

Local Government Law

The newsletter of the Illinois State Bar Association's Section on Local Government Law

Keys to Increasing Your Prospects for Success in Mediation: Insights from Chief Circuit Mediator for the U.S. Court of Appeals for the Seventh Circuit

BY EDWARD CASMERE

As a mediator at the U. S. Court of Appeals for the Seventh Circuit for the last 28 years, Joel Shapiro knows how to successfully mediate disputes. He and his colleagues in the Circuit Mediation Office conduct confidential mediations in fully

counseled civil appeals in accordance with Federal Rule of Appellate Procedure 33 and Circuit Rule 33. They handle over 400 mediations every year with a success rate of around 40 percent. That

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Justice Rita Garman, the Longest Tenured Sitting Judge, Is Retiring: A Look at Her Career and Legacy

BY HON. ALFRED SWANSON (RET.)

After 48 years, six months as a judge, Supreme Court Justice Rita Garman is retiring effective July 7, 2022. That is the second longest continuous tenure of a judge in Illinois court history. Her career includes service at every level of the Illinois courts, from associate judge to chief justice

of the Illinois Supreme Court.

When she graduated from the University of Iowa Law School in 1968, Justice Garman didn't expect to be a judge. Her goal was to find a job as an attorney, which was not an easy task for a woman

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is quite an impressive statistic given how the underlying district court proceedings resolve so many cases by ruling, disposition, or settlement. As a result, cases typically come to the Seventh Circuit mediators with a history that includes clearly drawn lines and vexing issues which often polarize parties and cement positions increasing the degree of difficulty of the mediation.

Through a series of interviews in early 2022 Mr. Shapiro graciously shared some of the insights he has gained mediating cases over the past three decades. What follows are some distilled down highlights from those conversations with Chief Circuit Mediator Shapiro:

What are the benefits of mediation?

Mediations are a great way for parties to maintain control over the outcome of litigation through a guided resolution process with an independent third party who can bring perspective to, and provide a sounding board for, litigants. Mediators can accomplish that without the burden or stigma of declaring “winners” or “losers.” Being a different species from judicial settlement conferences, mediations have an ability to delve deeper into the needs and interests of participants with less pressure to try to broker a quick deal. Mediations are, therefore, a bit enigmatic with an arguably more ambitious objective than a judicial settlement conference, but with less leverage because mediators do not carry the power of being an ultimate decision-maker.

Besides the sympathetic ear of their counsel, mediators are often the first (and sometimes only) independent person connected with the litigation process that will listen directly to a client’s side of the story. That can provide a form of catharsis – sometimes people just need to get something off their chest, to say things out loud to someone who will listen and not judge. As such, mediations provide a forum for clients to obtain acknowledgement (and sometimes “tough love”) from an independent source – someone who can

let both lawyer and a client feel heard while also providing an unbiased reality check.

Mediations also provide an opportunity to bring together all the main faculties of lawyering: counseling, advocacy, negotiation, documenting, and oversight. Lawyers can get creative in solving problems for clients and help limit or mitigate risk and uncertainty. According to Mr. Shapiro, “lawsuits are really coins thrown into wishing wells, and lawyers are the plumbers that try to turn those wishes into some kind of reality,” with mediation serving as a critical tool in the lawyer’s ability to do that.

What are some mediation insights learned over the years?

Technique is secondary to mindset.

Having the parties and their counsel engage in the mediation process with the right mindset – one open to understanding the other side’s point of view, open to compromise, and realizing that everyone cannot get everything they want – is more important to increasing the chances of a successful mediation than any strategy or technique. “Too often,” Mr. Shapiro observes, “parties attach a symbolic significance that the mediation cannot bear.” Mediations are not designed to give any party total victory, domination, or oppressive punishment. If that is a party’s mediation goal, they will be disappointed.

Try to listen more than you talk. The key to compromise is focusing not on a party’s own interests, but considering the other side’s needs as well. Parties must listen to each other to understand what they really want, and really need. Addressing your counterpart’s needs is often necessary to be able to meet yours. “It is surprising,” Mr. Shapiro notes, “how often people are wrong about what their counterpart actually wants or will agree to.” Listen and observe to understand, not just to figure out your counterargument.

There is no optimal tactic, move, or game theory. Each mediation is unique, and life is a lot messier than academics.

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This is the newsletter of the ISBA’s Section on Local Government Law. Section newsletters are free to section members and published at least four times per year. Section membership dues are \$30 per year.

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Parties need to adjust expectations, embrace uncertainty, and get comfortable with feeling their way to a resolution in unanticipated ways. These journeys often mysteriously deliver solutions and accommodations that were never anticipated. “Mediation is not like a juicing machine, where you put a bunch of material in one end and a settlement instantly comes out the other,” says Mr. Shapiro. The mediation process evolves over time and makes use of all the inputs. Take each step as it comes. Do not worry about being perfect. There are very few mistakes in a mediation that cannot be fixed.

Take as little as possible for granted.

This frees you up to respond to what is *actually* happening, as opposed to what you *thought* would happen.

Success does not happen by chance.

Mediation is a collaboration. Everyone must be prepared to do their part to have a successful outcome, however that is defined (resolution or some other positive outcome).

How can counsel best use mediation to benefit their clients?

On this score, Mr. Shapiro said he could not improve on the advice he put forward many years ago, which still appears at the Circuit Mediation Office webpage: “Recognize that the mediation is an opportunity to achieve a favorable outcome for your client. Without laying aside the advocate’s responsibility, approach the mediation as a cooperative, rather than adversarial, exercise. Help your client make settlement decisions based not on overconfidence or wishful thinking, but on a realistic assessment of the case. Assist clients to make decisions not on emotion, regardless of how justified they may be, but on rational self-interest. Suggest terms of settlement that maximize the benefits of settlement for all parties. Take advantage of the opportunity to talk confidentially and constructively with counsel for the other parties. If clients are present, address them respectfully but convincingly. Let the mediator know how he or she can assist you in obtaining a satisfactory resolution. Be candid. Don’t posture. Listen closely to what other participants have to say. Give the process a chance to work.”

What is one thing that has been a surprise?

Prior to the pandemic, the Seventh Circuit program hosted about 40 percent of its initial mediation sessions in person. From Mr. Shapiro’s point of view, conducting all mediations remotely has not been a hardship because, in his experience, there is no meaningful difference in success between telephonic and face-to-face mediations. In fact, there are some significant benefits to conducting mediations by phone. In telephone mediations you can focus on listening without distractions and reading or misreading body language and facial reactions. Thus, there is a level of protection against mental background noise and the barrage of sensory information that is often misinterpreted. There is also protection for parties and counsel from the discomfort of sitting across the table from people they have reason to dislike. Parties are present to one another without the disadvantages of being face-to-face. In Mr. Shapiro’s experience, “phone discussions allow the litigants and the mediator to develop a sense of intimacy that is not always achieved in person.”

Is there a secret to the success of the Seventh Circuit mediators?

First, mediation is all the Circuit mediators do. It is their full-time job, and they take seriously the privilege and delicacy of their work. Second, because they are cloaked with the court’s authority, they take their responsibility to the court – and their identification with the court – very seriously. They are dedicated to the integrity of the process. Third, being an extension of the court, the Rule 33 mediation process is extraordinarily respectful of the litigants and demands the same of them toward one another and toward the mediation. Fourth, through years of experience with every kind of case, situation, conduct and negotiating tactic, they have accustomed themselves to making no assumptions. They take each case as it comes, practicing the “Three P’s:” Preparation, patience and persistence.

In Mr. Shapiro’s view, his work is less about pulling rabbits from hats than about helping people to find their way out of a jam. His parting insight is perhaps as obvious as it is profound: **Mediators don’t settle cases, parties and counsel settle cases.** The mediator provides guidance, a steady hand, and a calm influence, but does not make the

settlement happen. Only the parties can do that. As such, parties and their counsel need to take ownership of, and responsibility for, the process and the outcome.

To learn more about the Circuit Mediation Program of the U. S. Court of Appeals for the Seventh Circuit visit <https://www.ca7.uscourts.gov/mediation/mediation.htm>. ■

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Justice Rita Garman, the Longest Tenured Sitting Judge, Is Retiring: A Look at Her Career and Legacy

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at that time. Nor did she expect to have a number of “firsts” on her career resume.

Looking back on her career, Justice Garman recounts many uphill challenges. When she decided to attend law school, there were no women judges on the Illinois supreme or appellate courts. She was one of eight women in her law school class. She recalled a professor telling her that she was “only in law school to catch a husband” and that she should give up her seat to “a more deserving male candidate who would have a family to support.”

After law school, she had difficulty finding a job as a lawyer. She was turned down for several positions, once being told: “I don’t know what I would do with you because no one wants to talk to a woman lawyer.” One position she told me, went to a man who was offered \$1,500 more than she was offered. She said the state’s attorney in Vermillion County wouldn’t even interview her for an open position. Justice Garman said she is pleased that those times are in the past. But, she said, women still face challenges even though they have more opportunities now in the law.

Finally, Justice Garman landed her first job as a lawyer when the head of the legal aid office left and the board chairman asked her to assist just to keep the agency doors open. She received valuable assistance from two experienced legal secretaries at legal aid. More assistance came from court clerks and judges who “were very gracious to [her].” With this assistance, she said she was able to keep the doors to legal aid open and the office running until a new director was retained.

After about six months at legal aid, and with a new director coming on board, the state’s attorney called and asked her to join his prosecutor’s staff to handle juvenile and family cases. Four years later, she joined a law firm in Danville. Then, on Christmas Eve 1973 while driving with her husband and two-year-old daughter to a family Christmas gathering, she heard on the radio that a woman had been selected to become

a judge in downstate Illinois. That’s how she learned she would become an associate judge in Vermillion County. When she was sworn in on January 7, 1974, she became the first woman judge in the fifth circuit.

Justice Garman was elected a circuit judge in 1986 and a year later she became the first woman presiding Judge in Vermillion County. In 1995 when she was assigned to the appellate court, Justice Garman became the first woman to serve on the fourth district bench. In January 2001, she became the second woman to sit on the Illinois Supreme Court.

Justice Garman’s retirement on July 7, 2022, is 48 years, six months to the day from when she was first sworn in as an associate judge. Justice Garman told me she has been privileged to work with exceptional jurists throughout her career. Colleagues told me it was they who were privileged to have worked with Justice Garman. As a colleague, retired Justice Lloyd Karmeier described Justice Garman as “outstanding, pleasant, delightful, prepared.” Justice Mary Jane Theis said that Justice Garman brought her personality to the courts she served: “calm, wise, respectful,” and a good leader.

Justice Theis added that Justice Garman’s “impact on Illinois courts and her legacy is in the body of her work” and her “clear writing and thinking.” In more than 21 years on the Illinois Supreme Court, Justice Garman wrote 240 majority opinions plus numerous dissents and special concurrences. Justice Theis described a Garman opinion as “crisply written” in which the reader readily “knows the issue presented and the standard of review applied.” She said Justice Garman “knows and writes to her audience of lawyers, trial judges and the public. She is writing also to future readers to provide a clear understanding of the law.”

Justice Garman told me this is the right time to retire so she can travel and, more importantly, spend more time with family. Another factor in her decision to retire now, she said, is the new judicial district map

that greatly altered the boundaries of the fourth district, which she served at both the appellate and supreme court levels. She said neither retention option of running in the counties of the old fourth district nor the new fourth district was appealing given her desire to have more time with family, particularly her three youngest grandchildren who live in Iowa and whose activities she likes to support. At age 78, Justice Garman still loves to travel and looks forward to the chance “to go where I want to go and when.”

A final example of Justice Garman’s wisdom and leadership, according to Justice Theis, came in her recommending Fourth District Appellate Justice Lisa Holder White be appointed to take her place on the Illinois Supreme Court. When she takes the oath of office on July 8, 2022, as the 121st Justice, Justice Holder White will become the first woman of color to serve on the Illinois Supreme Court and the fifth woman Justice in the Court’s history. Like Justice Garman, Justice Holder White will have served as a judge at every level of the Illinois courts. ■

Illinois Notary Law Changes

BY KEVIN J. STINE

Senate Bill 2664 become effective January 21, 2022, and changed the existing notary laws and also added provisions for “remote notaries” and “electronic notaries.”

Substantive changes affecting regular notaries are summarized below:

1. All new applications and renewal applications must provide the Illinois Secretary of State your email address and state that you are proficient in the English language.
2. You are required to take a course on notarization that is required by the Illinois Secretary of State and pass an exam.
3. Your notary commission will no longer be recorded with the county clerk.
4. You must notify the Illinois Secretary of State of a change of your residential address or email address within 30 days.
5. When you receive your notary commission from the Secretary of State you must obtain an official seal (stamp).
6. A notary CANNOT explain, certify, or verify the contents of any document (there is an exemption for lawyers).
7. The Secretary of State may revoke the commission of a notary who is a licensed attorney and has been sanctioned, suspended, or disbarred by the Illinois Attorney Registration and Disciplinary Commission or the Illinois Supreme Court.
8. YOU MUST NOW KEEP A JOURNAL:
 - It can be paper or electronic.
 - You must not surrender the original journal to your employer upon termination of employment.
 - If the journal is lost, stolen, or compromised, you must notify the Illinois Secretary of State within 10 business days after the discovery of the loss, theft, or breach of security.
 - You cannot provide any information

in the journal to a third party, including personally identifiable information, except when required by law, law enforcement, the Illinois Secretary of State, or court order.

- Upon written request of a third party, which request must include the name of the parties, the type of document, and the month and year in which a record was notarized, a Notary public may supply a copy of the line item representing the requested transaction after personally identifying information has been redacted.
- The journal must be kept for a period of 5 years after the termination of the registration of the Notary.

Regular notaries are authorized to perform remote notarial acts. Below is a brief summary of rules for performing remote notarizations.

1. The audio-video communication used for a remote notarization to allow for remotely located notaries and principals to engage in direct, contemporaneous interaction between the individual signing the document (signatory) and the witness by sight and sound.
2. The audio-video communication used for a remote notarization to be recorded and preserved by the signatory or the signatory’s designee for a period of at least 3 years.
3. The signatory to attest to being physically located in Illinois during the two-way audio-video communication.
4. The signatory must affirmatively state on the two-way audio-video communication what document the signatory is signing.
5. Each page of the document being witnessed to be shown to the witness on the two-way audio-video communication technology in a means clearly legible to the witness and initialed by the signatory in the

presence of the witness.

6. The act of signing to be captured sufficiently up close on the two-way audio-video communication for the witness to observe.
7. The signer must transmit by fax or electronic means a legible copy of the entire signed document directly to the notary no later than the day after the document is signed.
8. The notary must sign the transmitted copy of the document as a witness and transmit the signed copy of the document back to the signatory via fax or electronic means within 24 hours after receipt.
9. If necessary, the notary can sign the original signed document as of the date of its original execution by the signer the notary receives the original signed document together with the electronically witnessed copy within 30 days after the date of the remote notarization.

An electronic public notary (e-notary) requires a separate commission and has its own set of rules and applications, that are more detailed and exhaustive than this article will allow. The difference between a remote notarization and an electronic notarization is that in most cases an electronic notarization requires the notary and participants (signer and witnesses) to all be physically together in the same room. However, the notarized document contains electronic signature and an electronic notary stamp so it can then be transmitted electronically immediately as an original document.

The full text can be found at 2021 Ill. Legis. Serv. P.A. 102-160 (S.B. 2664) (WEST).■

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