

# **MEDIATION: THE HUMANIZATION OF THE JUSTICE SYSTEM RESULTING IN THE TRUEST EQUITIES AMONG THE PARTIES**

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## **I. Introduction.**

“I get frustrated when I hear how long the trial took. . . . It took Jimmy nine years to die. Those were nine horrible years for him and for us. That’s not remembered enough.”

Ann Anderson, whose son’s and family’s plight was the subject of the book and movie entitled “*A Civil Action*” by Jonathan Harr.

Mediation has been defined and analyzed from a technical point of view since its adoption in the rules of numerous federal and state courts throughout the nation.<sup>1</sup> Having

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<sup>1</sup> The ADR Plan for the Northern District of Alabama states that the “purposes of mediation are to increase the chances of settlement, help the litigants devise better settlements, and improve relationships among the litigants.” The Plan also states that a “mediator facilitates discussions among litigants to assist them in identifying the underlying issues and in developing a creative and responsive settlement package. The mediator does not, however, make findings of fact, make recommendations to the court . . . or render a decision on the merits of the case.”

Rule 1 of the Alabama Civil Court Mediation Rules defines mediation as “an extrajudicial procedure for the resolution of disputes suggested by rule 16(c)(7) [of the Ala. R. Civ. P.]. . . . Mediation is a process by which the parties submit their dispute to an impartial person—the mediator. The mediator may suggest ways of resolving the dispute, but cannot impose a settlement on the parties.”

Mediation has also been defined as a “process by which the parties, assisted by a neutral third person, ‘attempt to systematically isolate points of agreement and disagreement, explore alternative solutions, and consider compromises for the purpose of reaching a consensual settlement of the issues relating to their conflict.’” John S. Murray, et al., Mediation and Other Non-Binding ADR Processes 80-1 (1996). Murray, Alan S. Rau, and Edward F. Shermann, defined the stages of “classical” mediation as: (1) introductory remarks by the mediator; (2) statement of the problem by the parties and their counsel; (3) information gathering; (4) problem identification; (5) problem solving, through generating options and bargaining; and (6) writing the mediation agreement. See John S. Murray, et al., Dispute Resolution: Materials for Continuing Legal Education III-7-9 (National Institute for Dispute Resolution 1991).

had the honor and privilege of serving as mediator in thousands of cases where resolution has been achieved, I have learned many effective mediation techniques. Perhaps more importantly, I have also gained a unique and distinguishable perception of mediation as the humanization of our beloved justice system.

Our legal education and subsequent practice obscure the true purpose for which we are given license to serve the public: the resolution of *human* conflict. In law school, we learn legal research and brief writing, the evolution of torts, contracts, constitutional law and the like. Through the Socratic method, we are taught to think, reason, and understand the strategies that will enable us to “win” on behalf of our clients. In practice, we measure success by victories (“win-loss”), from which we attain greater financial reward. However, true success and reward are found in achieving efficient and equitable results (“win-win”) through an understanding of the human needs and interests of our clients.<sup>2</sup>

Enter the opportunity to mediate.<sup>3</sup>

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<sup>2</sup> A mediator should remember that people are motivated by needs. “Individuals will likely choose a course of action by which needs can be met. Ascertaining these needs, or interests, is part of the mediator’s role.” Kimberlee K. Kovach, Mediation, Principles and Practice 37 (1994).

<sup>3</sup> Of course, there exist many strategic reasons for mediation, including: (1) resolving part of a case; (2) focusing the issues; (3) testing a claim or defense; (4) evaluating the strengths and weaknesses of a case during discovery; (5) assessing the credibility of the parties; (6) resolving discovery disputes; and (7)

## II. The Humanization of the Justice System.

### A. The problems.

(1) A teenage mother gives birth to a second child at a hospital outside the authority of her treating obstetrician. Subsequent to delivery, she visits an emergency room where the physician on-call makes a diagnosis of pelvic inflammation and prescribes a certain drug. The emergency room doctor consults with the treating obstetrician, and advises of the diagnosis and suggested treatment. The obstetrician concurs with the emergency room physician's diagnosis and suggested treatment without further examination of the patient. Within twenty-four hours, the patient goes into shock due to an infection throughout her body, her organs shut down, and she dies.

The patient's parents bring suit against both physicians and the hospital. The physicians assert, both personally and through expert testimony, that they met their standard of care based upon the consultation regarding the patient's condition. The hospital claims that it did not breach any standard of care because the doctors are not employees of the hospital, and because there is no independent cause of action asserted against the hospital.

The parents have lost their teenage child; two children survive this teenage mother; two doctors grieve over the loss of a patient. The obstetrician's insurance company

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determining the real parties in interest, etc. See John W. Cooley, Mediation Advocacy 22-30 (NITA 1996). However, these reasons ignore an essential benefit of mediation: the resolution of human conflict through mutual negotiation and agreement.

is bankrupt, leaving potential exposure to the doctor or her rights under the state's insurance guaranty association. The hospital (a county hospital – and thus, under a statutory cap) denies independent and corporate liabilities for the acts of the physicians. Each party reaches out to the justice system for an answer – finality and equitable resolution.

(2) A property owner sells lots within a subdivision on the representation that the acreage has been properly subdivided and engineered for adequate drainage. After purchasing and developing one of the lots, the plaintiffs experience flooding and damage to their property. The plaintiffs lack adequate means of repairing the real property. They file suit against the seller and the engineer, alleging loss of value and mental anguish based upon missed expectations and opportunity.

Neither the seller nor the engineer denies the flooding or the damage that has been caused, but each asserts that the other is solely responsible. Once again, the parties reach out to the justice system for finality and equitable relief.

(3) A husband purchases life insurance from his friend and agent. The agent represents that the policy requires only five years of premium payments, although the insurer conditions such a limitation on interest rates. Eight years later, after paying premiums for three years beyond the represented period, the husband is diagnosed with cancer. He becomes disabled and uninsurable, and can no longer afford the premium payments. The husband intended the insurance policy to sustain his family by investment of the \$500,000 face value of the policy. The husband and his family file suit, alleging that the

absence of the insurance coverage causes fear of financial insecurity in the face of certain and short term death.

The agent sympathizes for his friend, but asserts that his representations were based upon his training by the insurance company. The insurance company provides clear documentation supporting the policy limitations and conditions, as well as the adequacy of the agent's training. The insurance company fears that if the agent's numerous other policyholders bring similar lawsuits, its own financial future could be jeopardized. Insecurity abounds, and each party demands resolution . . . but at what cost?

Plaintiffs' counsel in each of these cases can assert the villainous nature of each defendant with allegations, causes of action, and monetary demands far in excess of what any defendant may practically afford, or reasonably pay. Defendants' counsel in each case can assert affirmative defenses which, despite possible "responsibility," could totally negate "liability." Thus begins the inexhaustible quest for discovery, motion practice, trial preparation, trial, and appeal. Years later, after the legal process frustrates the respective assertions of the parties, a day of reckoning comes. The parties lay their quest for resolution before the triers of fact and law.

Our system of justice dictates that trial judges must cloak themselves in black robes, and cloak their communications behind the formalities of the rules of evidence and procedure. Rulings and orders are the means of communicating to the parties through their counsel. No *ex parte*, informal chats are tolerated. So too, the appellate arena multiplies that

formality by three, five, or nine, depending on the size of the appellate tribunal. The judicial process is simply not the forum for resolving the human interests underlying the parties' legal conflict.<sup>4</sup>

## **B. Enter Mediation.**

In contrast, a mediator has the opportunity to engage in *ex parte* conversations with each side and serve as an impartial facilitator who empathizes, understands, and brings out the best of each party in an appropriate way.<sup>5</sup> The mediator works to earn the trust of all parties, while communicating the positions of opposing sides. Mediation allows counsel to “stand up” for their clients and provides the parties with a “day in court.”<sup>6</sup> Mediation also

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<sup>4</sup> If mediation is to achieve an outcome that will satisfy the interests of the parties, at least acceptably, and leave the parties feeling fairly treated, then the parties must understand each other's interests, perceptions, and notions of fairness. “[J]oint problem-solving revolves around the interests that lie behind each side's positions. . . . In order to end up with an agreement that satisfies both sides, [the mediator must] begin by figuring out each side's interests.” William Ury, Getting Past No 17 (1993). See also Roger Fisher & Scott Brown, Getting Together: Building Relationships as We Negotiate 10 (1988).

In fact, basic interests underlie even the most complex disputes. One commentator identified four levels of interest, corresponding with differing levels of complexity of disputes: (1) litigation interests; (2) business interests; (3) personal/professional interests; and (4) community interests. See Leonard L. Riskin & James E. Westbrook, Dispute Resolution and Lawyers 147-49 (1997) (citing Leonard L. Riskin, Understanding Mediator Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Neg. L. Rev. 7, 8-13, 17-38 (1996)).

<sup>5</sup> The impartiality of the mediator is crucial. “Each of us tends to see things in ways that take our own interests disproportionately into account. And the facts we know best are those closest to us. The more we know about something, the more important it is likely to appear.” Roger Fisher & Scott Brown, Getting Together, Building Relationships as We Negotiate 25 (1988). An objective and impartial mediator can assist the parties, through meaningful dialogue and earning the trust of the parties, to see the dispute through the eyes of the opponent.

<sup>6</sup> The importance to the parties of being heard cannot be overlooked. “We all feel a deep need to be understood. By satisfying that need, [the mediator] can help turn the [dispute toward resolution].” William Ury, Getting Past No 55 (1993).

affords its participants an opportunity to objectively and confidentially assess the strengths, weaknesses, risks, and benefits of their claims.

The mediation process cannot work within the constraints of specific time limitations. Rather, the process must have the time to “breathe life” into the humanities of each side. The mediator can tear down the barriers of resolution by empathetically acknowledging words which ordinarily evoke anger, pain, or vengeance.<sup>7</sup> Simultaneously, an objective analysis of the facts, law and evaluation can be exchanged. Question: What is a reasonable resolution and at what price is finality reasonable and appropriate?

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<sup>7</sup> Resolution cannot be achieved unless the mediator earns the trust of the parties and their counsel. In addition, “empathetic understanding is essential if the mediator is to establish trust with the parties. Demonstrating awareness of the feelings of those in dispute can provide a positive environment for the exchange of information which will pave the way toward resolution.” Kimberlee K. Kovach, Mediation, Principles and Practice 36 (1994).

Judicial paperwork fills the gap of communication in litigation. In mediation, this gap is bridged through meaningful dialogue. Instead of cross-examination, explanations, apologies,<sup>8</sup> empathy, and understanding become the persuasive articulation of adversaries.<sup>9</sup> The parties' counsel can objectively set forth evidence, comparable jury verdicts, and appellate decisions for the opposition. Each side can discuss the probabilities of summary judgement, directed verdict, verdicts, and appeals. Each side can make reasonable moves that become "seeds" of trust and good faith bargaining, out of which blossoms the "flower" of resolution.

Mediation truly allows each side to reach across a table, and, through a mediator, provide meaningful resolution between adversaries. "Enemies" at 9:00 a.m. exchange an exhaustive handshake or hug at midnight, sighing in relief at the "finality" reached through the judicial process. The gestures of good faith bargaining are genuine because they truly have been negotiated within the context of fair dealing.

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<sup>8</sup> Advocates often overlook the simple power of an apology. When people perceive that they have been wronged, most generally want the "recognition that they *have* been wronged. Only when that acknowledgment has been made will they feel safe in negotiating toward a mutual resolution. An apology thus creates the conditions for a constructive resolution of the dispute." William Ury, Getting Past No 61 (1993). Mediation offers the opportunity for the parties to apologize, and thereby fulfill a compelling *human* interest.

<sup>9</sup> The mediator must address the parties' emotions before he may address the parties' reason. "Most mediators believe that the opportunity to clearly express strong feelings related to the conflict is an essential part of the process. Failing to foster this opportunity increases the likelihood of deadlock and frustration." Mark D. Bennett & Michelle S.G. Hermann, The Art of Mediation 95 (NITA 1996). "Human beings are reaction machines. The most natural thing to do when confronted with a difficult situation is to react—to [strike back and] act without thinking. . . . [However, striking] back rarely advances your immediate interests. . . . Even if you do win the battle, you may lose the war." William Ury, Getting Past No 32-33 (1993).

Through mediation, the parents of the teenage mother can care for their grandchildren with the knowledge that through the death of their daughter they have provided financial means of support. After learning hard lessons, the physicians can move on without the guilt and defensive attitude that would otherwise spill over into their daily practice.

Mediation allows the owners of the devalued property and the husband whose insurance had lapsed to find meaningful relief, security, and finality in a resolution crafted by the parties themselves. Additionally, the confidentiality of the resolution achieved through mediation permits the defendants in these latter cases to preserve their reputations and their future business/professional relations with the public that they serve.

The humanity of the justice system has been achieved in each case . . . through *mediation*.<sup>10</sup>

### **III. The Resolution Results in the Truest Equities Among the Parties.**

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<sup>10</sup> The legal dispute is resolved through fulfillment of the parties' *human* interests. "Awareness of the importance of feelings, skill in managing the process of expressing emotion between the parties, and the ability to stay in touch with the emotional states of the parties are essential tools for successful mediation." Mark D. Bennett & Michelle S.G. Hermann, The Art of Mediation 96 (NITA 1996).

Mediation must not be considered a “winner-takes-all” process. This thinking works in the courtroom or the appellate process, but not at the mediation table.<sup>11</sup> Rather, mediation is a “win-win” process that achieves the truest equities among the parties.

How do the parties achieve this “win-win” equitable finality? The answer begins with a departure from the “get what they deserve” or “get what I want” attitude. The parties must turn their sights to an analysis of what a reasonable judge, jury, or appellate court would decide after taking into consideration the arguments of each side. Such analysis creates the reasonable judgment range (“RJR”). Once each side objectively and candidly establishes an RJR, the next step is to evaluate a reasonable settlement range (“RSR”). An RSR consists of an examination of plaintiff and defendant opportunities for which the result may be high or zero, the cost to get to an RJR, and the time differential between settlement and ultimate judicial finality. The parties should achieve an RSR if they are candid, objective, and reasonable.

Once the parties establish RJRs and RSRs, the next step toward a “win-win” resolution is to determine the particular interests of each party. While some plaintiffs seek opportunities for structured settlement, others seek the security of some form of extrajudicial relief. Some defendants seek confidentiality, yet others seek a longer payment plan than

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<sup>11</sup> The goal of negotiating toward the resolution of a dispute in mediation must be to “*aim for mutual satisfaction, not victory.*” William Ury, Getting Past No 156 (1993) (emphasis supplied).

would otherwise be available by judgment. In any event, the RSRs are influenced by the individual interests of the respective parties.

Ultimately, if the parties fairly and reasonably negotiate toward an RSR, they will create a “reasonable ballpark.” Continuing on this theme, “homeplate” exists somewhere within that ballpark, and the mediator must help them round third and slide into home. Sometimes the parties can negotiate towards homeplate. Sometimes the parties must confidentially meet with the mediator to locate homeplate. Sometimes the mediator must help the parties find homeplate through a “mediator’s proposal.”<sup>12</sup>

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<sup>12</sup> A mediator’s proposal is not a proposal whereby the mediator imposes his or her will upon the parties. This is not an arbitrator’s award. Rather, it is the mediator’s attempt to achieve a common ground between the RSRs of the parties. This may not, necessarily, be an equal ground between them. It requires not only trust in the mediator, but the mediator’s genuine efforts to bring together the common interests of the parties.

The healthiest way to achieve homeplate is for the parties to negotiate towards it. The good faith negotiating that brings the parties to the ballpark can, likewise, bring them to homeplate. The key to this negotiation is “mutuality.” The “give” and the “take” that transpires in the negotiation creates a sense of mutuality.<sup>13</sup> Black’s Law Dictionary defines mutuality as “reciprocation; interchange. An act by each of two parties; and acting in return.” Where parties act with mutuality, they are able to not only interchange and reciprocate, they can resolve. They, themselves, can “trot” to homeplate.

Where parties have vastly different RSRs, have negotiated with a sense of advisorialism, or have other barriers blocking the identification of homeplate, an effective mediator can help the parties locate homeplate. The mediator does this through private discussions or through a mediator’s proposal. Victory is achieved when the parties slide into

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<sup>13</sup> Mediation offers the mediator a chance to infuse humanity and mutuality: “[T]o achieve *mutual resolution* of a matter, much of the mediator’s work will involve motivating *human* behavior.” Kimberlee K. Kovach, Mediation, Principles and Practice 37 (1994) (emphasis supplied). Indeed, underlying the mediation “process is the philosophy that any agreement should be voluntarily arrived at by the parties. It is believed that the parties will be more satisfied, and thus more likely to abide by the agreement, if it is of their own creation, and there is evidence to support this premise.” John S. Murray, et al., Mediation and Other Non-Binding ADR Processes 81 (1996) (citing McEwen & Maiman, Mediation in Small Claims Court: Achieving Compliance Through Consent, 18 Law & Soc. Rev. 11, 40-47 (1984) (finding that a higher percentage of the parties studied complied with a mediated settlement than with a court-ordered judgment)).

the same homebase. The trust and impartiality of a committed mediator promotes resolution when mutuality fails among the parties.

In the end, the parties have negotiated their way from two separate and opposing RSRs to one ballpark. Within this ballpark the parties have found homeplate.<sup>14</sup> Finality is achieved not because it has been imposed, but rather because it has been mutually “agreed” upon by the parties themselves. The humanity of the justice system has been achieved, through mediation, and this “win-win” resolution constitutes the truest equities among the parties.

Respectfully submitted,

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<sup>14</sup> This achievement must in all instances be secured through a “mediation agreement.” “If the mediation is successful, a settlement agreement must be drafted.” John W. Cooley, Mediation Advocacy 153 (NITA 1996). This agreement becomes the testament to the parties’ mutually achieved (or mediator-prompted) equitable resolution.