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Top Reasons to Mediate Your Case on Appeal

By Jeffrey King

You won your case at the trial level; you believe everything went pretty smoothly, so why be concerned when you receive the notice of appeal? Of course you will prevail on appeal.

"Not so fast my friend," as Lee Corso might say. Perhaps it's time to step back and consider a resolution through mediation. This article will outline the risks and costs involved in the appellate process, what to look for in choosing a mediator, and how best to prepare for the process.

Numbers Don't Lie

Seldom is there a civil proceeding without arguable error. Two studies by the Judicial Council of California show that on appeal, 19 percent of civil judgments are outright reversed with another 10 percent being either modified or affirmed in part. Two Department of Justice studies found that 35 percent of all civil judgments and 40 percent of plaintiffs' verdicts are either reversed or modified. And a study by the National Center of State Courts concluded that 30 percent of civil judgments are either reversed or modified. With these percentages, it is clear that the appellate process can be just as problematic as the trial process. Because of this, mediation on appeal should be considered as seriously as at the trial level.

A Lack of Certainty

For a trial judge, it is close to impossible to handle a civil case without arguable error occurring. Civil litigation is adversarial in nature with lawyers trying to direct the court's rulings in opposite directions. The law is rarely black and white, and each ruling made by the trial court involves the selection of legal principles, and/or the exercise of discretion based on that particular judge's understanding of the law and how it applies to the facts. Consequently, there is ample room for legitimate appellate arguments that any given ruling or decision was "contrary to the law," and hence error.

Once an appeal is filed a lack of certainty in its outcome arises for many reasons. As with the trial courts, the workload of the state appellate courts is great. From my experience, any given justice may author between 80 and 150 opinions each year. It is these authored opinions on which the justice spends the majority of his or her time. In addition, each justice will probably sit as a panel member on another 300 cases in which the opinion is authored by a fellow justice. Although each justice must be comfortable with the holding and result, due to the sheer volume of matters heard, the non-authoring justices must necessarily rely heavily on the authoring justice's analysis. While there is give-and-take among the justices, the final opinion is predominantly the work of one justice, the authoring justice. And, like any trial judge, the appellate court justice's view of the facts and law is shaped by his or her background and experience.

What one justice may believe is an abuse of discretion or an error of law, another justice may not. An error one justice may feel is prejudicial another may find harmless. Certainly, many attorneys involved in the appellate process have uttered the words, "these guys are just wrong." Whether such an assessment is correct or not, it nonetheless illustrates that there is no sure thing on appeal. Thus, as with most any process, the outcome becomes unpredictable.

Time and Money

In addition to the fact that appellate courts overturn a substantial percentage of civil judgments, the costs of pursuing an appeal, as well as passage of time and delay in obtaining finality militate in favor of appellate mediation.

Aside from the cost of duplicating the record, and the appellate filing fee, attorney time or fees can be prohibitive. Depending on the nature of the lower court proceeding, attorney fees can range from about $15,000 on the simplest appeal to $75,000 and more for an appeal from a judgment entered after a jury verdict.

Additionally, the time lapse from the filing of the notice of appeal to a decision can run from 15 months to two and one-half years, throughout which neither party has achieved finality. Indeed, the appellate court's decision may return the case to the trial court for further proceedings, delaying finality further.

Although mediation is optimal prior to the filing of the notice of appeal or shortly thereafter, in that costs and attorney fees can be minimized, it is never too late to approach settlement through mediation. California Rules of Court, Rule 8.248 provides a mechanism whereby the time for filing briefs can be tolled until the conclusion of the mediation. And while many respondents may initially have little impetus to resolve the matter, once they come to grips with the number of judgments overturned on appeal and the costs and time delay involved, mediation and possible settlement should become the preferred approach.

Appellate Mediation Tips and Best Practices

Mediation at the appellate level obviously differs from mediation before trial. Rather than focusing on the merits or value of the underlying case, mediation at the appellate level is more about the kind of error that arguably occurred and the court's varying standards of review. Knowledgeable mediators, who are familiar with these standards of review and the kinds of errors that lead to reversal, can be instrumental in the settlement of the case.

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As a litigator, you must be familiar with whether the arguable errors are subject to review under a standard of abuse of discretion, de novo, substantial evidence or some combination thereof. Most importantly, the lawyer must be realistic in recognizing the possible error and come to grips with the fact that the appellate process can be just as problematic and unpredictable as the trial process.

Whether your client has won or lost at the lower court, mediation at the appellate level with a knowledgeable mediator should be seriously considered.

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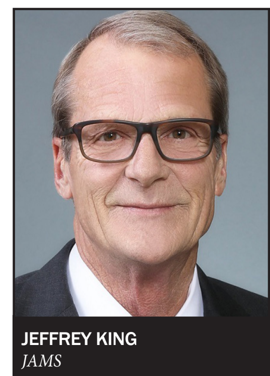

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