

TEXAS LAWYER

An **ALM** Publication

texaslawyer.com | April 24, 2020

Mediation of Interlocutory Appellate Disputes Offers Opportunity for Efficiency Gains

If referrals to mediation have the likely effect of winnowing down the overall appellate caseload, it makes sense for mediation to be a default prerequisite.

BY MICHAEL MASSENGALE

Interlocutory appeals are on the rise in Texas state courts. So are mandamus petitions and other types of original appellate proceedings. The opportunity to “go to the booth” for a second look by a court of appeals, like instant-replay review in the NFL, is fraught with strategic implications. Apart from merits review of a challenged ruling, interlocutory proceedings can delay discovery and trial settings. They also can impose additional litigation costs on the opposing party, sometimes even injecting the risk of fee-shifting. When a ticket to early appellate review of an unfavorable trial ruling is available, these factors may make the journey seem irresistible.

While interlocutory review provides an important procedural safeguard that can prevent wasted time and money resulting from a consequential pretrial ruling, it comes at great cost to the efficient operations

of courts. A detour from the ordinary progression of a trial court proceeding does not disrupt just that case, but it also impedes the orderly processing of appellate dockets. For every accelerated interlocutory proceeding, there is an equal and opposite effect on the court’s ability to timely resolve ordinary appeals from final judgments. What litigants and courts seem not to fully appreciate is the substantial efficiency gained by promoting well-timed mediations of interlocutory disputes.

Parties incur a relatively low cost to initiate interlocutory review. To have a reasonable chance of success, the winning arguments usually must have been preserved in the trial court. Those arguments get repackaged and refined when presented to a court of appeals, and likewise the responding party will polish its prior arguments to defend the trial court’s favorable ruling.



Courtesy photo

Former Judge of the First Court of Appeals Michael Massengale is a JAMS arbitrator and mediator.

When the appellee (or real party in interest) files its response, the arguments have been fully developed and presented. Yet with the occasional exception of emergency motion practice, by that time there usually has been no substantive engagement by the court or its staff. This is the sweet spot on the procedural

timeline, when mediation can precede efforts by three judges and one or more staff attorneys.

Consider the relative investments of time required to resolve the dispute from this point forward. The parties have completed the most important part of their work: the substantive briefing. To mediate ordinarily would require engaging a mediator for one day—perhaps a bit more for preliminary preparation and discussions, or perhaps a half-day session could suffice. Additionally, the participation of at least one lawyer and a client representative on each side is required, almost certainly less investment than would be necessary if the court set the case for argument. If the mediation succeeds, the appellate proceeding is dismissed and the parties can resume litigating in the trial court. In this case, it is likely that months have been saved. Other intangible benefits can be realized, such as the mutually face-saving opportunity of returning to the trial judge with an agreed-on compromise, as well as sparing the trial judge the risk of a public correction.

By contrast, in the absence of a mediation, what happens next? Typically, a staff attorney would prepare a preliminary analysis. If the attorney recommends dismissing a mandamus petition without requesting a response or issuing an opinion, that could be prepared for the court and considered in as little as a day. But for a more complicated petition—anything that would result in granting relief, or any interlocutory appeal that would require issuing

an opinion—a staff attorney could be expected to spend a week on the case, in addition to the time required for three appellate judges to review the filings and to deliberate. At least one appellate judge likely would invest additional time in preparing any opinion. And to the extent the issues are complex or the panel does not come to easy agreement, the judicial time investment can quickly increase.

Considering the expense of mediating compared to the judicial resources necessary to resolve most interlocutory proceedings on the merits, it is reasonable to ask parties to invest one day of effort into seeking an agreed resolution. While some interlocutory proceedings have the potential to be case-dispositive, most are not. Thus, interlocutory proceedings should have an increased likelihood of agreed resolution because they are not burdened by the greater challenge of settling the entire dispute on the merits. For these reasons, I propose that litigants should engage in timely mediations of interlocutory proceedings—and appellate courts typically would be justified in referring such cases for mediation.

To the extent some litigants might be disinclined to mediate, instead viewing interlocutory review and its delays as a procedural right to be exercised by fiat, they should reconsider. Multiple ethical principles counsel against this perspective. The Texas Supreme Court's Standards for Appellate Conduct promotes counsel's duty to reconcile a client's lawful objectives with duties to the

legal system and the public good; counsel's obligation to advise clients about the availability of alternative dispute resolution; and the requirements that appeals be pursued only in the good-faith belief that the trial judge erred, and not primarily for purposes of delay or harassment. Additionally, the appellate court itself is ethically obliged to manage its docket to avoid the injustice that can result from unnecessary delays.

Thus, if referrals to mediation have the likely effect of winnowing down the overall appellate caseload, it makes sense for mediation to be a default prerequisite. To achieve the greatest gains, this should occur after the responsive merits brief and before the judges and their staff invest their resources into resolving an interlocutory dispute in a case that may not ever be tried to a final judgment.

Michael Massengale, a former judge of the First Court of Appeals, is a JAMS arbitrator and mediator. He was a trial partner in an international law firm, specializing in commercial disputes, before serving nearly 10 years as a state appellate justice in Houston. He can be reached at mmassengale@jamsadr.com.

