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Effective appellate mediation

A CLOSER LOOK AT THE MEDIATION OF A DEFENSE APPEAL FROM A MONEY JUDGMENT

You have slogged through years of pleading and motion practice, discovery, a settlement conference/mediation or two, agonizing trial delays, a jury trial, a successful verdict, and unsuccessful post-judgment motions by the defendant trying to reduce or eliminate your verdict. What comes next is either a check, or a Notice of Appeal.

And if it is a Notice of Appeal, you brace yourself and your client for another eighteen months to three years of waiting and worrying about the outcome of the appeal. And for good reason. Despite the appellate presumptions in favor of a judgment, the fact is that "Reversals Happen."

There still may be, however the possibility of settlement during the appeal, at least in an appeal from a money judgment. (For obvious reasons, settlement is unlikely if you are prosecuting an appeal from a defense outcome, and so this article assumes that the appeal is by a defendant and from a money judgment.)

Although compromising a verdict can be a hard-sell to an injured client who has yet to see a dime, the lengthy appellate process and the risks to both sides may present a golden opportunity to finally settle the case. One effective way to facilitate that settlement is through an appellate mediation.

The differences between pre-trial and appellate mediation

Appellate mediations present a host of different issues and challenges than do pre-trial mediations. The most obvious difference is that the parties now know the value of the case as determined by a jury. Further, all other issues of law, procedure and evidence have also been determined, although it is those issues that will be most in play, retrospectively, in the appellate arena.

Where a pre-trial mediation is predictive (How will the trial court rule on motions and evidentiary issues? How will the witnesses testify? How will the jury come down on liability and damages?), an appellate mediation is analytical and retrospective (How will the Court of Appeal view the trial court's exercise of discretion and rulings on questions of law, and on the jury's findings?).

For similar reasons, the client's expectations in an appellate mediation differs from that in a pre-trial mediation,

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A court-by-court overview of appellate mediation programs

State Courts of Appeal

First Appellate District

The First District currently does not operate a mediation program.

Second Appellate District

The Second District Court of Appeal operates a voluntary mediation program that kicks in upon request by all parties. Mediators volunteer a total of 4.5 hours, including time spent in reading briefs, premediation conferences, and the mediation session. Beyond that time the mediator charges his or her own hourly rate.

For information on the Second District's program, see www.courts.ca.gov/2499.htm. A form Request for Mediation can be downloaded from the Second District's website and emailed to 2d1.mediation@jud.ca.gov

Third Appellate District

The Third District requires all parties to a civil appeal to file a Mediation Statement at the commencement of the appeal. Those statements are reviewed by the administrative presiding justice, and if the case is selected, participation in mediation is mandatory. See Third District Local Rule 1. The parties may also stipulate for a Court supervised mediation, although the Court is not bound to honor that stipulation.

For more information about the program and procedures see https://www.courts.ca.gov/3140.htm.

The Third District's mediation program administrator is Rene Ackerman. She can be reached at rene.ackerman@jud.ca.gov or (916) 643-7084.

Fourth Appellate District

Each Division of the Fourth District has its own settlement program protocols.

For Division One (San Diego) see https://www.courts.ca.gov/2519.htm#settle.

For Division Two (Riverside) see https://www.courts.ca.gov/2519.htm#volunteer and Local Rule 4 (applies to Division Two only).

Division Three (Santa Ana) does not currently have a mediation program.

Fifth Appellate District

The Fifth District requires the parties to file a Mediation Program Questionnaire. See Fifth District Local Rule 2. If the case is selected, the mediation is mandatory and will be conducted by a sitting Justice. The Court will also "consider" stipulations for mediation if agreed to by all parties.

Information on the 5th Appellate District's mediation program can be found at https://www.courts.ca.gov/15256.htm.

Sixth Appellate District

The Sixth District requires parties to civil appeals to file a Mediation Statement Form, but participation in mediation remains voluntary. The Court maintains a panel of volunteer mediators. See Sixth District Local Rule 1. More information, including the list of volunteer mediators, can be found at https://www.courts.ca.gov/8866.htm.

The mediation program office can be reached at (408) 494-2538 or Sixth.Mediation@jud.ca.gov

Ninth Circuit Court of Appeals:

The Ninth Circuit operates a robust mediation program, where a staff of trained mediators act as adjuncts to the Court, and have been delegated authority to enter orders. The Court distributes a mediation questionnaire at the commencement of most civil appeals. Those questionnaires are reviewed by the mediation staff for cases that seem ripe for mediation. Attorneys may also contact the mediation office directly to request mediation. There is no cost for the mediation services.

For more information see https://www.ca9.uscourts.gov/mediation. The Mediation Office's telephone number is (415) 355-7900.

where the outcome of the trial is speculative. A tort client who has been vindicated after a grueling trial now has their eye on that jury's prize and may be inflexible about giving back a dime, especially with ten-percent interest accruing for the duration of the appeal. In other situations, the litigant may need the funds ASAP and does not want to wait out the appeal.

The defendant-appellant, on the other hand, faces statutory interest growing on the judgment, the cost of prosecuting the appeal, and the general low odds of success. The appellant may also be concerned about a published opinion that tilts the law in favor of plaintiffs in similar circumstances as your client. Even a non-published opinion may prove embarrassing to a tortfeasor defendant.

For all these reasons and more, appellate mediations, once initiated, often succeed, especially where the parties and counsel are clear eyed about the risks of the appeal and benefits of settlement.

Choosing a forum and paying for the mediation

If you've never mediated an appeal before, here is good news: The concept is not new. Several state Court of Appeal districts have mediation programs where trained mediators or sitting justices will preside. In federal court, the 9th Circuit has a robust mediation program where staff mediators will attempt to broker a settlement at no cost to the parties.

In some state Court of Appeal districts, the mediator will spend up to a

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half day at "no charge" (although much of that time is eaten up by the mediator's review of the briefs.) In some situations, all the parties need do is ask the court to set up a mediation; in others, the court will "ask" you to participate. See sidebar to this article for a court-by-court overview of appellate mediation programs.

If you prefer private mediation, all the major ADR providers have retired appellate justices on tap for paid mediations, often at top dollar. There are also private appellate practitioners with mediation credentials offering their services. If the defendant-appellant is motivated, they may be willing to foot the bill for the mediator.

Choosing a mediator

The single most important criteria for an effective appellate mediator is one who understands how appeals work and how appellate judges think. You want a mediator who has a thorough command of the appellate standards of review and won't be unduly swayed by passionate "jury arguments" about "what the evidence showed." Such arguments may play well with the clients, but not with an experienced appellate mediator.

In my experience, you do not necessarily get what you pay for in appellate mediators. I have participated in mediations where well-known (and pricey) retired appellate justices did little to broker a deal, and other mediations where a mediator provided at no charge by the court engaged in intense shuttle diplomacy until the parties found common ground.

Be wary of top-gun mediators proposed by opposing counsel, especially if opposing counsel is one of the go-to appellate firms routinely used by large defendants and carriers. Appellate law in California is a small universe, and many justices and appellate practitioners know each other well. Opposing counsel and the mediator should voluntarily disclose their prior business relationships, and it is often worth probing before agreeing to a mediator.

One advantage of using a retired appellate justice is the ease with which you can research their prior opinions, published or not, relating to the area of law in your case. Those opinions may provide clues to that mediator's biases or their approach to issues like those presented by your case.

Appellate mediation briefs

I have participated in appellate mediations before the filing of any appellate brief (relying only on mediation briefs); after the appellant's opening has been filed but before the respondent has filed theirs; and after both the Opening Brief and Respondent's Brief have been prepared. In my experience it is most effective to present to the mediator both the appellant's opening brief and a full respondent's brief so that the mediator – hopefully one experienced in appellate law – can fully compare the parties' positions in greater detail than a mere mediation brief allows. That also provides you as the respondent the best opportunity to pinpoint the weakness of the appellant's position.

In a recent appellate mediation, for example, I discovered that the appellant's Opening Brief was premised on matters outside the appellate record. I prepared and presented not only a Respondent's Brief but a Motion to Strike the Appellant's Brief and Dismiss the Appeal, pushing the appellant into a double-defensive mode.

Implicit in this recommendation is that you retain appellate counsel to draft the respondent's brief, and have that attorney attend the mediation to discuss the issues, including the standards of review, and to call foul if the defendant (or the mediator) tries to introduce non-appellate concepts so to intimidate your client.

Also implicit in this recommendation is that the mediation be held well into the appeal, after the record has been lodged and the parties have had time to prepare their briefs. Sometimes an early appellate mediation is fruitless because the parties have not yet had time to develop their appellate theories.

Evaluating value

Establishing a settlement value on a money judgment on appeal can be as simple as applying the general appellate reversal rate (fifteen to twenty percent) to the amount of the judgment, including costs, attorney's fees if any, and statutory interest accrued up to the date of the mediation. That is not a bad opening position for a plaintiff who is defending the judgment.

But the defendant will have a different calculus, claiming an inflated risk of reversal, the length of time that your client will need to wait for payment if the appeal does not settle, and the cost – both monetary and timewise – to both parties in the event of a reversal and retrial. I have seen defendants open an appellate mediation with offers ranging from twenty to fifty percent of the verdict while wholly discounting the costs and fees if any, and statutory interest to date. Not all appellate mediations succeed, of course, but by the end of the day you may reach a number that is 75% to 80% of the verdict.

Defense tactics to watch for

Over the years I have seen defendants (and mediators) try the following tactics and settlement positions. Be ready for them:

Disregarding costs, fees and interest

Expect the defendant to claim that the amount of the judgment at issue is the verdict itself (damages only) and to strip out costs, attorney's fees if awarded, and interest accrued to date. Be ready to put those numbers back into the amount in controversy and work down from there.

Confidentiality

It is not unusual for the defendant to demand confidentiality (or worse, to slip a confidentiality clause into the settlement agreement even if not discussed during the mediation). This is not much different than pre-trial mediations but for one factor: If the defendant is averse to disclosure, the risk it faces on appeal is an opinion that, published or not, is forever available online. That provides fodder

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for push-back on settlement value, i.e., if confidentiality is valuable, it costs money.

Dismissal in the trial court

A successful mediation will result in a dismissal of the appeal. But I have seen defendants demand (or slip into the settlement agreement) a requirement that the plaintiff file a request for dismissal of the case in the trial court. However, once a judgment is rendered the trial court clerk cannot enter a dismissal upon request and will not do so absent an order from the trial court. All the defendant is entitled to is a Satisfaction of Judgment and there is no reason to offer anything more.

Stipulated reversal

Sometimes the parties will agree, as a term of settlement, to stipulate to an appellate court reversal of the judgment. Be aware, however, that the Courts of Appeal are not bound by such an agreement and can deny the application in its discretion based on a set of statutory factors relating to the public interest. (See Code Civ. Proc., § 128(8).)

Herb Fox is a certified appellate law specialist with over 30 years of experience handling hundreds of civil appeals in appellate courts throughout the state. He represents plaintiffs who are defending money judgments on appeal on a contingency or hybrid fee basis in select cases, and he has participated in more than a dozen appellate mediations. More information about Herb can be found at www.FoxAppeals.com. He can be reached at 310-284-3184 and at HFox@FoxAppeals.com.

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