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# Leveraging the Experience of Retired Appellate Justices: The Increasingly Important Role Neutrals Are Playing in Support of Counsel

## *Three distinguished JAMS neutrals share their insights*

***Featuring:***
***Hon. Ignazio J. Ruvolo (Ret.)***
***Hon. Sheila Prell Sonenshine (Ret.)***
***Hon. David A. Thompson (Ret.)***

Attorneys are always looking to build the strongest case possible for their clients, whether it's preparing for trial, presenting a case or working on an appeal. For many attorneys, neutrals play an important role in helping them evaluate their trial strategy, refine their briefs and arguments, and gain invaluable, objective input on their case.

Taking advantage of the expertise of a neutral, particularly one with appellate experience, can be especially useful when dealing with the nuances of the court of appeals. Tapping into the vast knowledge of a retired justice can offer attorneys insights into the way justices view cases and how they decide them.

To better understand how neutrals can help counsel, both in district and appellate court matters, we sat down with three distinguished retired California appellate court justices who now serve as neutrals for JAMS: Hon. Ignazio J. Ruvolo (Ret.), Hon. Sheila Prell Sonenshine (Ret.) and Hon. David A. Thompson (Ret.).

**Q. What role can neutrals, particularly those with appellate experience, play in assisting counsel during the different phases of the appeal process?**

**Justice Thompson:** Neutrals with appellate experience can assist counsel in preparing briefs by spotting issues, structuring arguments, evaluating strengths and weaknesses, and even with substantive editing—all to maximize the likelihood of success. Most appeals are decided on the briefs, which is why this feedback can be invaluable. Appellate neutrals can also help counsel to prepare for oral argument by fine-tuning arguments, anticipating questions and formulating answers.

**Justice Ruvolo**: I concur with Justice Thompson. Neutrals can add a lot of value with mock arguments, enabling counsel to more effectively respond to issues that have been, or will be, raised by the other side. Because these cases tend to be complex, high-stakes cases with a lot riding on the outcome, using a neutral is well worth the cost.

**Justice Sonenshine:** Depending on the complexity and the dollars involved, counsel should consider retaining an appellate neutral at the very beginning of the case—even before any trial court filings. An appellate neutral can help counsel evaluate whether they should proceed with the underlying action. Too often, counsel expend hundreds of thousands, if not millions of litigation dollars, when the chances of trial court or appellate success are slim or the net reward does not justify the effort.

Keep in mind that the court of appeal decides cases based on what happened before the appeal. Retaining appellate neutrals at the commencement of the litigation can help counsel identify and develop issues and strategies, review important trial court pleadings and in general ensure an appropriate trial court record.

Appellate neutrals can also serve as a sounding board for counsel and clients in determining whether to pursue an appeal. As impartial and knowledgeable voices, neutrals bring a certain gravitas, enabling lawyers and client to accept their chances for success.

**Q. In your experience, which cases make the most sense for appellate settlement?**

**Justice Sonenshine:** The short answer is that mediation is appropriate for all appellate cases. I base this conclusion on the 4th District, Division 3 Settlement Conference Program, which I initiated and chaired. We settled 40% of our civil cases. Neither the size of the case, nor its subject matter, nor whether it was an appeal from a pre-trial matter or a jury or court trial, caused any statistical difference in the success rate. The determining factor was the judicial officer conducting the mediation.

What did we learn? The same factors that motivate a pre-appeal settlement, also induce parties to settle on appeal. Litigants appreciate the confidentiality a settlement affords. They also like being able to control the outcome and create their own solutions, including accounting for tax and other considerations which they can't do in a court setting. The most important thing is that parties are able to put an end to financially and emotionally costly litigation.

Actually, and contrary to popular belief, our appellate settlement program showed that it may be even easier to settle at the appellate level than during earlier stages of the litigation process. Facts are not in dispute and everyone knows how the evidence is going to unfold. Counsel is able to look at the litigation as a whole and consider other unfiled matters. Even pretrial appeals, like summary judgment, are ripe for settlement because the appellate neutral can not only opine on the chances for victory, but also explore the litigation's outcome if the summary judgment is reversed.

Moreover, because of standards of review like harmless error, substantial error, and abuse of discretion, we found many lawyers were often surprised to learn the affirmance

rate is over 90%. And sometimes a "win" isn't a victory, but merely a chance for a remand or second trial, this time with a better educated judge and adverse counsel, as well as the possibility of another trial, followed by yet another appeal!

**Justice Thompson:** I have found that the cases with a fairly clear-cut outcome from trial court are less likely to settle in appeal because the result was patently obvious and the winning side is unlikely to feel an incentive to settle. On the other hand, parties to larger cases with complicated issues, or ones that are cutting-edge, with no direct precedent, are more likely to consider ADR. In such cases, both parties face a real risk of losing and, as a result, may be more amenable to settlement. It's important to keep in mind that an appeal is a long and costly process.

**Justice Ruvolo:** To expand on my colleague's last point, if the parties are cost-sensitive, then having to engage in the expense of getting the trial court record and paying to have the lawyers prepare briefs, may be enough to make early settlement attractive.

**Q. Based on your many years on the bench, what advice can you offer appellate lawyers as they approach the appellate process?**

**Justice Thompson:** Whole books have been written on this subject, but I can offer a few basic tips. When it comes to writing briefs, be familiar with and follow the California Rules of Court, Title 8. Failure to follow them can forfeit an issue and, if nothing else, leave a negative impression. Always include a brief introduction to set the stage and get the court's attention. Understand and apply the standards of review. Be true to the record, which means including all material facts, favorable or not. In terms of analysis, put your best argument first, and eliminate weaker arguments that detract. Overall, be intellectually honest. Deal with and distinguish unfavorable issues and law. With regard to oral arguments, focus on the heart of the matter, call attention to the critical facts and be prepared to have a conversation with the panel. Be prepared for justices to interrupt your prepared remarks. And don't treat questions as interruptions. Directly answer the justice's questions. Avoid sarcastic comments or personal attacks on opponents. And avoid repetition.

**Justice Ruvolo:** For those attorneys who don't specialize in appellate practice, the tone of briefs or oral arguments can sometimes be a little too rough. Justices and research attorneys do not respond well to histrionics or vituperative language or snide comments that are more common in trial courts in front of juries. The tone of briefs and arguments is an important consideration. It's also important that counsel on both sides have a realistic sense of the chance of reversal. Counsel also need to take into consideration whether the loss on appeal may have an effect on other potential parties. Will it lead to more litigation by others? Is the case likely to be in a published decision or unpublished decision? If it's in a published decision, it's going to have a precedential value that other courts are going to follow. So it's really setting the parameters as to that legal issue involving those parties. These are some of the things that lawyers should keep in mind.

**Justice Sonenshine:** Just to reiterate a point I made earlier: Appeals start with the first client interview. Counsel must properly prepare the case for trial and preserve the trial record if they expect to maintain a trial court victory or reverse the lower court's decision.

**Hon. Ignazio J. Ruvolo (Ret.)** is a mediator, arbitrator, referee/special master, neutral evaluator and hearing officer at JAMS. He was presiding justice of the California 1st District Court of Appeal, Division Four from 2006 until his retirement in 2018. He was appointed as an associate justice in Division Two in 1996. Prior to that, he served on the Contra Costa Superior Court. He can be reached at iruvolo@jamsadr.com.

**Hon. Sheila Prell Sonenshine (Ret.)** has 50 years of legal and business experience, including 13 years as a mediator, arbitrator, referee/special master, and judge pro tem at JAMS. She has been recognized by The American Bar Association, State Bar of California, Orange County Bar Association, Orange County Bar Association Appellate Law Section and the Academy of Matrimonial Lawyers for her accomplishments. She can be reached at ssonenshine@jamsadr.com.

**Hon. David A. Thompson (Ret.)** serves as an arbitrator, mediator, special master/referee and neutral evaluator at JAMS. He joined JAMS after a distinguished 24-year career on the bench. As a justice of the California Court of Appeal for nine years, he authored hundreds of opinions covering civil and commercial litigation. Previously, Justice Thompson served 15 years as a trial judge in the Orange County Superior Court. He can be reached at dthompson@jamsadr.com.