

# Windows on Diversity: Lawyers, Culture, and Mediation Practice

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*This article explores connections among culture, lawyering, and mediation. Starting from a broad definition of culture, the authors illustrate ways that cultural competence is important to mediation practice and process design. They suggest that awareness of legal culture is an important facet of mediator competence because of the pervasive influence of legal ways of thinking in mediation process design and implementation.*

In the past twenty-five years, community and government-initiated alternative dispute resolution programs have become available to many who might otherwise find themselves in litigation. Mediation counters the image of the remote and mysterious court, offering informality; freedom from rules of evidence and procedure; and a chance for a more direct, human experience of dispute resolution. It has been promoted as a process that provides justice more quickly and efficiently than courts, giving parties a voice in outcomes that affect them, and leading to more satisfying and durable resolutions.

But mediation can only fulfill this promise if it is adaptable and flexible enough to function well for people from a range of cultural backgrounds. For mediation programs to pass this “diversity test,” several factors are important. First, mediation processes themselves must reflect a range of values about how disputes are named, understood, and addressed. Second, mediators in both court-attached and private settings need to be trained in and apply cultural competence to their work. It helps, symbolically and practically, if mediators also reflect the multifaceted demographics of their

neighborhoods, including racial, ethnic, linguistic, religious, socioeconomic, and other identity cleavages. Third, the influence of legal culture on mediation processes and mediator behavior should be investigated, since its pervasive influence affects process design, mediator behavior, and the inclusiveness of mediation processes.

Culture is inadequately considered in much mediation training, mediation process design, and intervention because it is complex and multidimensional. Realizing that taxonomies won't do and that addressing culture often arouses tension, discouragement, or resistance in training participants, trainers tend to give culture short shrift or to compartmentalize it in modules that fail to address its being interwoven by nature with disputes and dispute resolution. Mediation training and process design initiatives that incorporate broad understandings of culture help participants develop cultural competence and ultimately contribute to a more accessible dispute resolution field.

### Connections Between Culture and Disputing

Culture is what everyone in a group knows that those outside the group do not know. Culture relates to the symbolic aspects of our lives, those places where we are constantly making meaning and composing our identities. All of us have multicultural identities in the sense that we belong to various groups connected by generation, socioeconomic class, race, sexual orientation, ability and disability, political and religious affiliation, language, gender, and discipline or work role.

Messages about disputes are part of the cultural common sense that we carry into the world, often outside our conscious awareness. These messages shape what we call disputes, how we think of and relate to them, whether and how we address them, and the range of acceptable outcomes.

Since naming disputes is a cultural act, deciding how to frame and respond to them is also completely bound up with culture. Variables relating to timing and setting interrelate with communication preferences involving such things as formality or informality, directness or indirectness, and specificity or diffuseness. Party identification is also a cultural question, as those from more individualist settings tend to identify fewer parties, seeing people as autonomous and independent, while those from more collectivist settings may define parties more widely, seeing themselves as part of a network of interdependent circles.

## Cultural Competence

Given the complexity and interwoven nature of cultural aspects of disputing, how can cultural competence be developed? Cultural competence does not mean having an encyclopedic knowledge of myriad cultural groups to apply in specific circumstances. It does mean familiarity with culture as a powerful underground river that shapes expectations, understandings, and actions in mediation.

To cultivate this familiarity as a resource for process design and practice, practitioners are well advised to start with themselves. Unless mediators are aware of the cultural lenses through which they look, they will make process decisions that in effect filter out ways of making meaning that are off their cultural radar screens.

Mediators can begin the process of developing cultural competence by surveying their own starting points and currencies. Starting points are those places where it feels natural to begin, while currencies are those things that are valued. If a mediator's cultural starting points are shared with those of disputants, then the mediation process may proceed smoothly. If they are not shared (as is often the case in a multicultural society), the mediation process may not serve disputants as well. For example, early in a family mediation session about parenting plans postdivorce for a Chinese immigrant family, one party suggested that their child be sent to live with his grandmother in Hong Kong. The mediator, listening from an individualist starting point, listed this suggestion as an option, and continued talking with the parents about their lifestyles, daily schedules, child care arrangements, and relationships with the child. Only later in the session did it become clear to the mediator that the collectivist starting point of the family led to the view that parenting could be done as well, by the child's grandparent as by the parents, or better. The mediator's values about preserving the nuclear family and frequent contact with both parents were different from the parents' values of facilitating care giving by an available family member while both parents worked full-time. If this mediator had been aware of cultural starting points—hers and the parents'—she might have recognized that they led to different understandings of the family's and children's needs and helped effect a less circuitous resolution. Awareness of cultural starting points is an important part of cultural competence.

Culturally competent mediators and process designers take culture into account by noticing how their cultural starting points open some paths and process choices and foreclose others. They cultivate flexibility, adaptability,

and comfort with ambiguity as they engage with parties. They encourage everyone involved to view mediation as an educational experience, a chance to learn about different cultural starting points and how they influence communication patterns and the course of disputes. As a spirit of inquiry infuses mediation processes, they are more likely to be sites of change and improved relationships.

### Cultural Competence and Mediation Training

Developing cultural competence is an ongoing process, never fully achieved because of constant change. Training programs and courses in mediation can help mediators develop cultural competence by treating culture as an integrated element of mediation process design and practice, rather than a module or a stand-alone topic.

Howard Gadlin, ombudsperson at the National Institutes of Health in Washington, D.C., has developed a series of questions for himself and members of his staff that help them consider how identity differences may affect their work as third parties. These questions canvass the effects of different starting points on perceptions and interpretations. They include asking “How do my own various identities (race, gender, sexual orientation, class, etc.) affect the way I interpret the experiences of people who are like me, [and] not like me? How can I make myself aware of the ways in which these various identities affect my understanding of my role and what, if anything should/could I do to limit these effects (or expand my awareness so that I am not limited by them)?” Building on this awareness, Gadlin and his staff also explore whether and how to surface and deal with issues relating to difference in specific interventions (Gadlin, 2003). Practical questions like these are useful practical additions to mediation training programs, since they raise awareness and help mediators dialogue internally and with colleagues about navigating cultural differences.

As cultural awareness is developed, training participants can reflect more deeply on their mediation practices through considering real or constructed case examples. For example, in a scenario where face saving is a primary focus for disputants, training participants can explore how parties’ comfort with indirect communication could be accommodated. In a dispute where cultural styles of communication shape stories into spirals for some and linear progressions for others, training participants can dialogue with trainers and each other about ways to adapt their processes to avoid favoring the linear storyteller.

Going deeper, training participants can be challenged to develop ways to respond to the range of meanings they and disputants attach to elements of mediation processes. Trainers can begin this inquiry with an exploration of embedded assumptions in dominant culture mediation processes, such as the utility of direct communication and the normalcy of action-oriented lifestyles, individual initiative, and self-reliance. After several assumptions have been uncovered, training participants can consider a range of cultural contexts and how these unnamed assumptions might function to promote a sense of comfort or discomfort for parties. They can then consider how flexibility, comfort with ambiguity, and creativity can contribute to culturally competent mediation practice and design.

In a recent training, the assumption that mediation agreements should be in writing and signed by both parties was uncovered by a director of mediation services in a primarily African American neighborhood. He explained that parties in his center frequently objected to written agreements following mediated settlements. For many of the disputants, the requirement to put terms in writing and obtain signatures sent a message that their word was not enough and that the mediator and other party believed they could not be trusted. This negative inference seemed to become a self-fulfilling prophecy in several instances, fueled by a sense that there was nothing to live up to if those involved did not believe in the person's trustworthiness. At the same time, issues of durability and enforceability arose when no written record of settlements was kept. The director of this center examined his and his mediators' starting points influenced by legal and professional culture; he decided to resolve his dilemma in the direction of flexibility, making the requirement for formal, written mediation agreements optional.

When this kind of example is shared, it helps participants in mediation training programs consider their hidden assumptions, and how their ways of conducting mediation might serve or alienate a broad range of clients. As the example illustrates, the expectations and assumptions flowing from mediations conducted in the shadow of the law are not always in harmony with local ways of doing things. Exploring cultural competence by considering the orientations and assumptions of legal culture is important because of the pervasive influence of lawyers and the law in mediation, and useful because it is less threatening than examining some other aspects of identity.

Situating explorations of legal culture as an entrée to broader examinations of culture and cultural competence has several practical benefits.

Most mediation training participants are familiar with legal culture, so it does not need a lot of background explanation. Since many mediations are actually conducted in courthouses, the tangible influence of the law on the climate of mediation can hardly be refuted. Unlike many approaches to culture in mediation training, using legal culture as a way into culture is fast, understandable, easily accepted as important, and less likely to generate resistance.

Trainers can introduce this topic by eliciting several attributes of legal culture, continue by listing problems many clients may have with those attributes, and complete the discussion by exploring assumptions that mediators who are influenced by legal culture have about clients and mediation processes. As training participants develop understandings of legal culture and its implications for mediation practice, they get a concrete experience of building cultural competence. From this foundation, they can begin to develop competence with starting points relating to multiple identities.

### Legal Culture and Mediator Awareness

Legal culture is an important influence on mediation for at least four reasons. The most obvious one is that many mediators are lawyers, and their cultural mode of being and behaving is shaped in multiple ways by their training in law and their association with other legal professionals. Second, most mediation is conducted in the shadow of the law, whether or not it is carried out in a court-attached program. Parties may or may not have legal representation, and counsel may or may not be present in mediations, but the law remains an important touchstone and yardstick for shaping issues and communication during mediation, as well as for measuring options and outcomes. Third, mediation as a practice arose in part from dissatisfaction with lengthy and complicated legal processes and the aspects of legal culture associated with the depersonalization and dichotomous analysis of disputes. Like a child who vows not to repeat the errors of her parent, mediation and mediators are shaped by their resolve to offer alternatives to traditional legal processes. So long as law and legal culture are reference points, even if in defining what mediation is not, they have a powerful impact on mediation processes and mediator behavior. Finally, since mediators are frequently lawyers or familiar with legal culture and their clients often are not, legal culture may operate to exclude or alienate people in ways outside mediators' awareness.

It is useful to identify some of the starting points and currencies conveyed to lawyers in training, and to notice which worlds these bring into view and which worlds they hide from awareness (Adler and Birkhoff, 2002; Lang, 1993). Law students exist largely in a world of the mind. They are taught logical analysis, familiarity with technical words and documents, and the importance of rules. Precedents, or decisions interpreting laws, afford some certainty by giving indications of how rules will apply in the future.<sup>1</sup> Written words are highly valued, whether in contracts, legislation, or regulations. Advocacy and skills of partisan argument are honed, to be exercised on behalf of clients to enforce their rights and protect their interests.

Law students are trained to approach problems deductively, with precision and attention to detail. They pay attention to “the facts” as they relate to rules and laws, and to solutions to problems. Placing facts and events in sequential order is essential to highly valued clarity. Maximizing client gains and winning arguments is an accepted value, and good lawyering in the competitive arena of the court brings the values of clarity and effective advocacy together.

Lawyers who act as mediators or representatives in mediation cannot avoid being influenced by these ways of paying attention and approaching problems, even if they have never engaged in adversarial practice. Which worlds do these habits of attention reveal, and which are they likely to obscure? Reflecting the influence of dominant culture values on legal training, lawyers tend to be oriented to individualist perspectives, expecting clients and others to act in autonomous, self-interested ways. They are at home in the mind, comfortable with logical analysis and direct communication, and trained to dissect the facts. They easily see flaws in arguments, inconsistencies in stories, and ambiguous interpretations. Lawyers care about fairness and justice, even as they acknowledge that these ideals are not always attained. They get satisfaction from solving problems, so they pay attention to practical possibilities and achieving closure.

These ways of paying attention are not positive or negative, good or bad. The strengths of legal orientations are important and helpful in addressing many conflictual issues. We live in a society where laws regulate every facet of our lives, whether or not we are aware of it. Understanding, translating, and working within legal frameworks is therefore an important part of resolving disputes. Analysis and problem solving are useful, and far superior to violent or other escalatory cycles of addressing disputes. At the same time, these approaches translate disputes from “raw, lay forms and

descriptions, into legal categories . . . encod[ing] and rework[ing them] to fit the traditions and habits of internal legal culture. . . . In the process, the dispute itself has been subtly or not so subtly altered” (Friedman, 1989, p. 21). When the influence of legal culture in mediation shapes and alters disputes in ways that exclude important aspects of worldviews, context, relationships, or the full range of human experiences, mediation becomes a venue that reproduces some of the limitations ADR was designed to address.

Scholars have argued that lawyer mediators should adopt a deliberative approach to mediation, eschewing rudeness, preoccupation with rules over relationships, and rugged individuality (Nolan-Haley, 1997–98). Mediation, they maintain, is an opportunity for lawyers to “recognize and honor the missing human dignity” in current versions of legal practice (Nolan-Haley, 1997–98, p. 1371). Although this is a laudatory goal and one with which we would agree, achieving it means developing awareness of the deep cultural underpinnings of law and legal practice, not just deciding to orient our practices toward client-centered goals and civility.

From a legal frame, the wisdom of old stories and oral traditions, insights of lay people, nuggets in proverbs, local knowledge not subjected to the rigors of scientific “proof,” and spirituality may be seen as marginal or less important. Emotions may be seen as clouding judgment, and thus attempts are made to screen them out and extract them from the picture (Vanderkool and Pearson, 1983; Emery, 1995).<sup>2</sup>

What lawyers are not taught from their first day in law school is that different logics and ways of meaning making exist in the world. These worldviews, when they proceed from currencies and starting points divergent from those enshrined in laws, tend to be discounted, marginalized, and ignored. Whether or not a wider variety of cultural reference points are eventually introduced into our laws and legal systems, mediation is a venue where it is at least theoretically possible to welcome divergent ways of being in and seeing the world.

Culturally competent mediators make room for various starting points, recognizing the need to translate worldviews and currencies back and forth among parties who may have conflated cultural differences with bad intentions or character flaws. They recognize that legal culture as it influences mediation may filter out some elements essential to satisfying processes and durable outcomes—for example, holistic ways of approaching problems drawing on emotional, imaginative, and spiritual ways of knowing. Recognizing these invisible but powerful filters, mediators, lawyer representatives, and parties are free to access intuitive, creative resources and



emotional intelligence in their work. Cultural competence operates like a mirror, a way to look behind to see what else might be integrated into disputes and attempts at resolution.

If legal analysis of problems and disputes is one of several lenses offered, clients can take the whole picture into view: their context and the other party's context, the relational interests of whole families and communities rather than individual interests, and the cultural common sense everyone brings. They can consider ethical and moral questions of responsibility; spiritual and religious perspectives on right action and right relationship; and the place of forbearance, forgiveness, reconciliation, and healing in the big picture of their lives (Coogler, Weber, and McKenry, 1979).

As cultural awareness infuses mediation process design and practice, the promise of mediation comes within reach. More than a place where problems can be resolved with more speed and efficiency than in a court, mediation offers the ground on which the ideals of a multicultural society can be translated into reality. Mediation is no substitute for efforts to address the systemic inequities and injustices that must be ameliorated if fairness and justice are to be part of our multicultural mosaics. But it can be a space in which people from diverse cultural and worldview perspectives find scope to be themselves, to unravel disputes in ways that make sense to them with the assistance of culturally competent third parties. Even as mediation is conducted in the shadow of the law, it can be practiced in ways that hearken back to the civility and humanity that is part of common law tradition. Cultural competence in process design and practice helps make mediation a welcoming process marked by flexibility, inquiry, sensitivity, and the awareness that in contemporary multicultural society one size does not fit all.<sup>3</sup>

## Notes

1. The system of precedent operates in common law jurisdictions existing across North America, with the exception of the Canadian province of Quebec, where civil law relies on interpretation of legal principles more than precedent.

2. Although this is not true for all lawyers or lawyer mediators, the perspective that says "mediation is not therapy" may lead to emotional issues being ignored or inadequately addressed.

3. The limiting influence of laws and legal culture on exploring a range of possibilities in disputes was identified in the early days of divorce mediation practice.

## References

Adler, P. S., and Birkhoff, J. E. *Building Trust: When Knowledge from "Here" Meets Knowledge from "Away."* Portland, Oreg.: Policy Consensus Center, 2002.

- Coogler, O. J., Weber, R. E., and McKenry, P. C. "Divorce Mediation: A Means of Facilitating Divorce and Adjustment." *Family Coordinator*, Apr. 1979, 28 (2), 255–259.
- Emery, R. E. "Divorce Mediation: Negotiating Agreements and Renegotiating Relationships." *Family Relations*, Oct. 1995, 44 (4), 377–383.
- Friedman, L. "Litigation and Society." *Annual Review of Sociology*, 1989, 15, 17–29.
- Gadlin, H. "Cross Cultural Issues in ADR." Paper presented at the Association of American Law Schools Annual Meeting Workshop on Dispute Resolution: Raising the Bar and Enlarging the Canon, Washington, D.C., Jan. 2–5, 2003.
- Lang, W. "A Professional's View." In G. O. Faure and J. Z. Rubin (eds.), *Culture and Negotiations*. Thousand Oaks, Calif.: Sage, 1993.
- Nolan-Haley, J. M. "Lawyers, Clients, and Mediation." *Notre Dame Law Review*, 1997–98, 73, 1369–1390.
- Vanderkool, L., and Pearson, J. "Mediating Divorce Disputes: Mediator Behaviors, Styles and Roles." *Family Relations*, Oct. 1983, 32 (4), 557–566.

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