Appellate mediation

An appealing prospect when you receive defendant's notice of appeal

By John Drath

Congratulations! After three weeks of trial, and spending $100,000 in experts and court costs, the jury just gave you double defendant's 998 offer. The motion for new trial was denied. Break out the champagne! Call the newspaper! Drop by the Tesla dealer! Wait a minute – a notice of appeal? Are they serious? That verdict is bullet proof, and with interest at 10 percent, you might as well sit back, wait for justice to prevail (again) and then enjoy an even bigger pay day.

Sobering up, you consider the three possible results on appeal, two of which are not good: (1) the judgment could be upheld; (2) the judgment could be reversed and the case remanded for a new trial; (3) the verdict could be overturned and judgment entered for the defendant.

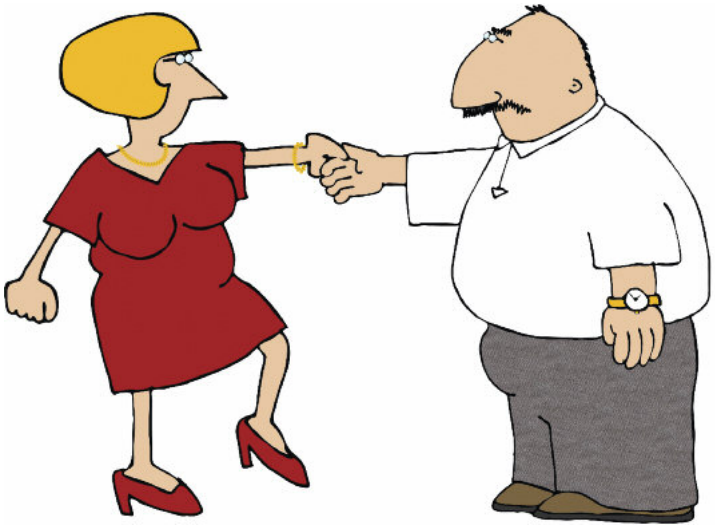
You bring the client in to explain this new development. Then the questions begin. What are the chances of the verdict being overturned? (Slim, but not impossible.) How long will this take? (One and a half years if you're lucky.) Will I have to go through a trial again? (Probably not, but no guarantees.) How much will all this cost? (A new fee agreement is required, and the percentage has increased.) If we have to go to trial again, is there a chance that I will get less? (Not likely, but always possible.) Could I end up with nothing? (Again, unlikely, but no guarantees.)

Should I call the dealer and cancel the order for the new Mercedes AMG? (Yes, quickly!) And, finally, is there a settlement offer on the table?

Most litigators have encountered this scenario in one form or another. Before budget cuts, most if not all appellate districts had mediation programs and a means for identifying cases suitable for mediation, and a panel of mediators available for assignment. Some, but by no means all, have reinstituted their programs. Whether or not your case is in a district with such a program, mediation should be an option under consideration in the majority of civil cases on appeal. Although the district court programs targeted cases which had not yet been briefed, there is no reason that mediation cannot take place at any stage of the appellate process.

Why go to mediation on a case on appeal?

Fact: if your case was appropriate for mediation *before* trial or judgment, then it is still appropriate for mediation *after* trial or judgment, perhaps even more so. Often by that point some of the variables have been eliminated, enabling more precision in evaluation. This holds true for both appellants and respondents. The



usual motivation for settling, i.e., risk of a poorer outcome and expense avoidance, remain extant. If you represent a plaintiff who has won a money judgment, the client may not be willing to wait for the case to wind its way through the appellate process. There may be other motivating factors, such as avoiding a damaging precedent or unwanted notoriety.

The evaluative process is no different in appellate mediation: On a percentage basis, how often do you prevail on appeal? If a case is reversed, how often do you prevail at trial, and what is the verdict range? What costs are you facing, and how much better do you have to do on appeal or at trial to improve on what is on the table at this point? If you represent a defendant with an adverse money judgment, what will be the size of that judgment with interest by the time that the appeal is heard and decided? A couple of examples illustrate the process.

•1. Defendant appeals a jury verdict for $500,000

You represent the plaintiff/respondent, and you expect that the verdict will withstand appeal 80 percent of the time. Liability was strongly contested. The verdict itself was higher than you expected, at or near the top of your projected verdict range. Your last pre-trial demand was $250,000, and the highest defense offer was $100,000. These were not cost-shifting offers.

The total litigation cost, including experts, was $50,000. You had a 40 percent contingent fee, which increases to 50 percent in the event of an appeal. Going into trial, you felt

you would prevail on liability 60 to 70 percent of the time, and the client would have accepted $200,000 if it had been offered.

The appeal process will take 18 months, at the end of which your judgment would be $575,000. Factoring in the 20 percent chance of losing on appeal, that translates to a settlement number of $460,000. However, you cannot ignore (1) the costs to be incurred in the event that the matter has to be retried; (2) the 30 to 40 percent chance of getting defensed at retrial; and (3) the prospects of getting less than $500,000 at trial, coupled with your client paying a 10 percent higher fee. All of these factors point to a settlement value at or below $400,000.

From the defense perspective, let us assume that the defense is somewhat more optimistic about its chances on appeal, and they think the case will be sent back for retrial 30 percent of the time. Applying that to the amount of the verdict with interest 18 months down the road, that points to a settlement value of $402,500. If it cost the defense $130,000 to try the case the first time around, it will probably cost $100,000 to retry it. At retrial, they project a 40 percent chance of a defense verdict, and if there is a plaintiff verdict, it will fall in the $300,000 to $500,000 range. If the case is reversed, the settlement value would be in the $240,000 range, and the defendant would be facing an additional $100,000 in legal expenses if the case did not settle after reversal. All of these factors again point to a settlement in the $350,000 to $400,000 range.

•2. Plaintiff appeals a summary judgment

Consider the same fact pattern as Hypothetical #1, only this time the defense prevails at summary judgment. Prior to losing summary judgment, you had the settlement range at $250,000 to $300,000, after factoring in liability problems. Summary judgments are more likely to be overturned than a trial on the merits, but if the judgment is upheld, your client gets nothing. If you think you will prevail on appeal 70 percent of the time, then that should translate to a settlement range of $175,000 to $210,000.

How and when to mention mediation

Although I personally believe that at the end of the day it has no effect on the ultimate outcome at mediation, most attorneys remain reticent to be the first to suggest mediation out of fear that it shows weakness. Waiting for the other side to blink, however, can sometimes lead to lost settlement opportunities, or at least lost settlement arguing points (e.g., saving attorney's fees and costs). Here are a few suggestions for bringing up mediation without losing ground.

•*Direct Approach*

If early in the process, contact defense counsel and point out that you are going to be retaining appellate counsel, and that will (1) increase the cost to the client; and (2) harden your settlement position. Observe that if the defense is interested in resolving the case, the price for doing so will be more palatable now than once appellate counsel gets involved.

Consider making a written settlement demand, perhaps including a waiver of costs, a time limit, or both. Defense counsel will have to pass it on to the carrier or client, and that could well trigger a response that invites mediation.

•*Indirect Approach*

Use an intermediary. If you had been to mediation before trial (and assuming you liked the mediator) contact the mediator and get him or her to approach the other side about possibly getting back to the bargaining table.

You could also contact the court, if it is a district with an ADR program, and ask them to approach the appellant about going to court-sponsored mediation.

The take away

Frankly, there is no time that is *not* appropriate for settlement discussions, formal or otherwise. How many times, for example, have you heard of a judge shocking a prevailing party by granting a motion for new trial or nonsuit? It may not happen often, but it is devastating when it does. Frank settlement discussions while that motion is pending are worth considering.

The reality is that lightning can and does strike in litigation, and a case on appeal is not immune. The motivation for mediation on appeal is, if anything, often greater than before trial, particularly if the appeal is from a jury verdict. The parties will have likely quenched their thirst for their "day in court." There are fewer unknowns, and the outcome on retrial is more predictable. Emotionally, there is typically disappointment and often anger at having the matter drag on, particularly after a significant investment of time, expense and energy. The targets of that emotion are the defendant and the system, but at times their own attorney gets pulled into the turbulence.

Getting settlement discussions going, either directly or through mediation, makes good sense, particularly early in the appellate process. From that point forward your investment of time and money will increase, as will your client's disappointment and frustration.

Unfortunately, too often lawyers for whatever reason just let the appeal run its course and hope that it all turns out in their favor. And, all too often, that is not a strategy that benefits either client or counsel.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