



It Happened In Mediation – Believe It Or Not (part 2 of 2)

Daniel Ben-Zvi and Michael D. Young

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 wives 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.

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 under-aged 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 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 devise” 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

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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 *four 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 Bhuddist 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

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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. 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 talk about over beers. And people think we are boring. Hah, 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...* 🍷



Daniel Ben-Zvi

Daniel Ben-Zvi, mediator and arbitrator with ADR Services, Inc. and AAA, is co-author of the book, "Inside the Minds – Alternative Dispute Resolution". He is a "Distinguished Fellow" [International Academy of Mediators] and "Power

Mediator" [Hollywood Reporter] who mediates in L.A. and Orange Counties with highly successful results in p.i., business, employment, real estate, construction, entertainment, i.p., and professional liability. daniel@dbmediation.com



Michael D. Young

Michael D. Young is a full time neutral with Judicate West in California, focusing on employment, intellectual property, and other complex civil matters. He is a Distinguished Fellow and past President of the International Academy of Mediators, and

was an adjunct professor in negotiation and mediation at USC Law School for nearly a decade and at Pepperdine Law School. He welcomes your comments at Mike@MikeYoungMediation.com, or join the conversation at www.MikeYoungMediation.com/ask-a-mediator.