

VERDICTS & SETTLEMENTS

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Empowering Partner

Retired judge Paul D. Herbert brings empathy, preparation and deep experience to private dispute resolution.

By Shane Nelson

Special to the Daily Journal

Retired judge Paul D. Herbert has developed a particular fondness in his work as an ADR Services Inc. private neutral.

“My first love is mediation and settlement,” Herbert said. “I’m happy to be an arbitrator and a referee if that’s the service folks need, but my preference is to do mediations and help people get out of the system and back to their regularly scheduled lives.”

A 1982 UC Hastings College of the Law graduate, Herbert started his legal career as a research attorney for the 1st and 5th Districts of the Court of Appeal. He later tackled business, employment and civil litigation in the private sector, representing clients on both sides of the bar.

“I’ve represented a lot of institutional defendants, but I’ve also represented a lot of individual plaintiffs,” Herbert explained. “So, it helps me better understand the dynamics of what’s going on in the cases I’m mediating.”

Herbert was appointed in 2013 by Gov. Jerry Brown to the Alameda County Superior Court, where he presided over criminal and civil calendars and worked for more than five years settling civil cases.

“I was interested in settlement even before I became a judge - just as a lawyer, of course - settling civil cases through mediation,” Herbert recalled. “But working at the court really gave me the bug, so to speak, and was frankly transformational in terms of me seeing how much more efficient the settlement process would be for the litigants and how rewarding that was for me as a judicial officer.”



Jana Ašenbrennerová / Special to the Daily Journal

Herbert retired from the bench in February 2024 and joined the ADR Services portfolio of private neutrals in March last year. He’s since been tackling commercial, employment, personal injury, insurance, real estate and product liability disputes as a mediator, arbitrator and discovery referee.

“I would say I’m doing about 90% mediation and 10% arbitrations and referee assignments,” Herbert noted.

As an arbitrator, Herbert said he tries to be very well prepared, and he follows the law.

“I think I had a good reputation at the court for fairness - for both plaintiff and defense counsel - and I try to apply those same principles and same skills when I have an arbitration,” he explained. “I listen and

don’t form judgments until I actually receive all the evidence and really try to be as evenhanded as I can, so everyone at the arbitration - even if they end up on the losing side - will feel they have been heard.”

Before his mediations, Herbert likes to receive briefs from all parties and speak over the phone with counsel. On the day of mediation, the ADR Services, Inc. neutral said he starts out with introductions and explains to the parties what he sees as the three stages of mediation: information gathering, bargaining and impasse.

Herbert noted that early on he prefers to speak with the litigants themselves provided their counsel approves.

Paul D. Herbert

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"Initially they're going to tell you what they want, and of course, that's good to understand, but I'm always going to try to figure out what do they really need in a deal in order to persuade them to a settlement," Herbert explained. "I find it very important to empower them and help them understand there won't be a settlement unless we can put together a deal that has enough deal points that are of interest to them."

Herbert said he prefers to make use of a more facilitative approach throughout his mediations, but he will provide evaluative insight later in the day if he's asked.

"Rather than tell them precisely what I think of their case, I will be willing to express concerns - things I want them to think about," he explained, "just to make sure they've thought them through in terms of pluses and minuses of settlement and litigation."

Herbert added that he may volunteer some of his concerns about a case later in the process if he feels it might move a party closer to compromise.

"I'm very careful to explain to them that I've been doing this for

43 years as a lawyer and a judge ... and I've still never seen a perfect case," he said. "So I don't expect anybody to have one of those. I've never seen one of those. And so every case has its strengths and its relative weaknesses."

Oakland litigator Monica J. Burneikis worked with Herbert to resolve cases through settlement conference when he was on the bench.

"Judge Herbert's personality is calming, it is assuring, and I think that is very important to my clients, who are always plaintiffs, always injured parties or family members of parties," Burneikis said.

"He takes the time to listen to what my clients have to say. ... And my clients felt heard and understood, and I think that was instrumental in helping facilitate a resolution."

Orinda plaintiffs' attorney Susan Kang Gordon also appeared before Herbert when he was on the bench and has since used him to resolve several elder neglect, catastrophic injury and wrongful death cases as a mediator and arbitrator.

"I think he's one of the best in the business," Gordon said. "He has the

right combination of insurance coverage experience and likability so that people trust him."

Gordon noted that parties who work with Herbert as an arbitrator should be well prepared, but she added that the retired judge is conscientious about giving each side a fair chance. Gordon also emphasized that Herbert's demeanor is a terrific strong suit in mediations.

"My clients are usually families of elders, who have suffered severe injuries in a nursing home setting, and many have died as a result," Gordon explained. "And when we get in a room with Judge Herbert, and he begins to talk and show that he cares about the families, they're more inclined to listen to what he has to say because of his ability to connect with people."

San Francisco litigator John M. Feder appeared before Herbert on the bench and has since used him as a private mediator to resolve catastrophic injury and wrongful death cases. Feder said the neutral is an outstanding listener.

"He's got an empathetic ear to all sides of the case," Feder said. "A lot of lawyers and judges are very com-

fortable speaking, but they're a little bit more challenged when it comes to listening carefully. Lots of smart judges and attorneys that are working as mediators don't always have the touch and the people skills that it takes to excel as a mediator. I think Judge Herbert has all of those skills."

Feder added that his last case with Herbert featured a range of complex medical facts.

"He did a really good job of mastering the complicated issues that confronted both sides," Feder said. "He's thoughtful about what he says, and he's thoroughly prepared. He's read the briefs; he's thought about the case. He's just one of those guys that I think loves his job and is damn good at it."

Here are some attorneys who have used Herbert's services: John M. Feder, Rouda Feder Tietjen & McGuinn; Susan Kang-Gordon, Susan Kang Gordon PLC; Monica J. Burneikis, Burneikis Law PC; Maria M. Lampasona, Rankin, Shuey, Mintz, Lampasona & Harpe; Aaron A. Hayes, O'Hagan Meyer LLP

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