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## Believe it or not: It happened in mediation

A GLIMPSE OF THE WILD, THE UNPREDICTABLE, AND THE UTTERLY PREPOSTEROUS THINGS THAT HAVE HAPPENED IN REAL MEDIATIONS

Admit it. You believe that your favorite mediator, like Clark Kent, lives this dull and drab existence, spending the day in a suit and tie (or suit and heels), shuffling from room to room while parties and lawyers strategize and agonize over numbers and brackets, everyone trying to find that elusive “deal.” Your mediator is as exciting as an accountant at a tax convention.

**Or is he?**

What *really* goes on behind those closed doors? How crazy are those mediators, and those warring parties, once the cloak of confidentiality has descended and, like a good shot of Cuervo, released those wild inhibitions? Is Clark Kent living a secret double life as ... *Super Mediator*?

Well, as much as we would like to think so, probably not. Our spouses can vouch for that. On the other hand, despite our best efforts, wild and crazy things do happen in mediation that never reach the public eye.

**Until now....**

Changing names and facts just enough to avoid getting in serious trouble (we hope), your courageous and foolhardy authors have peeled back the protective cloak of confidentiality just enough to let you glimpse the wild, the unpredictable, and the utterly preposterous things that have happened in real mediations. We would like to say there are lessons to be learned here; however, unless “don’t be stupid” is a lesson, there’s probably not much to discern. (Although, upon reflection, maybe “don’t be stupid” isn’t so bad of a lesson.)

**So without further ado, here we go.**

### Over the moon

Look, we get it. When we are in the dog hours of the mediation, with settlement numbers being bandied back and forth like a hot potato, sometimes the offer or demand is not fully appreciated in the receiving room. Especially with clients who are not used to the flea market bargaining nature of the process. One client was particularly incensed when the mediator conveyed the defendant’s very low opening offer. So much so that the plaintiff proceeded to pull down his pants, bend over the conference table, and shout out loud that “this,” pointing to his bare rump, “is what that jerk is doing to me.” It wasn’t exactly clear what the plaintiff meant, but the mediator (he is an expert after all) thought it might be imprudent to ask just at that moment. Once everyone was fully clothed again, the mediation continued to a successful *end*.

### SURPRISE!

In employment cases, it is rare for an employer to readily admit that it fired an employee while the employee was out on a protected medical leave. At a minimum, employers at least *try* to assert a legitimate basis, such as poor performance, for the termination decision. But not this time. After reading the briefs,



**MY COMMENT APPEARED TO BE INVITING FEEDBACK.  
DO NOT BE FOOLED.**

the mediator understood that the employer was not contesting liability. Indeed, it seemed, if the mediator was not mistaken, that the employer was even *pleased* with what was clearly an unlawful firing. So the mediator was looking for the back-story when he entered the plaintiff’s private mediation room one sunny morning. He didn’t get it. Instead, the plaintiff’s attorney was alone, drinking his coffee and reading emails. The lawyer explained that, according to his client’s mother, the plaintiff was in court on a custody matter that morning and would be arriving at the mediation shortly.

So the mediator visited the defense room, mentioning to the defendant and his attorney that the plaintiff was running a little late. The defendant and his attorney shared a smirk, and then a laugh. “He’ll be late all right,” the defendant finally blurted, “about 30 years late.” The mediator looked inquisitive. “He’s a little tied up,” the defense lawyer explained. “Well, actually, he’s a little *locked* up. No, that’s not right either. He’s *very* locked up.” The defendant finished the thought: “The plaintiff was arrested yesterday and is in jail...for *murder*. Now you know why we fired him when we did. Everyone at work was petrified of him, even me. So when he went out on medical leave, we finally had the guts to fire him.”

Back in the plaintiff’s room, the mediator apprised the still unsuspecting plaintiff’s attorney that his client might be gone for quite some time, like 30 years to life. The plaintiff’s lawyer took the news in stride, confirmed the situation by checking the on-line records, and then reached a discounted tentative settlement with the defense (which the plaintiff later affirmed from his jail cell). The lawyer then had the unpleasant task of calling

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the plaintiff's mother to break the news that her loving and devoted son might be a little late returning from that "custody matter."

### I'd die for a settlement

The plaintiff was naturally upset at the defendant for publicly destroying the plaintiff's once-thriving interior-design business. Indeed, the inciting episode, the defamation, the loss of business, the lawsuit, and now the mediation, was almost too much for her. And the defendant knew it. He knew the plaintiff was emotionally vulnerable, and the mediator suspected he was trying to take advantage of that fragility by dragging the negotiations out as long as possible, giving a little here and a little there, hoping that at some point the plaintiff would break and accept a low deal. The defendant almost got more than he bargained for.

At 11:00 p.m., the plaintiff announced to the mediator that if the case failed to settle by midnight, *she would commit suicide right then and there*. There was no smile on her face. The mediator looked the plaintiff in the eye, and then over to her attorney, trying to ascertain whether the plaintiff was serious. Was she that close to the edge? Or was she crazy like a fox, using her threatened suicide as a tactic to influence either the mediator or the defendant...or both? Was it a fascinating game of chicken, or a cry for help from an emotionally distraught litigant? The mediator was sure this was a tactic. Well, he was pretty sure. The plaintiff's attorney was also "pretty sure" the plaintiff wasn't serious. Wisely choosing not to find out, the mediator pressed the process and helped get the case settled by 11:30 p.m. He then politely escorted everyone out the door, a full half-hour before the deadline...leaving the mediator to wonder, was he just *played*?

### Mirroring

The client and his attorney were enjoying the fresh coffee and snacks in their private caucus room, waiting for the mediator, when the door burst open and an ape – yes an ape – burst into the room

flailing its arms and screeching. Coffee flew and clients screamed. Taking "mirroring" to an extreme, the ape then began mimicking the attorney, moving his arms as the attorney moved her arms, shaking his head as the attorney shook her head, copying every gesture. The ape finally took off his head, exposing the laughing pate of their mediator, who reminded them all that it was Halloween. The first agreement of the day came a few minutes later when both parties conceded that the mediator was bananas. Bananas or not, the mediator helped the parties settle the case, convinced that his unorthodox "ice breaker" made all the difference. (We have no idea whether the clients shared this opinion, but we do know that your authors are not brave enough to try this.)

### Showing off a little too much

It was a sexual-harassment case in the entertainment industry, with the plaintiff, a pretty young woman, complaining that every time she was called into her boss' office, he would be sitting in his chair with his belt buckle open, pants undone, zipper down. The defendant denied it, of course. At the mediation, when the mediator visited the defendant's caucus room, there was the defendant, sitting in the conference room chair...with his belt buckle open, pants undone, and zipper down. ("I've gained some weight recently," was his explanation.) His lawyer encouraged the defendant to settle...quickly.

### They settled for a song

A mediator of a long-term boundary dispute between neighbors managed to get all parties together for a joint session limited to introductions and a meet and greet. Once gathered, the mediator first confirmed that those there had seen the movie *Casablanca*. He then belted out in a passable baritone the movie's iconic theme song, "As Time Goes By." Expressions around the table ranged from disbelief and worry to muffled laughter and enjoyment. The mediator then quizzed the parties about the movie. What does it mean that they will "always

have Paris" or that their problems "didn't amount to a hill of beans?" The discussion elicited personal stories of the parties and lawyers, leading the neighbors to discover that they had much more in common than an inability to carry a tune. Their long simmering feud ended that afternoon with warm handshakes and a promise to go to the movies together once a month. (Okay, we made that last part up, but it sounded good.)

**They settled with a song:** Since we are on the subject of songs, the members of a popular band found themselves, as so many of them do, at odds over creative differences, the kind of creative differences that rhyme with "honey." Tired of the sound (and expense) of litigation, they tried a different tune, mediation (we know, too many bad music puns). By 4:00 p.m., with the four bandmates still far apart, the mediator prevailed upon them to do her a great favor – sing one of their earliest hits. With a little coaxing, they finally agreed, and together they sang a cappella several of their most beautiful and memorable songs. What followed (with a little subtle guidance by the clever mediator) was a sharing of the band's history, allowing the members to harken back to when they all liked each other and were excited to create music together, to tour, and to play. The good vibrations led to a settlement. The mediator got paid, and has the memory of a free private concert to cherish for a lifetime.

### Jail time for boorish mediation behavior

A young, rich creator and purveyor of soft-porn videos was sued in a one-judge town in the deep South by underaged girls claiming that the "auteur" plied them with alcohol until they were drunk, and then filmed them exposing their breasts. Proving that wealth does not always come with wisdom, or even common sense, the defendant arrived at the mediation four hours late (he claimed his private jet was delayed waiting for his expensive big city attorney to finish a hearing across country), unshaven, wearing flip-flops, a backwards

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baseball cap, shorts, and a t-shirt. When the plaintiffs' attorneys were asked to come to the defense room to make an opening statement, they found the man-child playing video games on his "electronic device" with his dirty bare feet on the table.

The attorneys didn't get four words into their statement when the defendant jumped up and started screaming "Don't expect to get a f\*\*\*ing dime – not one f\*\*\*ing dime!" When it was clear the attorneys were not going to be able to say their piece, they prepared to leave. At this point, the defendant "got in their face," and started yelling "We will bury you and your clients! I'm going to ruin you, your clients, and all of your ambulance chasing partners!" The plaintiffs filed a sanctions motion the next day, describing this behavior, and claiming "bad faith" and a violation of the court's order to mediate.

From here, things got complicated, but the end result? The defendant found himself in jail on multiple contempt charges initially arising out of his "colorful negotiating tactics" at the mediation. (See any confidentiality issues here, anyone? Filed with the court, really?) The film buff eventually settled, which released him of his civil contempt charges, but he remained in jail for criminal contempt (he seemed to have forgotten to appear for his court-ordered incarceration by the federal judge's deadline), and was later transferred to federal prison for tax evasion. It was no surprise when the slow learner was sued again a few years later for groping an 18-year-old girl at another party he sponsored (with his video camera in tow).

### Mom's love

Speaking of grown-up adolescents with too much money, three wealthy septuagenarian brothers were in litigation against one another over the family business. One brother appeared at the mediation via Skype from overseas with his lawyer appearing by telephone from the east coast. A second brother appeared in person, bringing with him for "moral support" (i.e., "inside dirt"), the ex-wife

of the third brother. The third brother, learning that his ex-wife had now sided with the second brother, was apoplectic and didn't want to talk. The first thing out of the 76-year-old oldest brother's mouth once the mediation got under way was: "Mom always loved Charlie best." The mediator was pretty sure this would take more than the 4 hours the parties had reserved....

### Inanimate consultants

The mediator walked into the plaintiff's mediation room only to find an extra participant, a life-sized Kermit the Frog doll. Throughout the mediation, the plaintiff unabashedly consulted the doll for advice. The mediator, more of a Miss Piggy fan if truth be told, nonetheless must have made a decent impression on the frog because Kermit ultimately recommended that the plaintiff accept a settlement proposal. (Thankfully, her lawyer agreed with Kermit that the deal was a good one.) In an unrelated matter, the mediator found her plaintiff consulting a different inanimate object, this one a small jeweled box that the plaintiff held tightly to her body throughout the mediation. It was only after the settlement was reached that the mediator learned from the plaintiff's counsel that the box contained the ashes of his client's dog. (We know, that's very sad.)

### Beware the men's room

In contentious cases, mediators are always aware of where the parties are physically, and take great care to avoid situations and confrontations that might inflame the dispute rather than tame it. The parties in these highly emotional disputes are usually directed to separate caucus rooms, while the mediator does his or her best Henry Kissinger or Madeleine Albright impersonation and shuttles back and forth between rooms. But the call of nature is universal, and mediators can't be everywhere at all times, as one mediator found out the hard way. Two bitter, aggressive, and angry former business partners were in the midst of a mediation when the morning's coffee began to show its effects...

simultaneously. In an unfortunate turn of bad timing, both disputants ended up in the men's room at the same time. Words were exchanged, a shove here, a push there, and a full brawl erupted, leading to a surprise visit by the EMTs and an expensive ambulance ride to the hospital. For some reason, the mediator was unsuccessful in resolving the case that day. On the bright side, the mediator got another opportunity to try to resolve the case in a second session a year later, this time with an "assault in a men's room" added as a cause of action.

### We liked to smoke weed

Two business partners were entrenched in litigation over the dissolution of what had been a profitable business venture. When the mediator asked the two parties to describe what they liked to do together back when the relationship was strong, they both chimed in "we liked to smoke weed." The mediator, thinking quickly and stepping out of the mythical "box," grabbed both parties, put them in his car, and drove to a remote Buddhist temple where he left the former friends alone to contemplate their situation together. When the mediator returned two hours later, he found the two former partners sitting side by side on the ground, with their backs against the wall, shooting the breeze. They had settled the case an hour earlier. It was never clear whether the former stoners revisited their early years in any way other than by memory.

### Shooting blanks

It's always exciting when, at mediation, one party pulls out the theretofore hidden metaphorical *smoking gun* and bandies it about. You never can tell how the other side will react, how quickly they will think on their feet, how cleverly they will recover. It makes for good drama. But sometimes, the gun shoots blanks.

For instance, in one mediation, the defense claimed to have a video of the injured plaintiff not just without his crutches or neck brace, but actually doing calisthenics in a gymnasium.

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Making a Hollywood production out of it, the defense set up the projector and screen, invited the plaintiff and his attorneys into their room, and started the video. As the video played, the defense stood in the back corner, looking very self-assured, waiting for the fireworks. Sure enough, the video depicted a man looking exactly like the plaintiff, without crutches or braces, running through a strenuous exercise regimen, the literal picture of perfect health.

The plaintiff and his attorneys watched the video intently, without saying a word. As the video concluded, the smug defense attorney declared with a little too much glee, “we rest our case.” “Well done,” responded the plaintiff. “And if my *twin brother* ever sues you for personal injuries, you will win for sure. Now, can we get back to talking about *my* case?”

### Putting your money where your mouth is

It’s always the client’s case, the client’s decision, the client’s settlement. Always. But sometimes, it seems to the outside observer that the client’s decision is just wrong. Indeed, sometimes, the plaintiff’s lawyer is looking at what he believes to be (to quote a reality star) a *huge* potential verdict, but has a client who prefers the certainty of a sub-optimal settlement. Well, one risk-taking plaintiff’s attorney (is there any other kind?) just couldn’t stand it. His client had what he was *sure* was a multiple seven-figure case, but the most the defense would put up in mediation was \$400K. The plaintiff was tempted. More than that, the plaintiff wanted the deal. More precisely, the plaintiff *wanted* the seven-figure result, but he *needed* the certainty of the six-figure

recovery. What’s an enterprising attorney to do?

In the private caucus room of the mediation, this foolishly courageous (or brilliantly confident) attorney cut a deal with his own client. If the client would allow the attorney to try the case, the attorney *guaranteed his client \$400K*. In other words, if after trial the jury were to come back for the defense, or with a verdict under \$400K, the attorney would make up the difference from his own personal funds. Guaranteed. It was an offer the plaintiff couldn’t refuse. The mediation ended in impasse and the plaintiff’s attorney got his trial. He also scored a \$2 million jury verdict. When the verdict came in, the lawyer’s sigh of relief could be heard all the way across town in the mediator’s conference rooms.

### Beyond the pale

We can’t tell whether this was real, or merely an obscene effort to bias the mediator in one’s favor. Either way, it is very disconcerting. Following the first session of a mediation of an international real estate dispute between three partners, one of the partners was killed under suspicious circumstances. Despite the death, the dispute continued, and the two remaining partners returned to the same mediator for a second session.

In private caucus, one of the parties told the mediator that he was *convinced*, absolutely convinced, that the other partner had murdered the third. He couldn’t prove it, and didn’t want the mediator to say anything (as *if*: “Hey, by the way, I heard you murdered your partner, is that true?”), but he wanted the mediator to know that he could be mediating with a psychopathic killer. “I’m not trying to bias you at all, I just wanted you to know who you might be dealing with.” If true,

is the mediator in danger? If false, has one party just unfairly attempted to impact the mediator’s neutrality? Does a mediator have an obligation to recuse herself at this point? In case you were wondering, this is the type of stuff mediators love to talk about over beers. And people think we are boring. Ha, take that, accountants.

We could go on and on with these wild and crazy stories. But then we’d have nothing to regale you with at our next cocktail party as we try desperately to prove we are so much wittier than the CPAs. (By the way, if you ever need some help falling asleep, just ask a mediator to discuss his or her thoughts on bracketing, joint sessions, or mediator’s proposals.) Until next time, *up, up, and away...*

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