

VERDICTS & SETTLEMENTS

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Free Association

Retired San Mateo County Judge Robert D. Foiles has embraced a looser, more personal style.

By Shane Nelson

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Working as a JAMS private neutral has given retired judge Robert D. Foiles an opportunity to loosen up a little.

"The nice thing about being a mediator is you're not as buttoned up as a judge," Foiles said with a chuckle. "As a judge, you always have to stay in character. Even if you're doing a settlement conference, these are folks you're going to see on a trial or something else in the not-so-distant future, so you're buttoned up, you're formal, you can't really associate with them. Once you've become a [private] neutral, you're less compelled to those responsibilities. ... As a mediator, you have a lot more liberty."

A 1984 University of San Francisco School of Law graduate, Foiles started his legal career as a law and motion research attorney at the San Francisco County Superior Court and then worked for 13 years as a San Mateo County Deputy District Attorney.

"In '94 I spent 12 months in trial - seven months on one death penalty trial and then five months on another death penalty trial," Foiles recalled. "I was just trying cases like crazy until 1997, when they called and asked, 'Would you contemplate going on the bench?'"

Foiles worked for nearly 27 years as a San Mateo County Superior Court Judge before his retirement last March, tackling family law, law and motion, criminal, civil and settlement assignments. He served two different terms as presiding judge and presided over more than 150 jury trials during his time on the bench.



Robert D. Foiles, JAMS • Silicon Valley | Jana Ašenbrennerová/ Special to the Daily Journal

"I didn't want to completely give up the law," Foiles said of his decision to join the JAMS roster of private neutrals last spring. "I want to keep a toe in the water. ... It's fun to be retired but still have enough on your plate to keep thinking about the law and working with people."

Foiles said his caseload is roughly a 50-50 split between mediation and arbitration these days, including personal injury, employment, real estate and business cases.

"The work I've done as a trial judge I think allows me to move forward and handle issues expeditiously, so we don't wind up bogging down in areas that are just irrele-

vant or overly time consuming," Foiles said of his approach as an arbitrator. "Lawyers, I think, want a decision. They want a decision relatively quickly, and whether a decision is for them or against them, ultimately they want to have a relatively expeditious process, and that's what I bring."

Prior to his mediations, meanwhile, Foiles likes to receive briefs from all the parties and to speak over the phone beforehand with counsel. He noted that he handled more than 1,000 settlement conferences as a judge.

"When I get a mediation now, I have a lot more time," Foiles said,

"as opposed to the days when I was in the Superior court handling 10 a week - or even more."

On the day of mediation, the retired judge said he likes to let the parties speak first.

"I try not to be too evaluative initially and just let them talk," Foiles said. "It is amazing how it doesn't matter if they're sophisticated or not - they want to tell their story. So, I let the client speak, air out their grievances and talk and build a relationship and build some trust. And we do that over the morning hours, where we go back and forth and develop a relationship of sorts."

Foiles said he will typically move into a more evaluative approach later in the day, but he does so carefully.

"I don't want to put them off," he said. "I'm not going to come in like some judges and just tell them, 'Oh you're full of baloney' ... You build this relationship. Make them see there is another side to the story and in this process to realize the other side has a grievance, too."

Daly City defense attorney Vincent Castillo tried a case in front of Foiles when he was on the bench and has since used him to resolve two different personal injury disputes. Castillo described the retired judge as "a very reasonable, very pragmatic" mediator.

"He's going to listen to your position, and in a respectful way, he's going to ask you to explain what you know," Castillo said. "He may not agree with you, but I think it's going to be a very fruitful conversation because when he doesn't agree with you, and you have your client present, that's helpful for your client to hear."

San Mateo plaintiffs' attorney Gregory C. Cattermole also appeared before Foiles when he was on the bench and has since used him as a private mediator to settle a personal injury case.

"He gets a good grasp of the issues and what is important to the parties," Cattermole said. "What are your strong points? What are your weaker points? He gets a good grasp of that early on and proceeds from there to work between the parties to get them to a point where it can resolve."

Foiles added that while he will make use of mediator's proposals, he tries not to employ that strategy too early.

"It's funny because 20 years ago, people didn't really do mediator's proposals quite so much. Now we start a mediation at 10 o'clock, and some lawyers are asking by 10:30 for a mediator's proposal," Foiles said. "I always say 'Let's wait.' ... I'm cautious about mediator's proposals because sometimes they'll conclude the mediation - because then they

gotta chew on it. ... I like to try to let the case resolve on its own, and then if it's necessary, that's when you do the mediator's proposal."

Millbrae plaintiffs' attorney Sumble Manzoor appeared several times before Foiles while he was on the bench and recently used the JAMS mediator to resolve an employment dispute. Manzoor said the retired judge's demeanor is an important strong suit.

"My clients really ended up connecting with him and trusting him," Manzoor said. "And obviously, his decades of service on the San Mateo County bench go a long way in allowing the parties to feel that level of trust."

Manzoor added that Foiles' extensive background as a judge makes him a terrifically versatile private neutral.

"His ability to focus discussions in a productive way that allows clients to express their frustrations and feel heard while also guiding them to understand the realities and risks involved with their case is just invaluable," Manzoor said.

Foiles added that he feels he typically builds rapport relatively easily with parties, which helps a great deal when working toward settlement.

"It doesn't matter their demographic or their economic status - I tend to connect with them," he explained. "And that allows me to eventually become evaluative. ... But I don't want to be one of those people that tell you what the case is worth and walk out. I want the lawyers and the parties to negotiate, to find a ballpark of what's reasonable."

Here are some attorneys who have used Foiles' services: Gregory C. Cattermole, Law Office of Gregory C. Cattermole; Vincent Castillo, Castillo, Moriarty, Robinson LLP; Sumble Manzoor, Corey, Luzaich, de Ghetaldi & Riddle LLP; Stanley W. Smith, Niven & Smith LLP; Niall P. McCarthy, Cotchett Pitre & McCarthy LLP

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