

Understanding Other Idiosyncrasies

Retired Judge Marshall Whitley excels as a mediator in probate, trust & estate disputes, lawyers say.

By Don DeBenedictis

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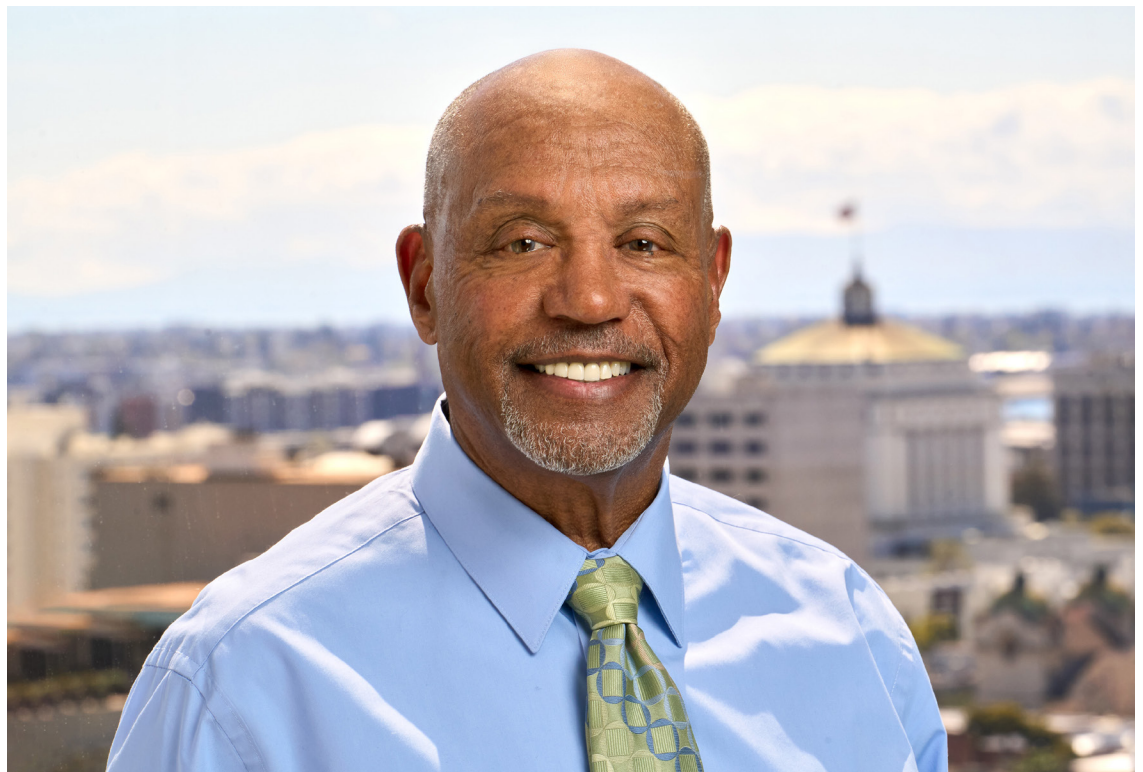
Marshall Whitley likes to describe himself as a specialist. “Some people prefer to be generalists,” he said. “I prefer to be a specialist because I like to get deep into a particular area rather than being on the surface of a lot of areas. ... I prefer that deep dive.”

His primary specialty since he became a mediator in 2013, and for 10 years before that as a superior court judge, has been probate, trusts and estates matters. Whitley was the Alameda County Superior Court’s supervising probate judge from 2003 through 2007. Then, he led the court in setting up a special department to handle all the long-cause trust and estate litigation.

Complicated probate and trust litigation “was the fastest growing litigation throughout the state of California,” he said. “In fact, it still is.”

During much of that same time, he headed the court’s probate committee and served on probate-related committees for the Judicial Council and the California Judges Association. For a time, he also chaired the probate and mental health committee of the state court system’s judicial education system, California Judicial Education and Research, or CJER.

These days, about three-quarters of the cases Whitley takes on as a neutral concern probate, trust and estate disputes. He also handles real estate, property tax, contracts and other civil cases, he said. About 70% of his assignments are mediation, but he also arbitrates some matters and serves as a referee.



Gary Wagner / Special to the Daily Journal

Whitley has a deep “understanding of the idiosyncrasies of trust and estate law,” said San Mateo probate attorney Jeffrey Loew. Denise Chambliss of Hoge Fenton Jones & Appel in Pleasanton said the retired judge’s “fantastic experience helps parties understand the strengths and weaknesses of their cases.”

But lawyers asked about Whitley praised more than his knowledge. “He is knowledgeable about the law and also knowledgeable about people,” said Oakland’s Verleana Green.

“He’s very good at evaluating the cases, but also his people skills are second to none,” Loew said. “He has a lot of gravitas.”

Whitley “talks to people on their level, not talking down to them,” said Matthew Toth of Pedder Hesselstine Walker & Toth. “He almost becomes their friend, which is a very good approach.” Toth added that Whitley has settled cases for his firm that other mediators couldn’t.

“He thinks about the people” caught up in the trust and estate cases he mediates, according to Noe-Marie Claraty of the Pastor Law Group. “He notices that they are people, which I’m not sure every lawyer does.” Often in litigation, attorneys reduce everything to dollars quickly, she said. “But Judge Whitley notices that there

Marshall Whitley

ADR Services, Inc.
Oakland

Areas of Specialty:

Probate
Trusts & Estates
Civil

are many goals for the family ... and he is able to communicate complex legal positions in a human way. ... He can wear his judicial hat and his human hat at the same time."

Attorneys said Whitley uses his people skills to impress upon litigants the value of settlement. "He has a way of asking a rhetorical question of a client where he's not telling them to rethink their position ... but gently suggesting they rethink their position," Loew said.

Douglas Housman of the Law Offices of Cain, Cain & Housman said Whitley is "upfront about what his goal is: to uncomfortably push the parties closer together. ... He lays the groundwork right off the bat to the parties."

Because he can connect with the parties on a human level, "he is able to break down those barriers quickly to get to the meat of the issue," Housman added. "He allows them to vent for the first portion of the mediation. A lot of time, these people just want to be heard."

Chambliss made the same point. "He's very good at facilitating conversations with clients," she said. He gives them "the time and space to tell their side of the story, which is probably the one chance clients get to say what they want to say."

Many of the probate and trusts attorneys in the Bay Area knew Whitley from his time on the bench. Several also knew him from Golden Gate University School of Law, where he taught probate and related courses for years. He also developed the law school's LLM program in trust, estate and probate law. Later, he created and taught a course on mediating trust and estate cases as part of the program.

"I've always been into the educational aspects of whatever I'm

doing," he said, noting his work teaching judges. "Teaching was always my thing. I think I get that from my dad."

His father was a high school teacher and principal in Maryland. The family lived in a largely Black neighborhood in Washington, D.C. In 1954, after *Brown v. Board of Education* came down, they moved to an all-white neighborhood, the first Black family there.

Whitley attended public schools in the district and then Howard University for a couple of years. He graduated from nearby Bowie State University in 1970. He earned his law degree three years later from the University of Connecticut.

Early in his 2L year, he volunteered to be a poll watcher when Medgar Evers' brother Charles ran unsuccessfully to be governor of Mississippi. "That was very eye opening," Whitley said. "I had never experienced that much ... racism where it was just so palpable, you could feel it."

After earning his law degree, he returned to Washington to go to work for D.C. Superior Court Judge James Washington Jr., a former Howard University law school dean who also had been part of the team that won *Brown v. Board*. But first, Whitley had to find a new job for an old high school acquaintance who already held the clerkship. That clerk, Emmet G. Sullivan, is now a senior federal district judge in D.C. and a good friend.

In 1974, Whitley went to work as an attorney with the D.C. local government. His first assignment was drafting legislation to consolidate the district's public colleges into one university.

Then, after earning an LLM in tax from Georgetown, he became special tax counsel to Washington

Mayor Marion Barry. His work included drafting tax legislation to curb gentrification and to align the district's income tax laws with federal tax law.

He joined the Justice Department's tax division in 1979, becoming the first Black trial lawyer assigned to its western region. Though still based in Washington, he tried tax cases in California, Colorado, Iowa and Wisconsin. "I did a lot of traveling and honing my tax litigation skills," Whitley said.

He moved to the Bay Area in 1983 to become a tax supervisor for the former international accounting firm Coopers & Lybrand. He also began teaching tax litigation and procedure courses at Golden Gate. Then in 1985, he opened his own law firm focused on tax, estate planning and business matters. Eventually, two partners joined.

Gov. Pete Wilson appointed Whitley to the Alameda Municipal Court in 1993. That meant for the first time he worked on criminal cases. But he later became the court's supervising judge and reorganized how it processed criminal cases. His colleagues called his new system the Marshall Plan after his first name, he said.

Wilson elevated Whitley to the Superior Court in 1999, where he continued to handle criminal cases until 2003, when he took over the probate calendar. Ten years later, he retired from the bench and went to work full time heading Golden Gate's tax and estate law programs, including creating its trust, estate and probate LLM degree.

That same year, he also began mediating with ADR Services, Inc., whose office was across the street from the law school. By 2017, his mediation work had grown enough

that he quit Golden Gate to be a full-time neutral.

Whitley describes his approach to mediating a dispute as figuring out and getting in sync with the dynamics of the case. "In other words, what's the flow of this, what's instigated it, what's it coming from and how has it been flowing," he said. Then, while remaining consistent with that dynamic, he tinkers with it.

By tinkering he means asking the parties questions about different approaches and possible outcomes. "I try, in a question-and-answer way, to get the parties to think not so much about their position and their case, but to think a little more about what it looks like from the other side and how they're going to deal with that."

Each side comes into a mediation with their own understanding of reality. "But that's not necessarily the reality of a settlement," Whitley tells parties. "The reality of a settlement is what the other side is likely to agree to."

And the alternative to settlement is litigation, which, he adds, "is surgery without anesthesia."

Here are some attorneys who have used Whitley's services: Alexander M. Biddle, Biddle Law; Lauren B. Bradley, Barr & Douds Attorneys; Konstantine A. Demiris, The Demiris Law Firm PC; Graham D. Douds, Barr & Young Attorneys; Laurelle Gutierrez, McDermott Will & Emery LLP; Sydney J. Hall, Law Office of Sydney Hall; L. Randolph Harris, Jeffer, Mangels, Butler & Mitchell LLP; David G. Knitter, Knitter & Knitter LLP; G. Jeffrey Coons, Morrill Law; Guy O. Kornblum, Guy O. Kornblum PLC; Joseph M. Morrill, Morrill Law; Adam F. Streisand, Sheppard Mullin Richter & Hampton LLP; Matthew B. Talbot, Talbot Law Group P.C.