

Reality Check

Former complex court judge James Kleinberg calls it as he sees it

By Banks Albach
Daily Journal Staff Writer

With tensions high and passions boiling, mediation between two feuding parties can be difficult to manage. That is why former judge James P. Kleinberg, now a neutral with JAMS, runs every session with one rule: don't put them in the same room.

"I do not do joint sessions, at least not yet," Kleinberg said. "In my view, I don't think it's productive."

Kleinberg joined JAMS last year after 34 years in private practice as a litigator and 11 years on the Santa Clara County Superior Court bench.

In that time, Kleinberg has drifted toward what mediation experts refer to as the "evaluative" approach.

Rather than taking a passive role in the process — letting the parties do the talking — Kleinberg said he sizes up the strengths and weaknesses of their merits and sometimes even questions their positions.

The end result, after much discussion with both sides, is often a deal crafted solely by the mediator, Kleinberg said.

"Sometimes it comes down to a mediator's proposal," he said. "I've drafted these proposals several times and it's worked."

He also gives fair warning to attorneys before launching the sessions.

"I talk to the lawyers at least a few days before the mediation," he said. "I level with them on the phone and say 'Look, you're not coming here to show off for your client.' But I also tell them, 'I'm getting you off the hook. I'm going to be the bad guy and deliver the bad news.'"

Michael A. Geibelson, a Los Angeles partner with Robins Kaplan LLP, found that demeanor beneficial earlier this year in a real estate breach of contract case that Kleinberg mediated.

Not only does Kleinberg cut through complexity in ways that other mediators don't, Geibelson said, he is quite willing to call attorneys out for

"acting like lawyers and not thinking like jurors."

"He's very good at cutting through the grandstanding that lawyers are willing to do irrespective of the facts," Geibelson said. "He also has a keen sense of when alternate methods are necessary."

Kleinberg put that skill to use last February while mediating a high-profile patent dispute over millions of dollars between two public companies. After closing the monetary gap and deciding on a settlement, the two parties began butting heads again, this time over how to frame the press release.

The company that was receiving money wanted to play up the settlement, while the party that paid wanted that fact watered down. To break the stalemate, Kleinberg said he "interjected himself," and drafted a "neutral" press release that both sides eventually accepted.

"I felt really good about that outcome," Kleinberg said.

About 25 percent of his workload is mediation and roughly half is arbitration. The rest includes discovery work and presiding over mock trials in both law schools and firms.

Since joining JAMS, he's mediated cases involving personal injury, disclosure issues in a merger, a feud between a founder and an acquirer, real estate, and product liability and maintenance.

JAMS requires their mediators to be either a licensed attorney or a former judge. Kleinberg said his fusion of both — decades litigating complex corporate matters and years presiding over civil cases — prepares him well for the neutral ground. And as a justice, he has ruled on some big-ticket suits.

Jeffrey T. Thomas, an Irvine-based partner with Gibson, Dunn & Crutcher LLP and lead trial attorney on Hewlett Packard Co.'s 2011 breach of contract suit against Oracle Corp. — which Kleinberg presided over as a judge — described him as practical and comfortable handling complex cases. *Hewlett-Packard Co. v. Oracle Corp.*, 203163 (Santa Clara County Super. Ct., filed June 15, 2011).



Banks Albach / Daily Journal

James P. Kleinberg

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Area of specialty: Contracts, intellectual property, trade secrets, employment, real estate

"Maybe I like him a lot because we won," Thomas said. "But he was always well prepared and he is very comfortable with complex issues and big-ticket litigation. I would be more than happy to use him as a mediator."

That case is currently on appeal.

During his time on the bench, Kleinberg presided over scores of cases that were simultaneously filed in Delaware state court and became nuanced in the workings of the corporate code there, said Boris Feldman, a Palo Alto partner with Wilson Sonsini Goodrich & Rosati PC.

"People tended to think he had achieved a level of mastery" of Delaware corporate law, Feldman said. "I think a lot of people will use him as a mediator in shareholder lawsuits."

Kleinberg counts himself as fortunate in his career. After his father's untimely death when Kleinberg was just 14, he went straight to work — pumping gas or stocking product at the drugstore.

He lived at home in Pittsburgh, Penn. as an undergrad and took the bus to class on scholarship. He was later admitted to several prestigious law schools, including Stanford University, but could not foot the bill for most.

He ended up graduating in 1967 from the University of Michigan Law School, where he met his wife, another turn of luck that Kleinberg savors.

"I would say that I have been a very fortunate person," he said.

He landed a position with the U.S. Department of Justice in 1967 and later moved into corporate litigation in 1969 with Petty, Andrews, Tufts & Jackson, now Jackson Tufts Cole & Black LLP, where he eventually became managing partner.

In 1983, he joined McCutchen, Doyle, Brown & Enersen as a partner and left in 2002 after being appointed to the Santa Clara County Superior Court by then-Gov. Gray Davis. By the end of his tenure, he handled the county's complex litigation calendar.

With that track record, Kleinberg said he brings savvy character judgment to the mediation table. But nothing's perfect, he noted.

"Every case is different and I think mediation is hard," he said.

"As a mediator you have to accept the fact that the parties are never going to tell you everything. In fact, they may never tell you the truth. The key thing is finding out what the attitudes of the people are and what they are thinking about coming into the room."

Here are some attorneys who have used Kleinberg's alternative dispute resolution services: Timothy T. Scott, King & Spalding; Michael A. Geibelson, Robins Kaplan LLP; J. Philip Martin, Kastner Kim LLP; Daniel Ballestreros, Hoge Fenton Jones & Appel Inc.; David Eiseman, Quinn Emanuel Urquhart & Sullivan LLP; John W. Fowler, Bergeson LLP; Andrew A. Bassak, Manatt, Phelps & Phillips LLP; Sarah Robertson, Donahue Fitzgerald LLP; Grant P. Fondo, Goodwin Procter LLP; Tyson J. Wiles and Bradley D. Wiles, Wiles & Wiles Attorneys at Law LLP.