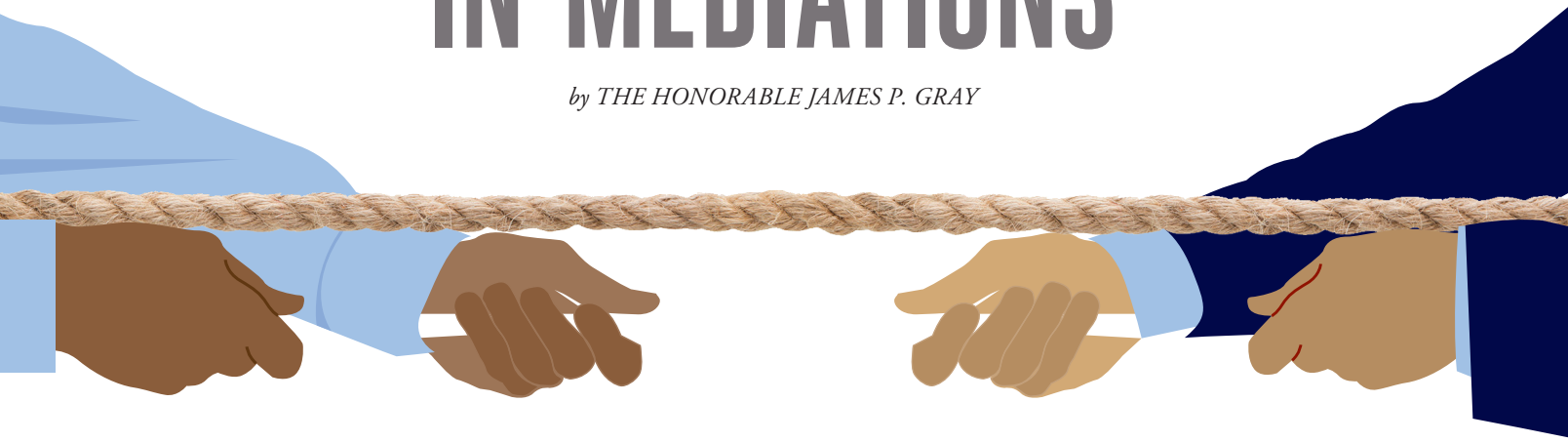
FIRST THINGS FIRST IN MEDIATIONS

by THE HONORABLE JAMES P. GRAY



So the parties and their counsel have gathered in your offices for a mediation . . . now what? Let me share with you some tips on what I do that I have found to be successful for a number of reasons both for private mediations and for Mandatory Settlement Conferences.

Begin by being friendly and human in your introductory comments, but also serious, because these things set the tone. I almost always keep all disputing parties separate from each other unless there is truly a good reason to do otherwise, and I usually begin by meeting with the plaintiffs. So here, basically, is how I begin my sessions.

Hello, and welcome, my name is Judge Gray and I am glad you are here. I was a judge for twenty-five years on the trial court here in Orange County. But I retired more than nine years ago, so I don't have any enforcement authority anymore, which now makes my professional life the same as my home life has always been. As a result, you don't have to convince me of anything because I won't be your judge, or on your jury if you have one, or even your arbitrator if you pursue that route. Nevertheless, I do have a lot of experience in disputes like yours, have settled many, and have also seen some juries deal with them, with varying results. As a result, I have some opinions that I will share with you.

When it comes down to it, you are retaining me to help you resolve your case. Today, not next month, or even next week. As a result, when I am with you I will focus upon your vulnerabilities, and you certainly have some. Why do I do that? Because if I were to say that every time your attorney Ms. Jones argues a point she will win, that is not real world—even as Ms. Jones would grudgingly admit. So, since you have some risks, I will stress your vulnerabilities so that I can help you face reality. But cheer up; when I am in the other room with the defendants, I will focus upon their vulnerabilities, and they certainly have some as well. In fact, it might put a smile on your face to hear me talk with the defendants, which you will not be able to do, but it also might make the defendants somewhat pleased to hear me talk to you, which they will not be able to do either. As a result, I am in the dissatisfaction distribution business. So today I will probably make everyone unhappy with me. But tomorrow, once this case is resolved and you can get back to doing something more constructive, you might think I was not so bad after all.

Actually, your attorney probably knows more about my reputation than I do, but one thing I do know is that I tend to be quite blunt. Maybe my "bedside manner" could be improved, but I have found that generally the parties appreciate hearing the straightforward thoughts of someone who is experienced and neutral. And this helps them do a reasonable cost-benefit analysis.

So, the first decision you will have to make is whether you are going to make a business decision, or base your decision upon something more emotional. There is simply nothing wrong with "Not a penny for tribute," or "I will not be extorted," or "This is a matter of principle," as long as you recognize that these more emotional responses may be controlling your decision. Of course, your attorney and I can only give you some

recommendations, but the decisions are yours. And if you understand that they are based upon something other than a business decision, both of us will have done our jobs. (Almost all of the time, parties say they are not deciding based upon emotion, but that often is not true. So later in the day, I will remind them of what they said to me earlier in the day.)

Then, there are two realities that I will share with you that you may not have thought of before. The first is that, in your case, and in all other cases as well, what actually happened is irrelevant. Strange as it may seem, what actually happened doesn't make any difference whatsoever. The only thing that matters is what can be *proved* to have happened—and that is not always the same thing. So, if you can't prove it, put it out of your mind. And, of course, if you think about it, that is the only way we can do business. If you had a one-on-one discussion with the defendant, I can tell you exactly what you said, what you meant, and what the other person said as well. And that is whatever the jury *says* you said. (Thus, talking to a defendant, "Yes, we understand that you never sexually harassed your employee, but that employee/plaintiff will say you did, and who will the jury believe? You, the evil big corporation employer, or the little guy? It is a risk." This often strongly helps by giving the defendant an "out" to settle the case while still fully maintaining complete innocence of wrongdoing.)

The second reality is that in a mediation, to use a baseball analogy, you will give up your right to hit a home run. Why? Because the settlement is voluntary, and the other side will not agree for you to hit a home run. So if a home run is what you seek, such as being made whole for your psychological trauma, or receiving punitive damages, you will have to go to trial to get that result. But you will also give up your right to strike out, because you will not agree to that. So if you want to hit a solid "ground rule double," I am your guy. That's why we're here.

For defendants, I also frequently promise that I will ask them to pay more than the case is worth, particularly in a personal injury case. Why? Because, as a practical matter, unless the plaintiffs get some money in their pockets from the settlements after paying their expenses and legal contingency fees, they simply have no benefit in settling the case. In this situation, the plaintiffs can take the case to trial with virtually no risk other than some emotion and lost time. So even paying more than the case is worth is still worth it for the defendant to be rid of the case and all of its risks.

For other cases in which there is an attorney's fees award for the prevailing party, I hammer on that risk. Not only will you be paying your own attorney's fees, but think of the expense and how you would feel paying for your opponent's. And if there is no such provision, understand that every dollar you give to your attorney will never be seen again. And Ms. Jones charges at least $23 per hour? (Whereupon Ms. Jones smiles and agrees she charges at least that much.) These are realities, and helping parties to face those realities is doing them a favor.

So now we will be acting as if we all have rolled up our sleeves, and are negotiating to buy a used car. While I now go and introduce myself to the defendants, since you are the plaintiff, I will ask you to begin the negotiations with a demand. Of course, you are a business person, so you know that you should make your opening demand high enough to give you some flexibility, because the numbers will only be reduced from here. But please make the number low enough to give the defendants some reasonable hope that the matter should settle.

And then I'm off to set a similar stage for the defendants. Of course, there are many more approaches as the mediation progresses, such as focusing upon accountings, dealing with personalities and claims of righteousness, the psychology of numbers, and, if all else fails, making mediator's proposals, but those will have to be left for later columns.

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