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DEVELOPMENTS AND PRACTICE NOTES

PRE-ARGUMENT SETTLEMENT AT THE MICHIGAN COURT OF APPEALS: A SECRET TOO WELL KEPT

Jeremy L. Fetty*

I. INTRODUCTION

Unbeknownst to many practitioners, the Michigan Court of Appeals, like several other state and federal appellate courts, uses facilitative mediation to resolve or simplify issues on appeal. The use of mediation at the appellate level is relatively new: It has, for the most part, developed since the late 1980s and early 1990s, although a pioneer mediation settlement program

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has been used by the United States Court of Appeals for the Second Circuit since 1974.¹ Generally speaking, most lawyers do not view the appellate level as a time at which settlement or mediation should be considered. However, views have begun to change in the past fifteen years. Recent positive experiences with, and recent publicity about, alternative dispute resolution in general, coupled with federal appellate-court settlement program successes, have led several state appellate courts to adopt settlement programs.

Behind this trend seems to be appellate courts' realization that adverse trial-court decisions can cause appellants to reconsider what they once may have thought of as strong cases, while appellees may wish to avoid both the risk of reversal and the time-consuming and expensive appeal process.² And appellate courts with increasing dockets have welcomed mediation to promote and expedite pending appeals.³

The Michigan Court of Appeals Pre-Argument Settlement Program⁴ is the focus of this article. It was initiated and is

1. Joseph A. Torregrossa, *Appellate Mediation in the Third Circuit—Program Operation: Nuts, Bolts and Practice Tips*, 47 Vill. L. Rev. 1059, 1060-61 (2002) (noting that the Second Circuit has used mediation since 1974, but that most federal and state appellate courts did not begin to use mediation until 1990 or after); see also J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 Vand. J. Transnatl. L. 187, 204 (2005) (indicating that by 1996 all federal appellate courts had mediation settlement programs); Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 Yale L.J. 755, 756 (1986) (describing the design and philosophy of the Second Circuit's program).

2. Torregrossa, *supra* n. 1, at 1062.

3. Kathleen M. Scanlon, *A Case for Judicial Accountability: When Courts Add a Settlement Detour to the Traditional Appellate "Path,"* 17 Ohio St. J. on Dis. Res. 379, 394-95 (2002).

4. Michigan's Program is outlined in Rule 7.213(A) of the Michigan Court Rules, which provides:

(A) Pre-Argument Conference in Calendar Cases.

(1) At any time before submission of a case, the Court of Appeals may direct the attorneys for the parties and client representatives with information and authority adequate for responsible and effective participation in settlement discussions to appear in person or by telephone for a pre-argument conference. The conference will be conducted by the court, or by a judge, retired judge or attorney designated by the court, known as a mediator. The conference shall consider the possibility of settlement, the simplification of the issues, and any other matters which the mediator determines may aid in the handling of or the disposition of the appeal. The mediator shall make an order that recites the action taken at the conference and the agreements made by the parties as to any of the matters

maintained for the purpose of resolving parties' disputes, which in turn helps to reduce the number of cases on the Court's docket. Experience shows that the Program can reduce costs for the Court and the parties, and can produce a settlement that satisfies all involved. This article provides an overview of the Program, presents the settlement rates for 1999-2004, estimates the cost savings attributable to those settlements, and concludes that the Program is a success.

considered, and that limits the issues to those not disposed of by the admissions or agreements of counsel. Such order, when entered, controls the subsequent proceedings, unless modified to prevent manifest injustice.

(2) All civil cases will be examined to determine if a pre-argument conference would be of assistance to the court or the parties. An attorney or a party may request a pre-argument conference in any case. Such a request shall be confidential. The pre-argument conference shall be conducted by

(a) the court, or by a judge, retired judge or attorney designated by the court;

(b) if the parties unanimously agree, a special mediator designated by the court or selected by unanimous agreement of the parties. The special mediator shall be an attorney, licensed in Michigan, who possesses either mediation-type experience or expertise in the subject matter of the case. The special mediator may charge a reasonable fee, which shall be divided and borne equally by the parties unless agreed otherwise and paid by the parties directly to the mediator moderator. If a party does not agree upon the fee requested by the mediator, upon motion of the party, the Court of Appeals shall set a reasonable fee.

When a case has been selected for participation in a pre-argument conference, participation in the conference is mandatory; however, the Court of Appeals may except the case from participation on motion for good cause shown if it finds that a pre-argument conference in that case would be inappropriate.

(3) Any judge who participates in a pre-argument conference or becomes involved in settlement discussions under this rule may not thereafter consider any aspect of the merits of the case, except that participation in a pre-argument conference shall not preclude the judge from considering the case pursuant to Mich. Ct. R. 7.215(J).

(4) Statements and comments made during the pre-argument conference are confidential, except to the extent disclosed by the pre-argument conference order, and shall not be disclosed by the mediator or by the participants in briefs or in argument.

(5) To facilitate the pre-argument conference, unless one has already been filed, an appellant must file the docketing statement required by Mich. Ct. R. 7.204(H).

(6) Upon failure by a party or attorney to comply with a provision of this rule or the pre-argument conference order, the Court of Appeals may assess reasonable expenses caused by the failure, including attorney's fees, may assess all or a portion of appellate costs, or may dismiss the appeal.

II. BACKGROUND OF THE PROGRAM

The Program started as a pilot program that ran from 1995-1997.⁵ The Court wanted to examine whether a settlement program would be feasible—and successful—for Michigan appeals because, although settlement programs were proven successful in federal appellate courts, the results in state courts were mixed.⁶ During the pilot period, volunteers from the state bar association's Appellate Practice and Alternative Dispute Resolution Sections served as volunteer mediators in the 120 cases assigned to the pilot program.⁷ The emphasis was on resolving complex or "box" cases (those in which the record is contained in one or more boxes) through settlement before they were sent to research, which would result in significant cost and time savings for the Court.⁸ In the first year, forty percent of the cases placed in the pilot program settled, and in the second year, thirty-two percent settled. This compares to a normal dismissal-by-stipulation rate of seventeen percent, which figure is presumed to include primarily cases that have settled.⁹ The Court, apparently considering the pilot program a success, began planning for a permanent program.

By January 1998, the Program was official, and by February 1998, it was fully operational.¹⁰ Once it was official, a push was made to include a more representative sample of cases in the Program.¹¹

Originally, two staff attorneys conducted the Program. In late 2001, the Program was restructured; the Settlement Office is now staffed by one full-time attorney, who is the director of the Program, and an administrative assistant.¹² Also in 2001, the

5. Interview with A. David Baumhart, Settle. Dir., Mich. Ct. App. Settle. Off. (June 10, 2005) [hereinafter Baumhart Interview I].

6. James N. McNally, *Lessons Learned in the Court of Appeals Settlement Program*, 79 Mich. Bar J. 488, 488 (May 2000).

7. *Id.*

8. *Id.* at 489.

9. *Id.* at 488.

10. Baumhart Interview I, *supra* n. 5; McNally, *supra* n. 6, at 489.

11. McNally, *supra* n. 6, at 489.

12. Mich. Ct. App., *Annual Report* 12 (2002), available at http://courtofappeals.mijud.net/pdf/Annual_Report_2002.pdf (accessed Nov. 18, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter *2002 Report*]. The initial—and current—director of the Program is A. David Baumhart, who has nearly thirty years of litigation

Settlement Office began using volunteer circuit court judges to mediate complex cases, and in 2002, it began using volunteer family law mediators to mediate domestic relations cases. The Program goal is for a settlement rate of about a third of the cases placed in the Program.¹³

A Settlement Committee consisting of three Court of Appeals judges, the Settlement Director, and the Research Director oversees the Settlement Office,¹⁴ reviewing operations, policy, and the potential development and expansion of the Program. The Committee then reports to the Court its suggestions for modification or improvement.¹⁵

III. CURRENT PRE-ARGUMENT CONFERENCE PROCESS

A. Case Selection

The Settlement Office may direct a pre-argument settlement conference in any case, but certain types of cases—those involving termination of parental rights, paternity cases, cases in which parties are in *pro per*, and custody actions—are generally considered not appropriate for mediation.¹⁶ Of the cases eligible, those selected for the Program are placed in two categories: general civil matters and domestic relations matters. Because the selection process is somewhat different for each type of case, they will be treated separately below.

1. General Civil Matters

Cases are typically selected in one of three ways: (1) the Settlement Director reviews the parties' docketing statements in

experience, has been trained in mediation, and has worked full time for the past seven years facilitating settlement for cases on appeal.

13. Baumhart Interview I, *supra* n. 5.

14. Interview with A. David Baumhart, Settle. Dir., Mich. Ct. App. Settle. Off. (June 22, 2005) [hereinafter Baumhart Interview II].

15. *Id.*

16. Baumhart Interview I, *supra* n. 5; Mich. Ct. App., *Court Settlement Program*, available at <http://www.courtsofappeals.mijud.net/court/settlement.htm> (accessed Nov. 18, 2005; copy on file with Journal of Appellate Practice and Process) (listing answers to questions often asked about the Program) [hereinafter *Court Settlement FAQs*].

order to determine whether a case is suitable for settlement; (2) certain types of negligence cases are placed in the Program automatically when the appeal is filed; or (3) the attorneys for any party may call the Settlement Office in confidence and request that a pending appeal be considered for a settlement conference.¹⁷ In the past some judges have referred some cases after oral argument, but this is rare, and it is not considered the best use of the Program because settlement is unlikely at that point.¹⁸ Approximately ten percent of the Court's civil caseload is selected for settlement conference.¹⁹

An attempt is made to get the cases into the Program prior to any briefing, which gives the parties a financial incentive to use it because they can save money by not proceeding further into the appellate process. (Incentives for settlement may diminish once the expenses associated with briefing the case and preparing for oral argument have been incurred.) The Office tries in consequence to act quickly: Docket statements filed with the clerk are electronically imaged and transmitted in that form to the Settlement Office within twenty-four hours.²⁰ Completing the docketing statement requires a party to indicate whether settlement negotiations have been scheduled or conducted, and whether settlement is unlikely, and the party can also fill in a space provided for further explanation. However, a party's indication that a case is unlikely to settle does not mean that it will not be selected for the Program. Staff attorneys determine which cases are suitable for the Program after reviewing all of the information in the docketing statements.²¹

Cases that are routinely placed into the Program include those docketed as property and real estate, contracts, labor relations, no-fault automobile insurance, medical malpractice, personal injury from automobile negligence, other personal injury, other damages actions, estates and probate, and general civil cases.²² Verdicts and judgments in favor of plaintiffs,

17. *Court Settlement FAQs*, *supra* n. 16; Baumhart Interview I, *supra* n. 5.

18. Baumhart Interview II, *supra* n. 14.

19. *Court Settlement FAQs*, *supra* n. 16; Baumhart Interview I, *supra* n. 5.

20. Mich. Ct. App., *Annual Report* 15 (2001), available at http://courtofappeals.mijud.net/pdf/Annual_Report_2001.pdf (accessed Nov. 18, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter *2001 Report*].

21. Baumhart Interview I, *supra* n. 5.

22. *Id.*

default judgments, dismissals, and cases that are “not a lock” are prime cases for settlement; these are always carefully considered for participation in the Program.²³

2. Domestic Relations Matters

The selection of domestic relations cases for the Program is handled differently. When an appeal is filed in a domestic relations case, the docketing statement and any judgment or order that has been submitted are sent by the Settlement Office to domestic relations screeners, who are volunteers with experience in family law matters.²⁴ Domestic relations screeners have a three-to-five-day period in which to determine whether a particular case is appropriate for settlement,²⁵ and presently, only domestic relations matters involving property and monetary disputes are considered for the Program.²⁶ If a screener determines that a case is appropriate for settlement, he or she will recommend that it be placed in the Program.²⁷ The Settlement Office then submits the case to a volunteer domestic relations mediator for a settlement conference.

B. Proceedings After a Case Is Selected for the Program

When a case is selected, an order is entered placing the case in the Program.²⁸ The Court sends the attorneys or parties a package containing that order, instructions, information on the Program, and a scheduling letter identifying the location of the conference.²⁹ In domestic relations cases mediated by volunteer domestic relations mediators and certain complex cases that are mediated by volunteer circuit court judges, the designated mediator or judge also receives a package detailing the case.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The Court has tried placing custody matters in the Settlement Program, but time issues made this difficult. Baumhart Interview I, *supra* n. 5.

27. *Id.*

28. *Id.*

29. *Court Settlement FAQs*, *supra* n. 16.

That package also contains the order placing the case in the Program.³⁰

The attorneys and parties must discuss the possibility of resolving the appeal in a confidential setting.³¹ The Program is mandatory, in that once a case is placed in the Program, participation generally is required, but settlement is voluntary.³² Under Mich. Ct. R. 7.213(A)(1), the Court may compel the attendance of the parties, their attorneys, and/or a client representative at the discussion because it has authority to direct the attendance of someone from each side who has "information and authority adequate for responsible and effective participation in settlement discussion." However, if a party files a motion showing good cause that the case would be inappropriate for settlement, the Court can remove the case from the Program.³³ Otherwise, if a party fails to comply with the pre-argument conference order, the Court may "assess reasonable expenses caused by the failure, including attorney's fees, may assess all or a portion of appellate costs, or may dismiss the appeal."³⁴

The Settlement Director usually conducts settlement conferences for general civil cases.³⁵ But the Settlement Office also uses circuit court judges to facilitate settlement in some complex civil cases³⁶ and family law experts to facilitate settlement in domestic relations matters.³⁷

30. Baumhart Interview I, *supra* n. 5.

31. Mich. Ct. R. 7.213(A).

32. *Id.*

33. Mich. Ct. R. 7.213(A)(2)(b).

34. Mich. Ct. R. 7.213(A)(6).

35. *Court Settlement FAQs*, *supra* n. 16; Baumhart Interview I, *supra* n. 5.

36. *2001 Report*, *supra* n. 20, at 15. The circuit court judges are volunteers and are assigned only to cases outside of and adjacent to the counties of their circuits. Baumhart Interview I, *supra* n. 5. In domestic relations cases, the facilitative mediators are volunteers with experience in family law. *Id.*

37. Baumhart Interview I, *supra* n. 5; Press Release, Mich. Ct. App., *Volunteer Mediators in Family Law Cases to Be Honored by Court of Appeals*, available at <http://courtofappeals.mijud.net/resources/pressrel.html> (Dec. 16, 2003) (accessed Nov. 21, 2005; copy on file with Journal of Appellate Practice and Process); *Volunteer Mediators in Family Law Cases to Be Honored by Court of Appeals*, available at <http://courtofappeals.mijud.net/resources/pressrel.html> (Dec. 2, 2003) (accessed Nov. 21, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter *Volunteers Press Releases*]. Approximately, ninety volunteer mediators (typically members of the state bar association's Family Law Section), now assist the Court in attempting to settle domestic

The Settlement Office conducts settlement conferences both in person (when parties and counsel are readily available) and by telephone (when parties and counsel are located far from Detroit).³⁸ The Settlement Office generally schedules eight conferences a week, and usually conducts four to six, allowing for adjournment.³⁹ Sometimes the Settlement Director will meet with the parties and their attorneys, but will most often meet just with the attorneys because they tend to be more candid about the validity of their sides' positions when the parties are not present, and also because the attorneys are familiar with the legal issues, which can make the process more efficient.⁴⁰ But, if necessary for settlement, the Settlement Director will ask the parties to attend. The meeting usually lasts for two or three hours, and the Settlement Director follows these meetings up with frequent phone calls.⁴¹

With the agreement of all parties, an outside mediator may be selected by the parties or the Court to facilitate settlement conferences for both general civil cases and domestic relations cases.⁴² The Court maintains a roster of outside attorneys who are qualified to mediate such cases; they are in each case compensated by the parties.⁴³

No matter who does the mediating, a facilitative mediation method is used in attempting to reach settlement.⁴⁴ The mediators do not evaluate or predict outcomes, but are neutrals attempting to facilitate the parties' attempts to reach agreement

relations cases. Mich. Ct. App., *Annual Report* 14 (2003), available at http://court of appeals.mjud.net/pdf/Annual_Report_2003.pdf (accessed Nov. 18, 2005; copy on file with Journal of Appellate Practice and Process) [hereinafter *2003 Report*].

38. *Court Settlement FAQs*, *supra* n. 16. The in-person conferences conducted by the Settlement Director are usually held at the Court of Appeals office in Detroit, but the Settlement Director has occasionally traveled to other Court of Appeals locations. *Id.* However, travel has been limited due to budget constraints. Baumhart Interview I, *supra* n. 5. The circuit court judges typically conduct mediations in their chambers. *Id.* And the volunteer family law attorneys often mediate domestic relations appeals at offsite locations, typically in their offices. *Id.*

39. Baumhart Interview I, *supra* n. 5.

40. *Id.*

41. *Id.*

42. Mich. Ct. R. 7.213(A)(1)(b); *Court Settlement FAQs*, *supra* n. 16.

43. Baumhart Interview I, *supra* n. 5. Any outside mediator must be either an attorney with mediation experience who is licensed in Michigan, or a Michigan-licensed attorney who has expertise in the subject matter of the case. Mich. Ct. R. 7.213(A)(2)(b).

44. Mich. Ct. R. 7.213(A).

or to find their own solutions.⁴⁵ Typically, the mediator makes an opening statement, which outlines the process and ground rules.⁴⁶ This is followed by statements from the parties, which are supposed to be geared toward settlement. This is not an opportunity for the parties to argue the validity of their appeals.⁴⁷ The mediation is typically conducted in joint sessions, but often the mediator caucuses separately with each side.⁴⁸ According to a former Court mediator, the most significant progress is generally made in caucus because there is more candor and deeper discussion there.⁴⁹

Sometimes cases in mediation resolve specific issues on appeal, and other times they resolve broader issues.⁵⁰ The Program is not intended to coerce the parties to settle, and the mediator is used only to promote discussion, not to decide the case.⁵¹ As in other forms of mediation, the parties decide whether to settle the case, and there is no penalty if they do not settle.⁵² The entire process is confidential,⁵³ which encourages the parties to be candid during settlement discussions: They have no fear that their statements will either be brought before the Court or released to the public.

For general civil cases, the Court typically allows approximately ninety days for settlement, and the order entering the case into the Program does not expire based on a timeframe, although the Program is not supposed to delay the case's progress through the appellate process. This differs from the domestic relations cases, in which the Program allows the parties only fifty-six days from the date on which the order is entered to reach settlement,⁵⁴ although extensions can be given upon request if progress is being made.⁵⁵

45. McNally, *supra* n. 6.

46. Baumhart Interview I, *supra* n. 5; McNally, *supra* n. 6, at 490.

47. McNally, *supra* n. 6, at 490.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 488 n. 5 (noting that "settlement is always voluntary").

53. Baumhart Interview I, *supra* n. 5.

54. *Id.*

55. *Id.* Typically, this extension is for thirty days, but it can be longer (sometimes sixty or ninety days).

If the parties reach settlement, a stipulation to dismiss is prepared and signed by the parties, and an order is entered dismissing the appeal.⁵⁶ The mediator does not write up the agreement for the parties, and the settlement agreement is not made a part of the record.⁵⁷ It is the parties' responsibility to draft the agreement, which differs slightly from the process commonly used in facilitative mediation, in which the mediator drafts the agreement for the parties. The Court adopted its variant practice in order to save time because most conferences are conducted by the Settlement Director, who is the only mediator employed by the Court.⁵⁸

Occasionally, parties must have the settlement approved by the trial court because actions affecting some lower court orders must be presented to the lower court,⁵⁹ and jurisdiction to approve settlement can be conferred upon the trial court under Mich. Ct. R. 7.208(A).⁶⁰ The parties generally address during the mediation the action that must be taken by the trial court in order to effect the settlement, and they include this in the agreement.⁶¹ Dismissals entered pursuant to the Program are entered with prejudice and without costs.⁶²

The Program usually does not delay the case's progress through the appellate process, and if the case does not settle, it continues along the regular appellate track.⁶³ In March 2002, the

56. *Id.*

57. *Id.*; McNally, *supra* n. 6, at 491.

58. Baumhart Interview I, *supra* n. 5.

59. For example, the parties to a mediated case may stipulate in their settlement agreement that the judgment below should be set aside or vacated. (In other jurisdictions there have been issues raised with regard to whether it is proper to vacate a lower court judgment pursuant to a settlement on appeal. See Scanlon, *supra* n. 3, at 381. However, to date no such issues have come to the attention of the Settlement Director in Michigan. Baumhart Interview II, *supra* n. 14.)

In addition, the parties in domestic relations cases may be required to go before the lower court to have the judgment of divorce amended. Other settlements require court approval pursuant to court rule. See Mich. Ct. R. 2.420 (settlements for minors and legally incapacitated individuals); Mich. Ct. R. 3.501(E) (settlements in class actions).

60. Baumhart Interview I, *supra* n. 5; McNally, *supra* n. 6, at 491.

61. Baumhart Interview II, *supra* n. 14.

62. *Id.*

63. Baumhart Interview I, *supra* n. 5. Dates for filing briefs and other deadlines are not suspended when cases are placed in the Program. In the early days of the Program briefing was suspended, but this changed when the Program was restructured in 2001. 2001 Report, *supra* n. 20.

Court adopted a long-range goal of disposing of ninety-five percent of appeals filed within eighteen months of their filing, commencing with those cases filed on and after October 1, 2003.⁶⁴ For the most part, the Program is compatible with this goal, as it does not slow case progress through the appellate process, and it helps the Court dispose of cases before they are placed on the case-call docket.⁶⁵

Once settlement is reached or the parties are at impasse, the mediator files a report. In general civil cases, the Settlement Director issues a one-page form report for every case stating whether settlement was reached, whether issues on appeal were limited, or if the parties reached impasse, indicating that the case did not settle; the domestic relations mediators must issue similar reports.⁶⁶ Parties are not charged for settlement conferences conducted by Court staff attorneys or volunteer mediators, but if an outside mediator is hired, the parties split his or her fee unless otherwise agreed.⁶⁷

IV. PROGRAM RESULTS

In each of the first two years of the Program, 1998 and 1999, approximately 2,000 docket statements were reviewed, and 300 cases were entered into the Program.⁶⁸ About a third of these cases settled.⁶⁹

In 2000, the Settlement Office again reviewed more than 2,000 docketing statements, and selected 268 for the Program.⁷⁰

64. Mich. Ct. App., *Delay Reduction Plan—Progress Report No. 12* at 3 (May 20, 2005), available at http://courtofappeals.mijud.net/pdf/Delay_Reduction_Report_Progress_12.pdf (accessed Nov. 21, 2005; copy on file with Journal of Appellate Practice and Process).

65. Baumhart Interview II, *supra* n. 14.

66. Baumhart Interview I, *supra* n. 5.

67. *Court Settlement FAQs*, *supra* n. 16. If the parties do not agree with the mediator's requested fee, they can move the Court to set a reasonable fee. Mich. Ct. R. 7.213(A)(2)(b).

68. McNally, *supra* n. 6, at 489. Approximately twenty percent of the cases settled in 1999 were settled by telephone conference. Mich. Ct. App., *Annual Report 15* (1999), available at http://www.courtofappeals.mijud.net/pdf/Annual_Report.pdf (accessed Nov. 18, 2005) [hereinafter *1999 Report*].

69. *1999 Report*, *supra* n. 68, at 15.

70. Mich. Ct. App., *Annual Report 15* (2000), available at http://www.courtofappeals.mijud.net/pdf/Annual_Report_2000.pdf (accessed Nov. 21, 2005; copy on file with Journal of Appellate Practice and Process).

Of those, approximately one-third settled.⁷¹ A survey of the parties participating in the Program revealed an 8.5 satisfaction rating on a one-to-ten scale for those whose cases settled and a 6.7 satisfaction rating for those whose cases did not.⁷²

In 2001, the settlement office only settled twenty-six percent of the cases entered into the Program, a figure lower than those in previous years.⁷³ To address the decline in the success rate, the Court began at the end of 2001 to implement new initiatives to increase the settlement rate,⁷⁴ including changes in methods for determining which cases were to be brought into the Program based on the sorts of cases that settled most often in prior years: judgments for plaintiffs in negligence and contract actions.⁷⁵ Under the new plan, these cases were to be automatically placed into the Program for closer review.⁷⁶ The Program was further changed so that it no longer suspended briefing, in hopes that a pending due date on briefs might encourage settlement.⁷⁷ The restructuring also brought about an amendment to Mich. Ct. R. 7.213(A)(1), which now allows the Court to compel the attendance of parties' attorneys or a client representative who has full settlement authority at the mediation conference.⁷⁸ In addition, the restructuring resulted in the decision to use circuit court judges to mediate complex box cases.⁷⁹ The continued success of the Settlement Office has, in part, been attributed to the inclusion of this innovation in the restructuring.⁸⁰

In 2002, 267 cases were selected for the Program. Of these, 35.4 percent⁸¹ of the cases placed in the Program were settled. (Forty-four of the cases were still pending at the end of the

71. *Id.*

72. *Id.*

73. *2001 Report, supra* n. 20, at 15.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *2002 Report, supra* n. 12, at 12.

81. The .4 reflects a partial settlement (two out of five issues), as do all other fractional figures reported in this discussion.

year.⁸²) Further, of fourteen complex or box cases placed in the Program to be mediated by the volunteer judges, the Program had a 60.7 percent settlement rate.⁸³ In 2002, the outside domestic relations mediators were used for the first time, resulting in a settlement rate of 26.7 percent.⁸⁴ The number of settled cases in 2002 approximately equated to the case workload of more than two staff prehearing research attorneys, which saved the Court that expense in addition to other costs foregone by moving those cases out of the appellate process.⁸⁵

In 2003, 325 cases were placed in the Program. Of these, ninety-four settled and 186 did not settle (forty-five were still pending at the end of the year), for a success rate of 33.6 percent.⁸⁶ For the general civil cases, the Program had a success rate of 32.7 percent, and for the domestic relations cases, it had a 36.8 percent success rate.⁸⁷

In 2004, a combined total of 269 cases were placed in the Program.⁸⁸ Of these, 36.27 percent of approximately 200 general civil cases were actually settled.⁸⁹ However, only fourteen percent of approximately fifty domestic relations cases actually settled; this is down from both 2002 and 2003.⁹⁰

The Court's settlement goal is that approximately a third of the cases placed in the Program be settled, and on average, the Court has been above this goal. When the Program did not meet the settlement goals, adjustments have been made to raise the settlement rates. Appellate issues vary significantly from case to case, which makes year-to-year comparisons and measurements difficult. But rough estimates show that the Program saves the Court research costs which would be the equivalent of the salaries plus benefits for two prehearing attorneys.⁹¹ In addition, settled cases save "incalculable amounts of time by Clerk's

82. 2002 Report, *supra* n. 12, at 12.

83. *Id.*

84. *Id.*

85. *Id.*

86. 2003 Report, *supra* n. 37, at 14.

87. *Id.*

88. Baumhart Interview I, *supra* n. 5.

89. *Id.*

90. *Id.*; *Volunteers Press Releases*, *supra* n. 37.

91. This amounts to approximately \$125,000.00 per year. Telephone Interview with Larry Royster, Research Dir., Mich. Ct. App. (June 24, 2005).

Office personnel, judges and law clerks in not having to process cases to disposition by opinion.”⁹² No clear numbers have been derived, but it was predicted that this savings could be an additional \$125,000.00, resulting in a projected combined savings of approximately \$250,000.00.⁹³ Under the direction of the Settlement Committee, the Program continues to explore news ways to increase both the settlement rate and user satisfaction with the Program.⁹⁴

V. CONCLUSION

The experience of the Michigan Court of Appeals and other state and federal appellate courts supports the conclusion that providing an opportunity for mediation and settlement at the appellate level can work, despite what many in the legal community used to think.⁹⁵ By the time a case enters the Program, at least one judicial decision has been reached and significant uncertainties have been resolved. The parties can in consequence consider a settlement that may achieve their

92. 2002 Report, *supra* n. 12, at 12.

93. Royster Interview, *supra* n. 91.

94. Baumhart Interview II, *supra* n. 14.

95. The United States Court of Appeals for the Ninth Circuit has the most successful program, with a settlement success rate of ninety-one percent, settling 803 of the 878 cases mediated in 2003. J. Clifford Wallace, *Improving the Appellate Process Worldwide Through Maximizing Judicial Resources*, 38 Vand. J. Transnatl. L. 187, 207 (2005). This settlement rate is up from past years, for in 1994, seventy-three percent of cases in the Ninth Circuit program settled, and in 1995, 66.5 percent of its cases settled. See Ignazio J. Ruvolo, *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 San Diego L. Rev. 177, 204-205 (2005). Interestingly, a large number of Ninth Circuit cases are settled by telephone conference. *Id.* From 1995 through the end of 2001, the United States Court of Appeals for the Third Circuit settled approximately thirty-seven percent of the cases placed in its mediation program. For California’s First District Court of Appeals, the figure was about fifty-five percent of the 500 cases selected for mediation in one four-year period. *Id.* at 201. For the Oregon Court of Appeals, 200 of the 350 cases placed in the mediation program in 2001 were settled; in 2002, 220 cases were mediated and 151 settled. *Id.* The New Mexico Court of Appeals settled approximately twenty-nine percent of its cases over a two-year period, primarily through reliance on telephone conferences. *Id.* at 203. For the Hawaii Court of Appeals, mediation has resulted in approximately half of its cases settling. Settlement programs vary significantly with regard to settlement staff size and resources expended, and the point of this footnote is not to compare the programs. The intent is merely to point out that several appellate courts have had some success with mediation programs, and have used them to settle a significant number of cases. For further discussion and analysis of the various programs see Ruvolo, *supra* this note.

practical goals and satisfy their mutual interests. Those goals and interests can be addressed openly in the context of a settlement conference on appeal, while a lower court's decision may seem to the parties merely to have sided with legal arguments raised by only one of them.

The Michigan Program's mandatory nature forces parties to communicate. Without this prompt, a resolution outside the court system might never have been discussed, even in many cases that have settled under the Program. The relatively high proportion of cases settled in the Program shows that even parties involved with cases that seem unlikely to be good candidates for settlement can find a way to settle if required to communicate with each other.

Not everyone is persuaded by the evidence at first. Michigan attorneys sometimes complain that there is no reason for mandatory mediation when it is clear that the parties are not willing to settle, and no one involved in the case believes that it can settle on appeal.⁹⁶ However, one of the "greatest misconceptions" is that cases cannot be mediated to agreement when both attorneys say that they cannot settle.⁹⁷ Many cases settle even when attorneys believe strongly that they will not, and it is rare for the mediator not to get at least some movement from the parties.⁹⁸ As a former staff attorney for the Program has pointed out, sometimes a party balking at settlement just needs closure, and a mediator "who listens carefully and asks pointed questions can sometimes bring the closure parties need."⁹⁹

For the initial seven years of its existence, attorneys and parties have been receptive to the Program, and have attempted to settle in good faith, despite sometimes expressing initial doubts about its usefulness.¹⁰⁰ What they often realize during the process is that settlement and mediation allow parties to be creative even while on appeal. The Program's mandatory conferences present the parties with opportunities that neither

96. Baumhart Interview II, *supra* n. 14.

97. McNally, *supra* n. 6, at 490.

98. Baumhart Interview I, *supra* n. 5; McNally, *supra* n. 6, at 490. Out of 175 cases that were settled or partially settled in 1998 and 1999, counsel in seventy-six had noted on the docketing statement that settlement was unlikely. McNally, *supra* n. 6, at 491.

99. McNally, *supra* n. 6, at 490.

100. Baumhart Interview II, *supra* n. 14.

the lower courts nor the appellate courts can provide, and often an attorney will learn only during the mediation that the parties are in fact willing to settle.

The Program has been successful by any measure. And because the time and money required to pursue an appeal, the uncertainty of winning on appeal, and the fact that alternatives available in settlement may be more likely to advance the parties' true interests all figure into parties' decisions, it appears that appellate mediation in Michigan will continue to be successful.



