

## 'S & SETTLEMENTS

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### Neutral Serves Up Food, Savvy to Settle Disputes

By Craig Anderson  
Daily Journal Staff Writer

**W**ALNUT CREEK — Malcom Sher, an independent mediator and arbitrator, says he always serves good food to the litigants and their attorneys during their sessions.

Sher serves cheese, fruit, vegetables and dip — and keeps it coming. It's not just because he wants his clients to eat well. He also likes the concept of getting people on opposing sides of a lawsuit, who sometimes view their legal opponent almost as an enemy, to share food.

#### ADR Profile

"If they will break bread together," Sher said, "they may be willing to resolve their differences."

Sher, who handles an array of cases that include malpractice claims and real estate and commercial disputes, said many of them have "significant emotional overtones" because the parties feel they have been cheated or do not believe they have done anything wrong.

He said his job is to address not just the legal issues in a dispute but also the emotions that sometimes get in the way of reaching a settlement.

Sher often jokes during his mediation session that he is not a therapist, and he said that lawyers who choose him as a mediator "are not looking for a touchy-feely guy."

Legal disputes are costly not just in dollars, Sher said, but also in emotional energy. Continuing litigation, he said, "rents an expensive space in your head."

Many people would like to find a way to resolve such battles, even if it costs them more than they would like to pay.

"If given the chance," he said,



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"I try to gently prod and encourage the parties and their lawyers to a reality check. If they will break bread together, they may be willing to resolve their differences," said independent neutral Malcolm Sher.

"they would rather resolve it than take the risk on an uncertain decision."

Attorneys who have used Sher's services said the combination of food and savvy can be very effective.

Gregg Riehl, a Lafayette real estate attorney who represented a couple who allegedly had failed to disclose problems in the home they sold, said, "[Sher] has a very good manner about him and sets up a comfortable atmosphere."

The opportunity to eat together "gave people a chance to mingle together socially," Riehl said. "He did a very good job setting that up."

Riehl, who said his clients did nothing wrong but faced uninsured

exposure because of allegedly inadequate disclosures about problems with the house, said Sher provided "a cloak of authority" to help the various parties reach a settlement. The defendants included real estate agents, a home inspection company and a termite company.

"He takes enough time to understand," Riehl said of Sher. "I'm not sure we would have gotten it done without him."

Barbara D. Jewell, an attorney with Gagen, McCoy, McMahon, Koss, Markowitz & Raines in Danville who represented the buyers, said it took two sessions to hammer out a deal.

Sher, she said, "demonstrated a real ability to explain what the is-

sues were."

The final settlement, she added, was "an excellent result for a pre-litigation resolution."

"What I try to do is gently prod and encourage the parties and their lawyers to a reality check," Sher said.

A native of Rhodesia, now Zimbabwe, who moved to London after his parents' divorce, Sher worked as a solicitor in England before taking what he planned as a three-month vacation across the United States in 1975.

The trip, which he spent traveling from New York to California, ended up lasting nine months. And Sher ended up finding a new home in

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# Neutral Serves Up Food and Savvy to Resolve Differences

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the San Francisco Bay Area — and a wife, Kathy, whom he married in 1976. He passed the State Bar Exam that same year and took a job at Ericksen, Ericksen, Mackenroth & Arbutnot, a civil litigation defense firm. The firm is now known as Ericksen, Arbutnot, Kilduff, Day & Lindstrom Inc.

In his first year, he successfully defended a wrongful-death case in which a child drowned in a swimming pool.

"It really started me down the road to dispute resolution," said Sher, who believed most people in such a tragic case would rather settle it than take the lawsuit to trial.

Sher worked as an associate, then a partner, at Buchanan Kass Morgan & Miller between 1980 and 1984. He then became a partner at Wilson Sher Marshall & Peterson, where he worked until 1997, when he decided to stop commuting to Oakland from his home in Contra Costa County.

He has done alternate dispute resolution work since the mid-1980s, including work as a small-claims judge. At the same time, as a partner at Sher Minnard in Walnut Creek, he continued working as a civil trial lawyer, handling real estate, professional liability and employment cases.

Sher, 59, who has made a transition to almost full-time work as a mediator and arbitrator within the past year, said he will take chances if he believes personal feelings are standing in the way of a settlement.

Last year, he mediated a dispute between a man and the couple who bought his Oakland home. The couple claimed the man had not disclosed construction defects.

The seller, who had built the house to sell, threw a party there shortly before it changed hands and left wine stains on the carpeting. This offended the buyers, who believed his treatment of the house was an insult.

Sher said he asked the buyer and seller to meet privately with him, a tactic he admits was "quite risky" because of the potential for matters to spiral out of control.

But, he said, "you've got to improvise sometimes."

The seller apologized, and the case settled 25 minutes later, Sher recalls.

"That was the breakthrough," he said.

In discussions with each side, Sher poses leading questions and calls his approach "evaluative," although he said he does not like to offer a lot of his own definitive opinions.

"If [lawyers and their clients] are really listening, they are going to know what [I] think about the case," he said.

Still, Frederick C. Hertz, an Oakland sole practitioner, said Sher "is not afraid to express opinions," an approach that can backfire — but not in the three cases Sher has handled for him.

"He was extremely effective," Hertz said of two dissolutions and a wrongful-foreclosure claim against



## Malcolm Sher

Mediator and arbitrator

**Affiliation:** Independent

**Location:** Walnut Creek (Contra Costa County)

**Areas of specialty:** real property, commercial, construction and probate

**Age:** 59

**Fee:** \$300 an hour for up to three parties; \$350 an hour for more than three parties

a lender. "He engaged the parties to talk, and not just the lawyers."

"He used his substantial knowledge to ... challenge people's assumptions," Hertz said. "The trick in doing these mediations is to be

able to focus on the underlying emotional issues and the legal issue."

That can be true not just in the breakup of a relationship but also in dealing with disputes that are, on their face, strictly business.

Sher is very good at navigating litigants' "professional pride," Hertz said.

Hertz also likes the informality of Sher's independent practice. The fees are reasonable, he said, and "the informality is quite welcome."

Jewell said Sher conducts separate meetings with each party and shuttles between them.

"He knows the law in this area and understands the strong and weak arguments that can be made," she said. "He knows how to talk to lawyers and to litigants."

While Sher can ask probing questions, he said he does so in private caucus, "so you're not embarrassing the lawyer or the client."

"We mediators kind of parachute into the room, where people put a lot of trust in us," Sher said. "A mediator's role is not to do any harm."

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

- Barbara D. Jewell, Gagen, McCoy, McMahon, Koss, Markowitz & Raines, Danville; Gregg Riehl, Lafayette; Frederick C. Hertz, Oakland; Michael D. Cooper, Wendel Rosen Black & Dean, Oakland; Paul J. Dohring, Calistoga; Sunena Sabharwal, Oakland; and Howard R. Melamed, Walnut Creek