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“HOW DO YOU SUCCESSFULLY MEDIATE FEELINGS?”

[Written in memory and honor of Cotton Harness]

“Mediation is the art of recovery.”¹

I’m now into my second year as a fulltime family law mediator, which represents my third career “shift” in the practice of family law over a 36-year span of time². I have also determined that, on many levels, mediation has presented me with my greatest professional challenge. I’ll explain.

For the first twenty-five years of an otherwise mediocre career I had a general law practice which over time and for purely economic reasons moved me deeper and deeper into the purgatory of family law. I was an advocate. I picked the side of the client who retained me (wife or husband or mother or father or grandparent... it didn’t matter), and my side was always “the right side”. Inside a family courtroom I was convinced I could argue paint off the walls, and the only **feelings** that mattered to me were my client’s feelings. To borrow a mediation term, I had convinced myself I was becoming a master at “positional bargaining”...the only correct “position” was my client’s position, and I came to court prepared to “bargain” on that basis. Those were difficult years.

In July, 1998, I began “phase two” of my “family law practice”, and for the next 10+ years I was a family court judge. Suddenly I could no longer pick a side, nor was I an advocate. Now there were two sides to consider (or possibly three, or more). However, I found “phase two” to be much easier than “phase one”. Regardless of how factually difficult the case, I enjoyed the legal arguments and often esoteric discussions of the attorneys, especially if the attorneys were skilled and well-prepared. But I found the most significant difference was that I no longer had to worry about, or concern myself with, the **feelings** of the parties. I just naturally assumed that by virtue of their sitting inside my courtroom they didn’t much care for each other. My role in this drama was to take the testimony and evidence funneled to me through the witness’s chair and then render a decision in this case. My obligation was to pay close attention to the

¹ From “Family Court Mediation Training Program”.

² Of some interest (and obvious importance) to me is a judicial advisory opinion which concluded that engaging exclusively in an arbitration/mediation practice by a retired judge does not constitute the “practice of law”.

presentation of the case, take copious notes, and be fair in deciding the case based on the information given to me. However, I've never read an appellate court case nor any legal treatise or legal text or article, nor attended any CLE or judges' conference which instructed a judge to consider the **feelings** of the parties in the decision-making process.

I retired from the bench at the end of December, 2008, and in January, 2009, I "transitioned" into my mediation practice, convinced that I had enough experience in this area immediately to become a natural-born mediator. I just knew I could settle every case by sheer force of will and experience. Wrong.

Mediation forced me – no, it required me – to become enmeshed with the **feelings** of the parties.

I have found that, for the mediator, the mediation process runs the gamut from interesting to fascinating to frustrating...but always challenging. In the excellent materials which were provided over the years by Cotton Harness and Mary Bryan to so many of us who became certified mediators during the Family Court Mediation Training Program, I have found the following passage to represent the "beating heart of the mediation process":

"Divorce and disputes involving children and other family members are difficult for the strongest and most resourceful people. Although mediation offers many benefits when compared to traditional conflict resolution through the legal system, there is no painless way to make these necessary decisions. Mediation is a brief, significant, helpful intervention at a time of immeasurable pain."

Now I understand all too well that the **feelings** of the parties who participate in the mediation process not only matter, but form the engine which drives the process forward. These **feelings** include (often all at the same moment in time) -

- Anger
- Bitterness
- Hurt
- Mistrust
- Frustration
- Helplessness
- Hopelessness
- Sadness
- Anxiety
- Loss
- Confusion
- Dependency

In my first mediation efforts I would tell the parties that I could do nothing about their collective pasts; that I could not change their **feelings** towards each other which resulted in one (or both) of them filing an action in family court. And if they could not “forget the past”, then they could not move beyond it into the future. However, this approach was all wrong. Either consciously or subconsciously it was the attorney or the judge in me saying to them, “get over it...let’s get this case settled”. Quite logically, the attorneys who work with me in mediation most often still bring this professional “mind set” into a mediation session. And I can certainly understand why. The attorneys have already heard their clients vent constantly as to his or her **feelings**, and because family law attorneys by training and experience are “result-oriented”, they want this mediation session to produce immediate progress and results. This difficult case needs to be settled, Mr. Mediator, so get on with it!

For the mediator, however, understanding and being constantly aware of, and attuned to, the nuances of the parties’ **feelings** which they bring to the mediation session are absolutely essential in leading towards a resolution of the case.

So please let me close with a few salient points which I’ve been trying to make:

To the attorneys who are participating in the mediation:

- a. A mediation is not a family court hearing which is intended to be conducted (started and ended) within a finite period of time. Please don’t arrive leaving. Mediation should be a family law attorneys’ best friend.
- b. I would urge every family law attorney who participates in mediation to remember these words: Mediation is a process which will have a point-of-beginning, but which will end when it is supposed to end.
- c. Please give your mediator time to work with your clients to discover whether your client’s **feelings** continue to create a wall or barrier which prevents a reasoned and reasonable discussion affecting the resolution of his or her case. Your mediator will know, often instinctively, when it is time to try and break through this wall. In other words, cut the mediator some slack.

To the clients who are participating in the mediation:

- a. You must trust your mediator to level the field for both sides. A mediator is a “neutral”...and you should both embrace and understand the significance of that term.
- b. Your **feelings** matter to your mediator, but you also have an obligation to be both honest and candid with your mediator as to whether the **feelings**

which you have brought to the mediation process make it impossible for you to make reasoned and reasonable compromises towards the resolution of your case.