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A Mediation Tune Up For the State Court Appellate Machine

Bobbi McAdoo*

I. INTRODUCTION

*"I think of justice as akin to the oil within an engine. It allows the many parts within the engine to interact without the friction that generates heat and leads to breakdown."*¹

Litigation, despite its key role in our justice system, has been criticized for not actually delivering the "justice" most valued by litigants.² In fact, early research on justice revealed that peoples' unhappiness with decisions in many contexts, as well as their general unwillingness to comply with them was the result of insufficiently fair treatment during the decision-making process more than any conclusion about whether the substance of the end result seemed fair to them.³ This important distinction led to a robust body of research about whether and how the justice of procedures shapes party satisfaction about and compliance with outcomes.⁴ Articulating conclusions from this procedural justice research, Professor Tom Tyler writes that "using fair decision-making procedures is the key to developing, maintaining, and enhancing the legitimacy of rules and authorities and gaining voluntary deference to social rules."⁵

* Professor of law and Senior Fellow, Dispute Resolution Institute, Hamline University School of Law. Many thanks to Beryl Blaustone who helped launch this article; to my Hamline colleagues Peter Thompson and Sharon Press for helpful comments and suggestions; to Nancy Welsh and Donna Stienstra for supportive ideas always; to Chelsea Griffin and Ross Oden for expert research assistance and advice; to Judge Harriet Lansing and Aimee Gourlay for tireless work on the pilot program; and to K.C. Morris for expert editorial assistance.

1. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 117 (2000).

2. See Tom R. Tyler, *What Do They Expect? New Findings Confirm the Precepts of Procedural Fairness*, 44 CAL. CTS. REV. 22, 22-23 (Winter 2006).

What do people want from the courts? . . . [People do] care whether their outcomes are fair. However, studies consistently find that procedural judgments are more central to people's willingness to accept the outcomes of court cases than are outcome judgments. And this is true of both cases handled through formal trials and cases handled through less formal processes such as mediation.

Id.

3. See Tyler, *supra* note 1, at 118 (citing to a study that found "respondents seldom mentioned unfair allocations. Instead, they focused upon issues such as being treated with consideration and politeness."). For seminal works on procedural justice scholarship, see generally JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (Melvin J. Lerner ed., Springer 1988); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978); Tom R. Tyler, *Conditions Leading to Value Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987); Tom R. Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103 (1988).

4. See Tyler, *supra* note 1, at 118.

5. *Id.* at 120 (citation omitted).

Professor Tyler and others consistently point to four key procedural elements that lead parties to conclude that fair decision-making has occurred: 1) opportunity for participation (voice);⁶ 2) the neutrality of the forum;⁷ 3) the trustworthiness of the authorities;⁸ and 4) the degree to which people are treated with dignity and respect.⁹ Tyler has also indicated that more informal legal procedures, especially mediation, are viewed as “particularly fair” and “typically rated as more satisfactory than court trials.”¹⁰ As mediation has been embraced (some say “captured”) by the court system over the last several decades, however, a very real concern has been that mediation abandoned its commitment to these “procedural justice” values in favor of a contribution to the courts’ efficiency (i.e., earlier disposition through settlement).¹¹

Although the courts’ desire for fair (and efficient) outcomes is understandable, it is clear that there is “dissonance between the expectations of [the court] and the public,”¹² i.e., the court may not be attuned to what litigants want *most*.¹³

6. *Id.* at 121 (“People feel more fairly treated if they are allowed to participate in the resolution of their problems or conflicts by presenting their suggestions about what should be done. Such opportunities are referred to as process control or voice.”).

7. *Id.* at 122 (“People are influenced by judgements [sic] about the honesty, impartiality, and objectivity of the authorities with whom they are dealing. . . . Basically, people seek a ‘level playing field’ in which no one is unfairly disadvantaged.”).

8. *Id.* at 122.

[People] are concerned about the motivation underlying the decisions made by the authority with which they are dealing. They judge whether that person is benevolent and caring, is concerned about their situation and their concerns and needs, considers their arguments, tries to do what is right for them, and tries to be fair.

Id.

9. *Id.* at 122. Because being treated with dignity and respect honors people in ways totally unrelated to actual outcomes of a case, “the importance that people place upon this affirmation of their status is especially relevant to conflict resolution.” *Id.*

10. Tyler, *supra* note 1, at 121. Professor Nancy Welsh explains that “[i]n the Model Standards of Conduct for Mediators, mediation proponents explicitly invoked the significance of procedural fairness as a measure of the quality of the mediation process.” Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L. Q. 787, 835 (2001) [hereinafter *Making Deals*]. Moreover, the key mediation concept of self-determination speaks directly to ensuring party voice and choice in a procedurally fair mediation process. See AMERICAN ARBITRATION ASSOCIATION, ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS 6-8 (2005), available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (last visited Sept. 13, 2010). See generally Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 30 (2001) [hereinafter *The Thinning Vision*] (explaining the importance of party participation (linked to procedural fairness) and empowerment (linked to self-determination in mediation)).

11. Carrie Menkel Meadow and others recognized this issue early in the development of court-connected mediation programs. See Carrie Menkel Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or “The Law of ADR”*, 19 FLA. ST. U. L. REV. 1, 3 (1991) (“In short, courts try to use various forms of ADR to reduce caseloads and increase court efficiency at the possible cost of realizing better justice.”); Sharon Press, *Building and Maintaining a Statewide Mediation Program: A View from the Field*, 81 KY. L.J. 1029, 1036 (1993) (“Dependence on [the goal to quickly produce settlements] may also be in direct conflict with the goals of providing parties with the opportunity to exercise self-determination or to improve the relationship between the parties.”); Jonathan M. Hyman & Lela P. Love, *Problem Solving in Clinical Education: If Portia Were A Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 164 (“[J]ustice in mediation comes from . . . the parties The justice that pertains in mediation is the justice the parties themselves experience, articulate and embody in their resolution of the dispute.”)

12. Judge Kevin Burke & Judge Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, A White Paper, 44 CT. REV.: J. AM. JUDGES ASS’N 15 (2007), available at

Judges Kevin Burke and Steve Leben, in a thoughtful “white paper” prepared for the American Judges Association, suggest that this dissonance can be resolved through the use of mediation, giving people a forum “. . . more consistent with what they were expecting out of their involvement with the court . . . [leading to] greater satisfaction and compliance with . . . agreements.”¹⁴ With an endorsement of key aspects of procedural justice, they continue: “People are directly involved in a mediation session; they get to have a voice and see evidence that the authority figure is listening to and addressing their concerns.”¹⁵

Scholars with an interest in procedural justice agree, believing that a commitment to procedural justice in mediation can promote resolution together with the experience of justice, and that this is critical to the legitimacy of our court system.¹⁶

[M]ediation should be expected to deliver to disputants an experience of justice, more commonly referred to as *procedural* justice. . . . [C]itizens] want the courts to resolve their disputes in a manner that *feels like justice is being done*. . . . Ultimately, ensuring that mediation comes within a procedural justice paradigm serves some of the courts’ most important goals—delivering justice, delivering resolution, *and* fostering respect for the important public institutions of the judiciary.¹⁷

When a court develops a mediation program as an alternative to its usual decision-making process, the tension between mediation as an efficient settlement process and as something “more” is brought into sharp focus. Even the results from empirical research on mediation illustrate this tension. In summarizing the findings from twenty-seven studies on general civil court mediation programs, for example, Roselle Wissler notes that “mediation . . . settles cases,” and “participants view the process and outcome as fair.”¹⁸ Joan Kelly, likewise summarizing studies on family mediation research, writes:

<http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf> (last visited Sept. 14, 2010). Judges Burke and Leben suggest that “‘outcome concerns had a greater influence among judges than the procedural criteria of trust, neutrality, and standing’ that constitute the public’s conception of procedural fairness.” (quoting from research conducted by Professor Larry Heuer, *What’s Just About the Criminal Justice System? A Psychological Perspective*, 13 J. L. & POL’Y 209, 217 (2005)). *Id.* at 15.

13. *Id.*

14. *Id.* at 16.

15. *Id.*

16. Judge Wayne Brazil has been an eloquent voice on the potential of ADR to “enrich the court’s sense of mission.” Wayne Brazil, *An Assessment: Court-Related ADR 25 Years After Pound*, 9 DISP. RESOL. MAG. 4, 5 (2003).

[W]e came to understand that mediation might democratize our institution in potentially profound ways. By sponsoring mediation, the court was acknowledging that values other than efficiency and rationality sometimes could be more important to parties—and that those ‘alternative’ values could be legitimately pursued in the public system of justice.

Id.

17. *Making Deals*, *supra* note 10, at 791-92 (emphasis added).

18. Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 65-68 (2004). Wissler noted that the outcomes from the general civil research emphasized settlement rates (found to be generally between twenty-seven and sixty-three percent); participant satisfaction (found to be highly favorable for *both* litigants and attorneys); and time and cost savings (found to be mixed when there were available comparisons to non mediation alterna-

In public and private sectors, in voluntary and mandatory services, and when provided both early and late in the natural course of these disputes, family mediation has been consistently successful in resolving custody and access disputes, comprehensive divorce disputes, and child protection disputes. Mediation has given evidence of its power to settle complex, highly emotional disputes and reach agreements that are generally durable.

. . . [C]lients indicated that they felt heard, respected, given a chance to say what is important, not pressured to reach agreements, helped to work together as parents, and felt their agreements would be good for their children.¹⁹

The fact that mediation settles cases *and* is seen as “fair” and that participants appreciate the opportunity for “respectful treatment” and “voice,” all evidenced in the Wissler and Kelly summaries, supports a dual efficiency *and* “procedural justice” lens through which to view the success of court-connected mediation.²⁰

The focus of the research regarding appellate court mediation programs is less multi-dimensional. Wissler also reports on fifteen studies on appellate court mediation programs. If one assumes that what is considered important to the success of an appellate program is what is measured,²¹ then an obvious conclusion is that appellate programs care almost solely about efficiency. Only one of the studies collected *litigant* feedback. Only six collected *attorney* feedback about the mediator and mediation process.²² In contrast, most of the appellate studies described by Wissler focus on efficiency, finding that mediation “reduces the rate of cases

tives). *Id.* at 65-67. The research results on participant satisfaction included that: “[m]ost litigants said the mediation process was fair . . . and gave them sufficient opportunity to present their case. A majority of litigants felt they had control over the process or had input in determining the outcome[,] . . . the mediator was neutral[,] . . . did not pressure them to settle[,] . . . understood their views and the issues in dispute[,] . . . and treated them with respect . . .” *Id.* at 65 (alteration to original) (citations omitted). These elements suggest that an experience of “procedural justice” occurred for these participants in general civil mediations.

19. Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, 22 CONFLICT RESOL. Q. 3, 28-29 (2004). For research on family mediation, *see generally*, CONNIE J. A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS (American Psychological Association 2001); Joan B. Kelly et al., *Mediated and Adversarial Divorce: Initial Findings From a Longitudinal Study*, in DIVORCE MEDIATION: THEORY AND PRACTICE 453 (Jay Folberg & Ann Milne eds., Guilford Press 1988); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in DIVORCE MEDIATION: THEORY AND PRACTICE 429 (Jay Folberg & Ann Milne eds., Guilford Press 1988); Jessica Pearson, *The Equity of Mediated Divorce Agreements*, 9 MEDIATION Q. 179 (1991); Jessica Pearson, *Family Mediation: A Working Paper for the National Symposium on Court-Connected Dispute Resolution Research* (October 15-16, 1993), available at http://www.ncsconline.org/WC/Publications/KIS_ADROthNatlSympCtDispFam.pdf (last visited Sept. 14, 2010).

20. See *supra* notes 6-9 and surrounding text.

21. Bobbi McAdoo & Nancy A. Welsh, *Court-Connected General Civil ADR Programs: Aiming for Institutionalization, Efficient Resolution, and the Experience of Justice*, in ADR HANDBOOK FOR JUDGES 1, 39 (Donna Stienstra & Susan M. Yates eds., Am. Bar Ass’n 2004).

22. See Wissler, *supra* note 18, at 74. Although these limited assessments were favorable, it is noteworthy that there were so few given that satisfaction assessments from litigants are so common in mediation survey research. Wissler indicates that the appellate mediation outcome studies focused mainly on settlement rates, attorney’s assessments and efficiencies of dispute processing. *Id.* at 73.

that go to oral argument and reduces the time to disposition compared to cases that are not assigned to mediation.”²³

These results suggest some support for the predominance of what Menkel-Meadow called the “quantitative-efficiency” rationale in appellate mediation, rather than a more “qualitative-justice” rationale (that is needed in particular to support the *self-determination* mantra of mediation).²⁴ In appellate mediation, even a nomenclature blurring, e.g., settlement conferences and mediation sessions defined as interchangeable concepts suggest that “mediation success” at this level is primarily about settlement.²⁵ The research and practice in this area thus provide some fuel for the debate about whether mediation has been co-opted by the courts into a process solely preferred for (maybe even defined by) an efficiency rationale.²⁶

Research that will be discussed in this Article delivers the message that it is possible to develop and implement appellate mediation in a manner that supports and encourages both settlement *and* procedural justice for litigants.²⁷ Program

23. *Id.* at 81.

24. See Menkel-Meadow, *supra* note 11, at 12; Press, *supra* note 11, at 1036; see also *Making Deals*, *supra* note 10, at 4 (explaining that mediation as it is now practiced is primarily helping the court system to achieve speedy and inexpensive resolutions); *The Thinning Vision*, *supra* note 10, at 859 (examining how the vision of self-determination, based on a concept of party empowerment, has changed in its adaptation to the culture of the courts).

25. In 2004, Judge Evans identified two program models for most appellate programs: the settlement conference model (usually conducted by a judge, retired judge, court attorney or administrative staff) and the mediation model (usually conducted by a third party neutral chosen by the parties or the court). The differences between the two models, according to Judge Evans, have become “somewhat blurred.” Frank G. Evans, *ADR Programs in the State Appellate Courts*, in *ADR HANDBOOK FOR JUDGES* 277, 283 (Donna Stienstra & Susan M. Yates eds., Am. Bar Ass’n 2004); see also Wayne Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way*, 18 OHIO ST. J. ON DISP. RESOL. 93, 144 (2002). “If we fail to maintain clear differences between processes and permit all court ADR to become some blur of evaluative mediation and a settlement conference, we will needlessly compromise our ability to be responsive to the full range of values and needs that litigants bring to our courts.” *Id.* A 1993 report on research *about appellate mediation* recognized an abundance of state settlement programs (over forty), but “only one state appellate court appears to have tried to marry the traditional settlement conference approach with modern mediation techniques.” See NATIONAL SYMPOSIUM ON COURT-CONNECTED DISPUTE RESOLUTION RESEARCH, A REPORT ON CURRENT RESEARCH FINDINGS: IMPLICATIONS FOR COURTS AND FUTURE RESEARCH NEEDS 27 (1994). This marriage was seen as “a striking success” for significant efficiency reasons as well as participant satisfaction related to “clear, orderly, and fair” administration of justice. *Id.* at 30. It is not clear, however, that the participant assessments included feedback from persons other than attorneys.

26. Judge Ignazio Ruvolo acknowledges that appellate settlements have been viewed “as an oxymoron.” See Ignazio J. Ruvolo, *Appellate Mediation: “Settling” the Last Frontier of ADR*, 42 SAN DIEGO L. REV. 177, 178 (2005). Because it may not be intuitively clear at the appellate level that something more than basic risk analysis is needed (to inform a bargaining environment in which a “winner” needs to be given some incentive to compromise with a “loser,”) it is not surprising that appellate mediation programs are seen to “exist primarily to promote and expedite settlements of pending appeals and any related cases. The savings that result for both the courts and the parties by settling an appeal provide a compelling efficiency rationale for the continued existence and growth of the programs.” Kathleen M. Scanlon, *A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate Path*, 17 OHIO ST. J. ON DISP. RESOL. 386, 394 (2002); see also S. Gale Dick, *The Surprising Success of Appellate Mediation*, 13 ALTERNATIVES TO HIGH COST LITIG. 41, 47-48 (1995) (differences in local legal and mediation cultures resulted in different styles of mediation practice; even so, Dick notes the predominance of the efficiency rationale at the appellate level).

27. See *infra* Part III.c.

designers need not fear that an emphasis on ensuring that party voice and participation occur in a neutral and respectful mediation process will somehow sacrifice their efficiency goals. Rather, there is every reason to believe that these goals can be delivered in tandem, and that well-designed programs will do just that.²⁸ Moreover, the significant upside of ensuring procedural justice for litigants is that when settlements happen, litigants will be more likely to comply with their terms, and they will respect the judiciary that provided them with the “opportunity” to participate in a mediation process.²⁹

This Article begins in Part II with a review of the rationale for appellate mediation programs. In Part III the Article will discuss the development and evaluation of a pilot program for the mediation of family appellate cases in Minnesota. The pilot was developed and implemented with the goals of settlement *and* other qualitative justice measures in mind.³⁰ Moreover, preliminary evaluation results for the pilot suggest that *both* continue to be important and can be achieved.³¹ In Part IV the Article will discuss the elements of program design most likely to make appellate mediation programs succeed, in terms of both efficiency and procedural justice. The Article will suggest that commitment to both of these goals in appellate mediation programs will help to ensure that there is sufficient “oil” to prevent a “breakdown” in the “engine” of justice.

II. THE RATIONALE FOR APPELLATE MEDIATION³²

It is not surprising that appellate Alternative Dispute Resolution (ADR) programs emerged given the generally positive view of mediation at the trial court level.³³ Often delineated as settlement programs, appellate programs provide a

28. In keeping with the quotation that opened this article, some fine tuning to the appellate mediation machine may be called for to accomplish this. *See infra* Part III.a.

29. Brazil, *supra* note 25, at 99. In identifying the criteria for success of mediation, we should . . . consider what effect [mediation has] on how well served the parties feel by the system of justice and on whether their experience in the court system enhances or reduces their respect for and feeling of connection with their government. . . . [H]ow people feel about their governmental institutions is so important in a democracy . . .

Id.

30. *See infra* Part III.

31. *Id.*

32. Several scholars have written helpful pieces about their experiences in and advice about appellate mediation and are gratefully acknowledged here. *See generally* ROBERT J. NIEMIC, MEDIATION AND CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center 2006) (1997); Richard Becker, *Mediation in the New Mexico Court of Appeals*, 1 J. APP. PRAC. & PROCESS 367 (1999); Roger A. Hanson & Richard Becker, *Appellate Mediation in New Mexico: An Evaluation*, 4 J. APP. PRAC. & PROCESS 167 (2002); Frank G. Evans, *ADR Programs in the State Appellate Courts*, in ADR HANDBOOK FOR JUDGES 277 (Donna Stienstra & Susan M. Yates eds., Am. Bar Ass’n 2004); Ignazio J. Ruvolo, *supra* note 26; TASK FORCE ON APPELLATE MEDIATION, MANDATORY MEDIATION IN THE FIRST APPELLATE DISTRICT OF THE COURT OF APPEAL: REPORT AND RECOMMENDATIONS (2001), available at <http://www.courtinfo.ca.gov/reference/documents/mediation.pdf> (last visited Sept. 3, 2010).

33. *See* Ruvolo, *supra* note 26, at 212 (stating that ADR has revolutionized litigation at the trial court level for the past twenty years); Wissler, *supra* note 18 (summarizing research for twenty-seven studies on general civil court mediation programs, noting positive outcome and procedural data); McAdoo & Welsh, *supra* note 21 (noting the vast array of civil ADR options and citing empirical work that supports the use of mediation); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer’s Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL’Y 376 (1997) (“in nearly every

neutral platform for parties to exchange information and evaluate their risks and their expected future time and expenses in a given case, with an eye towards reaching a reasonable compromise when it is in their best interests.³⁴ Although the existence of crushing case backlogs³⁵ may have been the primary impetus for the growth of appellate ADR, the positive notions of self-determination and procedural fairness, that are especially important to mediation in general, apply to this development as well.

Why appellate mediation?

Once there has been a trial and decision in a case, and given that generally a court of appeals applies a very narrow standard of review, what is it about appellate mediation that contributes to its growth?

Commentators, judges and lawyers suggest a number of reasons to engage in appellate mediation:³⁶

1. When cases settle in mediation, particularly if the parties rather than the court are paying the mediator, judicial resources are conserved and judges can spend more time on cases that demand their time and expertise.³⁷ The rationale for initiating state intermediate courts of appeal (as well as other docket clearing devices) is applicable here: overcrowded dockets diminish the quality of decisions.³⁸
2. Mediation can produce an affordable forum. Professor Tyler's research, admittedly pertaining to ADR in the trial courts, acknowledges that not all ADR programs achieve cost savings for either the courts or the litigants. He still concludes, however, that it is possible to "design alternative dispute resolution programs in a way that most disputants assigned to them will reach and accept settlement. Hence, *well-designed, court-administered* alternative dispute resolution programs seem able to reduce court costs. . . ."³⁹ For litigants at the appellate level, at a minimum a well-designed program should eliminate costly transcripts, briefing, and oral arguments.⁴⁰

state, at least one local state and/or federal court has incorporated ADR in some manner"); John Lande, *Commentary: Focusing on Program Design Issues in Future Research on Court-Connected Mediation*, 22 CONFLICT RESOL. Q. 89, 97 (2004) ("No further research should be needed to persuade policymakers about the potential efficacy of court-connected mediation programs.").

34. See Evans, *supra* note 25, at 280.

35. Ruvolo, *supra* note 26, at 178-79 ("[D]riven by ponderous appellate backlogs . . . ADR encampments have been erected by appellate judges . . ."). This impetus is familiar to ADR advocates: "Burgeoning court dockets created unwieldy case backlogs [at the state court level, and] . . . an alarmed bench and bar began to look for new case management methods . . .," including ADR. Evans, *supra* note 25, at 277-78.

36. See generally Ruvolo, *supra* note 26; Evans, *supra* note 32; Becker, *supra* note 32.

37. See NIEMIC, *supra* note 32, at 6.

38. See Note, *The Minnesota Supreme Court Prehearing Conference: An Empirical Evaluation*, 63 MINN. L. REV. 1221, 1222 (1979); Ruvolo, *supra* note 26, at 213.

39. Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 425 (1989) (emphasis added). Although Professor Tyler was comparing ADR programs with traditional trials, the same cost-saving results can occur with well-designed appellate ADR programs.

40. Ruvolo, *supra* note 26, at 220 ("Every step in the appellate process brings added costs."). See also TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 18; Becker, *supra* note 32, at 370

3. Party participation (“voice”) in a procedurally fair process supports party responsibility and promotes higher levels of compliance.⁴¹
4. Global settlements—the settlement of issues outside those actually on appeal—are possible in mediation. This allows for the satisfaction of underlying party interests and not just a decision on a narrow legal question. Global settlements save time and resources all around.⁴²
5. Earlier resolution in mediation obviates the risks of reversal at the court of appeals, where often the case is sent back to the trial court. Resolution allows all parties the ability to get on with their lives.⁴³

Admittedly, several of these reasons for appellate mediation depend primarily on settlement in mediation. But Richard Becker describes mediation in the New Mexico appellate program as a process in which mediators seek to “. . . find out the reasons why the parties are pursuing the case, *learn their underlying interests, explore common ground*, and examine bases for settlement.”⁴⁴ A publication of the Federal Judicial Center describes mediation settlement conferences in this way: “[M]ediation sessions exist to help parties *communicate with one another, clarify their understanding of underlying interests and concerns*, identify the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options.”⁴⁵

Settlements in appellate mediation, therefore, have the potential for a “value-added” punch, promoting the panoply of factors widely acknowledged as critical to the success of mediation: communication, mutual understanding, better case management, speed of resolution, and the subjective experience of justice for

(“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.”); Evans, *supra* note 25, at 291 (“[T]here are factors making it easier to settle at the appellate level . . . additional attorneys’ fees in relation to the amount in controversy create economic incentives for both parties to settle . . .”).

41. See *supra* note 6 and surrounding text. Professor Tyler examined the fairness of procedures that courts and police use to exercise their authority, and concluded that, with respect to courts, how they treat members of the public is more important to litigant trust and confidence (leading to compliance) than the “evaluations of outcome fairness, assessments of structural problems in the courts and/or evaluations of the costs of litigation.” Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215, 226 (2001); see also Larry Heuer, *What’s Just About the Criminal Justice System?: A Psychological Perspective*, 13 J.L. & POL’Y 209, 226 (concluding that the legitimacy of the law and the authorities who enforce it are enhanced by fair treatment).

42. TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 11 (“It is not unusual for an appeal to be one of a number of disputes between the same parties. . . . Appellate mediations are designed to resolve all disputes between parties. Often they achieve this goal.”); Donna Riselli, *Appellate Mediation at the First District Court of Appeal: How and Why it Works*, 75 FLA. B. J. 58, 60-61 (2001) (explaining how global settlements in the First District Court of Appeal resulted in significant time and money savings to the parties); see also NIEMIC, *supra* note 31, at 5; Becker, *supra* note 31, at 370 (“[U]nderlying interests can be satisfied without a court victory.”).

43. TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 10; Ruvolo, *supra* note 26, at 218 (“For many [mediation] participants, the thought of continuing the fight into the appellate courts becomes unthinkable stressful. They are emotionally exhausted, leading many to seek an honorable way out of the dispute”); Becker, *supra* note 32, at 370 (“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.”).

44. Becker, *supra* note 32, at 376 (emphasis added).

45. NIEMIC, *supra* note 32, at 5 (emphasis added).

individual parties.⁴⁶ In fact, it could be argued that there exists a unique opportunity for mediation at the appellate level to enhance parties' experience of procedural justice, even if a case does not settle. The usual appellate process, with its narrow legal focus and lawyer dominated briefs and arguments, is not focused on party "voice" and participation, or even, at times, on party presence. Yet compelling research has established that parties' compliance with decisions, and even their views of the legitimacy of the court system, depends to some extent on their perception that they have been treated fairly.⁴⁷ Thus, an appellate program that is developed to maximize this potential for "value-added" settlement in mediation is more likely to be successful in the eyes of the litigants.

III. THE DEVELOPMENT AND EVALUATION OF THE MINNESOTA FAMILY APPELLATE MEDIATION PILOT PROGRAM

This Article now turns to examine the design, implementation, and evaluation of a pilot program for family appellate mediation in Minnesota. Like many states, Minnesota jumped on the ADR bandwagon in the 1980s and formally institutionalized its approach to trial court ADR through the implementation of court rules in 1994.⁴⁸

In March 2007 the Minnesota Court of Appeals (COA),⁴⁹ facing increased case filings and inadequate funding, convened a workgroup to consider the use of

46. See Hanson & Becker, *supra* note 32, at 177 ("[M]ediation appears to have been conducive to an orderly and helpful dialogue."); Ruvolo, *supra* note 26, at 193 (finding that parties who did not settle in mediation benefitted from the highlighting of the strengths and weaknesses of each party's case). See generally Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators, 12 OHIO ST. J. ON DISP. RESOL. 1 (1996). Baruch Bush suggests that the value-added of mediation is that mediators help parties put more reliable information on the table than if parties negotiated on their own. *Id.* at 13. The improved information base provides parties with an enriched negotiating environment and with more clarity around the issues at hand. *Id.* A second "value-added" aspect of mediation is that mediators help parties understand each other "more fully and accurately than they would if left to themselves." *Id.*

47. See Brazil, *supra* note 25, at 106 (citing the research-supported proposition that public confidence in the judicial system significantly turns on party perceptions of process fairness); see also Wayne D. Brazil, *Why Should Courts Offer Nonbinding ADR Services?*, 16 ALTERNATIVES TO HIGH COST LITIG. 65, 73 (1998) (explaining that "providing dispute resolution services whose quality and integrity are respected by the people encourages respect for government--and the more the people respect their government, the more willing they are to abide by the rules of law it promulgates.").

48. See Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401, 410 (2002). Minnesota General Rule of Practice 114 was enacted in 1994 and required "attorneys to consider ADR in every civil case, discuss ADR with their client(s) and opposing counsel, and advise the court regarding their conclusions about ADR, including the selection of a process, a neutral and the timing of an ADR process." MINN. GEN. R. PRAC. 114.01 (2006) (amendments in 2006 added these requirements to family cases). For an overview of the Minnesota history leading to the enactment of Rule 114, see generally Barbara McAdoo, *The Minnesota ADR Experience: Exploration to Institutionalization*, 12 HAMLINE J. PUB. L. & POL'Y 65 (1991).

49. See generally Minnesota Judicial Branch, Background on Its Court of Appeals, http://www.mncourts.go/Documents/0/Public/Court_Information_Office/InformationalBrochures/QF-Court_of_Appeals.pdf (last visited Sept. 16, 2010). The Minnesota Court of Appeals is a 19-judge intermediate appellate court in Minnesota. The court hears appeals from decisions of the district court, state administrative agencies, city governments and county governments. *Id.*

mediation for *appellate* cases.⁵⁰ Under the leadership of Judge Harriet Lansing, the workgroup recommended to the Chief Justice of the Minnesota Supreme Court that a pilot program on family law appellate mediation be implemented.⁵¹ This Article will describe elements of both the design and implementation of the pilot program, as well as the results of its evaluation, to increase knowledge about the potential of such programs and provide general advice to others who may be considering the same.⁵²

Because all evaluation results need to be understood in the context of how the program was constructed and implemented, some attention to detail in this regard follows.

a. Basic Program Design

In the development of the pilot project,⁵³ the program designers tried to incorporate the work of those who had experience in similar appellate programs in other parts of the country.⁵⁴ This translated into key judicial support for the following program components:

1. Dedicated paid administration

An Appellate Mediation Administrator (AMA), a court employee, was appointed to review all cases, start the process of selecting mediators, and assist with the disposition of cases after mediation. A Mediation Case Manager (MCM), an employee at the Mediation Center of Hamline Uni-

50. Increased case filings and inadequate funding are common factors that lead to the use of ADR. See Pearson, *supra* note 19, at 55. In Minnesota, from 1999 to 2008, case filing increased eighteen percent but case dispositions did not experience a similar increase. See BOBBI MCADOO, EVALUATION OF THE APPELLATE FAMILY MEDIATION PILOT PROGRAM: A REPORT TO THE MINNESOTA COURT OF APPEALS 4 & n.5 (2010) [hereinafter MINNESOTA EVALUATION REPORT] (Although dispositions improved somewhat after 2008, the case timing statistics for 2008 and 2009 were higher than the court's goals for speedy resolution.).

51. The discussions focused on family law "because Judge Lansing's exchange of information with experts in the family-law area indicated that encouraging voluntary settlements in family-related appellate disputes could advance overall efficiency, and also reduce the destructive escalation of conflict and stress that occurs for families with protracted litigation." MINNESOTA EVALUATION REPORT, *supra* note 50, at 4. Chief Justice Eric Magnuson authorized the pilot project on Family Law Appellate Mediation in a court administrative order. See *In re* Pilot Project on Family Law Appellate Mediation in Minnesota Court of Appeals, ADM08-8003 (Aug. 29, 2008).

52. Although the emphasis in this article is on state court practice, in the federal courts, Federal Rule of Appellate Procedure 33 provides the umbrella under which settlement conferences *aka* mediation sessions occur. Beginning with a program of the Second Circuit in 1974, all thirteen federal courts of appeals now have mediation programs in place. A non-judicial court employee or other third party neutral usually serves as the mediator in federal court programs, and the mediation is held before the filing of appellate briefs and oral argument. See NIEMIC, *supra* note 32, at 3 (This excellent resource describes each of the federal appellate court programs in some detail.).

53. The Minnesota pilot was for the mediation of dissolution of marriage issues and issues between unmarried parents (not Child in Need of Help or Protection (CHIPs) cases or termination of parental rights cases). Cases with precedential points of law were still to be decided by the court. MINNESOTA EVALUATION REPORT, *supra* note 50, at 6.

54. Professor Nancy Ver Steegh provided this key research-based information to the Court of Appeals workgroup. Aimee Gourlay, director of Mediation Center at Hamline University School of Law, was engaged to bring appropriate ADR knowledge and administration skills to the project. *Id.* at 5.

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versity, was hired on contract to assign mediators, set fees, schedule pre-mediation conference calls and maintain a basic data base. Appendix A gives more information about the roles of the AMA and the MCM in the pilot program.

2. Trained and experienced private mediators

Twelve mediators were selected for the pilot program based on *both* mediation and appellate experience. They attended a one-day training provided by Dana Curtis, an experienced appellate mediator, prior to beginning the pilot program mediations. The use of private mediators and not, for example, court-employed mediators, was consistent with the culture of Minnesota's implementation of earlier ADR initiatives.

3. Early mediation, before briefing

The pilot program maximized potential cost savings by staying the transcripts and briefing schedule during the pendency of mediation in the Order of Referral to Mediation, at Appendix B. The court informed court reporters about the pilot program to try to ensure that transcripts were not prepared unless the case did not settle in mediation.

4. Mandatory participation

Mediation was mandatory for selected case types. Although an opt-out could be requested, few were granted unless there was an allegation of domestic abuse or a good argument that the case raised a precedential issue and needed a court opinion.

5. Personal participation by the parties

The pilot program was designed to ensure that parties themselves would have "voice" in the appellate process. This required clients, and not "just" their attorneys, to be in attendance.

The court of appeals workgroup also asked for input from members of the Minnesota American Academy of Matrimonial Lawyers (MAAML) as the program design was developed. At a conference of the MAAML, members of this group made the following suggestions for the pilot program that were ultimately accepted by the workgroup:

- The availability of mediators with different styles/approaches;⁵⁵

55. No one mediation approach (facilitative, evaluative, transformative, etc.) was privileged for the pilot program. The pilot favored a system of allowing clients and attorneys some choice based on their reading of mediator qualifications. The administrator, after a review of the filings, selected five mediator names (based on style, skills set, geography, knowledge base, mediator case preferences and the court's desire to spread cases to all mediators) to send to attorneys and pro se parties. Each side ranked the names on a Mediator Selection Form used by the court to assign the mediator. *See infra* app. A.

- Mediators should be paid;⁵⁶
- Screening for domestic abuse;⁵⁷
- Protection for confidentiality under Rule 114;⁵⁸
- A sliding fee scale, with consideration for *in forma pauperis* clients;⁵⁹
- A system by which cases would keep their “place in line” if mediation was not successful,⁶⁰ and
- An evaluation of the pilot program before embarking on rules changes for the program.⁶¹

In her training, Dana Curtis suggested that the pilot program incorporate pre-mediation phone calls between the assigned mediator and the attorneys or pro se parties. This program design suggestion was also accepted by the workgroup. It was hoped that this practice would give the attorneys and pro se parties an opportunity to fully understand the mediation process being followed and provide them enough time to inform the mediator about their case.

b. The Evaluation Plan

The Court of Appeals approved the basic design of the pilot program in January 2008. A State Justice Institute (SJI) grant for program implementation and evaluation⁶² was approved in June 2008 and the pilot program began in September 2008.

The Court of Appeals workgroup developed the following specific objectives for the pilot program:

- Increase Efficiency
- Encourage Voluntary Settlement

56. There was never any suggestion that the program should be a pro bono effort on the part of the mediators. Although some jurisdictions have used this approach, Minnesota has always supported a market-based approach to mediator compensation. Barbara McAdoo, *The Minnesota ADR Experience: Exploration to Institutionalization*, 12 HAMLIN J. PUB. L. & POL’Y 65, 86 (“The fee [for ADR] ‘shall be set by the marketplace,’ and will be paid by the parties, usually on an equal basis.”).

57. Allegations of domestic abuse made a case automatically opted-out of the program. The AMA, the MCM and the mediators also provided input on any case that needed to be returned to the court docket because of domestic abuse issues. MINNESOTA EVALUATION REPORT, *supra* note 50, at 6, 7.

58. Minnesota Rule 114 rules on confidentiality were in operation for the pilot program. See MINN. R. GEN. PRAC. 114.08 (2008).

59. The mediators suggested the adoption of a sliding fee scale, and also a flat-fee of \$25.00 for parties who proceed *in forma pauperis*. Each side’s fees were set separately. Because the mediators did not want to work for low hourly rates while their attorney-colleagues were billing full rates, the mediators proposed that the court also look at the attorneys’ hourly rates. This resulted in the adoption of a policy whereby fees were based on the sliding fee scale, or one-half of the individual client’s attorney’s rate—whichever was higher. See *infra* app. A & tbl.1.

60. If the case did not settle in mediation, the Court of Appeals ordered the case back into the appellate process at the same “place in line,” to be heard as if mediation had not occurred. MINNESOTA EVALUATION REPORT, *supra* note 50, at 6.

61. The court applied for and received a small State Justice Institute grant both for basic implementation funds and to ensure that the pilot would be evaluated. *Id.* at 6, 10.

62. The funds available for the evaluation were minimal but allowed for basic data collection and the development and analysis of participant surveys. *Id.* at 10.

- Enhance Litigant Satisfaction
- Reduce Cost to Litigants and Court
- Reduce Conflict Levels.

A data collection plan for the evaluation of these objectives was developed by the author⁶³ with input particularly from Aimee Gourlay at the Mediation Center, Judge Lansing, and Craig Hagensick, a Research Analyst for the Minnesota Judicial Branch. It was decided that basic quantitative data (contained in court records or administrative records developed for the pilot program) would be augmented by information collected in qualitative surveys mailed to attorneys and clients in control and experimental groups. The control group was populated by litigants who had experienced an appellate court decision on a family case (the same case types as those in the mediation pilot program) in summer 2008.⁶⁴ The experimental group was comprised of the attorneys and clients who participated in the mediation pilot program. The plan for the evaluation, discussed by each objective, was as follows:

Increase Efficiency

Efficiency was evaluated using three approaches. First, routine court records were examined to determine the time to disposition for control and experimental groups. Second, a survey question was developed to pinpoint whether global settlement was achieved in mediation. Third, other survey questions for control and experimental groups were developed to ask about satisfaction with the timing of the court decision or mediation.

Encourage Voluntary Settlement

Given that the work group had not defined any criteria for achievement of this program objective, several methods were used to evaluate whether voluntary settlements were encouraged by the pilot program. First, input from the court was solicited to determine appellate settlements historically. Second, mediation and court records were created to track settlement rates in mediation. Third, survey questions were developed to explore party and attorney satisfaction and specifically whether these were affected by settlement of the case, and also whether settlements were seen as durable and fair. Finally, another survey question explored mediator techniques that may have contributed to the settlement process.

Enhance Litigant Satisfaction

Litigant satisfaction with both process and outcome was measured similarly in survey questions for both control and experimental groups.

Reduce Cost to Litigants and the Court

63. During the winter and spring of 2008, the author's ADR Program Design and Evaluation class at Hamline University School of Law worked to develop drafts of potential surveys for attorneys and clients.

64. Craig Hagensick, research analyst for the court, generated the list of attorneys and clients from COA data.

Cost reduction for litigants was evaluated through survey questions to lawyers designed to estimate client savings (or not) from the use of mediation; and a determination about cost savings for the court was derived primarily from interviews with court personnel.

Reduce Conflict Levels

To evaluate the reduction in conflict levels for litigants, survey questions asked for qualitative information such as:

- Was the agreement fair, complete, and/or durable?
- What was the reason for settlement (e.g. was it better for the children)?
- Were parenting abilities, the relationship with the other party, and relationships with children affected more by court rulings or mediation?

*c. The Pilot Program Evaluation Results*⁶⁵

Control group surveys were sent to 179 clients and 210 attorneys with responses received from forty-two clients (response rate of 23%) and eighty-three attorneys (response rate of 41%). Experimental surveys were sent to 258 clients and 258 attorneys with responses received from twenty-eight clients (response rate of 11%) and forty-three attorneys (17% response rate). In addition, all but one mediator participated individually in a telephone survey conducted by Hamline law student Jon Janes during December 2009.

The number of responses and the response rates, especially for the experimental surveys, cautions the interpretation of the survey data.⁶⁶ So far, however, the data suggest value in most of the program design decisions that drove the pilot program; and also raise policy questions about some others.⁶⁷ The limited data support the proposition that an appellate program can promote settlement “plus” the elements of procedural justice.

Each of the objectives for the pilot program will be examined separately below. The same data may be relevant to multiple objectives; thus, any conclusions may be relevant to more than one objective as well.

i. Increase Efficiency

Appellate family case filings for 2008 totaled 190; in 2009 case filings totaled 234. The average case timing (time to disposition) for appellate family cases in

65. The results reported here were originally developed for a report on the pilot program made to the Minnesota Court of Appeals by the author, *See* MINNESOTA EVALUATION REPORT, *supra* note 50.

66. It is always difficult to generate qualitative data from clients. For this project, direct mailings to clients met with almost no success; thereafter, mailings sent from attorneys to their clients generated the responses received; these included only six responses from clients who had reached settlement. With such low numbers, no statistical tests to examine significance levels were done to the data, and conclusions based on survey responses can only be tentative. *See supra* note 62 and accompanying text.

67. *See infra* Part III.

2008 was 293.5 days; in 2009 the average time to disposition was 231 days (with a median of 256 days).⁶⁸

There were 101 cases mediated during the sixteen-month pilot program; the settlement rate was 48%. The average case timing for the settled mediation cases was eighty-nine days (with a median of eighty days). This spans the time of filing up to the order to dismiss the case. The timing for the mediation group is even shorter when the time from filing to settlement, instead of dismissal, is counted. Additional time was needed to finish paperwork and report to the court, and this sometimes added significant time to the reported dismissal date.

The potential for family appellate mediation to increase efficiency when cases settle in mediation is clearly established by the quantitative data in the Minnesota research.⁶⁹

ii. Encourage Voluntary Settlement

Research in ADR has generally concluded that success begets success. Lawyers who initially oppose mandatory programs become true believers who often recommend the use of mediation to their clients after these lawyers experience success in mediation themselves.⁷⁰ Thus, the very fact that the pilot program happened, with a settlement rate of 48%, should encourage the use of mediation in the future. In fact, it is likely that future mediations will result in an even better settlement rate.⁷¹

Those who advocate for mediation also point to several characteristics of the process that undergird its success and thus encourage voluntary settlements. These include: 1) the potential for complete and durable settlements; and 2) mediator engagement with parties to help them overcome impediments to settlement and explore creative solutions that they are unlikely to receive in court decisions.⁷²

68. Court and program administrative records are on file with the author. Craig Hagensick, research analyst at the court, reports that although 25% of cases filed on appeal usually resolve prior to a court decision, the bulk of these dismissals are for cases not filed correctly and not because of settlement. No exact data is available. E-mail from Craig Hagensick, research analyst for the Minnesota Court of Appeals, to Author (Apr. 27, 2010) (on file with author).

69. Because cases were ordered back in line if the case did not settle, the time to disposition for these cases was not affected by the mediation detour. Telephone Conversation with Craig Hagensick, research analyst for the Minnesota Court of Appeals (Jan. 28, 2010).

70. Roselle L. Wissler, *Attorneys' Use of ADR Is Crucial to Their Willingness to Recommend it to Clients*, 6 DISP. RESOL. MAG. 36, 36 (2000) ("The factor that had by far the greatest impact on attorneys' advising their clients to try mediation . . . was their having been counsel in a case that used that particular procedure.").

71. In most mediation programs the settlement rates go up as mediators gain experience with mediation. See Jessica Pearson & Nancy Thoennes, CTR. FOR POLICY RESEARCH, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 429, 436 (Jay Folberg & Ann Milne eds., Guilford Press 1988) (citing empirical evidence revealing that outcomes greatly improved for mediators who handled six or more cases); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 678-79 (2002) (finding training had no impact on mediator settlement rates, but experience did have an impact on settlement rates); see also *infra* note 142.

72. See Lela P. Love & Joseph B. Stulberg, *The Uses of Mediation* in *THE NEGOTIATOR'S FIELDBOOK* 573, 573-79 (ABA Publishing 2006); and practically every article ever written about mediation.

The survey data suggest that attorney respondents from the pilot program experienced both of these.

a. Complete and durable settlements

In the control and experimental surveys, respondents were asked the same Yes-No opinion questions about the appellate decision or mediation agreement. Although the response numbers are low, Table 1 below represents answers from lawyers whose cases settled in mediation and lawyers who received an appellate court decision (experimental client response numbers were too low to compare on this question):

Table 1

Attorney affirmative ("yes") responses	<i>Mediation (Agreements Reached) (n=17)</i>	Court Decision (n=83)
Agreement/decision is realistic	100% yes	60% yes
Agreement/decision is one that will last⁷³	100% yes	50% yes
Agreement/decision is clear	94% yes	78% yes
Agreement/decision is complete	94% yes	76% yes
Agreement/decision is fair	88% yes	69% yes
Agreement/decision resolves the real issues between the parties⁷⁴	65% yes	38% yes⁷⁵

Table 1 above is evidence that attorneys believe that mediation settlements are complete and durable; and that attorneys experiencing a court decision are considerably less sure that the decision will last or that it will resolve the real issues between the parties. In addition, in a survey question to control group attorneys asking about the conclusion of the regular appellate process, 28% of the res-

73. Emphasis added.

74. Emphasis added.

75. This is not surprising at the appellate level where a narrow issue of law often predominates.

pondents indicated that the result of the appellate court decision was to remand the case to the district court. Obviously, this means that the case is far from over following the appellate court decision.⁷⁶ Comments from the experimental surveys illustrate why attorneys find the mediation process to be valuable on this issue:⁷⁷

“. . . [S]ettlement was final but appeal would only result in a remand.”

“If we hadn’t resolved it the way we did, there were sure to be further post decree motions and further litigation.”

“[The mediation] allowed the parties to think in real terms about the reality of the outcomes which may result from appeal and the length of the appeal process.”

b. Creative solutions and mediator techniques in mediation

During mediation sessions it is possible to explore solutions that would never be possible in a court decision. Moreover, mediators can utilize techniques, e.g., the caucus, reality testing, and mediator suggestions, to get past client “barriers”⁷⁸ to resolution. Attorneys who answered a survey question about what contributed to their mediation agreement chose the following answers:⁷⁹

“The mediator used separate meetings (caucused) with each side.” (82% of responses)

“We explored solutions that wouldn’t have been likely in a court decision.” (76% of responses)

“The mediator suggested good ideas for resolution.” (71% of responses)

76. See *supra* note 43 and surrounding text.

77. These quotes are just a few of the answers to open-ended questions by attorneys who experienced the mediation process. Summaries of the text responses to several open-ended questions from all control and experimental attorneys and clients are attached at Appendices C through G.

78. See generally Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993). Mnookin’s article discusses common barriers that keep cases from settling, including: the strategic maneuvering that occurs in negotiation as parties seek to maximize their gains; the tension between principal and agent incentives for settlement; the distrust that parties have when settlement terms are suggested by the “other” side; and the different ways that people process risks and uncertainty as they contemplate settlement. Mediators provide assistance in overcoming each of these barriers.

79. For each statement, the attorney respondent group (representing those whose cases settled) equals seventeen. The statements themselves were provided as choices in the survey. Family Law Attorneys (Experimental Group) Survey Results, Question 1 (2009) (on file with author) [hereinafter Attorney Survey Results].

“The mediator encouraged the parties to be more realistic about their respective positions.” (71% of responses)

Mediators make positive substantive and procedural contributions to the parties’ search for resolution. The agreements reached in appellate mediation are seen as realistic, fair, and durable. With some likelihood that settlement rates will stay the same or increase, the data from the Minnesota research suggest that family appellate mediation will continue to encourage voluntary settlement.

iii. Enhance litigant satisfaction

There were several questions in the control and experimental surveys designed to discern litigant satisfaction with the regular appellate process and with the mediation process. In particular, there was an almost identical eleven-part question asked of all control and experimental respondents about their satisfaction with various aspects of either the appellate or the mediation process. Table 2 compares the lawyer responses to the question and concludes that lawyers were generally somewhat or very satisfied with *both* the appellate decision-making process and the mediation process.⁸⁰ There are, however, some differences worth noting.

80. Reliance on a comparison of lawyer responses is necessary here because the experimental client response numbers are too low and too biased (only six of those who responded to the survey reached settlement). This is unfortunate since client satisfaction is a critical concern in measuring the success of mediation in fulfilling its potential to deliver an experience of procedural justice.

Note: Table 2 represents the percentages of experimental or control group lawyers who responded either somewhat satisfied (SS) or very satisfied (VS) to the question prompt. The second percentage number for each question in the experimental mediation group column represents responses only from those lawyers who settled in mediation.⁸¹

Table 2

Question # from experimental survey ⁸²	Experimental SS or VS Mediation group	Control SS or VS COA decision group
13a. Opportunity you had to present your side of the case	86% n=43 93% if settled n=14	85% n=83
13b. Fairness of the mediation process or appeal process	81% 93% if settled	85%
13c. Outcome of the mediation process or Decision of the appellate court	38% 93% if settled	59%
13d. Closure provided to your client by the mediation process or the appeal process	34% 86% if settled	45%
13e. Degree to which the mediator or the appellate judges understood the concerns of your client	79% 93% if settled	65%
13f. Degree to which the mediator was or appellate judges were knowledgeable about the issues involved in the dispute	79% 93% if settled	81%
13g. Amount of time it took between filing the appeal and the conclusion of the mediation session(s) or the decision of the court	57% 93% if settled	25%
13h. Respect you received from the mediator or the appellate judges	93% 93% if settled	91%
13i. Respect you received from non-judge court personnel	68% 90% if settled n=10	91%
13j. Opportunity you had to have the other party hear your concerns	53% 64% if settled	52%
13k. Opportunity you had to hear the other party's concerns	52% 71% if settled	60%

The most striking and expected difference between the experimental and control respondents involves the timing question (13g). Those who experienced the mediation process were considerably more satisfied with the efficiency of that process, even if their case did not settle, than those who experienced the regular

81. This was fourteen for most of the question subparts and only ten for question 13i.

82. Except that the process being tested was either mediation or an appeal to the COA, this multi-part question was the same for both surveys. It was question 11 in the control survey and question 13 in the experimental survey.

appeals process. The entire range of answers for this question is in Table 3 below.⁸³

Table 3

	Very dissatisfied	Somewhat dissatisfied	Neither D nor S	Somewhat satisfied	Very satisfied
13g. (all attorney experimental) Amount of time it took between filing the appeal and the conclusion of the mediation session(s) (n=43)	5%	12%	26%	17%	40%
11k. (all attorney control) Amount of time it took between filing the appeal and the decision of the court (n=80)	20%	29%	26%	20%	5%

The satisfaction levels pertaining to outcomes and closure for the experimental mediation group (13c and 13d on Table 2) seemed initially to be counterintuitive to mediation theory. When the data for those who *settled* in mediation are examined separately from the whole sample of experimental responses, however, the picture changes dramatically. On outcomes from the mediation process, question 13c (Table 2), 93% of the attorneys were somewhat or very satisfied when the case settled. On the closure provided by the mediation process, question 13d (Table 2), 85% of the attorneys were somewhat or very satisfied when their case settled. These percentages are considerably higher than those for the corresponding questions eliciting opinions about the regular COA process. Other answers reflected in Table 2 show smaller differences that also support mediation over the court process, but without statistical evidence, the possibility that these differences could have occurred by “chance” cannot be ruled out.⁸⁴

The fact that attorneys in the experimental group were more satisfied when cases settled played out in almost every response to the questions in Table 2. Interesting comparisons were also evident in a different series of questions asking for attorney opinions about their mediators. The questions asked for responses on

83. As seen in Table 2, the satisfaction percentages for experimental respondents on question 13g are even higher (93% compared to 57%) when cases settled in mediation. On Table 3 the question 13g data represent all respondents.

84. See Lande, *supra* note 33, at 97 (explaining the difficulty of determining true differences even with statistical tests that meet “scientific norms”). For the appellate pilot program, after conversations with Craig Hagensick, research analyst for the Minnesota Court of Appeals, and Donna Stienstra, senior researcher at the Federal Judicial Center, the author decided that the data sets for the Minnesota program were too small to perform statistical tests.

a five-point Likert scale, reduced for ease of analysis to a three-point scale (adding together the top two and bottom two selection points). Comparing the percentage of attorney responses from those whose cases settled in mediation to those whose cases did not settle in mediation yielded the following:

- To a question about getting the sides to engage in a meaningful discussion of the issues, 86% of attorneys whose cases settled in mediation (n=14) rated their mediators as *very effective*. Only 42% of attorneys whose cases did not settle in mediation (n=24) rated the mediator *very effective*; and 25% of the non-settling respondents rated the mediator as *very ineffective*.⁸⁵
- To a question about the level of trust the attorney had in the mediator, 93% of attorneys whose cases settled in mediation (n=14) responded *very high*. Only 71% of attorneys whose cases did not settle in mediation (n=24) responded *very high* to this question; and 13% of the non-settling respondents selected *very low* as their level of trust in the mediator.⁸⁶
- To a summary question asking about the mediator, 93% of attorneys whose cases settled in mediation (n=14) chose *excellent*. Again, only 71% of attorneys whose cases did not settle in mediation (n=24) chose *excellent*; 8% of the non-settling respondents rated the mediator overall to be *terrible*.⁸⁷
- Two questions illustrated high satisfaction even when a case did not settle. A high percentage of all attorney respondents rated the mediator as a good listener⁸⁸ and thought that the mediator's treatment of the parties was very fair.⁸⁹ These answers suggest evidence of an experience of procedural justice even in those mediations that did not result in settlement.⁹⁰
- Finally, a question that asked about mediator pressure to help the parties settle the case revealed answers that mirror an ongoing debate on this issue in the mediation field.⁹¹ For those who reached settlement in mediation (n=14), 57% of the attorneys were of the opinion that the mediator applied *too much pressure*. For those who did not reach settlement

85. Zero percent of those whose cases settled responded "very ineffective". Attorney Survey Results, at Question 15a.

86. Zero percent of those whose cases settled responded "very low". *Id.* at Question 15d.

87. Zero percent of those whose cases settled responded "terrible". *Id.* at Question 15f.

88. "Good listener" was selected by 93% of attorneys whose cases settled and 88% of attorneys whose cases did not settle. *Id.* at Question 15b.

89. "Very fair" was selected by 100% of attorneys whose cases settled and 88% of attorneys whose cases did not settle. *Id.* at Question 15c.

90. *See* Tyler, *supra* note 1, at 121-22, and surrounding text of notes 6-9 of this Article.

91. *See generally* Am. Bar Ass'n, *Task Force on Improving Mediation Quality: Final Report*, A.B.A. SEC. DISP. RESOL. 17 (2008), available at <http://www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf> (finding that over 98% of mediation users find persistence to be "an important, very important, or essential quality in a mediator"). Eighty percent believe that "analytical input" from the mediator during the mediation is appropriate. *Id.* at 14. *But see* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 80-81 (1998) (stating that "the line is fine between a mediator's proposing a fair outcome or the likely outcome at trial, [the authors suggest that this is too evaluative for mediation] and 'reality testing' a party's proposal or assertion about the likely court outcome.").

(n=24), 52% of the attorneys were of the opinion that the mediator was *not sufficiently forceful*. The data could be read to suggest some attorney confusion, mirrored perhaps in the mediation field, about what actions a mediator is supposed to take.⁹²

There was an interesting comparison between the client and lawyer control group answers which provides some evidence that clients may be less satisfied than their lawyers in court processes. The clients who experienced the regular appellate process were considerably less happy than their lawyers.⁹³ Adding very and somewhat satisfied categories together, although 85% of the control group attorneys were happy with the opportunity to present their case, only 44% of their clients responded that way. On fairness of the appellate process, only 55% of the control group clients were somewhat or very satisfied; the corresponding percentage for their attorneys was 88%. Finally, on respect received from judges, 96% of the control group attorneys, but only 56% of their clients, were somewhat or very satisfied.⁹⁴

Finally, it may be instructive to examine some of the text answers from all respondents in an effort to add some depth to the data about litigant satisfaction.⁹⁵

Attorney and client control group respondents were asked about the positive or negative effects of the appeal and appellate decision.

On the positive side:

From attorneys

“Provided closure; legal standard was enforced; and it was important for the parties to hear the ruling from a judge.”

From clients

“Affirmation of prior decision; common sense can sometimes prevail; resolves support issues for other children; clarity and sense of relief; closure; satisfaction”

92. This confusion is of concern to many. See Brazil, *supra* note 16, at 7.

Another peril lurks in the trend to devolve court-sponsored ADR into one hybrid but largely evaluative process. This fusion would compromise our ability to serve the full range of litigant needs and values, risk corrupting both “evaluation” and “mediation,” threaten quality control and impair the parties’ ability to predict and prepare for ADR processes. These developments, in turn, would imperil the productivity of ADR processes and undermine public confidence in their integrity.

Id.; see also Brazil, *supra* note 25, at 145 (“As predictability of process declines, so does the parties’ ability to prepare adequately, which not only jeopardizes the usefulness of the ADR event but also increases the risk that parties will feel that the program is unfair.”).

93. This is similar to earlier research in Minnesota. See Wayne Kobbervig, *Mediation of Civil Cases in Hennepin County: An Evaluation* 1, 2 (February 1991) (noting that “Litigants reported greater satisfaction with ADR processes than with judicial processing of their case . . . and [a]ttorneys were more favorable than litigants toward the traditional judicial process They also tended to substantially . . . over-estimate their clients’ satisfaction with the judicial process.”).

94. At an appellate hearing, clients are not expected to say anything and rarely, if ever, interact with the justices. Thus, this response was not unexpected. The comparisons of client and attorney data, however, speak directly to the potential for a lack of procedural justice for clients in appellate processes.

95. See *infra* Appendices D-G for a complete set of answers to text questions.

On the negative side:

From attorneys

“Additional time and expense not worth it; unhappy clients who were bitter, hateful, resentful; took too long; case remains unresolved; decreased client’s faith in the courts.”

From clients

“Attorney consensus—decision wrong: “I’ve been robbed;” 2-year case settled with 15 minute argument; time lag; delay and cost; financial despair; remanding back does not help; demeaning system; left without means to survive; emotional burden; continuing animosity and tension within family; discouraged with system overall.”

There are good, relevant and important values represented in the positive comments above. The negative comments, however, portray a decidedly unflattering picture of litigant opinions about how they experienced the court system.

Attorney and client experimental group respondents were asked about the positive or negative effects of the mediation. Because the client experimental sample in particular was heavily weighted towards clients who did not reach settlement in mediation, this bias needs to be kept in mind in reviewing the comments below.

On the positive side:

From attorneys

“Client satisfied with expedited process, shorter appeals process; more issues were settled thus ending further litigation; allowed parties to think about outcome realities”

From clients

“Learned about motivations of other party; good to have it done – should be implemented earlier in the process; gave an extra two months to write brief”

On the negative side:

From attorneys

“Extra cost for the client; non complex issues that should have settled did not because of level of animosity, stubbornness and lack of agreeability; mediators continued the mediation when there was no chance of settlement”

From clients

“Waste of time and money (attorney costs, mediator costs); no results; unwillingness of parties to cooperate; lack of flexibility; mediation slowed appeals process; no way to check the truth, punishes truthful party who is stuck with cost burden;

party manipulation of system through attorney; lost income and overall expense; mediator was not neutral and prolonged the process”

Again, there are good, relevant and important values represented in the positive comments above. The very negative reactions, however, suggest that when cases do not settle, clients feel that the process is a waste of time and money, and they are not particularly attuned to whatever experience of procedural justice is experienced. The negative comments also provide some insight into mediator training topics that need consideration.

On the objective of “enhance litigant satisfaction,” overall survey question comparisons indicate that *with settlement*, satisfaction is notably enhanced;⁹⁶ therefore, it may follow that cases should be better screened for those likely to settle and/or a more flexible opt-out policy should be adopted.⁹⁷ This conclusion, however, is at odds with the mandatory nature of the pilot program.

Attorneys and clients were asked in the survey for suggestions on how to improve the appellate mediation process. The answers from those whose cases did not settle do suggest a high level of dissatisfaction with the mandatory nature of the pilot program design.⁹⁸

From clients:

“Consider each individual case. Look at the history and listen to those involved. I knew we would resolve nothing in mediation.”

“Low cost, make optional. I knew the odds of her agreeing were next to zero and that it would cost me \$.”

“Don’t make people go through it if one or both are against it.”

96. The pilot program survey answers are consistent with other mediation research. Empirical studies have demonstrated that clients are more satisfied with mediation when they reach an agreement than when they do not reach agreement. See Chris Guthrie & James Levin, *A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute*, 13 OHIO J. ON DISP. RESOL. 885, 895-96 (1998) (stating that although parties who do not settle report high levels of satisfaction with mediation, those who do settle tend to rate mediation more favorably than those who do not); Kelly, *supra* note 19, at 29 (“[S]atisfaction is higher when clients reach agreement as opposed to no agreement.”); Thomas A. Kochan, et. al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233, 266-67 (2000) (finding a positive correlation between settlement and the perception that “the mediation was fair”); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 599 (1997) (finding that “settlement was associated with more favorable ratings of mediation on many dimensions”).

97. This does not mean a retreat from a process that values procedural justice. Rather, settlement and procedural justice should work in tandem. See Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RESOL. MAG. 8, 8 (2003) (“...settlement and justice are so important to the success and quality of court-connected mediation, they must be considered carefully in . . . court-connected mediation programs.”).

98. These quotes are from those whose cases did not settle. Fourteen attorneys (out of twenty-nine in the survey data whose cases did not settle) and twenty clients (out of twenty-one in the survey data whose cases did not settle) replied to this question. E-mail from Drew Hagquist, consultant to the appellate mediation project, to Author (Dec. 16, 2009).

“The process is an extra step and expensive one.”

“Ask to see if each party feels they would go thru [sic] with it not demand that they have to. Both attorneys could have told you this mediation would be a worthless endeavor.”

“It should be an option, not a requirement. We mediated for nearly a year before going to court. We asked to be excused from the appellate mediation because it was not a successful format and it was denied. People in this stage of divorce proceedings should know what is the best course for their situation.”

From attorneys:

“Ours was not a case conducive to mediation. I believe that this case should have been excepted from the mediation requirement.”

“This case was not well suited for mediation either geographically (closest mediator was 200 miles away) [or] procedurally. Appeal from Nice v. Peterson type hearing. Neither attorney felt the case was suited for mediation which was related to the appellate court.”

“Don’t mediate in all cases. I knew given the appellant that this would not work.”

“Be more receptive to requests to withdraw from mediation when post-referral developments render mediation inappropriate.”

“My client did not want to go to mediation again. She and her husband went . . . many times. She felt all issues had been discussed thoroughly in prior mediation. It was an added expense for her that she thought was unnecessary. In summary—where the parties have previously mediated the issue . . . they should be allowed to opt out.”

It is not easy to determine how to screen for cases most likely to settle in mediation, but given the correlation between satisfaction and settlement, it is important to consider at least three (3) policy questions addressed in data from the pilot program:

- 1) what to do about parties who have been through a prior mediation (before or during the district court process) before the case is filed at the court of appeals;
- 2) what to do about pro se parties; and
- 3) what to do about an opt-out policy in general.

Prior mediation

In the survey data set, 66% or twenty-seven of the experimental attorneys reported a prior mediation before or during the district court process. Of the twenty-seven, only seven (26%) reached agreement on all issues and seventeen (63%) did not reach any agreement in the appellate mediation. Answers related to survey questions on satisfaction show less satisfaction from those who had experienced a prior mediation, which makes sense because the overall settlement rate for that group is lower. It may be that those who have already mediated should simply be allowed to opt-out as a matter of right. Of course there is a need for more data; however, because settlement is so directly tied to litigant satisfaction overall, it will be important to continue to monitor settlement rates for cases previously mediated. At a minimum, mandating mediation for a second time in the life of a case raises a challenge to the concept of party self-determination in mediation.⁹⁹

On the telephone interviews with the mediators, the mediators felt in general (and not surprisingly) that settlement rates are not necessarily indicative of the success of mediation; and that parties should not be denied the chance to “get their life back” in mediation simply because of an earlier mediation. A suggestion was made that perhaps “new techniques” are necessary for appellate mediations. There was also recognition that many variables relate to settlement rates, although earlier failure at mediation could signal ongoing resistance from parties that is very difficult, if not impossible, to overcome in mediation.

Pro se parties¹⁰⁰

There were only twenty-one cases in the pilot program in which one or both parties were pro se. Of these, only four settled, for a settlement rate of 14%. Mediators were asked specifically in the follow-up telephone interviews to speak to the issue of pro se parties in appellate mediations. Although the mediators did not want a policy of precluding pro se parties from participating in the program, their responses, as summarized by the interviewer after the telephone calls, included the following:

*Pro se parties do not understand the law and come in as victims;
they see cases only as win-lose scenarios

99. Professor Nancy Welsh and I have advocated for policies that allow parties to opt-out of mandatory mediation programs. See Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap And Keep On Looking: Lessons From the Institutionalization of Court-Connected Mediation*, 5 NEV. L. J. 399, 426 (2004-05) (“[M]andatory mediation programs should be changed to permit parties to opt out easily”); see also McAdoo, *infra* note 118, at 425 (Without sufficient data to “prove” that mediation improves bilateral negotiated agreements, “it is imperative to allow clients and attorneys to choose whether to engage in mediation or not”). In California, although case participation was formally mandatory for the selected appeals, the Administrator generally was unwilling to submit a case if one or more parties resolutely opposed mediation. Ruvolo, *supra* note 26, at 190. TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 19.

100. Again, Professor Nancy Welsh and I have written about the “grave concerns” raised by the use of mandatory mediation for unrepresented parties. See McAdoo & Welsh, *supra* note 99, at 414.

*Perhaps pro se cases need a different approach (maybe transformative mediation¹⁰¹) with more time and hand-holding

*Perhaps the information packet for pro se parties needs beefing up

*Reality testing is ineffective because pro se parties don't know the system or the law and lack competent legal advice

*Some pro se parties are only trying to punish the other party and keep the process going

*Sometimes judges should just make rulings

Opt-out policy in general¹⁰²

Finally, the issue of mandatory mediation and opt-out requests is an important one. There were fourteen instances in which a litigant asked the court to be excused from mediation, the request was refused, and the parties *did* subsequently settle in mediation. There were seventeen instances in which a litigant asked the court to be excused from mediation, the request was refused, and the parties *did not* subsequently settle in mediation. The court documents for these thirty-one cases were examined to determine if any patterns could be discerned.

For those that settled, litigants originally wanted to opt-out for time and financial reasons; they were pessimistic about the potential success of mediation given a prior mediation or a view of the opposing party as too inflexible; and they felt the issues on appeal were outside the scope of mediation and ones that the court should decide.

For those that did not settle, there was some overlap on the reasons for seeking an opt-out, although in general it seemed that the relationship between the parties was more strained. The parties expressed exhaustion from their previous attempts at settlement; and a greater level of skepticism about the potential for success in mediation was apparent.

It may be fair to conclude that those who had better relationships with opposing parties, as well as some openness to resolving their dispute, experienced greater settlement rates after their unsuccessful attempt to opt-out of the mediation process.¹⁰³ This is an area that could benefit from more data collection.¹⁰⁴

The potential for family appellate mediation to enhance litigant satisfaction (in comparison to satisfaction with court processes) is especially clear in the Min-

101. Transformative mediation involves a focus on the improvement of inter-party communication in order to bring party "empowerment-and-recognition" to the negotiation process, i.e., the enhancement of the quality of each party's own decision-making as well as understanding of the "other" perspective. Bush, *supra* note 46, at 36.

102. See *supra* note 99.

103. Emails from Jon Janes, Hamline University law student, to Author (on file with author). This is consistent with other empirical work. See Kelly, *supra* note 19, at 28. ("However, profound distrust and a lack of fair-mindedness on the part of one or both partners more often interfere with reaching agreements (as is true in litigation processes as well).")

104. There is an obvious tie-in here to the need for a nuanced screening process in any ongoing program. See *infra* notes 119-132 and surrounding texts.

nesota research when cases settle. There is also some evidence that even in cases that do not settle, there are procedural justice advantages for litigants. The Minnesota data also raise policy issues relevant to litigant satisfaction that need more consideration pertaining to litigants who have already experienced mediation prior to filing an appeal, pro se parties, and whether opt-outs should be more generally granted.

iv. Reduce Cost to Litigants and Court

For the Litigants:¹⁰⁵

The lawyers were asked to consider what the client's total litigation costs would have been if the case had not been assigned to mediation and to indicate whether the use of mediation decreased or increased total costs to their clients (or had no effect). Thirty-eight percent of all lawyer respondents (all of those (n=14) whose cases settled in mediation, and one whose case did not settle in mediation) replied that mediation had caused costs to decrease for their clients. When asked by how much, the responses averaged \$8,155.¹⁰⁶ Presumably these savings come from the fact that there usually are no transcripts, briefs, or oral arguments when cases settle in appellate mediation.

Many specific results from the pilot program point to the *potential* for a decrease in costs for litigants when family appellate mediation is used: the decrease in time to disposition for successfully mediated cases; the possibility that issues other than just those on appeal can be resolved in mediation; and the fact that agreements are generally considered durable. The positive results for reduced costs for represented litigants when appellate cases settle are once again underscored.

When the case does not settle in mediation, however, there will usually be an increase in costs to the litigant. For nineteen attorney survey respondents whose cases did not settle and who guesstimated a dollar figure cost increase for their clients, the average increase was \$1,729.

For the Court:

Determining cost savings for the court is complicated. The court of appeals considers that, if twenty-four cases settle, this translates into one month of work saved for three judges and their staff.¹⁰⁷ Thus, for the life of the pilot program, the fact of forty-eight settlements translated into substantial savings in time (and therefore money) for the court. There are, however, one-time and ongoing costs associated with administering this program.

105. It is extremely difficult to gather valid data to support litigant cost savings, even in a well-funded, major study, which this was not. Lawyer "guesses" here should be taken as just that, nothing more, though it is not difficult to conclude with common sense that the elimination of transcripts, briefs or oral argument should save money for the client who settles in mediation.

106. This average did not include an outlier estimate of \$100,000 decrease in costs.

107. E-mail correspondence from Judge Harriet Lansing, Minnesota Court of Appeals judge and chair of the Appellate Mediation Task Force, to the Author (on file with author).

Members of the court's workgroup put in untold numbers of volunteer hours to guide the start-up of the pilot program. SJI funds provided \$30,000.00 to pay for assistance with program design and monitoring, mediator panel management, education documents and video, mediator training, mediation case management and evaluation. As required by SJI, the court of appeals contributed \$3,000.00 in direct subsidies for copying, printing, and office costs and \$12,000.00 in-kind support in the form of judicial and administrative time.¹⁰⁸

To help determine ongoing costs if the program continues, program administrators estimated that each individual mediation case takes an average of two hours of administrative time (one hour of AMA and one hour of MCM time per case), and other administrative tasks take an additional estimated ten to fifteen hours per week. These program administrative tasks include: managing the mediator panel; information management and website maintenance; liaison to the ethics board and the future rules committees; training; monitoring/evaluation; data gathering; responding to questions about the program; problem-solving overall; and scheduling workgroup meetings. It was estimated that after the start-up time and the final adoption of court rules to govern the process, at least a .5 Full Time Equivalent (FTE) to administer the program in its current format will be needed.¹⁰⁹

On the reduction of costs objective, data from the Minnesota research concludes that costs can decrease for litigants when cases are settled in mediation. There are also time and money savings for the court when cases are settled in mediation. There are, however, costs to running a quality program, especially when the program is new. Moreover, when a case is not settled in mediation, there are most likely increased costs. The "best case scenario" to reduce costs for litigants and the court is to have parties settle in mediation.

v. Reduce Conflict Levels

The goal of reducing conflict was a modest one in the pilot program. The hope in family mediation is that it puts a stop to the ongoing fight in which the parties are engaged as they cycle in and out of court over many years. The assumption is that this protracted fight is especially bad for children involved in divorce and child custody battles, whose stability is better served if mediated decisions can be reached in a shorter amount of time and through a settlement committed to by their parents. There was, however, no illusion that major behavioral change would occur because of a short, court-connected, mediation intervention.¹¹⁰

There is evidence that the goal of reducing conflict as thus modestly defined was reached in the pilot program: the mediation settlement rate was 48% and the

108. MINNESOTA EVALUATION REPORT, *supra* note 51, at 23.

109. *Id.*

110. See Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 385 (2009) (arguing that other dispute resolution processes may be preferable to mediation in certain family cases). Research suggests that major behavioral changes may be possible with therapeutic longer-term interventions. See CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 11 (American Psychological Association 2001).

agreements were reached in a considerably shorter amount of time than it would have taken to reach the point of an appellate decision. Moreover, the attorney respondents in mediation overwhelmingly judged these agreements to be complete and durable.

There also were several relevant questions about the effects of the court process (for the control group) and the mediation process (for the experimental group) on: the relationship between the parties; the ability of the parties to parent their children together; and the relationship of one party to his or her own children. On the question of the relationship between the two litigating parties, only two respondents out of thirty-five, or 7% of the experimental attorney group, surmised that mediation harmed the relationship, while 17% (seven out of forty-one attorneys) of the control group attorneys surmised that the court process harmed the relationship. On the question about abilities related to parenting their children together, only one attorney (out of thirty-five) in the experimental group (4%) surmised that these abilities got worse in mediation, while 17% of the control group attorneys (five out of thirty-one) surmised that these abilities got worse in the court process.¹¹¹ It is not a ringing endorsement of family appellate mediation to say that it is “less bad;” and, as with the rest of the survey results, there is need for more data to conclude confidently. When this data is combined with survey data overall, however, the results point in a decidedly positive direction for mediation.

The potential to reduce litigant conflict in family appellate mediation finds support in the evidence of its ability to provide settlement in an efficient manner. The addition of limited comparative evidence from the Minnesota pilot program suggests that mediation is less damaging to family relationships than litigation ending in a court decision.

IV. RECOMMENDATIONS FOR APPELLATE MEDIATION PROGRAM DESIGN¹¹²

This Article turns now to discuss the elements of program design related to program success based on, when possible, the conclusions from empirical research about appellate mediation programs. Much of the research in ADR suffers from methodological weakness, including the absence of thorough descriptions of the key program design elements implemented in the ADR process or program being studied; the lack of random case assignment; the absence of control groups for

111. The client control data (n=42) are more striking but unfortunately cannot be compared to any client experimental data because the response rate for that data set is too low. In the client control data: 37% of the respondents replied that the court process harmed the relationship; 43% reported that the relationship with children got worse; and 43% replied that parenting abilities got worse during the appellate court process. Family Law Clients Survey Results (2009), at Questions 11, 16, 17.

112. Obviously a specific appellate mediation program will sometimes include family appellate mediation cases, and sometimes not. In general, this section seeks to synthesize the “big picture” of program design elements for an appellate mediation program. To the degree that larger issues of family mediation practice are implicated in family appellate cases, e.g., (1) which model of mediation promotes major behavioral change; or (2) whether more options for families in court systems are needed, these questions are beyond the scope of this paper. See generally Salem, *supra* note 110 (explaining that there are a variety of alternative dispute resolution models and processes that can be effectively used in family cases).

comparison purposes; and the lack of statistical significance tests on comparative groupings.¹¹³ Unfortunately, few can afford the type of research that would correct all these weaknesses.¹¹⁴ It is true that flaws in research design and implementation make it impossible to pinpoint specific design element(s) that have contributed to program success or failure in many of the research studies on ADR. Nevertheless, this does not render all of the research useless. Program managers have to do the best they can with the information available. This may include drawing logical inferences from the research and/or sometimes just making common sense decisions about program design, while awaiting the completion of more scientific studies and advice.

After the uproar from a study critical of ADR (the study did not find valid proof to support oft-stated claims of ADR proponents), Professor Craig McEwen and Elizabeth Plapinger chided the ADR field for missing something very important:

[The study] describes one mediation program that violated most of what is known about building successful court programs. It required little training for its lawyer-mediators; settlement-empowered clients and insurers generally did not attend mediation; and the mediation sessions were often short and perfunctory Why and how do flawed program designs develop and get put into practice especially when there is considerable guidance available to avoid serious pitfalls?¹¹⁵

With this in mind, despite the admitted lack of clear empirical proof for each of the following prescriptions for successful appellate mediation programs, they draw upon the “considerable guidance” available, including the evaluation results from the Minnesota family appellate mediation pilot program.¹¹⁶

113. See BECK & SALES, *supra* note 19, at 21; KENNETH KRESSEL & DEAN G. PRUITT, *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* 400 (Jossey-Bass 1989); Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 *DISP. RESOL. MAG.* 15 *passim* (Am. Bar Ass’n 1999); Wissler, *supra* note 18, at 81.

114. Certainly we were not able to do this in Minnesota. Hopefully the descriptions of the program design elements, see *supra* Part II, are helpful and thorough. Case assignment was not strictly random although entry into mediation was essentially mandatory and not done through a screening process. There was a control group for comparison purposes, although the numbers of experimental survey responses were too low to subject them to statistical test. Importantly, this does not mean that there were no differences between the control and experimental groups; it does mean that the reliability of these differences is not at a desired “scientific” level of confidence. See Lande, *supra* note 33, at 97. Lande rightfully suggests that research should focus on “factors that program designers can adjust.” *Id.* at 93. However, this is often impossible in the political and economic environment of evaluating a mediation program. See Brazil, *supra* note 25, at 119 n.74 (acknowledging the expense and the political and policy barriers to conducting “controlled” experiments with “real cases and real litigants”).

115. Craig McEwen & Elizabeth Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, 3 *DISP. RESOL. MAG.* 10, 10 (Am. Bar Ass’n 1997).

116. This section draws on the excellent work of Ruvolo, *supra* note 26, at 201-12 (describing appellate mediation programs in several states); Becker, *supra* note 32 *passim* (describing the insights gained from the New Mexico Court of Appeals pilot mediation program); NIEMIC, *supra* note 32, at 4 (describing the details of the Federal Court appellate programs); Evans, *supra* note 25, at 280-81 (describing the key features of successful appellate mediation programs); several interviews with state court appellate program administrators conducted by the author; and the Minnesota research covered in Part III of this Article.

a. Mandatory or Voluntary?

Mandatory mediation is alive and well in many court-connected programs, and the available research documents significant settlement activity in these mandatory programs.¹¹⁷ In fact, without mandatory ADR it is unlikely that mediation would have grown to the extent it has in the United States.¹¹⁸ Voluntary trial court programs initially were not widely used, and it is not a leap to imagine the need to mandate mediation in new *appellate* programs to nudge reluctant lawyers to experience and appreciate their value.¹¹⁹ Becker discusses the fact that in an appellate process, unlike trial proceedings, few opportunities are presented for the parties to discuss settlement. Additionally, some lawyers could still be reluctant to initiate settlement negotiations, feeling vulnerable to exploitation for displaying weakness.¹²⁰

Although programs with little or no administrative support may feel the need to rely on mandatory and/or automatic random assignment of cases to mediation, a better option is to screen for cases with good settlement potential.¹²¹ Judge Evans explains the rationale for this as follows:

[F]or an [appellate] ADR program to be acceptable to lawyers and their clients, it must incorporate a screening mechanism that will result in referral of only those cases having good settlement potential; otherwise, the

117. Wissler, *supra* note 18, at 65, 71-73 (all but one program was mandatory with some opt-outs allowed; settlement rates ranged from 27% to 63%).

118. See Bobbi McAdoo, *All Rise, The Court Is in Session: What Judges Say About Court-Connected Mediation*, 22 OHIO ST. J. ON DISP. RESOL. 377, 394 (stating that mandatory ADR has gained widespread acceptance); Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 242 (2002) (stating “[m]andatory mediation programs . . . have significantly contributed to the growth of an ADR industry”); see also Linda R. Singer, *Divorce Mediation in the United States: An Overview, in THE ROLE OF MEDIATION IN DIVORCE PROCEEDINGS: A COMPARATIVE PERSPECTIVE* 11, 13 (Vt. Law Sch. 1987) (attributing the tremendous growth in family mediation to mandatory programs and not self selection); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 695-96 (2002) (finding that “attorneys who had used mandatory mediation were more likely to use mediation voluntarily in cases where it was not required”).

119. Ruvolo, *supra* note 26, at 214; McAdoo, *supra* note 118, at 394; McAdoo & Welsh, *supra* note 21, at 10 (mandatory referrals are often necessary for a new program to gain acceptance from the local bar); see also JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, EVALUATION OF THE EARLY MEDIATION PILOT PROGRAMS REPORT 29 (2004) (voluntary program had higher use because of judicial encouragement and financial incentive to use the court’s program; and mandatory programs had higher settlements when party preferences were taken into account before being ordered into mediation); Brazil, *supra* note 25, at 146.

Once the ADR learning curve has declined, we need to be sure that our systems do not thoughtlessly force parties into ADR when it would likely not be productive for them . . . by engaging in real, open minded dialogue with litigants to determine what they need and whether there is a real prospect that they would benefit from a referral to ADR the court encourages respect for itself and a perception that it understands itself as fundamentally a service institution.

Id.

120. Becker, *supra* note 32, at 375.

121. See TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 14; see also Hanson & Becker, *supra* note 32, at 172 (New Mexico program started with random assignment and changed to screening of cases). Hawaii also started with random assignment and changed to screening. Ruvolo, *supra* 26, at 211. Michigan has a case screening system. *Id.* at 210.

parties and their counsel may view the program as an unnecessary waste of their time, money, and effort.¹²²

A “screening mechanism” to find cases with settlement potential suggests the existence of a proven screening tool; like trial court mediation, “bright line” screening criteria elude detection.¹²³ Program administrators in many states have, however, developed criteria based on the contours of individual program operation. For example, in California, the

[f]actors considered in assigning cases to mediation included the identification of the parties, the subject matter of the appeal, the source of the judgment, whether there were ADR processes before the appeal, whether the case involved issues of first impression, and whether there was an ongoing relationship between the parties.¹²⁴

The Oregon program selection criteria includes:

[T]he willingness of parties to engage in mediation, the assessment by counsel as to the potential of the case for settlement, the extent to which the subject of the litigation involved an industry wide practice, the need to rely on statutory interpretation to resolve the case, and the strength of existing applicable precedent to decide the appeal.¹²⁵

Rule 3 of the Alabama Rules of Appellate Mediation, Referral to Mediation, states that “selection of cases for mediation is based on the administrator’s determination that the case should be referred to mediation after reviewing the facts, the order appealed from, and the standard of review the appellate court will employ.”¹²⁶ Celeste Sabel, the appellate mediation administrator of the Alabama Supreme Court, acknowledged that this rule allows for a great deal of discretion once it is determined that the case is a “civil case with all parties represented by counsel.”¹²⁷ Sabel indicated that there are a number of case types she typically might not send to mediation: statute of limitations or immunity; cases in which the parties are particularly hostile to each other (e.g., boundary and probate were mentioned); and appeals from summary judgment, even though she always asks

122. Evans, *supra* note 25, at 285. There is concrete evidence that attorneys have higher opinions on almost every satisfaction scale when cases settle in mediation (*see supra* tbl.2); and their opinions of mediators are considerably better when cases settle (*see supra* notes 85-87 and surrounding text). It follows that litigants who are ordered into mediation, not allowed to opt-out, and do not experience case settlement, will not be as satisfied with the mediation process.

123. Evans, *supra* note 25, at 286. *But see* Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch’s Family Civil Intake Screen*, 27 PACE L. REV. 741, 746 (2007) (describing the successful pilot of a criteria-based screening tool to direct parties to the correct ADR process); Salem, *supra* note 110.

124. Ruvolo, *supra* note 26, at 190.

125. *Id.* at 202.

126. ALA. R. APP. MED. 3(a) (2009), available at <http://judicial.alabama.gov/mediation/rules.pdf>, (last visited Sept. 16, 2010)

127. E-mail from Celeste Sabel, appellate mediation administrator, Supreme Court of Alabama, to Author (April 9, 2010, 11:16 a.m. CST) (on file with author) (Alabama does not mediate pro se cases at the appellate level).

for confidential information from the parties to gauge their attitudes towards each other and towards mediation.¹²⁸

Erica Bianchi-Jones, the administrator of the Arizona Appellate program, indicates that she considers the following factors as favoring mediation when she screens for appropriate cases: the existence of an ongoing relationship or a case in which the amount in controversy is small. If one or both parties are pro se; if medical malpractice is involved; or if a state agency is the defendant, it is less likely that mediation will be ordered.¹²⁹ Arizona also does not mediate custody cases at the appellate level because the appellate judges feel that the trial courts are “in the trenches” with the parties and know better what to do with these cases.¹³⁰

Finally, the case selection criteria for a program now disbanded in the First District Court of Appeal in Florida emphasized a concentration on cases that were very time and work intensive for the judges and their staffs. About this program Donna Riselli wrote:

Typically, cases that are subject to a competent substantial evidence or abuse of discretion standard of review are selected for mandatory participation in the appellate mediation process, since their determination is extremely work-intensive for the appellate court yet usually results in affirmance of the decision of the lower tribunal, often without an opinion.¹³¹

Without a screening mechanism, mandatory programs should have an opt-out procedure for those litigants who do not wish to use mediation. Success at the appellate level requires party motivation to engage in productive settlement discussions.¹³² At a minimum, program administrators should ask questions of lawyers and parties to gauge their willingness to negotiate as part of a screening protocol.¹³³ This seems especially important when party costs are quite certain to increase if there is no settlement in an appellate mediation. Parties also should be allowed to opt-in to mediation if the screening procedures of a voluntary program do not initially give them an option to participate in the program.¹³⁴

128. *Id.* Rebecca Oates, administrator for the Alabama Court of Civil Appeals, indicates case types that she does not send to mediation include “juvenile cases, adoptions, commitments, purely child custody and most state agency cases.” E-mail from Rebecca Oates to Author (April 20, 2010, 11:14 a.m. CST) (on file with author).

129. Telephone Interview with Erica Bianchi-Jones, settlement conference attorney for the Arizona Appellate Mediation Program (Feb. 18, 2009).

130. *Id.*

131. Riselli, *supra* note 42, at 59.

132. The Minnesota research illustrates the irritation felt by some litigants ordered to mediation. See *supra* pp. 19-29. See also Brazil, *supra* note 25, at 146 n.133 (noting risks described to him by Sharon Press when lawyers felt that ADR was not appropriate but they went “through the ADR motions anyway because . . . the court would not excuse them from participation even if they made a detailed and good faith showing in support of such a request.”).

133. See *supra* note 99.

134. Michigan, like many states, allows parties to request inclusion if they are not otherwise selected for mediation. Ruvolo, *supra* note 26, at 209.

b. Parties with Authority at Mediation

Although some question whether clients are needed at mediations, the better course for substantive reasons, as well as those of procedural justice, is for the clients to be in attendance. Judge Evans advises that a mediation referral order should state “that all parties and their representatives will be required to attend the process and, if appropriate, that if any parties are corporate entities, their corporate representatives must be individuals with adequate authority to negotiate a settlement.”¹³⁵ California allows for sanctions if no authorized *party* representative attends mediation because the likelihood of settlement was found to be reduced when parties were not personally at the mediation.¹³⁶ Most mediation advocates view the attendance of clients at mediation as very basic to the operation of good mediation.¹³⁷

c. Support from the Bench and the Bar

It may be unclear exactly how one quantifies the effect of a supportive Bench and Bar on a successful ADR program. Its importance, however, is underscored in every bit of prescriptive advice on court-connected programs.¹³⁸ A National Center for State Courts archived web page on appellate mediation conveys this important point as follows: “With a chief judge or justice conveying interest in and support for mediation, attorneys take mediation seriously. . . .”¹³⁹ In Minnesota, development of web sites, videos and attendance at relevant local Continuing Legal Education programs were tangible activities undertaken by the court to help build knowledge about and support for the appellate mediation pilot program.

135. Evans, *supra* note 25, at 290. *But see* Becker, *supra* note 32, at 375 (“the lawyers must feel comfortable with the process in order for it to be successful and . . . 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.”) Becker goes on to say:

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.

Id. at 379.

136. Ruvolo, *supra* note 26, at 197.

137. *The Thinning Vision*, *supra* note 10, at 25 (lamenting that mediation’s vision to promote active party participation and control has morphed into a process in which sometimes clients do not appear, or, if they appear, it is in a subordinate role to their attorneys); *see also* DAVID C. STEELMAN & JERRY GOLDMAN, *THE SETTLEMENT CONFERENCE: EXPERIMENTING WITH APPELLATE JUSTICE*, NATIONAL CENTER FOR STATE COURTS, FINAL REPORT 133 (1986) (even pre-argument settlement programs are more successful with client attendance: “The presence of a client would presumably bring factors other than legal issues to bear on the consideration of a case, such as the business concerns of a merchant or the emotional concerns of a party to domestic relations litigation.”).

138. McAdoo & Welsh, *supra* note 99 at 405-25; *see also* McAdoo & Welsh, *supra* note 21, at 9-10; *see generally* Nancy A. Welsh & Bobbi McAdoo, *The ABCs of ADR: Making ADR Work in Your Court System*, 37 *JUDGES’ J.* 11 (1998) (explaining the importance of garnering support from informed attorneys and judges when implementing an alternative dispute resolution program).

139. National Center for State Courts, *Appellate ADR: FAQs*, <http://www.ncsconline.org/WC/CourTopics/FAQs.asp?topic=ADRApp> (last visited July 11, 2009); *see also* Becker, *supra* note 32, at 371.

d. Trained and Experienced Mediators

Appellate mediation is different from trial court mediation, most clearly in the fact that there is already a decision that has been reached in the case.¹⁴⁰ In Minnesota, the twelve mediators trained for the pilot program were all lawyers with significant experience as family law mediators at the trial court level. At the conclusion of the pilot program, they were interviewed about differences they experienced between trial court and appellate court family mediation. Several of their responses suggest it is important to have at least a minimum level of legal knowledge:

Mediation is more about legal positions instead of personal issues at the appellate level because the case has already been through the courts once.

Different because there are narrower issues on appeal and less room for ideas outside of the issues on appeal.

Lawyers are always at the table in appellate mediations; not always the case in district court mediations; more polarized environment.

Losers often feel that the trial court was wrong and will fight through mediation.¹⁴¹

Judge Ruvolo succinctly summarizes his view of the key training needs for appellate mediators: "Mediators who are experienced with pretrial disputes must learn the appellate process, the standards of appellate review, and the risks and costs of appeal. Conversely, appellate specialists must learn the principles and skills of mediation."¹⁴² Although empirical work does not always support the salutary effect of training on the number of mediation settlements, empirical studies have concluded that mediators *with experience* can mean the difference be-

140. See generally Evans, *supra* note 25. The intense debate about mediator qualifications in the mediation field at large (lawyer v. non-lawyer; judge v. non-judge) is not heard much in discussion about appellate mediation. Perhaps when an appellate caseload includes, for instance, family cases, the same rationale for using professionals other than just lawyers as mediators in the trial court should apply. Andrew Schepard, *Divorce, Custody and Visitation*, in ADR HANDBOOK FOR JUDGES 89, 107-08 (Donna Stienstra & Susan M. Yates eds., Am. Bar Ass'n 2004) (outlining qualifications and training for mediators). Nevertheless, given the nature of appellate practice and the legal standards of review, it is fair to say that the large preponderance of mediators in appellate programs is likely to be lawyers; see also Wissler, *supra* note 18, at 73 (showing that only one program used non-lawyers).

141. The mediator interview responses are at Appendix C. They suggest the added difficulties inherent in appellate mediation. In turn, this suggests the importance of adequate training to adjust to these realities.

142. TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 20. Judge Ruvolo lists the principle subjects covered in appellate training as:

a comparison of the appellate process and the mediation process; standards of appellate review; reversal rates; program rules; ethical standards for mediators; confidentiality; negotiated problem solving; communication skills; risk analysis; structuring the mediation; understanding the dispute from each party's perspective; defining problems to be solved; caucusing; generating and testing options; reaching resolution; and drafting a memorandum of understanding.

Id. at 6; see also Ruvolo, *supra* note 26, at 200 (suggesting advanced training topics for mediators).

tween success and failure for a mediation program.¹⁴³ At a minimum, an appellate program should try to ensure that mediators have a sufficient number of cases to mediate so they can continue to sharpen their appellate mediation skills.

e. Mediator Compensation

Related to the issue of trained and experienced mediators is what role, if any, mediator compensation will play in a given appellate program.¹⁴⁴ Some theorize that paid mediators are much more likely to achieve settlements than unpaid mediators.¹⁴⁵ This is the “effort justification” theory: “the more you pay for something, the more you value it.”¹⁴⁶ When parties are forced to pay for mediation, settlement is more likely simply because the parties have incurred expense.

Another argument for the use of paid mediators is that “court reliance on volunteer mediators inhibits the development of a pool of qualified mediators who will make a professional commitment to the work.”¹⁴⁷ This presupposes that paid mediators take their work more seriously and will put more effort into achieving settlement than unpaid mediators. Another twist to the compensation issue is whether the mediators should be judges (assuming of course that the judge who mediates the case will not sit on the panel hearing the appeal).¹⁴⁸

Empirical studies have produced mixed results about the effect of compensation on settlement rates. A study of three court-connected mediation programs in Ohio produced no difference in settlement rates between a free mediation program and a party-paid program.¹⁴⁹ A survey of family mediators found that mediators

143. See Wissler, *supra* note 70, at 678-79 (finding that training had no impact on mediator settlement rates, but experience did have an impact on settlement rates); Kelly, *supra* note 19, at 28 (“Mediation appears to work with angry clients and sometimes for those with serious psychological and family problems. What is required are experienced and trained mediators.”); Thomas A. Kochan & Todd Jick, *The Public Sector Mediation Process: A Theory and Empirical Examination*, 22 J. CONFLICT RESOL. 209, 224 tbl.2 (1978) (showing that mediator experience was the better predictor of settlement); Bobbi McAdoo et al., *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, 9 DISP. RESOL. MAG. 8, 10 (2003) (stating that mediation experience is empirically linked to higher rates of settlement). Judge Ruvolo focuses on mediator attributes that serve as the best predictors of a mediator’s ability to settle cases: “(1) the mediator’s determination to achieve positive results, (2) the mediator’s legal experience in appellate procedure and the substantive area of law involved in the assigned case, and (3) experience and training in mediation.” Ruvolo, *supra* note 26, at 222.

144. Of course both of these issues relate to program costs for litigants. Although Judge Evans advocated for public funding of court-administered ADR programs, see Evans, *supra* note 25, at 293, this is not likely for state court programs in these economic times. Florida is an example of a court program that started out with staff mediators but changed to a program of outside mediators for cost reasons. Telephone call with Sharon Press, then the director of the Florida Office of Dispute Resolution (Feb. 15, 2009).

145. See Jeff Kichaven, *Pay More and Resolve Cases?: The Value Issue in Court Mediation*, 23 ALTERNATIVES TO HIGH COST LITIG. 177, 188 (2005).

146. *Id.* at 188.

147. Barbara A. Phillips, *Mediation: Did We Get It Wrong?*, 33 WILLAMETTE L. REV. 649, 682 (1997).

148. Becker outlines the advantages and disadvantages of different types of mediators (judges, volunteers, or staff). Becker, *supra* note 32, at 372-73. Becker’s team decided that a staff appellate mediator would avoid the major disadvantages of using either judge or volunteer mediators.

149. Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN’S L. REV. 375, 454 (1999).

who charged fees indicated higher settlement rates than mediators who did not.¹⁵⁰ Judge Ruvolo concludes that there is no evidence that a single type of mediator (in-house, paid, or volunteer) produces better mediation results.¹⁵¹ This issue is intertwined with issues of the local legal culture that supports the mediation program.¹⁵² Further research is needed in order to make an informed decision about whether mediator compensation and/or type of mediator affects the success of an appellate mediation program.¹⁵³

f. Staff Support

An ADR office administrator can perform many key duties for an appellate program: screen cases for ADR potential; ensure that all necessary paperwork is accomplished to refer cases to mediation, and either dismiss or reinstate cases depending on mediation outcomes; provide a point of contact for questions and to report potential complaints, particularly if pro se parties are involved; monitor and evaluate the program's results; provide ongoing training when necessary; and provide oversight and recommendations for changes to the program based on operational data. Once again, Judge Ruvolo provides a succinct summary:

It is imperative that any court system contemplating the implementation of an appellate mediation program set aside funds necessary to hire and retain at least a part-time program administrator. The work needed to design, implement, operate, and collect data for an ADR program successfully cannot be minimized. Each established, reputable mediation program incorporates this feature.¹⁵⁴

g. Early in the Process

When mediation occurs early, the savings for litigants (eliminating transcripts and briefs especially) and the court (eliminating conferences, oral argument, and opinion writing) can be great.¹⁵⁵ In addition, when early settlement occurs, the hoped-for reduction in appellate court case loads is possible.

150. Edward Kruk, *Practice Issues, Strategies, and Models: The Current State of the Art of Family Mediation*, 36 FAM. & CONCILIATION CTS. REV. 195, 199 (1998).

151. Ruvolo, *supra* note 26, at 222

152. Welsh & McAdoo, *supra* note 138, at 15 (explaining that at the trial court level, “[t]he different cultures, personalities, and practices of each district court have a huge impact on the ease or difficulty of institutionalizing ADR”).

153. Wissler, *supra* note 18, at 73 (most appellate mediation was offered for free; the mediators were mostly employed by the courts; and only two were partially or fully pro bono).

154. Ruvolo, *supra* note 26, at 215; *see also* Nicole L. Waters & Michael Sweiker, *Efficient and Successful ADR in Appellate Courts: What Matters Most?*, 62 DISP. RESOL. J. 42, 52 (2007) (“[S]uccessful resolutions are achieved more often in court-sponsored ADR programs in which the court commits to overseeing the program.”).

155. Ruvolo, *supra* note 26, at 220 (“Every step in the appellate process brings added cost.”); NIEMIC, *supra* note 32, at 7 (party incentives “decrease as their briefing and oral argument preparation progresses”).

h. Guiding Precedent Already Exists

Attorneys make settlement recommendations to clients based upon an assessment of the risks they take before trial and on appeal. This advice is much more difficult to give at the appellate level if there is no controlling precedent on the issue(s) in the case. Although this does not preclude settlement at mediation, unless a party goal is to avoid harmful precedent, a case of first impression is likely to “need” an appellate court decision.¹⁵⁶

i. Each Side has Something to Win and Lose

A specific example of a good case for appellate mediation might be when there are solid cross appeals in a case. In this situation, as parties conduct their cost/benefit analyses, they are quite likely to conclude that each has something to gain (i.e., win) but perhaps, more importantly, to lose.¹⁵⁷ This case posture can push parties to better communicate what is most important to their side and thereby frame the contours of the compromise that is likely necessary to achieve their most important goals.

j. Ongoing Party Relationships

Although the absence of ongoing relationships operating as a deterrent to settlement is not clearly supported by the research, anecdotal evidence and much writing still supports the opposite (correlative) statement that when there are ongoing relationships, settlement is more likely.¹⁵⁸

k. Live Mediation Sessions

There has been much success with telephone mediation, and the issues of geography and cost make the availability of telephonic or other technology-supported mediations a necessity.¹⁵⁹ When this is the case, however, program administrators and mediators need to be especially tuned in to the need to ensure that the parties involved will have an experience of procedural justice to the greatest extent possible. Again, Judge Ruvolo summarizes this point:

156. TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 10. Both California and Oregon consider whether a precedent exists or is needed when cases are screened. *See supra* notes 124-125.

157. Telephone Interview with Erica Bianchi-Jones, Settlement Conference Attorney for the Arizona Appellate Mediation Program (Feb. 18, 2009).

158. Telephone Interview with Erica Bianchi-Jones, Settlement Conference Attorney for the Arizona Appellate Mediation Program (Feb. 18, 2009); TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 10; Ruvolo, *supra* note 26, at 218 (“[B]ecause family and probate cases involve litigants tied to each other by present or former intimate relationships they are often emotionally draining affairs . . . [Participants] are emotionally exhausted, leading many to seek an honorable way out of the dispute.”) Judge Ruvolo also mentions a category of “wasting assets” (known finite value in probate and family cases) that are good cases for settlement. *Id.*; *see also* McAdoo & Welsh, *supra* note 99, at 415 n.78-79.

159. Riselli, *supra* note 42, at 58-59; NIEMIC, *supra* note 32, at 10-11; Becker, *supra* note 32, at 369.

Nonetheless, one cannot ignore the salutary effect personal participation may have on the parties to cases selected for mediation. Involving the client directly in the process ensures that the party, who after all bears the risk and expense of appeal, has been afforded a cathartic opportunity to be heard This undoubtedly enhances public appreciation of the justice system.¹⁶⁰

*l. Minimum Disruption of Regular Appellate Process*¹⁶¹

It was very important to the Minnesota pilot program that when a case did not settle in mediation, it would move back to its “place in line” and would not be disadvantaged because of the mediation. To garner effective attorney support for appellate programs, this is the usual process that has been followed, together with power for a mediator to grant requests for necessary extensions. Becker wrote as follows:

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.¹⁶²

m. Cases with a Previous Mediation and Pro Se Cases

For each of these, more research is needed to gauge their possible impact on settlement; and for each, there could be policy issues that need consideration outside of the effect on settlement.¹⁶³ What is clear, however, is the possibility that forcing unrepresented parties into mediation at any level, or forcing represented litigants to go through a second mediation process at the appellate level, risks a negative experience of justice for the parties involved. It behooves program designers to give thoughtful consideration to both of these case categories before they are included in an appellate mediation program.¹⁶⁴

160. Ruvolo, *supra* note 26, at 224-25; *see also* McAdoo & Welsh, *supra* note 100, at 424 (“[P]arties’ perception of mediation’s process fairness are likely to suffer if court-connected mediation programs do not permit or require parties to attend mediation sessions.”).

161. *See* Ruvolo, *supra* note 26 at 186-87 (describing California practices designed to ensure minimal disruption of the appellate process).

162. Becker, *supra* note 32, at 374.

163. *See supra* pp. 27-29; TASK FORCE ON APPELLATE MEDIATION, *supra* note 32, at 10; Becker, *supra* note 32, at 373; Telephone Interview with Erica Bianchi-Jones, Settlement Conference Attorney, Ariz. Appellate Mediation Program (Feb. 18, 1998).

164. An effective opt-out option could correct for any problems caused by including these case categories. *See* Brazil, *supra* note 25, at 146.

Parties who feel forced into ADR when it has little to offer them are more likely just to go through the motions and to be perceived by the neutral and other parties as so doing. Such rituals without real prospect of reward can erode the public’s confidence in both the court and in ADR,

V. CONCLUSION

This Article advocates for sufficient fine-tuning of appellate mediation programs to ensure that the twin goals of efficiency and procedural justice are honored. They both can be achieved. Looking at the results of the evaluation of the Minnesota pilot program, the expectations for a family appellate mediation program were substantially fulfilled:

- Savings for the court occurred because of settlements in the appellate mediation program
- Time to disposition for settled cases improved dramatically; those cases that did not settle resumed their place in line in the appellate process
- Litigants whose cases settled reported dollar savings
- Parties were required to attend the mediation; their “voices” were heard
- Agreements were responsive to the “real issues” in the case; and settlements were deemed to be durable and fair

Although no one design factor of the Minnesota pilot program can be deemed to be definitively causative, the following factors together produced a successful program.¹⁶⁵

In support of the efficiency/settlement goal:

- Mediation took place early in the appellate process
- If cases did not settle, they resumed their place in line in the appellate process
- There was staff within the court, together with an outside contractor, who kept the process moving, e.g., ensuring that mediators were selected and that the mediation occurred within the time limits established; and completing the paperwork required at every step of the process

In support of the procedural fairness goal:

- The twelve mediators were all experienced in trial court mediation with a commitment to the self-determination and confidentiality inherent in good mediation practice and required by Rule 114 of the Minnesota Rules of General Practice¹⁶⁶
- Training in appellate mediation was provided
- Parties were required to attend the mediation; their “voices” were heard

and foreseeable bad experiences with ADR are not likely to encourage parties to consider its use when it really could deliver value.

Id.

165. *See supra* pp. 12-14.

166. *See* MINN. GEN. R. PRAC. 114.13 (2010).

- Party choice was honored in the ranking and selection of mediators for individual cases

A design factor in the Minnesota program not included above is that of mandatory referral to mediation. A case can be made that mandatory mediation supports efficiency (e.g., less staff resources are required to implement a mandatory program, and settlements obviously occur). Mandatory mediation, however, poses a risk to the procedural justice goals of mediation (and the self-determination that is supported by a procedurally just process).¹⁶⁷ The negative reactions of those who were forced into mediation (hardly a view of respectful treatment by the courts) suggest that a liberal opt-out procedure is needed to ensure that party “choice” (i.e., “voice”) is heard by the court system. Moreover, additional research is needed to carefully gauge the procedural justice effects of the mediation of cases involving pro se parties or those who already experienced mediation before arriving at the appeals court. Considerably lower settlement rates for these groups of litigants caution against ordering them to mediation.

An appellate mediation program committed to both efficiency and procedural justice can increase voluntary settlements which will be lasting and responsive to the real issues between parties. This can be achieved in a way that will also produce satisfied litigants. Appellate mediation represents a significant alternative choice for parties, and its use should be encouraged. With some fine-tuning to ensure that its design is tooled to make full use of its justice parameters—substantive and procedural—the appellate mediation machine can be expected to run smoothly.

167. See generally McAdoo & Welsh, *supra* note 99, at 400 (mandatory mediation promoted the institutionalization of mediation but “widespread institutionalization [of ADR] alone does not constitute success. Instead pronouncement of success should be grounded in the achievement of goals that enable institutions [the courts] to better fulfill their missions.”).

APPENDIX A
Pilot Program Implementation¹⁶⁸

This appendix will detail the course of a family appeal through the pilot mediation program.

Step-by-Step Process

1. Appeal filed.
2. Family case types that fall within the scope of the mediation pilot program are set aside by the Clerk of Appellate Court.
3. Appellate Mediation Administrator (AMA) reviews the set-aside cases for appropriateness for mediation, including flagging concerns about domestic abuse. Cases with an active “no contact” order are not referred to mediation.¹⁶⁹
4. AMA reviews case, selects five mediators who are appropriate (based on mediator style, skills set, geography, knowledge base, mediator case preferences and the court’s desire to spread cases to all mediators) based on a review of the filings.
5. AMA sends to attorneys and pro se parties:
 - a. Order for Mediation,¹⁷⁰
 - b. FAQ Sheet about Appellate Mediation;
 - c. Confidential Information Form (CIF); and the
 - d. Mediator Selection Form.
6. Parties/Attorneys return the Confidential Information and Mediator Selection Forms (ranked choices) to the Court of Appeals within two weeks. The Confidential Information Form contains information about the party’s income and attorney’s fees (to set mediator fees), and also the requests for opt-outs.
7. AMA processes requests for opt-outs. If a party does not wish to mediate because of allegations of domestic violence, an opt-out will always be granted. Opt-outs are granted only on a case-by-case basis for other reasons, including previous ADR, the precedential nature of a case, the case outcome affects an attorney malpractice claim, party lives out of state, party is in jail, etc. The AMA consults with judicial

168. Aimee Gourlay prepared this Appendix as part of the report on the pilot program to the Minnesota Court of Appeals. See MINNESOTA EVALUATION REPORT, at 7-9.

169. This paper review is not sufficient, or the only, domestic violence screening. The Appellate Mediation Administrator (AMA), the Mediation Case Manager (“MCM”) and the mediators continue to screen the cases as they move through the system.

170. The Order, including a Stay of the Appeal, is attached at Appendix B.

members of the steering committee as necessary in making decisions about requests for opt-outs.

8. Cases that successfully opt-out are ordered back into the appellate process.
9. After the AMA receives the appellant and respondent Confidential Information and Mediator Selection Forms, the case is referred to the Mediation Case Manager (MCM) at Mediation Center.
10. The MCM:
 - a. Assigns the case to a mediator based on preferences and mediator availability;
 - b. Sets the fees;
 - i. At the advice of the mediators, the pilot project adopted the sliding fee scale that is used for Early Neutral Evaluation cases in the Fourth Judicial District. Family law attorneys are accustomed to this scale.¹⁷¹ Parties pay one-half of their attorney's rate or the sliding fee scale, whichever is higher.
 - c. Schedules a pre-mediation telephone conference between the mediator and attorneys or pro se parties; and
 - d. Sends a scheduling letter and information about mediation to the attorneys or pro se parties and the mediator.
11. Mediators conduct a pre-mediation phone call with attorneys and pro se parties which covers:
 - a. The procedures to be followed;
 - b. The nature of the case;
 - c. Appropriate dates for the mediation and anticipated length of the session;
 - d. Location of the mediation;
 - e. Who will be present at the mediation session;
 - f. Any concerns about domestic abuse between the parties;
 - g. Ideas to improve the effectiveness of the mediation session or matters that could pose impediments;
 - h. Information to exchange or provide to the mediator before mediation;

171.

Gross Annual Income	Hourly Mediation Rate <u>Per Party (Appellant and Respondent fees determined separately)</u>
Party with IFP Status	\$25.00 FLAT FEE
\$0 - \$50,000	\$25.00
\$50,000 - \$75,000	\$37.50
\$75,000 - \$100,000	\$50.00
\$100,000 - \$125,000	\$75.00
\$125,000 - \$250,000	\$125.00

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- i. Any questions about how the mediator conducts mediations; and
- j. Any questions about the mediation program.

12. Mediators schedule the mediation session.

13. Mediation sessions are generally one-time only. If participants require additional time for more mediation sessions or other reasons, the mediator may request additional time to complete the process on behalf of the participants. The court will not approve extensions without a revised deadline date for completion.

14. Mediator informs the AMA after mediation whether or not the case settled.

15. The AMA assists with disposition of the case:

- a. The AMA notifies the district court to expect a settlement document. At the request of Judge Lansing and Chief Judge Toussaint, district court judges agreed to review and approve/not approve settlements within 30 days. After the settlement is approved, the Court of Appeals dismisses the case.
- b. Parties also may agree in mediation to a voluntary dismissal of the case.
- c. If a case does not settle, the Court of Appeals orders the case back into the appellate process at the same "place in line," to be heard as if mediation had not occurred.

APPENDIX B:
Order of Referral to Mediation

STATE OF MINNESOTA

IN COURT OF APPEALS

[Case Title]

ORDER

#A[case number]

The above case, having been reviewed by the appellate mediation administrator, is hereby referred to the family appellate mediation pilot program.

IT IS HEREBY ORDERED:

1. The above-referenced case is referred to mediation.
2. Within 2 weeks from the date of this order, the parties shall submit the documents listed below to the Appellate Mediation Office, #335A, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, MN 55155. ALL INFORMATION OBTAINED FOR AND THROUGH THE MEDIATION PROCESS, WILL REMAIN CONFIDENTIAL AND WILL NOT BECOME PART OF THE OFFICIAL COURT RECORDS.
 - a. Selection of Mediator Form.
 - b. Confidential Information Form.
3. The Court will issue a letter appointing the mediator. Attorneys and pro se parties will be contacted by the mediation office to schedule a mediation planning telephone call. Parties shall begin mediation as soon as possible and complete mediation within 90 days from the date of this order.
4. The parties shall submit mediation statements if the mediator so requests.
5. Parties with full settlement authority and counsel are required to attend mediation sessions. If a party refuses to attend a mediation session

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or sessions, unreasonably delays the scheduling of mediation, or otherwise unreasonably impedes the conduct of the appellate mediation program, and the case is returned to the appellate docket as a result of those actions, the court may impose sanctions. NOTE THAT SCHEDULING IS NOT CONSIDERED PART OF THE MEDIATION PROCESS AND IS NOT SUBJECT TO THE CONFIDENTIALITY PROVISION.

6. Each party shall appear at the mediation session or sessions. A party is deemed to appear at a mediation session if the following persons are physically present:

- a. The party or its representative having full authority to settle without further consultation; and
- b. The party's counsel of record, if any.

7. All appellate mediation sessions shall be confidential as provided in Minn. R. Gen. Pract. 114. Actions listed in #5 above, are not confidential and shall be reported to the court for possible sanctions. They shall not, however, become part of the court file.

8. The appellate process, including the times for preparing and transmitting the record, requesting transcripts, and filing briefs in this case, is stayed pending further order of this court. THE TIME FOR FILING ANY CROSS APPEAL OR A SEPARATE APPEAL IS NOT STAYED. Any deficiencies in the filing of the appeal MUST be remedied

9. THE MEDIATION SHALL BE COMPLETED WITHIN 90 DAYS FROM THE DATE OF THIS ORDER.

Dated:

BY THE COURT

Judge

**APPENDIX C:
Summary of Telephone Calls with Mediators***

Question 1: In what ways were the appellate mediations different from (or the same as) your other mediation work?

Mediator 1

- Aspects of appellate mediation very similar to normal mediation scenarios; just have different issues in appellate mediation.
- Success may be different at an appellate level versus a trial level.

Mediator 2

- Potential to reach a different decision than was made by the trial court.
- No longer have the bargaining chip of uncertainty of a court decision.
- Losers often feel that the trial court was wrong and will fight through mediation.

Mediator 3

- Attorneys are more involved in mediation and that is too bad.
- Mediation is more about legal positions instead of personal issues at the appellate level because the case has already been through the courts once.
- There is a lot of ego involvement at the appellate level, especially if the trial attorney is also the attorney at the appellate level, making mediation more difficult.

Mediator 4

- At the appellate level, there is already a winner and a loser; thus, there is a happier party and this is definitely a factor in the interaction.
- There is not really an unknown. All the issues have been heard, and there has been an outcome.

Mediator 5

- Different because there are narrower issues on appeal and less room for ideas outside of the issues on appeal.

Mediator 6

- At the appellate level, the parties have their heels dug in and they are more positional.
- Parties are sick of litigation at this point and not hesitant to express themselves; it doesn't take long to convince the parties to settle as the alternative is a continued long road of more litigation.

Mediator 7

- Lawyers are always at the table in appellate mediations; not always the case in district court mediations; more polarized environment.

Mediator 8

- Attorneys are antagonistic and always present, and they get caught up in the legal issues so that there is less room to settle using non-legal issues.

Mediator 9

- Both similar: uncertainty of outcome, which can be overcome with mediation.

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- Although decision already made at trial court level, can stress that appellate court could take a long time and parties should consider the economics of settling.

Mediator 10

- More caucus at the appellate level because opposing parties and often attorneys do not want to meet at the same table.

* Thanks to Hamline law student Jon Janes for making the telephone calls and compiling the responses

Question 2: Thinking about the techniques you use in mediation (caucus, reality testing, making suggestions, active listening) what worked and didn't in these cases?

Mediator 1

- Caucus is widely used in appellate mediation and is highly effective, as many parties have been feuding for years and it allows for separation.

Mediator 2

- Money issues are the easiest disputes to settle through mediation.
- Custody issues are the hardest dispute to handle through mediation – lots of control issues at play (people want to appeal just to explain the ruling).
- No bright line techniques to use in mediation; more about the people, and you must base your actions accordingly.

Mediator 3

- Because attorneys are present and often dominate, it is difficult to get parties involved and thinking outside the box.
- Mediators get parties to interact in many different ways—the nature of the appeals system may be to blame if there is no success.

Mediator 4

- Directive style works in these types of mediations, but pure facilitative techniques do not.
- Lots of time at the beginning should be spent understanding the needs and interests of the parties.

Mediator 5

- Reality testing with attorneys is important—different from other mediation because attorneys are entrenched; they often regret settling because then they can't go forward on appeal issues.
- Used caucus a lot in these mediations (more than usual) because attorneys and parties requested it and didn't find joint session helpful.
- A timeline for the appeals process would be helpful to offer, as parties can better understand the cost of not settling and associated delays.

Mediator 6

- Caucus works well and is necessary.
- It worked to tell parties that the attorneys will argue the fine points of law, but the easier way to resolve the matter is to settle in mediation.
- Facilitative approach does not work as well at this level—parties are more positional.

Mediator 7

- Caucus was more necessary in appellate mediation.
- Attorney presence is helpful.
- TIME is very important—needed the whole day.

Mediator 8

- Mediation at this level seems to be going back and doing what should have been done initially. Positional bargaining must be avoided.
- Having a better knowledge of the available assets in divorce cases is helpful (parties should look at income with a tax planner for example to get better understanding).
- Rarely used caucus (resists it) but it helped settle in certain cases.
- Must emphasize a client centered process (cannot focus on the law); should let the data unfold in a room and not do deposition reviews.

Mediator 9

- Used non-caucus a lot, with success at having all in the same room to re-solve issues not on appeal.
- If asked, will answer evaluative questions and may use reality testing.
- Helped to tell parties about higher “burden” at the COA level.
- Overall, used similar techniques – venting is important, let people talk and mediator listen. Also, meeting with lawyers first is helpful.

Mediator 10

- Many similar techniques used, but more evaluation needed.

Question 3: What changes would you suggest for the program beyond the pilot phase?

Mediator 1

- Change the fee structure in the future.
- Develop strict rules for what happens when a case settles (district court should lose jurisdiction over the case on appeal; need district court to sign order before case dismissed on appeal).
- Changes to the Rules of Civil Appellate Procedure may be necessary.

Mediator 2

- Program worked well.
- Beneficial for any attorney to see what a third person (the mediator) considers.
- Mediation forum allows parties to do the talking and get out their frustrations; in other forums, lawyers usually do all the talking.

Mediator 3

- Get ineffective attorneys to stay home (not possible).
- Would be more effective to have two 2-hr sessions, than one 4 hour session (but this would be too expensive and much more difficult to set up).

Mediator 4

- The cases should be screened better; some cases are not really appealable and will be dismissed. These cases are easily recognizable.

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- Parties think their cases are not appropriate for mediation sometimes, and that should be considered.
- Pro se cases should be considered carefully as well (especially those in which the party had representation at the trial level and goes pro se at the appellate level).

Mediator 5

- Screening the cases is important—some of the mediated cases only had legal issues that the court should have decided, e.g. child support modifications.

Mediator 6

- Perhaps parties should get their filing fee back; it would be another carrot to hold out to the parties to encourage settlement.
- The cases should be screened more carefully.

Mediator 7

- Need for changes to the time when the clock starts and stops.
- Mediations are scheduled w/in ninety days; by the time of the conference call there are only about forty-five days left due to previous motions to get out of it, lagging court response, etc.—need more of the ninety days available.
- Court is good about extensions, but there should be a shorter time period between the time the case is filed and the conference call.

Mediator 8

- Mediators should not all be lawyers.

Mediator 9

- Really liked the initial telephone conference (sets up time, etc.).
- Too much time at the COA level before the conference; then left with a time crunch to finish everything.
- Trouble collecting fees.

Mediator 10

- Would like to be able to see the final order, to tell the next clients what to expect and to get a better idea of the actual outcome.

Question 4: There are 2 categories of cases where the settlement rate is definitely lower: pro se cases and cases in which mediation took place some earlier time in the life of the case. Do you have any suggestions or ideas about either of these areas? Should we be mediating these cases?

Mediator 1

Pro Se/Prior mediation

- Both types of cases should be mediated, as it should not matter whether there was a past failure.
- Statistics for settlement should not matter either—should still have a chance to be mediated as appellate mediation is not the same as prior mediation.

Mediator 2

Pro Se

- Understands why people go pro se and want to mediate, but people don't understand the law and come in as "victims."

- Pro se clients want to be able to control the situation and they see them as win/lose scenarios (blinded to other factors involved).
- In certain instances, judges should just make the rulings (forgo mediation).

Prior mediation

- Does not know how prior mediation in the case life affects mediation.
- In both situations, parties must know that they can only appeal on certain grounds and must learn to make concessions; they often have other agendas that one must try to unveil to get at the real issues. Mediation might be a better forum for that.

Mediator 3

Pro Se

- Pro se often out to prove themselves because, e.g., they received advice from support groups, but they lack competent legal advice about the case.
- Reality testing is not effective because pro se don't know what the system is like.
- Require parenting classes?

Prior mediation

- Animosity is really high at the appeals level (interpersonal conflict).
- Need change of heart or conscience to be successful at appellate mediation.
- Even though past mediation didn't work, should still be mediated because there is always a chance—parties still deserve a chance to get their life back.

Mediator 4

Pro Se

- Had little success with pro se cases, but definitely still try to mediate.
- Perhaps change the approach—more time and hand holding.
- Look at rate structure for pro se (if they are not paying enough, they are more dismissive).

Prior mediation

- Previous mediation—more tools at their disposal but also could be tough to deal with.
- Settlement rates are not necessarily indicative of success of mediation; the trial court decision may change at the appellate level and new things could surface.

Mediator 5

Pro Se

- May be beneficial to sit with these parties beforehand to lay out what an appeal could look like—perhaps beef up the information packet.
- Go forward with the mediation in these cases unless parties crazy, in jail, etc.

Prior mediation

- Still should mediate these cases unless straight legal issues; people often think that they won't settle and they end up being able to, especially on issues outside of the issues on appeal.
- People want to be done with the divorce process but don't know how to be—mediation affords them that closure.

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Mediator 6

Pro Se

- Limited unsuccessful experience with pro se.
- Perhaps approach them in a different way; they should not be excluded from mediation.
- Look more closely at money and job status; many can only afford to mediate for an hour and that is not enough time.

Prior mediation

- Limited experience, but can talk about process with parties, ask a lot of questions and make the necessary changes to make mediation at the appellate level more successful.
- Try new techniques to see what may work for the parties.

Mediator 7

Still should mediate both of these areas

- Unsure about effect of prior ADR experience on the parties or attorneys, but even if only 20% settled, it would be better than nothing.
- Low settlement rates could be attributable to different mediators or mounting costs or the phase of the mediation—must look at many things.
- May have accomplished something (short of settlement).

Mediator 8

Pro Se

- Unrealistic pro se clients use the courts to punish the other person or keep the process going by appealing (should assess attorney's fees on these people).
- Fees need more thought; everyone should pay something.

Prior mediation

- If following Rule 114, all cases should have been previously mediated, so don't eliminate them all.
- Parties probably didn't have a real mediator in the prior mediation.

Mediator 9

Pro Se & Prior Mediation

- Do not exclude; should require a retainer for pro se and set criteria for exclusion

Mediator 10

Pro Se

- Should be mediated, and pro se cases often are not.
- Transformative style may need to be implemented to settle these cases.
- These cases are worth putting through the program as they can have successful outcomes.

Prior mediation

- There are too many variables in these cases to assign cause for settlement rates.
- Look closer at someone with many motions, even after trial, as that may be indicative of ongoing resistance and potential lack of success.

Question 5: Is there anything else you want to add?

Mediator 1

The MN Court of Appeals Family Mediation Pilot Program is a good program.

Mediator 2

- Good Program; attorneys don't seem to like it, but people do.
- May have different lawyer from trial to appellate levels. Trial lawyers have a better grasp on the facts of the case; if they stayed with the case, there might be better outcomes.

Mediator 3

- Family bar in MN is so different at the trial and appellate levels: the appellate level is not about people or families, but about argument and laws; less conducive to good mediation.

Mediator 4

- Should have more support meetings for mediators, including more training about successful techniques at the appellate level.
- The role of lawyers should be examined. They come in with winner and loser mindsets, just like the parties and they often lose sight of family issues. There should be more lawyer education about how to behave at the appellate level and why it is important to settle.

Mediator 5

- Hard to screen these cases.
- Scheduling was the hardest part; the court cannot designate any sort of priority and it is even harder and more frustrating when attorneys can't commit due to unknown client availability.

Mediator 6

- Makes mediators better—provides a more challenging environment that requires new techniques and approaches.

Mediator 7

- Really liked the experience; appreciated training at the beginning.
- Examine the cases that settle; how is mediation making a difference? Would like to know how many settle after mediation without court involvement.

Mediator 8

- Wants to have a final roundtable discussion with all the mediators.
- Mediator can't call "bad faith" and sometimes needs to. Should have code of conduct for attorneys; need written and signed agreements.

Mediator 9

- Fees issue needs more work. When party pays fixed fee to lawyer, no disadvantage for delaying tactics. With large retainers, also disincentive to lawyers to settle.
- Overall positive reaction and pleased with the program; wants more meetings with mediators (would be helpful to share experiences) and more assistance from those in charge.

Mediator 10

- Really liked the meetings with the other mediators; quarterly meetings would be a big help.

APPENDIX D
 Summary of Attorney Control Group Text Answers
 (*'s = many responses)

Question 17 – Would mediation on appeal been helpful in resolving party issues?

YES

- Mediation at any stage is helpful.
- Lower cost and speedier results.
- Several children affected by blanket decision—mediation would allow specific solutions for each child.
- Chance to be heard—lawyers and judges do all the talking on appeal.
- Case was poorly tried and poorly managed by judge.
- Remand back to District Court is a waste of money.
- If not an additional economic burden.
- Only because COA lacked understanding of facts.
- Must have knowledgeable mediator.

NO

- Issues not suitable for mediation.**
- Parties don't have the funds.*
- No room for compromise; parties not agreeable.*
- Ingrained hostility; increased conflict.
- No trust or respect between parties.
- Extreme polarization.
- Unwilling to exhibit rational or reasonable thought.
- Parties like litigation; personalities of the parties would hinder resolution.
- Underlying emotional issues.
- Other party moved out of town.
- Domestic abuse involved.

Question 18 – What are positive/negative effects of the appeal/appellate decision?

Positive Effects:

- Provided closure; results oriented decision.*
- District court did not listen, appeals court did.
- Important for parties to hear ruling from judge.
- Provides insights for the opposing party.
- Helps other side to be more realistic.
- Legal standard enforced: child's best interest.

Negative Effects:

- Additional time and expense not worth it.*
- Could not afford additional appeals.*
- Questionable decisions by appeals court.*
- Unhappy clients; bitter, hateful, resentful.*
- Took too long for oral arguments and overall litigation.
- Case remains unresolved

- **Decreased client's faith in the courts.**
- **Judge was hostile and made up rules when the case was remanded.**
- **Blame falls on attorneys for inconsistent decisions.**
- **Attorney errors affect client outcomes.**

APPENDIX E
Summary of Client Control Group Text Answers

Question 17 – How did the appellate process affect mutual parenting?

- More stress.
- Parenting abilities never existed; stayed the same.
- Perpetuated the abuse.

Question 18 – Would mediation on appeal been helpful in resolving issues?

YES

- Very helpful, likely to have resolved issues
- Black families are being destroyed by the lower court.
- Need way to address missed items by the court.
- Unbiased and professional mediator would help.
- Helpful if the outcome of mediation is legal.
- May have addressed underlying anger and limited prolonged emotional stress.

MAYBE

- Court supported the “other” story and not facts.
- Willing to try.
- Unsure, but maybe.

NO

- Don’t trust mediation process.
- Ex-spouse is unreasonable, uncooperative, manipulative, dishonest, litigious, never satisfied (and many variants).
- Hostility and polarization between parties too great; already tried to resolve.
- Waste of time and money.
- Not possible due to substance abuse
- Unlikely due to financial situation.
- Original decisions fair, no need to revise.
- Attorneys drag it out and take too much; result is lots of money and headache.
- Need to present facts and evidence to judge—judicial authority forces parties to listen; impartial decisions carry more weight.
- Lawyers talked us out of agreement.
- Attorney would have attacked party and was uncompromising.

Question 19 – What are positive/negative effects of the appeal/appellate decision?

Positive Effects:

- Appellant validated all unsupported issues with evidence.

- Stronger bond with children.
- Affirmation of prior decision.
- Common sense can sometimes prevail.
- Resolves support issues for other children.
- Clarity; sense of relief.
- Finally over; closure.
- Sound legal arguments; satisfaction.

Negative Effects:

- Judge's decision inaccurate and unfair—displeased with outcome; need better judges.
- Attorney consensus—decision wrong; “I’ve been robbed.”
- 2 year case settled with 15 minute argument.
- Time lag; long appeals process.
- Delay and cost; financial despair.
- Length between court dates—anxious to take next step.
- Length of time it takes for judges to make decisions.
- Additional court decisions against me will be used as persuasive argument in future proceedings.
- Critical of lower court findings.
- Remanding back to same judge does not help.
- Demeaning system; left without means to survive.
- Ignore precedent; overturn previous rulings—need court reform.
- Attorneys use appeals for financial gain; legal system wins.
- More evidence was necessary.
- Emotional burden.
- Dishonest parties.
- Damage to relationship with children.
- Discouraged with system overall.
- Enforcement of decisions is a major issue; victory on paper, not in reality.
- Continuing animosity and tension within family.

APPENDIX F
Summary of Attorney Experimental Group Text Answers

Question 9 – What contributed to the agreement?

- The parties resolved their dispute on the eve of mediation.
- Additional attorney's fees and costs to parties for appellate process.
- Extenuating circumstances: e.g. client job loss resulting in unlikely child support payments, mother accepted lump sum.

Question 10 – What kept the case from full resolution?

- Issue not suitable for mediation.
- Other party unwilling to budge from the "winning" order she had from the district court.
- Other party took unreasonable position.
- One party abandoned tentative agreement.
- Attorney interference–adversarial positioning or unwilling to fully participate
- Party wanted to delay the appeal.
- Subjective opinion: case was never going to settle.

Question 21 – What positive or negative effects did mediation have on the case?

Positive Effects:

- Idea of mediation contributed to settlement before scheduled mediation.
- Client satisfied with expedited process, shorter appeals process.
- More issues were settled thus ending further litigation
- Knowledgeable, unbiased mediators.
- Allowed parties to think about outcome realities
- Attorney able to speak to and understand opposing party.
- Revealed party incentives to settle.

Negative Effects:

- Extra cost for the client.
- Delayed an already lengthy appeals process.
- Client interference: e.g. drunk opponent, disappeared from mediation; opponent held self out to be more knowledgeable than mediator and attorneys; absolute inability for parties to agree on anything
- Non-complex issues that should have settled did not because of level of animosity, stubbornness, and lack of agreeability.
- Mediators were too persistent and continued the mediation when there was no chance of settlement.

Question 22 - Suggestions for the improvement of the appellate mediation process?

(s = many responses)**

- Know when to allow parties to opt-out;** consider previous attempts, party willingness and ultimate cost if opt-out denied.
- Better screening processes—some cases not suitable for mediation.**
- Continue to use knowledgeable mediators—those who are kind and respectful, but also know the issues (both excellent and incompetent or weak mediators were mentioned).
- It was not helpful when mediator approached the case as "just numbers" and wanted parties to get to a "number."
- Mediator should focus on parties and not tell too many "war stories."
- Mediator fee should not be related to hourly fee of the party's attorney; cap mediator pay to regular rates (if they make more, might drag out the process).
- Mediations need to be identified by a case number—it was hard to tell concurrent mediations apart.
- Needs to be less of a time lag in getting cases scheduled.
- Geography should be taken into account (closest mediator 200 miles away).
- Sufficient time is needed after an unsuccessful mediation to get transcript and file briefs—it felt rushed. Attorneys need to know the schedule.
- Process and strict deadlines needed for completing final written agreement and getting it entered by court (e.g., other attorney was to prepare agreement and hasn't; no cooperation in finalizing agreement from handwritten agreement; etc.)
- To reduce client costs: keep the mediation, but scuttle the expensive paperwork to initiate the appeal (except Notice of Appeal); the bond requirement; and the professional brief printing.

APPENDIX G
Summary of Client Experimental Group Text Answers
*’s = many responses

Question 10 – What contributed to the agreement?

- Party just wanted to finish and offered money to advance that goal

Question 11 – What kept the case from full resolution?

- Personality conflicts: e.g. trouble negotiating with a manipulative, con-niving, irrational party.
- Parties using or taking advantage of court to get out of responsibility
- Mediator focus: mediator went outside of the law and focused on irrele-vant issues.
- Party already had advantage–after winning, no motivation to settle.
- Parties mirroring uncooperativeness; unwillingness to be flexible.
- Unraveling of previously agreed upon amounts, without new conditions to consider.
- Party enjoys litigation.
- No good faith effort–party just going through the motions.
- Favoritism shown by mediator, or uneven time allocation–mediator spent 90% of the time with the other party.
- Agreement was never written down.
- The other party left before mediation was complete.
- Mediator interference: interrupting the parties to track progress for case notes.
- Actual issue was side-tracked to another issue not pertaining to the case.

Question 20 – How did the mediation process affect mutual parenting?

- It is now harder to see the children; less communication.
- Introduced additional stress.

Question 21 – What positive or negative effects did mediation have on the case?

Positive Effects:

- Learned about motivations of other party.
- Good to have it done–should be implemented earlier in the process.
- Gave an extra two months to write brief.

Negative Effects:

- Waste of time and money; no results**.
- Unwillingness of parties to cooperate; lack of flexibility.
- Mediation slowed appeals process.

- When mediators deal with issues outside the scope of those on appeal, it costs the parties more money.
- Attorney costs**.
- Mediation costs**.
- Lost income and overall expense (financial hardships for many).
- Decision at trial level hinders mediation progress.
- Party manipulation of system through attorney—getting out of child support payments.
- Mediation should be done by retired judges when cases are about complex property issues.
- Questionable billing by mediators.
- Fear and threats of violence affect outcome, e.g. an ex-husband threw a pen across the room quite forcefully and stood up yelling about how he was glad he was divorced—quite unsettling.
- No way to check the truth (inaccurate figures on spouse’s money); punishes truthful party who is stuck with cost burden.
- Mediator was pro respondent instead of pro state laws and statutes; prolonged process.
- Mediator failed to file recommendations in allotted time frame to allow appeal to go forward.
- Previously awarded investments all lost

Question 22 – Would you recommend the use of the family appellate mediation process to a friend?

YES

- Straight “Yes” answer five times; a couple more with conditions

DEPENDS

- Only if party is honest and rational.
- Depends if both parties are willing and reasonable to give and take**.
- Depends on situation and circumstances; beneficial to consult attorneys first.
- If it does not involve complex property issues.
- If mediator different.
- Yes, if before trial.
- Common sentiment: yes, if situation was “different than mine.”
- Only if each side has an attorney.
- Not if a mediation already occurred at the district court level.

NO

- Straight “No” answer seven times; a couple more with conditions.
- Waste of time and money; past mediation failed.
- Parties are set in the outcome they want at this level.
- Not after trial decision.
- Subjected parties to spouses’ outbursts.
- Delays the process.

Question 23 – Suggestions for the improvement of the appellate mediation process?

(s = many responses)**

- Consider each individual case (listen to the parties), including history; mediation should be an option, not a requirement; don't force mediation if both parties are unwilling.*
- Costs need to be lowered; mediation is too expensive;* should be court-sponsored.
- Mediate earlier in the process—system favors attorneys.
- Need for verification of answers with stiff penalties if questions are fraudulently answered.
- More research should be done by mediator.
- More accountability for mediation by the mediator.
- When court rules, nothing happens in regards to money owed being paid; drives up attorneys fees, ex-spouse gets off the hook and only lawyers ultimately win.
- There is no incentive to settle in an equitable manner after the lower court award.
- Attorneys drag out mediation process and do not want issues resolved – they make more money (mediate without attorneys).
- The party being filed against should not have to share in paying for the mediator.
- No mediation at the appellate level; court should decide.*
- Better documentation of agreements made during mediation.
- Mediators must exert pressure and argue case merits for both sides (neutrally); the feel good counseling approach does not work.
- Basis for attorney and mediator fees not explained and was questionable.

