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Making Years of Mediation Mistakes: What I've Learned

After 10 years on the bench conducting settlement conferences, I anticipated that becoming a mediator would be easy. Seventeen years later I am writing an article I could call "How To Do Mediations Wrong." Mistakes have taught me what I can do better to help counsel and clients increase the likelihood of a successful mediation.

Hon. William Cahill (Ret.)

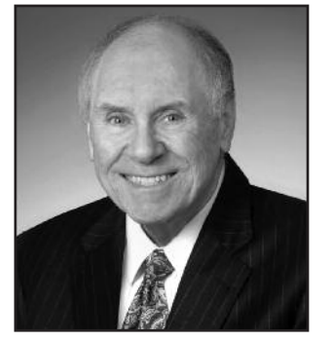
Like all good mediators, I have learned to keep all secrets and forget them the next day. I have found that I need to tell counsel and especially clients the truth of what I perceive to be strengths and weaknesses of a case (I do emphasize different things to different parties). I have learned to listen to all questions, especially from clients, and to answer those questions (or not) depending on the circumstances. I have learned to make sure the mediation gives the clients their "day in court." If counsel and I do all that

Continued on page 2

Also in This Issue

The Bay Area Complex Litigation Superior Courts Part I

In the summer and fall of 2017, an Association of Business Trial Lawyers (ABTL) team conducted one-on-one interviews of the nine Bay Area Complex Litigation Judges for the Northern California ABTL Report. The Judges interviewed were Hon. Barry P. Goode of Contra Costa County, Hon. Mary E. Wiss and Hon. Curtis E. A. Karnow of San Francisco County, Hon. Marie S. Weiner of San Mateo County, Hon. Brian C. Walsh and Hon. Thomas E. Kuhnle of Santa Clara County and Hon. Winifred Smith, Hon. Brad Seligman and Hon. George C. Hernandez of Alameda County.



Frank Burke

The interview team consisted of ourselves and volunteers from the ABTL's Leadership Development Committee: Shana Inspektor, Adrian Canzoneri, Stephanie Biehl, Kapri Saunders, Adam Brausa, and Ashley Shively. Our goal was to provide a comparative perspective for practicing lawyers about the respective Judges' case mix, standard pretrial and trial practices, their likes and dislikes concerning lawyer conduct, and other as-yet-unpublished feedback for counsel. The interviewers asked the Judges a common set of prepared questions on these topics. After preparing our interview notes, we provided them to the Judges for editing and comments. The Judges were extremely generous with their time, both in the interviews and in the edits.

Continued on page 6

Continued from page 1

Superior Courts Part 1

This article provides an overview of our interview findings. The Northern California Chapter will make available to members the complete interview summaries as well as supplemental materials offered by the Judges.

Case Mix

The case mix information was either anecdotal or based on the individual Judges' case management data, since none of the Counties track this information in their official statistics.

Chandra Russell

All of the Judges reported that employment and wage hour class action and PAGA actions constitute either their largest category of actions or are among the top two types of actions in their court. They constitute 48-50% of the actions in Santa Clara, 40% of the actions in San Mateo, 10-43% of the actions in the various Alameda Departments, and one of the top two categories in San Francisco and Contra Costa.

The next largest categories vary by County. Contra Costa has significant construction defect and mass tort cases, and Judge Goode also handles CEQA cases. San Francisco has significant mass tort claims as well as many coordinated and consolidated claims of various types. Another Department handles asbestos and CEQA claims. In San Mateo County, securities actions are approximately 20% of the total actions, and Judge Weiner also handles CEQA cases. Alameda County has significant volumes of asbestos, toxic tort/Prop 65, and construction defect claims, each in the 15-25% range.

Except as noted above, the Judges reported a smaller mix (in the 10% or less range) of complex tort, contract, insurance, antitrust, securities, construction defect, trade secrets, other IP, product liability, business torts/unfair competition and personal injury/property damage/wrongful death.

Professional Standards

All Judges agree that the quality of the lawyering is very high in the complex litigation courts. They also agree that collaborative case management by counsel, including robust meet and confers in advance of hearings and trial, are essential to complex cases. They encourage face-to-face meetings rather than e-mail. Relatedly, the Judges discourage wasting time on collateral matters in discovery or taking unnecessarily adversarial positions in legal briefs and motion practice. As Judge Goode puts it, "light, not heat" is preferred in briefs and at oral argument, and "excessive use of adverbs and adjectives is not helpful."

Adequate preparation is a must. Most Judges also agree that, when in court and on the record, lawyers should address the Judge, not each other. Of course, arguing with the other side in open court is discouraged.

Judges Hernandez and Goode noted the value of creativity and novel approaches to the thorny and cutting-edge issues that often arise in complex cases. Judge Weiner adds that lawyers should be dressed professionally before entering the courtroom, stand while speaking, keep objections short, and not infringe on the jurors' space. Judge Smith, who permits counsel to communicate with the Court via email, discourages parties from using that medium to air disputes or ask questions whose answers lie in the court rules.

All Judges encourage younger attorneys to participate at hearings and trial. Most Judges do not have a formal rule on this but are enthusiastic when senior partners ask junior attorneys to participate, particularly where junior attorneys "did the work." The Santa Clara Complex Civil Litigation Guidelines contain two explicit references to encouraging junior attorney participation at hearings and trial.

Applicable Rules

In Alameda, parties in complex-designated cases receive a notice of assignment and an initial case management order containing specific rules. Each of the three complex Judges has a standing order. The standing orders all prohibit parties from moving to compel before a discovery conference, though the Judges have their own procedures for seeking a conference. Each Judge has recommended procedures available on the Alameda County Superior Court website, where litigants can find procedures and other resources to aid them during litigation.

Santa Clara County's complex departments follow CRC but add three mechanisms for complex case management: (1) automatic discovery stay until the first CMC; (2) a stay on the responsive pleading deadline also until the CMC; and (3) an Informal Discovery Conference (IDC) before any discovery motion can be filed. The Santa Clara County Guidelines cover most aspects of complex practice. Judge Kuhnle notes that complex cases often require

Continued on page 10

Continued from page 6

Superior Courts Part 1

deviation from the standard rules, especially in regard to discovery.

As in Santa Clara, Judge Goode's preliminary notice of assignment stays all discovery until the CMC. Judge Goode issues an e-filing order in each case. Judge Goode's Order re Issue Conference contains detailed rules regarding various aspects of trial, including a list of seven sua sponte rulings for which it is unnecessary to file motions in limine. The court website also has "A Handy Guide to Department 17."

In San Francisco, Judge Karnow's Users' Manual provides thorough guidelines on case management, discovery, class actions, page counts, trial, and other matters. Judge Karnow stresses the importance of flexibility in modifying CCP, CRC, and Local Rules in complex cases. Judge Wiss does not have any chambers rules.

Attorneys appearing before Judge Weiner are required to follow the CRC, Local Rules, and Complex Civil Department rules (available on the court's website and contained in her CMC Order #1). The website contains model protective orders and special rules for Filed Documents and Courtesy Copies, Hearing Dates, Ex Parte Applications, and Discovery.

Case Management Conferences

Each of the Judges emphasized the critical role of case management in complex litigation. Judge Karnow has emphasized that the difference between a simple and complex case is "the interventionist role of the judge in the complicated case as a result of the failure of the usual rules of civil procedure and the inefficiencies of the usual roles of the participants." At the initial CMC, most Judges do not want to receive the standard Judicial Council form, opting instead for a joint statement covering the principal factual allegations, causes of action and defenses, status of the pleadings, identification of major procedural and substantive problems, and a vision of how the case will progress. Judge Goode wants the parties to cut through to the heart of the case and identify "lynch pin" dispositive issues that can be teed up for decision. Similar sentiments were expressed by most of the Judges. Judge Hernandez encourages counsel to come up with novel, "even crazy" solutions. Most encourage lead counsel to attend in person and not send a stand in.

Each Judge sets a schedule of follow-up CMCs at 2-5 month intervals. Most discuss a discovery plan at the CMC, covering issues such as phasing or bifurcation, and some engage in a preliminary discussion of how E-discovery will be handled. Judge Seligman does not think it helpful to launch extensive discovery without having first thought about the issues requiring resolution. Judge Karnow prefers that the parties consider sequencing discovery, "with each phase to either lead directly to a motion or provide efficiencies for the next phase." Judge Smith considers phasing discovery or bifurcation if requested by the parties.

Many of the Judges inquire about and set deadlines for substantive or class certification motions at the CMC. There are differences among them on the scope of discovery in advance of a class certification. Judge Goode usually limits such discovery pre-certification to class certification issues, but recognizes that an examination of these issues may implicate substantive issues as well; he encourages parties to "try to find the line and stay on the class certification side of it initially and keep the merits discovery to only that which is necessary to inform the class certification issues." Judge Walsh uses a similar approach. In employment class actions, Judges Goode and Walsh try to determine whether defendants plan to file declarations in opposition to the class certification motion, which may lead to further deposition discovery by plaintiffs before the response or reply brief is due. One of Judge Karnow's approaches is similar, but he usually anticipates little discovery before the certification motion, with defense discovery before its response and plaintiff discovery before the reply. Judge Hernandez's and Judge Smith's Department Guidelines suggest a similar "staggering" of discovery by plaintiffs and defendants in connection with a motion for class certification. Judge Weiner does not stay merits discovery pre-certification, but sometimes prioritizes the staging of discovery pre-certification, especially E-discovery which may be voluminous and time consuming.

The Judges report that in PAGA actions, phasing of discovery is impacted by the recent case of Williams v. Superior Court, 3 Cal. 5th 531 (2017), which governs.

Discovery

The topic of discovery and discovery disputes is another area for novel solutions in the complex litigation courts. Most of the Judges use a very differ-

Continued on page 11

Continued from page 10

Superior Courts Part 1

ent approach from that set forth in the rules. Judge Karnow urges counsel to "think outside the box." For many, discovery conferences are informal, with short letter briefs instead of traditional style briefs and informal dialogue among the Court and counsel, sometimes considered to be off the record.

For example, in both Santa Clara County and Contra Costa County, all discovery is stayed until the CMC. After all parties have been served, the stay may be lifted in whole or in part. A hallmark of the Santa Clara Guidelines is the Informal Discovery Conference ("IDC"), an off-the-record discussion preceded by a three-page letter brief. If an agreement is reached, it is memorialized in an order, and if not, a motion may be filed. Judge Goode encourages informal discovery conferences, but does not require them. Judges Hernandez, Seligman and Weiner require an informal process, with short letter briefs and discussion and guidance from the Court, before they will grant permission for the parties to file a formal motion. Judge Smith requires the parties to send two page e-mails to her Department requesting a Discovery CMC when there is a dispute. Judge Karnow recommends that counsel consider informal conferences with him, either telephonically or in writing, and provides a checklist for counsel to follow. If that fails, he offers a unique "one shot" procedure which requires a joint submission which groups the issues, quotes only the relevant text of the disputed discovery, and succinctly presents each parties' argument, once per issue. He usually rules without a hearing within a few business days but will schedule a hearing if requested.

Judges Weiner, Seligman and Wiss are more proactive on electronic discovery. Judge Seligman wants the parties to issue litigation holds and determine what information they have, where it is and how to search for it, and to meet and confer with the other side before coming to the case management conference. Judge Weiner encourages the parties to agree on initial search terms and an initial subset of custodians and complete those productions before conferring on the full scope of custodians, a topic on which they often disagree, which is when she gets involved. Judge Wiss asks the parties to present her with information about what kind of discoverable information is available, its format, how it should be produced, the cost of productions, and whether they recommend using a document depository.

Several of the Judges suggest that parties focus on the named plaintiffs' depositions and defendant PMK depositions early on. Judges Hernandez, Smith and Weiner suggest that parties focus on depositions and documents rather than interrogatories and requests for admission. Judge Weiner limits parties to 35 special interrogatories and 35 requests for admission (other than authenticity of documents), without a prior court order after demonstration of need and a showing that other means of discovery would be less efficient.

Frank Burke handled complex litigation for 42 years, and is now a neutral at ADR Services, Inc. and a Pro Tem Settlement Judge.

Chandra Russell is a senior associate in the Employment Practice Group at Farella Braun + Martel LLP.

Continued from page 3

What I've Learned

they are signing a settlement. (I think cases settle earlier during the winter because the sun goes down earlier.) If we don't succeed the first day it helps if counsel stays in touch with me, and tells me what prevented settlement that day.

I have made the mistake of making a Mediator's Proposal too early, so the parties do not trust it. If someone is asking for a proposal, it is usually too early. The proposal is my best estimate of what I think the parties will settle for. In confidential meetings with counsel throughout the day I get a lot of vital information about what might work. I never accept "bottom lines" (and please don't try to fool the mediator, if you want a successful mediation). But if I have been paying attention and especially if counsel has been honest with me, I have some idea as to what might work. I also give the parties enough time to respond thoughtfully. A corporation or carrier may need a few days to evaluate what has happened.

Early mediations are a mixed bag. If we settle, then it saves costs for clients. But nothing is under oath, and attorneys cannot later rely on hearsay information from mediation. It helps to give the other side documents they will get in discovery anyway so that everyone is can go forward early, but informed.

When someone says, "I won't negotiate against myself" I explain that they are not really negotiating with the other side, they are negotiating against a number they have in mind, probably decided even before the mediation started. You are negotiating against that secret number, so it does not matter what the other side is doing.

Continued on page 12