Introduction

A. The Growing Field of Appellate Mediation

Mediation of cases on appeal has continued to increase in the United States since the Second Circuit started the first appellate mediation program in 1974.[1] Today every federal circuit court (except the Federal Circuit) has an appellate mediation program.[2] And the appellate courts in 33 states and the District of Columbia have court-connected mediation programs. Although some early efforts at court-connected appellate mediation in the 1980s fizzled for lack of financial and judicial support, since 2000 reviewing courts have embraced mediation.[3] Enthusiasm for appellate mediation continues to grow among courts of review and litigants themselves for a compelling reason: it works! Almost six out of ten civil appeals in the federal courts are successfully settled prior to decision by a court of appeals.[4] Even after years of litigation and failed settlement efforts in the trial courts, appellate mediations frequently resolve appeals in a single mediation session.

Because voluntary appellate mediation tends to occur with less frequency than court-ordered mediation, the trend is to make participation in court-connected mediation programs mandatory.[5] Thus, many parties to civil appeals in a majority of states and nearly all federal circuits have no choice but to participate in appellate mediation. In some appellate courts, mandatory mediation is not just possible, it is probable.[6] As a consequence, effective advocacy on appeal now requires lawyers to develop skills in negotiating and representing their clients in mediation in addition to the ability to write briefs and present oral arguments. This book serves as a guide to lawyers serving clients participating in appellate mediation.

1. Sandra Schultz Newman & Scott E. Friedman, *Appellate Mediation in Pennsylvania: Looking Back at the History and Forward to the Future*, J. Appellate Practice & Process 5 (2003): 410; *see also* Robert W. Rack Jr., *Thoughts of a Chief Circuit Mediator on Federal Court-Annexed Mediation*, 17 Ohio State J. Dispute Resolution 609 n.3 (2001) (asserting that the Sixth Circuit's program is the longest continuously operating program since its inception in 1981).
2. Rack, *supra* note 1, at 610.
3. Newman & Friedman, *supra* note 1, at 419–21.
4. Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38(1) J. Leg. Stud. 133 (2009).
5. Ignazio J. Ruvolo, *Appellate Mediation-Settling the Last Frontier of ADR*, 42 San Diego L. Rev. 185 (2005); Irving R. Kaufman, *Must Every Appeal Run the Gamut—The Civil Appeals Management Plan*, 95 Yale L.J. 755 (1985).
6. Robert J. Niemic, Mediation and Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers 6 (1997).

The demand is also growing for neutrals adept at mediating cases in the appellate arena, with all of its unique procedures and substantive rules. Appellate mediation is a growing opportunity for professional mediators, and this book provides them with essential information about appellate law and the idiosyncrasies of appellate mediation. It guides them through a process developed over the past 20 years in scores of appellate mediation trainings and programs throughout the United States in both state and federal courts. This book also offers pointers for professional neutrals who are interested in expanding their mediation practices to include appellate mediation.

Despite the prevalence of appellate mediation, the literature on appellate mediation is sparse—usually limited to law review articles, court guides focused on whether and how to implement a mediation program, and short chapters in works otherwise devoted to mediation of disputes in the prelitigation or trial court contexts. Although a number of texts address mediation in general, these have limited utility for appellate cases, given their unique rules and procedures.

Until now, legal advocates and neutrals have lacked a resource to guide them in understanding mediation in the appellate context and to advise them about what works and does not work for mediation of appeals. This book fills that gap: it is a comprehensive guide to appellate mediation for legal advocates and mediators. We offer a time-tested approach that can guide first-time participants in appellate mediation and enhance the practice of those who regularly conduct or attend such mediations.

B. Terms We Use in This Book

Before we explore what distinguishes appellate mediation from other alternative dispute resolution processes, we need to define a few basic terms to describe the progression of a case through appeal.

1. Terms Relating to the Appellate Process

- **Trial court** refers to the court in which the legal action was filed and that makes the findings of fact (either by jury or bench trial).

- **Judgment**, as used in this book, refers to the decision by the trial court challenged by the appellant in the appellate court. Judgment thus encompasses any order, ruling, interlocutory judgment (entered in an intermediate stage between the commencement and termination of a case), or final judgment for which a party seeks reversal or modification on appeal.

- **Party** refers to any person, company, or entity entitled to appear in the appellate court to challenge or defend the judgment or order being appealed. Party does not include amicus curiae, or attorneys providing

legal representation. In short, a party stands to gain or lose personally depending on the outcome of the appeal.

- **Appellant** refers to the party who files an appeal in order to reverse the judgment or challenged order.

- **Respondent** refers to the party defending a judgment or order. In the federal circuits and some states, the respondent is called an appellee. In some cases, the respondent may also wish to challenge the same judgment or order on appeal—perhaps because the respondent believes the judgment awarded too much or too little in damages, or perhaps because the judgment did not provide the full extent of legal or equitable relief to which the respondent may lay claim. In such a situation, the respondent may file a cross-appeal.

  In many court documents a respondent who appeals is additionally called a cross-appellant and the appellant, a cross-respondent (or cross-appellee in the federal circuits). For our purposes, we will refer to the parties according to their position vis-à-vis the judgment when the first notice of appeal is filed. If a party is both an appellant and a cross-respondent, it is easiest to analyze that party's position in the reviewing court as two separate appeals. Thus, the analysis for the appellant will apply for the initial appeal, and the analysis for the respondent will apply to that same party with respect to the cross-appeal. Attorneys and mediators should be sure to consult portions of this book addressed to appellants and to respondents for the respective aspects of the case with two or more notices of appeal.

- **Appellate court** refers to any court that has power to affirm, modify, or reverse decisions of a lower court.

- **Appellate mediation** refers to the process in which parties work to resolve a dispute with the assistance of a mediator after a judgment or appealable order has been entered by the trial court. Appellate mediations may be court ordered, may merely be encouraged by a program within a reviewing court, or may be conducted outside the court context by parties who have hired a private mediator. Although the judgment or appealable order addresses the legal issues between the parties on appeal, a mediated agreement may also resolve disputes other than the appeal or include stakeholders who are not party to the appeal. Thus, mediation allows the parties to an appeal to craft agreements that reach beyond the limits of a court's power in order to address the needs, interests, and concerns of the parties.

2. Terms Relating to the Mediation Process

In practice, mediators vary in how they perceive their roles and their interactions with the parties and attorneys. Moreover, mediators vary in their mediation styles, even within a single mediation, depending on what the situation demands. Thus, the following terms are helpful to describe the varying styles and approaches taken during the mediation process.

- **Facilitative.** Facilitative mediators emphasize the creation of a safe, nonjudgmental atmosphere in which the parties and lawyers explain their positions and interests and negotiate for and among themselves. The facilitative mediator's role is to ask questions, demonstrate and ensure understanding, and help explain the other side's perspectives. Facilitative mediation is especially appropriate for disputes in which emotions and personalities are as important as legal or factual issues and the parties' needs to speak and to be heard are critical first steps to discussing a settlement. Some mediators with a facilitative style work with the parties and counsel in joint session throughout the mediation to encourage the cooperation required to produce a mutually developed and acceptable resolution.

- **Evaluative.** Evaluative mediators tend to use their status and subject matter expertise to evaluate the strengths and weaknesses of each side's positions and legal arguments and to communicate those evaluations in an effort to affect the parties' risk analysis. Mediators with an evaluative style often conduct most of the mediation in confidential meetings with each side rather than in joint session. They believe this approach minimizes polarization of the parties' positions and allows room for the face-saving that this approach often provides. An evaluative approach may be most appropriate for disputes in which the parties have developed divergent assessments of the probable outcome of litigation or when the principle the parties have fought for has become more important than a reasoned legal analysis of the case.

- **Directive**. In addition to, and independent of, being evaluative or facilitative, mediators may be more or less directive about both process and substantive issues. Mediators inclined to be directive regarding process will prescribe a fixed mediation structure that is not easily influenced by the participants. Sometimes known as "muscle mediators," mediators who are more directive about substantive issues are more aggressive in asserting their evaluative predictions about litigation outcomes and rely heavily on their powers to persuade to encourage parties to reach agreements that are consistent with mediator predictions.

- **Less-directive** mediators seek process input from participants before and during mediation and are more inclined to focus on understanding and to elicit the parties' evaluations of settlement proposals in reaching decisions about how to approach resolution of the case. They believe process decisions should be based on the parties' expression of their needs and interests as well as their predictions about litigation outcomes, which are informed by what they learn from their attorneys and from the other side.

C. Significant Differences between Appellate Mediation and Mediation Occurring before a Trial Court Judgment

Mediations before and after entry of a judgment differ significantly. The existence of a court judgment or appealable order has critical implications for risk analysis, settlement options, and timing of appellate mediations. Appellate mediations occur after at least one party has prevailed legally and another has lost and therefore focus their risk analysis and case valuations on whether the trial court made a mistake. By contrast, prejudgment settlement conferences and mediations focus on this question: "Who's going to win at trial?"

After what may be years of litigation and substantial financial costs, the positions of the parties have often hardened into inflexibility and an adversarial mindset. Respondents usually feel vindicated—at least to a certain extent—that the jury or judge credited their position. A boost in their confidence exacerbates the entrenchment in their positions. By contrast, appellants are frustrated that the legal process failed to give them justice and may therefore redouble their efforts to seek legal relief by pursing the appeal.

The very existence of the judgment requires that the trial court's decision be addressed if the mediation is to succeed. If there is a money judgment in favor of the respondent, the respondent's attorney is usually entitled to begin efforts to collect from the appellant even while the appeal and appellate mediation are occurring. If the judgment grants injunctive relief, the appellant (and perhaps both parties) may be obligated to comply with the court's order during the appeal. Sometimes parties—especially institutional or business entities—facing a judgment that negatively affects their reputation will seek to erase the judgment completely through a settlement in which the parties agree jointly to request a reversal of the judgment in the appellate court.

Moreover, parties need to account for the appeal itself as they attempt to negotiate a settlement. Questions of timing become critical. Should the parties seek a stay of the appeal in order to mediate without the pressure of appellate briefing deadlines? If the terms of a settlement agreement cannot be immediately fulfilled, when should the appeal be dismissed? Can appellate mediation occur too late, given that appellate courts sometimes refuse to dismiss