

LESSONS LEARNED REGARDING APPELLATE MEDIATION

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LESSONS LEARNED REGARDING APPELLATE MEDIATION

I. INTRODUCTION

The author has had considerable experience both as an appellate lawyer involved as an advocate in appellate mediation and as an appellate mediator helping to settle cases after trial over the last 12 years. In that time, the author has learned a number of lessons about how to make appellate mediation successful. The purpose of this paper is to share those lessons so that both appellate lawyers and appellate mediators might help parties achieve a successful settlement.

Underlying this paper are two secondary theses. The first thesis is that, if appellate lawyers understood appellate mediation from the perspective of experienced appellate mediators, then they would have a better grasp of the process and would get better results. The second thesis is that appellate mediators also will benefit if appellate attorneys and their clients are as knowledgeable as possible concerning the appellate mediation process. Everyone benefits when each participant better understands the appellate mediation process from the perspective of the other participants.

This paper is divided into three sections. The advantages of appellate mediation compared to pretrial mediation in achieving a successful mediated settlement, prerequisites to a successful mediated settlement, and the dynamics of a successful mediation will each be addressed.

II. THE ADVANTAGES OF APPELLATE MEDIATION VS TRIAL MEDIATION

Most attorneys and many mediators believe that appellate mediations are far less likely to settle than pretrial mediations. They point to the fact that mediators normally obtain settlements in pretrial mediations because they can point to all the uncertainties that await both parties as to the outcome of the case. Logically, the fact that appellate mediations occur after the parties have learned the outcome of the trial would eliminate most of those uncertainties that help get cases settled. Plus, the party that won at trial normally feels vindicated and sees no reason to settle the case after having fought the good fight and having prevailed. Conversely, the party that lost at trial normally believes that an injustice occurred at trial, and their resolve to win on appeal increases exponentially. Another factor in making appellate mediations seem more difficult is the fact that affirmances are statistically far more likely to occur than

reversals, making winning parties even more intransigent in their approach to settling at mediation.

All of the above presumed difficulties in appellate mediations are precisely why the opportunity to mediate and actually settle the case should not be missed. The appellate lawyer who can settle a case that presumably cannot be settled will get the credit for being so good that the other side capitulated. While the short term horizon might make some appellate attorneys concerned about losing the opportunity to work on, bill for, and prevail in an appeal, the long term horizon makes the appellate lawyer a hero. Being a hero increases the chance of getting repeat business or referrals from the client or attorney who engaged the appellate lawyer who brought about the settlement that seemed all but impossible after trial.

Appellate mediations may actually be easier to settle than pretrial mediations. This counterintuitive observation is supported by a number of reasons. First, there are far fewer issues and far fewer moving parts in appellate mediations when compared to pretrial mediations. The only live issues on appeal are those issues that are raised by the appealing parties in their appellant's brief. Appellate lawyers know that appellate courts prefer that parties, whenever possible, limit the number to their points on appeal to two or at most three. Even the potential pool of appellate points have been narrowed because the various possible theories of recovery and defenses that existed before trial have been narrowed down to what was actually presented by the parties and submitted by the court to the jury. Even those issues that were presented at trial have been narrowed down further to those facts actually found by the jury and made the basis of the judgment by the court. The facts are now fixed in the record and cannot be supplemented or modified once the judgment is entered and the case is on appeal.

Similarly, the relevant legal theories are only those that relate to the judgment that was actually entered. The case law that will be applied by the intermediate appellate courts is relatively fixed compared to the various legal issues that are normally bandied about by the parties pretrial. Although losing parties talk about changing the law with their appeal, appellate lawyers know that intermediate appellate courts apply existing law and leave the creation of new law to the Supreme Court whenever possible. The Texas Supreme Court is even less likely to make new law since it decides to hear less than one in ten of the petitions for review that are filed in the Supreme Court.

Second, the merits of a case on appeal normally break down into one of two worlds: easy calls and hard

calls. Easy calls are those points on appeal where a consensus of appellate experts would say that they can predict with relative confidence how the appellate court would rule on the issue. Hard calls are those points on appeal where the appellate court could go either way and cannot be predicted with any confidence. Hard calls arise where facts truly distinguish the case on appeal from otherwise controlling case law, or where the law is unclear, or where for whatever reason the appellate court is unpredictable on the particular issue. Good appellate lawyers who have completed their research, legal analysis, and briefing know what their prospects are on appeal. Moreover the statistical probabilities are so high that any particular legal ruling by the court will be affirmed and not reversed on appeal that it is far easier to predict what will occur on appeal compared to predicting what would happen at trial. There are lots of easy calls in appellate cases.

III. PREREQUISITES OF A SUCCESSFUL MEDIATION

There are several prerequisites to a successful mediation. First, the parties must determine the threshold question of whether it makes sense to participate in appellate mediation. Presumably, most cases on appeal are cases that could not be settled in a pretrial mediation. For this reason the key prerequisite is that both parties must want to settle. If one party does not want to settle, a settlement will not happen. For any mediation to succeed and result in a settlement, it takes two to tango. Also, if one party wants to win the case in mediation, it will not settle. It is indispensable that both parties must understand that they are going to have to give more than they want in order to settle.

The second prerequisite is the selection of the right appellate mediator. In my experience, a successful mediation requires a mediator who is an expert in both of the two tracks that comprise a successful settlement: the merits track and the dollars track. First, regarding the merits track, the best appellate mediator is someone who knows appellate practice, appellate procedure, and how appellate courts decide appellate cases. Discussions of the merits focuses on the issues on appeal, the case law, the facts in the record, and the synthesis of those components, which is the party's chance for success on that particular point on appeal. The discussion of the merits of the appeal is very important because a successful mediator normally must have the confidence of both parties concerning how the case will be decided by the appellate court. The best mediator is one who can get each party to believe in a more realistic assessment of their prospects on each point of error. To do that, the

appellate mediator should be someone who is an expert in appellate matters and someone who has the reputation and objective basis for the parties and their counsel to accept the mediator's evaluation of the merits and predictions of the likely outcome of the case on appeal.

With respect to the dollars track, the mediator must also be an expert in the mediation process. Specifically, the mediator must be an expert in how to persuade parties to make bigger moves in terms of dollar offers and demands than they expected to make before the mediation started. To achieve that level of credibility and influence with both parties, the best appellate mediator must persuade each party to believe that the mediator can persuade the other side to move their dollar offers by providing a dose of reality. This is essential so that each party will keep making the dollar moves that make the other side believe the case can actually settle. The appellate mediator must be an expert in both the merits and the dollars tracks because ultimately the two tracks need to come together to accomplish a settlement. The merits and dollars tracks come together when both parties think the mediator is getting the other side to see reality. As a result, the mediator must be an expert in both appellate practice and the process of bringing all sides to believe that they can make the case settle. The mediator with the right credentials and personality to bring and nurture maximum credibility can persuade the parties to move to the rhythm and the melody that the mediator is orchestrating. Then, and probably only then, when the case is in a posture where both parties think that the case can settle, will the parties be able to get over the inevitable logjams over dollars. Those logjams can be broken when the mediator can convince both sides to make the additional dollar moves that are necessary to inspire still further additional mutual moves. When both sides see those mutual additional moves occurring, moves that the parties had not expected when they came to the mediation, the case can and likely will settle.

IV. DYNAMICS OF A SUCCESSFUL MEDIATION

In order to have a successful mediation and maximize the chance for an agreed settlement, there are a number of moving parts. The parties, their counsel and the mediator all have significant roles and their tasks change during the course of the mediation. These dynamics of a successful mediation are describable because in this author's experience as an appellate mediator, they almost always occur in appellate mediations that result in an agreed settlement. The

following describes those dynamics of an appellate mediation that results in a settlement.

V. THE BEGINNING OF THE MEDIATION

At the beginning of the mediation, both parties and their counsel are normally pessimistic about their chances for success. All the reasons that the case did not settle before trial are now exacerbated by a victory for one side and the loss by the other side. The statistical improbability of reversal in appellate cases generally only compounds the difficulties. The appellate counsel have developed what is normally their most aggressive statement of their prospects on appeal. Those statements have a tendency to anger the other side, both because they normally ignore the strength of their opponent's arguments and exaggerate the strength of their own arguments. It would be nice if this was not almost always what occurred in appellate mediations, but that would be unrealistic to expect.

At the outset of the mediation it is critically important that the mediator establish credibility with both parties and their counsel with respect to their ability to evaluate the merits of the points on appeal. In order to maximize their credibility with the parties it is very important that the mediator demonstrate at the outset of the general caucus, with all parties present, that the mediator has read the briefs and understand the basic arguments of each side on each point. Because the parties will be looking for any sign of how the mediator is leaning, it is important for the mediator to look impartial as between the sides even if the comments suggest that the mediator has some sense of which issues involve easy calls as opposed to hard calls on the merits.

VI. PRESENTATION AND DISCUSSION OF THE MERITS

After the mediator demonstrates that the mediator has read and researched to some extent the arguments in the briefing, the parties will need the opportunity to present their arguments on why they will win the appeal and why the other side will lose the appeal. This is a controversial aspect of the mediation process because it is correct to say that these presentations can have a polarizing effect on the other party in a process that otherwise requires some degree of cooperating in negotiation to settle. Unfortunately, it is this author's observation that a critical factor in the success of the mediation is that the parties must themselves believe that their counsel has had the opportunity to make their appellate arguments as effectively as possible so that the merits have been expertly presented. Admittedly, some of this part of the process includes emotional venting; however, because of the unique posture of all cases on

appeal, which involve the restricted facts in the records and limited governing law, appellate mediation tends to call for a presentation more like appellate oral argument. Hopefully, counsel presenting this argument will be experienced appellate specialists who will focus on the points on appeal, rather than making a jury argument, which is usually not well received by either appellate judges or appellate mediators. Good appellate advocates will make their presentation concisely and professionally, eliminating or keeping to a bare minimum personal jibes and emotional pleas.

After each side has made their presentation on the merits and has been given the opportunity to reply, the appellate mediator should seriously consider taking the next step in obtaining the confidence of the parties: asking questions about the case that are calculated to identify clear winning arguments from clear losing arguments. Telling the parties which points seem to be easy calls and which issues seem to be hard calls, either indirectly by questions or by direct statements, can significantly increase the parties' confidence in the mediator. Although any in-depth analysis of strengths and weaknesses of the issues on appeal should be deferred until private caucuses, this public airing of the important merits issues has a chance to make the parties believe that the merits of the case will be addressed by the mediator in the private caucuses. This is of critical importance to the chance for a successful settlement at the end of the mediation. Each party to a mediation believes that the only way the case will settle is if the mediator can make the other side "more realistic" about their prospects for losing their arguments and their appeal. The other side has proved throughout the litigation process that they are unrealistic about the merits of the case, their prospects for success in litigation, and the value of their case in settlement. This public discussion of easy and hard calls is seen as a discussion of strong and weak points and sets the stage for the mediator to have more in depth discussion of the strengths and weaknesses of the each party's merits during the next phase of the appellate mediation, the private caucus with each party.

VII. PRIVATE CAUCUSES

The real work in any mediation occurs in the private caucuses with each party. In any mediation that results in a settlement, this is where discussion of the merits becomes progressively more pointed and critical. This is also the phase of the mediation where the dollar numbers are continually requested by the mediator and given by the party. The merits discussion starts off with a positive, affirming focus on the obvious strengths of that

party's appellate position. When the mediator starts off the private sessions by acknowledging the obvious strengths of their position and the obvious weaknesses of the other side's position, the party will believe that this is a truly credible appellate expert who "gets it" and presumably will bring a hard dose of reality to their opponent.

It is important for the mediator to gain credibility as an appellate expert in two respects. First, it will be important for the mediator to gain credibility in the first private caucus because the mediator eventually will dispense bad news concerning the merits of the position in subsequent private caucuses. Second, that credibility is important when the mediator transitions in each private caucus from a discussion of the merits to a discussion of the dollar offer to be authorized by the party and transmitted to the other side by the mediator. When it comes to dollars, the mediator will need maximum credibility to ask the party for a specific number to communicate to the opponent. Ultimately, the credibility of the mediator will be bolstered by the ability of the mediator to obtain continually improving dollar numbers from the opponent.

In subsequent private caucuses, the mediator will progressively increase the negativity of the assessment of the party's chances for success on appeal. Hopefully, the mediator will have sufficient good will from having recognized publicly at the outset the obvious strength of some of that party's appellate arguments to withstand the resistance or even the ire of that party and their counsel in connection with the mediator's communication of bad news regarding the merits of other arguments. To balance out that lessening of that party's confidence in the mediator, the mediator needs to have succeeded in generating confidence in the mediator's ability to bring home the bacon – by continually improving numbers coming from the mediator's private caucuses with the other side. When that happens, many other good things happen. First, it will appear as though the mediator is succeeding in convincing the other side of the problems they face. Second, the improving dollar offers are seen as a reflection that the mediator is succeeding on the dollars track as well as the merits track. Success on the dollars track will soon become far more important than the merits track, and at some point the discussion of the merits will stop altogether and the discussion will focus exclusively on the dollar numbers being exchanged.

VIII. BREAKING IMPASSES

The killers of all mediations are impasses or logjams in the otherwise continual flow of dollar number exchanges. In order to succeed, the dollars must

continually flow. Just like sharks that must continually move through the water to live and will die if they stop moving, so too must mediations constantly move through the exchange of new numbers. When one party refuses to give a new number, regardless of the increment of the change, then the mediation process stops. If the exchange of numbers does not resume, the process is dead. In order to keep the process alive, the impasse must be ended and the logjam must be broken. This is always the key to whether the mediator will succeed or fail, and all good mediators have a number of devices that they will employ to break the logjam and resume the exchange of better numbers. At the heart of whether the mediator will succeed in breaking the logjam, however, is the issue of credibility. If the mediator has developed enough credibility with both sides to convince them that settlement is increasingly possible, then the party may give the mediator numbers they never expected to be giving. When the other side sees those numbers are better than they expected at the outset and reflect that the other side may get into "the ballpark" where the case can settle, then the mediator has a realistic chance of breaking the impasses.

After a number of impasses have been broken, it frequently occurs that there will be a final impasse where both parties are stuck at their respective numbers. In this situation the mediator's credibility will finally be tested. At this point the mediator may suggest that the parties agree to a specific number between their respective stopping positions. A variant of this is for the mediator to make a mediator's proposal. A mediator's proposal involves the mediator making a specific proposal that each side is asked to accept or reject in secret. If both parties accept that number the case is settled by agreement. If one or both parties reject the proposal then neither side is told if the other side accepted or rejected the proposal. In this author's experience, the mediator's proposal has frequently succeeded. Here, as in the other stages of the mediation process, the mediator's credibility in assessing the merits and the dollars negotiation can determine their ability to obtain the agreement of both parties to a final settlement agreement.

IX. CONCLUSION

Appellate mediations present a very real opportunity for difficult cases to be settled before appellate courts render their decisions. Although there are many reasons why appellate mediations should be among the most difficult type of matter to be settled by mediation, there are also advantages and unique opportunities to reach a successful settlement for parties and mediators who

understand both appeals and the mediation process. By appreciating the need for candid assessments of the merits of any appeal and the need for parties to continually move their dollar offers toward success, the final resolution of the case can be achieved by agreement rather than by judicial decree.