

## THE ROLE AND NEED FOR SETTLEMENT JUDGES IN APPELLATE CASES

BY HARRIET E. CUMMINGS, ESQ.



The court's settlement program is an Alternative Dispute Resolution (ADR) program, geared specifically toward cases that have reached the appellate level.<sup>4</sup> The ADR method used by the program is mediation in which an impartial third party (the settlement judge) assists the parties in reaching a mutually acceptable solution to their dispute. In this sense, settlement program judges aren't traditional judges, because they do not decide the outcome of the matter on appeal. Rather, they assist the parties in communicating their positions and interests to each other, in order to promote understanding, reconciliation and a mutually acceptable solution to their dispute. Mediation provides the parties an opportunity to resolve their case themselves, guided by the settlement judge's expertise in the mediation process.

Settlement judges are appointed by the Supreme Court based on an evaluation of the applicant's education, training and experience. They are required to have a high degree of training and experience in mediation skills. Most settlement judges also have significant legal experience practicing law in Nevada, including specialized experience in appellate work, which requires in-depth knowledge of appellate practice and procedure and familiarity with how both the Supreme Court and the Court of Appeals operate.

According to Parraguirre, "the program has been very successful since its inception in 1997." Although initially there was some skepticism about whether settlement could be attained after a case had reached the appellate level, Parraguirre notes that, "on average, more than half of the cases in the program settle. Over 4,700 cases have settled since the program began.

The Nevada Supreme Court is in need of additional judges for its Civil Settlement Program. According to the Honorable Ron Parraguirre, Chief Justice of the Nevada Supreme Court, "We especially need settlement judges who are qualified to take family law cases." To qualify, an applicant must have demonstrated experience in appellate law and mediation, and have completed a mediation training course of at least 40 hours. Active membership in the state bar, with significant legal experience in the state of Nevada, is strongly preferred. Specialized training and experience are required to be assigned family law cases.<sup>1</sup>

Once appointed, prior to being assigned any cases, a settlement judge must observe or conduct two co-mediations, on a pro bono basis, with an experienced settlement judge. Thereafter, each year the settlement judge must average at least four cases and complete an average of four hours of CLE in mediation, including one hour in ethics, for the duration of his or her term (appointments are for two-year or three-year terms). Settlement judges are also expected to abide by the Code of Conduct for Supreme Court Settlement Judges.<sup>2</sup> Their duties of confidentiality and avoidance of conflicts of interest persist even after termination of the settlement proceedings.<sup>3</sup>

In fact, Nevada's program has been so successful that it has been a model for appellate settlement programs in other jurisdictions."

Settlement Judge Lansford Levitt of Reno, who has mediated hundreds of cases for the program, observes that, "there are many, many advantages to the Nevada Supreme Court Settlement Program." These advantages include:

- **Cost Savings**

Because the mediation is held at the beginning of the appellate process, and because briefing and preparation of transcripts are stayed, parties can avoid significant costs by participating in the settlement program.

- **Time Savings**

Pursuing mediation may lead to resolution of a case in just a matter of days, whereas a fully briefed and argued appeal may take many months to resolve.

- **Party-Powered Process**

Parties to a mediation have the opportunity to work toward a mutually agreeable solution to their dispute, leading to an outcome that everyone can accept. Resolving the dispute themselves is often seen as less stressful than facing the uncertainty of litigation and having a court-imposed decision thrust upon the parties.

- **Multiple Case Savings**

During the process of mediation, the parties may resolve all outstanding issues between them, including other related litigation. They are not limited to resolving just the specific legal issues presented in a particular case on appeal.

- **Creative Opportunity**

Because the parties are not limited to resolving only the specific legal issues presented in the case on appeal, they are free to pursue creative solutions to a wide range of problems or

issues that may exist between them. Thus, the parties may reach an outcome that is more satisfactory and comprehensive than that which could be obtained on appeal.

- **Risk Avoidance**

Mediation can provide more certainty regarding the outcome of an appeal. An appeal contains an element of risk for both parties. The appellant is faced with the fact that the standard of review typically requires deference

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- Graduated from UNLV Boyd School of Law
- Masters in Social Work

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- Graduated from UNLV Boyd School of Law
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and a showing that the district court abused its discretion before a judgment can be overturned. For this reason, the majority of cases are affirmed on appeal. Conversely, even though the respondent may have won in the district court, there is the risk that the case could be reversed on appeal, in whole or in part, and remanded for additional proceedings, including a new trial. Also, a judgment may not be worth face value if it has not yet been collected. For example, a debtor may file for bankruptcy, or there may be a significant delay in collecting a judgment. These inherent risks for both sides can be avoided through successful mediation.

## • Effectiveness

Many seemingly intractable disputes have been successfully resolved through the mediation process. Additionally, a mediated settlement provides higher satisfaction for all parties, because mediation allows the parties to consider creative and mutually beneficial outcomes. Such outcomes may not be possible for an appellate court to consider in rendering a decision, because the court is limited to considering only facts that are contained in the record on appeal; is bound by the applicable standard of review; and, as a general rule, may consider only legal issues properly presented for appellate review.

The many benefits of the Supreme Court Settlement Program can be

highlighted in a recent example. In this mediation, Settlement Judge Levitt brought the parties together at an early stage of the litigation process. Because the parties were pursuing a global settlement, this permitted them to avoid significant time and expense related not just to the specific issues on appeal, but also in several cases pending at the trial level. Even though, at times, it seemed resolution was impossible, because of Levitt's skills as a mediator, he was able to keep the parties open to the possibility of settlement.

Reasons settlement judges give for participating in the program vary, from being able to give back to the community, to expanding their expertise, to increasing career satisfaction. Settlement Judge Kathy England of Las Vegas is enthusiastic about the program. She says that having been a Supreme Court settlement judge for the past 19 years, "is one of the most rewarding aspects of my law practice. It is gratifying to step out of my usual role

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of advocate, to act as a quasi-judicial mediator — helping parties revisit their interests and positions in the litigation where one side has lost (and appealed) and one side has won. I enjoy the challenge of helping parties and their counsel see the benefit of creating a resolution to their dispute, and agree to a settlement, and thereby avoid the time and expense of the appellate process and further litigation. I like to think it's a win-win for all involved: for the parties and for the courts."

There are numerous resources available for prospective settlement judges seeking the necessary training. Here in Nevada, for example, the National Judicial College in Reno offers a week-long mediation course, as does the Saltman Center for Conflict Resolution at the UNLV William S. Boyd School of Law in Las Vegas. Outside of Nevada, numerous universities such

as Pepperdine and Harvard are known for their mediation training programs. In addition, organizations such as the American Bar Association and Association of Attorney-Mediators list a number of mediation training resources on their websites. The Nevada Supreme Court also provides periodic training courses for already-appointed settlement judges, enabling them to stay current on program requirements.

**More information about the Supreme Court Settlement Program can be obtained online at [http://nvcourts.gov/Settlement\\_Program/Overview/](http://nvcourts.gov/Settlement_Program/Overview/), by emailing [settlement@nvcourts.nv.gov](mailto:settlement@nvcourts.nv.gov) or by phoning Settlement Program Administrative Coordinator Shaunna Troop at (775) 684-1600. **NL****

1. The requirements for becoming a Supreme Court Settlement Judge were established in 2006. See *In the Matter of the Adoption of Rule 16 of the Nevada Rules of Appellate Procedure Governing Settlement Conferences in Civil Appeals*, ADKT 244 (Order Re: Supreme Court Settlement Judge Qualifications and Requirements, July 7, 2006).
2. See *id.*
3. *Ryan's Express Transp. Servs. v. Amador Stage Lines*, 128 Nev. \_\_\_, \_\_\_, 279 P.3d 166, 172 (2012).
4. Rules governing how the settlement program works may be found at Nev. R. App. P. 16 (as amended effective January 20, 2015).

**HARRIET E. CUMMINGS** has been a Nevada lawyer for 25 years. She is a certified public manager employed as Chief Assistant Clerk of Court by the Nevada Supreme Court, where she also serves as administrative counsel and legal advisor to the settlement program. Previously she worked as a criminal defense attorney, a legal services lawyer and an instructor at McGeorge School of Law. Her degrees are from The Johns Hopkins University and UC Davis School of Law. She would like to thank the program's administrative coordinator, Shaunna Troop, and former administrator Tom Harris for their assistance.