"Last Call for Settlement — Appellate Mediation"

Mary F. April | Monday, November 21, 2016

You've won your trial and popped the champagne, but the other side decides to appeal. Do you have to mediate again? And why would you mediate after you've won?

Perhaps the most significant reason for an appellant to mediate a case is that the standards of review are substantially different from the burden of proof at trial. Although a trial may depend on whether the fact finder is persuaded by a preponderance of the evidence, that same case on appeal may hinge on whether there was an abuse of discretion by the court or competent substantial evidence to support the factual findings made. These are difficult standards to overcome and can make the potential for reversing a case on appeal unlikely.

On the other hand, for the appellee, outcomes can still be unpredictable, and there are associated risks for both sides. For example, if an appellee is going to argue that any error was harmless error, they must now show there is no reasonable possibility that the error complained of contributed to the verdict. Early discussion with an appellate mediator may also bring dispositive procedural issues to the fore and avoid unnecessary briefing. Of course, one of the biggest reasons to reach an early resolution for both sides is the cost involved in an appeal.

In federal court, the U.S. Court of Appeals for the Eleventh Circuit has an in-house mediation program that is operated by the Kinnard Mediation Center. The KMC's mediators work full-time for the center, and there is no charge for mediation to the parties. Most civil appeals are eligible for the program, and they are assigned rotationally to the circuit mediators. Shortly after the civil appeal statement is filed, the mediator will send written notice of the mediation. At that point, the lines of communication are open to the mediator. Although most mediations are held in person in Atlanta or Miami, telephone mediations are also possible. Further, if all parties agree that mediation would not be productive, the mediation may be changed to an assessment conference by the mediator.

Most importantly, the mediator has the authority to adjust the briefing schedule to accommodate the mediation. This allows the parties time to determine whether a settlement would be in their best interests before they have to commit extensive resources to briefing and oral argument. Similar procedures are generally followed in other federal circuits, although each circuit has its own rules.

State Courts

Mediation has had a spotty history in the state appellate courts. As with the federal courts, the First and Fourth District Courts of Appeal instituted programs using staff mediators that saw some success, but these were discontinued in 2001 due to budgetary concerns. About the same time, however, the Fifth DCA launched a successful program that was later adopted permanently by administrative order.

The Fifth DCA's program relies on private mediators and mediation costs are borne by the parties, although a pro bono mediator may be appointed upon motion and

for good cause. All civil cases are first screened for mediation by one of three screening judges based on a mediation questionnaire. All deadlines are automatically extended upon receipt by the parties of the questionnaire from the court, and if the court orders the parties to mediation, all appellate deadlines are tolled until 10 days after mediation is completed.

The most significant question that appellant's counsel must answer on the Fifth DCA's mediation questionnaire is to describe the expected (but nonbinding) issues on appeal and the applicable standard of review for each one. According to a 2012 National Survey of Appellate Mediation, slightly less than 30 percent of all civil appeals in the Fifth DCA were selected for mediation, and the most success was in foreclosure and contract cases. The cost of administering the program was pegged at approximately $31,500, almost all of which was allocated to the cost of the one staff person necessary to administer the program.

In 2010, standardized mediation rules and procedures for most civil cases were added to the Florida Rules of Appellate Procedure, but there is no requirement that the DCAs implement any specific procedure. Mediation simply may be required by the court or upon motion of the parties, although a party may object to mediation. The rules contemplate the use of private mediators with the caveat that the mediator must be a certified appellate mediator. Unlike the program in the Fifth DCA, there is no requirement for screening, so any method for overcoming the inertia of the parties themselves moving for mediation is left to each individual DCA.

In sum, there are good reasons in many cases to require appellate mediation. The Fifth DCA has pointed the way to a cost-effective implementation. Perhaps something as simple as requiring counsel to discuss the potential for appellate mediation within 10 or 15 days after a notice of appeal is filed would be an inexpensive starting point to get the mediation ball rolling.

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