

VERDICTS & SETTLEMENTS

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Finding His Footing

John Herlihy had to learn to let go of his tendencies as a judge to become an arbitrator and mediator.

By Craig Anderson
Daily Journal Staff Writer

SAN JOSE — John F. Herlihy, a longtime Santa Clara County Superior Court judge who retired at the end of 2009 and now works as a mediator and arbitrator with JAMS, said he is getting used to working without “the hammer” of judicial authority.

“When you’re a judge, the work comes to you,” said Herlihy during an interview in his San Jose office. “What we do in the ADR world is just like being in private practice. That is a very different kind of thing.”

Herlihy said judges have an advantage when trying to settle cases because lawyers and their clients know they face an expensive trial if the matter is not resolved. But he said anyone in mediation is motivated to find a solution.

“When people hire me, there’s a problem with the communication,” he said. “But the fact that they are willing to pay and come here means they would like to settle.”

“I think that gives mediators an advantage,” Herlihy added. “Most of the people are very serious.”

Herlihy, who started at JAMS in January 2010, said he spends about two-thirds of his time on mediation and 25 percent on arbitration, with the rest split between private trials and discovery matters.

The retired judge said thus far he has handled “an eclectic group of cases,” ranging from real estate and employment disputes to trade secrets theft. “I have a real interest in intellectual property issues.”

Albie B. Jachimowicz, a partner at Hinkle, Jachimowicz, Pointer & Emanuel in San Jose who represents plaintiffs in personal injury and legal malpractice cases, said Herlihy already is adjusting from his longtime role as judge to his new one as mediator.

“You could still see the judge in him” at first, said Jachimowicz, who hired Herlihy to mediate cases in his first week. “He wanted to make rulings.”

“Now he’s more patient with himself,” Jachimowicz added. “He’s learned his role as a mediator isn’t to decide how much the case is worth. He has grown into that role.”

Dean C. Rossi, a partner at Rossi, Hamerslough, Reischl & Chuck who hired Herlihy to mediate a breach of investment agreement dispute, said he did an excellent job even though the matter is still unresolved.

“He has a great ability to work with people and size them up and recognize the strengths and weaknesses of both parties,” Rossi said.

While some judges are very aggressive during mediation, Herlihy does not handle cases with a “heavy fist,” the San Jose attorney said.

“What I have found most impressive is that he is able to find common ground and a framework for how the case is to be resolved,” Rossi added.

Herlihy also is persistent. In a dispute over a multi-million dollar claim by an investor who withdrew from the purchase of a business, Tyler G. Draa — a San Jose-based partner with Trepel McGrane Greenfield LLP — was convinced that the likelihood of a settlement was almost non-existent.

But Herlihy, Draa said, spotted an opening. “I don’t think he depolarized the parties but he could get them to see a practical outcome,” the attorney said.

Herlihy encouraged everyone to stay past 5 p.m. They emerged at 2 a.m. with a settlement.

“He’s not someone who bludgeons you with opinions, but gets you to listen to him in a calm, respectful way,” Draa said. “He knows how to speak to people in a non-condescending, insightful way.”



S. Todd Rogers / Daily Journal

John F. Herlihy

Affiliation: JAMS

Areas of specialty: Business litigation, intellectual property, labor and employment

A native of Atlanta, Ga., Herlihy is the son of a U.S. Navy pilot who moved to the Bay Area after retirement, ending up in Mountain View. He went to St. Francis High School and San Jose State University. “My father believed you should go to college, but on your own dime,” he said.

Like many future lawyers in his generation, Herlihy grew up watching television shows like “Perry Mason” and “The Defenders.” He always wanted to be an attorney and remembers writing an essay about becoming an attorney in sixth grade. “That was my goal,” Herlihy said.

Herlihy put himself through school working as a cook at a Palo Alto restaurant, and still enjoys cooking as a hobby. He and his wife, Mary Ann, have two adult daughters.

He graduated from UC Hastings College of the Law in 1974, then worked at a small firm for a couple of years before joining the Santa Clara County district attorney’s office to gain courtroom experience. “It was a great career move for me.”

In 1980, Herlihy was appointed a Santa Clara Municipal Court commissioner, then elected as a municipal court judge in 1982. Gov. George Deukmejian elevated him to the Superior Court bench in 1990.

Herlihy spent most of his judicial career handling civil cases, with the exception of 2007, when he handled a high-profile corruption trial against former San Jose Mayor Ron Gonzales. The judge dismissed the charges, saying prosecutors erred in how they presented the case to the grand jury that

indicted him.

As a mediator, Herlihy said he is a big fan of “premediation calls” with attorneys on each side. “It’s another tool to get up to speed so I know things that some mediators refer to as ‘below the line’ issues, such as what’s driving the desire to settle the case,” he said.

James McManis, a partner at McManis Faulkner in San Jose, said Herlihy exchanges ideas with attorneys, an approach that sometimes produces a better way to proceed. “It’s a real team effort,” he said. “In terms of getting things done, it’s much better.”

“He’s just a very decent person who treats people with respect,” McManis added.

Here are some of the lawyers who have used Judge Herlihy as a neutral:

James McManis, McManis Faulkner, San Jose; Kurt El Wilson, Sweeney, Mason, Wilson & Bosomworth, Los Gatos; Mark B. Fredkin, Moorgan Franich Fredkin & Marsh; Christopher J. Olson, Sweeney, Mason, Wilson & Bosomworth, Los Gatos; John J. Falcocchia, San Jose; Tyler G. Draa, Trepel McGrane Greenfield LLP, San Jose; Albie B. Jachimowicz, Hinkle, Jachimowicz, Pointer & Emanuel, San Jose; Dean C. Rossi, Rossi, Hamerslough, Reischl & Chuck, San Jose; Frank R. Ubhaus, Berliner Cohen, San Jose.