Practice Tips For Appellate Mediation From Appellate Mediation: A Guide For Attorneys And Mediators By Dana Curtis And Brendon Ishikawa

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The following is excerpted from our *Appellate Mediation: A Guide for Attorneys and Mediators* published in 2016 by ABA Publishing.

A. Significant Differences between Appellate Mediation and Mediation Occurring before a Trial Court Judgment

Mediations before and after entry of a judgment differ significantly. The existence of a court judgment or appealable order has critical implications for risk analysis, settlement options, and timing of appellate mediations. Appellate mediations occur after at least one party has prevailed legally and another has lost and therefore focus their risk analysis and case valuations on whether the trial court made a mistake. By contrast, prejudgment settlement conferences and mediations focus on this question: "Who's going to win at trial?"

After what may be years of litigation and substantial financial costs, the positions of the parties have often hardened into inflexibility and an adversarial mindset. Respondents usually feel vindicated—at least to a certain extent—that the jury or judge credited their position. A boost in their confidence exacerbates the entrenchment in their positions. By contrast, appellants are frustrated that the legal process failed to give them justice and may therefore redouble their efforts to seek legal relief by pursing the appeal.

The very existence of the judgment requires that the trial court's decision be addressed if the mediation is to succeed. If there is a money judgment in favor of the respondent, the respondent's attorney is usually entitled to begin efforts to collect from the appellant even while the appeal and appellate mediation are occurring. If the judgment grants injunctive relief, the appellant (and perhaps both parties) may be obligated to comply with the court's order during the appeal. Sometimes parties—especially institutional or business entities—facing a judgment that negatively affects their reputation will seek to erase the judgment

completely through a settlement in which the parties agree jointly to request a reversal of the judgment in the appellate court.

Moreover, parties need to account for the appeal itself as they attempt to negotiate a settlement. Questions of timing become critical. Should the parties seek a stay of the appeal in order to mediate without the pressure of appellate briefing deadlines? If the terms of a settlement agreement cannot be immediately fulfilled, when should the appeal be dismissed? Can appellate mediation occur too late, given cases imminently set for oral argument or the release of the court's decisions? Questions of appellate procedure also become important. Does the mediation automatically stay the appeal by rule of the appellate court, or does the appeal proceed on a parallel track to the mediation—without affecting the appellate briefing schedule?

Finally, appellate advocacy is profoundly different from trial practice. Appellate practice, procedure, and substantive law have many differences from the rules that govern trials. Parties must decide whether to bring in an appellate specialist—whether just to help with the mediation or also to handle the appeal. Mediators in appeals must understand at least the basics of appellate procedure and substantive law, too.

The expense and delay inherent in appeals make exploring voluntary settlement negotiations worthwhile even for appeals in appellate courts with- out formal mediation programs. Many courts that do not maintain a mediation program nevertheless retain policies for conducting settlement conferences in cases in which the parties stipulate to participate in such conferences. Settlement conferences in these courts are often handled by judges appointed for that purpose.

B. Appellate Mediation Benefits from a Client-Centered, Problem-Solving, and Primarily Facilitative Approach

The art of appellate mediation is in helping parties successfully explore solutions that have previously eluded them because they have not been able to open channels of candid communication, uncover hidden or erroneous assumptions, or engage in constructive negotiations.

In defining a successful mediation, we focus on the process, not the result. First, in a successful mediation the parties explore as fully as possible—from their own and the other party's perspectives—the background of the dispute and its impact, their personal and/or business needs and interests going forward, and the legal risks and opportunities they face

absent a negotiated agreement. With this information, the parties develop and then evaluate options for resolution that are immediately available to them that either reflect their informed analysis of the present value of their legal case or otherwise address their needs and interests, or both. Most of the time this process enables parties to reach an agreement that leaves them better off than pursuing an appeal. Sometimes, the best available option is to go forward with the appeal.

By the time a case is on appeal, parties have almost always engaged in direct negotiations and participated in both mediation and settlement conferences, sometimes on multiple occasions. Nevertheless, options that were better for them than continuing the legal battle—and remain available—have eluded them. Settlement conferences are, almost without exception, attorney-centered, evaluative, directive processes, the goal of which is a resolution based on the settlement officer's best guess about what will happen if the parties fail to reach an agreement. In our experience, a majority of pretrial mediations follow this same approach as well.

As Dana began mediating appeals full time as a Circuit Court Mediator for the Ninth Circuit, she was disconcerted to discover that the settlement conference approach to mediation predominated in pretrial mediations and was, in fact, what the lawyers expected in appellate mediation. This model was in contrast to her previous private mediation practice, where she offered the approach we take in this book. In settlement conferences, what motivated the parties to settle was fear of an adverse judgment as predicted by the mediator. Thus, focus in this style of mediation was to instill fear by arguing the legal case, hearing the mediator's adverse predictions of the outcome (which are often different for each party), and struggling back and forth to reach a settlement that usually approximates the mediator's prognostication. The primary function of the mediator was to browbeat the parties into "agreement.

As Dana considered this approach, she began to wonder: Why would we offer parties in appellate mediation the same approach—one that is attorney-focused, directive, and evaluative—that did not work the first time? Thus, during her tenure as a Ninth Circuit Mediator, Dana and her colleagues experimented with another approach. For Dana, this meant a focus that was more closely aligned with her belief that mediation should offer parties the opportunity to reach agreements that address their interests, strengthen relationships, and improve upon the option of continuing to litigate. For over 20 years as she mediated appeals and taught appellate mediation she honed this approach, which is based on the following principles:

- **Understanding-based.** We strive toward a process that expands the parties' understanding of their own and the other party's perspectives on the dispute, their underlying needs and interests, the legal risks and opportunities on appeal, and the practical realities that exist and inform resolution.

- **Client-involved.** To the greatest extent possible in both joint and separate sessions, clients participate actively in discussion of a broad range of topics of importance to them because the dispute—and any resolution—belongs to them, not to the mediator or the lawyers. They must live with the result of litigation or any settlement—and they must fund it. This approach contrasts with the more common For a thorough and thoughtful discussion of client-centered, understanding-based mediation, we recommend attorney-centered approach, in which the mediator works mostly with the attorneys to negotiate a resolution on behalf of their clients. The discussions generally focus on legal arguments and probable litigation outcomes absent a resolution. The clients generally interact very little, or not at all, with the other side and often take a back seat with the mediator, as well.

- **Discussions that are problem-solving, not argument-generating.** Problem solving has two aspects in our approach to mediation. First, it maintains a broad problem definition, encouraging parties to examine the problems underlying the conflict and develop solutions to address their needs and interests that go beyond the relief an appellate court might provide. It also extends beyond the narrow problem definition of the settlement conference model—to predict the likely outcome on appeal and craft a settlement that consists of the limited relief available in court. When discussions turn to legal analysis, problem solving means that attorneys work to educate the parties about the law, rather than to argue about it, in contrast to a typical settlement conference model where lawyers argue their case to the mediator in order to defeat the other side and gain a more favorable prediction from the mediator.

- **Collaborative and engaging rather than isolating.** Sadly in our view, in many—if not most—jurisdictions, joint sessions are no longer fashionable among lawyers. Even more distressing is the trend toward rejection of joint meetings altogether, even for the limited purpose of introductions and discussions of procedural matters at the beginning of the mediation. When asked the reason for refusing joint sessions, lawyers express concern that frank and open discussions of opposing points of view

may negatively affect settlement. With a skilled media- tor to help shape conversations, participants can minimize the down- side and maximize the upside of meeting together.

- **Facilitative rather than coercive or threatening.** Mediators facilitate discussions about the differing perspectives on what happened and on the law rather than simply presenting their personal opinions about the legal outcomes. We believe much of the trepidation experienced by parties ahead of a mediation session comes from unpleasant experiences in which judges and other settlement conference officers tried to browbeat them into acquiescence. We believe coercion is not a good path toward satisfying resolutions of legal disputes.

Finally, our approach translates into real practice in the form of an appellate mediation process that (1) is carefully structured as understanding-based, client-involved, problem-solving, collaborative, and primarily facilitative; (2) includes all necessary activities for achieving a successful outcome; (3) organizes the process into phases that build on one another and allow participants to anticipate the process and to focus their discussions on the topics at hand; and (4) discourages premature bargaining over money to the exclusion of more creative, interest-based discussions.

Dana Curtis' *interest and experience in appellate mediation began with her service as a Circuit Mediator with the U.S. Court of Appeals for the Ninth Circuit in the mid-1990s. Since then, she has continued to mediate appeals in her private practice and to train appellate mediators in California's First, Second and Third Appellate Districts and in appellate courts throughout the U.S. Recently, she published the first book on appellate mediation Appellate Mediation: A Guidebook for Attorneys and Mediators with appellate specialist Brendon Ishikawa (ABA Publishing 2016). Dana taught mediation at Stanford Law School for 10 years and presently co-teaches Mediating Disputes for Harvard Law School's Program on Negotiation and serves as Director of Conflict Resolution Programing for University of Santa Clara School of Law.*