

# **What's the Appeal of Appellate Mediation?**

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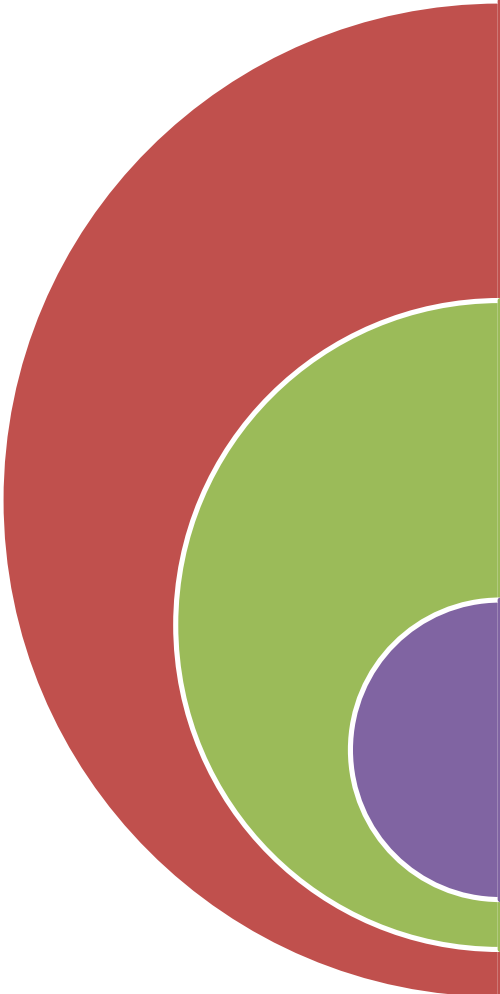
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# What Rules Control?

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?



<b>Final orders of lower courts</b> <b>Rules 9.030 and 9.130</b>
<b>Non-final orders of lower courts</b> <b>(venue, injunctions, child custody,</b> <b>etc.) Rule 9.030 and 9.130</b>
<b>Administrative action</b> <b>Rule 9.030</b>

**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**



# **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).

# **Cost of Appeal = Reality Testing**

## **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**

# **The 1<sup>st</sup> BIG Truth - Counsel**

- \*\* 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.**

# **The 2<sup>nd</sup> BIG Truth – Family Law**

**More than half of appellate cases are  
FAMILY LAW.**

**Are you 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**.