

VERDICTS & SETTLEMENTS

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‘Velvet Hammer’

Neutral Scott Markus has a “smooth exterior” but a “spine of steel”, at least one attorney says.

By Shane Nelson

Special to the Daily Journal

Scott S. Markus has mediated more than 4,000 cases over the past three decades, but one dispute involving medical malpractice claims and a plaintiff facing a terminal cancer diagnosis will always stand out.

The case settled for nearly seven figures 25 years ago, according to Markus. The plaintiff — a nurse who had long worked with children suffering from cancer — donated a substantial portion of that money to renovate and improve the children’s lounge in the pediatric oncology department where she worked for years, he recalled.

“She said, ‘I want it recarpeted, repainted. I want books, puzzles, magazines, video games, and I want to pay for it out of my settlement,’” Markus recalled. “There was not a dry eye in the room.”

After the plaintiff spelled out her wishes during the mediation, Markus said he went across the hall to the room in which the defendants were gathered and explained the details of the dying nurse’s refurbishment plans.

“I looked at the defense, and I said, ‘Would you consider naming the room after her?’ They looked at each other, and they said, ‘Done,’” Markus explained, struggling a bit to contain his emotions. “I’ll never forget that case.”

That settlement is the best example Markus said he could think of to explain why he left his 12-year career as a business litigator in 1992 to pursue alternative dispute resolution full time.

“There are people in pain in both sides of a litigated or a pre-litigated dispute — people who feel they’ve been wronged or are being wronged by the virtue of the lawsuit,” Markus said. “I’m there to try and help get that matter resolved. ... While parties are in litigation, there is no opportunity to heal.”

The San Diego based mediator said he handles many medical malpractice cases, along with nursing home and elder abuse matters, but he also regularly mediates employment and catastrophic injury disputes. After working as an independent mediator for nearly 30 years, Markus joined Signature Resolution on Aug. 2, spearheading the opening of the panel’s new San Diego office.



Thomas Kurtz / Special to the Daily Journal

“Scott Markus is an icon in San Diego County,” said Dario Higuchi, managing partner of Signature Resolution. “He practically invented alternative dispute resolution in this region, and we are excited to work with Mr. Markus as we expand our services in the San Diego market.”

Although Markus also handled arbitrations very early in his career as a full-time private neutral, he said he no longer works as an arbitrator because it became too difficult for him.

“I would agonize over decisions knowing that ultimately someone was going to be unhappy with the result even if it was explained,” Markus explained. “And there would be a tendency for that party to blame me rather than their lawyer or themselves about their decision not to resolve the case.”

Scott S. Markus

Signature Resolution
San Diego

Areas of Specialty:

Employment,
Professional Liability,
Catastrophic Injury,
Real Property,
Business Disputes

To prepare for a mediation, Markus said he speaks over the phone with every lawyer separately to discuss scheduling, briefing issues and outline the process. He also asks defense counsel to draft an initial full-form settlement agreement before the mediation and share it with the plaintiffs' attorneys.

"The document is returned to undergo a revision, and then when the mediation starts in the morning, I already have a document that's 90% done," Markus explained. "There are too many cases where if that preparation isn't done, the document can take two or three hours at the end of the day to get done. Plus, it highlights issues other than the amount the matter's going to resolve for."

San Diego labor and employment attorney Marie Burke Kenny has used Markus as a mediator over the past 10 years, and said that the process of exchanging draft settlement agreements beforehand is a terrific element of the neutral's approach.

"There are certain terms everybody knows are standard in the settlement agreements, and Scott tries to get that out of the way upfront," Kenny said. "There have been situations where I've reached a settlement, and the number's been worked out, and then you spend the next three hours bickering about terms."

Markus also noted that on the day of mediation he rarely works anymore with all of the parties present in joint sessions, saying that approach has "fallen in disfavor in California."

"If they decline to discuss issues face to face with the other side, I'm not there to impose process on them. That's counterproductive, and it'll just antagonize them," he said. "If I can get the lawyers to talk directly — if they are cordial and respectful toward each other — I do encourage that. But again, I don't impose it."

Mediators' proposals are another tool Markus makes use of regularly, though he did say he handles them a bit differently than when he first started working full time as a private neutral.

"Proposals can be destructive, and if you make the wrong one, then the case doesn't resolve," he said. "And I do frequently remind the lawyers they are not negotiating with me; they're negotiating with the other side. At the end of the day, as a mediator, I hold 0.00 votes."

Riverside defense attorney James J. Wallace has used Markus on many medical malpractice cases over the past 20 years, and said the mediator always employs "a genteel approach."

"Scott has a way of putting people at ease," Wallace said, "and it's not confrontational. Some mediators come in, and you feel like they're turning you upside down to shake money out of your pockets. That leaves a bad feeling, a bad taste in people's mouth. Scott's not like that."

Kenny agreed, saying Markus excels at building a genuine connection with litigants on both sides of a dispute while not being afraid to be honest with them.

"I call it the velvet hammer. That smooth exterior where you develop rapport but then you also have that interior spine of steel when you need to tell a party their evaluation or view of the case is wrong," Kenny explained. "Scott's not afraid to make tough statements, but he does it in a way that's not offensive. I've had mediators I will never use again because by one o'clock my client's been offended by them multiple times. ... Scott can transcend that."

Westminster plaintiffs' attorney Neil Pedersen has used Markus to successfully resolve several employment disputes in recent years and said he's certainly not a mediator who strong-arms parties.

"A lot of retired judges act like they're still judges, and they try to use the force of their personality to get things done," Pedersen said. "Scott uses logic and compassion, and he's just very good with people. Clients walking away from mediation with Scott Markus believe they were treated fairly."

Here are some attorneys who have used Markus' services: Neil Pedersen, Pedersen Law APC; James J. Wallace II, LaFollette Johnson DeHaas Fesler & Ames; Marie B. Kenny, Procopio, Cory, Hargreaves & Savitch LLP; Heather K. McMillan, Stevens & McMillan; Julie A. Dunn, DLA Piper LLP ■