

Appellate Neutrals: An Invaluable Resource to Counsel

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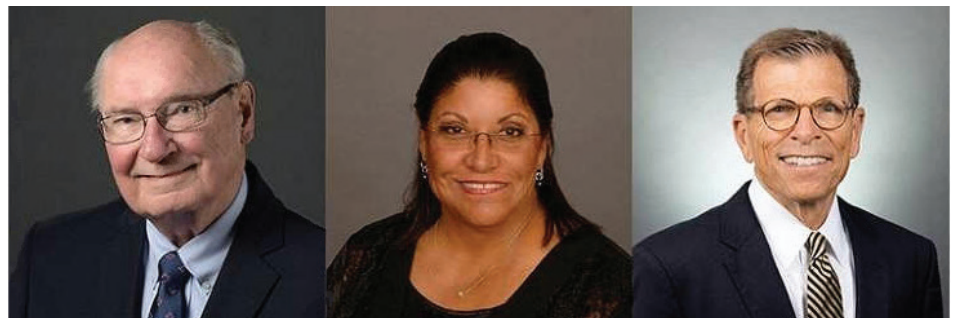
A conversation with three distinguished JAMS neutrals

When preparing to come before a court, whether a district court or the court of appeals, attorneys are constantly looking to gain every advantage in persuading judges or justices to rule in their favor. This means crafting briefs and formulating oral arguments that are persuasive, factual and effective. In the appeals process in particular, understanding the nuances of the court, and the way justices view these cases and their role in deciding them, is absolutely crucial to a successful appeal. Neutrals with appellate expertise can be an invaluable resource for attorneys preparing for virtually any kind of case. Their broad experience across a wide range of cases gives them unparalleled expertise.

To gain greater insight into the role neutrals play in helping counsel, we spoke with three distinguished retired California appellate court justices who now serve as top mediators for JAMS: Hon. Richard M. Aronson (Ret.), Hon. Candace Cooper (Ret.) and Hon. Raymond J. Ikola (Ret.).

Given the unique nature of the appellate process, how can neutrals assist counsel during the different phases of an appeal?

Justice Ikola: Because each case



Hon. Raymond
J. Ikola (Ret.).

Hon. Candace Cooper
(Ret.)

Hon. Richard M.
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comes to the appellate court with a presumption that the lower court's decision is correct, the appellant has a steep hill to climb in order to affirmatively demonstrate that it is not correct. Having a neutral with extensive appellate experience can be extremely useful in helping counsel to better understand the three standards of review at the appellate level. These are a review for substantial evidence, a de novo review for certain legal errors and a review for abuse of discretion. A neutral can provide assistance regarding which standard should be applied and how to overcome the presumption of correctness.

Justice Aronson: I concur with Justice Ikola. And I would add that there are tactical choices that lawyers can make to enhance the chances of winning on appeal. There are ways to present arguments that increase their chances for success,

and neutrals can offer suggestions on how to refine and improve those arguments.

Justice Cooper: Appellate neutrals are uniquely qualified to assist counsel. They tend to be high-performing, elite judges and, in some cases, lawyers, who have the ability to evaluate oral arguments at a very high level. This can be useful in a number of specific ways. One, a neutral can provide input into which points are the most cogent and the most persuasive. Two, because it can be emotionally difficult to rank your arguments, a neutral can offer objectivity. And lastly, style-wise, a neutral can help counsel make a better presentation, which is absolutely vital.

What types of cases would benefit most from neutral analysis?

Justice Cooper: I believe most cases would benefit from neutral evaluation, but those with the

highest stakes are probably the best candidates; for instance, cases in which the court is being asked to interpret the law in a different or new way. This might be a legal issue that has not really been decided by prior appellate authority. It's actually surprising how often issues come up before the court where there hasn't been a prior decision that is right on point. These are the ones best suited for neutral analysis, because the result truly matters.

How important is a neutral's appellate experience in helping counsel prepare for an upcoming appeal?

Justice Aronson: Based on our experience having served on appellate courts for many years, oftentimes decades, we can identify the strongest arguments and can help lawyers present them in the strongest way. Appellate neutrals understand how to present oral arguments in a manner that will be attractive to the court. The breadth of our experience allows us to provide invaluable input on briefs as well, helping counsel to focus on which arguments to emphasize and which to minimize or drop all together.

Justice Ikola: Sitting on a court of appeal is what I would call a generalist practice. In California, because all litigants have the right to at least one appeal, the courts hear all manner of cases, including felony matters on the criminal side, unlimited civil cases on the civil side, family law cases, probate cases, conservatorship cases, mental health cases and juvenile dependency and delinquency cases. As a result, appellate neutrals have been exposed to a

wide variety of disputes. As such, we have developed an ability to quickly absorb both the law and the facts. The depth of experience we bring, having sat on an appellate court, can be tremendously beneficial to counsel.

How does an appellate neutral prepare for an evaluation?

Justice Cooper: When I approach a neutral evaluation, I start by learning the case extremely well. I read the briefs thoroughly and the underlying cases very thoroughly. Neutrals bring a great deal of focus to an evaluation. And because many times mock arguments are presented, I come prepared to pepper counsel with questions and challenge their assumptions and arguments, much like what would occur in a courtroom. My role is to provide as much feedback as I can, and that starts with a lot of preparation.

What advice would you offer lawyers who are preparing an appeal?

Justice Aronson: Even an experienced appellate attorney will benefit from having an appellate neutral's analysis. It is often difficult to anticipate how the appellate court will react to certain arguments or to decide which arguments stand the best chance of succeeding. This is when appellate neutrals can help counsel. The former appellate justices now at JAMS have heard hundreds, if not thousands, of oral arguments and have reviewed a greater number of briefs because the oral argument is often waived. Simply put, these neutrals can help counsel identify the arguments offering the

best chance to succeed and advise counsel how to structure those arguments to maximize their effectiveness.

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