

THE RECORDER

Court Watch

JUDGES AND THE JUSTICE SYSTEM

Neutral gets point across using plaintiff background

More than one defense lawyer has flinched upon being told that Eric Ivary — the co-founder of a successful and aggressive plaintiff firm — would be their court-appointed mediator.

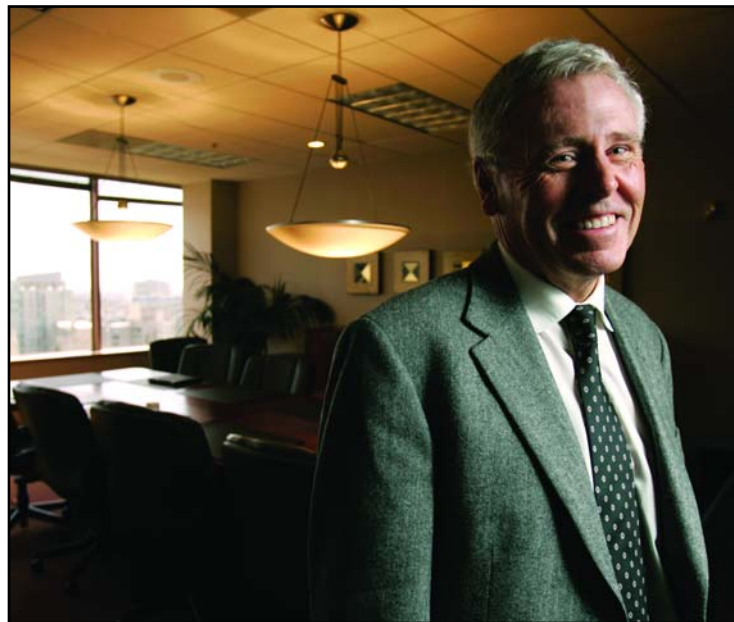
“I was not happy about the assignment, to be honest,” Carolyn Knox, a partner at Seyfarth Shaw, said of the first time a federal court’s alternative dispute resolution program sent her to the former plaintiff lawyer.

“And he knows this, because my firm’s very familiar with him as Gary Gwilliam’s (former) partner.”

Because he helped co-found the East Bay plaintiff shop Gwilliam, Ivary, Chiosso, Cavalli & Brewer, many lawyers can’t help but think of Ivary — who left plaintiff work to become a full-time neutral in 2001 — in terms of his aggressive former partner. Ivary said he understands the reaction to Gwilliam.

“God love him, he’s my best friend,” Ivary said. “But when he gets angry, look out.”

Whereas Gwilliam is known as stubborn, Ivary has developed a softer reputation with defense counsel, according to Knox, who specializes in Em-



JASON DOY

ployment Retirement Income Security Act cases. And that translates well to mediation.

Since her reluctant first experience with Ivary, Knox has gone back to him repeatedly, particularly for cases in which plaintiffs have serious medical problems. In addition to being well-versed in such cases, Knox said, Ivary’s background gives him extra clout with hard-headed plaintiff lawyers.

“I was stunned by how impressed I was with him, because I’m naturally skeptical of any plaintiff lawyer who wants to

become a mediator,” she said.

Ivary’s style is different from most neutrals, Knox explained, because he tends to delve deep into the technical issues surrounding an injury and its after-effects. And he prefers to do so with all the parties in the same room, something other mediators shy away from.

“He likes to keep the parties together as long as possible,” she said, sometimes almost to the point of discomfort.

For Ivary, Knox said, the tactic seems to work. Ivary said that’s because it reminds people

Eric Ivary

AFFILIATION: ADR Services, since June

DATE OF BIRTH: Sept. 15, 1946

LAW SCHOOL: Santa Clara University School of Law, 1971

PREVIOUS JUDICIAL EXPERIENCE: None

that their adversaries are human beings.

“I want to make the process as little like a court as possible,” he said, and by bringing litigants together, mediation can force them to stop posturing and confront the actual facts of a suit.

“It’s a way to cut through all the crap you see in litigation and get to the real case, and not the crap you thought you had,” he said.

Once people drop the pretense and realize that mediation can resolve a case without the stress and uncertainty of a trial, Ivary said, they will almost always settle.

To get to that point, he says, his background is his “greatest strength,” especially in negotiating with plaintiff lawyers. “I can

take them to the woodshed and talk in words they understand.”

It also presents a liability, he said, since some defense lawyers and insurance providers refuse to hire a mediator best known for winning big employment, personal injury and medical malpractice verdicts.

But after four years of full-time neutral work, most of Ivary’s business comes from repeat clients, and most of them are defense lawyers. Several, such as Michael Welch, are lawyers who once faced Ivary in court.

“I’ve known him for all of my professional career, which is about 25 years,” said the partner at Caudle, Welch & Umipeg in Concord. “He was always suing my clients.”

Welch said it’s the rapport they developed through litigation, along with Ivary’s ability to gauge the value of personal injury cases in a way that plaintiff attorneys trust, that makes him call on Ivary for mediations.

“He’s the type of guy who makes my life easier because we know plaintiff

lawyers are going to like him,” Welch said.

Ivary said he expects plaintiff lawyers to approach mediations differently than trials, and is particularly bothered by lawyers who try to show up their adversaries.

“A lot of plaintiff lawyers don’t realize that you’re asking them for money,” he said.

“You don’t come in and give an opening statement where you call the other guy a jerk, because you’re asking him for money.”

Plaintiff lawyer Eustace de Saint Phalle said he appreciates Ivary’s expectations and the tone he sets in mediations.

“He’s a very even-handed, very straightforward mediator,” said de Saint Phalle, a partner at The Veen Firm in San Francisco.

Like Knox, de Saint Phalle said Ivary is particularly helpful in cases where complex medical issues are at play.

Ivary, 59, charges \$350 an hour, which includes the time he spends

preparing for a case.

Ivary, who had been working independently, joined ADR Services in June. And while his mediation practice is growing, that may not be the case for long.

In recent months, Gov. Arnold Schwarzenegger has submitted Ivary’s name to the state Commission on Judicial Nominees Evaluation for a possible Alameda County judgeship, said lawyers who’ve seen a questionnaire relating to the possible appointment.

Ivary wouldn’t discuss the judicial interview process, but said that the last four years have taught him that he’s better suited to being a neutral than an advocate.

“I never dreamed I’d like it as much as I do until I started doing it full time,” he said.

— Justin Scheck

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