

# VERDICTS & SETTLEMENTS

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## Trust the Process

*Mediator Peter Kirwan is there to build rapport and help parties find common ground.*

By Shane Nelson

Special to the Daily Journal

For retired judge Peter H. Kirwan, it's important that all the litigants involved in his mediations feel at ease.

"Litigation is stressful enough, so I try to create an environment where people are as comfortable as they can possibly be," said Kirwan, who joined Signature Resolution's roster of private neutrals last spring. "I always say to the parties, 'We're going to spend all day together. Is it OK if we refer to each other by first names?' ... And I think that helps put people at ease. I also do a lot of listening at the beginning, which I think puts people at ease."

Kirwan added that he tries to help parties get into the right mindset for mediation early.

"I tell them the day is going to be a little bit of a roller coaster," he explained. "What the other room's position is at 10:00 in the morning may not always be reflective of what it is at 3:30 in the afternoon. So, trust the process."

A 1986 graduate of Santa Clara University School of Law, Kirwan spent nearly two decades as a civil litigator, often defending clients in insurance and commercial disputes. In 2006, Kirwan was appointed by Gov. Arnold Schwarzenegger to the Santa Clara County Superior Court, where he tackled criminal, civil, complex litigation and family law assignments until his retirement in January 2024.

"As an arbitrator, I adopt my style as a judge, which is I'm going to let [attorneys] try their case. I'm not going to interfere," Kirwan said. "I will make decisions when appropriate, but I think good litigators and trial lawyers want an arbitrator



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or judge who lets them try their case and doesn't put handcuffs on anyone unnecessarily."

Prior to his mediations, Kirwan likes to receive briefs from all the parties and will often speak on the phone beforehand with counsel. He conducts about half of his mediations entirely in person and another 25% are a hybrid of in-person and virtual.

"My preference is - if the parties are willing - to do it in person," he said. "If they're not ... I will certainly do it virtually. But if I were the one making the decision, I would say, 'Let's all get together in person.' I just think it creates a better dynamic to communicate, to listen and to perhaps read some of the subtle, non-spoken body language that sometimes is important to be aware of."

Building rapport with the parties is an early objective for Kirwan.

"I want them to know I've carefully reviewed their brief, and I want to hear from them," he explained. "I may direct the conversation in terms of questions I have about the factual background that aren't necessarily laid out in the brief, but I want to create a dialogue. I want to create a rapport and trust and let them know I'm not here to make a decision. I'm here to help them find common ground. I'm going to do everything I can to work with all the parties to see if we can inch towards common ground to solve the problem."

San Francisco plaintiffs' attorney Brandon M. Banks has used Kirwan as a mediator on several employment and personal injury disputes, and said he has an "excellent bedside manner" with clients.

### Peter H. Kirwan

Signature Resolution  
San Jose

#### Areas of Specialty:

Employment  
Commercial  
Personal Injury  
Insurance  
Professional Liability

"Litigation itself is a nerve-wracking process, and for clients - who've never been through the process - mediation can also be pretty nerve-wracking," Banks said. "But Judge Kerwin does a great job of making the clients feel comfortable and of helping guide them through the process."

Los Angeles plaintiffs' attorney Howard L. Magee has used Kirwan to resolve employment disputes, and said, "Clients come in different shapes, size and form, and not all clients are easy to deal with - some are quite difficult. Even as representatives of the client, they can be difficult."

"But Judge Kirwan has this amazing ability, where he can just fit with any type of personality or dynamic and get things settled into a calm discussion," Magee explained. "His ability

to adapt to the different personalities, temperaments and characteristics - I think that's a very, very important skill set that he has."

Kirwan said he will eventually move on to a discussion of the case's strengths and weaknesses, but he noted that it's important not to be too evaluative too early.

"And I always tell the parties, 'I'm going to acknowledge the strengths of your case, but it's my responsibility to sometimes point out the vulnerabilities in your case, so you have a clear picture as to what lies ahead,'" Kirwan explained. "Parties tend to focus on the strengths of their cases. It's human nature. But they don't always fully recognize the weaknesses or vulnerabilities. So, I prepare them that sometime during the day I may have that conversation with them."

San Jose litigator Edward A. Kraus has used Kirwan as a mediator on a few environmental and commercial disputes, and he described the neutral as no-nonsense.

"He quickly gets to whatever the hang-up issue in that case is between the parties and then works on it, and he's pretty tenacious on that, which is good," Kraus said. "Some mediators try to be nice to everybody, and it's not that he's not nice, but he doesn't have a problem telling you straightforward, 'Well, here's what I think,' which is helpful. ... Some mediators won't necessarily push. He's willing to at least push each side so they move, and I think that's beneficial."

Kirwan says he's thoroughly enjoying his work as a private neutral.

"Every case I have has a different

dynamic and different challenges, but if you're patient and you let the process happen and let the parties feel like they've got control of the outcome, I've found it really rewarding," he explained. "When you take a case - that in the morning you thought would never settle - and at the end of the day, or in the evening, you've got it settled, it's just a very, very rewarding thing."

*Here are some attorneys who have used Kirwan's services:* Edward A. Kraus, Silicon Valley Law Group; Brandon M. Banks, Brandon Banks Law APC; Howard L. Magee, Diversity Law Group; Qiaojing Ella Zheng, Sanford Heisler Sharp McKnight LLP; Edward Romero, Gordon & Rees Scully Mansukhani LLP.

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