

## **Strategies and Perspectives for Appellate ADR**

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## **STRATEGIES AND PERSPECTIVES FOR APPELLATE ADR**

### **I. OVERVIEW**

Over the last several years, ADR has become a fact of life in Texas courts. In Houston and Dallas, mediation has become so commonplace that it is difficult to imagine not mediating a case prior to trial. This trend has also affected appellate practice. Parties interested in settlement are now asking counsel to arrange for mediations, and appellate courts are normally suggesting and often times requiring ADR.

Unless you have actually experienced a mediation, however, alternative dispute resolution may appear somewhat mysterious to the appellate attorney. The purpose of this paper is to help familiarize appellate attorneys with ADR procedures. The paper is divided into three sections, examining ADR from the advocate's perspective, the mediator's perspective, and the appellate court's perspective. By de-mystifying the mechanics of ADR and by identifying potential strategies for succeeding in ADR, appellate attorneys may eventually make ADR as commonplace in appellate practice it has become in trial practice.

### **II. ADVOCATE'S PERSPECTIVE**

Appellate advocates, third-party neutrals, and appellate courts each have their own unique perspective on ADR. Advocates have an obligation to their client to represent them as zealously as possible, and the judicial process becomes largely a tool wielded by the attorney for crafting as successful a result as possible for the client. As ADR has become an important aspect of the judicial process, it has become accordingly more important to understand it and to use it as the advocate's tool for achieving victory on appeal.

#### **A. The purpose of ADR.**

It is not enough to say that the purpose of ADR is settlement. Underlying settlement is the client's interest in a particular result at an affordable cost. Settlements occur when the client decides that the costs of continuing with litigation do not justify whatever additional gains could be achieved beyond settling the case today. For example, if a defendant can settle a medical malpractice case today for \$100,000 prior to briefing and oral argument, or could settle for the same \$100,000 after spending an additional \$30,000 in briefing and oral argument costs prior to appellate judgment, it would be cost-beneficial to settle today. That calculus works the same way whether the client is plaintiff or defendant in that example. This analysis identifies two of the key components of any advocate's analysis of ADR: the client's interests and the client's costs.

#### **B. Selecting the type of ADR.**

Section 154 of the CIV. PRAC. & REM. CODE identifies five different ADR types. They are mediation, arbitration, moderated settlement conference, mini-trial, and summary jury trial. The most likely types of ADR in an appellate context are mediation, moderated settlement conference,

and arbitration. Each has its advantages and disadvantages. One of the keys for evaluating the suitability of a particular ADR type for any particular case is to determine the level of involvement you want from the third-party neutral. As an advocate, are your client's interests served best by obtaining an educated opinion from the third-party neutral concerning the merits of the case? If so, would you want the neutral's opinion to resolve the matter completely or merely provide useful information for your client's use in considering settlement? Similarly, do you want the third-party neutral to block out an entire day to conduct shuttle diplomacy between the various parties in an effort to settle the case?

## **1. Mediation.**

Mediation attempts to find a point of common ground between the various parties where the case can be settled. The mediator serves as a facilitator, helping the parties to identify both their interests and their risks and shuttling information between the parties. The goal is to have both sides better understand the case and the point of common ground at which the case can be settled.

The appellate mediation commences in the morning at the offices of the mediator. An appellate attorney and the person with the decision-making authority appear on behalf of each party, and they both remain at the mediation for the entire process. All the parties meet in the "joint session," where the mediator explains the process and the ground rules. The mediator first calls on appellant's counsel to present their case. Each party may be asked to identify what the ultimate result on appeal will be concerning both liability and damages and to explain the reasons for their prediction. The presentation may take anywhere from ten minutes to an hour. The appellee makes the same sort of presentation. At the conclusion of the parties' presentations, the mediator will then attempt to identify specific areas of agreement and disagreement between the parties in order to narrow the issues for further discussion. The parties may speak if they desire, but that is not required. Normally no settlement offers or demands are made during the joint session.

At the conclusion of the joint session, the parties break into "private caucuses." Each party group is put in a separate office or conference room. The mediator then conducts shuttle diplomacy between the various parties. When the mediator discusses the case with any particular group, the discussion is confidential, unless the party authorizes certain disclosures. The mediator's focus is more likely to be on the weaknesses of that party's case than on its strengths. The mediator's goal is to highlight the risks and costs to the party of not settling the case.

In essence, the advocate's discussions with the mediator will occur on two levels: the merits level and the monetary level. It is not uncommon for discussions on the relative merits of the case to end after a few rounds of shuttle diplomacy, leaving only the monetary proposals and counter-proposals to be discussed and shuttled between the parties. If a settlement is reached, the parties execute Rule 11 paperwork, memorializing the terms of their settlement. Normally only the future drafting and execution of the settlement papers and the exchange of settlement monies is left to be done after the Rule 11 Settlement Agreement is signed and mediation is concluded.

## **2. Moderated Settlement Conference.**

A moderated settlement conference ("MSC") is another means of attempting to settle a case based on the presentation of each side's case to the other parties and to the third-party neutrals. Normally the MSC panel is composed of three neutrals who have some knowledge of the substantive area of law. The MSC process may be distinguished from a mediation primarily by the panel's rendering of an advisory opinion as to how they believe the case would be resolved at trial or on appeal. Also, the members of the moderated settlement conference panel normally do not conduct shuttle diplomacy between parties. All of the MSC process, except for the panel's deliberations, are conducted in a joint meeting of all counsel and client representatives with authority.

Through their counsel, the parties normally request that the local bar association or non-profit dispute resolution center select the three panel members of the moderated settlement conference and set a time for the moderated settlement conference. It normally occurs in the conference room of one of the panel members. Appellant's counsel goes first and makes a presentation on the appellate issues, liability, damages, and expected outcome. The panel members may or may not ask questions of counsel during counsel's presentation. After appellant is finished, counsel for the appellee proceeds and makes the same kind of presentation. After each party has made its respective presentation, the panel will normally allow rebuttal presentations, if any. At the close of all presentations, the panel retires and deliberates. It returns with its opinion as to the probable outcome of the appeal. If the panelists disagree, minority reports may be offered by the dissenting panelist(s). The panel may also then recommend that the case be settled along particular lines. The parties are encouraged to reflect on the panel's report and to attempt to negotiate a settlement, either at that time or at some point in the immediate future.

### **3. Arbitration.**

Arbitration is another means of attempting to resolve the dispute through the intervention of a neutral party. The parties to an arbitration must have previously agreed to arbitrate their dispute and they may create whatever process is mutually agreeable. For example, the parties may agree to have one arbitrator consider presentations made by each party and then make a binding adjudication of the dispute that fully and completely resolves the dispute without further litigation or appeal. On the other hand, the parties could agree that the arbitrator's report will not be binding in the sense of fully and finally resolving the dispute. In that instance, the arbitrator's report functions as an advisory opinion much like that provided in a moderated settlement conference.

In an appellate context, the parties presumably did not have an arbitration agreement requiring them to submit to binding arbitration only on appeal. The parties would therefore have to agree to submit the case to an arbitrator or a panel of arbitrators, selected in some agreed upon fashion, who would then render either a binding or a non-binding decision. Also, the parties would have to agree to the terms of whatever process or format was to be used, as the arbitrator would not otherwise have any power to impose a particular arbitration procedure on the parties.

#### **C. Selecting a third-party neutral.**

Procedures for selecting a third-party neutral vary widely. Some courts will appoint third-party neutrals of their own choice. Some courts will designate the local bar association or dispute

resolution center to select the third-party neutral(s). Many courts will ask the parties to agree on the selection of their neutral. The more prevalent practice is selection of the third-party neutral(s) by the agreement of the parties.

If the parties have the power to select the third-party neutral by agreement, a number of strategic considerations arise. Do you want the neutral to be a person who is a recognized expert in the substantive field of law? Do you want to select a neutral who has vast experience in the process of a particular ADR technique? Do you want a neutral who is predominantly associated with either the plaintiff's side or the defense's side of the docket? Answers to these questions will vary from case to case and play a critical role in the strategic selection of a neutral.

For example, if one party is more interested in settling the case than the other party, selecting a neutral who is identified with the resistant party's side of the docket may make strategic sense. When defending a professional negligence case, counsel may want a plaintiff-oriented neutral, who has the trust and respect of plaintiff's counsel, to make the plaintiff more comfortable that they are not settling their case for too little money. Conversely, a neutral who has a defense-oriented litigation practice may have an advantage in persuading a resistant defendant that its exposure is greater than it had considered prior to ADR.

Alternatively, the parties may all want a neutral who is knowledgeable in the subject area and who can be fair to both the plaintiff's and defendant's side of the case. In an appellate context, a widely respected former appellate judge or an experienced appellate attorney may be perceived as providing the most accurate insight into how an appellate court would resolve the issues on appeal.

#### **D. Preparing for ADR.**

The advocate will want to carefully prepare for the ADR. Regardless of how far along the case has proceeded in the litigation process, the advocate will want to marshal all of the available favorable points. In an appellate context, the focus should be identifying the outcome of the appeal or any retrial, and the advocate should then prepare the most important points for explaining why that outcome is the most likely. The critical appellate points should be identified by the advocate, and the best arguments supporting those propositions should be prepared for presentation at the ADR.

As a practical matter, a party may decide that certain key points should not be disclosed during the ADR process. In making that determination, the advocate must take into consideration how likely or unlikely the case is to settle during ADR. The advocate must also consider how much of a difference disclosure or non-disclosure of the point would make in either achieving a settlement or producing a more favorable settlement than would otherwise be the case. Oftentimes, information that will make the greatest impact on the result of a settlement during ADR concerns the damages issues. It often seems that the importance of any particular liability issue can be lost in the shuffle during mediation, but important damage points more directly relate to the bottom line issue: the settlement figure.

Developing an overall strategy for ADR in any particular case is also very important. Do you want to appear eager to settle, or will you appear very pessimistic about the chances of settling? Will you take an extreme and "unreasonable" initial position in the first exchange of settlement proposals, or will you offer to cut straight to the chase and avoid wasting hours on gamesmanship? Will you emphasize some principled reason for holding to a particular settlement range or will you focus primarily on trading dollars? Will you be completely candid with the neutral and confide what your true bottom line will ultimately be, or will you keep the neutral at a distance and negotiate with the neutral as well as the other parties? Will you and your client present a good cop/bad cop image to the neutral? Will you make large movements or small movements in your dollar proposals? Will you hurry the process and attempt to identify the point of impasse before lunch, or will you dribble the money and play for the 12 o'clock midnight crowd? All of these strategic considerations, and more, must go into your preparation.

#### **E. Conducting the ADR.**

Regardless of how good your preparation has been, ADR normally does not proceed as anticipated. Parties frequently take unusual or extreme positions. Parties may be more intransigent than you can tolerate. The neutral's assessment of the weaknesses of your case may be far more pessimistic than what counsel told their client. The client may be far more intransigent than their counsel expected.

There are also certain dynamics to ADR that occur with amazing frequency. Mediations, for example, have a common rhythm. First, it seems that the case could not possibly settle during mediation. The parties' positions appear unreasonably far apart, and you are extremely pessimistic of your chances to settle. Sometime during the latter part of the afternoon, however, the intensity of the arguments concerning the merits dramatically ebbs. The speed with which settlement offers and counter-offers are exchanged becomes much more rapid. The dollar amount of the movement in the parties' proposals become much greater. Pessimism is replaced by optimism that the case may actually be settled. Just when it looks like the gap between the parties' positions is relatively small, however, progress may stop. Both sides attempt to gain the upper hand in the very last stage of mediation, and the animosity heightens and the pessimism returns. Fortunately, the mutual resistance eventually fades away and the parties compromise close to the middle between their respective final positions. While this rhythm by no means occurs in every case, this rhythm occurs frequently enough to offer insight into the process. When an advocate comes to recognize these dynamics in any ADR process, the advocate's strategy during that process will anticipate, reflect, and react to those dynamics.

### **III. THE MEDIATOR'S PERSPECTIVE.**

A neutral brings her own unique perspective to ADR. The neutral's job is to be neutral, unaligned with either party. As indicated above, however, opposing parties often view the mediator as something other than neutral. By understanding the perspective of the mediator, the parties may better understand the process and how to use it.

#### **A. The purpose of mediation.**

From the mediator's perspective, the main purpose of mediation is to settle the case. Mediators generally believe that virtually all cases can and should settle during ADR. That has been their experience, and that is their objective. In order to achieve that result, the mediator will try any and all conceivable strategies for bringing the parties together to the point of settling. Keep in mind that many mediators market themselves based on their success rate in settling cases.

### **B. Type of ADR.**

Neutrals will vary their approach based on the type of ADR selected by the parties. The neutral is much less likely to spend the time and energy in trying to craft a settlement during a moderated settlement conference than in a mediation. The neutral will also be more concerned about presenting an objective prediction on the ultimate outcome of the litigation in a moderated settlement conference than in a mediation. In an arbitration, the neutral will attempt to make the right decision without regard to reaching a compromise settlement acceptable to all parties.

Even in the context of a mediation, the mediator may emphasize either communication facilitation or an opinion concerning the likely outcome, depending on what the parties desire. For example, if the parties have selected a mediator based on substantive expertise, the parties might tell the mediator that they are looking for more objective insight concerning the likely outcome of the appeal than in the neutral's communication facilitation skills. Conversely, the parties may be much more interested in the neutral's ability to persuade the other party to settle than in the neutral's subjective opinion as to how the appeal would ultimately be resolved.

### **C. ADR structure.**

Depending on the type of case and the preferences of the parties, the neutral may customize the structure of the ADR. If all the parties are motivated to settle, the mediator may be able to serve the parties' interests best by getting out of their way. For example, the parties may want to negotiate face to face, across a conference room table, instead of being separated into private caucuses that rely on shuttle diplomacy. On the other hand, the parties may be so hostile to each other personally, that a joint session and face to face confrontation would be counter-productive. It is one of the advantages of ADR that their flexible structure can be modified to suit the particular circumstances of any case.

### **D. Strategy of the neutral.**

From the mediator's perspective, any and every appropriate strategy should be tested in order to accomplish the goal of resolving the dispute. If one party is prepared to settle on a reasonable basis but the other party is unwilling to be reasonable, the neutral may spend the most time with the recalcitrant party, trying to focus on the weaknesses of that party's case. If one party refuses to consider a settlement on any terms other than a specific ratio relative to another party's settlement contribution, for example, the neutral may spend the most time trying to move that party out of its positional approach. If the lawyer for a party is trying to obstruct the settlement process unreasonably, the neutral may attempt to communicate as directly as possible with the party's

representative. Obviously, there are an endless number of situations which may suggest trying a myriad of different strategies in order to bring the parties together.

#### **IV. THE COURT'S PERSPECTIVE.**

The Alternative Dispute Practices Act of 1987 mandates that the trial and appellate courts employ ADR wherever appropriate, either on motion of a party or on the court's own motion. Generally, those courts that have embraced ADR have eventually come to be major proponents of the ADR process. The A. A. White Dispute Resolution Center and the Houston Bar Association ADR Section primarily surveyed appellate practitioners and courts concerning the desirability of ADR on appeal. The results reflect the interest of the appellate bar and the judiciary in expanding ADR into the area of appeals. This should encourage appellate practitioners to consider participating in ADR for their appeals.

#### **V. CONCLUSION.**

The success of ADR in trial practice also argues as well for its applicability on appeal. The different kinds of ADR, the different approaches to ADR by different neutrals, and the myriad of different strategies for using ADR all contribute to its potential for successfully resolving disputes on a less expensive and time-consuming basis.