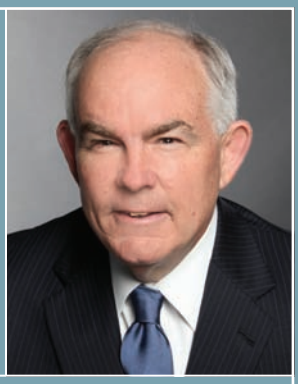
JAMS VIRTUAL ROUNDTABLE: APPELLATE MEDIATION



Moderator
CHIEF JUSTICE LINDA B. THOMAS (RET.)
Fifth District Court of Appeals; JAMS Dallas Mediator/Arbitrator

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JUSTICE MARK WHITTINGTON (RET.)
Fifth District Court of Appeals; JAMS Dallas Mediator/Arbitrator

Panelists
NINA CORTELL, ESQ. *Haynes and Boone, LLP*
WADE C. CROSNOE, ESQ. *Thompson, Coe, Cousins & Irons, LLP*
ROBERT M. (RANDY) ROACH, JR., ESQ. *Roach & Newton, LLP*

WHITTINGTON: Nina, what are the important differences between trial and appellate mediations? What are some of the major obstacles to settlement at the appellate level? What are some of the major opportunities for settlement that are available in appellate mediation?

CORTELL: For better or for worse, with an appellate mediation one variable has been eliminated: there is a trial court determination of the merits. The risk of how a jury and/or trial judge might resolve the case is no longer present; there is a winner and a loser. There remains, of course, the risk of what will happen on appeal, but that analysis must be viewed through the lens of the standard of review, which might or might not be deferential to the lower court. So, the impediment to mediation after trial and on appeal is that the risk factors have been reduced, and one side is feeling pretty grand, being in possession of a piece of paper that holds the potential of a good payday in the future. The challenge to the mediator and appellant is to convey the risks that lie ahead, framed within the context of the appellate standard of review. The risks could, of course, include outright reversal and rendition of a take-nothing judgment or reversal and remand for a new, potentially expensive re-trial. If such risks can be conveyed convincingly, the ability to settle will be enhanced. This is especially true when considered in combination with the opportunity to resolve the case months, if not years, before the case would otherwise be resolved on appeal. It is well known that the appellate process can take between one and three (or sometimes more) years; a mediated settlement, in addition to resolving the risks presented by the appeal, can be an attractive option because it holds the promise of an earlier payday. The bottom line is that, although an appellate case might present fewer risks than a case pending trial, there are still many risk factors at play that, when combined with timing considerations, can make a mediated settlement a very good way to resolve the case. Such a resolution quantifies all parties' risks, stops the appellate attorneys' fee meter from running, and expedites payment.

CROSNOE: I agree with Nina about the major difference between trial and appellate mediation: the previously unknown (what a judge or jury will do) is known. There are other differences too. One is that the opening presentations tend to differ, especially in personal injury and product liability cases. The opening presentation at trial mediations in such cases can be emotional and full of bluster – it is usually the first chance for plaintiff's counsel to talk to the defendant directly about the plaintiff's injuries and perform for the client. The emotions can run high on the defense side too, particularly in cases where the defendant feels it has no responsibility. Appellate mediations are generally less emotional because both sides have already had the chance to present their evidence and arguments at trial. The lessened role of emotion is more conducive to settlement. Another difference between trial and appellate mediations is the mediators themselves. In my experience, appellate mediators are more likely to be former appellate or trial judges than trial mediators. Former judges can bring more credibility to the table in discussing the standard of review and risks on appeal with both attorneys and clients.

As for the obstacles to settlement at an appellate mediation, the confidence of the victorious trial court party and the lessened risk can certainly be impediments. Another impediment is the tendency of attorneys and clients to become more confident in their positions and the justness of their cause over time. This problem can be lessened somewhat by the involvement of new appellate counsel, particularly if the mediation occurs earlier in the appellate process. Also, I never thought I would say this, but

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the current postjudgment interest rate in Texas state court (the statutory minimum of 5%) may be an impediment to settlement from the plaintiff's perspective. That rate of return is not easy to duplicate in today's economic climate.

I agree that the cost and delays associated with an appeal are the biggest factors that can lead to settlement. Another is the risk of an adverse published decision for large companies that are frequent litigants – for instance, insurance companies and product manufacturers.

WHITTINGTON: I would amplify just one point mentioned by both Nina and Wade, and that is the importance of consideration of the standard of review in appellate mediations. In pre-trial mediations, the focus is frequently upon the burden of proof and whether a judge or jury will find crucial facts by a preponderance of the evidence. In appellate mediations, the discussion almost always begins with consideration of the standard of review to be applied to the points raised on appeal. The attorneys, and ultimately their clients, must have a working knowledge of the framework an appellate court will use to resolve their appeal to be able to effectively evaluate risk associated with proceeding. For instance, there are certain standards of review, such as abuse of discretion and factual insufficiency, that rarely result in reversal on appeal. In contrast, if the de novo standard of review is to be applied, the prospect of reversal is much greater. On a related topic, it is also important the client understand the impact of the standard of review upon the resolution of the appeal. If abuse of discretion is the standard applied, the worst outcome for the losing party is remand for a new trial. But, if a legal insufficiency point is raised, the client must consider and evaluate the risk of rendition of a take-nothing judgment.

ROACH: Another potential advantage that presents in an appellate mediation, as opposed to a trial mediation, is the ability of the mediator to predict the outcome of the case on appeal, then use that to help get the case settled. Because of the many fact-related variables inherent in a trial, predicting outcomes in trial is extremely difficult. Those fact-related variables are almost all resolved by the time of an appeal. While law-related variables continue to exist, they are much more susceptible to reasonable prediction than are fact-related variables. An appellate mediator who is asked to predict outcomes on a point-by-point basis on appeal can be much more confident than a trial mediator could ever have been in predicting an outcome. This gives the mediator real power to help get the case resolved, if used judiciously.

THOMAS: A potential challenge with appellate mediation is the fact that oftentimes, one party is considering only what is possible at the intermediate appellate level, while the other party or parties are looking beyond that to final resolution at the high court. When this occurs, the first challenge is to get all sides on the same page. I have found the parties to be significantly more entrenched in their positions at appellate mediations.

WHITTINGTON: Does the type of case make a difference in appellate mediation? For instance, are there different considerations when the dispute involves insurance coverage as opposed to personal injuries? Can a summary judgment be successfully mediated on appeal? What about an interlocutory judgment? As a corollary to the previous questions, should the appellate mediator try to reach a global resolution of the dispute or only those issues addressed in the judgment or order?

CROSNOE: The type of case involved definitely makes a difference in appellate mediations. Contract disputes can be easier to settle than personal injury cases because there is generally less emotion involved. Contract disputes can also be easier to resolve when the contract or insurance policy specifies a set amount of damages or benefits, leaving the resolution of the appeal on the question of contract liability as the only unknown risk factor. When an insurance coverage dispute is thrown into the mix with a dispute over liability and damages in underlying tort litigation, however, settling the entire controversy can be extremely difficult. Settling such disputes requires a mediator knowledgeable about both tort and insurance coverage matters. The opportunity for settlement there is the additional unknown of whether the tort plaintiff will have a readily-available source of recovery (the insurance policy) if the plaintiff prevails in the underlying tort litigation, not to mention whether the defendant/insured might have to satisfy an adverse judgment itself or face bankruptcy if it cannot.

The type of judgment that is being appealed can also make a big difference. Summary judgment appeals can be especially difficult to settle. Before evaluating what the result of a trial might be on remand, the parties first have to evaluate whether the summary judgment will be reversed on appeal. And unlike in appeals from final judgments following trials, the parties don't have the luxury of knowing what happened at a prior trial. Appeals from another type of order – interlocutory orders – are not mediated as often as ordinary appeals, in my experience. Appellate courts don't tend to refer such appeals to mediation with the same frequency as appeals from final judgments, perhaps because of the accelerated deadlines involved. If the parties agree to mediation, they are faced with many of the same uncertainties of mediation in a summary judgment appeal, plus the possibility of facing additional proceedings on

remand even if the order is affirmed. Nevertheless, the added uncertainties presented by appeals from summary judgments and interlocutory orders present an opportunity for settlement that a mediator can exploit.

Some of the examples I have given raise the question of whether an appellate mediator should try to reach a global settlement of all outstanding issues between the parties or just the issues that are presented on appeal. Of course, the preference of the parties will generally be to resolve all outstanding issues. Settlement of only an issue presented by an interlocutory appeal – an issue that is often a straight legal question – can be difficult to conceptualize and implement and does not necessarily end the litigation costs. Nevertheless, I was recently involved in a restricted appeal in which the parties agreed to ask the court of appeals to vacate a default judgment and remand to the trial court for a trial. So it is possible to settle an appeal without settling the entire case.

CORTELL: My general reaction is that all appellate cases, regardless of type, have settlement potential through appellate mediation. To be sure, the devil is in the details, but, generally speaking, I would not rule out mediation in any case unless there is a long history of failed mediations in the past. With respect to summary judgments, the last statistic I saw revealed a high reversal rate, leading me to conclude that such cases should be good candidates for mediation. I have also had luck with mediated settlement of personal injury appeals and interlocutory appeals (the latter occurring when the issue was central to the case). If insurance is involved, then I heartily agree with Wade that it is very important for the mediator to be savvy as to insurance issues; it is also important to have the carrier represented at the mediation. As to whether the settlement should be global, that is clearly the desired result, if it can be reasonably achieved.

THOMAS: Appellate mediations can take place at various times after a decision in the trial court by a judge or jury. In general, what are the considerations involved in making a recommendation to your client regarding timing of the appellate mediation? Are the considerations different based on the type of case, posture of the parties, or amount of money involved?

ROACH: My usual settlement advice to clients is to try to mediate as soon as possible after the verdict and before judgment is rendered. The three factors that are key in my opinion are:

1) The high cost of post-verdict appellate work that hasn't yet been started at this point and could all be saved if the case is settled before that work begins,

2) Uncertainty about what the judge or the appellate courts are going to do with the jury's verdict may be as high for both parties as it will ever be in the future, and

3) If an insurer is involved for possible payment of a judgment, the insurer may be at its most settlement-motivated place relative to the whole litigation process.

An immediate mediation is most valuable because it allows the parties and counsel to see how close or how far they are from settling the case without incurring the high costs of post-verdict and appellate costs.

My experience has been that after this opportunity comes and goes, a very small percentage of my cases settle until after the appellate court announces it first opinion. Even then the best prospect for successful settlement occurs if the appellate court requests a response to a motion for rehearing.

The dynamic that I see more often than not is that the party that won the verdict/judgment treats it as sufficiently (read "too") bulletproof that it eschews reasonable settlement proposals that otherwise requires the winner to take more of haircut off the dollar value of the judgment than they are prepared to accept. Often that confidence is overstated, but the statistics on appellate affirmance are unquestionably very high and dampen the level of uncertainty.

Given the above, my main reason for recommending that the mediation occur at the earliest possible time post-verdict and pre-judgment is so the parties can see at the cheapest point in the appellate cost arc how reasonable or intractable the other side is going to be regarding settlement. If the case can be settled now, then the amount of foregone appellate cost savings will be at their highest. If on the other hand, the winner is unwilling to take a sufficient haircut for the insurer or uninsured defendant to settle without an appeal, then the defendant can now make the decision to appeal, confident that they have already taken their best shot at settlement and are now going to bear the high cost of appeal because they had no other choice.

WHITTINGTON: Attorneys and parties considering the timing of an appellate mediation session obviously have different issues to consider than in a pre-trial mediation. Basically, the appellate mediation session can occur anytime after the judge announces a decision or a jury renders a verdict. Roughly, those times can be broken down as follows: (1) after the judge or jury has made a decision but before the entry of judgment, (2) after entry of judgment but before the notice of appeal is filed, (3) after notice of appeal is filed but before the record and briefs are filed, and (4) after briefs are filed. Although (1) and (2) are similar, there are a few cases where entry of judgment may be a critical issue for one of the

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parties. For instance, entry of a fraud or breach of fiduciary duty judgment may trigger adverse consequences that an individual defendant may want to avoid. Along the same line, a corporate defendant may want to avoid entry of a significant judgment that could trigger adverse publicity or a fall in stock value. In cases like this, the decision of the judge or jury has changed the litigation landscape and a business defendant may want to reevaluate its negotiating position before entry of judgment. One other consideration with (1) and (2) is that the case is still pending in the trial court and any communication regarding mediation will be with the judge who presided over the trial and it may be easier to signal the parties' desires with respect to mediation to that judge than to an appellate panel. Once the case has moved to the appellate court, the considerations change. Parties, and to some extent their attorneys, are frequently shocked to learn how long the appellate process takes. Receipt of some money now versus the possibility of a larger recovery years down the road is one of the strongest inducements to settlement a defendant can bring to the table. If this is a consideration, mediation before the filing of the record and briefs can also save money that can be added to the settlement pot. This is one of the reasons some appellate courts order mediation occur within 30 days of the filing of the notice of appeal. However, some cases stand a better chance of success if they are mediated after briefing is complete. If the appeal involves complex appellate points, briefing will provide clarity for both the mediator and the opposing party and contribute to a more in-depth evaluation of risk and probability. Some issues, such as waiver and procedural default are difficult to evaluate without a trial court record and are more successfully considered after briefing is complete.

CORTELL: As Justice Whittington points out, there are different considerations depending upon when the appellate case is mediated. Based upon my experience, I would break down the most realistic possibilities as (1) before judgment, (2) after judgment and before appellate briefs are filed in the court of appeals, and (3) after briefing but before argument in the court of appeals. Justice Whittington correctly notes that the mere entry of judgment can sometimes pose significant problems, providing an opening for mediated settlement. There is also the possibility that the trial court will not provide all of the relief requested. That uncertainty can be helpful as well. Finally, an early settlement can allow the losing party to avoid issues relating to supersedeas or judgment enforcement. The next major event in my judgment is the filing of appellate briefs. Once the briefs are filed, parties' positions can harden, making settlement very difficult. Also, by that point, the biggest appellate expense has likely been incurred, creating another impediment to settlement. For these reasons, I tend to favor mediation before the filing of briefs, but have had success settling after briefing as well because the briefs can clarify the risks presented to both sides.

The comments above do not take into account the next level of appellate review – e.g., the state supreme court in state court appeals and the United States Supreme Court in federal appeals. Given that appellate review at this level is discretionary, a new set of considerations come into play. That said, I have settled cases at this stage as well. In one instance, the other side did not think we would prevail at the court of appeals; when we did, there was a renewed interest in settlement. Or there may be genuine concern that the higher court will take the case and negate or diminish the prevailing party's victory in the court below.

My bottom line is "never say never." Each appellate stage provides settlement opportunities, although the relevant considerations change at each stage.

CROSNOE: I agree that earlier is generally better when it comes to the timing of appellate mediations. That is particularly true when the cost of briefing will be significant in relationship to the amount in controversy and when there is uncertainty about whether the trial court will enter judgment on the verdict. An early mediation is also a good idea under two circumstances noted by Nina and Randy: (1) when the defendant is concerned about its ability to supersede the judgment and (2) when a liability insurer is involved. To elaborate on the second circumstance, when a liability insurer has coverage defenses or is faced with a verdict in excess of its policy limits, the insurer may be reluctant to provide security on behalf of the insured for fear of effectively waiving its coverage defenses. The insured may be unable to procure a bond or other security on its own. Placed in this difficult position, both the insurer and insured may be motivated to settle before security must be posted.

There are other times, however, when it is preferable to delay the mediation. If appellate counsel is not hired until after the verdict or later, new counsel may not have sufficient time to review the record and analyze the appeal issues before entry of judgment. The appellant may also want the appellee to see the appellant's briefing before going to mediation, particularly when new counsel is involved.

CORTELL: I want to underscore Wade's excellent last point. It is very advantageous when there are skilled appellate counsel on both sides, as well as a mediator conversant with appeals. That lineup provides the best promise of a meaningful discussion of risks, and, consequently, the best promise of settlement. ■