

Of Potted Plants and Personal Injury: a Contrarian View of Mediation¹

by John A. Lassey²

It has now been almost fifteen years since I joined with a small band of other lawyers assembled in the jury room of Hillsborough South to participate in the first training session of what was then a pilot program to implement the mediation portion of [N.H. Super. Ct. R.170](#). Prior to attending the training, we were all asked to read the seminal work on negotiation, *Getting to Yes*, by Roger Fisher and William Ury. We learned about BATNAs,³ negotiating based on interests instead of positions, making the pie bigger, “win-win” solutions, and other concepts designed to teach us that being a mediator requires a different set of reflexes from those of a trial lawyer.

Since then, like others in the Rule 170 program, I have participated in further advanced training sponsored by the New Hampshire Superior Court and other organizations, served as a mediator in courts all over the state, and have studied a fair amount of literature on the subject. In my view, much of the recommended approach to the practice of mediation, while offering useful ways of resolving many types of disputes, nonetheless has only limited application to the personal injury cases that make up a large part of the civil litigation landscape. Moreover, use of some of the recommended techniques may even harm the process. The purpose of this article is to explain why I believe this is so, and to foster an approach that I think does work.⁴

The Role of Attorneys in Mediation

A prevailing theme in some mediation literature portrays lawyers as impediments to dispute resolution, rather than as helpful problem solvers. It has become fashionable in some circles to believe – sometimes with messianic fervor – that successful mediations occur *in spite of* lawyers and only because the mediators are able to bypass the lawyers by interacting directly with their clients.

The theory goes that lawyers “just don’t get it” about the court system’s limitations. We are so focused on trials and our reflexes so preconditioned to combat that we find it difficult to “think outside the box.” We are like old fire horses that start stomping the floor whenever the bell rings. For this reason, mediators are urged to cut through the lawyers’ protective screens and talk directly with the clients. The following remark is typical: “[b]y communicating directly with representatives of the parties, the mediator can overcome the posturing of counsel which typically occurs in a

¹ The title was inspired by Atty. Brendan Sullivan’s famous remark at the United States Senate Iran-Contra hearings July 9, 1987. On being told by Senator Inouye to allow his client, Lt Col. Oliver North, to object for himself if he wished to do so, Mr. Sullivan said: “I’m not a potted plant. I’m here as the lawyer. That’s my job.” This article was included in the Fall 2007 issue of New Hampshire Trial Bar News (Vol. 29, p. 169), published by the [New Hampshire Trial Lawyers Association](#).

² Member, Wadleigh, Starr & Peters, P.L.L.C., 95 Market Street, Manchester, New Hampshire 03101 (jlassey@wadleighlaw.com). Mr. Lassey has been a trial lawyer since 1978, and a mediator since 1992.

³ Best Alternatives to Negotiated Agreements.

⁴ The focus of the article is on personal injury litigation; however, the points made are equally applicable to any tort or other civil litigation where resolution depends primarily on monetary factors. For further reading on why this type of mediation presents different challenges, see J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (ABA Section of Dispute Resolution 2007).

mediation.”⁵ Another well-known author in the field puts it another way, saying: “[m]ediators may sometimes decrease adversarial tendencies in mediation by encouraging parties to retain lawyers for legal advice but not for service as surrogate negotiators.”⁶ I could cite more, but I expect you get the picture.

Frankly, I am getting rather tired of such comments. When you think about it, this attitude is reminiscent of a “cavalry to the rescue” scene from an old western movie, with the mediator as the cavalry, the parties as the besieged settlers, and the lawyers as the hostile Indians! It is as though only mediators are sensitive enough to be tuned in to what people really want or need. In my experience, the underlying premise for this approach is simply not accurate. A trial lawyer needs to be kicked in the stomach only once by a wayward jury to fully understand the limitations of the system and the risks his or her clients run by letting twelve strangers decide their case! Most of the trial lawyers I have worked with, whether as allies, opponents or as a mediator, *do* get it.

Far from being useless appendages to mediation, lawyers, both for the plaintiffs and defendants, play an essential role in the process – particularly mediation of tort cases. This applies especially to plaintiffs because they are usually not as experienced in litigation or settlement negotiations as are the opposing insurance claims representatives and must rely heavily on their lawyers.

Why Personal Injury Mediation Is Different

I have been a trial lawyer for nearly thirty years now and a mediator for almost fifteen. I have come to the conclusion that, while the Fisher and Ury “win-win” model can be very helpful in resolving many disputes where the parties have important relationships to preserve, it is not particularly useful for resolving personal injury cases. In the typical personal injury case, there is no relationship between the parties to preserve, as there may be between feuding neighbors, family members, or business associates, for example. And even in those cases where there is such a relationship (*e.g.*, an injured automobile passenger suing a driver who happens to be her mother), the people controlling the money (*i.e.*, the insurance companies) simply don’t care about that relationship to the same extent as the parties. In fact, the insurance company responsible for defending the lawsuit may no longer even be the carrier for the defendant.

Likewise, the *Getting to Yes* concept of negotiating based on interests instead of positions usually has little practical relevance to personal injury cases. This is because each party’s BATNA is usually the same – a jury trial in which it wins! Of course, each party’s *worst* alternative to a negotiated agreement is a jury trial in which the *other* side wins. Without the complications found in cases where relationships and other non-monetary factors are more important, a personal injury plaintiff’s real interests normally lie in settling for as much money as the defendant’s insurance company will pay; the insurance company’s interests lie in spending the least amount of money the plaintiff will accept. Not coincidentally, these happen to be the parties’ positions as well.

⁵ Bennett G. Picker, *Mediation Practice Guide: A Handbook For Resolving Business Disputes*, 45 (2nd ed., ABA Section of Dispute Resolution 2003)

⁶ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 146 (2nd ed., Jossey-Bass Publishers 1996)

This is not to say that negotiators shouldn't analyze all of the costs of litigation, monetary or otherwise, or that there is nothing that can be done to make the "pie" a *little* bigger in personal injury settlement negotiations. The purchase of health insurance coverage or a structured settlement annuity, for example, can magnify the effect of the defendant's settlement dollars. But these approaches usually have only limited effectiveness. Though such techniques may be useful in breaking through an impasse when the gap between evaluations is not too big, unless the present dollar value of the proposed settlement approximates the plaintiff's estimate of the case's fair value, use of these techniques probably won't materially add to the process.

All of this focus on money doesn't mean that there is no emotional component to personal injury disputes, or that apologizing or otherwise showing compassion is a waste of time, or that an injured plaintiff's anger doesn't need to be dealt with in some fashion. Any lawyer who has litigated a case with parents who have lost a child can testify to that. I will be the first to admit that personal injury disputes are not always *only* about the money. However, having said that, I also have to say that by the time such disputes reach the mediation stage, they are usually *mostly* about the money. Mediators who do not recognize this truism often find themselves spinning everyone's wheels. The parties end up being frustrated and dissatisfied with the process.

Settlement of Personal Injury Cases Is Driven by Risk

Much has been said and written about the reasons why cases do or do not settle. Emotion sometimes enters into the equation, as does the need for "closure." The need to avoid further expenditure of time, money and other resources is also an important factor. But there is usually one overwhelming concern that ultimately drives the decision whether to settle a personal injury case, and that is the sure knowledge that if the case *doesn't* settle, somebody will win and somebody will lose – and there is no good way of telling which will be which in advance. All of this makes for a good deal of uncertainty, without which mediation would probably not be necessary. Although some attorneys believe they have a pretty good idea of what an average jury will do with a given set of facts, there really is no such thing as an average jury. Just as each case is different, so each jury is different. Juries are made up of different individuals and the way they mix together can vary widely. And all that a civil jury may legally do is award money damages – or not. This is the so-called "box" that mediators are supposed to think outside of. But the only way out of the box 99% of the time is to either pay money or accept it.

In the final analysis, the value of a tort case is what the jury you end up with will award. Unfortunately, there is no good way of determining what that amount is in advance of the trial, and it is the risk associated with that mystery that the parties are trying to avoid by settlement. Realistically, therefore, the parties can only reach an *approximation* of the case's value, which is (surprise; surprise) what a willing defendant will pay and a willing plaintiff will take. The factors that go into determining those amounts are many and vary tremendously depending on the strengths and weaknesses of each side's case and the parties' willingness to accept risk.

What should not, in my view at least, play a controlling role in settlement negotiations is the so-called emotional component. Fortunately, the idea that litigants, particularly personal injury plaintiffs, are bundles of emotion who cannot act rationally is largely a myth. In my experience by the time a personal injury case has reached the stage where mediation would be fruitful, most plaintiffs have come to grips with their injuries and, while emotions never completely leave the

picture, they are held pretty well under control. Plaintiffs have usually spent enough time with their attorneys to know something of how the system works and what to expect at a mediation. By then, they are normally ready to resolve the case and move on. They reached that stage primarily because of preparation with their own attorneys and not because the mediator – a person whom they probably just met, after all – spent part of the session “understanding” them and “feeling their pain.” To the extent there may still be emotional baggage when the matter is mediated, the attorney’s role as trusted counselor becomes even more important.

As I said earlier, many texts and presentations on mediation recommend going around the attorneys and talking directly with the parties. We are told time and again to empathize with the plaintiffs, to work with them to make sure that they are satisfied on an emotional as well as a monetary level. But there is a danger in this. Emotional satisfaction at the conclusion of the mediation may be ephemeral – particularly if the new money in the plaintiff’s bank account runs out faster than it should. If the plaintiff is persuaded into an unfair settlement just to relieve the emotional strain of dealing with the lawsuit, he or she will certainly not have been well served by the process.

One example that has been cited as epitomizing the role of the mediator as peacemaker comes from an article in the April 2006 issue of *Trial*. A well-known mediator described his involvement in resolving a medical malpractice case alleging a failure to diagnose breast cancer. The parties, who had a longstanding doctor-patient relationship, mediated to impasse. To break the logjam, the mediator met separately with just the plaintiff and the defendant doctor. When the three were together, the doctor said, “I’m sorry” and began to cry. The plaintiff then said, “that’s all I wanted to hear” and started to cry too. The two of them, presumably still crying, then hugged each other and the case settled.⁷ This story was presented as a good reason to bypass the attorneys and keep them from fouling up a settlement. But I have always felt that there was something missing. Did the plaintiff get fair value for the case? Was the carrier scared into paying too much by the meltdown of its doctor? Did the settlement really approximate what a jury would have been likely to award under the circumstances? Was justice truly done; or were the parties just caught up in the emotion of the moment? To paraphrase an old saying: settle in haste; repent at leisure.⁸

The most vulnerable person at a mediation is usually the plaintiff. The attorneys and the insurance adjuster(s) are more experienced in the process, have less of a personal stake in the outcome, and normally can be more objective. The plaintiff usually is unfamiliar with the process and typically feels overwhelmed by it; that is why he or she hired an attorney. In the midst of all the emotion and feeling good about oneself promoted by much of the mediation literature, lawyers must protect their clients. A lawyer cannot allow the client’s emotions of the moment to override his or her good sense. The lawyer absolutely cannot recommend an unfair settlement just because the client is temporarily relieved by venting, or induced into a feeling of euphoria by having had a good cry with the other side. The lawyer must protect the client from the *perception* of value, if reality lies elsewhere.

⁷ Judith Meyer, John Leo Wagner and Joe Epstein, *What Mediators Really Want to Hear*, *Trial*, April 2006 (Vol. 42, Issue 4) at 24, 31.

⁸ William Congreve, *The Old Bachelor*, act V, scene i (1693)(“Married in haste, we may repent at leisure.”)

The Role of the Mediator

If it is primarily the attorneys' job to interact with their clients during a mediation, what *is* the mediator's role? Why have a mediation at all if the attorneys are going to control the process anyway? One could certainly argue that there are many cases that do not require mediation. Experienced trial lawyers and/or claims representatives are often perfectly capable of talking directly with each other and resolving cases that way. There is certainly nothing wrong with that approach. After all, thousands – probably even millions – of cases have been settled in just that way. Of course, many of those cases were resolved on the courthouse steps, so to speak, and a lot of time, energy, and money may have been wasted getting the cases to that stage.

There are a lot of barriers to settling cases at an early stage. In many cases, the parties simply do not know enough about their case to intelligently value it and settle early, even when assisted by a mediator. Lawyers are reluctant to recommend settlement too early, particularly in complex litigation, fearing that they are not serving their clients well if they have not gone through some discovery – at least enough to satisfy themselves that they are not missing anything important. Another reason cases sometimes don't settle early is that the parties, particularly the plaintiffs, have an emotional need to go through some discovery first, or simply to allow some time to pass. Earlier in this article, I mentioned litigation involving parents who have lost a child. Having participated in a number of these cases, I am convinced that most parents would feel guilty about settling their cases too early; they do not want to be seen (or think of themselves) as just out for the money or as not keeping faith with their child.

But I think the primary reason that cases don't settle early is that the parties and their lawyers simply do not trust each other enough to engage in the kind of frank settlement discussions needed to reach an optimal compromise – *i.e.*, one that maximizes value for all parties. Let's face it; despite all of the efforts to create a kinder, gentler litigation process, the civil justice system that we inherited from England is still very much adversarial. Lawyers and their clients fear – usually with good reason – that if they speak too frankly, the other side will take advantage of them. Like it or not, this is the way the system works. Trial lawyers know that if they are looking for weaknesses in the other side's case, the other side will be looking for weaknesses in theirs. I suspect that this wariness may be anathema to many mediators schooled in the “win-win” philosophy, but that is what lawyers are hired to do. Some experienced lawyers who have been dealing with their counterparts for years are able to overcome this barrier and still obtain full value for their clients by dealing directly with the other side, but most have difficulty doing so. This is where a mediator can help.

Even when both sides value a case in the same range, there typically has to be a certain amount of back and forth negotiation before the case will settle. Each side may have come to the table with a “drop dead” figure in mind; however, most would like to do better than that, if at all possible. This is why attorneys were hired – to maximize value. It would be foolish for plaintiffs' attorneys, for example, to start the bidding at the bottom of their range – or even in the middle – because of the risk that the defendants' estimate, after all, might be better for their clients. Unless one starts at a more extreme number, the chance of maximizing value is quite a bit lower. Thus, despite the fact that the typical back and forth negotiation, or “dancing” may seem boring and unimaginative, it really is an essential part of the process. The mediator in this dance fills the role of orchestra leader. It is his or

her job to keep the beat going, to never let the rhythm stop, even if the individual movements are minuscule.

The primary goal of the mediator in the process is to gradually get a feel for each side's best number, while being careful to let the participants play the game the way they want to. It is not the mediator's role to get the parties up or down so as to meet in the middle if they do not want to go there.

Haggling is a traditional and accepted way to negotiate. It is usually also the only way you are assured of maximizing the benefit to your client. Normally, to settle a case under our adversarial process, all parties want to believe that the others are at the edge – in other words, that they can't go any further. Neither side wants to risk “leaving money on the table” and every effort is made to assure that the others have gone as far as they can.

To reach a level of satisfaction that you have brought the others as far as they are willing to go, there usually has to be some testing. Typically, most mediations go through a posturing or bluffing stage before an ultimate compromise is reached. This is not always true, but it is most of the time. Except in simple cases, mediation requires time – sometimes a lot of time. I have seen mediation where early negotiation results in substantial movement, but hours are spent thereafter in making only tiny incremental changes. Is such extra time wasted? I don't think so, because when that happens, everyone is virtually certain that the other side has reached the end of its rope.

By using a mediator, a neutral person trusted by both sides, the process is enhanced and the dance has more of an opportunity to result in a satisfactory conclusion. Parties know that because of the confidentiality rules imposed on the mediator,⁹ they can be more open in their private discussions, or caucuses, so the mediator can more quickly get a sense of their best number while they can maintain a position of strength as far as the other parties are concerned.

For the mediator, gaining the trust of all participants is a process that, in itself, takes up a lot of the initial time in a session. But after the negotiation has been going on for a while, the mediator usually gets a pretty good idea of the true gap between the positions. Once that point is reached, the case can then move into the end stage, which involves exploring whether the parties are willing to change their positions enough to close the gap.¹⁰ The smaller the gap, of course, the more likely it is that the case will settle. There are a number of different techniques that mediators use to accomplish this task. They vary from case to case, but most of them boil down to helping the parties take a good hard look at the facts and assumptions that underlie their evaluations.

Preparation for mediation may be regarded as the *Readers Digest* condensed version of preparation for trial. You need to know as much as you can about the essential aspects of the case so you can better analyze your strengths and weaknesses and those of the other side. The better prepared all of the participants are, the better the chance that they will be able to psych out the other side's settlement range and the better the chance that all the best numbers will be close together and that

⁹ [N.H. Super. Ct. R. 170 \(J\)\(4\)](#). Provisions providing for confidentiality may also be written into agreements for private mediation.

¹⁰ It is sometimes possible for the mediator to discern a negative gap – *i.e.*, one where the defendants are higher than the plaintiff – but it is more typical for the gap to be the other way.

the mediation will succeed. Most personal injury cases that settle do so because the stakeholders start the process tuned into approximately the same wave length.

Where the true difference between the parties' positions is small, the case should probably settle. Experienced trial attorneys know that opinions on fair value are just that – opinions. If the parties are \$5,000 or \$10,000 apart, most attorneys who have been at it for a while realize that no one can call it any closer than that and it is usually best to reach a compromise somewhere in the middle. This may not be the case, however, if the gap is larger.

If, as it turns out, the parties are not in the same or a similar ballpark, one of two things should happen. Either there is no settlement – in which case the parties simply end the mediation – or the parties need to rethink their evaluations. Except in the simplest of cases, the latter usually requires additional time. Therefore, if the true gap between evaluations is large, it is sometimes best for everyone to take a break and decide at a later time whether to resume the mediation, or whether to try a different form of dispute resolution, other than a trial, such as “high-low” or “baseball” arbitration, for example.

The goal of the mediator should not be to settle the case regardless of the differences between the parties. After all, if the parties have truly evaluated the case differently, they should not be persuaded into a settlement that all do not believe is fair. The mediator, whose involvement in the case is only fleeting, should not try to substitute his or her judgment for that of the parties and their attorneys who have been immersed in the case far longer.

Conclusion

In the final analysis, while an experienced mediator can greatly enhance the chances of settlement, much more depends on the parties and the lawyers than on the mediator. Successful resolution through mediation involves five interrelated factors: time, energy, preparation, place and desire. If all participants are willing to devote the necessary time and energy, want a case to settle, prepare for it, and gather together in one place for that purpose, chances are the mediator will help them find a way to get the job done.

If some of these ingredients are missing – *e.g.*, if some participants are only lukewarm to the idea of settlement and either don't personally attend or prepare for the mediation only halfheartedly – the chances of success will drop drastically.