Appellate Conference Program - Frequently Asked Questions About the Initial Conference

1. What usually happens at the initial conference?

The primary purpose of the initial conference is evaluation of whether the case is a good candidate for further settlement discussions. There may be some discussion of the legal issues and the underlying facts, but the conference is not a dress rehearsal for oral argument. The attorneys should expect to be asked about their client's general attitude toward settlement of the case, but normally will not be asked to have specific settlement authority for the initial conference.

2. Is the client or client representative allowed to participate?

Yes, although their participation is not necessary for the initial conference. If you want a client representative (or another attorney) added to the conference call, let us know in advance of the conference.

3. How long does the initial conference last?

Generally between 15 and 45 minutes, but very rarely longer than one hour.

4. What should be in the issue statement?

The issue statement is meant to briefly inform the conference attorney of what issues will be raised on appeal. It should not contain extended argument, but should be more specific than "The district court erred in granting summary judgment." When the district court did not write an opinion, or wrote one that does not address the underlying facts, it is helpful if the issue statement also provides information about the factual background of the case.

5. I don't think the case is likely to settle. Should I opt out of the program?

That depends. If your conclusion is based on what you know about your client's interests and intentions, then you probably should opt out. If your client would be willing to talk about settlement but believes that the other side will be unreasonable, our advice is generally not to opt out – sometimes, having a neutral third party ask questions of your opposing counsel yields surprising results.

6. What if I'm not available at the stated date and time for the conference?

You can call us to reschedule. It is much easier if you call opposing counsel first and supply us with a few alternative times and dates when both sides are available.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GENERAL ORDER GOVERNING THE APPELLATE CONFERENCE PROGRAM
EFFECTIVE MARCH 27, 2000

O R D E R:

1. Pursuant to Federal Rules of Appellate Procedure Rule 33, it is hereby ORDERED that, in matters selected for participation in the court's appellate conference program, or referred to the program by the court, conference proceedings shall be conducted in accordance with the provisions of this General Order.

2. Counsel will be notified by letter of the date and time scheduled for the initial conference. Conferences may be conducted by telephone or in person at the option of the conference attorney or upon request of all parties. Conferences will be scheduled and adjourned at the conference attorney's discretion, with due regard for the availability and convenience of counsel.

3. The principal purpose of the conference program is to explore the possibility of settlement and to facilitate settlement discussions. Conferences may also entail consideration of simplification, clarification, and reduction of issues, and any other matters relating to the efficient management and disposition of the appeal.

4. Counsel's participation is required at any scheduled conference. The conference attorney may also require attendance

by the parties in person or through appropriate corporate representatives or representatives of insurers providing a defense. After a case has been assigned to the conference program, any party may submit to the conference attorney a written request not to participate in or to terminate settlement discussions. In cases selected for the conference program by the conference attorney, such a request will be honored, and any further conference proceedings will be restricted to the other purposes of the conference program. In cases referred to the conference program by the court, the request will be submitted to the court, and conference proceedings will be held in abeyance pending further directions from the court.

5. The conference attorney may require counsel to provide pertinent written information or materials, including position statements, lists of issues, outlines of arguments or other documents that the conference attorney believes may be helpful in accomplishing the purposes of conferences under Rule 33.

6. During the pendency of conference proceedings, counsel should provide the conference attorney with copies of all filings and correspondence sent to the clerk. Counsel should not send the clerk copies of materials or documents requested by the conference attorney or otherwise prepared specifically for the program. Documents created for the program and furnished to the conference attorney will not be included in the court's file.

7. The time allowed for filing of briefs will not be tolled automatically by proceedings pursuant to this order. If the parties are engaged in settlement discussions, the conference

attorney may recommend a resetting of the briefing schedule. The conference attorney may also recommend the entry of other orders controlling the course of proceedings, including orders altering the page and type-volume limitations for briefs and record excerpts.

8. All statements made by the parties or their counsel in the course of proceedings pursuant to this order, and all documents specifically prepared for use in such proceedings, shall be without prejudice, and, apart from any settlement agreement reached, shall not be binding on the parties. Such statements and documents shall not be quoted, cited, referred to or otherwise used by the parties or their counsel in the course of the appeal or in any other proceeding, except as they may be admissible in a proceeding to enforce a settlement agreement. Such statements and documents shall be privileged from discovery by the parties except in such a proceeding.

9. Confidentiality is required with respect to all settlement discussions conducted under conference program auspices. Information concerning such discussions shall neither be made known to the court nor voluntarily disclosed to anyone not involved in conference proceedings (or entitled to be kept informed of such proceedings), by either the conference attorney, the parties or their counsel, except insofar as such information may be admissible in a proceeding to enforce a settlement agreement and except as provided below.

10. Information about the assignment of particular cases to the program shall not be made public either by the staff of the

conference program or by the clerk. For good cause (and in the absence of an explicit agreement to the contrary) the fact that a case has been assigned to the conference program may be disclosed by any party as long as substantive information about settlement discussions is not revealed, and the disclosure is not purposely used in an effort to gain an advantage over another party. Any such improper disclosure will result in the release of the case from the program. The identity of cases assigned to the program may in any event be provided to the court in statistical reports, in response to inquiries and in connection with recommendations about procedural orders.

11. Once all briefs have been filed, or when a motion is under submission to the court, the conference attorney may report to the court whether active settlement discussions are under way in order to assist the court in scheduling. Such reports may include information about the likelihood and timing of settlement, but information about the parties respective positions or other substantive aspects of settlement discussions will not be revealed to the court except upon the joint request of all parties.

12. The confidentiality provisions of this order shall extend to discussions occurring in the course of preliminary contacts between the conference attorney and counsel about the possibility of settlement, whether or not the case is eventually assigned to the program. These provisions shall also be binding on non-parties (such as insurers or parties to related disputes) who accept invitations to participate in conference proceedings.

For the purposes of this order these participants shall be treated as parties, and participation in settlement discussions under the auspices of the conference program shall be deemed to constitute an agreement to be bound by the confidentiality provisions of this order.

13. Counsel for each party shall be responsible for providing a copy of this order to all persons participating in conference proceedings on behalf of that party. In addition, before disclosing any information about settlement discussions conducted under conference program auspices to any other person whose position or relationship with a party requires such disclosure, counsel shall provide such person with a copy of this order and obtain such person's agreement to be bound as a party would be bound by its provisions requiring confidentiality.

14. If a party is subject to obligations of disclosure to the public or to persons from whom such agreement cannot be obtained, counsel shall inform the conference attorney and counsel for the other party or parties. Settlement discussions may then be conducted under program auspices only if all parties agree to proceed. This order is not intended of its own force to prevent disclosure required by applicable law, but parties subject to such requirements must make every effort to maintain, to the extent permitted by such provisions of law, the confidentiality of such settlement discussions.

15. The confidentiality of any settlement agreement will be governed by the terms of that agreement and the law otherwise applicable thereto.

16. This General Order supersedes the prior General Order issued November 16, 1996, which shall nevertheless continue to be effective for cases assigned to the conference program before the date hereof.

Carolyn Dineen King
Chief Judge

March 27, 2000

A (Very) Short Guide to Appellate Mediation

Joseph L. S. St. Amant

Appellate mediation differs substantially from pre-trial mediation. Because the claims and defenses are well understood by both sides, and have been tested in the trial court, there is no need for the process of disclosure and argument used in pre-trial mediation to try to convince an opponent of the strength of your case. This kind of approach is usually counterproductive. It can easily create an atmosphere not conducive to settlement, and it suggests that efforts to compromise may be fruitless in the face of what may well be perceived as an unrealistic assessment of the situation.

Capable lawyers, even though on opposite sides of an appeal, are nevertheless likely to have generally similar ideas about the appeal's prospects, and therefore about the value of the case. Good lawyers therefore make settlement much easier. Appeals settle because the added value produced by a settlement bridges the gap between the two sides' evaluations, not because one side becomes persuaded that the opponent's evaluation is the correct one.

The main sources of added value are savings in time and transaction costs, and the benefits of certainty, as opposed to letting an important outcome depend on something that, from the prospect of the litigant, must contain a substantial element of chance. For individuals, obtaining closure of a protracted and draining emotional experience can be important; for corporations, avoiding a damaging published opinion may be a motive for settlement.

These considerations point to the kinds of appeals that are good candidates for mediation:

> Appeals from plaintiff's judgments in favor of individuals. Most people would be far better off getting part of the judgment for certain than taking a chance of losing it entirely.
>
> Low value cases that are worth less than the cost of routine briefing.
>
> Appeals that will be very expensive to brief.
>
> Interlocutory appeals, and appeals that appear likely to result in a remand and more expense in the trial court.

An exception to this last category must be made for appeals that will determine the forum in which a case will be tried – for instance, state or federal court. Even good lawyers find it difficult to agree about valuation when there is uncertainty about where the trial will occur.

There are other categories of cases that are not particularly good candidates for appellate mediation:

> Appeals that really do involve matters of principle or significant legal points.
>
> Situations in which there is a valid concern that a settlement will encourage more lawsuits. Often, however, cases can be settled at a level that leaves plaintiff's counsel with such a small fee that he has no incentive to repeat the experience – this may be a better option than even a small risk of a very bad outcome with its attendant publicity.
>
> Cases in which the losing side has invested heavily, or in which any settlement will be subject to a large lien. These appeals may not have sufficient value to satisfy the practical or legal claim on the proceeds with anything left over for the client – there will be no incentive for settlement.
>
> Appeals in which a party's resources are insufficient to fund an otherwise appropriate settlement, or in which the case might be thought to have substantial value based on a very small possibility of an extremely large judgment. Potential collectability problems introduce an element of factual uncertainty, and predictions requiring the estimation of very remote risks are difficult to make with sufficient confidence.
>
> Appeals in which the people who will make decisions about settlement are the same ones that created the problem that led to the litigation.

Curiously, even badly injured individuals often have less emotional difficulty thinking about a compromise than businessmen who were personally involved in the underlying dispute. It may be that the long exposure to the unfamiliar world of litigation that a typical personal injury plaintiff has had before the case reaches the appellate level tends to bleed off the emotional pressures; it may also help that the real opponent in the litigation is almost always an insurance company or corporation, and not the person who actually caused the injury.

Unfortunately, there is not much room in appellate mediation for clever solutions that transfer value from one party to the other less painfully than by writing a check. When the two parties have managed to get involved in a dispute that not only led to litigation but reached the court of appeals, encouraging a further business relationship is probably not a good idea. Instead, they are likely to need what amounts to a business divorce.

It should be apparent that much of what goes on in appellate mediation has to do with money. Injured individuals, and plaintiffs in employment cases, often need assistance in working through their feelings about the situation, and indeed, a plaintiff whose case was dismissed through summary judgment may benefit greatly from being able for the first time to tell his story to someone in a neutral position. However, because the litigation has reached such and advanced stage, the lawyers play a fundamental role in reaching a settlement. Their interests, like those of the clients, become heavily involved – an appellate mediator needs to be conscious of these interests, and thoroughly familiar with the business of trying to make a living practicing law.

The role of the mediator in appellate mediation is necessarily different from that of a pre-trial mediator, and even more different from that of mediators who are charged with trying to resolve disputes whose principal components are not financial, as is often the case in domestic relations situations. Emotions are often involved, but money is usually paramount, and assisting with evaluation of the case – either as a facilitator or an evaluator – is a less important part of the mediator's job. It is not always easy, however, for opposing lawyers in an appeal to conduct settlement discussions successfully – or even comfortably – and the mediator can have a substantial role to play.

> The mediator can initiate settlement discussions, so that neither party has to be the one to take the first step.
>
> The mediator can improve communications between the parties by filtering out inflammatory material that would make direct communication less likely to be successful.
>
> The mediator can provide a safe (or at least safer) way for a party to disclose a willingness to compromise, or a figure at which a settlement might be possible. The mediator's interest in effecting a settlement should assure the party making the disclosure that the information will not be passed on to the opponent if or to the extent that it is likely to encourage overreaching.
>
> The mediator can act as a good listener, giving counsel a person with whom to talk through valuation questions.
>
> The mediator can help the parties understand the value they can gain through settlement instead of continued litigation.
>
> The mediator can help the parties come to terms with a legal system that has given them results with which they are dissatisfied.

This last is an important but delicate part of an appellate mediator's job, especially one working in a court-annexed mediation program. Almost everybody comes to an appeal unhappy with the legal system. The losing party, whether plaintiff or defendant, will be unhappy for obvious reasons. A winning plaintiff may think the judgment was too small, and will certainly be alarmed at the prospect of losing it altogether. And a prevailing defendant will be angry that he had to pay his lawyers large sums of money to defend a claim that has now been shown to be non-meritorious. Handling these kinds of problems effectively but appropriately is perhaps the most difficult part of the job of a mediator employed by a court of appeals.

The Organization and Management of Appellate-Level Court-Annexed ADR Programs

Joseph L. S. St. Amant

The ADR Program as Part of the Court

The overriding consideration in the organization and management of a court-annexed ADR program is that the program operate appropriately as a part of the court. It must provide and be perceived as providing a service to litigants and their lawyers that is consistent with the role of the court itself in the resolution of disputes. The program must do nothing that detracts from the dignity of the court or that subverts the court's position as the ultimate source both of decisions in particular cases and of decisional authority.

A court-annexed ADR program must therefore refrain from methods and tactics, however effective, that would be inappropriate in a judicial setting. For instance, providing opposite sides with significantly different descriptions of likely outcomes has to be avoided, as do methods of persuasion that might be perceived as an attempt to deny litigants their right of access to the courts. An important management goal in such a program is to ensure a uniformity of practice among the mediators so that these kinds of lapses are avoided, and so that the impression the public receives in dealing with the program is the same no matter which mediator is handling a case.

The next consideration is one of institutional continuity. Court-annexed ADR programs, like the courts themselves, have to be operated for the long term – managed in a way that guarantees that their effectiveness will survive the departure of senior personnel. Difficult cases, management responsibilities and opportunities for interacting with the judges have to be passed on to more junior people as soon and as much as is appropriate.

The salary structure available for these programs, and their history, means that they will tend to be relatively hierarchical organizations, more so than the court itself, in which a judge is at least nominally regarded as the equal of the others immediately upon appointment. In this respect, court-annexed ADR programs are probably more like corporate law departments even than private law firms. Being conscious of the need for professional (and managerial) development of both the lawyer-mediators and the non-lawyer staff is correspondingly important.

Cost / Benefit Analysis

Subject to these considerations, a court-annexed ADR program must be organized and operated to provide the maximum benefit possible with the resources available. As a practical matter, these programs in the federal courts have relatively little short-term influence on the size of their

own budgets – it is a matter of doing the best job possible with the amounts allocated. From a longer perspective, it is the success of these programs and their favorable reception by the public that will guarantee that they continue to be funded at a relatively generous level in these times of budgetary constraints.

In fact, we are fortunate that the federal judiciary is as supportive as it is of court-annexed ADR at the appellate level. All twelve of the regional courts of appeal have ADR programs, and I think it is fair to say that each program feels that it can meet the basic needs and expectations of its court, its bar and its litigants with the resources allotted. Everybody, of course, thinks that they could do more good if they had more to work with. However, the programs that are staffed so that they can work on every eligible case seem comfortable with the amount of time that a lawyer-mediator can spend on a case, and the programs that operate more selectively seem comfortable that they can reach the cases that, given the circumstances of local practice, offer real prospects of benefitting from the program.

An obvious benefit of court-annexed ADR is that settlement of cases removes them from the court's docket. Even though all these programs spend time and efforts on cases that do not settle, the ones that do settle make a significant difference in the workload of the courts. The programs concentrate on fully-counseled civil cases, which tend to be the ones that would require the most work from the judges. They often present complicated factual situations and difficult issues of law – state, rather than federal, law in diversity cases – and they often would require oral argument and published opinions.

While it is difficult to generalize about the relative amounts of work that might be required to help a case settle as opposed to deciding it, the ADR programs, even though staffed with very experienced lawyers, are inexpensive compared to the court's decision-making apparatus. A formal study done several years ago in the Sixth Circuit confirmed that savings from the additional settlements generated by that court's ADR program more than offset the cost of operating the program. In addition, removing cases from the court's docket produces other cost savings and less tangible benefits well in excess of a proportional share of the cost of judges, chambers staff and other court employees necessary to the decision-making process.

The political complications inherent in increasing the number of judges on a court of appeals guarantee that upward adjustments to deal with an increasing caseload cannot be easily or quickly made. Because federal judges serve for life, downward adjustments are even less manageable. Furthermore, a larger court is not as efficient as a smaller one.

The more judges there are, the more difficult it is for each judge to remain current with all of the work of the court, but uniformity and consistency requires this familiarity. Collegiality suffers, and with it the court's ability to function as a whole. The managerial costs associated with a larger support staff are also disproportionately greater.

The benefits to the court of removing cases from the docket through settlement are therefore great. The benefits to the litigants can be substantially greater.

I estimate that it costs roughly $10 of the clients' money in attorneys' fees for every dollar of the government's money that is spent in deciding a case. It is much more time-consuming to write a competent brief and to prepare for and deliver an oral argument than it is to read the briefs, listen to the argument and prepare an opinion. The point of the process is for the lawyers to give the court as much help as possible in analyzing the record and the applicable law – otherwise the courts of appeals could not possibly function with their small numbers of judges and immense caseloads. But a result is that the bulk of the cost of the appellate process is borne by the litigants.

Settlements also allow the litigants to achieve results that could not be imposed by the court. Almost every settlement is an intermediate result somewhere between the two extremes – often all-or-nothing possibilities – that the court has available to it. Because one or both litigants may have a non-linear perception of the value of money, an intermediate result can have a greater value for both litigants than the expectation value of a litigated result, obtained from a probabilistic computation based on the outcomes that the court could provide.

There are also opportunities to add value through including in a settlement elements that are not before the court. While it is often unwise for parties in litigation to be thinking about further business dealings, the resolution through a settlement of other aspects of the parties' relationship can provide a real benefit beyond what would be available through continuing the appeal.

Assessing Program Results

It should be apparent that all settlements are not created equal – that the benefits to the court and to the parties vary greatly, and depend on the particular circumstances involved. Some settlements benefit the court, the parties and the public substantially. Other cases may be easier to decide than to settle, or they may involve legal issues of first impression or questions of public importance so that they ought to be decided rather than settled. As a result, statistics about the operations of a settlement program have to be regarded as giving only a rough picture of what is being accomplished.

Another reason for caution when dealing with program statistics is the impossibility of providing a precisely equivalent control group for statistical comparison. Because every appeal is *sui generis*, it is impossible to say with certainty whether a case that settles under program auspices would have settled on its own. Nor is the *fact* of settlement the only measure of program success. Both the court and the parties benefit when a case settles before rather than after briefing, and even in cases that do not settle, discussing the issues should have a positive effect both on the quality of the presentation to the court and on the facility with which any further litigation can efficiently be conducted.

Nevertheless, one important management goal for an ADR program is maintaining accurate records from which useful and usable statistical information may readily be extracted. It is

essential to have ready access to the current state of the program docket, and pertinent information that will be needed for historical analyses has to be identified and accumulated as events occur. For an program of any size, a computerized database system is a necessity.

Program Staffing

Court-annexed ADR programs are special-purpose organizations that tend to be added on to courts that already have in operation much larger clerk's offices and other support groups, with functioning systems in place. These systems – the clerk's office computer system, for example – will not have been designed to provide docket control, data collection and statistical analysis for an ADR program, and even satisfying parallel requirements like providing ready access to lists of attorneys with their addresses is likely to require a certain amount of adaptation of the systems already in place.

This circumstance places considerable demands on the non-lawyer staff of the program. Because they cannot rely on clerk's office systems for these essential program functions, they have to accomplish, in microcosm, the kinds of program support that in the clerk's office is performed by specialists. While these specialists – like the court's information systems people – are generally available to provide assistance, the responsibility for all of these basic functions lies with the small program staff.

At the same time, dealing with the program's public – the lawyers and litigants – in person and by telephone – is very much non-routine. As a result, the non-lawyer staff, whatever their education and experience, has to function much like a law firm or law department's legal assistants. This relatively high level of expectation contrasts with the way in which a clerk's office is organized to handle routine matters, and the salaries and recruiting efforts have to be adjusted accordingly.

Assembling the right group of lawyer-mediators is also critical. In my mind, the first requirement is that these lawyers have enough experience in practice, manifest ability and presence to command immediately the attention and respect of any lawyer who practices in the court. The second requirement is one of temperament. Many fine litigators are so competitive, or even combative, that no amount of training or practice would make them effective mediators. Training or experience *in mediation* is not in my view essential, but either is undoubtedly valuable, and of assistance in identifying people whose native abilities and inclinations make them good candidates for program positions.

In fact, it is probably the correspondence between these requirements of inclination and temperament and the attractions that go with government employment – steady income and an absence of concern about generating new business – that makes possible the recruitment of the right kind of lawyer-mediators. As with judgeships, salary levels cannot match what can be attained in private practice by people with the requisite abilities, but the best kinds of lawyers for these jobs are also people who might find adequate compensation in these intangible benefits and

the extraordinary degree of responsibility and interest that goes with the work.

Workload and Case Management

The workload of a lawyer-mediator is limited principally by the number of open files that is consistent with effective case management – in our experience this figure is around fifty. The number of cases that a lawyer can handle in the course of a year thus depends on the amount of time that an average case remains in the program before it is settled or until a decision can be made that no further settlement-related work is justified. This rate of progress is in turn affected by many factors that are outside the control of the lawyer-mediator, or that involve the program management and the mediator in balancing the various interests involved.

In the federal courts of appeals, the bulk of cases eligible for court-annexed ADR are appeals from summary judgments for defendants. Most of these cases have a small potential settlement value – reversal rates are low, and there is no guarantee that reversal would lead to an eventual plaintiff's victory. In a circuit that covers a large geographic area, it may be necessary to handle these cases by telephone rather than through in-person mediation – the time and travel required for the mediation would eat up the money that could be used to settle the case.

One way to reduce dependence on the telephone is to establish branch offices that bring court-annexed ADR to the places from which most of the appeals originate. Several federal circuits have decentralized their ADR programs with good results. There are, however, issues of cost, maintaining control and consistency of approach, and mutual assistance among lawyer-mediators that mean that this solution is not appropriate everywhere.

While telephone mediation – a better description is facilitated negotiation – has a naturally slower pace than mediation in person, accomplishing a settlement in a case – especially a case on appeal – is something that cannot be rushed. Time is needed for emotions to fade, the parties expectations to adjust and businesslike alternatives to be considered. Patience is often the key to success, even in cases that can be mediated in person.

There is also a need to strike a balance between the program's efficient throughput of cases and the level of imposition on the parties and their counsel that the program's requirements cause. This balance is one in which the court has the final say, because it reflects on the public's perception of the program and the court. The balance also depends on the expectations of the court's bar – required preparation and formal presentation that might be regarded as normal in one place could be considered onerous in another.

At the other end of the spectrum, the court's own need for efficient functioning puts a limit on the patience that can be shown and the extended assistance that can be provided by the program when negotiations become protracted. As a practical matter, it is the period before briefing begins that provides the setting for most settlement efforts. Not having to write a brief is a

powerful inducement toward settlement. The program can arrange for briefing deadlines to be extended if extensions will facilitate settlement, but this is an area in which judgment has to be exercised to ensure that the program's actions in this respect are consistent with court policy and that the results do not interfere with getting cases that do not settle decided within a reasonable time.

Case Selection

Another management issue related to program efficiency is case selection and assignment. Random assignment of cases may be appropriate in a program adequately staffed to handle all eligible cases, and geographic assignment may be necessary in a program with branch offices. But in a centralized program that can accept only a fraction of the fully-counseled civil appeals, careful selection and assignment of cases can result in the program's resources being applied where they will do the most good.

If an examination of materials from the district court leads to the conclusion that a settlement is unlikely, the time that a lawyer-mediator spends preparing for and conducting an initial conference (that would lead to the same conclusion) can be spent on another, more likely, case. Lawyer mediators have (and can develop) particular areas of substantive expertise, experience with particular kinds of practice, relationships with particular lawyers and an understanding of the customs and attitudes prevalent among the lawyers practicing in particular localities. In mediation at the appellate level, much of what goes on has to do with the business of making a living practicing law, and suitable assignment of a case, especially with respect to these last three areas, translates into results.

This kind of detailed attention to case selection is of course time-consuming, but the work has other benefits in keeping the program administration familiar with the whole of the civil docket of the court of appeals. The fact that a particular issue is about to be decided in a pending case may be of substantial assistance in the handling by the program of another case involving the same issue, and an overall view of the work of the district courts in the circuits is of considerable assistance in assessing how the court of appeals may go about examining a particular case.

Selecting cases for their settlement potential does make analysis of program statistics more difficult, but purposely spending efforts on unlikely candidates for settlement in order to make statistical results easier to interpret seems an inappropriate choice in the absence of a compelling need for statistical justification. In any event, room has to be allowed for cases that are sent to the program by judges, or included at the request of the parties and their counsel – the latter, especially, should be encouraged as a back-up mechanism for the necessarily imperfect selection of cases based on materials available from the district courts.

Confidentiality

Another management issue that arises particularly in the context of court-annexed ADR programs is the need for maintaining confidentiality. The critical requirement is that program participants be assured that their statements and positions will not be reported to the court. All of the ADR programs of the federal courts of appeals are protected by local rules or general orders that have fairly thunderous language imposing confidentiality, but it is imperative that the program actually be operated in a way that makes people satisfied that the rules are being followed.

Counsel and client can be confident that because of the natural desire to be successful in settling the case, a lawyer-mediator will be careful about revealing concessions and admissions to the other side. In contrast, for communications with the court, the incentives might be perceived to work the other way. Many people who have been exposed to the settlement efforts of district judges and magistrate judges are concerned, rightly or wrongly, that their positions and responses in a settlement context can have an effect on the decision-making process, and this concern has to be alleviated.

This need to keep a court-annexed ADR program entirely separate from the decision-making apparatus of the court is not inconsistent with the requirement mentioned earlier that the program operate as part of the court – instead, it is a necessary concomitant. From a management standpoint, this separation has interesting effects. It puts the lawyer-mediators in the strange position of being forbidden to talk to their bosses – the judges – about their work. It elevates the importance of anecdote in the feedback mechanisms that allow the court to evaluate the program's performance – perhaps with beneficial effect on the efforts of the lawyer-mediators to work effectively while maintaining cordial relations with counsel who appear in program cases. But while this separation must be effective in order for the program to operate as intended, it does not alter the basic proposition that the program is part of the court.

Court-Annexed ADR as a Different Alternative

Court-annexed ADR provides a service that is different from private mediation, and court annexed ADR programs and private mediation organizations are subject to different management considerations. Court-annexed programs can supply an initiative toward settlement when none of the litigants is willing to take the first step, and they afford a setting for mediation that encourages everyone involved to consider the alternatives seriously.

The court's lawyer-mediators are likely to be very different people from entrepreneurial private

mediators, with different temperaments and different perceptions of their role. They are likely to approach cases in different ways. The immediate goal for either is the settlement of an individual case, but for the longer term, the court's program has to operate, both overall and in detail, in a way that is in keeping with its place in the judicial system. These programs provide an alternative that has proven effective in resolving previously intractable litigation. This alternative should be considered seriously in every civil appeal.