



Understanding cultural differences to mediate more effectively

Cultural diversity can create barriers to settlement, but they can be overcome

BY RANDALL CHOY

I am an avid, though not a particularly distinguished, tennis player, and had the good fortune of playing on a team to represent Northern California in the USTA National Championships in Tucson, Ariz. Sixteen teams from all over the country each represented their sections, distilled down from the 6,000 teams that started the season, all with high hopes of making it to “The Nationals.” What struck me most about the event was that every other team, except the team from San Francisco, was basically homogenous in its makeup of team members, at least in terms of ethnicity.

As one might surmise, most of the teams were comprised of Caucasian players from all over the country, but some teams were all Filipino, Taiwanese or all

Hispanic. The team from San Francisco however, was a “rainbow coalition” of African-American, Vietnamese, Chinese, Persian, Lebanese, Indian (Southeast Asian), and Caucasian. To throw in even more variety, we also had straight and openly gay players. Fortunately there wasn’t a hint of discrimination at the event, but we were quite the talk of the event because of our diversity.

While we are very lucky to be on the West Coast and have this diversity, it also introduces many challenges on occasion, when attempting to successfully mediate or arbitrate cases. The signals sent and received, both verbal and non-verbal, can be subtle, yet significant.

This article is not, by any means, intended to be a comprehensive discussion on how to approach the complex topic of cultural sensitivity. It is however, meant to

raise awareness of the role of culture in successfully litigating, mediating and arbitrating cases involving the vast cultural diversity found on the West Coast, as part of the greater Pacific Rim.

Taking sides

Fast forward to a meeting that I participated in a few years ago, where both sides had “lawyered up,” and in attendance were young associates, forensic accountants, personal representatives, and the parties themselves. Both clients were Asian, and the other side “took the floor,” wanting to present their side first. My client glanced at me, and I knew she was annoyed by the presumptuousness, but it was also unspoken that it was to our advantage to let them go first. We would learn more by listening than by talking.



What the other lawyer could have done was offer to let us go first, whereupon we would have politely declined, and both sides would then have achieved their preliminary objectives. In any event, the other side then proceeded to put on a “dog and pony show,” during the entirety of which my forensic accountant and I listened politely, nodding occasionally to show that we understood their position. At the end of the 30-minute presentation, the attorney closed his binder, and asked if we had any questions. We did not so the three of us shook our heads, “no.” The other attorney then, looking rather smug, thrust a small sheaf of documents across the table at us, and said, “Since that’s the case, I’ve prepared the documents to settle this case, so sign and we can be done with this mess.”

Let’s take a moment to analyze what happened here. In Western culture, perhaps absolutely nothing occurred out of the normal realm of negotiation strategy. In this particular case however, a myriad of faux pas were committed. The other side started out by aggressively taking the floor, something that is probably taught as good strategy in some cases. “Take the floor,” “own the courtroom,” “take control of the agenda.” All good western approaches to meetings held all over the country, if not the world. As pointed out earlier though, these approaches are not necessarily the approach that will lead to the greatest receptiveness in certain situations and cultures.

What else happened? Complete misreading of how their presentation was received by one side of the table. Politely nodding our heads meant that we understood what was being presented, *not that we were accepting the position posited by the presentation*. When we politely declined to sign the proffered settlement agreement, agreeing only to take the presentation under calm deliberation and provide a response, the other side was livid. They had assumed as the presentation was going along, that the polite nodding of heads was tacit agreement with their position, and therefore they had won. Wrong.

Tips for cross-cultural mediations

In mediating cases, with cross-cultural effects, and indeed all mediations, it is important to:

- Do your homework. Know your party’s cultural, economic and personal background.
- Determine the level of hostility, anger and resentment, which are not part of the law, but clearly part of the process. Do this by engaging the parties at the outset.
- Determine the *real* goal (Chinese: *mùdì*) of the parties. If it is monetary compensation, that is easy; but it often takes a little digging to get a bottom line.
- As all good mediators do, listen carefully and watch for clues that may not be immediately obvious, and be sensitive to different cultural values.

Lastly, one could assume a rather minor detail, yet was one which could have major ramifications, was the flippant act of tossing the settlement documents across the table to my clients to sign. In most Pacific Rim countries, that would be construed as disrespectful. Even if the documents were ultimately to be signed because they represented a fair resolution of the issues, that act could disrupt the entire process, and at best, delay it until the insult was attenuated by time. A mediator’s nightmare for sure, to have settlement at hand, only to have it delayed by an unintended failure of etiquette.

Using aggression

Aggression is part of our American culture, especially for lawyers. It is not surprising that Asian cultures also express and encourage aggressive tactics. However, aggression is expressed in many different ways, and many cultures. Some Pacific Rim cultures tend to be less outwardly expressive of aggression. Traditional Asian martial arts is particularly illustrative of this issue. Though some forms are outwardly aggressive, like Kenpo and Tai Kwan Do, others are counter-punching or even outwardly passive, such as Wing Chun or Tai Chi.

Litigation can be very similar to martial arts. Who throws the first punch? Is your strength in attacking, defending or counter-punching? Psychologically, how do you best get information about your opponents? As a mediator, this same information is important to get both sides of the table to engage in meaningful dialogue. Perhaps even more important is to know each side’s propensities to prevent unnecessary friction which can obstruct resolution, or delay it.

The different cultural approaches to aggression arise frequently. I was recently asked about receptivity of Asian parties to mediation, and told that while mediation was almost non-existent, arbitration was steadily gaining acceptance as ADR. I was then asked why I thought that was. Upon reflection, I think my answer was correct. Nearly 40 years of practicing law and mediation has shown that most cultures still adhere to the adversarial mode of dispute resolution. Someone is right, someone is wrong. Mediation is more often, a middle ground. Mediation is allowing the parties to honestly and openly discuss the issues. I think mediations are not successful because the parties are led kicking and screaming to the bargaining table. It is often hard to have forthright conversations without a lot of confidence and trust-building first, something not easily done in one session.

Chinatown no longer homogeneous

By a rather late introduction, I am Chinese by ethnicity, a fourth generation San Franciscan, born and raised. How then, am I any more qualified to speak about diversity than any other mediator? Take a stroll down San Francisco’s Chinatown, and to the uninitiated, it looks very similar to what one might expect – upturned gabled roofs, painted in garishly flamboyant colors, reds and greens predominating. There are still souvenir shops, roast ducks and roast pork strips hanging from racks, prominently displayed in shop windows; tea and herb



shops are still numerous. Yet the Chinatown the tourists see today is vastly different from the Chinatown of 50 to 60 years ago – the point being, the *people* of Chinatown, the population is vastly different. For one thing, it is actually far more diverse than one would expect, and lumping the population into the group “Chinese” would be stereotyping at its worst.

Rolling the clock backwards about 65 years however, for the first 100 years the Chinese population was far more homogenous. One could, with some validity, make certain assumptions about the Chinese people they were dealing with. I make two brief points here: One, I am more “Chinese” than one would expect of a fourth generation ethnic Chinese because my parents grew up in a culturally Chinese environment, since Chinatown in America was a static copy of China as the first immigrants knew it when they left China.

Get to know the other side

The first step in evaluating your opponent, client or party is to do a little homework and determine the most likely scenario. What country, what region, what era and what family background did they come from? As a mediator, I often hear people complain that the first hour or so in mediation doesn’t seem to target the issues. On the contrary, as I get to know the parties by getting to know who they are, where they come from, that is exactly the information that helps me successfully mediate a case. And this is true even if the culture that I am learning about is outside of California, or outside of my admittedly urban sensibilities.

I do have a little advantage being ethnically Chinese, particularly because I speak Cantonese relatively fluently and was very interested in Asian-American History. I know that immigration until 1965 was predominately from the Sze Yup Provinces in China, an area that was predominately poor, uneducated and subject to certain stereotypes. As I hope you noticed, I have just fallen into the trap of stereotyping. I too, have to constantly remind myself not to fall into assumptions, pejorative or otherwise. Dealing with Chinese parties who came to America later than 1965, (and that group is getting more and more prominent), can be difficult based on where they are from. Taiwanese think differently than Mainlanders, who think differently than their countrymen from the South, let alone Tibetans or Mongolians. Not only is Thai culture vastly different from Lao, Cambodian, Japanese, Singaporean, or South East Asian culture, but even within each country sometimes dramatic regional differences exist.

Do some research, show respect

Of course, no mediator can expect to have expertise in all cultures, but the internet is amazingly helpful in doing a little homework, laying the foundation for at least letting the parties know that the neutral cares enough to want to learn about a certain culture. Working with Chinese parties, I still have a lot to learn. For example, mediating a case involving the equivalent of the Chinese Chamber of Commerce, and its various constituent parts, I did some research that enabled me to show the parties that I was familiar

with their various boards, which Chinese villages they represented, and the area’s election process. That credibility enabled me to get started quickly with the issues they were trying to resolve. As mediators and advocates, tap into your resources in the community who can give you the “lay of the land,” politically and culturally.

In the opposite kind of situation, where I had no knowledge of a particular culture, instead I spent the first hour listening to a party from Iran, and learned about the issues of Persian ethnicity, and the difficulties of being assimilated in the U.S. coming from a Middle Eastern country with a certain population that doesn’t fit into the mold of an Arab culture. I know a former superior court judge who is not Asian, but is a highly successful mediator. For his cases involving Chinese parties however, he makes a point of bringing out a little notebook with some Chinese phrases that he has memorized. His pronunciation is horrible. However, it is clear that he is respectful, always is interested in learning, loves people, loves his job, and is truly interested in helping to resolve the problem. Needless to say, he is not only popular, but extremely successful in mediating cases.



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