

Second Thoughts: Jurist finds new knack

After nearly jumping to another public sector job, judge discovers mediation

By John Roemer
Daily Journal Staff Writer

SAN JOSE — Kevin J. Murphy stepped into a legal quagmire in 2007 when he opted to doff his superior court judge's black robe before his judicial term expired and become top assistant to the newly elected Santa Clara County district attorney.

Murphy, now 65 and a neutral for ADR Services Inc. here and in San Francisco, had to quickly withdraw from that job thanks to a little-known anti-moonlighting clause in the state Constitution that has frustrated other judges and is currently the subject of a lawsuit.

He said that despite the hassle, "It worked out for me. I love what I'm doing now."

Many who've hired Murphy for mediations, arbitrations and case evaluations have become fans. "I'm a repeat customer," said Allen J. Ruby of Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates' Palo Alto office.

"He was a world-class judge and now he's a world-class mediator," Ruby said. "For complicated business disputes, he is a very thoughtful person. If a problem seems complex at the beginning, it is less so after he sorts it out. He methodically works his way there. He is thoughtful, engaged and — above all — calm."

Murphy charges \$425 per hour but said he keeps working on a case if it doesn't end after a formal mediation. "I put in more time than I bill for," he said. "I don't need to nickel and dime people. I don't like a system where the mediator says, 'Too bad, best of luck, unless you schedule another session.' That's distasteful to me."

William M. Litt, a deputy county counsel in Monterey County, praised Murphy.

"We were unable to resolve at a mediation meeting," he said of an employment dispute. "Judge Murphy

worked hard when he wasn't being paid over the course of the next three or four days. He kept in touch by email and got it settled. He did a remarkable job.

"And an interesting thing, he emailed in advance of the mediation, too, and asked a lot of detailed questions," Litt added. "Very few mediators do that. He was effective and fair for us."

Murphy said one of his most emotional mediation challenges concerned a funeral home that released a deceased's ashes to the wrong party, who then scattered them. The other party learned of the mistake and sued.

"Trial was approaching and both sides decided they wanted to talk settlement," Murphy said. "The improper disposal of remains causes emotional distress, and there's always a monetary component. What made the difference was that the family that suffered the loss of the remains wanted to make sure it didn't happen to another family."

So Murphy proposed that as part of the settlement he would visit the funeral home and familiarize himself with the safeguards it had put into place to prevent a recurrence. "It was not the most pleasant experience, but it was important to the resolution," he said.

Another lawyer who has used Murphy's services is Richard N. Grey, an Encino sole practitioner. "It's unusual for me to work in Monterey County," Grey said of an employment matter Murphy mediated. "But Judge Murphy resolved the matter in a day and both sides were very satisfied. He determined the value of the case and came up with a nice, clean resolution. I recommend him without hesitation."

Murphy also performs arbitrations and case evaluations. "Trial lawyers want to present a case to a trial court or a court of appeal," he said. "They seek my opinion. It's really fun going through a bunch of documents, [to] listen to their arguments and then give a critique. Then I get to watch the trial or appeal and hope I'm right."

The start-and-stop stumble when Murphy first left the bench for the district attorney's shop in 2007 resulted



Sam Attal / Special to the Daily Journal

Kevin J. Murphy

ADR Services Inc.
San Francisco

Areas of specialty: business, employment, banking, trade secrets, real estate, personal injury
to keep judges from currying favor from the bench by ruling in the favor of potential state agency employers.

Currently challenging the rule is Presiding Justice Arthur Gilbert of Division 6 of the 2nd District Court of Appeal in Ventura. Gilbert sued the state controller in 2012 seeking a judicial declaration that he is eligible for a public job if he retires before his term expires in 2019.

Murphy testified against the rule at the Los Angeles trial of Gilbert's suit, but the trial judge in July held that valid policy reasons favor the constitutional prohibition. Gilbert is currently appealing that decision.

Here are some of the lawyers who have used Kevin Murphy's services recently:

William W. Faulkner, McManis Faulkner, San Jose; James J. Brosnahan, Morrison & Foerster, San Francisco; Sarju A. Naran, Hoge Fenton Jones & Appel, San Jose; Jennifer M. Protas, Hoge Fenton Jones & Appel, San Jose; Michael J. Betz, Allen Matkins Leck Gamble & Mallory LLP, San Francisco; Natilee S. Riedman, Severson & Werson PC, San Francisco

from his wish to serve the public in a different role after 26 years as a state trial judge, he said.

"I had to be talked into it," he said of agreeing to work for District Attorney Dolores A. Carr, who had recently been elected. "The closing argument for me was, 'How about doing something for your community?' It sounds hokey and corny, I know, but it was the public service argument that swayed me. I was willing to resign to do it."

But within hours of the announcement that Murphy was switching jobs, Carr called to say she'd learned there was a problem. The state Constitution bars judges from taking new state jobs until their terms end.

"I did some research and found the law was not settled," Murphy said. "I could fight it and create an immediate issue for a DA who'd campaigned on ethics. Or I could turn down the job and withdraw my retirement."

Murphy said the media had fun with the messy glitch. "DA's first move runs afoul of law," a local newspaper headline read. "I was labeled [Carr's] mistake No. 1. I didn't know [about the constitutional bar]. I was a judge. I should have known. I was embarrassed. I was disappointed," Murphy said. He withdrew from the appointment, rescinded his retirement and stayed on the bench another two years before joining ADR Services.

The anti-moonlighting rule dates from Gold Rush days and is designed