

'Early legal assessment' program gives cases innovative push toward resolution

By Don J. DeBenedictis
January 28, 2014

SANTA ANA - After 20 years as a neutral, Edward A. Panelli was puzzled when lawyers brought him a lawsuit that they didn't want him to mediate. Rather than asking him to resolve their product liability case or suggest a settlement value, the attorneys simply wanted the retired state Supreme Court justice to provide his opinion about how the statute of limitations applied.



Edward Panelli is one of several experienced mediators and former judges participating in a new "early legal assessment" initiative in Orange County Superior Court.

The case was one of a large batch of lawsuits involving medical devices known as pain pumps consolidated in front of Orange County Superior Court Judge Gail Andler. And it was the first case to go through a new pilot project Andler devised this fall that she calls "early legal assessment."

The idea is that early in the litigation process, attorneys present short briefs and arguments to a retired judge or appellate justice about "a pivotal legal issue" in their case, according to Andler's October memo about the project. In the right case, the neutral's analysis could foreshadow the ultimate winner and loser and thus allow the parties to avoid costly discovery and summary judgment motions.

"I think it's a good idea," Panelli said. His analysis of the statute of limitations issue could "have gone a long way to resolve the case."

"I think it's an excellent process," agreed retired Orange County Superior Court Judge Judith M. Ryan, who gave an early legal assessment in an employment class action from Andler's docket of complex civil cases. "Every case has some issue that would benefit from having someone looking at it early on."

The pilot project also might be unique among alternative dispute resolution programs, at least in the fine details. Andler, Panelli and Ryan said they hadn't seen anything just like it before. So too did Wayne Brazil, a national expert on early-stage ADR processes and a former U.S. magistrate judge in San Francisco.

But in another sense, Andler's pilot program is not unique at all. It is one of dozens of programs, projects, efforts and new ideas that judges and administrators across California are creating in order to make their courts more efficient in a time of sharply reduced budgets.

Steven Jahr, the administrative director of the California courts, has been traveling from county to county collecting efficiency and streamlining ideas for other courts to try. "There are all kinds of things going on," he said.

For instance, the court in Napa created an online orientation course on family law mediation so that it no longer has to put on weekly live classes. State law requires couples disputing child custody or visitation to go to mediation - and to take an orientation class about mediation before that - prior to a court hearing.

Kim Turner, the court administrator in Marin County, leads a Judicial Council project on "trial court reengineering" focused on teaching courts how to improve their business and administrative operations. Among the new good ideas she's seen is the Los Angeles County Superior Court's "My Jury Duty Portal," where people called for jury duty can request delays, change courthouses, find nearby restaurants or chat online with a jury staffer.

The Sonoma County court sends discovery disputes initially not to a judge or even a referee, but to a volunteer lawyer "facilitator" to mediate a resolution, she said.

"There are amazing ideas being implemented all over California," Turner said.

Andler's early legal analysis project grew out of the Orange County court's existing early neutral evaluation program. She discovered that very few lawyers were using that program, in which a neutral gives a broad evaluation of a case early in the litigation.

"Attorneys were not interested in that because at that point in the [litigation] process, they're not ready to go to mediation ... and discuss dollars and cents," she said.

In addition, clients may view their attorney's interest in early-stage mediation "as a lack of confidence in the case."

The early legal assessment approach tries to get around those problems, she said. Andler also gathered some suggestions about how to set up the program during a panel at a national meeting of the American Board of Trial Advocates, from Ryan and Orange County litigators Michael P. Maguire and Dean J. Zipser.

As described in her memo, the process "is designed to serve as a candid and confidential assessment early in the litigation when the parties differ substantially on legal issues." Further, it "can be useful in educating clients and carriers as to the realities of the litigation and in so doing remove barriers to discussion about the monetary value of the case."

Likely legal issues might include the statute of limitations, as in the pain pump case, or choice of law, contract interpretation or the measure of damages, according to Andler's memo.

The issue in the wage-and-hour class action Ryan heard involved whether settlement with some claimants jeopardized the remaining class members' claims under the Private Attorney General Act, according to the retired judge. "It was a critical issue that really was the stumbling block" preventing resolution, Ryan said.

Ryan said she doesn't know whether the case has settled.

In fact, Andler doesn't know whether the early legal assessment process has sparked any settlements at all so far. The pilot project is still young, and lawyers from only about a dozen cases have expressed interest.

The judge makes a point of not asking whether the lawyers try the approach. "I don't specifically follow up because I don't want anybody to feel I'm requiring it," she explained.

Though she and others said they hadn't heard of any similar programs, Andler said she would imagine there are some. "I don't think there's anything new under the sun," she said.

"We're all looking for ways to expedite settlement," Andler said. "It's all about doing more with less."