Teaching and Learning from the Mediations in Barry Werth's *Damages*

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I. INTRODUCTION

The two mediations in the book Damages illuminate much about mediation in today's litigation environment—even though they took place in 1993 and each was, in its own way, quite unusual. For that reason—and because we have few
good detailed descriptions of real mediations—I have used these two mediations to teach in a variety of settings. First, they served as one of several focuses in the course based on this book, called *Damages: A Case Study*, that we taught at the University of Missouri-Columbia, School of Law in the winter 2002 and 2003 semesters. In that course, students did not have a uniform background in mediation; some knew a great deal and others knew just a little. Accordingly, I used Werth’s descriptions of these mediations as opportunities to teach about the basics of mediation and its role in American tort law in order to give some insight into advantages and disadvantages of various mediation and mediation advocacy behaviors. Second, I used these mediations in courses in mediation and alternative dispute resolution at the University of Michigan Law School during the winter 2003 semester. In such settings, the students learned a great deal about mediation before encountering these case studies. As a result, the analysis could be more sophisticated and my presentation did not include much basic descriptive information about mediation. This essay is based primarily on the materials I developed for the Missouri courses. For that reason, it assumes the reader has very little knowledge of mediation and, accordingly, includes some very basic information about mediation that would be unnecessary in the other settings. It also assumes that the reader is familiar with the *Damages* book. When I do not ask students to read the entire book, I distribute a summary of the book and a list of characters, which resemble materials that appear earlier in this symposium.²

II. BACKGROUND ON MEDIATION

In mediation, a third-party, seeking to be impartial, helps others resolve a dispute or plan a transaction. Unlike a judge or arbitrator, a mediator has no authority to impose a solution, so she helps the parties negotiate one. This means that mediation, in contrast to a trial, normally is oriented more toward the future than the past: the process need not produce a consensus about what *has* happened, but it aspires to produce an agreement about what *will* happen. Since about 1980, the use of mediation in connection with tort litigation (and other spheres) has grown enormously in nearly every part of the United States. Today mediation is much more common in virtually every part of the country than it was in 1993, when the Sabia mediations took place. In many areas of the United States, mediation is part of the routine practice of law. A major portion of the mediations, like those in *Damages*, are voluntary, in the sense that the parties or their lawyers choose to enter the process. But many courts order cases into mediation, either routinely or in particular circumstances. The degree to which parties may select the mediator varies from court to court. Courts may assign a particular mediator, subject to the parties’ approval, or require or encourage parties to select mediators from a court-approved list of neutrals who have met specific criteria dealing with training, education, and experience. Mediator compensation varies dramatically. In some programs mediators serve pro-bono; in others they receive a fixed amount per mediation or per hour or per day; in still other programs, and outside organized programs, mediators set their own rates, which generally resemble lawyers’ hourly

². See Melody Richardson Daily et al., *Using a Case Study to Teach Law, Lawyering, and Dispute Resolution*, 2004 J. DISP. RESOL. 1.
rates. A few mediators even use contingency fees, though some mediators think this practice is unethical.

The mediation phase of the Sabia case began in September 1993, nine and a half years after the birth of Little Tony and six and a half years after the filing of Sabia v. Norwalk Hospital and Maryellen Humes in Bridgeport, Connecticut Superior Court. It followed extensive pretrial discovery and settlement negotiations, and included two quite different mediations.

III. THE FIRST MEDIATION

I divide the discussion of the first mediation into four parts: deciding to mediate; choosing the mediator; preparing for mediation; and mediating.

A. Deciding to Mediate

Plaintiffs' lawyers Michael Koskoff and Chris Bernard decided to propose mediation after the judge postponed the long-delayed trial—just one day before it was to begin in September 1993. Bernard was concerned about Tony Sabia's emotional condition, and both Bernard and Koskoff worried that Little Tony might die before the case was resolved. But they faced a common dilemma: if they proposed mediation, the other side might take that as a sign of weakness. To deal with that potential problem, in suggesting mediation, Bernard offered to let Travelers select the mediator. He was aware that Travelers had been a leader among insurance companies in promoting mediation of insurance claims, and so he thought that resistance from Bill Doyle or Travelers would be a sign of weakness on the defense side.

B. Choosing the Mediator

David Ferguson was an unusual choice for mediator. He had a Masters Degree in Conflict Resolution from George Mason University in Virginia, an excellent program, and apparently had experienced great success as a mediator. Recently he had joined Endispute, a highly regarded dispute resolution firm, which has subsequently merged with other providers. But he was not trained as a lawyer. In 1993 and today, almost all mediations in tort cases involving insurance claims (especially those that deal with significant amounts of money) are mediated by lawyer-mediators. Court-connected mediation programs that maintain rosters of mediators sometimes restrict membership to lawyers—a practice to which many non-lawyer mediators object. Even in the absence of such restrictions, lawyers representing the parties generally select a lawyer as mediator.

3. For background on mediation, see JAMES ALFINI ET AL., MEDIATION THEORY & PRACTICE (2001); LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 313-501 (2d ed. 1997).


5. WERTH, supra note 1, at 296-99, 310-25.

6. Id. at 298-99.

7. Id. at 299.
Some do so because they want the mediator to be able to fully understand their claims and the relevant law, which may provide the "shadow" in which they will negotiate, to make a prediction about what would happen in court; or, in other ways, to help them better understand their legal situations.

C. Preparing for Mediation

1. The Mediator

Werth tells us that Ferguson liked to know "next to nothing" about the case before the mediation began, although he does not tell us exactly what information the parties sent him, either at his request or on their own initiative. Mediators and mediation programs have a wide range of practices as to such issues. These include:

- Asking the lawyers to send the mediator short letters outlining their claims, history of negotiations, and, sometimes, their clients' aspirations (coupled with directions either to send, or not send copies to opposing counsel—or to decide this question for themselves). I always ask the lawyers also to discuss their clients' underlying interests, i.e., what really motivates them in asserting positions; the lawyers rarely do so.

- Asking for a mediation brief or copies of all relevant pleadings, depositions, and other materials, which the mediator can study before the mediation—for which the mediator ordinarily would charge her regular hourly rate.

- Conducting a pre-mediation meeting or telephone conference call to learn about the case and to discuss and perhaps make decisions about procedural issues. Such sessions usually take place well in advance of the mediation.

- Conducting private caucuses with each side before the first joint session.

The book does not tell us which, if any, of these steps took place.

2. The Parties and Lawyers

When Koskoff briefed Tony and Donna Sabia about their case in preparation for this mediation, he stressed the rationale for their claim—in Werth's terms, that "they and their [family] had been devastated by appalling medical care."  

9. WERTH, supra note 1, at 313.
10. Id. at 311.
Koskoff also recommended how they should treat various settlement offers: "'If the offer was less than $5 million, I'd recommend that they reject it; that between $5 million and $7 million was a judgment call; and that anything over $7.5 million they ought to take.'"\textsuperscript{11}

It is not clear from the book what else Koskoff and Bernard did to prepare Donna and Tony for the first mediation. Tom Arnold, a well-known mediator of intellectual property and other complex disputes, argues that it usually is valuable for the lawyer to explain the mediation process to the client; to prepare the client to make a statement; and to arrange for the client to be present during all or part of the mediation.\textsuperscript{12} My previous discussion of the ways a client can be available during a settlement conference and the potential advantages and disadvantages of a client's presence at such conferences applies equally to mediation:

A client's attendance at a settlement conference can take numerous forms. The following continuum describes one aspect of such involvement:

- Client is available by telephone.
- Client waits outside the conference room.
- Client waits outside the conference room part of the time and sits in on the conference part of the time.
- Client sits in on the conference but does not speak, except to perhaps his lawyer.
- Client sits in on the conference and speaks in response to questions from his lawyer or in response to questions from the other lawyer or judge.
- Client sits in on the conference and speaks and asks questions relatively freely.
- Client takes lead in speaking, consults lawyer as needed.
- Client and lawyer meet privately with judge.
- Client meets with judge without lawyers.

\textsuperscript{11} Id. at 312.
\textsuperscript{12} Tom Arnold, 20 Most Common Errors in Mediation Advocacy, 13 ALTERNATIVES HIGH COST LITIG. 69 (1995).
One area of debate concerns the effect of the client’s participation on the client’s own interests. For each potential advantage trumpeted, a corresponding risk or potential disadvantage waits to be sounded:

- The client’s presence increases the likelihood that her lawyer will be well prepared. [But: the client’s presence may incline some lawyers to posture, to “show off.” In addition, the client may become a great bother, interfering with the lawyer’s ability to accomplish her work.]

- The client’s presence can reduce the risk that interests of the lawyer will prevail over those of the client. For instance, a lawyer might recommend for or against a particular settlement because of the lawyer’s own financial or professional needs, which could be related to excessive pressure from the judge. [But: the client’s presence may remove tactical advantages. For example, often a lawyer will falsely attribute stubbornness to the client to give the lawyer negotiating strength. In addition, it may be strategically useful to delay consideration of an offer from the other side; this is easier to do with an absent client.]

- The client will feel he has had a chance to tell his story, in his own words, by participating in a settlement conference. [But: to the extent that such a feeling makes it easier for the client to settle, he loses his real day in court.]

- The client can learn much about the strengths and weaknesses of both sides of the case by observing the conduct of the other parties, the lawyers, and the judge; this can soften his attitude or positions. [But: exposure to the other side’s behavior will anger or harden some clients, making settlement more difficult.]

- If the client actually observes the exchange of monetary offers, he can better assess the strength of the other side’s commitment to a position; he may notice things the lawyer misses. Although there may be some lawyers who can fully appreciate and convey the nuances of a settlement negotiation, many are vulnerable to misreading, to oversimplifying, and to embracing too warmly the virtues of their own side’s case. [But: the client may misinterpret the events and affect the lawyer’s judgment in an erroneous direction or become more difficult to “control.”]

- The client’s presence permits more rounds of offers and counter-offers. It permits him to act on new information
and allows cooperation and momentum to build. In addition, attendance requires the client to pay attention to the case, which, in itself, makes settlement more likely. [But: the client may lose his resolve because of the "crucible effect."]

- The client can clear up miscommunications about facts and interests between lawyers. [But: the client may be too emotionally involved to see the facts clearly.]

- Direct communication between clients can lead to better understanding of each other or of the events that transpired, perhaps even allow a healing of the rift between them. [But: direct communication may cause a flare-up and loss of objectivity. Parties may harden their resolve.]

- The client, because he is more familiar with his situation may be more able to spot opportunities for problem-solving solutions, which could lead to quicker and more satisfying agreements. [But: the client may give away information about his underlying interests that could leave him vulnerable to exploitation. Moreover, the client will not be sufficiently objective. A lawyer knowledgeable about the client's situation might do a better job of developing problem-solving solutions.]

- Because the client's presence increases the likelihood of a settlement, and a settlement that will be satisfactory to the client, participation likely will result in a savings of time and money for the client. [But: if some of the risks described above materialize, his presence will have caused him to lose time and money.]

**D. Mediating**

I recently described a method of understanding decision-making in and about a mediation, which I call the "New New Grid System." It divides decision-making into three types—substantive, procedural, and meta-procedural. Substantive decision-making deals with defining the problem or problems to address in the mediation and with trying to understand and resolve them. Procedural decision-making deals with establishing procedures, including logistics, and the roles of the mediator and the participants. Meta-procedural decision-making means

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deciding how to make subsequent procedural decisions. The New New Grid System provides a graphic method of depicting the influence that any participant—parties, lawyers, mediators—expect or hope to exert, or actually exert, with respect to any number of issues—substantive, procedural, or meta-procedural.

For purposes of this essay, I will focus on only a small number of issues that seem to hold the most educational benefits, including: (1) the substantive decision of what should be the problem-definition or focus of the mediation; (2) the related procedural issue of whether and how the clients should participate in the mediation; and (3) the procedural issue of whether the mediator should evaluate, i.e., make predictions about what would happen in court. Damages provides almost no information about meta-procedural decision-making. This is not surprising, as such decision-making often is implicit and outside the conscious awareness of the participants. Accordingly, in this essay, I will ignore meta-procedural decision-making.

1. Problem-Definition

The problem or problems to be addressed in this mediation could have been defined in a variety of ways, ranging from narrow to broad (with the broad typically including the narrow). I have previously used the following graphic, Figure 1, to depict the issue of problem-definition.15

![Figure 1. Problem-Definition Continuum](https://example.com/figure1.png)

Using this figure in connection with the Sabia case, at the narrowest point, the “problem” is how much money Travelers will pay the Sabias. In this conception of the problem, the most important information is what is likely to happen if this case goes to trial and the likelihood that Little Tony’s death might occur before the trial, which would have drastically reduced the amount of potentially recoverable damages. This idea of the problem takes into account almost exclusively the

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financial value of the Sabias’ legal claims and each side’s willingness to face the risks of not settling.

Broader definitions of the problem include the parties’ underlying interests or needs that motivate them to assert their positions. In this case, as we will see below, Tony and Donna’s needs might have included understanding what actually caused the damage to their children; gaining recognition or acknowledgement of how they suffered and how well they had coped (what Robert A. Baruch Bush and Joseph Folger have called “recognition”); providing care for Little Tony over his lifetime; and, perhaps, at least in the opinion of one of the defense lawyers, enabling their other children to attend college. A still broader definition could have included needs of a wider segment of the community. It is conceivable, for instance, that in the mediation setting, the parties could have turned their attention to improving public or private assistance programs, which might have helped this family and other families in similar situations.

Many commentators, myself included, trumpet mediation’s potential for fostering broad problem-definitions that allow for creative problem-solving, for healing relationships, and for transforming people and situations. Yet in this case (as is true in the vast bulk of mediations involving personal injury claims), the narrowest definition of the problem seemed to govern. Indeed, there is no suggestion in this book that any professional involved in this mediation did anything to broaden the problem-definition—except for Doyle’s initial offer, described above, which sought to build on what he assumed, without asking, were the Sabias’ needs. Who chose this narrow definition, how, and why?

It seems that many factors might have contributed to this narrowness. First, pretrial litigation processes routinely rest on a narrow problem-definition. Second, apparently all the lawyers fully subscribed to that narrowness, the product not only of the circumstances, but also of a common mindset that I have labeled the “lawyer’s standard philosophical map”:


17. Who should define the problems to be addressed? Here, Bill Doyle, attorney for the hospital (hired by the hospital’s insurance company, Travelers) apparently thought he knew the Sabias’ needs. Did he? This conception of the problem was the basis for the first offer that Doyle extended in the mediation. This offer was a structured settlement of $1.7 million, with an initial payment of $700,000 and $100,000 invested in annuities that would yield $60,000 per year for Little Tony’s lifetime. In addition, Travelers offered to pay $12,500 each year for four years of college tuition for the Sabias’ other two children (not realizing that they had three). Id. at 318. Note that with the addition of this tuition component (which would cost Travelers about $100,000), the offer would actually total $1.8 million, rather than the $1.7 million that Werth mentions.

18. Hints of such issues came out when Tony “exploded” upon learning that the defense had rejected the mediator’s $7 million settlement proposal. WERTH, supra note 1, at 319. See also infra Part IV. (discussing this issue in the context of the second mediation).


20. Although Damages seems an accurate depiction of the events that occurred, many of the statements of fact are Werth’s interpretations, based on interviews with people directly involved in the case. While Werth is a gifted and careful reporter, inevitably, a study such as this cannot accurately report every detail and nuance. We need to keep this limitation in mind as we try to understand, assess, and learn from the conduct of the various participants.
What appears on the map is determined largely by the power of two assumptions about matters that lawyers handle: (1) that disputants are adversaries—i.e., if one wins, the other must lose; and (2) that disputes may be resolved through application, by a third party, of some general rule of law . . . .

On the lawyer's standard philosophical map . . . the client's situation is seen atomistically; many links are not printed. The duty to represent the client zealously within the bounds of the law discourages concern with both the opponent's situation and the overall social effect of a given result.

Moreover, on the lawyer's standard philosophical map, quantities are bright and large, while qualities appear dimly or not at all. When one party wins, in this vision, usually the other party loses, and, most often, the victory is reduced to a money judgment. This "reduction" of nonmaterial values—such as honor, respect, dignity, security, and love—to amounts of money, can have one of two effects. In some cases, these values are excluded from the decision-maker's considerations, and thus from the consciousness of the lawyers, as irrelevant. In others, they are present but transmuted into something else—a justification for money damages . . . .

The lawyer's standard world view is based upon a cognitive and rational outlook. Lawyers are trained to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, to focus on acts more than persons. This view requires a strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.

Mediator David Ferguson apparently shared the lawyers' narrow conceptualization of the problem. There is no suggestion in the book that he did anything to address Donna and Tony's interests in recognition. I have argued elsewhere that a large percentage of mediators have a tendency toward defining the problem either

21. Riskin, Mediation and Lawyers, supra note 19, at 43-45. Of course this map is overdrawn; it exaggerates a common tendency. Many lawyers practice in more balanced ways. And transactional lawyers tend more often to draw on wider perspectives. But as I said almost twenty years ago, it describes the way most lawyers think most of the time. Id. at 46. Other limiting mind-sets also contribute to the problems I describe. See, e.g., ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 9-91 (2000) (describing limiting mind-sets associated with client counseling and negotiation).

This lawyer's standard philosophical map has its virtues, of course, but it also carries problems. It severely limits a lawyer's ability to see things broadly or deeply, to develop curiosity, to listen fully to clients and others, to learn about people's underlying interests, and to think creatively. And it seems to render irrelevant attempts at self-understanding or at seeking out, or even noticing, what connects people (in addition to what separates them). Thus, it may contribute to many problems in law practice and in the legal system—such as excessive adversarialism, inadequate solutions, high costs, delays, and dissatisfaction among both lawyers and clients—all of which produce suffering. Riskin, Mediation and Lawyers, supra note 19.
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broadly or narrowly.\textsuperscript{22} Many mediators who regularly handle personal injury claims routinely adopt the narrow conceptualization that ordinarily has dominated the pretrial and negotiation processes. Often this is what the lawyers expect. On the other hand, many mediators who tend toward a broad focus customarily invite the parties to consider broadening the focus to include their underlying interests.

It seems plain that Tony and Donna would have preferred a broader focus. They wanted to learn what actually caused the damage to their children; to have others recognize how they had suffered and how well they had coped; and to provide care for Little Tony over his lifetime.\textsuperscript{23} But they seemed to have little or no influence over the development of the actual problem-definition. Although it is a bit speculative, Figure 2 depicts the most likely predispositions or aspirations of the various participants as to the problem-definition.

![Figure 2. Substantive Decision-Making: Predisposition/Aspirations Re: Problem-Definition](https://example.com/figure2.png)

Point A shows that the plaintiffs' lawyers (PL), defense lawyers (DL), and mediator (M), all had a narrow conception of the problem-definition and assumed that each would equally influence the development of that problem-definition. My hunch is that they never actually discussed what the problem-definition should be, but each assumed that the question of how much money would change hands simply was the problem. Point B shows that the Sabias were predisposed to a broader problem-definition. I suspect they believed that they should have some influence in establishing such a problem-definition.

\textsuperscript{22} Riskin, Mediators' Orientations, supra note 15, at 24-26.

\textsuperscript{23} Werth, supra note 1, at 312 (Donna); id. at 359 (Tony).
2. Roles of Participants

a. The Parties

Broadening the focus to include the issues that Tony and Donna cared about probably would have required that they attend the mediation session, or at least substantial portions of it. Some mediators routinely urge the lawyers to include clients in mediation. In some court mediation programs, clients must attend. In this case, however, Michael Koskoff did not want Tony to attend, for fear that he might "lose it." Donna, Tony, and Little Tony were introduced at the beginning of the mediation, and Donna and Tony remained available and participated in caucuses with their lawyers and with the mediator, but did not attend the joint mediation sessions. In one caucus, Tony did erupt; in that and other sessions, he was able to make clear that he was in charge of deciding what offer they would accept and that he was having strongly negative emotional reactions.

b. The Lawyers

The lawyers' behavior was quite typical of mediations of personal injury claims: extremely adversarial, exaggerated arguments by both sides, reluctantly-made offers by each side that the other side considers outrageous, the resulting wide, seemingly unbridgeable gulf between their positions—these are standard features of nearly all mediations of this sort. They are part of a "negotiation dance" that both sides apparently feel a need to conduct, and which is virtually impossible to short-circuit with negotiators who are accustomed to this system. In other words, this is an extension of the kind of negotiation that ordinarily precedes the mediation.

c. The Mediator

If that is true, why have a mediation? Why can't skillful lawyers negotiate settlements? Usually they can, and mediation normally takes place when the lawyers have failed to negotiate a settlement or when they, or a court, expect them to have difficulty reaching a settlement. Mediation can enhance the likelihood of a settlement in several ways. Simply holding a mediation—whether the mediator performs well or not—often is enough to bring about a settlement. Although most civil claims result in settlements, the vast bulk of these take place only after the parties have spent a good deal of time and money preparing for trial. A mediation scheduled earlier in the process sometimes can precipitate a settlement simply because it requires the decision-makers to take the time to focus on the case and to negotiate. (Although sometimes participants may be unwilling to settle without knowing more information.) Without or before mediation, negotiations to settle such cases often take place on the telephone, and it is easy to end such calls. The very circumstances of a mediation require that the lawyers take the time to listen

24. See Riskin, Represented Client, supra note 13, at 1059.
25. WERTH, supra note 1, at 313.
26. Id. at 319.
teaching and learning to each other and deliberate. And the mere presence of the mediator usually prompts each side to be polite, which ordinarily enhances opportunities for settlement. Equally important, a mediator inclined toward a broad problem-definition can help the parties explore underlying interests, or even to "heal" wounds associated with the dispute.

In addition, a mediator can help the parties transcend the "negotiator's dilemma"—the tension between adversarial and problem-solving approaches—by learning about interests that a participant might be unwilling to reveal to the other side and then, without disclosing these interests, helping to build a resolution that accommodates them. A mediator can help the parties develop, exchange, and evaluate offers. A mediator can model appropriate behavior. A mediator can propose solutions. She can help the parties understand their own and each other's interests as well as their legal claims. And through persistence and relentless optimism, a mediator can keep the parties talking and keep alive the possibility of settlement. Not all mediators do all these things. But all mediators do some of them.

In examining this mediator's conduct, I will focus on just two issues: (1) The decision that the mediator would not provide an evaluation; and (2) The decision to conduct most of the mediation in private caucuses.

1) Evaluation by the Mediator

The most interesting aspect of Ferguson's service was that, because he was not trained as a lawyer, he probably was unable to assess the strengths and weaknesses of the legal positions and legal arguments. From the book, we cannot tell the extent to which he understood those arguments, or could engage in discussions about them. (To be fair to Ferguson, his prior experience as a mediator might have given him significant familiarity with the legal issues.) When Ferguson characterized his approach in helping parties reach an agreement as "facilitative," he likely was referring to the evaluative-facilitative continuum of mediator approaches. I have recently proposed reconceptualizing that continuum, using the terms "directive" to "elicitive." Most of Ferguson's problem-solving work fell into the elicitive category, in the sense that he was trying to get the parties to put forth their own arguments and their own proposals. He apparently did not generally react to such proposals. It also seems clear, however, that the lawyers needed some help with respect to their demands and offers. In Werth's words, Koskoff

27. Adversarial approaches are grounded on the assumption that the parties must divide a fixed resource, and adversarial strategies commonly involve withholding information about one's true interests, misleading the other side, and asserting "positions" based on claimed entitlements. Problemsolving approaches, on the other hand, assume that by exploring underlying interests (the needs that underlie the parties' positions), the negotiators can "expand the pie" before dividing it. See Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. REV. 754 (1984). The two approaches interfere with each other: a negotiator who is too adversarial may lose opportunities to create value; and the problem-solver's need to reveal his true interests renders him vulnerable to exploitation by an adversarial counterpart. This potential for interference gives rise to the so-called "negotiator's dilemma"—whether to be adversarial or problem-solving at every moment in a negotiation. See MNOOKIN ET AL., supra note 21.

28. See Riskin, Mediators' Orientations, supra note 15.

29. See Riskin, New New Grid, supra note 14, at 30-34.
thought "he had no incentive not to posture" because Ferguson "wasn’t going to push him to be realistic." Indeed, Ferguson thought that the lawyers wanted him "to tell them what the case was worth." Was Ferguson “directive” about the decision not to evaluate? Is that a useful question, given that the lawyers may have or should have known about Ferguson’s self-identified mediator approach?

The issue of whether, when, how, and why a mediator should evaluate has been the subject of enormous controversy. Many commentators argue that mediators should not offer evaluations, either because an evaluation could interfere with party autonomy or because mediators rarely have sufficient understanding of a case to make a valid prediction. Others have argued that mediators should provide an evaluation only if the parties ask for it and only as a last resort. In actual practice, however, most mediators who regularly mediate tort cases provide some kind of evaluative feedback. They can offer a variety of kinds of evaluations, ranging from very directive to very elicitive. Here is a list, for example, of evaluative activities by the mediator, grouped in terms of whether they are “directive,” that is, meant to direct the parties toward a particular solution or a particular understanding, or “elicitive,” meant to encourage the parties or their lawyers to contribute information as to the likely court outcome:

Directive

- Pushes the parties to accept a particular solution
- Tells the parties how a court would decide this case
- Tells the parties a range of outcomes in court, perhaps attaching percentages of likelihood
- Tells parties the strengths and weaknesses of their cases

30. WERTH, supra note 1, at 315.
31. Id.
32. Id. at 320.
34. See Riskin, New New Grid, supra note 14, at 20.
Elicitive

- Asks lawyers about the likelihood of winning in court
- Asks lawyers about strengths and weaknesses of each side’s case

The more training and experience the mediator has in relevant areas of law, the better job the mediator can do with any of these activities, especially the directive ones.

Eventually, as a last resort, Ferguson did offer something in the nature of an evaluation. He did not evaluate their legal prospects, however, but proposed a figure, $7 million, which he thought each side “would have to think very hard about.” He did this as a last resort. In fact, the idea was Koskoff’s. When the book explains how Ferguson presented this idea to both sides, it does not say whether he explicitly asked Doyle if he wanted such an evaluation. Accordingly, we cannot tell how directly Ferguson behaved about this, but I assume Doyle could have derailed this plan had he wanted to do so.

The result was an unhappy one. It caused Doyle to completely lose faith in Ferguson as the mediator. He believed that the figure Ferguson proposed set a value on the case that greatly exceeded what he would recommend paying. In addition, it apparently contributed to much agonizing on the part of Tony and Donna, who, understandably, had to struggle with whether to agree to the mediator’s proposal. The events surrounding the evaluation illustrate a well-recognized potential drawback of more conventional kinds of evaluations of court outcomes. In the words of Arthur Chaykin, vice-president of the Sprint Corporation, “[p]arties often feel an evaluation is what they want, until they get it.” It is easy for an evaluation to undermine at least one party’s confidence in the mediator’s impartiality.

Given Ferguson’s background and the fact that an expert assessment might have facilitated a settlement, what, if anything, could he have done to get such feedback for the parties? With hindsight, a number of practices that were not common at the time of this mediation suggest themselves. The mediator might have brought in an expert to provide an assessment, or he might have helped the lawyers construct evaluations by employing a “decision-tree.”

2) The Private Caucus

After the first joint session, most of the mediation took place in private caucuses—the most common arrangement in the mediation of personal injury claims and other “commercial” (i.e., non-family, non-community, non-criminal) disputes in the United States. Proponents of the caucus argue that it has several advantages

35. WERTH, supra note 1, at 323.
36. Id.
38. See David P. Hoffer, Decision Analysis as a Mediator’s Tool, 1 HARV. NEGOT. L. REV. 113 (1996).
that make it virtually essential: it gives the parties an opportunity to reveal information to the mediator that they would not be willing to share with the other side; provides them a chance to bond with the mediator; and allows a calm, safe atmosphere for deliberation and testing ideas.

However, a significant minority of mediators of commercial cases never or almost never caucus. (In family mediation, and in some community mediation programs, this no-caucus approach is quite common.) Those who avoid the private caucus do so for several reasons: they believe that it gets in the way of the parties' developing an understanding of each other; wastes time; and impairs party autonomy by giving the mediator too much power, e.g., deciding what information to reveal, when, and how, while putting him in the awkward position of keeping secrets. 39

E. Discussion Questions about the First Mediation

1. Did it make sense for Koskoff to sweeten his proposal to mediate by allowing Travelers to select the mediator? What would you need to know about the nature of the mediation that would take place in order to make such an offer? 40 Would it matter whether you expected the mediator to make predictions about what would happen in court or to push the parties toward a particular agreement or toward agreement in general? What would be the importance of subject matter expertise? 41

In my mind, the selection of a mediator could depend on many factors. To simplify, however, it generally would make more sense for a lawyer to allow the other side to select the mediator if the mediator was not expected to render an opinion about what would happen in court. Conversely, if the lawyers wanted such a prediction, it would be essential that they had equal confidence in the mediator and that the mediator had the expertise to make such a prediction.

Would there have been other ways for Koskoff to make a mediation proposal without appearing weak? Good suggestions along these lines, including a simple explanation of the potential benefits of mediation coupled with an assertion of confidence in one's own case, appear in a very helpful article by mediator J. Michael Keating, Jr. 42 Some courts or judges order civil cases into mediation, either by category of case or in certain circumstances; such orders reduce or eliminate this dilemma.

2. If you were representing plaintiffs in a case such as this, what qualities or capabilities would you want in a mediator? Would your answer be different if you represented the hospital? If Humes had not settled, and you represented her?

39. For an excellent demonstration of the Understanding-Based model of mediation, which avoids private caucuses, see Videotape: Saving the Last Dance: Resolving Conflict through Understanding (Reunion Productions 2001) (on file with the Harvard Law School Program on Negotiation) [hereinafter Saving the Last Dance].
40. See Riskin, Mediator Orientations, supra note 15, at 47-48. As indicated below, this mediator did not, and because of his background could not, make predictions about a court outcome.
41. Id. at 46-47.
3. As a mediator, which approach toward getting information in advance of the mediation would you follow? Which approach would you want as a lawyer or party? What variables would you consider in answering these questions? To what extent should the various participants in a mediation—parties, lawyers, mediators—influence the determination of such issues?

4. In briefing Donna and Tony for the first mediation, was it a good idea for Koskoff to encourage them to “believe” the factual and legal arguments that he intended to make? Did it “pump them up” too much? (Recall that before that time they were still not clear that anyone was really at fault; rather, Tony wondered why this had happened to him.) Was it a good idea for Koskoff to tell them about the range of settlement offers and to proffer recommendations about how to treat such offers? Did these statements encourage them to think that they would likely get a substantial settlement offer? It is common for lawyers to try to keep their clients’ expectations low in order to make it more likely that they will be pleased with an eventual settlement. Could Koskoff have had that in mind? If so, had he misperceived how the defense would negotiate? Or did he want to instill high aspirations in Donna and Tony so that they would be willing to decline lesser offers, which could lead to a higher settlement?

5. Based on what you know of the Sabia case, as their lawyer, how would you assess the potential advantages of participation by Donna and Tony in this mediation? It is clear that they wanted to participate and that Michael Koskoff wanted to keep Tony out; Koskoff thought that Tony’s behavior was unpredictable and that, as a result, it might undermine his efforts on Tony and Donna’s behalf. Koskoff recently indicated that in retrospect he was less certain of the wisdom of the decision to keep Tony and Donna out of the joint sessions, after he introduced them to the mediator and the defense team. As indicated below, the question of who participates, and how, can have a major impact on decision-making about and in mediation.

6. Do you think Koskoff was aware of Tony and Donna’s needs for recognition? What about Bernard, who had worked intimately with them for a long time? If so, what kept them from trying to address these needs in the mediation? (There are suggestions in the book that Bernard maintained a close relationship with the Sabias, and this may have included attention to such needs.)

7. Why did Doyle (apparently) assume that Tony and Donna wanted money to send their other children to college? Is that a result of treating them like hypothetical people, rather than real ones? What kept him from asking Tony and Donna, or their lawyers, about their actual interests?

8. Nothing in the book suggests that the mediator did anything to bring attention to the parties’ underlying interests. Assuming that was the case, what kept the mediator from doing so?

9. One cause for Koskoff’s concern about Tony’s presence was that Doyle might deliberately provoke Tony. Did that seem like a realistic possibility? What was the potential harm of an “explosion” by Tony? What were the potential benefits?

43. Michael Koskoff, Remarks at the “When Law, Medicine, and Insurance Collide” roundtable discussion at the University of Missouri-Columbia, School of Law (Apr. 11, 2003).
Were there other ways to include Tony while minimizing the risk and maximizing the potential benefits? Tom Arnold, a well-known Houston lawyer who mediates large intellectual property disputes, argues that the wise lawyer will prepare his client to participate in the mediation generally; in addition, he will prepare the client to make an opening statement. Should Koskoff have done that in this case? If Ferguson had sent Tom Arnold’s article to Koskoff in advance of the mediation, might Koskoff have included Donna and Tony? I have written previously that some mediators and some lawyers may exclude clients and other non-lawyer participants from mediation sessions because of the unpredictability of their behavior. The professionals may feel anxious, or at least uncomfortable, in dealing with non-professionals. Given Tony’s explosive temperament, do you suppose that either the mediator or the defense lawyers wanted him in the mediation sessions? By asking these questions, I am not trying to second guess the lawyers, but simply to identify issues and options.

10. Each side had a substantial delegation of professionals. The defense had William Doyle and Beverly Hunt, the lawyers; Brian Casey, Travelers’ Vice President for Medical Liability; and Cathy Gonzales, Travelers’ case manager, facing three plaintiffs’ lawyers, Michael Koskoff, Joel Lichtenstein, and Chris Bernard. But should other individuals have participated? Given Donna and Tony’s needs for recognition, if they had been present for some of the sessions, would it have made sense to include a representative of the hospital? What about individuals who provided birth-related services to Donna, such as Barbara McManamy or Molly Fortuna? Might participation in such a process have been of value to them? Were they in any sense “damaged” by the entire dispute resolution process in this case? What risks would their presence have presented, and to whom? And what about Humes? The case against her had already been settled, at the insistence of her insurance carrier. But she carried many wounds—emotional as well as financial. Might she and the Sabias have benefited from a direct conversation, especially given that the Sabias had substantial doubts that Humes was at fault? What would have been the potential benefits and risks of including her in some or all of the mediation sessions? What kind of change in mindsets would have been required to make this happen?

11. Would the parties have been better off with a mediator who had a stronger background in law? Apparently they thought so, as they selected mediators for the second mediation who had extensive legal experience in such matters. Why, then, did they choose Ferguson in the first instance? Travelers selected him, and Koskoff had previously been in mediation with him. So both sides had the opportunity to know his background and what he could offer. If Koskoff did not want Ferguson, he may have been unwilling to say so, given that he had offered to let Travelers select the mediator. Is it possible that Travelers wanted Ferguson precisely because they knew he would not offer an evaluation? Is it possible that one or both sides did not quite realize that Ferguson would not evaluate? Could it

44. Arnold, supra note 12, at 69.
45. See Riskin, Represented Client, supra note 13, at 1105.
46. Large insurance companies such as Travelers often have continuing relationships with organizations that provide mediation services for cases in which they are parties. Often the insurance companies will routinely offer to pay the mediation fees if the plaintiffs will agree to mediate. In this case, of course, Koskoff proposed the mediation. See WERTH, supra note 1, at 298-99.
be that, before the mediation, one or both sides thought they did not want an evaluation, but changed their minds during the session?

12. How was the decision made that the mediator would not evaluate? Does the following grid help you understand that issue?

![Figure 3: Procedural Decision-Making: Influence on Evaluation by Mediator](image)

Was it a good idea for Ferguson to have proposed the $7 million figure? If he had proposed $5 million, would that have angered Koskoff?

13. How do you think the mediator and parties decided to have private caucuses, and when to have them? Does the directive/elicitive role of the mediator continuum help us understand this question? A better way to understand it is through the New New Grid System, which focuses on the influence that each participant exerted, or might have exerted, over that issue, as shown in Figure 4.

![Figure 4: Procedural Decision-Making: Influence on Use of Caucus](image)
It seems likely that in this case, there was no explicit decision-making around the question of whether and to what extent caucuses would be used. In all likelihood both the lawyers and the mediator assumed that they would use the caucus heavily. It also is unlikely that the clients participated in decision-making around the use of the caucus. Should they have done so?

IV. THE SECOND MEDIATION

A. Deciding to Mediate and Choosing the Mediators

Doyle proposed the second mediation, and he suggested that the mediators be lawyers who could, in Werth’s words, “tell them what the case was really worth and how a jury would most likely decide.” Although co-mediation is common in certain kinds of cases (e.g., high-stakes, very complex, multiparty commercial or public policy disputes, and divorce and community mediation), it is rare in medical malpractice cases. Doyle apparently reasoned (or so Koskoff thought) that he would need the support of two “heavy hitters” in order to give Travelers justification for raising its offer. (Plainly he never got the kind of justification he sought in the first mediation.) He also must have thought that he needed the mediators to influence Koskoff.

Koskoff apparently agreed with Doyle’s proposal that each side would choose one mediator. In fact, each chose a mediator whom they trusted and who belonged to his opponent’s side of the bar and ethnic group. One of the mediators, Tony Fitzgerald, was a certified mediator in a court program, so he probably had mediation training and experience. I assume from his behavior, that the other mediator, Stanley Jacobs, had no background as a mediator, and this produced a major problem.

B. Mediating

By the time of this mediation, Koskoff was well aware that Tony “craved accountability,” i.e., to know what caused the injuries to his children, and Koskoff realized that a mediation could not provide it. Koskoff still worried about Tony’s conduct in the mediation. When Donna and Tony insisted on attending, however, he agreed, but on the condition that they promised to hold “their questions until the end.”

Because Tony and Donna were present, the second mediation shows, more dramatically than the first, the disparity between Tony and Donna’s perception of the problem-definition and the perception of the lawyers. On one level, it also validated Koskoff’s concern. The Sabias were overwhelmed by listening to Koskoff’s and Doyle’s presentations. And well before the end of the mediation, Tony exploded, as Koskoff had feared, partly because he thought Doyle had “no

47. Id. at 340-44, 356-65, 370.
48. Id. at 341.
49. Id. at 357.
50. See supra Figures 1 and 2. See also supra Part II.D.1.
clue” about what he had been through. In doing so, he expressed or acted out his real needs. In Werth’s words:

The world had no idea how he and Donna and Little Tony had suffered, and that ignorance itself was the larger crime, even more than whatever had been done to them in the first place. He wanted Doyle to acknowledge that the hospital was at fault for killing Michael and devastating Little Tony and making him and Donna wrecks. He wanted Travelers to pay, dearly. But what he seemed to want even more was a formal recognition of what his family had been put through, how violated and alone they were, and what it had taken for them to survive. He wanted Doyle and Casey [Brian Casey, Travelers’ Vice President for Medical Liability] to concede that he, Tony, had withstood all the mental abuse the world could throw at him and was still standing.

He wanted respect.

He did not get it, however. Immediately after Tony’s statement, Fitzgerald “threw everybody out” because he wanted to talk to Jacobs about what he considered “the key issue”—causation. Plainly that would have been the key issue at trial and therefore it has an important place in the mediation. Many mediators, however, would have tried to attend to Tony’s emotional needs. Mediators who take a “transformative” approach, for instance, see “recognition” as one of the two most significant elements of mediation, the other being empowerment; they view settlement as a secondary goal. And, the “understanding-based” approach to mediation would have placed Tony and Donna’s emotional needs front and center and seen them as an essential component of the learning required to truly resolve this case, rather than simply settle it.

Many more traditional mediators also would have responded to these needs. Virtually any book on mediation and nearly any mediation training program would say that, at a minimum, the mediator should have used “active listening,” i.e., paraphrased the content and named the emotions connected with Tony’s outburst. This could have given Tony at least some of the acknowledgment he sought and made it easier for the defense team to really hear or understand what Tony was saying. In addition, a mediator could have given such recognition to Tony and Donna in private caucus and, in private caucuses with the defense, made certain that they were aware of this need and asked them to consider responding to it. Any mediator who was open to a “broad” perspective would have at least raised this as an issue and done what seemed appropriate and feasible in the circumstances. Because we do not have a verbatim record of the mediation, we cannot be sure the mediators did not do any of this, but the book gives no hint of it.

51. Werth, supra note 1, at 359.
52. Id.
53. Id. at 360.
54. Bush & Folger, supra note 16, at 84-99. To what extent did Donna and Tony feel “empowered” by or during either mediation? Would “transformative” mediation have made sense here?
55. See Saving the Last Dance, supra note 39. For an explanation of the difference between settlement and resolution, see infra note 70.
In the mediators' private session, Jacobs told Fitzgerald, in Werth's words, that "the case might net $7.5 million at trial," and suggested that, accordingly, $5 million was a good settlement figure.\textsuperscript{56} There were other ways to present an evaluation, of course.\textsuperscript{57} One obvious method was to have given a range of possible outcomes and attached probabilities to each. Would that have been more realistic? More helpful? A recent conversation I had with an active mediator in a big city bears on this question. This mediator had been a lawyer, then served as a judge in his state's trial court, intermediate appellate court, and supreme court. He said that, notwithstanding all that experience, he did not feel competent to predict a specific court outcome.

Of course, the book does not say that Fitzgerald or Jacobs told the participants that Jacobs predicted a $7.5 million court outcome. I suspect, however, that they did so, in order to justify the proposed settlement of $5 million. (Both sides needed a rationale with which they could feel comfortable.)

As the mediation progressed, Jacobs' behavior undermined Fitzgerald's mediation attempts. In general, a mediator is charged with assuming an impartial or neutral role, which, to some commentators, seems inconsistent with the evaluative responsibilities with which Jacobs was charged. Moreover, Jacobs went beyond the normal evaluative role and, in a private caucus, actually supported Doyle's argument and position, which seemed to increase Doyle's intransigence.\textsuperscript{58} This plainly impaired Fitzgerald's attempts at shaking the defense team's confidence in order to get them to see the wisdom of a $5 million settlement.\textsuperscript{59} Fitzgerald also tried to shake confidence on the plaintiffs' side, and Werth suggests that Jacobs also undermined that effort.\textsuperscript{60} It seems clear that Jacobs, though apparently a highly capable plaintiffs' lawyer, did not understand the mediator role.\textsuperscript{61} Assuming that there was potential benefit in getting the kind of evaluation of the court outcome that Jacobs provided, could he have contributed to the process without trying to help mediate? Although the practice was not common in 1993, today, it would not be unusual to agree in a mediation to have an evaluation prepared in order to facilitate the negotiations.

In retrospect, was it wise for Fitzgerald to push for the $5 million settlement and continue to ask the parties, privately, if they could "get there"? Although the book is not clear on this point, it seems that Fitzgerald may have asked the lawyers for their "bottom line" figures,\textsuperscript{62} so that he could have a sense of whether it was possible for them to eventually agree to his proposed settlement figure. As-

\textsuperscript{56} WERTH, supra note 1, at 360.
\textsuperscript{57} See supra Part III.D.2.c.1.
\textsuperscript{58} WERTH, supra note 1, at 361.
\textsuperscript{59} This might partially explain why only Fitzgerald was involved in the telephonic mediation that followed the formal mediation sessions. According to Werth's account, Jacobs' only potentially useful contribution was to provide an evaluation. Id. at 360. Most mediators would say that co-mediation can be far superior to solo mediation, but only if the mediators can work well together.
\textsuperscript{60} Id. at 363.
\textsuperscript{61} For a famous recent example of a person with a brilliant legal mind who "mediated" an important case but seemed to know little of basic principles of mediation, see Ken Auletta, Final Offer: What Kept Microsoft from Settling Its Case?, NEW YORKER, Jan. 15, 2001, at 40 (describing Judge Richard Posner's mediation of the antitrust cases against Microsoft).
\textsuperscript{62} I am guessing that this is what Werth and Ferguson meant by "real numbers." WERTH, supra note 1, at 360.
summing he did ask the lawyers for such a figure, was it a good technique? Many mediators scrupulously avoid asking for the parties' bottom lines. Why?

Many times a negotiator's bottom line changes with the circumstances, with what they learn in the mediation, and with their moods. Such a bottom line often is based on limited settlement authority that negotiators receive from their superiors; and it is fairly common for negotiators to call their superiors for additional authority. Some mediators would avoid asking for a bottom line out of fear that the negotiator who answers this question may in some sense feel committed to the figure she gives. On the other hand, it is common practice for negotiators to tell the mediator, sometimes without the mediator's asking, a "final, final" figure—and then depart from it later. Sometimes, however, when negotiators claim to be giving their final figure, they mean it.

As the mediation proceeded, Koskoff reduced his demand from $13 million to $8.5 million, and privately told Fitzgerald he would come down to $7.5 million. Doyle raised his offer from $2.5 million to $3.5 million, leaving a $5 million official gap and a $4 million unofficial gap.

What ultimately stopped the parties from reaching an agreement during the face-to-face mediation? After the defense team walked out, Fitzgerald told the plaintiffs' side about a previously unreported offer that had a value of $5.15 million.63 In Werth's words, Koskoff replied that it was "too little, too late."64 Why was this too little, given that Donna and Tony had just struggled with accepting a $3.5 million offer? And why was it too late? We read that Koskoff had been "offended" by the $3.5 million offer. And just before he walked out, Doyle felt and expressed great anger at Koskoff for not "moving" enough and for not giving Doyle the kind of justification he thought he needed to request a larger payment from Travelers. Apparently he and his colleagues from Travelers left in anger, without saying goodbye to anyone on the plaintiffs' side. Werth says that "a mixture of pride and spite and greed" prevented the settlement.65 Do you agree? Was Werth referring to the lawyers, or the clients, or both? To what extent should lawyers' emotions or ego-needs play a role in determining whether a settlement will take place?

Despite this inauspicious ending to the formal co-mediation, the mediation resumed by telephone, with just one mediator, Fitzgerald, and led to a settlement. It is quite common for mediations to continue by telephone after the in-person sessions have ended without a settlement. It also is quite common for a case to settle shortly after mediation through negotiation between the lawyers. Often, time is essential for the lawyers and the parties to digest what they learned in the mediation and to incorporate it into their understanding of the case.

C. Discussion Questions for the Second Mediation

1. What kept the mediators and the lawyers in this mediation, as in the first one, from trying to do something about Tony and Donna's deep need for recognition? Was it that they adopted the same, very narrow problem-definition that

63. Id. at 363.
64. Id.
65. Id.
dominated the pretrial process and the first mediation?\(^\text{66}\) If so, did they not consider that attending to Tony and Donna’s needs for recognition might make it easier to settle the case? If not, why?

2. Ironically, Doyle probably had a better basis for understanding Tony and Donna’s experience than most people. Doyle “had grown up in a household like [theirs], with a crippled birth-injured child, neglected siblings, and a hard-bitten father and suffering mother struggling against defeat.”\(^\text{67}\) But Donna and Tony did not know this. What do you suppose kept Doyle from telling them or from otherwise responding to Tony’s plea for recognition? What about Casey of Travelers? We learn that he was a single father and admired Tony. Why didn’t he say so? Would that have given Tony some of the recognition he needed and helped him reach an emotional resolution? Could it potentially have hurt Casey or Travelers? Do you think that Doyle or Casey felt empathy or sympathy for the Sabia family? If not, why not? If so, do you think they paid any psychic price for not expressing those feelings? Recent scholarship has focused on the importance of empathy and apology in resolving disputes.\(^\text{68}\)

3. Could Koskoff have done anything to head off Tony’s outburst that would have allowed Tony to express his emotional needs? What if Koskoff had helped him prepare an opening statement, as Tom Arnold recommends, and as is common in mediations today?\(^\text{69}\)

**D. Dimensions of Conflict Resolution**

Bernard Mayer writes that it is helpful to view conflict, and conflict resolution, as taking place along three dimensions—behavioral, cognitive, and emotional—and that real resolution includes all three dimensions.\(^\text{70}\) Behavioral resolution means that the parties stop contesting; cognitive resolution means that the parties felt comfortable with a rationale that supports their decision to stop contesting, e.g., that they thought they had reached an appropriate settlement; and emotional resolution means that they were emotionally at peace about the matter, i.e., no longer investing emotional energy in the dispute. Which of these goals did each of the participants have in mind? Which did they achieve? Which were possible to achieve?

Obviously, all concerned achieved a behavioral resolution. And it is likely that most reached a cognitive resolution, developing an intellectual comfort that comes from accepting a rationale that justifies accepting the settlement agreement. But what about emotional resolution? It appears that Koskoff and Doyle must

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\(\text{66. See Guthrie, Philosophical Map, supra note 33 (arguing that lawyers’ dominating personalities and mindsets may interfere with their ability to deploy certain mediation strategies and techniques).}\)

\(\text{67. WERTH, supra note 1, at 359.}\)

\(\text{68. See, e.g., Jonathan R. Cohen, Advising Clients to Apologize, 72 S. CAL. L. REV. 1009 (1999); Jennifer Robbennolt, Apologies and Legal Settlement: An Empirical Examination, 102 MICH. L. REV. (forthcoming 2003).}\)

\(\text{69. Arnold, supra note 12, at 69}.\)

\(\text{70. See BERNARD MAYER, THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER’S GUIDE (2000). See also J. Michael Keating, Jr. & Margaret L. Shaw, Compared to What?: Defining Terms in Court-Related ADR Programs, 6 NEGOT. J. 217 (1990) (suggesting that “settlement” typifies judicially-hosted settlement conferences, but that “collaboration” or “resolution” should be the goal in mediation).}\)
have reached psychological comfort—and cognitive resolution—based on the idea that they did as well as they could have, under the circumstances. But that was not true for all the lawyers involved. To Beverly Hunt, the associate lawyer who worked for Doyle and his predecessor in representing Norwalk Hospital, "the settlement was a lie, invalidating everything she believed in. Unlike Doyle, she'd been unable to put her identification with the hospital aside, and the mediations had proved unsupportable—'the most castrating experience of my life.'"

The mediation processes did not provide Tony and Donna the kind of recognition they needed for emotional resolution. (And Donna also felt shut out of the final decision-making during the mediation). 71 Ironically, they seemed to have gained that recognition, and I suspect, the emotional resolution it could help produce, through publication of Barry Werth's *Damages*. I hope that the publication of this Symposium and other writings about their case will provide similar benefits. But, I wonder whether some of the other participants in the evolution of this case, such as Maryellen Humes, M.D., and Molly Fortuna, the nurse-midwife, also might have achieved some aspects of resolution by participating in such processes. 72

**V. CONCLUSION**

Teaching about mediation from *Damages* has been a great joy for several reasons. First, the book contains lucid, engaging, detailed descriptions of the mediations from the perspective of a disinterested third party who—unlike many "experts"—began with no particular expectations or beliefs about what mediation is or should be. Second, the rest of the book helps provide a detailed context in which to understand the mediations and the people involved—their personalities, situations, and aspirations. Such information about mediations is rarely available, largely because of the confidentiality normally associated with mediation. For these reasons, *Damages* is a treasure for teachers and students of mediation, as well as for those who study negotiation and, as this Symposium shows, a wide variety of other topics.

In this brief essay, I have touched on only a few aspects of the mediations. I hope that others will explore these rich descriptions more deeply and widely; they will bear much more study.

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71. WERTH, *supra* note 1, at 369.
72. Id. at 367.