What’s the Appeal of Appellate Mediation?

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What Rules Control?

FL Rules of Appellate Procedure, Rules 9.010 through 9.990

FL Rules for Certified and Court-Appointed Mediators, Rules 10.200 through 10.690
Which Circuit Cases are Eligible?

Final orders of lower courts
Rules 9.030 and 9.130

Non-final orders of lower courts (venue, injunctions, child custody, etc.) Rule 9.030 and 9.130

Administrative action
Rule 9.030
What Other Cases Are Mediated?

- Certified Questions from the Federal Courts (Rule 9.150)
- Discretionary Proceedings to Review County Court Decisions (Rule 9.160)
- Appeals from Probate and Guardianship Cases (Rule 9.170)
- Appeals from Workers’ Compensation Cases (Rule 9.180)
- Appeals of Administrative Action (Rule 9.190)
Which Cases are NOT Mediated?

Rule 9.710 - Any case... except:

- Criminal, collateral criminal, and post-conviction cases
- Habeas corpus and extraordinary writs
- Civil or criminal contempt
- Involuntary civil commitment of sexually violent predators
- Other matters specified by admin order
Timing of Appellate Mediation

After decision but before entry of judgment

After entry of judgment but before filing Notice of Appeal

After Notice of Appeal but before record and brief are filed

After briefs are filed but before argument

After argument but before decision
Role of the Mediator

- Review Pleadings
- Review Cases (provided or researched)
- Discuss Standard of Review
- Identify areas of Risk (Percentages)
- Raise matter of Costs

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So What IS the Appeal of Appellate Mediation?

- All the prohibitions against expressing an opinion are GONE.
- You SHOULD read the cases and pleadings.
- You are EXPECTED to challenge the parties on their assumptions.
- You are EXPECTED to discuss risks, costs, and outcomes.
Likelihood of Success of Mediation

- 40%-50% of appeals filed are DISMISSED (procedural: untimely, no jurisdiction)
- Of the cases heard:
  - 1/5 reversed
  - 2/5 affirmed
  - 2/5 reversed in part!!

(Rate of mediated settlement increased from 19% at the outset to 43% with the new program)
Pleadings = Reality Testing

• Original arguments for EACH side
• Winning/Losing arguments for EACH side
• Strengths and Weaknesses of arguments on appeal
• Final or interlocutory appeal
Case Law = Reality Testing

• Cases provided by a party
  ** Objective reading of pro cases
  ** Objective reading of con cases
• Cases NOT provided by a party
  (but provided by the opposing party)
• Cases NOT provided by either party
  (independent research)
Standard of Review = Reality Testing

- Decision based on Question of Law = NEW TRIAL
- Decision based on Findings of Fact = REVIEW OF THE RECORD
- Decision based on Judicial Discretion = REVIEW OF THE RECORD
Cost of Appeal = Reality Testing

• **Rule 9.200 Record** (original documents, all exhibits not physical evidence, transcripts filed below [not summonses, subpoenas, returns, N/Hearing, N/Deposition, other discovery].

• **Rule 9.210 Briefs** (initial, answer, reply, cross-reply). [Initial = table of contents, table of citations, stmt/case, stmt/facts, summary of argument, argument re: each issue including standard/review, conclusion]

• **Rule 9.220 Appendix** (Index and conformed copy of opinion plus record segments and authorities).
## Rule 9.400 Costs and Attorneys’ Fees

- ** fees for filing and service of process
- ** charges for preparation of record
- ** bond premiums
- ** other costs permitted by law
- ** attorneys’ fees
New Trial = Reality Testing

Starting ALL over again:

- Availability/cost of witnesses
- Availability/cost of exhibits
- Availability/cost of new evidence
- Publicity
- Emotional Cost
- Likelihood of collectability
- ...and more
Review of the Record = Reality Testing

Quality of record

- Objections preserved
- Cases introduced
- Arguments presented
- Trial level counsel
- ...and more
| **   | If trial counsel has LITTLE/NO knowledge of appellate rules and procedures but attends appellate mediation, the likelihood of resolution is SIGNIFICANTLY diminished. |
| **   | If trial counsel attends mediation WITH appellate counsel, the likelihood of resolution is SIGNIFICANTLY increased. |
| **   | If appellate counsel attend on both sides of the table, the likelihood of resolution is the GREATEST. |
More than half of appellate cases are FAMILY LAW.

Are your comfortable with that?

Family law divides into two categories:

** Truly “family law” issues (relocation)

** Issues of law arising in a family case (fraud)
Summary of Appellate Mediation Realities!

1. Mediator is ACTIVELY involved in the discussion, not just facilitating it.

2. REALITY-TESTING means digging into the cases and the record finding strengths and weaknesses facing each side:
   - Trial and appellate COUNSEL issues.
   - COSTS are SIGNIFICANT.
   - Ability to GO THROUGH IT AGAIN
   - COLLECTABILITY (time and cost) is a factor.
   - RISK of partial reversal is SIGNIFICANT.

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