

VERDICTS & SETTLEMENTS

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Judicial Instincts

San Jose neutral John Herlihy draws from 30 years on the bench in his mediations.

By Chase DiFelicianantonio
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Former Superior Court Judge John Herlihy said he tries to find the human angle and learn as much as he can about a case and the people involved in his practice as a neutral at JAMS in San Jose.

“It gives you a chance to get away from everything that has to be monetized in dollars and cents and gives you the opportunity to think outside the box,” Herlihy said of his approach as a neutral.

“There may be other ways of solving the dispute without trying to simply say we have to fix blame and then we have to asses a dollar amount to who is responsible.”

Herlihy said he does a pre-mediation call with each lawyer before he dives into issues that aren’t in the briefs.

“I want to know the human aspect to the case,” he said. “I want to know what some mediators call the below-the-line issues. What’s really driving this dispute?”

During one difficult mediation that involved a business dispute between a brother and sister, Herlihy found both parties cared deeply about the sister’s children.

Herlihy had a private educational trust set up by the brother for his niece and nephew and persuaded him to relinquish the business without admitting wrongdoing, solving the dispute using factors that went deeper than the facts and the law.

John F. Herlihy

JAMS
San Jose

Areas of Specialty: Business/commercial law; class actions; construction; employment; insurance; intellectual property; personal injury/torts; professional liability; real property

A general session usually kicks off Herlihy’s mediations, and he said it was important for all the parties to at least be in the same room together, not only to build trust with him but to see one another.

“It’s a way of easing people into it,” he said. “My feeling is that the idea that you’re going to negotiate through a mediated process to a resolution on a case and you never see the other person or the other lawyer, it just doesn’t start out right.”

He said he sets the tone in the room by framing the process as one focused on problem solving. “I don’t like to talk about ‘the case’ and how do we settle ‘that case,’” Herlihy said. “I never use those terms. I use the terms problems, solutions, dispute, and resolution.”

This helps litigants feel more involved in the process as opposed to talking about resolving a lawsuit, which is traditionally the job of the legal system, Herlihy said.

“I want them to understand that mediation is a team sport,” he added.



Chase DiFelicianantonio / Daily Journal

After a career spent first as a prosecutor and eventually as the supervising judge of the civil division of the Santa Clara County Superior Court, Herlihy said he will also weigh in on a litigant’s chances during trial, relying on his years of experience.

“I’ve been a judge for 30 years and that impresses some people,” Herlihy said. While he frequently discusses litigation risk with attorneys and their clients, it is usually not his first tactic to get a resolution, he said.

“I try to steer it more towards how much more do you want to invest in this in terms of your time, your money and your emotional investment?” he said.

This tactic helped Herlihy resolve a multi-party real estate dispute that had been ongoing for roughly a decade and had already been to a state court of appeal. He said while he highlighted the expense and risk of trying the

case, he also underscored the emotional burden of drawn-out litigation.

In a key moment, Herlihy listened attentively while one of the litigants read him a lengthy statement about the case. “I never interrupted him one time,” he said. “When he got done he felt, ‘I got to tell my story.’”

The endless variety of the law is what Herlihy said he enjoys most about his work, which includes employment law, real estate work, commercial business cases, tort litigation, professional negligence cases, class actions and more.

He also said he favors less commonly used dispute resolution processes like mock trial, general references, and sitting as a judge pro tem.

“The mock trial concept is one people are not really very familiar with, and yet I think it can be very helpful on the more complex

cases,” he said. He added that neutral evaluations are somewhat uncommon but can be valuable in resolving disputes.

“When he comes in as a private judge, because of his background, he’s not afraid to make a decision,” said Pallie Zambrano, a family law attorney and founding partner at Oleander Law Partners LLP in Los Gatos who has used Herlihy as a neutral in the past.

She said he was skilled at handling the charged emotions that often come with family law cases and was an expert with the rules of civil procedure and evidence codes.

“He has a unique blend of experience, knowledge and temperament to fashion a resolution between parties that are typically polar opposites,” said Christopher Olson, a shareholder at Sweeney, Mason, Wilson, & Bosomworth in Los Gatos who has used Herlihy as a mediator multiple times.

Olson said Herlihy’s long legal career also helped resolve cases. “It’s one thing to have the experience, but it’s another thing to be able to communicate the experience effectively as an advocate for resolution,” he said. “He has that knack.”

Those judicial instincts also come into play during Herlihy’s

arbitrations, according to David Hamerslough, a partner at Rossi, Hamerslough, Reischl & Chuck in San Jose.

“When I arbitrated the case in front of him I enjoyed that he let the lawyers do their job,” Hamerslough said. “He did not try to impose what he thought were the factual or legal issues.”

One of the attorneys who worked with Herlihy in resolving the decade-long real estate dispute said Herlihy was one of only a few neutrals who could have handled the case successfully.

“He was very considerate about the emotional components of the litigation,” said Martin Foley, now

a sole practitioner in Los Angeles. “He resolved what I considered to be an unresolvable case.”

Herlihy said he enjoys spending time with his wife and two grown daughters and three grandsons. He said he enjoys the beach and the family trip to Maui every year.

Here are attorneys who have used Herlihy’s mediation services: James McManis, McManis Faulkner; Christopher Olson, Sweeney, Mason, Wilson, & Bosomworth; David Hamerslough, Rossi, Hamerslough, Reischl & Chuck; Pallie Zambrano, Oleander Law Partners LLP, Martin Foley, Los Angeles.