



*From Lynne Bassis, Esq.*



## My All-Nighter

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My case started on July 3rd at 9:00 a.m. and alas, but soft, what light through yonder window breaks, ended at 7:00 a.m. on July 4th.

It was an interesting mediation. As the day drew on, we had to order food. In the middle of the night, new people joined the mediation. Throughout the mediation, a hall monitor, usually me, monitored bathroom breaks to make sure that no one ran into anyone from the other side. When the settlement agreement was finally signed, it included one special imprint: Intending to send a message to the plaintiff, one of the signatories to the settlement agreement pricked her finger, leaving a blood stain on her signature line. Though I knew not the meaning of the blood stain, I deduced that it was not a positive omen.

This case was about a woman of tender years (though chronologically “of age”) who succumbed to her uncle’s advances while employed at her aunt’s restaurant. The incident had split the family in halves, with some members siding with the uncle and aunt and other siding with the plaintiff. The family members, being from outside the United States, but residing in the United States, were embroiled in customs, languages, and allegiances of two cultures.

Whether intimate conduct is or is not consensual is a fairly common theme in mediations involving allegations of sex discrimination, sexual harassment or sexual battery. What was novel about this case was not whether the encounters were consensual (since the plaintiff was technically an adult under the law). The thrust of plaintiff’s challenge was that the “consensual” argument was irrelevant. Irrespective of plaintiff’s chronological age, argued plaintiff’s counsel, plaintiff was not of sufficient emotional maturity to give consent. Recent developments in brain science lent support to this notion, i.e., making plausible an argument that plaintiff’s brain development was a work in progress and, as yet, incomplete. Thus, the argument went, plaintiff lacked the requisite maturity to understand the impact of her actions and was therefore incapable of providing consent. Plaintiff’s counsel provided 75 pages of briefing regarding the inability of a young woman in her early 20’s to be psychologically capable of giving consent, that is, understanding meaning and ramifications of a sexual encounter, notwithstanding the law that set the age of adulthood at age 18.

However captivating this argument might have been from a social science or neuroscience perspective, pursuing the matter to trial would have left absolutely no possibility for any family reconciliation. The two sisters - plaintiff’s mother and plaintiff’s aunt - the matriarchs of the family - found themselves torn asunder by the allegations and the fallout. Plaintiff’s mother, aghast at the alleged conduct of her sister’s husband (plaintiff’s uncle) was poised to retaliate in the most aggressive way she could contemplate. Plaintiff’s aunt, insistent on protecting her husband’s reputation, believed that the allegations of intimate encounters between her husband and plaintiff were fabrications of her fanciful niece. Or, in the alternative, if the encounters did take place, they were plaintiff’s fault in that plaintiff had been successful in seducing her husband. Putting this now divided family before a jury would be the death knell of any possible reconciliation in the future - something which both sisters, at different times during the mediation had hinted would be of interest.

It was the plaintiff herself, in the face of her disapproving mother, who was willing to consider an apology from her uncle. The apology, however, had to be made in a specific way. Plaintiff refused to receive a face-to-face apology from her uncle who was down the hall. Plaintiff also refused to speak to her uncle via the telephone. The only way she would entertain an apology was if it were hand-written and delivered to her during the mediation. The uncle agreed to put an apology in writing, however, he did not speak or write English (much of the mediation had been

conducted with translators). The uncle was given some time to prepare and write an apology.

As I looked upon the nearly two pages of (to me) undecipherable script that had been handed to me, I wondered what it said. Could I just hand it over on good faith that it was an apology? What if I was holding a scathing monologue written by plaintiff's aunt? What if it called Plaintiff a tramp, a liar, or something equally colorful? I considered asking for a translation before delivering the apology to plaintiff. But, could I trust that the translation was accurate if someone in the uncle's camp had provided it? Since it was in the wee hours of the morning, translation services were not available. This was not the kind of need that could be satisfied by a provider of emergency room services or other all-night establishments; I was left to my own devices. I had to trust my instincts.

With the uncle's permission, I asked a family member of the aunt and uncle to review and translate the pages. I explained how dangerous it would be if the apology were susceptible to different interpretations. I had to make sure that what purported to be an apology, was indeed an apology. I received assurances and decided to deliver the apology.

The apology did the trick. It was received well by the Plaintiff (albeit less so by her mother) and opened up the door for the monetary negotiation.

Dollars later, I locked up the office to get some zzzzs before my fireworks celebration was to begin. I do not know what transpired after the mediation. But, a more captivating mediation script I could not have made up because, as it is sometimes said, truth is stranger than fiction. This was a case that goes down in the annals of my mediation career as being both memorable and instructive. It illustrates the fact that one can never anticipate the twists and turns of mediation. One must be willing to follow the parties' lead, all the while bringing presence, creativity, unrelenting commitment to the process, and never a hair of fatigue, regardless of what number the big hand or little hand is on.

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