

RECOGNIZING AND VALIDATING DIVERSITY IN MEDIATION

By Malcolm Sher

Introduction

As a foreign born and educated lawyer and mediator, I am frequently engaged to mediate cases in which some, or often all of the parties lived, were raised or educated somewhere other than the United States. When they become involved in disputes, whether litigated or not, people from differing cultural or ethnic backgrounds often bring to the table differences that may have caused or contributed to the dispute, and that may well govern its outcome. This article will examine some of those differences and emphasize the need for all participants in the mediation process to learn about and validate them in order to bring about a mutually beneficial settlement.

The opinions and examples in this article are just that; opinions and examples and are based on thirty six years litigating cases here and abroad and over twenty mediating cases. They are not intended to account for, respond to or characterize every individual within the group described.

Choosing Culturally Sensitive Mediators and Lawyers

Choosing diverse mediators, who understand that people's different backgrounds influence the way they understand situations and evaluate facts makes not only good business sense, but promotes successful mediation. Similarly, it is not sufficient for counsel representing the parties to have a good grasp of the facts and legal issues; counsel must know *who* the client is and what about the client's culture, ethnicity or gender will positively or negatively impact the process and promote or prevent settlement. Living in Africa and the U.K. and traveling widely in Europe and elsewhere has been pivotal in raising my consciousness and awareness of important "multi-dimensional" or cultural differences. Observing the trust and respect engendered by tribal elders formally convened to settle disputes in the informality of the African outdoors was but one eye-opening experience which has influenced what, hopefully, is a flexible and enlightened, approach to mediation.

Individualists and Collectivists –“Can't We All Just Get Along?”

At the risk of stereotyping, there is much to read and, as a mediator, observe about how different cultures approach negotiation in mediation. Dutch psychologist, Geert Hofstede in *Culture and Organizations: Software of the Mind* 50-51 (rev. ed. 1997) talks of Americans, people from Israel, South Africa and many of the countries of Northern and Western Europe as "individualists" whose social pattern Hofstede contends emphasizes the individual's personal preferences, goals, rights, needs, and interests that tend to be self-reliant and competitive. Conversely, "collectivists" predominate in much of the rest of Africa and the Middle East, most of Asia, South America, Mexico and parts of Eastern

Europe. Often less affluent, they may be more focused on group harmony, solidarity based on a sense of communal duty and responsibility.

On entering the mediation room, usually in the formal setting of a lawyer's or the mediator's office, Anglo-American parties and counsel will typically shake hands, introduce each other by their first names, make "small talk" about sports, business, family or vacations. Among counsel, intimate details about the last case they had together, the judge's or other lawyers' peculiarities are shared and generally accepted as "ice-breakers" or conversational openers.

As a mediator, I have seldom observed such informality among individuals from Middle-Eastern, Asian countries, India, parts of Africa or South and Central America unless they have lived in this country for many years and are totally assimilated into this culture. Rather, I typically see greater formality. As one example, those of Japanese descent may be expected to bow, exchange business cards, (which should always be offered and accepted with two hands, carefully scrutinized but never written on). As another example, in Arabic culture, one should not cross one's feet so that the soiled soles of one's shoes are exposed as this may be taken as a sign of disrespect.

Lawyers representing parties are well advised to inquire of their clients what formalities may be expected or deserved, especially in business, commercial partnership and sometimes even in family law mediations, since a perceived failure to act appropriately may be seen as a sign of disrespect and shut down negotiations before they have ever started!

Once the joint session of a mediation has commenced, it is not uncommon for Anglo-American disputants and their lawyers, who have a greater tendency to view conflict as a natural part of human interaction, to insist on "getting down to business" with little regard for the niceties. Making statements or unfiltered observations, asking direct questions, tabling demands and even attempting to rush decisions, are often the norm, with the participants ever-vigilant about the cost of their own and their lawyer's time. Direct communications and eye-contact among disputants is generally considered appropriate, affords an opportunity to the parties to be heard and their comments validated. However, David W. Augsburger, in *Conflict Mediation Across Cultures: Pathways and Patterns*, (1992) writes that collectivists may find this direct approach, which joint sessions promote, to be uncomfortable, or even a loss of face. I have observed this and have quickly shifted my approach accordingly. If you know in advance that this is an issue, you may wish to alert the mediator of it in a pre-mediation telephone conference.

Recently, I experienced a situation where the plaintiff, an older Iranian woman, who purchased a house felt that the young, white male defendant who sold the house to her and her husband was so disrespectful when she attended his deposition, that at first she even refused to enter my office unless she could be assured that he would have no direct contact with her. I ascertained that the defendant had testified at his deposition that plaintiff's complaints "reminded me of my mother". It was immediately clear that dealing

with this perceived insult required thoughtful consideration of the cultural, gender and age diversity issues. I suggested to the defendant that he consider apologizing for the comment. With counsels' permission, I met alone with the plaintiff and defendant. In private, she rebuked him saying, "If you had any respect for you mother, you would not have sold us a house in that condition". With his apology.....and some money, the case settled. Apparently, my emphatically-stated respect for *my* Jewish mother didn't hurt, either!

Differences in Negotiating Technique

Usually, mediation among so-called individualists follows a pre-determined model. It starts with fact gathering, moves to issue clarification and then to needs and interests identification, ending with the generation and selection of options. How the options will affect the individual parties is usually most important issue. Among so-called collectivists, however a different model is often preferred. Augsburger describes it as more relationship-oriented, with time initially spent establishing a basis of trust in the mediator and each other upon which to build negotiations. Hypothetical issues may be raised which approximate those in the dispute. They may be tentatively resolved, to be later revisited as part of a more comprehensive agreement. In one case which came me, a Chinese litigant was accused of trying to "renegotiate" issues that were believed to have been resolved but which she was really only "thinking about" as a possible concession in the larger picture. Many people from Middle-Eastern and other cultures, less accustomed to the Anglo-American preference for written agreements, establishing relationships, do business on a handshake. The vagaries of such deals may even have brought about the dispute. The subtleties or what we might call the "fine print" may have been ignored or overlooked so that when disputes arise, the mediator and counsel should look for other signs, and reactions to stated positions to ascertain whether they are acknowledged and perceived as credible. No-one should immediately assume that "bad faith" tactics were employed in making the original deal or are being employed to taint the "new" deal.

The Impact of Custom and Tradition on Decision-making

Simple as it sounds, in some cultures, decision-making takes time and follows tradition. In parts of Asia, having tea or a light meal with an adversary shows courtesy and helps build trust. During my mediations I always serve food, having first ascertained whether any of the parties have dietary constraints. Another cultural consideration involves people with a consensus-based or familial attitude to negotiating. They will frequently seek the guidance and blessing of a patriarch, matriarch or older sibling before making a decision. Latino families, whose members are often very close-knit, with multi-generational members sometimes living together or owning and operating a business together, may enter the mediation knowing that there are "second tier" players, whether at the table or not who may need to be consulted. Individualist negotiators, wanting a quick "yes" or "no" response should not view this as a delaying tactic but rather as proper, orderly and respectful. To avoid derailing the process, the culturally sensitive mediator should encourage counsel and the parties to exercise patience, recognizing that more than one mediation session may be necessary to achieve a balanced result.

Conclusion

To be successful, the mediation model of the United States and other individualist cultures must be modified to accommodate the diverse backgrounds of disputants. Mediators and lawyers must identify and address their own cultural and gender perceptions, at the same time counseling parties not to be judgmental or stereotypical in order to avoid creating barriers, and thereby foster the credibility and trust that is necessary for successful mediation.

I highly recommend lawyers and mediators to visit www.implicit.harvard.edu to review Harvard University's collaborative research on bias and take a fascinating self-evaluation test designed to encourage thoughts and feelings that exist outside our conscious awareness or control, but much of which I have seen influence the approach to mediation.

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