

# BAR BULLETIN

KING COUNTY BAR

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## *Getting Some Help:*

# Neutral Case Analysis, Before and After Trial

### **By Judge Anne Ellington (Ret.)**

Why does a good lawyer need another pair of eyes? When we are immersed in a case, we tend to have blinders on. Committed to our client's cause, we are influenced by their hopes and expectations. We tend to convince ourselves of the strength of our arguments and underestimate the merits of the other side's case. As good lawyers know, overconfidence is common (and not just on the part of our opponents).

We routinely seek consultation in drafting important documents. Why not do the same when preparing for trial or arbitration?

### **How does it work?**

An experienced, objective and disinterested former judge or attorney works directly with trial counsel to provide a candid, confidential and objective assessment of a case or any part of the case. The evaluator can provide an objective view of facts and arguments, the monetary value of your case and feedback/suggestions regarding effective presentations.

This can occur at any stage — before filing, before summary judgment, before trial or arbitration, before and upon appeal — whenever an outside view can be useful. The evaluation may consider such factors as process, law, decision makers, substance or evidence issues, and potential outcomes.

One of the great values of neutral analysis is to help manage client expectations. An evaluation can be short and sweet, or it can take place sporadically through the life of the case. The evaluator works directly for you to provide a candid and confidential assessment.

### **When is the best time to do it?**

A neutral analysis can be useful at any point in a case, depending on your purpose. Used early, it can help you and your client decide whether to proceed, balancing the expense of litigation with the likelihood of success. The evaluator can help pinpoint the unknowns and their importance, identifying the potential legal theories and the necessary elements of each, assessing the risks, prioritizing discovery and more. Or the neutral can offer a private assessment of the claims brought against your client and how to respond to them.

Once the game is on, an evaluator can help analyze issues, frame a summary judgment argument or evaluate the timing of mediation. Are there any holes in your case that you need to close before the discovery deadline? What are your strongest arguments, and how do you make them? What about experts? What about your opponent's strongest arguments? Which arguments are just distractions? Do you move for summary judgment? For discovery or for real? What are the likely settlement options? What are the key jury instructions? Where do you need to be careful about preservation of error? You can decide what you need and control the relationship accordingly.

### **What about after the case is tried?**

For most of us, an appeal is a solitary exercise, fraught but private. We pore over the record, identify and fine tune our arguments and cobble together a brief, usually in the relative solitude of our own offices. We wonder whether our sense of proportion or perspective is accurate. We lose ourselves in our client's cause and hope for the best.

This is not the only way to do things. Many of the finest appellate attorneys in Washington routinely seek consultation with retired judges or senior appellate advocates to help build the most persuasive cases. A neutral person familiar with appellate procedures, rules and tribunals, and conversant with issues of preservation of error and standards of review (and what makes a persuasive brief and oral argument), can provide perspective on and concrete help with questions big and small. This may take the form of consultation on issues, briefing or argument. As with pretrial consultation, counsel retains complete control of the scope of the relationship.

Many appellate lawyers arrange moot arguments with retired judges, fine tuning the presentations they will make to the appellate panels. This provides counsel with a good idea of what the judges are likely to focus on in argument and what questions may be asked.

Mediation is now routine (and often required) in federal appellate courts, but it is still infrequently used in state courts. Cases can be settled on appeal. Appellate mediation can be very effective when each side has something to lose, there is no clear path to a particular result or the parties can't endure the expense and delay. Again, cases can be settled on appeal.

In the state courts in Washington, there is no formal mechanism for taking a case off the perfection track to explore settlement. But if the parties are serious about settling, the court can stay proceedings or delay the perfection deadlines while the parties pursue negotiations.

Getting help from a neutral mediator during these discussions is no different

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from doing so in any other mediation. A person who has no stake in the outcome, has relevant experience and is conversant with the procedures and tribunals can help the parties find that elusive middle ground.

Sometimes the wisdom of negotiation is not apparent until the case has been fully briefed. There is still time to attempt settlement before oral argument. If the case has been argued, however, the court must consent to a stipulated settlement.<sup>1</sup>

### **What about the expense?**

The cost depends upon the assignment: Two or three hours to evaluate specific issues and discuss strategies

with counsel will cost relatively little. A moot hearing with two or more judges (who have closely read the briefs) and chief authorities will require a larger investment. Having consultations at several stages may cost much more. The stakes must justify the expense. When they do, the effort is usually worthwhile.

The point is that you have complete control: first, because the letter of agreement will specify the time allotted and the tasks to be undertaken, and second, because you determine what tasks and materials will be included in the evaluation. The process can take the form most useful to you whenever you and your case can benefit from a second set of (experienced) eyes.

In short, an evaluator provides experience, confidentiality, candor and neutrality. ■

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*Judge Anne L. Ellington (Ret.)* previously served on the Washington State Court of Appeals (Division One) from May 1995 until November 2012, after almost 11 years on the King County Superior Court bench. She is now a neutral at JAMS. Judge Ellington can be reached at [aellington@jamsadr.com](mailto:aellington@jamsadr.com).

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<sup>1</sup> See the Washington State Court Rules of Appellate Procedure, Rule 18.2. Consent is usually forthcoming, but a best practice is to settle before argument. You don't want to learn that the court has decided to make new law against your position! A valuable reference is Ishikawa and Curtis, *Appellate Mediation, A Guidebook for Attorneys and Mediators* (2016).