

VERDICTS & SETTLEMENTS

FRIDAY, JULY 15, 2005

Neutral's Bag of Tools Includes Humor, Honesty

Retired Judge Prefers Using Subtle Suggestions, Gentle Wit to Reach Settlement

By Lorelei Laird

Daily Journal Staff Writer

When negotiations get tense, David H. Brickner likes to defuse things with a joke.

"Frankly, I don't really think the mediation is started until I get a laugh," Brickner said.

The mediator and arbitrator describes his mediation technique as friendly.

"Persons who come to me can expect to be handled in a courteous, friendly way, leading ultimately to the moments of truth," he said. "Because I think that's what they're paying for, frankly. They're not paying for me to tell them how wonderful their case is."

William J. Brown Jr., an associate at the Irvine office of Jones Day, says humor is one of the tools in Brickner's bag. Another, Brown says, is honesty.

"He was very honest in his assessment of our case in terms of pointing out the strengths and weaknesses," Brown said. "[And] he had a good knack for using humor at a rough time, to either grease the skids when he was going to tell you his opinion on things, or during tense negotiations."

Another tool he employs is subtlety, Brickner says. He recognizes that lawyers who are attempting to settle have a lot invested in their cases and usually don't appreciate direct assaults.

"The mediator has to guide the conversation and mediation in such a way that folks do not have to lose faith [in their cases] in order to settle," Brickner said. "So the tactful and the oblique are employed to great extent."

That's half of Brickner's philosophy of mediation: It's better to reach settlement with subtle suggestions and gentle humor than to bludgeon the parties with harsh words.

The other half is that reaching a



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Partner at Sheppard, Mullin, Richter & Hampton

settlement is not just the best outcome of a case, he said, but his most important priority.

"Folks are paying a fairly reasonable amount of money to have a product delivered to them, and that product is a settlement," he said. "And I take that very seriously."

And that means that he's willing to hang on to a case as long as it takes to reach accord. The mediation itself is just Chapter

One, he says. If the parties don't settle during the initial sessions, "we just go to Chapter Two."

Attorneys who have used Brickner's services have noticed that tenacity in the pursuit of a settlement. Partner Sean P. O'Connor of Sheppard, Mullin, Richter & Hampton in Costa Mesa finished a mediation over a breach of contract before Brickner in May.

"I think what really separates him from others is his extraordinary effort," O'Connor said. "He is creative in coming up with solutions, and ... if the matter does not settle on that particular day, he will politely badger the attorneys afterward with phone calls in an effort to keep the settlement discussions going. He refuses to allow the settlement discussions to get cold."

John W. Holcomb, a partner at the Riverside office of intellectual property firm Knobbe, Martens, Olson & Bear, agrees. A trade secrets misappropriation case that Holcomb had before Brickner took two full days of mediation — and four months of phone calls from the judge — to settle.

"I was really impressed with his follow-up," Holcomb said. "He didn't give up on it, and I don't think we paid him for that extra time that he spent."

"It seemed like he really cared about getting a resolution in the case."

Brown says that, if he has any criticism of Brickner, it's his honesty — which is why his use of humor to temper that frankness is so important.

"Sometimes, too much honesty isn't what your client wants to hear," Brown said. "[Brickner's] used to being on the bench and saying what he thinks, and that honesty comes across very seriously."

"But I think he's transitioned well from the black-robe mode to being a mediator. So he's not oblivious to the effect that he's having on the parties."

Brickner made that transition in 2003. After 20 years with the Orange Superior Court, he went to JAMS.

Born and raised in Huntington Beach, he

David H. Brickner

Retired judge, Orange Superior Court

Age: 66

Affiliation: JAMS

Location: Orange

Specialties: Commercial litigation, personal injury

Rate: \$425 an hour

earned a bachelor's degree from Stanford University in 1961 before serving as a lieutenant in the Navy from 1962 through 1965. When he returned to civilian life, he earned a degree from the UCLA School of Law and passed the State Bar in 1969.

Brickner began his legal career with the Orange County district attorney's office and, a few years later, became a private criminal law practitioner. But when Gov. Jerry Brown appointed him to a West Orange County Municipal Court seat in 1983, he made the switch to civil. He stuck with civil after his subsequent election to the Superior Court in 1986 and throughout his judicial career.

When he left the bench in 2003, he didn't feel ready to stop working completely.

"I had no desire to retire with a capital R and work on my garden and fish for trout," he said. "So the question was, do I want to sit on assignment or work with JAMS?"

And for him, there was no question that alternative dispute resolution was the right choice.

Brickner says his years on the bench have come in handy in his work as a mediator because they give the weight of authority to his predictions about how a case might fare in court.

"The judge can say to the folks, 'Look, I

have presided over cases like this before, and I have a sense of what the jury does with this kind of case,'" he said.

As a mediator, Bricker says, he has no power to decide anything "except what time it is." But he does expect the lawyers who appear before him to make a serious effort at reaching settlement, he says.

"There are very few things that cause me angst unless the lawyer is unduly argumentative and combative in our joint session," he said. "So ... come with the view that you are, in good faith, trying to come to a reasonable compromise."

Outside the conference room, Brickner has his family to keep him busy. His wife, Leah T. Brickner, is a legal research attorney with the Orange Superior Court, and he has two sons still at home, Matthew Brickner, 18, and Michael Brickner, 21. His three sons by a previous marriage — Jason, Thomas and Warren Brickner — are off on their own.

Brickner enjoys bicycling, playing a good game of golf and strumming his guitar. But work ranks right up there with his other hobbies.

"You know, it keeps you going," he said. "I don't know what I'd do if I didn't have some kind of a job."

Here are some of the attorneys who have used Brickner's services:

Andrew J. Guilford, Sheppard, Mullin, Richter & Hampton, Costa Mesa; Francine T. Radford, Goodin, Macbridge Squeri & Richie, San Francisco; Lynda J. Zadra-Symes, Knobbe, Martens, Olson & Bear, Irvine; James R. Wakefield, Cummins & White, Newport Beach; Michael C. Moore, Mattel Inc., El Segundo; and Dennett F. Kouri, Meserve, Mumper & Hughes, Irvine