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COMMENTARY

Mediation: It's Not Only for the Trial Court Anymore

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Attorneys who regularly litigate civil and family cases in Florida's state courts will be familiar with mediation. Florida Rule of Civil Procedure 1.700(a) allows a presiding trial court judge to refer "all or any part of a contested civil matter to mediation or arbitration." Florida Family Law Rule of Procedure 12.740(b) contains a similar provision. But attorneys might be surprised to know that, should they find themselves in one of Florida's six District Courts of Appeal (DCAs), their appeal could also be ordered to mediation in a similar manner as in the trial court.

The possibility that the court might order the parties to participate in appellate mediation depends on which DCA is handling the appeal. The First DCA previously had a mediation program but abolished it at the beginning of 2002. The Second and Fourth DCAs do not currently have appellate mediation programs. Of course, nothing prevents the parties from conducting appellate mediation voluntarily if the appeal is pending in one of those appellate courts.

In contrast, the Fifth DCA and Sixth DCA have mediation programs applicable to most final civil and family court appeals. The Third DCA also provides parties the option to request referral to mediation in all final civil cases or family law appeals. The DCAs with mediation programs describe the goal of appellate mediation as saving litigants time and money by resolving disputes in less time and with less expense than the traditional appeal process, and helping to narrow and clarify issues for appeal. This article provides a general description of the process but is not intended to be a detailed guide. Attorneys and pro se parties will want to consult Rules 9.700–9.740 of the Florida Rules of Appellate Procedure, applicable to mediation, as well as the rules and instructions found on the website of the DCA in which their appeal is pending.

In both the Fifth DCA and the Sixth DCA, a party may be required to complete a mediation questionnaire or confidential statement once the court deems the case eligible for mediation. In the statement, the party confidentially provides the court with information about the nature of the case and the issues, as well as whether the party believes that mediation of the appeal is appropriate. If the court orders the appeal to mediation, the parties will receive an order to that effect providing information on the process, setting deadlines, and describing how the parties must select a mediator. Both courts provide for the tolling of briefing deadlines until mediation is completed. The mediator will inform the court of the outcome of mediation. If mediation is unsuccessful, the appeal will resume and proceed as it normally would. If mediation is successful, the parties will generally file a joint stipulation for dismissal or the appellant will file a notice of voluntary dismissal.

The pros and cons of appellate mediation are similar to those involved in mediation in the trial court. If mediation is successful, it saves the parties the time and expense of proceeding with briefing, motions, and oral argument in the appeal. The parties get the benefit of certainty in the negotiated settlement and can put the dispute behind them and move on with their lives.

However, mediation itself can be a costly and time-consuming process. Mediators charge a fee for their time, and that fee is generally split by the parties. Furthermore, most mediators require the parties to prepare and submit confidential mediation statements prior to mediation, to inform the mediator about the case and the parties' positions. Mediation conferences can take an entire day or more, depending on factors such as the issues in the case, number of attorneys and parties present, and style of the particular mediator. If mediation is unsuccessful, the parties must then still proceed with the work required in the appeal, and the expenses incurred for the mediation will have been in vain.

In light of the above, parties considering an appeal in a Florida civil or family court case should be aware of whether the DCA that will decide their appeal has a mediation program. The prospect of requesting, or being ordered to attend, appellate mediation might be viewed as a benefit or a drawback depending on the unique circumstances of a particular case and a party's position. But it is important for attorneys to know when advising their clients that appellate mediation is available, and might even be required by the court, in their appeal.

Jonathan Mann *is a senior associate with Schwartz Sladkus Reich Greenberg Atlas in the firm's Boca Raton office. He is board certified in Appellate Practice by The Florida Bar.*