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## The Case for a Mediation Program in the Federal Circuit

Gilbert J. Ginsburg

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## The Case for a Mediation Program in the Federal Circuit

## ESSAY

# THE CASE FOR A MEDIATION PROGRAM IN THE FEDERAL CIRCUIT

GILBERT J. GINSBURG\*

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\* Professor Ginsburg is the principal of Gilbert J. Ginsburg, Attorney and Counselor-at-Law and Co-Director of the A-76 Institute. Formerly he was founding Dean of *Touro Law School*; Professor of Law and Director, Government Contracts Program, the *George Washington University*; and a senior partner of Epstein Becker & Green, P.C. His website is <http://www.profgilginsburg.com>. The author acknowledges the assistance of Joel Davis and Christine Lawson.

## INTRODUCTION

The U.S. Court of Appeals for the Federal Circuit (the “Federal Circuit”) is the only Circuit Court of Appeals that does not have a mediation program that provides third party assistance to parties seeking an alternative to appellate litigation. The other twelve Circuit Courts of Appeal—the regional Circuit Courts—all have well-established mediation programs<sup>1</sup> and only the Eighth Circuit’s program is voluntary. All the regional Circuits have settlement conference programs that provide mediation services when requested by the parties.<sup>2</sup> The Federal Circuit does not provide any form of mediation or alternate dispute resolution (“ADR”) when the parties desire, leaving unassisted settlement negotiations or appellate litigation as the only options.<sup>3</sup>

I believe that the Federal Circuit should join the other twelve Circuits and establish a formal, court-sponsored mediation program. This program’s case review and referral guidelines should be modeled on the existing programs in the regional Circuits and include staff review of incoming cases for mediation referral. This new program should be widely publicized to ensure that the services

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1. The U.S. Court of Appeals for the First Circuit has the Civil Appeals Management Plan (CAMP); the U.S. Court of Appeals for the Second Circuit has the Civil Appeals Management Plan (CAMP); the U.S. Court of Appeals for the Third Circuit has the Appellate Mediation Program; the U.S. Court of Appeals for the Fourth Circuit has the Pre-Argument Conference Program; the U.S. Court of Appeals for the Fifth Circuit has the Appellate Conference Program; the U.S. Court of Appeals for the Sixth Circuit has the Pre-Argument Conference Program; the U.S. Court of Appeals for the Seventh Circuit has the Settlement Conference Program; the U.S. Court of Appeals for the Eighth Circuit has the Settlement Program; the U.S. Court of Appeals for the Ninth Circuit has the Settlement Program; the U.S. Court of Appeals for the Tenth Circuit has the Circuit Mediation Office; the U.S. Court of Appeals for the Eleventh Circuit has the Circuit Mediation Office; the U.S. Court of Appeals for the District of Columbia Circuit has the Appellate Mediation Program. See Robert J. Niemic, *Mediation & Conference Programs in the Federal Court of Appeals*, Federal Judicial Center 5 (1997), available at <http://www.fjc.gov/newweb/jnetweb.nsf/pages/315> (describing alternative dispute resolution programs in the various federal courts of appeals).

2. See *id.*

3. The Federal Circuit *does* have a “settlement discussion” rule, Fed. Cir. R. 33, which requires that the parties to certain cases discuss settlement, through counsel, prior to the hearing. However, there is no provision for ADR or any involvement by Court personnel. Moreover, the rule does not apply at all to Government contract and other cases where the Federal Government is a party. Federal Judicial Circuit website, <http://www.fjc.gov/>. Indeed, appeals from any decision of the U.S. Court of Federal Claims, see 28 U.S.C. § 1295(a)(3), are not covered by Fed. Cir. R. 33. Cases in which the United States is a party are a significant part of the Federal Circuit’s docket.

offered by the Federal Circuit Court are known to the bar and their clients. Irrespective of whether a case is chosen by the Court's mediation program office for mediation, the Court's mediators would be available to assist all parties if they voluntarily ask for ADR assistance.

A comprehensive mediation program in the Federal Circuit should include a program mediation office, separate and distinct from the Clerk's Office. It should also include an office staffed with full-time personnel whose principal responsibility is exploring the feasibility of settling cases filed in the Court. A program such as this will provide greater opportunity for concluding cases through mediated agreements.

As of the summer of 2001, the Court of Appeals for the Federal Circuit had not established a court-sponsored mediation program that provides a neutral third party to assist parties in reaching mutually satisfactory settlements. Although funding has been granted for a program and staff in annual budgets over the past ten years, the total annual budgets have not yet allowed the court to maintain suitable court staff and still establish the mediation program. However, this year, for the first time, it appears that adequate funds are available to establish a mediation program and to maintain the necessary court staff.<sup>4</sup> Despite funding difficulties, the Federal Circuit should follow the lead of the regional Circuit Courts and make a commitment to providing an alternative method to litigation for parties to resolve their disputes.

#### I. PERSONAL EXPERIENCES IN THE FEDERAL CIRCUIT

Recently, I filed an appeal of an adverse decision by an agency board of contract appeals with the Federal Circuit. The dispute centered on how to implement an earlier favorable decision of the same board of contract appeals granting reformation for mutual mistake. Between the adverse decision of the board and the time for filing the appeal,<sup>5</sup> there was a "window of opportunity" to resolve the dispute at the agency level.

Prior to filing the appeal, I discussed with agency counsel possible ways of resolving the dispute other than litigation. Unable to reach agreement, the agency counsel suggested that his clients, the cognizant agency officials, might be willing to settle if there were a

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4. See *infra* Part IV.

5. A petitioner has a 120 day window in which to file an appeal after a ruling from a board of contract appeals. See 41 U.S.C. § 607(g) (1994 & Supp. V 1999).

favorable recommendation from a neutral third party. He suggested approaching the Federal Circuit, which would be receiving the appeal, to schedule an ADR under the Court's auspices.

When I contacted the Clerk's Office, a senior member of the Clerk's Office informed me that there was no provision for ADR in the Federal Circuit. He added that nothing like that had ever been done in the last nineteen years he had been employed in the Clerk's Office. As a result of the unavailability of ADR under the auspices of the Federal Circuit, an opportunity to settle the case was lost. Instead, the case was briefed and argued.<sup>6</sup> Although this is only one example, it is impossible to predict how many other Federal Circuit cases might have been settled if ADR were available. The statistics from other Circuits reflect that a significant percentage of cases do settle following a settlement conference under a mediation program.<sup>7</sup> While it is not certain that my case would have settled, I believe there was a respectable chance of reaching an agreement and would have liked the opportunity to pursue a resolution to the dispute under the guidance and assistance of a court sponsored mediator.

## II. OVERVIEW OF REGIONAL CIRCUIT MEDIATION AND CONFERENCE PROGRAMS

Available statistics support the usefulness and effectiveness of the regional Circuits' mediation programs.<sup>8</sup> This Part will provide an overview of the services provided in the regional circuits in the chronological order of their establishment. It includes recent statistical information from court mediation program administrators and staff attorneys that supports the effectiveness of ADR services.

### A. *Second Circuit*

The Second Circuit mediation program, Civil Appeals Management Plan ("CAMP"), was established in 1974.<sup>9</sup> The Second Circuit employs three full-time staff counsel who conduct the CAMP

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6. The appeal was successful. However, that result was unnecessarily delayed for almost two years. See *Richlin Security Service Co. v. INS*, No. 00-1134, 2001 WL 744463, at 1 (Fed. Cir. July 2, 2001) (table).

7. See *infra* Part II (discussing settlement statistics in the various Circuit Court of Appeals).

8. For a complete and comprehensive overview of the mediation programs in each of the Federal Circuit Court of Appeals including information on (1) the case selection process, (2) eligible cases, (3) the programs structure, (4) scheduling conferences, (5) what the conference session would include, (6) rules of the program, and (7) the administration of the program, see generally Niemic, *supra* note 1.

9. See Niemic, *supra* note 1, at 3.

conferences.<sup>10</sup> Nearly all docketed civil cases are referred to the Office of Staff Counsel, which then issues a scheduling order that includes a mandatory pre-argument conference.<sup>11</sup> Together the three staff attorneys conference approximately 1,200 cases each year.<sup>12</sup> The program is sparsely staffed and does not have the resources to maintain independent program statistics. Although the focus of the program is settling cases, it also provides a means to narrow issues, eliminate meritless arguments and appeals, and resolve procedural issues.<sup>13</sup> The Senior Staff Counsel estimates that forty-five to fifty percent of the cases settle each year.<sup>14</sup>

The Senior Staff Counsel also recalled an unpublished study that was commissioned by the Second Circuit and performed by Professor Maurice Rosenberg almost twenty years ago on the Second Circuit mediation program.<sup>15</sup> He informed me that Professor Rosenberg concluded, in his report to the Second Circuit, that the Circuit's mediation program saved two full-time judges and their staffs comprised of three to four law clerks and a secretary for each judge.<sup>16</sup>

#### B. Sixth Circuit

The figures from the Sixth Circuit program, established in 1981,<sup>17</sup> are even more dramatic. The Sixth Circuit employs five staff attorneys that conduct conferences; once a conference is scheduled, participation is mandatory.<sup>18</sup> The Sixth Circuit takes almost all eligible cases<sup>19</sup> into their Pre-Argument Conference Program. It

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10. See Niemic, *supra* note 1, at 24.

11. See Niemic, *supra* note 1, at 24.

12. Telephone interview with Frank J. Scardilli, Esq., Senior Staff Counsel, U.S. Court of Appeals for the Second Circuit (May 18, 2001); see also Niemic, *supra* note 1, at 24 (providing statistics for 1994 and 1995).

13. See Niemic, *supra* note 1, at 24 (explaining the goals of the CAMP program).

14. See Scardilli, *supra* note 12.

15. See Jerry Goldman, *An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration* (Federal Judicial Center 1977) (evaluating the CAMP program in effect in the mid-1970s) (report on file with author).

16. See *id.* The Federal Judicial Center also did two earlier studies in the early days of the Second Circuit program. See GOLDMAN, *An Evaluation of the Civil Appeals Management Plan* (1977); PARTRIDGE & LIND, *A Reevaluation of the Civil Appeals Management Plan* (1983) (on file with author). The former study found the results inconclusive. The latter study found that intervention by Frank Scardilli, the present head of the Second Circuit program, was effective in reducing the number of cases that went as far as oral argument. See *id.* at 33-36.

17. See Niemic, *supra* note 1, at 3.

18. See *id.* at 52.

19. All civil cases docketed in the Sixth Circuit are eligible. In practice, however, conferences are generally not scheduled in prisoner cases, tax appeals, agency cases such as review of administrative orders from the Social Security Administration and the NLRB, pro se cases, or where there are unresolved jurisdictional problems. These exclusions are common among the Circuits. See Federal Judicial Center,

receives between 1000 and 1100 cases per year and settle between 450 and 500 of them.<sup>20</sup> This is an effective use of the Sixth Circuit's available manpower.

Fifteen years ago, the Federal Judicial Center did a random control group comparison of appeals filed in the Sixth Circuit between 1985 and 1987. The study found that sixty-nine percent of the cases in the "non-conferenced" control group did not settle. In comparison, fifty-seven percent of the cases in the "conferenced" group did not settle. Significantly more of the cases subject to the Sixth Circuit mediation program settled than those in the non-conferenced group. Forty-three percent of the "conferenced" cases were settled while only thirty-one percent of the "non-conferenced" cases were settled or withdrawn. This demonstrates a 38.7% greater likelihood of settlement in the conferenced group over the non-conferenced control group. The Federal Judicial Center study concluded that the Sixth Circuit's mediation program saved the work of one judge and the judge's staff.<sup>21</sup>

### C. Eighth Circuit

The Eighth Circuit's program, also established in 1981, is the only Circuit mediation program in which participation is completely voluntary;<sup>22</sup> attorneys for both parties must agree to mediation and cannot be compelled to participate. The Clerk's office screens a total of about 750 cases per year and refers all of the eligible cases—about 450—to the single Circuit mediator.<sup>23</sup> In approximately sixty percent of the referred cases the Circuit mediator makes contact with counsel for the parties and conducts conferences in approximately twenty-percent of the cases.<sup>24</sup>

The Circuit mediator, however, declined to disclose how many cases settled as a result of his efforts, because he believes such statistics can be misleading and the basis for the statistics varies among Circuits.<sup>25</sup> He is of the opinion that the program is worthwhile. More importantly, the judges of the Eighth Circuit believe that the Circuit mediator does the work of a judge and thus

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available at <http://www.fjc.gov> (Aug. 2001).

20. Telephone interview with Robert W. Rack, Jr., Esq., Senior Conference Attorney, U.S. Court of Appeals for the Sixth Circuit (May 14, 2001).

21. See generally Niemic, *supra* note 1.

22. See *id.* at 64.

23. Telephone interview with John H. Martin, Esq., Director, Settlement Program, U.S. Court of Appeals for the Eighth Circuit (May 21, 2001).

24. See Niemic, *supra* note 1, at 64.

25. See *id.* Based on my observations, I agree with Mr. Martin that the basis for measurement of settlement statistics varies among Circuits.



saves the cost of a judge and judge's staff. The Eighth Circuit mediator believes "it's more like [the work of] half a judge."<sup>26</sup>

#### D. Ninth Circuit

Perhaps the most striking statistics come from the Ninth Circuits' Settlement Program, implemented in 1984.<sup>27</sup> The program employs six circuit mediators, including a chief circuit mediator who reports to the chief circuit judge.<sup>28</sup> The Settlement Program reviews all the eligible cases and selects those with settlement potential; settlement services are also provided upon the parties' request or when a case is referred for settlement by an appellate panel.<sup>29</sup>

In 1999, the Ninth Circuit's Settlement Program staff screened 2,148 out of 2,682 eligible cases. They selected 611 cases for mediation and successfully settled 737.<sup>30</sup> The additional settled cases were ones under mediation that were carried forward from the prior year. However, of the cases that were under mediation, only 149 were sent back to resume litigation.<sup>31</sup> In 2000, the staff reviewed 2,055 cases and selected 648 for mediation. Including the cases carried forward from 1999, 739 cases were settled and only 98 were sent back to resume litigation.<sup>32</sup>

#### E. D.C. Circuit

The D.C. Circuits' Appellate Mediation Program was implemented in May 1987.<sup>33</sup> Cases are referred to the program by the clerk's office, and parties can also request mediation by submitting a confidential request form to the clerk's office.<sup>34</sup> If a case is selected for mediation, participation is mandatory.<sup>35</sup> The D.C. Circuit has one paid, part-time administrator<sup>36</sup> and utilizes approximately forty volunteer members of the bar as pro bono mediators.<sup>37</sup> The volunteer attorneys that serve

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26. Telephone interview with John H. Martin, *supra* note 23.

27. See Niemic, *supra* note 1, at 72.

28. See *id.* at 79-80.

29. See *id.* at 72.

30. Teleconference with David E. Lombardi, Esq., Chief Circuit Mediator, U.S. Court of Appeals for the Ninth Circuit (May 15, 2001).

31. See *id.*

32. See *id.*

33. See Niemic, *supra* note 1, at 94.

34. See *id.*

35. See *id.*

36. The U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia share the same program administrator.

37. See U.S. Court of Appeals for the District of Columbia: Appellate Mediation Program, page 1 of 6 pages, Federal Judicial Center website, <http://www.fjc.gov/>; Telephone interview with Nancy E. Stanley, Esq., Director of Dispute Resolution, U.S. Court of Appeals for the District of Columbia (May 11, 2001).

as mediators are selected by the court and given professional mediation training.<sup>38</sup>

In the year ending March 31, 2001, the D.C. Circuit's Appellate Mediation Program took 75 cases<sup>39</sup>—thirty-six percent of which were settled.<sup>40</sup> Since the inception of the D.C. Circuit program, twenty-eight percent of the total cases that were referred to the program were settled.<sup>41</sup>

#### F. Tenth Circuit

The Tenth Circuit's Circuit Mediation Office began offering mediation services in 1991.<sup>42</sup> The program includes three circuit mediators and a conference administrator.<sup>43</sup> Because of the limited staffing, cases are randomly selected by the program for mediation, though it typically provides services for represented parties that request mediation services.<sup>44</sup> Participation in the program is mandatory once a case is scheduled for conferencing.<sup>45</sup>

The Tenth Circuit "conferenced" 503 new cases in 1998, settling thirty-nine percent. In 1999, the Circuit's program conferenced 467 new cases and settled forty percent. In 2000, the Circuit conferenced 452 new cases and settled forty-one percent.<sup>46</sup>

#### G. First Circuit

The First Circuit's CAMP was established in 1992<sup>47</sup> and schedules conferences in all civil cases that are eligible for mediation—approximately 600.<sup>48</sup> An active circuit judge oversees the program with the assistance of a chief administrator.<sup>49</sup> Participation is mandatory.<sup>50</sup> Of the approximately 600 cases that are eligible for mediation, forty to forty-five percent are settled. A single mediator now handles all appellate mediation in the First Circuit.<sup>51</sup>

38. See Niemic, *supra* note 1, at 94.

39. Telephone interview with Nancy E. Stanley, Esq., *supra* note 37.

40. See *id.*

41. See *id.*

42. See Niemic, *supra* note 1, at 81.

43. See *id.* at 86.

44. See *id.* at 81.

45. See *id.* at 84.

46. Telephone interview with David W. Aemmer, Esq., Chief Circuit Mediator, U.S. Court of Appeals for the Tenth Circuit (May 15, 2001).

47. See Niemic, *supra* note 1, at 18.

48. Telephone interview with Judge Neal Lynch, Settlement Counsel, First Circuit of Court of Appeals (May 21, 2001); Telephone interview with Mrs. Irene Gamel, Assistant Administrator, Settlement Counsel's Office (May 21, 2001).

49. See Niemic, *supra* note 1, at 23.

50. See Telephone interview with Judge Neal Lynch, *supra* note 48.

51. See Telephone interview with Judge Neal Lynch, *supra* note 48.

### H. Eleventh Circuit

The Eleventh Circuit Mediation Office (CMO) has also been remarkably successful in using alternative dispute resolution. The CMO was established in 1992<sup>52</sup> and consists of four circuit mediators, a mediation office administrator, and administrative assistants.<sup>53</sup> The CMO selects a cross section of eligible civil cases for conferences or a case can be referred by an appellate judge or at the request of a party to an eligible case.<sup>54</sup> Although participation is generally mandatory, a party can request to be removed from mediation.<sup>55</sup> In 2000, the CMO counsel mediated 687 civil appeals and resolved 354—a fifty-two percent settlement rate.<sup>56</sup> In addition, by settling the 354 appeals, 154 related trial court claims were settled in the process.<sup>57</sup>

### I. Fourth Circuit

The Fourth Circuit's Pre-Argument Conference Program, started in 1994, has also been successful. After docketing, the senior conference attorney reviews all eligible cases to determine if a pre-argument conference might assist the court or the parties.<sup>58</sup> The Court employs three conference attorneys who mediate selected cases and cases in which a party requests mediation services.<sup>59</sup> In 1998, the court mediated 788 cases and settled thirty-six percent.<sup>60</sup> In 1999, the court mediated 772 cases and settled thirty-eight percent.<sup>61</sup> And in 2000, the court mediated 813 cases and settled thirty-four percent.<sup>62</sup>

### J. Seventh Circuit

The Seventh Circuit's Settlement Conference Program, implemented in 1994, selects one in five eligible cases at random to participate in mediated settlement conferences.<sup>63</sup> Parties can also request settlement conferences. The Settlement Conference Program served notice for settlement conference pursuant to FRCP

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52. See Niemic, *supra* note 1, at 87.

53. See *id.* at 92.

54. See *id.* at 87.

55. See *id.* at 87.

56. Telephone interview with JoAnn Knapp, Administrative Manager of the Circuit Mediation Office, U.S. Court of Appeals for the Eleventh Circuit (May 11, 2001).

57. See *id.*

58. See Niemic, *supra* note 1, at 39.

59. See *id.* at 44.

60. Telephone interview with Patricia Connor, Clerk of the U.S. Court of Appeals for the Fourth Circuit (May 15, 2001).

61. See *id.*

62. See *id.*

63. See Niemic, *supra* note 1, at 58.

Rule 33 on parties to 850 eligible civil cases (counting consolidated appeals as a single case) during the docket years 1998 and 1999 combined. Eighteen of those cases were later dismissed on jurisdictional grounds. Of the 832 cases remaining, six percent were settled or withdrawn by the litigants before the initial Rule 33 conference took place, and forty-six percent were settled or withdrawn after conference proceedings commenced.<sup>64</sup>

Of particular interest is the fact that the Seventh Circuit also ran statistics for a group of cases not included in the settlement conference program. This appears to be the most recent statistical comparison of cases in mediation with cases not in mediation.<sup>65</sup> In a “control group” of 245 randomly selected cases from the cases not selected for settlement conferences, twenty-two percent were settled or voluntarily withdrawn by the parties. Thus, the settlement/withdrawal rate for cases in the conferenced group was more than double the settlement/withdrawal rate for cases not in the conferenced group. However, as Joel N. Shapiro, the Seventh Circuit’s Senior Conference Attorney, notes, the non-conferenced “control group” was not a truly random group, because it comprised cases that were left out of the group selected for conferencing after review.<sup>66</sup> In the words of Mr. Shapiro:

Bear in mind, though, that unlike the “control” group, cases noticed up for Rule 33 conferences from the 1998 and 1999 dockets were not selected entirely at random. To conserve resources, we did not schedule conferences in cases that appeared, from preliminary review, to be extremely unlikely to respond to mediation—for example, where the litigants seemed determined to have the Court of Appeals decide an issue of policy or statutory construction.<sup>67</sup>

Accordingly, the comparison of the settlement/withdrawal rates for the conferenced cases with the non-conferenced case “control group” is not a true random sample comparison. The results of the comparison, however, bolster the argument that a well-run mediation

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64. Telephone interview with Joel N. Shapiro, Esq., Senior Conference Attorney, U.S. Court of Appeals for the Seventh Circuit (May 17, 2001); Letter from Joel N. Shapiro, Esq., Senior Conference Attorney, U.S. Court of Appeals for the Seventh Circuit to Professor Gilbert Ginsburg (May 23, 2001) (on file with author) [hereinafter “Shapiro Letter”].

65. The Federal Judicial Center study of the Sixth Circuit’s Pre-Argument Conference Program was completed more than twelve years earlier and Federal Judicial Center studies of the Second Circuit Program were performed many years prior.

66. See Shapiro Letter, *supra* note 64.

67. See *id.*

program will increase the number of settled cases and save judges and their staffs considerable time.

#### K. *Third Circuit*

The Third Circuit's Appellant Mediation Program began in May 1995.<sup>68</sup> The program is a separate unit of the court and directed by a program director that works in conjunction with the clerk of the court.<sup>69</sup> Senior judges of the Court of Appeals and the District Courts in the Third Circuit conduct about half of the mediations.<sup>70</sup> The programs director mediates the remaining cases. From its inception through December 2000, the Third Circuit program has reviewed 5009 cases for mediation, it has mediated 1,817 cases and settled 665 cases (or thirty-seven percent of the cases mediated).<sup>71</sup>

#### L. *Fifth Circuit*

The Fifth Circuit's Appellate Conference Program was first initiated in November 1996.<sup>72</sup> The conference program is a separate unit of the court<sup>73</sup> and directed by an appellate conference attorney.<sup>74</sup> Approximately ten percent of all Fifth Circuit cases are accepted into the conference program. The appellate conference attorney mediates all cases.<sup>75</sup> In 1999, the Fifth Circuit accepted 406 cases into the Conference Program<sup>76</sup>—forty-one percent were settled,<sup>77</sup> forty-nine percent were decided by a judge, and five percent remained open.<sup>78</sup>

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68. See Niemic, *supra* note 1, at 3.

69. See *id.* at 32.

70. See *id.*

71. Telephone interview with Joseph Torregrossa, Esq., Director, Appellant Mediation Program, U.S. Court of Appeals for the Third Circuit (May 15, 2001). Mr. Torregrossa noted that these statistics only include cases actually mediated and only include settlements actually achieved in the mediation process. *Id.* They do not include settlements which occurred before the actual mediation process or settlements or other non-judicial resolutions which occurred after the conclusion of the mediation process. *Id.*

72. See Niemic, *supra* note 1, at 46.

73. See *id.* at 51.

74. See *id.* at 46.

75. See *id.*

76. Telephone interview with Joseph L. S. St. Amant, Esq., Appellate Conference Attorney, Court of Appeals for the Fifth Circuit (May 11, 2001); Letter from Joseph L.S. St. Amant Esq., Appellate Conference Attorney, Court of Appeals for the Fifth Circuit to Joel Davis (May 30, 2001) (on file with author).

77. Partial settlements are not included in this figure.

78. See *id.* An "open" case is one in which the Fifth Circuit Conference Attorneys were still "actively working" on them as of May 28, 2001. 1999 is the latest year for which the data is substantially complete. *Id.*

### III. MEDIATION PROGRAMS IN OTHER CIRCUITS WORK

I have had favorable professional experiences using the mediation programs in other Circuits. A few years ago, I received an adverse decision from the Federal District Court of Connecticut in a case seeking recovery from a surety of contributions to a pension plan. The contractor was required to make contributions, under the Davis-Bacon and Davis-Bacon Related Acts, but was financially unable to do so. The district court denied relief because the statute of limitations under the Miller Act has expired.<sup>79</sup> I appealed the ruling to the Second Circuit Court of Appeals, where presumably it was referred to the Civil Appeal Management Plan.<sup>80</sup> An attorney in the Office of Staff Counsel for the Second Circuit convened a mandatory teleconference and, through his efforts, the surety company's counsel and I were able to reach settlement. It is unlikely that we would have reached a settlement in the absence of the Second Circuit's dispute resolution program. I have also seen the mediation program work in the Fourth Circuit. From my first-hand experience, circuit court mediation programs are a useful tool for settling cases.

### IV. THE FEDERAL CIRCUIT'S CONSIDERATION OF A MEDIATION PROGRAM

In the past, the Federal Circuit has considered establishing a mediation program. Since Fiscal Year 1992, the Federal Circuit has continuously included a request for funds for a two-person mediation office—one mediator and one secretary.<sup>81</sup> Congress has appropriated the requested funds for the mediation office and personnel. However, the Court was not given sufficient funds for each judge to have three law clerks and establish the mediation program. Because the Federal Circuit's caseload comprises patent cases, which tend to have a high level of complexity, the Federal Circuit Court judges believe that they each need three law clerks.<sup>82</sup> Consequently, the Federal Circuit reprogrammed the funds appropriated for the mediation program and used the funds to help insure that there would be three law clerks for each judge.<sup>83</sup> This pattern of

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79. *United States of America ex rel. Valley View Enter., Inc. Ret. Plan & Trust v. Valley View Enter., Inc.*, No. 396CV01825 (D. Conn. Mar. 31, 1998).

80. *See* Niemic, *supra* note 1.

81. Telephone interview with Judge Paul R. Michel, Judge, Federal Circuit Court of Appeals (May 23, 2001).

82. Most of the other Circuit's judges have at least three law clerks and many have four law clerks. *See id.*

83. *See id.*

reprogramming funds has continued for nine years.<sup>84</sup> However, the budgetary situation has improved to the point that the Federal Circuit can now afford to establish a mediation program and provide three law clerks for each judge.<sup>85</sup> The Circuit should now “revisit” establishing a mediation program, particularly in light of the success of the mediation programs existing in all of the other Circuits.

The Federal Circuit held a two-day retreat in May 2001. Part of the program at the retreat was a panel discussion on mediation programs. The panel, led by Judge Michel of the Federal Circuit,<sup>86</sup> was comprised of two Justice Department lawyers, one private practitioner, and mediators from three of the Circuits.<sup>87</sup> The inclusion of the panel on the program, particularly bringing Circuit mediators from various parts of the country to participate, is an indication that the Federal Circuit is seriously considering adopting a mediation program.

#### CONCLUSION

The statistical data indicates that a significant percentage of cases that enter a Circuit Court of Appeals mediation program are settled. While some of the cases likely would have settled anyway, the percentages of settlement at the appellate level is quite a bit higher than would be expected in the absence of a mediation program. Uniformly, the senior program officials we spoke with at the various Circuits expressed confidence that the mediation programs made a significant difference in the settlement of cases. Their conclusion is supported by the Federal Judiciary Center’s study of the Sixth Circuit program concluding that the program eliminated the need for 1.06 judges and their staffs.<sup>88</sup>

Several of the heads of Circuit mediation programs informed me they could not understand why the Federal Circuit did not have a mediation program. As explained above, there is a valid reason why the Federal Circuit has not had a mediation program until now. However, now that the funding shortfall has been alleviated, the Federal Circuit can have both three law clerks for each judge and a mediation program, which is long overdue. As of this writing, shortly

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84. *See id.*

85. *See id.*

86. Telephone interview with Judge Michel, May 23, 2001.

87. Mediators from the Eighth Circuit and D.C. Circuit were present at the panel discussion. A third mediator, from the Second Circuit, was ill and unable to attend; his views were presented on the panel by Judge Michel.

88. *See supra* note 18.

after the Federal Circuit included the mediation panel discussion at its May 2001 retreat, we believe the Federal Circuit judges are now considering the implementation of a mediation program. We look forward to their decision, which hopefully will be to join the rest of the Courts of Appeals, all of which have mediation programs.