

# Daily Journal

## VERDICTS & SETTLEMENTS

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# The Human Dimension

*Former US judge Jeremy Fogel is passionate about giving disputants a chance to be heard.*

By Shane Nelson

Special to the Daily Journal

Retired federal Judge Jeremy D. Fogel isn't ready to quit his day job as the executive director of the Berkeley Judicial Institute, but he is enjoying the hands-on opportunity to help people resolve their disputes a little more frequently these days.

"I really like doing mediation," Fogel said. "And I was looking for some way to keep my hand in that without in any way diminishing the work I do at Berkeley."

Fogel described the center he heads at UC Berkeley School of Law as a combination of research and education aimed at applying an academic focus to the work judges do. Fogel has been the executive director there since 2018, and he does a fair bit of teaching – although he said his students are typically judges or people working in the judiciary, such as law clerks.

"I've actually been doing a lot of teaching all over the country the last couple years on managing stress and just maintaining wellness," he said. "Because of the pandemic, judges were starting to feel really stressed on top of an already stressful job – doubly stressed because of the isolation caused by the pandemic and the disruption of their lives."

A former Santa Clara County Superior Court judge and then U.S. judge for the Northern District of California Fogel was also the director of the Federal Judicial Center in Washington, D.C. from 2011 to 2018.



Gary Wagner / Special to the Daily Journal

He noted, however, that his initial mediation training dates back to his time running a family law courtroom in Santa Clara during the 1980s and 1990s, and he said he honed those skills with a fair bit of frequency over his more than three decades on the state and federal benches. Fogel has often taught mediation over the years, but he's been doing a little more work as an actual mediator recently, and he joined FedArb roster of neutrals in March this year.

"It just seemed like it would be a way to put out to the legal community that I do this in a certain number of selected cases a year,"

Fogel explained. "And FedArb said, 'Do as much or as little as you want to do, and we'll provide the administrative support.'"

Whether it's workplace harassment or a high-tech intellectual property patent dispute, Fogel said most of the cases he's been involved with over the years feature a human dimension, which is where he feels most comfortable.

"I feel like I'm good at working with people who don't trust each other," he said. "Where feelings are very personal and people really need to be heard, they need to be understood and they need a chance to really have their view of reality drawn out and listened

## Jeremy D. Fogel

FedArb  
Berkeley

### Areas of Specialty:

Antitrust  
Employment  
Patent  
Intellectual Property  
Commercial  
Family Law

to with respect. That's something I really care about, and I think that's something litigants don't get in litigation. And if mediation is done as a facilitative process, people really have a chance to tell you why they're there. ... And sometimes it's really that somebody just felt disrespected or mistreated or taken advantage of, and they're looking for some way to get that point out and to be heard."

Before a mediation, Fogel said he is happy to receive briefs or speak over the phone with attorneys, but he doesn't insist on either.

"Sometimes briefs are helpful; and particularly in a case where the law is complicated, it's good to have parties' views of that, so I know what that side of the dispute is about," he explained. "But really, what I'm looking for from counsel is: What is the narrative for your client? What is your client looking for in the litigation? What are they looking for in mediation? I don't necessarily have a preferred format as

to how I get that. ... I play it by ear to tell you the truth. I've done everything from formal briefs to ex parte phone calls with the permission of the other party. I'm just trying to find out why they're stuck."

Fogel said he does make use of joint sessions and will encourage the approach when he feels it might be fruitful, but he noted the strategy certainly doesn't make sense for every dispute.

Mediator's proposals are another strategy he will employ, but only after receiving permission from all sides.

"You want to keep it as voluntary and as party driven as possible," he said. "I always make sure the parties want one and they understand it's just my best view of the case based on what they've told me."

San Francisco plaintiffs' attorney Randolph Gaw used Fogel this year to settle a long-running class action pitting online advertisers against Google, and he said the mediator's track record on the federal bench helped a great deal.

"He obviously is very well known in the Northern District of California and very highly respected," Gaw said. "And his views of the case carried a lot of weight, especially with defense counsel who might not be inclined to listen to just any mediator tell them about the weaknesses of their case."

Gaw described Fogel as unfailingly polite and especially genuine, but he noted the FedArb mediator will share his opinions frankly.

"He's firm, and he doesn't dance around the bush," Gaw explained. "So if you ask him for candid feedback, he will give you candid feedback. And to me that's very helpful in making a settlement decision. ... And he will tell you his detailed reasoning as to why he thinks a particular part of your case is subject to vulnerability."

U.S. District Judge Phyllis J. Hamilton, who worked with Fogel when he was on the bench and played an important role in bringing him on as an ombuds-

man for the Northern District court during her time as chief judge, affirmed he has tremendous people skills.

"He just really knows how to talk to people, to inject a sense of calmness," Hamilton explained. "He's not the kind of mediator who's going to be pounding on the walls, pounding on the table and yelling at people and telling them what to do. I know that works for some, but it doesn't work for all. And that's not Jeremy's style. He's a very grounded, emotionally centered, intelligent human being. ... And he really has the personal skills and the temperament to be an excellent facilitator and to bring people together."

*Here are some attorneys who have used Fogel's services:* Randolph Gaw, Gaw Poe LLP; Michael G. Rhodes, Cooley LLP; Thad C. Kodish, Fish & Richardson; Ethan E. Dettmer, Gibson Dunn & Crutcher LLP; Morgan Chu, Irell & Manella.