
Skill Is Not Enough: Seeking Connectedness and Authority in Mediation

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Coauthor Christopher Honeyman was struck by the flagging "marketability" of mainstream professionally trained mediators in the U.S. More and more parties were choosing retired judges and other practitioners who were not classically trained mediators to help them resolve their disputes. Searching for an explanation of this phenomenon, Honeyman found a possible answer in Melbourne, Australia, where he listened with a Western ear to the presentations of coauthors Loretta Kelly and Bee Chen Goh about the importance of connectedness and individual perceptions of authority to the parties in the mediation of indigenous disputes. In this article, the authors present case histories from Australia and Malaysia to illustrate these concepts. They contend the same concepts are behind the shifting of the market for mediation in the United States.

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What are parties seeking in a mediator? When some of us set out years ago to make mediation work for people on a large scale in the United States, it seemed natural to call for competence, ethics, and dedication on their behalf — the standards of reference for any profession. Accordingly, our field has tried to set up systems of teaching and qualification to provide these things.¹ One would expect no less of any other field that proposed that its practitioners be allowed to poke around in sensitive areas — such as dentistry.

Dentistry, as it happens, makes a good comparison (although any number of other specialized fields and professions would also work) because it provides ready understanding of what our field was *not* looking to promote. In the United States, most people do not care who their dentist is related to, and are more likely to value evidence of state-of-the-art training than proof that their dentist is highly regarded by the community. The trappings of community connection and local authority are simply not regarded as essential attributes of a typical profession.

For mediation in the West, however, it is becoming increasingly evident that the deceptively simple opening question triggers concerns not only about skill and substantive knowledge, but about culture, appropriateness, and what we might call “saleability.” These do not always play out in ways consistent with our expectations as to the value of “quality” or the usual image of a “profession.” We will make an attempt to relate them here. The effort involves a comparison of our experiences across three very different cultures.

It has been more than twenty years since mass practice of mediation became a possible, if not inevitable, result of court and administrative reforms in a number of domains, and more than fifteen years since the first reasonably comprehensive test for mediator skills was articulated (Honeyman 1988, 1990). In the years since performance-based testing and other tools for gauging and improving mediators’ skills became available, there has been a significant effort toward distinguishing varying definitions of the skills involved so that programs with different purposes and means can tailor the resulting evaluation scales and their uses to their own needs and circumstances. Yet the “cultural” criticisms of Western mediation orthodoxy have increased. At the same time, the case flows coming into mediation in the U.S. have sometimes seemed not only unresponsive to all of these qualitative criteria, but dependent on something else entirely. Research by Bobbi McAdoo, for example, has demonstrated how, in the face of widespread training directed toward an “elicitive” model² of mediation (an approach, Riskin said, “which implies that the mediator draws something from the parties: ideas, issues, alternatives, proposals,” [2003: 20]), civil court parties in two states with strong lawyer-mediator training programs have shifted away from the elicitive model toward using mediators whose primary skill set has more to do with the ability to

evaluate (see Kovach and Love 1996) a case in monetary terms (McAdoo 2002; McAdoo and Hinshaw 2002). This is most striking in Minnesota, a state where a single training organization — Mediation Center in St. Paul — had trained more than 2,000 Minnesota lawyers and judges in the “elicitive” model of mediation only to discover, years later, that the practice had shifted to one primarily focused on monetary evaluation.

Christopher Honeyman, one of the authors of this article, had been mulling over for some time why the mediation marketplace seemed to be moving in such an unexpected direction when an unusual angle of view presented itself. Sometimes it is helpful to go some distance away from your immediate concerns to acquire some perspective, and this certainly seems to have been true in this case. The chain of acquaintance that led to this collaboration between Honeyman and fellow authors Loretta Kelly and Bee Chen Goh was a consequence of the Broad Field Project’s call for people with original ideas to present at the 2003 meeting of the International Association for Conflict Management (IACM) in Melbourne, Australia. The IACM is a U.S.-based group that has a strong international component but had never previously ventured beyond Europe.

Kelly came prepared to deliver a sharp critique of typical mediation practice by members of the Australian majority culture as it related to Aborigines — either in disputes among Aborigines, or in disputes between members of that community and nonindigenous Australians. Goh was ready with an equally pointed critique of Western assumptions of how mediation should be conducted in China — a nation with far longer experience of mediation than the West.

Although Goh and Kelly had never heard of each other before the Broad Field Project contacted them, they agreed to give a joint presentation at the IACM. That presentation cast light on some troubling developments in Western³ mediation practice — even as it applied to other Westerners — and led to this article. In brief, Kelly and Goh’s demonstration of how Australian Aboriginal and Chinese/Malaysian parties sought — and used — mediators, who were seen as authority figures and had strong connections to the parties and the community, made it possible to recognize a similarity to current Western parties’ predilections, a similarity that was all the more striking in view of the sharp differences between the respective cultures.

We will begin with two brief case studies from rural Australia, which show how much certain parties desire a mediator who is connected to their life experience — even to the degree that a “biased” mediator is seen as quite acceptable, at least as part of a team. The case studies are based on actual mediations conducted by Kelly.

The first case study illustrates the importance of building the parties’ trust in the mediators. Fostering trust can be more easily achieved if the mediator(s) is already known to the parties. Alternatively, Kelly concludes that in Aboriginal disputes the parties must be able to make some sort of

kin connection to at least one of the mediators. The second case study illustrates the importance of nonverbal communications, cultural nuances, and the intuition of the mediator in relation to his/her knowledge of Aboriginal parties.

Aboriginal Case Study One: “Who Are You?”

The New South Wales Department of Community Services (DoCS) contacted Kelly to conduct a mediation between DoCS representatives and an Aboriginal family in relation to a child protection matter involving an Aboriginal family. DoCS had previously appointed a non-Aboriginal mediator, and the mediation was unsuccessful.⁴

Three Aboriginal children, all girls aged 3, 6, and 10, had been staying with a non-Aboriginal woman (Wanda) and her Aboriginal partner (Wayne) for the past six months. Neither Wanda nor Wayne is related to the children. DoCS had determined that the natural mother (Mary) and father (Mark) were placing the children at risk by not providing adequate care. DoCS had decided that Mary had left the children with Wanda “indefinitely.” In other words, Mary abandoned the children. Wanda had been taking care of Jean, 10, on-and-off since she was a baby, as she and Mary were close friends at the time of the girl’s birth. But six months ago, when DoCS intervened, Mary and Wanda became enemies.

After the first attempt at mediation failed, DoCS asked the family members, including parents Mary and Mark; the maternal grandmother, Margaret; and two of the maternal aunts, Carol and Sharon, if they would participate in mediation in relation to the three children — this time with Aboriginal mediators at their side. The other party in both mediations was the DoCS officers. Wanda and Wayne did not directly take part in the mediations as this would have made the process untenable because of the anger involved and, in any event, their participation was not required by the overarching child protection legislation. The family agreed and Kelly was given their contact numbers.

Kelly: I went to Margaret’s house at the arranged time. Immediately upon my arrival, the family members asked me bluntly, “Who are you?” I explained my role, to which the family members replied “But where are you from?” and “Who’s your mother?” I had to explain the community from which I originated (some 200km south) and name my extended family members. The family then traced a connection to their extended family.

But within an hour or two — a period that would seem remarkably short to a Western mediator — I began to feel that the family was holding back certain facts and emotional content. I suspected this was because I was not directly known to the family. I concluded that, for this mediation to be successful (defined not in terms of settlement, but by the parties speaking freely and feeling safe), I needed to have a co-mediator who was personally known to — and trusted by — the family.

I promptly explained that I would change to using “co-mediation” and that the family could choose the co-mediator. Fortunately, I had previously trained three local Aboriginal women who were accredited by Interrelate, the agency which had convened the mediation. The family was happy with any of the three as a co-mediator, so they decided “whoever’s available on the day.” More remarkably, the act of invoking a co-mediator itself had an immediate effect. The family also said to me that “you’ll be right now” — that is, that I could now be trusted. This was a breakthrough. I spent another hour with the family, and they revealed a great deal more of the facts and expressed their emotions openly. They expressed their anger, their grief, and sadness. All of the women were able to weep.

I subsequently did a fresh “pre-mediation” with the DoCS workers. I explained that the co-mediator would be a local Aboriginal woman who was known to the parties, and asked them how they felt about that. The DoCS workers acknowledged that this was important to the process, and did not appear concerned that the co-mediator might be biased towards the family — perhaps because I was there too.

At the start of the first co-mediation session, it became apparent that the local Aboriginal co-mediator was “very acceptable.” The co-mediator had lived and worked in the community her whole life, and all of the family members had a great deal of respect for her. It is worth noting that when the parties first came in to meet the co-mediator, they immediately hugged her. I had never seen this happen with non-Aboriginal parties. The DoCS workers saw this, but appeared to understand that this connection was important for the Aboriginal family to feel comfortable and to have faith in the mediation process.

The first session was very challenging for everyone. There was a great deal of emotional expression and, at times, the Aboriginal participants walked out of the session. Fortunately, the mediators had previously “contracted” with the family not to end the mediation until they first spoke to the mediators. There were several situations during both the first and second sessions when I and my co-mediator believed that, but for our presence as Aboriginal women, the mediation would definitely have ended.

One example in the first session was when the father, Mark, became very angry with the DoCS workers, and said “How dare you steal my children. I was a drunk, but now I’ve been sober for twelve months. How dare you make me jump through your [obscenity deleted] white hoops!” I said, “Brother, we all know this is hard for you. We’ve all heard that you have changed and we know that you love your children. So let’s look at what we can do that’s best for the kids.” I believe that this statement, coming from a white person, would not have been accepted — it might have been perceived as condescending and not as empathetic. But Mark’s anger quickly dissipated and he was able to move on to problem-solving. The session was very productive, and the parties were able to reach an interim agreement whereby the parents and grandmother could have contact with the children — something that had not occurred for six months.

The second co-mediation session took place as the final court hearing loomed. DoCS had hoped to come up with an agreement with the family that they could then present to the court as a recommendation, but the agency's position that there should be no "restoration plan" (i.e., that the children would not be returned to the parents, but would become wards of the State) appeared to leave little room for compromise. Yet my co-mediator and I were able to help shift the position of DoCS in private session, following a profound plea from the grandmother, Margaret, in the joint session.

Margaret said to one of the DoCS workers (named Gizelle): "Do you have children?" When Gizelle did not reply, Margaret said "Can't you at least imagine what it's like for Mary to have her children ripped from her arms? What about all the thousands of children that were stolen from their mothers' breasts by the Welfare Board?" Gizelle responded, "I did have a child, but she's gone." It appeared that her child had died. Gizelle started crying, followed by Margaret and Mary. Margaret said, "So you know what it's like — can't you have pity on my daughter and grandchildren?"

During this whole discussion, we were reluctant to intervene and interrupt a possible breakthrough, and yet we did not want it to become too personal for Gizelle, as she was present in her capacity as an employee of DoCS. Still, the situation was deeply personal to all involved, including the mediators. Later, in speaking with my white colleagues, I asked them what they would have done. My colleagues said they would have responded to the effect of "That question (from Margaret) is not relevant because Gizelle is here as a DoCS worker, not as a mother," or "We're here to talk about the three girls."⁵

My co-mediator, however, dealt with this extraordinarily emotional discovery in a manner that proved to be very effective. She acknowledged the pain that Aboriginal people have felt because of what is now widely understood as the "stolen generation," and the pain they continue to feel when Aboriginal children are removed from their parents' care; but she also acknowledged the pain all mothers experience when children are taken away from them in some way.

The group then broke into caucuses. In a private session, Gizelle stated that she could now better appreciate the family's pain — and would agree to a restoration order, provided they met various conditions to prove that they could be stable parents.

Aboriginal Case Study Two: "I Thought This Was a White Service!"

Kelly: I was appointed as a co-mediator for a mediation conducted by a free public mediation service involving an Aboriginal man, Alfred, and his middle-aged non-Aboriginal next-door-neighbor, Alicia. The area of the dispute was on the north

coast of New South Wales, which, for the purpose of this case study, is referred to as Gumbaynggirr territory.

The particular mediation service which convened this case does not usually offer a pre-mediation session unless it involves children or complex matters. Alfred had only spoken to a non-Aboriginal intake officer, and had evidently assumed that it was a mainstream mediation service, because when I greeted him, Alfred said "I thought this was a white service!" I replied that the service tries to appoint Aboriginal mediators where at least one of the parties is Aboriginal, to which he replied, "Oh, that's good — I feel better already, my sister!"

Alicia had previously applied for a personal Apprehended Violence Order (in U.S. terms: a restraining order) to prevent Alfred from entering her property and talking to her. The dispute involved Alfred jumping Alicia's fence to eat the fruit from trees in her backyard, and also, watering them with his hose. The fence was now damaged and falling down due to "him jumping the fence all the time," according to Alicia. Alicia would then verbally abuse Alfred for both stealing her fruit and watering the trees because, occasionally, Alfred would wet the clothes on the washing line (accidentally, according to him). This would then lead to "slanging matches" between them. Alicia used racist names, and Alfred did the same.

The mediation session included me, and a co-mediator — in this instance, a white middle-aged man. From the parties' opening statements, the mediators drew up a list of issues, which included property, fence, behavior, language, and neighborly relations. Several times, Alfred communicated nonverbally, using various gestures, which I picked up on and which the co-mediator did not notice at all. An example was that every time Alicia talked about the fence, Alfred shook his head very slightly. It was barely noticeable; I saw it, but during later debriefing the co-mediator commented that he completely missed it. There was a reason I noticed this subtle signal: I knew that Alfred was disagreeing with the very *idea* of fences. My traditional knowledge is that, within the territory of a tribe/language group, there are no fences except the "invisible" ones stated in traditional laws that demarcate sacred sites (these "invisible fences" are usually referenced to naturally occurring landforms). This tradition has carried on to the present day.

I could not say to Alfred, "What are you shaking your head for?" because his gesture was too subtle. So instead, I asked "When you hear the word 'fence,' what does that mean for you?" Alfred, of course, replied "Unless you're going onto another tribe's territory, there's *no such thing* as a fence."

I discerned another elusive clue to the dispute when Alfred would seem unresponsive, repeatedly stating, "But I am Gumbaynggirri." I knew that what he was saying was that, as a Gumbaynggirri person, he has the right to eat the produce from his land, as that land is traditionally identified — i.e., with reference to traditional land divisions quite unrelated to mainstream

property “ownership.” His statement meant much to Alfred, but to the non-Aboriginal people present, it was of little significance. I was able to ask questions to encourage Alfred to explain the importance of being Gumbaynggirri to the other party, and thus its importance to the subject of the dispute.

Intuition and experience also told me that Alfred needed acknowledgement of his status as a traditional owner of the land. I felt that Alicia would be willing to do this, because of her fleeting statement that she used to be a member of the local reconciliation group⁶ “before all this started happening.” (In later debriefing, the co-mediator said that he did not understand, during the mediation, the importance of Alicia’s former involvement in reconciliation.)

Pursuing my intuition, I drew Alfred to state explicitly that this was one of his needs. At this point, Alicia actually wept, and said “*Of course* this is your land.” Alicia went on to apologize for “all the injustices suffered by Aboriginal people.” The result was a profound realignment of the parties’ relationship. The agreement at the end of the mediation involved a withdrawal of the Apprehended Violence Order, a repair of the fence — Alfred was to repair it and also add a small gate for him to enter the property to pick fruit — and the promise that Alfred was not to hose the fruit trees when there was washing on the line.

In debriefing, the co-mediator said to me “Thank God you were there! I have done so many mediations and never have I misread a party like this Aboriginal guy.” The co-mediator added that he would never mediate with an Aboriginal party again without an Aboriginal co-mediator, and thought this should become agency policy.

The Importance of “Connectedness” in Mediation

At a first cut, the working hypothesis that might be derived from these two case studies is that Western assumptions concerning acceptability of a neutral mediator, being based partly on distance of the mediator from any relationship with the parties, are culturally inappropriate when one or more of the disputants is an Aboriginal person. Some might go further and postulate that this may be true for a number of other cultures with which Westerners are typically unfamiliar, or to which they may even be oblivious — including minority cultures within the United States.

That is certainly consistent with the thrust of Goh’s critique of Westerners’ efforts at mediation with the Chinese. But Goh’s critique has additional elements that support extending the hypothesis beyond specific populations to a more general one, encompassing even a population as diverse as that of the United States.

Two Chinese-Malaysian Cases

Differences between the Aboriginal and the Chinese-Malaysian cultures result in characteristic differences in case studies. For example, one case that coauthor Bee Chen Goh studied in Malaysia (a nation with a large,

distinct, and long-established Chinese component) involved a crime whose resolution involved both police intervention and mediation. The crime resulted when a coolie quarrel within the same clan became violent, with one person drawing a knife and slashing the other. The victim was sent to the hospital and the police arrested the offender.

Goh: An angry mob of youths gathered and demanded “an eye for an eye” with the intention of hurting the offender’s family. A meeting was hastily convened in the clan hall and the head of another clan, a much respected person who inspired communal trust and embodied authority, was asked to mediate.

The mediator advised the youths to look at the situation practically and to channel their energy for positive purposes. He suggested money donations, as the victim was poor and could not afford medical expenses. The mediator got the collection started by making a donation of his own. After some hesitation, the townspeople agreed to collect money for the victim. The offender was sentenced to six months in jail; when he was released, he went to Singapore.

Without mediation, experience in similar situations suggested, the kinsmen would have gone “on the warpath” and endless fighting would have ensued. Mediation helped the victim and, by advising the youths to act in a rational, positive, constructive way, made the youths feel they were doing something moral and useful. Justice, however, was best left to the law.

This educative role is an essential part of Chinese mediation, with the mediators assuming a social duty, instructing the disputants in morally righteous behavior. The concept of righteousness incorporates both what is “proper” and what is “morally-disposed” under the circumstances, which gives rise to the possibility of yielding and compromise.

Another case that Goh studied concerned a Chinese villager who, unable to speak or understand Malay, raised pigs and set up his pigsty next to a Malay family of Muslims. The Malays were extremely upset with the proximity of pigs to their home because in the Muslim religion pigs are viewed as unclean. The Malay property owner became further outraged when the Chinese farmer unwittingly used the word “pig” on him. The Chinese farmer was beaten and sustained severe injuries.

Goh: Instead of approaching the police, the Chinese farmer resorted to a mediator. The mediator advised him that strict legal rights were not what he was after but, rather, a peaceful co-existence with his neighbor. An apology was tendered to the Malay neighbor for the unfortunate utterance; in return, the Malay neighbor was asked to pay some money to cover the Chinese farmer’s medical expenses, and to present some symbolic Chinese gifts in order to restore good luck and good relations between the parties. The Chinese farmer later moved his pigsty to another part of his farm. Thus harmony was achieved.

Chinese Culture and Its Relation to Mediation

Chinese and Aboriginal culture-focused approaches to indigenous disputes have much in common, while the common law in many countries with diverse populations frequently bears heavily on indigenous peoples in culturally incongruent ways. The two case studies Goh just described match Kelly's Aboriginal case studies in one crucial respect: all four studies support the idea that culture is a critical factor in any mediation process — that is, the respective cultural backgrounds of the disputants and the mediators concerned play a significant role in the mediation process. This becomes very apparent with minority groups in other countries, and the style of mediation described above is particularly relevant to Western mediators when the parties are members of indigenous communities. This is because in Western society, there is a prevalence of the “cultural unconscious” (Hall 1981: 162).

Although Western mediation is, by and large, governed by individualistic ideals, these ideals are not often expressly articulated. In contrast, indigenous communities — like Australian Aborigines — are aware of cultural differences and need to strike a cultural chord when choosing to participate in mediation in the mainstream. Most immediately, what this means for mediation in the Australian context is that nonindigenous mediators who are engaged in settling disputes involving indigenous disputants should be culturally literate to some extent. Otherwise, it is both prudent and desirable to involve an indigenous co-mediator in the process.

Oftentimes, culture plays such a subtle role that only the indigenous mediator is able to pick up the important nuances in order to create a successful mediation. For instance, Western-trained mediators may tend to be more transactional (culturally speaking) and regard the success of the dispute resolution as being limited to the immediate settlement of the issues between the parties. On the other hand, an indigenous-oriented mediator may be more inclined toward a relational style, putting primacy on the long-term preservation of relationships between the disputants and vis-à-vis the community at large. Nonindigenous mediators can be “deceived” by the fact that most indigenous Australians speak English as a first language, and, by default, interact with indigenous parties using a Western cultural paradigm, and so, the mediator may neglect to explore or attempt to understand the underlying subtle indigenous cultural norms. A lack of understanding of such divergent cultural norms may signal the failure of a cross-cultural (Western-Indigenous) dispute.

At a minimum, to establish trust, Western mediators should possess some degree of cross-cultural literacy in mediating Western-Indigenous disputes. Indigenous disputants will feel at least a degree of rapport if they know that the Western mediators have some appreciation of their culture.

Such a rapport, in turn, improves their trust and confidence in the mediator. Establishing trust is an essential factor in the success of resolving indigenous disputes.

Indigenous disputants must be able to have personal confidence in the mediator. This confidence can be established more easily, in the case of indigenous mediators, if such mediators are able to associate their own extended family with the particular indigenous party concerned. But for Western mediators, an acquired indigenous cultural literacy can at least be significant in building mediator confidence.

“Dissolving” Rather Than “Resolving” Conflict

Goh: From a Chinese point of view, mediation as practiced in the West is actually a culturally artificial construct. This is because Western culture is still prone to litigation as a means of settling disputes, while mediation is not as yet fully assimilated. The rapid rise of mediation in the West owes its origin to expediency, rather than any cultural imperative. In China, by contrast, the public are not only familiar with, but regard mediation as the only accessible — and affordable — conflict-settling tool. More significantly, mediation is used to “dissolve,” rather than “resolve,” conflicts, and truly acts as a preventative measure.

Dispute settlement systems are culture-specific, whether or not the participants are conscious of their driving force. They also tend to evolve over time, and become part of the participants' larger systems of religious and philosophical beliefs, embedded in their respective institutions. Very broadly speaking, Western culture has pursued democratic rights and individual justice and, for this purpose, has used the communicative tools of open debate and confrontation to achieve its goals. Individualistic ideals promote the establishment of legal institutions as private guardians. The formal law is thus viewed with supremacy and power. Consequently, litigation is seen as the prime and primary method of dispute settlement.

In contrast, Chinese culture has always cherished political stability and social harmony, and towards these ends has adopted subtle persuasion and conflict avoidance techniques in communication. The Chinese may be generally described as “litigation averse.” Mediation in China and in the West bear different connotations: the former is intuitive and informal and exhibits collectivist tendencies, while the latter is recognizably more formal or structured, and stems from individualistic principles.⁷ In this connection, Francis Hsu (1981: 135) has aptly remarked that the problem for the Chinese “has always been how to make the individual live according to accepted customs and rules of conduct, not how to enable him to rise above them.”

The Chinese have adopted Confucian culture and believe in the cosmology of heaven, earth, and humanity linking the natural order and the human order. One affects the other, as it were, in

that a disturbance of the natural order can cause chaos in human society. Confucian ethics regard legal promulgation as indicative of a moral decline. The general Chinese populace tends to regard law as a punitive tool wielded by the state for the procurement of its own ends, rather than a protector of one's private rights. Social cohesion is achieved through family bonds and closely-knit extended networks, with social sanctions in the form of shame and ridicule acting as effective control agents.

In China, to be called upon to mediate — especially in community disputes — is a great honor indeed and hence, mediators are often not paid. Social rewards come in the form of recognition, prestige, enhanced face in one's community, and the bestowal of an honor which far outweighs financial rewards. Other factors unusual to the West are that because the primary goal of mediation is to prevent escalation of conflict, it is perfectly acceptable in China to call on a mediator in the middle of the night; and that while there is an assumption that each side must take some blame in any dispute, compromise outweighs concepts of justice. Monetary compensation is rarely sought, and often, instead, the aggrieved asks for some functional approach to restoration of reputation. Consequently, in keeping with collectivist ideals, remedies in the form of a public apology, symbolic gifts, and feasting to conclude a dispute are the norm in China.

Back in the U.S.A.

For purposes of this article, the authors were particularly interested in the implications for a different sort of influence — that is, whether Chinese and Aboriginal experience can teach Western mediators something about how our field really works even within Western culture, and about why the market for mediation in the U.S. appears to be moving away from the norm of a free-standing profession.

Thus far, more than a few people have written in terms consistent with the implied conclusions that Westerners are typically insensitive to cultural variations and that this may make their efforts in mediation ineffectual or even detrimental. For example, in a 1998 *Mediation Quarterly* article, Nancy Welsh and Debra Lewis describe the unsettling realization that Mediation Center in St. Paul, Minnesota was attracting very few customers from the Cambodian community despite earnest efforts that included sliding fee scales that made service extremely economical for those without much money to pursue a dispute.

After looking into the matter further, they concluded that their 100-member panel's composition was not merely unresponsive to a reasonable distribution of ethnic representation for its market, but that even if their existing panel had attracted such disputants, there was a high probability that the typically white, middle-class, highly-educated mediators would have proven to be insensitive to critical cultural nuances, which would have, in turn, wrong-footed their most well-meaning efforts. Writings

by Kevin Avruch (2003), Christopher Honeyman and Sandra Cheldelin (2002), and others speak to the same perception.

However, Kelly's and Goh's case studies suggested to Honeyman that there may be still more to this pattern, because there are cultural trends even within the most "mainstream" of U.S. communities that align better with Aboriginal and Chinese perspectives than one might expect. Taken together, these factors begin to outline a more general idea: that parties in the West who are moving away from classical definitions of professional mediation service are seeking *connectedness* and *authority* in a mediator — attributes that even the most skilled professional mediator does not necessarily provide. By *connectedness*, we mean a sense on the parties' part that the mediator is, in some way, "one of us." By *authority*, we mean a sense on the parties' part that, even while being "one of us," the mediator is a person of more than average seriousness of purpose, experience, and gravitas. Authority here is sharply distinguishable from both capacity to make a decision and any predilection to do so.

Honeyman: It was the widespread arrival of judge-mediators on the scene in U.S. commercial disputes which started some wondering as to "what's going on here?" A number of our colleagues have viewed with dismay the increasing number of former judges now practicing as mediators, not so much because of simple work preservation desires — though that is never far from the surface — as because of the general fear that judges who turn to mediation will continue to apply the perceived skills of a judge in a mediation case: i.e., become "evaluative" at the drop of a hat. There is an increasing variety of stories about judges who do not do this; but the perceived pattern probably has some validity.

Sheer ignorance on the part of the parties and the limited philosophical map of their attorneys (McAdoo and Welsh 1992) have generally been blamed for a pattern in which increasing numbers of commercial cases are being submitted to an expanding cadre of judge-mediators, as well as lawyer-mediators also skilled particularly at case valuation, while more classically-trained or more openly-elicitive mediators languish with unfilled calendars. Yet interest-based/elicitive, and more recently, transformative styles of mediation have hardly gone unmarketed to lawyers and other professional representatives.

Our field has now had a good twenty years of consistent salesmanship for elicitive mediation, and a decade's worth for the transformative model. The only best seller ever published out of this field resoundingly advances interest-based concepts. Not only that, but most of the training being offered by most institutions, including law schools, draws much more from at least the elicitive/interest-based model than from any nod in the direction of the propriety of occasional evaluation; often, such training has explicitly denied any proper role to evaluation even as a last resort. Thus to continue to claim that the conceptual map

of lawyers in general has been unaffected by all of this training activity comes close to denying the efficacy or normative effect of training in general. I believe that after all these years, it would be appropriate now to show more skepticism toward both the “ignorance” and “limited philosophical map” explanations.

Similarly, the rate of transmission of knowledge of elicitive modes of mediation among at least the repeat-player parts of the client base can increasingly be assumed to have been substantial by this time. By now, therefore, some other explanation seems needed as to why, among large parts of the potential client base, people not only remain unconvinced, but are actually searching out alternatives, which seem less likely to lead either to long-term ability to handle other disputes productively, or to joint gains.

If, however, the Aboriginal and Chinese examples Kelly and Goh have given are indeed typical of their respective cultures — but not as culturally dissimilar from Western experience as they at first seem — a credible explanation for the relative market failure of mediation as originally conceived in the West may be easier to find. Suppose for a moment that parties in general (i.e., those who are not particularly favorable to, but not particularly hostile to, mediation as a concept) seek *connectedness* and *authority* as they implicitly define these terms. As we have seen, *connectedness* in Aboriginal terms derives primarily from family or communal relationships. When considering a relatively small population dispersed over an enormous land mass, this desire for direct connection is inevitable. But what if Western potential customers of mediation are still applying the idea, using a culturally different definition of what *connectedness* means?

That, it seems to me, would be consistent with widespread thought to the effect that Westerners have become quite disassociated from traditional family closeness — but also consistent with the notion that other forms of “community” have grown up in their place. The search for nonfamilial forms of community in the U.S. is particularly evident with professional communities, but also apparent in the sense of community that sometimes builds within a single organization across varying kinds of jobs. Indeed, organizations, particularly large private companies, spend vast amounts of money and time in efforts to create such a close-as-family type of corporate community.

There is, of course, a tension between *connectedness* and the impartiality for which Western mediation has argued so vigorously. But there are several strategies for preserving the best of both. Industry connections generally do not pose the closeness of connection that family members/business partners/financially-involved people can have, which would clearly trigger a greater concern about possible partiality.

In addition, co-mediation, which has been widely used in the West to supplement process skills in community mediation, obviously has the additional potential, [as] employed by Kelly, to add a greater degree of *connectedness* (or, of course, a different dimension of *authority*) to the proceedings — without turning

over the mediator role entirely to a mediator who may be seen as having a rather closer connection to one party than to the other. Also, in cultures where *connectedness* is not primarily familial, people may be able to invoke that quality without being personally related to or even directly known to the parties — except by reputation.

Finally, for quite some time now, alongside the drumbeat of impartiality there has been a small number of experienced voices asserting that biased mediators can be effective. The most obvious examples are also some of the biggest and most emblematic cases. In international disputes, for example, it is commonly held that there are no truly *unbiased* mediators.⁸

Similarly, the search for *authority* may also mean something different in the dominant culture of the West than it does in a village in China. Local communities have their own definitions of *authority*, and this is coming into play. For instance, groups as expert (and, in their own ways, authoritative) as the Public Conversations Project and Search for Common Ground are now actively seeking ways of building relationships with, and better training models for, local pastors, priests, rabbis, and others who are seen within their respective communities as authoritative, and who are regularly called upon to act as mediators of community disputes — with or without the benefit of previous mediation training.

In the U.S., however, it is within the commercial sphere that the search for authority in a mediator is given its clearest example: the prevailing preference of thousands of parties for former judges as mediators — even in the absence of high quality mediation training tailored specifically to help these professionals mediate in a way that preserves as much of the parties' autonomy as possible. After all, a reputable former judge embodies a host of signifiers of *authority*, of a kind to which the parties' lawyers — who generally select the mediators — are particularly sensitive.⁹ At the same time, the *connectedness* factor also plays a part in the selection of judge-mediators by lawyers, in the sense that, not only may they know the judge personally, but what they will get from a judge-mediator bears a strong resemblance to processes they understand and with which they have grown comfortable. It is also interesting to note that the difference between the attorneys' comfort and their clients' frequent discomfort in this instance, stemming from the clients' *lack* of connectedness to judges, could be seen as a central element in the argument that judicial mediation is a distortion of the field's ideals.

There are other conspicuous examples of case assignments going to others instead of "mediation professionals." In the very largest among public policy and international disputes the best-trained and most highly-regarded mediators our industry has been able to produce have been conspicuous by their absence from the caseload. When considering the market position of the highest-status private mediators, the pattern is distinct. A telling

indicator is the degree to which some of the most talented, experienced, and even renowned mediators our field has produced have found themselves limited to markets in which they can demonstrate *authority* and *connectedness*. Some of the most noted public policy mediators, for example, have essentially no caseload in high-dollar commercial cases, despite a track record in work that is clearly at least as difficult and in all likelihood more so.

At the very highest levels of disputing, it is noteworthy how many of the disputes are in effect being mediated — whether effectively or not — by people whose backgrounds include zero formal mediation training or previous explicit affiliation with this field, but who do have some kind of conspicuous connection to the particular community of disputants involved and, in the parties' view, large amounts of authority. Thus, not only former politicians and diplomats but military officers, retired or still serving, find themselves asked to adopt the role of a mediator in extremely high-tension disputes in which hostilities may break out at any moment.¹⁰ Yet few of the principal trainers of this field, so far, have presumed that military officers are in fact the likely mediators of international disputes, and few of the training resources of this field have been trained on them with artillery-like determination.

Commonality across Cultures

While the search for autonomy (although a Western preoccupation, as Goh notes) is an integral part of the rhetorical claim by Western mediators to offer a process superior for the parties than court determination of the merits, the fact that the field has not faced up to the depth of parties' desires for *authority* and *connectedness* has created a logical flaw in the West's typical mediation offering.

In effect, the image of the “multi-door courthouse” has had a cloak-room at the entrance, in which the U.S. mediation field expects the parties to check their autonomy on the way in — with a promise that it will be given back to them once they are safely inside an approved process. It is not surprising that the parties have proven to be underwhelmed by the promise of Western mediation. An ironic result is that, at least in the U.S., many parties are demonstrating their autonomy by ignoring the field's predominant and carefully considered recommendations as to how they should handle their disputes, and going elsewhere.

There are, of course, real-world tradeoffs between the qualities under discussion. For at least some potential parties and some lawyers, effectiveness at reconnecting the parties or ingenuity at crafting integrative solutions are a high priority, and *connectedness* is demonstrated to a sufficient extent by a talented mediator's membership in one or another kind of professional community that includes the lawyer or client. Similarly, for some part of the population of potential clients and representatives, *authority*

is sufficiently demonstrated by possession of a sterling reputation as a mediator.

As always, there is a balance to be struck by the parties between what is desirable, what is available, and what is feasible. Thus many parties are quite happy with the results of community mediation, even though only the more optimistic would assert that the prevailing level of technical skills (or *authority*) in these programs is on a par with those of the best-known private mediators. In effect, for very practical reasons, the parties are accepting a tradeoff in which the mediators, who are typically members of the same community in which they provide service, make up in *connectedness* (along with the moral *authority*, which derives from contributing one's labor free or at low cost) what they may lack in training. We do not represent, in other words, that a bright-line test can be applied to the characteristics we are outlining.

Yet lessons from how other cultures use mediation, such as the Chinese and Aboriginal experiences briefly outlined here, are one indication that the "mediation experience-generated" forms of *connectedness* and *authority* may never be enough, by themselves, to create the mass market for "elicitive" or "transformative" mediation that so many of this field's most dedicated practitioners and teachers have been seeking to establish in the West.

At the same time, it is widely recognized that outside of what has been conceived as the "mediation market" there is a massive amount of what is effectively mediation work going on — particularly if one accepts the inclusion of "nondocketed" work that resembles mediation in everything except the presence of a case with a docket number. For example, research by Henry Mitzberg (1973) implies that typical U.S. corporate managers spend a substantial part of their work time in effect mediating disputes between subordinates and colleagues. It is worth noting that such informal mediators almost by definition possess both *authority* and *connectedness* within their tightly defined "market," a single organization's hierarchy

This is consistent with research by Roy Lewicki and others into how trust is developed (Lewicki and Bunker 1995; Lewicki and Wiethoff 2000). Nearly everybody agrees that for mediation to work, the parties must trust the mediator; but few have absorbed the implications for mediators of Lewicki's definition of three types of trust. These are *calculus-based*, which is the easiest to achieve and focuses on a party's instrumental reasons for trusting that someone will do what they say they will do in a given instance; *knowledge-based*, a rough equivalent of what most mediators hope to achieve by developing their qualifications and by marketing to position themselves as experts; and *identification-based*, the deepest and most powerful level, in which the trusted person is seen as someone who really understands you and shares your way of looking at the world.

It is significant that in recent versions of this theory, Lewicki has been inclined to collapse the three types of trust into two, eliminating *knowledge-based* trust as a separate category by rolling it in with *calculus-based* trust, implying that *knowledge-based* trust also operates only at an instrumental level. The shift, Lewicki says, is based on coming to believe that “knowledge as a basis for trust is not grounded in trust, but grounded in the nature of the relationship itself; that is, that trust moves from *calculus-based* to *identification-based* as knowledge about the other develops, but that knowledge itself is not a basis for trust.”¹¹ The more powerful *identification-based* trust, meanwhile, is conceptually close to the property we are describing as *connectedness*.

What Western Mediators Can Learn from Other Cultures

The concept of the parties opting for *connectedness* and their notion of *authority* over professional mediation skills may carry some uncomfortable connotations for many practitioners who have seen this field as the one in which they hope to devote their working life. The mediation field, after all, has thus far shied away from the intensity of training characteristic of, say, a physician, even though some of the field’s most astute observers, such as Deborah Kolb and Jonathan Kolb (1993), have argued such a standard of training should be required before permission to practice mediation is granted. As yet only a relatively few stalwart programs have adopted other credible alternatives for creating a sense of authority out of the “whole cloth” of mediation expertise, such as performance-based testing — the “audition-style” approach to qualification.¹² The currently bruited certification schemes of the major U.S. membership organizations, meanwhile, appear to be marketing-driven, pallid imitations of true professional standards, which, we believe, are unlikely to convince anyone who looks at them with a questioning eye. Thus the field has, in effect, opted out of producing its own signifiers of authority.

Short of a rigorous standard of either education or performance measurement (or failing that, merely the “journeyman” evidence of training intensity anyone would demand before hiring a plumber) it now seems increasingly unlikely that dedication to this field, a strong sense of ethics, and even greater-than-normal mediation skills will supplant prevailing forms of *authority* and of *connectedness* to the population base of parties and representatives the mediator seeks to target. One implication of this is that there may not be a market of sufficient size for practitioners of mediation whose basic claim is simply competence as a mediator. Instead, the bulk of the market, rightly or wrongly, will go to people who demonstrate a culturally suitable form of *connectedness* to the parties (or at least to their representatives), and who are perceived to have about them an appropriate air of *authority* — whether or not that population of practitioners demonstrates much in the way of technical sophistication in mediation work.

This leads us to several related implications. First, from the standpoint of building a field in the West — a goal that must draw its moral authority from the needs of the public and the parties, not from the needs of the mediators — we have created an entire structure of training largely engaged in training the wrong people, or at least, in training them for implied work beyond the settings in which their career is most viable. Taken a step further, three possible inferences are that:

1. Courses in mediation in the U.S. should be ramped up for military officers, police officials, high-level company officials, attorneys, mayors, union officials, and local religious leaders, among others who have the requisite *authority* and *connectedness* to a population with real needs. After all, we believe that these people are going to get the bulk of the mediation work anyway. Not to acknowledge this would mean missing the chance to develop training that might help this population deliver better service, as well as wasting the opportunity to deliver appropriate signifiers of differential quality to help parties choose the most able practitioners *within* this population. (Incidentally, New York's CPR Institute for Dispute Resolution has been prescient in this respect, focusing most of its training effort on high-level company officials and the top echelon among corporate lawyers.)
2. The "stand-alone" expert mediator model is just not going to work in this field on a mass scale. Thus, training of a general student population, as well as training offered to a general run of professionals who are simply seeking a more satisfying working life, should carry a clearly stated caveat that the primary purpose of the training is to develop "life skills" as well as the ability to work well *with* a mediator. Fresh graduates will acquire opportunities to practice as a mediator only in limited markets — unless they can identify a population of parties in whose eyes they can demonstrate a sense of *authority*, as well as significant *connectedness* to the parties' needs and lives.
3. People who seek to mediate as an expression of their own values — including a number of truly fine mediators, in terms of skill — will probably have to adjust their sights. If, as we now suspect, a commercial, public policy or other relatively "high end" practice will remain out of reach even for many highly skilled mediators, other opportunities may arise once a given mediator reexamines her sources of *connectedness* and *authority* — outside her skills as a mediator. For example, mediation of disputes that occur within a single organization, such as those being handled by thousands of company managers ("mediators without a brass nameplate"), may provide numerous opportunities to exercise mediation skills while earning a living.

Many people's regular occupations provide them with both *connectedness* and *authority* from one perspective or another. The key may be a sense

of realism as to who is in the market for mediation. In short, while we predict that the difficulty many existing mediators have experienced in getting cases will persist, we do not maintain that mediators should give up trying, merely that they should sharpen their focus so that the “case market” each pursues is one in which that mediator’s claim to *connectedness* and *authority* will be seen as legitimate, and will resonate with parties.

In the brief history of “modern” dispute resolution, this is a time when the now-customary trumpeting of the field’s successes has had to give way to the examination of some things that have clearly not gone according to the highest hopes. The relative failure to develop a mass market is but one of these; criticisms of how practice has developed in the courts and other institutionalized settings¹³ are also now increasingly numerous.

Yet at the same time, the first indications of a hoped-for “second wave” are becoming visible. In recent writings, two experienced practitioner-scholars, John Paul Lederach and Bernard Mayer, have separately outlined how people can demonstrate the “moral imagination” that breaks open entrenched conflicts, and new ways that “professional neutrals” might get beyond the current list of accepted roles to develop new ones that parties will find of service (Lederach 2004; Mayer 2004).

If our field can now admit that Western practitioners of mediation can learn something not only from other cultures such as those we have briefly sketched here but from using that sometimes uncomfortable spotlight to illuminate what even Western parties might truly want out of the process, the way may be more open for the “second wave” of imagination, program redesign, and renewed commitment to service, which our field so clearly needs. In the meantime, we believe that ignoring the parties’ desire for *connectedness* and *authority* in a mediator will get the mediator nowhere; accepting it as a real-world requirement sets the stage for a realistic reassessment of what a given individual really has to offer, and where her skills might most cleverly be employed.

NOTES

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1. See *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators*. Test Design Project (Honeyman et al. 1995).

2. Leonard Riskin coined the term in his “new grid” (2003), which is an adjustment of a central concept, “facilitative mediation,” from his well-known original “grid” article (1996).

3. By “Western” mediation we refer to the prevailing practices that have developed over the past twenty-five years in the Anglo cultures that predominate in the U.S. and Australia, particularly the assumptions of neutrality and the (competing) elicitive/interest-based, evaluative, and “transformative” styles of mediation.

4. Some facts in all case studies here have been slightly altered so as to prevent identification of the parties.

5. Nancy Welsh has noted that, in this respect, the DoCS workers behave similarly to school officials she has encountered in her study of Pennsylvania special education mediation who also seek to define the issues in technical dimensions and avoid emphasizing the human connections.

6. There are many reconciliation groups existing at the local level across Australia, whose primary function is to "reconcile" the historical and cultural divide between Indigenous and non-Indigenous Australians. These groups were established in response to the work of the (now defunct) federally legislated body, *Council for Aboriginal Reconciliation*. Several legal and political events of national significance in the 1990s led to a huge upsurge in awareness in mainstream Australia in relation to Indigenous Australia.

7. It is beyond the scope of this article to ascribe moral value, relative or absolute, to the Western view of mediation's fundamental purposes, or the Chinese or the Aboriginal views; here we are merely looking for what we can learn from the commonalities. Readers interested in comparing the Chinese with the Western moral basis for mediation can find a tour d'horizon of the Western view in Carrie J. Menkel-Meadow's article "And Now a Word about Secular Humanism, Spirituality, and the Practice of Justice and Conflict Resolution" (2001). A tour d'horizon of the Chinese moral basis for mediation can be found in B. C. Goh's *Law without Lawyers, Justice without Courts: On Traditional Chinese Mediation* (2002). The moral basis for the Aboriginal style of mediation is described in L. Behrendt's *Aboriginal Dispute Resolution* (1995); L. Kelly's "Mediation in Aboriginal Communities: Familiar Dilemmas, Fresh Developments" (2002); and S. Beattie's "Is Mediation a Real Alternative to Law? Pitfalls for Aboriginal Participants" (1997).

8. See Smith (1985); also Touval (1985) and Honeyman (1985). In turn, ethical principles, centering on full disclosure, have been developed to apply to this situation; see Honeyman (1986). These principles have more recently been extended to entire organizations that appoint mediators. The following is a leading example, from *Principles for ADR Provider Organizations*, Georgetown-CPR Commission on Ethics (Menkel-Meadow et al. 2002):

V. Disclosure of Organizational Conflicts of Interest

a. The ADR Provider Organization should disclose the existence of any interests or relationships which are reasonably likely to affect the impartiality or independence of the Organization or which might reasonably create the appearance that the Organization is biased against a party or favorable to another, including (i) any financial or other interest by the Organization in the outcome; (ii) any significant financial, business, organizational, professional or other relationship that the Organization has with any of the parties or their counsel, including a contractual stream of referrals, a *de facto* stream of referrals, or a funding relationship between a party and the organization; or (iii) any other significant source of bias or prejudice concerning the Organization which is reasonably likely to affect impartiality or might reasonably create an appearance of partiality or bias.

b. The ADR Provider Organization shall decline to provide its services unless all parties choose to retain the Organization, following the required disclosures, except in circumstances where contract or applicable law requires otherwise.

9. The same is true when the effective selector of the mediator is also a judge. There is no more evocative example of a selection based on *connectedness* and *authority* than the mediation in the Microsoft antitrust case. Judge Richard Posner, the first person appointed as mediator, is a highly regarded appeals court judge and an authority on antitrust matters. But his experience with the Microsoft case became a painful illustration of the difference between the *authority* and *connectedness* that influenced the sitting trial judge to recruit Posner as mediator, and the actual skills of a mediator — as demonstrated by Eric Green, Posner's successor as mediator in that celebrated matter.

10. See Dunlap and McCarron (2003).

11. Lewicki cautions that "This is, quite frankly, an intuitive hunch, since it is almost impossible to separate out knowledge as a dimension of relationship from knowledge as a dimension of trust." (e-mail communication with Honeyman, December 18, 2003.) See also Lewicki and Wiethoff (2000) at fn. 1, p. 104.

12. In "Credentialing Approaches: The Slow Movement toward Skills-Based Testing Continues," Ellen Waldman (2001) assesses the "state of the art" of efforts to guarantee quality of mediation services. See also Honeyman (1988, 1990).

13. A broad look at many consequences of institutionalization will be found in the seventeen articles comprising the Fall 2003 special issue of the *Pennsylvania State Law Review*. This symposium issue, organized by Pennsylvania State law professors Robert Ackerman and Nancy Welsh in collaboration with Honeyman, considered the risks of "routinization" and other current phenomena of the conflict resolution field from perspectives of law, mediation and arbitration practice, education, government agency administration, sociology, economics, psychology, engineering, ethics, political science, public policy, community relations, court administration, and religious/ethnic conflict.

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