

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

DEVELOPMENTS AND PRACTICE NOTES

MEDIATION IN THE NEW MEXICO COURT OF APPEALS

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In September 1998 the New Mexico Court of Appeals launched a pilot mediation program for a broad variety of civil appeals. The purpose of this article is to explain how our court developed its program, inform the reader about the mediation process in the appellate context, and suggest how practitioners can prepare for mediation and use it for their clients' benefit.

I have had the privilege of being the sole mediator for the program since its inception. The support and encouragement I have received and continue to receive from the national appellate mediation community have been both inspiring and valuable. My hope is that this summary of our experiences may be of assistance to judges, lawyers, and court administrators who are curious about the potential of appellate mediation in their own jurisdictions.¹

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1. For a survey of state alternative dispute resolution programs, see NANCY NEAL YEEND, STATE APPELLATE ADR: NATIONAL SURVEY AND ANALYSIS OF ITS USE WITH IMPLEMENTATION GUIDELINES (1999).

If this article generates more questions for the reader than answers, be encouraged. The issue of whether to mount an appellate mediation effort is a topic that cannot be considered apart from an individual court's own culture, and the design of a mediation program is far from a one-size-fits-all matter.

I. PROGRAM DEVELOPMENT

The court began its examination of appellate mediation after Chief Judge Harris L. Hartz attended a national chief judges conference in October 1997 and heard a presentation about a pilot mediation program that was underway in Florida's First District Court of Appeals. While I was delighted to be asked by the Chief Judge to report on what was happening in the field of appellate mediation, I sensed that a number of the other judges were dubious that such a program would have any value.

The skeptical comments I heard included statements such as: "If I were back in private practice, I would not recommend that my client participate in appellate mediation"; "A mandatory appellate mediation program erects a bureaucratic hurdle in the path of a party who has a constitutional right to have its appeal decided by the appellate courts"; and "Appellate mediation doesn't work because there is no incentive to settle." While I could have viewed these remarks as discouraging, I chose to appreciate them as signposts directing me to potential problems that would be better addressed sooner rather than later. Judges' concerns must be dealt with before any mediation program can be seriously considered.

My initial survey disclosed that all of the federal circuit courts and almost half of the states have an appellate mediation program in place.² Although there is a high degree of variation among the programs, there are attributes common to them all: Appellate mediation is only used in civil cases; some types of civil cases, e.g., prisoners' appeals and driver's license revocations, are not eligible for mediation; statements made by counsel and parties during mediation conferences are

2. See S. Gale Dick, *The Surprising Success of Appellate Mediation*, in 13 ALTERNATIVES TO THE HIGH COST OF LITIGATION 41, 43 (1995); Robert J. Niemic, *Mediation and Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers* (1997) <www.fjc.gov/ALTDISRES/mediconf/mediconf.html>.

confidential; mediation and litigation records are maintained separately; mediations are conducted in a combination of joint and private sessions; and courts provide mediation services at no additional charge to the litigants.

However, among programs I surveyed, there are more components of the programs that vary from court to court. For example, court-annexed mediation programs are administered either by judges or staff. Some courts screen cases in an effort to select appeals that are more likely to settle, while others assign cases on a random basis. Mediators can be active or retired judges, appellate practitioners, or staff. Non-judicial employees who mediate cases may be paid, or they may be volunteers. Training for mediators may or may not be provided. Conferences are conducted in person or by telephone. The requirement that counsel participate in mediation can be either voluntary or mandatory, as can be the need for the parties to attend the sessions. Parties may or may not be compelled to submit special documents for use by the mediator. Briefing may be suspended during the mediation process or not. The mediation approaches implemented by the courts range from directive and evaluative to interest-based and facilitative.³

Experience has shown that appellate mediation endeavors create a potential for several important benefits, including a reduced number of cases for the appellate court to decide, fewer remands and secondary appeals, the streamlining of appeals through partial resolution of issues, the satisfaction of parties' underlying needs and interests, and the reduction of the time a case spends on appeal. Mediation brings people together to discuss matters of common interest. It allows for negotiation and compromises, and parties are reminded that they have choices other than continued litigation and that, by acting cooperatively

3. At the evaluative end of this continuum are strategies and techniques intended to direct some or all of the outcomes of the mediation. At the facilitative end are behaviors that assist the parties' negotiation by allowing the parties to communicate with and understand one another. An appellate mediator who evaluates acts on the belief that the participants want and need some guidance as to the appropriate legal grounds for settlement and that the mediator is qualified to provide assistance as a result of training, experience, and objectivity. An appellate mediator who facilitates believes that the participants are thoughtful, able to collaborate with their adversaries, capable of understanding the complexities of their situations, and qualified to decide what to do. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 23-24 (1996).

with their adversaries, they may be able to tailor a solution that a court may not be able to provide.

There are a number of reasons why appellate adversaries are motivated to settle even after they have been through the rigors and expense of trial. Through the process of answering challenging questions posed by mediators, participants may develop a less optimistic assessment of their chances on appeal. An appellee may settle a case because it perceives the trial court opinion to be so favorable as to not want to take any risk that it will be overturned. A party may be involved in some other different litigation at the same time as the case on appeal, and it may believe that the other proceeding is better suited to resolution of its concerns. Sometimes the existence of an unfavorable precedent is more problematic for an appellant than the result, and a joint motion to vacate the lower court decision may satisfy all parties. The expense of further litigation at the appellate level, and perhaps on remand to the trial court, may make it economical to resolve the conflict through mediation. In contrast to the judgment imposed by a court, in mediation the parties can devise a structured settlement. Continued litigation may take years to end, particularly where there is the potential for an appeal to a higher level appellate court, remand, or both. Appellants may accept that they have had their day in court and that it is time for them to devote their energies to other matters. New lawyers often become involved when a case is appealed, and they may have a moderating influence on the optimism experienced during trial and a more constructive approach to negotiation than their predecessors. In sum, a party may come to the realization that its underlying interests can be satisfied without a court victory.

Once the New Mexico court learned that appellate mediation is widespread and that it has the capacity for increasing judicial efficiency and for providing a valuable service for lawyers and clients, Chief Judge Hartz appointed a working committee comprised of Judge Thomas A. Donnelly, Judge Benny E. Flores, and myself to develop ideas for a mediation program for the court. Equipped with detailed information about twenty different programs, we discussed and identified ingredients of success. We also considered the limitations and opportunities presented by the court's procedures

and finances, as well as the realities of New Mexico appellate practice.

We cataloged many factors that can enhance the success of a mediation program. Some elements relate primarily to administration, like smooth integration with existing court processes, adequate funding and staffing, realistic goals, and regular monitoring and evaluation. Other factors foster the support of the bar, like promotion by the court, early and low-cost intervention, ongoing education of appellate counsel, patience, opportunities for feedback, supportive court rules, and qualified mediators.

The New Mexico context included some distinctive circumstances. The state is the fifth largest in the nation, encompassing 121,365 square miles. There were minimal funds available to support a new project. The bar's experience with mandatory mediation in state courts was not extensive; outside of the metropolitan and district courts in Albuquerque, compulsory court-annexed mediation was generally limited to disputed child custody matters. The ten judges on the court of appeals depended heavily on the support of a central staff of thirteen attorneys. The court's fast-track summary calendar process disposed of over half of its civil docket prior to full briefing.⁴

The effort of the Utah Court of Appeals was of particular interest to the committee because its caseload approximated that of our court and because it was able to begin its program without any new financing. In January 1998 the Utah court began its new program⁵ with a single mediator, moved from a central staff attorney position, plus a half-time administrative assistant. Utah's program was modeled in part after a successful program that has been in operation in the Tenth Circuit since April 1991.⁶

David Aemmer, Chief Circuit Mediator for the Tenth Circuit, graciously accepted our committee's invitation to meet

4. This process is described in Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86 (1991).

5. Michael J. Wilkins and Karin S. Hobbs, *Utah's Appellate Mediation Office Opens January 1998 A New Option For Case Resolution at the Utah Court of Appeals*, UTAH B.J., Dec. 1997, at 25; Appellate Mediation Office of the Utah Court of Appeals <<http://courtlink.utcourts.gov/mediation/coamed.htm>>.

6. David Aemmer, *Appellate Mediation in the Tenth Circuit*, 26 COLO. LAW., Oct. 1997, at 25.

with the court in Albuquerque, and he spent several hours relating how his court's program operates and why certain procedures have been chosen. I cannot underestimate the significance of Mr. Aemmer's visit. Mr. Aemmer addressed each and every concern that the judges expressed, he explained how major operating decisions were made, and he credibly demonstrated that the Tenth Circuit's program is a success.⁷ Moreover, several judges on our court remarked that they had positive experiences with mediations conducted by Mr. Aemmer and other mediators on his staff.

Following the court's meeting with Mr. Aemmer, the committee expanded to include the Attorney-Clerk of the Court and Chief Staff Attorney of the Prehearing Division,⁸ both of whom are members of the court's management team. Our committee identified the procedures and tasks necessary to activate and maintain a mediation program, and the members collaborated in the preparation of an order that adopts procedures patterned upon the Tenth Circuit program.⁹

Before the committee decided to recommend to the court that a staff mediator administer the program and conduct the mediations, it considered the possibility of using sitting judges or volunteers. We rejected the idea of using sitting judges for three reasons: (1) Judging and mediating are different skills; (2) a judge who mediates will not be available to serve on a panel deciding the case; and (3) we were concerned about the appearance of a potential for breach of confidentiality. We viewed the potential advantages of using volunteers to be several, including prestige for the program, no cost for conferences, bar involvement, geographic diversity, and specialized knowledge. Possible disadvantages included limitations on availability, lack of quality control, difficult recruitment/exclusion issues, experience spread thin, need to provide training, administrative burden, and immunity concerns. Ultimately, we decided that use of a staff appellate mediator would not involve the disadvantages of using sitting judges or

7. *See id.*

8. Patricia R. Wallace and Gina M. Maestas, respectively.

9. Ct. App. Order No. 1-23, In the Matter of the Court of Appeals Pilot Settlement Conference Procedures <<http://www.nmcourts.com/FTP/coaorder.htm>>. This order has been superseded by <<http://www.nmcourts.com/FTP/2dord.pdf>>.

volunteers, and that it would provide the benefits of streamlined administration and regular personal contact between the bar and the court.

In order to expedite activation of the program, the court made a conscious decision not to seek an amendment to the Rules of Appellate Procedure.¹⁰ The court's order, signed by all ten judges on the court, was enthusiastically approved by Supreme Court Chief Justice Gene E. Franchini.

II. THE COURT OF APPEALS APPELLATE MEDIATION PROCESS

The Appellate Mediation Office may schedule and conduct mediation conferences in any civil matter pending before the court except requests for stays; appeals in which one of the parties is incarcerated or in which a non-attorney is a pro se party; and in cases involving the revocation of a driver's license, a petition for extraordinary relief, or an appeal arising from the Children's Code. Counsel for any party may request a conference, and judges may also refer cases for mediation. Otherwise, the Appellate Mediation Office randomly selects cases for conferencing from the pool of eligible cases. We started with random selection for two reasons: We assumed that limited staffing would prevent mediating every case, and the experience in other programs suggested that it is difficult to predict which cases are more likely to settle. In the first six months of operation, initial mediation sessions have been scheduled in every eligible case, and conferences in approximately fifteen new cases are being held each month.

The Appellate Mediation Office initiates the mediation process by sending a conference notice to counsel. The conference notice informs counsel of the time and date, whether the session will be in person or by telephone, and the names of all attorneys who have been notified. Additionally, counsel are provided with an information packet that includes information on what to expect and suggestions on how to prepare for the conference.¹¹

10. See N.M. R. APP. P. 12-313 ("The appellate court may, by procedures adopted by it from time to time, hold settlement conferences to facilitate the settlement of cases pending on appeal.").

11. The information packet is regularly revised. The current version is available at

Conferences are scheduled approximately three to five weeks after notices are sent, depending on caseload. Anyone with an unavoidable scheduling conflict may ask that the conference be rescheduled; the Appellate Mediation Office will then provide one or more alternate dates and ask the attorney with the conflict to arrange a new conference date with the other participants. The combination of excellent administrative assistance and computer software has eliminated the stress usually associated with complex scheduling.

Typically, the mediation process commences after the appeal has been assigned to a non-summary calendar, but before briefing has started. The court's decision to focus its mediation efforts on non-summary cases represents a compromise between low cost and efficiency. The prospects of settlement, at least in cases not involving high stakes, tend to lessen with the expenditure of additional litigation effort and expense as parties invest more heavily in a litigated result. At the point that a case is assigned to a non-summary calendar, an appellant will have filed a docketing statement,¹² and one or both parties may have filed memoranda in response to calendar notices. On the other hand, the expense of full briefing has not yet been incurred. And, because the mediator will have access to the court file, record proper, and analysis prepared by central staff for the benefit of the calendaring judge, it is not necessary for clients to incur the additional expense of preparing position papers.

The regular timelines for filing notices, designations, and briefs are not suspended during the mediation process. In fact, some appellants resist any delays in the appellate litigation process. However, the appellate mediator routinely issues orders granting verbal requests for an extension of time until after the mediation process has ended. Our experience is that lawyers are delighted that the court has implemented this user-friendly procedure.

From the court's perspective there is little reason to interfere with the summary calendar process, as it has proven to

<<http://www.nmcourts.com/FTP/stuffer.pdf>>.

12. The requirements of the docketing statement found in N.M. R. App. P. 12-208 allow the Court to know everything it needs to know to calendar the case for a faster or slower track, including a statement of the issues and how they were preserved, the pertinent facts, and citation of pertinent authorities.

be an effective tool for managing the court's increasing case load. On average, over the past eight fiscal years the court of appeals has disposed of 57% of its civil docket through the summary calendar process. For the fiscal year ending June 30, 1998, 310 cases, representing 58% of the total civil docket, were assigned to a non-summary calendar. The fact that our mediation program does not incorporate "routine" kinds of cases may affect how our settlement rate compares to settlement rates in other programs.

Mediation conferences are mandatory, meaning that lead counsel are required to participate in the process. Underlying the court's decision to implement a compulsory program are four important assumptions. First, lawyers are often reluctant to initiate settlement negotiations out of a concern for displaying weakness. Second, the appellate process, unlike trial proceedings, presents few opportunities for the parties to discuss settlement. Third, a mediator can help parties accomplish what they cannot accomplish alone. Finally, a mediation office, operating with confidentiality apart from the court's decisional process, can offer flexibility otherwise unavailable in a formal appellate court setting. No one, of course, is required to settle.

Most conferences are initiated by a telephone call from the appellate mediator in order to minimize costs,¹³ although in some cases counsel and clients are required to attend in person. Generally, we attempt to encourage attorneys to consider inviting their clients to participate rather than insisting on the parties' attendance. Our theory is that the lawyers must feel comfortable with the process in order for it to be successful and that forcing clients' participation upon them may be counterproductive. On the other hand, it is very encouraging when counsel on both sides recommend that all parties participate. On occasion, the mediator may travel to a conference site. The influencing factors are budget and time constraints plus the level of commitment and hopefulness expressed by the attorneys.

The mediator conducts the initial conference in a series of joint and separate sessions, talking first with both sides together

13. Long distance telephone charges may be substantial, as can be equipment costs and/or conferencing charges necessary to allow the mediator to shuttle between private conversations with opposing parties.

and then generally with each side separately. The conference typically will begin with an inquiry about any procedural issues that can be resolved so as to avoid unnecessary paperwork. For example, the parties may agree on how to resolve transcript difficulties, whether appeals should be consolidated, or the value of extending time for briefing. Discussions then shift into settlement.

Throughout the conference, whether in joint or private session, the mediator seeks to find out the reasons why the parties are pursuing the case, learn their underlying interests, explore common ground, and examine bases for settlement. Discussion of the legal merits of the case for the purpose of understanding the key issues on appeal and evaluating the risks of continuing with the case are usually handled in private session; there seems to be little value in having counsel re-argue positions that they have already staked out. Negotiations usually extend beyond the initial conference through subsequent conversations or additional conferences as offers are exchanged and considered by the parties. A case will stay in mediation until it settles or when, in the judgment of the mediator, settlement does not appear possible.

In situations where negotiations are breaking down, the mediator can suggest compromises and propose solutions involving reciprocal concessions that the parties themselves did not contemplate. This will usually be done only after the parties' own ideas for settlement have been thoroughly explored and exhausted. Sometimes the mediator's suggestions, even though they may be unacceptable to all of the participants, can help the parties continue talking. The mediator does not try to steer the process toward a particular result and does not interfere with the parties' own proposals. A mediator cannot erase inequalities in the resources and bargaining power of parties, but will act to maintain fairness in the negotiations.

Statements made during a conference and in related discussions are confidential and may not be disclosed to any court by the Office, counsel, or the parties. The mediator may not communicate anything to the other side that was revealed in a private discussion without authorization from counsel. In rare cases, the mediator may communicate directly with a court when necessary to implement an agreement, but only after being

authorized by all the parties regarding the content of the communication. The purpose of confidentiality is to encourage full and candid discussions and to ensure the impartiality of decision-making in the event a case does not settle.

The mediation program operates on a track separate from the court's decisional processes. The court is not aware of the progress of settlement efforts, and judges, their law clerks, staff attorneys, and administrative personnel of the court do not have access to information related to settlement that is generated by the activities of the Office.

Any action that affects the interest of a party will be taken only with the agreement of all parties. If a settlement is reached, the mediator and counsel will agree on a date for filing a settlement stipulation. Some settlements may be global in nature and result in the resolution of cases in other courts. Other settlements may forestall the filing of additional lawsuits. Moreover, as settled cases are neither remanded to lower courts nor appealed to the New Mexico Supreme Court, further litigation beyond the court of appeals can be avoided. Hopefully, even in cases that do not settle, the parties will leave the process knowing why they did not settle, how far apart they are, and that all possibilities have been fully explored and communicated.

While the court is optimistic about its new program, its continuing commitment will be contingent on a showing that its efforts are statistically efficient and also that its customers—lawyers and clients—are satisfied with the services being provided. In order to formulate a statistical benchmark, we have calculated the percentage of eligible appeals that historically have been settled prior to the issuance of a written opinion. Records for cases opened during the calendar years 1995 through 1997 show, for the types of cases that will be eligible for inclusion in the pilot program, that an average of 6% were settled and voluntarily dismissed after assignment to a non-summary calendar. The court is hoping to improve substantially on that settlement rate and also to achieve economies through the conservation of staff and judge time necessary to decide cases by written opinion. In an effort to generate customer service-type feedback, the Court Clerk sends anonymous questionnaires to participants in closed cases, whether or not they have been settled.

The court's mediation committee continues to oversee the activities of the Appellate Mediation Office. The committee meets in advance of regularly scheduled judges' meetings in order to discuss policy matters, review statistics, and identify issues that merit the attention of the chief judge or the full court.¹⁴

III. THE ROLE OF LAWYERS IN USING MEDIATION TO SERVE THEIR CLIENTS

Anything beyond a cursory introduction to mediation and negotiation theory and practice is beyond the scope of this article. I can only hope to highlight some of the similarities and differences between lawyering activities within and outside of the mediation context. The importance of the role of counsel in the outcome of mediation efforts in specific cases and in the overall success of an appellate court's program cannot be over emphasized. Skill and planning contribute both to advocates' powers of persuasion and to the capacity of mediators to effectively perform their functions.

Mediation is basically facilitated negotiation. Hence, like any other negotiation, careful preparation produces more beneficial results. While the interactions may be more intricate due to the presence of a neutral third party, the stages and technique that are part of every negotiation remain constant. Ultimately, counsel and clients have the final authority to consent to or reject any proposed resolution.

Before the mediation, counsel should probe the client's objectives, develop some realistic options, and avoid substituting their own values for those of their clients. This information will provide a basis from which to evaluate proposals in light of the risks of continued litigation and to meaningfully consider other alternatives for achieving the client's interests.

Counsel participating in mediation should know the strengths and weaknesses possessed by their own clients as well

14. Judge Flores retired from the Court at the end of 1998, and he has been replaced on the committee by Judge James J. Wechsler. Judge Lynn Pickard has succeeded Judge Hartz as chief judge.

as those of their adversaries. They must also ask themselves what their opponents know about their specific situation. Acknowledgment of one's own weakness in private discussions with the mediator does not have to undermine the inner confidence that may be essential should further litigation become necessary. The party that has more accurately evaluated the circumstances has a distinct advantage over the party that unthinkingly anticipates victory.

By listening closely to what the other side has to say and by not interrupting, counsel can gather information that will help in a realistic assessment of the case and can pick up clues as to the underlying interests that a settlement proposal can be structured to accommodate. When counsel respond to proposals with a reasoned and objective rationale rather than with inflexible positions, real collaboration can occur. Counsel should strive to be persuasive while remaining open to persuasion.

Clients are generally not required to be present during mediation sessions, particularly at the first conference, in part to minimize pressure on counsel to posture. However, counsel should consider the value of having their clients participate. Sometimes it can be useful for the client to hear matters from a neutral third party that may be difficult to hear from counsel alone. It also may be more efficient to have clients present to voice concerns and identify needs as they make and respond to settlement proposals.

The negotiating environment is structured to be noncoercive and, while positions are explored for the purpose of evaluating the case and considering options, pressure is not put on anyone to settle. At no point does the mediator interfere in the attorney-client relationship. Counsel is never separated from the client and is free to disagree with anything that is said.

Lawyers interested in learning more about mediation and gaining some hands-on experience may want to consider taking one of the basic courses that are regularly offered throughout the United States. The content of a basic course typically includes mediation and negotiation theory, discussion and demonstration of effective mediation techniques, and extensive opportunities to practice skills in coached role-plays. While such courses do not focus on the process of assisting clients in the settlement of

cases, the classes teach how mediation works and illuminate its potential for helping resolve disputes.

IV. CONCLUSION

The success of appellate mediation programs throughout the nation suggests that when court-annexed mediation is made readily available to parties, the interests of efficient judicial administration are well served. The pilot appellate mediation program underway in the New Mexico Court of Appeals is designed to provide a structure to bring litigants who have already been through the rigors of trial, and who may not be disposed to reasonable discussion, into an arena that is non-confrontational, where real differences between the parties can be fully explored, where appellants have the opportunity to moderate the impact of loss, and where appellees can hedge their bets.

Based on the information the court has reviewed about other programs and the results obtained thus far, it is confident that the support and commitment embodied in the procedures it has adopted, along with the talent of the New Mexico bar, will lead to a successful pilot program. We encourage and support ongoing examination of the value of using mediation at the appellate level as an instrument for generating appropriate alternatives to continued litigation and for conserving resources for the judiciary, counsel, and parties through early resolution of cases.