



From Hon. Jacqueline Connor (ret.)



MEDIATION: THE INVISIBLE HUMAN VARIABLES

CAALA Advocate Magazine January 2011

From the perspective of mediators, what is the point? Is the point to get a settlement by hook or by crook? Making people happy? Making both sides unhappy? Some too often see mediation work as a notch on the resume...and look only at their percentages of resolution rather than what might be viewed as a larger view of what the disputing parties reflect, seek or need. It is easy to slip into the mode of experiencing satisfaction when a case does settle, with the parties generally not too happy but relieved, spent and thoroughly exhausted.

I had a reminder recently of the impact of the emotional cost of settlements on a case I did not even remember. A prospective juror on a panel spoke up during voir dire and said he had had a case in my court some years before that I had “settled.” I was prepared for an expression of appreciation but found instead that this juror, to this day, regretted succumbing to what he felt was pressure to “get it done.” His inference was that he wished he had not followed his attorney’s advice. The experience was not a good one for him. He was friendly enough but very direct about his disappointment with the system, which in his view, failed him.

Granted, he very likely could have been even more unhappy hundreds of hours and thousands of dollars later, litigating his dispute with or without a happy ending. Nevertheless, this encounter was a small reminder about what the purpose of mediation is for the mediator and what the purpose of settlement is for all stakeholders. It may well have been that his case would have ended up exactly where we took it in our negotiations. However, maybe more time had been needed. Maybe there were other factors that had not been accommodated, or maybe it truly was just a lousy result.

I was also reminded of experiences when still doing criminal cases. Defendants were all too often less unhappy about sentences that were imposed than the way they were treated when being sentenced.

This musing led me to examine the differences human beings have in the ways in which they communicate, the ways in which information is assimilated, the ways in which decisions are reached and the ways in which comfort levels are attained, and maintained. We certainly all know from experience that people communicate in unique ways. While a single approach never works every time, there are patterns and models for which mediators should be careful not to lose sensitivity.

We have certainly all been in an interaction with a person who needs to say their piece at their pace and in their way, regardless of the circumstances. You can stop them and try to get them to refocus on what seem to be the most pertinent issues, but once they regain the “floor”, they start up again as if in midsentence and don’t stop until they are done. Knowing that this party has that need makes it easier to sit back and let that need be accommodated, before moving on. The bottom line with this personality is that there is no moving on without that need being accommodated.

Timing, as a factor in communication as well as problem solving, is another critical variable. It is not at all unusual to find in a settlement discussion that the numbers are absolutely right but the timing is wrong. Some people need a certain number of dance steps before they are convinced they have reached the “best deal.” Sometimes some parties need to let the numbers marinate. On the other hand, with the same factual scenario but different personalities, the failure to lock down the numbers then and there will cause the discussions to collapse.

If timing is a significant variable, there are many others that have defined themselves in the settlement world I have experienced. A short and unscientific walk through the differing human variables have led me to a number of considerations and categories. Some of the most obvious are cultural and gender related. Not to exhaust the list, there are differences that can be teased out in the means by which people collect information and come to decisions.

With the Japanese culture, for example, there are many different forms of language: the language of children versus adults, the language of men versus women, and the language of rank. Learning Japanese from a book doesn’t always capture these differences. I recall one gentleman who learned language from a Japanese girlfriend. He realized down the line to his embarrassment that he was speaking as a female when he thought he was fluent. He was fluent...but he wasn’t... Mistakes in use of language can be the source of disputes and misunderstandings that lead to the problem that can end up in court or mediation. They can also be a barrier in reaching a resolution in the absence of careful hands. They can also become an obstacle when the attorneys representing the parties are not aware of the nuances. In dealing with parties from different cultural backgrounds, research and advance warning can be crucial.

While with Japanese culture, the differences are fairly clear and the rules quite established, these nuances exist in other cultures, including our own, in perhaps more subtle ways.

Gender is a category in itself. I dare to say that men and women universally communicate differently. Acknowledging that there are exceptions to every generalization, ignoring gender differences do not infrequently lead to misunderstandings and miscommunications. Even those who are not familiar with the concepts articulated in the Men from Mars Women are from Venus cultural icon, recognize the disconnects that work to great disadvantage...or advantage, for those who understand the nuances. Addressing just two of many differences, experience has shown that men are more likely to be proactive while women are less comfortable with confrontation but work to facilitate and enable personal connections. On a second track, men tend to demand respect while women are most comfortable in a connected interaction where feelings and emotions are recognized and validated.

From other unrelated sources, I have come to recognize four very different modes in which people make decisions. Some, on reflection, may be instantly recognizable. Taylore B. Sinclair, an expert who introduced me to the four modes in an entirely unrelated context, made it easy for me to recognize which mode applied to my own decision making approach. I was further intrigued when I learned that a business executive took a course from her and used the forms in dealing with people in business settings, both in sales and marketing as well as with personnel issues. He would try different modes of communication until he figured out which type they were, and then he would adjust his approach to great success.

Exploring the four types, and anticipating the different requirements and needs of each type, has been

helpful in smoothing access to satisfactory settlements. Each type collects and then decides just differently enough that they respond to particular settlement strategies while others work to shutdown progress. They are described below in very simplistic terms.

The first type tracks multiple approaches and facts, is open to any number of considerations, sorts through the issues and arrives at a quick decision. Their goal is to reach the end, with less serious attention paid to details. They are often “too” forthcoming, suggesting some naiveté in disclosing perhaps too much, but there is no hidden agenda. They approach the world in an open manner and, by the same token, are most comfortable in an atmosphere of openness with all the information on the table. They can engage and juggle a number of different options, while relying on intuition to reach their decision. They see all kinds of possibilities inside and outside the box, and they operate quickly. To those in alternate modes of decision-making, they may appear to operate somewhat sporadically as they consider, discard and weigh all the possibilities. While this first type may sometimes come across as unfocused and impractical, the deal breaker can happen when they are dismissed as being ridiculous, or are deemed “light-weights” or frivolous. As a result of their appearance to the other three types as somewhat flighty, their need for acknowledgement of their intelligence and legitimacy may become important.

The second type is gentler and more slow-moving. They present as gentlemen or gentlewomen in the definitional sense. Their focus is on the goal as they spend attention and time collecting details and facts, testing the information with question after question, seeking feedback during this exploration. They need details and answers. At the same time, they are the most patient of the four types. That patience and need for details and facts also makes them the slowest to come to a resolution, but once their decision is made, it is difficult to shift them. They are persistent, directed and insistent in a gentle, calm manner and are the best listeners. This type often operates more fully behind the scenes and are not as readily appreciated as their efforts are not as visible.

They require the time to think about, research and collect information while searching for the possible solutions being considered. The process is careful and slow. The access to details and information is important and cannot be short circuited. All angles are examined, and options discarded or added as the problems, advantages and disadvantages are sorted out. This can't be hurried and persons with this approach most often need the most time to consider and evaluate the decision. They want to address and resolve all the problems raised by the details before reaching a decision.

If this process is short-circuited by being pushed too quickly, this type will shut down and all progress will be stopped. The answer to any question at this point is likely to be NO, until they can get back on track either by being allowed more time or space.

The first and second types are more reactive, in contrast to the proactive nature of the third and fourth types.

The third type's approach is faster, quicker and more directed. Their energy is palpable. They are determined to get to the result, quickly. Two persons of this type can get a resolution in minutes. People with this third approach work fast and suddenly, seemingly swerving from one direction or option to the next, with the underlying attitude being that the details can be handled later. Energy is high, and they tend to be very confident in their positions. They make decisions quickly. They are focused on the result and work towards getting that result, then move on to the next task at hand, unconcerned about the pending

details. They need to keep things moving or they check out. They are the most impatient of the four types, which can be off-putting, particularly to the deliberate second type.

Their comments can be blunt and direct. They not infrequently throw out comments, not because they necessarily believe they are true or untrue, but in order to get things moving. They are good at getting things done, which may create difficulty if the timing is not right for the other parties. They will walk away, interested in something else, rather than take what seems to be too much time. They may exit physically or mentally, but if that point occurs, the interaction is generally over.

Similar to the second type, this type does not change its mind.. If there is a problem with any of the details, it is of little concern to them as they are already on to something else. They get right to the point, sort it out then get to their conclusion as they then move on.

The fourth and last approach is perhaps the most direct. Their movement is consistent, even and unwavering from point A to point B, and once that direction is determined, is hard to get them to shift. They are driven by the notion that they are not like others; they distinguish themselves from others. They have a need to be right and can therefore be the hardest to deal with. They are very open in what they do, but collect hard facts, having no interest in emotions. Emotions are not necessarily irrelevant and they are not necessarily cold people, but in a setting where decisions are being made, emotions have no place and can be off-putting to them.

They are the most likely to stonewall or simply refuse to respond. They tend to see things in black and white, right or wrong. Someone either did it or didn't do it. There are no grays, and in this black and white world, it is important to them that they are right. In a practical and positive sense, they are more confrontational, insisting on dealing with a problem directly rather than tiptoeing around any fact or issue.

They are clear, logical and straightforward in their approach. They can quietly sit, acquire and evaluate the facts and listen. They are skilled at seeing what is missing in a scenario. They want to stay with it and want to win. Similar to the other proactive type, the third type, they are not interested in emotions and are not above intimidating to reach their goal. They sit straight, make solid eye contact and hold you.

Ironically they are the most easily wounded and they don't forget slights. The third type forgives because they don't really care...and are on to the next issue or adventure. The first and second types forgive right away but this fourth type does not, and will remember, hanging on to the slight. They are upset if personally challenged and will stonewall, simply refusing to respond or continuing to interact, removing themselves mentally or physically, using the strategy as a weapon

Ms. Sinclair, who is the first type, told me about an interaction she had with the third type. There were others there who observed what appeared to be a fast and furious exchange, direct, blunt and frank. She and the third type got through their dispute and had the matter resolved in a matter of minutes, while the observers, the patient second type, stood by with their mouths open, expecting world war three to ignite.

Misunderstandings are easy to anticipate. The second and four types think the other types go off halfcocked, ignoring important details, while the first and third see the second and fourth as beating dead horses and taking too much time.

Understanding the types allows a mediator to be cognizant of what creates stress, to be sensitive to what

causes the communication to shut down and reduce the chance of a resolution with the comfort levels of all parties. If the communication does shut down because a trigger has hit the wrong nerve, understanding and recognizing the types provide for techniques that can jumpstart the process.

It is important to the first type to be acknowledged; it is important that the mediator or the person they are communicating with “gets” them. Consequently, an effective approach is to say “You’re obviously so open and willing to let this happen. I can see how smart you are...”

The second type seeks appreciation and recognition of their careful evaluation of the facts and details. They might be approached with the following: “It is really clear to me that you have given this a lot of thought and attention and have worked hard and offered so much.....”

The third type needs to be important, so the approach might start with “I can appreciate that you’re obviously a powerful person and so many important things to do. And I know you’re really determined to get this worked out...”

The last and fourth type could be approached with the following: “It’s obvious you have real control over the facts and understand the big picture and I know you want to get this right....”

Recognizing the different patterns, needs and approaches can eliminate much of the frustration of dispute resolution. It is important to sense when to speed things up, or slow them down. It is helpful to be able to explain to one party that their approach will not work and suggest another that might be more effective with the opposing side. It is helpful to distinguish what the most important goals are and noting that they may not always be in conflict with the other side.

At the end of the day, it is worth the time for a conscientious mediator to think through the multiple variables that impact on parties, their personalities and the personalities of their attorneys. Mediators also bring their own talents as well as weaknesses to the table. Recognizing their own preferences and styles, as well as a willingness to abandon those preferences, can be one of the most powerful tools a mediator offers.

Ultimately, ideally it isn’t just about getting it done. It is also about doing it right with the stakeholders left with the confidence that they were heard. Not easy. Not easy at all.

Questions?	Email Judge Connor: judgeconnor@adrservices.org
Mediate with Judge Connor	Contact Audra Graham at ADR Services, Inc. (310) 201-0010 / audra@adrservices.org