ADR PROCEDURES AT THE APPELLATE LEVEL

Hon. Guadalupe Rivera (Ret.)

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by

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In 1987 the Texas legislature enacted the Alternative Dispute Resolution Procedures Act (ADR Act) to encourage the early resolution of disputes and the settlement of pending litigation through the use of a number of settlement procedures.[2] The ADR Act mandates all courts carry out the Act's policy.[3] To enable the courts to fulfill this mandate, the legislature has specifically authorized the courts, on their own motion or the motion of either party, to order the parties in a pending case to participate in an appropriate ADR process.

The use of settlement conference programs in Texas appellate courts actually dates back to a time prior to the enactment of the ADR Act. In 1975, the First and Fourteenth Courts of Civil Appeals in Houston initiated a pilot settlement conference program, using a retired chief justice to serve as the conference judge. In civil cases selected at random, the conference judge met informally with counsel to discuss ways to narrow the issues on appeal, reduce the size of the appellate record, and consider the settlement aspects.

As a result of these conferences, the voluntary dismissal rates of the 2 appellate courts increased by some 18% during the program year. When the services of the retired justice later became unavailable, the courts discontinued the program.

Several years later in 1978, the First Court of Civil Appeals initiated a similar program using 3 sitting justices who rotated as the settlement conference judge. This program produced statistical results that showed even higher voluntary dismissal rates. However, this program was also discontinued because conflict occurred when the conference justices were required to sit as members of the panel deciding the case. It was decided the conference judge was more valuable sitting as an active member of the court than as a conference facilitator.[4]

Since enactment of the ADR Act, great progress has been made in the use of pre-trial settlement through mediation at the trial court level. Although initially there was resistance to the use of court ordered mediation among the bench and bar, today, a vast majority of Texas trial courts now incorporate mediation as part of their standard docket management process and realize a significant positive impact on the docket. At the appellate level, the use of court ordered pre-trial settlement conferences or mediation is not as common.

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[2] Tex. Civ. Prac. & Rem. Code Ann. §§154.003 –155.006 (West 2011).

[3] Tex. Civ. Prac. & Rem. Code Ann. §154.003 (West 2011).

[4] Frank Evans & Lynne Liberato, ADR Procedures at the Appellate Level, in Alternative Dispute Resolution Handbook (Kay E. Elliot & Frank W. Elliot eds., 3d ed. 2003).

Most of the 14 Texas appellate courts have adopted court policies and procedures for mediation, however mediation is infrequently ordered. The appellate courts that do not have pre-trial settlement policies in place only order mediation when requested by all of the parties. This chapter reviews the use of ADR procedures in Texas appellate courts, and provides a brief overview of the mediation policies adopted by federal appellate courts and some state appellate courts.

Impact of ADR on Our Courts

Experience has shown that a large number of cases settle before they ever reach trial on the merits; settlement discussions are more likely to occur as the trial date approaches, because it forces the parties to come to terms with the inevitable expense and time from continued litigation.

Statistics from the Office of the Texas Court Administration establish that the number of lawsuits tried to a jury verdict has steadily declined over the years. Yet, the number of lawsuits filed annually has increased. One explanation for this trend is the routine use of ADR in the trial courts. Pretrial mediation has become mandatory in virtually every civil trial court in Texas and parties and attorneys have accepted ADR procedures as part of the litigation process. Among corporate defendants, ADR has emerged as the preferred method of resolving disputes due to its time- and cost-saving benefits.[5]

There are no comparable statistics available for the courts of appeal, primarily because court-driven mediation does not play as great a role in the docket management process at the appellate level. One explanation may be that appellate courts view their primary role to be one of creating or developing law particularly when dealing with an issue of great legal importance, rather than merely one of resolving disputes. Another may simply be a philosophical opposition to the idea of privatizing justice by sending the parties before a private tribunal for resolution of their disputes.

Statistics published by the Office of Court Administration for 2014 show that appellate courts had a clearance rate of 104% yet ended the year with pending cases on the docket, despite the fact that the number of cases added overall had decreased by 1.3% from the previous year. In 2014, the total number of cases disposed by the appellate courts was 11,549 and the total number of pending cases at the end of the year was 7,294. In 2015, the total number of cases disposed by the appellate courts was 11,189 and the total number pending at the end of the year was 6,749 with a clearance rate of 105.2%.[6]

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[5] Robin R. Grant, Alternative Dispute Resolution in Texas –Trends and Tips, Kane Russell Coleman & Logan PC (June 9, 2015), http: //www.krcl.com/index.php?src=news&refno=569&wpos=0,5000,8273.

[6] The Office of Court Administration collects and provides statistical data from Texas courts and produces the Annual Statistical Report for the Texas

Texas Appellate Courts

Texas intermediate courts face many challenges that directly impact productivity. Chief among those challenges is the replacement of a justice through the election or the appointment process, and the frequent turnover of staff attorneys as well as the delay in filling vacancies. Cases have become more complex and challenging and require more time and resources. The current volume and complexity of cases on the appellate courts' dockets, along with the constant, legislatively mandated budget cuts, have required appellate courts to find creative ways to improve court efficiency and productivity. Some courts have recruited temporary assistance from law schools, retired judges, and contract attorneys.[7] Others have made changes in court procedures, such as accelerated appeals, shortened time for oral arguments, and summary disposition of certain types of cases. While these remedies usually provide some relief, they also create other problems.

For example, reassignment of permanent staff tasks may satisfy one need, but may also create a void requiring additional staff. Similarly, the use of temporary help may provide a short-term solution, but it also imposes on the court the time-consuming need to train, supervise, and support the temporary staff. The restriction of oral argument and summary dispositions of cases may improve efficiency, but in fact may result in greater isolation for the appellate courts from the bar creating doubt and uncertainty about the basis for the court's rulings.

The use of ADR, in the form of mediation or settlement conference, is a valuable tool, readily available to the appellate courts for docket management and in bringing about a definite and early resolution of pending disputes.

The benefits available to both the courts and parties of successful mediated settlements are undeniable:

Judicial System. See Statistics and Other Data, Texas Judicial Branch, http: //www.txcourts.gov/statistics/annual-statistical-reports.aspx.

[7] J.T. Nobles, Appellate Delay Reduction Project, Year 2000, Houston Bar Association –Appellate Section (2000) (new case filings in Dallas and Houston courts of appeal increased 28.5% over a four-year period ending in 1998); see also Rita M. Novak & Douglas K. Somerlot, Delay on Appeal: A Process for Identifying Causes and Cures, (1990).

1. Even a few early settlements will have a pronounced effect on a court's docket and productivity.
2. The early settlement of a dispute provides the litigants savings in time and expense.
3. Early settlement has a profound impact on litigants' personal lives by eliminating the emotional drain and daily uncertainty that exists during the pendency of the appeal.

Additionally certain types of early resolutions at the appellate level may have a positive trickle-down effect to the trial court level as well. For example, if parties settle their entire dispute when appealing from

- a temporary injunction,
- a summary judgment,
- a default judgment, or
- an involuntary dismissal,

the need for further action at the trial level disappears. Both the parties and the courts will save considerable time and valuable resources.

Most importantly, with a mediated settlement agreement comes certain finality unavailable to parties who choose to proceed with the slow and expensive appellate process.[8]

A Current Perspective

Most appellate courts post internal mediation policies and procedures on their website. The two major concerns faced by courts utilizing mediation are the selection of the mediator and costs.

The selection method for the mediator varies from court to court.

- Some courts appoint the mediator, but allow the parties to agree to another mediator by a specified deadline.

[8] The Office of Texas Court Administration statistics indicate that in some cases the time from filing to disposition can be over one year.

- Other courts allow the parties to agree to the mediator, but if they cannot agree, will appoint the mediator.
- Deadlines for conferring with the mediator conducting the mediation, notifying the court of the result, and filing the appropriate dispositive motions are typically set out in the court's order.

As for costs, Texas intermediate court budgets do not provide funds for the administration of a mediation program.

A survey was taken of the fourteen Texas courts of appeals regarding their use of mediation. Their responses are set out below.

A. 1st Court of Appeals (Houston)

Year	# Referred	#Mediated	#Settled	Settlement Rate
2010	27	9	3	33%
2011	27	9	3	33%
2012	53	21	7	30%
2013	42	17	7	41%
2014	49	18	8	44%

Referral Decision: A judge appointed by the court routinely reviews the docketing statement filed with the appeal for mediation requests and for appropriateness for referral to mediation.

Referral Point: Upon review of the docketing statement, a referral is made if mediation is requested or determined appropriate. An order to mediate will be withdrawn if a reasonable basis for an objection is found.

Stay of Appeal: For 45 or more days.

Court's View: Mediation is beneficial. The court has procedures and standards in place for ADR

Caseload Activity

Year	Added	Disposed	Pending
2014	1211	1375	876
2015	1188	1221	850

B. 2d Court of Appeals (Ft. Worth)

(Records not kept prior to 2013)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2013	34	8	4	50%
2014	29	16	2	12%

Referral Decision: Before submission, the administrative justice assigned on a rotating basis, oversees the appellate mediation process and makes the decision to order mediation. After submission, a case may be referred to mediation by the panel.

Referral Point: At the time the docketing statement is filed, a case is routinely reviewed for referral to mediation. However, referral may occur at any time during the progression of the appeal.

Stay of Appeal: Usually 30 days.

Court's View: The court encourages the early settlement of cases pending on its docket and views mediation as a beneficial tool to encourage and assist the parties in reaching a voluntary settlement of their dispute.

Caseload Activity

Year	Added	Disposed	Pending
2014	943	965	634
2015	889	1045	480

C. 3d Court of Appeals (Austin)

The mediation program was discontinued approximately 6 years ago. Currently, the court does not have an active mediation program. However, the court will order mediation if the parties request it.

Caseload Activity

Year	Added	Disposed	Pending
2014	878	909	623
2015	860	869	615

D. 4th Court of Appeals (San Antonio)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	22	22	5	22%
2011	20	16	7	25%
2012	13	10	6	60%
2013	15	7	4	57%
2014	10	5	1	20%

Referral Decision: A justice on the court oversees the ADR docket. All civil appeals are routinely reviewed for referral to mediation.

Referral Point: In all civil cases, the ADR Addendum to Docketing Statement must be filed by all parties and is reviewed. No referral is made until jurisdiction to consider the appeal is confirmed. Once referred the case is mediated.

Stay of Appeal: Generally limited to 45 days.

Court's View: The court is committed to continuing the ADR process. Although most cases on appeal do not settle, any settlement results in savings to both the parties and the court.

Caseload Activity

Year	Added	Disposed	Pending
2014	905	966	478
2015	853	917	413

E. 5th Court of Appeals (Dallas)

The only information available is that the court is very committed to the use of mediation and routinely refers cases to mediation. No formal responses to the survey were received.

Caseload Activity

Year	Added	Disposed	Pending
2014	2078	2160	1157
2015	1906	2076	987

F. 6th Court of Appeals (Texarkana)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	4	4	2	50%
2011	3	3	1	33%
2012	3	1	0	0%
2013	3	3	3	100%
2014	0	0	0	0%

Referral Decision: If a party suggests mediation, the court will consider referral.

Referral Point: At the party's suggestion.

Stay of Appeal: Usually 30 days.

Court's View: Mediation is potentially beneficial and should be an option, but may not be the most likely solution at the appellate stage. Court Mediation Inquiry is required in all appeals except original proceedings, criminal and parental terminations. The court adopted a formal policy setting out the court's mediation procedure in 2006.

Caseload Activity

Year	Added	Disposed	Pending
2014	388	399	187
2015	346	361	172

G. 7th Court of Appeals (Amarillo)

The court does not have a policy on the use of mediation.

Caseload Activity

Year	Added	Disposed	Pending
2014	516	507	368
2015	488	515	339

H. 8th Court of Appeals (El Paso)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	14	10	6	60%
2011	18	7	6	86%
2012	23	14	6	43%
2013	13	6	0	0%
2014	20	7	4	57%

Referral Decision: No routine review of cases for referral. Mediation is ordered if requested, unless the court determines mediation is not appropriate.

Referral Point: When the docketing statement is filed in a civil case, or when a motion for referral to mediation is made.

Stay of Appeal: 60 days. Upon request, additional time is provided.

Court's View: Mediation is not ordered in juvenile or termination of parental rights cases. Upon the filing of an objection to referral, appeal will be reinstated if objection has a

reasonable basis. ADR can be beneficial even at the appellate stage of a case and may result in resolution of dispute. Parties are given a limited amount of time to mediate, so there is no significant delay of appeal.

Caseload Activity

Year	Added	Disposed	Pending
2014	363	364	373
2015	354	391	437

I. 9th Court of Appeals (Beaumont)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	1	1	1	100%
2011	2	2	1	50%
2012	3	3	2	66%
2013	3	3	2	66%
2014	1	1	0	0%

Referral Decision: Made by the chief justice.

Referral Point: When the parties request it. No routine review of cases for referral. Only refer cases on request.

Stay of Appeal: 60 days.

Court's View: Occasionally beneficial.

Caseload Activity

Year	Added	Disposed	Pending
2014	462	452	364
2015	506	503	367

J. 10th Court of Appeals (Waco)

Recent Stats: The court reported that statistics were not available.

Referral Decision: The justice assigned as author of the opinion.

Referral Point: From filing of docketing statement to post submission.

Stay of Appeal: Until mediator's report is received.

Court's View: Blanket referral of all cases is not favored. Referrals are made on a case-specific basis. Appeals of cases with issues that are difficult to resolve or where there is a lack of unanimity may be referred. Appeals involving a governmental party are not considered good candidates for referral.

Caseload Activity

Year	Added	Disposed	Pending
2014	404	456	223
2015	400	415	210

K. 11th Court of Appeals (Eastland)

Court's Position: The court does not have a program for appellate mediation, but the court is looking at procedures used by other intermediate courts to be applied on a case-by-case basis.

Caseload Activity

Year	Added	Disposed	Pending
2014	370	384	384
2015	336	380	366

L. 12th Court of Appeals (Tyler)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	0	0	0	0%
2011	2	2	2	100%
2012	0	0	0	0%
2013	7	7	5	71%
2014	8	8	5	63%

Referral Decision: Chief justice routinely reviews civil cases for referral upon filing of mediation questionnaires by the parties.

Referral Point: Mediation questionnaires inquire about the nature of the case, legal issues, mediation history, and position on mediation referral. If no objection, parties choose between mediation before the record is filed (fast track) and post-briefing. Mediation may still be ordered post-briefing if the court's criteria is met.

Stay of Appeal: No stay is imposed.

Court's View: Mediation is beneficial.

Caseload Activity

Year	Added	Disposed	Pending
2014	374	378	222
2015	344	349	217

M. 13th Court of Appeals (Corpus Christi)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	20	17	5	29%
2011	17	17	6	35%
2012	11	9	2	22%
2013	17	14	6	42%
2014	21	19	9	47%

Referral Decision: A mediation team consisting of an assigned justice, the chief staff attorney, and the clerk work together to select cases for referral to mediation.

Referral Point: Mediations may be ordered at any time during the appellate process, but there are 2 standard times for referral.

Fast Track Mediation: A case may be referred to mediation prior to the record and/or briefs being filed. Cases meeting certain criteria will automatically be referred after the docketing statement is filed.

Post Briefing Mediation: A case may be referred to mediation prior to submission for decision on either oral argument or briefs, should the team or the panel assigned to hear the case believe the case is a good candidate for mediation.

Stay of Appeal: Appeal is stayed during the mediation period.

Court's View: The court encourages the peaceable resolution of disputes and the early settlement of litigation. The court strives to secure a fair and efficient resolution of cases and in some instances this is best achieved by allowing the parties the opportunity to mediate.

Caseload Activity

Year	Added	Disposed	Pending
2014	893	898	543
2015	851	852	537

N. 14th Court of Appeals (Houston)

Year	# Referred	# Mediated	# Settled	Settlement Rate
2010	22	22	5	22%
2011	16	16	7	43%
2012	10	10	6	60%
2013	7	7	4	57%
2014	5	5	1	20%

Referral Decision: One justice on the court oversees the ADR docket.

Referral Point: Civil appeals are reviewed for referral to mediation after the alternative dispute resolution addendum to civil docketing statement has been filed by both parties.

Stay of Appeal: Generally 45 days.

Court's View: The court is committed to continuing the ADR process. Although most appeals do not settle, those that settle result in savings to both the parties and the court. Pursuant to the court's internal operating procedures, all cases referred to mediation are mediated.

Caseload Activity

Year	Added	Disposed	Pending
2014	1316	1336	762
2015	1287	1295	759

While most Texas appellate courts see the value of ADR as an integral part of the civil justice system and are willing to embrace their judicial responsibility to encourage the early settlement of cases, internal policies and procedures in place at most appellate courts do not provide for a consistent evaluation and referral of cases to the mediation process. Very few appellate courts require, at the minimum, initial participation in the process when a referral is made, particularly if an objection is raised.

Appellate Settlement Programs in the Federal Courts

On October 3, 2005, pursuant to Rule 33 of the Federal Rules of Appellate Procedure, the United States Court of Appeals for the Federal Circuit adopted procedures for the implementation of an appellate mediation program for all intermediate courts. The program is administered by the Circuit Executive through the Office of General Counsel. Since that time, all 13 of the federal courts of appeal have implemented programs to assist parties resolve issues on appeal. Rule 33 provides:

> The court may direct the attorneys—and when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings. This includes simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.[9]

While Rule 33 uses the term "settlement conferences," circuit courts of appeals use a variety of terms to describe essentially the same processes. In the federal system, the term mediation is used interchangeably with the term conference, settlement conference, and Rule 33 conference.

Regardless of the term used, the focus of the settlement programs is to encourage or require counsel for the parties to explore the possibility of settling the case using a third-party neutral or mediator. Generally speaking, the conferences are held before appellate briefs are filed and cases are argued. This timing assumes that incentives for settlement often decrease as briefing and oral argument preparation progresses.

[9] Fed. R. App. P. 33.

Appeal conferences have evolved into an integral and important part of the appellate process; all are designed to

- resolve procedural issues on appeal,
- improve efficiency,
- aid in the simplification of the appellate proceeding, and
- facilitate settlement.[10]

Each circuit court of appeal has its own procedures in place for screening of cases to determine which cases will be selected. In some courts, the availability or shortage of staff will determine the procedure followed.

Before a settlement conference is held, the attorneys are required to consult with their clients and obtain as much settlement authority as feasible. Principal counsel must participate in any initial telephone conference ordered. The initial telephone conference may be avoided if the parties agree to meet for a mediation session. Most importantly, participation in at least 1 session is mandatory.

Parties, or at least their attorneys, are required to participate if the case is selected for the settlement process. But not every circuit program requires client attendance at the mediation sessions. Formal provisions for removing a case from the program are uncommon; however, a few courts provide for removal of a case from the program either at a party's request or at the discretion of the mediator. Importantly, some initial case reviews take into account the willingness of the parties to mediate as a factor in deciding which cases to refer to mediation.[11]

The mediation process followed by the courts may vary depending on the procedures adopted by a particular circuit and the mediator. In some instances, the facilitator or mediator may serve more as a court administrator who will discuss ways to expedite record preparation, establish briefing schedules, and explore the potential for resolution through the use of an appropriate ADR process. Mediation is the most commonly used ADR procedure, and typically commences with a general session with all parties or their authorized representatives, counsel, and the mediator.

At the general session, there will be a discussion of the case, the mediation process, the issues on appeal, and other matters important to settlement. The mediator will then meet separately with each

[10] Appeal Conferences, in Business and Commercial Litigation in Federal Courts, § 55.53(Robert L. Haig ed. 3d ed. 2011).

[11] Robert J. Niemic, Mediation and Conference Programs in the Federal Courts of Appeals: A Sourcebook for judges and lawyers (1997).

party and their counsel in separate caucuses. In these separate sessions, the mediator will foster negotiations between the parties aimed at reaching settlement. If a case settles during mediation, the mediator may confirm the settlement in writing and require the parties to file a Stipulation of Dismissal of Appeal (Stipulation). The filing of the Stipulation generally terminates the appeal. If the case does not settle, the appeal ensues.[12]

The Appellate Mediation Program Guidelines, effective December 6, 2013, provide for noncompliance sanctions.[13] Any party, counsel, or outside mediator who fails to materially comply with any of the provisions of the Guidelines may be subject to sanctions by the court. Sanctions can include

- reasonable expenses,
- attorney's fees,
- all or portion of the appellate costs, and
- dismissal of the appeal.[14]

Appellate Settlement Programs in State Courts

Other state appellate courts have adopted appellate rules, or entered orders to establish appellate settlement conference programs in the intermediate courts. A summary of a sample of state courts policies and processes are set out in this section.

A. New Mexico

New Mexico Court of Appeals, Rule 12-213 NMRA 1998 and Ct. App. Order No. 1-23 authorizes the Appellate Mediation Office to conduct mediation conferences. The mediations are designed to reduce the time and expense of civil appeals by aiding in the disposition of pending cases. Neutral mediators meet with the parties and their attorneys to evaluate the case and explore the possibility of a voluntary settlement.

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[12] *Carlos A. Rodriguez Vidal*, Mediation Programs in the Federal Courts of Appeals, *Section of Dispute Resolution ADR Roundtable (August 9, 2014)*, http: //www.americanbar.org/content/dam/aba/events/dispute_resolution/Mediation.authcheckdam.pdf.

[13] See United States Court of Appeals for the Federal Circuit: Appellate Program Guidelines, *United States Court of Appeals for the Federal Circuit* (Dec. 6, 2013), http: //www.cafc.uscourts.gov/mediation/guidelines.

[14] *Id.*

Any civil matter, with the exception of cases involving incarcerated individuals, driver's license revocation, extraordinary relief, or appeals arising out of the Children's Code, is eligible for random referral. Participation by lead counsel is mandatory. Most initial conferences are conducted by telephone, with the court initiating the call, to make the process as inexpensive as possible.

The initial conference is intended to facilitate an understanding of the issues and involves a candid evaluation of the risks and opportunities for each side. In some cases, discussions may go no further than the initial telephone call; in others, proposals are generated that require further review and follow-up conferences with the mediator. Experience has shown that in most cases there is substantial movement from prior settlement positions. The mediation process is non-binding, so no settlement is reached unless all parties fully consent.[15]

B. Oregon

In 1995, the Oregon Court of Appeals adopted ORAP 15.05, which established an Appellate Settlement Conference Program (Program). ORAP 15.05 mandates that a settlement conference be held in cases assigned to the program. The ORAP lays out the respective authority for both the court and director; an abeyance period of 120 days; confidentiality requirements; the parties' duty to submit requested information; and the neutral's fee.

After the case number assignment, an initial screening process takes place. Cases that fall into several general categories, such as

- civil,
- domestic relations, and
- worker's compensation

are diverted to the Program. Once diverted, the appellants and cross-appellants receive a Notice of Assignment to the Program and an Appellate Settlement Conference Statement form. The appellees are invited, but not required to respond. Once the forms are returned, a more in-depth screening process takes place.

[15] Mediation Conference Procedures and Suggestions for Effective Mediation Representation, *New Mexico Court of Appeals*, http: //www.nmcourts.gov/newface/coa/coaorder.html.

Either the staff attorney or Program director contacts the parties for a more thorough screening process. Based on conversations with counsel and a review of the forms and court documents, a final decision is made on the appropriateness of referral to mediation. The parties and counsel attend mediations, although on occasion, a party may appear by phone. The parties pay the mediator's fee.

Role of Counsel in ADR

Trial and appellate courts have been mandated to carry out the ADR Act's early resolution policy through the use of ADR procedures, and are authorized to enter orders necessary to carry out the Act's goals. At the trial level, most Texas courts routinely utilize some form of ADR in the pretrial process and a number of the appellate courts have procedures in place for mediation. Conceivably, every litigator or appellate attorney in the state will at some point in time be ordered to engage in a dispute resolution procedure, which will require a basic understanding of the benefits and opportunities available in early settlement negotiations. Yet, ADR courses are not made a part of the required core curriculum in law schools, nor do State Bar of Texas CLE programs routinely include ADR presentations as part of every course. Most lawyers fulfill minimum continuing legal education courses by attending programs that focus on their practice area of the law and may never attend an ADR presentation.

Often counsel, unversed in the procedures or benefits of ADR, must nonetheless participate in mediation and educate the client about case evaluation, and the benefits to be derived by engaging in the use of early settlement procedures. Even seasoned litigators experienced in dispute resolution procedures frequently find it difficult to encourage clients who are firm in their position to engage in realistic case evaluation, and to participate in early settlement negotiations.

This feat becomes even more complicated in the appellate setting, when parties to an appeal perceive post-trial settlement negotiation as a waste of time if they have engaged in extensive, yet unsuccessful mediation efforts at the trial court, or were the successful party at the trial level.[16] A clear understanding of the process and benefits of mediation is essential for all attorneys, trial or appellate, who must navigate today's judicial system.

[16] Mediation of State Court Appellate Cases, *Oregon State Bar*, https: //www.osbar.org/public/legalinfo/1222_MediationStateApp.htm.

Role of Appellate Mediator

Several factors may affect the degree of success in mediation, but certainly the experience and ability of the mediator is highly important. At an appellate mediation, the mediator faces the unique challenge of educating the parties not only on the benefits of early resolution, but also on the appellate process in general. This includes how appellate courts address issues on appeal.

The distinctions between the trial process, as opposed to the limited focus of the appellate court, must be clearly defined. Counsel needs to discuss the fact that an appellate court will not retry the case or take additional evidence, as well as explain the more complex limitations of the appellate court's jurisdiction and the legal standards on review.

A discussion of the possible ramifications of the applicable standard of reviews involved, the merits of the case from an appellate point of view, and the inherent risks of proceeding on appeal can be invaluable in helping to remove a client's unrealistic expectations. Counsel should also communicate the added benefit of extended creative resolutions available to a party in an appeals-level mediation. For example, in an appeal involving a very narrow issue, an experienced appellate mediator may focus on the resolution of the entire case rather than on the narrow issue presented in the appellate proceeding. In that way, an appellate mediation may offer a much broader and effective remedy unavailable in the appellate court.

Determining Settlement Potential

During the early days of the Texas ADR movement, appeals from summary judgments, temporary injunctions, and interlocutory rulings were not considered good subjects for an ADR process. In practice, these cases have proven to be appropriate for ADR, because of the potential for resolving the underlying issues in the case, not just the narrow appellate issue.

Other misconceptions dispelled by experience are that

- ADR could not be effective in a dispute over an "important legal issue",
- It is a waste of time when the dispute involves a "matter of principle," and
- A dispute could not be resolved by settlement if the client was firm in his belief that he was right and committed to winning at trial.

In reality, most litigants are willing to engage in settlement negotiations if they understand the benefits of early resolution. Moreover, most litigants usually are able to reach a settlement after they fully understand, and are able to deal with, the underlying dynamics of their case.[17]

Timing

Determining which case is appropriate for mediation is but one aspect of the court's consideration in referring a case to mediation. The other is timing.

The timing of a referral to mediation has a significant impact on the success or failure of mediation. In most cases, court-ordered mediation during the early stages of a pending dispute is more often successful. This is simply because parties may be more reluctant to resolve the dispute when antagonism and expenses have increased as the process wears on, and the parties' positions have become well entrenched.

Ideally, appellate-settlement negotiations should occur before the parties have invested heavily in the appellate process and before counsel have become too committed to their positions through the briefing process. Typically, settlement negotiations should begin after the parties and their counsel have obtained enough information to evaluate their positions.

Other considerations that may have an impact on the success of early settlement negotiations include a party's desire:

- to avoid publicity;
- to take advantage of a business opportunity;
- to minimize losses and reach finality; or perhaps
- to prevent fatigue over the stress, cost, and time involved in the appellate process.

In some cases, a party may be confident of ultimate success, but may be swayed toward settlement by the opportunity for immediate resolution. Whatever the circumstance, the court, counsel, and parties should view mediation as a worthwhile option and should consider the potential value and benefits of early court-annexed settlement negotiations. Regardless, settlement should always be an option available to the parties, whether the negotiations occur early on or later in the appeal process.

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[17] *R.M. Roach, Jr. Appellate ADR 6* (1998) (certain dynamics of ADR occur with amazing frequency).

Developing an Appellate ADR Program

The primary objectives of an ADR program should be:

1. To provide a means for parties to engage in meaningful settlement negotiations during the early stages of the appeal; and

2. To reduce the number of cases pending on the court's docket.[18]

Early settlement programs should not only focus on the ultimate resolution of the dispute. They should also be used to resolve procedural issues involved in the appeal; narrow the issues to be presented for resolution; and aid overall in the simplification of the appellate proceeding while ultimately facilitating a settlement. Early settlement programs employed in their broadest form achieve overall efficiency for the court and the parties.

Several factors will affect the degree of success of any appellate settlement conference program. The most important are:

- The degree of commitment of the court's judges and staff;
- The experience and ability of the conference facilitator and counsel;
- Whether participation is mandatory at the inception of the mediation discussions for counsel and litigants; and
- Early intervention in the appeal.

[18] *Stephen O. Kinnard*, Mediating the Decided Case: What to expect if you're looking to settle at the appellate level, *Dispute Resolution Magazine*, Summer 1999, at 17 ("parties settle lawsuits when they decide that factors favoring settlement outweigh the need for final resolution of contested issues.").

Conclusion

Appellate courts are mandated by statute to facilitate the early resolution of disputes, and are provided the tools by which to carry out that mandate in the ADR Procedures Act. The move in that direction has been much more rapid in the trial courts than in the appellate courts. Currently, the appellate courts have not developed a uniform approach for the integration of a settlement program in the appellate process.

While it is highly important to maintain confidence in the wisdom and justice of the courts among the bar and litigants, it is also just as important for the parties to resolve disputes as efficiently and timely as possible. When litigants are given an opportunity to resolve their dispute by engaging in reasonable, self-directed settlement negotiations, rather than leaving the decision to 12 strangers or the court, they usually will choose the self-directed option.