

VERDICTS & SETTLEMENTS

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Experimentally Creative

JAMS mediator Wynne Carvill seeks inspiration inside and outside the law.

By Henrik Nilsson
Daily Journal Staff Writer

As a mediator, former judge Wynne S. Carvill looks for inspiration in areas outside the law.

Carvill and his colleagues at JAMS have recently discussed the works of Daniel Kahneman's, the behavioral economist who won a Nobel Prize in economics in 2002.

Carvill particularly remembers an experiment mentioned in Kahneman's book "Thinking, Fast and Slow," where people were asked how many countries in Africa are members of the United Nations shortly after being exposed to either the number 10 or 65 on a rigged wheel of fortune.

"There's a remarkable difference in the estimate of those who spun 10 versus those who spun 65, and it has a dramatic impact on their estimate of the number of countries in Africa in the UN," Carvill said. "And it doesn't make any difference if you're dealing with students, faculty, lawyers, doctors, or any age or educational attainment. It makes no difference."

Carvill said he and his colleagues try to identify situations in their mediation sessions similar to the experiments discussed in Kahneman's books.

The discussions are part of JAMS' internal education programs, which is one reason

Carvill joined the firm in January 2020. Carvill was a judge of the Alameda County Superior Court from 2003 through 2019, spending his last year as presiding judge.

He worked at Thelen, Marrin, Johnson & Bridges from 1977 until 2003.

Being a new neutral, Carvill said that while he spends most of his time on mediation, he expects arbitration cases to pick up.

In the past year, Carvill has mainly handled employment disputes. As a judge he also dealt with family law and anti-trust cases.

If a case does not settle on the day of mediation, Carvill said he is persistent and continues to follow up with the parties even weeks after the initial session.

"One of the important things is trying to understand from the lawyers what they want from me," Carvill said. "I try to give them the kind of mediation they think is appropriate for their case and their client and that's the importance of the pre-mediation calls."

During pre-mediation calls, Carvill tries to gather as much information as possible about the parties involved, such as what lawyers perceive as personality issues on each side or what Carvill must be sensitive to.

When he started at JAMS, he was surprised by the number



Jana Ašenbrennerová / Special to the Daily Journal

of lawyers who submit confidential mediation briefs not shared with the other side. Carvill said that he always tries to convince lawyers to communicate with the opposing party beforehand.

"You should be writing your mediation brief not for me, not for the other lawyer — but for the opposing client," Carvill said. "This is your opportunity to talk to them. It's your opportunity to explain why your client feels they've been wronged or the possibilities in mediation that neither of us will have if we go to trial."

Carvill said he is always looking for creative solutions and tries to go beyond the one-dimensional approach to medi-

Wynne S. Carvill

JAMS
San Francisco

Areas of specialty:

Employment, class action, business, commercial, personal injury, torts, intellectual property, insurance, antitrust, professional liability, construction

ation, where one party writes a check and the other receives it. Instead, he wants to find paths forward that would not happen in a trial.

In a defamation case where one party was accused of having

made statements to the community that damaged the other, the settlement was resolved after the parties agreed to Carvill's solution of submitting the defendant to a lie-detector test.

"The case was dismissed after the test and the settlement agreement provided what would happen depending on the different results in the lie detector test," Carvill said. "That's the kind of thing in terms of creativity that is available in mediation that is never available if you go to court. I'm always looking for the creative possibility."

In a probate case, Carvill had to negotiate a mediation that ended up resembling a family therapy session.

The real issue was not how much money should be paid out, Carvill said, but rather navigating childhood traumas and resentment that had built up over the years.

"Most of the mediation was to allow people to discuss those issues," Carvill said. "And then at the end of the day, when all that was off their chest and people went through their catharsis and their crying, we got back to the issue and the case settled."

Attorneys who have used Carvill as a mediator also testified to his sessions' unique and balanced approach.

Mark D. Lonergan, a trial lawyer with Severson & Werson, reached out to Carvill for a case last year in a consumer class action involving bank fees.

Lonergan said that lawyers should keep the issues and their presentation simple.

"Judge Carvill won't be impressed by an overly complicated recitation of legal arguments but is focused on cutting through to the issues that really matter, to the case and resolution of the dispute," Lonergan said.

Carvill's preliminary calls with both sides were helpful since it allowed Lonergan to bring the judge up to speed but also to preview issues that might have prevented a resolution.

Kimberly Corcoran, senior counsel at Carle, Mackie, Power & Ross LLP, described Carvill as smart, funny, honest and creative.

Carvill was recommended to Corcoran when she looked for a "no nonsense" mediator in a case where the parties "were

multiple orders of magnitude apart in settlement expectations."

The case did not settle, which Corcoran said was expected.

"What was unexpected was Judge Carvill's tenacity at trying to get that case settled anyway, for almost a year after mediation," Corcoran said.

Corcoran has since used Carvill in a different case involving a custom crush winery contract and complicated federal and state licensing issues.

"What helped that case settle was that he took the time to understand the licensing issues, rather than gloss over them as something that he didn't need to understand because the parties did," Corcoran said. "One of the parties didn't understand those issues, so Judge Carvill's time and effort on that issue was the key factor in settlement of that case."

Elena R. Baca, partner at Paul Hastings LLP, approached Carvill in a case that involved multiple lawsuit and is still pending.

"I think he certainly understands and communicates well his understanding of the legal issues and the key points

that need to be addressed and resolved without getting lost in the minutiae of facts," Baca said.

For Carvill, the cases that do not settle are the ones that keep him up at night. After one year at JAMS, Carvill is determined to follow up with counsel that have used him as a mediator in situations where the parties could not reach an agreement.

"I went through that exercise in December," Carvill said. "And there was one case where there was some additional activity that may still bear fruit. But I'm glad to say the list of settled cases was substantially longer than the unresolved cases."

Here are some attorneys who have used Carvill's services: Kimberly Corcoran, Carle, Mackie, Power & Ross LLP; Mark D. Flanagan, Wilmer Cutler Pickering Hale and Dorr LLP; Maria S. Bellafronto, Hopkins & Carley; Jeffrey M. Theodore, BraunHagey & Borden LLP; Gregory P. O'Hara, Nixon Peabody LLP; Mark D. Lonergan, Severson & Werson; Elena R. Baca, Paul Hastings LLP

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