A SENSE OF JUSTICE AND DOING WHAT THE LAW REQUIRES

Roger Clemens, one of the great baseball icons of our time (who spent many a glorious year with the Boston Red Sox, before ultimately losing his way and joining a particularly odious rival toward the end of his career), walked out of a Washington courtroom on Wednesday after his case was mistried due to a US Attorney’s use of hearsay evidence that had previously been ruled inadmissible in the prosecution’s case in chief. A hearing is set for a few weeks as to whether "jeopardy has attached", meaning he can never be tried again under the double jeopardy clause of the Constitution. For now, though, it appears that he will walk free, never again to face charges of lying to Congress.

Casey Anthony was acquitted of three of the most serious felonies against her arising from the murder of her two year old daughter. Yet the prosecution in that case failed, according to the jury, to produce the type and quality of evidence to convict her beyond a reasonable doubt.

The OJ Simpson case produced an acquittal under similar (albeit much more bizarre) circumstances.
So where's the disconnect?

Why is it that we are reminded of Dickens' quote from Oliver Twist, "If the law supposes that, then the law is an ass!" Is the law “an ass”? Or were any or all of these results technically correct under the law?

Without question, there is a disconnect that sometimes occurs between a technically correct legal result (and I'm not taking a position on Clemens, Anthony or OJ - to be clear) and our yearning for "justice" or "that the right thing be done". One is dispassionate and reasoned while the other hits us on a more human and emotional level. One gets us a required result in the view of the deciders, while the other gets us finality and closure.

Indeed, in the words of our current Chief Justice of the United States, Justices are “like umpires, there to call balls and strikes”. But even a cursory review of recent headlines shows a spate of controversial decisions from the US Supreme Court recently, and those who disagree have taken to calling various Justices “activists” or “legislating from the bench”, both from the right and from the left. No wonder so many citizens in this country say “I just don’t get it!” and "It’s not fair or right!"

So what does this have to do with mediation?

One thing that a trial lawyer must do, on behalf of a client, is release control of the case to a jury. Once it is out of his or her hands, it is waiting time and nervous time for both of them as the jury deliberates. Sometimes, those results can be immensely satisfying; sometimes, those results can be completely devastating.

But by retaining control over the outcome so that it can be structured and negotiated, however, participants in a mediation greatly enhance their chance of achieving a sense of justice and closure. A negotiated agreement can only be achieved by clients and counsel having participated in it to the end. As such, when an agreement is carefully and respectfully negotiated, the participants themselves achieve a greater sense of closure.
It is, of course, pure speculation whether an agreement would be better or worse than an eventual verdict. But without question, the participation in, and control over the eventual outcome in a settlement satisfies a greater sense of "justice" and "closure" than does releasing control to a panel of citizens who have essentially told the court that they feel they can be fair.

Something to think about as we ponder some controversial decisions from our courts.