

The Power of Silence

Mediator John Flaherty gets to 'yes' by giving parties space to speak

By Fiona Smith
Daily Journal Staff Writer

SAN JOSE — For John Flaherty, an 18-year veteran of mediations, being flexible is key to helping settle a dispute.

He varies his approach depending on the case — trying to draw people out and empowering them to figure out a resolution while appealing to people's desire to get out of a stressful situation.

Working for JAMS in San Jose since 1998, the retired Santa Clara County Superior Court judge has handled a wide range of mediations and arbitrations.

One case that stands out to him involved a dispute between a real estate broker and the owner of a large commercial property. The broker had found a lessee for the property and was due a \$1 million commission from the landlord. But due to subsequent changes in the lessee's business, it later did not lease the property from the landlord.

"I walked into the mediation thinking, 'How the heck am I going to settle this case?'" Flaherty said. "There was no way the landlord could get paid on the lease, but the broker had earned his commission under the law and I came in and said to the lawyers, 'How can we settle this case?'"

The lawyers suggested the broker and landlord meet alone without the lawyers, and the pair worked out a business solution to the dispute, Flaherty said.

"There's so many cases we have where the solution isn't necessarily a money solution — 'We'll pay you X dollars to drop the lawsuit' — but the solution is a business solution in some form and it just has to be found and in many cases," Flaherty said.

"That's what I mean by flexibility, looking for solutions in different ways," he added.

In another case, a minor problem between the buyer and seller of a luxury \$6 million Silicon Valley home

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mushroomed into a big fight. The new buyer was upset after finding mold in the wine storage cabinet of the house and wanted the seller to pay to fix it.

"When you're dealing with a \$6 million house that would be a small item, but to this buyer, who obviously had a lot of money and to the seller who also had a lot of money, they just went to war," Flaherty said.

In dealing with the wealthy, a mediator can't rely on a bedrock argument for settling — it will save a lot of money.

"You still have the argument that 'Look, OK, forget about the money, this is going to cost you time and stress — do you really need that in your life?'" Flaherty said. "People who haven't been through a trial don't appreciate how much time it's going to take and how much stress it's going to be."

The case did end in a settlement.

And there are some cases in which none of the go-to strategies seem like the way to go. He remembers a fight between two immigrants who each claimed \$10 million that had been brought in from a foreign country to invest in a U.S. hotel was theirs. Neither of them spoke any English and they each had friends at the mediation to act as interpreters.

"I remember going into the room where these two gentlemen were with the interpreters and making this pronouncement, kind of pounding the table ... making a big speech about how important it was that they resolve this and then sitting down and hoping that this would happen, just hoping something would happen," Flaherty said.

"Finally, after what seemed like an eternity to me ... one of them kind of barked something to the other, in a language I didn't understand, and the other barked something back and pretty soon they were yelling at each other



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and ... eventually they started talking to each other as opposed to shouting at each other and eventually that settled."

Allowing for silence after he made his initial speech to the pair was uncomfortable, but "silence can be used as a strategy — both by a lawyer and as a mediator," Flaherty said.

"I've seen lawyers early in my practice as a judge who were really good at just not saying anything when the other side was provoking them or asking a question that begged for an answer and instead of answering it with some trite or meaningless answer, just not saying anything," Flaherty said.

Anthony F. Ventura, who has used Flaherty to aid in many residential real estate disputes, said he is an engaging mediator.

Most of his clients are individuals and Flaherty is good at letting them air their views, including them in the discussions and always making sure they understand any legalese, said Ventura, a partner with Slater Hersey.

"Judge Flaherty is good at letting my clients say what they want to say and, to avoid being confrontational, he'll raise the other side's arguments in the form of a question," Ventura said.

"It allows people to digest things in a less confrontational way instead of it turning into a five-hour fight ... It allows people to deescalate, talk and become more solutions-focused," the attorney added.

Ralph A. Lombardi, who has used Flaherty for medical malpractice arbi-

trations, called him bright, courteous and a quick study.

"He runs an efficient proceeding," said Lombardi, of Lombardi, Loper & Conant LLP. "When you read his decisions, he seems to have always picked up on the biggest issues, both legally and medically."

Before becoming a neutral, Flaherty sat on the Santa Clara County Superior Court bench for 21 years after being appointed by Gov. Jerry Brown in 1977. He handled a wide variety of assignments over the years, although he focused on civil toward the end.

He practiced as a lawyer for 13 years before his appointment, starting out as a generalist doing everything from divorces to criminal defense, and then later concentrating on business and real estate litigation.

Flaherty grew up in San Jose and has spent his entire professional career in the area. He is married and enjoys going on birding trips with his wife both locally and internationally — including many visits to the jungles of Central America. He also enjoys doing yoga.

Here are some attorneys who have used Flaherty's alternative dispute resolution services: Anthony F. Ventura, Slater Hersey; Steven L. Friedlander, SV Employment Law Firm PC; Kenneth R. VanVleck, GCA Law Partners LLP; Gigi M. Knudtson, Knudtson & Nutter LLP; William C. Last Jr., Last & Faoro; Ralph A. Lombardi, Lombardi, Loper & Conant LLP