of 5%. Categorically, the highest settlement rates were achieved in workers compensation, family law, and general commercial litigation cases. Significantly, 86% of the cases were settled before the completion of briefing, and one-third involved global settlements.⁷⁰

More recently, the Oregon program has expanded, and the results it

68. OR. OFFICE OF THE STATE CRT. ADM’R, FINAL REPORT ON APPELLATE SETTLEMENT DEMONSTRATION PROJECT “USE OF COURT-ANNEXED SETTLEMENT CONFERENCE/MEDIATION PROGRAM” RUN UNDER GRANT NUMBER SJI-95-03W-A-163, at 7 (1998) (on file with author).

69. OR. R. APP. P. 15.05(7)(a).

70. MICHAEL FINIGAN, NORTHWEST PROFESSIONAL CONSORTIUM, *An Evaluation of the Settlement Conference Program* 6.

achieved surpassed the program's impressive initial two years of operation. For example, in 2001, Oregon's attorney volunteer mediator panel had swelled to 120 neutrals, who mediated 350 cases, while settling 200—an impressive rate of 60%. In 2002, 220 cases were mediated, and of this number 151 settled. This computes to a settlement rate of 69%—the highest rate encountered in the research for this Article since the Ninth's Circuit astounding settlement rate of 73% achieved in 1994.⁷¹ By case types, settlement rates, in descending order, were as follows: workers compensation (63%), general civil (54%), family law (50%), and probate (50%).⁷² Of further interest is that thirty-five of the cases successfully mediated in 2001 were global settlements involving forty-five other pending legal proceedings.

B. Federal Ninth Circuit

The settlement program of the federal Ninth Circuit Court of Appeals was first implemented in 1984, and is by far the largest appellate ADR program examined.⁷³ The program, which operated as an independent unit of the Ninth Circuit, was originally staffed by five full-time circuit mediators and three support members in San Francisco, with one mediator and support person in Seattle, Washington. Ten staff mediators are currently employed. Reports of program operations were made to the chief judge of the court by a designated chief mediator.⁷⁴ The circuit mediators are employees of the court, and cases are assigned to them on a random basis. They are hired based on their civil litigation experience, as well as prior training and experience as ADR neutrals.⁷⁵

Data available to the task force disclosed that in 1994 circuit mediators screened 2016 program-eligible cases (2500 in 1995),⁷⁶ and scheduled

71. See the section on the Ninth Circuit program immediately below. Telephone Interview with Judy Henry, Oregon Program Administrator (Sept. 2003) (discussing data relating to Oregon's program from 2001 and 2002).

72. Several adoption and public agency cases were mediated and *all* of those settled. However, Ms. Henry is of the view that the number of cases was too small to be statistically reliable. *Id.*

73. The Ninth Circuit program is governed generally by Rule 33 of the Federal Rules of Appellate Procedure, and local rules 3-4, 15-2, and 33-1. ROBERT J. NIEMIC, *MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS* 72 (1997).

74. *Id.* at 79–80.

75. *Id.* at 79.

76. Most types of civil cases filed in the federal circuit were eligible for inclusion. Exceptions to this were certain types of prisoner cases, including those in which the

773 settlement conferences (1000 in 1995).⁷⁷ Selection was generally made based on information provided by the parties through the submission of a Civil Appeals Docketing Statement (CADS), which were required to be filed in all program-eligible cases. The CADS includes information concerning the nature of the case, including the basis for the court's jurisdiction, result at the trial level, issues on appeal, and whether there are any related matters pending in any federal court, or proceedings pending in any court involving the same subject matter.⁷⁸ Where the information in the CADS was insufficient to allow the screening mediator to decide whether to include the case, an initial assessment conference was scheduled with the attorneys of record. Initial assessment conferences occurred in about 25% of the eligible cases.⁷⁹

Once selected, participation in the Ninth Circuit program is mandatory, although the rules provide that overlooked cases could opt into the program. This occurred in approximately 5% of the cases not selected for participation by the circuit mediator.⁸⁰

Because of the extensive geographic area served by the Ninth Circuit, it was not surprising to learn that 70–75% of the mediation sessions were conducted by telephone, and not in person. Moreover, while it was customary that parties attend the telephonic conferences, such attendance was not required in all instances. What was surprising, however, and as discussed below, was the substantial settlement rate achieved simply through telephonic conferences.⁸¹ In-person mediations were scheduled at the discretion of the circuit mediator at which both counsel and a client representative were required to appear. Telephonic mediation conferences generally lasted one to two hours while in-person mediations were typically four to eight hours in duration.⁸²

To ensure confidentiality, program rules prohibited counsel from disclosing the content of any settlement discussions in briefs or arguments. Furthermore, filings and documents pertaining to the selected cases and the program's operations were kept in files inaccessible to other court personnel, including judicial staff. In those rare instances in which a

party-prisoner was still incarcerated, acting pro se, and virtually all prisoner writ proceedings. *See id.* at 72.

77. *Id.*

78. *Id.* at 73.

79. *Id.* at 72, 75.

80. *Id.* at 72, 74. Counsel for any party can contact the circuit mediator concerning inclusion into the program. At counsel's request, the contact is kept confidential. *Id.* at 74. A desire for anonymity is understandable in some cases, where counsel, or their clients, wish to veil any eagerness to participate because of concern that it would convey a lack of resolve or signal weakness to the opposing side.

81. *Id.* at 75–76.

82. *Id.* at 76–77.

judge participated as a mediator, the judge was precluded from later involvement in the adjudication of the case, but could vote on whether the court should hear the case en banc.⁸³

What was completely unexpected was the impressive level of settlements achieved despite the absence of in-person conferences in most cases. In 1994, 598 cases settled, resulting in a jaw-dropping disposition rate of 73%, while the 573 settlements in 1995 represented a settlement rate of 66.5%.⁸⁴ But apparently this is no anomaly, because it compares favorably with the Ninth Circuit's results in other years.

C. New Mexico

New Mexico's intermediate appellate court is comprised of ten appellate justices who hear cases predominantly in Albuquerque and Santa Fe, the state capital, although the panels have sat occasionally in Carlsbad, Las Cruces, Las Vegas, and Roswell. The jurisdiction of this court is largely mandatory, and 50% of the cases are civil. The court processes approximately 1000 appeals annually of which 500 are civil, 450 criminal, and 50 are interlocutory appeals.⁸⁵

Uniquely, the New Mexico court uses a two-track system to process appeals. This dual system was first put into place in 1975 for criminal appeals only, but since 1987 it has encompassed nearly all of the court's caseload.⁸⁶ Relying on the trial court record and a detailed docketing statement required to be filed in all appeals, one of the court's central staff attorneys⁸⁷ will recommend to the justice assigned to supervise the case calendar whether the matter should be placed on the court's "summary" calendar, or simply assigned to the general calendar. If the supervising justice determines that the appeal is appropriate for summary disposition, the parties will receive a notice of this preliminary determination,

83. *Id.* at 79.

84. *See supra* note 70. According to two former Ninth Circuit mediators (1993–1997), one reason for the seemingly high settlement rate may be that the program counted as a resolution any case that resolved after any contact by the program, even if it was settled by the parties without the assistance of a mediator. For example, the mediator assigned to the case might initially call counsel to offer case management assistance. If that case later settled, with or without a mediator's help, the settlement was counted as a resolution in the program's statistics.

85. Roger A. Hanson & Richard Becker, *Appellate Mediation in New Mexico: An Evaluation*, 4 J. APP. PRAC. & PROCESS 167, 170 (2002).

86. *Id.* at 171.

87. Central staff personnel on most courts are not assigned to a particular chambers but work for the court as a whole, or for a division of a court generally.

along with a tentative, summary decision in the case. The parties are given an opportunity to respond by raising additional errors of law or fact. The court will then assign the appeal to a panel of three justices who will either agree with the preliminary decision and issue it as the opinion of the court, or agree to move the case to the regular appellate calendar. In the latter instance, the parties will be afforded a full opportunity to brief the appellate issues, attend oral argument, and a full written opinion will ultimately be filed by the panel.⁸⁸

New Mexico's mediation program commenced in the fall of 1998, and since its inception has operated using a single full-time staff mediator who is assisted by a part-time administrative assistant. The mediator was selected by the court from its central staff, and the mediator underwent training in modern mediation technique early in the life of the program.⁸⁹ The court considered and rejected the idea of using sitting appellate judges to mediate cases. In making this decision the court recognized the important differences in skill sets between judging and mediating. Not all judges make the most effective mediators. Second, the court wanted to avoid encumbering judicial resources by eliminating one of the court's jurists from the ability to sit on the appellate panel hearing an unsuccessfully mediated case. Lastly, there was a desire to remove any possible hint that confidential information disclosed in the mediation might affect a later appellate decision on the merits.⁹⁰

The court similarly examined the option of relying on appellate attorney volunteers for mediation services. Positive factors favoring the use of attorneys included the absence of cost (other than party time and the cost of their own counsel) to the parties participating in mediation, the ability of the parties to rely on the specialized substantive knowledge of the volunteers, geographic diversity on a panel of volunteers, and a perceived benefit of fully involving the bar association in the process.⁹¹ The court finally chose to use a court-hired, full-time mediator believing this choice would still allow direct contact between the program and the bar, while affording a more streamlined administration.⁹²

Cases screened for inclusion in the program come from the court's regular case docket. Because the matters disposed of through the court's summary disposition calendar were relatively small and uncomplicated, the cases resolved quickly and with little expenditure of judicial resources, it was concluded that the focus of the program should be on the regular

88. Hanson & Becker, *supra* note 85, at 171.

89. *Id.* at 172.

90. Richard Becker, *Mediation in the New Mexico Court of Appeals*, 1 J. APP. PRAC. & PROCESS 367, 372 (1999).

91. *Id.*

92. *Id.* at 372-73.

calendar cases.⁹³ Of course, counsel in any case could request to be included in the mediation program.

Although the program designers looked at other appellate mediation models that used both case screening selection criteria and random selection systems, the New Mexico court decided to use a random system.⁹⁴ Once a case is selected, however, participation in mediation is mandatory, although the mediator considers the views of counsel as to whether the case is appropriate for mediation. Mediation conferences are generally conducted before briefing begins, and usually are telephonic. In-person conferences are occasionally held in Santa Fe and Albuquerque.⁹⁵ Furthermore, direct participation by clients is encouraged, but is not mandatory in most cases. The program mediator held the view that mandating client participation could alienate the parties and ultimately prove to be counterproductive. Additionally, in some cases, the absence of the clients reduced the risk of attorney posturing, which is an impediment to settlement.⁹⁶ Most civil appeals are eligible for mediation, although cases in which the parties are self-represented (*pro per*), writ proceedings, civil cases brought by incarcerated individuals, or cases involving New Mexico's health and welfare statutes are categorically excluded.⁹⁷

Typically, cases are assigned to the mediation program after the parties are notified that the case has been placed in the court's regular disposition calendar, but before briefing has commenced. Placement in the program does not result in any routine suspension of timelines for preparation of the trial court record or briefs, and some appellants resist any delays in the appellate adjudicative process occasioned by diversion into the mediation program. Nevertheless, the court's mediation is authorized to grant verbal requests for extensions of court rule-mandated deadlines where needed to facilitate the mediation process.⁹⁸

The operations of New Mexico's mediation program are kept separate from the court's adjudicative processes. Court personnel not directly involved in the program have no access to program files or information

93. *Id.* at 374–75.

94. *Id.* at 373.

95. Hanson & Becker, *supra* note 85, at 172.

96. Becker, *supra* note 90, at 375, 379.

97. Hanson & Becker, *supra* note 85, at 169–70. Beginning in mid-2000, the court began considering *pro per* cases on a strictly voluntary basis.

98. Becker, *supra* note 90, at 374.

concerning the progress towards settlement of any one case.⁹⁹ Similarly, the program operates under strict rules guarding the confidentiality of matters disclosed by the parties and counsel during the mediation process. Any communications between the mediator and court personnel necessary to carry out a settlement reached in mediation is made only with the express authorization of the parties as to its content.¹⁰⁰

From commencement of the program until June 2000, a period of almost two years, approximately three hundred cases were sent to mediation, a prodigious number considering the New Mexico court uses a single mediator. Moreover, largely relying on telephonic conferences, eighty-eight cases, or 29%, settled.¹⁰¹ While perhaps a bit lower, this rate is roughly comparable to disposition rates enjoyed by other programs mentioned in this article, and is indeed laudable, particularly in light of the fact that primary reliance is placed on telephonic conferences, often without clients' presence.

The court's mediator attributed the program's success to several factors, including the patience of the mediator in remaining available to assist counsel and their clients in resolving issues systematically over a protracted period of time. By utilizing a process that relied on small incremental steps, the parties were given the time needed to find their own common ground deemed so important to successful mediation.¹⁰²

New Mexico's program also concluded that cases in which there had been no significant communications or prior negotiations were ripe for appellate mediation regardless of which style of mediation was used. Furthermore, the number of mediation sessions did not seem to affect the settlement rate, so long as the parties were given sufficient opportunity to forge their solution. Somewhat surprisingly, New Mexico's mediator did not find that settlement rates were affected statistically by the substantive area of law involved in the case.¹⁰³

Although statistical information is limited, the average time from filing an appeal until settlement through the court's mediation program was sixty-eight days in 1997. This number compares very favorably with the time each case spends on the summary calendar before being placed on the regular calendar (150 days), and the total time for disposition by opinion after briefing and oral argument once assignment to the regular calendar takes place (450 days).¹⁰⁴

99. *Id.* at 377.

100. *Id.* at 376-77.

101. Hanson & Becker, *supra* note 85, at 173.

102. *Id.* at 174-75.

103. *Id.* at 176.

104. *Id.* at 180.

D. Michigan

The mediation program of the Michigan Court of Appeals has been in operation for six years. Its day-to-day functions are directed by a full-time Settlement Director, who reports to the Director of Research Division. Lateral oversight is provided by a three-judge Settlement Committee appointed by the Chief Judge of the court.¹⁰⁵

The Michigan court employs a hybrid system of mediator assignments. The majority of the mediations are conducted personally by the court's Settlement Director, although complex cases are assigned to volunteer circuit court judges. Additionally, volunteer mediators are used in domestic relations appeals, and the Director maintains a list of private mediators if the parties prefer to use such mediators. The Director has undergone formal mediation training at court expense, although mandatory training is not required for the program's volunteer mediators. No matter who mediates the case, the mediator's services are provided to the program on a pro bono basis.

The court utilizes a case screening system to select cases for program inclusion. No random selections are made. The parties may request to be included in the program, if not otherwise selected, and will be accommodated if the program's general case criteria are met. In this regard, cases in which the parties are self-represented, administrative mandamus appeals, and domestic relations and dependency proceedings dealing with child custody issues are categorically excluded from the program.¹⁰⁶ Categorically included are appeals arising from negligence actions, automobile no-fault appeals, and appeals from the granting or denial of attorney fees and sanctions. Beginning in January 2004, the program started to include all employment actions in which the plaintiff was the prevailing party in the trial court.

Case selection occurs within sixty days from the filing of the appeal, and the mediation usually takes place before briefing is required, in order to minimize expense to the parties for those cases destined to settle (and to serve as an inducement). For those cases scheduled for mediation, there is no routine suspension of the time for briefing or for the preparation of the record. However, there is a procedure available

105. Telephone Interview with A. David Baumhart, III, Michigan Director (Sept. 2003) (regarding the Michigan program and discussing responses to a questionnaire posed by the Author to the Director of that program).

106. *Id.* Beginning in January 2004, cases involving child custody issues became eligible for mediation.

for the parties to request extensions of the time for record preparation and briefing upon a showing of good cause. Settlements typically occur within six months from the filing of the appeal, which compares very favorably with the typical time of eighteen months or more to achieve a disposition by opinion.

In its six years of operations, the Michigan program has enjoyed settlement rates ranging from 25–35%. With one exception, the settlement rates in Michigan did not vary to any large degree depending upon case type. In descending order, settlements by case type in 2002 (a total settlement rate of 35.4%) and 2003 (total settlements of 32%) were achieved as follows: medical malpractice appeals (61%),¹⁰⁷ miscellaneous damages (44%), nonauto personal injury (37.6%), contract disputes (37%), auto personal injury (31.5%), and family law disputes (without child custody issues) (35%). Additionally, global settlements have involved other matters pending in state and federal trial and appeals courts, administrative agencies, as well as other legal disputes between the parties, which had not yet ripened into litigation. No more specific data as to the number of global settlements are available.

E. Hawaii

Hawaii's program, like that in Riverside, was born partially in response to an increasing appellate backlog. In January 1994, the Judiciary's Center for Alternative Dispute Resolution (Center) was requested to convene a task force to study and implement an appellate mediation program for the Hawaii Supreme Court. The work of this task force led to the adoption of rules establishing a mediation program by the Hawaii Supreme Court in March 1995.¹⁰⁸

Selection of civil cases for inclusion in the Hawaii program was originally made on a random basis. The thinking was that including only those cases likely to settle might lead to the trivialization of the program's merits, and could make its program statistics suspect. Furthermore, those appeals that were likely to settle inevitably resolved on their own without court intervention. Therefore, random selection seemed the appropriate way to test the program's merits and the talent of the mediators. Despite these efforts, in February 1996, a court rule

107. *Id.* This rate is remarkably high when compared with the First District's medical malpractice settlement rate. It may be that these types of cases are more difficult to settle under California's stringent requirement that all medical malpractice settlements, arbitrations, or judgments over \$30,000 be reported to the state's licensing authority. CAL. BUS. & PROF. CODE §§ 801(b), 801.1(b), 802(b) (West 2003 & Supp. 2005).

108. Elizabeth Kent, *Appellate Mediation in Hawaii: The First Eighteen Months of the Hawaii Appellate Conference Program*, 13 HAW. BAR J. 95, 95 (1998).

change allowed the program administrator to select cases on a discretionary basis. Once a case was selected, participation was mandatory.¹⁰⁹ After February 1996, cases not selected could request inclusion into the program. Like other programs, early intervention was viewed as a key component of the Hawaii program, with cases selected for mediation within three weeks after the notice of appeal was filed, and before cost of preparation of the trial record was incurred.¹¹⁰

Mediators are selected from the ranks of retired justices and trial judges, as well as retired or semi-retired practitioners, who are then trained in mediation technique. During the first eighteen months, approximately one case per week was mediated in Honolulu, the Center headquarters, and one additional case mediated in either Maui or on the island of Hawaii. Mediators volunteered their time at no cost to the parties, although parties were afforded the option of selecting their own mediator who would be compensated by the parties. During the initial program period of eighteen months, no one opted for their own paid mediator.¹¹¹

While the Hawaii program encouraged in-person mediation, for geographic reasons, many of the conferences were held at the state's video conference center. No data were available comparing the success of in-person conferencing with mediations conducted via teleconferences.

Like the other programs examined, Hawaii's mediation program boasted a settlement rate that seemed counterintuitive in light of traditional obstacles to the resolution of cases on appeal. Of the eighty-six cases completing mediation in its initial eighteen month period, thirty-three resulted in full settlements while eight others either partially settled or had the issues to be decided on appeal significantly narrowed. This yielded a complete settlement rate of 38%, with an additional 10% partially settling.

Since then, the program has mediated a total of almost 300 cases, approximately 50% of which have settled.¹¹² In the last reported fiscal year, 53.8% of the mediated cases resulted in complete settlements, and an additional 5.4% were partially settled—the highest settlement rates in

109. *Id.* at 97.

110. *Id.*

111. *Id.* at 98 & n.15.

112. 13 HAW. JUDICIARY CTR. FOR ALTERNATIVE DISP. RESOL. ANN. REP. 3 (2001); 14 HAW. JUDICIARY CTR. FOR ALTERNATIVE DISP. RESOL. ANN. REP. 4 (2002).

the last three years.¹¹³ By case type, settlements were achieved in the following descending order: contract (70%), torts (67%), agency appeals (50%), family (43%), and real property (33%).¹¹⁴

IV. REFLECTIONS & CONCLUSIONS

A. A Growing Favorable Environment for Appellate Mediation

Alternative dispute resolution (ADR) has revolutionized American civil litigation practice at the trial court level over the last two decades. Few lawyers practicing today have no experience in ADR. In this writer's experience, arbitrations and mediations are widespread, and have become more common than trials as the means by which the judicial system resolves civil disputes today. To meet this transformation, law schools have enlarged their curricula to include instruction in ADR techniques and procedures, and several include such topics in introductory civil procedure courses. A goodly number of judges and attorneys are abandoning courtrooms¹¹⁵ and traditional law practices in most jurisdictions in favor of life (or reincarnation) as ADR neutrals. Neutrals are no longer operating as informal cells created to share information, and are now chartering their own associations, sponsoring sophisticated educational programs, drafting their own codes of ethics, appearing as amicus curiae in cases involving ADR issues,¹¹⁶ and

113. 14 HAW. JUDICIARY CTR. FOR ALTERNATIVE DISP. RESOL. ANN. REP. 4 (2002).

114. *Id.* One can quibble about the reliability of these statistics given that only a total of thirty-four cases were directed to the program in 2001–2002. However, the Hawaii program has consistently settled approximately one-half of its cases each year. *Id.*

115. For a disquisition concerning the perceived “brain drain” from the judiciary caused by the ADR revolution, see Kim Karelis, Comment, *Private Justice: How Civil Litigation is Becoming a Private Institution—The Rise of Private Dispute Centers*, 23 SW. U. L. REV. 621, 629–30 (1994).

116. See, e.g., Brief of California Dispute Resolution Council as Amicus Curiae at 2–4, *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 25 P.3d 1117 (Cal. 2001) (No. S087319) (filing by CDRC, the principal organization of ADR neutrals in California); Brief of the California Dispute Resolution Council Amicus Curiae in Support of Real Parties in Interest at 1–2, *Rojas v. Superior Court*, 126 Cal. Rptr. 2d 97 (Ct. App. 2002) (No. S111585) (same).

The issue in *Foxgate* was whether there is an exception to the confidentiality provisions of sections 1119 and 1121 of the California Evidence Code for communications made during a mediation evidencing the failure of a party to comply with a court order. *Foxgate Homeowners' Ass'n*, 25 P.3d at 1119. In *Rojas*, the issue was whether section 1119 is an absolute bar to the discovery of materials “prepared for the purposes of a mediation.” *Rojas v. Superior Court*, 126 Cal. Rptr. 2d 97, 104 (Ct. App. 2002), *rev'd*, 15 Cal. Rptr. 3d 643 (Cal. 2004). CDRC's brief argued that the mediation process would be undermined unless materials prepared for mediation are protected by confidentiality under section 1119. Brief of the California Dispute Resolution Council Amicus Curiae in Support of Real Parties in Interest at 2, *Rojas* (No. S111585).

demanding that bar associations provide support services to neutrals as they have traditionally done for litigation practitioners.

The success of ADR appears to have been erected on the American judiciary's failures to meet the needs of those driven to the courts seeking legal redress for perceived or actual civil wrongs in two primary ways.¹¹⁷ First, growing case backlogs and unavailable courtrooms have compelled parties to find new, more responsive forums to resolve legal claims quickly. The flourishing of national high technology commerce gave urgency to this search in the industry where one-year product shelf lives are typical, and made it commercially intolerable for these emerging businesses to endure delays of two years or more before mercantile disputes are adjudicated.

Second, over time, the courts have become unwitting collaborators with the legal profession in adding complexity to the adjudicative process. This, in turn, has driven up the cost of conventional litigation to the point where access to the courts has become no longer an option for many claimants or defendants. Serpentine, complex procedures for summary judgments, technical pleading requirements, open-ended discovery in even the most routine cases, and layer after layer of case management hearings and meetings, raised the cost of litigating beyond the means of most individuals or small businesses.¹¹⁸ The reflexive efforts of the judiciary to reduce civil delay have been too little, and came too late.¹¹⁹ Fueling this race to find a new form of civil justice was an ill-timed downturn in the national economy in the late 1980s and early 1990s. This recession rendered an increased number of businesses

Another organization of ADR neutrals, the Southern California Mediation Association, had filed a brief in support of the Court of Appeal decision in *Rojas*. Amicus Curiae Brief of Southern California Mediation Association in Support of Petitioners at 1–2, *Rojas v. Superior Court*, 126 Cal. Rptr. 2d 97 (Ct. App. 2002) (No. S111585).

117. See generally Hufstedler, *supra* note 4.

118. Some of the more complex rules and statutes in California drafted with the encouragement, if not the direct participation of judicial advisory groups, include: CAL. CIV. PROC. CODE § 437c (West 2004) (containing California's summary judgment statute); see also *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 501 (Cal. 2001) (representing California Supreme Court's latest interpretation of the burden of proof and standard of review on summary judgment); CAL. CIV. PROC. CODE § 2025 (West 1998 & Supp. 2005) (describing oral depositions in California); CAL. R. CT. 204–214 (Civil Trial Court Management Rules).

119. CAL. R. CT. 204–214. While the purpose of these rules is to “secure the fair, timely, and efficient disposition of every civil case,” CAL. R. CT. 204, they have imposed a layer of procedural complexity on the management of civil litigation that has aggravated the cost of pursuing a determination in court.

impecunious, thereby exacerbating the exodus of litigants from the courts in search of a more cost-effective dispute resolution modality. Now, the metamorphosis of the American litigation experience from one of adversarial trials to one involving a full panoply of ADR processes has become essentially complete.

These same failings are infecting the American appellate judicial system. Delays in adjudicating appeals because of docket backlogs and the skyrocketing cost of prosecuting or defending appeals, have similarly driven responsible courts to experiment with appellate ADR during the past decade, mostly in the form of mediation. In fact, virtually every program examined in this Article was spawned by one or both of these concerns.

The need to find appellate solutions has caused many attorneys and their clients to embrace appellate ADR. Familiarity with trial court ADR, which shares many common features with these new appellate programs, when coupled with the demonstrated success of appellate mediations, have tightened this embrace and expanded its usage. While not yet as commonplace as trial level mediations, the current environment is receptive to appellate ADR. The task now is for the appellate courts to fashion mechanisms best suited to slack litigants' thirst for prompt and inexpensive resolutions of appeals.

With this in mind, I offer some conclusions about what seems to be working in those extant programs, and suggest why.

B. Programmatic Features That Favor Mediated Settlements

1. Mandatory Participation

Virtually all appellate mediation programs reviewed for this Article now make participation mandatory, once a case has been assigned into the program. There exist good reasons for this feature. Early voluntary appellate ADR programs were grossly underutilized. The reluctance to volunteer for ADR may have been caused by the lack of a cultural environment receptive to the idea of appellate mediation, the absence of adequate promotion and education, or the failure of confidence in the worthwhileness of the effort. Making appellate mediation mandatory breaks down these barriers to acceptance of ADR. While some day soon appellate ADR will be as common and accepted as trial court ADR, and thus, participation can be made voluntary, we have not yet reached this point. Until then, exploiting the captive market appears to be justified.

A further reason mandatory mediation seems superior is that it helps attorneys to overcome client resistance to the idea of settlement without raising a question of the attorney's loyalty to the client in suggesting

mediation. Where the attorney and client disagree about the value of ADR, the attorney can deflect debate by pointing out that the court requires participation. If any client displeasure remains, the court becomes the “heavy” and not the attorney. While certainly not an issue in every case, this tension reportedly develops with substantial frequency, especially with clients unsophisticated in litigation matters.

2. *Paid, Dedicated Program Administration*

It is imperative that any court system contemplating the implementation of an appellate mediation program set aside funds necessary to hire and retain at least a *part-time* program administrator. The work needed to design, implement, operate, and collect data for an ADR program successfully cannot be minimized. Each established, reputable mediation program incorporates this feature. Without doubts, no one else employed by the court has the time or inclination to undertake the formidable, time consuming tasks typically undertaken by program administrators, some of which have been discussed in this article.¹²⁰

Furthermore, it is in the best interests of the program to separate mediation processes from the court’s adjudicative function. Without independence from the court’s role in deciding cases, few litigants and their counsel will be willing to participate candidly in ADR if they fear that the panel adjudicating the appeal may become privy to what happened in mediation. Absent this separation and assured confidentiality, the parties will not approach mediation with the degree of frankness needed for success. Lastly, having a separate, professional staff dedicated to the program’s operations gives the enterprise much needed *gravitas* within the legal community. It communicates to members of the bar and to their clients alike that the court is making a serious commitment to mediation. Investing resources in infrastructure for the program conveys a sense that the court views the program as an institution of some permanence.

3. *Trained, Experienced Mediators*

Some courts use their program administrators as the principal mediator, others call upon the pro bono services of retired judges, and still others rely on the good offices of active practitioners to staff mediator panels.

120. See *supra* Part II.B.

Regardless of the source from which the mediator panel is derived, formal training in modern mediation techniques and appellate procedure is desirable. It should be abundantly clear by now that mediation is a far distant relative to the ham-fisted settlement conference of yesterday. Surely, by the time a case reaches the appellate level, badgering or cajoling the parties or counsel is unlikely to be fruitful in bringing about a negotiated resolution.

The long process by which cases finally reach appeal has allowed much emotional baggage to accumulate. Someone has also been proven wrong in anticipating success at the trial level, and the natural desire to seek vindication on appeal must be overcome. These case dynamics present both challenges and opportunities to the modern mediator. The most productive approach to take in a particular mediation can be a very complex decision, and one that calls upon specific skills best acquired through formal training.

Appropriate training includes teaching mediators how to foster understanding of the litigants' points of view, how best to use caucuses, how to help the parties find solutions, the techniques needed to break through emotional content, how to steer the parties to achieve frank case self-assessments, the development of strategies to overcome impasses, and the art of "closing the deal," among other important mediation tools.¹²¹ Yes, one may be a natural mediator with an exquisite intuitive feel for these processes, or after years of experience one can develop the necessary skill set to be competent. But training reduces the time necessary for experiential learning, and assists most people who lack the natural ability to mediate to acquire that capacity in a realistic timeframe.

Court-funded training helps to attract and maintain high-quality volunteer mediators. Such training can serve as a form of compensation for the volunteers, since quality training is expensive to obtain. It also demonstrates a willingness by the court to invest in its mediator pool, and exhibits an important degree of confidence in the abilities of the volunteers. Lawyers asked to forego billable time to participate as neutrals will realize and appreciate that this investment demonstrates that they are not being treated as fungible players in yet another court-sponsored program.

Training also benefits the program and the volunteer mediators by improving the settlement rates over a period of time. For example, one of the reasons for the increase in the First District's settlement rate over the last several years has been the increased proficiency of the mediators, a product of both training and experience. High settlement

121. See *supra* note 1 and accompanying text.

rates enhance the reputation of the program, and encourages attorney volunteers to get involved. They also reflect well on the ability of the mediator. Because it is common for pools of mediator volunteers to be populated by attorneys who are transitioning from traditional law practice to work as ADR neutrals, programs that enhance the stature of the attorney in the ADR community by improving their proficiency are likely to attract the best mediator candidates.

4. *Selection by Criteria vs. Random Selection*

The debate continues as to whether selection of cases for appellate mediation should be criteria-based or random. While random selection may appear to be more democratic, sending cases that have little or no chance of success to mediation can be disabling to the program for several reasons. First, forcing the parties and counsel to spend time, and therefore money, mediating a hopeless case will undoubtedly engender resentment towards the court and its program. Such damage to the reputation and prestige of the program can be substantial. Similarly, assigning a hopeless case to a volunteer mediator may undermine the mediator's commitment to the program. As previously noted, many private attorneys acting as mediators are trying to transition their practices from traditional law practice into ADR. In those instances, the mediator may be hoping to build an impressive pro bono settlement rate to enhance his or her reputation as a private mediator for fee. Those mediators will be unwilling to endure many doomed pro bono assignments before he or she begins to question the value in continuing to participate in the program.

Additionally, the potential for wasting court resources cannot be overlooked. Every appeal with no chance for settlement that is assigned to the program reduces the time the administrator has to devote to more promising cases. The same is true for the time of the volunteer mediators. The corollary to this is that for every random case placed in the program, one having a statistically better chance of settlement is likely excluded. Thus, random selection raises the risk of missing opportunities to settle cases, ironically contrary to the very *raison d'être* for the program's existence.

Certainly, using a criteria-based system can still result in some deserving cases not being selected. However, this possibility can be ameliorated by allowing cases to opt into the program, thereby assuaging any concern that criteria-based case selection is antidemocratic.

5. Relationship Between Mediation Success and Case Type

Appeals from family law and probate judgments appear to enjoy the highest rates of settlement through mediation. An important reason for this high success rate appears to relate to the fact that both family law and probate cases typically involve disputes over wasting assets. That is, the community or estate assets are of known, finite value. Thus, a party's expectation as to how much of these assets will be realized at the conclusion of litigation must necessarily be reduced by the transaction costs expended. Court costs and attorney fees will deplete the assets in direct proportion to the length and vigor of the legal fight. Because appeals are expensive, factoring the wasting effect of continued litigation into one's net recovery expectation leads many litigants to see the economic benefit of settlement.

In addition, because family and probate cases involve litigants tied to each other by present or former intimate relationships, they are often emotionally draining affairs. For many participants, the thought of continuing the fight into the appellate courts becomes unthinkably stressful. They are emotionally exhausted, leading many to seek an honorable way out of the dispute, bringing with it the reward of allowing the parties to move on with their respective lives.

Commercial disputes also appear to be good candidates for mediation. A major explanation is that many of the litigants are in the same or related industries. For this simple reason, many will be economically coerced to do business with each other in the future. If not, some will nonetheless see the prospect of voluntary future mercantile relations as offsetting what is at risk in the litigation. This can be an asset for the ingenious mediator who will leverage future prospects of doing business to greatest advantage in presenting alternatives to continued, distracting, and expensive litigation. Of course, the ability to restructure business relationships is one unique to the mediation setting. Appeals are focused on the resolution of discrete legal issues, or the search for error committed by a trial court. These limited inquiries rarely allow for the positive realignment of business relationships, which can be achieved by agreement.

Experience suggests that personal injury cases are good candidates for mediation, at least if the judgment being appealed from was one in favor of the injured party. While carrying a favorable judgment into the appellate arena surely comforts successful plaintiffs, the reality of a year or more of litigation before the judgment becomes liquid spurs many to consider discounted recoveries in return for immediate payment. Moreover, because judgments require the payment of at least postjudgment interest, defendants look more closely at the time value of the money at risk

during times when the investment value of funds falls below most statutory interest rates. For example, California law mandates that judgments bear interest at the statutory rate of 10% from the time of judgment until payment.¹²² Since at least the late 1990s, the commercial borrowing rates have been generally lower than 10%. Thus, even if a business entity needed to borrow funds to pay an outstanding adverse judgment, the interest on those borrowed funds would be less than the entity would have to pay in statutory interest in the event the adverse judgment was affirmed on appeal. Therefore, in deciding whether to settle or proceed with the appeal, a judgment debtor would likely consider the difference between the interest, which might eventually have to be paid on the judgment, and the value of the assets or borrowing needed to settle immediately. This would be yet another factor favoring settlement, and may be part of the reason that personal injury cases, as well as business disputes, have done relatively well in mediation.

The settlement rate in employment cases is lower for several reasons. First, like family and probate cases, employment cases carry high emotional content, but without the familial bonds, which sometimes can be used to forecast an eventual end to the litigation. Second, burdened by substantive law which is still developing, the outcome on appeal remains less predictable than in other categories of cases. Third, depending on the issue involved, employers are understandably concerned about the effect settlement may have on the remainder of its workforce.

Furthermore, like personal injury cases, employment appeals are not generally good candidates for mediation where the defendant has prevailed below. In those instances, the unsuccessful plaintiff is likely to pursue the appeal rather than accept the customary *de minimus* offer. Obstacles may also appear in cases where the plaintiff prevailed below. For example, in some cases the damages awarded to the plaintiff in the trial court are exceeded by the attorney fees awarded. (California law allows for the recovery of attorney fees in some employment disputes.) In those instances, this anomaly creates conflicts of interest between the employee/plaintiff and counsel that interfere with settlement.

The low settlement rate in insurance cases may also be suppressed by uncertain substantive law and institutional factors. For example, the insurance industry, a sophisticated, repeat player in California litigation,

122. CAL. CIV. PROC. CODE § 685.010(a) (West 2004).

is far more perspicacious about the precedential value of cases than many other commercial entities. Ready settlements justified, perhaps, by the circumstances of a given case must be tempered by the fear that other policyholders would be emboldened by this apparent capitulation.

Moreover, because of the high volume of litigation into which most carriers are thrust, the insurance industry may arguably have a greater ability to weather the financial ebb and flow of adverse judgments than other, less frequent litigants. For this additional reason, insurers may be less risk adverse, and, therefore, more likely see an appeal to its conclusion on the merits.

Appeals involving public entities rarely are candidates for mediation, in part because they involve governmental bodies that face high volumes of disputes. Because of this volume and the fact that many appeals involve the use of agency counsel, the risk of loss can be spread out, and therefore the outcome of any single case is not likely to be influenced by the risks on appeal. Additionally, representatives who attend mediation are often not the officials who must approve any settlement (boards of county supervisors, governing boards of water or utility districts, city councils, etc.). This can mean that the decisionmakers who may have to ratify any tentative resolution lack firsthand knowledge of the proceedings and of the underlying dispute.

6. Timing of Mediation

Appellate court programs dedicated to early mediation have a significant advantage over those that divert cases only after the record has been received and the appellate issues briefed. Certainly deferring cases until postbriefing ensures that appellate issues have crystallized. This, in turn, may afford greater focus and efficiency during the mediation session. However, any advantage in this regard is more than offset by the loss of financial leverage that early mediation provides.

Every step in the appellate process brings added costs. Savings in attorney time by early settlement, therefore, can be substantial. An efficiently run program can save the cost of briefing the appeal—a significant saving, and, as importantly to the success of mediation—an incentive to get the matter settled promptly.

Furthermore, in many cases appeals are commenced by trial counsel, with appellate counsel being retained, if at all, only later in the proceedings. Conducting mediation early with trial counsel—and before appellate counsel has been retained—may also improve settlement leverage in several ways. Bringing in new counsel undoubtedly carries with it a significant cost just in bringing appellate counsel up to speed. Settlement before that expense is incurred by the clients can be appealing.

Candid settlement discussions with trial counsel, especially if that counsel happens to represent the appellant, could be beneficial. Some trial counsel may be defensive about their performance below, and, therefore, anxious to avoid the prospect that their action or inaction will be critiqued either by later retained appellate counsel, or, even worse, by the appellate court.¹²³

Correspondingly, delaying mediation until appellate counsel has become involved may impede settlement. After all, what appellate specialist wants to commence their engagement as appellate counsel by advising the new client that settlement of the matter appears to be warranted? Presumably, the client made the decision to hire appellate counsel based on an assessment that seeing the appeal to its conclusion was necessary or desirable.¹²⁴

Of course, in a given case, early mediation, and the concomitant need to negotiate with trial counsel, could present a greater challenge than an advantage. Counsel defensive about his or her professional performance in the trial court may be unwilling to acknowledge weaknesses in the case. Trial counsel's lack of understanding of appellate standards of review or procedure may also make self-assessment of the case more difficult.

For all of these reasons, one must be circumspect when predicting if early mediation with trial counsel has intangible benefits or not. Notwithstanding this difficulty, there can be little debate that at least the cost savings of mediating before appellate counsel is retained provide a strong reason to structure an appellate mediation program to enable early intervention.

That is not to say that all costs of pursuing an appeal can be avoided

123. Common examples of such areas of potential sensitivity are claims by appellees or respondents that appellate issues were waived by trial counsel's failure to object or otherwise to preserve the issue for appeal. Seeking a review of the sufficiency of the evidence to support factual findings may result in second-guessing an attorney's tactical decisions about what witnesses were called or which documents were offered into evidence.

124. Indeed, it may be that once put into prose, the client or even counsel may "fall in love" with the brief, thereby reducing their objectivity. Suffice to say too that one must exercise extreme care before imputing selfish motives and stratagems to either clients or counsel, which might either impede or encourage settlement. But, in considering case dynamics, the mediator cannot ignore all possible human factors potentially affecting settlement, including the attorney's profit motive in continuing to litigate, fear of malpractice being revealed on appeal, and potential "turf wars" between appellate and trial counsel developing for future work from the client, to name just a few.

by early mediation. Because in most courts the commencement of record preparation comes so soon after notices of appeal are filed in most courts, even the earliest intervention usually will not eliminate this expense. Of course, if a court agrees by rule to defer record preparation once a case has been sent to mediation, this additional savings can be realized. However, so far few courts have been willing to institutionalize delay in case processing by enacting such a rule. Indeed, because half or more of the cases in even the most successful mediation programs do not settle, this reticence seems justified. Nevertheless, in some cases where the records are large, mediation can be achieved before the trial court record, including reporter transcripts, has been fully prepared. In those cases, “stop work” orders issued immediately after mediation can still reap savings of at least some of these costs.

C. Controversial Programmatic Features

The foregoing conclusions about appellate mediation find support in the data available from programs examined in this Article. However, a number of these comparably successful programs incorporate distinctive features that merit discussion. Several of the more important ones are discussed below, along with the Author’s own conclusions as to best practices.

1. Use of Volunteer Attorney Mediators

Appellate courts mine a variety of sources to find their mediators. Some recruit active and retired trial judges in their jurisdictions, while others corral a few appellate justices from their own courts who have an exhibited desire or penchant for ADR. Further, some use unpaid attorneys, and some exclusively rely on the program’s administrator, or other court personnel, to staff mediations. Initially it must be acknowledged that, of the various sources of mediators, no single category seems to produce significantly better mediation results. Overall, among the attributes that appear to be the best predictors of a mediator’s ability to settle cases are the following: (1) the mediator’s determination to achieve positive results, (2) the mediator’s legal experience in appellate procedure and the substantive area of law involved in the assigned case, and (3) experience and training in mediation. Each of the categories from which mediators are drawn includes attorneys and judges who have these necessary skills. But not all members of either group will have these skills. Thus, it is not surprising that credible programs drawing on different mediator sources have achieved comparable levels of success.

Nevertheless, in the Author’s view, having the program administrator

serve double duty may be workable, but only for small mediation caseloads. Where a mediation program requires the screening of more than a few hundred cases annually, and one hundred or more cases are actually mediated each year, a program administrator will be unable to both administer the program and mediate individual cases effectively.

In the First District, we chose to use volunteer mediators for many of the same reasons that have motivated the Hawaii and Oregon programs to do so. First, few courts have the resources to devote to the hiring of staff mediators, notwithstanding any potential savings in the costs needed otherwise to administer a stable of private attorney mediators. If a program hopes to assign a significant number of its civil appeals to mediation, the costs of hiring and supporting more than a single staff mediator will be correspondingly high. Relying on nonemployee mediators also adds a sense of separation from the adjudication function of the court, which may encourage greater candor by litigants and their counsel during the mediation process.¹²⁵

Involving the bar in appellate mediation programs also has much to commend it. Private attorney mediators develop a proprietary interest in the program's success, which, in turn, provides the incentive to invest time as a mediator in each case. Further, the ability to draw on active practitioners representing a cross-section of the modern diversity of the practice of law, ensures that substantive expertise in a particular area of law can be made available where it may be helpful to the mediation process.

One final advantage of using volunteer attorneys as mediators is that this model holds out the best chance that one day the court's direct involvement in, and responsibility for, appellate ADR might end. My prediction is that appellate mediation, while perhaps now in its infancy, will one day take its place as a normal and customary tool routinely used to resolve appeals. But if and when that time arrives, there must be an apparatus in place, if there is any hope that a private system will emerge to supplant court processes, or at least to ease the courts' burden of operating appellate mediation programs. Therefore, to the extent courts

125. It is perhaps noteworthy that the First District's panel of appellate mediators includes a number of retired jurists who have shown interest and ability to participate successfully. To the extent there is an advantage in using a shorthand reference to the First District's mediator panel as one comprised of "volunteer *attorney* mediators," one must bear in mind that the panel is not strictly comprised of all attorneys, and thus, is not fully descriptive.

now are utilizing and welcoming the services of private volunteer attorney/mediators, they are indirectly investing in the creation of a private system, which can inherit responsibility for appellate mediation in the future.

2. *In-Person Mediation vs. Electronic Attendance*

In the First District, mediation program rules mandate that sessions take place in the physical presence of the mediator with all counsel of record, clients, or client representatives having complete settlement authority, present.¹²⁶ Personal participation in mediations is considered to be so important to the success of the program, that sanctions have been imposed when either lead counsel of record or the appropriate client representative are absent from the session. In researching this Article, therefore, the Author was truly astonished to learn of the significant success achieved by some programs that rely on telephonic or video conferencing and dispense with requiring client attendance.

Obviously, the geographic size of some judicial jurisdictions is a major obstacle to face-to-face mediations. For example, any rule that attempted to compel litigants in the federal Ninth Circuit, a jurisdiction comprising ten states, or in the archipelago of Hawaii, to meet in a single location for a mediation would be grossly unfair, and likely counterproductive to settlement. Electronic hookup is thus a practical necessity. The question remains: Why do these jurisdictions have successful mediation programs? The answer is not self-evident.

One possible answer is suggested in the reported comments of New Mexico's former program administrator.¹²⁷ As noted, New Mexico mediations are normally held without face-to-face meetings, and sometimes without direct client participation in the telephonic conferences. Yet, the program enjoys success, which the administrator attributes to convincing the participants that appellate mediation is an evolving process that yields results over time. This allows the parties to find solutions to settlement obstacles incrementally. It may be that this attitude or style of mediation overcomes the disadvantage of trying to conduct an ADR process long-distance.

Nonetheless, one cannot ignore the salutary effect personal participation may have on the parties to cases selected for mediation. Involving the client directly in the process ensures that the party, who after all bears the risk and expense of appeal, has been afforded a cathartic opportunity to be heard. Numerous evaluations submitted

126. CAL. 1ST DIST. CT. APP. R. 3.5(8).

127. Hanson & Becker, *supra* note 85, at 184–85.

during the First District's pilot period express satisfaction with the feature of the process allowing for the client's direct participation in the resolution of their cases in a nonadversarial setting.¹²⁸ This undoubtedly enhances public appreciation of the justice system.

V. FINAL REMARKS

The two main goals of this Article are to offer encouragement to appellate jurisdictions which have not yet implemented mediation programs and to describe models that have been tried in other jurisdictions. For those courts not fully satisfied with their present programs, perhaps this thesis can also serve to nudge them in new directions, which might yield greater success.

In doing so, the Author does not intend, however, to disparage those courts that lack the interest, or resources, to join in the settlement of this last frontier of ADR. After all, appellate courts remain above all part of the branch of government dedicated to the interpretation and enforcement of law and legal rights. That function is, and will remain, largely exercised through close judicial review of trial court proceeding for error in the adjudication of legal disputes. Appellate courts should also be relied on to guide the evolution of case law used in future times as precedent.

Even with our traditional and enduring roles, as to those appeals which can and likely will settle, it is hard to argue that we should not provide means to allow them to do so, particularly where the cost and time to adjudicate those disputes can defeat the interests of justice for the parties. It is this limited, but sizeable, class of cases upon which the outposts of appellate ADR will continue to be built. If such an outpost has not yet been constructed in the reader's jurisdiction, rest assured that it will be, and soon. The public's unquenchable demand for prompt, cost-effective resolution of disputes will make it happen.

128. MANDATORY MEDIATION, *supra* note 24, at 15–18.