

Mediation: The Humanization of the Justice System Resulting in the Truest Equities Among the Parties

By Rodney Max

"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 family's plight was the subject of the book and movie "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. Having 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.

Enter the opportunity to mediate.

The Humanization of the Justice System

The problems. 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 suggests treatment without further examination of the patient. Within 24 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 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.

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.

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 near-term death.

The agent sympathizes for his friend, but he 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 that, 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.

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. 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." Mediation also 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 that ordinarily evoke anger, pain, or vengeance. 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?

Judicial paperwork fills the gap of communication in litigation. In mediation, this gap is bridged through meaningful dialogue. Instead of cross-examination, explanations, apologies, empathy and understanding become the persuasive articulation of adversaries. 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 judgment, 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 a.m. exchange an exhausted 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.

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 and professional relations with the public whom they serve.

The humanity of the justice system has been achieved in each case . . . through mediation.

The Resolution Results in the Truest Equities Among the Parties

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. 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 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, home plate exists somewhere within that ballpark, and the mediator must help them round third and slide into home. Sometimes the parties can negotiate toward home plate. Sometimes the parties must confidentially meet with the mediator to locate home plate. Sometimes the mediator must help the parties find home plate through a mediator's proposal.

The healthiest way to achieve home plate is for the parties to negotiate toward it. The good faith negotiating that brings the parties to the ballpark can, likewise, bring them to home plate. The key to this negotiation is mutuality. The give and take that transpires in the negotiation creates a sense of mutuality. 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 can "trot" to home plate.

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