Chapter 10
Cultural and Diversity Issues in Mediation and Negotiation

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Introduction

Mental health professionals often engage in professional work that resembles mediation and negotiation. Whether in the form of couples counseling, family therapy, parent–child counseling, or simply the setting of boundaries and ground rules in individual psychotherapy, mental health practice has much in common with the work that mediators do. In this chapter, we offer the perspectives of two practicing mediators on a subject that is critical to the work of both mediators and mental health professionals—namely, cultural and diversity issues.

Mediators routinely encounter racial, cultural, and other forms of diversity in their work, and therefore no curriculum of mediation training would be complete without consideration of the challenges (and opportunities) that accompany such

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diversity. In the Massachusetts Uniform Rules on Dispute Resolution, cultural diversity is listed as one of the "critical issues" in the training curriculum required for court-approved mediation programs.[1]

Mediation is sometimes described as "making a safe place for a difficult conversation." Mental health professionals are often engaged in that same process, and among the things that make such conversations difficult are the differences described in this chapter.

Although we cannot treat this subject exhaustively in one chapter, we can offer perspectives—both our own and those of experts in the field—as an introduction to some of the diversity issues that arise in mediation.

The Seeds of Difference

The word "barbarian" in ancient Greece was used to delineate between those who were born Greek and those who were not; those who spoke Greek properly and those who did not; and later, those who were civilized (the Greeks) and those who were not (the Persians). Throughout history we encounter countless examples of how humans have differentiated themselves from each other, whether it is based on country of origin, race, religion, tribe, or language, to name just a few of the familiar lines of demarcation.

Had anyone told the ancient Greeks that the use of the word "barbarian" was discriminatory or prejudicial toward non-Greeks, they probably would have snorted in disdain. In those times, being able to identify who was an outsider and who was not often became a matter of life and death. The homogenous character of the modern Greek state, like many European states, is beginning to change. However, different ethnicities in Greece are oftentimes greeted in much the same way as they were in Plato's time, as Greece struggles to integrate refugees from Pakistan, Afghanistan, Bangladesh, and Sudan.

While Buddhists teach that we are all from the same cosmic soup and therefore share a common humanity, most of us have ingrained reactions to people who are different from us. (See discussion below regarding "implicit bias.") Every nation or culture has a "them"—the dreaded "other" that represents a real or imagined threat to its safety. And every individual makes thousands of split-second judgments about

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[1] In addition, Rule 1(b)(vii) provides: "The policies, procedures and providers of dispute resolution services should reflect the *diverse needs and background of the public*" (emphasis added). And Rule 7(b) ("Diversity") provides: "Programs shall be designed with *knowledge of and sensitivity to the diversity of the communities served*. The design shall take into consideration such factors as the languages, dispute resolution styles, and ethnic traditions of communities likely to use the services. Programs shall not discriminate against staff, neutrals, volunteers, or clients on the basis of race, color, sex, age, religion, national origin, disability, political beliefs or sexual orientation. Programs shall *actively strive to achieve diversity* among staff, neutrals, and volunteers" (emphasis added).

his or her environment and the people who inhabit that environment, engaging in a type of cultural shorthand that makes negotiating daily life easier. For example, when we encounter someone who is fashionably attired and driving a Maserati, or someone who looks dirty and disheveled, carrying an empty cup, and asking for handouts, we make unavoidably hasty judgments—at what point do those judgments veer into the territory we call "prejudice" or "bias?" At what point do those judgments inhibit us from experiencing the people in our world with an open mind and an open heart?

One of the primary roles of the mediator (and mental health professional) is to be impartial regardless of the parties' circumstances and differences, and to bring an open mind and heart to the process. And yet mediators often find themselves feeling more sympathetic to one party than another, even while they exhibit behavior that the parties view as impartial. Moreover, experience quickly teaches mediators that the parties do not meet on a level playing field—one in which the disputants are fairly equal in power and information or can be made equal by a process that shares information and incorporates or acknowledges difference in ways that promote good communication. All too often, differences create advantages and disadvantages at the bargaining table—some of them reflecting a differential in the parties' resources, and some of them internalized attitudes of superiority on the one hand, or fear and disempowerment on the other. In addition, people come to the mediation table with vastly different life experiences—some of them the result of mistreatment based on race, gender, or other characteristics. Or, the parties may have positive feelings about their differences—for example, a person's ethnic, regional, or racial heritage may be a source of pride and may even be celebrated by society as a whole.

Even if the disputants are two white middle-aged educated individuals who live in the same city, work for the same corporation, and ostensibly speak the same language, sometimes they are *not* speaking the same language, especially when one is a male and one is a female complaining about sexual harassment. Or, if one disputant comes from a family that reveres holidays and has numerous memories of happy gatherings with smiling faces and the other comes from a family whose dysfunction was especially acute during the holidays with excessive drinking or violent episodes and broken furniture, will they approach the task of constructing a parenting schedule for the holidays in the same way? If the mediator's family holidays were centered on somber religious activities, how will that affect the mediation of that schedule? What if the mediator has an incest history, the bulk of which occurred during family holidays?

Given the vast differences that make up who we are as human beings, is it possible to truly manage differences sufficiently to ensure the process is fair to the participants? Can we empower participants sufficiently that their past experiences are not a barrier to meaningful mediation?

There are no easy answers to any of these questions, no boilerplate checklists that will provide the correct path through the maze that we call diversity and inclusion. The purpose of this chapter is to point mediators and mental health professionals in the right direction and to suggest the types of questions we might ask ourselves and the parties about our differences.

Mediation and the Problem of Bias

One of the persistent criticisms of mediation is that bias is less controllable in informal forums, and thus the preferred method of dispute resolution in cases where such bias is a factor is litigation, where there are strict rules of procedure, a public forum, and a judge to oversee the process.[2] This is an argument frequently put forward by gender specialists who caution that the use of mediation, especially mandatory mediation, is counterproductive, even harmful, given the power imbalances that often exist between men and women in our society. The late Trina Grillo, a law professor known for her gender-based critique of mediation, makes the argument forcefully:

> Mandatory mediation can be destructive to many women and some men because it requires them to speak in a setting they have not chosen and often imposes a rigid orthodoxy as to how they should speak, make decisions, and be. This orthodoxy is imposed through subtle and not-so-subtle messages about appropriate conduct and about what may be said in mediation. It is an orthodoxy that often excludes the possibility of the parties speaking with their authentic voices. Moreover, people vary greatly in the extent to which their sense of self is "relational"—that is, defined in terms of connection to others. If two parties are forced to engage with one another, and one has a more relational sense of self than the other, that party may feel compelled to maintain her connection with the other, even to her own detriment. For this reason, the party with the more relational sense of self will be at a disadvantage in a mediated negotiation.[3]

Professor Deborah Kolb and researcher Gloria Coolidge explore these gender differences by focusing on how men and women tend to negotiate differently[4]:

> Women speak differently. Their assertions are qualified through the use of tag questions and modifiers … the female pattern of communication involves deference, relational thinking in argument, and indirection. The male pattern typically involves linear or legalistic argument, depersonalization, and a more directional style. While women speak with many qualifiers to show flexibility and an opportunity for discussion, men use confident, self-enhancing terms.
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> Anticipating that assertiveness may lead away from connection, women tend to emphasize the needs of the other person so as to allow that other person to feel powerful. Her behavior may thus appear to be passive, inactive, or depressed.

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[2] See Fiss O. Against settlement, Yale LJ. 1984;93(6):1073; Delgado E. Fairness and formality: Minimizing the risk of prejudice in alternative dispute resolution. In: Alfini J. et al., editors. Mediation theory and practice. 2nd ed. New York: LexisNexis; 2006. p. 360: "The risk of prejudice is greatest when a member of an in-group confronts a member of an out-group; when that confrontation is direct, rather than through intermediaries; when there are few rules to constrain conduct; when the setting is closed and does not make clear that 'public' values are to preponderate; and when the controversy concerns an intimate, personal matter rather than some impersonal question…"

[3] Grillo T. The mediation alternative: Process dangers for women, In: Alfini J. et al. editors. 3rd ed. Mediation theory and practice. New York: LexisNexis; 2007. p. 362.

[4] Kolb D, Coolidge G. Her place at the table: A consideration of gender issues in negotiation. Breslin, JW, Rubin JZ, editors. Cambridge, MA: Harvard Law School; 1991. pp. 261, 265, 269.

Professor Linda Babcock performed experiments with men and women as advocates for themselves and others in salary negotiations, and found that women tend to be less forceful advocates for themselves, but are more forceful when advocating for others. For men, the pattern was the opposite—they were more assertive than women when advocating for themselves, and somewhat less so when advocating for others.[5]

This is one of the primary reasons why domestic violence experts are adamantly opposed to the use of mediation. Aside from the physical risk of continued close contact, in order for a battered spouse to *leave* the batterer, she must overcome societal and internal expectations that she *stay* to keep the family intact. Engaging in mediation during that crucial period when an abuse victim has finally broken through her silence and publicly acknowledged being battered can easily retard the victim's nascent sense of independence and self-hood. In addition, the informality of mediation allows the batterer the opportunity to continue the psychological manipulation inherent in the relationship, frequently impressing the neutral party with his normalcy, charm, or erudition. It can also cause the victim to distrust her own instincts for survival. This is especially true when mediation is focused on the *present* and participants are admonished to ignore *past* conduct, or assured that the forum will be "judgment free." Victims of domestic violence *need* judgments made about the abuser in order to disentangle themselves from a horrible situation. Thus, a mediated agreement may be "fair," but as some authors point out, it may not be "just."

The impact of bias and power imbalance described above with regard to gender can be seen in the areas of race, ethnicity, culture, sexual orientation, age, religion, disability, and other factors that affect the mediation process. Although empirical research about this impact is still in its early stages, the results thus far suggest that diversity issues affect outcomes in mediation.

One of the frequently quoted studies involved comparing the outcomes of adjudicated cases and mediated cases in the Bernalillo County Metropolitan Court in Albuquerque, New Mexico.[6] Using approximately 600 cases, the evaluators attempted to discern whether women and minorities "would do more poorly … because mediation is a less formal, less visible, and less controlled forum than adjudication."[7] The study focused on both subjective and objective outcomes and found that minority disputants received less money than non-minority litigants in adjudicated cases *and* mediated cases, with the latter being "more pronounced." While some of the variation was due to other "case characteristics," such as the claimant being a lawyer or represented by a lawyer, the study essentially concluded that mediated outcomes for minorities were less favorable than for non-minorities. However, on subjective scales, such as satisfaction with the process, "minority

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[5] Babcock L, Laschever S. Women don't ask. Princeton, NJ: Princeton University Press; 2003. p. 172.

[6] Herman M. et al., An empirical study of the effects of race and gender on small claims adjudication and mediation. In: Alfini J. et al., editor. Mediation theory and practice. 2nd ed. New York: LexisNexis; 2006. pp. 371–77.

[7] *Id.* at 372.

claimants were consistently more positive about mediation than they were about adjudication." What is most interesting about the study, however, is that the measured effects of bias in objective outcomes (less money received or more money paid) were dramatically altered if the mediators were members of the minority group—in other words, minority disputants achieved better results in mediations with minority mediators.[8]

With regard to women, the study found that gender had no direct effect on monetary outcomes, whether the case was mediated or adjudicated. However, white women were more satisfied with the adjudication process than with mediation and "less likely to see the mediation process as fair and unbiased,"[9] while minority women were more satisfied with mediation. Furthermore, minority participants in mediation continued to express greater satisfaction with the process over time.[10]

Understanding Patterns of Oppression and Discrimination

Discrimination in Negotiation

It is hardly surprising that diversity issues impact the results of mediation. Discrimination has been a persistent feature of commerce in the United States since our nation's inception and before. Racial discrimination in housing and employment, for example, has been widely documented long after the enactment of civil rights legislation designed to end such practices.

In one famous study of discrimination in the commercial arena, reported in an article entitled *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations* published by the Harvard Law Review, testers used a uniform negotiation strategy to bargain for the purchase of a new car at ninety dealerships in the Chicago area.[11] The testers were white and black, women and men. The article's author—economist, lawyer, and business professor Ian Ayres—found that the offers made by salespeople were biased by both the race and gender of the buyers (Table 10.1):

Table 10.1 Gender and race discrimination in car sales

	White male	White female	Black male	Black female
Average dealer profit based on initial offers by the dealer ($)	818	829	1,534	2,169
Average dealer profit based on final offers by the dealer ($)	362	504	783	1,237

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[8] The same was not true if one of the two mediators was white.

[9] Herman, *supra* note 8, at 374.

[10] *Id.* (Significantly, women mediators were more successful in reaching agreement in mediation than their male counterparts.)

[11] Ayres I. Fair driving: gender and race discrimination in retail car negotiations. Harvard L Rev. 1991 Feb.; 104(4):817.

Gender-based discrimination was also convincingly demonstrated in studies involving auditions for symphony orchestras. In 1970, female musicians comprised only 5 % of the musicians in the top five symphony orchestras in the United States. Under pressure to increase this number, the orchestras instituted new procedures involving the use of "blind auditions" in which prospective performers played behind a screen so that the judges could not see them. This produced a five-fold increase in the number of women who won places in those orchestras.[12]

Race and gender are, of course, not the only factors that affect negotiations, hiring decisions, and the way people treat each other. Research has shown that physical appearance can produce both positive and negative bias. Taller people get paid higher salaries, on average, than short people.[13] Unattractive people also face bias in employment,[14] and, according to one study, physical attractiveness can produce a significant boost in salary.[15] (Even in the realm of criminal law, attractiveness plays a role: one study has shown that criminal defendants who are viewed as less physically attractive risk harsher sentences.[16]).

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Moreover, it is difficult for white people to deal effectively with their unacknowledged racism. The guilt attendant to such unexamined feelings frequently clouds our perceptions and good intentions/actions. As much as we would like to think we are "color blind," if we grew up in the United States, we have racial baggage—regardless of our race. Professor Peggy McIntosh, a women's studies expert, makes the point quite effectively when she states the following in an essay entitled *White Privilege: Unpacking the Invisible Knapsack*[17]:

> I have often noticed men's unwillingness to grant that they are overprivileged, even though they may grant that women are disadvantaged … As a white person, I realized that I had been taught about racism as something that puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.

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[12] Goldin C, Rouse C. Orchestrating impartiality: The impact of "blind" auditions on female Musicians. Am. Econ Rev. 2000;90(4):715.

[13] Judge TA, Cable DM. The effect of physical height on workplace success and income: Preliminary test of a theoretical model. J Appl Psych. 2004; 89(3):428.

[14] *See generally* Rhode D. The beauty bias: The injustice of appearance in life and law. New York: Oxford University Press; 2010.

[15] Rhode D. Prejudiced toward pretty. National LJ. 2010 May 3 ("In a famous study, 'Lawyers' Looks and Lucre,' economists Jeff Biddle and Daniel Hamermesh estimated that attractiveness may account for as much as a 12 % difference in attorneys' earnings.")

[16] Gunnell JJ, Ceci SJ. When emotionality trumps reason: A study of individual processing style and juror bias. Behav Sci Law. 2010;28(6):850.

[17] McIntosh P. White privilege: Unpacking the invisible knapsack, peace and freedom [Internet]. 1989 July/Aug. Available from: http://www.amptoon.com/blog/files/mcintosh (this website was not found on Dec 3, 2012), *reprinted in* Rothenberg PS. ed. White Privilege: Essential Readings on the Other Side of Racism. Worth Publishers; 2007. p. 123.

McIntosh continues her self-assessment with a list of the "daily effects of white privilege," among them the following:

- I can go shopping most of the time, pretty well assured that I will not be followed or harassed.
- I am never asked to speak for all the people in my racial group.
- If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.
- I can take a job with an affirmative action employer without having coworkers on the job suspect that I got it because of my race.
- If my day, week, or year is going badly, I need not ask of each negative episode or situation whether it has racial overtones.
- I can worry about racism without being seen as self-interested or self-seeking.

No one likes to think of themselves as biased, but reading that list, or making up your own, certainly highlights the ways in which the lives of white people in our society differ from the lives of African-Americans, notwithstanding the laws that prohibit discrimination of various kinds.[18]

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The phenomena described above with regard to race apply with equal force in connection with gender, culture, sexual orientation, and other characteristics. Although some indicia of discrimination have improved (e.g., pay gaps between men and women have narrowed somewhat), disfavored groups still suffer a variety of disadvantages in our society and the favored groups still, for the most part, struggle with acknowledgement of their advantages.

There is a paradoxical aspect of cultural competence for mediators—namely, that mediators are trained to look forward, and yet to be culturally competent requires an understanding of the past, and in particular the ways in which oppression has shaped the experience, values, beliefs, and emotional reactions of non-dominant groups.

Internalized Oppression

Discrimination takes its toll internally, as well as externally. In the landmark school desegregation case of *Brown v. Board of Education*,[19] the Supreme Court cited as support for its opinion psychological studies showing that African-American children had internalized a sense of inferiority—for example, preferring white dolls rather

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[18] For a recent, highly acclaimed novel on the treatment of African-Americans' migration to the North and West in the 1900s, *see* Wilkerson I. The warmth of other suns. New York: Random House; 2010. An effective treatment of American-Muslim bias post 9/11 is Eggers D. Zeitoun. San Francisco: McSweeney's; 2010, a novel based upon true events following Hurricane Katrina in New Orleans.

[19] *Brown v. Board of Education,* 347 U.S. 483 (1954).

than dolls with darker skins, and attributing more positive characteristics to the white dolls. Based on this "doll test" and similar tests of children, the studies concluded that prejudice, discrimination, and segregation caused black children to develop a sense of inferiority and self-hatred. Citing this study with approval, the Court stated that segregating black children from white "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[20] Today, *de jure* segregation is illegal, but patterns of housing and school assignment still relegate too many African-Americans *de facto* to an essentially segregated world.

A related phenomenon is that of "internalized homophobia," experienced by lesbian and gay individuals who internalize the prejudices of a heterosexist society. "Stigmatized individuals engage in defensive reactions as a result of the prejudice they experience and thus incorporate a unique form of psychological distress."[21] One of the obvious stressors is being "in the closet"; however, unlike other oppressed groups, LGBT people also risk being shunned by their families or religious groups and must actively seek out new or alternative social networks that validate their existence.

Another form of internalized oppression can be seen in a phenomenon known as "stereotype threat," which can undermine the performance of people who are members of groups that are negatively stereotyped.[22] This phenomenon occurs even if there is no overt stereotyping taking place. According to several studies, stereotype threat "undermines performance by creating distraction" and produces this effect in both laboratory and real-life settings. An example of this phenomenon was found when measuring the performance of women in chess matches in which the identity of the opponent was hidden from the players.[23] In comparison to their rated strength, the women played worse when told that their opponents were men and that men are better chess players than women. When women players were told that they were playing against women, their performance improved, regardless of whether their actual opponents were men or women.

In another experiment, a group of African-American test-takers who were asked to indicate their race at the beginning of the verbal portion of Scholastic Aptitude Test performed substantially worse than a comparable group of African-Americans who were not asked to indicate their race.[24] In other words, just reminding someone

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[20] *Id.* at 494 & n.11.

[21] Williamson IR. Internalized homophobia and health issues affecting lesbians and gay men. Health Educ Res. 2000;15(1):97–106. This article gives an excellent overview of the issue and incorporates current thinking/criticism about the use of the phrase " internalized homophobia." The danger, as the author points out, is that such studies may "repathologize" gays and lesbians while ignoring cultural and institutional heterosexism."

[22] Walton, GM, Spencer, SJ. Latent ability: Grades and test scores systematically underestimate the intellectual ability of negatively stereotyped students. Psychol Sci. 2009;20(9):1132–39.

[23] Maass A, D'ettole C, Cadinu M. Checkmate? The role of gender stereotypes in the ultimate intellectual sport. Eur J Soc Psychol. 2008;38(2):231–45.

[24] *See* Steele CM, Aronson J. Stereotype threat and the intellectual performance of African Americans. J Personality Soc Psychol. 1995;69(5):797.

of a racial difference of this kind may be a trigger that affects performance. In a similar test involving math skills, asking Asian-American women questions that evoked consciousness of their race at the beginning of the test produced higher test scores, while asking them questions that evoked consciousness of their gender resulted in lower test scores.[25]

Internalized oppression can also produce physical effects. In 2007, The Boston Globe reported on the growing body of evidence—more than 100 studies, most published since 2000—showing the negative effects of racial discrimination on physical health, including heart disease and stroke.[26] This phenomenon has been found outside the United States as well. An epidemiologist at the Harvard School of Public Health, Nancy Krieger, found that these health effects are worsened when the discrimination is not discussed or addressed in some manner. "She confirmed that experiences of race-based discrimination were associated with higher blood pressure, and that an internalized response—not talking to others about the experience or not taking action against the inequity—raised blood pressure even more."

For mediators, these studies suggest the importance of addressing discriminatory behavior or comments when they arise. Sometimes comments are made in mediation that the mediator fears might be experienced by others as discriminatory even if they were not intended that way. Under those circumstances, the mediator could meet with the parties separately to assess the situation and decide whether it seems advisable to address this issue directly.

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Culture and Negotiation

In our discussion thus far, we have focused on the impact of difference in the context of bias and oppression. Mediators, we conclude, need to be keenly attuned to the impact of such differences because of their potential impact on the mediation process. For example, a party who feels demeaned by an opposing party because of his/her race, class, ethnicity, or gender, may "shut down" and find it hard to participate fully in the mediation. (In Section V below, we discuss interventions that a mediator can use in such situations.)

In this section we focus on cultural differences that do not always involve value judgments but may engender misunderstanding if not understood. For example, in some cultures, eye contact in a negotiation is considered aggressive, perhaps even offensive, while in other cultures the failure to make eye contact may be viewed as

[25] *See* Shih M, Pittinksy T, Ambady N. Stereotype susceptibility: Identity salience and shifts in quantitative performance. Psych Sci. 1999;10(1):80; *see also* Kray LJ. et al., Stereotype reactance at the bargaining table: The effect of stereotype activation and power on claiming and creating value. Personality Soc Psychol Bull. 2004;30(4):399,400-01 (women do worse in negotiation when stereotypes are primed, even if women are not mentioned).

[26] Drexler M. How Racism Hurts—Literally, The Boston Globe. 2007 July 15;Sect. E:1.

suspicious. These differences are akin to a difference in eating utensils: chopsticks are neither inherently better nor worse than silverware—just different. A vast array of cultural differences can complicate the work of peacemaking, if mediators are not sensitized to those differences and trained to deal with them effectively.

Cultural competence requires us to learn or at least become familiar with the "silent language," as Jeswald Salacuse calls it, of other cultures—a task akin to learning a foreign language. We don't, for example, try to change how the Russians decline nouns; we accept it and endeavor to become more adept at communicating in that language.

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Negotiation Styles

Professor Jeswald Salacuse focused his analysis strictly on negotiation and measured bargaining behavior, as reported by the negotiators, using the following matrix[27]:

1. Negotiating goals (contract or relationship?)
2. Attitudes to the negotiating process (win/win or win/lose?)
3. Personal styles (formal or informal?)
4. Styles of communication (direct or indirect?)
5. Time sensitivity (high or low?)
6. Emotionalism (high or low?)
7. Agreement form (specific or general?)
8. Agreement building process (bottom up or top down?)
9. Negotiating team organization (one leader or consensus?)
10. Risk taking (high or low?)

Professor Salacuse measured responses from individuals in twelve countries.[28] The results reflect significant variations from country to country. Some of the results seem predictable. For example, on Salacuse's "informal or formal scale," 83 % of the Americans interviewed felt they had an informal negotiating style as compared to 54 % of the Chinese negotiators and 53 % of the Spanish negotiators. Cultures that negotiate similarly in one respect may diverge widely in another—for example, on the scale of negotiation attitude (win/win vs. win/lose), 82 % of the Chinese negotiators describe their style as win/win, while only 44 % of the Spanish negotiators do.

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[27] Salacuse JW. Ten ways that culture affects negotiating style: Some survey results. Negotiation J. 1998;(14)(4):223–24.

[28] The United States; the United Kingdom; France; Germany; Spain; Mexico; Argentina; Brazil; Nigeria; India; China; and Japan.

While the complete results of this study are too lengthy to include in this article, this brief description suggests why the participants in a mediation session might be approaching the task of problem solving differently based on their cultural or ethnic background.[29] Even a reluctance to participate in mediation could be an indication of a cultural attitude, such as the Korean-Americans studied by Diane LeResche, who view "conflict as a negative situation […] represent[ing] a shameful inability to maintain harmonious relationships with others."[30]

It is not always easy to know whether cultural issues are impacting mediation or whether a mediator's assumptions about cultural behavior are getting in the way of successful communication. Mistakes will be made!

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Along with complexities of negotiation style, mediators encounter a dizzying variety of communication styles—many of them culturally rooted. "Every country has its own way of saying things," according to the prolific travel writer Freya Stark. "The important thing is that which lies behind people's words."[31]

Cataloguing specific cultural variations in communication style lies beyond the scope of this chapter. Suffice it to say, however, that an astute mediator will be attuned not only to content (e.g., is the style direct or indirect?) but also facial expressions, eye contact (or the lack of it), body language, and gestures. Figures of speech do not always translate well from one culture to the next, and hand gestures can be particularly tricky. (For example, a thumbs-up gesture in American culture means approval, but in Arab cultures and South America, its meaning is vulgar.)

Gender as Culture

Researchers have long debated the question of whether male–female differences are learned or innate. For purposes of understanding and working with those differences, however, their origin is probably irrelevant. What matters is how we react to the parties in the mediation process and how they react to each other. (In the discussion that follows, gender is discussed based on what sociologists find as the center of the bell curve, and, as in other descriptions of cultural norms, exceptions, and outliers abound.)

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[29] Cultural indicators, of course, can also be found domestically in various non-ethnic groups, such as the LGBTQ community, in which there are a number of sub-cultures as well (such as gay male, lesbian, and transgender communities).

[30] LeResche D. A comparison of the American mediation process with a Korean-American harmony restoration process. In: Mediation and negotiation: Reaching agreement in law and business. 2nd ed. New York: LexisNexis; 2007. p. 197.

[31] Freya S. The journey's echo. In: The peace corps cross cultural workbook. p. 75, [Internet] [cited 2012 Dec 3]. Available from: http://www.peacecorps.gov/wws/publications/culture/pdf/chapter3.pdf.

Among recent conceptual breakthroughs in our understanding of how gender affects our experience, perspectives, and social interactions, two stand out: Professor Carol Gilligan's research about the development of ethical norms[32] and Professor Deborah Tannen's research about gender differences in the way people communicate.[33] Gilligan found that boys tend to develop attitudes about ethics based on rule-based ideas of right and wrong, whereas girls tend to develop attitudes that are more contextual and relational. Tannen found that women's conversational styles were more personal, relational, and focused on understanding, while men's were focused more on information, advice, and status/power. Neither Gilligan nor Tannen argued that the norms of one gender are "better" than the other's (quite the opposite)—instead, their point was that these differences, if not identified, become sources of misunderstanding, judgment, and blame.

Research reported by Dr. Pat Heim shows that these differences are not surprising, because boys and girls grow up in different "cultures" with differing expectations about how to behave and how they will be treated.[34] These differences begin early in life. Infants wrapped in blue blankets are handled differently than infants wrapped in pink blankets. The leading children's books—those that have won the coveted Caldecott medal—show ten males in positions of leadership for every female in such a role. The games that boys tend to play (war, cops and robbers, football) are essentially hierarchical, competitive, goal-oriented, and often team-based, while the games that girls tend to play (dolls, house) are typically based on one-on-one connections, cooperation, and "flat" (as opposed to hierarchical) relationships. Although winning is the sole point in boys' games, boys, on average, lose as often as they win, and therefore learn to mask their emotions, because showing sadness as a result of a loss would be considered "unmanly." In girls' games, there tend to be no winners and losers, and girls learn the importance of "being nice" and "getting along."[35]

To be sure, the upbringing of girls and boys has changed in the United States in recent years, and today more girls than ever are involved in competitive team sports (due in no small measure to the enactment of Title IX). However, social scientists continue to see substantial differences in how men and women behave, how they communicate, and how they fare in business.[36] At the same time, these different "cultures" get blended to some degree as adults, since occupational roles influence behavior. For example, law has often been described not only as a male-dominated profession (though this is changing) but also as a profession in which typically male

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[32] *See* Gilligan C. In a different voice: Psychological theory and women's development; 1993.

[33] *See* Tannen D. You just don't understand: Women and men in conversation. 2nd ed. New York: Ballantine Books; 1991.

[34] *See* Pat Heim, Susan Murphy, Susan K. Golant. In the company of women: Indirect aggression among women (2003); Videotape: *The Power Dead-Even Rule and Other Gender Differences in the Workplace* (Dr. Pat Heim Series1995).

[35] *See generally* Heim P, Murphy SA, Golant S. In the company of women: Indirect aggression among women. New York: Penguin Group; 2003. pp. 84–106.

[36] *See, e.g.*, Mulac A, Bradac JJ, Gibbons P. Empirical support for the gender-as-culture hypothesis: An intercultural analysis of male/female language differences. Human Comm Res. 2001;27(1):121.

"norms" hold sway. To use Gilligan's typology, successful arguments in the legal arena are based on rules of general applicability (and concepts of right and wrong) rather than contextual and relationship-based norms.

The bottom line, as we try to understand the ways in which gender operates as a "cultural" difference, is that one culture is not better than the other. Chopsticks are not better than silverware, nor is it essential that one culture learns to use the utensils of the other. Rather, the point—for mediators and others—is to destigmatize the difference.

Confounding Variables: Psychological Issues and Social Dynamics

One of the joys of mediation is its inherent complexity. For people who enjoy challenges, it is an ideal occupation. The challenges presented by diversity issues are compounded when we take into account the psychology of the parties (and our own) and the social dynamics that influence behavior in the setting of mediation.

A case in point: a middle manager is fired by his employer for abrasive communications with his colleagues and supervisors. He sues the employer, alleging national-origin discrimination (he is from Eastern Europe). In the mediation of this dispute, the employee negotiates in a manner that seems unusual to the mediator. The employee lowers his demand, then raises it again. The mediator makes the assumption (probably inaccurate) that the employee's bargaining style is different because of cultural differences. The mediator encourages the employee to follow the lead of his attorney, who is very experienced in employment cases, but the employee resents this advice, fires his lawyer, and arrogantly asserts that he is a better negotiator than anyone involved in the case and therefore does not see why he should follow anyone's advice. In the end, the mediator concludes (after consulting with a psychologist) that the employee's behaviors indicate the possibility of a narcissistic personality disorder.

In this case, culture no doubt played a role in the negotiations. But because culture was the most obvious difference, it obscured a less visible but more powerful factor—namely a psychological issue that stood in the way of productive bargaining.

Social dynamics can also play a role. In most mediations, the parties are not alone—they are part of a social matrix that influences their bargaining behavior. In divorce mediations, for example, each spouse usually receives advice and encouragement from an assortment of friends and relatives—not to mention professional advice from lawyers and therapists. Not surprisingly, the parties feel accountable to some degree to these constituencies of supporters. Thus, while the mediator tries to understand the unique aspects of each of the parties (cultural, gender, psychological, or other), s/he may not realize that there are a host of other people in the wings, each with their own complicated backgrounds and psychological orientations. To the extent that each of the parties in the mediation is driven by a desire not to lose

face with these supporters, it becomes necessary for the mediator to understand the cultural orientation and goals of those supporters.

Another case in point: a college freshman has died in a fraternity hazing incident, and his parents are now suing the fraternity, its parent organization, the owner of the fraternity's building, several individuals involved in the incident and all of the relevant insurers. The family is demanding $10 million as a settlement. The mediator is meeting with the defendants—eleven parties in all. Everyone in the room agrees that their initial offer of settlement needs to be no less than $1 million, or else the plaintiffs will likely terminate the mediation. When each party is asked what they are willing to offer in this first round of negotiation, the collective sum is only $900,000. All of the defendants agree that it would be in their best interest to come up with another $100,000 in order to keep the mediation on track, but no amount of reasoning and cajoling from the mediator breaks this deadlock. The mediation ends, and the case proceeds to litigation. Why were the defendants deadlocked? The mediator concludes that there were two sets of social dynamics that overwhelmed rationality. First, in the conference room, each of the defendants was seeking to communicate its resolve to the other defendants. Even though there was virtually no chance that the defendants' initial offer would be accepted, none of the defendants wanted to "blink," because of the precedential effect that could have been had in subsequent rounds of bargaining. Second, and equally important, each of the defendants (and particularly the corporate defendants and insurers) were merely representatives of a complex organization with its own unique culture and values. These representatives may have felt that they needed to avoid losing face with their constituencies back at the office. (One common observation about negotiation dynamics is that the toughest bargainers are those who are farthest from the table.)

Mediators need to remember that, even if they believe they understand how culture, class, race, ethnicity, gender, sexual orientation, and other factors may be influencing the individual parties, each of the parties may also be influenced by unseen psychological and social dynamics. Accordingly, mediators should inquire about those dynamics and try to understand how they are affecting the mediation process.

Practical Considerations for the Mediator

Given what we now know about bias, how can the well-intentioned mediator guard against it both personally and with clients?

* * *

Developing Cultural Competence

One obvious place to start is to look within. Acknowledgement and self-assessment help us clear our minds of judgments about the parties.

Bias arises from learned attitudes and can be transmitted to those close to us or part of our group. And what can be *learned*, can be *unlearned*. This conclusion was documented in fMRI studies reported by the developers of the Implicit Attitude Test, an ongoing study sponsored by Harvard University.[37] Visitors to this site have completed more than 4.5 million tests, which explore their reactions to people based on their race, age, gender, weight, disability, and other characteristics. Based on this data, researchers have found, among other things, that 80 % of Americans harbor negative attitudes toward the elderly and 75-80 % of the white and Asian test-takers express preferences for whites rather than blacks. The developers of the Implicit Attitude Test found that while we have automatic, immediate, unconscious reactions to people of a different race at the level of our amygdalas, those responses (not surprisingly) can be moderated by other parts of our brains that regulate our social interactions.[38] (The test gives new meaning to the expression, "The truth shall make ye free, but first it shall make ye miserable.")

Recognizing that bias is a universal phenomenon can lead us to both self-criticism and self-forgiveness. Both of these seemingly contradictory impulses are valid responses to the residue of bias that lingers in even the most conscientious and culturally competent mediators.

When Harvard psychology Professor Mahzarin Banaji developed the implicit bias test, she was surprised to find that she was biased against blacks—a particularly vexing phenomenon because she herself is a person of color. One of the techniques that she used to counteract her own implicit attitudes with regard to both race and gender was to display prominently in her office photographs of women and people of color whom she admired—George Washington Carver, Emma Goldman, Miles Davis, Marie Curie, Frederick Douglass, and Langston Hughes.[39]

Perhaps an even more profound change may come from widening and deepening the circle of connection in each of our lives. All too often, those in our circle of friends and colleagues look a lot like us. Mediators can make a conscious choice of involving a wider circle of colleagues in our professional work through self-reflection and peer supervision groups. And even within our existing circle, we often fail to explore deeper levels of understanding of people who are different from us.

* * *

Here is an exercise in overcoming our own implicit bias described by Professor Banaji:

> Just before Halloween, Banaji says, she was in a Crate & Barrel store when she spied a young woman in a Goth outfit. The woman had spiky hair that stuck out in all directions. Her body was pierced with studs. Her skull was tattooed. Banaji's instant reaction was distaste. But then she remembered her resolution [to engage with people she might otherwise have avoided]. She turned to make eye contact with the woman and opened a conversation.[40]

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[37] This implicit attitude test. Available from: http://www.implicit.harvard.edu.

[38] Stanley D, Phelps E, Banaji M. The neural basis of implicit attitudes. Curr Directions Psych Sci. 2008;17(2)164.

[39] Vedantam S. See no bias. The Washington Post. 2005 Jan 23;Sect. W:12.

[40] *Id*.

Cultural competence involves more than freeing our minds of bias—it requires affirmatively seeking to understand the people we encounter in the mediation process and elsewhere. Curiosity is key. If participants are from a country or ethnic group outside your experience, spend some time reading about that culture. If the person's background or ethnicity is not apparent, do not be afraid to ask background questions that will aid your work. Avoid stereotypes—for example, do not assume that all people from a particular country or culture are likely to have the same negotiating style.

Respect for the parties is a crucial element of cultural competence. One key element of such respect is pronouncing the parties' names correctly and adopting a form of address that is comfortable. Many mediators prefer working with the parties on a first-name basis, because the informality contributes to a spirit of collaboration. However, first-name basis may be profoundly uncomfortable for people who are accustomed to a more formal manner of addressing people in a business setting. And it might also be uncomfortable to people who, because of cultural or power dynamics, have felt demeaned when called by their first names.

Finally, mediators need to bring enough humility to their work to be open to the possibility that some other mediator might be a better fit for the parties because of background or experience. (Also, see discussion below regarding co-mediation.)

The Mediator's Relationship with the Parties

An enigmatic story from Professor Michelle LeBaron about an informal mediation in a Native American community captures one aspect of what mediators need to know to practice in a culturally competent manner.

There was an elder who had a dog, and that dog barked all night long, every night, kept the whole neighborhood awake. It was a really yappy dog, and nobody could stand it much longer. One afternoon an elder went over to visit the dog owner without being announced. They had tea. Talked about the weather and the upcoming pow wow. They told a couple of stories. Then the elder left. Still the dog barked at night. A few days later, the same elder dropped by for another visit. Same thing. They talked about the weather and the brushfire down in the coulee. Then the elder left. Still no relief. A day or two later, the elder visited again. They had tea. Talked about the weather, the way the government negotiations were going. And the elder left. After that, the dog was kept in every night. Never caused anybody trouble anymore.[41]

Why did the two elders never discuss the dog? And how did the dog owner finally come to understand what was being asked of him/her—albeit inexplicitly? The essential element of the success of this intervention appears to be the recognition that the dog owner needed to avoid losing face in the community, and therefore

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[41] LeBaron M. Bridging troubled waters: Conflict resolution from the heart. San Francisco: Josey-Bass; 2002. p. 245.

direct confrontation about the dog might have been counterproductive. This story suggests that in this particular culture, a gentler, less direct form of negotiation was needed. A mediator who lacked an understanding of this feature of the parties' culture might have been more direct and less successful.

However, given the enormous variety of cultural and diversity issues that can arise in a mediation, how can a mediator manage those differences successfully?

1. Pre-mediation Consultation, Planning, and Research
   Mediators should generally consider and, in some cases, insist on a pre-mediation consultation with the parties. In addition to such logistical considerations as who will be attending, how much time to reserve, and how the mediation fee will be allocated, mediators can ask about the parties, their backgrounds, and other information about them that will help the mediator prepare for the case.

   These separate meetings provide an excellent opportunity to explore diversity issues in a safer setting. In family mediation, meeting separately with the parties can uncover power dynamics and cultural differences. The Internet also provides a vital opportunity to learn about the parties, their values, and their backgrounds.

2. Confronting Bias
   As noted above, one of mediation's central tasks is making a safe place for a difficult conversation. If any of the parties feels demeaned—particularly as a result of his/her culture, class, ethnicity, gender, race, sexual orientation, or other characteristics—the mediation will no longer feel safe. How, then, can a mediator prevent or respond to behavior that causes the mediation to feel unsafe in this way?

   As noted above, preparation can sometimes head off trouble at the outset, by alerting the mediator to the relevant risks. The mediator might be informed that one of the parties is considered a bigot by the other parties. Or that one of the parties has a hard time treating women as equals. What might the mediator do in a separate meeting with one or more of the parties to neutralize potentially disruptive behavior?

   An even more challenging dilemma arises when one of the parties says or does something in the mediation that has the unmistakable ring of bias, condescension, or disrespect. The mediator has a number of choices—the following are only a few of the options. First, s/he can decide to ignore the event for the time being, hoping that the negotiation will stay on track, and perhaps revisiting the incident later with the parties separately or together. Second, s/he can intervene in the moment by calling attention to what s/he saw or heard, and either lodging his/her objection or inquiring about what the action or comment was intended to communicate. Third, s/he can inquire of the party who was the object of the action or comment, to find out what impact it may have had. Finally, the mediator can call for a break and discuss what occurred with each of the parties. None of these courses of action will be right for every case. And it is, of course, challenging to consider these options and others (and their respective advantages

and disadvantages) in the split-second in which a timely decision must be made. To some extent, the mediator must use his/her intuition, and then be self-forgiving if the judgment proves to be unsound.

And what if the offensive remark is directed at the mediator?

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The critical decision for the mediator is whether a response is needed for reasons related to the mediation itself. There are occasionally situations—particularly in joint sessions—where offensive, disrespectful, or bullying behavior directed toward the mediator must be addressed in order to foster a feeling of safety for the other participants in the mediation. Even in those situations, for example, there are choices to be made about how to address the offensive action of remark. For example, speaking separately to the offender might elicit an apology that could defuse the tension and possibly even create some positive momentum toward settlement.

3. Validating Differences and Commonalities

One of the key concepts in negotiation theory is that the parties' differences create opportunities for joint gains. In the classic example of dividing an orange, described in the book *Getting to Yes*, the fact that one child wanted to make juice and the other wanted only the rind for a cake created the opportunity for each to have the equivalent of a whole orange. Culturally competent mediation means striking the balance between acknowledging and validating the parties' differences when they are relevant and at the same time looking for common ground.

How does this work in practice? A case in point: an elderly African-American janitor was suing his employer for race-discrimination in terminating him. As the mediation began, the mediator asked if the parties were comfortable addressing each other on a first-name basis. The janitor said, "I prefer that you call me Mr. Jones." In the course of the mediation he discussed his background as a sharecropper and the way that he was addressed as "boy" long into his adulthood. The central issue of the mediation thus became whether a settlement could be reached that did further strip this gentleman of his dignity. The fact that his life experience made him different from everyone else in the room could have been downplayed, but instead it was acknowledged by the mediator without condescension. The mediation resulted in Mr. Jones being reinstated in exchange for his withdrawing his suit, but the most memorable aspect of the mediation, he said, was that he was treated as an equal in the mediation room. That acknowledgment—and reinstatement—were worth more than a monetary settlement from Mr. Jones' standpoint.

A key element for the mediator is sensitivity to the following question: how does each person feel about his/her difference being acknowledged or treated as irrelevant? The answer to this question may be far from obvious, and the answer may change over time as the mediation unfolds. Taking breaks in the mediation for caucus sessions creates an opportunity to address such questions and thus keep the mediation on track.

Another key element for the mediator is recognizing that people have far more in common than often meets the eye. Identifying those common elements of the human condition can sometimes open the door to resolution. Among Maori tribes, the traditional method for resolving territorial conflicts between tribes was to gather for negotiation, which could only begin after the tribes have: (a) discussed their lineage and the times in the past when their ancestors had helped each other; (b) named those in their respective tribes who had passed away; and then (c) shared a meal together.[42] Such elaborate rituals are ill-suited to modern mediation, but acknowledgment of common experience (e.g., the loss of loved ones) or the sharing of a meal can sometimes help to bridge gaps that initially might seem insurmountable.

4. Mediating Values-Based Conflict

Among the most profound differences that mediators encounter are those based on deeply held values—sometimes fueled by religious or political beliefs. For example, in the conflicts over abortion, advocates on both sides of the controversy are unlikely to find common ground, and neither believes that a compromise is morally acceptable.[43] Moreover, the values and beliefs that fuel this controversy are unlikely to yield to persuasion.

MIT Professor Lawrence Susskind has identified four methods for addressing values-based conflict: (a) focusing on interests and values separately (for example, the parties might achieve a mutually beneficial détente without having to resolve their differences regarding values; (b) shift the goal of the mediation from resolution to dialogue, seeking to increase mutual understanding; (c) identify one or more overarching values on which the parties agree and that enable the parties to transcend the conflict; and (d) confront values directly with the goal of reconciling the differences.[44]

In some cases, one or more of the parties may couch their differences as a matter of principle—for example, "I refuse to negotiate with a liar, as a matter of principle." In such situations, the parties do not disagree about values—both sides would readily agree that lying is blameworthy. Instead, the dispute is more accurately described as one in which one of the parties fears exploitation, or is dug in because of anger over past exploitation, or both.

5. Co-Mediation as a Technique for Leveling the Playing Field

The parties in a mediation often wonder if the mediator can truly be impartial. This concern is heightened if, for example, the mediator is the same race, gender, or ethnicity as one of the parties but not the other. In divorce mediation with heterosexual couples, co-mediation—with one male and one female mediator—is often used. In a recent sexual harassment case, the female plaintiff asked the

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[42] This description is from Sallyann Roth, LICSW, who has studied Maori customs in connection with her travels in New Zealand.

[43] For a moving account of discussions between abortion rights and anti-abortion advocates, *see* Fowler A, Gamble NN, Hogan FX, Kogut M, McComish M, Thorp B. Talking with the enemy. The Boston Globe, 2011 Jan 28; Sect. F:1.

[44] Susskind L. How to negotiate when values are at stake. Negotiation; 2010 Oct.

male mediator if he would be willing to have a woman co-mediator; the answer was yes, and the case quickly settled. Adding a co-mediator does not mean that a solo mediator could not be impartial. However, from the standpoint of feeling heard and understood, the parties' preference to have one of the mediators be someone with a background or characteristics similar to theirs makes sense and has proven to be a successful strategy for settlement in mediation. Co-mediation also adds value for the mediators. Drawing on the experience, skills, expertise and perspectives of two people who have different approaches and have worked in different contexts will add to the diagnostic range and the variety of tools needed to handle complex conflicts. This is particularly true in situations involving diversity of race, culture, class, gender, and other characteristics.

6. The Power of Narrative

Discussing diversity issues in mediation, as in other settings, can be fraught with emotion. For those who have been subjected to discrimination, seeking to be understood on the subject of bias may arouse feelings of vulnerability. For those who have enjoyed the benefits of majority status, the same conversation may evoke feelings of defensiveness. These two reactions can feed each other, fostering a cycle of blame and denial.

In order to break that cycle, mediators have found that personal narrative can be a powerful tool for understanding. Narrative can overcome argument, because the teller is not seeking agreement—s/he simply recounts what happened and how the teller experienced that history.

* * *

Narrative is not a magic bullet. But in appropriate cases, it can unlock the door to resolution and understanding diversity.

One of the best case studies in the literature of mediation—mediator Carol Liebman's *Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University's Hamilton Hall*[45]—tells a story of co-mediation. The students—primarily, but not exclusively, students of color—were demanding the creation of an Ethnic Studies Department at Columbia. Liebman, who teaches mediation at Columbia, was asked to mediate the conflict despite her position as a faculty member, but, because she is white, she sought out a minority co-mediator, political scientist Carlton Long, and the two of them successfully mediated the conflict.

One of the valuable insights from Liebman's account of the mediation is the metaphor of parallel seminars, which captures three important aspects of the case. First, the idea that mediation involves education, not only for the mediator, who is learning about the dispute but also for the parties, who may be unfamiliar with the process of mediation and interest-based negotiation. Second, the idea that these seminars can take place separately—in parallel—when the tensions between the parties, as in this case, run so high that the parties are unwilling, for the most part, to participate in joint sessions. Finally, the idea that in situations where diversity

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[45] Liebman C. Mediation as parallel seminars: Lessons from the student takeover of Columbia University's Hamilton Hall. Negotiation J. 2000;16(2):157.

issues are present, there is yet another important layer of learning that is underway, as the mediators and the parties try to understand the identity-based and value-based issues that are driving the conflict.

Because we can never entirely walk in each other's shoes, diversity issues require of mediators an ongoing openness to learning and a commitment to bringing "beginner's mind" into every mediation. Even when diversity issues are not present, the idea of the parties and mediator educating each other is a valuable model for the mediation process.[46] In the mental health professions, this aspect of the process might be referred to as psychoeducation.

Welcoming Diverse Practitioners to the Field of Mediation

Attend almost any conference of mediators in the United States, and you might wonder: where are the people of color?[47] For reasons described in this chapter, mediation can be more effective in resolving conflict if the ranks of mediators reflect the diversity of our society.

There appear to be at least three reasons for the underrepresentation of minorities in the mediation field. First, minorities are underrepresented in the occupations from which many mediators—perhaps even a majority—come. The following census figures tell that story, which has improved a bit, but only a bit, in recent years (Table 10.2)[48]:

Table 10.2 Underrepresentation of minorities in selected professions

	US population (%)	Lawyers (%)	Psychologists (%)
African-American	12.3	4.3	3.8
Asian	4.4	3.4	3.3
Hispanic	14.4	3.4	7.3

Subtle, and not so subtle, headwinds retard progress of non-whites in these professions. It was not until 1943, for example, that non-white lawyers were even allowed to join the American Bar Association.

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[46] For an example of such education of the parties, see the description of the mediation of the San Francisco Symphony Orchestra strike in Mnookin R. Bargaining with the devil: When to negotiate, when to fight. New York: Simon & Schuster; 2010. pp. 177–208.

[47] A notable exception is the annual conference of the Center for alternative dispute resolution in Maryland [Internet] [updated 2013 June 6; cited 2013 June 17]. Available from: http://www.natlctr4adr.org.

[48] See Bureau of Labor Statistics [Internet]. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity [2008]; cited 2012 Dec 4. Available from: http://www.bls.gov/cps/cpsaat11.pdf; See also U.S. Census Bureau. Resident population by sex, race, and Hispanic origin status; 2008.

Second, mediation is still a relatively new phenomenon. Making a living as a mediator can be extraordinarily difficult. In minority communities in the United States, the individuals who achieve the level of education required for work as a professional may be among the first in their families to do so. The risk—both social and economic—involved in using that education on a relatively unconventional occupation can be a formidable obstacle.

Finally, the lack of minority participation in mediation can become a self-fulfilling prophecy, as the field of mediation looks less appealing to would-be minority mediators until there is a critical mass of people of similar background.

For all of these reasons, it is incumbent upon those who seek to advance the use of mediation broadly throughout the United States to take affirmative steps to invite and include minority mediators.

Conclusion

Becoming a culturally competent mediator is a process, not a destination. The complexity of the task of mediation is multiplied several fold by the diversity of people that mediators encounter. Cultural competence requires a form of learning that is not only intellectual but also lodged in the heart. Compassion and empathy are as vital as curiosity and an open mind.

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