



By Joan B. Kessler

# Beyond the Golden Rule: Successful intercultural mediations

## Introduction

The Golden Rule, “Do unto others as you would have them do unto you,” is an important rule to live by, but not necessarily in a mediation with people from diverse cultural backgrounds where communication strategies are more complex. In a culturally diverse mediation, the way you or your client might expect that someone else wants to be treated and the results you wish to get may not be what someone from another cultural orientation may want “done unto them.”

While law schools are more eager to embrace teaching communication and conflict resolution courses, many law schools still do not have communication courses, and there are many lawyers in practice today who have had no such courses and have been forced to “learn on the job.” Former Chief Justice Warren Burger repeatedly called upon the legal community to increase the study of communication skills in law schools. (*See* Burger, *The Special Skills of Advocacy*, 46 N.Y. ST. B.J. 89 (1974); Burger, *The Role of the Lawyer Today*, 59 Notre Dame L. Rev. 1, 5 (1983).)

While former Chief Justice Burger did not suggest turning law schools into trade schools, he did stress the importance of communication-skills training in areas such as advocacy skills. More and more lawyers have become aware of the importance of understanding the research tools and theories used in communication research. One example of the use of communication research by the legal community occurred over 30 years ago when the United States Supreme Court was deciding whether to allow panels of fewer than 12 jurors. The Court cited various studies including this author’s communication study on jury size in support of its decision. (*See, e.g.*, this author’s Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-*

*Making Processes* (1973) 6 U. MICH. J.L. REFORM 712, cited in *Colgrove v. Battin* (1973) 413 U.S. 149, 159-160 [93 S.Ct. 2448]; *Ballew v. Georgia* (1978) 435 U.S. 223, 238, 242-43 [98 S.Ct. 1029].) Since then, innumerable articles have been written by both legal scholars and social scientists alike, demonstrating the greatly increased awareness of lawyers in communication studies.

Intercultural communication issues have become even more important because of the large mix of cultures in the United States and particularly in Los Angeles. Mediators regularly confront cultural diversity among litigants, lawyers and mediators. Further, the growth of multinational corporations and international investors in this country has increased the possibility of intercultural mixes among litigants, lawyers and mediators.

The goal of this article is to discuss how intercultural communication issues can be applied in the mediation context. If the litigants’ problems can be resolved in mediation before filing a lawsuit, many matters could be resolved early in the process and most litigation expenses would be avoided. Further, to resolve a litigant’s problems without a trial once a case is filed, the mediator must be able to communicate effectively with the attorneys and parties, gather as much information as possible and have the parties explore alternatives. In order to accomplish this result in the intercultural context, the mediator and lawyers must recognize and overcome barriers in order to achieve effective intercultural communication. It is important to identify the legal and factual issues in dispute in a mediation, and it is equally important to use intercultural communication skills to help identify communication differences and similarities as the process unfolds and address these issues to increase success in resolving the dispute.

## Communication issues

Problems may occur when either the lawyers, clients and/or mediator become ethnocentric in a mediation. Ethnocentrism is when one defines the world only through their own beliefs, values and attitudes, and does not acknowledge that others may not see things the same way. The meaning intended by one person may not be correctly received by the other person. Developing an awareness of the possible impact that ethnocentrism has on effective intercultural communication will be valuable to a participant in a mediation from a background different from the background of others participating in the process. Those involved in a mediation should be able to identify their prejudices and learn to control them. These insights may help the mediator, attorney or party examine, analyze, predict and regulate his or her conduct. This will help the mediator gain the best result by obtaining the most information from the parties while avoiding any possible intercultural conflict in bringing about a resolution.

The mediation process emphasizes the need for increased sensitivity to individual needs. One example of this need is an anecdote about a European client who was unfamiliar with American legal procedures and this lack of knowledge left him unable to anticipate the expense of discovery and the financial costs of proceeding with litigation. Sensitivity to cultural differences may have helped his lawyer explain the costs of discovery in the United States more thoroughly to the client which would have assisted in explaining the need for an early mediated settlement.

## Developing sensitivity to the uniqueness of culturally diverse litigants

The potential for misunderstandings, confusion and hostility is evident in

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many mediations and particularly increases in the intercultural mediation. One way to improve the quality of the information exchange among lawyers, litigants and the mediator is to improve the communication effectiveness. As more shared meanings and mutual understandings occur, attorneys and litigants will be more likely to share honest and complete information with the mediator.

There are various ways to improve the communication environment during intercultural interactions. For instance, open-ended questions may be used, which allow the respondent's answer to be broad without limits and allow interpretation by the respondent of the subject matter. These open-ended questions early in the mediation may help to put the litigants at ease and encourage communication. For example, a mediator might ask an accident victim to describe how the accident happened by using the open-ended question structure.

A mediator who interacts with litigants from different cultures should consider establishing common ground and emphasizing similarities to help the litigants feel more comfortable in the exchange. Conveying to the litigants that the message was understood through paraphrasing may be even more important in an intercultural exchange than in a mediation with litigants who are all from the same cultural background. The mediator may actually be able to improve litigant satisfaction and reach resolution if communication improves between the litigants.

### Reaching empathy

Sometimes at the beginning of a mediation, litigants cannot even be in the same room, intercultural differences aside. However, reaching empathy may be one way to help solve the potential communication problems in any mediation and especially in an intercultural exchange. (See, e.g., Bennett, *Overcoming the Golden Rule: Sympathy and Empathy* (1979) 3 ICA COMM. Y.B. 407 [Author suggests using empathy to try to experience what the person from the other culture is experiencing.]) Empathy occurs when one has insight into the feelings of others and can share those feelings.

Training in empathy is particularly important in intercultural exchanges where there are increased chances for miscommunication. There are two steps to empathy: first, respond to what the person says explicitly and then second, respond to what is implied or hinted. If mediators and lawyers respond to culturally-diverse clients with heightened sensitivity, the interaction might be more productive. The mediator and lawyers must be empathetic listeners and think about what is implied to empathize with the clients.

### Speaking honestly

Parties may be embarrassed and fearful about a case outcome, which may heighten communication problems in a mediation. The mediator's objective is to convey to the litigants and attorneys in any mediation, particularly in the intercultural environment, that speaking honestly to the mediator is acceptable. The fact that much of the population distrusts the legal system makes this goal even harder to attain. Mediators and lawyers need to be aware of the litigants' feelings and not just respond to the substantive aspect of their words.

In an intercultural exchange it may be difficult for a mediator to experience the feelings of a litigant whose cultural orientation has been different from his or her own. One major factor that may block one's ability to understand the orientation of another is stereotyping. If, for instance, the participants decide that all members of a certain ethnic group are the same, he or she may not effectively empathize with the unique characteristics and feelings of a certain litigant. The key to empathy for a mediator and the participating lawyers in an intercultural interaction is to prevent prejudices and stereotypes from clouding perceptions of the culturally diverse litigants.

One communication scholar suggests that in intercultural exchanges one person must *not* use the Golden Rule and "[d]o unto others as you would have them do unto you," but rather think of how the person from the other culture is feeling and consider how his or her cultural background affects perceptions and influences reactions. (See generally Bennett, *supra*.) In

this regard, empathetic listening is a critical tool in a mediation. In intercultural exchanges the mediator and the lawyers must go beyond what the litigants say to discover what is actually meant.

In a mediation setting with a Japanese litigant, or a litigant who has been strongly influenced in his or her communication style by Japanese traditions, a "yes" may be given although there is really disagreement with the mediator's suggestions, or the litigant may keep silent or understate the point. In one recent mediation, one party indicated agreement to the mediator by head shaking. Yet, when the mediator said, "Tell me, will you sign an agreement with these terms," the answer was, "No." The mediator must be aware of the possibility of misinterpretation, and pursue the issues for clarification.

### Application

The major elements of the communication process are: 1) the source of the communication, 2) encoding the message, 3) the message, the set of symbols resulting from encoding, 4) channel, the means of transmitting the message from source to receiver, 5) receiver, the one who intercepts messages, 6) decoding, changing external messages into meaningful information, 7) receiver responses about the message, and 8) feedback or information about communication effectiveness. Accordingly, when a mediator and a litigant or attorney discuss a matter, they send and receive messages through verbal and nonverbal cues. This communication process is ongoing and irreversible. We are always communicating, intentionally or not. For instance, when an attorney shuffles papers and looks at the clock, mediation participants may get the message that it is time to go, whether or not the "shuffler" or "clock watcher" intended such a message.

In an intercultural exchange, several variables may cause breakdowns in the communication process. Perception is a key component to any communication, and especially to the intercultural exchange. In addition to perceptual problems, language may pose a problem in the intercultural exchange. Even if the

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mediator, litigants and attorneys speak the same language, thought patterns may be different in the creation of the message. Differences in slang and vernacular may also cause problems in the intercultural exchange in a mediation.

In addition to perception and language, many other variables may also cause problems in the intercultural exchange with mediators, litigants and attorneys. Nonverbal communication aspects such as differences in use of personal space and differences in the use and the value of time are examples. Beliefs, attitudes, values, roles, the environment or setting in which the interaction takes place, and the world view of those involved are other intercultural variables that might produce barriers affecting the intercultural exchanges in a mediation.

Lack of accurate analysis of feedback may cause problems in communication in a mediation. This may be especially true when the participants have different cultural orientations. When one person sends a message to another through verbal and/or nonverbal channels, the reaction of the receiver is feedback. The subsequent messages sent by the sender may be influenced by the receiver's feedback, or the sender's perception of the receiver's feedback. For instance, in an intercultural exchange between a mediator and litigant and/or attorney, the mediator must carefully assess the litigant's and/or attorney's

reactions to what is said in order to decide how and what to say to the individual from another culture. Failure to understand how this litigant and/or attorney is reacting may cause the person to feel hostile or uncomfortable with the mediation.

There are many factors that may cause problems in mediations and especially in the intercultural context. Lack of empathy, lack of trust, stereotyping, and especially ethnocentrism, or judging another culture according to one's own cultural values, may lead to communication problems. For example, a mediator would be ethnocentric in thinking that all people would perceive the running of a negotiating session as a mediator would. This ethnocentric attitude might lead to a culturally diverse litigant's and/or attorney's negative reaction to the mediator.

There are various solutions to breaking down these barriers in an intercultural exchange. Self awareness, being empathetic, using good communication skills, and seeking common ground are helpful. Being respectful, nonjudgmental, listening carefully, avoiding ethnocentrism, being flexible and tolerating ambiguity are helpful in improving intercultural communication.

### Conclusion

The mediator's first and foremost job is to bring the parties together and help

them reach a solution and settlement. To achieve this result, however, the mediator's role as interpersonal communicator is critical in an intercultural mediation. Former Chief Justice Burger called upon lawyers generally to work to reduce "friction in our complex society." (Burger, *supra*, at 19.) By developing an awareness of the importance of intercultural communication, mediators may be able to reduce friction between themselves on the one hand and litigants and lawyers on the other hand who may be of different cultural backgrounds and thereby increase the success of the mediation process. Attorneys' awareness of these issues will help make their mediations more successful.

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