Florida Mediation Institute

Volume IX

Cultural Issues in Mediation: A Practical Guide to Individualist and Collectivist Paradigms

By Walter Wright

I. Cultural Differences between Individualists and Collectivists.

A. *Introduction*.

Every mediation has a unique character influenced by the cultural perspectives of its participants. Differences in perspectives may impede an agreement if the participants' views diverge on such fundamental issues as individual autonomy and group interdependence. When issues based on individual rights or strong group identification arise in a mediation, a mediator's awareness of individualist and collectivist paradigms can help surmount such cultural barriers to an agreement. Familiarity with the paradigms may be helpful because mediation models in the United States are based upon individualist cultural assumptions that group-oriented, or collectivist, participants in a mediation may not share.

B. *Attributes of individualists and collectivists*.

1. Individualism and individualists.

Individualism is a social pattern that places the highest value on the interests of the individual. Individualists view themselves as independent and only loosely connected to the groups of which they are a part. When establishing the level of their commitment to others, individualists balance the advantages and disadvantages of cultivating and maintaining a relationship; the level of commitment generally corresponds to the level of perceived benefit. Personal preferences, needs, rights and goals are individualists' primary concerns, and they tend to place a high value on personal freedom and achievement. Self-reliance and competitiveness are common individualist traits. When personal goals conflict with group goals, individualists tend to give priority to their personal goals.[1]

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2. *Collectivism and collectivists.*

Collectivism is a social pattern that places the highest value on the interests of the group. Collectivists view themselves as interdependent and closely linked to one or more groups. They often are willing to maintain a commitment to a group even when their obligations to the group are personally disadvantageous. Norms, obligations and duties to groups are collectivists' primary concerns, and they tend to place a high value on group harmony and solidarity. Respectfulness and cooperation are common collectivist traits. When personal goals conflict with group norms, collectivists tend to conform to group norms.[2]

C. *Factors affecting individualist and collectivist behavior.*

1. *Socialization.*

While all people manifest individualist and collectivist characteristics in varying degrees, the extent to which they exhibit one set of traits more than another usually depends upon their socialization. All children begin their lives in a collectivist context, dependent on their parents and any other adults who rear them. In individualist societies, however, children often are encouraged to identify personal preferences and to pursue personal goals and achievements. As a consequence, they begin to establish separate identities from their parents and other caregivers. With the passage of time, such children's pursuit of personal ends can create conflicts between their goals and the norms of their caregivers. In an individualist society, the pursuit of personal goals that conflict with family norms may be acceptable, even expected. Children's successful cultivation of separate identities leads to a degree of detachment from their families by the time they are adults. Detachment from families often establishes a similar pattern of detachment from other ingroups, such as employers, religious groups and civic organizations.[3] In contrast, when children of collectivist societies exhibit individualist tendencies, those tendencies frequently are discouraged. Compliance with group expectations and norms is praised. As a consequence, many children of collectivist societies learn to conform and to identify closely with their ingroups. As adults, they have strongly interdependent relationships with their families and other ingroups.[4]

2. *Demographic factors.*

Generally speaking, adults tend to become more collectivist as they age, the affluent are more individualist than the poor, and women have more collectivist tendencies than do men. Those whose occupations emphasize team work generally are more collectivist in their working environments than those whose occupations emphasize individual initiative and accomplishment. Education, travel and living abroad tend to expose people to diverse ideas, thereby increasing their individualism.[5]

3. *Context.*

Whether people behave as individualists or collectivists also depends on context. For example, collectivists emphasize harmony and cooperation with members of their ingroups. Because interdependence is not a factor when dealing with members of outgroups, however, collectivists may adopt competitive attitudes toward them.[6] Similarly, in individualist societies, adults may exhibit competitive traits in business and employment relationships but extend deference and respect to their parents.[7]

D. *Geographic distribution of individualists and collectivists.*

Every country contains both individualists and collectivists, but most countries have a preponderance of one cultural type or the other. Dutch psychologist Geert Hofstede's survey of cultural differences in over fifty countries found that individualists predominate in the United States, Canada, Australia, New Zealand, Israel, South Africa and most of the countries of Northern and Western Europe.[8] Collectivists are predominant in most of the rest of the world.[9] Because examples of both types may be found in every country, however, one must remember that generalizations about the individualist or collectivist nature of a country are based on a statistical tendency that does not apply to every person within its physical boundaries.[10]

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II. Applications of Individualist and Collectivist Paradigms in the Mediation Context.

A. *Individualist nature of United States mediation models.*

The Hofstede study found the United States to be the most individualist country surveyed.[11] It is not surprising, therefore, that mediation models in the United States are based on individualist cultural assumptions about conflict and how it should be resolved.[12] Mediators in the United States should become familiar with those assumptions and recognize the ways in which collectivists' assumptions may differ. In some instances, mediators may find it necessary to adjust their models in order to accommodate collectivists' discomfort with certain of the models' individualist aspects.

B. *Participation of disputants in the mediation process.*

1. *Contrasting views of the nature of conflict.*

Individualists tend to view conflict as a natural part of human interaction. For example, one of the leading United States books on conflict resolution systems design holds that "(d)isputes are inevitable when people with different interests deal with each other regularly."[13] In *Getting to Yes*, the classic text on principled negotiation, the authors describe conflict as a "growth industry."[14] The Texas author of an authoritative mediation textbook notes that while conflict often has a negative connotation, in some cases it can be positive, "an exciting and inspiring experience,"[15] and it "is at the root of personal and social change."[16] Collectivists, on the other hand, tend to view conflict as an aberration, at least where ingroup relationships are concerned. For example, a survey of Korean-Americans found that the respondents viewed conflict as a "shameful inability to maintain harmonious relationships with others."[17] The Japanese, for their part, "abhor direct personal confrontation and, to avoid it, almost always operate by consensus."[18] Among collectivists, avoidance is a common, often preferred, approach to conflict.[19]

2. *Effect of perception of conflict on participation in mediation.*

Under most circumstances in the United States, attendance at a mediation session is at least a tacit admission that a dispute exists.

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Given their view of conflict as a natural phenomenon, individualists generally are able to acknowledge conflict and participate in a mediation without experiencing shame.[20] For collectivists, however, even a tacit acknowledgement of conflict could cause a loss of face,[21] and participation in a typical mediation in the United States might be an unwelcome experience. Collectivists might refuse to participate in voluntary mediation, and if mandatory, might resist orders to mediate. If mediation is unavoidable, they might exhibit signs of anxiety and confusion during the process. Collectivists' resistance to mediation, as it is practiced in the United States, is likely to be most pronounced when the other disputants are current or former ingroup members or persons with whom the collectivists wish to maintain or re-establish relationships. Resistance to mediation is likely to be less intense when the other disputants are outgroup members or former ingroup members with whom the collectivists no longer wish to maintain relationships. If mediators in the United States detect resistance to participation in mediation from persons exhibiting collectivist behavioral patterns, the mediators can offer modifications in their mediation formats. Some tactics to encourage collectivists' participation in the mediation process are described below.

C. *Preferences and expectations about mediators.*

1. *Types of mediators preferred.*

Individualists tend to prefer professional mediators who have specialized training in mediation procedures. In an individualist context, the mediator usually is expected to be impartial, with no undisclosed relationship to any disputant.[22] Among collectivists, there tends to be less of a concern about professional credentials and impartiality, but more of a concern that the mediator be an insider, someone who knows the parties or at least the context of their dispute.[23] In a mediation in the United States involving a collectivist, the mediator rarely will know the disputants or have a thorough understanding of the collectivist's insider and outsider relationships. If it appears to the mediator that specialized knowledge of a disputant's social context would be useful, the mediator should consider referring the dispute to another mediator who has the specialized knowledge or asking that mediator to serve as a co-mediator.

2. *Expectations of mediators.*

In the United States, there seems to be less consensus today than in the past about mediators' proper roles. Traditional descriptions depict mediators as facilitators of communication, negotiation and decision making.[24] Some mediators argue, however, that their roles include the evaluation of the merits of disputants' claims and the proposal of resolutions.[25] Among collectivists, there is a tendency to prefer evaluative mediators who are familiar with the context of the parties' dispute and who can suggest resolutions that will restore harmony both to the disputants and their relevant ingroups.[26] In order to avoid conflicting expectations among mediators and disputants, mediators should disclose their perceptions of proper mediator roles and attempt to ensure the disputants' understanding of and agreement to those roles. If agreement on such basic matters cannot be secured, it may be best to allow the disputants to find another mediator or choose another dispute resolution process.

D. *Participants in mediations.* Individualists tend to view the parties to a dispute as those who are directly involved in it. As a result, they may consider a relatively small number of people to be the appropriate participants in a mediation session.[27] Collectivists, on the other hand, may view members of their ingroup who are not directly involved as parties to a dispute. As a consequence, collectivists may believe that a relatively large number of people, or at least a respected member of an ingroup, should participate in a mediation session.[28] Mediators in the United States, who often have an individualist perspective of the relevant parties to a dispute, should avoid the automatic exclusion from their mediation sessions of all persons who are not directly involved. Rather, they should ask the disputants to identify those who are likely to attend the sessions and the reasons for each person's attendance. Careful inquiry could indicate that some participants, though not directly involved in the dispute, are to be important advisors and participants in negotiation and decision making.

E. *Formality and informality in mediation.*

While a typical mediation in the United States takes place indoors and often in a formal office setting, mediators tend to deal informally with the disputants, often calling them by their first names.[29]

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In collectivist societies, on the other hand, outdoor and informal indoor mediation settings are common, but the use of first names among strangers or persons of unequal status is not.[30] Mediation, as practiced in the United States, certainly is less formal than litigation, but people from collectivist societies may be intimidated by formal office settings. Collectivists also may insist upon using titles when addressing mediators and other mediation participants, while expecting similar manifestations of respect in return. Possible accommodations to collectivists could include informal office settings, non-office mediation venues and the use of last names and appropriate titles for everyone throughout the mediation session.

F. *Face-to-face dealings vs. shuttle diplomacy*.
Most mediations in the United States begin with the mediator and the disputants in the same room, often seated at the same table. After the mediator explains the ground rules, the disputants have the opportunity to explain the basis of the dispute to each other from their personal perspectives. Direct communication among the disputants generally is considered appropriate, as it provides each disputant with an opportunity to be heard and aids the mediator in the tasks of interest identification and issue clarification. Sometimes, especially at the community mediation level, disputants resolve their issues without a single private meeting between the mediator and one of the parties.[31] On the other hand, collectivists who prefer conflict avoidance strategies may find the direct approach of an initial joint session uncomfortable, or even a loss of face. In collectivist societies, it is more common for a mediation to commence with private meetings between the mediator and one party. The mediator acts as a shuttle diplomat carrying information and settlement ideas from one party to the other. Once the general outline of an agreement is reached, the disputants may agree to meet in order to negotiate the finer details.[32] In the United States, when a disputant prone to collectivist behavior is involved in a mediation, the mediator may want to adopt a shuttle-diplomat approach to meetings between the parties.

G. *Differences in negotiation patterns*.
1. *Individualist patterns.*

Mediation models in the United States are strongly influenced by individualist negotiation patterns, which tend to be direct, linear and task-oriented. In a typical mediation, an initial fact-gathering stage usually is followed by interest identification and issue clarification. Next, the parties generate options. Individualists tend to be autonomous decision makers. As such, they are more concerned with how an option affects them than with how it affects others. In a successful mediation, issues are resolved, usually one at a time, and a settlement is documented in a written agreement.[33]

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The natural response of a learner or a child to differences is delighted curiosity. The common, conditioned response of adults to differences is fear and insecurity. We must help people notice and respectfully embrace differences rather than pretend not to notice them. Appreciate differences as differences, non-judgmentally.

Roberto Chené

2. *Collectivist patterns.*

Among collectivists, negotiation styles tend to be indirect, spiral and relationship-oriented. At the outset of a negotiation, considerable time may be spent establishing a relationship of trust upon which further negotiation can be based. Interests sometimes are expressed through the use of metaphors and body language and can be missed by someone unfamiliar with the relevant cultural context. Issues often are seen as interrelated, thus requiring a holistic approach to resolution. A holistic approach may lead to a spiral negotiation technique whereby issues are resolved hypothetically or tentatively and later revisited to evaluate the proposed resolutions' compatibility with a comprehensive agreement. Resolution options are considered not only on the basis of their effects on the disputants, but also in view of the likely effects on ingroups, who may need to be consulted before a final agreement is reached. Collectivists tend to be more interested in the restoration of overall harmony than in written agreements, especially where ingroup relationships are concerned.[34]

3. *Conflicting negotiation patterns in mediation.*

Individualist and collectivist participants in mediation may misunderstand each others' intentions and become frustrated with each others' negotiation styles. For example, individualists can misconstrue collectivists' preference for establishing trust before proceeding with negotiations as a delay tactic, while collectivists may perceive individualists' preference for "getting down to business" as rude and imprudent. Collectivists may be offended by individualists' frank and direct statement of demands during negotiations, while individualists may miss subtle communication signals and become frustrated with collectivists' inability to "just say yes or no." Individualists may accuse collectivists of "bad faith" when collectivists attempt to "renegotiate" issues the individualists consider resolved but the collectivists view as "under consideration" until the parties reach a comprehensive agreement. Individualists who quickly evaluate options and decide upon a course of action may not understand collectivists' more deliberate, consensus-based approach to decision making. If individualists attempt to rush a decision, collectivists may feel pressured to make an agreement without consulting appropriate ingroup members. In each of these events, an effective mediator acts as a cultural bridge between the participants by explaining to them the possible bases of their misunderstandings and encouraging them to be patient with, and nonjudgmental of, each other.

III. Conclusion.

Individualists and collectivists hold dramatically different views of themselves and their proper relationships to others. As a consequence, their approaches to conflict resolution tend to diverge in equally dramatic ways. Mediation models in the United States mirror the conflict resolution preferences of individualists. When collectivists attempt to participate in such mediation models, opportunities for misunderstanding and confusion abound. Effective mediators are aware of the cultural assumptions upon which their mediation models are based and endeavor to adjust the models in order to prevent contrasting individualist and collectivist paradigms from becoming obstacles to agreement.

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1. *See* Harry C. Triandis, Individualism and Collectivism 2, 12, 28, 34-35, 43-44 (1995); *see also* Geert Hofstede, Culture and Organizations: Software of the Mind 50-51 (rev. ed. 1997). For a brief discussion of individualism and individualists in the United States, see Edward C. Stewart & Milton J. Bennett, American Cultural Patterns: A Cross-Cultural Perspective 94-96, 110, 133-38, 142-47 (rev. ed. 1991).

2. *See* Triandis, *supra* note 1, at 2, 12, 28, 34-35, 43-44; *see also*, Hofstede, *supra* note 1, at 50-51; Brishkai Lund et al., Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project 4 (1994). For a discussion of collectivism and collectivists in Japan, see Robert C. Christopher, The Japanese Mind 38-58 (1st Tuttle Co., Inc. ed. 1987).

3. *See* Triandis, *supra* note 1, at 9, 37, 63-66. Ingroups also can be based upon friendship, political party, social class, education, race, tribe, caste and language. *Id.* at 9. "Ingroups are usually characterized by similarities among the members, and individuals have a sense of 'common fate' with members of the ingroup." *Id. See also* Stewart & Bennett, *supra* note 1, at 133.

4. *See* Triandis, *supra* note 1, at 9, 37, 63-66; *see, e.g.*, Christopher, *supra* note 2, at 61-76.

5. *See* Triandis, *supra* note 1, at 62-63, 66, 82-83, 86.

6. Id. at 9-10, 74-76, 126-28, 176-78. Outgroups are "groups with which one has something to divide, perhaps unequally, or are harmful in some way, groups that disagree on valued attributes, or groups with which one is in conflict." *Id.* at 9.

7. *Id.* at 27.

8. *See* Hofstede, supra note 1, at 53. Greece and Portugal were the dominantly collectivist exceptions in Western Europe. *Id.*

9. *Id.* The countries surveyed and found to be predominantly collectivist, in varying degrees, were Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Egypt, El Salvador, Ethiopia, Ghana, Guatemala, Hong Kong, Indonesia, India, Iran, Iraq, Jamaica, Japan, Kenya, Kuwait, Lebanon, Libya, Malaysia, Mexico, Nigeria, Pakistan, Panama, Peru, Philippines, Portugal, Saudi Arabia, Sierra Leone, Singapore, South Korea, Taiwan, Tanzania, Thailand, Turkey, United Arab Emirates, Uruguay, Venezuela, Yugoslavia and Zambia. *Id.*

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10. *See* Triandis, *supra* note 1, at 5. The Amish in the United States and kibbutzim in Israel are examples of collectivist groups found in countries whose inhabitants are mostly individualists. In China, a dominantly collectivist country, there are people who advocate individualist ideals, such as free speech, at great personal risk. *Id*. at 87-89; *see also* George Wehrfritz, *Wei Jingsheng, Free at Last*, Newsweek, November 24, 1997, at 42.
11. Hofstede, *supra* note 1, at 53. On an individualism scale of zero to one hundred, the United States received the highest score, 91. *Id*.
12. *See generally*, John P. Lederach, *The Mediator's Cultural Assumptions*, Conciliation Q. (Mennonite Conciliation Svc., Akron, Pa.) Summer 1986 at 2-5, *reprinted in* Mediation and Facilitation Training Manual: Foundations and Skills for Constructive Conflict Transformation 80 (Jim Stutzman & Carolyn Schrock-Shenk eds., 3d ed. 1995); *see also* David W. Augsburger, Conflict Mediation Across Cultures: Pathways and Patterns 28-35 (1992).
13. William L. Ury et al., Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict xii (1988).
14. Roger Fisher, et al., Getting to Yes: Negotiating Agreement Without Giving In xvii (2d ed. 1991).
15. Kimberlee K. Kovach, Mediation: Principles and Practice 2-3 (1994).
16. *Id*. *See also* Diane LeResche, *Comparison of the American Mediation Process with a Korean-American Harmony Restoration Process*, 9 Mediation Q. 323, 326 (1992).
17. Diane LeResche, *supra* note 16, at 326.
18. Christopher, *supra* note 2, at 53.
19. *See* Triandis, *supra* note 1, at 77, 128, 160-61; Augsburger, *supra* note 12, at 94-96; LeResche, *supra* note 16, at 326.
20. *See, e.g.*, Augsburger, *supra* note 12, at 200-05; Stewart & Bennett, *supra* note 1, at 96-99; Lederach, *supra* note 12, at 2-5.
21. *See, e.g.*, Augsburger, *supra* note 12, at 200-05; Christopher, *supra* note 2, at 53-55; Lederach, *supra* note 12, at 2-5.
22. *See, e.g.*, State B. of Tex. ADR Sect., Ethical Guidelines for Mediators No. 4 (1994); Soc'y of Prof. in Disp. Resol., Ethical Standards of Prof. Resp. No. 4 (1986); Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5.
23. Lund et al., *supra* note 2, at 6-7; Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5. *See, e.g.*, Jane Fishburne Collier, Law and Social Change in Zinacantan 169-265 (1973).
24. *See, e.g.*, Kovach, *supra* note 15, at 28-29; Barbara Ashley Phillips, Finding Common Ground: A Field Guide to Mediation 119 (1994); Melinda Smith & Scott Bradley, *What is Mediation: A Perspective from Community Mediation*, NIDR News, Apr.-June 1997, at 8.
25. *See, e.g.*, Charles Guittard, *Muscle Mediation*, Texas Lawyer, March 4, 1996 (Mediation Magazine), at 24, 27-30. For a description of "advisory mediation," see Phillips, supra note 24, at 119.
26. Lund et al., *supra* note 23, at 4-7; Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5.
27. *See, e.g.*, Stewart & Bennett, *supra* note 1, at 62-69; Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5.
28. *See, e.g.*, Augsburger, *supra* note 12, at 200-05; Stewart & Bennett, *supra* note 1, at 62-69; Christopher, supra note 2, at 53-55; Lederach, *supra* note 12, at 2-5.
29. *See* Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5. *See also*, Kovach, *supra* note 15, at 23-27.
30. *See* Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5.
31. *See, e.g.*, Kovach, *supra* note 15, at 23-27; Phillips, *supra* note 24, at 145-154; Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5.
32. Augsburger, *supra* note 12, at 94-102, 187-228; Lederach, *supra* note 12, at 2-5; *see, e.g.*, Collier, supra note 23, at 169-265.
33. *See, e.g.*, Kovach, *supra* note 15, at 23-27; Phillips, supra note 24, at 145-154; Augsburger, *supra* note 12, at 200-05; Lederach, *supra* note 12, at 2-5.
34. Augsburger, *supra* note 12, at 94-102, 187-228; Lederach, *supra* note 12, at 2-5; *see, e.g.*, Collier, supra note 23, at 169-265.

Fifteen Common Reasons Mediation Fails:

1. An inappropriate mediator has been chosen to mediate the dispute;
2. the disputants do not have a commitment to resolve the dispute;
3. mediations are ordered by the court;
4. the mediator, attorneys, or disputants fail to adequately prepare for the mediation;
5. the mediation statements, positions, and interests are not fully developed, complete, and disclosed to the mediator prior to the mediation;
6. the mediator, attorneys and the disputants fail to anticipate potential issues that may result in impasse and discuss rules or methods to address impasse before it occurs;
7. there are settlement conferences scheduled after the mediation;
8. mediation is premature in that there are outstanding discovery issues, records review, investigation, or pending motions with the court;
9. a previous offer was made by a representative and exceeds the settlement authority given to the attorney at the mediation;
10. the claimant increases the demand at the mediation;
11. in cases where there are multiple defendants, the disputants fail to consider contribution issues prior to the mediation;
12. in cases where insurance companies or other third party payors are involved, the plaintiff fails to consider and address subrogation issues before the mediation;
13. the parties present at the mediation do not have sufficient settlement authority;
14. the person or persons with settlement authority fails to attend the mediation; and
15. there is a failure to properly document a settlement in mediation.

From Avoiding Pitfalls: Common Reasons for Mediation Failure and Solutions for Success, by Jack G. Marcil and Nicholas D. Thornton;

http://www.americanjournalofmediation.com/docs/Avoiding%20Pitfalls%20-%20Common%20Reasons%20for%20Mediation%20Failure%20and%20Solutions%20for%20Success.pdf

Mediation Tips

By Kevin Thomas McIvers

Mediation is becoming so commonplace that many attorneys go through the familiar routines of the process, without really *using* mediation and the mediator fully. Posturing from extreme positions, and butting heads over money in the usual format, are not the best approach to many cases. Mediation can be used more creatively, to address your toughest problems, while getting to settlement. The key is to enlist the mediator as your ally in dealing with these issues. In other words, tell the mediator what you need and ask for help.

Every case has its unique challenges, which must be successfully addressed to achieve an acceptable outcome. They may involve a complex analysis of the facts or law, or more subtle concerns. In some cases, a temperamental client will require special handling. In others, opposing counsel may be a difficult personality, or have an unusual approach to the dispute. The client, or a key witness, may be someone who will inspire a profound reaction (sympathy or loathing) from a jury. When the case is approaching mediation, ask yourself this question: *What can the mediator do to help me address the unique challenges of this case?* Next, let the mediator know.

A common problem is one's own client. If the client is too furious, distraught, or bullheaded to follow or even hear your advice, it is tough to do your job with any hope of client satisfaction. Why not call the mediator beforehand to brainstorm about what your client needs to make a rational decision? Level with the mediator about the issue. A skilled mediator can usually find a way to ease such clients into a fruitful discussion, with your help identifying the issues. For example:

- An attorney with an obstinate client, who did not trust his attorney, took me into the hall early in a mediation. He told me to *please* not ask him to discuss the negative features of the case in caucus with his client. He would lose the client, and the client already thought he was too negative. We decided that I would be the bearer of bad news while the attorney argued the client's irrational position. He stayed in the client's good graces. The client heard the bad news from a neutral source, and settled.

- Counsel for a distraught parent of a child killed in an accident asked to speak with me before mediation. It was a very tough liability case for plaintiff, which the attorney did not want to try. His client perceived the litigation as "fighting for her son" and would not compromise. We needed a way for her to demonstrate her support for her son, other than having the attorney fight a losing battle at trial. We conceived of a monument to her son, funded by the defense, and other measures to avoid future accidents of the kind which killed her son. This was negotiated *before* butting heads over money. Case settled.

Advance communication with the mediator can also help with the substantive issues. One of several defense attorneys for a target defendant called me before a mediation to request that I coach plaintiff's counsel to emphasize *covered* claims, in the brief and joint session. I got those lawyers together by telephone to strategize, changing the focus of plaintiff's presentation. The case settled largely with insurance funds.

You may also use the mediator to structure the process in creative ways. Joint sessions can be done in many ways or bypassed, as discussed in a previous "Mediation Tips" article. Advance discussion about who should be present (or who should not) may help the mediator get the right people to the table. Private caucusing can also be adjusted to suit each case. Let the mediator know what you feel the client needs to hear or discuss, or the tone that would most effectively reach your client (or the opposing party).

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Mediator Resources

Mediate.com
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ADR Resources
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National Institute for Advanced Conflict Resolution
http://www.niacr.org/pages/mediation_resources.htm

Mediation Resource Center
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Mediation Center
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If your main difficulty in a case is the obstructive opposing attorney, tell the mediator and strategize about how best to handle interaction. A mediator who is warned in advance to avoid unproductive interactions or topics will be better prepared to serve you.

Much of this may be picked up by an intuitive mediator without being told. Why take the risk, or bumble through part of a mediation while the mediator tries to pick up on the dynamics? Use the mediator to help you with your toughest issues.

Mr. McIvers is a full-time mediator practicing in California and the Western United States since 1996. He is known for his persistence, for a very high settlement rate, and for being easy with which to work. His success is based upon the conviction that virtually every case will settle in mediation, if handled properly. Mr. McIvers excels at complex and emotionally-charged disputes, and cases which have failed to settle at prior mediations.

Mr. McIvers co-chaired the ADR Section of the Santa Barbara County Bar Association for two years, and is active in several other ADR organizations. He is a Vice President of the International Academy of Mediators. He has been a frequent speaker, instructor and writer on ADR topics, including at the ABA Advanced Mediation Training, the Masters Forum (Pepperdine), and the Santa Barbara County Bench & Bar Conferences.

Some Thoughts

"If there is any one secret of success, it lies in the ability to get the other person's point of view and see things from the other person's angle as well as from your own."

Henry Ford

Five steps to becoming bias free
1. Become aware of your biases
2. Identify why you hold this bias
3. Acknowledge shared characteristics
4. Put your biases aside, and maintain an open mind
5. Don't allow a negative experience to revive your biases.

Managing Emotional Energy at Work
Dale Carnegie Training

Practice Tip:

Buying the Cow: Mediators, Money, and Value

By: **Diane Levin, J.D.**

During the many years now I've been in the mediation field I like to think I've given of my time generously on behalf of our profession.

I've devoted countless unpaid hours to serving on numerous boards and committees to advance the ADR field; organizing numerous conferences and workshops for mediators; volunteering in community mediation programs mediating and mentoring new mediators; answering numerous phone calls and emails from people hoping to become mediators; providing tech support to colleagues struggling with ethical dilemmas; helping other ADR professionals master social media like Twitter; supporting fellow ADR bloggers through my ADRblogs.com project and other endeavors; and sharing what I know through this site, responding to every person who contacts me, including numerous requests over the years from mediators and mediation programs throughout the world seeking help locating resources, people, or information.

My digital door is always open.

But ultimately I'm a business owner and a professional, and there are things I don't give away for free. Once, a mediator, just starting off, contacted me to ask me to meet them and their business partner on a regular basis to help them set up their business and web site. When I quoted my fee, I got an angry email in response, wondering how I had the nerve to ask to get paid for something they thought I should give them for nothing. This left me scratching my head, wondering why they didn't respect or value my time as a professional.

I similarly upset some mediators in an advanced mediation training that I taught recently. The organization I was teaching for had provided a comprehensive training manual packed full of many practice forms for the participants to use later. As I was teaching one module, I mentioned that what I'd done in my own practice for this kind of case was to develop a handbook for my clients to assist them in preparing to mediate, suggesting to the participants that they should do the same. One participant raised a hand to ask if I would make my handbook available to them. I told them no, it was proprietary to me and my business, but that they should by all means create materials of their own that would serve them and their clients. I also reminded them that the organization providing the training had generously included in the training manual plenty of client forms for them to use and adapt.

My "no" evidently put some people off. Two participants complained about my refusal to share materials I'd created for my own business. One wondered why I was even there if I didn't want to share my stuff.

This left me puzzled and a little sad as well. I was in fact very willing to share – everything I know, the experiences I've had, the lessons I've learned, it was all available to them, unstintingly. I just declined to share my intellectual property – the content I'd created and customized to use in my business – the work product to distinguish me from the rest of the herd.

Unfortunately they heard only the "no", and not the rest of my message: As a professional be willing to create your own stuff. Construct your own tools, the better to fit your hand. Perhaps this view is just a consequence of living in the digital age, when we have come to expect content to be free and where the lines between original content and borrowed material have grown blurred. Surely no one could think that my appearance at the training program constituted a relinquishment of my rights in my own content or the keys to my office door.

But there's another reason, an issue that haunts our profession. Almost four years ago I sent a message to ADR professionals: "Don't sell yourself short: why fair compensation should matter to mediators."

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The General Luncheon Session, Florida Mediation Institute

Gary Toole and John Leighton, “Designing the Mediation” panel.

Haley Cutler, “The Abusive Use of Technology within Domestic Violence”

This post urged mediators to value themselves and each other more highly; too often we give both the milk and the entire cow away for free. In our negotiation with the larger world, we ourselves must start placing greater value on our work. To do otherwise diminishes our worth.

To be sure, ours is a profession devoted to helping others. It rests on certain important principles: value creation, not value claiming; the notion of the ever-expanding pie; creative allocation of resources; and of course collaboration, teamwork, and sharing. Ours is a profession devoted to helping others. These are noble principles to be sure, embodying the highest aspirations of our field.

This is perhaps why some of us are uncomfortable with professional self-regard. It seems to contradict these cherished ideals.

But just because we place a premium on collaboration does not mean that we must refrain from placing a premium on our services or the content we create as business owners. As usual, the toughest negotiation is always with ourselves.

Diane Levin, J.D., is a mediator, dispute resolution trainer, negotiation coach, writer, and lawyer based in Marblehead, Massachusetts, who has instructed people from around the world in the art of talking it out. Since 1995 she has helped clients resolve disputes involving tort, employment, business, estate, family, and real property issues, and serves on numerous mediation panels, including the United States Equal Employment Opportunity Commission. Training and coaching are an enduring passion -- she has taught thousands of people to resolve conflict, negotiate better, or become mediators -- from Croatian judges to Fortune 500 executives.

A geek at heart, Levin consults on web design and social media to professionals. She blogs about ADR at the intersection of law, science, and popular culture at the award-winning MediationChannel.com, regarded as one of the world's top ADR blogs. She also tracks and catalogues ADR blogs world-wide at ADRblogs.com, where she has created a community for bloggers writing about constructive ways to resolve disputes.

"To see a problem in a new light, we need to analyze it from perspectives other than our own. In each case, our power depends on our ability to put ourselves in other people’s shoes and to see the world from their point of view.”

-Roger Fisher, International Best Selling Co-author of Beyond Machiavelli: Tools For Coping with Conflict, 1994.

Recap of FMI Institute Program, 2011

By Larry Langer

What makes an educational mediation seminar superlative? Not only must the programs be informative, practical, and entertaining, but they must offer CMEs covering all required topics. Measured by these standards, the 2011 FMI program is on track to serve as the apotheosis for mediation seminars in Florida. For those who were unable to make this year's event, we offer this recap of some of the program highlights.

Beginning with the highly regarded Rod Max, we learned how pre-mediation planning, such as pre-mediation telephone conversations with the attorneys can effectively predispose the parties to "getting into the ballpark."

John Elliott Leighton, a plaintiff's attorney specializing in catastrophic cases, explained how excellence in mediation advocacy differs from trial advocacy. Recognizing that over 95% of cases settle, he allowed that he has become more of a "settlement attorney" than a "trial attorney." He commented that a "great mediator takes himself out of the picture", taking care not to "push people into a corner."

Both Mr. Leighton and the defense attorney on the panel, Gary Toole, noted that analyzing jury verdicts from that jurisdiction can help the parties predict a fair and reasonable outcome. As Mr. Leighton sees it, "Verdicts drive predictability." Mr. Leighton proposed that in order to be effective, mediations "need some degree of urgency" which typically means an impending trial date. However, Mr. Leighton enumerated other less apparent reasons why the defense may be motivated to settle at mediation: 1) to avoid detrimental discovery, 2) to avoid bad publicity, or 3) to avoid a pending motion or deposition. Conversely, he pointed out that for some clients having their day in court is more important than money.

In designing his mediations, Mr. Leighton must decide how much evidence or research to reveal. Should he show video tapes or disclose mock trial results? If he has observed that emotions are running too high, he considers foregoing joint openings sessions which can be "counterproductive." Gary Toole believes that "the purpose of mediation is to educate the plaintiff." He fears that television and other forms of lawyer advertising have misled people into concluding that every injury will result in a financial payout. He commented, "I have seen cases where the plaintiff turned down millions and wound up with $0."

When Mr. Toole submits his comprehensive mediation statement, it is directed toward the mediator and not his opposing attorney. He questioned the wisdom of selecting retired judges as mediators because they are more accustomed to ordering outcomes rather than persuading attorneys.

Rod Max concluded the morning's presentation by urging that mediators avoid war stories, not be number carriers, but instead make it their "life's mission" to settle that case. If it cannot be done during the one session, Mr. Max advocates coming back another day: "Don't impasse." He uses the catchphrase, "The world was created in six days" to convince parties to exercise patience. Upon closing his remarks, he quoted Coach Bear Bryant, "Never quit."

Ross Stoddard, one of the most sought after mediation speakers in the country, addressed the conference on ethical issues. He urged mediators to make certain that they have set aside enough time for the parties to work through the mediation process. In Socratic fashion, he postulated a hypothetical scenario of an insurance adjuster who, under confidentiality, discloses to the mediator in caucus that there is no settlement authority.

Florida Mediation Institute President Robert Dietz in ceremonial headdress

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May the mediator convey that information to the other side over the adjuster's objections?

Robert Dietz regaled the luncheon crowd by using a game show format with multiple answer questions and movie clips. In a highly entertaining presentation, Mr. Dietz brought home the point that we often fail to correctly observe aspects of cultural diversity in our everyday lives. Mr. Dietz use of

Michael Bishop noted that uncovering a party's hidden agenda can optimize the chances of resolution. While preaching patience to overcome defeatism, Mr. Bishop acknowledged that pessimism can frequently surface during mediations. He discussed the strategic use of pessimism to facilitate an outcome. In his mediation openings, Mr. Bishop sometimes deals head on with this problem, "You are going to experience pessimism at some point in this mediation" but he counters that by explaining to the parties why this is "a great day to mediate your case."

Ross Stoddard addressed Mediator Ethics

Mr. Bishop suggests that the mediator consider whether to begin with a joint session because "openings can be polarizing in complex cases." In order to diffuse anger, Mr. Bishop cautions the parties, "You will probably hear information with which you do not agree." When confronted with emotions in caucus, Mr. Bishop attempts to validate those experiences, but responds by asking, "How can we take the next step?"

Kim Kirn, "Difficult Conversations"

As suggested by other presenters, Mr. Bishop uses pre-mediation telephone conferences so that he can construct a strategy before the mediation begins. In order to avoid moving into a deadlock, Mr. Bishop may cajole the party by saying, "C'mon, you need to do a little better than that." After establishing rapport with the party, he may ask, "Do you trust me or would you rather trust six strangers to determine your case?"

For people needing visualization, Mr. Bishop drafts sample agreements or uses whiteboard calculations so that the parties can visually inculcate a mediated outcome. In closing his remarks, Mr. Bishop offered that when a mediator recognizes rising internal negativity, she should "step to the balcony," i.e. take a break in order to gain perspective and recharge.

Michelle Riley focused her comments on ethical issues associated with closing the deal. She comically noted that at 9:00 AM her mediations are "open, transformative," but by 5:00 PM that day, they can be "grinding and evaluative." As with other commentators, she proposed that persistence is essential to mediation success. This observation is consistent with surveys showing that 90% of attorneys label persistence as "an essential quality for mediators." Ms. Riley itemized difficulties a mediator may encounter when drafting the final agreement. For example, when mediating an agreement involving international trade, should the mediator bring up for the first time which currency will be used to issue payment? Reduced to its essence, her advice is that mediators protect impartiality through neutral questioning when memorializing the agreement's details.

Michele Riley, "Ethical Issues with Closing the Deal"

Kim Kirn's remarks were inspired by the bestselling book "Difficult Conversations: How to Discuss What Matters Most" by Douglas Stone, Bruce Patton, Sheila Heen, and Roger Fisher. According to Ms. Kirn, when we are requested to convey potentially inflammatory information, we should "surrender assumptions about how it's going to go." As an example she referred to a situation where an attorney wanted her to warn the opposing side that criminal records involving that party would be coming into evidence. When this information was finally conveyed, Ms. Kirn was relieved that the party accepted it with equanimity. They had already contemplated that possibility before the mediation began.

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When broaching highly charged topics, Ms. Kirn suggests that mediators ask themselves: "Why am I uncomfortable about this? Can I be neutral?" She urges the parties to avoid using the terms "always or "never" when engaging in difficult conversations.

Opening statements occasionally reveal radically different interpretations of past events. For Ms. Kirn, one of the keys to defusing harsh feelings is to validate a party's emotional response to these past events and the ensuing conflict. To accomplish this, Ms. Kirn engages in active listening characterized by open body language, eye contact, head nodding, and paraphrasing what has been said for the sake of "clarity". When a party is stuck in the "blame game," Ms. Kirn may ask "How is that working for you?" This may be particularly useful with the party who is insistent upon "being right all the time."

Ms. Kirn explained that because people possess complicated psychological components, behaviors that appear inconsistent may reflect their internal complexity. She recommends that we prepare parties to be "ok with contradictions" and help the parties to avoid assuming that past events mean bad intentions or bad character.

In order to move passed emotional obstacles, Ms. Kirn encourages parties not to live in the past, "live in the present with one eye on the future." Ms. Kirn admonishes mediation participants that "if you don't acknowledge the feelings, you can't get beyond them." At the same time she is sensitive to the fact that a party may have his or her self identity diminished during the dispute. For example, women who perceive themselves wives or mothers may be unnerved by divorce. In other situations it may be necessary to reassure a party they are a "decent person" after their character or reputation has been impugned. In summary, in order to let go of an agonizing personal issue, the party may need to accept three things about herself: 1) You are going to make mistakes, 2) your intentions are complex, and 3) you have contributed to the problem. In this manner mediators can help the parties take ownership of the mediation.

An amazingly diverse and informative program delivered in an unparalleled facility. The Florida Mediation Institute 2011 was a "can't miss" opportunity to learn from national leaders in mediation theory and practice. Adjectives fail to adequately describe the benefits of this program. The Institute is deeply indebted to its board and officers, Robert Dietz, Christine Harter, Anne Marie Kim, Larry Langer, Juliet Roulhac, Jake Schickel, and Stuart Suskin. Without the dedication and contributions of these exceptional mediators, the Florida Mediation Institute would not be, and this caliber of mediator education would not exist in Florida. The Institute would be impossible without the support of the sponsors listed on Page 3 of this edition of The Florida Mediation Institute.

Planning is underway for Florida Mediation Institute 2012. If you have suggestions for speakers, topics, or the Institute generally, contact us. Our success is your education and your success is our mission.

The Marriott World Center, Orlando.

Save the Date:

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