

**FEBRUARY 19, 2010**

## **Heraclitean Mediator**

Neutral Douglas E. Swager says every case - just like every stream - is different. You have to determine what you think is best based on the knowledge you already have.

By Dhyana Levey

Daily Journal Staff Writer

**SAN FRANCISCO** - Douglas E. Swager, a recently retired appellate justice who now works as a neutral, likens his mediation style to his hobby of fly-fishing.



Every day - just like every stream - is different, so you have to determine what you think is best based on the knowledge you already have, he said. But litigants can be as unpredictable as the great outdoors, so a mediator must be prepared to alter his methods based on the personalities involved.

Swager brought 13 years of experience on the 1st District Court of Appeal bench to ADR Services, which he officially joined at the beginning of 2009.

He also carried with him one of his favorite mottos. Swager had a little sign at the appellate court that said "Patience. Respect. Keep your mouth shut."

"It makes me think of mediation in a way," he said. "It's not necessarily about keeping your mouth shut, but it's about listening. Because by listening to the parties and letting them have their say, you can gain a lot about how to approach the mediation."

He recalled a particularly difficult mediation he handled recently between two sophisticated businessmen fighting over property. The hard feelings in the case came through even in the briefs and, upon speaking with the clients and their attorneys, Swager decided it would be best to divide the parties into separate sessions.

"There are some cases where it's not going to be real productive if you have people getting into heated conversations with each other," Swager said. "It's just going to throw some oil on the fire, so to speak."

William L. Coggshall, a partner with Archer Norris in Walnut Creek, remembered working with Swager on a real estate dispute over an easement involving a wealthy, eccentric land developer.

The personalities involved made for a rocky session, and the case didn't end up

settling, but Coggshall said that wasn't for lack of skill, effort or professionalism on Swager's part.

"He understood the case, understood the issues and had a pleasant demeanor," Coggshall said. "He comes across as authoritative because he's a justice, but he's also down to earth and likes to talk about his background."

Another attorney who hired Swager as mediator said he liked working with the retired justice but believed he wasted too much time telling personal anecdotes. "I think he was effective, but we could have gotten there faster," said the attorney, who did not want to be identified. "Sometimes mediators invest too much of their personalities in the process."

Alameda lawyer Scott C. Stratman, a supervising attorney with Valerian, Patterson & Stratman, also described Swager as a storyteller.

"He uses stories to break the ice and ease everyone into conversation," said Stratman, who used Swager's mediation services about three months ago for a personal injury dispute. "He's not an 'in-your-face' mediator."

Although resolution appeared unlikely, he added, Swager took extra steps to get the parties to see what their case was worth and ended up helping them settle. "He had the ability to understand and assess the possible outcomes when a legal issue predominated," Stratman said.

Growing up in El Cerrito, Swager took an aptitude test before college that suggested he become a farmer. But he decided business administration would be a better fit for his interests and skills. By the time he earned his undergraduate degree in business from UC Berkeley in 1966, law became his profession of choice.

He graduated from UC Hastings College of the Law in 1969 before starting as a deputy district attorney for Contra Costa County. At the district attorney's office Swager gained experience handling a variety of cases ranging from simple misdemeanors to high-profile felonies.

Richmond firm Watson, Hoffe & Hass recruited him to private practice several years later, and he then joined Whiting, Rubenstein, Swager & Levy as a partner in 1981.

While the district attorney's office gave him insight into criminal matters, his private practice developed his knowledge of real estate, business and environmental litigation. Swager was enjoying his law practice so much that he turned down recommendations in the early 1980s to run for a position on the municipal court bench.

But he changed his mind upon hearing news of an opening at the Richmond court after one of its judges announced his retirement. Swager applied for a judicial position and took the bench in 1985 and was elevated to Contra Costa Country Superior Court in 1987.

Getting to the appellate court bench also took some convincing for Swager. The trial court was close to his home and he appreciated the type of interaction it gave him with the attorneys.

Once appointed to the 1st District Court of Appeal in 1995, however, he was happy to discover that bench to be a collegial place to work without the time pressures of the trial calendar. He was also pleased by the vast variety of cases he got to explore and said he hopes to keep that pattern of diversity in his caseload going as a mediator.

"The more variety you have the more interesting it is, at least to me," Swager said. "That was one of the great advantages on the court of appeal. When you are a justice in that court, you are really one of the last generalists of the law."

*Here are some of the lawyers who have used Swager's mediation services:* William L. Coggshall, Archer Norris; Gregory de la Peña, De la Peña & McDonald; Jeffrey A. Leon, Leon & Leon; Scott C. Stratman, Valerian, Patterson & Stratman; Steven Riess, San Francisco; David A. Stein, Donahue Gallagher Woods; Kevin D. Siegel, Oakland City Attorney's Office.

[dhyana\\_levey@dailyjournal.com](mailto:dhyana_levey@dailyjournal.com)