

HOW I BECAME A MEDIATOR

*Richard M. Calkins**

You ask, how did I make the trek from trial lawyer to mediator, from advocate to peacemaker? What path did I take that placed me in the ranks of “recovering trial lawyer”? I will tell you, for the journey was long and arduous and included passing through the hallowed halls of Drake University Law School.

The journey began upon graduation from Northwestern University Law School in 1959, where I was filled with inspiration and hope that on entering the temple of justice, where truth and justice prevailed, I would thrive. Instead, I found it was an arena where ultimate fighters engaged in combat, not to uncover truth, but to win. My accomplishments in that arena were modest at best, and that perhaps is an exaggeration of my success. I bankrupted a thriving chicken franchise started by two brothers 20 years before and led a senior vice president of a major corporation, whom I defended, to jail to serve time for violating Section 1 of the Sherman Antitrust Act.¹ He was one of the first individuals to be incarcerated for a violation of the criminal provisions of that law.

I did succeed in becoming a partner in the prestigious antitrust law firm of Chadwell, Keck, Kayser, Ruggles and McLaren, which no longer exists, and in 1969, established my own law firm of Burditt and Calkins, which also no longer exists. However, my law firm had its moments of success and had grown to 22 lawyers when I left to join the faculty of Drake Law School, and continued growing to 63 lawyers thereafter, which shows you the impact my leaving had.

I was dean at Drake Law School from 1980 to 1988 and had a modicum of

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Mr. Calkins was president of the American Mock Trial Association from 1984–2004; President of the Blackstone Inn of Court from 1992–1994; President of the American Academy of ADR Attorneys from 1999–2000 and Dean from 2000–2002; and president of the International Academy of Dispute Resolution from 2014–2016. He has completed over 2,000 mediations and arbitrations, and regularly holds classes in mediation training, having taught over 800 lawyers and 1,000 law and undergraduate students. He is also co-author of the treatise, *Lane and Calkins Mediation Practice Guide*.

1. 15 U.S.C. § 1 (2012).

success. We established the internationally recognized Drake Agricultural Law Center, headed by Professor Neil Hamilton. Through the good offices of Congressman Neal Smith we established the Bea and Neal Smith Legal Clinic, spearheaded by Professor Dan Power, and the James Madison Constitutional Law Center, one of four established by Congress in connection with the bicentennial of the U.S. Constitution. Alumnus Dwight Opperman of the class of 1951, then CEO of West Publishing Company, graciously provided speakers each year for the lecture series, beginning in 1988, when then-Chief Justice Warren E. Burger spoke and dedicated the Legal Clinic. Thereafter, two other Chief Justices, William Rehnquist and John Roberts, have spoken as well as a number of Associate Justices: Sandra Day O'Connor, Antonin Scalia, Clarence Thomas, Anthony Kennedy, Stephen Breyer, Ruth Bader Ginsburg, and Samuel Alito.

However, the real direction I was to traverse was set in motion in 1985, when we established the American Mock Trial Association at the college, high school, and middle school levels—it already existed at the law school level. I encouraged mock trial, particularly at the college level, for the altruistic purpose of recruiting for Drake Law School. To this end I had some success. College mock trial has grown from 12 teams and 8 schools in 1985 to over 450 teams and some 375 schools this past year. The goal has been to introduce students to the United States' adversarial system of dispute resolution, while giving them a competitive environment parallel to that provided to our college athletes.

As these programs grew, I began to realize that the message we were giving young people was misleading because it spurred competition and the mindset that the only way differences could be resolved was by requiring parties to go to battle and establish a winner and loser. I became concerned because the mock trial program itself was becoming overly competitive, where the only thing that mattered was to win. It was then I began thinking in terms of mediation. But I get ahead of my story.

In 1988, I stepped down as dean of Drake Law School with the intent to return to my law firm in Chicago. I was dissuaded from doing so when my wife, Anita, suggested that if I went back to Chicago, I might be going back alone. We remained in Des Moines, and I was fortunate enough to have good friends, Ed Sease and Bruce McKee, encourage me to join their law firm, Zarley, McKee, Thomte, Voorhees & Sease (now McKee, Voorhees & Sease). At this time, alumni of the law school did me the great honor of roasting me. The master of ceremonies, Dick Smith, graciously introduced me as a very humble person, and then added, "This is because Dick has much to be humble about." And the roast went south from there.

The real dawn of my mediation career began in 1988, when Drake Law

School alumna, Kim Stamatelos, set the compass for where I would go the next 26 years. She invited me to attend a mediation training session conducted by Alan Alhadeff of Seattle, Washington. I resisted, explaining I did not want to be an arbitrator but wanted to get back into the arena and give it another try. Frankly, I did not know the difference between arbitration and mediation. She persisted, and I received training. It was then the light became brighter and I realized I was never meant to be an advocate, but a mediator and peacemaker, in which role I might make a difference.

My first mediation was with Jerry Foxhoven, now director of the Drake Legal Clinic. It involved an elderly woman who, one afternoon, visited a bedridden friend in a nursing home. The nurse used a crank to lift the back of the bed so the patient would be in a sitting position. However, she failed to fold the crank back under the bed, and, when the visitor left, she tripped over the crank and broke her hip. At the mediation, both attorneys told me—at separate times and in confidence—they would like to settle the case for \$15,000. And so it did, and I was profusely congratulated for my fine work. I thought “this is for me.” I liked it so much better than the courtroom. However, this was the easiest mediation I have ever had. To this day, I think it was a setup to get me hooked on mediation. Later I learned that plaintiff had been in Florida with her son and daughter-in-law, and her doctors told her she could no longer travel to Des Moines, for trial or otherwise.

Some 2,000-plus mediations later, I have learned why mediation is winning out the marketplace. As former Chief Justice Burger stated: “Our [U.S. civil] system is too costly, too painful, too destructive, too inefficient for a truly civilized people.”² And indeed it is too costly. In the late 1980s, top lawyers in Chicago were charging \$350 per hour.³ By the year 2000, it was over \$1000 per hour, and today, in 2016, over \$1,500 per hour.⁴ Pretrial discovery in one antitrust case involving Microsoft Corporation cost over \$80 million.⁵ Federal district judge John Jarvey stated that the court system serves the rich, those with insurance, and those who can shift the cost of litigation to the rich and those with insurance. He stated, “I cannot personally afford to use the system I treasure.”⁶ Also, with extended pretrial discovery, cases can languish in the courts for 10 and even 20 years, as occurred in one antitrust case involving farmer milk cooperatives that was

2. Warren E. Burger, *The State of Justice*, 70 A.B.A. J. 62, 66 (1984).

3. See e.g., PATRICK M. GARRY, *A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA* 176 (1997).

4. Claire Zillman, *Some Lawyers Are Now Charging \$1,500 Per Hour*, FORTUNE (Feb. 9, 2016, 9:16 AM), <http://fortune.com/2016/02/09/lawyer-hourly-rates/>.

5. *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2005).

6. Richard M. Calkins, *Mediation: A Revolutionary Process that is Replacing the American Judiciary System*, 13 CARDOZA J. CONFLICT RESOL. 1, 5 (Fall 2011).

successfully mediated in its 21st year.⁷

However, my concern with the U.S. adversarial system is neither its costs nor its delays and inefficiencies, but the severe stress it places on the parties and lawyers alike. I have personally witnessed two fatal heart attacks and one suicide directly attributable to a trial. A famous jurist, Learned Hand of the federal Second Circuit Court of Appeals observed, "I must say that as a litigant I should dread a lawsuit beyond almost anything in life short of sickness and death."⁸ Former Justice Antonin Scalia noted, "I think we are too ready today to seek vindication or vengeance through adversary proceedings rather than peace through mediation."⁹

The impact of mediation on courtroom trials has been severe by any measurement. In the past two decades, trials in both federal and state courts have declined by over 60 percent.¹⁰ In 1962, 11.5 percent of cases filed went to trial; today a little over 1 percent are tried.¹¹ It was Chief Justice Burger's prognostication that for many claims trial by adversarial contest must "go the way of the ancient trial by battle and blood."¹² And this seems to be coming to pass.

My concern has been that we have not been getting this message to our law students in particular, and for this reason, we started our mediation program to parallel mock trial. As students quickly recognize, mediation is more than a transfer of cases from the courtroom to the conference table. It is a dramatic change in mindset, which blesses the parties and lawyers alike. It is a change which has invigorated the profession by placing it on the pedestal with the other healing ministries. It makes mediation into peacemaking, the highest calling in the legal profession, and one of the highest callings in life. Let me explain.

What I have observed after 60 years practicing law, both in the courtroom and at the conference table is: first, the U.S. adversarial system is indeed archaic, as noted by Chief Justice Burger.¹³ It is based on the fundamental premise that to

7. *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1179 (8th Cir. 1982).

8. Jerome Frank, "Short of Sickness and Death": *A Study of Moral Responsibility in Legal Criticism*, 26 N.Y.U. L. Rev. 545, 546 (1951) (citing Judge Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 LECTURES ON LEGAL TOPICS 89, 105 (1926)).

9. Antonin Scalia, Editorial, *Teaching About the Law*, CHRISTIAN LEGAL SOCIETY QUARTERLY, Fall 1987, at 6, 8.

10. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004).

11. See Patricia Lee Refo, *The Vanishing Trial*, LITIGATION ONLINE, Winter 2004, at 2, 2.

12. *Burger*, *supra* note 2.

13. See Warren E. Burger, *Remarks of Warren E. Burger Chief Justice of the United States at the Dedication of Notre Dame London Law Centre: The Role of the Lawyer Today*, NOTRE

resolve differences someone must be defeated. The goal is to win. In mediation there can be no losers—all must win to find resolution. It is a win–win proposition. To defeat is not part of its lexicon.

Second, in law schools, students are grilled and drilled in honing adversarial tools of cross-examination, impeachment, discrediting, undermining, and defeating. In mediation not so. Mediators, as well as attorneys, are trained to give up their adversarial swords and reach out to the parties to lift them not only to resolution but peace, conciliation, and healing. They seek to build rapport and trust between parties, not defeat one. They seek to bind the wounds and not deepen them. Most importantly, mediators and lawyers alike are encouraged to use their genius, intellect, energy, and talent to bring healing and not hurt, to work together for common good and not single gain.

Third, the courtroom battle locks advocates into a process that is static, fixed, and inflexible, governed by strict rules of evidence and procedure, and a set format that must be adhered to in order to avoid error and even sanctions. And a major part of any law school curriculum covers these areas. Mediation is the exact opposite. There are no rules of procedure that must be followed. Students and lawyers quickly learn they can mediate any way they wish. They can even create a process on the spot to meet the exigencies of the parties. Chief Justice Burger stated: “[Lawyers] must be legal architects, engineers, builders, and from time to time, inventors as well.”¹⁴ For example, when Southwest Airlines first came on line, it had a trademark that was quite similar to a southeastern regional airline, so much so that trademark litigation was contemplated. The two CEOs of the companies met and decided litigation was not the road to travel in that each would spend over \$1 million to litigate, while a new trademark would cost the loser \$30,000 or less to create. Instead, they decided to arm wrestle, two out of three. For the cost of a party and a great deal of fun for everyone, the matter was resolved.

Fourth, the system places an unconscionable burden on counsel to evaluate properly their cases and advise their clients whether to settle or go to trial. And a jury of peers generally decides who is dead wrong—sometimes both are. These juries and even judges are highly unpredictable. Skilled lawyers win cases they should lose and lose cases they should win. It can be and is a crapshoot. For the losing lawyer, he can go on to another case. For the party it can be a life-altering tragedy.

In a major antitrust case, the plaintiff corporation, on the advice of counsel,

DAME L. REV., Dec. 1983 at 1, 2–3.

14. Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 337, 378 (1980).

sued the defendant, a major international corporation, for tortious interference with contractual rights, demanding \$8 million. The defendant counterclaimed for alleged violations of Section 1 of the Sherman Act, seeking \$150 million in damages (when tripled under the statute and attorneys' fees and costs added, it was a claim for \$500 million). Just the size of the counterclaim and the costs of defending almost bankrupted the plaintiff and forced it to curtail operations. After three years of litigation and \$40 million spent in discovery, trial commenced and the judge indicated he was considering dismissing both claims because neither was sustainable under the applicable laws. At the recommendation of the judge, the matter was mediated and settled in the second week of trial.

Mediation, on the other hand, can avoid the pitfalls and vicissitudes of the courtroom because it adds a third person to the negotiations between parties: the mediator. He is specifically trained to settle cases and sees the matter through a different prism than the advocating attorneys. Whereas counsel see the case through the advocate's prism, the mediator sees it through one that is neutral and impartial and seeks to find resolution; a totally different mindset. Again, as Chief Justice Burger stated: "We have served, and must continue to see our role as problem-solvers, harmonizers, and peacemakers, the healers—not promoters—of conflict."¹⁵

Fifth, the adversarial system has another glaring weakness that should be of concern to every lawyer in the profession. It permits parties to use their lawyers for less than altruistic purposes. Especially in divorce and custody battles, lawyers with reputations are specifically hired to wreak vengeance on a spouse. In one case a skilled divorce lawyer cross-examined the husband to the point that he broke down and wept, much to his consternation. Two years later, the ex-husband and a friend were at the Lyric Opera in Chicago, and at intermission the lawyer approached them. Not knowing of the prior encounter, the friend started to introduce them. The ex-husband said nothing, turned, and went to the men's room where he became sick and had to go home. Just the sight of the lawyer had that effect.

In mediation, the opposite occurs. Mediators are trained to build rapport and trust with the parties and help them find not only resolution but also peace, conciliation, and healing. A mediator's worth can be measured by how many hugs he gets a month. The mediator is trained to assist in this healing process; this is something that does not occur in any other setting, legal or otherwise.

The mediator even has the responsibility of establishing peace between lawyers. This role was needed when two lawyers began shouting at each other in

15. *Id.*

the opening session of a mediation. The one, an African-American lawyer, accused the other of discriminating against blacks in settling cases involving sexual abuse by clerics against young altar boys. The mediator immediately pulled the lawyer outside the room to quiet him down and explain the realities of the situation. He demonstrated there had been no discrimination and all victims, white and black, were treated equally and fairly. Calming down, the lawyer apologized to the other and the mediation proceeded to a successful conclusion.

Sixth, a court of law permits jurors to award only damages. In mediation, there is total flexibility as to what can be included in a settlement. Matters having nothing to do with the lawsuit can be included if the parties so agree. Thus, an apology, a letter of recommendation, naming a room after a person, arranging a scholarship fund, setting up a structured annuity, or publishing a retraction in the newspaper to correct an error previously reported are available remedies to the parties. The possibilities are endless.

In one case, a widow, on behalf of her husband's estate, sued his prior employer, which had terminated his employment after 28 years of faithful service on the grounds he was not proficient enough to run the new computer program in the accounting department. The plaintiff sought considerably more than new owners could afford to pay and the mediation was failing when the plaintiff was asked if an apology would help. She responded it would and it would also help if the new owners would take sensitivity training so as not to hurt other employees. The employer readily agreed to both conditions. As it turned out, it was the apology she wanted and would have taken less dollars than she was being offered. The case settled.

Seventh, once trial commences in a courtroom, it runs down a track until it reaches conclusion. The process cannot be interrupted with further discovery or a change of venue. Again, it has no flexibility. On the other hand, mediation is flexible and can easily adjust. Once commenced, it can be interrupted to conduct further investigation, research legal points, conference with witnesses who have not yet been deposed, or continue the mediation to another day by telephone.

In one case, an insurance company denied coverage when a bartender—in anger—ripped a red fire extinguisher off the wall and threw it at a patron standing at the bar. The patron ducked and it hit the plaintiff standing in the middle of the room talking to another person. The insurance policy excluded intentional acts. The insurance company offered costs of litigation only. The plaintiff stated that six months before the same bartender got in a similar argument with a patron; however, no one was injured. This was reported to the owner. Knowing that the owner did not take steps to cure the situation, the plaintiff argued *negligent* supervision, which was covered. Over the noon hour, the person—who spoke to

the owner on the prior occasion—was called and came to the mediation, after they spoke to the adjuster and the case settled for a fair figure.

This same flexibility permits the mediator to offer polygraph tests to determine which person is prevaricating on an important issue. Of course, polygraph tests are inadmissible in a trial, but in mediation they are a helpful tool. Generally, the person who is lying will not take the polygraph test suggesting he is nervous, or sick, or the tests are not reliable or inadmissible at trial. The person who is telling the truth will readily agree to take it.

A woman was hired as chief financial officer of a small, but very successful corporation. She claimed the CEO insisted they have an affair when they were on business trips together, to which she consented to keep her job. The CEO contended the affair began long before she was hired by his company. Whether there was prior consent became a major issue, which the mediator suggested be resolved by offering polygraph tests. When offered, both agreed. However, the evening before the tests were to be given, the woman sent an email reneging saying she was ill and nervous about taking the test and, in any event, polygraph tests were not admissible in a court of law. The CEO took the test and passed. Plaintiff's counsel advised the plaintiff to settle the matter or to get another attorney. He would not allow her to perjure herself on the witness stand. The case settled.

Eighth, one of the more challenging realities of the practice of law, which law students must be alert to, is that being a trial lawyer can be addictive. An inordinate number of practitioners have become alcoholics and addicted to drugs, making the profession one of the most vulnerable of all professions. “[Mediation] is public enemy #1 for trial by jury.”¹⁶ One bygone trial lawyer explained it this way:

Trying cases is hard. It ruins lots of weekends and destroys lots of marriages. It is emotionally exhausting. It causes you to drink too much, smoke cigarettes, and sleep too little. So why do it? Because it's what we do. It's fun. It's rewarding. It's important. And hearing a jury pronounce a good verdict for your client is magical.¹⁷

Becoming an effective mediator, on the other hand, is not addictive and is uplifting. Of the hundreds of trial lawyers I have trained over the years, all of them affirm that they feel so much better about themselves and the practice of law. To settle, rather than litigate, a difficult case is far more rewarding and uplifting than

16. Thomas Q. Keefe Jr., *Trial Lawyers Should “Get Back in The Saddle”*, CHI. DAILEY L. BULL., Law Day 2011, at 1, 14.

17. Richard Calkins, *Challenges to the American Adversarial System*, INADR.ORG, (Nov. 10, 2015), www.inadr.org/2015-congress-materials/.

hearing a jury pronounce a good verdict for your client. A good settlement is magical.

In one such difficult case, 13 teenagers were selling magazine subscriptions door-to-door in Wisconsin. Traveling late at night from one town to another, they were driving 84 miles per hour on a two-lane road. A police cruiser turned on its lights, and the driver of the van, a 16-year-old who did not have a driver's license, tried to switch places with the girl next to him, who did have a license. The van crashed and seven students were killed, one suffered a severe concussion, and one was left a paraplegic.

After two mediation sessions in Madison, Wisconsin, a settlement was reached, conditioned on all parents agreeing to it. One father, who lost a daughter, and one mother, who lost a son, would not. It was not the money, but an obsession to punish the owner of the business and drive her into bankruptcy. At a third mediation session, the two finally capitulated after eight hours of intensive negotiations. The mediator, who had kept the parties separated, asked if they would like to meet the owner. The father declined; however, the mother consented, for she desired to tell the owner how evil she was. The two met with only the mediator present. For 10 minutes, the mother shouted at the owner. The owner finally replied, saying she would feel the same as the mother if their roles had been reversed. The mother asked why she had not called anyone. The owner replied, the lawyers would not let me. She then explained that she collapsed and went into serious depression and was hospitalized when she heard the news. The two women spoke on and the owner finally said that what pulled her out of the depression was that she prayed to God. The mother said she couldn't believe there was a God who would allow this tragedy to happen. The two kept talking for an hour. At the end, they hugged each other and said, they would pray for each other and exchanged cards. The mediator realized this was the power of mediation, and the joy and gratitude he felt could not be measured.

In 2000, two professors approached me and stated they were concerned about the growing competitiveness of mock trial. They asked whether we could do something with mediation to show students there is a better way to resolution. My inquiry was, how can you provide students with an alternative to mock trial when mediation has to be, by definition, a win-win result? I was aware that the American Bar Association (ABA) had a so-called mediation program which was really a glorified negotiation tournament with outside persons acting as mediators.

Fred Lane, Case Ellis, and myself met to consider the project and came up with a format we thought would work. To facilitate the program we established the International Academy of Dispute Resolution (INADR). The format was different from the ABA program in three ways: First, students would play the part of

mediators as well as attorney and clients and would be judged accordingly. With three rather than two members on a team, one would participate as a co-mediator with a student from another school, and the other two as attorney or client. Each member of the team had to mediate one of the three preliminary rounds with the other two acting as attorney or client.

Second, 1 1/2 to 2 days at the beginning of the tournament would be used for training of the students in mediation. We have always had some of the top mediators in the country provide training.

Third, although students like to compete and win at any tournament, we have emphasized the learning and social aspects of the program. I have always stated that 50 percent of the tournament is learning good mediation skills, 35 percent is networking with students from other schools and even other countries, and 15 percent is winning. More than one student has said the tournament was a “life-changing experience.”

Frankly, I was concerned how our program would be received. It began in 2001 with eight teams from four law schools: Georgetown University Law Center, University of South Dakota Law School, Drake University Law School, and Loyola University of Chicago School of Law. In 2011, we held our first tournament outside the United States in London, England. Twenty-three schools and thirty-six teams from around the world participated—representing England, Northern Ireland, Scotland, Germany, Australia, India, and Canada. Thereafter, it became the mission of INADR to introduce mediation to students around the world. Every other year the championship tournament is held outside the United States: London, England (2011), Dublin, Ireland (2013), London, England (2015), and in 2017, Glasgow, Scotland. In the even-numbered years, the tournament is held at Loyola University Chicago School of Law in Chicago, Illinois.

Some 68 schools from 6 continents—North America, South America, Europe, Asia, Australia, and Africa—have participated. Significantly, invitational tournaments have been held around the globe—in Australia, Brazil, England, Scotland, Northern Ireland, Irish Republic, Lithuania, Ukraine, Greece, United Arab Emirates, and the United States—with additional tournaments being planned in Poland, Lebanon, Zimbabwe, and Singapore in 2017. At one of the tournaments, a team from Russia sat next to a team from Ukraine, during the height of the conflict in eastern Ukraine. In another, two students from Siberia with minimal skills speaking English (all tournaments are conducted in English) were assisted by a team from Lithuania, which helped them successfully participate. And in Athens, Greece, in May 2016, six Syrian students from Syrian refugee camps were invited to participate. Funds were raised to buy them clothes (they had lost everything escaping the war in Syria), transportation, hotel rooms, and food for the

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three days they participated. One Syrian student wrote us:

My participation at the tournament was really a great experience. I was so excited because many people said to me I can't do it. . . so it was some kind of a challenge for me to make them see that we can do it. I think we can't just sit and say we want a new life . . . we have to fight to do it and by saying fight I don't refer to the fighting with arms that we have in Syria! We need to let other people know that Syrians are nice people . . . we're not just people fighting with weapons We used to have a good life before the war begun . . . I can only say that we're really peaceful people

I did not choose to be born in Syria and I did not choose to be a Kurdish . . . it[']s not my fault . . . all we need is hope and a chance to be better. . . .¹⁸

As I sit here in my office, looking out the window, I realize it has been a long, worthwhile journey. We have introduced thousands of law students from around the world to mediation and they are networking. What more could I ask?

18. E-mail from Ibrahim, Refugee Student Participant in Athens INADR Tournament, to Elena Koltsaki, INADR Tournament Coordinator (May 2016) (on file with author).