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Foreword

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Appellate Mediation in the Third Circuit

FOREWORD

EDWARD R. BECKER*

THE United States Courts of Appeals are best known for their role in establishing circuit law through the filing and publication of precedential opinions. The existence of a coherent and consistent body of circuit law created by these opinions enhances predictability of the law and gives the community confidence in making business and personal decisions. For this reason, in 1993, when the Court of Appeals for the Third Circuit first considered establishing a mediation program under the leadership of then-Chief Judge Dolores K. Sloviter, objections were voiced that such a program was at odds with the primary mission of a lawmaking court. It was argued that to attempt to settle cases that had come so far in the litigation process—through trial and beyond—was to deprive courts of their ability to expand the corpus of the law.

These objections were seriously considered but rejected by a Committee appointed by Judge Sloviter and chaired by Judge Anthony J. Scirica. The Committee, and ultimately the Court, were influenced by three countervailing considerations: the success of appellate mediation programs in a number of state and federal appellate courts; the growing need to help litigators to control the ever escalating costs of litigation; and the need to help an overburdened Court cope with a caseload that threatened to get out of control. Acting on the recommendation of the Committee, the Court decided to establish a pilot mediation program, which was initiated in August 1994 and initially considered only cases from the Eastern District of Pennsylvania. Arthur H. Kahn, Esquire, became the program's pilot mediator.

In April 1995, based on the results of Mr. Kahn's work, the Court created a permanent Appellate Mediation Program, and Jacob P. Hart, Esquire, was hired to be the full-time Director. At that time, cases from all district courts within the Circuit (except the Virgin Islands) became subject to the new Program. In November 1997, Mr. Hart was selected to become a United States Magistrate Judge in the Eastern District of Penn-

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sylvania, and Joseph A. Torregrossa, Esquire became the Court's Director of Mediation. In 1998, Virgin Island cases were added to the Program, and in January 2000, a new Local Rule 33.0 was adopted to replace the August 1994 Order establishing the Program.

The decision to establish the Appellate Mediation Program was one of the wisest the Court has ever made, for it has been a spectacular success. During the statistical year 2001, for example, 159 cases were settled. It would have taken over four panels of the Court—12 judges, each of whom would have had to read large amounts of material—to prepare for and decide these cases. Since the Program's inception, almost one thousand cases have been settled! This represents an enormous relief for a Court that must dispose of approximately 1,700 appeals per year and which currently has two long-unfilled vacancies. Within its own framework, the Program is also enormously successful. On average, 37% of the cases accepted for mediation are settled.

In selecting its Appellate Mediation Program Director, the Court has made a conscious decision to choose a lawyer who possesses not only high intellectual competence but also long experience "in the trenches," rather than someone just trained in mediation. We made this choice believing that an experienced litigator would possess the best judgment in evaluating a case and would be more likely to command the respect of counsel and the litigants, who, after all, must decide whether to accept the mediator's recommendations. Our present Director, Joe Torregrossa, who meets these qualifications, has performed brilliantly, settling cases that no one ever thought could be settled, and winning countless kudos from the bar for his consummate skill.

It bears mention that the role of an appellate mediator is markedly different from that of a trial level mediator. An appellate mediator's threshold job is to evaluate not the relative strength and merits of the parties' intrinsic case, but their chances of succeeding on appeal. Joe Torregrossa's mastery of the appellate issues and the trial record has contributed markedly to his success. His predecessors, Arthur Kahn and Magistrate Judge Jacob Hart, also performed brilliantly; they too produced a large number of settlements.

Of course, Art Kahn, Jake Hart and Joe Torregrossa have not done it alone. Although the Director performs the greatest number of mediations, and Joe Torregrossa now travels to Pittsburgh, Newark and the Virgin Islands for more effective face-to-face sessions—they all have had a great deal of help from a cadre of District and Circuit Senior Judges, who have also settled many cases. Special praise goes to Senior District Judge Harold A. Ackerman of the District of New Jersey, who has had remarkable results.

It is clear in retrospect that the mediation program has had no adverse effect on the development of Circuit law. The Court writes precedential opinions in only 15% of its cases. That number has remained

consistent since the inception of the Appellate Mediation Program. Indeed, without the Program, the judges of our Court would have faced additional burdens that would have made it difficult for them to produce so many precedential opinions of high quality. At all events, I have long believed that, given the uncertainties and huge cost of litigation at all levels—including the appellate level—the highest form of justice that courts can produce is a freely negotiated settlement between the parties. Our appellate mediation program helps us mightily in achieving this goal.

A little known fact about the dockets of the Court of Appeals is that a substantial number of cases are filed by pro se litigants. In the Third Circuit, for the twelve-month period ending September 30, 2001, over 45% of the appeals were filed pro se. Two years ago, it occurred to me that some of these cases might be susceptible to successful mediation. In 2001, we adopted the Pro Se Mediation Program, and Local Rule 33.6 was added governing that program; prior to Rule 33.6, pro se cases were excluded from the Program. We now appoint attorneys on a pro bono basis, for the purpose of mediation only, for pro se litigants. While this aspect of the Program is still in its nascent stage, it has shown promise. We have already settled ten pro se cases. We look forward to expansion of our efforts in this regard.

The foregoing discussion just scratches the surface. The following Article by Joe Torregrossa furnishes the details of what I believe to be a model appellate mediation program. I commend it to all appellate courts in the land.