



Reflections III

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Introduction

This is the third article in our series of points to ponder in relation to mediation. These points cover alphabetically both those frequently mentioned as well as some that are not often noted by either participants in mediation or by commentators. However, all of the points we have selected cover issues that we see repetitively in our mediation practice. It is just that some points are readily noticed while others are more subtle and often escape recognition. It is our hope that both “partners in conflict” and their advocates will find our reflections helpful.

I. Empowerment

... in simplest terms, empowerment means the restoration to individuals of a sense of their value and strength and their own capacity to make decisions and handle life’s problems.¹

Empowerment along with individual responsibility is a key objective of the transformative mediation process favored and promoted by Bush and Folger. Their transformative model, which seeks to modify conflict behavior, has been utilized in the context of family, employment, and public interest disputes. Empowerment, the ceding of control to the principles, is both a skill and a transforming technique. Often parties can close a deal if empowered to do so. Even in distributive mediation, which is the tradition zero sum approach, if principles are given the reins they can frequently find a way to bridge an impasse. In other instances, empowerment may evolve simply with the opportunity to be listened to and appreciated. It may come with the opportunity to brainstorm ideas that help mold the settlement. Empowerment then is simply the process of giving the principles control and/or recognition.

II. Energy

Sometimes we are overwhelmed by the energy of hate, anger, or fear. We forget that in us there are other kinds of energy that can manifest also. If we know how to practice, we can bring back the energy of insight, of love, and of hope in order to embrace the energy of fear, of despair, and anger.²

Energy, in our view, has several components within the context of mediation. First, there is the emotional energy identified by Thich Nhat Hanh. He suggests that the positive energy of insight, love, and hope can disarm the negative energy of fear, despair, and anger. Previously, we have written that the three dominant emotions (what Thich Nhat Hanh calls “energy”) in mediation are grief, anger, and fear. Despair is part of grief and certainly close enough to grief to be the same for the purposes of this discussion. In the context of mediation insight, hope, and respect (if not love) can be a powerful positive source of energy that has the potential of being an antidote for the negative energy that invades during in conflict. Mediators try to bring this positive energy into play by empowering participants, creating a respectful forum, giving people voice, and creating a sense of fairness. This is a more difficult mediation process than simply trading numbers and telling folks what they must do and is more satisfying all around. Thus, when parties come to a mediation bound up with negative energy it is helpful if a mediator has the insight, intuition, experience, and talent to enable parties to replace some negative energy with forgiveness and positive energy.

Another dimension of energy is creative energy. In mediation, creative energy may involve pre-mediation meetings, site visits, product demonstrations, staggered starts, client only 1:1 meetings, focused openings, and other

variations of the standard mediation process. Too often mediators and their clients fall into the trap of template mediation that seeks to apply the same mediation process to all situations—like the one size hat that fits all and ends up fitting no one well.

Finally, energy may simply be an upbeat and positive tone that is set by the mediator, negotiator, and parties, too. It involves exercising humility so others can speak and shine. It involves according others both dignity and respect. Constructive framing and reframing are other components of positive energy.

Taken together, the various aspects of energy can be a powerful and positive resource in the mediation process.

III. Ethics

An old man once said,
 In the end, when your name
 is spoken,
 The sentiment evoked by
 its vibration
 Will show how well
 You have lived your life.³

This Native American observation is similar to a Jewish proverb that is, “How I live any day determines how I sleep at night.” In any event, these basic statements of principal have as much if not more resonance than the Code of Professional Conduct for lawyers. After all not all participants in mediation are lawyers and participants should have more concern about how they measure up with their Creator than with their grievance committees.

Today there has been a greater push to bring folks to the mediation table before litigation and early in the litigation process. For such mediation to be effective, parties have to be able to trust each other. Playing the poker

cards of litigation openly, honestly, candidly, and transparently in relation to the sharing of information enables pre-litigation and early dispute resolution to work. And, working to meet an over arching ethical code enables folks to sleep at night knowing that he/she is a person of integrity.

IV. Face

Face-saving is at the core of the negotiation process. . . Face is more than ego. It is shorthand for people’s self-worth, their dignity, their sense of honor. . .⁴

Too many participants in mediation, caught up in their self-worth and self-esteem, their stature, status and position, forget there are other folks at the mediation table. They forget that others at the mediation table have the same or similar interests to protect or promote. Similarly, folks at mediation have positive and negative emotional energy that they have brought to the mediation. Thus, is it any wonder that when a negotiator forgets to attend to his/her opponent’s needs in the negotiation process, these mediations fail?

If negotiators will tell stories rather than give lectures, if they will attend to another’s ego, and sense of worth, and be humble, they will be on the way of giving their opponent not only face but also a way of to find a reason to reconsider and reevaluate his or her bargaining position.

Face is not only important in mediations involving on-going relationships, but also cases where the parties do not have a continuing association.

Most people are not self-actualizing so they require others to give them honor and dignity. Often in mediation this requires subtlety, sensitivity, a quiet voice, and/or humor.

V. Fairness

. . . first, people are more likely to judge a process as fair if they are given a meaningful opportunity to tell their story. Second, in a process that feels fair people receive reassurance that the decision-maker has listened to them... and cared about what they had to say. Third, people watch for signs that the decision-maker is trying to treat them in an even-handed and fair manner. Finally, people value a process that accords them dignity and respect.⁵

When mediators do not read the material submitted by parties they are reflecting that they don’t care; that they are more likely to be uninformed, biased, arbitrary, and capricious. When mediators lecture without listening, they shut others down and off. These twin problems of lack of preparation and lack of listening reflect a lack of respect, appreciation, and/or acknowledgment. It says to the parties that expediency and bullying will hold sway over fairness. The end result of this sort of evaluative mediation process may be fair, but it will not be perceived as such and the participants will feel that the judicial process is like watching sausages being made – the ingredients are pretty disgusting. Thus, if we want parties to perceive that they have participated in a fair process, they must have the opportunity to tell their story to someone who has taken the time to listen and to connect with the story teller. If the parties are looking for the mediator to express an opinion, they are more likely to listen to the mediator’s stories if he or she has accorded others the respect he or she now seeks. Thus, fairness is not only “objective” fairness it is also perceptual fairness.

VI. Fear

... the student warrior stood on one side, and fear stood on the other. . . . The young warrior roused herself . . . and asked, ‘how can I defeat you?’ Fear replied “my weapons are that I talk fast, and I get very close to your face. Then you get completely unnerved, and you do whatever I say. If you don’t do what I tell you, I have no power...”⁶

Fear is raw and basic. It is a powerful, and a primal force in many mediations. It can be paralyzing. It can shut down a party. It can lead to avoidance (flight), capitulation (fright), or intransigence (fight). All three responses are formidable barriers to conflict resolution.

Fear has both a psychological and physiological component. Fear along with anger and grief is one of the top three persuasive factors that we deal with in mediation.

Fear is frequently an over riding component for the company facing the economic consequences of a class action lawsuit, for a widow who has lost her husband, for an amputee, for an employee who has lost his job, for an adjuster or defense attorney afraid of losing his job, for a plaintiff’s attorney afraid of losing the money he has invested in the case. Simply put, fear often comes from many directions with differing intensity and differing degrees of obviousness.

In short, mediators and negotiators have to be attuned to the fears that are in play during a particular mediation. We have to spot these concerns. Often mediators must try to have participants look at their fears and their apparent lack of fear realistically. Failing to spot or attend to fears can doom mediations.

VII. HEALING

... *the force of healing is always at work in us, and we must trust it. Our goodness, our ability to persevere, our capacity to let go and transcend will help us through.*⁷

Healing certainly can be a part of many mediations. If we agree that the predominant emotions at mediation are grief, anger, and fear then addressing them certainly creates an opportunity for calmness, understanding, recognition, respect, and healing. Achieving these notable objectives is more likely to be successful if the parties are empowered and the process has created a sense of fairness, both of which are unlikely in the evaluative mediation process that feels more like

a settlement conference than mediation. Healing may occur just with the opportunity to be heard. It may come from being accorded dignity and respect. One party can help another party heal by offering acknowledgement or by making an apology. Healing may evolve with a sense that the mediation process has been fair, or that a party has been empowered or simply listened to. Healing may occur with forgiveness- that gives a measure of peace to the forgiving party and the forgiven party. Healing may occur in many mediations if partners in conflict are just given some help with a rough spot in their journey. An “open” ear will allow participants in mediation to spot these opportunities for healing.

VIII. Heart

*Surprisingly enough we are more than sorrow. We are breadth and beating heart, we are spirit resilient and possibilities simply unexplored.*⁸

Redress in mediation of litigated cases often focuses on monetary resolution. But, the son who is contesting a will may be looking for that and for something that may be called “heart”. The parents who have lost a child due to another’s act certainly want to attend to a “heart” filled with anger and grief. A business partner left with partnership obligations may have fears that fill his “heart” with pain. Money can take care of some of his needs if the mediating parties can also find a way to at least acknowledge the deeply felt emotional pain that figuratively resides in his heart. It is a way to accomplish a broader and longer lasting purpose of aiding people in the midst of conflict.

What does it mean to mediate with heart? The answer depends on the type of case and the personalities of the participants. Institutions can be encouraged to do “the right thing” if given the “right” information. In community disputes “heart” may come from walking to the other side of the room (walking in another’s shoes). In partnership dissolution cases mediating with “heart” may require finding a way to appreciate another’s pain, sorrow, anger, or fear. In wrongful death and catastrophic injury cases mediating with “heart” may require taking off the blinders of partisan perception and taking on the difficult task of connecting with emotions.

Mediation with “heart” often depends on the opportunities afforded by the nature of the case or the personalities of the parties. It often takes the willingness to mediate dangerously as you touch your own and others emo-

tions and feelings. It means looking for inner peace for yourself and others while addressing the outer conflict. Mediation with “heart” requires using your spirituality to touch your own soul and the soul of others involved in the conflict.

IX – Feelings

*Sounds, sights, and senses connect feelings in a kind of web; ...when we communicate these feelings to each other in telling our stories or sharing our imaginings, we build empathy, trust, and relationship. From this foundation we can apply...the compassion that emotional intelligence infuses into our processes.*⁹

Feelings abound in mediation. Conflict invokes feelings of injustice, mistreatment, distrust, powerlessness, pain, grief, sorrow, sadness, despair, anger, fear, etc. One of the beautiful aspects of mediation is that it allows participants to engage in story telling that is not part of the natural format of litigation. A forum may be created in mediation to allow for the balancing of power imbalances, the building of bridges for understanding, appreciation, recognition, and resolution. Talented mediators often facilitate story telling and allow parties to see their way to closure by telling stories themselves. The exchange of stories and the process of doing so create a connection and trust which are critical to building a bridge to resolution. Too often in mediation feelings are ignored in the pursuit of settlement, in the false premise that all that we do is rational. Settlement without addressing feelings often results in a continuing sense of unfairness, discontent, and disquiet. Assuming that what we do in mediation of disputes is always rational, we disregard both the science on emotional and social intelligence and our vast mediation experience. Thoughtful

negotiators and mediators know that rational analysis typically does not take us to satisfying conflict resolution.

X – First Impressions

*Psychological research has shown that people weigh initial information much more heavily than later information... It's a simple fact. The first information people get about anything... influences how they process later information. In other words, people are more likely to believe that the first things they learn are the truth.*¹⁰

People make first impressions all the time, both intentionally and unintentionally. These first impressions set the tone for the ensuing negotiation and mediation. They become a filter which later information is considered. Interestingly, Demarais and White speaking in a social context note that “the shortest route to getting what you want is to give to others first...”¹¹ Thus, the more you listen and connect, the more likely others will listen and connect with you.¹² They point out that appearances impact “first impressions” so looking appropriate, fitting in, and appealing to your audience is important.¹³ The art of creating connection in social settings applies as well to the mediation setting and is done through active listening; open ended non-judgmental questioning, non-interrupting, and self-disclosure.

In the mediation setting it is important to remember that “people prefer to say yes to individuals they know and like.”¹⁴ Thus, people in conflict should work at getting to know and understand the opposing party. Relatedly, the social science on this topic reflects that people filter information with a “partisan perception” and that they prefer those who have similar backgrounds and interests.¹⁵ Parties in conflict should look for what they

have in common so they can build a bridge of understanding and appreciation and break down the barriers to good first impressions.

Thus, the message for mediation is to do all you can to create a positive first impression before you even get to mediation and continue that positive first impression at the mediation. Positive first impressions may involve appearance, attitude, demeanor, power, empathy, honest, integrity, preparation, etc all in a mix that fits for a particular conflict situation.

Conclusion

In a series of reflections ranging from empowerment to first impressions we have tried to provide you with additional tools for your mediation toolbox. Like our earlier segments of this series of reflections we are offering you concepts to consider as you prepare for and participate in mediations.

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Endnotes

- ¹ ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION*, 22 (Rev'd Ed. 2005).
- ² THICH NHAT HANH, *TAMING THE TIGER WITHIN*, 91 (2004).
- ³ GABRIEL HORN, *THE BOOK OF CEREMONIES*, 125 (2000).
- ⁴ WILLIAM URY, *GETTING PAST NO*, 120 (1993)
- ⁵ Nancy A. Welsh, *Perceptions of Fairness*, *THE NEGOTIATOR'S FIELDBOOK*, 165, 169 (Andrea K. Schneider & Christopher Honeyman, eds. 2006).
- ⁶ PEMA CHODRON, *WHEN THINGS FALL APART*, 35 (2000).
- ⁷ THICH NHAT HANH, *CREATING TRUE PEACE*, 33 (2003).
- ⁸ MOLLY FUMIA, *SAFE PASSAGE*, 162 (2003).
- ⁹ MICHELLE LEBARON, *BRIDGING TROUBLED WATERS*, 62 (2002).

¹⁰ ANN DEMARAIS, PH.D. & VALARIE WHITE, PH.D., *FIRST IMPRESSIONS*, 16 (2004).

¹¹ *Id.* at 25.

¹² *Id.* at 25 – 27.

¹³ *Id.* at 41.

¹⁴ ROBERT CIALDINI, *INFLUENCE*, 126 (4th Ed, 2001).

¹⁵ *Compare id.* at 150 with ROBERT MNOOKIN, *BEYOND WINNING*, 157-159 (2000).