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# Gack's Got the Knack for Settlement

*Trial experience gives JAMS mediator skill at breaking cases down to possible outcomes if they went to trial.*

By Ryne Hodkowski  
Daily Journal Staff Writer

Kenneth D. Gack likes to think his mediations and arbitrations go well because he is able to build a rapport with his clients. Those same clients think the mediations and arbitrations go well because of their respect for him. It's two sides of the same coin, but the relationships help explain why attorneys agree on Gack for mediations, arbitrations and even as a discovery referee time and time again.

"Both sides respect him, and if you don't have that, you're not going to agree upon him in the first place," said Thomas J. Donnelly, founding partner of Walnut Creek-based Donnelly Nelson Depolo & Murray LLP. Donnelly said he's mediated cases with Gack about "20 to 30 times."

"If he wasn't well respected, people wouldn't listen to him when he talked, and I wouldn't be working with him this long if I didn't think he was the best."

A former civil trial attorney and founding partner of the now-defunct James, Gack, Bernheim and Hicks law firm in Santa Rosa, Gack practiced on both sides of the bar, focusing on personal injury, real estate, commercial disputes and other areas.

His wide focus as a lawyer that has helped afford him the opportunity to mediate cases in areas including personal injury, employment, health care, environmental, business and construction.

"I love the variety. I loved it when I was practicing and I love it in my ADR practice," Gack said. "The variety of matters gives you a broader base to try and draw upon in helping folks resolve their dispute."

His experience as a trial attorney has also given Gack a keen ability to dissect the particulars of a case, including what will happen if the case were to go to trial.

This skill wouldn't be worth much if Gack weren't relating his thoughts to the parties involved. To this extent,

he brings another useful skill to the table: communication.

"He will raise issues and ask questions of the lawyers about what will or will not resonate with the jurors," said J. Niley Dorit, founder of San Francisco-based Dorit Law Firm and a specialist in personal injury matters. "He doesn't necessarily inject his own opinions, but he guides the process by highlighting issues that he thinks are important."

"He's got the ability to read the tea leaves and get a sense of where the parties are and where they are going to end up, or where they can end up," said Mary Alexander, founder of San Francisco-based Mary Alexander and Associates, P.C. and a personal injury specialist. "He doesn't tell you what the case should settle at, he tells you what the case can settle at."

"He's not afraid to give you his thinking," Donnelly said. "A lot of mediators I think see their role as diplomats. I think Gack is more proactive. He's an active player rather than acting in shuttle diplomacy."

Gack said he sees his role as one where he is not telling people "what to do."

"I should listen to what their aspirations are and try to help them find a path to achieve that outcome," he said. "At some point during the day though, I think people look for a mediator to weigh-in with his or her assessment and evaluation of what the evidence may look like, challenges or opportunities they're going to face, or strengths and weaknesses of their case."

Gack's candor and communication has often times helped attorneys change their minds on where they were in the settlement negotiations.

"He changed my way of thinking," said Kathryn A. Stebner of Stebner & Associates and president of the San Francisco Trial Lawyers Association.

Stebner said she was involved in a case involving a quadriplegic with bed sores, a case she didn't believe would settle. Gack spoke to her frankly and told her to re-evaluate her stance. She



**Kenneth D. Gack**

JAMS

Northern California

**Specialties:** Personal injury/torts, health care, employment

did, and later said it saved her time and money in the long run.

"I've been doing this for 27 years and I'm not always right. I could have kept going and lost [the trial] and lost a lot of money and dragged my client through it," she said.

Others have failed to heed Gack's advice.

"I had two cases with him that didn't settle when he recommended that they did," said Michael A. Kelly, name partner at San Francisco-based Walkup, Melodia, Kelly & Schoenberger and beneficiary of a stubborn defense. "They would have settled for half of what the verdict was, and the defense didn't want any part of it."

"He's mediated some cases where people did not follow his lead and got hammered," said Donnelly.

For the most part, however, cases will settle when Gack is mediating. Clients attribute this to his remarkable persistence.

"He just can't let it go," said W. Timothy Needham, a plaintiff-side personal injury attorney at Eureka-based Janssen Malloy LLP. "You'll say 'It's fine Ken, some cases don't settle.' He doesn't believe in that."

"We had an extremely difficult case because the defense attorneys could not reach an agreement on what the case should settle at," Donnelly said, referring to a medical malpractice case. "I can't tell you how many phone calls he made over the next

four months. There was several times where we thought there was no way it would settle. It would have been so easy for a different mediator to just give up."

"I expect that if we get 95 percent done with settling a case, he will do whatever it takes to get the other 5 percent done," said Kelly.

Gack also serves as an arbitrator, a facet that some attorneys find fascinating given its potential for conflicting interests. Still, attorneys realize that any potential for Gack straining relationships with future clients is quickly quashed by his fairness.

"Many mediators are concerned or attentive about potentially getting into an adversarial position where they have to make a decision," Kelly said. "He doesn't have any problem hearing evidence and calling it as he sees it."

"He gets to the point quickly so the case moves quickly," added Stebner. "People don't stretch their position on cases because he sees right through things and people want his respect."

"I will certainly make every effort to be thoroughly prepared for any matter I'm going to hear, mediation or arbitration," said Gack. "People are much more likely to be receptive to the mediator's input about particular challenges they possess in their case if they're satisfied that you've taken the time to show up prepared."

When all else fails, it doesn't hurt that Gack often takes an optimistic appraisal of a case, telling cantankerous parties the he will act as a "crucible of optimism."

"I say, 'Let me be the one to reach a conclusion that we can't do something today.'"