



It Happened In Mediation – Believe It Or Not (part 1 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.

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, 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 alright,” the defendant finally blurted, “about 30 years late.” The mediator looked inquisitive. “He’s a little tied up,” the defense lawyer explained. “Well, actually,

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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 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 KILL 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 pm, 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 pm. 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

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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.

... And that's just the beginning. To be continued in the next issue of the *Verdict*.



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