

RECOGNIZING AND VALIDATING DIVERSITY IN MEDIATION

By Malcolm Sher

I am a foreign born, (Zimbabwe) and educated (England) lawyer who practiced in the U.K and California for forty years, before becoming a full time mediator some years ago. I am also a white male.

In fifty percent or more of my mediations, some, often all of the parties were born, raised, educated or lived, 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 mediative process to learn about and validate them in order to creatively shape solutions to disputes.

The opinions, observations and examples in this article are just that. They are based on years of experience here and abroad. They are not intended to stereotype or characterize every individual within any group described.

Choosing mediators, who understand that people's different backgrounds influence the way they understand rights and obligations, evaluate facts and make deals is 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 the U.K. and the United States and traveling widely in Europe, China and elsewhere has been pivotal in raising my own consciousness and awareness of important "multi-dimensional" or cultural differences. Even observing how trust and respect was engendered by tribal elders settling disputes under the African sun, has I hope influenced, approach to mediation.

Dutch psychologist, Geert Hofstede in *Culture and Organizations: Software of the Mind* 50-51 (rev. ed. 1997) talks of people from North America, 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, he believes "collectivists" predominate in much of the rest of Africa, 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 and solidarity based on a sense of communal duty and responsibility.

On entering the mediation room, usually the formal setting of 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, or 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 disputants from the Middle East, Asia, India, parts of Africa or South and Central America, unless they have lived in this country for many years and are assimilated into this culture. Instead, there is greater formality. As one example, Japanese, Thais and Indians may be expected to bow, "wai" (a prayer-like gesture with the hands together in front and head slightly bowed) or make similar greetings. Touching may be frowned upon. Business cards are offered and accepted with two hands, carefully scrutinized but never written on. In Arabic culture, crossing one's legs so that the soiled soles of one's shoes are exposed may be taken as a sign of disrespect. Sikh men may arrive in traditional dress with turbans and even carrying daggers, as I observed in a recent mediation. The food, which I provide at all mediations, was strictly vegan on that occasion.

Mediators and lawyers representing parties would do well to inquire what formalities may be expected or deserved, especially in business, commercial partnership and sometimes even in family law mediations. A perceived failure to act appropriately by both may be seen as disrespectful, shutting down negotiations before they have even 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. "Grandstanding" or unfiltered observations, asking direct questions, tabling demands or 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, according to David W. Augsburger, in *Conflict Mediation Across Cultures: Pathways and Patterns*, (1992), collectivists may find this direct approach to be uncomfortable, even offensive, especially in joint sessions. As an "improvisational" mediator, I attempt to learn as much as possible about parties' styles in pre-mediation telephone conversations and shift my approach accordingly, always remaining flexible to the parties' wishes.

In one mediation, plaintiff, an older Persian woman and the buyer of a home, felt that the young, white male defendant-seller was disrespectful when, at his deposition, which she attended, he had testified that her complaints "reminded me of my mother". At mediation, she initially refused to have any direct contact with him. It was clear that dealing with this perceived insult required a thoughtful approach to the diversity in culture, gender and age. 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. I like to think that my emphatically stated respect for *my* Jewish mother didn't hurt, either!

Many people from Middle-Eastern and other cultures, less accustomed to the Anglo-American preference for written agreements, often do business on a handshake. The vagaries of such deals may even have brought about the current dispute. The subtleties or what we might call the “fine print” may have been ignored or overlooked so that when disputes arise, even trying to figure out what the deal was becomes challenging.

Usually, negotiation at mediation among most so-called “individualists” follows a pre-determined model. Starting with fact gathering, it moves to issue clarification and then to identifying needs and interests, hopefully ending with the generation and selection of options. How the options will affect the individual parties is usually the most important issue. Among “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. Having tea or a light meal with an adversary is often customary, shows courtesy and helps build trust. Accordingly, during my mediations I always serve food, having first ascertained whether any of the parties have dietary constraints.

Simple as it sounds, negotiation is truly a dance and the mediation is not over until a compromise is reached or someone stops the music. In many cultures, decision-making takes time and often follows tradition. For example, hypothetical issues may be raised which approximate those in the dispute. These issues may appear resolved, only to be later revisited as part of a more comprehensive agreement once “real” facts are revealed and considered. In a memorable mediation, a Chinese litigant was accused of trying to “re-negotiate” issues that everyone, including her lawyer, assumed to have been settled earlier in the day, but which she was only “thinking about” as possible concessions in the larger picture. When this happens, no one should immediately assume that “bad faith” tactics are being employed to taint the negotiations.

Consideration must also be given to people with a consensus-based or familial attitude to negotiating. They will frequently seek the guidance and blessing of a patriarch, matriarch, uncle or older sibling before making a decision. Close-knit Latino families, often with multi-generational members living together or owning and operating a business together, may enter the mediation knowing that there are other stakeholders, “second tier” players who might not be at the table but need to be consulted. Anyone anticipating 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. In a recent mediation with an Iranian and an Afghani, we used Skype in private caucus to talk to and consult with an older brother abroad before the deal was finally made.

To be successful, the mediation model of the United States and other individualist cultures must often be modified to accommodate the diverse cultural backgrounds of disputants. Like diplomats, mediators need not be of the same race, religion or culture as the disputants or their advisors. Indeed, I believe that to sometimes be counter-

productive. Rather, both must identify and address their own cultural and gender perceptions, be curious about the other's and discourage attitudes that are judgmental or stereotypical, in order to avoid creating barriers, and instead foster the credibility and trust that is necessary for successful mediation.

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