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VERDICTS & SETTLEMENTS

Wrangling Emotions

Howard Herman gets parties out of battle mode in cases with complex power dynamics.

By Don DeBenedictis

Special to the Daily Journal

After 37 years as a mediator, including 23 years overseeing the mediation program at the federal district court in San Francisco, Howard Herman has become adept at working with complex cases of all types, especially challenging civil rights, discrimination and disability access cases.

A common aspect of those cases is the high emotions they produce among the parties and their attorneys, he said. "People have strong feelings about their cases and about the principles that are involved. Emotions are pervasive."

Those cases demand a great deal of empathy from the mediator for the aggrieved plaintiff, of course. The defendants also require empathy, he said. "I think that's something that I'm known for."

After all, he added, "Insurance adjusters have feelings too. ... Every person does."

Herman "specializes in matters involving high emotion and complex power dynamics," says his page at JAMS. Lawyers for plaintiffs and defendants agree that he is very skilled at handling the problems those cases present.

Plaintiffs' employment attorney Jean Hyams said Herman listens to the parties carefully and is very compassionate. "He is able to pull out a lot of different tools to help people think past the dispute to what their real needs are," she said. "He helps people step out of battle mode ... and think



Jana Ašenbrennerová / Special to the Daily Journal

about what their life will be after."

Eugene B. Elliot, who defends public entities, said that in mediation Herman "demonstrates ... empathy with each side and an understanding of what their positions are, as well as their emotional components."

He is excellent at listening to and understanding the disabled clients whom Celia McGuinness represents in complex discrimination and Americans with Disability Act litigation. "He really gives them the sense that he understands," she said. "It's one of the main keys to his success."

Finding out bankers' and insurance adjusters' feelings can be tricky because they tend to just say

"no," according to McGuinness. But Herman can do that, too.

"He's the single best mediator I have ever had in my approximately 30 years of practice," she said.

Born in Cleveland, he grew up there and in California's Central Valley. He was influenced to become a lawyer by an uncle, Bernard A. Berkman, who was the ACLU attorney who argued *Mapp v. Ohio*, in which the U.S. Supreme Court extended the exclusionary rule to the states.

Herman graduated from UC Berkeley, flirted with a career in education and then earned his law degree from UC Hastings College of the Law in 1983.

Howard A. Herman

JAMS

San Francisco

Areas of Specialty:

Disability Access

Civil Rights

Public Policy,

Employment

He was just a second-year associate at Graham & James when he second-chaired a federal jury trial for Lufthansa German Airlines. They won.

"We did a particularly terrific job," he said. "And the next thing that happened was we got fired because we'd spent so much money winning that we had really lost sight of the client's underlying needs and interests. "It was an early lesson to me ... about what really counts and what matters."

He sees it now as a touchstone for his approach to mediation, which is to meet the parties' needs and interests.

In late 1985, Herman took a job with the 9th U.S. Circuit Court of Appeals as one of the first staff attorneys in its very early mediation program. Initially, the attorneys also assisted judges with certain pre-litigation motions and other matters, but the settlement aspect of their work grew quickly.

"I was really sold," he said. "I got the bug of wanting to help people really solve their problems and resolve their disputes, not just win in court."

Still, after four years, he left to join Kindle & Anderson because he "needed a little more seasoning as a lawyer."

Then in 1993, he accepted a post as the director of the Contra Costa County Superior Court's alternate dispute resolution program. "I was the first person whose full-time job it was to look after the program, to build it, to improve the design and really to refine the procedures," he said.

Four years later, he joined the ADR program at the Northern District of California federal

court. He became the program's director in 2005.

In both the Contra Costa and federal courts, Herman mediated cases himself, but he also was responsible for building, training and supervising panels of volunteer lawyer mediators. A court's program "is only as good as the people who are serving as the mediators," he said. "The most important thing was to maintain that quality control, which involved knowing who the mediators are," including their personalities, strengths and weaknesses.

One of his innovations at the district court was setting up what he called practice groups, small groups of mediators with different levels of experience and different legal specialties. They would meet regularly to dissect how their cases had played out or to brainstorm how to deal with difficult ongoing cases.

Herman retired from the federal court in 2020 and joined JAMS. He is primarily mediating discrimination matters, including many complex disability act cases. He has handled cases about access to a large hotel, a challenge to ongoing construction and several cases from disabled golfers seeking access to courses.

One of the most interesting cases he's had recently was brought by a man who had been wrongfully convicted of a serious felony and sought compensation from the city and the police officers he blamed for his many years in prison.

Herman said he rarely offers mediator's proposals, but he needed one to settle that case. "And not just a number, but a real

explanation for both sides about why the number would work," he said.

In general, he said he seeks to customize his mediation approach to fit each case. He likes to begin the customization process with a joint telephone conference with the attorneys "to figure out what are the needs of this particular case, these particular parties, these particular lawyers," he said. "I want to be able to understand the dynamics that are going on."

The discussion typically includes deciding what should go into the pre-mediation statements, whether they'll be exchanged, whether enough discovery has taken place, who'll attend the mediation and if it should begin with a joint session. He calls it "impasse avoidance."

Unlike many mediators, he does like to open with a joint session. "We talk to the clients about the process, and everybody gets to see each other and say hello," he said. "It starts everybody on the same page, and it humanizes the situation."

Once formal mediation begins, "he is superb," defense attorney Elliot said. "He is intelligent, patient, persistent, personable, thorough and creative" in ways that develop "options and ideas to find a way through an issue."

He also is always "listening and assessing and looking for ... some common ground" he can use to "build agreement, any kind of agreement, along the way," Hyams, the employee lawyer, said.

Disability rights attorney McGuinness added that Herman looks at the cases in a very strategic way. "He is watching the

proceedings from 30,000 feet," she said. "I can tell he's thinking three steps ahead" and will assist if the parties run out of ideas.

In addition to many mediations and the occasional arbitration or early neutral evaluation, Herman is also participating in a new project that doesn't involve litigation called JAMS Pathways. For it, mediators help larger institutions assess and address problems that are "getting in the way of that organization's core mission," he said. So far, he has been part of a team working with a community college on problems within a department.

Herman has taught ADR-related courses at Hastings since 1997. In his current class, he teaches students how to represent clients effectively in mediation.

He and his wife are also working with the 9th Judicial Circuit Historical Society, the Berkeley Judicial Institute and the Law School Admissions Council on a project called "Effective Communication Across Differences." The virtual program aims to teach law students how to communicate effectively with people with whom they disagree.

Herman's wife, Claudia Bernard, is the retired chief circuit mediator for the 9th U.S. Circuit Court of Appeals.

Here are some attorneys who have used Herman's services: Eugene B. Elliot, Bertrand, Fox, Elliot, Osman & Wenzel; Jean Hyams, Levy Vinick Burrell Hyams LLP; Celia McGuinness, Derby McGuinness & Goldsmith LLP; Denise K. Top, Top Law PC; Minh N. Vu, Seyfarth Shaw LLP.