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Appellate Mediation: a Good Choice for Clients?

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Resolution of disputes may take different paths. One is full litigation from trial to exhaustion of all appeals. Another is direct negotiations between litigants. Here, I will discuss whether appellate mediation, rather than these other paths, is a good choice for your client.

Seeking Court Review. An aggrieved party may seek review of a trial decision by timely filing either a notice of appeal or a notice for discretionary review.[1] What follows is often a lengthy, expensive, and uncertain process.

A trial decision in a civil case is enforceable pending review unless stayed.[2] But a stay is conditioned on the posting of a supersedeas bond or other security in a sufficient amount.[3] This amount could be a substantial expense.

The record on review is another expense.[4] But this is an essential expense for both appeals and cross-appeals.

Briefing on appeal adds more expense in terms of attorney time. But excellent briefing is the most critical part of any appeal. "[T]he purpose of the written brief is to educate the court and to persuade it to accept a conclusion."[5] "[T]he purpose of oral argument is to clarify and emphasize what has been written."[6]

Uncertainty of outcome is another factor to consider. An appellate court may "reverse, affirm, or modify the decision being reviewed."[7] It may also affirm in part, reverse in part or remand for further proceedings. How this plays out in cases varies.

A decision of an appellate court may not be the end of litigation. A reversal, either in whole or in part, will lead to a remand for further proceedings. And the grant of discretionary review by the state supreme court of a decision of the court of appeals adds uncertainty and expense.

Added to the uncertainty and expense of further litigation is delay. Data from caseload reports for 2020 on the Washington Courts website are telling. There was an average of 593 days between filing of a notice of appeal and filing of an opinion for 75% of the cases in the three divisions of the court of appeals. Additional time must be added for those cases in which the state supreme court grants discretionary review. Is delay in your client's best interest?

Careful assessment of all these risks by client and counsel is important to decide whether exhaustion of all appeals makes sense. Appellate mediation may provide a better path to resolve the client's disputes.

Appellate Mediation. "Mediation is now routine (and often required) in federal appellate courts, but it is still infrequently used in state courts."[8] The Washington State Court Rules of Appellate Procedure formerly provided for settlement conferences before judicial officers.[9] But that process was rescinded years ago.[10] Nevertheless, there is still room for appellate mediation outside the direct supervision of an appellate court.

Careful assessment of expense, delay, and uncertainty of outcome before the relevant court is important in any mediation. But appellate mediation is quite different from mediation prior to final judgment at trial.[11]

First, the entry of a judgment at trial marks the point where a judge or jury has decided a "winner" and a "loser." There is no longer any uncertainty regarding how a judge or jury might decide a case. What remains is the issue of whether the decision will withstand appellate review.

Second, entry of judgment narrows the scope of what an appellate court will consider on review. During trial, there is a broad scope of issues, arguments, and evidence at play. This is not the case with appeals. The record on appeal restricts the scope of issues, arguments, and evidence that an appellate court will consider. Arguments and/or objections not made below will not be considered on appeal; likewise, evidence not before the court below will not be considered on appeal.

Third, the lens through which an appellate court decides an issue is defined by the proper standard of review. The scale goes from most deferential to least deferential.[12]

Fourth, reversal on review rests on the determinations that the trial court committed error and that the error was prejudicial. The absence of either is fatal to a successful appeal.

A thorough understanding by client and counsel of these differences of appellate mediation from other mediation is vital to assessing accurately whether the former is a more attractive alternative to continued litigation.

Expense, delay, and uncertainty of outcome weigh in favor of a mediated end to disputes. What other factors make mediation an attractive alternative to continued litigation?

First, where the controlling substantive law is either unknown or uncertain,

all parties to the appeal share the common interest of avoiding an adverse ruling by the court.

Second, the parties may have an ongoing business relationship that is mutually beneficial to preserve, notwithstanding the issues arising from a particular appeal.

Third, mediation may be more attractive where a crafted solution is beyond what an appellate court could order.

There are disputes that may offer more promise of resolution by appellate mediation. For example, commercial disputes are good candidates, particularly where the parties are sophisticated businesspeople. Another example is where the parties have a business relationship that they wish to preserve to their mutual future benefit. Still another is where it is advantageous to the parties to resolve their disputes privately rather than continuing to fight in a public forum.

However, there are obstacles to appellate mediation and settlement. First, the entry of judgment by the trial court will create in the minds of the parties a "winner" and a "loser," at least for the time being. The "winner" may have an undeserved confidence that the judgment will withstand review without first carefully analyzing with counsel the risks of the case.

Second, the victorious client and counsel will have much invested in achieving a win in the trial court. But objective review of the case by someone not so invested may be helpful, whether the reviewer is new appellate counsel or an appellate mediator.

Third, there may be a lack of full understanding of the standards of review that an appellate court will apply on review. For example, if there is substantial evidence to support a jury verdict, it does not matter whether client and counsel believe that "the jury got it wrong!" The court will affirm.

Conclusion. Appellate mediation can provide an attractive alternative to exhaustion of all appeals of an adverse judgment. It may even be more useful than direct negotiations between the parties. The expense, delay, and uncertainty of outcome involved in exhausting appellate review are all reasons for carefully considering whether appellate mediation best serves the interests of your client. ■

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[1] Washington State Court Rules of Appellate Procedure, Rule 5.1.

[2] Rule 8.1.

[3] Rule 8.1(c).

[4] Rule 9.1.

[5] Tessa L. Dysart, *Winning on Appeal: Better Briefs and Oral Argument 23*, National Institute for Trial Advocacy, Third Edition, 2017.

[6] *Id*. at 24.

[7] Rule 12.2.

[8] Judge Anne Ellington (Ret.), "Getting Some Help: Neutral Case Analysis, Before and After Trial," *King County Bar Association Bulletin*, July 2019.

[9] Rule 5.5(b), (f)-(j).

[10] Rule 18.11.

[11] Brendon Ishikawa and Dana Curtis, *Appellate Mediation: A Guidebook for Attorneys and Mediators*, xxiii-xxiv, 2015.

[12] *State v. Richie*, 126 Wn.2d 388, 399, 894 P.2d 1308 (1995) [abuse of discretion]; *State v. Kipp*, 179 Wn.2d 718, 727, 317 P.3d 1029 (2014) [de novo review].