



**TRAVELING THE HIGHWAYS  
TO RESOLUTION**



# During Today's Presentation.....

- You will get insight into a mediator's needs to forge a path to a successful resolution.
- You will learn how roadblocks to resolution can be prevented.
- You will discover the different roads to resolution in cases that start off with a mutual, potentially fatal, misunderstanding.
- You will hear a mediator's insight into some 'out of the box/off the beaten highway' creative solutions.



# The Following Hypotheticals are *Inspired* by Real Cases!

- Hypothetical #1: The [Liberty] Mutual Misunderstanding
- Hypothetical #2: Up Against Legal Walls
- Hypothetical #3: Up Against Emotional Walls

THE POINT: How can the problems in these cases be prevented and how can the problems be fixed?

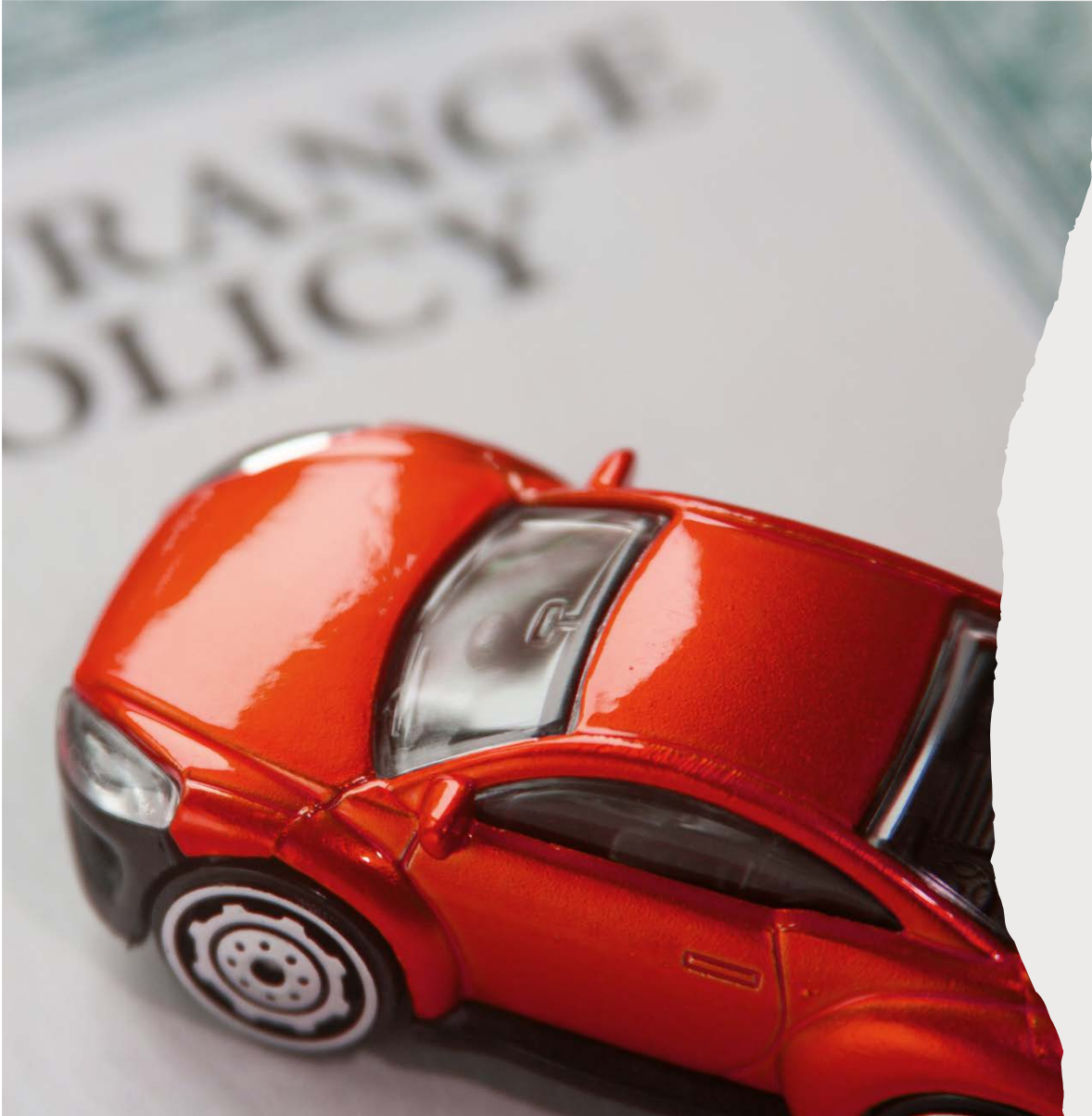


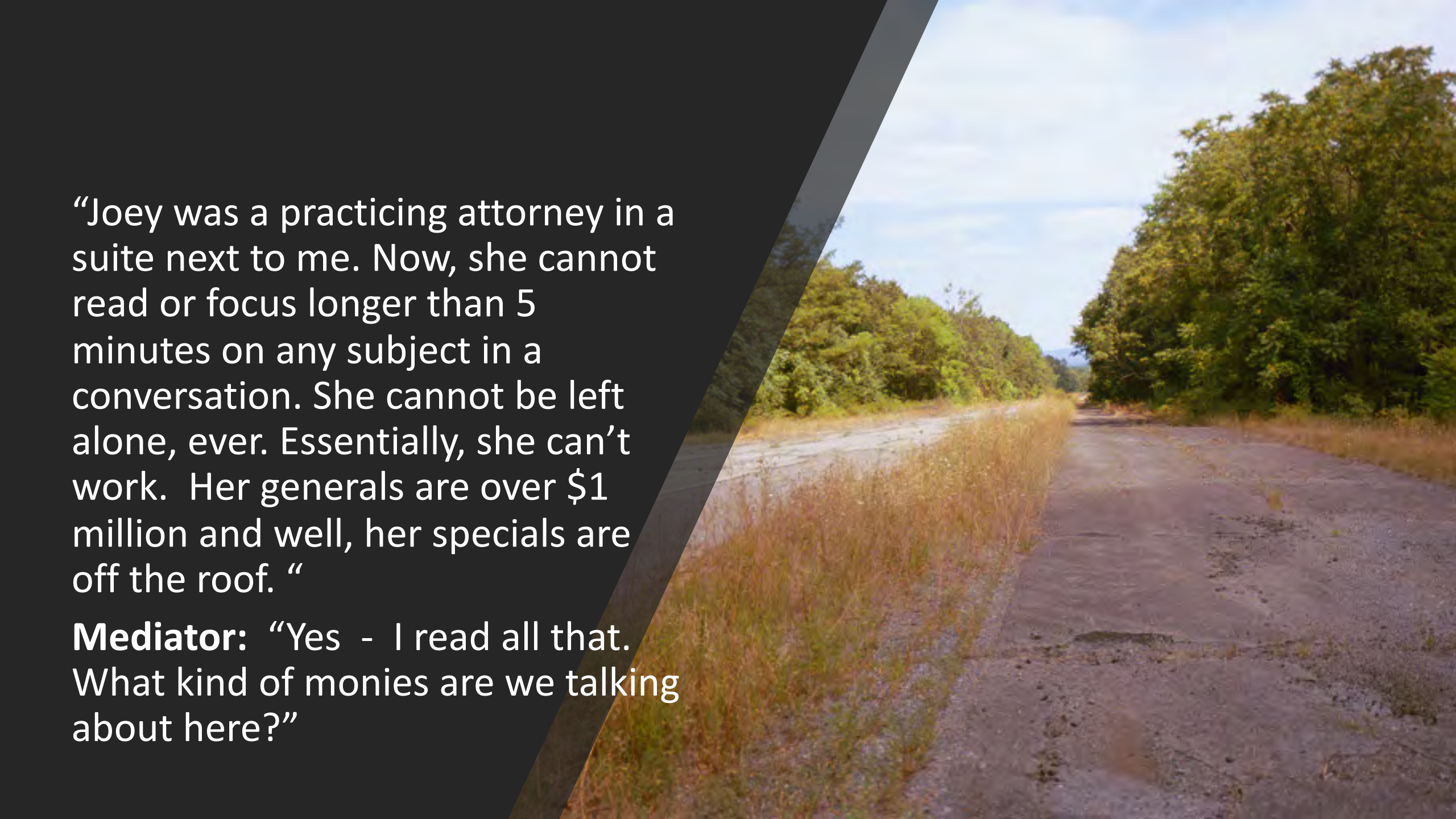
# [LIBERTY] MUTUAL MISUNDERSTANDING

We enter a ZOOM BREAKOUT ROOM:

**Mediator:** “Hello, I am Judge O’Neill, your mediator, and you must be Joey Phelan’s counsel. Will Ms. Phelan be appearing today on the Zoom?”

**Plaintiff’s Counsel:** “Yes, Judge, and I am her attorney, Richard Thorne. My client is available by phone today or we can hook her up to a Zoom session with us, once I get the lay of the land in terms of what kind of money defendants have brought to the table. Look, I hope you read my brief and the all the medical records for Joey. What we have is a plaintiff who looks like she is pretty healthy, but the car accident she was in two years ago with the defendants clearly at fault, involved a traumatic brain injury.”





“Joey was a practicing attorney in a suite next to me. Now, she cannot read or focus longer than 5 minutes on any subject in a conversation. She cannot be left alone, ever. Essentially, she can’t work. Her generals are over \$1 million and well, her specials are off the roof. “

**Mediator:** “Yes - I read all that. What kind of monies are we talking about here?”



**Plaintiff’s Counsel:** “Well, I had a long discussion with defense counsel. We’ve got policy limits of about \$2 million, but he assured me based upon Joey’s injuries and her long-term prognosis, the carrier would pay more. So, we are looking at an opening demand of \$10 million. Let’s face it – her earning capacity was huge until she was rear-ended and suffered brain damage.”

**Mediator:** “Ok, let me consult with defense counsel and see where we are at – I have your authority to ask for \$10 million now and to indicate you are aware this is over policy limits but defense counsel assured you this was do-able?”

**Plaintiff’s Counsel:** “Absolutely and Judge, I am counting on you to intimidate these guys into a reasonable settlement.”

## SWITCH TO ZOOM BREAKOUT ROOM

**Mediator:** “Hello, I am Judge O’Neill, the mediator in this matter and you must be defense counsel. Is your adjuster signing on to Zoom here today?”

**Defense Counsel:** “Well, judge, the adjuster is monitoring three other mediations – he’s located in Wichita Kansas, but if we need him, I only have to call and he’ll pop in. You are aware, that this plaintiff is faking her injuries –a lawyer who knows how to scam the system – we’ve had her examined and she’s perfectly fine. Our brain expert says her brain injury has resolved and she should be back at work. We know we have to pay something, but no where near the \$2 million dollar policy limits!”

**Mediator:** “Hmm.... Plaintiff’s counsel has authorized me to demand \$10 million and is under the belief that this amount, even though it exceeds policy limits, was not going to be a problem, as your insurance company was aware they would have to pay more and you believed it would not be a problem.”



# HOW COULD THIS 'MISUNDERSTANDING' HAVE BEEN AVOIDED?

- Pre-Mediation Discussions – Getting Your Mediator Educated
- The Importance of Mediation Briefs:  
Parties, Insurance Coverage, Assessment of Liability, Settlement discussions to date, Specials/General Damages, Medical Assessments, Demand/Offer to be made at Mediation, State of Discovery, Trial Dates

**EARLY SUBMISSION OF BRIEFS!**

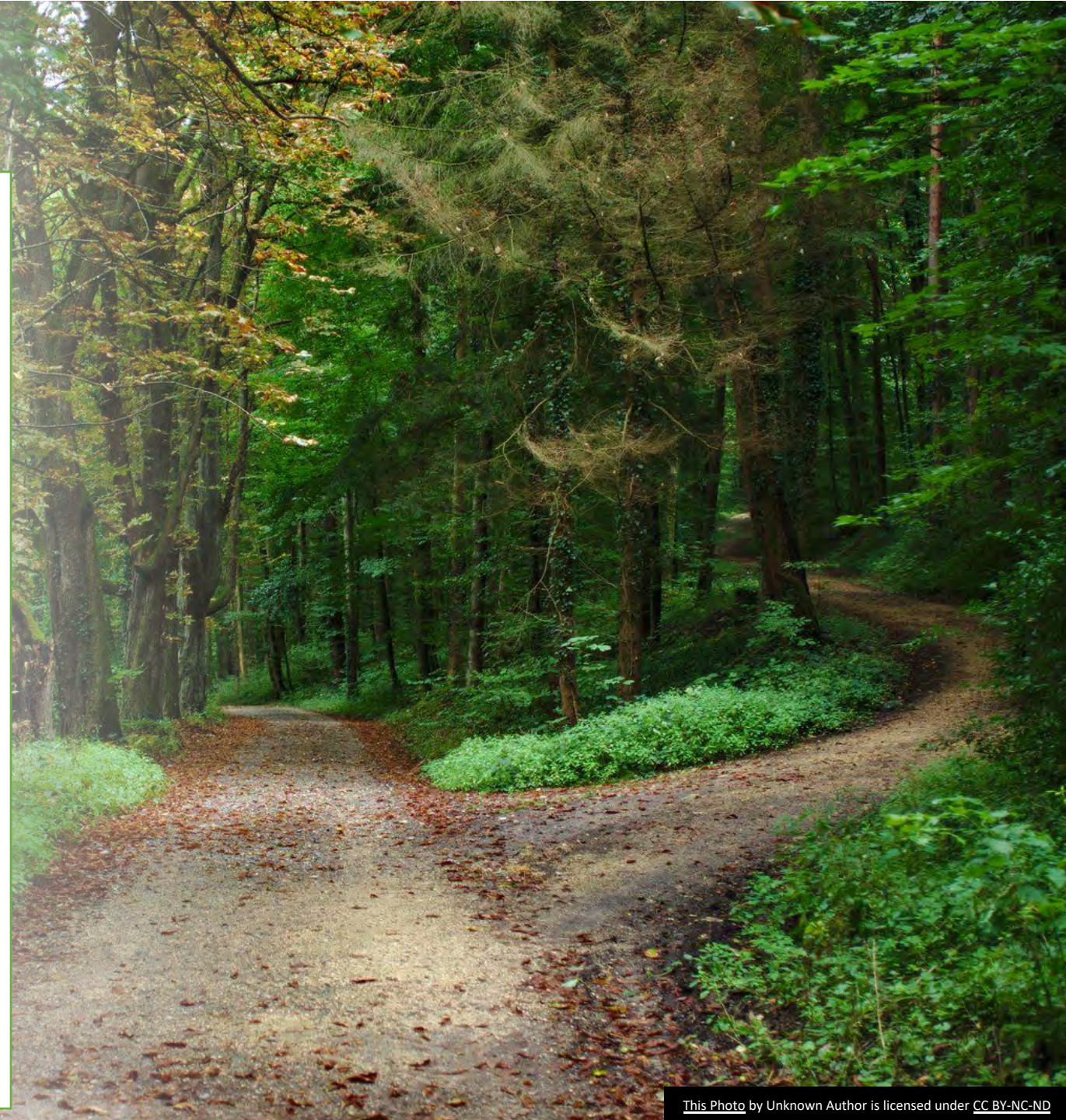




# CAN THIS BE FIXED?

- Be Prepared for the Mediator to:
  - Ask for any confirming documentation regarding discussions!
  - Inquire about defendant's personal assets – enough to exceed insurance policy limits?
  - Ask if personal assets at risk – conflict issue?
  - Inquire about your respective client's flexibility in the demands/offer?

➔ YOU be prepared:  
Don't hesitate to strategize with  
Mediator!



## UP AGAINST LEGAL WALLS

Henry Walls died in 2016 after being married four times. He had two kids with his first wife – Kim and Dan. Kim helped Henry run the family business while Dan lived out of state, pursuing his own business opportunities. Henry had been married over 12 years to his fourth wife, Julia, during which time a home was bought and title was taken as Henry Walls, “a married man as his sole and separate property.” Julia petitioned the probate court to have the home she and Henry lived in for over 10 years declared community property. The children object.





## Counsel Only:

**Mediator:** “Look counsel, I have you in this breakout room without your clients because, after reading your briefs, it appears that what’s at issue is the interplay between Family Code section 760 and presumption of community property and Evidence Code section form of title presumption with an overlay of Family Code section 721 – overcoming the presumption.”

**Julia’s Attorney:** “That’s right, Judge. We’re very confident that we can convince the court, in this case, that Family Code section 760 applies and not Evidence Code section 662.”

**Dan's Attorney:** "Well, judge, on this issue, I am speaking for both kids – Henry got screwed over in his three divorces and was never, ever going to share a house with another spouse, only to lose it in the divorce. Julia knew this and everything was kept separate."

**Julia's Attorney:** "Hey, that is just baloney – Julia put sweat equity into that house for years, she painted it, landscaped...."

**Mediator:** "[Interrupting] Okay, okay, I get the picture."



# RECENTLY 'SETTLED' CASE LAW HERE

- This scenario raises the issue of when Evidence Code Section 662, presumption that title is held as reflected in the deed, versus Family Code Sections 760 and 721: the presumption that property acquired during marriage is community property and there is a rebuttable presumption of undue influence.
- New case: *Estate of Wall* (August 24, 2021) Third Appellate District, C087730
- Prior cases: *Marriage of Valli* (2014) 58 Cal.4<sup>th</sup> 1396 and **In Re Brace** (2020) 9 Cal.5<sup>th</sup> 903



## WHEN THINGS GET LEGAL.....

- Role of the Mediator When a Legal Issue Needs Resolution
- Your Role to Assist the Mediator When there's a Stalemate Regarding a Pivotal Legal Issue
- What to Expect/Ask of the Mediator?
- Assist the Mediator in Strategizing the Road to a Compromise
- The Importance of Using the Mediator to Explain the Law to Clients with a Risk Assessment as the Basis of the Discussion



# Tools To Assist the Mediator

- Provide any pleadings that explain the legal issue
- Get the Mediation Brief to Mediator at least 5 days before the hearing
- Request a pre-mediation conference
- Advise Mediator about the sophistication of their clients in understanding the legal issues
- Shepardize Seminal Cases



# The Emotional Walls: Another Roadblock to Resolution

Think this case is over? Sorry.....even though united against their “wicked stepmonster,” Dan and Kim are engaging in their own battle. Kim worked with Henry in the ‘family’ business. Dan did not, but upon returning home for his Dad’s funeral, he took a look at the business’s books. As there was no estate plan, Dan tells his sister that not only was he going to get ½ of the business, but he was also going to sue her for elder abuse for manipulating Henry and syphoning money from the business for personal expenses. To make matters worse, Kim is unrepresented, citing that she has no money to pay for an attorney.





# Zooming with the Self-Represented Litigant


**Mediator:** “I understand that there is not only the spousal petition, but that Dan has filed an 850 petition alleging elder abuse.”

**Kim:** “Oh, don’t I know it! Dan is a money-grubbing, self-centered, selfish person, who for years didn’t call our Dad or visit him. Dan left me to sort out all of the family business issues as Dad’s health declined. And, don’t get me started about my so-called stepmother and her greedy ways. Both of them, in their own way, contributed to my Dad’s death! I’m the one that should get all of the business! I worked it for years and years without even getting a steady salary. Elder abuse, my ass! Dan’s the one who abused our Dad by neglect and emotional distress because of it. I can’t afford an attorney and I just can’t believe this is happening to me. I don’t want him to get one penny!!!!!!”



# DEALING WITH AN EMOTIONAL LITIGANT

- Please, please, tell the mediator the emotional “climate” of your client and the rest of the parties
- Give the mediator your personal and *realistic* assessment of your client control and his/her motivations:
  - “It’s the Principle of the matter ...”
  - “He’s got to change....”
  - “I’m tired of giving in...”
  - “I want her to feel punished when this is all over...”
  - “I want my day in court....”
  - “It’s not about the money....”



ROUGH  
ROAD  
AHEAD

# HOW YOUR APPROACH IS CRITICAL TO ASSIST THE MEDIATOR

- Mediations: Your mindset important!
- “Soft” Advocacy– mediations are not Law and Motion Hearings
- Willingness to Recommend Compromise to Client
- Prepare the Mediator to do a Case Evaluation for benefit of client –  
i.e., evidentiary issues (criminal record, presumptions, judge’s discretions under 352)



Help!

THE ROAD  
TO  
RESOLUTION  
IN THE  
FUTURE?





QUESTIONS?