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## Ahead of the Curve

*Scott S. Markus was San Diego's first – and for a while, only – full-time attorney-mediator*

By Blake Edwards  
Daily Journal Staff Writer

Early in his career, Scott S. Markus was the best full-time attorney-mediator in San Diego.

He had a foundational understanding of economics learned at Middlebury College in Vermont; a quick and creative legal mind cultivated at the University of Oregon; a deep knowledge of the law acquired during more than 10 years of legal practice; and a deft touch for the interpersonal gifted to him by nature.

There was simply no one better. There was also no one else.

When Markus left law practice to mediate, it wasn't a move other attorneys were making. The decision was something of a risk for Markus, who was then a partner at Duckor Spradling Metzger Wynne.

"When I left my law firm in 1992," he said, "at least some of my law partners were saying behind my back -- it's good to have sources -- that I was crazy to leave the practice of law and pursue a career as an attorney-mediator. Who could possibly make a living doing that?"

Markus made \$17,000 his first year away from the firm. For supporting his leap of faith, he said, his wife was the real hero.

Asked why he would leave the relative security of his partnership, he said, "Because I'm a problem solver, and I was a litigator. Those were in conflict. At some level as a litigator, you're the gladiator."

Of course, Markus turned out to be on the front end of a nascent mediation revolution.

Some litigators say he's still the best full-time attorney-mediator in town and this time not just by default.

"To be perfectly candid," said Robert J. Sunderland of Sunderland McCutchan LLP, "I have mediated with Jeff Krivis and just about every respected, high-dollar mediator in our state. After in excess of 500 mediations, I can unequivocally say that Scott is my first choice."

Sunderland, who has brought real estate non-disclosure, misrepresentation and business dispute cases before Markus, said he doesn't go to him because gets what he wants.

"The fact is my clients, insurance carriers and the undersigned respect him, and he has caused me to pay more in settlement or walk away from more than the others," Sunderland said.

Jeffrey F. LaFave of LaFave & Rice said he also puts Markus at the top of his list. "Scott has a strong presence but is not overbearing like some mediators," he said. "That doesn't mean he isn't tough, he just isn't a bully like some retired judges. Nobody is better."

Markus makes something a bit north of \$17,000 these days.

He insists his success is all about process.

"My approach is perhaps different from other mediators," Markus said. "To me, it's a process in the same way trial is a process. And you don't just show up to trial never having spoken to the trial judge. It amazes me how few mediators talk to the lawyers before they show up."

Attorneys agreed that Markus is unusual in this respect.

"[He] is one of the very few mediators who has phone conferences with the individual attorneys before the mediation date so that he can personally tailor the mediation to the particular parties' needs," Janice F. Mulligan of Mulligan & Banham said.

Markus said he uses the early phone call to flesh out the nonlegal particulars of a case - information he can't find in a brief.

"[Lawyers] always want to tell me what the case is about," Markus said, "[but] I want to know more about who's coming and what the dynamics are



between the parties, what the dynamics are between the lawyers and what's going on with the court. Because if you don't know about that stuff, it's hard to do your job well."

In addition to a premediation phone call, Markus asks defendants to draft - and plaintiffs to approve - a settlement agreement containing everything except dollar amounts, all before the mediation begins.

Michael K. Newlee, a plaintiffs' attorney in San Diego, said that requirement "puts everybody in a settlement frame of mind [and] streamlines the process once it happens."

If Markus sounds like a football coach by harping on "the process," it's not out of character.

An avid sports fan, he calls his post-mediation follow-up phone calls with attorneys "extra innings." He says he strives to be a "five-tool player," a baseball term for players who can hit for average, hit for power, run bases well, throw and field. On the back of his green Mercedes, Markus sports a large University of Oregon "O" logo, and he joked when posing for a photograph that he should hold one of the ducks -- the mascot of his law school -- puttering through the park in San Diego.



Like Cal Ripken, the 21-year Baltimore Oriole to whom he compares himself, Markus has seen the mediation "game" change in two decades.

He noted terminology changes -- mediator techniques like "bracketing" and "mediator's proposals" were once known as "negotiation parameters" and "double blinds," respectively. He mentioned technological changes, as well, particularly the diverse means of communication available to attorneys and mediators. Markus said he even settled a case via text message recently.

But the biggest change was the most welcome one, and it vindicated Markus' early move:

"About 10 to 12 years ago, the courts normalized the mediation process by funding pilot programs throughout the state," Markus said. "Courts were ordering parties to mediation and could do so because the parties did not have to pay the mediators. Although the funding dried up, the legal culture had been changed for good."

*Here are some lawyers who've used Markus's services:*

Robert J. Sunderland, Sunderland McCutchan LLP, San Diego; Jeffrey F. LaFave, LaFave & Rice, San Diego; Janice F. Mulligan, Mulligan & Banham, San Diego; Joel P. Kelly, Jackson Lewis LLP, Los Angeles; Claudette G. Wilson, Wilson Turner Kosmo LLP, San Diego; Michael J. Faber, Los Angeles.