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BRAIN DAMAGE CASES

MEDIATION OF THE TRAUMATIC BRAIN INJURY CASE

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## MEDIATION OF THE TRAUMATIC BRAIN INJURY CASE

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“A gentle answer turns away wrath, but a harsh word stirs up anger.”  
Proverbs 15:1

”A hot tempered man stirs up dissension, but a patient man calms a quarrel.”  
Proverbs 15:18

Dispute resolution has been an integral part of society since the dawn of humanity. The Bible’s admonition of an eye for an eye was actually an early form of limiting the response when one was injured by another. Early on when a man was injured his clan would respond to the injury by killing the malfeator, his brother, wife, manservant, maidservant, donkey and anyone who looked like him. Killing feuds were the order of the day.

The Code of Hammurabi was one of civilization’s earliest codifications of the law and also established a measured response:

If a man destroys the eye of another man, they shall destroy  
his eye.

If he breaks a man's bone, they shall break his bone.<sup>1</sup>

One early form of dispute resolution which perfected the art of candle making was in Burma where each contestant would light a candle at the same time and the winner was the owner of the candle that burned the longest. One that I'm sure would please the soccer fans of today was found in New Guinea where an aggrieved party would round up his friends and relatives to stand face to face with his aggressor and his clan with hands behind their backs and kick others shins until one side retreated<sup>2</sup>.

We find humor in these methods until we recall our antiquated custom of dueling. At least the earlier forms of dispute resolution did not lead to the death of prominent members of society, yet in 1804 the Vice President of the United States shot and killed a person of such renown and respect that his portrait is immortalized on our currency: Alexander Hamilton.<sup>3</sup>

Our Anglo-Saxon heritage went through various forms of seeking resolution of issues indulging such time honored variations as carrying a hot iron for 9 paces to see if a man's hand was burned, throwing the malfessor bound by his hands and feet in the water to see if he would float (thus rejected by the water and guilty) or sink (thus guiltless but no less drowned) and my personal favorite retrieving brass bracelets from boiling water to determine guilt by whether or not the skin was burned.<sup>4</sup>

From these early objective but presumable flawed techniques our heritage led us to the jury system which has matured into a cornerstone of our democracy. However,

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<sup>1</sup> Dwyer, William L.; "In the Hands of the People", St. Martin's Press, N.Y. 2002, p. 13

<sup>2</sup> Id. Dwyer, pp. 14-16.

<sup>3</sup> Dwyer, p. 8.

<sup>4</sup> Dwyer

litigation has its problems leading William L. Dwyer<sup>5</sup> to identify the six deadly sins of litigation. Dwyer compared them to six of the seven original Seven Deadly Sins.

- (1) Overconscientiousness = anger.
- (2) Expenses = avarice
- (3) Delay = pride (in the form of a stubborn refusal to change outmoded ways)
- (4) Fecklessness = sloth
- (5) Hyper-technicality = envy (hyper technical judges envy, and try vainly to emulate, the deities' unique quality of perfection)
- (6) Overload = gluttony<sup>6</sup>

Our focus in this paper is how do we avoid the first deadly sin in litigation through the use of mediation and its resultant poison, anger in order to conduct a trustful, contention free and successful mediation.

Get Yo'self Together

or

Organize the Team

Prior to the mediation the foundation should be established by careful thought as to who will attend the mediation. The logical starting point is the mediator. Attention needs to be paid to not only how well the mediator is acceptable to your side but is the mediator a person that will be accepted and respected by your opponents. Highly emotional cases need skilled diplomats to diffuse the emotions.

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<sup>5</sup> Dwyer, p. 118

<sup>6</sup> Dwyer, p. 128

As counsel you are significantly responsible for input into the decision as to who will represent your side of the case. Do you bring a named Co-Defendant such as the driver of a truck owned by a trucking company? If insurance is involved do you bring an adjuster or claims professional with little skill in handling mediations or ask for a representative who is more seasoned? Does the case call for gender considerations? In a sexual assault or sexual discrimination case should your company representative be a woman?

Once you have organized your team, have a team meeting. Best plans are assembled in person but at least prepare your representatives by conference call. You, as counsel, are the quarterback, the choreographer, the director and each member of your team has a role to play. They will play it best when they know your blueprint for a successful mediation.

Keep Your Eyes on the Prize

or

Get a New Plan, Stan

(with apologies to Paul Simon)

A major step in removing contentiousness from a mediation and helping to build a bridge to success is to know clearly what your objective is. The obvious objective is to resolve the dispute, settle the case, agree to a resolution or bring the parties to a meeting of the minds. Unfortunately, many of us and our clients from time to time have failed to see the obvious and have other agendas. Your Plaintiff may want to show the other side he's right and you are wrong. Other objectives can be:

- (a) Delay;
- (b) Teach those sorry so and so's a lesson;
- (c) Annoy, aggravate or irritate the other side; and
- (d) Discovery

In my opinion while every mediation must be approached with a good faith effort to resolve the dispute, don't lose sight of the fact that a mediation is worth its time and expenditure for the information you are provided on a silver platter by the other side. Where else can you get the other side to sit down and brief you on their case, often in writing with exhibits and using the themes you are likely to hear in opening argument.

Prepare for mediation like you prepare for trial. Prepare your client and make sure your team is aware of your plan. It is easier to avoid mediation conflict if your clients are well prepared and understand the goal. If the goal is to resolve the conflict and you have a bitter and angry representative, who you know can't hold their tongue and miss an opportunity for insult, keep your eyes on the prize and leave them at home. If you can't leave them at home, prepare them for success by educating them on the importance of using a diplomatic approach. Prepare any witnesses carefully and school them on the difference between mediation and trial. Get everyone's agreement on what you want to accomplish and your clear advice on how to avoid negativism and condescension that can cause you to fail to meet your goal.

#### Don't Sweat the Small Stuff

How many times have you brought a mediation to almost a successful conclusion by agreeing on the major points and then the negotiation begins on how the agreement is going to be structured. The Plaintiffs want their money immediately. The Defendants

want all the liens removed and an indemnity clause. Furthermore, the Defendants want a confidentiality agreement. These are generally matters of major importance but minor in the scheme of the settlement. It is my suggestion that you write a letter to your opposition well before the mediation so that they have your list of conditions well before they are tired, angry and ready to get out of there and when a relatively minor matter can be not only a source of contention but a potential dealbreaker. Send your opposition a letter. Spell out very clearly the conditions that you would want such as a dismissal, a complete release, an indemnity agreement, removal of liens and subrogation interests, confidentiality agreement and how long it is going to take you to get the money. That way you will know well in advance of the mediation that the smaller matters are resolved or a thing that you thought was a small matter is a big matter and you can get it worked out during the course of the day without surprising your opposition with a relatively minor matter.

Say Howdy

or

Meeting and Greeting

The Honorable Jack P. Etheridge in his book *Coming to the Table, A Guide to Mediation in Georgia*<sup>7</sup> in his chapter on negotiation pointers and techniques, points out that you must be keenly aware of when the mediation begins. If you walk in to the reception area of the mediator's office and your opposition is there, many times your clients simply nodded to their clients and head off to another area to avoid each other.

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<sup>7</sup> Etheridge, Jack P.; *Coming to the Table, a Guide to Mediation in Georgia*, American Lawyers Media, L.P., 1994, p.

However, this is your opportunity to put your best foot forward and set a positive tone. Introduce yourselves. Make sure your clients are introduced. Take the opportunity to engage in small talk and treat your opposition with respect. This is an opportunity to set the table for a successful mediation and remove contentiousness by being a cordial and pleasant person. It also gives you an opportunity to bring your client to life. All of a sudden the other side discovers that your side has individuals with children, families and interests outside of litigation. Don't miss this opportunity.<sup>8</sup>

### Pay Your Respects

A significant percentage of mediations involve the resolution of personal injury cases. No matter what the case a greeting at the beginning that recognizes the aggrieved party's loss, thank them for their agreement to be present, a kind word for their recovery is a literal cornerstone for a successful mediation process. If it is not sincere don't deliver it. People can smell insincerity a mile away and it is clearly counterproductive. My career has brought me the challenge of representing clients who are often Defendants in wrongful death cases. You must realize what may be a routine business day for you is part of the grieving and healing process, the day of hopeful closure for your adversaries. Anger is a natural reaction to a loss, whether of a loved one, business opportunity or marriage. If appropriate, start the mediation by acknowledging that loss. "I'm very sorry for your loss" delivered honestly and sincerely goes a long way to establishing a rapport with your adversary unfiltered by your opponent. Rare is the person who has not lost a loved one and can truly identify with the loss of another

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<sup>8</sup> Etheridge, Jack P.; *Coming to the Table, a Guide to Mediation in Georgia*, American Lawyers Media, L.P. 1994, p. 92

human being. It costs you nothing, admits nothing but establishes a positive tone and for your work.

If confronted by a client who tells you they don't want to deliver any apology or thoughtful word, refer them to our opening "Keep your eyes on the prize". Ask what do you want to accomplish? How do we both do that? Even in a business dispute, an argument over a contract, a greeting of "John, I'm sorry we are having this problem, I know its disruptive to you and your business and we will work with you to resolve it" sets up your day for success while an icy glare starts you down the road to failure.

### Hush Yo' Mouth

or

You can lean more with your ears than your mouth.

It goes without saying that professionals know to listen during the opening joint mediation session when your opponent is presenting its case. However, your clients may not and they need to be forewarned. You must also bite your tongue and listen, truly listen to the other side's presentation. Make careful notes on issues that need to be addressed, identify the decision maker of the case and discuss what and who is driving the other side. You can only do this by carefully exercising a lost art, the art of listening.

Advise your clients and representatives beforehand of this protocol. Make sure your clients do not interject acrimony into your work by angrily challenging a remark they disagree with. Counsel your clients ahead of time and identify those clients that need the most counseling and counsel them the most.

Recently I was involved in a difficult mediation involving six different defendants with six competing interests in which a well respected and talented lawyer made

statements that were absolutely and undeniably false. Five lawyers and hosts of representatives held their tongue. When our time came, we were able to refute the statement but in a non-offensive way, a way that did not embarrass the attorney and cause him to dig in his heels or strain to prove a point not worthy of our time. It was done by holding our tongues until the appropriate moment.

“You Can Catch More Flies with Honey than with Vinegar”

or

Wash Your Mouth out With Soap

Diplomacy. Doing what your Mama taught you. Minding your manners. All of these things that we were taught since childhood and honed in adulthood are the essentials of setting the tone for a successful mediation. Making your arguments in a polite and reasonable manner even if you disagree with the other side or even if the other side is being offensive to you provides an atmosphere of cooperation. While you may have very strong points to be made, they can be made frankly and politely. In many respects you are an ambassador for your side and your job is to sell your point of view. You can sell that point of view more often when the other side understands that you are presenting your points with respect and in a way not to offend. All of these things we were taught as children, sometimes the art of advocacy that we use in the courtroom or in cross-examination is certainly detrimental to the mediation process. It is my recommendation to simply present your arguments and points with respect.

Pay Your Respects – Part II

In establishing the tone for a successful mediation, it is my recommendation that you give a first offer that recognizes the realities of the case. Proposing a solution that is

so far out of the realm of reason that it can only offend establishes framework that is difficult for both you and the mediator to overcome. Give serious thought to what would be an appropriate response, what would be a successful conclusion, and give the other side the clear message that you want to resolve the dispute. Go back to the chapter of Eyes on the Prize, what do you want to accomplish? If you are simply doing this for discovery or to annoy or harass the other side, this isn't necessarily a proposal to accomplish those goals. However, if your goal is to resolve the dispute, let the other side know that you are serious about this right from the beginning.

Rex, cut me a switch.

When I was a youngster, my mother and father were raised in an environment where they truly believed in not sparing the rod and spoiling the child. Whenever discipline was called for in our household my mother would send me outside and make me cut a switch to get my discipline. If I came in with one too little she would spank me with that one and send me out after another one and I certainly wasn't going to come in with one too big. In any event, I had to be the one to pick the rod.

This same concept can be used in presenting your heavy and difficult arguments. Let the evidence do the talking. In every mediation you have to make decisions on what you are going to disclose. In the vast majority of my mediations I have made the decision that I am going to disclose most everything in a true effort to conclude the case. There are some times when you cannot do this. When you know that if you can't resolve the case and you have to try it, there are certain conflicts and contradictions that you are going to let your adversary explain for the first time from the witness stand. However, my recommendation is that you let the evidence speak for itself. Prepare your slides,

exhibits, handouts and other presentations based on the evidence. Let your adversary be in the role of a juror. What will a juror think when the Plaintiff is claiming substantial lost wages yet the certified tax returns show a different amount. How does the Plaintiff view the videotaped deposition of the physician where the physician questions the truthfulness of your adversary? How does the Plaintiff respond to his own deposition testimony that is in conflict or contradicts his current position? Let your adversary make their own judgments but show them the evidence that the jury is going to hear and then let them make their decision on how a jury or fact finder will view this evidence. One phrase I often use is "I wasn't there but here is the evidence a jury will have to consider." Let the evidence do the talking.

"Give them enough rope and they will hang themselves"

If your adversary has inconsistencies, equivocations or outright falsehoods, prepare for those so that your adversary is hearing his own words. Prepare videos, graphs and other evidence so that they can make their own judgments concerning their inconsistencies.

"Don't Pay it No Nevermind"

or

"Like Water Off a Duck's Back"

It is a rare case in which you are not confronted with confrontational statements or your client at least is not confronted with a statement that could cause a strong negative response. Counsel your clients beforehand not to show emotion, not to take offense, to listen and respond in an orderly fashion. Don't take the bait. Don't let your adversary escalate the tone of the conversation. Once again, keep your eyes on the prize.

“You Mind the Teacher”

There is a third party present. It is someone that you obviously have some regard for because you are paying them a significant sum of money to listen to the dispute and counsel you on it. It is my recommendation that you listen to the mediator, take their counsel on what issues are helpful and what issues are not. Since you took the time to meet with these people, you agreed to this particular mediator, realize that while they may have a different point of view, they have probably done this many times and have a better feel for what is going to be successful in resolving your dispute than you may. I once had a case in an aviation matter in which a Plaintiff asks three separate times in settlement discussions for an unlimited first class pass for air travel. While we had explained that that was not a possibility, on the first time that we made an offer in which we included opening a frequent flyer account and providing them with bonus miles, it was accepted. This was from listening to the mediator and getting an understanding from the other side as to what was important to them. Make sure that you give your neutral respect and take their guidance.

“Don’t Get on your High Horse, Don’t be Too Big for your Britches  
and Don’t Feel Like you have to Take them Down a Notch or Too”

All these southernisms have to do with arrogance. All of us are guilty of it at one time or another but it is a human frailty that we can all sniff out a mile away. Arrogance or haughtiness in any of its varied forms can only cause you difficulties in resolving your conflict. Don’t allow it to creep into your speech or actions and counsel your client not

to have it in theirs. I once took a videotaped deposition for preservation of a witness whose words were very helpful to me but the arrogance in which the deponent delivered those words was so poor that I didn't even order the videotape. Make sure neither you nor your client interject this poison into your case.

The goal of all mediations should be the resolution of the conflict. Simply minding your manners, and paying respect to your adversary will set a tone to help you accomplish this goal.