MEDIATION IN THE SEVENTH CIRCUIT COURT OF APPEALS

Joel N. Shapiro*

Since 1995, court-sponsored mediation has been a fixture of appellate practice in the Seventh Circuit Court of Appeals. The mediation program has enjoyed strong support from the court and the Bar. It has assisted litigants to resolve a great many cases that would otherwise have had to be decided by the circuit judges at significant expense to the court and the litigants, with results disappointing to at least one side and sometimes to both. It has provided an opportunity for parties to write their own final chapter in the saga of litigation –to consider their interests, assess their prospects, explore their alternatives, and fashion a result of their own making.

Each federal court of appeals has a mediation program.[1] Indeed, the success of these programs was saluted by Congress when it enacted the Alternative Dispute Resolution Act of 1998, mandating that alternative dispute resolution be offered in every federal district court.[2]

As judges and court administrators seek to encourage settlement in ways consistent with the role of the judiciary and their own court traditions, the experience of the Seventh Circuit may be instructive. Mediation has thrived here because it serves the court's needs and reflects the court's values.

THE SEVENTH CIRCUIT

To get at the congruence between the court's needs and values and the character of its mediation program, I begin with a description of the Seventh Circuit Court of Appeals. Our court greatly values collegiality. While circuit judges are no longer expected (as they once were) to live in the Chicago area, they all have assigned chambers at the courthouse in Chicago and (with rare exceptions) continue to sit together only there. We currently have eleven active and four senior circuit judges. Far from being "*in*active," our senior judges carry significant workloads. All the judges enjoy their work and feel strongly about doing their share. They collaborate cordially and enjoy the

---

* Senior Conference Attorney, U.S. Court of Appeals for the Seventh Circuit. B.A., University of Chicago 1966; M.A., Harvard University 1971; J.D., University of Chicago 1984. The author thanks his fellow circuit mediators throughout the country for their counsel and friendship.

1. *See* ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES & LAWYERS (SECOND) (Federal Judicial Center 1997).
2. Pub. L. No. 105–315 § 3 (codified as 28 U.S.C. § 651 (2000)).

give-and-take of collegial decision-making. When they disagree, whether about matters of jurisprudence or court policy, they manage to do so without rancor.

Our court likes to decide cases and invests heavily in deciding cases. It hears oral argument in a greater percentage of appeals than any of its sister courts.[3] The judges are known to prepare thoroughly for argument and to challenge advocates with vigorous questioning. They issue reasoned written decisions in nearly all appeals and publish more opinions than all but one other circuit.[4] Yet, they do not reach out to decide cases they need not or should not decide. The court polices its jurisdiction rigorously and does not hesitate to dismiss appeals for lack of federal or appellate jurisdiction.

Our court has a strong interest in the policies underlying both statutory and common law. Some of the judges are noted contributors to specific areas of the law. Some famously have a bent toward the "law-and-economics" approach that transcends subject matter. However, the court makes a great effort to speak as one and to be addressed as one. Judges are assigned to panels at random, and the composition of panels is not disclosed until the morning of oral argument. The court has a reputation for sound (sometimes bold) jurisprudence and is reported to be the most frequently cited federal court of appeals.[5]

Our court's management style is also distinctive. Under the leadership of Collins Fitzpatrick, the court's Circuit Executive for more than thirty years, court administration is humane, informal, and egalitarian. The court trusts its staff and supports them in their work. Cooperation and congeniality are the norm. We speak of the "court family" and mean it. Collaboration and congeniality are also the norm for bench/bar relations, notably through the activities of the Seventh Circuit Bar Association and the well-attended annual Seventh Circuit judicial conferences.

During recent decades, the court has adapted to a rapidly growing and changing caseload primarily by enlarging its legal and non-legal staff, introducing new technology, tightening case management, and simply working

---

3. JAMES DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR, Table 2–1(2006), http://www.uscourts.gov/judbus2006/contents.html.

4. *Id.*, Table S–3. Although the Eighth Circuit publishes more opinions than the Seventh, it also issues twelve times as many non-reasoned dispositions. *Id.* This reminds us that judges in every court are forced by time constraints to make trade-offs of one kind and another. Mediation programs are one means of alleviating that time pressure and allowing courts to improve the quality of justice they dispense in cases requiring a decision on the merits.

5. William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271, 304 tbl. 3, 330 tbl A2 (1998).

harder.[6] To a court that values collegiality as much as ours does, the mediation program has helped preserve the intimacy of the court by reducing the number of cases to be determined on the merits–especially cases that would ordinarily require oral argument. With fewer cases to hear and decide, the court is less tempted to seek an increase in the number of judges (even now just twenty-five percent greater than in 1972!),[7] or to call on judges from other circuits to sit by designation. The court has that much more time to maintain its tradition of hearing argument and issuing reasoned decisions in cases the parties cannot resolve themselves. Meanwhile, by requiring mediation, the court extends its hand to attorneys–and they are many–who want to pursue settlement on appeal but hesitate to make the overture for fear of appearing "weak." In providing that assistance, the mediation program makes a friend *of* the court.

Our judges have not been concerned that a successful mediation program would "put them out of business" or prevent them from deciding cases that are essential to the development of the law. They know that even a very successful mediation program could not resolve enough cases to alleviate the need for judging. They know that important legal issues have a way of cropping up again and again. Also, they know the first order of business in any case or controversy is not to advance the law, but to do justice between the parties. If, through mediation, the court can enable parties to do justice between *themselves*, the court indeed fulfills its calling.

THE MEDIATION PROGRAM

Let us look now at how at how the Seventh Circuit mediation program works.[8] Mediation in the federal courts of appeals is conducted under Federal Rule of Appellate Procedure 33, which authorizes pre-hearing conferences for the purpose of case management or settlement, or both. In the Seventh Circuit, Rule 33 conferences are, with occasional exceptions, devoted to settlement. The court's authority to conduct settlement conferences is

---

6. *See* Collins T. Fitzpatrick, *Court Changes Over a Third of a Century*, 32 S. ILL. U. L.J. 527, 528-31 (2008).

7. *Id. at* 539-40.

8. Our mediation program owes much to its sister program in the Sixth Circuit and to the inspiration of Chief Sixth Circuit Mediator Robert Rack, the honorary dean of federal appellate mediators. A statistical report on the Sixth Circuit's mediation program persuaded our court that appellate mediation was effective and could materially reduce the court's docket. *See* J. EAGLIN, THE PRE-ARGUMENT CONFERENCE PROGRAM IN THE SIXTH CIRCUIT COURT OF APPEALS (Federal Judicial Center 1990). Conversations with Mr. Rack fortified that conclusion and led this Court to emulate some cardinal features of the Sixth Circuit program–notably, the staff mediator and mandatory mediation models.

delegated to full-time attorney mediators (settlement conference attorneys) who staff the Settlement Conference Office.[9] In the course of their work, the mediators may incidentally address jurisdictional or other procedural issues, modify briefing schedules, and encourage counsel to clarify or narrow the focus of their appeal, but they do not have primary responsibility for jurisdictional screening, case management, or motion practice at the court. When a Rule 33 conference is for the purpose of case management, it is conducted by court personnel other than mediators.[10]

Most types of fully counseled civil appeals are eligible for mediation–diversity cases, bankruptcy cases, labor and employment cases, civil rights cases, and various other statutory and administrative appeals. Prisoner and pro se appeals are not eligible; nor are mandamus petitions or petitions for leave to appeal. The Settlement Conference Office reviews all eligible appeals and schedules as many appeals for mediation as the mediators can reasonably handle. Cases are assigned among the three mediators at random. While there is a presumption that all eligible appeals should be mediated–since cases of all kinds have benefitted from the process, and it is difficult to know in advance which cases have a chance of being settled–there is also a presumption that each mediation deserves a serious, sustained effort on the mediator's part. Thus, because of time constraints, not all eligible appeals are scheduled *sua sponte* for mediation. Those that are not tend to be appeals in which jurisdiction is doubtful or in which policy issues or political interests predominate. Counsel are welcome to request mediation in any eligible case, however, and such requests are usually accommodated. In all, between 500 and 600 cases are scheduled annually for mediation.

Each mediation begins with a morning or afternoon session, typically lasting for two to three hours. In the mediator's discretion, clients as well as counsel may be directed to attend. Most often, they are; if not, they must be available for consultation by telephone as needed. The initial session may be conducted in person at the U.S. Courthouse in Chicago, where the court's three mediators are based. This is the ordinary practice when parties and counsel reside in the Chicago area. When some or all of the participants reside elsewhere, for reasons of convenience and economy the initial conference is usually conducted by telephone. Special teleconferencing

---

9. *See* In re Young, 253 F.3d 926, 927 (7th Cir. 2001).

10. In the 1970's, the Seventh Circuit experimented with pre-argument conferences to reduce the pressure of its growing caseload. Those conferences were found to shorten the elapsed time from filing to argument and to cut down on the frequency of routine and non-routine motions. Settlement was not emphasized, however, and appeals in which conferences were held did not settle more often than other appeals. J. GOLDMAN, THE SEVENTH CIRCUIT PREAPPEAL PROGRAM: AN EVALUATION (Federal Judicial Center 1982), at 42–43.

equipment enables the mediators to combine as many as six lines and to caucus privately with each side. Occasionally the mediators conduct in-person mediations outside the Chicago area or make arrangements with out-of-town litigants to mediate in Chicago.

If a settlement is not reached during the first session but there is reason (as there usually is) to continue the mediation, follow-up sessions are conducted–in person or by telephone–with one side at a time or both sides together. Overall, about 60% of initial mediation sessions–and most follow-up sessions–are conducted by phone. In most cases, telephonic mediation works very well.

As one would expect, Rule 33 mediations are confidential.[11] Participants promise at the outset that they will not disclose the content of Rule 33 settlement communications, oral or written, to third parties or representatives of the media or to the judges of any court. The mediator, too, is required to maintain the strict confidentiality of the proceedings. He or she does not discuss the mediation with anyone outside the Settlement Conference Office, nor does the mediator report the result of mediation to the court. Attorney requests for mediation are also kept strictly confidential unless the attorney wishes otherwise.

During mediation, briefing is ordinarily postponed so that counsel can devote their full attention to settlement and client resources can be conserved. Regardless of how directly clients participate, the fulcrum of the mediation is the relationship between mediator and counsel.[12] All participants are expected to behave reasonably, diligently, and cooperatively, but as officers of the court, attorneys have a special responsibility to do so. As counselors, attorneys have great influence with their clients. Cases that clients are reluctant to settle can often be resolved with the advice of counsel. Cases that attorneys are unmotivated to settle rarely settle, regardless of the client's inclinations.

For the first five years of the mediation program, eligible cases were selected for mediation entirely at random to enable the Settlement Conference Office to make a controlled comparison between the outcomes of cases that were mediated and cases that were not. Did court-sponsored mediation make a significant difference in the frequency of settlement? The answer was yes. About twice as many appeals were settled or withdrawn after being noticed for mediation as were settled or withdrawn without the stimulus of court-

---

11. *Young,* 253 F.3d at 927.

12. So as not to put unrepresented parties at a bargaining disadvantage–and the mediator in the position of surrogate counsel–only appeals in which *all* parties are represented by counsel are eligible for mediation.

sponsored mediation. The experience of taking eligible cases "as they came," without preselection, also established that a great variety of cases were amenable to mediation, even if some might be more resistant to settlement than others. Whether a case could be resolved through mediation depended less on the subject matter or posture of the case than on the people–plaintiffs and defendants, clients and counsel–whose case it was.

THE COURT AND ITS MEDIATION PROGRAM

I return now to what I said at the outset: Our mediation program has thrived because it enjoys the full support of the court and because it reflects the values of the court. These two things are related. If the program were out of tune with the court, it would probably not have the court's full support. At the same time, without the confidence of the court, the mediators could not confidently do their work.

The Seventh Circuit's mediation program reflects the values of the court in two fundamental respects: how it is structured and how the mediators carry it out. I will illustrate the importance of structural decisions by highlighting two issues that are central to the formation of a mediation program: (1) Who shall mediate? and (2) Shall mediation be optional or compulsory? The decisions the Seventh Circuit made–to employ staff mediators and to make mediation compulsory–had disadvantages as well as advantages, but they were consonant with the core values of the court.[13]

Who mediates for the court is important not only because it may affect the productivity of mediation, but because counsel and clients spend *far* more time with the court's mediator than with anyone else who represents the court. The impression participants have of the mediator and the experience they have in mediation will very likely color their attitude toward the court itself.

At the Seventh Circuit, the mediators are members of the court's staff. Of course, there were other options. The court could have assigned active, senior, or retired federal judges to mediate. Judges would have brought to the task their experience on the bench, their acumen and settlement skills, and the prestige of their robes. Retired judges serve as staff settlement counsel in the First Circuit, and senior district judges conduct some mediations in the

---

13. Other important strategic decisions include: Who shall participate in mediations–lawyers, clients, both? Shall mediations be facilitative, evaluative, both? Shall mediations be conducted in person, by telephone, by video conference? Shall cases be assigned to particular mediators by subject matter, at the mediators' selection, at random? Shall the mediators be responsible for case management as well as mediation? There are no "right" or "wrong" answers to these questions. Some may suit one court better than another, depending upon the court's values.

Third.[14] Alternatively, the Court could have assembled a specially trained panel of attorneys in private practice to mediate. Had it done so, it could have enlisted practitioners with a variety of backgrounds and subject matter expertise and seeded the legal community with lawyers trained in mediation and mediation advocacy. This is the practice in the D.C. Circuit.[15] Alternatively, the Seventh Circuit simply could have adopted standards for mediators and allowed litigants to choose any qualified person to conduct a private mediation for them. That would have given litigants the "buy-in" of selecting mediators with whom they had worked before or to whom they had been referred by trusted colleagues.

Despite the advantages of designating mediators in one of these ways–any of which might have been less expensive for the court in dollar-terms–the Seventh Circuit chose to hire a staff of full-time lawyer mediators. This choice had significant advantages of its own. Staff mediators acquire vast cumulative experience with mediation and with the varied subject matter of federal appeals. They have the benefit of consulting one another continually. They build durable relationships with the bar of the court. Over time, they become finely attuned to the court's practices and values. They lend consistency and coherence to the court's mediation efforts.

It made sense for the Seventh Circuit to adopt the staff mediator model because it was a good fit with the court's values: reliance on the competence of staff, collegiality within the staff and with the Bar, comfort with the court's authority, and the tradition of speaking as one. Appointing staff mediators also sent a powerful message to the legal community: that mediation is integral to the court's work; it is worth a substantial investment of the court's resources; and it deserves the serious participation of the Bar.[16]

Now for the second critical issue. Regardless of who conducts the mediation, should it be optional or compulsory? Voluntary participation has advantages. It comports with the ethic and practice of voluntarism in private mediation. It lets counsel and clients, who presumably know their case best, decide whether to pursue settlement and whether mediation would be productive. It spares litigants who are not inclined to mediate the expense and delay of a proceeding they would rather dispense with. It also confines the compulsory authority of the court to its traditional domain–deciding cases and

---

14. *See* NIEMIC, *supra* note 1.
15. *Id.*
16. *See* Robert J. Rack, Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 OHIO ST. J. ON DISP. RESOL. 609 (2002) (providing a more extensive discussion of the staff mediator model, as well as the training and evaluation of mediators).

enforcing its own rules. To one degree or another, the voluntaristic approach is embraced by the Fifth, Eighth, Ninth, and D.C. Circuits.[17]

Despite the advantages–some would say, the imperative–of voluntary participation, the Seventh Circuit chose to require participation whenever the court–either *sua sponte* or by request–schedules an appeal for mediation. If mandatory mediation has some disadvantages, it also has advantages. It comports with the mandatory character of the court's authority. It spares litigants the appearance of capitulating by requesting or consenting to mediation. It doesn't rely on the judgment of counsel or parties–which turns out to be imperfect–as to whether their case is apt for mediation. It spares the court the need to prospect for litigants willing to mediate. It maximizes the impact of mediation on the court's docket. Further, it gives the mediator–whoever he or she may be–the moral authority to keep the participants working at settlement until the appeal is settled or until *the mediator* is convinced that mediation can accomplish nothing more.

For the Seventh Circuit, mandatory mediation was a sensible choice. It was consonant with the court's values: comfort with its authority, confidence in the compatibility of mediation with the exercise of judicial power, and a desire to maximize the benefits of mediation for the court and the litigants. Mandatory mediation also sends a potent message to the Bar: that mediation is an opportunity too important to be optional, settlement is a result no less worthy than a decision on the merits, and the art of settlement goes hand in hand with the art of advocacy.

Like these structural decisions, the manner in which the Seventh Circuit's mediators approach their task is consonant with the court's core values. It goes without saying that a court should choose mediators who are well-equipped for the task by aptitude and temperament, and should support them in every way to maintain the credibility and integrity of the program. What is equally important is that the mediators understand and embrace the court's ethos. In everyday parlance, the court and its mediators need to be on the same page. I think we have achieved that at the Seventh Circuit.

The Seventh Circuit's three mediators–Rocco Spagna, Jillisa Brittan, and I–are passionate about our work (though, as mediators, we try to be *dis*passionate while doing it!). We like our fellow lawyers and enjoy discussing their cases with them. We feel privileged to talk with clients about their concerns and, sometimes, their innermost thoughts. We love the variety of cases we encounter–each one a glimpse into a corner of the world, an area of the law, a slice of life. We consult with one another frequently. To us, no

---

17. *See, e.g.,* Lisa Evans, *Mediation in the Ninth Circuit Court of Appeals*, 26 JUST. SYS. J. 351 (2005); NIEMIC, *supra* note 1.

case is routine. Every mediation is fascinating–for its fact context, its legal issues, its personalities, or all three.

We believe that court-sponsored mediation is about developing alternatives and making choices in accordance with the parties' interests. We try to expand the alternatives and provide a safe, comfortable environment in which parties can choose freely. They may not be able to bring themselves to do what is in their interest, but we never expect them to do what is *not* in their interest. We are not there to tell them what to do. We are there to reason with them and, most of all, to listen. Our goal is to help counsel do the best job they can for their clients and to help clients make the best choices they can for themselves. If our legal assessment might be helpful, we give it. If a suggestion might open a door, we make it. We treat counsel and parties respectfully and hold them to the same standard of conduct with one another.

We assign cases among us at random. Each of us is a generalist. Each has exposure to the widest possible variety of subject matters and attorneys. Further, because many attorneys are "repeat-players," we build continuing relationships with them. They know we believe in preparation, patience, and persistence. We work hard with them. We are hopeful. We do not easily give up. If the mediation ends without settlement, we want to feel sure–and want attorneys and parties to feel sure–that everything that could reasonably have been done in the interest of settlement has been done. Then, if they must pursue the appeal, they can do so with the certainty that there was no acceptable negotiated alternative.

Our approach to mediation resonates with the emphasis the Seventh Circuit places on giving cases a *hearing*, getting to the heart of the matter, working collegially, working hard, and speaking as one. This is not an accident. It is the result of wise decisions in designing our program and, I hope, wise decisions in implementing it. As court mediators, we are fortunate to work in harmony with the Court's values and proud to contribute to the vitality of the Court as an institution.