

## What Every Lawyer Should Know about Appellate Settlement

**1 Settlement on appeal is a worthwhile option.** Too many lawyers and litigants believe that once a case is on appeal, it is too late to settle because the parties have become entrenched in their positions. Not so. On appeal, the parties should reevaluate their positions and consider the risks and benefits of potential appellate decisions. Prevailing plaintiffs must recognize that actual recovery still may be years away and that they may lose on appeal, especially if the standard of review is *de novo*. Prevailing defendants also face the risk of reversal and retrial. The prospects of enduring a retrial should give both sides reason for reflection. Settlement on appeal avoids the costs and delays inherent in appeals and, like other forms of settlement, often increases client satisfaction. Settlement on appeal also may prevent the creation of unfavorable precedent that could harm a client in a later case and also might harm the client's industry as a whole. Finally, as always, settlement provides a means for parties to fashion a result that could not be reached through the typical all-or-nothing consequences of litigation.

**2 The appellate courts will help settle your appeal.** Not only is settlement a viable option on appeal, but the appellate courts also will help to settle cases, often at no charge. For example, the 9th Circuit Court of Appeals has a mediation office staffed by full-time professionals who are attorneys well-versed in negotiation, mediation, and settlement. Their job is to settle appeals, and they do so successfully, with more than half the cases accepted into the program resolved without further appellate proceedings—and at no charge to the parties. Locally, the Second District Court of Appeal has a Settlement and Mediation Program by which trained and experienced practitioners offer a minimum of six hours of free time to help reach a settlement. Most other court of appeal districts have similar programs. Apart from court-based programs, parties may benefit from hiring retired appellate judges to serve as mediators.

**3 Good resources exist.** The literature on appellate settlement continues to grow, and these materials are worth reviewing in the context of any given appeal. Chapter 14 of John A. Toker's *California Arbitration & Mediation Practice Guide* discusses appellate mediation. Chapter 5 of the Rutter Group's *Practice Guide to Ninth Circuit Civil Appellate Practice* details the court's mediation program. Chapter 6 of the Rutter Group's *Civil Appeals & Writs Practice Guide* and Chapter 15 of CEB's *California Civil Appellate Practice* cover appellate settlement and mediation programs district-by-district for state appellate courts. For appeals to the Second District in particular, see [www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/mediation.htm](http://www.courtinfo.ca.gov/courts/courtsofappeal/2ndDistrict/mediation.htm) or contact Mediation Program Coordinator Theresa Carter at (213) 830-7136 or Theresa.Carter-Mata@jud.ca.gov. See also Justice Ruvolo's *Appellate Mediation—“Settling” the Last Frontier of ADR*, 42 San Diego L. Rev. 177 (2005).

**4 Don't settle too late, and don't forget to notify the appellate court.** Be careful about settling just before (or even after) oral argument. Although most courts are happy to accept settlements at any stage of the process, some appellate courts understandably may be upset at having expended precious resources on a case only to learn that the parties have settled. Some appellate courts view their role as not merely to resolve disputes but also to create law, and thus may decide cases and issues in published decisions even after the parties have settled. See, e.g., *Fireman's Fund Ins. Cos. v. Quackenbush*, 52 CA 4th 599 (1997); *Arden Group, Inc. v. Burk*, 45 CA 4th 1049 (1996). Avoid this possibility by starting the appellate settlement process early, and keep the court informed about the status of negotiations.

Similarly, when an appellate matter settles, do not forget to tell the court. Rule 20 of the California Rules of Court requires appellants to immediately serve and file a notice of settlement in the court of appeal. Appellants then have 45 days to file either an abandonment (if the appellate record has not yet reached the court of appeal) or a request for dismissal (if the record has reached the appellate court). If a case settles after the court has scheduled oral argument, Rule 20 also requires appellants to notify the court of appeal immediately by telephone or other expeditious method.

**5 Stipulated reversals are controversial and difficult to obtain.** One form of appellate settlement is the stipulated reversal, in which the parties agree that the trial court decision should be reversed. The California Supreme Court approved this type of settlement (absent extraordinary circumstances) and created a presumption in favor of accepting them in *Neary v. Regents of U.C.*, 3 CA 4th 273 (1992). The California Legislature, however, reversed that presumption by enacting Code of Civil Procedure Section 128(a)(8). That statute places the burden on the settling parties to convince the appellate court that a stipulated reversal would not adversely affect non-parties or the public, and that the reasons for a stipulated reversal outweigh the erosion of public trust that results from the nullification of a judgment by consent. This burden is very difficult to meet. *Hardisty v. Hinton & Alfert*, 124 CA 4th 999 (2004). Accordingly, because stipulated reversals are not easy to obtain, the safer course probably is to reach a settlement that does not also require a stipulated reversal.

—Submitted by Benjamin G. Shatz, certified specialist in Appellate Law in the Appellate Practice Group of Manatt, Phelps & Phillips, LLP. He thanks Clerk Joseph Lane and Theresa Carter-Mata for their insights. The opinions expressed are his own.

Reprinted with permission of the Los Angeles County Bar Association