PRACTICAL CONSIDERATIONS FOR POST-TRIAL AND APPELLATE MEDIATIONS

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THE TRIAL IS OVER. The jury has just returned a verdict either for or against your client. Or maybe the judge has granted a motion for summary judgment. The parties mediated the case before trial without success. An appeal is inevitable. Think the opportunity to negotiate a settlement has passed? Think again. The finality of a trial court judgment and the framing of issues on appeal may actually *help* the parties settle their dispute. With an overall statewide reversal rate of 36% in civil cases,[1] an appeal does not necessarily end the litigation process – it may be only another step in a seemingly endless and costly road to resolution. This article attempts to offer practical considerations for the mediation of cases post-trial and on appeal by addressing: (1) the advantages of appellate mediations; (2) the types of cases best suited for mediation in the appellate context; (3) major obstacles to settlement; (4) the best time to mediate a case after trial; (5) the selection of an effective mediator; and (6) court mediation programs.

1. Advantages of Appellate Mediation

At first blush, mediating a case on appeal may seem like an exercise in futility. One party has a judgment, ostensibly leaving the other party with no bargaining power. But there are some distinct advantages to an appellate mediation. First, a post-trial settlement may be a desirable alternative to the additional costs and inevitable delays of an appeal. Although Texas appellate courts have made great strides to reduce the average time from filing to disposition,[2] the appeals process still can take between one and three years for a complex civil case. For the party holding a money judgment, a mediated settlement not only eliminates the risk of reversal, but also promises an earlier payday. Second, like all settlements, the voluntary resolution of a case post-trial provides the parties with certainty and closure. The ability to more accurately assess the chances of success on appeal based on a fully developed record and established standards of review may enhance the prospects for negotiating a settlement. Third, unlike a pretrial mediation where risk assessment is complicated by a multitude of fact-related variables, only legal issues will be decided on appeal. Focusing on legal issues takes emotion out of the equation, making the case easier to settle. Fourth, by the time a case reaches the appeals court, the parties have been forced to recognize certain weaknesses in their respective positions as a result of the trial process. This may minimize unrealistic expectations and lead to a more productive settlement dialogue. Finally, the risk of a published appellate opinion establishing adverse legal precedent for future cases may make settlement desirable. This is particularly true for some tort and business cases, such as those involving insurance companies and product manufacturers.

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2. Case Selection

Of course, some types of cases of may be better suited than others for post-trial or appellate mediation. Commercial disputes between sophisticated parties or business entities are good candidates. In a typical business case, the parties are usually more interested in reaching a resolution based on economic rather than emotional considerations. An ongoing business relationship between the parties may provide additional incentive to settle. Tort cases with large verdicts or inflated punitive damage awards also have good settlement potential on appeal. In such cases, the facts have been fully vetted by a judge or a jury and the damages have been quantified. Yet both parties still face significant risks. The losing party is on the short end of a significant money judgment that will accrue interest at above-market rates while the case is on appeal. On the other hand, the prevailing party must get the judgment affirmed in order to collect. That may be a difficult task depending on the size of the damage award and the legal issues in the case. If the judgment is reversed and the case is remanded to the trial court, the whole process starts over again. Good lawyers, with the assistance of an appellate mediator, may be able to convince their clients that settlement is preferable to the risks and costs of an appeal which, if successful, may result in a second trial.

Although settlement is possible in any case, some types of cases have less settlement potential on appeal. Take-nothing summary judgments are especially difficult to settle. In such cases, the prevailing party has "two bites at the apple." Even if the summary judgment is reversed, the case will be remanded for a trial on the merits. As a result, there is little incentive for the prevailing party to settle unless and until the summary judgment is reversed.[3]Appeals from non-monetary judgments, such as injunctions and declaratory judgments, are also difficult to mediate.

3. Obstacles to Settlement

The major obstacle to settlement on appeal is the perceived shift in the balance of power. One party has a judgment, which leads to a reduced sense of risk and greater confidence in the ultimate outcome. Another obstacle is that the parties and trial counsel tend to become more entrenched in their positions over time. If the case was tried on the merits, both sides already have a considerable amount of sunken costs. It is also likely that the case was unsuccessfully mediated at least once at the trial level, giving rise to skepticism that another mediation at the appellate level will yield different results. Yet none of these obstacles are insurmountable. An appellate lawyer, preferably one who was not involved in the trial, can provide a fresh perspective on the risks of an appeal and the benefits of settlement. For example, even a sophisticated client may not fully understand that the appellate process is governed by legal standards of review rather than the more familiar standards of proof used by trial judges and juries to resolve factual disputes. Certain standards of review, such as abuse of discretion and factual insufficiency, rarely result in reversal. In contrast, the chances of reversal are much greater under a de novo standard of review.[4] A good lawyer, with the assistance of the mediator, can explain the framework used by the appellate court to decide the appeal.

4. Timing

Ideally, the best time for a post-trial mediation is after the verdict but before the judgment is rendered. At that point, the fact issues have been resolved, but neither side has incurred the high costs of post-trial and appellate briefing. There is also an element of risk to both sides in not knowing how the judge will rule on post-verdict motions. In some cases, the parties may want to explore settlement after entry of the judgment, but either before or shortly after the notice of appeal is filed. By that time, the results in the trial court have been quantified, but the parties have not yet incurred the substantial costs of filing the record and briefing the issues on appeal. Mediation shortly after entry of judgment is especially desirable in cases where the losing party is concerned about its ability to post a supersedeas bond. In other cases, the parties may want to mediate after the record is filed and briefing is completed. If the appeal involves complex or novel legal issues, briefing may help the mediator and opposing counsel better evaluate the risks and more accurately predict the outcome of the appeal. Of course, those benefits must be weighed against the costs incurred to that point, which may make the case more difficult to settle.

5. Selection of the Mediator

Choosing the right mediator is critical to the success of a post-trial or appellate mediation. At a minimum, the mediator should understand the applicable standards of review and the substantive law involved in the appeal. It is also helpful if the mediator is familiar with recent trends of Texas appellate courts. Whether the mediator is a former appellate judge or an experienced practitioner, the parties should select someone who has the credibility needed to encourage both sides to realistically assess the risks of an appeal and negotiate in a meaningful way. A strong mediator who openly challenges legal arguments can serve as a "reality check" to lawyers and their clients, thereby facilitating settlement. Like all neutrals, the appellate mediator must take a balanced and evenhanded approach in dealing with the parties and their attorneys. Preparation is key. A good mediator must be willing to invest substantial time both before and, if necessary, after the mediation session. If a settlement is not reached at the mediation, the mediator should be committed to working with the parties until the case is resolved. Finally, a good mediator must be willing and able to craft creative solutions to complex problems. Look for a mediator who can "think outside the box."

6. Court Mediation Programs

Even if the parties are not inclined to mediate, an appellate court may refer the case to alternative dispute resolution.[5] As part of the docketing statement in most civil cases, the parties are asked to provide basic information about the nature of the dispute, the amount in controversy, the procedural posture of the appeal, and prior mediation attempts. Once the docketing statement is completed, the court determines whether the case should be referred to mediation or continue along the normal appellate track. If the case is referred to mediation, any party may object within ten days after receiving notice of the referral.[6] The court must withdraw the mediation order if there is a reasonable basis for the objection.[7] Three Texas intermediate appeals courts – the Fifth Court of Appeals in Dallas and the First and Fourteenth Courts of Appeals in Houston – have the most active mediation programs. The Fifth Circuit Court of Appeals, through its appellate conference

program, also has procedures for exploring the possibility of settlement and facilitating settlement discussions in federal appeals.[8]

Among the factors considered by the appeals court in referring a case to mediation are the nature of the case and the type of issues involved. Complex cases, business disputes, jury verdicts, and family matters involving children are more likely to be referred. Conversely, appeals where jurisdictional issues predominate or where the lower court has made no determination on the merits are not good candidates for appellate mediation. The court also considers whether the case was mediated in the trial court and whether the parties believe another mediation would be helpful. Although empirical evidence is sparse, it appears that at least some of these appellate mediation programs are moderately successful.

Conclusion

It is never too late to consider settlement. A post-trial or appellate mediation gives the parties a unique opportunity to consider settlement options after a judge or jury has resolved the disputed facts and the legal issues have been fully developed. Although there are certain obstacles to settlement after trial, these obstacles can be overcome by a knowledgeable mediator who can help the parties realistically assess the risks of an appeal and the benefits of settlement.

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[1] Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 994, 997 & app. B (2012).

[2] According to the most recent Annual Statistical Report for the Texas Judiciary, the average time from filing to disposition of a civil case among the fourteen intermediate appellate courts is 7.9 months. *See* Office of Court Admin. & Tex. Judicial Council, *2012 Annual Report*, TEX. COURTS ONLINE, http://www.txcourts.gov/pubs/AR2012/toc.htm/4-activity-detail.xis.

[3] Surprisingly, the statewide reversal rate for summary judgments is no higher than for civil cases generally. In appeals from traditional or hybrid summary judgments, the reversal rate is 32%. The reversal rate in appeals from no-evidence summary judgments is only 19%. *See* Liberato & Rutter, *supra* at 1009-11.

[4] Although there are no statistics for reversal rates based on the standard of review, it is well documented that the chances of success on appeal depend in large part on the nature of the grounds raised by the appellant. For example, the most common reason for reversal of a judgment on a jury verdict is that the evidence was legally insufficient or that one of the parties was entitled to judgment as a matter of law. That category, which accounts for 77% of reversals in jury cases, includes issues that are reviewed on appeal under a de novo standard. In contrast, challenges to the factual sufficiency of the evidence and contentions that the verdict was against the great weight and preponderance of the evidence, both of which involve a more deferential standard of review, account for only 5% of reversals. *See* Liberato & Rutter, *supra* at 1003-05.

[5] The Texas Alternative Dispute Resolution Act authorizes any court, on its own motion or on the motion of a party, to "refer a pending dispute for resolution by an alternative dispute resolution procedure," including mediation. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.021(a)& 154.023 (Vernon 2011).

[6] *Id.* at § 154.022(b).

[7] *Id.* at § 154.022(c).

[8] *See* Gen. Order Governing Appellate Conf. Program (5th Cir. Mar. 27, 2000), http://www.ca5.uscourts.gov/clerk/docs/order.pdf.