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A Primer on Cross Cultural Negotiation and Dispute Resolution

Why is it so difficult for a litigator to bring matters to a resolution? Even very successful litigators may not be able to resolve their cases amicably while a mediator can do so in a short time. As a litigator for many years and after discussions with other litigators regarding alternative dispute resolution I have been able to discover certain truths.

1. As an advocate, it is difficult to consider the other side of the case and understand the position that the other side is adopting. In fact, an attorney must forcefully promote his client's position and consider the other side only if it is beneficial to his client's cause.

2. Litigators become so involved in the legal and factual issues of the case that they forget to consider the human parties involved. There may be opportunities to resolve a case amicably which would be overlooked because of the focus on legal and factual issues.

3. At times, when members of different cultures are involved in a dispute, a litigator would not look beyond the legal issues in the case to discover whether there were any cultural issues which may have caused or contributed to the dispute. If an attorney did so, he or she may have been able to resolve the dispute earlier and may have been able to perform a real service to his or her client.

These truths caused me to conduct a study on the effects of culture on disputes and the possibility of resolving disputes through an understanding of such cultural effects.

A search of the literature reveals that during the past several years, there has been a growing understanding that cultural differences could be a cause of or a contributing factor to conflicts and therefore, resolution of such conflicts would depend upon the ability of the mediator to understand the culture and be able to use that understanding to resolve the conflict. However, there are those who attach less significance to the effects of culture on negotiations and therefore mediation than others.

In an article published in 2005 by Harvard Business School Publishing (1), entitled "What's Lost in Translation," Lawrence Susskind, a prominent professor on negotiations, puts forth the argument that "Cultural Norms may be less significant than we think." As a basis for this argument, he states that "According to the prevailing view in the late 1970s and early 1980s, Americans seeking to make deals overseas should negotiate in their usual style and let others adapt. "It soon became clear that holding fast to one's traditional approach to negotiation in cross-cultural contexts would not help parties overcome serious communication obstacles. The result? A pendulum swing in the opposite direction. A strategy that gained popularity in the mid-1980s emphasized the need for Americans to learn to adapt to the negotiation styles of other cultures."

"In the early 1990s, the prescriptive advice in negotiation literature shifted yet again. Now Americans are urged to be sensitive to cultural differences without sacrificing their own negotiating strengths. Many companies armed their new overseas staff with guidebooks outlining the "do's and don'ts" of local negotiation:

Don't put your feet up on the table and show the bottom of your shoes to your negotiating partner in the Middle East.

An unwillingness to haggle will be misconstrued in certain parts of Latin America as a lack of interest in making a deal.

In Japan, understand that an invitation to socialize should not be put off until after you've reached a deal."

These do's and don'ts are overly broad, common sense matters that a simple study in the counterpart's Culture would reveal. But as Mr. Susskind suggests, none of these approaches seemed to be successful, since they overlooked the importance of individual differences within the various cultures. He recommends that the negotiator should "1. Research your counterpart's background and experience, 2. Enlist an advisor from your counterpart's culture, and 3. Pay close attention to unfolding negotiation dynamics." [Susskind, Lawrence, *"What is Lost in Translation"* Harvard Business School Publishing, 2005]

It is true that each individual is different and he or she is affected not only by his or her culture, but by his or her social environment, education, contacts with other cultures and several other factors which make up a person's identity. While, it is true that these factors should not be overlooked, a negotiator or mediator should not lose sight of the cultural differences either. Mr. Susskind also agrees that by enlisting an advisor from the counterpart's culture, one will achieve that goal in negotiations.

The use of an advisor from the counterpart's culture may help the negotiator. However, reliance on the advisor may have its difficulties as well. The problem with such an approach is that the advisor is so enmeshed in his or her own culture, which is different from that of the negotiator that it may be difficult for him or her to distinguish the differences and may interpret the negotiator's approach and actions as a manner of negotiation rather than a misunderstanding of the culture. Additionally, the negotiator may discount or dismiss the advice of the advisor as a failure of the advisor to understand their position rather than a proper understanding of the cultural issues. For a mediator, it would be doubly difficult to use an advisor and for smaller cases; it would be cost prohibitive.

I would, therefore, suggest that if a mediator decides to engage in mediating cross cultural disputes, he or she should at least familiarize himself or herself with the process of cross cultural mediation. Such a familiarity will help the mediator to understand the cultural forces which may be at play even if the mediator is not familiar with the specific culture of a party. When the mediator pays attention to cultural factors, he or she may be able to discover those cultural issues are the source of the dispute rather than the substantive issues. This will allow the mediator to choose an approach which will resolve the dispute.

But what is culture?

In order to have a working definition for culture, we should understand the wrong assumptions which are often made about culture. Put in a different way, what culture is not. In his book, "Culture and Conflict Resolution," Kevin Avruch refers to six different ideas about Culture:

1. *Culture is homogeneous.* This presumes that all individuals within the same culture act and react in the same manner. This assumption disregards the fact that there are other social and environmental factors which may affect such individuals.

2. *Culture is a thing*. This assumes that culture is a thing separate and apart from the individuals within that culture. The problem with this assumption is that it tends to overlook the fact that each person's individuality is made up of various factors which affect him even within the same culture and, therefore, there may be cultural differences even between the members of the same culture.

3. *Culture is uniformly distributed among the members of a group*. This idea disregards the variations between the individuals within the same culture.

4. *An individual possess but a single culture.* A person may have attained pieces of several cultures. One may not be considered to be simply an American or an Iranian. Depending on his or her education, residence, life experiences, etc. he or she subsumes such other cultures.

5. *Culture is custom.* Although customs are part of the culture, if one assumes that culture is constituted solely of custom, one would reduce culture to simply correct rules of behavior.

6. *Culture is timeless.* Over time and with changes in the world cultures also change. The American culture of 200 years ago is quite different than its culture today.

As a working definition for culture, Black and Avruch state that there are two orders of cultures which they refer to them respectively as generic and local culture. [Black, P. W. and Avruch, K., "Some Issues in Thinking about Culture and the Resolution of Conflict," *Humanity and Society 13, no. 1,* (1989): 187-194.] Generic culture is a species-specific attribute of Homo sapiens, an adaptive feature of our kind on this planet for at least a million years or so. [Boyd, R. and Richerson, P., *Culture and Evolutionary Process* (Chicago: University of Chicago Press, 1985).] Local cultures are those complex systems of meanings created, shared, and transmitted (socially inherited) by individuals in particular social groups."

Mr. Avruch argues correctly that using the wrong assumption about culture will reduce its utility in dispute resolution. The attorneys, as well as the negotiating parties should always be vigilant that their lack of understanding of culture does not contribute to the persistence or even creation of disputes. The mediators should be vigilant that their lack of understanding of culture or lack of attention to the cultural differences of the negotiating parties does not contribute to the failure of the mediator in reaching a resolution of the case.

Mr. Cloke defines culture "as a set of understandings, interpretations, and expectations regarding our environment." [Cloke, Kenneth, "*MEDIATING DANGEROUSLY: The Frontiers of Conflict Resolution"* (Jossey-Bass, A Wiley Company (2001)) p 24]

"A neat, one-sentence definition of culture can only mislead. More helpful is an ostensive definition, intended to draw attention to the main features of the concept. Amid the welter of formulations put forward in the literature, three key aspects of culture have gained general approval: that it is a quality not of individuals but of the society of which individuals are a part; that it is acquired - through acculturation or socialization - by individuals from their respective societies; and that each culture is a unique complex of attributes subsuming every area of social life" [Cohen, Raymond: *"NEGOTIATING ACROSS CULTURES – International Communication in an Interdependent World"* United States Institute of Peace (1991, 1997, 2004) p 11]

The three definitions stated above have one aspect in common. Culture is a complex phenomenon and it can be easily misunderstood. Misunderstanding the cultural signs and pointers can cause conflicts and by the same token, if a mediator misses such signs, it can cause a missed opportunity for resolving a dispute which could otherwise have been resolved.

Cohen advances the theory that "cultural factors may hinder relations in general, and on occasion complicate, prolong, and even frustrate particular negotiations where there otherwise exists an identifiable basis for cooperation. These cases of cross-cultural misunderstanding are certainly exceptional. The skill and experience of professional negotiators, diplomats and business people will often prevent incipient misunderstanding from getting out of hand. Every so often, though, important talks are disrupted by cross-cultural disharmony." [Cohen, Raymond: *"NEGOTIATING ACROSS CULTURES – International Communication in an Interdependent World"* United States Institute of Peace (1991, 1997, 2004) p 11]

Mr. Cohen then quotes Ambassador Grew, who served as the United States Ambassador to Japan in the 1930's and early 1940's, who wrote in his memoirs that "What really counts is the interpretation of the written word and of the spirit that lies behind it." He continues "International friction is often based not so much on radical disagreement as on nebulous misunderstanding and doubt." [Grew, Joseph C.: "*Ten Years in Japan"* (London: Hammond, Hammond, 1944, pp 229-230)]

In every dispute, there are issues regarding the words in a contract or the facts of an accident or the extent of an injury or the amount of damages. However, if the mediator simply looks at the dispute as initially presented by the parties, he or she might miss the fact that the real issue is not the vagueness of the contract, but rather it may be the assertion of control, not the severity of the injury, but rather the impoliteness of the party at fault in failing to apologize to the victim and not the facts of an accident, but rather the fact that a the parent of a driver will take his car away if it is found to be his fault or that his insurance may increase if it is a chargeable accident. While the underlying issues may be present regardless of culture, when the cultural factors are added as well, the underlying issues may take a different form and will become compounded many fold.

Therefore, the mediator must not only be aware of these issues, but manage to use these factors to achieve a resolution which he or she might not achieve in the absence of utilizing such factors. The following is a list of certain factors which have been identified by various researchers and authors in the field of mediation. I have made references to the Middle Eastern and American cultures. Again, it should be noted that all such references are general in nature and may differ within each culture depending on the party's life experiences.

Low context v. High context cultures:

High context cultures tend to place higher value on harmony, public conformity, and therefore, avoidance of conflict. "Individualistic (low-context) cultures prefer directness, specificity, frankness in stating demands, confrontation and open self-disclosure. Collectivistic (high-context) cultures tend toward indirect, ambiguous, cautious nonconfrontational, and subtle ways of working through communication and relational tangles." [Augsburger, David W.: *"CONFLICT MEDIATION ACROSS CULTURES: Pathways and Patterns"* (Westminster John Knox Press, Louisville-London (1992), p 28].

This fact can clearly be seen in dealing with the Middle Eastern cultures. Where an American would attack a conflict head on, a Middle Eastern party to a conflict will initially try to avoid it altogether. For this reason, one will often see that a conflict involving a Middle Easterner is left unattended for so long that it is in fact more difficult to resolve. Additionally, once he or she decides to attempt resolution, it takes much longer for him or her to arrive at the point of the matter in dispute because of his roundabout discussion and argument.

A major factor relating to the resolution of the dispute circles around the issue how the final determination of the case will look in the public's eyes. The public, however, may be the immediate family, the friends or even the opposing party. This may relate to saving face, pride or the need to be correct.

A mediator attempting to resolve a dispute between a person from a low context and one from a high context culture should be aware of this factor and must consider it in attempting to arrive at an acceptable resolution.

Communication Styles: Monochromic v. Poly Chromic Time Orientation

C.H. Dodd, in his book *Dynamics of Intercultural Communication,* divides the communication styles of various cultures into Monochromic and Poly-Chromic Orientation.

A monochromic person processes the information in a lineal sequential order, doing one thing at a time, whereas a polychromic person processes issues in a non-linear approach and is able to juggle different topics or cover various actions without difficulty. A polychromic person does not need closure of one topic before he or she goes to the next subject, whereas a monochromic person feels frustrated by leaving one issue hanging while starting on the next. This is so even if the end result would be the resolution of all issues. [Dodd, C. H. *Dynamics of intercultural communication (5th ed.)*. Boston, MA: McGraw-Hill (1998)]

In my experience, most Middle Easterners are polychromic whereas most Americans are monochromic. Consequently, it is not unusual for a Middle Easterner to jump from one issue to the next, whereas his or her American counterpart would like to negotiate and complete one issue before grappling with the next issue.

A mediator should recognize this difference in negotiations and not dismiss it as a lack of understanding or indecision on the part of the polychromic negotiator. Rather, the mediator may be able to use this difference to arrive at a resolution which may not have been obvious to a monochromic negotiator who may have focused on one issue only.

High Risk Avoidance v. Low Risk Avoidance

Some cultures generally have a concern about the unknown and an anxiety about the future. People from these cultures tend to avoid risk and are therefore more amenable to mediation and possible settlement. Other cultures, on the other hand, show less emotional resistance to change and therefore, are more litigious and less amenable to resolution of the cases through mediation.

Most Middle Easterners and Americans are among the low risk avoidance groups. This fact for the Middle Eastern person relates to his or her attempt to save face or his pride. It may also relate to the belief of a large number of Middle Easterners in fate. For the Americans, it relates to pride, and their belief in the justice system. Therefore, it is more difficult to fashion a settlement between these two groups as they would both rather take the risk of winning or losing their case in trial than reach a mediated settlement.

High v. Low Power Distance

In a number of countries, there is a high regard for authority and obedience of the power figure. People from these cultures would abide by the wishes of the person with the power or perceived power. People from other cultures, on the other hand, consider the person's power to be one of many other factors that goes into their determination.

Most Middle Easterners are among the people with high power distance. Most Americans are in the middle of power distance. A mediator should, therefore, present himself as a power figure and if he or she is perceived as such by the parties, he or she will be able to resolve the disputes between these two groups easier.

Additionally, the mediator must be aware that he or she is expected to be an authority on the value of the case or the manner in which the case will have to be resolved. Therefore, at some point the mediation should become evaluative rather than continuing to be facilitative. The point at which the mediation becomes evaluative is very important. If it is done too early, the mediator has not allowed the high context polychromic culture to express itself and the party to feel satisfied that he or she had been heard. If, on the other hand, it is done too late, the low context monochromic party will have lost interest in participating and the mediation would come to an end.

Cultural Concept of Success and Failure
High Individualism v. Low Individualism

In a high individualistic society or culture, individual gain and initiative is encouraged. Self-interest is paramount and group interest is only secondary. By the same token, the public's view of a person in a high individualistic society is unimportant to the party in dispute so long as he or she is satisfied with the outcome. In a low individualistic culture, on the other hand, the outcome must be such that the disputant would save face. Therefore the measure of success may not only be the value of the item in dispute, rather, the additional factor of how the resolution of the dispute will look in public is as important and sometimes, even more important.

Most of the Middle Easterners come from very low individualism cultures and most Americans come from high individualism cultures. The mediator, should therefore, be aware of this factor and deal with it effectively before he can bring the matter to a final resolution. One of the issues that usually come up in a

low individualistic culture is that the party to an action may not be the decision maker. The true decision maker may be the father, the brother, the son, the daughter or some other relative or friend. If the correct decision maker is not present, even if a resolution may be reached, it may soon fall apart because the real decision maker was not present.

One word of caution bears repeating. As has been discussed before, one should not stereotype any culture as there are variations and constant shifts within each culture. Additionally, contacts with other cultures and other societies create various sub-cultures within a society which should be considered.

Culture, therefore, can produce a broad range of differences which may cause or contribute to the creation of a dispute. More importantly, those cultural differences and peculiarities of each culture may be used by the mediator to help him or her to bring the dispute to a resolution and final closure.

This Article has been prepared by Mark K. Ameli, Esq., Attorney at Law, full time Mediator/Arbitrator and a member of ADR Services, Inc.

Mark K. Ameli has been a practicing attorney since 1980. His practice is concentrated in the areas of Business and corporate transactions and litigation, personal injuries as a result of defective products, vehicular collisions, slip and fall and industrial accidents.

Since 1994, Mr. Ameli has served as a judge pro tem in the Los Angeles Superior Court. He has also been appointed by the Superior Court of the State of California as an arbitrator and mediator in the Judicial Arbitration and Mediation Program. In 2005 his law firm started a mediation division under the name of Diversified Dispute Resolution. In 2015 he joined ADR Services, Inc. as a full time mediator in fields of Business, Personal Injury, Employment and Cross Cultural Mediation. Mark's Iranian American background makes him especially effective in the resolution of cross-cultural disputes.

Mr. Ameli holds a Bachelor's Degree from the University of California at Berkeley, Master's Degree from University of Southern California, both in Economics, and a Juris Doctorate degree from the University of West Los Angeles. He has also completed the various advanced mediation courses at Pepperdine University and at Harvard.

During the past years, Mr. Ameli has been involved as an attorney for a party, an arbitrator or a mediator in thousands of cases. In 2010 Mr. Ameli was a candidate for judge of the Superior Court in Los Angeles County and ran a very effective campaign. Although his opponent won the run off election with less than 5% of the total votes, he was able to receive in excess of 744,000 votes in the runoff.

Mr. Ameli is an active member of California State Bar and a number of bar associations. He is a founding member of Iranian American Lawyers Association and has served as the Chair of the Section on Conflict Resolution of the Beverly Hills Bar Association and as a member of the Board of Directors of Southern California Mediation Association.