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The last frontier of ADR: appellate mediation

By Ignazio J. Ruvolo

To some, "appellate mediation" may sound like an oxymoron. After all, one side has already "won," and the losing party has filed an appeal hoping that legal arguments can be thrown at the seemingly insurmountable wall of appellate standard of review sufficient to breach it.

But, those of us who have worked to establish appellate mediation as a worthy sibling to trial case mediation know that the change in forum also brings with it changes in procedural dynamics that make mediation success likely at the appellate level.

For example, like trial litigation, the appellate process is expensive; sometimes the costs of preparing the record, the preparation of formal briefs, and attending oral argument exceed the costs incurred below, particularly if the judgment was obtained through a summary disposition.

The latest Court Statistics Report (2017) published by the California Judicial Council reveals what many laboring through the intermediate state appellate process already experience: The median time for appeals from notice of appeal to a filed opinion is 842 days with a range from 622 to more than 1,200 days. Ironically, like the trial delays of the 1980s and 1990s that drove litigants and lawyers to erect alternative dispute resolution processes for lower court cases, so too appellate delay is contributing to the momentum behind appellate mediation's growth.

Compounding the impact of appellate delay is the unique reality that an appellant who appeals from an adverse monetary judgment will have to pay 10 percent annualized post-judgment interest if the judgment is affirmed. Thus, the time value of the judgment itself becomes relevant in comparing the post-judgment interest rate to the rate of investment return available during the pendency of the appeal, particularly when the process will not be completed for two to four years.

As significant to the success of appellate mediation as any of the above factors is the relatively high reversal rates for civil appeals generally. For example, the most recent Judicial Council annual report reveals reversal rates for civil appeals in 2013, 2014, and 2015 at 30 percent with another 10 percent of judgments modified. These reversal rates are consistent with my own experience at the 1st District Court of Appeal over more than two decades.

Therefore, it is little wonder that far from being an oxymoron, appellate mediation does produce settlements. As chair of the 1st District Mediation Program from 2000 until 2012 when budgetary constraints required the program be suspended, I wrote about these settlement results — results that have remained consistent over almost two decades. (Ruvolo, "Appellate Mediation, 'Settling' the Last Frontier of ADR," 42 San Diego L.Rev. 177 (2005).) During the initial two-year pilot program, appeals mediated by our panel of 1st District volunteer mediators, achieved an overall settlement rate of 43.3 percent. While the settlement rates varied depending on the subject matters of the appeals, the nature of the judgment being appealed (trial verdicts, summary judgments, judgments following demurrers), and the timing of the mediation, the overall annual settlement rates were remarkably similar during much of the program's life with most years reporting settlement rates of 40-50 percent.

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More recent data confirms that appellate mediation remains an important component of alternative dispute resolution generally. For example, the 3rd District in Sacramento began its program in 2006, and continues today. Like the 1st District, this program utilizes the volunteer services of about 80 attorneys who are specially trained in appellate mediation techniques. Currently, 70-75 pending appeals are admitted to the program annually. Of these approximately 50-60 percent are settled at or after the mediation session, and an additional 10-20 percent are resolved after counsel are contacted about the program, but before the mediation takes place.

Similar to the statistical conclusions reached in the 1st District, the 3rd discovered that, in descending order, the settlement rates were highest for appeals from court trial verdicts, followed by jury trial judgments, and then motions for summary judgment. The lowest rate was in appeals from judgments entered after demurrer.

Examining settlement rates by area of substantive law involved, both courts have found that probate and family law appeals, which almost always involve the practicality of "wasting assets," and which often arrive at the appellate level with the parties emotionally exhausted, enjoy the highest settlement rates.

Commercial/business appeals also are good candidates for appellate mediation: "A major explanation is that many of the litigants are in the same or related industries. For this simple reason, many will be economically coerced to do business with each other in the future. If not, some will nonetheless see the prospect of voluntary future mercantile relations as offsetting what is at risk in the litigation. This can be an asset for the ingenious mediator who will leverage future prospects of doing business to greatest advantage in presenting alternatives to continued, distracting, and expensive litigation. Of course, the ability to restructure business relationships is one unique to the mediation setting. Appeals are focused on the resolution of discrete legal issues, or the search for error committed by a trial court. These limited inquiries rarely allow for the positive realignment of business relationships, which can be achieved by agreement." (Ruvolo, *supra* 42 San Diego L. Rev. at p. 218.)

Experience also suggests that personal injury judgments are good appellate mediation candidates, particularly where the judgment being appealed was one in favor of the injured party.

Based on almost two decades of results, it is clear that appellate mediation often can serve the needs of the litigants in certain cases even more beneficially than an appellate adjudication. I urge those of you engaged in appellate work to join the burgeoning army of legal pioneers exploring and "settling" this last frontier of ADR.

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