Daily Journal

VERDICTS & SETTLEMENTS

www.dailyjournal.com FRIDAY, NOVEMBER 24, 2006

XIANG XING ZHOU / Daily Journal

"When you think about it, a trial is terribly wasteful on both sides, but people at the time didn't have the mentality set to see it. We knew that something goes on in a mediation; people change their minds, they look at things differently, and that's one of the great benefits of mediation," arbitrator and mediator Norman Brand said.

Circuitous Route Took Neutral to Legal Fields

By William-Arthur Haynes
Daily Journal Staff Writer

SAN FRANCISCO — As a young university professor in the 1970s, Norman Brand had only fleeting thoughts of a legal education — until he got himself arrested.

Brand, like so many college students and scholars of the time, was active in the anti-war movement. As a professor of English at the University of California, Davis, Brand joined a sit-in on a set of train tracks that wound from the state capital westward. The aim was to obstruct the flow of ammunition cars traveling from Roseville to the Concord Naval Weapons Depot. The result was free transport to jail.

ADR Profile

During the court proceedings, Brand had some ideas to offer the volunteer lawyers who took the case, "but I had no legal grounding," he said.

As the case wended its way from arraignment to pretrial motions and plea-bargaining, Brand became frustrated by his lack of knowledge of the system.

The incident set the stage for his return to the classroom — this time as a law-school student.

A few years before finding himself in the slammer, Brand was completing his doctorate in English as a Ford Foundation fellow at Arizona State University when he was presented with an interesting opportunity.

When law-school professors observed that Native American pre-law students were having trouble on their legal exams, Arizona State gave Brand some funding to create a six-week writing improvement program for minority students.

According to Brand, the major problem Native American students were experiencing was their approach to legal analysis.

"It was identified as a writing problem," Brand said. "They didn't feel that it was a problem of the students not understanding [the legal issues], because verbally they were quite good."

The Native American students tend to rely on recursive thinking, he said.

"They go round and round,"

See Page 2 — CIRCUITOUS

Circuitous Route Took Neutral Past Literature to Legal Fields

Continued from page 1

Brand said. "They get as good a result out of their thinking as lawyers get, but when a lawyer or law professor sees [the result] reproduced on paper, it's not [perceived as] good legal thinking."

The program was a success. In response, the University of Davis decided to host a similar writing program and asked Brand to show the law professors how to use the curriculum.

As the Council on Legal Education Opportunity prepared to take the program nationwide, Brand was learning a tremendous amount about the law.

"[Law] seemed easy to me," Brand said. "It seemed like I had a natural bent toward it, though I never had had any interest in being a lawyer."

Brand had become a full-time professor of English at Davis, teaching literature in addition to legal writing classes between 1970 and 1972. In 1973, shortly after finding himself in the clink for obstructing weapons-laden rail cars, Brand cut back his teaching hours and entered the UC Davis School of Law.

Brand developed an interest in labor law and securities regulation law. Of the two, he chose the former, and, law degree in hand, he went to work for the New York Office of Employee Relations in Albany.

It was a fascinating time to be a labor lawyer, Brand said. Collective bargaining was a relatively new phenomenon, and he was negotiating contracts for state employees on behalf of the governor.

It's that experience that translates into Brand's empathy for plaintiffs in employment cases, according to Randal M. Barnum, a labor and employment sole practitioner.

Barnum said he has represented plaintiffs in several employment law cases mediated by Brand.

"My clients always come out of the meeting with a good feeling," Barnum said. "He makes a good connection with them."

Brand also is effective at getting attorneys — for the most part — to leave their advocacy at the front door, Barnum said.

"Attorneys are natural advocates, fighting for [their] clients' position," he said.

That's not necessarily in their best interests in a mediation setting, Barnum noted.

Brand is able to push past those differences and get the parties to recognize what they have in common, he added.

"'Let's get away from how your clients see the case differently,'" Brand will tell the parties, Barnum said. "'Where's the common ground? What can we agree on?'"

In 1976, Brand went from Albany to financially troubled New York City. He represented the Emergency Financial Control Board, advising on labor matters and administering statutory wage freezes.

When he returned to California, he and a friend started the mediation firm Impartial Enterprises. At that point, Brand became aware of the myriad concerns and prejudices lawyers harbored about mediation. In essence, he said, those prejudices were disincentives to settling disputes.

The No. 1 fear among attorneys, he discovered, was that the mere suggestion of mediation was perceived as acknowledging the weakness of their case.

Second, Brand discovered that parties rarely discussed settlements before jury selection. The plaintiffs' lawyer, therefore, was going to expend tremendous effort and money to get to trial.

"When you think about it, it's terribly wasteful on both sides, but people at the time didn't have the mentality set to see it," Brand said. "We knew that something goes on in a mediation; people change their minds, they look at things differently, and that's one of the great benefits of mediation."

People who had never been in a mediation, however, were not convinced, he said, that anything that could happen in a mediation could not happen in a face-to-face negotiation.

Jonathan V. Holtzman, a government law and policy partner at Renne Sloan Holtzman Sakai, said he is among those attorneys who don't settle cases simply because of the high cost of litigation or just for the sake of settling.

Norman Brand
Arbitrator and Mediator

Affiliation: Independent

Location: San Francisco

Areas of Specialty: labor and employment, business, intellectual property, trade secrets, environmental

Age: 61

Rates: $425 an hour for arbitration and $5,000 a day for mediation

"The reason Norm is so persuasive is because he doesn't ask you to compromise your principles," said Holtzman, who has been before Brand on several occasions.

Brand has been a guiding proponent of alternative dispute resolution since the late 1980s. Most law schools didn't teach alternative dispute resolution at the time, and there was very little theory, Brand said.

This was during the debate of facilitative and evaluative mediation, which came to nothing "because people realized that a good mediator has a bag of tools that he or she uses when they're appropriate," he said.

Through numerous articles and speeches, a bimonthly ADR column in the Daily Journal from 1992 to 1995 and active participation in organizations such as the California Dispute Resolution Council, which he headed in 1998, Brand educated and introduced lawyers to the concepts of alternative dispute resolution.

Brand, who taught arbitration at Hastings College of the Law, has presided over 2,500 mediations and arbitrations, allocating 75 percent of his time to arbitration.

He tells parties that there is one thing for certain: If they settle that day, both parties will walk away unhappy because neither will have gotten what they expected to get when they entered. By the next day, however, they'll realize that they're beyond the dispute, the settlement was, overall, reasonable, and they can move on.

Brand employs risk analysis models based on data compiled by the federal and appellate courts, which estimate how many disputes are eliminated by summary judgment, how many reach trial, which party — plaintiff or defendant — statistically comes out ahead in those cases and the monetary awards connected with specific types of claims. It's a tool to get parties to think about risk, Brand said. Mediation is an attempt to find the appropriate risk-adjusted settlement.

It's a "fairly scientific approach," Holtzman said.

"One of the things with Norm is, when you're looking for an arbitrator who isn't intimidated by numbers, he will roll up his sleeves, deal with the numbers and point out the flaws in your numbers," Holtzman said.

"You have to try to look at something that will give some help, some number that isn't just taken out of the air," Brand said, "and that's what we're striving for."

Here are some attorneys who have used Brand's services: Randal M. Barnum, Benicia; Ronald W. Brown, Cook, Brown & Prager, Sacramento; Donald S. Burris, Burris & Schoenberg, Los Angeles; Arthur A. Hartinger, Meyers, Nave, Riback, Silver & Wilson, Oakland; Jonathan V. Holtzman, Renne Sloan Holtzman Sakai, San Francisco; Robert J. Kahn, Walnut Creek; Frank P. Sarro, San Francisco; Michael J. Vartain, Vartain Law Group, San Francisco; Alison Berry Wilkinson, Rains, Lucia & Wilkinson, Pleasant Hill