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Appellate Mediation: A Horse of a Different Color
Strategies for a Productive Settlement Conference

Many family law and civil trial attorneys are familiar with the notion that mediation at the appellate level can be challenging. There is a common refrain heard at dispute resolution conferences: "How do you get the parties to compromise on appeal when a 'winner' has already been declared?" In more closed circles, the question may be phrased more candidly, such as, "Why bother?" Attorneys representing the prevailing party at trial often believe that the likelihood of success on appeal is, statistically, so slim, there is simply no reason their clients should voluntarily agree to compromise what may have been a hard-fought judgment. On the other hand, attorneys representing the losing party – the appellants on appeal – may be convinced that the trial court made a cataclysmic error that no appellate panel could reasonably abide; or they may view the appellate process as a "Hail Mary," a last-ditch effort to reverse their client's misfortune. Either way, the appellant's focus is on a full reversal to avoid the effect of the judgment, not to concede defeat by compromising. From the time the Notice of Appeal is filed, both sides are operating under the belief that the best route is to see the appeal run its course. With that background, is it so surprising that an Order of Referral to Mediation from the appellate court might be received with cynicism?

Although skepticism may not be surprising, statistics show it may be unwarranted. The Fifth District Court of Appeal continues to report success with its mandatory mediation program. Of the cases that the court deems eligible (final civil and family appeals with both parties represented by counsel), approximately 33% are referred to mediation. Of the cases that are mediated, approximately 25% result in settlement and dismissal of the appeal. In 2017, the court reviewed 486 eligible cases. Of those cases, 169 (34.8%) were referred to mediation, and 42 (24.85%) were successfully resolved. Those numbers have remained consistent over several years. Although the Fifth District Court of Appeal is the only state appellate court with an institutionalized mediation program, all appellate courts have the discretion to refer cases to mediation by motion of the court or by a party, pursuant to Florida Rule of Appellate Procedure 9.700(b). The statistics support the conclusion that some cases should and can successfully settle post-judgment.

Aside from the obvious financial commitment of an appeal, the uncertainty of an appeal can often help the parties see the wisdom in compromise. Appellate mediators, who are specially certified by the Florida Supreme Court to mediate appeals, are trained that the best tool in their arsenal is doubt. While arguably more predictable than a jury verdict, the interplay between the standards of review, the preservation of errors at trial, the availability of a complete record, and a divergence of legal precedent can lead to unanticipated results. A mediator can sow doubt by focusing on the unpredictability of the appeals process, which may cause both parties to consider the possibility that they could lose on appeal and bring them to the bargaining table. A mediator can also remind the appellee that, although they have a money judgment, for example, collection on that judgment may be another costly endeavor.

Before an appellate mediator ever gets a chance to work his or her magic, however, the parties must come to the table. Literally. Although appellate mediations are intended to be similar in format to other civil mediations, more and more frequently, it seems that appellate mediators are dispensing with a joint opening session. The reason for this may be as simple as one party – often, the appellant, who has been declared the loser by the trial court – does not want to face his or her opponent. In an effort to start the process harmoniously, some mediators will abide by the request and dispense with the joint session – keeping the parties sequestered for the entire mediation conference. Of course, there is no requirement that mediators conduct a joint session. Joint sessions can be uncomfortable and awkward when there is a good amount of animus between the parties. They can also be dangerous where there is a history of domestic or interpersonal violence between the parties.

Absent mitigating circumstances that make face-to-face contact unwise, a joint opening session is a far more valuable tool in the appellate mediator's toolbox than many have been trained to believe. A joint session gives the mediator the opportunity to address and alleviate the hostility between the parties that can naturally grow during the trial process, and to foster an atmosphere of collegiality and cooperation. Of course, it is human nature to want to avoid conflict when possible. An appellant who has been embarrassed or outraged by a loss at trial may want to avoid having to face a gloating opponent across the table. Even a mediator, in a good faith effort to maintain a calm, peaceful environment,

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may want to avoid starting the session with the parties expressing their frustrations, which can get uncomfortable. Mediation is not easy work if you're doing it effectively. Giving parties, especially highly emotional ones, the opportunity to clear the air and find common ground after months or years of litigation requires patience and skill. However, it's worth the extra effort, and the mediation can be more effective with a "we are all in this together" kind of approach. This gives the mediator the opportunity to sow doubt in both parties at once, instead of being perceived as "beating up" on one party in a caucus room.

Another strategy for a successful appellate mediation is to reduce or eliminate trial counsel's participation in the process. After trial, it is not uncommon for the parties to view opposing counsel as an enemy combatant. Once trial counsel has put his opponent through the rigors of depositions, discovery, and cross-examination and managed to convince a jury that the opponent's claim or defense is wrong, the opponent may be understandably resentful. If the parties can enter appellate mediation with new counsel, attorneys who did not take an active role in the trial can quickly diffuse the animus. Of course, in many cases, it may be critical for trial counsel to participate in settlement discussions. In such an event, consider having trial counsel remain in the caucus room, and regrouping privately after the joint session.

Finally, remember that time is your friend. Under Rule 9.700(c), appellate parties have 30 days after the first mediation conference to complete the mediation. That deadline can be modified by court order, if necessary. In cases where the parties seem too entrenched in their positions to find common ground, the mediator may elect to continue the mediation rather than quickly declaring an impasse. If there have been settlement offers conveyed during the mediation, but the parties are too emotional or entrenched to make progress, sometimes the passage of time or other events continuing in the lower court (i.e., denial of a stay, attorneys' fee motions, enforcement proceedings, etc.) may make the parties rethink their positions. An effective appellate mediator will continue to monitor the parties to see whether there is an opportunity to bridge the gap before the expiration of the mediation deadline.

These are just a few tools an appellate mediator can use to ensure an effective mediation session and increase the likelihood of reaching a settlement. Recognizing that appellate mediation is a horse of a different color, and making a few strategic adjustments from a typical civil or family mediation, can result in better outcomes for all.

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