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A Conversation with Rex D. Smith, Hon. M. Gino Brogdon Sr. and Tami McDowell Ayres

In this installment of the Georgia Lawyer Spotlight, Editorial Board Member Jacob E. Daly interviews mediators Rex D. Smith, Miles Mediation & Arbitration, Atlanta; Hon. M. Gino Brogdon Sr., Henning Mediation, Atlanta; and Tami McDowell Ayres, BAY Mediation & Arbitration Services, Atlanta.

BY JACOB E. DALY

How was mediation viewed when you all started your respective careers?

AYRES: I started practicing in 1985, and I do not remember cases being mediated. They were either settled or tried. But at some point Ed Henning came to my firm and talked about mediation. Having known Ed as a litigator, we all thought it sounded good. Obviously he was way ahead of his time.

BROGDON: I got out of law school in 1986, and I don't think it was unanimously accepted then. I started practicing in Atlanta in 1987 with a midsize insurance defense firm, and there were folks there who thought mediation would never work because it was not necessary. Why would we hire somebody to do something we can do over the phone? There were people who were threatened by mediators because they were about to upset the apple cart.

SMITH: John Miles tells this story that I think is really interesting. He was telling a judge about mediation and hoping the judge would order some cases for mediation. He said the judge thought about it for a while and said, "Son, I don't need to be doing any meditation."

So were you trying cases more frequently back then, or were they just settling without mediation?

BROGDON: There were a lot more trials, particularly in insurance defense. As a young associate, you could be trying 10 State Farm cases in two months. But back in the mid-1980s, things like bad-faith claims weren't as popular, and so you could get a lot of cases settled because there weren't factors that would affect the normal value of a claim.

SMITH: When I started out, I was trying a case about every month. Just one right after another after another. You were either trying or preparing to try, and I would still say we settled most cases, but the proverbial courthouse steps is where they settled.

AYRES: I recall that the insurance adjuster, the attorneys and the clients were rarely together in one room, even at trial. I remember being in trial in front of Judge Jerry Baxter, and he was listening to the plaintiff's presentation of the case. He took a break, sent the jury out and looked at the defense lawyer and said, "I want you to go call your client right now, the adjuster, and you tell them that if they are not going to resolve this case, then they need to come down here and listen to what I'm listening to." It was a curious thing, but the concept of everyone being in the same room and working toward the same end just didn't really exist.

Was there a particular moment or event that caused you to leave the practice of law and become a full-time mediator?

BROGDON: My decision really was a pragmatic one. When I made the decision to be a full-time mediator, I was at a point when I had to balance quality of life. I had a good income as a lawyer, but looking at my bank account didn't make me happy. I realized when I did a mediation on Monday and a deposition on Tuesday, I was really happy on Monday, but on Tuesday I was miserable. As I got more popular as a mediator, I said, let me ride this wave, because it was more fun and the money from practicing law did not justify the stress. Becoming a full-time neutral is one of the few smart things I've ever done. I made the decision and never looked back. I don't have one regret.

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AYRES: I loved my practice and my partners, so I had a great situation, but after 25 years of a very demanding litigation practice, I wanted an opportunity to enjoy more time with my children while I could. At some point after I resigned my equity partnership and became "of counsel" with my firm, I thought I'd take a mediation course. That's when Rex first talked to me and said I should think about becoming a mediator. I contemplated it but, frankly, was enjoying my free time. I was subsequently approached by some of the principals at BAY, and they asked me if I'd be interested in joining its panel of mediators. I told them I'd like an opportunity to vet myself, and so I met with Rex again and Gino, and then I probably went out with five or six defense attorneys who had worked against me over the years. I asked them if they thought I'd be any good at it and if they would hire me, and the response was positive. The experience has been one I enjoy so much that I regret waiting so long to jump in.

SMITH: I had a very specific moment, and it's a sad story to start. I had just started mediating and for the first time I had three mediations in a row on the Monday, Tuesday and Wednesday before Thanksgiving. I was sitting in my office when another attorney came in and said, "Rex, I am in serious trouble. I have a big case on trial next Monday and I have done nothing." I said, "What do you mean?" The sad part is this was a wonderful person who had worked for about 25 years as hard as he could, and he basically was having a nervous breakdown. I feel very sorry that I didn't realize it, because he was the kind of person who would go into his office, close his door and just work. He had answered the suit and that was it. It was on trial on Monday, and so Walter McClelland and I decided that Walter would try to get the case continued and that if it had to be tried on Monday, I would try it. After I worked late into the evening, I was driving home to tell my lovely bride Mary that I wasn't going to be at Thanksgiving dinner, which was going to be at our house, when Walter called and said, "I got it continued." I was sitting at the red light in front of the Wesley Chapel Methodist Church, and I looked over at that church and said, "I'm going to go another way." I call it the Wesley Chapel Methodist Church moment, and that's the moment I decided to be a full-time mediator.

BROGDON: One thing that made the choice easier for me was some honesty about what my skills were. I was a very competent lawyer, but I wasn't a great lawyer. I'm a better mediator than I was a lawyer, and being a mediator appeals to all the things I like with none of the bad stuff. I like being in the middle of some tragic, complex, high-emotion, high-stakes case, but I didn't like preparing for trial in those cases or having the stakes being on my back. I like all the moving parts, and it pays well, but I don't take any of the stress home. Of all my legal jobs, being a mediator is the least stressful job I've ever had because I don't take myself too seriously, and I let the process do what it does.

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SMITH: I cannot tell you how much I enjoy mediating. It truly is a labor of love, and we basically get to hang out with our friends and talk about things that are very interesting to us. It makes my day when the lawyers come in and we sit down and start analyzing the problem, and I say people who tell lawyer jokes don't know lawyers. They are some of the most honest, ethical, kind, considerate, intelligent people, and I get to be with them all the time. It is a blessing to get to do what we do, and I love the people that are participants; I love the professionals; I love the people that are having the problem, the plaintiffs and defendants. It is an extraordinarily enjoyable and rewarding way to contribute and make a living.

AYRES: It's an incredible opportunity to have an impact and bring out good things in circumstances where people's lives have been decimated. That's the kind of practice I had for a long time, so I was used to dealing with people who were broken and were trying to get their lives back together. It was gratifying to work on their behalf in the hopes that I'd bring about a good resolution. As a mediator, I get to do that on a daily basis instead of three years to trial.

BROGDON: One of the benefits of mediation that I'm always reminded of is that most of my days I'm dealing with people who would trade places with me. I worry about my health and my weight, what people think of me, my finances and all these things, but I'm doing better than most of the people that are the subject of the cases in front of me. So most days when I finish a mediation, I drive home really grateful because I got to do something that helped a process resolve and helped something good come out of a tragedy.

What makes a good mediator?

BROGDON: Being a good listener and a person who can stay in his or her lane. Mediators don't settle cases; money and conditions settle cases. We take the credit, but the parties settle the case. I think a good mediator knows when to hit the throttle and when to hit the brakes. To be effective, a mediator has to have a certain amount of toughness and willingness to make people mad or uncomfortable. Also, a mediator has to be courageous and creative and needs to know when to shut up and get out of the way and not be invested in settling a case. Just being the grease in the machine.

SMITH: I think you have to have a lot of patience. Also, people need to be heard, and I would totally agree with Gino on listening, which is a lost art in America. You have to be creative. I try to make sure that I have thrown every idea I possibly can at people in terms of how we might approach this, so you need to be thinking outside the box; you need to be thinking non-traditionally about other avenues that might work, other suggestions. A lot of time I talk about high-lows. You have to be persistent. If you're easily discouraged, you shouldn't be a mediator because people are going to react negatively to ideas in the beginning. A number of my cases don't settle the day of mediation, but they settle in the next 30 days.

AYRES: To be a good mediator, you have to really like people. Getting to know other people and cultivating relationships are some of the things I always enjoyed in my practice and in my life. When you do that, you can hear the subtleties that are coming through in the words these people are speaking. They need to be heard, and they need to know they've been heard. I think it's about cultivating a relationship within that room and building trust.

What is the most important factor that attorneys should consider when selecting a mediator?

BROGDON: A mediator has to fit the case and the parties. If you don't have a good fit, the mediation can often be wasted. My style is not for everyone. I don't really change depending on the mediation in terms of my style. It's an evaluative, sometimes aggressive, sometimes playful and friendly kind of hugging style. And that's not for everybody, so it's very personality driven.

AYRES: You have to think of your client and what they need to hear and how they need to hear it and who might be the best person to deliver that message. I've been retained in some cases because I'm a woman and the attorneys thought that I, as a female, might be able to relate to the plaintiff in a way that would help all parties get the case resolved. That being said, in my 30 years of practice, I never had a female mediator, but our cases generally were resolved at mediation. That's a testament to the fact that good mediators can work with anyone effectively.

SMITH: I like the key words from both of my colleagues here: fit and relatability. I tell people when I speak on this from time to time that a very important decision for you as an advocate or as a litigator is who

you choose as your mediator. What do you need? Do you need help with your client? Are there complex issues so that you need subject-matter expertise? Are there personality considerations? You need to give as much thought to selecting the mediator as you do in terms of selecting the case if you're on the plaintiff's side or to selecting the defense counsel if you're going to be hiring defense counsel or retaining an expert. There are different qualities that different people bring. Do you need a former judge? Do you need somebody who can do some handholding, can make someone feel comfortable, can "feel their pain" and know that they've been hurt? As a litigator, you have to think through these things and decide who is the person that fits best?

Is there a type of case that you particularly enjoy mediating?

SMITH: I want the most complex, difficult, hardest case I can get my hands on. I like the complexity. I like multi-party cases. I'm happy do to anything someone will hire me to do, but what I really want is the case that cannot be settled.

AYRES: As former litigators, we all want the good cases, the hard cases, the complicated cases, the cases that are challenges, because they afford us an opportunity to bring our skillset to the forefront and work hard like we've done all our professional lives. We talked earlier about how gratifying it is to bring about resolution, and it's all the more gratifying in a case where you're having to work extra hard and pull together multiple factions and at the very end, you can tie it up in a bow and say, "It's done." My law practice focused on catastrophic personal injury and death cases, so I feel like I have broad experience from a subject-matter standpoint. Having said this, I like mediating medical malpractice cases. As a plaintiff's lawyer, I handled more than my fair share of them, and my husband is a physician, so I have a real understanding of the dynamics and interests on both sides.

BROGDON: This may sound bizarre, but I want the high-emotion, high-stakes cases. I want the ones where I have to pull people away from the cliff, high octane kind of stuff. They are usually fairly simple, but the task of getting them down and distilling them is just Herculean to me, and so I get pumped when it's something really juicy. The downside of being a mediator is seeing that these are real dilemmas—these are really bad things that happen to people. But the so-called sex appeal, the compelling nature of the cases, the high human drama, you can't get a job that's better than being a mediator.

Tell us about a mediation tactic by a lawyer that worked particularly well.

SMITH: I'll compliment Rob Katz. Rob had a very difficult case, and he knew there were going to be multiple decision makers, so he put together a 20-minute video and gave it to the defendants ahead of time so that when they round-tabled the case they heard his very diplomatic presentation with cuts from the depositions. He knew that the people making the decision didn't have a lot of time, so he made it very succinct, and it was a key factor in getting the case settled. I thought that was an effective technique from the plaintiff's point of view of communicating difficult information to the ultimate decision makers.

AYRES: I was recently involved in a discussion about whether preparing for mediation by the attorney is a wise investment, including whether mediation statements are effective. It was a curious discussion for me because I always prepared for a mediation and provided a mediation statement to my mediator so they had some sense for what the case was about and what the issues to be addressed. But there were times when we would send packets to the defense lawyers in advance so that they and their clients would have an opportunity to see and hear our positions in advance, as well. At mediation, it is really about educating the clients on both sides of the case as to the relative positions. While I was confident I could do that for my client, I wanted to make it easy for the other side to do it for their client. So I think just doing your homework and being prepared, having your client prepared, and, to the extent you can, preparing opposing counsel are things that should happen in all cases.

BROGDON: I say the same thing but a little differently. A lawyer who is effective in submitting his or her cases to mediation is effective because they've managed expectations. Their own client's expectations as well as the other side's expectations. Good lawyers see the evidence and the issues pretty much the same, so mediations fail most times in my experience when expectations have not been managed.

What is something that attorneys do not do during mediations that you think they should do?

SMITH: I would never voluntarily not take the opportunity to give an opening presentation. I know people who don't want to do them or think they are counterproductive. They are not counterproductive if you do them diplomatically. A diplomat is someone who can communi-

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cate difficult, hard information to other people and not alienate them. If I have the opportunity to speak to the plaintiff or the defendant or the decision makers, I am not going to voluntarily forego that unless there is a compelling reason.

AYRES: I talked about the importance of establishing relationships, and if you are not speaking, you are not working toward establishing a relationship. For example, the defense should express regret that the incident happened. The defense does not have to say, "I'm sorry we did this." Just say, "I know that this has been a very difficult time for you and we regret that this happened. We are here to see what we can do to get it resolved." You haven't promised anything, but you've invited a conversation, which is a starting point, and all of a sudden the plaintiff doesn't see you as these faceless people on the other side of the paperwork she's been getting.

Should that come from the attorney or directly from the defendant?

AYRES: It should come from everyone, if practicable. And then, if the plaintiff wants to speak, he or she should do so. As a plaintiff's attorney, I rarely had clients that wanted to speak, but there were some who just needed to have their story told, and just by getting it off their chest, it allowed them to move forward. I think that's on each individual lawyer to know what the client's needs are in that regard, but it humanizes the whole process when people in the room are speaking and engaging with each other.

SMITH: If the client is going to open his or her mouth, the attorney needs to know what's going to come out. It does very much humanize the process, but the attorney needs to make sure the client is ready to do that.

BROGDON: I used to be red hot on openings thinking all these same things, but I've become cynical about them. Not because they don't work, but because people do them either clumsily or with an insult or in a trial mode or a movie production or something that is harmful even to their own clients. There are a lot of lawyers who don't really think about what they are trained to accomplish in an opening, and so they misuse the opportunity to settle the case, which requires the mediator to put the case back together for the next two hours. So I think it's a case-by-case deal. All those things about the opportunity to apologize are very important, but I get less and less enthusiastic about the big production, dog-and-pony shows.

Besides the amount of money that each side is willing to either accept or pay, what one thing do you think is most important in determining whether mediation will be successful?

AYRES: It starts with the mindset of the parties. Are they there to get the case resolved, or are they there because the court required mediation? When the parties come in good faith and try to get the case resolved, chances are it will happen because the money and the other contingencies can be worked out, especially when the alternative is to present your case to a jury of 12 strangers, with all the attendant costs and preparation and emotional stress that comes along with trial.

BROGDON: I often say, particularly if I sense tension and if people are being ugly in the beginning, that I can't be effective as a mediator if you are not candid with me when I really demand your candor. I won't demand it always because you have to bluff me, but when I really need it, will you give it me? I think the candor is the foundation of it.

How do you see the future of mediation?

AYRES: I think we're going to see it continue to evolve and become bigger than it already is. I'm seeing signs of people trying to resolve cases before they are even filed, and I think we'll see mediations earlier and earlier in the process. The first three mediations I had were with a lawyer whose practice is in trying to settle cases before suit is filed. This lawyer reaches out to potential defendants and says, let me take a swing at trying to get these cases resolved. It was interesting for me to come in because the parties have very limited information, but I remember remarking that this is a great idea because it serves both parties' interests by getting ahead of a lawsuit. That was a new experience for me, but I think that's the wave of the future. I think we're going to find people working to get these things resolved sooner rather than later, and as quickly as possible, because it reduces the parties' investment, both emotionally and financially, and allows them to move on with their lives.

SMITH: I agree with that, and I think it is continuing to grow. I think more and more people are receptive to it, and more and more companies see the advantages to it. I had the pleasure of representing Delta Airlines for almost 20 years, and about five years in, I remember the gentleman who led their litigation and claims and risk management told me that as soon as a lawsuit came in, they wanted to gather as much information as possible, as quickly as possible, so we could depose the plaintiff and then mediate the case. He called it a decision point, and he wanted to get the cases to a decision point as quickly as possible. I think this view has spread throughout corporate America so that informed judgments can be made as quickly as possible and cases can be resolved before significant money is spent on experts and attorneys.

BROGDON: Regardless of the facts of the underlying event, ultimately it is a business decision.

SMITH: For both sides.

BROGDON: Mediation will become the norm with trial being the rare exception. •

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