APPELLATE MEDIATION IN HAWAII: THE FIRST EIGHTEEN MONTHS OF THE HAWAII APPELLATE CONFERENCE PROGRAM

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I. INTRODUCTION

This article describes the history, goals, and procedures of the Hawaii Appellate Conference Program (Program), which was adopted by the Hawaii Supreme Court effective March 15, 1995.[2] The article also presents a preliminary evaluation of the effectiveness of the first eighteen months of the Program, and analyzes whether Program goals were met.

II. HISTORY

The Program was started partially in response to Hawaii's appellate backlog. The backlog had increased significantly between 1992 and 1993, as had civil filings. The Supreme Court responded to the backlog problem by, among other things, (1) suspending oral argument in all but the most complex of cases, (2) rewriting procedural rules, and (3) establishing a task force to design an appellate mediation program.[3]

In January 1994, Chief Justice Ronald Moon asked the Judiciary's Center for Alternative Dispute Resolution (Center) to convene a task force to study and issue recommendations to implement an appellate mediation program, and to tailor it to meet the Hawaii court system's unique needs. Task Force members appointed by Chief Justice Moon included representatives from the Supreme Court, Intermediate Court of Appeals, the trial court, and the Center, respected attorneys with significant

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Ms. Kent would like to thank Chief Justice Ronald T. Y. Moon; James Branham, Staff Attorney to the Hawaii Supreme Court; Michael Broderick, Administrative Director of Courts; and Sandra Yasui, Supreme Court Clerk; for their consistent commitment, support, and vision in the implementation and administration of the Program. She would also like to thank Becky Sugawa and Laurie Tochiki, who work at the Center, for their assistance in administering the Program, and Susan DeGuzman for help in writing this article. Ashley Masuoka, Tina Forbush, and Jeff Hester, law students who volunteered at the Center, also contributed to this Article.

Finally, Ms. Kent extends her deepest appreciation and regard for the many hours of dedicated service provided the Program by the volunteer appellate mediators. Their continuing contribution to the Program is what makes it a success.

[2] In the Matter of the Amendment of the Hawaii Rules of Appellate Procedure, "Order Adding Rule 3.1 to the Hawaii Rules of Appellate Procedure."

[3] Approximately fourteen states and eight federal circuits have active appellate settlement programs. *See* S. FitzGibbon, *Appellate Settlement Conference Programs: A Case Study*, 1 J. Dis. Res. 57, 59 n.17 (1993) (Hawaii and Oregon started appellate mediation programs after the FitzGibbon article was written). Goals of these programs include (1) decreasing case processing time, (2) reducing judicial workload through settlement of cases, (3) dismissing cases that would be dismissed anyway at some point in the appellate process (e.g., for jurisdictional reasons), (4) narrowing issues on appeal, (5) clarifying issues on appeal, (6) resolving difficult cases that would require a great deal of court time, (7) resolving pending appeals more quickly, and (8) creating a place or an alternative forum where parties feel free to discuss their options. *See* R. Rack, *Pre-Argument Conferences In The Sixth Circuit Court of Appeals*, 15 Toledo L. Rev. 921 (1984); Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 Minn. L. Rev. 1221, 1230 (1979).

practice experience before the Hawaii appellate courts, and a law school professor who concentrates on civil procedure.[4]

The task force studied programs across the country and components necessary to make a program effective. It then transmitted recommendations to the Supreme Court, which adopted rules and commentary on March 1, 1995. Some significant amendments were added on February 16, 1996. The rules and commentary are discussed herein.

III. DESCRIPTION OF THE HAWAII APPELLATE CONFERENCE PROGRAM

A. Program Goals

The main objective of the Program is to provide an alternative to continuing the appellate litigation, by giving parties with a neutral place and process for resolving appeals or issues in appeals, and thereby enhance public confidence in the legal system.[5] If parties can amicably settle their cases, they avoid the need for further time-consuming, and often times, expensive litigation.

Successful appeal settlement results in a benefit to the courts' backlog and case reduction.[6] Additionally, reducing the number of cases requiring resolution allows the appellate courts to increase the pace at which other cases are resolved.

B. Cases Entering The Program

All civil appeals, with certain limited exceptions,[7] are eligible for inclusion in the Program. *See* Haw.R.App.Pro. 3.1 and Haw.App.Conf.R. 2.[8] Appeals may enter the Program in one of two ways.

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[4] Justice Robert Klein, Judge Corinne Watanabe, Judge Kevin Chang, James Branham, Michael Broderick, Elizabeth Kent, Darrell Phillips, and Gregory Sugimoto were Judiciary representatives to the Task Force. Attorneys Peter Van Esser, Lisa Munger, Carleton Reid, and Bert Sakuda also sat on the Task Force. Professor Eric Yamamoto from the Richardson School of Law also participated.

[5] Rule 1 states, in pertinent part:

A goal of the Hawaii Appellate Conference Program is to enhance public confidence in the court system. To the extent resources are available, this program will provide parties a forum and process to (1) realistically consider the possibility of settlement of the entire case or issues in the case, (2) discuss limiting and simplifying the issues on appeal, (3) discuss briefing schedules, the content of the record, and other pertinent matters, (4) take actions as may reduce costs, and (5) aid the speedy and just resolution of any case.

In pertinent part, the commentary notes:

The main objective of the Appellate Conference Program is to provide an alternative to litigation to parties who have filed an appeal. This objective is met by providing parties with a neutral place and process for resolving pending cases in total or, alternatively, issues within the case.

[6] In 1992, for civil appeals, the median number of days from filing a notice of appeal to court decision by an appellate court was approximately 575 calendar days.

[7] The exceptions are found in Rule 2 of the Hawaii Appellate Conference Program Rules and Rule 3.1(a) of the Hawaii Rules of Appellate Procedure. The exceptions are appeals or original proceedings involving "(1) petitions for extraordinary relief such as a petition for a writ of mandamus or the like, (2) petitions for a writ of habeas corpus, (3) appeals or petitions in which the appellant/petitioner is incarcerated and is seeking relief related to said incarceration, (4) appeals or cases arising under rule 40 of the Hawaii Rules of Penal Procedure, (5) questions of law reserved to the Hawaii Supreme Court, (6) revocation of a driver's license, or (7) a restraining order."

[8] Criminal cases and criminal-related cases are excluded from mediation and the settlement process because there is no room for negotiation between the parties. In addition, mediation might expose defense counsel to claims of ineffectiveness of counsel.

Originally cases involving pro se parties were excluded because (1) the pro se might rely on the neutral to represent his or her interests, (2) the pro se might not truly understand the nature of the proceedings, (3) having pro se parties and represented parties might create imbalance of power problems, and (4) often these cases are not capable of settlement. However, after the first year of the Program, the court recognized that a blanket exception for all cases in which parties appeared pro se would not be effective, and the court changed the rule.

First, an eligible appeal[9] may be selected by the Program Administrator from among all Program-eligible cases for inclusion in the Program. *See* Haw.App.Conf.R. 3(a).[10] If the case is thus selected, participation in the conference is mandatory.[11] *Id.* at 3(b). Second, parties to appeals eligible for the Program, but not selected into the Program, may request inclusion in the Program. *Id.* at 3(c). Inclusion requests may be made at any time after a notice of appeal has been filed, even after briefing or oral argument.[12]

In many cases, the Program Administrator will call counsel after the Civil Appeal Docketing Statement (CADS) is filed to discuss the appeal and the Program. Generally, the conversations last only a few minutes and concentrate on the facts of the appeal and the settlement history, if any, of the case. All conversations are confidential, and counsel are encouraged to be as candid as possible in discussing cases. Often these calls enable the Program Administrator to have a better understanding of the appeal than may be had from review of the documents alone.

Cases are selected into the Program as soon as possible after the CADS is transmitted from the lower court or agency to the Supreme Court Clerk's Office. Generally, selection is within three weeks after the appellant or cross-appellant has filed a Notice of Appeal, and before the record on appeal has been compiled and transmitted to the Court.[13]

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[9] Appellants in all cases eligible for the Program must file a Civil Appeal Docketing Statement (CADS), a short form which should be filed with the lower court or agency from which the appeal is being taken. The CADS adopted by the Hawaii Supreme Court is patterned after the form used in the United States Court of Appeals for the Ninth Circuit.

[10] Originally appeals were randomly selected into the Program. This was done for several reasons. First, neutrals from appellate mediation programs on the mainland suggested that, if only those cases likely to settle are included in a program, then attorneys would not take the program seriously and the program might not achieve much. Those appeals, the neutrals noted, would have likely been dismissed from the appellate docket anyhow by natural attrition. Furthermore, if only "sure bet" cases were included, all program results and statistics would be suspect. In any event, mainland appellate mediators noted it is not always easy at the outset of a program to determine what types of cases are likely to settle. On February 26, 1996, the rule was changed to allow for discretionary selection of appeals into the Program.

[11] Commentators appear to agree that mandatory programs are better utilized than voluntary programs. *See* SPIDR, *Dispute Resolution As It Relates To The Courts: Mandated Participation And Settlement Coercion*, 46 Arb. J. 38, 41 (March 1991); D. Steelman & J. Goldman, *Preargument Settlement Conferences In State Appellate Courts*, Fall 1986 St. Ct. J. 4, 11 (comparing appellate programs in three states and finding one to be most successful in large part because it was mandatory). In addition, one commentator noted that mandatory programs are more cost-efficient than voluntary programs and that expanded use of appellate conference programs (1) educate counsel and parties, (2) result in increased voluntary use of the program, (3) remove obstacles facing one party who is predisposed to settlement but fears that making a unilateral suggestion would be taken as a sign of weakness, and (4) make it easier for attorneys to recommend settlement because a neutral official is giving the same advice. *See* SPIDR, *Dispute Resolution*, 46 Arb. J. at 41; Steelman & Goldman, *Preargument Settlement Conferences*, Fall 1986 St. Ct. J. at 11; Note, *The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation*, 63 Minn. L. Rev. 1221, 1230 (1979).

[12] The commentary to Rule 6 makes it clear that parties in "opt in" cases may choose to proceed in the mediation program **and** on the appellate track at the same time. In other words, the parties do not experience any delay in the decision on their appeal by volunteering to go through the Program.

[13] Most successful programs hold their first settlement conference early in the appeal process, in part to allow adequate time for negotiation and settlement before commencement of brief writing and the attendant costs in attorney time. *See Franklin County (Ohio) Nov. 1, 1992—Oct. 31, 1993 Annual Report of Prehearing Conference Procedures (Local R. 15)* at 10. Without the cost savings, one impetus for settlement is gone. *Id.* Second, holding settlement conferences early in the appeal process allows more flexibility in decision making. Finally, if mediation is held early in the appeal process, there is a better chance that positions are less hardened than they would be later in the process, especially after briefing has been completed and significant costs have been incurred.

One study compared programs in three states. *See* S. Steelman & J. Goldman, *Preargument Settlement Conferences*, Fall 1986 St. Ct. J. at 7. One state court held its conference before the record on appeal had been transmitted and generally within forty-five days of the filing of the notice of appeal. *Id.* Another court held its conference after transmittal of the trial court record, and the third state court scheduled its appellate conference after briefing. Only the first program was clearly successful. *Id.* Interestingly, the second court changed its procedures to hold conferences within forty-five to sixty days from the filing of the notice of appeal. *See* August 6, 1993 Letter from Justice Angelo Santaniello (Connecticut Supreme Court) to Luan Nguyen.

C. The Process Leading Up To Mediation

Counsel and parties are notified after a case has been selected into the Program through a scheduling notice sent to the attorneys by the Supreme Court Clerk's Office. *See* Haw.R.App.P. 3.1(e). The Scheduling Notice informs counsel and parties of the date, time, and place of the first meeting. The Clerk's Office also notifies the court reporters and lower court or agency clerk's office that the appeal has been included in the Program and that preparation of transcripts and the record are stayed pending further notification from the clerk. *See* Haw.R.App.P. 3.1(e).

During the first eighteen months of the Program, approximately one case per week was scheduled for appellate mediation in Honolulu. Approximately one additional case per month was scheduled on either Hawaii or Maui.

Mediators are appointed by the court to help counsel and parties resolve the appeal or issues in the appeal. Retired justices or judges and retired or semi-retired practitioners, who have all been trained in appellate mediation, serve as volunteer mediators.[14] *See* Rule 5.[15] The Program could not exist without these volunteer mediators who are its very backbone. Their commitment to the courts, the Program, and litigants in the State of Hawaii, is appreciated by the Hawaii Judiciary.[16] When necessary, the Program Administrator and the Director of the Judiciary's Center for Alternative Dispute Resolution may also serve as mediators, provided the parties agree. The parties are not charged for the services of neutrals appointed by the Program. *Id.*

After appointment, the mediator usually sends an initial letter to counsel asking for pre-mediation statements. In this letter, the mediator will usually inform counsel if parties are required to attend the first mediation meeting.

The purposes of the pre-mediation statement are to

- give the mediator an understanding of the issues presented by the appeal, related issues, and the parties' positions and interests;
- encourage the parties to succinctly frame the issues on appeal and address the strengths and weaknesses of their legal positions;
- encourage the parties to think about goals that might be accomplished by settlement and creative ways of settling the case; and

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[14] David Lombardi and Dana Peterson, court mediators at the United States Court of Appeals for the Ninth Circuit, designed and led the initial training program for the volunteer mediators. The Hawaii Judiciary is very appreciative of the excellent training they provided the Program and for the continuing support and wise guidance Mr. Lombardi and Ms. Peterson have provided the Program.

[15] If the parties wish, they may jointly select their own mediator rather than work with the mediator appointed by the court. The selected neutral does not have to be from the court's list of volunteers and need not be an attorney. If the parties select their own mediator, the parties are responsible for paying the neutral for services rendered. As of the date this article went to publication, no parties had elected this option.

[16] The following people serve or served as volunteer mediators: Clinton Ashford (retired Chief Justice of the Supreme Court of the Republic of the Marshall Islands), Bill Burgess, Ben Carroll, Jim Case, Robert Won Bae Chang (retired circuit court judge), Frank Damon, Masato Doi (retired circuit court judge), JW Ellsworth, Al Gould (retired family court judge), Walter Heen (retired Intermediate Court of Appeals judge), James Hoenig, Walter Ikeda, Shunichi Kimura (retired circuit court judge), Edward King (retired Chief Justice of the Supreme Court of the Federated States of Micronesia and currently sitting as a federal magistrate), Richard Komo (retired circuit court judge), Evelyn Lance (retired family court judge), Rosalyn Loomis (retired family court judge), Herman Lum (retired Chief Justice of the Hawaii Supreme Court), Willson Moore, Frank Padgett (retired Justice of the Hawaii Supreme Court), William Richardson (retired Chief Justice of the Hawaii Supreme Court), Keith Steiner, Bill Stricklin, Frank Takao (retired circuit court judge), Ted Tsukiyama, Margaret Ushijima, Betty Vitousek (retired family court judge), and Patrick Yim (retired circuit court judge).

•encourage the parties to analyze the appeal from the perspective of the opposing party.

Mediators usually ask counsel to deliver the pre-mediation statements to them at least one week prior to the mediation date.

Confidentiality of the entire mediation process is critical to candid analysis of issues and appeals in the Program; therefore, the pre-mediation statements are not filed with the court Clerk's Office. To further encourage candid remarks, most mediators ask that counsel **not** exchange certain confidential portions of the pre-mediation statement. Mediators often talk to counsel about their pre-mediation statements before the first mediation meeting commences.

Mediators may also prepare for the first meeting by communicating with the trial judge about matters relevant to the appellate conference, provided the parties first consent to the communication. *See* Rule 8(b). In designing the Program, it was felt that such communications could provide a significant saving of time to the mediator. Time is especially important because the mediators are volunteers.[17]

D. The Mediation

On Oahu, most mediations are held at Ali'iolani Hale (the Supreme Court Building). Occasionally, when counsel and parties from different islands are involved, mediators have held conferences at the state's video conference center, which allows for tele-conferencing. Although in person meetings are preferable, mediators try to save the parties from incurring further costs whenever possible (there is also a time savings for neighbor island counsel and parties if meetings are held by tele-conference). The mediator balances the likelihood of settlement against the risk of incurred cost.

Mediators generally use a consensus-building style of mediation. At the beginning of the first meeting, the mediator usually discusses Program goals with the parties and explains that the mediator serves as an unbiased neutral and does not make a decision about who is right or wrong or what one party "must" do. The mediator also usually explains that s/he will probably meet individually with counsel and the parties in separate sessions. Mediators also generally discuss confidentiality, and stress that everything that is said in connection with the mediation is confidential and should not be communicated to any court. *See* Rule 8.[18]

Parties and counsel are asked to discuss the appeal and to critically examine their chances for success on appeal. The mediator may ask each side to discuss the standard of review and explains that it may differ significantly from that applied at the lower court.

The mediator asks parties and counsel to consider all costs of an appeal, including financial and emotional costs, and to conduct a cost-benefit analysis. Considerations such as the likelihood of prevailing and the projected time frame before final resolution of the case may also be addressed. In many instances, the mediator will point out that resolution of the issues on appeal may not actually resolve the dispute between the parties.

After the first meeting is held, counsel, parties, and the mediator often decide they need to reconvene. This allows the parties to evaluate progress toward settlement, the viability of options that were

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[17] Originally, the Program rules provided that mediators could communicate with trial judges only in cases which were tried by a jury. Later, the rule was amended to allow for communications in all cases. As a matter of practice, during the first eighteen months of the [appellate conference] Program, very few mediators chose to communicate with the trial court.

[18] At least two courts have held that parties are prohibited from advising members of the court or unauthorized third parties of discussions or actions taken at appellate conferences, including remarks made by the appellate mediator about whether a case is frivolous. *See Clark v. Stapleton Corporation*, 957 F.2d 745 (10th Cir. 1992); *In re Lake Utopia Paper Limited*, 608 F.2d 928 (2d Cir. 1979).

explored at the mediation, and possible alternatives. Mediators are aware that they need to maintain a balance between continuing the mediation to allow exploration of all opportunities for settlement and the risk of delay.

Mediators try to be flexible when fashioning interim relief and final settlement. In one case, the parties determined they might be able to settle a pending appeal (which was included in the Program) once a court issued a decision in a different case pending in a trial court. Counsel and the mediator entered an interim report, staying the briefing schedule of the included appeal, and setting a new mediation time several months in the future. In another case, counsel agreed that a decision in an appeal pending before a Hawaii appellate court would be dispositive in settling their appeal, and agreed to stay their appeal until the court entered a decision in the other appeal. Once that decision was entered, the parties settled the appeal included in the Program.

E. After The Mediation Concludes

If the parties successfully resolve all matters on appeal, the mediator will file a report noting that a tentative settlement was reached. The report also notes that the parties have thirty (30) days to dismiss the appeal. If the parties do not dismiss the appeal within that time, the case is returned to the appellate docket and the deadlines which were stayed by inclusion of the case in the Program once again become applicable.

If the parties are unable to resolve any issues in the appeal, the mediator notes on the report that no settlement was reached. The appeal is then returned to the appellate docket. If the parties were able to resolve some issues on appeal, the mediator notes this on the report, but the case is still returned to the appellate docket.

In all cases, if the mediator conferred with the trial judge, the conference is noted on the mediator's report. If the case is remanded to the trial court for further proceedings, it is remanded to a trial judge with whom the mediator had not communicated.

IV. ANALYSIS OF THE PROGRAM RESULTS OF THE FIRST EIGHTEEN MONTHS

A. A Significant Number Of Appeals Included In The Program Settled

One hundred and one (101) cases were included during the first eighteen months of the Program. Of these, fifteen were still pending at the time this article was written, so statistics were available only for eighty-six (86) appeals. Of the eighty-six, thirty-three (33) appeals, or thirty-eight percent (38%), were completely settled. In eight (8) appeals included in the Program, or ten percent (10%), the parties narrowed issues or reached partial settlements. Thus, a total of forty-one (41) appeals, or forty-eight percent (48%), were settled in whole or in part.[19] Eight (8) appeals, or ten percent (10%), were withdrawn by the mediator prior to commencement of mediation.[20] The remainder were not settled.[21]

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[19] Roger Hanson, who works at the National Center for State Courts, analyzed two hundred five (205) docket sheets from appeals filed in the Hawaii Supreme Court in 1991 and 1992. His analysis showed that the attrition rate for civil appeals at that time was thirty-seven percent (37%), meaning that for every one hundred (100) civil appeals filed, the Hawaii appellate courts rendered sixty-three (63) decisions.

[20] All but one of these cases were randomly selected into the Program. In most cases, the appeal was withdrawn from the Program because the mediator made a decision that the case was non-mediatable and that it would be a waste of time to proceed with the mediation. Now that the selection process allows the Program Administrator discretion in selecting cases, it is anticipated that fewer cases, if any, will be withdrawn by the mediator before mediation commences.

[21] These statistics cover both randomly selected appeals and appeals included in the Program after the rules were changed to allow for discretionary selection. Not surprisingly, settlement rates increased after the rule change went into effect.

The average number of days between filing of a Notice of Appeal and filing of the mediator's report for cases included in the Program was one hundred four (104) days, and the median was eighty-eight (88) days.[22]

Resolution of appeals included in the Program had an impact on cases pending in other courts and on other appeals. This is because mediators attempt to work with counsel and parties on global settlements rather than limiting themselves to the issues presented by the appeal. The Program does not keep records for cases settled outside its parameters, but it is estimated approximately ten cases pending in the circuit courts and two appeals pending in the appellate courts were dismissed as a result of successful resolutions of appeals in the Program. Significantly, some of the appeals reported out by the Program as "not settled," were later dismissed by agreement of the parties as a consequence of settlements later reached between them.[23]

B. Observations About Cases That Settle/Do Not Settle

Every appeal is different, and each has its own challenging dynamic that may make the case capable or incapable of settlement. With the move from random to discretionary selection, some of these nuances are more readily discernable, and this has certainly had an impact on the Program's success rate.

Generally, appeals in two areas of law seem most amenable to settlement or partial settlement at the appellate level. First, more appeals arising out of personal injury lawsuits settled than did not settle during the first eighteen months of the Program. Second, more family law appeals (generally divorce cases) settled than did not settle. Conversely, and perhaps surprisingly, fewer contract dispute appeals settled than were returned to the docket for decision by the appellate courts.

Other generalizations can be drawn from the initial results. Usually, but not always, appeals involving amounts in controversy of less than $20,000 settled.[24] Surprisingly, many of the appeals that settled did not involve parties with continuing relationships.[25] Cases in which governmental entities or large corporations with several layers of employees who share responsibility for decision making present special challenges for settlement. These challenges are not insurmountable, but they make settlement more difficult for the mediators, counsel, and the parties.

The mediation model used in the Program is client-oriented. Mediation appears to work best when clients are present, although some settlements were reached without the presence of clients. Presence of clients largely depends on the mediator's style and input from counsel. Whether a mediator requires parties to be present varies from appeal to appeal.

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[22] Roger Hanson found that for civil cases the average number of days between filing of the notice of appeal and appellate court decision was five hundred eight (508) days.

[23] These dismissals are not reflected in statistics kept by the Program, but information concerning them was obtained through conversations with counsel in these cases. As Program Administrator, I tried to follow up on a statistically significant number of cases that were not resolved in the Program to determine how inclusion in the Program affected them. In this way, counsel informed me of later settlements.

In analyzing the impact of this Program on the Court, it is also interesting to look at statistics for cases dismissed by the Court for lack of jurisdiction. Approximately twenty-nine percent (29%) of civil appeals filed are dismissed for lack of jurisdiction. Of these, approximately ninety percent (90%) are later refiled. Interestingly, not all appeals included in the Program and reported out as "not settled," and then later dismissed, were later refiled. No direct correlation has been established between the Program and the lowered tendency for refiling.

[24] In fact, a few appeals involving minimal amounts were among the most difficult to settle, and indeed did not settle while in the Program.

[25] Commentators often note that mediation is effective in cases in which parties have a commitment to maintaining future relationships and that parties in these cases have a particular interest in settling. *See* N. Rogers and C. McEwen, *Mediation: Law, Policy, Practice*, Section 3.2 at 17 (1989).

Perhaps the most important generalization that can be drawn from the mediators' collective experience is that cases are most likely to settle when counsel are well prepared, understand the mediation process and the mediator's expectations, know their clients' interests as opposed to their positions,[26] and have prepared their clients for the mediation. Mediators consistently comment that successful resolution is contingent on counsel and that when counsel, clients, and the mediator are able to work together, communication is improved and settlement opportunities increase.

C. Party And Counsel Evaluation Of The Program

Perhaps more important than the number of cases that settled as a direct result of mediation were the attitudes of counsel and parties who participated in mediation. Evaluations are sent to counsel and parties after the mediator's report is filed. There are two separate surveys—one for appeals that were successfully mediated, and another for appeals in which no settlement was reached.[27]

The first part of the survey is quantitative. Parties and counsel are requested to note whether they agree, strongly agree, disagree, strongly disagree, or are undecided about statements made about the Program. Most participants strongly agreed that the mediator assigned to the appeal was neutral. Most participants also strongly agreed or agreed that the mediator helped improve communication between the parties, even in those cases in which settlement was not reached. The majority of participants also strongly agreed or agreed that the mediator helped them identify options and alternatives and kept meetings on focus. Not surprisingly, for those appeals in which resolution was reached, most respondents strongly agreed or agreed that the agreement reached was clear, fair to all sides, and workable. Most strongly agreed that the outcome would last. Most respondents, both in appeals that settled and those that did not settle, strongly agreed or agreed they would recommend the Program to others.[28]

Respondents' responses to the open-ended questions in the second part of the survey are also important in evaluating the success of the Program. When asked to explain what would have happened if they had not participated in the Program, most respondents in appeals that settled noted they would have proceeded through the appeal process with the commensurate expense and delay. Generally, respondents in appeals that did not settle said that nothing different would have happened if they had not participated.

In response to the question, "What aspect of this program did you find most valuable or helpful," most respondents felt that getting together with the opposing side to communicate about the possibility of settlement was positive. Respondents also felt the mediators, and in particular the skill, neutrality, and legal knowledge they brought to the mediation, were a very positive aspect of the Program.

Respondents in cases that did not settle felt that the mediator's failure or reluctance to push parties, lack of power to "twist arms" or sanction the other side,[29] and delay of the appellate process were

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[26] *See* D. Lax and J. Sebenius, *Interests: The Measure of Negotiation*, Jan. 1986 Negotiation J. at 73-92, *reprinted in* R. Lewicki and J. Litterer, et al., *Negotiation: Readings, Exercises, and Cases*, (2d ed. Irwin).

[27] The identity of the person responding to the survey and making comments about the Program is confidential, and no records are kept concerning response or failure to respond to the survey. Therefore, while the following comments made by parties and counsel may not be statistically significant or reliable, they are of interest in helping to understand the perceptions of parties and counsel of the Program.

[28] A significant number, however, noted they were undecided in response to this question.

[29] After receiving numerous comments about the need for sanctions, Program rules were changed. Sanctions may now be imposed pursuant to Rule 10 of the Rules of the Hawaii Appellate Conference Program for failure to comply with Program rules.

the least valuable aspects of the Program.[30] Several respondents also noted a frustration (1) with opposing counsel and parties who refused to participate in good faith, and (2) that clients were not required to attend.

Respondents in cases that did settle responded that the mediator assisted in settlement by bringing parties together to fully consider and discuss their differences and problems with their appeals. They also appreciated mediators' realistic opinions about settlement offers and positions.

V. CONCLUSION

The first eighteen months of the Program show great promise and that, at least initially, the Program has met its goal of providing litigants with reasonable alternatives to litigation. Parties' and counsel's satisfaction with the Program and Program results are evidence that it is worthwhile to concentrate on settlement at the appellate level, early in the appeal process, and that mediation has much to offer to parties, attorneys, and the courts. The creativity that may be had through decisions willingly reached by those directly affected by the decision cannot be matched by court decisions in which one party will necessarily prevail and the other will lose. This creativity and party-based control is one of the most attractive facets of the Program. It will be interesting to see if parties and counsel take advantage of these opportunities during the next eighteen months of the Program, and if the next one year and one-half of the Program will be as successful as the first.

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[30] It is important to note that in most cases an appeal will be in the Program for only one month before a mediation is held and that, if mediation is not successful, then the case may be returned to the appellate docket shortly after the first session. The attendant delay should be less than forty-five (45) days. In terms of the life of an appeal, this is an insignificant amount of time. In any event, appeals are not always decided in order of filing, meaning that an appeal that is filed on January 1 will not always be decided before an appeal that is filed on March 1 of that same year. Therefore, participants should not feel overly concerned they are penalized for participating in the Program in terms of getting an appellate court decision in those cases that do not settle.