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Making a Case for Post-Trial Mediation

By Joette Katz

Much has been written about pre-trial mediation; indeed there have been countless articles about all its benefits, how to select a mediator, when to initiate mediation, the kinds of cases best suited, etc. Although many of these articles give passing reference to post-trial mediation, few discuss in depth the value of mediation *after* a judgment has been rendered.

Most litigants think that the judgment brings an end to any possibility of settlement negotiation. They are wrong. In fact, the opportunity for settlement may actually be better now that the facts have been found and the legal issues narrowed. Additional costs and delays associated with an appeal, the risks of reversal to the successful litigant, the weaknesses of a case exposed at trial, the jeopardy of making "bad law" for future cases, and the promise of an earlier payday are just some of the considerations that weigh heavily in favor of post-trial mediation.

I start with the most obvious factors—time and money. Anyone who has ever dipped a toe in appellate waters knows the expense and the delay. The process can take years and cost a fortune—transcripts get ordered, briefs are written, oral argument is scheduled and opinions get released. This time-consuming enterprise can then be repeated if the case is first decided by the Appellate Court and the losing party successfully gets to the Supreme Court.

Historically, a large percentage of the docket is consumed with criminal and child protection cases, which reasonably deserve to be prioritized, thereby negatively impacting the speed for achieving finality for every other type of case. All these factors contribute to long delays and a large price tag, and although the courts have made strides to reduce the time between filing an appeal and its final disposition, it remains a timely and expensive process.

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Certainly some types of cases may be better suited than others for post-trial mediation; most business cases are driven by economic rather than emotional considerations, making them good candidates. Tort cases with large judgments also have good settlement potential when one factors in the risk of losing the judgment and the challenges of collecting on it on one side and the dangers of having the judgment affirmed, coverage impacted and interest accruing on the other side, not to mention the added costs of a new trial and the inevitable appeal that both sides can incur.

There are, of course, some obstacles, but none that are insurmountable. After a trial, one side is naturally a bit emboldened, and even entrenched in its position. The favorable judgment can lead to a reduced sense of risk and greater confidence in the ultimate outcome.

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The failure of earlier attempts to mediate can give rise to skepticism about whether another mediation at the appellate level will bear any fruit, but none of these obstacles should undermine an otherwise great opportunity.

The right mediator can provide a fresh perspective on the risks of an appeal and the benefits of settlement, explain the legal standards that govern the appellate process, discuss the rates of reversal and essentially narrow the legal landscape. As with all mediation, the mediator is critical to its success. He or she should have credibility to help the parties realistically assess the risks associated with proceeding through the appellate process, the experience to engender trust and confidence in his/her assessment, and the time and patience to invest in the process. ■

Former Connecticut Supreme Court Associate Justice and state Department of Children and Families Commissioner Joette Katz is a partner in Shipman & Goodwin's business litigation practice group, where she focuses her practice on appellate work, mediation and investigations. She can be reached at jkatz@goodwin.com.