

TUESDAY, MAY 27, 2025

The case that changed the road ahead: a tire failure and a mediator's insight

How nuanced judgment and empathy gained through practice - exemplified by the story of an undocumented amputee mother - can profoundly shape a mediator's ability to guide parties toward resolution beyond the courtroom.

By Gary N. Stern

After 44 years litigating primarily tort cases on behalf of injured folks (with some work on the defense side sprinkled in for flavor), I am now an ADR professional, a transition I not only enjoy but fully embrace. Simply stated, I love what I do.

But I often think back to a debate I heard countless times over the years. The retired judge mediator? Or the lawyer mediator? There is no right answer, as there are many superb mediators who spent decades on the bench. There are as many lawyer mediators who never sat on the bench, even as a pro tem. There is only a life spent in the law and the perspective one brings to their work.

I have a story about one of my cases from about 20 years ago that I know will provide insight as to this one lawyer/mediator's perspective on catastrophic injury cases. I am confident that the perspective I describe informs many mediators as they go about the task of dispute resolution.

I was in Las Vegas with friends. Still, the work of a trial lawyer rarely takes a holiday, and so it was that early Saturday morning, I headed out to see a client who happened to live in Sin City. Ah, but not the Las Vegas of slot machines and poolside bars. I headed up Arville to Sahara, then over to Decatur, past the 95 freeway to Lake Mead and then into a section of Las Vegas they don't show in the travel guides.

You see my client was undocumented. She was a single mom with a six-year-old son. She also missed



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something we all take for granted: a leg. My client was a negligent-free passenger in a car that rolled over several times on Highway 15. The tread on a seven-year-old tire decided to take a hike, and the young driver, my client's niece, was unable to control the SUV, resulting in several flips into the center divider. My client, then aged 21, with her 11-month-old baby in her lap, found her leg trapped under the car seat. A quick helicopter trip to a Vegas hospital could not save the leg.

My client rarely worked in her young life. She left school after the 11th grade. There were few options for a single mom whose parents il-

legally entered the United States when she was two years old. At the time of our meeting, she lived with her boyfriend, the father of her son and a young man who struggled to find work in construction.

For five years, my client waited for justice. She waited while literally hundreds of lawyers took turns going after the tire company, represented by lawyers supremely well-versed in defending tire product liability cases. My client's case was part of a coordinated action with liaison counsel for plaintiffs among the very best on their side of the litigation. Not surprisingly, by the time the case approached a me-

diation session, it was not unreasonable for me to believe that the defense lawyer's job was to defend, delay, defend, meet, confer, delay, defend. I understood the practical as well as legal issues presented by a case of this magnitude.

My understanding of these practical problems, as well as the difficult and challenging legal and evidentiary issues had to give me pause. How could it be otherwise if I was going to do my job for my client? Yes, we had experts on our side, but so did the defendant. Trial would be risky; it would be expensive. After all, this was mass, coordinated litigation. We all wait. The

client waits. But I was a trained, experienced trial lawyer. Just prepare for trial. My client deserved far more than the defendant was offering.

The truth is that something else was going on in my head. I knew what the defense lawyer knew. For here was the dilemma that I could not ignore. It was a dilemma I would not ignore. My client needed money. She needed it badly. She could not afford to lose. Could I guarantee her an economic victory at the end of the trial rainbow? Of course not. The fact is that no matter how strong my case, no matter how confident I was in my skills as a trial lawyer, even a 10% chance of a defense verdict was too much of a risk.

I thought about such matters with virtually every case I handled, but no more intently than on that Sat-

urday morning as I arrived at my client's ramshackle home on the outskirts of The Strip. As I parked my rental car, I looked all around me, aware of more than one drug deal just blocks away. I walked slowly to the front door of my client's unit, one of three units in a single-family home that had been divided up so that three poor families could find shelter instead of one.

My client greeted me at the door. She was in her wheelchair, her shy son standing behind her. She had a prosthesis for her missing limb, but the public hospital and its likely too busy doctor who amputated her leg did such a poor job that her stump was ill-equipped to handle the prosthesis. The pain of wearing it became unbearable after half an hour. My client spent her days in a

wheelchair, in a home that was not only not equipped for the disabled but appeared to go out of its way to provide daily barriers.

There I was, sitting with my client in the living room (really, the only room), updating her on the case, letting her know that we were deep in settlement negotiations and that I needed her bottom-line settlement authority. The question was: What do I recommend and why?

So, dear reader, many years later, I approach every mediation with the perspective that comes with the years. Law school did not teach it all for the aspiring lawyer. Perspective comes with time and experience. It sure as heck provides the nourishment a mediator must have to be successful in the vital role of an ADR professional.

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