

## CHAPTER EIGHT

# MEMORIES

Ray, the general manager of Vista State Park, straightened the papers in front of him. As he looked down the long conference table to where the plaintiffs sat, he was confident that his offer would be accepted. Who could turn down that much money?

“According to our research,” he began, “\$800,000 is adequate compensation for your loss, and that’s what we’re offering.”

Martha and Jim Amato, the plaintiffs, were stunned. Martha felt sick to her stomach, as if she had been punched. The pain of her boys’ deaths had seemed impossible to bear, but the insensitivity of this negotiation was brutal. Three years earlier, near the end of a long summer vacation, Johnny, eight, and Scott, ten, had been riding their bikes in the state park near their home—just as they had nearly every day since June. But on this day, a Parks Service gardener who had been drinking on the job got in his state-owned truck and drove straight across the bike path, crashing into the boys and killing them instantly.

Martha and Jim were devastated: everything they valued had been taken from them in an instant. After the funerals, filled with anger and grief, they filed a suit against the state for the deaths. But instead of there being a speedy resolution that would let them get on with their lives, the negotiations surrounding the case had dragged on for three years with no settlement; neither side wanted to make the parents relive their children’s death in open court. Finally, on the eve of trial, the parties decided to make one last effort: mediation.

It was early in the Mediator’s career. He’d recently left a judgeship, where he was known for his decisive handling of cases. He was confident that his experience on the bench would serve him well

as a mediator, and so far it had. He knew that both sides were optimistic that his expertise would soon help resolve this ordeal, and he intended to do everything he could to settle the case quickly.

On the appointed day, both parties—Martha and Jim and their attorney, and Ray and the state’s attorney—were gathered around the long table in the largest of several conference rooms at the Mediator’s office. But what had begun in hope now seemed doomed to failure. Furious and in tears, Martha railed at Ray. “No amount of money will bring back our boys. We know that.” She locked eyes with her husband, whose grief had imposed a deep silence. “But to put this kind of price tag on the lives of our children is a slap in the face.” She turned to her lawyer and declared, “If that’s all they want to offer, we’ll see them in court.”

“Martha, I know how you feel, but let’s give this a little more time.” The lawyer spoke soothingly, but inside he was seething. This mediation was falling apart almost before it had begun.

Martha and Jim relented, and the negotiation dragged on for another hour, as both sides grew more and more tense. Finally, feeling that the emotional tension in the room was not helping the process, the Mediator decided it might be helpful to separate the parties into two smaller private rooms where he could talk to them privately about the issues.

In his long judicial career, the Mediator had been through these kinds of negotiations in court countless times, and he had always been successful in moving cases along to speedy and satisfying settlements. He felt that if they could each talk about their money issues privately, he could help them find a number that would work for everyone.



When the Mediator entered the plaintiffs’ conference room, Martha was fuming at her lawyer, her hands balled into tight fists. “These people are idiots! Our children are priceless. Can’t they see how insulting their offer is? They think that throwing money at us will make everything just go away? Fine. If they insist on treating Johnny and Scott like commodities, tell them we won’t take a penny less than \$1.2 million.”

Listening to Martha and seeing the determination in her face, the Mediator felt his optimism drop another notch. Clearly she was not going to be willing to compromise. He turned to Jim, the calmer of the two, thinking he might be clearheaded enough to talk more about the money. But even the stoic Jim had finally found his voice. Glaring at the Mediator, he said, “We’ve had enough. We’re not making any further concessions in the name of our children! Tell them we’ll see them in court.”

Jim’s attorney tried to calm him down. “Jim,” he began in a quiet voice, “the two of you have a gut-wrenching story to tell, but I just can’t guarantee you that the jury will give us a better result than the state is offering right now. You both need to think this through carefully. I’m going to leave you two alone to talk privately before we decide to adjourn this meeting.”

Reluctantly, they agreed to take twenty minutes and think things over. After their lawyer and the Mediator left the room, they just looked at each other helplessly. They really didn’t see any way out of going to trial.



Twenty minutes later, the Mediator rejoined Martha, Jim, and their attorney in the private office and learned that their feelings hadn’t changed. But the Mediator had adjudicated many tough cases, and continued to feel that he could turn this one around. He’d had an amazing settlement record when he was on the bench. Enough listening: it was time for him to take a stand. “I’m pretty sure I can get the state to consider splitting the difference,” he said confidently. “What do you say to that option?”

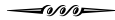
Flatly, Jim said, “Forget it.”

“We’re done with that,” Martha said. “The jury will understand our pain, even if the state doesn’t,” she added. “Justice will not be served until the state is made to pay. It has to hurt them as much as they hurt us.” She was gripping the edge of the table, her knuckles white.

In desperation, the Mediator threw out another time-proven suggestion. “How about this?” he said brightly. “I’ve done this in other cases, and it’s worked well. We’ll flip a coin, and who ever wins the flip will get their final settlement number.” He looked at

Martha and Jim expectantly. They were speechless, stunned by what they perceived as his complete lack of sensitivity. Flip a coin? This was not their idea of what mediation was about. In unison, they stood up and began to put their coats on. Without even a glance at her attorney, Martha announced, "This mediation is over."

The Mediator couldn't believe what had just happened. What else could he do? He had tried his best, but apparently some cases just didn't want to settle easily. "Okay," he said after a long, uncomfortable silence. "Let's reconvene with the state, just to confirm that this case is going to go to court."



Back in the large conference room, Martha let her frustration with the mediation spill out. She spoke directly to Ray, who had slumped back in his chair in exhaustion and frustration. "You people just don't get it," she said, holding back her tears. "They were our *children*. They had *names*. They were living, breathing boys. Their lives were short, but they were priceless. They should be remembered."

Silence hung in the room. Martha's frustration and despair were palpable. Without a word, Martha and Jim rose from their seats. Their lawyer, seeing it was over, began putting his files back into his briefcase. On the other side of the table, Ray's attorney was also putting his files in order. What more was there to say? The Mediator was miserable. Nothing in his judicial career had prepared him for this feeling of failure. What was worse, he didn't understand how the negotiations had gone so wrong.

But as everyone stood, preparing to leave after a very long day, Ray remained seated, Martha's final words echoing in his mind: "They were our *children*. They had *names*. They were living, breathing boys. Their lives were short, but they were priceless. They should be remembered." She must have said that a thousand times, but *they just hadn't heard her*.

"Wait!" he blurted. Everyone turned to look at him. Quickly, he turned to his attorney and whispered, "Look, I think we've been approaching this in completely the wrong way. This case isn't just about how much we owe: *it's about their kids*."

Ray looked Martha and Jim in the eye. “I’m so sorry,” he said. “Your kids do deserve to be remembered. We’ve had our eye on the money for so long, planning our court case, that we lost sight of Johnny and Scott and *their* value—as human beings.”

With that, Martha began sobbing. Jim, too, was fighting back tears. Someone was finally paying attention in the right way. *Finally*, Martha thought. She’d gotten them to think of her sons as people, not as accident statistics that were going to cost them money. For the first time in a long time, she felt listened to.

“Let me tell you about my kids,” Jim began suddenly, digging in his wallet and pulling out photos. “Johnny was an incredible soccer player, a goalie. We spent every weekend at the park watching his games. I miss his friends.” Jim stopped, lost.

Martha continued softly. “He and Scott fought sometimes, but they were really close. Scott couldn’t have been more different from his brother. He was so funny, a real comedian. And he loved to perform. The teachers didn’t always like it, but they always forgave him for his pranks.” The group listened as Jim and Martha colored in the outlines of their sons’ brief lives.

“Our kids were everything to us,” Jim explained, almost pleading. “Our family has been broken—forever. We can’t just erase their memories. Money won’t take their place. We still have boxes filled with the letters and cards that we received after your driver killed them. They are missed. That will never go away.”

The room was quiet, the presence and loss of Scott and Johnny suddenly evident. The Mediator felt a bit lost when he realized there had been a breakthrough that had nothing to do with money or moving things along in a timely manner or anything he had done. Thinking of his family, he realized that there were subtleties in mediation that the courts didn’t have time for. Some of his tried-and-true techniques just weren’t going to work in this context. He swallowed his pride and realized that he had a lot to learn. Right now, he needed to change his approach.

So, when the moment seemed right, he began again, on a completely different track. Looking at Ray, he said, “Perhaps there’s something the state could do to memorialize these children.”

Ray looked up. The general manager had kids too, a fact he had been trying to bury in order to get this negotiation accomplished in a “businesslike” way. Suddenly, he had a new idea.

“We’ve had to rebuild that bike trail to repair the damage the truck caused. How about naming it after the children? We can put a memorial marker at the site of the accident,” he suggested.

Now the state’s attorney was energized. “That’s a great idea! We could consider setting up a scholarship fund in their name. I know none of this will bring Scott and Johnny back, but we would like to honor their lives. Everyone who rides on that trail will know their names.”

Martha and Jim softened as the rage they had carried around for three years began to dissipate. It became clear that a trial would not be necessary, and they soon hammered out an agreement that satisfied all the parties. In addition to the bike trail and scholarship fund, the state added another \$50,000 to their original offer, and the case settled for \$850,000.

By the end of the following year, the state had constructed a new bicycle trail named after the children, and marked it with a plaque. The Scott and Johnny Amato Scholarship Fund was endowed by the state to help send children in need to summer camp. Now everyone who rode that trail would remember Johnny and Scott: their lives added value to the entire community.

## WHAT HAPPENED?

Understanding underlying motives can be a key that unlocks what looks like an unsuccessful negotiation. In this case, it was the sudden recognition that the case wasn’t solely about money but also about responding to the parents’ need to feel that their children’s lives were being valued. As long as the Mediator believed the problem was all about finding the right number, he was missing an intermediate step in the process: understanding and listening to the parties. Inevitably, the case stalled. When there was a general recognition of both the monetary issues and the very real concerns of the family, the dispute progressed toward a resolution that satisfied both sides.

This approach to negotiation underscores the idea that value is not always monetary. It cost the state relatively little to name the trail after the children and erect a plaque, but that gesture was worth hundreds of thousands of dollars to the parents and settled the case.

The Mediator took a wrong turn at the very beginning. He was accustomed to dealing with courtroom situations, where the key players—attorneys and judge—tend to use a narrow approach that is limited to finding the magic number that will close the case and clear the docket as quickly as possible. He was also uncomfortable with the level of emotion involved in the case. He understood the defendant’s monetary offer and was concentrating on crunching the numbers. But he was not allowing himself to get *in synch* with what were broader, more personal concerns of the plaintiffs. He realized that there was some sort of emotional barrier, but he couldn’t identify it.

The Mediator’s narrow focus caused him to miss the fact that money was not the only issue on the table. The parents gave a number of clues that the issue was not simply financial: Martha’s statements that “No amount of money will bring our boys back” and “Our children were priceless” should have made their feelings clear. Had the Mediator been open to just listening to the parents talk about their children in the beginning, he might have been able to unlock the case and settle it much sooner.

## WHAT STRATEGIES CAN WE LEARN?

### 1. Discover what people really value.

Figuring out what each side values most gives you the tools to close the deal. Always remember that you can add value in many ways, only one of which is in currency. Respect, honor, compensation in kind, even a simple apology may have more value for people than money.

### 2. Be willing to vary your approach.

Just because your approach works for you in most cases, don’t count on it working in every case. Be true to yourself, but assume the role that’s needed in the moment: the coach who gives direction, the bartender who listens and elicits information, the litigator who asks probing questions, the decisive judge who lays down the law. Sometimes just hanging back and allowing the lawyers and the parties themselves to get the work done is a good skill!

**3. Overcome barriers by listening to people and letting them know you hear them.**

In virtually every negotiation there is some type of barrier that can prevent the parties from negotiating realistically. Whatever the barrier—it might be psychological, or it could involve a party's strategic attempt to use information to their advantage—you will need to identify it before negotiating. Pay attention to verbal clues and body language. One way of eliminating the barrier in a highly charged emotional case is to help parties perceive each other more fully and accurately than if left to themselves. You can do this by demonstrating that you hear their plight and acknowledge them.

**4. Get in synch.**

Each case has a rhythm of its own, a tempo that emerges during the session that will tell you when it's time to listen and when it's time to act. Actions that don't follow that rhythm will be counterproductive. To succeed, you'll need to feel the tempo of the mediation, getting in synch with the parties and their counsel by listening and following their cues. It's almost like a drummer who maintains the beat of a jazz trio. The drummer listens for the clues from the lead player and learns quickly to adapt a beat to the music. You do the same by stepping into the shoes of each party and looking at the dispute through their eyes. To do this, be conscious of your preconceived notions about the outcome and let them go. The parties will get a sense that you understand them and are pulling for them to achieve their desired outcome. In this way you build a reservoir of trust you can draw from later.