

Appellate mediation in California

Appellate Court leads the way in successful settlement conference programs

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Background

Settlement programs have existed, on and off, for some time in the California Court of Appeal. Settlement conferences have been conducted by justices not assigned to the case, by superior court judges or by volunteer attorneys. The format usually resembles a trial court settlement conference. The most successful settlement conference program has been in Division 2 of the Fourth District, in Riverside, which has a separate conference center dedicated to the program.

In 1997, Chief Justice Ronald M. George appointed a Task Force on Appellate Mediation to determine whether to propose an experimental mediation program for civil appeals in the First Appellate District. The task force recommended that a program be established to include:

- Mediation on a mandatory and confidential basis for selected civil cases;
- Minimal disruption of appellate procedures and deadlines;
- Mediators chosen by the court from among appellate attorneys, mediators, and retired judges who successfully complete a training course sponsored by the court;
- Implementation and administration by an administrator, with oversight by the court; and
- An evaluation after the program has been operating for a period of time.

Program goals have been to address the interests of both litigants and the court by:

- Reducing costs to the parties and the court;
- Reducing time to resolution;
- Reducing the adversary culture of litigation;
- Increasing litigant satisfaction with the judicial process; and
- Increasing dispositions without judicial intervention.

These goals were met during a pilot period from July 1999 through June 2001, and the program was extended indefinitely.

Obstacles

There are significant differences from pre-appeal mediation that make settlement more difficult at the appellate level:

- Someone has won and someone has lost in the trial court. Respondents often are resistant to compromise judgments.
- A great deal of money, time, and emotion may have been expended obtaining that judgment.
- As a result, positions are likely to have hardened.
- The parties and their counsel may believe that the appellate issues require a court decision.

Opportunities

In spite of these obstacles, the settlement rate in the First District Court of Appeal from February 2000, when the mediation program began operations, through June 2007 has exceeded 60 percent.

The reasons that cases settle on appeal are similar to the reasons cases settle before trial:

- *Risk.* Appellate courts can be unpredictable. "Solid" judgments often are reversed. Respondents, especially, tend to be risk adverse. There also may be a risk that a judgment may not be collectible.
- *Cost.* The cost of an appeal can be daunting, often in the tens of thousands for counsel to review the trial court record, to prepare briefs, and, if elected, to participate in oral argument. In addition, if a judgment is not affirmed in full, parties may face the cost of further trial proceedings. Money saved by mediation early in the appellate process may be put into a settlement instead.
- *Time.* An early resolution of an appeal can mean that a respondent may receive payment a year or more before the appellate process is completed. In addition, there is a risk that the law may change before an appeal is decided.
- *Gain.* As with a pre-appeal settlement, the parties can agree to a result that a court cannot give them, like restructuring a business, employment, or parental relationship.
- *Life.* The stress of litigation intensifies during an appeal. A mediated settlement gives the parties closure.

Differences from pretrial mediation

The risk analysis is significantly different in appellate mediation. The standards of review applied by the appellate court and reversal rates on those standards are critical factors in determining the settlement value of a case.

The likelihood of reversal is slim if the standard of review is substantial evidence (any credible evidence to support the judgment) or abuse of discretion. The appellate courts give great deference to the trial court on issues of fact and discretionary rulings. Moreover, the appellate court will not reverse the trial court for

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discretionary errors unless a party can demonstrate prejudice. The de novo (independent) standard applied for legal questions (*e.g.*, relating to demurrers, summary judgments, and statutory interpretation) is significantly more favorable to an appellant or cross-appellant, but the odds still favor the judgment holder. An appeal may involve more than one standard of review, depending on the issues.

Another difference between appellate mediation and pre-appeal mediation is that post-trial appellate mediation may take place early in the appellate process, shortly after the notice of appeal is filed. This is because trial court proceedings, including discovery, normally have been completed and the issues should be known, even without review of the trial court record.

Counsel should feel less apprehension about the client's participation in post-trial appellate mediation, because the client's testimony is already on the trial court record. This eliminates the pre-trial concern about impeachment. However, if the appeal involves a decision made before trial, e.g., summary judgment, client statements in mediation may be more of a concern, even though they are confidential.[1]

Settlement factors

• *Subject matter*

Certain appeals are more likely to settle than others. Family law and probate appeals are good candidates for settlement, in part because continued litigation may waste the assets in dispute, whether community property or an estate or trust. Conversely, insurance coverage disputes and environmental conflicts are challenging because the parties tend to be less flexible and often have the assets to fund protracted litigation.

For personal injury and employment appeals, the key is which party has obtained the judgment. A prevailing plaintiff may be adverse to the risk of reversible error and also may be willing to compromise a judgment to receive an earlier payment. When a defendant has a judgment in a personal injury or employment case, however, resolution is difficult. Successful defendants in these cases usually are unwilling to make more than a minimal offer, perhaps a waiver or partial waiver of costs; in other words, nuisance value. Most plaintiffs in this situation would rather take their chances with an appeal, if a reversal may lead to substantial damages.

• *Nature of the judgment*

The nature of the judgment also is an important factor. Because appeals from pre-trial decisions, such as summary judgment, involve the de novo standard of review that is most favorable to an appellant, the risk factor may persuade respondents to compromise. On the other hand, the cost factor may be more important after a trial, especially if a substantial trial court record requires extensive review and briefing.

Other factors affecting settlements on appeal are the extent of prior ADR proceedings, issues of first impression, the existence of ongoing relationships, and the possibility of a global settlement.

Global settlements

It is not unusual for an appeal to be one of a number of disputes between the same parties. There may be one or more related appeals, trial court proceedings, or even disputes not yet in litigation. A common instance involves attorney's fee motions pending in the trial court while the judgment is on appeal. Other examples include individual appeals based on separate contracts, or tort actions and related indemnity agreements giving rise to separate appeals. Appellate mediations are designed to resolve all disputes between parties. Often they achieve this goal.

Mediation in other California appellate districts

The Second Appellate District, including Los Angeles and nearby counties, and the Third Appellate District, centered in Sacramento County, have initiated mediation programs in recent years. The Fourth Appellate District, with divisions in San Diego, Riverside, and Santa Ana, also provides mediation services. Eventually, mediation may be available throughout the California Court of Appeal.

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Endnotes

[1] See California Evidence Code section 1119(a) and *Foxgate Homeowners Ass'n v. Bramalea California, Inc.* (2001) 26 Cal.4th 1.

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