

# Contents

---

Foreword . . . . .	xv
About the Authors . . . . .	xvii
Introduction . . . . .	xix
SECTION I FUNDAMENTALS OF APPEALS . . . . .	1
A. Effective Negotiation Requires Mediators and Lawyers to Understand Appellate Rules and Procedures	1
B. Appeals Differ Dramatically from Trials	2
Chapter 1 Appellate Law in a Nutshell. . . . .	5
A. Appellate Law Fundamentally Rests on Two Questions: “Was There Error?” and “If There Was Error, Was It Prejudicial?”	5
B. Appellate Courts Use Standards of Review to Determine Whether There Was Legal Error at Trial	5
C. Effective Analysis of Appeals Begins with Standards of Review	6
1. What Are Standards of Review?	6
2. The Substantial Evidence and the Clearly Erroneous Standards Apply to Review of Challenges to Factual Findings	8
3. The Abuse of Discretion Standard of Review Applies When the Trial Court Had the Prerogative to Choose from a Range of Options	12
4. The Independent (De Novo) Standard of Review Applies to Questions of Law	14
D. Determining Which Standard of Review Applies	15
E. Appellate Courts Will Not Reverse in the Absence of Prejudicial Error	16
F. Appellate Courts Will Not Usually Reverse If the Appellant Did Not Raise the Issue in the Trial Court	18
G. Appeals Offer Only a Limited Scope of Relief	20
H. “Winning” on Appeal Rarely Ends a Controversy	22
I. Appeals Can Be Very Slow	22

<b>Chapter 2 Case Evaluation for Civil Appeals . . . . .</b>	<b>23</b>
A. What Is Case Evaluation?	23
B. How Does Case Evaluation Differ from Legal Assessment of the Appeal, Decision Tree Risk Analysis, and Negotiation?	24
C. Why Do Case Evaluation <i>before</i> Negotiating?	25
D. How to Do Case Evaluation for Civil Appeals	25
1. Step 1: Identify the Best Case Outcome	26
2. Step 2: Identify the Worst Case Outcome	30
3. Step 3: Estimate the Odds of Various Case Outcomes	32
4. Step 4: Compare All Presently Available Options	44
5. Step 5: Evaluate the Opposing Party's Appeal	50
E. Conclusion	51
<b>Chapter 3 Helping Parties on Appeal Answer the Question "What's My Case Worth?" . . . . .</b>	<b>53</b>
A. Introduction	53
B. The Need to Use Real Numbers	54
C. A Few Things to Know about Decision Tree Analysis before Getting Started	55
1. How Difficult Is Decision Tree Analysis?	55
2. What Are the Limitations of Decision Tree Analysis?	56
D. How to Calculate the Present Value of a Case on Appeal	56
1. Identify the Party for Whom You Wish to Calculate the Present Value of a Case	57
2. Identify the Possible Outcomes of the Appeal and Determine Whether Attorney Fee Shifting Applies	57
3. Assign Dollar Values and Percentage Odds to Each Possible Outcome	59
4. Multiply the Dollar Value by the Percentage Odds for Each Possible Outcome	60
5. Add All of the Values to Arrive at the Overall Expected Gain or Loss for the Appeal	61
E. Decision Tree Analysis for Each Party You Are Likely to Encounter on Appeal	61
1. Plaintiff/Appellant's Decision Tree Risk Analysis	62
2. Plaintiff/Respondent's Decision Tree Risk Analysis	74
3. Defendant/Appellant's Decision Tree Risk Analysis	83
4. Defendant/Respondent's Decision Tree Risk Analysis	92
F. Frequently Asked Questions about Decision Trees	101
1. Question: I Just Did a Decision Tree Risk Analysis and Got a Negative Number for Present Value. Did I Do Something Wrong?	101

2.	Question: How Do I Determine Present Value If There Are Both an Appeal and a Cross-Appeal?	101
3.	Question: The Worksheets Have Lines That Predict Who Will Be the Prevailing Party for Purposes of Attorney Fee Shifting. How Do You Know Who Will Be the Prevailing Party?	102
4.	Question: In the Hypothetical for the Defendant/Appellant, You Mention Postjudgment Interest. Is It Possible to Add the Cost of Postjudgment Interest to the Defendant/Appellant's Decision Tree?	103
5.	Question: Why Not Keep Going with More Nodes and Branches?	104
6.	Question: As an Attorney or Mediator, What Do I Do When an Appellant Wants to Use an 80-Percent Chance of Succeeding on Appeal?	105
7.	Question: Why Didn't You Provide a Line for Calculations Pertaining to the Attorney Fees I've Already Spent on My Attorney and That I Still Owe?	105
8.	Question: What If There Is a Significant Chance the Appellate Court Will Dismiss the Case for Lack of Jurisdiction, Such as a Late Notice of Appeal, Lack of Standing, or Other Problem of Justiciability?	106
9.	Question: Does a Decision Tree Analysis Calculate the True Value of a Case?	106
G.	Conclusion	109
<b>SECTION II THE APPELLATE MEDIATION PROCESS . . . . .</b>		<b>111</b>
A.	Introduction	111
B.	We Offer an Approach to Appellate Mediation That Will Help New and Experienced Mediation Participants Achieve Success	111
C.	The Advantage of Keeping Each Phase Separate	113
<b>Chapter 4 Premediation . . . . .</b>		<b>115</b>
A.	Introduction	115
B.	Determine Whether a Case Is Amenable to Mediation	115
C.	Facilitate a Premediation Conference Call	117
D.	Address Important Issues in Premediation Discussions	118
E.	Conclusion	119
<b>Chapter 5 Opening the Appellate Mediation in Phase 1. . . . .</b>		<b>121</b>
A.	Introduction	121
B.	Goals for Phase 1	121

C.	How to Accomplish the Goals for Phase 1	122
1.	Confidentiality	122
2.	Logistics	123
3.	Explanation of the Roles of the Mediator and Participants	123
4.	Communication Guidelines	124
5.	Agenda for the Mediation Session	124
D.	Conclusion	124
<b>Chapter 6</b>	<b>Exchanging Information in Phase 2 . . . . .</b>	<b>125</b>
A.	Introduction	125
B.	Address Each Topic Related to the Appeal and the Underlying Problem in a Separate Conversation	125
1.	Discussing the Legal Merits of the Appeal	126
2.	Discussing the Underlying Problem and Parties' Current Circumstances	128
C.	The Value of the Mediator in Phase 2	130
D.	To the Extent Possible, Conduct Phase 2 in Joint Session	130
E.	It's Not Yet Time to Negotiate	131
F.	People Get Angry; It's Okay	131
G.	It Is Crucial to Listen for Understanding of One Another's Views during Phase 2	132
H.	Private Caucuses Provide the Opportunity for "the Rest of the Information" to Be Exchanged— Even If Only with the Mediator	132
I.	Conclusion	133
<b>Chapter 7</b>	<b>Defining the Problem and Organizing the Issues in Phase 3 . . . . .</b>	<b>135</b>
A.	Introduction	135
B.	The Value of the Mediator in Phase 3	135
C.	Determine the Scope of the Problem to Be Solved	135
D.	Organize the Issues and Create an Agenda	137
E.	Work in Joint Session in Phase 3 to the Extent Possible	137
<b>Chapter 8</b>	<b>Developing and Negotiating Solutions in Phase 4. . .</b>	<b>139</b>
A.	Introduction	139
B.	What Are Parties Trying to Accomplish through Negotiation?	140

C. The Secret Sauce of Great Appellate Mediations Is to Begin Negotiations by Generating Options and Solutions that Expand the Pie and Potentially Address the Parties’ Interests	140
D. Brainstorm for as Many Options as Possible— Especially Options with Asymmetric Gains	141
1. Generate Options	141
2. Clarify the Options	145
3. Evaluate the Options	145
E. After Exploring Integrative Solutions, Negotiate Distributive Issues	146
F. Negotiations Using Joint Sessions and Private Caucuses	147
G. The Moment of Decision	148
H. The Value of the Mediator in Phase 4	149
I. Conclusion	150
<b>Chapter 9 Concluding the Mediation and Postmediation         Follow-Up in Phase 5. . . . .</b>	<b>151</b>
A. Introduction	151
B. When the Mediation Session Ends with an Agreement	152
1. Reaching Agreement Happens Only When Parties Address Every Essential Issue and Agree on Every Term	152
2. Signing the Agreement at the Mediation Session	156
3. Drafting the Written Agreement <i>after</i> the Mediation Session	157
4. Testing the Agreement for Clarity, Completeness, and Commitment	157
5. Implementing the Agreement	158
C. Disposing of the Appeal	158
D. When the Mediation Session Ends without an Agreement	159
1. Analyze Why the Parties Did Not Reach Agreement	159
2. Plan the Next Steps	160
3. Follow Up to Achieve Agreement	161
E. Conclusion	161
<b>SECTION III PRACTICE TIPS FOR APPELLATE ATTORNEYS. . . . .</b>	<b>163</b>
<b>Chapter 10 Tips for Attorneys Preparing         for the Mediation Session . . . . .</b>	<b>165</b>
A. Begin to Prepare as Soon as Possible	165
B. Gather the Key Documents That Were Filed in the Trial Court	166

C. Talk to Trial Counsel and Clients about Potential Appellate Issues	167
D. Analyze the Strengths and Weaknesses of the Appellate Case	167
E. Initiate the Mediation	168
1. Understand the Case-Screening Process for Court-Connected Mediations	168
2. If the Appellate Court Does Not Have a Mediation Program, Explore Voluntary Mediation	169
F. Consider the Effect of Mediation on a Pending Appeal	170
G. Select and Work with a Mediator	171
H. Communicate with the Mediator before the Mediation Session	172
I. The Mediation Statement	173
1. Practice Pointers	174
2. Make Sure the Necessary Persons Attend Mediation with Full Settlement Authority	176
3. Consider Whether Parties, though Required to Attend, Are Not Essential to the Settlement and Should Be Excused from Attending	178
J. Prepare the Client to Participate	179
1. Special Concerns to Discuss with Appellants before the Mediation Session	181
2. Special Concerns to Discuss with Respondents before the Mediation Session	181
K. Formulate a Negotiation Plan and Be Ready to Settle	182
<b>Chapter 11 Tips for Attorneys During the Mediation Session . . .</b>	<b>185</b>
A. To the Extent Possible, Have a Clear Calendar for the Day	185
B. Be Mindful of Your Physical Needs	185
C. Tips for an Effective Opening in Phase 1	186
D. Tips for Exchanging Information in Phase 2	186
1. Consider Joint Sessions to Be a Powerful Opportunity to Advance Mutual Understanding in a Way That Trial and Appeal Cannot	187
2. Present a Great Case on Behalf of Your Client	187
E. Allow Your Client to Speak	189
F. Use Private Caucuses Effectively	191

<b>Chapter 12</b>	<b>Tips for Attorneys on Concluding the Mediation and Appeal . . . . .</b>	<b>193</b>
A.	Reduce the Agreement to Writing <i>before</i> the Mediation Session Concludes	193
B.	After the Parties Sign the Settlement Agreement	195
C.	If the Case Does Not Settle on the Day of the Mediation Session	195
D.	Conclusion	196
<b>SECTION IV PRACTICE TIPS FOR APPELLATE MEDIATORS . . . . .</b>		<b>197</b>
<b>Chapter 13</b>	<b>Premediation and Phase 1, Opening the Mediation . . . . .</b>	<b>199</b>
A.	Overview	199
B.	The Premediation Phase	200
1.	Conduct a Premediation Call as Soon as Possible after You Are Hired or Appointed	200
2.	Review Mediation Statements and Key Trial Court Documents	201
3.	Design the Mediation	204
4.	Secure Agreement on Mediator Fees	206
C.	Phase 1: Opening the Mediation	206
D.	Transitioning from Phase to Phase	213
<b>Chapter 14</b>	<b>Phase 2, Information Exchange, and Phase 3, Identifying and Organizing the Issues . . . . .</b>	<b>215</b>
A.	Introduction	215
B.	Facilitate the Exchange of Information	215
1.	Shift from Debate to Dialogue	215
2.	Employ Empathy by Listening for Understanding	217
3.	Work Effectively with Lawyers	224
4.	Encourage the Expression of Feelings and Manage Emotional Discussions Effectively	226
5.	Make Full and Best Use of Joint Sessions	227
6.	Questions for Phase 2	229
7.	Encourage the Participants to Remain in Joint Session as Long as They Are Learning	232
8.	Help the Parties Stay on Task	233
C.	Help the Parties Define and Organize the Issues	235
1.	Identify Issues to Be Resolved	236
2.	Create an Agenda	237

D. Use Private Caucuses Effectively	237
1. Manage the Transition to Separate Sessions	238
2. Avoid Premature Bargaining	238
E. Discourage Premature Commitment	240
F. Conclusion	241
<b>Chapter 15 Identifying and Finding Solutions in Phase 4, and Concluding the Mediation in Phase 5 . . . . .</b>	<b>243</b>
A. Introduction	243
B. Identifying and Finding Solutions in Phase 4	244
1. Facilitate Integrative Bargaining	244
2. Facilitate Distributive Bargaining	249
3. Narrow the Gap and Move beyond Impasse	257
4. Take a Break (Especially for Something to Eat)	259
5. Keep in Mind What Ultimately Makes a Mediation Successful	260
C. Phase 5, Concluding the Mediation	261
1. If the Parties Settle at the Mediation, Help Them Conclude with Care	261
2. If the Parties Do Not Reach Agreement, Continue to Assist Them after the Mediation Session Ends	268
<b>Chapter 16 Grow Your Professional Appellate Mediation Practice . . . . .</b>	<b>273</b>
A. Introduction	273
B. Cultivate Appellate Mediation Skills through Learning Opportunities and Reflective Practice	273
1. Seek Training and Ongoing Learning Opportunities	273
2. Create a Learning Community	274
3. Engage in Reflective Practice	276
4. Realize That Everyone Makes Mistakes	278
C. Develop Your Professional Appellate Mediation Practice	281
D. Conclusion	284
<b>SECTION V APPENDIX . . . . .</b>	<b>285</b>
A. Overview	285
B. Resources for Appellate Mediators	285
1. Sample Premediation Telephone Conference	285
2. Sample Confirming E-mail Following the Premediation Conference Call	296
3. Sample Confirming E-mail Following the Premediation Telephone Conference	296



4. Sample Mediation and Confidentiality Agreement	298
5. Overview of the Appellate Mediation Process	301
C. Resources for Appellate Attorneys	302
1. Sample Mediation Statement for the Appellant, Douglas	302
2. Sample Mediation Statement for the Respondent, Daven	307
3. Sample Settlement Agreement in Daven v. Douglas	310
D. Our Favorite 12 Books	315
E. Our Favorite 25 Articles	316
F. Our Favorite Internet Resources	320
<b>Index</b> .....	<b>321</b>