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# Florida Appellate Mediation: Promising New Rules and Ethical Challenges

ERIN E. BOHANNON\*

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## I. INTRODUCTION

Prior to July 1, 2010, Florida state courts lacked uniform provisions for appellate mediation. Depending on the jurisdiction, many litigants did not have the benefit of mediation at the appellate level. The newly adopted Florida Rules of Appellate Procedure and Florida Rules of Certified and Court-Appointed Mediators<sup>1</sup> mark a significant change in the disposition of state cases at the appellate level. Now, all state appellate cases may be referred to mediation by the court, or upon motion by a party.<sup>2</sup> The new rules give appellate litigants the needed opportunity to mediate as an alternative to the costly and time-consuming litigation of the appeal. However, the new rules also mean that parties may be forced, or may move to force their opponent to attend mediation. Thus, the state appellate rules may also bring attendant ethical challenges for mediators. The comparable federal mediation rules from the United States Court of Appeals for the Eleventh Circuit provide a launching point from which to assess the potential risks faced by appellate mediators. Specifically, the distinctions between the federal and state systems illuminate the nuances of the potential difficulties and ethical dilemmas involved in the application of Florida’s new appellate mediation rules.

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1. In Re Amendments to the Fla. Rules of Appellate Procedure & the Fla. Rules for Certified & Court-Appointed Mediators, 41 So. 3d 161 (Fla. 2010).

2. *Id.* at 162.

This paper will provide an analysis of Florida's new appellate mediation rules, what led to their implementation, and their utility. It will also address some ethical concerns that may arise in the application of these rules. Part II will set forth the background of appellate mediation in Florida. Part III will discuss the newly adopted amendments to the Florida Rules of Appellate Procedure and the Florida Rules of Certified and Court-Appointed Mediators. Part IV will provide an analysis of the new appellate mediation rules by comparing key aspects of the new rules with the mediation rules from the United States Court of Appeals for the Eleventh Circuit. The focus of this section is to highlight practical and ethical issues involved in the application of Florida's new appellate mediation rules. Part V will briefly conclude.

## II. THE BACKGROUND OF APPELLATE MEDIATION IN FLORIDA

Florida's state courts of appeal have long recognized the utility of appellate mediation. Several of Florida's District Courts of Appeal implemented appellate mediation programs in the past; however, a majority of the programs were eliminated due to budget concerns.<sup>3</sup> For example, the First and Fourth District Courts of Appeal had mediation programs, which increased the rate of settlement, but were ultimately eliminated due to the cost of maintaining the programs.<sup>4</sup> The Fifth District Court of Appeal implemented the most effective appellate mediation program, which began as a pilot program in 2001 and was adopted permanently in 2004 after demonstrated success.<sup>5</sup>

The Fourth District Court of Appeal implemented a settlement conference program, which utilized alternative dispute resolution techniques to encourage early settlement.<sup>6</sup> The Fourth District's early settlement program began as a state-funded controlled study in 1981 and then continued as a state-funded program through 1991.<sup>7</sup> The Fourth District implemented another state-funded appellate mediation program in 1998, but the program was discontinued in 2001, because the court did not

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3. See Petition of the Committee on Alternative Dispute Resolution Rules and Policy to Amend the Florida Rules of Appellate Procedure and the Rules for Certified and Court Appointed Mediators, Case No. SC09-118, at 4, available at [http://www.floridasupremecourt.org/decisions/probin/sc09-118\\_Petition.pdf](http://www.floridasupremecourt.org/decisions/probin/sc09-118_Petition.pdf).

4. *Id.* at 5-6.

5. *Id.* at 6; see generally *Mediation*, THE FIFTH DISTRICT COURT OF APPEAL, [www.5dca.org/Mediation/mediation.shtml](http://www.5dca.org/Mediation/mediation.shtml) (last visited Nov. 7, 2010).

6. *Id.* at 5. (The Fourth District's program utilized two staff mediators. The mediators screened appeals for suitability and all civil final appeals were eligible for mediation. If selected for mediation, participation was mandatory. The litigation and mediation were segregated from one another and the briefing schedule was unaffected by participation).

7. *Id.* at 5-6.

deem it to be a cost-effective means of disposing of cases.<sup>8</sup>

The First District's program ran from 1996 to 2001.<sup>9</sup> Like the Fourth District's program, it utilized staff mediators.<sup>10</sup> However, many of the First District's mediations took place via phone or teleconference because of the First District's state wide jurisdiction.<sup>11</sup>

The Fifth District's appellate mediation program is unique in that the cases are screened for mediation by one of two screening judges who are former certified mediators.<sup>12</sup> The screening is based on a mediation questionnaire, which is filled out in all eligible appeals (all final family and civil appeals where all parties are represented).<sup>13</sup> Mediation is mandatory once a case is selected.<sup>14</sup> Parties may choose a mediator or the court will select one from a list in the instance that the parties cannot agree.<sup>15</sup> According to the Fifth District's website, "[m]ore than 200 mediators have completed the training district wide and are eligible for selection as mediators. In almost all cases, the parties mutually agree on a mediator, so the court has had to randomly select a mediator less than ten times."<sup>16</sup> Mediators may also provide pro bono services for parties who are unable to pay.<sup>17</sup>

As these examples illustrate, Florida courts have long recognized the benefit of appellate mediation, but lacked a uniform system for referring appellate cases to mediation before the adoption of the new rules on July 1, 2010. These new rules thus mark a significant and promising change in the disposition of appellate cases in the state court system.

### III. FLORIDA'S NEW RULES REGARDING APPELLATE MEDIATION AND CERTIFICATION OF APPELLATE COURT MEDIATORS

#### A. *Florida Rule of Appellate Procedure 9.700*

Florida Rule of Appellate Procedure 9.700, states that "[t]he court, upon its own motion or upon motion of a party, may refer a case to mediation at any time."<sup>18</sup> If the motion is from a party, the motion must contain a certificate that the movant consulted with the opposing party and is authorized to state that the opposing party: has no objection,

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8. *Id.* The cost of the program was close to \$ 300,000 per year.

9. *Id.* at 6.

10. *Id.*

11. *Id.*

12. *Mediation, supra* note 5.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. FLA. R. APP. P. 9.700(b).

objects and cites the reason for doing so, or will object.<sup>19</sup> The first mediation conference is to take place within forty-five days of initial referral to the court, unless the parties agree to postpone the mediation until after briefs have been filed.<sup>20</sup> The mediation should take place within thirty days of the initial mediation conference.<sup>21</sup> Unless the parties have agreed to postpone mediation until after the filing of briefs, the time periods are tolled "for the period of time from the referral of a case to mediation until mediation ends."<sup>22</sup> A party may also move to dispense with mediation within ten days of discovering facts which are the grounds for the motion.<sup>23</sup>

Although the new appellate mediation rules are based on the rules governing mediation at the trial level,<sup>24</sup> there are some notable distinctions in the appellate rules. The Committee on Alternative Dispute Resolution Rules and Policy undoubtedly included these changes to accommodate the unique requirements of appellate mediation.

For example, the time frame for appellate mediation is more restrictive than the time frame for mediations in the trial courts.<sup>25</sup> As explained in The Committee on Alternative Dispute Resolution Rules and Policy's petition to amend the rules, the Committee decided on the truncated time periods based on "the potential savings to both the courts and parties through earlier resolution of appeals."<sup>26</sup> Specifically, "rule 9.700(c) provides the first mediation conference shall be commenced within 45 (rather than 60) days of the order of referral," whereas Fla. R. Civ. P. 1.700(a)(1) states that the first mediation conference "shall be completed within 30 (rather than 45) days following the initial conference."<sup>27</sup> The Committee also added the tolling provision of 9.700(d) to accommodate the strict time limits for appeals.<sup>28</sup>

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19. *Id.*

20. FLA. R. APP. P. 9.700(c).

21. *Id.*

22. *Id.* Rule 9.700(c) also states that "[t]he court, by administrative order, may provide for additional tolling of deadlines. A motion for mediation filed by a party within 30 days of the notice of appeal shall toll all deadlines under these rules until the motion is ruled upon by the court."

23. FLA. R. APP. P. 9.700(e).

24. *See generally* FLA. R. CIV. P. 1.700–1.730.

25. *Compare* FLA. R. APP. P. 9.700(c) ("The first mediation conference shall be commenced within 45 days of referral by the court, unless the parties agree to postpone mediation until after the period for filing briefs has expired. The mediation shall be completed within 30 days of the first mediation conference. These times may be modified by order of the court.") with FLA. R. CIV. P. 1.700(a)(1) ("Unless otherwise ordered by the court, the first mediation conference or arbitration hearing shall be held within 60 days of the order of referral.").

26. Petition of the Committee on Alternative Dispute Resolution Rules and Policy, *supra* note 3, at 9.

27. *Id.* at 9–10.

28. *Id.* at 10.

### B. *Florida Rules of Appellate Procedure 9.710–9.740*

The remaining rules provide the general restrictions and procedures for the appellate mediation process. For example, some matters involving criminal cases or sexually violent predators are not appropriate for referral to mediation by the court.<sup>29</sup> If a party fails to appear at the mediation conference without good cause, the court may impose sanctions.<sup>30</sup> Also, within ten days of referral to mediation by the court, the parties may stipulate their mediator of choice.<sup>31</sup> If the parties cannot agree within ten days of the order of referral, then the court will appoint a mediator.<sup>32</sup>

### C. *Changes to the Florida Rules for Certified and Court-Appointed Mediators*

The amended rules for Certified and Court Appointed Mediators include language that accounts for the newly added category of appellate mediation.<sup>33</sup> The rules also require that, in addition to being “a Florida Supreme Court certified circuit, family or dependency mediator,” appellate mediators must “successfully complete a Florida Supreme Court certified appellate mediation training program.”<sup>34</sup> In formulating this rule, the Committee on Alternative Dispute Resolution Rules and Policy again noted the differences between mediation at the trial and appellate level and accounted for the specialized area of appellate mediation by requiring “substantial training keyed to appellate matters.”<sup>35</sup>

The amended rules for Certified and Court Appointed Mediators also altered the disciplinary structure of the Mediator Qualifications

29. FLA. R. APP. P. 9.710 states:

Any case filed may be referred to mediation at the discretion of the court, but under no circumstances may the following categories of actions be referred:

- (a) Criminal and post-conviction cases.
- (b) Habeas corpus and extraordinary writs . . .
- (c) Civil or criminal contempt . . .
- (d) Involuntary civil commitments of sexually violent predators . . .
- (e) Collateral criminal cases . . .
- (f) Other matters as may be specified by administrative order . . .

30. FLA. R. APP. P. 9.720(b) (noting that sanctions include an award of mediator or attorney’s fees or other monetary sanctions, striking of briefs, elimination of oral argument, or dismissal or summary affirmance).

31. FLA. R. APP. P. 9.730(a).

32. FLA. R. APP. P. 9.730(b).

33. See *In Re Amendments to the Fla. Rules of Appellate Procedure & the Fla. Rules for Certified & Court-Appointed Mediators*, 41 So. 3d 161 (Fla. 2010)(appendix showing changes) (Rule 10.100(a) “For certification as a county court, family, circuit court, or dependency, *or* appellate mediator.”).

34. FLA. R. MED. 10.100(f).

35. Petition of the Committee on Alternative Dispute Resolution Rules and Policy, *supra* note 3, at 18–19.

Board. Specifically, to assist the board in handling grievances filed against appellate mediators, the board must now have at least one certified appellate mediator.<sup>36</sup> The amended rules also require that at least one member of the Ethics Advisory Committee be a certified appellate mediator.<sup>37</sup>

#### IV. APPLICATION AND ETHICS: AN ANALYSIS OF FLORIDA'S NEWLY ADOPTED APPELLATE MEDIATION RULES IN CONTRAST TO THE MEDIATION PROGRAM FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

The distinctions between Florida's new appellate mediation rules and the rules utilized by the Eleventh Circuit Court of Appeals highlight the potential difficulties and ethical dilemmas involved in the application of Florida's new appellate mediation rules. Florida's new appellate mediation rules have some key differences from the mediation rules used by the Eleventh Circuit Court of Appeals. First, the Florida rules allow the parties to select a private mediator,<sup>38</sup> while the Eleventh Circuit utilizes staff mediators.<sup>39</sup> Next, the Florida rules permit a party to move for referral of the case to mediation with the opportunity for objection by the non-moving party,<sup>40</sup> while the Eleventh Circuit allows for anonymous requests for referral to mediation.<sup>41</sup> The variance between these rules provides an opportunity to assess the potential benefits and drawbacks of different mediation procedures, which in turn may provide some insight into the application of Florida's new appellate mediation rules.

Florida's adoption of uniform appellate mediation procedures in its state appellate courts will undoubtedly provide a benefit to appellate courts and parties who may now dispose of appellate proceedings in a quicker and more cost-effective manner. Alternative dispute resolution has proven to be an effective means for parties to exercise greater control over the outcome of their disputes and to avoid costly and protracted litigation. But what are the practical and ethical benefits and drawbacks

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36. FLA. R. MED. 10.730 (b)(6); Petition of the Committee on Alternative Dispute Resolution Rules and Policy, *supra* note 3, at 19.

37. FLA. R. MED. 10.900(c).

38. The court may also appoint a mediator if the parties cannot agree. *See* FLA. R. APP. P. 9.730(b).

39. The Eleventh Circuit permits the parties to elect a private mediator if they follow court procedure. *See* 11th Cir. R. 33-1(g). Interestingly, the staff circuit mediators for the Eleventh Circuit Court of Appeals explained that parties do opt for private mediation, but do so infrequently. Interview with Beth Greenfield-Mandler and Joe N. Unger, Circuit Mediators, United States Court of Appeals, Eleventh Circuit, in Miami, Fla. (Nov. 1, 2010).

40. FLA. R. APP. P. 9.700(b).

41. 11th CIR. R. 33-1(c)(1).

of different appellate mediation procedures? This section attempts to address this issue via a comparison of Florida's new appellate mediation rules and those utilized by the Eleventh Circuit Court of Appeals.

One inquiry is whether private mediators are preferable to staff mediators at the appellate level. Florida's new rules for appellate mediation permit the parties to select a mediator, or have the court select a mediator for them in the event that they cannot agree.<sup>42</sup> In either instance, the rules require appellate mediators to complete the Florida Supreme Court certified appellate mediator training program.<sup>43</sup> This ensures that the mediators are equipped with the skills to handle the unique qualities of mediations at the appellate level. In contrast, the Eleventh Circuit Court of Appeals utilizes staff appellate mediators, but permits parties to select a private mediator by following specified court procedures.<sup>44</sup> Significantly, both rules recognize that appellate mediation is a specialized process that requires mediators with particularized knowledge and experience. Of particular interest, then is the difference between a mediator with appellate dispute resolution training and a staff appellate mediator.

The staff circuit mediators from the Eleventh Circuit Court of Appeals Miami branch both agreed that staff appellate mediators are preferable at the appellate level because "[s]taff mediators truly have no economic interest in the outcome of the case. Their loyalty is to reducing the caseload of the Court."<sup>45</sup> This is an excellent point and raises interesting questions about the benefits of staff versus private mediators. Specifically, what is the effect of having the mediator paid by the Court rather than the parties directly?

Certainly, a private mediator may financially benefit from several mediation sessions, whereas a staff mediator may be able to ignore such pecuniary motivators and focus on reducing the court's docket. On the other hand, a court-employed mediator with substantial experience in appellate mediations may be more persuasive to the parties and thus highly influential. A mediator is expected to be extraordinarily impartial,<sup>46</sup> and thus too much sway over the parties may in fact interfere with

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42. FLA. R. APP. P. 9.730(b).

43. FLA. R. MED. 10.100(f).

44. See *Kinnard Mediation Center Private Mediation Procedures for Mediation of Appeals*, THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT, <http://www.ca11.uscourts.gov/documents/pdfs/privmediator.pdf> (last visited Nov. 13, 2010); 11th CIR. R. 33-1(g) ("Upon agreement of all parties, a private mediator may be employed by the parties, at their expense, to mediate an appeal that has been selected for mediation by the Kinnard Mediation Center.").

45. Interview with Beth Greenfield-Mandler and Joe N. Unger, Circuit Mediators, United States Court of Appeals, Eleventh Circuit, in Miami, FL. (Nov. 1, 2010).

46. See FLA. R. MED. 10.330(a) ("A mediator shall maintain impartiality throughout the mediation process. Impartiality means freedom from favoritism or bias in word, action, or



the parties' self-determination over the resolution of the dispute. For example, very few cases are overturned on appeal and the standard of review is often abuse of discretion. An experienced staff mediator's disclosure of the rate of reversal and the standard of review has the potential to become coercive.<sup>47</sup> Alternatively, regardless of whether a mediator is a staff member of the court or not, the mediator's role remains the same, to facilitate voluntary agreements between the parties.<sup>48</sup>

Nevertheless, an obvious benefit of having staff appellate mediators is that these individuals possess extensive experience with mediation at the appellate level, which deals with a different set of objectives and standards than mediation at the trial level. For example, the Eleventh Circuit staff mediators explained that, at the appellate level:

The parties' commitment to their legal arguments is much more entrenched by the time the case gets to the appellate courts. In addition, many of the original issues in the case have been narrowed down to just a few that will be presented to the appellate court. This makes analysis of the legal basis for recovery much narrower, and accordingly, it's harder to persuade either side of their argument's weaknesses . . . To summarize, the parties are more entrenched, there are fewer issues to work with, and the chances of a case being reversed is much lower than the same chances going into trial. It's much tougher.<sup>49</sup>

Thus, having highly trained individuals who are familiar with the objectives of settling cases at the appellate level and the standards of review involved is extremely important in appellate mediation.

However, there is no reason to assume that mediators who receive appellate training at the state level would be any less equipped to handle the nuances of appellate mediation.<sup>50</sup> In fact, the Committee on Alternative Dispute Resolution Rules and Policy envisioned appellate mediator trainings as based on that of the Fifth District Court of Appeal, which

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appearance, and includes a commitment to assist all parties, as opposed to any one individual"); FLA. R. MED. 10.310(a) ("Decisions made during a mediation are to be made by the parties. A mediator shall not make substantive decisions for any party. A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination.").

47. See FLA. R. MED. 10.310(a) ("A mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination") and (b) ("A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation.").

48. FLA. R. MED. 10.220.

49. *Id.*

50. For example, the Fifth District Court of Appeals appellate mediation program, which permits the parties to select their own private mediator, is deemed a great success. See Petition of the Committee on Alternative Dispute Resolution Rules and Policy, *supra* note 3, at 6.

“provides not only a framework around which the Committee would structure a statewide appellate mediation training program, but invites, as well, reflective examination based on *substantial experience over a period of years*.”<sup>51</sup> Thus, the Committee recognized that mediators in this area would benefit from continued experience and provided for such.

Another key difference between the new Florida appellate mediation rules and the Eleventh Circuit’s mediation rules is that the new Florida Rules of Appellate Procedure contain a provision that permits a party to move to refer the case to mediation.<sup>52</sup> The other party may object to the referral of the case to mediation.<sup>53</sup> This process is a substantial deviation from the federal approach, which allows a party to request mediation without disclosing that the other party made the request.<sup>54</sup> Thus, under the Eleventh Circuit Rules, it always appears that the court has ordered mediation without regard to the preferences of any individual party.<sup>55</sup> This difference has important implications for the mediation process in state appellate courts because a party whose opponent has forced them to mediation may be less cooperative.

In state appellate courts, under the new rules, one party may force another into mediation.<sup>56</sup> In fact, if the non-moving party objects, then the parties may have to litigate the merits of their desire to mediate.<sup>57</sup> To the extent that mediation is a process premised on the need for the participants to cooperate in a non-adversarial matter,<sup>58</sup> the state rules may undermine these objectives. At the state level, if a party successfully moves for referral to mediation, then the opposing party may be forced to attend a mediation that it does not wish to participate in, knowing that the other party forced them to go. The party who resisted mediation may resent an order to attend and be uncooperative.

To contrast, at the federal level, because the court orders mediation

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51. Petition of the Committee on Alternative Dispute Resolution Rules and Policy, *supra* note 3, at 20 (emphasis added).

52. FLA. R. APP. P. 9.700(b) (“The court, upon its own motion or upon motion of a party, may refer a case to mediation at any time.”).

53. *Id.*

54. See 11th CIR. R. 33-1(c)(1) (“Counsel for any party may request mediation in an appeal in which a Civil Appeal Statement is required to be filed if he or she thinks it would be helpful. Such requests will not be disclosed by the Kinnard Mediation Center to opposing counsel without permission of the requesting party.”).

55. *Id.*

56. See FLA. R. APP. P. 9.700(b).

57. *Id.*

58. See FLA. R. MED. 10.210 (“Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and NON-ADVERSARIAL process intended to help disputing parties reach a mutually acceptable agreement.”)(emphasis added).

and a party's request for mediation is not disclosed without permission, the parties are separated from the decision.<sup>59</sup> They cannot seek to blame each other for the decision to mediate. It was thrust upon them.

However, one or both parties may be uncooperative or resistant to mediation in many cases.<sup>60</sup> In fact, the mediator's *role* is to reduce such obstacles to communication.<sup>61</sup> It is unclear whether the potential for disputes regarding referral to mediation will actually present problems in mediations conducted under Florida's new appellate mediation rules.

## V. CONCLUSION

Florida's new rules governing mediation in appellate cases provide a promising alternative to parties who may benefit from alternative dispute resolution in settling an appeal. Appellate mediation has proven success in Florida's District Courts of Appeal as well as in the Eleventh Circuit's federal courts. The potential for successful disposition of appellate cases now extends to all eligible state matters. However, as with all mediation, appellate mediation is fraught with ethical concerns regarding the mediator's impartiality and duty to allow the parties to determine the outcome of their dispute. In spite of these ethical dilemmas, which are ingrained in the mediation process, the future of appellate mediation in Florida looks bright.

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59. See 11th Cir. R. 33-1(c)(1).

60. Fla. R. Civ. P. 1.710 also permits a party to move for mediation at the trial level, and thus, the fact that one party may not want to attend mediation is not novel to appellate mediation. Further, the possibility of a party being uncooperative may be just as likely if the court orders the parties to mediation *sua sponte*.

61. See Fla. R. Med. 10.220 ("The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute.").