

# —Revisiting 2018 ACCTLA Judge of the Year— Judge Herbert on What Actually Moves Cases

by Ethan Niedermeyer



If you've practiced in Alameda County over the past decade, there's a good chance you've stood in a hallway waiting for your case to be called — watching settlement conferences unfold under the steady hand of Judge Herbert. And if you did, you probably noticed something: cases moved.

Now, after more than 40 years in civil litigation, appellate work and over a decade on the bench, Judge Herbert is bringing that same approach to his work as a private neutral. For ACCTLA members, his perspective is especially valuable — not just because of where he's been, but because of how clearly he sees what actually drives resolution.

*We asked Judge Herbert* what younger attorneys tend to misunderstand about how judges evaluate cases. His answer wasn't about a formula or a damages model — it was about credibility. Settlement value, in his view, is not just about the numbers. It's about how the case presents: how prepared you are, how consistent your story is, and whether you've done the work to understand both sides of the dispute. That perspective comes from years of seeing cases at every

stage — first as an appellate attorney drafting opinions for the California Court of Appeal, then in private practice handling complex civil and insurance matters, and finally on the bench managing both direct calendars and high-volume settlement dockets.

**“Each side has 50% of the power to settle — and 100% of the power not to”** Judge Herbert's first judicial assignment included multiple settlement conferences

per afternoon, and it clearly left an imprint. One of his core takeaways is something every trial lawyer should keep in mind:

*Each party has 50% of the power to settle — and 100% of the power not to.*

It sounds simple, but it reframes how you approach mediation. Too often, lawyers walk in expecting the judge — or now, the mediator — to “solve” the case. Judge Herbert sees his role differently. He facilitates, tests assumptions, and helps

parties evaluate risk — but resolution ultimately belongs to the parties.

One of the more interesting insights from Judge Herbert's time as a settlement judge is how much environment matters. When he was running a busy settlement calendar with multiple cases set at the same time, he would often start with the case most likely to settle. Why? Because success breeds success. Once one case resolved in short order, the tone of the courtroom shifted. Lawyers waiting their turn understood that the settlement process in his department would be substantive and meaningful. Settlement became the expectation, not the exception. That positive mindset carried over to the other cases and became a realistic option for their consideration. There's a lesson there for all of us: mediation is not just about your case in isolation. It's also about the energy in the room, the positive mindset you bring to the process, and whether you're signaling to your client that resolution (through reasonable compromise) is a worthwhile, achievable goal.

Judge Herbert is a strong believer in early mediation, with an important qualifier: the case has to be developed enough that the narratives are “locked in.” If you go too early, before each side has committed to a theory, mediation can turn into a dress rehearsal — an opportunity to refine arguments rather than resolve the dispute. But when timed correctly, early mediation can be powerful. It can narrow issues, focus discovery, and create a more collaborative process. Judge Herbert has found this particularly effective in employment cases, where early resolution can significantly reduce costs and exposure for both sides.

Since leaving the bench, Judge Herbert has had more time to do what many of us wish judges could do more of — prepare for each mediation. He now conducts in-depth pre-mediation conferences with each side. These conversations, often held without clients present, allow attorneys to speak candidly about strengths, weaknesses and real settlement ranges. Think of it as a sidebar you actually have time for. He also places a strong emphasis on follow-up. Settlement doesn't always happen at 4:30 p.m. on mediation day, and Judge Herbert stays engaged in the days that follow to help bridge remaining gaps.

Judge Herbert's advice for practitioners is straightforward — and worth taking seriously:

- *Be in the room with your client. Zoom has its place, but when it comes to hard settlement conversations, being physically present matters. You need to be able to look your client in the eye when you're talking about risk.*

- *Work with opposing counsel, not just against them. Some of the most effective lawyers Judge Herbert observed — people like Gene Majeski and Joe Cotchett — were fierce advocates who also knew how to communicate and collaborate when it counted.*

- *Give younger lawyers real opportunities. Judge Herbert credits much of his own development to mentors who let him take on meaningful work early. That's something worth paying forward.*

Part of what makes Judge Herbert effective is the range of experiences he brings to the table. He spent years at the California Court of Appeal, drafting opinions under tight deadlines and learning to think like a judge. He practiced in complex civil litigation, including insurance coverage and

bad faith. And on the bench in Alameda County from 2013 to 2024, he saw firsthand how cases succeed — or fall apart — in real time. That combination is relatively rare. As he puts it, appellate lawyers don't often get to see what happens in trial courts, and trial lawyers don't always get the appellate perspective. He's had both.

For all the discussion of strategy and process, Judge Herbert comes back to something simple: the people involved in the process. Whether it's maintaining professionalism with opposing counsel, building trust with your client, or creating the right tone in a mediation, outcomes often turn on human dynamics as much as legal ones.

Outside the courtroom, that perspective carries into his personal life. A lifelong Bay Area sports fan who grew up going to Giants games at Candlestick and watching the early Warriors teams, he now spends more time with family — and has even taken up ballroom and Latin dancing with his wife.

One “wellness” suggestion for all lawyers? Take weekly dancing lessons with your life partner. “Dancing gives you an opportunity to hold your partner in your arms for a “date night” once a week — it's much more fun, effective, and cheaper than couples counseling.” Not a bad reminder for busy lawyers, like us, who spend most of their time in adversarial settings. If there's a throughline to Judge Herbert's career, it's this: preparation, professionalism, and respect still win the day. This remains an honorable profession. And if you find yourself in a mediation with him, you can expect one thing above all: a transparent process designed to actually get your case resolved. ♦