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## Selecting Mediators and Representing Clients in Cross-Cultural Disputes

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# SELECTING MEDIATORS AND REPRESENTING CLIENTS IN CROSS-CULTURAL DISPUTES<sup>1</sup>

*By: Harold Abramson\**

## I. INTRODUCTION

Even an adept negotiator can be baffled by cultural differences.<sup>2</sup> When a negotiation reaches an impasse because of an unfamiliar cultural interest or a miscommunication between the parties due to different styles of communicating, negotiating, or decision-making, the negotiator might find it helpful to enlist assistance from a culturally-trained and culturally-appropriate mediator. This Article considers how such a third party can help you, as a negotiator, bridge cultural differences. It considers when to seek aid from a mediator, what the credentials of the mediator ought to be, and the impact of the mediator's approach on the way you represent your client.

## II. WHEN TO ENLIST A MEDIATOR?

In a cross-cultural negotiation, a party may need a process that can address cultural differences. Parties brought up in dissimilar cultures might require a process that helps them recognize and bridge their different upbringings. They may need a process with a mediator who can help them overcome such cultural gaps as when an Asian or South American party may be more interested in the

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<sup>1</sup> This article is based on the author's chapter, "The Culturally Suitable Mediator" in *THE NEGOTIATOR'S FIELDBOOK*. Schneider and Honeyman, eds., (2006).

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<sup>2</sup> These differences can arise in disputes between parties from different countries as well as between parties within the same country when the parties come from different regions or from different religious, ethnic, or professional groups.

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relationship than the U.S. party who may be more interested in a detailed contract, or when the U.S. party wants extensive discovery while the civil law party sees no need for it. They also may benefit from a mediator who deeply involves the parties, the ones with the greatest knowledge of the dispute, when the negotiation seems to be failing because the cultural practice of one side replaces the principal with her lawyer. By turning to mediation, parties can create a forum in which barriers that parties may not be able to overcome on their own can be addressed.

I recently observed how attorneys can perceptively engage in cross-cultural analysis when they enlisted assistance from me as a mediator in a pre-mediation conference. The attorneys informed me that they thought negotiations had failed so far not because they were not on the same page, but because one of the parties from a small Western African country could not negotiate with someone whom he thought had acted so unethically. The party said that where he is from, you do not deal with someone like the other party. He would rather take a chance in court and lose, a significant risk according to his own attorney, than settle with someone who acted so unethically. The attorneys indicated that they needed a mediator that could help the parties overcome this impasse.

### III. WHAT CREDENTIALS SHOULD THE MEDIATOR POSSESS?

When dealing with cross-cultural disputes, you need a mediator whose training and experience goes beyond the familiar basic credentials. The standard checklist should be expanded to include two additional questions that are culturally-related: is the mediator trained to deal with cultural differences? And a second less obvious question, does the mediator approach mediation in a way that fits the cultural needs of the parties? The next sections consider these two questions.

#### A. Is the Mediator Trained to Deal With Cultural Differences?

A mediator should be trained and experienced in helping parties recognize culturally-shaped interests and overcome culturally-based impasses.

## i. Culturally-Shaped Interests

The primary purpose in a negotiation, like in any dispute resolution process, is to advance and meet your client's interests, whatever they might be. Some commentators have critiqued such an interests inquiry as a narrow cultural one, shaped by western cultural individualism. This simplistic view fails to take into account other culturally-driven goals such as interdependence and relatedness.<sup>3</sup> A broader view of parties' interests, however, can better capture the full range of a client's cultural needs, framing each party's cultural upbringing the content of his or her interests.

Spotting cultural interests can be difficult to do because they can be buried when positions are presented. A dispute that appears to be primarily about money, for instance, might be mostly about protecting a principle, saving face, preserving relationships, or promoting particular community norms and collectivist interests. Although these interests are not unfamiliar in the U.S. culture, these interests can be deeply compelling ones for parties from some non-U.S. cultures.<sup>4</sup>

In collectivist societies, such as in China and Japan, parties can have an interest in preserving face, an ingrained personal value that involves being treated with respect and dignity, maintaining positive relationships, and preserving an honorable reputation and social standing in the community. "Face-saving" according to Fisher and Ury, however, "carries a derogatory flavor [in the English language]. People say, 'We are doing that just to let them save face,' implying that a little pretense has been created to allow someone to go along without feeling badly. The tone implies ridicule. . . . This is a grave misunderstanding of the role and importance of face-saving. Face-saving reflects a person's need to reconcile the stand he takes in a negotiation or an agreement with his principles and with his past words and deeds."<sup>5</sup>

Parties also can have an interest in a solution appropriate for the community. In a study of mediation in an Islamic country, the author found:

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<sup>3</sup> Compare Amr Abdalla, *Principles of Islamic Interpersonal Conflict Intervention: A Search Within Islam and Western Literature*, 15 JOURNAL OF LAW & RELATIONS 151, 161-62, 165, 176 (2000-2001); ROGER FISHER, ET AL., GETTING TO YES 41, 48 (2d ed., 1991).

<sup>4</sup> See JEANNE M. BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES, AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES 8-9 (2001). See also FISHER, ET AL., *supra* note 4.

<sup>5</sup> See FISHER, ET AL., *supra* note 4.

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The settlement must be an appropriate outcome for the community as a whole as well as for the actual disputants. The group's interests guide the process. This is consistent with collectivist culture generally where communal and societal interests will preside over individual party interests. It enables this form of mediation to serve an educative role by articulating the social norms and providing acceptable behaviours and solutions for the disputants and for the community as a whole. In this way it differs from western mediations where confidentiality and privacy constraints, for the benefit of the individuals involved, limit a wider instructive role.<sup>6</sup>

Finally, consider this international mediation where a culturally shaped interest was not being met.<sup>7</sup> In a dispute between two businessmen from Latin America and a U.S.-based multinational company, the lawyer from the U.S. company could not fathom why the Latin American businessmen wanted an apology from the U.S. company for its apparent negligence in losing a valuable commodity. It was not until the U.S. lawyers realized that the two businessmen had spent on legal fees and travel almost as much money as they were seeking in court that the U.S. lawyer understood that an interest other than money needed to be met.

When these sorts of culturally shaped interests might arise in a dispute, you may want to select a culturally-trained mediator who can assist parties in recognizing these less familiar and yet essential needs.

## ii. Culturally-Shaped Impasses

Disputing parties can encounter impediments due to their different cultural upbringings that can foster conflicting wants and approaches to the negotiation. Any study of culture reveals numerous examples of behavior common in one culture that could be misinterpreted by someone brought up in another culture. These misunderstandings of behavior may result in or produce an impasse. When these cultural differences result in an impasse in a negotiation, you might turn to a culturally-trained mediator to help generate movement.

An appropriately trained mediator can help you recognize and overcome culturally-based impasses. The mediator can help you

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<sup>6</sup> See Black, *Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes*, 13 Bond LR at p. 26 (Dec. 2001) or <http://www.bond.edu.au/law/blr/vol13-2/black.doc>

<sup>7</sup> This dispute was mediated by the author.

classify an impasse as well as develop a suitable intervention. The mediator might use the following five steps.<sup>8</sup>

During the first three steps, the mediator prepares for the cross-cultural negotiation by mastering a cultural conceptual framework, learning about her own cultural upbringing, and investigating the culture of the other negotiators. The next two steps provide a guide for the mediator as the mediation progresses. The mediator approaches the negotiating behavior of others with an open mind and then helps parties bridge any differences.

These five steps can be illustrated through the use of a hypothetical. Consider how a U.S. attorney might react when he learns that the other party, an institutional client from Japan, will not be represented by someone with substantial settlement authority. Instead, the other side will be represented by a team of negotiators who will make decisions by consensus. Furthermore, all the team members cannot be present in the negotiation session. Under these circumstances, the U.S. attorney is likely to suspect that the other side is acting in bad faith. The other side appears to be replacing the person with real settlement authority with an un-wieldy team of negotiators. How might the mediator proceed?

First, the mediator comes to the mediation with a *conceptual framework* that can help her identify and understand cultural characteristics. The mediator must be able to grasp the meaning of “cultural behavior” and how it is different from universal “human behavior.” Cultural characteristics have been isolated in numerous studies of culture, including studies relevant to conflict resolution.<sup>9</sup>

The hypothetical implicates a cultural characteristic related to the process of decision-making for each side. This generic characteristic, like virtually all cultural characteristics, encompasses a continuum bound at each end with a value-based pole. At one extreme, societies can be found that are hierarchical, with decisions made by leaders. At the other extreme, societies can be found that are collective, with decisions made by consensus. The actual cultural practice is rarely one extreme or the other; it usually falls somewhere between these two end poles of the continuum. Sec-

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<sup>8</sup> Harold Abramson, *International Dispute Resolution: Cross-Cultural Dimensions and Structuring Appropriate Processes*, in ALAN RAU, ET AL., PROCESSES OF DISPUTE RESOLUTION 918-21 (3d ed., 2002).

<sup>9</sup> See, e.g., GEERT HOFSTEDE, CULTURE'S CONSEQUENCES (abridged 1980, 1984); GEERT HOFSTEDE, CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND (1997); DEAN ALLEN FOSTER, BARGAINING ACROSS BORDERS: HOW TO NEGOTIATE BUSINESS SUCCESSFULLY ANYWHERE IN THE WORLD 264-72 (1992, 1995) (showing how Hofstede's work relates to international negotiations).

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ond, the mediator fills in this conceptual framework with a deep understanding of her *own culture or cultures*.<sup>10</sup> A skilled mediator must be cognizant of the degree to which her own behavior is universal or culturally determined, because it is through this personal lens that the mediator observes and assesses the negotiating behavior of others. To reduce distortions, the mediator must learn about her own cultural upbringing in order to appreciate the extent to which her view of other people's behavior may not necessarily reflect a universal view. In the hypothetical, a U.S. mediator should be aware that her possible view that organizations tend to be hierarchical, where decision-making is centralized in "leaders," is not universal organizational behavior. Third, the mediator strengthens her conceptual framework with an understanding of the *culture or cultures of the negotiator(s)*. The mediator should try to identify and research the culture(s) of the clients as well as the attorneys that will be participating in the mediation. In doing so, the mediator should not assume that just because a person was brought up in a clearly identifiable culture, the person will act in accordance with its cultural norms. Furthermore, the mediator should learn as much as possible about the negotiators as individuals, that is, learn about their personalities and ways their negotiating behavior may vary from practices of their culture(s). In the hypothetical, the research might reveal that one side is from a society in which organizations typically make decisions based on consensus, but the research may reveal little about their individual personalities.<sup>11</sup>

These first three preparatory steps are relatively easy to complete because they entail collecting mostly accessible information on cultural characteristics. The next two steps, however, are much more difficult to accomplish because they require the mediator to suspend judgment and develop strategies during an intense, dynamic and fast moving mediation session.

Fourth, the mediator withholds judgments about the parties' negotiating behavior by viewing key behavior with an *open mind*. This mental process requires considerable discipline. It is too easy for a person who routinely judges negotiating behavior to prematurely judge it in a cross-cultural negotiation. In the hypothetical,

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<sup>10</sup> For studies of American culture, *see, e.g.*, GARY ALTHEN, AMERICAN WAYS xiii, 4, 8, 9-10, 14, 17, 24-25, 136-37 (1998); EDWARD C. STEWART & MILTON J. BENNETT, AMERICAN CULTURAL PATTERNS: A CROSS-CULTURAL PERSPECTIVE (1991).

<sup>11</sup> *See* Loretta Kelly's description of an Aboriginal Australian representative whose behavior was sharply at variance with those he supposedly represented. Loretta Kelly, *Indigenous Experiences in Negotiation*, Ch. 35 THE NEGOTIATOR'S FIELDBOOK. Schneider and Honeyman. (2006).

the mediator should not view one side's collective decision-making process as evidence of good or bad faith; instead she should view this key negotiating behavior as a difference that needs to be addressed.

Fifth and finally, the mediator searches for ways to *bridge* any resulting gap by helping the parties identify the nature of the impasse and by facilitating an intervention. The mediator might facilitate an interest-based negotiation, a compromise, or a decision to defer to one side's practice. In the process of doing so, the parties are likely to learn whether the gap reflects a cultural difference that can be bridged or a strategic ploy (which also could be cultural) that may impede or derail the negotiation.

In the hypothetical, the parties appear to have different views of who must be present in the mediation session. The U.S. party expects the other side to bring a single person with settlement authority, and the other side expects multiple people to sign off and they all cannot be present.

The mediator could facilitate a negotiated solution by resorting to an interest-based approach, where the interests behind the different practices are explicated and respected. In the hypothetical, instead of viewing the Japanese party's claim that it cannot agree to anything without a consensus as bad faith, the mediator might focus on how to respect the Japanese party's need for consensus while still meeting the U.S. party's need for the presence of clients with substantial settlement authority. The parties, for example, could negotiate an arrangement in which the Japanese party brings to the negotiation session all the people who must concur, or at least makes sure the absent people are available by telephone. Then, in the session, the Japanese consensus approach could be respected by giving members of its negotiating team ample time to meet privately.

This calibrated approach can smoke out whether the gap is based on a bridgeable cultural difference or a strategic ploy. It might reveal, for instance, an ingrained strategic practice such as haggling that includes a last minute demand by a senior person that is purposely not at the table.

Sometimes, a gap might be bridged by one side simply deferring to the other side's practice, especially when the other practice is not a deal-breaker or does not implicate core personal values. For instance, a U.S. attorney may defer to the other side's formal practices of carefully using titles and avoiding personal questions about family.



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In another example, consider how a mediator might handle an impasse that can arise when a U.S. lawyer insists that signed business agreements cover many details and contingencies and the Japanese lawyer displays little interest in reducing details to writing. The U.S. lawyer will likely interpret this disinterest as reluctance about the deal or a specific issue. In preparing for a cross-cultural mediation, a U.S. mediator will realize that his own preference for reducing everything to writing may be due to his own cultural upbringing and may not be a universal mode of behavior (step 2). The drafting of comprehensive contracts is taught in U.S. law schools and reinforced in law practice. A Japanese lawyer may have been brought up differently (step 3). Instead of being concerned about the details of a written agreement, the Japanese lawyer may be more concerned about the business relationship, leaving for the written contract a general statement about the relationship and basic principles for governing the business deal.

In the negotiations, the mediator would view the reluctance of the Japanese lawyer to put everything in writing as ambiguous behavior to be viewed with an open mind (step 4). These different approaches might be investigated by the mediator asking why the U.S. attorney prefers detailed contracts and why the Japanese attorney may not. As each side learns more about the other side's practice, the mediator can focus on ways to bridge this gap. The two sides may close the gap by respecting the reasons for the different practices. They may negotiate a compromise in which both sides seek to cultivate a relationship of trust and then enter into a contract that may cover key obligations but not every conceivable contingency (step 5).

B. Does the Mediator's Approach Fit the  
Cultural Needs of the Parties?<sup>12</sup>

Asking whether a mediator's approach fits the cultural needs of the parties can be an unfamiliar but necessary inquiry in order to formulate an effective cross-cultural process. You may want to inquire what sort of third party assistance the parties and the other attorney are accustomed to as this can influence the sort of mediator that they will respond to. This familiar problem-solving ap-

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<sup>12</sup> Substantial portions of this section are excerpted and edited from NOLAN-HALEY, ABRAMSON, & CHEW, *INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES* 123-37 (2005).

proach may run counter to their experiences, and a result, not be readily acceptable. You may need to select a mediator whose approach comports with the other participants' cultural upbringings in order to create an efficacious process.

This mediator selection method, in which cultural preferences drive the choices, is different from the method I have suggested for selecting U.S. mediators in a non-cross-cultural context.<sup>13</sup> In that context, parties should select a mediator that will use an approach that will meet the parties' needs for resolving the dispute. It is a choice driven by an analysis of the advantages and drawbacks of various mediator approaches in view of the parties' needs, including possible cultural considerations.

The culturally-driven selection method suggested here, however, may be only a intermediary method during this transitional period toward globalization of mediation practices. I recently saw evidence of the changes taking place when participating in a U.S.-Chinese Retreat of dispute resolvers hosted by the CPR Institute.<sup>14</sup> One of the Chinese participants noted that when Chinese companies negotiate with each other and use a mediator, they prefer a more directive approach to mediation (the common Chinese practice), however, when Chinese companies use a mediator with non-Chinese businesses, (i.e. international disputes), they use a facilitative approach (a new mediation approach in China). As the practices across the globe expand to encompass a broader range of mediator approaches, the emphasis in the mediator selection discussion is likely to shift away from cultural analysis and toward analysis of the various approaches.

Before suggesting a culturally nuanced way to classify mediator approaches, the term "mediation" needs some clarification and definition. There has been much debate over what processes can be legitimately called mediation. It seems to me that it is just too late to convincingly defend a favored, circumscribed mediation definition. I prefer a broad, generic definition that has the flexibility of accommodating the diversity of approaches to third party assistance found around the globe: Mediation is simply a negotiation conducted with the assistance of a third party. Instead of focusing on the noun of mediation, I prefer focusing on the adjective in

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<sup>13</sup> See HAROLD ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 133-45 (2004).

<sup>14</sup> The CPR Institute (International Institute for Conflict Prevention & Resolution) conducted this invitation-only one-and-half day retreat at the Mohonk Mountain House in October, 2005.

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front of the noun. Is the mediation facilitative, evaluative, directive, transformative, some mix, or something else? Various adjectives are highlighted in the classification system in this article.

i. U.S. Problem-Solving and Self-Determination Approach

U.S. practices reflect a culturally shaped view of mediation, a view that is vividly conveyed in the highly regarded original Model Standards of Conduct for Mediators.<sup>15</sup> Its definition of mediation, found in the Preface, reveals much about the problem solving role envisioned in the United States.

Mediation is a process in which an impartial third party—a mediator—facilitates the resolution of a dispute by promoting voluntary agreement (or “*self determination*”) by the parties to the dispute. A Mediator *facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem solving to enable the parties to reach their own agreement*. These standards give meaning to this definition of mediation. [Italics added].<sup>16</sup>

This definition, however, has been modified in the recent changes to the Model Standards to reflect a momentous broadening of the term mediation to encompass different “styles.” The revised definition provides that: “Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.”<sup>17</sup> According to the Reporter’s Notes<sup>18</sup> “It [the new definition of mediation] is not designed to exclude any mediation style or approach *consistent with* Standard I’s commitment to support and respect the parties’ decision-making roles in the process.” [Italics added].<sup>19</sup> Therefore, this ostensibly broader definition has a firm limit. It only welcomes those styles of mediation that comport with the Westernized fundamental principle of party self-determination.

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<sup>15</sup> The Model Standards were prepared and approved by three leading organizations in the United States dispute resolution field: American Arbitration Association, the Litigation and Dispute Resolution Sections of the American Bar Association, and the Society of Professionals in Dispute Resolution (1992-1994). For a discussion of the Model Standards by the chair of the drafting committee, see Feerick, “Toward Uniform Standards of Conduct for Mediators” 38 S. Tex. L.R. 455 (1997). A comprehensive review and revision of the Model Standards was adopted by the three sponsoring organizations in 2005. See <http://moritzlaw.osu.edu/programs/adr/> (last visited Aug. 2006).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at Preamble (Sept. 2005).

<sup>18</sup> *Id.* at 7.in Reporter’s Notes (Apt. 10, 2005).

<sup>19</sup> *Id.*

This fundamental policy of party self-determination reflects a distinctively U.S. cultural value that is not given the same sacred regard in more directive practices found in some other areas of the globe, as described below under evaluatively directive and wisely directive mediations.

Although the Model Standards' particular vision of the mediator's role reflect the dominate approach to training mediators in the United States and a widely practiced approach, it is not the exclusive one used. No culture can claim a single, monolithic mediation approach, and the United States is no exception. Two other widely used approaches are transformative and evaluative mediation.

## ii. Transformative Mediation

A transformative mediator engages in a mediation practice based on communication and relational theory. Instead of promoting the goal of settlement for the parties, the transformative mediator allows the parties to determine their own direction and supports the parties' own opportunities for perspective-taking, de-liberation, and decision-making. The mediator focuses on the parties' interactions and supports their shifts from destructive and alienating interactions to more constructive and open interactions (referred to as empowerment and recognition shifts). In this model, parties are likely to be able to make positive changes in their interactions with each other and, consequently, find acceptable resolution for themselves, where such terms genuinely exist.<sup>20</sup>

## iii. Evaluative Mediation

Mediation becomes evaluative when the mediator gives recommendations such as offering his or her views of the strengths and weaknesses of the legal case, assessing the reasonableness of particular settlement options, or proposing what might be a reasonable settlement. Mediator power to give recommendations can be found domestically in the recently adopted AAA International

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<sup>20</sup> See ABRAMSON, *supra* note 9, at 71-72; also see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). For an extensive resource list, see INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, INC. at <http://www.transformativemediation.org> (last visited Mar. 14, 2006).

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Dispute Resolution Procedures,<sup>21</sup> in foreign domestic laws such as the Indian Arbitration and Conciliation Act of 1996,<sup>22</sup> and in the United Nation's new Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.<sup>23</sup>

The adjective *evaluative* only refers to the power to offer an evaluation, not the power to persuade or pressure the parties to accept the evaluation. However, the mere expression of an evaluation can influence parties, that is assert a mildly directive influence, without the mediator doing anything more than offering the evaluation. Thus, an evaluation is inherently directive and therefore risks diluting the principle of party self-determination. When the mediator goes the next step and assertively persuades and pressures, the mediation moves pass mere evaluation toward more directive forms of mediation.

iv. Evaluatively Directive Mediation

When the mediator evaluates and then pushes his or her evaluation, the mediator shifts toward an evaluatively directive form of mediation, an approach that poses a clear threat to party self-determination. This form of mediation is practiced in the U.S. when mediators implement their evaluative power by either gently encouraging or by assertively pressing parties to move toward or adopt their evaluations.

In Continental Europe, the mediator's expected, if not preferred, role can be influenced by his or her civil law upbringing. In a study that compares mediation practices in Australia, a common law jurisdiction, with Germany, a civil law jurisdiction, Nadja Alexander noted that in Germany: "Like the government legal centres offering conciliation services, most of the dispute resolution processes associated with these conciliation centres [chambers of commerce] do not follow an interest-based mediation model.

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<sup>21</sup> See Rule M-10 Authority of the Mediator, American Arbitration Association, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules), Amended and Effective July 1, 2003.

<sup>22</sup> The Indian Arbitration and Conciliation Act of 1996, Article 67(4), adopted verbatim the Article 7(4) of the UNCITRAL 1980 Conciliation Rules.

<sup>23</sup> United Nations General Assembly, Resolution 57/18 Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law, Article 6(4), (Jan. 24, 2003). The UNCITRAL Model Law incorporated the power to make proposals for settlement found in the UNCITRAL Conciliation Rules, Article 7 (4) (Report of the UNCITRAL on the Work of it's Thirteenth Session, GAOR, Thirty-fifth Session, Supplement, No. 17, UN Document No. A/35/17 (1980)).

Rather, the processes offered tend to be directive, interventionist and rights-based in nature.”<sup>24</sup>

There are many mediators within the U.S. and around the globe that are known to be evaluatively directive, although the particular practices can vary across a continuum of less to more directive. The more directive a practice becomes, the greater the threat to party self-determination.

v. Wisely Directive and Authoritatively Directive Mediations

In some cultures, disputing parties are accustomed to relying on a “wise” third party as a source of the “right” answers who will assertively if not aggressively direct them toward a solution. A wisely directive mediator investigates the dispute, evaluates it, and formulates and promotes solutions based on the wisdom for which he or she was selected. That wisdom could be informed by local cultural norms, religious values, or the mediator’s age, legal knowledge, or leadership or authoritative position. Parties expect to receive answers and are receptive to, if not desirous of, adopting them. There seems to be little regard to protecting party self-determination. Therefore, while the role of the wise third party may be to “mediate,” the third party effectively functions as a quasi-adjudicator imposing a resolution on the parties. Wisely directive mediators can be found in some Islamic, Islamic/Arabic, and Chinese cultures, among other places.<sup>25</sup>

In Lebanese cultures, George Irani, noted that:

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<sup>24</sup> See Nadja Alexander, *What’s Law Got to Do with It? Mapping Modern Mediation Movements in Civil and Common Law Jurisdictions*, 13 BOND LAW REVIEW 16, 23 (Dec. 2001), available at <http://www.bond.edu.au/law/blr/vol13-2/Alexander.doc> (last visited Aug. 2006).

<sup>25</sup> See George Irani, *Islamic Mediation Techniques for Middle East Conflicts*, 3 MIDDLE EASTERN REVIEW OF INTERNATIONAL AFFAIRS 4 (June 1999); John Murray, *The Cairo Stories: Some Reflections on Conflict Resolution in Egypt*, 13 NEGOTIATION JOURNAL 39, 53-54 (1997); Ann Black, *Alternative Dispute Resolution in Brunei Darussalam: The Blending of Imported and Traditional Processes*, 13 BOND LAW REVIEW 16, 26 (Dec. 2001), available at <http://www.bond.edu.au/law/blr/vol13-2/black.doc>; SALAH AL-HEJAILAN, *MEDIATION AS A MEANS FOR AMICABLE SETTLEMENT DISPUTES IN ARAB COUNTRIES*, presented to WIPO Conference on Mediation, Geneva, Switzerland (Mar. 29, 1996), available at <http://arbiter.wipo.int/events/conferences/1996/hejailan.html>; Eric Glassman, *The Function of Mediation in China: Examining the Impact of Regulations Governing the People’s Mediation Committees*, 10 UCLA PACIFIC BASIN LAW JOURNAL 460 (1992); Michael T. Colatrella, Jr., *Court-Performed Mediation in the People’s Republic of China: A Proposed Model to Improve the United States District Courts’ mediation Programs*, 15 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 391, 404-08 (2000); Robert Perkovich, *A Comparative Analysis of Community Mediation in the United States and the People’s Republic of China*, 10 TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL 313 (1996).

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. . . as in Arab culture in general, the mediator is perceived as someone having all the answers and solutions. He therefore has a great deal of power and responsibility. As one participant put it: 'If [the third party] does not provide the answers, he or she is not really respected or considered to be legitimate.'<sup>26</sup>

In Egypt, John Murray observed the assertive role of third parties in his study of three public disputes and his own experiences living and teaching in Cairo:

\*\*\*[I]t is acceptable, indeed expected, that the third party will also apply pressure to help bring about agreement. This is why the resources and status of the third party are so valuable. Third-party pressure is welcomed even by those who feel its sting. . .<sup>27</sup>

In a study of traditional rural mediation in Brunei Darussalam, a country with a strong Islamic influence, Ann Black documented these mediator credentials and behavior:

Equally important is for the mediator to have good knowledge of the rules to apply and to employ these to determine what is the right or fair outcome, and then to direct and guide the parties towards a similar solution. An ability to persuade, even to coerce parties by moral imperatives, to a settlement, is an attribute.<sup>28</sup>

In the chart below, Ms. Black highlighted differences between traditional mediation in a collectivist society of the sort she studied in Borneo and the western form of mediation found in individualistic societies.<sup>29</sup>

She also observed how this traditional mediator's role, in which the wise third party promotes particular outcomes, can diminish when people leave the intimacy of their villages that are bound by social and kinship ties for more anonymous living in urban areas.

Although most of the mediation case studies that illustrate the work of a wisely directive mediator have been in community disputes, the practice also has been described in the mediation of

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<sup>26</sup> See George Irani, "Islamic Mediation Techniques for Middle East Conflicts" 3 Mid. E. Rev. of Intl Aff. 4 (June 1999).

<sup>27</sup> See Murray, "The Cairo Stories: Some Reflections on Conflict Resolution in Egypt" Neg. J. 39, 53-54 (January 1997).

<sup>28</sup> See, Black, *Alternative Dispute Resolution in Brunei Darussalam: the Blending of Imported and Traditional Processes*, 13 Bond LR at p. 26 (Dec. 2001) or <http://www.bond.edu.au/law/blr/vol13-2/black.doc> (last visited Aug. 2006).

<sup>29</sup> See, *Id.* at 21.

**Table 1 Comparison of Features of Western and Traditional Mediation**

<b>Western/Independent Mediation [individualist culture]</b>	<b>Traditional/Iban Mediation [collectivist culture]</b>
<p>Goal of mediation is for parties to reach an agreement that ends the dispute to their mutual satisfaction. ***</p> <p>Mediators should not have social ties, or be related to, the disputants. Accreditation has objective basis - such as courses, professional qualifications, recognition by authoritative bodies. ***</p> <p>Mediations occur in private settings - an office/ room neutral for the parties. ***</p> <p>Mediators should be impartial, objective and even-handed. Criticism of disputants' behaviour or character is unacceptable. Parties direct the outcome - mediator should not persuade or coerce.</p>	<p>Goal of mediation is to end the dispute between parties so that harmony can return to the longhouse community. ***</p> <p>Mediators are connected to the disputants through social relationships or kinship ties. Accreditation has subjective basis - trust and respect of that community. There is no training, other than community enculturation. ***</p> <p>Mediations typically occur in a public setting - <i>raui</i> of the longhouse. ***</p> <p>Mediators should be fair, kind, loving and subjectively appraise options. Criticism is acceptable where this is relevant to the dispute. Moral persuasion and coercion can be justified in the interests of the longhouse community.</p>

commercial disputes. When considering the role of the mediator in resolving private commercial disputes (such as intellectual property disputes) in the Arab world, the Chairman of the Higher Board of Euro-Arab Arbitration System and a lawyer in Saudi Arabia, Salah Al-Hejailan, gave this wisely directive characterization of the mediator's role:

The mediator is normally a person of a prestigious social standing who is known for his thorough knowledge, honesty and impartiality. Seniority and respect for elders are particularly resonant in the Arab World. Such a person enjoys the respect of the



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disputants who *invariably feel satisfied with any award he may deem appropriate* [italics added].<sup>30</sup>

Even though these historic wisely directive practices have been confirmed in my recent travels to Turkey and China to discuss mediation practices as well as in numerous meetings with visiting Chinese, Egyptian, Japanese, Indian attorneys, and other visiting foreign attorneys, these discussions also hinted at a transformation that may be taking place. When discussing the nature of wisely directive practices, the respect for these third parties seem to be diminishing although not necessarily the clout. Wisely directive mediation may be in the process of being supplanted with a form of mediation that I call “authoritatively directive.” Although these two sorts of mediators function similarly-as quasi-adjudicators, their sources of clout are different. While the wise mediator’s source of influence may be his or her recognized wisdom, the authoritative mediator’s source may be his or her position of official authority, especially in countries with authoritative governments or collectivism as a pervasive cultural value.<sup>31</sup>

vi. Distinguishing Wisely Directive Mediation from  
Other Settlement Processes<sup>32</sup>

The dominant function of the wisely directive mediator is similar to the function of an *evaluative mediator* in which the third person assesses the merits of the dispute or solutions, the *judge* in a *judicial settlement conference* in which the third person hints at what she might do in court or urges a particular settlement, and an *arbitrator* in *nonbinding arbitration* where the third person issues a decision on the merits. In all these processes, the third party offers evaluations.

It is important to note that parties’ responses to the evaluations in the U.S. differ from the responses to the wisely directive evaluation in other countries. An evaluation from a U.S. mediator can provide valuable input, however, parties are relatively free to reject the recommendation and resist any pressure if the mediator is also directive, with little consequence to the parties. An evaluation as well as any pressure from a settlement judge can be riskier

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<sup>30</sup> See Salah Al-Hejailan, “Mediation as a Means for Amicable Settlement of Disputes in Arab Countries” presented to WIPO Conference on Mediation, Geneva, Switzerland (March 29, 1996) at <http://arbiter.wipo.int/events/conferences/1996/hejailan.html> (last visited Aug. 2006).

<sup>31</sup> The authoritative mediator may be one appointed by the government to serve as a Judge to settle cases or as a mediator.

<sup>32</sup> This section is based on Abramson’s analysis in Nolan-Haley, Abramson, and Chew INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESS 136-137 (2005).

to repel especially if the parties want to avoid alienating the judge that might decide the case. Nevertheless, parties are not shy about resisting pressure when they must to protect their interests—a proud trait for those brought up in an individualistic society. In addition, a nonbinding decision from an arbitrator can influence parties without the parties being pressured by the third party, who will not be further involved in resolving the dispute.

In contrast, a wise third party's evaluation and pressure is received quite differently in other cultures. Based on history and experience in a collectivist society as suggested in the various case studies, disputing parties in other cultures expect the wisely directive mediator to steer them toward the right solution that they are then receptive to adopting. Why else would they go to a third party for help, they would wonder? In short, they expect the third party to dress like a mediator but act like a wise quasi-arbitrator.

Although wisely directive mediation may no longer be embraced intact by either mediators or parties in modern societies, its influence can still be felt in the mediation preferences of some cultures around the globe, including the possibility of it shaping an emerging authoritative form of directive mediation.

As should be apparent from these descriptions of wisely directive or authoritatively directive practices, they offer forms of mediation that seem to give the least regard to preserving party self-determination.

This section on various adjectives suggests a continuum of cultural influences and practices around the globe. Any generalizations are risky, especially because no country has a monolithic approach. Nevertheless, these generalizations, based on likely cultural propensities, can at least sensitize attorneys to the range of possible adjectives to look for. A tentative continuum might be constructed with Chinese and Islamic cultures being the most directive, Civil Law cultures less, followed by the U.S. and Australian cultures, with English practices being the most elicitive along with transformative mediation in the U.S. It remains to be seen whether this continuum<sup>33</sup> will withstand the ongoing study of global mediation practices.

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<sup>33</sup> Although this analysis concentrates on one prominent feature of mediation, the elicitive-directive continuum along with the corollary party self-determination continuum, a more nuanced analysis of the adjectives would consider other culturally distinguishing features. Mediation processes can be further differentiated based on the degree of impartiality of the mediator and the degree of influence the mediator has over the parties, whether the mediator focuses primarily on process or on process and content, the importance of confidentiality, and whether mediator training is required, among other distinguishing features.

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This next section considers how a participant's preference point on the elicitive-directive continuum shapes the resulting mediation process.

vii. Preferences Grid: Mediation Processes Based  
On Coalescing Preferences

As Professor Leonard Riskin has emphasized, it takes two to create a mediation process. It is not formulated by the mediator alone or the parties/attorneys alone. Each participant can influence the shape of the resulting mediation process.<sup>34</sup> Rather than focusing on influence here, however, I will consider how the cultural preference of each participant, when coalesced in the mediation, produces a distinctive mediation process. Instead of mapping each participant's ability to influence the final resulting process, this grid maps each participant's preference.

The preferences grid consists of two axes. The horizontal one maps the mediator's dominant approach to the mediation. It incorporates Riskin's elicitive-directive continuum, a continuum that reflects a range of mediators' approaches found around the globe. Mediators can be highly elicitive, facilitative, predominately facilitative, facilitative-directive, and varying degrees of directiveness. Riskin carefully defines directiveness broadly to include evaluations and assertive mediator behavior.<sup>35</sup>

The vertical axis maps the cultural preference of the parties/attorneys for third party assistance in resolving disputes.<sup>36</sup> It focuses on their preferred relationship with the mediator. The axis maps a continuum of party/attorney preferences that ranges from preferring elicitive to directive mediators. You would expect parties/attorneys brought up in an individualistic society to lean toward preferring a more elicitive approach and to be less deferential to a mediator's directiveness while a side brought up in a more

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<sup>34</sup> See Leonard Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME LAW REVIEW 1, 37-46 (2003).

<sup>35</sup> See *id.*

<sup>36</sup> The vertical axis reflects the parties'/attorneys' composite preference for a mediator although the preference of each attorney and each client may differ, especially in a cross-cultural mediation. A separate preference axis could be mapped for each participant. The vertical axis in the grid reflects the result negotiated by the participants among themselves regarding the sort of mediator that they want to select. Presumably, it is a result that fits the cultural needs of the parties.

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collectivist society is more likely to prefer a more directive mediator.<sup>37</sup>

<b><u>Parties/Attorneys' Preference</u></b>	
Prefer Elicitive Approach	
<b><u>Mediator's Approach</u></b> Elicitive	A Problem-Solving
	F Dysfunctional
<b><u>Mediator's Approach</u></b> Directive	B Evaluative
	E Evaluatively Directive
Prefer Directive Approach	
<b><u>Mediator's Approach</u></b> Elicitive	D Dysfunctional
	C Wisely Directive

This second axis firmly demonstrates how it takes two to tango—to create the mediation process. A mediator who is directive, even aggressively so, for instance, does not necessarily result in the parties/attorneys being deferential to the mediator's procedural moves or substantive direction. As the second axis clarifies, the parties/attorneys must be willing partners—that is, be receptive to a more directive approach for the resulting process actually to *be* directive.

The preferences grid illustrates the importance of the mediator and parties/attorneys sharing compatible preferences in order for the mediation process to function, and shows how these preferences shape the resulting process. Consider several combinations:

<sup>37</sup> But see Christopher Honeyman, et al., *Skill is Not Enough: Seeking Connectedness and Authority in Mediation*, 20 NEGOTIATION JOURNAL 489 (2004) (comparing U.S. practices with community mediations in China and Australia).

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If the mediator is extremely elicitive and the parties/attorneys prefer an extremely elicitive approach, then the result can be a classically problem-solving mediation that preserves party self-determination. See point A.

If the mediator is modestly directive and the parties/attorneys prefer a modestly elicitive approach, the result can be a classically evaluative mediation where the mediator offers evaluations and the parties/attorneys give some weight to them. See point B.

If the mediator is extremely directive and the parties/attorneys prefer an extremely directive approach, the result can be a wisely directive mediation. See point C.

If the mediator is extremely elicitive and the parties/attorneys prefer an extremely directive approach, the mediation process may become dysfunctional. The parties/attorneys are likely to become quite frustrated because they are not getting the mediation service that they prefer. See point D.

Within these prototypical results, many gradations may be encountered. For example, if the mediator is evaluative and considerably directive and the parties/attorneys prefer a considerably directive approach, the result is likely to be an evaluatively directive mediation process. See point E. If the mediator is evaluatively directive and the parties/attorneys prefer primarily an elicitive approach, the mediation process also may become dysfunctional because the parties/attorneys are likely to become frustrated with the process. See point F.

In the spirit of Riskin's caveats in his article about his "New New Grid System," this grid hopefully promotes understanding and discussion while avoiding being so complicated that it becomes confusing and unmanageable.<sup>38</sup> The tension between formulating a nuanced grid and one that is easily accessible is inherent in this undertaking. I also prefer to err in favor of simplicity in order to present succinctly the encounter between distinctively cultural approaches of mediators and the preferences of parties/attorneys. The resulting grid, however, should not be blindly followed as a confident predictor of the resulting mediation process. Its value is in offering a framework for discerning and selecting the type of mediator who might formulate the sort of mediation process that may be effective with your client and the other side.

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<sup>38</sup> See Riskin, *supra* note 35, at 50-53.

#### IV. IMPACT OF MEDIATOR'S APPROACH ON CLIENT REPRESENTATION

After you select a mediator who is culturally trained and suitable, you need to figure out how to effectively represent your client before that sort of mediator. Knowing that the mediator is *culturally trained* does not radically impact your approach to representation; it only expands the possibilities of what can be achieved in the mediation. The mediator can assist you in clarifying any culturally-related interests of the parties and overcoming any culturally-related impasses. Selecting a *culturally suitable* mediator, however, can singularly shape your entire representation strategy. Your whole approach to enlisting assistance from the mediator can be shaped by your understanding of how the mediator will approach the process; in other words, your approach will be fashioned by the “adjective.”<sup>39</sup>

If you select a problem solving mediator (one that will stay in that mode), you, as the attorney, can advocate as a problem solver.<sup>40</sup> You have the freedom and security to share information including interests, to brainstorm options, to recognize weaknesses in your client's legal case, and to be open to creative solutions that go beyond the ones in the legal papers. You can feel secure<sup>41</sup> asking the mediator for help—whether to sort out interests, facilitate evaluating the legal case, or develop multiple options. You also have much freedom and security with a transformative mediator, who is trained to support whatever sort of process is structured and implemented by you, your client, and the other side, although you cannot rely on the mediator's expertise or initiatives to create or direct a process, as the transformative mediator is committed to being non-directive.

In contrast, consider the impact of selecting an evaluative (non-directive) mediator on your approach to advocacy. Mediator evaluations can take a variety of forms, including the mediator as-

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<sup>39</sup> The following analysis of how the adjective can shape your representation strategy is taken from Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARVARD NEGOTIATION LAW REVIEW 103, 124-28 (2005). Also see NOLAN-HALEY, ABRAMSON & CHEW, INTERNATIONAL CONFLICT RESOLUTION: CONSENSUAL ADR PROCESSES, Ch. 4 (2005).

<sup>40</sup> For a full discussion on how to advocate as a problem solver, see ABRAMSON, *supra* note 9.

<sup>41</sup> But see the section on mediation's structural biases in Christopher Honeyman, *Understanding Mediators*, Ch. 67 in THE NEGOTIATOR'S FIELDBOOK. Sejmecoder and Honeyman, eds., (2006).

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sessing the reasonableness of various settlement options, assessing the consequences of not settling, or recommending settlement proposals either as the mediation unfolds or as a “mediator’s proposal.” Knowing that the mediator may formulate one or more of these types of evaluations can induce you to approach the mediation more like an adjudicatory process than a negotiation. Instead of formulating a negotiation strategy based on candid conversations with the mediator and meeting parties’ interests, you are apt to return to the traditional adversarial approach, so familiar in the courtroom, in which you withhold unfavorable information, hide any flexibility to avoid implying a lack of confidence in the legal case, and present carefully crafted partisan arguments and positions that are designed to persuade a decision-maker to act favorably.

Alternatively, you might problem solve, but in a selective way that reduces the risk of an unfavorable assessment by the mediator. In such a constricted problem solving approach, you still share and advocate your client’s interests and engage in problem solving moves such as brainstorming options and designing creative solutions, but only up to a point. You will avoid sharing information or showing flexibility that may risk a less favorable evaluation from the mediator. This carefully calibrated strategic plan can dilute the potential of a problem solving process by limiting the ability of parties to uncover optimal solutions. Withholding information may bury valuable data and insights relevant to devising solutions. Hiding flexibility may cramp the opportunity to search for, and devise, creative solutions. But, in return, you can secure an evaluation that might spur parties toward settlement.

As a mediator’s approach moves further toward the end of the directive continuum, your problem solving approach will become more constricted until it morphs into a traditional adversarial strategy. When the mediator’s approach becomes highly directive, or wisely directive, you are likely to view the mediator as a decision-maker and will advocate accordingly.

Finally, this discussion implies that a mediator will stay within the selected approach throughout the mediation process. But Riskin reminded us that mediation is not a static process. Some, if not many, mediators purposely vary their roles as the mediation progresses by facilitating at one point, evaluating at the point that seems useful, being directive when necessary at another point, and returning to facilitating when it seems appropriate—a practice that

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they espouse as necessary for resolving disputes.<sup>42</sup> Unfortunately, Riskin omitted assessing the impact of this mediator practice on how attorneys represent their clients. When the mediator freely switches roles, you are likely to abandon a nuanced representation approach and adopt the safest mode of client representation, an adversarial one, because it is likely to provide the best protection against an unfavorable evaluation.

## V. CONCLUSION

This article suggests when you might want to bring in a mediator to help parties resolve a cross-cultural dispute. When you decide to do so, you should consider enlisting a third party who is both culturally-trained and culturally-suitable for the dispute. After selecting the mediator, you need to contemplate how to effectively represent your client in the process. There is no one all-purpose strategy that will maximize the opportunities before every sort of mediator. The optimum advocacy approach depends on the sort of mediator selected.

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<sup>42</sup> See Riskin, *supra* note 35, at 13-17, 17-21, 28-29 (noting further how each role can either foster or impair party self-determination).



