Mediating in the Appellate Court

by Mark D. DeBofsky

You have just won a huge, and somewhat unexpected, verdict after a hard-fought month-long trial. Your client is thrilled, and you have already taken the trial team out for a festive victory lunch. But within days, the notice of appeal arrives on your desk. And not long after, the appellate court orders, or your adversary requests, that the parties engage in mediation. What do you do next?

Although much has been written about mediation before trial, the benefits of mediation after the court or a jury has issued its verdict have received less attention. The success of a mediation program that was initially piloted in the United States Court of Appeals for the Second Circuit has now been expanded to all of the federal circuits, and over 31 state appellate courts have introduced mediation programs. Several of these programs are mandatory; the rest make mediation services available only on request.

Although many factors suggest it would be difficult to bring a party who has secured a "solid" trial court victory to the negotiating table, or to convince the loser who feels confident of appellate victory to compromise, the success of appellate mediation stems from the fact that no appellate outcome is secure until the appeals are exhausted. Thus, the same consideration that promotes mediation before trial applies to appellate mediation: certainty. Mediation can eliminate the unknown by creating an opportunity for the parties to resolve their disputes with finality and clarity. Just as in mediation before trial, the use of a neutral mediator reduces the reluctance to "lay the cards on the table" that is inherent in a face-to-face negotiation and enables the parties to express their positions and goals confidentially. A neutral mediator also enables litigants to assess the strengths and weaknesses of their cases before an appellate court with knowledge of the trial record. A successful mediation may also make it possible for the adversaries to work out a resolution at the bargaining table that allows them either to resume a future relationship or to sever their relationship in a manner that will avoid future recrimination or litigation.

But there is so much more that mediation can accomplish. Even if it fails to produce a final resolution, it will enable the parties to better understand their litigation goals and separate from the real issues at stake many of the emotional issues that inevitably arise. Most important, though, it will focus the parties' attention on the alternative to settlement: an appellate ruling on the merits that, unlike trial court decisions or even published rulings issued by federal district courts, has precedential impact and finality.

Mediation also enables parties to fashion a resolution that may not otherwise be judicially available. For example, much of my work is in the area of disability insurance benefits. Disability benefit payments may last for years beyond the date of judgment, but courts lack authority, except in certain exceptional situations, to award benefits that will accrue in the future. A resolution by mediation allows the parties to resolve a disability benefit dispute with a single lump-sum payment encompassing future benefits. This enables benefit claimants to move forward with their lives without fear of a future benefit termination or intrusive examinations or investigation by the insurer. From the insurer's perspective, this kind of resolution eliminates the cost of administering a claim many years into the future, with the continuous threat of future rounds of litigation. Other situations in which mediation can satisfy extrajudicial goals arise in employment disputes where the scope of a consent decree can go beyond what an appellate ruling could accomplish. Mediation can also result in an apology by an employer to assuage an employee's hurt feelings, a remedy that obviously cannot be ordered by a court. Finally, mediation may be a means of resolving other existing or potential disputes between the same parties that may not be specifically involved in the litigation before the court.

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Another beneficial aspect of mediation on appeal that is often overlooked is the ability of mediation to resolve procedural issues in the case, particularly where cross-appeals are filed. Mediation can be used to streamline the appeal and tailor the issues presented to what is really at stake and avoid a focus on extrinsic or collateral issues.

Of course, mediation also helps conserve judicial resources. Because successful mediations lighten appellate court dockets, the appellate court judges or justices have more time to spend on the cases that cannot be resolved, enabling them to draft more contemplative opinions, concurrences, and dissents that provide more thorough consideration of the issues presented.

Once a case is selected for mediation, or if the parties decide to mediate on their own, the likelihood of a successful mediation is substantially enhanced by the parties' preparation. Both sides should come to the mediation well-prepared to make the session meaningful and constructive. That means the attorneys must first familiarize themselves with the standard of appellate review that will be applied to the trial court's decision. Surprisingly, many litigants embark on appeals without giving any thought to this critical factor. For example, appeals from summary judgment rulings are reviewed de novo, a standard that gives the appellant a significant advantage on appeal. Appeals from bench trials or jury verdicts, however, are usually reviewed under the clearly erroneous standard of review, which presents an enormous hurdle for appellants.

Counsel should also be familiar with the substantive area of law at issue in the appeal. Because there is often a significant delay between the briefing for a dispositive motion or trial and the entry of a final judgment in the trial court, counsel must update research to date to determine whether any new developments will affect the issues in the case. It is not enough to merely skim the briefs that have already been filed.

Counsel must also reread and be prepared to discuss any rulings at issue in the appeal. Lack of familiarity with the contents of the final judgment ruling will almost guarantee an unsuccessful mediation. Each side should also be prepared to discuss the issues they intend to focus on in the court of appeals and the supporting authority for each point, although there are limits to candor. If the mediation takes place before the filing of appellate briefs, counsel for the appellee may be reluctant to reveal its arguments for fear that doing so could educate the other side about how to be more persuasive in the court of appeals. Generally, though, for the appellant, coming to the mediation and saying you intend to reargue the same points that failed to persuade the judge below, without presenting a convincing rationale as to why the judge erred, will hardly convince a confident appellee to present a serious offer. Likewise, an overconfident appellee may turn victory into defeat by dismissing without any consideration the appellant's citation of a new significant ruling or a point the trial judge may have overlooked.

Finally, if there are issues relating to damages, both sides need to be able to come to an understanding as to the scope of available damages. It is very hard to resolve a dispute if one side believes the case has a value of "x" while the other side calculates the value as "y," which is either a multiple of or a fraction of the other side's assessment of damages. Admittedly, in personal injury cases, and often in employment disputes, it is difficult to quantify damages in that manner, but if there are statutes or rulings that place limits on damages, such as statutory caps on noneconomic damages, both sides should be aware of and acknowledge those restrictions.

Just as the lawyers need to prepare for mediation, so do the clients, because ultimately the appeal is about them. Appellants have to be prepared to be realistic; statistically, the odds are against their winning on appeal. Thus, they may need to adjust their expectations substantially from those they had before the entry of final judgment. Clients should also be informed of the outcome of recent similar cases. And they have to understand that litigating in the court of appeals is a zero sum-game. Unlike a trial where a jury may not give the plaintiff all of the remedies that she is seeking, but will likely award some amount of damages, appellate litigation is usually a winner-take-all proposition. Moreover, even a win in the court of appeals for the appellant might not result in an outright win; it might do no more than secure a new trial where there is still no guarantee of an ultimate victory. Appellants must also consider the cost and expense of appellate litigation.

Appellees should also acknowledge that a win in the court of appeals is not guaranteed, and that even an appellate victory may yet mean future litigation with the same party. Before the mediation, counsel should discuss with clients the consequences, not to mention the costs, of an adverse ruling. Appellate courts sometimes function as our present-day *deus ex machina,* except that instead of rescuing the hero, an appellate ruling may wreak havoc in a way that needs to be anticipated. The mediation should therefore be viewed as a valuable opportunity to discuss frankly the implications of what the appellate court may do.

In sum, the key is to get everyone—both the litigants and their attorneys—involved to both lower and be realistic in their expectations.

At the mediation, just as in the appellate court, histrionics and theatricality have no place. The parties need to come to the mediation prepared to speak dispassionately. In addition to full settlement authority, the two most important things to bring to the mediation are an open mind and a well-tuned ear. In gauging the effectiveness of the points asserted by opposing counsel and by the mediator in private caucus, it is just as important to hear what is not being said. Respect and courtesy for the other side are also essential tools that help resolve disputes. Interrupting either the mediator or the other side when they are speaking, or responding to them with anger will not advance the process. Even if there is vehement disagreement with the other side's arguments, it is best to remain silent and wait until the private caucus to explain to the mediator why the other side is wrong.

Remember that the mediator is neither a judge nor an arbitrator. The mediator is a facilitator who is there to convey proposals and assist the parties in fashioning an agreement. Therefore, there is little point in trying to persuade the mediator of the righteousness of your position and the poverty of the other side's arguments. Because the mediation is confidential, though, and nothing said in the mediation will be shared with the appellate judges or used against a party in litigation, it offers an opportunity to use the mediator to help assess the strengths and weaknesses of the arguments that will be presented in the appellate briefs and oral arguments. Sometimes all it takes is to hear an argument spoken out loud to know it is unlikely to be persuasive; other times the mediator may point out flaws in arguments or hint that a particular argument may have been successful in other similar litigation. The mediator

may also help evaluate settlement proposals and suggest counter-offers even if the session starts as a facilitative mediation. Thus, at the end of the session, even if an agreement is not reached, the mediation will still be of unquestionable value in helping to understand a range of potential outcomes or to tailor the arguments that will ultimately be presented in the court of appeals.

The parties should be prepared to think differently. They need to come to the settlement conference knowing their goals and understanding the implications and limitations of an appellate ruling. Many cases, particularly from the viewpoint of appellees, could have a substantial effect on other litigation. An adverse outcome in the court of appeals could affect hundreds or even thousands of other cases that may be pending against a large corporation, or may even have an industry-wide impact.

Sometimes, one or both party's goals cannot be achieved regardless of the outcome of the appeal. The ability of the parties to meet at the negotiating table may enable them to fashion a resolution they could not otherwise obtain. The parties, the attorneys, and even the mediator need to listen carefully for opportunities that arise during the course of the mediation and to suggest creative and nontraditional ways of resolving the dispute.

Mediation is also a process that requires tremendous patience to create an environment conducive to reaching a settlement. At a certain point in the process, it will become apparent whether the parties both desire to reach an agreement and whether a resolution is feasible. I liken that point to what happens when a car is stuck in the ice and snow. The first thing that occurs is that the wheels spin and the car fails to move at all. With a little patience, though, the driver learns to apply light pressure on the accelerator and the car begins to move forward a little bit. Ultimately, by switching the transmission between the forward and reverse gears, the car takes on a rocking motion; and when that point is reached, the driver is confident of pulling out of the ice and snow. Settlement works the same way; it has to go forward and backward a bit, but once the rocking motion is achieved, the mediator knows it and the caucuses accelerate as the parties endeavor to close the gap between their positions.

Finally, to make the mediation a success, the parties have to be realistic about identifying both their best and worst alternatives to a negotiated agreement. In the example about disability benefits given earlier, the best alternative (i.e., a win in the court of appeals) may be a pyrrhic victory if all it achieves is an opportunity for the insurer to cut off benefits at some future date. Reinstatement, the preferred remedy in employment cases, presents a nightmare scenario to an employee who has undergone workplace harassment. Therefore, an offer of money as a final resolution of all past and future claims is often a much better alternative than a victory in the court of appeals. Conversely, for an insurer or employer that has won a significant legal victory in the trial court, an outright reversal could have adverse effects on other pending litigation, while a settlement that leaves the lower court decision undisturbed could potentially aid in other cases. All of these considerations must be kept in mind, as the following illustrations show.

I have found that sometimes clients misunderstand or ignore the pre-mediation preparation. In a disability benefit case, the trial court awarded reinstatement of my client's monthly benefits, which had a modest accrued value of approximately $25,000. The insurer appealed, and shortly after the notice of appeal was filed, the court of appeals notified us that a mediation would take place by telephone. In preparation for the mediation, I explained to my client that even if he received the benefits awarded, along with present value of the future benefits that were not included in the judgment because they were contingent on the client's ongoing disability, the most he could recover would be $100,000. I cautioned the client that although we had achieved a victory in the district court, winning on appeal was not guaranteed. I also pointed out that even if we won on appeal, there was no certainty the client would remain disabled or even alive for the next ten years and that his expectations needed to be lowered.

Shortly after the mediation commenced, the insurer's counsel made a substantial settlement offer, and the mediator and I called the plaintiff to explain the offer and to elicit a counterdemand. After again explaining the maximum potential recovery could be no more than $100,000, the client said he was really looking to recover $1 million, but our explanation convinced him to lower his expectations and ask for $300,000. The mediator and I again patiently explained that his demand was three times the maximum potential recovery and was unachievable. The client nonetheless refused to budge. After two weeks of continued mediation during which we patiently explained the risks and benefits of continuing the litigation, provided spreadsheets to the client clearly establishing the parameters of the potential benefits that could be payable, and summarized the binding case law precedents that could result in losing all of the benefits altogether, we were finally able to convince the client to make a demand for less than the maximum recovery. Thus, we were ultimately able to resolve the case and avoid the risk that we might lose altogether if the court of appeals overturned the trial court's ruling.

The two most important things to bring to the mediation are an open mind and a well-tuned ear.

In another case I handled, shortly after the trial court had issued a ruling adverse to my client, my research in preparation for the appellate mediation revealed that a recent appellate ruling had altered the law governing the underlying basis of the court's judgment. If ever there was a case that was an "automatic" reversal, this was it. I arrived at the mediation, presented both the mediator and opposing counsel with a copy of the recent ruling, and suggested that the recent ruling completely undermined the lower court judgment and virtually guaranteed that my client would prevail in the appeal. After digesting the decision, my opponent agreed with my reading of the case and we were able to speedily negotiate a fair settlement at an amount higher than what had been offered before the entry of judgment in the court below.

In a similar situation, however, the mediation failed to resolve the case. I had received an unfavorable ruling that I felt was likely to be overturned based on recent precedent that supported two very strong arguments I intended to present. Unfortunately, the mediator did not invest himself in the

process and gave up on trying to settle the dispute after a very short caucus with each side. Fortunately for my client, my sense about the case was accurate, and the court of appeals reversed on both of the issues I argued. The case should have been settled, though, because both sides were represented by experienced counsel who could honestly evaluate the likelihood of what the court of appeals was likely to do.

This situation was quite the exception to the usual experience I have had mediating in the court of appeals. I anticipate when going into the mediation that the mediator is well-prepared and will be utterly tenacious in trying to resolve the case. Even if settlement sometimes appears hopeless, most mediators I have worked with will keep the parties talking for as long as it takes to explore every possible means or method to resolve the matter.

An example of an extremely successful mediation occurred in my favorite mediation experience of all. I had lost a case, an occurrence that may appear to the reader to be all too frequent in my practice. Although I felt there were strong grounds for appeal, in my heart I believed we were likely to lose, and I prepared my client by being honest and straightforward about our chances on appeal. Because I assumed that opposing counsel assessed the appeal in the same way, I had low expectations of a successful mediation. The mediator, however, worked on both sides to see if there was a basis for settlement, and we were ultimately able to get within striking distance. In an effort to bridge the gap,

The cost of further litigation is often a sufficient incentive to settle.

I told the mediator that I was going to present two proposals: I offered my client's bottom-line settlement position, and I also offered to take everyone to lunch if we were able to reach a settlement. The mediator then left to caucus with the other side, and after a lengthy interval, he returned wearing a poker face. I expected the worst, but after a dramatic pause, the mediator announced that he had good news: The other side had accepted my second proposal. I then waited for the other shoe to drop, and after an even longer interval, he admitted the first proposal had been accepted as well. The luncheon afterward was very enjoyable, and I made two good friends that day—opposing counsel and her client.

What these stories illustrate is that mediation creates opportunities and gives the parties control over cases that they lose once they place their case in the hands of the court of appeals. Although one side or the other may be inflexible and determined to let the appellate process take its course, if both sides acknowledge and recognize the potential weaknesses in their claims, there is an opportunity to mediate a successful resolution. Likewise, the cost of further litigation is often a sufficient incentive to settle.

On occasion, one party is willing to settle, but only on the condition that the trial court vacate its ruling. Although the U.S. Supreme Court has questioned the legality of vacating final federal court judgments, *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18 (1994), as long as the lower court is willing to go along, many mediators use the possibility of *vacatur* as a settlement tool. I have had several judges balk at vacating their rulings, however, taking the position that to do so would violate the constitutional prohibition against issuance of advisory opinions. A federal district judge recently suggested that the possibility of *vacatur* also discourages, rather than encourages, settlements because it emboldens parties to litigate cases they know they are likely to lose and then to seek to vacate unfavorable rulings rather than settle a losing case earlier, tying up valuable judicial resources in the process.

The issue of confidentiality is also often a major factor in settlement. Confidentiality can be a useful tool to encourage a settlement because it enables parties to settle with the knowledge that the terms cannot be disclosed and used by other litigants. A confidential settlement may also be a means of securing a return of documents or deposition testimony that may have been disclosed or elicited in discovery that could have proprietary or other value or threaten actual or perceived trade secrets. The danger, though, is that the public may not learn of a dangerous harm that could affect others.

In other situations, the need to maintain an ongoing relationship between the parties is often the leverage needed to secure a settlement. One party or the other may choose to be lenient in offering terms so that the parties can continue to co-exist and work with one another on ongoing matters. Other times, parties can use the mediation as a forum to establish terms for the ongoing relationship and establish a mechanism for either avoiding or resolving future disputes.

At the conclusion of the mediation, the parties will have either failed to reach an agreement or, hopefully, resolved the case in whole or in part. If the mediation is unsuccessful, the mediator may still be able to control the briefing schedule to suit the parties' schedules, and there may be enough of a framework for settlement discussions to continue during the briefing or even after oral argument but before the issuance of a ruling. A successful outcome to the mediation will result in the removal of the case from the appellate court's docket and a halt to the appellate process. There is an intermediate possibility as well. The parties may also reach a partial resolution that can significantly narrow the issues ultimately presented on appeal. Of course, there will also be situations where the appellant realizes after the mediation that the appeal is unlikely to succeed and the appeal is voluntarily dismissed. Indeed, many appeals are brought with the intent of using either face-to-face negotiation or mediation as a means of avoiding the taxation of costs in the trial court or to achieve a nominal benefit that falls substantially short of the initial goal of the litigation but still allows for some saving of face.

The mediator will report to the judges or justices of the court of appeals whether the case has settled but will not disclose the substance of the negotiations or provide any other comments about the manner in which the mediation was conducted or about the litigants. Nor will the parties be allowed to use any statements made during the appellate mediation in their briefs or in any other manner. Such confidentiality is mandated either as a matter of court rule or by agreement of the parties as a condition of the mediation.

The value of mediation in the courts of appeal is undeniable. Since the United States Court of Appeals for the Second Circuit implemented its mediation program in 1974, appellate mediation has expanded dramatically. Although the programs differ somewhat as to their structure and as to whether the mediators are judges themselves, are court employees, or are drawn from the private sector, mediation has proven to be an effective means of lightening the dockets of the courts of appeals.

When the parties adequately prepare for and treat mediation with the same seriousness as they would the entire appellate process, and when they approach mediation with candor, the process has many benefits for the parties as well as for the courts. Mediation can be a means of partially mitigating the sting of defeat in a lost cause or it can preserve a victory in danger of being snatched away. Either way, or even when mediation does not produce a settlement but merely serves as a proving ground for the arguments that will be presented to the appellate court, it is an essential tool for every appellate attorney. ◻