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## Let's Make a Deal...On Appeal

Appellate mediation is not frequently discussed. It lacks sizzle and pop, and it does not have the same sense of urgency that we find in ordinary trial court mediation. Appellate mediation feels like going to a distant friend's wedding in the morning. Why would you schedule that then? What is the chance this will be fun? How much orange juice do you want to drink?

Appellate mediation raises a number of threshold problems. Why do I have to go, asks the appellee, if I won? What kind of leverage do I have, asks the appellant, if the trial court or jury has already ruled in the appellee's favor? Those questions have answers. First, if the appellant is the party seeking to get paid, they have a long road ahead and may take a fractional sum to go away. Second, you have to evaluate the chance of reversal and the money saved by avoiding a remand back to the trial court. Third, a deal on appeal gives the appellee a guaranteed win, and the settlement discount is akin to a premium paid for an insurance policy. These are concepts most folks can understand. Trial courts make mistakes, and returning to a trial the court just reversed gives the other side momentum and some leverage with the trial judge going forward (unless they rotated in a new judge).

Precedent becomes a potential concern for some defendants. The case could affect other cases in the pipeline for either side, and so the attorney (with other cases) or the client may not like the risk of an adverse decision in this case—maybe other cases pending below have better facts or equities.

Brought to you by  
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Collection after appeal is a frequent source of discussion in appellate mediation. Here, we get into considerations of bankruptcy and insurance coverage, or the lack thereof. Conveyances, fraudulent or legitimate, may have occurred. Asset protection measures may be revealed in the mediation. A personal injury claimant/appellee may be desperate to get paid as they have wage loss and future medical needs. There are a host of reasons why people and businesses settle cases on appeal unrelated to the merits. A party may wish to sell the business rather than litigate. In a non-compete case, the restrictive period may be close to expiring, changing the non-economic considerations. Maybe one of the litigants no longer wants to fund the litigation.

Appellate mediation may also include an appellate lawyer separate from trial counsel who may change the interpersonal dynamics (which may be strained) or temper either side's expectations. While the settlement rate at appellate mediation is lower than in other mediations, the process will reveal interests and concerns that may provide a solution no one had considered or which was not available when the case was in the lower court. Outside of Florida's appellate courts, you will not find appellate mediation in too many places. And that's a shame, because giving the client another chance to resolve the case is never a bad thing.

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