FEATURE

MEDIATING CASES ON APPEAL:

Benefits, Strategy & Client Considerations

BY JUSTICE FAITH IRELAND (RET.)

Note: *This content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.*

Washington appellate courts have no civil case mediation requirement.[1] While some state appellate courts have shown that mandatory mediation can produce good results,[2] exploring settlement after a trial court victory can be a tricky proposal to make to a client. This article will explore when and how to propose mediation to a client and how to explain its potential benefits, as well as strategies for preparing for the mediation.

PROPOSING MEDIATION ON APPEAL

1 Time It Right

A prominent appellate lawyer who frequently represents respondents shared that she generally shuns the offer of a settlement or mediation conference if it is made before the appellant's brief is due. She waits to see if the appeal will happen and is not just a threat. Often no brief is filed and the appeal is dismissed. If the brief is filed, the lawyer then evaluates the pros and cons of pursuing settlement for her client.

2 Help Your Client See the Risks

Did your client prevail at the trial court level? If so, it may be hard for your client to see the benefits of a mediation or settlement conference. Help your client understand that no result is a sure thing on appeal. This is especially true when the issue on appeal involves a question of law or a question about how the law was applied, which the appellate court will determine *de novo*.

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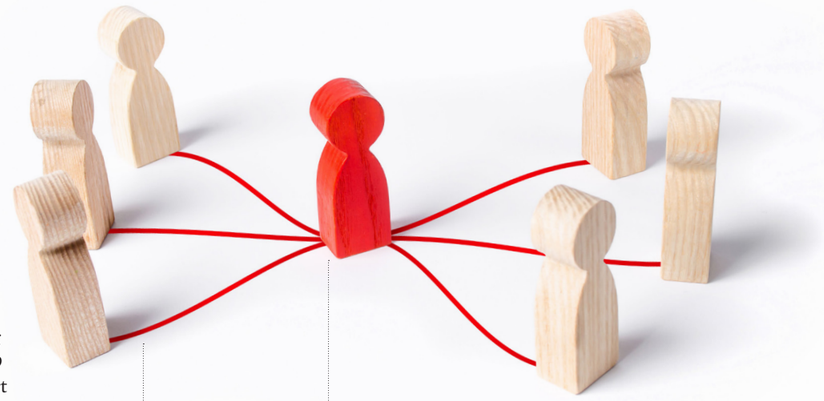

3 Explain the Tradeoffs of Settlement Now Versus Awaiting the Result on Appeal

If your client won at trial and the judgment is solely monetary, consider the time factor and the value of receiving a sum certain (even if less than the judgement) rather than awaiting the result of an appeal. It can now take more than a year-and-a-half from filing an appeal to decision. The average from 2019 to 2022, when all three divisions of the Court of Appeals are combined, is one year and 201 days, according to the Washington Administrative Office of the Courts.[3] Even if your client prevails in the Court of Appeals, there is also the risk of further delay if a petition for review is filed with the Washington Supreme Court.

If your client lost at trial and insists on an appeal, you still need to educate them about the potential for increased costs beyond the amount of the judgment. For example, is interest on the judgment accruing? Inform them of the likely attorney fees they will incur on appeal, and definitely advise them if there is a possibility that if they lose on appeal they will have to pay the opposing party's attorney fees as well.

4 Factor in Emotions, Bias, and Values

Are there matters to be dealt with between the parties while the appeal is pending? The emotions of the parties might provide another reason to mediate and reach an agreed resolution sooner than an appellate court's resolution later. This is especially true in family law, probate, partnership, and other cases where there are ongoing relationships to be preserved (or at least not further damaged).

In talking to your client about mediation versus the risks on appeal, also be aware that two forms of cognitive bias may be at play. The first is confirmation bias, which is the tendency to interpret new evidence as confirmation of one's existing beliefs or theories. This may cause a client—and especially a client who has prevailed at trial—to see all information through a misleading lens that discounts your discussion of any weaknesses in the client's arguments on appeal. One commentator has noted the effects of confirmation bias in the context of settlement on appeal: "The subject strongly credits information that supports a preconceived [idea]. ... The subject distrusts or rejects information that conflicts with those preconceived notions, even without an objective basis to do so."[4]

The second form of cognitive bias that can be a factor in your client's ability to assess the utility of settlement on appeal is loss aversion, in which "[l]osses loom larger than gains."[5] The pain of losing is said to be psychologically twice as powerful as the pleasure of gaining. With this filter in mind, help your client evaluate potential losses on appeal as well as potential gains.

Finally, consider the values of your client and the opposing party. What are typical values that matter? People often want to be seen as honest, trustworthy, and upstanding. They may also have values flowing from family, ethnicity, sexual orientation, nationality, etc. Core values may also include freedom, independence, security, and peace. Can you recognize and enlist your client's particular values in promoting settlement? It will also be helpful for the settlement officer or mediator to understand those values.

Work with your client to fashion multiple resolutions of the dispute in advance of the hearing.

PREPARING FOR MEDIATION

1 Selecting the Mediator or Settlement Officer

I have heard from seasoned appellate attorneys that they often prefer to use the same mediator on appeal who facilitated a pretrial settlement conference that failed, likely because of that mediator's familiarity with the facts of the case and with the parties. Otherwise, their preference is for a mediator or settlement officer who has previously been on the staff of or a judicial officer at the Court of Appeals.

2 Consider a RAP 5.5(b) Settlement Conference in the Court of Appeals

If you believe a settlement conference or mediation would be helpful but get a cold response from opposing counsel, consider filing a motion. The clerk of the division of the Washington Court of Appeals with jurisdiction can order a settlement conference. (Because RAP 5.5(b) specifically states "in the Court of Appeals," this strategy is not available if you are seeking review by the Washington Supreme Court.)

3 Offer to Delay an Appeal Bond

A defendant with a judgment may be required to post a supersedeas bond in order to delay payment until the appeals process is complete. The prevailing party may offer to delay the supersedeas bond until the mediation is complete as an inducement to mediate.

MEDIATION STRATEGY

The mediator will not be determining the outcome of the case but will want persuasive arguments to present to the parties and their counsel. Give the mediator an outline of your legal contentions and the reasons you think you will prevail. Parties often submit information to the mediator that they want kept confidential and not shared with the opposition. This is not helpful to the mediator.

The typical mediation has limited pre-meditation statements, sometimes a joint session, and then shuttle diplomacy as the mediator goes back and forth between parties. In their book, *Appellate Mediation: A Guidebook for Attorneys and Mediators* (ABA 2016), authors Brendon Ishikawa and Dana Curtis recommend that more time be devoted to developing and negotiating multiple solutions. Work with your client to fashion multiple resolutions of the dispute in advance of the hearing. Explain to your client when such nuanced results would not be available on appeal. This may promote collaboration during the mediation.

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1 Initiate a Mediator's Settlement Proposal

A poll of mediators on whether they use a mediator proposal will often result in one of three answers: always, never, and it depends. Some mediators will give a mediator's proposal only if both parties agree. Others do not require both to agree since either party is free to reject a mediator's proposal.

2 Lay the Groundwork to Prevent Impasse

It is often important to spend time on the emotional and values sides of a case before beginning the settlement demands and counteroffers. However, waiting too long can inhibit coming to settlement. Impasse occurs when each side claims to be done negotiating. Even when a party says it is their best and final offer, a mediator knows that is often not true.

3 Come Prepared to Settle

Bring a settlement statement comparable to a CR 2A agreement to present to the appellate court. Payment deadlines, waivers, nondisclosure agreements, and other case-specific requirements should be vetted early in the day. That avoids their becoming last-minute settlement killers.

If the case is one that provides for attorney fees on appeal, be prepared with the amount you should be paid by the opposition. Be sure your client knows what the net result will be if you settle, including attorney fees and costs.

Be honest with yourself and your client. The case most difficult to settle is often the one you would most love to argue and feel confident that you will win. Be aware of any personal resistance to settlement and focus on whether settlement is in your client's best interest, remembering that it ultimately is the client's decision.

If your mediation is successful, be sure to advise the appellate court promptly to avoid creating unnecessary work for the court or clerks. BN

NOTES

1. The Ninth Circuit Court of Appeals established a Mediation Program pursuant to Federal Rule of Appellate Procedure 33 and Circuit Rule 33-1 to facilitate settlement of civil cases on appeal.
2. Patrick R. Kingsley, a partner at Stradley Ronon, noted in a 2020 article on his firm's website, "New Jersey's Civil Appeals Settlement Program recently reported a success rate of over 40%. Statistics from other courts show some programs have settled about half of the referred cases."
3. Based on annual reports for Court of Appeal Div. I, II, and III from 2019 to 2021, www.courts.wa.gov/appellate_trial_courts/aocwho/.
4. Steve Emmert, "Appellate Mediation: Why is it so Hard to Settle During an Appeal" Appellate Issues (ABA Summer 2019), available at www.americanbar.org/groups/judicial/publications/appellate_issues/2019/summer/.
5. Daniel Kahneman, *Thinking, Fast and Slow* (2011).