Appellate Mediation in the Third Circuit - Program Operations: Nuts, Bolts, and Practice Tips

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Article

APPELLATE MEDIATION IN THE THIRD CIRCUIT—PROGRAM OPERATIONS: NUTS, BOLTS AND PRACTICE TIPS

JOSEPH A. TORREGROSSA*

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I. *Introduction*

A. *The Concept of Appellate Mediation*

The concept of mediation at the appellate level is relatively new. While the United States Court of Appeals for the Second Circuit has conducted mediation conferences since 1974, the majority of circuits

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have done so only since 1990.\(^2\) Mediation in the state appellate courts has likewise been principally a development of the 1990s.\(^3\)

Some lawyers and commentators were initially surprised that appellate mediation programs were settling a significant number of cases.\(^4\) This surprise may be attributed to a number of factors.

By the time a case reaches the appellate level, a judge or a jury has made a decision which generally reflects success for one party and a loss for the other party. The winning party typically views settlement on appeal as the equivalent of losing and a waste of the substantial resources already expended to obtain the victory. The losing party considers the adverse decision in the district court as a significant affront to justice which needs to be corrected. Both want a decision on appeal, or at least they think so.

Another factor is that lawyers rarely view the appellate process as a time to consider settlement. Counsel has little opportunity to discuss settlement with one another at the appellate level. The parties are focused on brief preparation and do not interact to the same extent as they do at the district court level. Lawyers are conditioned to view the appellate process as the last step in litigation and not as another opportunity to consider an amicable settlement.

Experience has shown, however, that settlement discussions at the appellate level are ideally timed. By the time a case has reached the appellate level, a very significant event in the life of a case has typically taken place—a decision has been reached where one party has prevailed over another party in the district court. Major uncertainties about disputed facts and questions of applicable law have been resolved. When a trial has been held, a judge or jury has determined the facts. Where the court disposits of the case by summary judgment, the facts must be assumed in favor of the appellant. There is little or no room to debate "who went through the red light." Likewise, any doubt about the applicable legal principles has been resolved. The district court judge has determined the applicable law either by dispositive motion or by charge to the jury.

While appellants have the opportunity to overturn the factual and legal findings in the district court, they face a very difficult challenge. The standards of review on appeal make overturning factual findings highly unlikely.\(^5\) While legal determinations are subject to the less stringent stan-

\(^2\) Since 1990, seven of the thirteen federal courts of appeals have implemented mediation programs. Id. at 2-3. Only one circuit, the Federal Circuit, does not have an appellate mediation program. See Albert J. Ginsberg, *The Case for a Mediation Program in the Federal Circuit*, 50 AM. U.L. REV. 1379, 1380 (2001).


\(^5\) In non-jury cases, findings of fact are reviewed under a clearly erroneous standard. See Henglein v. Colt Indus. Operating Corp., 260 F.3d 201, 208 (3d Cir. 2001). In cases tried to a jury, the standard of review is highly deferential. See
The modest chances of success on appeal will often lead the appellant to reconsider what was once thought to be a strong case prior to the decision in the district court. Before the district court’s decision, the typical refrain spoken by a litigant is that there is at least a “fifty-fifty” chance that one’s witnesses will be believed over the opposition’s or that the judge will accept one’s version of the law over the opposition’s version. Few appellants, however, can invoke the “fifty-fifty” mantra because the chances of reversal are rarely fifty-fifty.

The decision in the district court should materially affect the losing party’s assessment of its case or its defense. While the district court’s decision may drive the losing party into a resolve to “right the wrong,” it should make the losing party reconsider and soften its position for purely practical reasons. By moving away from vindication to practical considerations, the losing party may see the possibility of an amicable resolution as its best alternative.

By the same token, the winning party can achieve practical goals by considering settlement on appeal. Settlement on appeal is not a “loss” for the appellee and does not vitiate the district court judgment. Rather, by securing the “win” through settlement and by bringing closure to the appeal, the appellee avoids the risk of reversal and avoids a time-consuming and expensive process.

As lawyers and parties have perceived the practical wisdom of considering settlement on appeal, the success of appellate mediation becomes less surprising and more understandable.

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6. Under a plenary review, the court of appeals applies the same standard applied by the district court. See, e.g., Watson v. Eastman Kodak Co., 235 F.3d 851, 854 (3d Cir. 2000). Thus, under plenary review of a district court’s decision to grant summary judgment, the court of appeals, like the district court, must consider the evidence in the record in the light most favorable to the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

B. Why the Involvement of an Appellate Mediator Is a Good Idea

There are several reasons why a mediator’s involvement is necessary and helpful. As third-party neutrals, mediators can offer substantial assistance to counsel and the parties in achieving case settlement. While cases have settled without third-party assistance, in many situations mediators can help bring about settlements that parties would be unable to reach on their own.

1. Breaking Through the Hostility that Exists Among the Parties

Some cases do not settle because the litigants are hostile to one another. This tension is particularly evident in appellate mediation because the parties have usually endured years of litigation hardship and great financial expense. Such animosity becomes a barrier to any communication about resolving their dispute and fuels litigation tactics and strategies designed to destroy the enemy. Mediators can often help the parties cut through this hostility by listening, by being the voice of reason or by serving as a communicator.

2. Opening the Lines of Communication

Even if hostility does not exist among the parties, lack of communication may still be a major barrier. In many appellate mediations, the parties simply have not previously discussed settlement or have done so only minimally. In a surprising number of cases, the parties report that, prior to the decision in the trial court, there had been no prior settlement discussions. An appellee may report that the appellant never made a demand, and the appellant may report that the appellee never made an offer.

Even if the parties did initiate settlement discussions on their own before a decision in the district court, frequently those discussions never moved beyond the state of extreme demands and offers. For example, in a case where the plaintiff hopes to settle at $200,000, the plaintiff may initiate demands of $1 million or more. In response, the defendant, who might also want to resolve the matter for $200,000, develops the view that the plaintiff hopes to win the lottery, and that the $1 million demand is not a serious settlement proposal. Under these circumstances, any counterproposal made by the defendant is usually for a nominal amount or in the “nuisance value” range. Such a counterproposal typically outrages the plaintiff, who then assumes that the defendant is not serious about settling. Thus, the parties adhere to their beliefs that no one wants to settle, that any further overtures about settlement would be viewed as a weakness, and that the case should go forward to a district court decision.

Appellate mediators, armed with the district court’s decision, can help the parties initiate settlement discussions or help them move past their extreme settlement positions.
3. Providing a New Perspective

Some cases do not settle because the parties do not think of ways to bring about a settlement. Often, counsel and the parties become so focused on litigation procedures and tactics that they do not devote attention to ways to resolve their disputes. Mediators can point the way because they are not clouded by the litigation events. In addition, by virtue of training and experience, mediators are adept at finding solutions to problems and refocusing the parties on the real issues.

4. Neutrally Assessing the Parties' Positions

A case may not settle because, as advocates, lawyers convince themselves of the strength of their case. The lawyers may then, in turn, convince their clients of their potential success. Mediators, on the other hand, are not blinded by the zealfulness of advocacy and can serve as a reality check on the parties' assessment of their positions. A mediator's assessment may lead the parties to a different valuation of their case for settlement purposes. At the appellate level, mediators can serve as effective, neutral sounding boards on the question of affirmance or reversal. In the usual appeal, the appellant is optimistic about reversal, and the appellee is confident about affirmance. Appellate mediators, however, can provide an assessment of the case that may assist the parties in reflecting upon their chances of success on appeal. This, in turn, may impact the parties' assessment of their settlement positions on appeal.

C. Why Court-Sponsored Appellate Mediation Is a Good Idea

Commentators have debated whether it is proper for the courts to be involved in alternative dispute resolution. This Article will not enter into that debate. Rather, it assumes that courts can provide mediation services to litigants if they wish. For a number of reasons, it makes sense to mandate the use of appellate mediation services as opposed to making them voluntary.

First, many lawyers at the appellate level take the position that there is "no way" their case can settle. Yet, a significant number of these "no way" cases can and do settle. Without court-mandated mediation in these cases, the parties would not have had the opportunity to reach an amicable solution.

In addition, even if cases do not settle at appellate mediation, many lawyers and litigants are pleased to have had the opportunity to discuss settlement of their appeal. For litigants who lost in the district court without going to trial, a mediation session provides them a first-time opportunity to "tell their story" to a neutral, third party. The process thus provides

8. See Wayne D. Brazil & William R. Wilson, Jr., The Arguments For and Against Mandatory Arbitration, FJC DIRECTIONS, Dec. 1994, at 14, 14-17 (Brazil supporting mandatory arbitration, and Wilson opposing mandatory arbitration).
an outlet for a litigant who has been frustrated by not having had their "day in court." For lawyers, a mediation session will frequently include a discussion about the legal issues on appeal and the questions which might be important to the appellate court. Thus, the mediation session may assist the lawyers in streamlining their appellate argument.

In sum, appellate courts provide significant value to litigants by making available to them appellate mediation services. Even if some are initially brought into the process with little or no expectation of reaching a settlement, "hopeless" cases can and do settle, and the process is usually beneficial whether or not a settlement is achieved.9

II. DIFFERENCES IN MEDIATION IN THE UNITED STATES COURTS OF APPEALS

The purpose of this section is not to discuss in detail the mediation programs in each circuit. This task has been very ably accomplished by others.10 However, it is worthwhile to point out some of the major differences in the programs as a backdrop to the more detailed discussion which follows regarding the operation of the Third Circuit's Mediation Program.

A. Mandatory Mediation

Almost all federal appellate mediation programs are "mandatory." That is, if a circuit's mediation program decides that a case should be mediated, the litigants cannot refuse to participate.11 However, appellate mediators recognize that it makes no sense to force truly recalcitrant parties to sit around a table simply to announce that they will not settle. Therefore, most programs, including the Third Circuit's, will listen to the litigants' explanations why they believe mediation will not be productive. If the mediator considers the reasons sufficient, the Program will not proceed with mediation.

On the other hand, the litigants will often not present sufficient reasons to bypass mediation. For example, in the Third Circuit's Mediation Program, cases have been scheduled for mediation where the appellee's


10. See Niemic, MEDIATION, supra note 1, at 17-103.

11. See id. at 18, 24, 32, 39, 46, 52, 58, 72, 81, 87, 94, 102. Mediation is voluntary only in the Eighth Circuit. See id. at 64.
counsel has requested cancellation. This is generally due to the fact that the appellant wanted millions of dollars to settle prior to the district court's decision, and the appellee doubts that the appellant's views will change even after the adverse decision in the trial court. In any event, counsel for the appellee may argue to the mediator that there is "no way" his client will pay anything to the appellant. In response to the appellee's request for a cancellation, the mediator may ask whether the appellee's view about settlement would change if the appellant would accept an amount representing the appellee's costs of appeal or less. A common answer from counsel is that the appellee may be interested in settling on that basis but doubts that the appellant would settle for "that amount." Aware that cases in the past have settled at that level, the mediator may suggest that the appellee consider proceeding with the mediation to determine whether such a settlement can be achieved. The appellee's counsel will then reluctantly agree to proceed, and when the case does eventually settle, counsel will often express surprise that the case settled on those terms.

In summary, while appellate mediation may be "mandatory" in most circuits, litigants can seek to "opt out." However, optimistic appellate mediators, who have considerable experience mediating at the appellate level, will often test the litigant's reasons for wanting to opt out and will or will not proceed at their discretion.

B. Issuance of the Briefing Schedule

Another significant difference among the circuits concerns the issuance of the briefing schedule. In the Third Circuit, mediation occurs before briefing is required. No briefing order is issued until either the Program decides not to schedule the case for mediation or, if scheduled, the mediation does not result in a settlement. However, in most circuits, the issuance of a briefing order is unaffected by mediation and briefing may take place while the case is in mediation. However, efforts are made to schedule mediation sessions before briefs are due and the mediator or the court may stay briefing if it will facilitate the mediation process. In the Federal Circuit, which does not have a mediation program, counsel are required to discuss settlement after briefs are filed. In the Third Circuit, the Court allows the parties the opportunity to settle their case before imposing on them the considerable time and expense of preparing briefs. This supports the mediation process because the parties must consider how much time and expense will be incurred if a settlement is not achieved.

12. See 3d Cir. Local App. R. 33.3.
13. See, e.g., Niemic, Mediation, supra note 1, at 22, 29, 36, 43, 49, 55, 61, 69, 77, 84, 91, 96 (explaining procedures in all circuits). See also Scanlon, supra note 9, at 390 & n.50.
14. See Niemic, Mediation, supra note 1, at 102.
15. See id. at 34, 36.
C. Cases Selected for Mediation

Another significant difference among the circuits is the percentage of cases which are mediated. Most programs define what cases are eligible for mediation, and there is considerable uniformity among the circuits in this respect. However, some circuits mediate all eligible cases while other circuits will select some but not all of the eligible cases for mediation. This difference is largely due to the number of mediators in each circuit. In the Third Circuit, approximately forty percent of all cases eligible for mediation are in fact mediated.

D. Mediator Assignment

In almost all circuits, the mediators are employees of the court whose sole job is to mediate appellate cases. A unique feature of mediation in the Third Circuit is that, in addition to a full-time mediator employed by the Court, senior circuit judges and senior district judges within the circuit may be assigned as the appellate mediator. As a matter of policy, the Third Circuit has chosen to draw upon the experience of senior judges within its circuit to supplement the work of a full-time mediator. This enables the Court to mediate more cases without the expense of employing additional mediators. In addition, the senior judges are an excellent resource for matching the right case to the right mediator. This can work geographically. For instance, a senior judge located in the Newark area of the District of New Jersey can conduct a mediation with northern New Jersey-based litigants, rather than requiring the parties to travel to the Third Circuit's (and to Appellate Mediation Program's) principal office in Philadelphia, Pennsylvania. Similarly, a particular case may be well-suited for mediation by a particular judge because of his or her background or experience with the subject matter of the case.

In conclusion, while appellate mediation is quite similar in all circuits, there are a number of differences in policy and procedure that make each circuit's program unique.

III. THIRD CIRCUIT APPELLATE MEDIATION: RULES AND OPERATIONS

The operation of the Appellate Mediation Program in the Third Circuit is governed by Local Appellate Rule 33.0 et seq. (L.A.R. 33.0). The Rule provides the parameters for the Court's Program, from establishment

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16. See id. at 12-16 (table summarizing mediation and conference programs in federal courts of appeals, including what cases are selected for conferences); Scanlon, supra note 9, at 391.

17. See Niemic, Mediation, supra note 1, at 12-16.

18. See 3d Cir. Local App. R. 33.1; see Rack, supra note 9, at 610 & n.8.

19. Additional information about the Appellate Mediation Program in the Third Circuit may be found on the Court's website at www.ca3.uscourts.gov, click on "Mediation."

On a national level, appellate mediation within the circuits derives from Federal Rule of Appellate Procedure 33 which provides, in part, as follows:
of the Program and case selection to conduct of the mediation and ultimate resolution. A detailed review of the Rule’s provisions will explain the policies and procedures of mediation in the Third Circuit.

A. Program Establishment

Local Appellate Rule 33.1 establishes the Appellate Mediation Program “to facilitate settlement or otherwise assist in the expeditious handling of the appeal. . . .” It provides for the appointment of a “special master” who “shall serve as the program director” and manage the program in cooperation with the Clerk of the Court. This Rule designates as mediators either the special master or senior appellate or district judges within the circuit. Finally, the Rule authorizes the special master to select cases for mediation and to assign a mediator, although it permits parties to communicate directly with the special master to request mediation in a particular case. Such requests, in accordance with the Rule, may be made confidentially, that is, without notice to or communication with the other party.20

B. Mediation-Eligible Cases and Case Selection Procedures

Under L.A.R. 33.2:

[a]ll civil appeals and petitions for review or enforcement of agency action are eligible for mediation except: (1) original proceedings (such as petitions for writ of mandamus); (2) appeals or petitions in social security, immigration or deportation, or black lung cases; (3) prisoner petitions; (4) habeas corpus petitions or motions filed pursuant to 29 U.S.C. § 2255; (5) petitions for leave to file second or successive habeas petitions; and (6) pro se cases.

Thus, the vast majority of civil appeals are potentially subject to mediation. In order to assist the special master—more commonly referred to as the Program Director—in the case selection process, the Rule requires the appellant to file with the Clerk’s Office, within ten days of the docketing of the appeal with service on all parties, a “Concise Summary of the Case”

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, including 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.


20. Such confidential requests allow a party to seek mediation without fear that the request may be perceived by the opposing party as a sign of weakness.
and a "Civil Appeals Information Statement." In the Concise Summary of the Case, the appellant is required to provide basic information about the nature of the case, the essential factual and procedural background, the orders or decisions appealed from, the parties to the appeal, the issues to be raised on appeal and the amount in controversy or relief sought. A copy of the opinion(s) and order(s) appealed from must be attached to the Concise Summary of the Case. In the Civil Appeals Information Statement, the appellant is required to provide information about the district court proceedings and the names of the parties and counsel involved on appeal.

When the Concise Summary of the Case, Civil Appeals Information Statement and attorney entry of appearance forms are filed with the Clerk's Office, the case file is forwarded to the Mediation Program. The Program Director then reviews the file for selection purposes. No hard and fast rules govern case selection. The determination is principally made on the nature of the case. Experience has shown that cases involving employment discrimination, commercial disputes, personal injury and insurance are prime candidates for mediation. Occasionally, the Program Director will contact counsel and solicit their confidential views on the amenability of the case to mediation. As previously noted, counsel may contact the Program Director directly to provide input on whether the case should be mediated.

If a case is selected for mediation, the Program Director will assign a mediator and issue a "Notice of Assignment for Mediation" to counsel. As previously discussed, the Program Director or a senior judge will then serve as the mediator. When a case is selected for mediation, L.A.R. 33.3 provides that "... a briefing schedule shall be deferred during the pendency of mediation unless the court or special master determines otherwise." The Rule thus provides flexibility for the issuance of the briefing schedule where, for example, the parties are willing to mediate but do not want to delay briefing. The Rule also gives the Court and the Program Director discretion to issue the briefing order if the mediation process, though not concluded, is taking longer than reasonably expected.

If an appeal is not selected for mediation, the Clerk's Office is so informed and a briefing schedule is issued. Similarly, if a case is selected for mediation and the parties are unable to reach a settlement, the Program will close its file, and the case will be returned to the Clerk's Office for a briefing schedule.

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21. These documents are filed on forms supplied by the Clerk's Office. See 3d Cir. Local App. R. 33.2.

22. For example, in 1999 the Program settled 134 cases. Of these, 22.4% of the cases were employment discrimination, 16.2% were contract, 7.75% were personal injury, 10.7% were civil rights and 16.2% were insurance. All other cases accounted for 26.75%.

23. See supra section II.A.

24. See supra section II.D.
A case may also be selected for mediation, *sua sponte*, by any Third Circuit judge or panel of the Court. Local Appellate Rule 33.4 provides that "at anytime during the pendency of an appeal or petition, any judge or panel of the court may refer the appeal or petition to the special master for mediation." The Court may refer a case to mediation either before or after argument. Occasionally, a panel of the Court may ask counsel, following oral argument, if they wish to avail themselves of mediation before a decision is rendered. A case may be referred to mediation by the panel even if the case had previously been mediated but did not settle.

Counsel frequently ask whether they are required to participate in the Program if their case is selected for mediation. As previously discussed, while the general answer to this question is "yes," the Program Director is open to counsel's confidential views why mediation will not be fruitful. If a sufficient reason is presented, the appeal will be withdrawn from the Program, and the parties will proceed to briefing.

C. *Proceedings Following Selection*

L.A.R. 33.5 governs mediation proceedings following selection. A mediation Notice is issued which provides the name of the mediator assigned to the case. If the Program Director is assigned to the case, the Notice also gives the date and time of the mediation. If a senior judge is assigned as the mediator, the Notice informs the parties that the judge's chambers will notify them of the date and time of the mediation.

A mediation may be conducted in-person in the mediator's offices or chambers, or by telephone conference, at the mediator's discretion. The mediation Notice will specify whether the mediation will be conducted in-person or by telephone. While the Program is not aware of any study analyzing whether more settlements are achieved by way of in-person mediations than by telephone conference, experience suggests that in-person mediations are preferable and more productive. The decision to schedule mediations in-person or by telephone conference is essentially based on a cost-benefit analysis. If counsel and the parties are located near the mediation site, the mediation will likely be conducted in-person. Typically, the Program Director conducts in-person mediations at the federal courthouses located in Philadelphia and Pittsburgh. A case is selected for telephone mediation where the parties and their counsel are located in different parts of the circuit (or outside the circuit) and the geographical distance among them is substantial.

In accordance with L.A.R. 33.5(a), the mediation Notice will also state that the parties are required to submit to the mediator confidential posi-

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25. Under L.A.R. 33.4, a judge or panel may also refer motions or procedural matters to the special master for amicable resolution. See *3d Cir. Local App. R.* 33.4. In addition, a judge or panel may refer any aspect of an appeal to the special master for "any other purpose consistent with this rule." *Id.*

26. See *supra* section II.A.
tion papers of not more than ten pages. These papers are not served on opposing counsel and are “for the mediator’s eyes only.” Likewise, the papers are not filed with the Clerk’s Office and are not in any way made part of the case record. The confidential nature of these papers allows the parties to candidly express their views on the case and on settlement.  

To assist counsel in preparation of their position papers, the Notice sent to counsel includes “Instructions to Counsel Regarding Confidential Position Papers.” In general, while some discussion of the facts and law supporting a party’s position should be included, the paper should focus on issues affecting settlement and prior settlement efforts. The settlement issues to be discussed include the amount and terms a party is willing to settle for, the anticipated costs and fees to be expended in connection with the appeal, any perceived obstacles to settlement and the potential weaknesses in the party’s own case.

D. Persons Required to Participate in the Mediation Sessions

L.A.R. 33.5(b) requires the senior attorney in charge of the appeal and the person or persons with actual authority to negotiate a settlement to attend the mediation. The Rule is designed to ensure the presence of the individuals who can meaningfully participate in settlement discussions.

As to attorney presence, the intent of the Rule is to make certain that the attorney who is handling the case and who is principally responsible to the client-litigant is in attendance. This avoids the situation where a “junior associate” or other attorney is sent to the mediation without any significant background in the case. While the Rule refers to the “senior attorney” responsible for the appeal, occasionally the Program office is advised that the “senior attorney” is not necessarily the attorney most familiar with the case or the client. In that event, the Program office allows the attorney who is most knowledgeable to attend and excuses the “senior attorney.”

Client presence seems to create more difficult issues. Again, the intent is to have the “right” person at the mediation. In an automobile case, for example, the presence of the defendant driver is wholly unnecessary where the defendant is covered by insurance and the insurance adjuster is the person with full authority to settle.

On the other hand, often the person with “ultimate” authority does not attend the mediation and instead a “representative” is sent. This com-

27. Appellate or post-decision mediation is frequently conducted differently than pre-decision mediation. In pre-decision mediation, the parties have often not shared with each other how their case will be presented to the decisionmaker. In such a mediation, it may be preferable to have the parties share their position papers with each other so they can see what the other’s case looks like. In appellate mediation, the parties have usually fully expressed their positions to each other and the decisionmaker. Therefore, it is less important to have those positions shared with each other and more important for the parties to be candid with the mediator.
monly occurs, for example, when the party is a municipal government. The persons with authority to settle for the government are often a board of elected commissioners who can only act after a public meeting. In those instances, the municipal solicitor will frequently attend the mediation, and if a settlement is reached, it is conditioned on “board approval.” While L.A.R. 33.5(b) could technically be read to require the elected commissioners to attend the mediation, the Program makes an effort to be flexible enough in practice to accommodate different scenarios relating to a party’s authority to settle.

The subject of ensuring that the appropriate client representative attends the mediation will be further discussed in this Article under the heading “Suggestions for Counsel to Make Mediation More Meaningful for the Court and the Client.” Nothing can frustrate a mediation session more than the absence of a person whose participation is crucial to the resolution of an appeal. It unfortunately happens too often that either no client representative is present or the representative who does attend cannot act with full authority.

The Program’s mediation Notice will often permit the appropriate client representative to participate by telephone in mediations which occur in-person, if the client representative is more than 150 miles from the mediation site. This is an attempt to be sensitive to costs. Where the appropriate client representative is, for example, in California, the cost of attendance may outweigh the benefit of attendance. In that event, however, the client representative should not just be “available” by telephone to speak when necessary but rather is expected to participate by telephone in the entire mediation process.

E. Conduct of the Mediation Sessions

L.A.R. 33.5 does not specifically address the conduct of the mediation sessions, except to state that if “the mediator believes further mediation sessions or discussions would be productive, the mediator may conduct additional sessions in person or telephonically.”

Mediation sessions are typically conducted in the familiar mediation structure. The mediator will hold a joint session with all counsel and all parties. Thereafter, the mediator will meet with each side separately in “private caucuses.”

In the joint session, the mediator introduces the program with a discussion of the mediation ground rules and emphasizes the rule relating to the confidentiality of mediation discussions. The mediator informs

28. See, e.g., 65 Pa. Cons. Stat. § 704 (2002) (requiring open meeting for official action and deliberation by agency, which includes any political subdivision of state, such as municipalities).
29. See infra section VII.
30. See 3d Cir. Local App. R. 33.5(b).
31. For a more detailed discussion of confidentiality, see infra section III.G.
counsel and the parties that the Clerk's office will defer the briefing schedule pending the outcome of the mediation. To ensure that counsel and the parties share the same understanding of the issues on appeal, the mediator will typically summarize the background of the case and the proceedings in the district court. The mediator then discusses the timing of the court's decision and how the case may proceed on appeal in the event that a settlement is not reached.

During the joint session, the mediator will frequently ask counsel and the parties to address the underlying merits of the appeal. This information enables the mediator to provide insight into the strengths and weaknesses of each party's position on appeal and provides counsel and the parties the opportunity to hear the arguments to be presented to the court.

Counsel and the parties may discuss other issues during the joint session. A frequently discussed subject is the prior settlement discussions among the parties. This issue may also be addressed in detail when the parties meet separately with the mediator.

When meeting with the parties separately in private caucuses, the mediator will listen to each party's thoughts about the case and their current settlement position. The mediator's goal is to reach a point where each party is willing to make or react to a reasonable settlement proposal. This serves as a starting point for negotiations. Once a party expresses its proposal to the mediator, the mediator will convey that party's position to the other party. In the process of conveying proposals and counterproposals, the mediator and the parties may also discuss in detail the underlying merits of the appeal and other factors affecting a party's settlement position, such as the costs of appeal. Negotiations will go back and forth until the parties reach a settlement or until the mediator determines that the case cannot be settled. In some instances, the mediator may determine that the case cannot be settled at the initial mediation but that further negotiations among the parties would be productive. L.A.R. 33.5(b) provides the mediator discretion to schedule a second mediation session if necessary. In many cases, however, further negotiations take place by telephone without the scheduling of a formal mediation session.

If the parties are unable to reach a settlement, the Mediation Program informs the Clerk's Office that mediation efforts were unsuccessful, and the Program will close its case file. The Clerk's Office will issue a briefing schedule, and under L.A.R. 33.3, the case "will proceed in the appellate process as if mediation had not been considered or initiated."

If the parties reach a settlement, the mediator will orally confirm the terms of the settlement at the mediation session and later send a confirming letter. While the parties may address the type of documentation they want used to conclude their settlement, the mediator usually does not discuss the precise language of the documentation. However, the parties'
may request that the mediator assist them with developing the language to be included in the settlement agreement.

F. Post-Mediation Session Activities

If the parties reach a settlement, the Mediation Program will send a confirming letter to counsel and will inform the Clerk's Office that a settlement has been reached. The mediator's confirming letter will typically outline the general terms of the settlement. At their option, the parties may prepare a more detailed settlement agreement.

Under L.A.R. 33.5(d), the parties have thirty days to finalize the settlement and to file a Stipulation of Dismissal of the appeal in accordance with Rule 42(b) of the Federal Rules of Appellate Procedure. The letter sent to counsel confirming the settlement will make reference to this requirement and specify the date when the Stipulation must be filed with the Clerk's Office.

In some circumstances, the parties may be unable to file the Stipulation within thirty days. If good cause is shown, the Program Director may extend the time for filing. In addition, situations sometimes arise when a settlement must be approved by a bankruptcy court or by a district court such as in cases involving minors or class actions. In those instances, for jurisdictional reasons, the parties will be required to file a motion with the Third Circuit for a partial remand of the case to allow the bankruptcy court or district court to consider the settlement. After the settlement is approved, the parties will then file the Stipulation of Dismissal of the appeal. The Mediation Program will provide the parties sufficient time to allow the approval process to be completed.

32. Rule 42(b) of the Federal Rules of Appellate Procedure provides as follows:

(b) Dismissal in the Court of Appeals. The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court (as amended Apr. 24, 1998, eff. Dec. 1, 1998).

33. As a general rule, an appeal to the court of appeals will divest the district court of jurisdiction. See Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., 198 F.3d 391, 394 (3d Cir. 1999) (discussing effect of filing notice of appeal). "It is well established that 'the filing of a notice of appeal ... confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" Id. (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)) (ellipses in original). A partial remand serves to vest the district court with enough jurisdiction to consider the settlement while jurisdiction remains with the court of appeals. In the event the settlement is approved by the district court, the parties will file a Stipulation of Dismissal pursuant to Federal Rule of Appellate Procedure 42(b). If the settlement is not approved, the court of appeals may proceed with the appeal.
G. Confidentiality

Confidentiality is probably the most frequently discussed issue in mediation and has been the subject of several court decisions. In the Third Circuit, confidentiality is governed by L.A.R. 33.5(c).

Under L.A.R. 33.5(c), mediation discussions are confidential, and the mediator will not disclose to the Court or any third party statements or information discussed during the mediation. Likewise, counsel and the parties are prohibited from disclosing the statements made or information discussed during the mediation to individuals other than clients, principals or co-counsel. These individuals are, in turn, required to keep this information confidential. L.A.R. 33.5(c) further provides that mediation sessions are considered "compromise negotiations" under Rule 408 of the Federal Rules of Evidence.


36. Third Circuit Local Appellate Rule 33.5(c) provides as follows:

(c) The mediator shall not disclose to anyone statements made or information developed during the mediation process. The attorneys and other persons attending the mediation are likewise prohibited from disclosing statements made or information developed during the mediation process to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurances that the recipients will honor the confidentiality of the information. Similarly, the parties are prohibited from using any information obtained as a result of the mediation process as a basis for any motion or argument to any court. The mediation proceedings shall be considered compromise negotiations under Rule 408 of the Federal Rules of Evidence. Notwithstanding the foregoing, the bare fact that a settlement has been reached as a result of mediation shall not be considered confidential.

37. Rule 408 of the Federal Rules of Evidence provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativ-
The purpose of confidentiality is to encourage the parties to be candid during the mediation sessions without fear that statements made or positions taken might be brought to the Court's attention and hurt their case or brought out publicly and embarrass them. Court decisions have made it clear that breach of mediation confidentiality rules will be taken seriously and will be dealt with severely. Thus, confidentiality fosters the settlement process by insuring that all information relevant to settlement is disclosed during mediation.

While mediation discussions are confidential, L.A.R. 33.5(c) provides that if the parties reach a settlement, the fact that a settlement was reached through mediation is not confidential. The Rule, however, does not preclude the parties from agreeing to keep the terms of the settlement confidential. Thus, if one or more parties desire confidentiality, it should be discussed as part of the mediation session and agreed upon there rather than left open for post-mediation negotiations.

IV. SOME TYPICAL APPELLATE MEDIATION SCENARIOS

Many cases eligible for appellate mediation reach the Third Circuit in one of two postures. First, the district court may dismiss a plaintiff's case by summary judgment or by motion under Rule 12 of the Federal Rules of Civil Procedure. Alternatively, the parties may proceed to a trial by a judge or jury resulting in a verdict for the plaintiff or the defendant. This section discusses how a hypothetical case in each posture typically proceeds through the mediation process.

A. Summary Judgment for the Defendant

The first scenario involves an employment discrimination case. The plaintiff claims that his employment was terminated as a result of unlawful discrimination. After extensive discovery and motion practice, the trial court dismisses the plaintiff's complaint deciding that, as a matter of law, the plaintiff has insufficient evidence that his termination was based on discriminatory motives as opposed to legitimate, non-discriminatory reasons. Thus, summary judgment is appropriate, and a trial is unnecessary. In such cases, the plaintiff often seeks damages in the six-figure range to cover a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408.

38. See In re Anonymous, 283 F.3d 627; Calka, 167 F. 3d 144, Bernard, 901 F. Supp. 778; Paranzino, 690 So. 2d 725.

39. Settlements involving public entities generally cannot be kept confidential. See, e.g., 65 PA. CONS. STAT. § 704 (2002) (requiring open meeting for official action and deliberation by agency, which includes any political subdivision of state, such as municipalities).

40. The Third Circuit has set forth the evidentiary standards for proving discrimination in employment discrimination cases where the plaintiff has no direct evidence of discrimination. See Fuentes v. Perskie, 32 F.3d 759, 763-65 (3d Cir. 1994).
range for lost wages, emotional distress and punitive damages. In contrast, the defendant typically feels its reasons for terminating the plaintiff’s employment were legitimate and non-discriminatory. The defendant feels irritated that it was forced to spend enormous sums on legal fees and costs in the litigation to have the district court uphold its employment decision.

The above scenario will often play out in the appellate mediation process as follows. On appeal, the plaintiff-appellant must face the reality that years of litigation may result in no recovery. This reality may be particularly difficult to grasp because the plaintiff has had no opportunity to present his case to a judge or jury. Instead, the plaintiff-appellant’s only testimony was taken by defense counsel at a deposition that was contentious, difficult and focused on weak points in his case. Unless the plaintiff-appellant is able to come to grips with the grim reality potentially ahead, he will be unable to focus on what might be a reasonable solution under the circumstances.

On the other hand, the defendant-appellee must consider the reality that the Third Circuit may reverse the district court’s decision. In that event, the defendant-appellee will have wasted years of litigation and expenses, will face a jury trial with its additional expense and will risk losing at trial. While the defendant-appellee may be confident that it will succeed on appeal, the defendant-appellee must recognize that some risk of reversal is a reality in every case. If the defendant-appellee focuses on these practical considerations, it may consider settling the case by taking into account the costs of appeal and the risks of reversal. However, if the defendant-appellee determines that there are policy or other non-economic considerations more significant than the practical, economic reasons for resolving the appeal, then settlement is an unlikely option.

In the event that the defendant-appellee is prepared to resolve the appeal, then the plaintiff-appellant who faces the possibility of no recovery may determine that he or she is better off accepting a modest sum rather than risking no recovery. If a settlement is reached under these circumstances, both parties find themselves in a “win-win” situation. They have brought closure to a long, expensive and contentious dispute and have avoided the risk that litigation would continue for additional years with uncertain results.

B. The Verdict for the Plaintiff

The second scenario involves a personal injury case. In this case, the plaintiff receives a $1 million jury verdict against the defendant. After years of expense and litigation, the plaintiff feels vindicated and compensated by the monetary award. In contrast, the defendant is shocked at the verdict and its size. The defendant believes it has not received a fair trial due to rulings by the trial judge.

As in the first scenario discussed above, both sides must face certain realities on appeal. The plaintiff-appellee must face the possibility of los-
ing the verdict on appeal. If the Third Circuit determines that the plaintiff-appellee's claim fails as a matter of law, the plaintiff-appellee has no recovery. If the Third Circuit determines that the defendant-appellant is entitled to a new trial, the plaintiff-appellee must return to the district court for a new trial and face uncertain results and inevitably more expense. Moreover, this scenario assumes that plaintiff can collect his verdict if the case is affirmed on appeal. If there is a risk that an affirmed judgment will be difficult to collect, then plaintiff-appellee is given further reason to consider accepting as a settlement an amount less than the face amount of the judgment. While plaintiff-appellees are often confident that their verdict will stand on appeal, there have been some cases in which similarly confident plaintiff-appellees have turned down substantial sums in settlement during appellate mediation and have later lost their verdicts completely.

The defendant-appellant must face the reality that the verdict will be affirmed. In that event, defendant-appellant will be responsible for the face amount of the verdict as well as post-judgment interest. In addition, defendant-appellant will have to pay additional legal fees and costs to its attorney. Furthermore, in cases where the plaintiff-appellee, as a prevailing party, is entitled to his or her legal fees under statute, the defendant-appellant may also be required to pay those legal fees and costs on appeal. Thus, by the time the appeal is concluded, the $1 million verdict against an unsuccessful defendant-appellant may involve economic consequences of another $100,000 or more.

The possibility of an amicable settlement becomes apparent if both parties are prepared to face the realities and risks of appeal. The plaintiff-appellee should seriously consider settling for less than $1 million to avoid the risk of losing its verdict. Likewise, the defendant-appellant may save a significant amount off the verdict by reaching a settlement. For example, if the case settles for $850,000, the defendant-appellant saves $250,000, which represents $150,000 off the verdict plus $100,000 in post-judgment interest and expenses. Moreover, even if the defendant-appellant were granted a new trial, the defendant-appellant risks losing that trial as well, perhaps for a greater amount and certainly with additional expense.

Thus, the parties have achieved a "win-win" situation. The plaintiff-appellee obtains a significant recovery and avoids the risk of no recovery or a new trial with uncertain results. The defendant-appellant saves a significant sum and pays much less than required if the verdict is affirmed.

V. Statistical Information

The Third Circuit established its Appellate Mediation Program in 1995, and the Mediation Program has maintained statistical information on various aspects of the Program’s operations. The statistics in Sections A and B below cover the period from the Program’s inception in April 1995 through December 31, 2001.
A. Number of Mediations

The Mediation Program has received and reviewed 5,932 cases eligible for mediation. Of these, 2,284 have been mediated. Thus, approximately 39% of the total pool of cases eligible for mediation were actually mediated.\footnote{A mediation is counted as a mediation only if a mediation session is actually conducted. If a mediation session is scheduled but canceled, either because the case settled on its own or because the mediator concluded that mediation would not be productive, then it is not counted as a “mediation.”} Of these mediations, approximately 80% were conducted by the Program Director and 20% were conducted by senior judges.

B. Number of Settlements

The Third Circuit’s Mediation Program has settled 834 cases since its inception through December 31, 2001.\footnote{A settlement is counted as a settlement only if the settlement derives from a mediation session. If a case is scheduled for mediation but settles before the scheduled session and without any further involvement by the Mediation Program, then that result is not counted as a settlement. Similarly, if a case is mediated and does not settle at mediation but is later dismissed for procedural reasons (e.g., voluntarily withdrawn, failure to file brief, lack of appellate jurisdiction), such resolution is not counted as a settlement even though the case did not reach the court for a decision. Finally, if a case is mediated and does not settle at mediation but later settles before court action, this result is counted as a settlement only if the Program is advised by the parties of the settlement.} Thus, the settlement rate, that is, the number of settlements divided into the total number of mediations conducted, is 37%.

C. Miscellaneous Statistical Information

In 1999, an internal study was conducted on the nature of the cases settled. The purpose of this study was to ascertain the kinds of cases most frequently settled. In addition, a study was performed on the number of cases mediated and settled on a district-by-district basis. The purpose of this study was to determine whether certain districts had higher settlement rates than other districts. The following reports on the results of those studies.

1. Nature of Cases Settled

In 1999, there were 129 Stipulations of Dismissal filed in the Third Circuit pursuant to settlements reached by the Mediation Program. Of these settlements, cases involving employment, insurance, commercial contracts, civil rights and personal injury were the most frequently settled. These cases accounted for almost 75% of all cases resolved as follows: employment, 22%; insurance, 16%; contract, 16%; civil rights, 11%; and personal injury, 8%.
2. District-by-District Study

The following reports on this geographical study which concluded that there is no significant difference in settlement rates among the districts within the Third Circuit.

<table>
<thead>
<tr>
<th>DISTRICT</th>
<th>MEDIATIONS</th>
<th>SETTLEMENTS</th>
<th>PERCENT SETTLED</th>
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</thead>
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<tr>
<td>E.D. Pa.</td>
<td>130</td>
<td>54</td>
<td>41.5%</td>
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<tr>
<td>M.D. Pa.</td>
<td>40</td>
<td>13</td>
<td>26.5%</td>
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<tr>
<td>W.D. Pa.</td>
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<td>36.3%</td>
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<tr>
<td>D.N.J.</td>
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<td>33</td>
<td>37.5%</td>
</tr>
<tr>
<td>D. Del.</td>
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<td>3</td>
<td>42.8%</td>
</tr>
<tr>
<td>D.V.I.</td>
<td>9</td>
<td>3</td>
<td>33.3%</td>
</tr>
</tbody>
</table>

VI. Pro Se Mediation Program

A. Establishment

One of the unique features of appellate mediation in the Third Circuit is the Pro Se Mediation Program, which was established in 2000. In 2001, L.A.R. 33.0 was amended to include L.A.R. 33.5, which governs mediations in pro se cases. Under this Rule, the Program Director may appoint counsel to represent a litigant on a pro bono basis for the purpose of mediation only.

As Chief Judge Becker has pointed out in his Foreword to this Article, pro se cases represent a substantial percentage of the Third Circuit caseload. Pro se cases cover a variety of subject matters including cases involving employment, commercial matters, civil rights and personal injury. In many of these appeals, the pro se litigant was represented by counsel in the district court and has become pro se on appeal. The purpose of establishing the Pro Se Mediation Program was to provide pro se litigants with counsel so that these cases would become "counseled" cases and could proceed to mediation like any other civil appeal. Like all circuits, the Third Circuit will not mediate cases if one party is pro se. If counsel is appointed for the pro se litigant, the case enters the Mediation Program like any other counseled case eligible for mediation.

43. All other circuits exclude pro se cases from mediation. NIEMIC, MEDIATION, supra note 1, at 18, 25, 39, 46, 52, 58, 64, 72, 81, 87, 95, 102. Pro se cases are generally not considered good candidates for mediation because one party is not represented by counsel. As a result, there is a risk that the litigant will seek legal advice from the mediator. This is not the mediator's role. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS R. VI (American Arbitration Association 2000), available at http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\\Resources\Roster\Mediators\standard.html.
B. Procedures

1. Case Selection

The Mediation Program receives the case file from the Staff Attorney’s Office. To determine if the case is a good candidate for the Pro Se Mediation Program, the Program Director may obtain further information from the pro se litigant and his or her prior counsel, if any, as well as from counsel for the opposing party. If the case is appropriate for mediation, a letter is sent to the pro se litigant informing him or her that the case has been selected for mediation, and with the litigant’s consent, an attorney will be appointed to represent him or her on a pro bono basis. Included with the letter are “Guidelines for Court-Appointed Mediation Counsel,” a statement which outlines the responsibilities of the appointed attorney and a “Consent to Appointment of Counsel” form which must be signed by the litigant.

If the pro se litigant consents to the appointment of counsel, the Program Director will seek out an attorney to represent the litigant on a pro bono basis. When counsel is located, he or she enters an appearance for the limited purpose of representing the litigant during the mediation process. When the limited entry of appearance is filed, a notice with the date and time for a mediation will be sent to the attorneys. At this point, the Pro Se Mediation Program will follow the procedures contained in L.A.R. 33.0 which require that counsel file position papers and that counsel and the parties participate in the mediation. As with regular counseled cases, the Clerk’s Office defers the issuance of the briefing schedule pending the outcome of the mediation.

2. Mediation and Post-Mediation Procedures

A pro se mediation is conducted in the same manner as a regular mediation. If the parties reach a settlement, the parties may formalize the settlement in a written agreement and are required to file a Stipulation of Dismissal with the Clerk’s Office. If the mediation is unsuccessful, the Mediation Program informs the Clerk’s Office, and a briefing schedule will be issued. L.A.R. 33.6 states that if mediation is unsuccessful, court-appointed counsel may, at his or her option and with the agreement of the litigant, enter an appearance as counsel of record for the purpose of representing the litigant fully on appeal.

Since the Pro Se Mediation Program’s inception, there have been several cases in which court-appointed counsel have agreed to continue representing the pro se litigant on appeal. This is a highly beneficial side effect of the Pro Se Mediation Program, both for the pro se litigant and the Court.

44. Local Appellate Rule 33.6 also provides that if an applicable statute authorizes the award of attorney fees, counsel and the pro se litigant may enter into a written agreement designating the amount of attorney fees. See 3D CIR. LOCAL APP. R. 33.6.
From the establishment of the Pro Se Mediation Program in 2000 through September 18, 2002, 341 pro se cases have been considered for mediation and 41 have been mediated. Of those cases mediated, ten have resulted in settlements. While the settlement percentage does not match the percentage in regular, counseled cases, the Program has produced enough settlements to save significant time for the Court; perhaps more importantly, the Program provides a substantial service to litigants in the difficult circumstance where one party is proceeding pro se.

VII. SUGGESTIONS FOR COUNSEL TO MAKE MEDIATION MORE MEANINGFUL FOR THE COURT AND THE CLIENT

The purpose of this section is to offer some suggestions to counsel to make their appellate mediation more meaningful and more successful. While some of these suggestions are applicable only to appellate mediation, many of them apply to mediation generally.

A. Have the Right Party Representative Present at the Mediation

L.A.R. 33.5(b) requires that clients be present at mediation sessions. In some instances, contrary to the rule, a client does not appear or the client representative that does appear is not the best choice for maximizing the efficacy of the mediation. Appellate mediators and their courts consider client participation to be a serious matter. Moreover, at least one court has ruled that an attorney’s failure to abide by the appellate mediation rules regarding client participation at mediation sessions is potentially sanctionable.45

1. The Absent Client

If counsel fails to bring a client to the mediation, this directly violates the Court’s rules. It also creates numerous practical problems. Often counsel explains that he or she has settlement authority, so appearance by the client is unnecessary. However, inevitably counsel will have to contact the client during negotiations because counsel’s authority is limited. If counsel is unable to reach the client during the mediation, there is delay and inconvenience.

In addition, when the client for one side fails to appear, the opposing counsel and client will frequently question the absent client’s good faith in participating in mediation. This creates a hostile atmosphere, which is not conducive to reaching an amicable resolution.

The Mediation Program recognizes, however, that in certain circumstances there may be good cause for a client not to appear. Apart from reasons such as health, there can be valid reasons for clients not to appear.

45. See In re Young, 253 F.3d 926 (7th Cir. 2001) (finding attorney’s refusal to bring client to mediation session despite mediator’s order is potentially sanctionable).
For example, in an automobile accident case, if the individual defendant is covered by insurance and he has no say in settlement, it is not necessary for the client to appear as long as the insurance company representative with authority appears. Where counsel believes there is good reason for their clients not to appear at the mediation, counsel should seek advance permission of the mediator.

2. The Inappropriate Client Representative

If the client representative who attends the mediation is not the appropriate person to participate, this likewise causes a problem. L.A.R. 33.5(b) requires the presence of a client representative who has authority to settle the case. Where the client is an individual, no issue arises as to who should appropriately appear. In the case of corporations, governmental entities or where insurance coverage is involved, the issue becomes more complicated. The problem usually surfaces in a number of different ways.

If the client representative participating in the mediation has little or no authority to settle, those who are present must "check back" with the absent decisionmaker. This absent decisionmaker has not had the benefit of the mediation process. Even if the decisionmaker receives a report of what transpired at the mediation, much can be lost in translation. Thus, the absent decisionmaker has a substantial impact on the mediation, but his or her absence frustrates the process.

A related issue arises when the client representative who is present has authority to a certain dollar amount. Prior to the start of the mediation session, the party perceived that dollar amount to be the maximum it would pay in settlement. The mediation process sometimes produces a potential resolution which is attractive to the party but beyond the authority of the client representative participating in the mediation. Again, the persons present must "check back" with the absent decisionmaker, and this causes frustration and certain delay for the parties involved. One of the more frustrating aspects of this scenario is when the parties present report back that the absent decisionmaker declined to authorize a settlement without providing any reason or basis for the decision. In such situations, the mediator may request to speak with the absent party directly to ensure that the absent decisionmaker understands the situation and to gain some insight into why the potential settlement is not acceptable.

The Mediation Program is receptive to counsel's requests to excuse the "ultimate" decisionmaker as long as the client representative who will be present will make the mediation process meaningful. For example, governmental entities often can only settle cases if a board or committee of elected officials approve the settlement. In such situations, the Program does not necessarily expect that the entire elected body be present.

A final problem arises when the client representative present at the mediation is viewed by the opposing side as not objective. For example, in
an employment discrimination case where the employer representative who is present was the person who fired the plaintiff, the plaintiff's side will often be quite skeptical that mediation will be fruitful. The employer representative is viewed as the enemy whose purpose is to justify the adverse employment action rather than to consider objectively whether the action may be found to be unlawful. Often the plaintiff's side correctly assesses the situation, and the mediation fails. Thus, at a minimum, counsel should consider having present at the mediation a client representative who is more objective. The presence of such a client representative has the potential of achieving a more productive mediation session. If counsel desires to have the involved client representative present, the more objective representative can attend in addition to the less objective one if, for some internal reason, the employer does not wish to exclude that person from the settlement process.

In conclusion, counsel must give serious consideration to having the right client representative present at the mediation. It is inexcusable to have no client representative present or to have one present without any real ability to negotiate a settlement. When counsel is dealing with a situation of levels of authority, counsel should make every effort to appear with the person who has the maximum authority that is reasonable under the circumstances. By having such a client representative present, counsel will maximize the ability of the mediation process to be meaningful and will demonstrate to the mediator and to the opposing party a good faith attempt to participate. Finally, where the client representative is also the person alleged to be responsible for the claimed wrong, counsel should consider bringing a different representative or having another representative accompany that person. The goal is to have present a client representative that will make the mediation both meaningful and efficient.

B. Avoid Creating a Hostile Environment at the Mediation

Litigation often produces accusations of bad faith and perjury. Such accusations particularly have no place at a mediation. While it is often necessary for a party to argue its position at a mediation session, counsel can do so effectively without accusations and ad hominems. Some mediations either start with or evolve into inappropriate shouting matches between the parties. This is counterproductive to maximizing the possibilities of settlement. Mediations are much more productive when the climate is one of peace and not one of hostility.

C. Avoid Treating the Mediator as an Adversary

A mediator is always willing to listen to a party's frustration and anger about a case. However, on occasion, a party identifies the mediator with the other party and forgets the mediator's role as an intermediary. Thus, for example, when the mediator conveys a settlement proposal made by one party which the other party considers outrageous and insulting, that
party may react inappropriately toward the mediator. Such a reaction does not contribute to the mediator's role of assisting that party with ways to improve its settlement position.

D. Prepare Appropriately for the Mediation Session

1. Be Prepared to Discuss the Merits of the Appeal

Some lawyers believe that mediation only addresses the parties' "settlement numbers." Appellate mediators, however, almost always include a thorough discussion of the issues on appeal and the parties' arguments in favor of affirmance or reversal. This discussion is an integral part of the appellate mediation session. Thus, counsel should be prepared to discuss the merits of the case and to explain why their client will succeed on appeal. This discussion may prompt the other side to reevaluate its settlement position and may provide the parties with a preview of the issues and arguments on appeal.

2. Be Prepared to Discuss Damages

The parties should be prepared to discuss the issue of damages at the mediation. A significant number of cases on appeal are dismissed in the district court either by a motion to dismiss or by summary judgment. Because the parties did not go to trial, counsel are frequently unprepared to discuss damages at the mediation. Counsel tend to focus on the district court's decision on the issue of liability. In the event of reversal, however, the parties should be aware of what is potentially at stake. Thus, the plaintiff-appellant should be prepared to show the defendant-appellee its economic exposure. Similarly, the defendant-appellee should be prepared to show, if possible, that even if the plaintiff-appellant succeeds on appeal, it will ultimately recover little to no damages. Accordingly, while counsel should appropriately focus on the liability issues on appeal, they should also address the issue of potential damages if the case is remanded to the district court.

E. Be Prepared to Assist the Mediator

Counsel should enter the mediation with suggestions for the mediator on how to settle the case. Counsel are in an excellent position to assist the mediator with the mediation process because of counsel's extensive background in the case and their familiarity with their clients. When provided with ideas and information from counsel, the mediator can be most helpful to the settlement process. Counsel can assist the mediator in several ways.

1. Cast Doubt on the Opposing Side's Position

As previously discussed, a party who perceives a risk of loss on appeal is more inclined to settlement. Counsel can help the mediator by point-
ing out clearly and concisely the reasons why the decision in the district court will be affirmed or reversed.

2. *Think of Ways to Settle*

Many lawyers advise the mediator early and often that there is "no way" the appeal can be settled. While this may be true at times, there are many cases where counsel do not focus on ways the case can settle. If counsel were to step back from the legal positions and hostilities of the litigation and instead view the litigation as a "problem to be solved, not a war to be won," counsel may perceive ways to settle not previously apparent.

3. *Provide Rationale for Settlement Proposals*

Counsel can be helpful to the mediator by supporting settlement proposals with good reasoning. If a party explains to the mediator why a particular settlement proposal is reasonable and should be accepted by the other side, the mediator will be better able to present that proposal effectively to the other side. Failure to present reasons for a settlement proposal has the opposite effect. For example, it is often counterproductive to inform the opposing side that a nominal sum is available in settlement only because the case is a "nuisance." This "nuisance value" description is not a helpful settlement rationale. Instead, counsel should support modest settlement proposals with more specific and concrete reasons why such a proposed settlement is reasonable.

4. *Alert the Mediator to Non-Legal Factors Affecting Settlement*

Counsel will often focus on their client's legal position and ignore the non-legal factors which may impact settlement. For instance, a party's financial position may affect its ability to pay a judgment. The issue of non-collectability of a judgment may be far more important to settlement than the legal grounds upon which to seek a reversal of that judgement. Similarly, there may be some history between the parties not directly relevant to the case but which may affect settlement. For example, the parties have sued each other numerous times before and are fierce competitors in the same industry. If provided with this information, the mediator will gain a perspective on the matter not apparent from the legal aspects of the case. Finally, in some mediations a party is apparently influenced by a third party, such as a family member. Counsel should inform the mediator of such situations and discuss the third party's participation.

F. *Do Not Rush the Mediation Process*

Lawyers often become frustrated by the mediation process and want to proceed directly to a discussion of settlement in concrete dollar amounts. Experience has shown, however, that the mediation process should not be rushed. By the time a case reaches the appellate level, the parties have expended much time, money and emotion in litigating their case. The parties usually want to explain how emotional and expensive the litigation has been. The mediation process provides the parties with that opportunity and serves as a backdrop for a discussion of how to resolve all the negative emotion and how to avoid further expense.

Counsel should inform the mediator if they are uncomfortable with the negotiation process, and the mediator can assist counsel. However, efforts to rush the negotiation process more often than not brings about an unsuccessful conclusion rather than a settlement.

G. *Keep an Open Mind About Settlement*

Counsel should keep an open mind about settlement. By the time the case has reached the appellate level, any prior settlement efforts in the district court were unsuccessful, and counsel may be less optimistic about settlement. As mentioned earlier, counsel should not view the appeal as just the final step in the litigation, but rather as another opportunity to think about settlement. Maintaining an open mind may result in ideas and information helpful to resolving a case.

VIII. **Conclusion**

The goal of this Article is to provide a better understanding of the appellate mediation process in the Third Circuit. Since there are substantial benefits to be obtained from the mediation process, hopefully, this Article has provided counsel with helpful suggestions when representing clients in appellate mediation and in all types of mediation.

47. *See supra* section I.A.