

# Mediating Pain and Suffering Is All About Balance

By Milan Slama

For a while it always intrigued me how when mediating employment and personal injury cases, attorneys and their clients attach monetary value to their emotional distress.

When a plaintiff sustains an injury due to an automobile accident or gets injured as a consequence of 'fall and slip,' or claims infliction of emotional distress by his or her employer, the issue of damages and adequate compensation is a key concern.

How these damages can be assessed is a problematic matter. How do we appraise what kind of monetary award plaintiffs deserve? What are the objective criteria, if any, we should apply to the subjective perceptions of injured parties? These are difficult questions.

After an injury, parties often go into an emotional spin. They worry that they will not be able to take care of their families. They worry they are not attractive enough for their husbands or girlfriends, or to find a new mate. Many employees are anxious about going back to work, which creates enormous stress. After a car accident, people are constantly vigilant. They avoid freeways. They frequently check their rear view mirror to make sure the car behind them is not too close. The traumatic experiences invite sleeplessness, continuous worry, and anxiety. Yet the legal profession does not prepare attorneys for the psychological trauma of their clients. After all, attorneys are trained to argue, reason, and analyze.

Another issue contributes to the confusion — our society prides itself on self-reliance and self-sustenance. We are inundated with messages about overcoming obstacles, being tough, surviving in hostile environments, and fighting negative circumstances. Yet when cases are argued and rights and responsibilities are weighed, the plaintiffs' counsels make sure they get as much sympathy for their injured clients from juries as they can. The more sympathy clients get, the larger the monetary compensation they may be awarded. Therefore, the pain and suffering occasionally might be exaggerated. This can be done unintentionally when clients' anxieties contribute to

their subjective assessments. Personal histories and negative experiences, coping ability or the lack of it, often determine how clients evaluate their future and assess how much compensation they deserve, based on the misfortune inflicted by the guilty (or the liable) party. It is not unusual to hear, "For all they did to me they must pay." This can be done intentionally when clients deliberately exaggerate their pain and suffering so that they can harvest bigger awards.

Recently I had three cases where \$600,000, \$300,000, and \$100,000 were presented as an initial demand. Pain and suffering was the biggest portion of those demands. I did not hear any systematic explanation why the insurance companies should pay that kind of money or why the client deserved that amount.

Often, the initial demand is for plaintiff's side to test the defense. Because there are no reasonable criteria to help parties assess the scope and intensity of the emotional distress experienced, the value of pain and suffering is driven by negotiation. Comparing similar cases can help. Yet it becomes abundantly clear that the skills attorneys like to utilize, such as reasoning, analysis, or argumentation are not easily applicable in these instances. Very often it comes down to persuasion through presentation.

Here's an example to show the volatility of emotional distress. Imagine a young woman. It can be your daughter, spouse, or someone you have worked with for the last three years. She believes she is quite unattractive because of her nose. Every day she looks at herself in the mirror and gets depressed. She becomes more and more self-conscious about her appearance. Her self-confidence and esteem go down as her subjective pain increases. You personally believe that your spouse or daughter looks good. You try to console her the best you can, to no avail. "Honey there is nothing wrong with your nose, you look wonderful." And the answer is always the same. "Please don't talk to me about this. You don't understand."

Now consider the case where the injured party becomes disfigured and consequently falls into deep despair. The permanence of the injury, remedial measures, which could help alleviate at least some of distress, and the cost of future care will be considered. The visibility of the injury, stigma associated with that injury, and how others might react to it will be assessed, as well as the measures the party undertook to remedy the situation on his or her own. How the person copes and what kind of outlook she or he applies toward the future will also be examined. The cost of mental health services should be incorporated into the compensation scheme. Yet none of these considerations prevent the volatility arising from the evaluation of emotional distress claims. That lack of certitude allows parties and their attorneys to ask for damages that might appear excessive. There is no doubt that reparation for injuries is important because we, as a society, believe that people deserve damages so they can get back on their feet. We also believe that those damages should be equal to the injuries sustained. Important as well, is the knowledge of whether the compensations demanded from defendants, who are mostly insurance companies,



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## Common Ground

Continued from page 1

ing," he said.

He later took regional vice president Mark Kaufman up on his offer to join Judicate West as a full-time neutral in 2008.

"I think I have a pretty good feel for the valuation — what cases are worth and what they're not worth — and how to size up a witness and what issues each side is looking at and looking for," Brenner said.

There are no hard-and-fast rules to mediation in his eyes. Flexibility is key, because some parties need to spend a lot of time discussing their feelings about the issues at hand while others need to cut to the chase.

"One of the most frustrating things to me was when I would walk into a mediation and the mediator had a set agenda," Brenner said. "I've seen many mediations go south, because the mediator wouldn't be flexible."

He follows the lead of the attorneys who seek his services and welcomes their input on how he might handle their clients and their opponents.

"I think you have to afford people dignity and courtesy," Brenner said. "Sometimes one side will come in and maybe emotions run high or maybe they just disagree with the other side's position and they just think the other side is way off base. You have to be able to look at that and assess the full picture."

Here are some of the lawyers who have used Brenner's mediation services:

Robert D. Shoecraft, Shoecraft Burton; James P. Frantz, Frantz Law Group; Harvey C. Berger, Pope Berger & Williams; William M. Berman, Berman & Riedel; Randall W. Kaler, Gilbert Kelly Crowley & Jennett; Gregory L. Johnson, Law Offices of Gregory L. Johnson; Gregory C. Kane, Shifflet Kane & Konoske; Robert Juskie, Wingert



**Jonathan A. Brenner**  
Mediator  
Age: 49  
Affiliation: Judicate West  
Location: San Diego  
Areas of Specialty: Personal injury, employment, business, wrongful death and other disputes

Grebing Brubaker & Goodwin; Bill Harris, Austin Brownwood & Cannon; Douglas W. Lewis and David Driscoll, Lewis Brisbois Bisgaard & Smith; Harvey Levine and Harris I. Steinberg, Levine & Miller; John H. Gomez and Robert N. Hamparyan, The Gomez Law Firm; David S. Casey, Robert J. Francavilla, Frederick Schenk, Gayle Blatt, Thomas Penfield, Casey Gerry Schenk Francavilla Blatt & Penfield; Otto Hasselhoff, Law Offices of Otto L. Hasselhoff; David Strauss, Law Offices of David P. Strauss; Michael R. Marrinan, Law Offices of Michael R. Marrinan; David W. Baumgarten, Yale & Baumgarten.

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## The New York Times Crossword

- Across**
- 1 Procrastinator's reply
  - 9 Engagement party?
  - 15 Beat
  - 16 Enclosed
  - 17 Rat smeller's words
  - 19 Roll
  - 20 Break
  - 21 \_\_\_ bonus
  - 23 Doesn't go swimmingly?
  - 24 Alternative to premium
  - 28 Heathrow takeoff sound?
  - 32 Winter sports arenas
  - 36 Neurotic toon
  - 37 Warning to a pest
  - 40 Elvis Presley was one: Abbr.
  - 41 Trading center during the Klondike gold rush
  - 42 Unit in an erg's definition
  - 44 Way to look back?
  - 45 Jewel holder
  - 49 "\_\_\_ said ..."
  - 50 Court cover-up?
  - 53 They're often associated with world leaders
  - 56 "Seriously?"
  - 60 Crude container
  - 61 Artery binder
  - 62 "Climb Ev'ry Mountain" singer in "The Sound of Music"
  - 63 Rails at
  - 2 Egg head?
  - 3 Placement aid
  - 4 Pistachio or almond
  - 5 Prefix with -valent
  - 6 Gary who invented the Pet Rock
  - 7 1960s-'70s Citroën
  - 8 Grapevine cultivator?
  - 9 Big name in college guides
  - 10 Take over
  - 11 Colliery access
  - 12 A hook might give it a hook
  - 13 Columbia Pictures co-founder
  - 14 Green attachment?
  - 18 Knock (about)
  - 21 Anhydrous
  - 22 It goes by quickly
  - 23 Face reddener
  - 25 Baltimore neighborhood that includes Marble Hill
  - 26 Bar mitzvah, e.g.
  - 27 On a deck beneath
  - 29 Composition of some plasmas
  - 30 Folks may cry after it's shot
  - 31 Members of the carrot family
  - 33 Loop setting, briefly

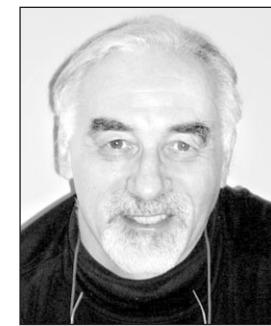
### ANSWER TO PREVIOUS PUZZLE

PALPS ARAB AMPM  
 ALIAS LODESTARS  
 REBUT DIDGERIDOS  
 TVIDOL PASSEDOFF  
 VESSEL TOPHAT  
 OKAPIS NOONE  
 WINECASK ASNER  
 SOP IDO IDO IDO IDO ORR  
 TRUSS FROTHERS  
 ATRIA FASTER  
 CHILIDOG ENRAPT  
 ATEKOSHER ASEEA  
 PLANTFOOD STARR  
 PONTI ONED HUMIDOR  
 STIR ROSEY AMITY

Congratulations to the puzzlemakers, Robin Schulman and Byron Walden, who were married on June 25, 2010. A hidden announcement of their "I do's" appeared in acrostic form in the Across clues.

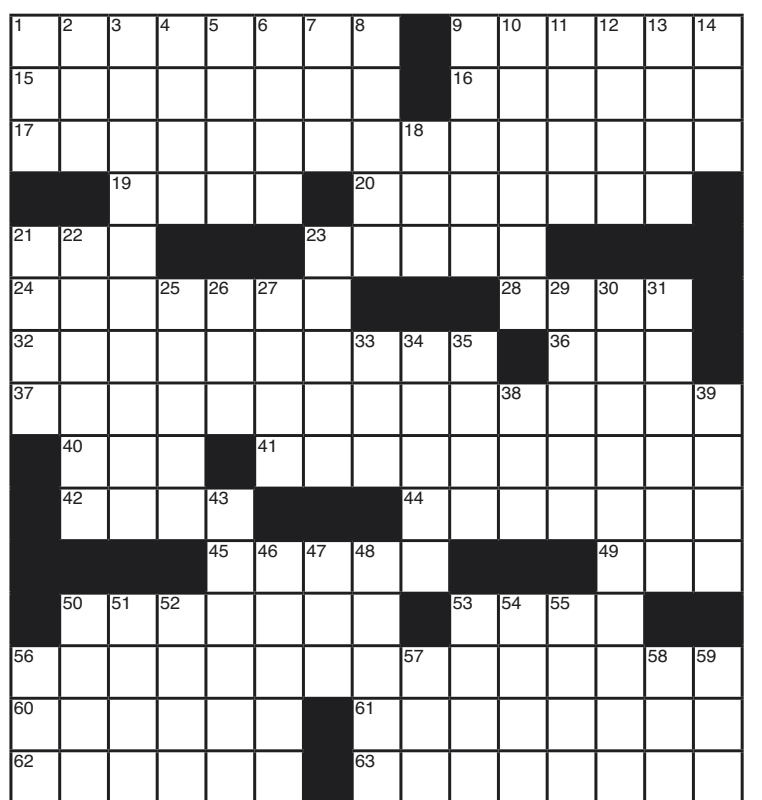
through the legal process are excessive, or we will all end up losing. The bigger the judgments awarded to plaintiffs, the higher the premiums imposed on insurance policy holders.

Here is where mediation process becomes valuable. If the mediator keeps in mind the bigger picture, and at the same time is receptive to the individual stories, he or she can skillfully perform a balancing act between the interests of the individuals injured and the common interests of the large number of policy holders. Under these circumstances, everybody benefits.



**Milan Slama** is a practicing mediator in the Los Angeles area. He is associated with the L.A. County Superior Court where he mediates the variety of litigated cases, as well as the Equal Employment Opportunity Commission, L.A. County Bar Association, and the L.A. city attorney's office. He can be contacted at [Milan@focuson-solutions.com](mailto:Milan@focuson-solutions.com). Or through [www.focuson-solutions.com](http://www.focuson-solutions.com).

Edited by Will Shortz No. 0626



Puzzle by Robert H. Wolfe

- 34 1984 hit with the lyric "Have a banana, have a whole bunch"
- 35 9-mm. weapon
- 38 Brainstorm outburst
- 39 St. Philip of Rome
- 43 Hollow replies
- 46 Does semi-related work?
- 47 Pennsylvania's \_\_\_ Mountain (skiing area)
- 48 Allay
- 50 Many a dinar spender
- 51 Dinar spender
- 52 Phoenix construction
- 53 Envelope-pushing
- 54 Cousins of fjords
- 55 What may start climactically?
- 56 Grp. concerned with precedents
- 57 Semana segment
- 58 Chain-sporting star
- 59 Job ad abbr.

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