MEDIATOR: "I'LL BE THERE IN AN INSTANT"

by MICHAEL G. BALMAGES

"An expert is one who knows more and more about less and less until he knows absolutely everything about nothing." ~ Nicholas Butler

I graduated from law school in 1972, so it's not surprising that I remember very little of what I was taught there. In fact, it is limited to a few bits of wisdom. Two of those bits of wisdom came from the same source, the late Professor John Hetland. Professor Hetland was an expert in real property security, you know, "one form of action" and "anti-deficiency" legislation and "purchase money protection," but he spoke of eternal law truths. One truth was that whenever the law uses the term "constructive" it means it did not really happen, like constructive termination and constructive notice. Now, plaintiff's lawyers will argue that constructive termination is real and that the employee was unceremoniously booted out of the company by an overbearing boss or circumstances, and real property fraud or title defendants will say that the plaintiff really did have notice (or should have had notice). However, in both situations, this is just a fiction—a way to survive a demurrer or an MSJ and get to a jury.

The other bit of eternal wisdom I remember from Professor Hetland was that the phrase "with all due respect," really means "with no respect." Professor Hetland expressed to our class that he learned this directly from the California Supreme Court when the court cited his *amicus* argument "with all due respect" and then paid him and his argument absolutely no respect. I've seen this in real life, in real time, when a lawyer is arguing to the court and starts with the phrase "with all due respect, Your Honor." That usually is a killer. I recall one time when the judge stopped counsel right there and asked, "What do you mean by that?" A much safer phrase is "with respect, Your Honor."

I remember only two cases from law school and only because I remember a phrase from each of those cases. The first phrase is "traditional notions of fair play and substantial justice." That comes from *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), a case about "minimum contacts" and *in-personam* jurisdiction. But, the phrase has much broader application than that. I have used it at least a dozen times in briefs and points and authorities, without citation, as if it was my own phrase, and many more times in conversations. It's my substitute for "it's not fair!" I'm apparently not the only one who has adopted this phrase as it has

made its way into the "The Free Dictionary" (found at acronyms.thefreedictionary.com) as a recognized acronym "TNFPSJ."

The other phrase is from Justice Oliver Wendell Holmes, Jr.: "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown v. United States*, 256 U.S. 335, 343 (1921). I have never practiced criminal law, but this phrase just made sense and has stuck with me. I actually got to use it last week as I was handling a U.S. District Court Central District mediation involving allegations of excessive police force in the death of a suspect. Defense counsel was glad that I remembered that phrase. I was surprised that he did not.

The only other bit of wisdom I remember from law school was from a trial practice course in which the professor emphasized that trial lawyers are the best generalists, that it doesn't matter what the subject matter of a case is to a true trial lawyer as he or she is equipped to handle it. This is because trial lawyers are "instant expertisers." My initial real-life experience with this came in my first "big" trial (in 1979, yikes!). I was a sole practitioner at the time and a couple came to see me about their newly built and newly purchased house that was slowly sliding down a hill in Laguna Beach. I knew about Laguna Beach as I had grown up in Orange County but I knew nothing about house construction or hills. I barely knew about houses as my wife and I had bought our first one only two years earlier and I was still trying to figure out how the sprinklers worked. I did quickly figure out that even a slowly sliding house is not a good thing. A demand letter was sent, negotiations followed, and eventually a lawsuit for construction defects and fraud was filed. That was followed by depositions and experts and eventually a trial before the late Honorable Leonard Goldstein. By the time trial commenced, I had "expertised" and knew absolutely everything (or just enough) about building a house on a hill in Laguna Beach. This is not the place to brag so I won't tell you how the trial turned out, but I will tell you that approximately two weeks after the trial was over, I knew absolutely nothing about building a house on a hill in Laguna Beach. That is instant expertising: you learn it, you use it, you forget it.

Twenty years ago, I joined the Temporary Judge panel of the Orange County Superior Court, doing Mandatory Settlement Conferences. I have since conducted more than 1,000 MSCs. I'm sure that is a world record, although Guinness refuses to recognize it. Every time I submit it, they demand to know the details of all of the cases and I remember none. Each month, the temporary judges are asked to submit an Availability Form. For the TJs who do MSCs, there are four subject-matter expertise choices: Personal Injury, Business Litigation, Medical Malpractice, and Foreclosures. As a business, real-estate, and employment trial attorney, I always check the Business Litigation and Foreclosures boxes. It has never mattered. Before the pandemic, a TJ would show up to his or her assigned department and be handed a file or two or three by the clerk. The clerks never checked to see which panel you were on; they just handed you a file and expected you to conduct the MSC. Remote MSCs are the same: you get sent a case regardless of its subject matter.

I have conducted dozens to hundreds of MSCs involving slip-and-fall, trip-and-fall, rear-enders, parking lot collisions, motorcycle accidents, traumatic brain injuries, Lemon Law, insurance coverage, and other areas of law in which I never practiced. Most of these cases have settled at the MSC or soon afterward (often on a "mediator's proposal.") This includes medical malpractice cases. We TJs are generalists: just give us a file and we will settle it. Like trial lawyers, we "instantly expertise," and it's really in an instant on an MSC. The point of all this is that you do not need subject matter expertise to settle a case.

After being a trial lawyer for forty-five years, I became a mediator. I have now mediated more than 600 cases in addition to my 1,000-plus MSCs. Many of them have been Central District "panel" mediations in areas outside of my practice expertise. Instant expertising works in mediation also. I get briefs from both sides. They argue the law. I read the briefs and get an idea about the dispute. I speak to each side and, generally, each is confident that its view of the law will prevail. Usually they will acknowledge that there is a small risk that the court might not agree. Rarely does anyone change their professed view of the law at a mediation. Fairly early on, we stop talking about the law. Next comes the facts. After a while of each side accusing the other side of distorting the facts, we stop talking about the facts. In fact, the facts and the law are often irrelevant in mediated settlement. Also, traditional notions of fair play and substantial justice are not pertinent. What is relevant is "smartness." A good mediator helps the litigants make smart decisions based on the totality of the circumstances. You don't need subject matter expertise to do that. You need rapport with the parties and counsel and you need persistence.

As a Temporary Judge, I drew an insurance coverage dispute involving a lot of money with insurance companies on both sides. Plaintiff insurance company was represented by a high-powered Orange County firm that everyone in the county knows. The defendant insurance company was represented by one of the premier law firms of the world. Defense counsel assured me that he was the number one coverage attorney in the nation. He cited all of the appellate opinions bearing his name. He knew the law and told me that the plaintiff's lawyers were just plain ignorant, and I could tell them that. I did. They were not impressed. I was not, and am not, a coverage expert. That did not matter as I understood the dispute about the law and I knew that my lack of expertise was not going to affect the chances of the case settling. We kept working it from every angle and even continued the MSC to a second session. The case settled and within minutes of it settling I forgot all the coverage law that had been hammered into me by counsel. Not even an uplifted knife could make me remember.

"With all due respect" to those who insist that mediators must have subject matter expertise, it just is not the case. Detached reflection shows that expertise in the business of law is more important: trial experience, discovery experience, fee charging and collecting experience, judgment collecting experience, experience dealing with clients, experience with running a law practice, etc. Those and the ability to make small talk for hours and hours. Those are much more constructive.

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