



The Journal of Appellate Practice and Process

Volume 4 | Issue 1

Article 8

2002

Appellate Mediation in New Mexico: An Evaluation

Roger A. Hanson

Richard Becker

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the Courts Commons, and the Dispute Resolution and Arbitration Commons

Recommended Citation

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

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol4/iss1/8>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

APPELLATE MEDIATION IN NEW MEXICO: AN EVALUATION

Roger A. Hanson* and Richard Becker**

I. INTRODUCTION

This article reports on the recently completed independent evaluation of the New Mexico Court of Appeals' mediation program. The Court began a mandatory mediation program in September 1998. A previous article in *The Journal of Appellate Practice and Process* explained in detail how and why the program was designed and generally commented on the program's progress.¹

Overall, the Court has been pleased with the number and percentage of cases that have been resolved and the feedback received from the bar. After two years, however, the Court determined it would be helpful to have an analysis conducted by an independent, outside expert. It believed an objective report would enhance the Court's ability to communicate effectively about the program with judges, the bar, the legislature, and the public. The New Mexico Administrative Office of the Courts sought an assessment of the program and secured a grant from the State Justice Institute to hire an independent evaluator. This article is based in large part on a report developed under that grant.²

*Judicial consultant, Ph.D., University of Minnesota, 1973.

**Appellate Mediator, New Mexico Court of Appeals, J.D., University of Southern California Law Center, 1974.

1. Richard Becker, *Mediation in the New Mexico Court of Appeals*, 1 J. App. Prac. & Process 367 (1999).

2. Roger A. Hanson, *Alternative Dispute Resolution* (available at <<http://www.factory7.com/~rah>> (accessed Feb. 17, 2002; copy on file with *The Journal of Appellate Practice and Process*)).

Improved ways of resolving disputes in the nation's state appellate courts have been perennial topics of conversation among judges, court staff, attorneys, alternative resolution experts, and scholars for the past twenty years. Are there faster, cheaper, and fairer ways to resolve a case than by a court decision based on a review of fully written briefs, oral argument, and a signed, written opinion? One of the leading alternatives is the use of mediation to encourage opposing attorneys and their respective clients to negotiate a voluntary settlement, followed by an agreed-upon dismissal of a case. Descriptions and evaluations of attempts to apply mediation are available in law reviews, journals, and other sources.³

The basic premise of these various applications is that early intervention (i.e. prior to briefing) in the form of a settlement conference will stimulate communication among the attorneys and clients that would otherwise not occur. A mediator's presence will enable negotiations to begin and remain focused. Consequently, the participants will be better able to reach agreement on all or most of the unresolved issues.⁴

Previous research has documented that this premise, to a great extent, is valid. Efforts to bring attorneys and the parties together do prompt communication. Mediators are viewed as effective facilitators, and the rate of settlement has indeed increased with the introduction of mediation, at least in some courts. Interestingly, however, one study found that when there is communication and informal negotiation among a control group of attorneys *without* a settlement conference, the rate of

3. See e.g. Student Author, Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 Minn. L. Rev. 1221 (1979) [hereinafter *The Minnesota Prehearing Conference*]; The Honorable James F. Couch, Jr., *The New Maryland Appellate Pre-Argument Conference*, 14 Md. B.J. 7 (April 1981); Joseph R. Weisburger, *Appellate Caseload: Meeting the Challenge in Rhode Island*, 16 U. Mich. J.L. Reform 527 (1983); John H. Martin, *Eighth Circuit Court of Appeals Pre-Argument Conference Program*, 69 Judicature 312 (1986); Robert W. Rack, Jr., *Pre-Argument Conferences in the Sixth Circuit Court of Appeals*, 15 U. Toledo L. Rev. 921 (1984); David C. Steelman & Jerry Goldman, *Preargument Settlement Conferences in State Appellate Courts*, 10 St. Ct. J. 4 (Fall 1986); Roger A. Hanson, *An Assessment of Florida's Fourth District Court of Appeal's Settlement Conference Program*, 18 Fl. St. U.L. Rev. 177 (1990); *Appellate ADR: D.C. Circuit Experimenting with Mandatory Mediation in 100 Lawsuits*, 6 Alternatives to the High Cost of Litigation 35 (1988).

4. See e.g. Jerry Goldman, *Ineffective Justice: Evaluating the Preappeal Conference* (Sage Pub., Inc. 1980).

settlement is the same as it is in an experimental group *with* a settlement conference.⁵

What remains to be determined is the element of early intervention. Is negotiation possible, probable, or frequent if and only if mediation is introduced early in the appellate process, say fifteen to thirty days or fewer after the filing of a notice of appeal? Must mediation be the first intervention by a court? The premises suggest that the answers to these questions are affirmative, because at the appellate level the room for fruitful negotiation is assumed to exist, if at all, only early in the appellate process.

Mediation is considered much more possible at the trial level. Once a case has been appealed, the opportunity for mediation is constrained because appellate attorneys and their clients have developed entrenched positions. More importantly, the adversaries shore up their positions, especially after the basic costs of appellate litigation (i.e., brief writing) have been borne. Hence, settlement efforts in virtually all appellate courts are introduced shortly after the initial step of case filing in accordance with the untested assumption that bargaining prospects dwindle as the appellate process is extended.⁶

The New Mexico Court of Appeals provides an opportunity to scrutinize the assumption that the possibility of settlement through mediation at the appellate level is short lived. The introduction of mediation in this Court occurs primarily after cases have been handled but unresolved through a summary procedure aimed at resolving more routine cases. If cases deemed appropriate for resolution under modified procedures are ultimately not amenable to summary treatment, then the prospect of mediation arises.

Most cases are eligible for mediation. Exceptions include appeals involving a pro se party; a driver's license revocation; applications for stays; a petition for extraordinary relief; an incarcerated criminal defendant; or the state's mental health and

5. *Id.*

6. One of the exceptions to the introduction of mediation prior to briefing was the initial phase of a settlement program in the California State Court of Appeal, Fourth District, Division Two. From 1991 to 1997, mediation was targeted at fully briefed appeals. Not until 1997 did the program shift its emphasis to the settlement of cases before briefing, which is its current focus.

children's codes. In the summer of 2000, the program began experimenting with pro se cases, on a strictly voluntary basis.⁷

The New Mexico setting is one that traditionally is believed to provide very few targets of opportunity for mediation. New Mexico's cases for mediation seemingly are not amenable to negotiation (cases not resolved on the summary calendar) or are inappropriate because of issue complexity or difficulty (cases immediately placed on the regular calendar).

The objective of the grant-funded evaluation was three-fold: (1) to see if the untested assumption concerning early intervention is essential to successful mediation; (2) to evaluate the consequences of mediation in New Mexico on settlement rates, to gauge the reactions of attorneys to this method of dispute resolution, and to consider possible time and cost savings attributable to mediation; and (3) to consider the implications the New Mexico experience has for other courts.

II. COURT CONTEXT AND BRAND OF MEDIATION

The New Mexico Court of Appeals is a single, ten-judge, state intermediate appellate court with statewide jurisdiction over civil and criminal cases. The Court hears arguments primarily in Albuquerque and Santa Fe, the state capital, but occasionally sits in Carlsbad, Las Cruces, Las Vegas, and Roswell. The overwhelming majority of the Court's jurisdiction is mandatory, with approximately 1000 cases filed annually. Civil appeals, including administrative agency cases, are approximately 500 in number, with about 450 criminal appeals, and fifty discretionary petitions (interlocutory appeals).⁸

Each judge is assigned one law clerk to assist primarily in opinion preparation. Law clerks generally are recent law school graduates and frequently hold their positions for one to three years. A pool of fifteen lawyers works for the Court as a whole. These central staff attorneys work on cases placed on the

7. As of this writing, mediation conferences had been held in only four pro se cases, and no settlements were achieved.

8. *Examining the Work of the State Courts, 1998: A National Perspective from the Court Statistics Project* (Brian J. Ostrom & Neal B. Kauder eds., Natl. Ctr. for St. Cts. 1999).

summary calendar as well as on fully briefed cases on the regular calendar.

After a notice of appeal (or petition for review) is filed, the trial counsel also must file a substantial docketing statement that summarizes the facts, issues on appeal, a list of pertinent authorities, and references and citations to prior and related appeals. Once the record of trial court documents is received, a central staff attorney makes a recommendation to a judge in charge of the case calendars on whether the case should be handled as a summary matter or placed on the regular (or general) calendar.

If the judge agrees that the case should be handled as a summary matter, a notice is sent to the parties proposing a preliminary, summary decision with legal citations to support this action.⁹ Parties can then respond and raise errors of facts or law in the case. Another proposed disposition may be issued, or the calendaring judge may believe that the case is ready for disposition. In the latter instance, two additional judges are assigned to the appeal. They may agree with the single judge in charge of the summary calendar, and issue a summary opinion, or they may move the case to the regular calendar. They might move a case because the case is too complex, a transcript is required (summary proceedings do not provide for the filing of a transcript), or the disposition may require support by other than New Mexico authorities. Cases initially not recommended for or not resolved on the summary track are placed on the regular calendar for fully written briefs, possible oral argument, and a written decision.

The summary calendar started in 1975 with an initial focus on criminal cases. By 1987 virtually all cases were potentially eligible. Court records indicate that approximately sixty percent of the Court's cases had been resolved on the summary calendar from 1990 to date. The impetus for mediation was a purposive and deliberative decision to increase both court efficiency and

9. The purpose of the summary calendar is to resolve more routine cases efficiently and to allow judges to spend more time on the complex cases. New Mexico's summary calendar is one of the ways first-level appellate courts have modified the traditional appellate process of a complete transcript, fully written briefs, arguments, and a signed, written opinion. For an evaluation of its effects, see Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 *Judicature* 86 (1991).

quality in the form of less time and cost to the attorneys and litigants. Appellate settlement conference programs historically have been characterized as one of the few ways that a court can cope with an increasing caseload by reducing the number of cases that it has to decide on the merits. However, the idea of mediation came to the New Mexico Court when the then chief judge attended a national meeting at which an appellate mediation program in Florida was highlighted. After extensive examination of mediation programs extant in the field, the Court settled on a particular structure and process. The New Mexico program represents a proactive policy of self-improvement. (Necessity is not always the mother of innovation.)

Mediation in New Mexico began on September 1, 1998, and continues to operate with the resources of a single mediator and a part-time administrative assistant. The mediator, one of this paper's authors,¹⁰ is an attorney trained in modern mediation methods and hired by the Court, although he previously was one of the Court's central staff attorneys. The overwhelming numbers of cases subject to possible mediation are those that have failed to reach a summary disposition after being placed on the Court's summary calendar. Most of the other potential cases are those that have been screened for the regular calendar. The mediator examines both sets of these cases and issues notices to attorneys in virtually all cases eligible for mediation, informing them that their case has been referred to mediation. Mediation is mandatory unless the attorneys successfully persuade the mediator that their case is not appropriate for mediation.

Mediation conferences are generally held before briefing commences. Most of the conferences are conducted by telephone, although the mediator regularly conducts in-person conferences in Santa Fe, where his office is located, and in Albuquerque. From the program's start in September 1998, until June 30, 2000, approximately 300 cases had been screened for mediation.¹¹

10. *See supra* n. **.

11. A copy of the notice to attorneys informing them that their cases have been referred to mediation is found in Appendix A, *infra*.

III. THE EVALUATION

The evaluation was organized to answer four basic kinds of questions commonly asked of appellate settlement conference programs:

- What are the consequences of mediation on the resolution of appeals? Has it produced negotiated agreements precluding the need for a judicial decision?
- How do attorneys view the mediation program? Are they receptive to it, and do they have favorable opinions about their experiences?
- Are there time and cost savings to the court? Are there savings to litigants?
- How does the use of mediation fit into the Court's overall delivery of services?

The remainder of this article addresses these questions and suggests what the policy implications of the program's consequences are for the Court and for the rest of the appellate-court community.

A. Consequences of Mediation on Settlement

One of the obviously key questions concerning the consequences of mediation is the settlement rate after the introduction of mediation. The striking result of mediation in New Mexico is that, of the first 308 cases scheduled for a mediation session, eighty-eight were settled. That is a twenty-nine percent settlement rate.

There is no available industry standard against which to assess this figure. The California State Court of Appeals, Fourth District, Division Two in Riverside California, had a program that, in its first few years, involved intervention at a point in the appellate process parallel to New Mexico's. When the California program began in 1991, mediation was tried only in fully briefed appeals. Interestingly, the settlement rate ranged between twenty-five and twenty-eight percent in the program's initial stages, although the California program had the benefit of voluntary participation by the attorneys. The California Court deemed this initiative a success and maintained its post-briefing form until 1997, when the Court refocused mediation to occur

before briefing. Hence, New Mexico's effort compares favorably with a similarly situated program.

A more general observation concerning New Mexico's settlement rate is that it achieves a substantial number of negotiated agreements under conditions not assumed to be amenable to such an initiative. Mediation occurs after a form of summary disposition has failed or has been deemed to be unsuitable. Early court intervention into primarily routine cases is assumed to be essential for reaching negotiated agreements. New Mexico's program should be expected to produce few, if any, settlements. Hence, the figure of twenty-nine percent is substantial, although its full significance is discussed later in the section on time and cost savings.

A statistical analysis was conducted to determine what case characteristics or aspects of mediation are closely related to the likelihood of mediation.¹² A single factor emerged as influential in producing settlements: The likelihood of settlement increases the longer the elapsed time from the date of the initial mediation conference until a resolution or impasse. In other words, the more time a case remains under negotiation, the greater the chances of settlement. This finding means that when the mediator discerns the probability of settlement and gives the attorneys enough time to tackle outstanding issues, settlements are more likely achieved. Patience has its own reward.

The results do not mean that the mediator is gaining settlements simply by letting negotiation drag on endlessly. Negotiation without end in all cases would not produce results similar to those observed. That strategy would fail because the mediator would not be following up on the most promising candidates for settlement. The twenty-nine percent settlement rate is achieved because of the mediator's discernment and willingness to extend the negotiation beyond the boundaries of an initial session. Extending the time frame beyond an initial session is a reflection of the mediator's emphasis and focus on settlement, rather than on time. For example, a mediator may ask, "Can you try to respond to a particular outstanding issue in such-and-such a way?" or "If you are agreeable, can you make

12. The statistical analysis is described in Appendix B, *infra*.

an effort by such-and-such a date?" rather than "Time's up. Sorry you folks couldn't agree on this particular issue."

The style of mediation in New Mexico is a combination of what experts have called two opposing polarities of "bargaining" and "therapy."¹³ On the one hand, the mediation sessions are organized to achieve settlements. The parties and their attorneys clearly are encouraged to reconcile their differences. A focus on settlement is part of the bargaining style of mediation.

On the other hand, the New Mexico program mediator yields the floor to the respective sides and makes almost no attempt to steer the discussion in a particular substantive manner. A session might last a few hours because the mediator sometimes holds separate or ex parte discussions with each side (pending mutual agreement) and allows parties to vent their feelings as well as give their respective arguments. What might be a relatively unique or special aspect of New Mexico's style is the mediator's way of drawing the parties out and encouraging negotiation.

The mediator opens the initial session, and continues throughout the session to ask each side questions in a Socratic style. The questions start with "What's this dispute all about?" proceeding to "What are the ends you wish to achieve (and to avoid)?" to "Do you have a settlement offer?"

The mediator has considerable information on the case prior to an initial session. Docketing statements, trial court pleadings, internal court memoranda prepared by central staff attorneys, and pre-mediation conference telephone conversations with the attorneys all help to provide a picture of the parties' positions and interests and a case's posture. However, the mediator does not necessarily draw on documents and produce synthesizing statements such as "We are here to discuss the issue of such-and-such" or "The matter before us concerns x, y, and z." Rather, the mediator artfully tries to get each party to crystallize its own views, to articulate what it is seeking, to recognize the risks involved in achieving these ends, and to see

13. Susan S. Sibley & Sally E. Merry, *Mediation Settlement Strategies*, 8 L. & Policy 7 (1986).

the other side's perspectives. One might call this style of mediation "coaching."

Yet, despite the perhaps special nature of New Mexico's style, there is a common aspect of appellate litigation that underlies and enables the New Mexico program to achieve settlements. That aspect is the general lack of informal communication and negotiation between the sides. Based on an observation of mediation sessions, it is apparent that the introduction of mediation into the appellate process has spurred communication that otherwise would not have occurred. The basic condition plus a "coaching" rather than a mere "facilitating" role by the New Mexico mediator channels the discussion toward settlement.

Interestingly, the likelihood of settlement is not related to other possible explanatory variables. The area of law (e.g., tort versus contract versus domestic relations versus agency proceedings), the particular county where the case had been tried, and the number of contacts made by the mediator with the attorneys after the initial session are not related to achieving settlements. Instead, the mediator's judicious structuring of a time frame that enables the attorneys to resolve outstanding issues increases the chances of settlement.

B. Attorneys' Views

One way to gauge the attorneys' receptivity of mediation is to ask those who have participated in mediation sessions to react to their experiences. Did the mediator do his job? What were the advantages and disadvantages of mediation? Was the experience worthwhile?

Data from written questionnaires completed by attorneys after mediation was tried in their cases are available to address these sorts of queries. Some questions are common to both attorneys whose cases settled and those attorneys whose cases did not settle. Other questions are aimed at only attorneys whose cases settled, with a parallel, but different, set of questions aimed at only attorneys whose cases did not settle. For this research, questionnaires completed and returned to the mediator program office between September 15, 1998 and September 30, 2000 are examined.

A basic expectation is that for mediation to be judged successful, at least fifty percent of the attorneys need to register favorable responses toward the new procedure. The higher the percentage, the more positive is mediation's performance.¹⁴

Fifteen questions formed the basic questionnaire. These questions range from issues concerning the comprehensibility of mediation to the mediator's role to the mediation agreement, in cases where it was reached. All questions asked the respondents to indicate their approval to a particular proposition about mediation on a scale from one to five, where one indicates strongly agree and five indicates strongly disagree.¹⁵

The results indicate very positive performance. They are as follows:

- Ninety-seven percent (393/407) of the attorneys agree that mediation program's goals and requirements are understandable.
- Ninety-four percent (384/408) of the attorneys agree that the mediation is held at a convenient time.
- Ninety-four percent (384/408) of the attorneys agree that the mediator is a neutral third party.
- Sixty-one percent (247/406) of the attorneys agree that the mediator improves communication with the opposing side.
- Eighty-four percent (340/405) of the attorneys agree that the mediator keeps the session on focus.
- Sixty-seven percent (273/407) of the attorneys agree that the mediator helps identify options.

Based on the responses of all attorneys to a common set of questions, mediation appears to have been conducive to an orderly and helpful dialogue. Given the busy schedules of attorneys, the high level of agreement that the session was convenient is remarkable. Similarly, an overwhelming majority of attorneys believe that the mediator contributes context conducive to negotiation. The lowest positive score given to the mediator occurred in the area of communication. Yet, sixty-one percent reported favorable judgments on that topic.

Concerning the views of attorneys whose cases did not settle, they remain positive in the main. They are as follows:

14. A similar approach and similar criteria of performance measurement are found in *Trial Court Performance Standards: "Testing the Measures"* (Natl. Ctr. for St. Cts. 1995).

15. Copies of the questionnaires are found in Appendix C, *infra*.

- Sixty percent (189/313) of the attorneys whose cases did not settle agree that the mediator points out the risk of continued litigation.
- Forty-two (126/311) percent agree that the mediator helps resolve procedural issues.
- Fifty-five (168/308) percent of the attorneys agree that the mediator helps clarify issues.

As expected, these reactions, while positive, are not as enthusiastic as the views of attorneys whose cases settled.

Attorneys whose cases settle propound overwhelming positive views on the agreements that they have reached. They are as follows:

- Ninety-one (87/96) percent of the attorneys agree that mediation agreements are clear.
- Eighty-six (74/86) percent of the attorneys agree that mediation agreements are fair to them.
- Eighty-six (79/86) percent of the attorneys agree that mediation agreements are workable.
- Ninety-one (86/95) percent of the attorneys agree that the mediations are fair to the other side.
- Eighty-seven (79/91) percent of the attorneys agree that mediation agreements will last.

Finally, an acid test of whether attorneys regard mediation as an appreciable improvement and worthy of continuation is whether they would commend the procedure to others. The evidence is that all attorneys, whether their cases settled or not, see value in mediation, as shown in the following table.

PERCENTAGE OF ATTORNEYS AGREEING OR DISAGREEING TO
RECOMMEND MEDIATION TO OTHERS

	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree
All attorneys (n=376)	44%	29%	15%	8%	4%
Attorneys whose cases settled (n=81)	72%	22%	6%	0%	0%
Attorneys whose cases did not settle (n=295)	37%	30%	17%	10%	6%

Of special interest is the small number (four percent) of rejections: those attorneys who, after their unsuccessful experience with mediation, object to mediation in principle. This small percentage is no greater than the number of attorneys who have wanted mediation abandoned in other courts that have been evaluated as overall successful uses of mediation at the appellate level.¹⁶ Hence, it seems fair and valid to infer that New Mexico's program is performing relatively positively.

C. Time and Cost Consequences

The mediation of civil appeals in the New Mexico Court of Appeals contributes to both time and cost savings, although resources are required to support the mediator and his assistant. In the past year, the total expense for the mediation program was approximately \$97,000, including salaries, fringe benefits, and long distance telephone charges. A precise possible cost savings figure is very difficult to estimate, but a general sense of the program's net value can be gauged in an approximate manner.

The settlement rate of twenty-nine percent under mediation translates to eighty-eight cases over two years, forty-four cases annually, and between three and four cases per month. These cases would probably otherwise have been on the regular calendar with full written briefs, possible oral argument, and a written court opinion. To measure the financial benefit to the court of these settlements, the study analyzed the workload required to handle fully briefed cases and how it is distributed.

Generally, each judge on the Court receives three assignments per month to author opinions in fully briefed cases. The work required to prepare opinions in these cases is a combined effort of a judge and a law clerk. Sometimes a judge might request that a central staff attorney be assigned to tackle a fully briefed case, which the Court calls a "project matter." In instances of project matters, a central staff attorney might provide either a complete work up on a case (i.e., a

16. Roger A. Hanson, *The Use of Mediation to Resolve Workers' Compensation Cases: A Report to the Tenth Appellate District of the Court of Appeals of Ohio* (Natl. Ctr. for St. Cts. 1997) [hereinafter Hanson, *Tenth Appellate District Report*]; Roger A. Hanson, *Report on Workers' Compensation Mediation Program of the Supreme Court of Appeals of West Virginia* (Natl. Ctr. for St. Cts. 1999).

recommendation and a proposed opinion) or an analysis of a specific issue. The bottom line is that the estimated numbers of cases settled annually (forty-four) through mediation exceed the annual number of regular calendar cases assigned to a judge and his or her court staff members.¹⁷

Hence, the mediation program consisting of one mediator, who also manages the program, and a part-time assistant requires fewer resources than are required to produce an annual assignment of written opinions in regular calendar cases. Judges and their staffs have other work to do, such as handling motions, reviewing discretionary cases, and conducting public education and outreach programs. Nevertheless, mediation constitutes a cost-effective way of using limited court resources.

The savings in time is, perhaps, even more striking. Based on information for 1997, cases on the summary calendar took approximately 150 days, on average, to be resolved, and cases on the regular calendar took 450 days. In contrast, the elapsed time from when a case is referred to mediation until it either settles or remains unsettled is sixty-eight or eighty-two days, respectively. Assuming that every settled case had spent 150 days on the summary calendar and sixty-eight days in mediation, the total amount from the date of the notice of appeal to voluntary dismissal is 266 days, on average, which is considerably shorter than 450 days.

For cases that do not settle in mediation, it is not possible to conclude whether mediation adds or saves time. Is mediation an extra step that increases the time to resolution or does it reduce time because at least some of the initially outstanding issues are resolved? Data are not available from program records to estimate the overall resolution time for the notices of appeal to resolution for unsettled appeals. Nevertheless, for cases that settle, the litigants experience definite timesaving because of mediation, and possibly a cost savings from reduced litigation (i.e., a reduced need to prepare briefs, motions, oral arguments, to consult with clients, and to travel to and from the courthouse). Thus, the use of mediation in New Mexico is an efficient use of public resources.

17. Three calendar cases per month times twelve months times one judge equals thirty-six cases.

D. Summary

The mediation program established by the New Mexico Court of Appeals provides the taxpayers of the State with value for their dollars. More cases are resolved, and resolved faster, than would be without the intervention of a mediator.

A major, if not the principal, lesson to be learned from the New Mexico experience is that there is always room for effective negotiation. Even though the mediator initiates contact with the attorneys and the parties at a later stage in the legal process than is normally the case with appellate mediation programs, a lot of cases ultimately settle. Impressively, more cases are settled annually than are resolved on the regular calendar by a single judge and accompanying court staff members.

Looking to the future, state appellate courts that have not tried mediation might reconsider the reasons for their inaction. The experience of the New Mexico program, as assessed by an independent evaluator, belies arguments asserting that mediation will not work on appeal, that there are not enough cases to warrant its introduction, or that there is no backlog.

APPENDIX A: MEDIATION REFERRAL NOTICE

June 11, 2001

Ms. Joan Smith
123 Main Street
Albuquerque, NM 87110

Re: *Rivera v. Jones*, Ct. App. No. 20,000

MEDIATION CONFERENCE NOTICE

Dear Ms. Smith:

Pursuant to Rule 12-313 NMRA 2001 and Ct. App. Order No. 1-24, In the Matter of the Court of Appeals Settlement Conference Procedures, a mediation conference has been scheduled in this case. This office will initiate a **TELEPHONE CONFERENCE CALL** on July 9, 2001, at 1:30 p.m. Our records show that your telephone number is 888-1000. Please allow at least two hours for the conference.

Enclosed please find information relating to the Appellate Mediation Program. The mediation conference will be an informal meeting in which we will discuss the strengths and weaknesses of the parties' arguments, assess the risks of proceeding with the appeal, explore options for settling the case, and address case management matters. Counsel are expected to have consulted with their clients prior to the conference and to have as much authority as feasible regarding settlement and case management matters. The record proper will not be available during the week prior to the conference.

Mr. Gomez has also been notified of this conference. Please contact this office **BY TELEPHONE IMMEDIATELY** if we need to notify different or additional lawyers, if you need to have the conference rescheduled because of an unavoidable conflict, or if you would prefer to have the conference held in person.

Sincerely,

Richard Becker

APPENDIX B: DATA MINING

A statistical technique is used to help discern what possible aspects of civil appeals and the mediation process influence settlement. Are there particular case characteristics of appeals that settle? Is some element of the mediation process particularly effective in promoting settlement?

Data are available from mediation program records on five potential sources of settlement success. They include (1) a case's area of civil law; (2) the location where a case arose; (3) the elapsed time from the date when a case is sent a notice of mediation referral to an initial mediation session; (4) the elapsed time from the date an initial mediation session is scheduled to final resolution; and (5) the number of contacts, including telephone conversations, between the mediator and the attorneys.

There are three basic propositions that can be examined with this information. First, appeals in different areas of law might have different probabilities of settling.¹⁸ Second, the location of the trial court where the appeal arose allows verifying the conventional notion that cases are different from one geographic area to another. Comparing cases from Bernalillo County, the State's population center, to cases from other counties captures some feature of an urban versus non-urban dimension that possibly shapes the nature of litigation. The third proposition to be tested is the working hypothesis arising from previous research that mediators gain more settlements when they extend negotiation beyond the initial session and make post session contacts.¹⁹

The key result is that the elapsed time from the initial mediation session to when the case either settled or was dropped from further mediation handling because of an impasse is the only statistically significant variable associated with settlement. The more time that the case remains actively under the mediator's monitoring, the greater the chances of settlement. Statistical results based on the application of a statistical

18. See *The Minnesota Prehearing Conference*, *supra* n. 3, at 1221.

19. See Hanson, *Tenth Appellate District Report*, *supra* n. 16.

technique called logistic regression are shown in the following table.

WHAT VARIABLES INFLUENCE THE LIKELIHOOD OF SETTLEMENT?

	Coefficients	Wald Statistic	Significance Level
The length of elapsed time from the date of an initial mediation conference to settlement or impasse	.016	26.081	.001
The length of elapsed time from the date of referral to mediation to settlement to an initial mediation session	-.017	.401	.527
Number of contacts between mediator and the attorney	-.042	.903	.342
Location of the Lower Tribunal			
Bernalillo v. administrative agencies	1.165	4.339	.037
Bernalillo v. all other counties	.481	1.702	.192
Area of Civil Law in the Appeal			
General litigation and domestic relations v. administrative agency and cases involving state or local government as a party*	.295	.741	.389
Statistical constant	-1.984	11.630	.001

Only the variable measuring the time from an initial mediation to a case's settlement or impasse has a statistically significant effect on the probability of settlement. The value of the coefficient, .016, associated with this variable is positive, which indicates the longer the elapsed time, the greater the chances of settlement. Moreover, the significance level of .001 between the elapsed time and the likelihood of settlement

* This categorization of cases proved to be strongest statistically and was used, therefore, instead of other classification schemes, like general civil litigation v. domestic relations v. agency cases.

suggests their observed connection is not a random association. If the significance level is .01 or smaller, then there is only one chance in a hundred that the variables are actually unrelated. None of the other variables have significance values of .01 or smaller, which is a common criterion of whether a variable has a statistically significant connection to another variable. However, if a less stringent test is used, and the significance level used is relaxed to .05, then it is also true that cases arising from administrative agencies are significantly more likely to settle than those from Bernalillo County.

As indicated in the text of the report, these statistical results are interpreted to mean that the New Mexico mediator discerns which cases are amenable to settlement and extends the negotiation period to permit the parties and their attorneys to resolve outstanding issues. Moreover, this process swamps the efforts of possible contending explanations of why some cases settle and others do not settle.

APPENDIX C: ATTORNEY QUESTIONNAIRES

MEDIATION PROGRAM QUESTIONNAIRE [N]

Please rate the effectiveness of the Appellate Mediation Program in the following areas:						
	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	n/a
You understood the requirements and goals of this program	5	4	3	2	1	
The timing of the mediation session(s) was convenient for you	5	4	3	2	1	
The mediator was neutral	5	4	3	2	1	
The mediator helped improve communication between the parties	5	4	3	2	1	
The mediator kept the discussion on focus	5	4	3	2	1	

The mediator helped identify options and alternatives	5	4	3	2	1
The mediator helped evaluate the risk of continued litigation	5	4	3	2	1
The mediator helped resolve procedural issues	5	4	3	2	1
The mediator helped clarify issues	5	4	3	2	1
You would recommend this program to others	5	4	3	2	1

1. Prior to the conference, what did you think the chances were that this case would settle prior to a decision by the Court of Appeals?

_____ %

0=no chance at all of settlement

50=fifty-fifty chance of settlement

100=certainly would have settled

2. What, if anything, could the mediator have done to improve the chances of settlement of this case?

3. What aspect of this program did you find **most** valuable or helpful?

4. What aspect of this program did you find **least** valuable or helpful?

6. Please tell us any comments you may have about your experience, including suggestions for the improvement of the Appellate Mediation Program.

Thank you for completing this questionnaire.

MEDIATION PROGRAM QUESTIONNAIRE [Y]

Please rate the effectiveness of the Appellate Mediation Program in the following areas:						
	Strongly Agree	Agree	Undecided	Disagree	Strongly Disagree	n/a
You understood the requirements and goals of this program	5	4	3	2	1	
The timing of the mediation session(s) was convenient for you	5	4	3	2	1	
The mediator was neutral	5	4	3	2	1	
The mediator helped improve communication between the parties	5	4	3	2	1	
The mediator kept the discussion on focus	5	4	3	2	1	
The mediator helped identify options and alternatives	5	4	3	2	1	

The agreement you reached is clear	5	4	3	2	1
The agreement you reached is fair to you	5	4	3	2	1
The agreement you reached is workable	5	4	3	2	1
The agreement you reached is fair to the other side(s)	5	4	3	2	1
The agreement will last	5	4	3	2	1
You would recommend this program to others	5	4	3	2	1

1. Prior to the conference, what did you think the chances were that this case would settle prior to a decision by the Court of Appeals?

_____%

0=no chance at all of settlement

50=fifty-fifty chance of settlement

100=certainly would have settled

2. What do you think would have happened if you did not participate in this program?

3. What aspect of this program did you find most valuable or helpful?

4. What aspect of this program did you find least valuable or helpful?

5. Specifically, how, if at all, did the mediator assist in the settlement of this case?

6. Please tell us any comments you may have about your experience, including suggestions for the improvement of the Appellate Mediation Program.

Thank you for completing this questionnaire.