

VERDICTS & SETTLEMENTS

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Genuinely Honest

Neutral Kevin Murphy doesn't have a fake bone in his body, lawyer says.

By Shane Nelson

Special to the Daily Journal

The son of an attorney, retired judge Kevin J. Murphy's love for the law first took root in elementary school.

"I used to love going into my dad's office and – believe it or not – touching his law books," Murphy recalled with a chuckle. "They looked like they could contain something of value, so I was fascinated. And to this day, I'm fascinated by the law. One of the things I like about arbitration and mediation is there are always new areas of law coming up that I haven't come across."

A 1973 UCLA School of Law graduate, Murphy worked for 10 years as a Santa Clara County deputy district attorney before he was elected in 1983 as a Municipal Court judge, defeating an incumbent.

"The incumbent had been appointed judge, then was voted out of office, and then he was reappointed," Murphy explained. "I didn't think that was right, so I ran."

Murphy was appointed to the Santa Clara County Superior Court in 1989, overseeing criminal, civil and appellate assignments until he left in 2011 and joined ADR Services Inc.'s roster of private neutrals. He's tackled a wide range of mediations and arbitrations since then, focusing frequently on employment, business, real estate and trade secret cases.

Murphy mentioned that a common criticism of arbitrators these days is that many of them don't follow the law due to an unhealthy interest in return business.

"In other words, they tailor a ruling or split the baby in order to get somebody to come back for another arbitration or a mediation,"



Gary Wagner / Special to the Daily Journal

Murphy explained. "I don't proceed that way, and I've told attorneys this: I'd rule against my own mother at an arbitration if the law and facts supported such a ruling."

Murphy added, however, that he'd first try to disqualify himself, noting with another chuckle: "I love my mother." But the retired judge insisted he's an arbitrator who follows the law.

"Any decision I make – if it's wrong, it's due to mistake, maybe negligence – but it's not going to be due to dishonesty," he explained. "As a consequence, I come across like an old-fashioned judge, and I'll make attorneys follow the law."

Before a mediation, Murphy likes to receive briefs from both sides and often speaks over the phone beforehand with the attorneys. He also said he starts every mediation trying to earnestly connect.

"You can't just walk into a mediation and say, 'Hi, nice to meet you. I'm a former judge, and your case stinks,'" Murphy explained with a laugh. "You have to build rapport with the attorneys and the parties, and you can't just assume that's going to happen because of your background. ... What I try to do – especially with the nonattorneys, the clients – is I try to find some connection, some way to bond

Kevin J. Murphy

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with them, which may actually have absolutely nothing to do with the case.”

San Jose plaintiffs’ attorney B. Robert Allard has used Murphy half a dozen times as a mediator in difficult childhood sexual abuse cases. He said the neutral started out each of those mediations by talking with clients about his experience prosecuting sex crimes as a Santa Clara County deputy district attorney.

“He shared with my clients his experience in that world and gained their trust fairly early on with the understanding that he was putting the bad guys away,” Allard said. “With those introductions in all those matters, it was almost palpable how much my clients breathed in a sigh of relief because he’s so real. There’s just not a fake bone in his body.”

San Francisco litigator Richard G. Garcia has used Murphy to resolve half a dozen personal injury and business disputes, and he agreed that the retired judge’s efforts early

on to genuinely connect with parties distinguish him from other mediators.

“He’s just a genuinely good man,” Garcia said. “And as he’s spending time with the parties – who are obviously upset and distrust the other side. He provides that sense of, ‘OK, I can trust what he’s saying, and I think he’s doing his best to be as fair as possible.’ In this field of heavy dispute and distrust in the litigation process, he’s just very effective at breaking down the walls that naturally exist in the process.”

On the other hand, Murphy also described himself as a “really evaluative” mediator.

“I will tell a party, if appropriate, if they have a poor case or a strong case,” Murphy said. “And on occasion, I’ve actually told the key witness – usually a party – that they won’t be a good witness, which is difficult to do, but I certainly try to do it in a nice way. ... I remember once telling this man, ‘I hate to tell you this, but you’re going to be a

terrible witness.’ And his response was, ‘My wife says the same thing,’ and he then proceeded to settle the case.”

San Jose defense attorney Alison P. Buchanan has used Murphy as a mediator in several legal malpractice disputes, and she said the neutral’s tactful approach to sharing his opinions was especially productive.

“He can communicate the bad news in a way that is direct but not harsh,” Buchanan explained. “For a party taking a particularly hard stand on an issue, hearing from a respected neutral like Judge Murphy that maybe the argument they think is a winner isn’t such a winner after all – if that’s delivered effectively it can be really helpful to resolution. Whereas I think in some cases, if a neutral is too heavy handed, that can have the opposite effect, where it just causes someone to further entrench in their position.”

Buchanan also noted that often the underlying law in legal mal-

practice disputes can be extraordinarily varied, but she’s never seen Murphy unprepared.

“On the civil bench in Santa Clara County, he obviously saw a variety of matters, and I think he also puts in the work beforehand,” Buchanan explained. “I’ve mediated all sorts of legal malpractice cases, where the underlying case could be anything from personal injury to employment to a tax issue, and he’s very good. No matter what the underlying area was, I’ve never had the sense he was out of his depth.”

Here are some attorneys who have used Murphy’s services: Alison P. Buchanan, Hoge Fenton Jones & Appel Inc; B. Robert Allard, Corsiglia McMahon & Allard LLP; Richard G. Garcia, Manning & Kass, Ellrod, Ramirez, Trester LLP; James McManis, McManis Faulkner; Shannon M. Nessler, Hanson Bridgett LLP.

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