Getting to Maybe, or Being Willing to be Willing During Mediation

By Eric Gillett

We are now well past the two-year anniversary when civil litigation turned upside down. Our courts came to a standstill. Pending trials were immediately continued and those underway were either quickly concluded or stopped midstream and held in abeyance for several months while our judges attempted to find a way to move forward, however awkwardly.

Mediations, like trials, which had been conducted in person almost exclusively, were shot into a virtual world almost overnight without much to guide us. Thankfully, at the same time the world seemed to close its doors, technology opened a new one, Zoom. I imagine that most of you are like me and found this "new" technology both fascinating and perhaps, depending on your generation, a little intimidating. New instructions, new buttons, a *Hollywood Squares* screen of faces. For me anyway, I was witnessing what Walt Disney promised me in his 1950s House of the Future. It could not have landed at a more appropriate time.

And now, more than two years later we are still in a virtual world for much of our civil litigation practice. Sure, trials are live again in limited areas, but the backlog of criminal cases keeps many civil cases on standby. Even where courts are conducting civil trials virtually, criminal trials are still in our way. Until the doors to our courthouses are fully open again, this problem is going to continue.

This roadblock has only increased the need for alternatives to trial. Civil cases need resolution, whether that is a decision made by twelve strangers or a mutual agreement by two or more parties. In our new normal, mediations have become more vital than ever before.

As I work with more and more young lawyers inside and outside my firm, I try to encourage them to think about innovative ways to resolve cases short of trial. To be sure, I am a believer that almost every case must be prepared with the idea that one day it may go to trial. One of the first things I ask a young lawyer with a new case is what will the jury instructions tell the jury to do?

But statistically, the chances of going to trial are small. As a consequence, I remind them that holding back a smashing piece of evidence to use at trial is likely to be lost to history. They will not get their *Perry Mason* moment in front of a jury and watch a witness fall apart based on their timely and deft revelation of a "smoking gun." Instead, they should seek ways for that evidence to be used to improve their chances to resolve the case either by motion practice, one on one negotiation with opposing counsel, or mediation.

Mediation often suffers from the one-dimensional tactic of shuttle diplomacy and the simple exchange of numbers by an uninterested mediator until both parties are too close to walk away. It works, but it also fails, and always leaves clients dissatisfied with the process, jaded by the experience, unimpressed by their lawyers, and wishing things had been different. For plaintiff lawyers, unless the numbers worked in their client's favor, they are unlikely to see any benefit from a referral. For defense lawyers, they are positioning themselves to be sidelined in favor of the next firm on an insurance carrier's approved list.

Mediation, like trial, is an opportunity to present your best case and do the job you were retained for: getting the best possible result for your client. While there are some jurisdictions that encourage "opening statements," most do not. Certainly, that is true in the Pacific Northwest, where opening statements are almost non-existent in mediation. But that does not prevent you from drafting a mediation letter where you explain not only what the case is about, what evidence you have amassed during discovery, but also why a judge or jury is more likely to agree with your position. If you have one, your smoking gun should be exposed or at least hinted about at mediation. It may be your best opportunity, used wisely by your mediator, to help the parties move closer together.

As a mediator, I look for ways to communicate each side's position to the other side without alienating either side. I find it unhelpful if I simply tell

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Abortion, State Income Taxes, Precedent and Politicians

By Kary Krismer

My last *Bar Bulletin* article[1] contained extensive sarcasm, but at the end I made the serious point that analysis of court decisions should not be based virtually exclusively on whether the result was perceived as being desired, or on perceived public opinion. This article will look at two serious and divisive issues, and an inconsistency in how precedent is viewed for those issues and how politicians have acted or failed to act. The divisive issues are abortion and state tax policy. Given their divisive and serious nature of those issues, sarcasm and attempts at humor will be avoided.

In 2022 its decision *Dobbs v. Jackson W.H.O.*[2] the Supreme Court overturned the nearly 50-year-old decision of *Roe v. Wade*.[3] The *Roe* decision came down when I was a teenager, and shortly after Washington legalized abortion through referendum. Prior to Washington's referendum I was at an age where I did not know much, if anything, about abortion. But to let the reader know my bias, due to my Libertarian tendencies I have always supported Washington's law and the holding of *Roe v. Wade*. It was not until law school, however, that I actually read *Roe v. Wade*, or considered the legal rationale of the decision.

The Washington Supreme Court may soon decide the legality of recent state income tax legislation.[4] For approximately 90 years their precedents have held state income taxes to be unconstitutional.[5] This was not something I studied in law school, and in fact I did not read the relevant decisions until Seattle started proposing income taxes. As to my bias, I would like to see Washington's tax system revised, but not as a result of the Washington Supreme Court reversing long standing precedents.

That gets to the first point of this piece. While I support following precedent on both issues, I suspect that many of those objecting to *Dobbs* reversing *Roe* would support the Washington Supreme Court legalizing income taxes. And while that difference in position can be justified on other grounds,[6] it is difficult to see how someone could vigorously claim that precedent is important for one but not the other. Washington's income tax cases are almost twice as old as *Roe*, and there are probably few people alive who remember the early Washington income tax decisions coming down. Many have probably made life decisions based on those rulings, including possibly moving to or doing business in Washington. Washington's income tax rulings have been accepted as well-settled law and have mainly been challenged by politicians looking for more revenue, and challenged by questionable "studies" which falsely analyze Washington's tax system.[7] That is not to say, however, that Washington's tax system is not regressive and could not be improved, only that is it not as regressive as frequently claimed.

Beyond how precedent is viewed, there is another significant difference regarding these two issues, specifically the behavior of politicians on these issues tends to be at odds. If hearings for Supreme Court Justice nominations by past Republican Presidents demonstrate anything, it is politicians knew *Roe* was at risk of being overturned. But it was mainly after being overturned that concerned federal politicians proposed to codify the result of *Roe*.[8] In contrast, Washington State politicians seeking a different result on income taxes knowingly pass unconstitutional ordinances and legislation, albeit typically pretending that their tax on certain types of income is somehow not an income tax.[9] So on one issue politicians failed to enact legislation supporting existing precedent, and on the other they purposefully enacted legislation inconsistent with existing precedent.

So where do we go from here on these issues? On abortion it is hardly worth considering corrective federal legislation, because such a thing is very unlikely to pass through Congress in this political environment, if it ever were possible.[10] Fifteen or so years ago an obscure issue relating to abortion held up passage of the Bankruptcy Act for a few years, and politicians are even more divided today. But if *Roe*-protective legislation had somehow been passed decades ago, overturning *Roe* would have been much more difficult, because that would have required first overturning the protective legislation. That presumably would require a holding that such legislation exceeded the enumerated powers of the federal government, as was done in *U.S. v. Lopez*,[11] regarding the Gun-Free School Zones Act. Realize though that if the federal government can legislate in this area to protect abortion rights nationwide, then it could legislate to restrict abortions nationwide, as was recently proposed by Senator Lindsey Graham. It is doubtful either side would want abortion rights to swing back and forth with majorities in the House and Senate and resident of the White House. Having different rules in different states would probably be preferable.

As to the state income tax issue it would be both possible and preferable to amend the state Constitution, as has apparently been done over 100 times. The amendment of Washington's Constitution is practically an annual event. To do it successfully, however, some creativity is probably required, such as the proposed amendment simultaneously limiting or eliminating other taxes. Such a proposal could have been presented many years ago, but instead state politicians act hoping that the Washington Supreme Court will ignore or reverse prior precedent.

Finally, there is a likely reason politicians did nothing and may do nothing on either issue. Division is good for political donations and good for both parties. These are issues that get people to open their pocketbooks and vote. But whatever the reason for political inaction, the result is not good for most of us. ■

The material above is the opinion of its author and should not be considered legal advice to any particular person or entity. In addition to being a licensed but nonpracticing attorney, Kary Krismer is also a real estate managing broker with John L. Scott, Inc., in Renton. He may be contacted at kary@khouseagent.com.

1 The Bill of Rights: Do We Really Need This Many Rights? *Bar Bulletin*, August, 2022.

2 597 U.S. ___ (2022).

3 410 U.S. 113 (1973).

4 The constitutionality of RCW 82.87.040, taxing certain long term capital gains, is before the Court in *Quinn v. Department of Revenue*, No. 100769-8. Proponents of the tax deny it is an income tax, but I am referring to it as "income tax legislation" because that is how I see it.

5 See, e.g. *Culliton v. Chase*, 174 Wn. 363 (Wash. 1933), and *The Apartment Operators Assc. Of Seattle, Inc. v. Schumacher*, 56 Wn.2nd 45 (1960).

6 The right to choose is a far more significant and important concern than that of avoiding paying a certain type of tax. There can also be religious and moral concerns, and likely others.

7 It is possibly the result of some authors of studies wanting a result and that desire driving the reported study data. For example, some studies incorrectly treat real property taxes paid by landlords as being paid by tenants even though rents are determined by supply and demand. An entire article could be written on the press-driven fallacy that all taxes are passed through to consumers. Washington's relatively low real property tax rates have minimal impact on rental supply, and thus have minimal impact on rental rates. Other government restriction of supply and programs increasing demand for rentals undoubtedly affect rental rates far more significantly than real estate taxes.

8 At the state level outside Washington State politicians enacted legislation that they probably knew or strongly suspected violated Roe. Exceptions would be states that enacted so-called trigger laws, dependent on Roe being overturned.

9 For example, Seattle claimed its income tax was an excise tax. See also RCW 82.87.040.

10 If the Respect for Marriage Act passes, protecting non-traditional marriages, that would be some indication I am wrong as to the likelihood of abortion legislation passing. I suspect, however, that abortion is a much more divisive issue.

11 514 U.S. 549 (1995),

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one side or the other that the view in the other room is much different than theirs. Everyone already knows that. Instead, I find it useful if I can help each side find something to appreciate about the other side's position, even if they are adamantly at odds with the other side's proposed resolution. True smoking guns are rare but reasonable opposing viewpoints are common. It is the reasonableness of your position that I want to communicate to the other side. The rationality and acceptance of the possibility that others might agree with you that is essential. In other words, I am trying to get both sides to be willing to be willing to accept what is being proposed in the other room. What you say in your mediation letter and what you bring to the mediation through your advocacy is essential to this process.

Early on in a mediation, it is not unusual for both sides to see a wide, often unbridgeable, gap between them. Neither side is willing to come all the way to the other side's number or suggested resolution. And it can seem like a waste of time when that situation does not change over the course of a few hours. But I have learned over more than 35 years in this business, that time takes time. It's not that one side needs to outlast the other's recalcitrance. Instead, the process of moving parties from an extreme position to a more moderate position takes time and energy. Human nature is stubborn in that regard. We become enamored of our beliefs. We might attach our ego to our positions. You certainly have clients who often come into a mediation with unreasonable expectations for the result. Even more problematic is when those expectations are being generated or supported by someone not participating in the mediation, like a trusted friend, family member, or insurance adjuster. That issue is worthy of a completely different discussion. But with time, support, and a simple request that each side be willing to be willing to consider the other side's way of thinking, we usually get to yes. Or at least maybe. And once we get to maybe, we have a better chance of getting to a resolution that makes sense to both sides, even if it is not the resolution they wished for when they turned on their computer and signed onto Zoom. ■

Eric Gillett is a founding partner of Preg, O'Donnell & Gillett. He is licensed in Washington, Oregon, and Alaska. He is available to mediate your cases and help you navigate toward a solution. He can be contacted through his legal assistant, Jasmine Reddy, at 206-287-1775 or jreddy@pregodonnell.com. While in person mediations can be arranged with all participants fully vaccinated, Zoom mediations are also available and encouraged.