

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Culture in International Parental Kidnapping Mediations

Melissa A. Kucinski*

I. INTRODUCTION

The Montenegrin people have a saying: “the peacemaker gets two-thirds of the blows.”¹ This article is written for those peacemakers who will step up to meet the challenge of mediating an international parental kidnapping case. These cases involve much more than knowing some family law—they involve complex emotions, strict time constraints, multiple nations’ laws and policies, intricate international treaties, juggling interpreters, attorneys, government officials, judges, and parents who may be physically located thousands of miles apart, and the blunt reality that you may have no understanding of either parent’s cultural customs or the way each will communicate with the other parent or with you.

While the “culture” part of the mediation may appear to be the least significant element, it could be key to the success of the mediation. Nonetheless, “culture” has only recently begun to be incorporated into mediator trainings, and is very much a mere “afterthought” in the process. This paper will discuss “culture” by examining basic elements of communication, views of families and children, its effects on the mediation itself, and what should be incorporated into a training program for mediators.

* Melissa A. Kucinski, Esquire is a private practice family law attorney in Bethesda, Maryland. Ms. Kucinski also has a Master’s degree in International Peace and Conflict Resolution, is co-founder of the Global Justice Initiative, and holds multiple leadership positions within the American Bar Association. Ms. Kucinski is trained in mediation, facilitation, and collaborative law, and is admitted to practice in Maryland and the District of Columbia.

1. DAVID W. AUGSBURGER, CONFLICT MEDIATION ACROSS CULTURES: PATHWAYS & PATTERNS, 191 (1992).

A. "Culture"

Culture is often described as a lens through which each person sees the world.² Each person carries multiple lenses—"national, confessional, ethnic, organizational, or occupational, to name a few."³ It seems easy, although quite stereotypical, to claim that all Germans share a "culture" or all Kenyans share a "culture." Yet, I would also say that deaf people share cultural characteristics, as do veterinarians, and people from my hometown of Erie, Pennsylvania. Each individual is made up of many cultures. One must not so much try to understand each and every facet of a person's cultural background, but rather acknowledge that these many facets will affect how this person sees the world, depending upon what lens they are viewing it through.

Cultures are "systems of shared understandings and symbols that connect people to each other, providing them with unwritten messages about how to express themselves and how to make meaning of their lives."⁴ Our pervasive cultural background will inevitably dictate how we react to, manage, perpetuate, and resolve conflict. It will also dictate how we, as peacemakers, help others with their conflict. "Culture stipulates rules . . . for how conflicts should be pursued, including how to begin and when and how to end them."⁵ When a crisis occurs, or there exists conditions of great stress, "people revert to their primary cultural programming as they attempt to understand and function."⁶ Therefore, it is of the utmost importance that a mediator has a background in dealing with others from their own or different cultural lenses, as few things are more stressful than an international parental kidnapping.

B. "Conflict"

"Conflict is universal yet distinct in every culture; it is common to all persons yet experienced uniquely by every individual."⁷ Conflict is an

2. See, e.g., Kevin Avruch, *What I Need to Know about Culture? A Researcher Says . . .*, in *A HANDBOOK OF INTERNATIONAL PEACEBUILDING: INTO THE EYE OF THE STORM*, 75, 78 (John Paul Lederach & Janice Moomaw Jenner eds., 2002) (noting that culture is always the "perception-shaping lens through which the causes of conflict . . . are refracted.").

3. KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION*, 59-60 (1998).

4. MICHELLE LEBARON, *BRIDGING CULTURAL CONFLICTS: A NEW APPROACH FOR A CHANGING WORLD*, 10 (2003).

5. See Avruch, *supra* note 2, at 78.

6. Mitchell R. Hammer, *Negotiating Across the Cultural Divide: Intercultural Dynamics in Crisis Incidents*, in *DYNAMIC PROCESSES OF CRISIS NEGOTIATION: THEORY, RESEARCH, AND PRACTICE* 105, 108 (Randall G. Rogan et al. eds., 1997).

7. AUGSBURGER, *supra* note 1, at 18.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

inevitable part of human life. When the conflict involves intimate details of your family life, it can cause “discomfort, loss of face, struggle and pain.”⁸ Culture affects each person’s approach to conflict. Culture does not cause conflict, but can exacerbate it, resolve it, transform it, and affect how a person communicates about it.⁹ It also affects how a mediator will intervene. Because of culture, a conflict may need to be kept private, or may need to be brought forth into the open. Culture will affect the extent of a mediator’s intervention, when that intervention is appropriate or possible.¹⁰ It is impossible to eliminate conflict, and it may be undesirable to do so—conflict can lead to creative and constructive change, and a mediator can be the vessel by which the most productive change occurs.¹¹

C. “*Intervention*”

When a third party seeks to intervene in an international parental kidnapping case, that mediator’s primary role may be to absorb a great deal of the tension that naturally flows from the conflict. It is an exhausting role that in the case of an international parental kidnapping will be condensed into a short period of time. What form should this role take? Should the mediator be a neutral and unbiased party? Should the mediator share the culture of one of the parties? Or, speak the language of at least one of the parties? Will a parent allow a mediator to intervene into a private family matter? What other people are necessary to the intervention? Must there be interpreters, attorneys, social workers, psychologists, judges, or co-mediators? What about involving extended family members, community members, or the children? These decisions may require an examination of “culture” before choosing the best means of intervening.

Should a mediator consider “culture” at all? Would this be more or less likely to bias the mediator, or affect the way the mediator communicates with the parents? Or, is treating both parents identically unfair because it does not account for each parent’s cultural understandings and ways of communicating? A third party can “offer objectivity, emotional distance, protection of face and honor, a time delay to allow emotions to cool, mediation and negotiation skills,” life experience of a different or the same

8. LEBARON, *supra* note 4, at 27.

9. AVRUCH, *supra* note 2, at 78-79.

10. LEBARON, *supra* note 4, at 125.

11. AUGSBURGER, *supra* note 1, at 21.

community, “balancing of power differentials, and a witness to attest to the authenticity of the process and its appropriate resolution and termination.”¹²

II. COMMUNICATION BETWEEN CULTURES: A MEDIATOR’S ABILITY TO COMMUNICATE

Culture implicates the way that two parents are communicating. It will also implicate the way a mediator communicates with each parent, and his or her interpretation of the parent’s verbal and non-verbal messages. “People tend to see what they expect to see and, furthermore, to *discount* that which conflicts with these preconceptions, stereotypes, or prejudices towards persons.”¹³ A mediator may feel “culturally competent,” but may inadvertently discount certain things because they are outside of the mediator’s cultural vocabulary. Mediators cannot be trained to understand all cross-cultural communication, but a mediator can be aware that culture greatly influences this communication, and therefore the potential resolution of the conflict.

A mediator should first recognize whether a person exhibits traits of a collectivist culture or an individualistic culture. Individualists may distance themselves in their personal interactions, while collectivists may interact closely with others and are interdependent.¹⁴ “Individualists tend to be self-motivated and can be stimulated to achieve by individual competition,” while collectivists “are better encouraged by appealing to their group spirit and cooperation.”¹⁵ This distinction can greatly affect a mediator’s success—should the mediator encourage resolution by engaging the parent in cooperative acts, or by appealing to the parent’s independence and self-sufficiency in accomplishing tasks? A mediator will need to be attuned to what a parent says or how he or she acts in order to analyze what cultural connection that parent is making—does the parent focus on “I” or on “we.” “Individualistic cultures prefer directness, specificity, frankness in stating demands, confrontation and open self-disclosure. Collectivistic cultures tend toward indirect, ambiguous, cautious, nonconfrontational, and subtle ways of working through communication and relational tangles.”¹⁶ Individualists value independence and seek outcomes reached efficiently, objectively, equitably, and often through competition and formal

12. *Id.* at 33.

13. TRACY NOVINGER, INTERCULTURAL COMMUNICATION: A PRACTICAL GUIDE 29 (2001).

14. *Id.* at 30.

15. *Id.*

16. AUGSBURGER, *supra* note 1, at 28.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

processes.¹⁷ Collectivists value interdependence and seek outcomes reached informally, sustaining social relationships, face, and harmony.¹⁸

A primary observation a mediator must make in this process is: how is gender influenced or affected by culture? Some behavior is regarded as masculine or feminine, and a culture may define certain behaviors as appropriate or inappropriate for that gender.¹⁹ Cultures define specific roles for females and for males. What will happen if a mediator is male, and one of the parents is female and is from a culture that discourages interaction with non-relative males? What will happen if the mediator is female, and one of the parents is culturally ingrained to not consider a female as an authoritative figure? What if one of the parents hails from a culture where fathers are expected to primarily raise their children, while the other parent is from a culture where mothers are expected to primarily raise their children? There is a fundamental cultural difference between these people, and how must a mediator frame his or her interaction with each parent? What if the mediator shares the cultural views of one of these parents? Will this affect the mediation, either positively or negatively?

A mediator should also ask: how do the parents' cultures view social classes and social hierarchies? "We all identify with a social class, consciously or unconsciously, and we sort others and ourselves into social classes when we interact. We use criteria such as income, occupation, education, beliefs, and attitudes. We also sort people into classes by grammar, accent, houses, cars, dress, and other factors."²⁰ If the mediator sees a well-dressed, well-educated parent and a parent who is poorly dressed, in dire economic straits, and who uses poor language skills, the mediator may subconsciously think that the child will have better opportunities with the more "successful" parent.²¹ The mediator may become guilty of passing cultural judgment on a person based upon social class, and how the mediator's culture views class in its hierarchy.²² "Some cultures stress economic success, and others place more emphasis on intellectual pursuits, while still others focus on the spiritual dimension of living."²³ If the mediator values spirituality more than intellect or

17. AVRUCH, *supra* note 2, at 84.

18. *Id.*

19. NOVINGER, *supra* note 13, at 35.

20. *Id.* at 37.

21. *See generally id.*

22. *Id.* at 38.

23. *Id.* at 40.

economics, how will this affect the way he or she mediates? What if the parents value intellect or economics more? Will the mediator steer the parents toward a resolution that is a bad fit for the parents?

Another cultural concept inherent in family disputes centers on the social organizations in which people congregate.²⁴ What is the cultural view of government? What will happen if the person is from a place where government is not to be trusted? Will that person trust a mediator, at times appointed by a government entity, to interfere in the most personal family matters? What if a person hails from a culture where government is seen not only as legitimate, but as a source of reason and power, in which case a government mediator may appear to be an official authority that may be able to deal with a dispute in a professional manner? Should mediators come from non-governmental organizations?

Another consideration is that people from different cultures learn differently. Some cultures learn by rote memorization, others by demonstration, by guiding, by doing, et cetera.²⁵ “To process new information, people seek analogues for it within their own experience, and if they do not have any they are liable to distort or reject the new information.”²⁶ This is particularly important when a mediator is proposing unique or novel suggestions to resolve the dispute between the parents; how will each parent process the information and utilize it as it applies to their particular situation? If a suggestion is outside of a parent’s cultural purview, will he or she entertain that suggestion, or even understand it?

Another cultural difference lies in the manner in which people deal with time.²⁷ A culture may be monochronic in their thinking – they deal with events in a linear and sequential approach.²⁸ They suppress spontaneity and focus on one activity at a time.²⁹ If a mediator’s culture favors monochronic time, the mediator may not understand the parent’s story if it is in a non-linear timeline.³⁰ If the mediator is not attuned to hearing stories in this fashion, it may skew the story or block the mediator from understanding the important elements of the story. Some cultures attend to events in a polychronic manner—that is they carry on many activities at the same time, including perhaps many conversations.³¹ Those who are not used to this

24. *See generally id.* at 38.

25. NOVINGER, *supra* note 13, at 39.

26. *Id.* at 39.

27. *Id.* at 60-61.

28. *Id.*

29. *Id.* at 61.

30. *Id.*

31. NOVINGER, *supra* note 13, at 61.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

cultural time concept may find such a person overwhelming to the mediation process. “Polychronic cultures have different patterns of turn-taking when speaking than do monochronic cultures. Interrupting another speaker is not uncommon in a polychronic culture, and in fact may be taken as indicative of one’s interest or enthusiasm, but interruption causes offense in some cultures.”³² A mediator from a monochronic culture may find a parent from a polychronic culture to be rude in the way he or she converses. This could shade the mediator’s view of the parent, and therefore affect the flow of the mediation.

For those in polychronic cultures, “[b]usiness and social calls both take time and often require multiple visits, where one visit would suffice to accomplish the same purposes in a monochronic culture.”³³ This could cause problems with scheduling mediation sessions, or working through a mediation that may tend to take more time than the mediator is able (or wants) to dedicate to the mediation. There is also an issue of how long it will take people of different cultures to build trust in the mediator, especially if the mediator is of a different culture or a complete stranger.

Different approaches to time can cause or escalate conflict, especially when they are outside conscious awareness. In negotiations, for example, monochronic approaches dictate prompt beginnings, scheduled breaks and closings, turn taking when speaking, and adherence to an agenda. Polychronic participants may arrive after the scheduled start, talk through breaks or adjournment times, interrupt each other to contribute to ideas, and freely deviate from an agenda.³⁴

Another part of the verbal process is the use of silence.³⁵ Some cultures are more comfortable with silence. For others, if there is a long period of silence, a person feels compelled to speak and fill that silence.³⁶ Since most communication is non-verbal, a mediator must be astutely aware of both parents’ non-verbal cues, such as eye contact. Does direct eye contact show interest and empathy or disrespect and boldness? Is it important to shake hands? How far must the mediator stand or sit from a parent? Is it appropriate to touch a parent’s shoulder to console him or her? Will certain touches or body space be offensive? Will the lack of such touches be offensive? Will the mediation be held in person, and if so, how should the

32. *Id.* at 62.

33. *Id.*

34. LEBARON, *supra* note 4, at 42.

35. NOVINGER, *supra* note 13, at 51.

36. *Id.*

room be organized? Room arrangement may be affected by cultural notions of hierarchy, space, or the need to have face-to-face discussions.

Many people from Asian and Latin American cultures avoid eye contact as a sign of respect. This is also true of many African Americans, particularly in the southern United States. Many North American employers, teachers and similar 'authority' figures interpret avoidance of eye contact as a sign of disrespect or deviousness.³⁷

There are numerous cultural communication considerations of which to take account. What type of volume, pitch, rhythm, tempo, resonance, and tone do the parents and the mediator use? If a parent starts speaking very loudly, does that automatically mean that the parent is angry or aggressive? If the parent is quiet, does that mean he or she is withdrawn or uninterested in the process or, worse yet, the child? Will a mediator assume that a parent who is quiet and uses silence might have an underlying concern, such as abuse? Will a mediator read too much into cultural ways of communicating, or misinterpret communications?

Another communication consideration is that some cultures do not possess equivalents for "yes" or "no," and therefore if a mediator asks a question requiring such answer, in the response may be what U.S. North Americans feel is "round about" or "indirect." Some cultures do not even use the past tense, and therefore all verbal communication is spoken in the present tense. This could cause a conflict that happened in the past to be spoken about as if it were still a present occurrence.³⁸ Another concern is: what if the mediator shares the language skills of one parent, but not the other? "People tend to avoid communicating with persons whom they know or anticipate will not have adequate command of a language common to both parties to permit ease of communication. It is uncomfortable and embarrassing not to understand what a person is saying or not to have them understand you."³⁹ Will a mediator interact more, or even favor, the parent who shares his or her language? The left-out parent may feel the mediator is biased.

A primary issue among those who study cross-cultural communication is that of context.

[A] high-context . . . message is one in which 'most of the information is either in the physical context or internalized in the person, while very little is in the coded, explicit, transmitted part of the message. In contrast, a low-context message is one in which the majority of the information is found in the explicit, verbal language or code.'⁴⁰

37. *Id.* at 21.

38. *Id.* at 46-47.

39. *Id.* at 49.

40. Hammer, *supra* note 6, at 109-10.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Low context cultures say exactly what they mean, and expect the same of others.⁴¹ High context cultures speak around a point, “putting all the pieces in place” and expect others to understand the crucial point.⁴²

There is much room for miscommunication. A low context individual is direct, brief, verbal, and aims to solve problems.⁴³ This may intimidate a high context individual and escalate the conflict.⁴⁴ A high context individual is indirect and vague, using similes or proverbs, which may appear deceptive or insincere to a low context individual.⁴⁵ “For high-context cultures, the use of a third party actually increases one’s sense of control while for low-context cultures, the use of third-party intermediaries is often perceived to lessen control and escalate conflict issues.”⁴⁶ “For low-context cultures, one’s reputation or self-image is largely defined in individualistic, personal characteristic terms. For high-context cultures, one’s self-image largely derives its existence in relationship with other people and groups.”⁴⁷

Everything is contextual. We have to understand the context in which a person is communicating to understand the message. In the U.S., the mediator is an outside person who has no understanding of the context of this particular family. The U.S. mediator may only understand how his or her own family operates, or how U.S. cultural norms dictate how a family should operate. In order to mediate a case in a very ad hoc manner (communicating with the parents independently of one another, usually by the telephone), and in a very quick turn-around, the mediator will likely not understand the context in which each parent is communicating to any significant degree. In fact, if the mediator is speaking to the parents by telephone only, it might be outright impossible to get the full picture of what each parent is communicating. What if a parent comes from a high context culture where more emphasis is placed on nonverbal communication, yet the mediator can only hear the parent’s voice, or the voice of an interpreter? How much does the mediator really understand from the parent? Is it important that the mediator really “hear” the parent’s communication, or is it more important for the other parent to hear what this parent is

41. *Id.* at 110.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 110-11.

46. Hammer, *supra* note 6, at 111.

47. *Id.* at 112.

communicating? If a mediator is attentive to cross-cultural communication issues, he or she can increase the effectiveness of the mediation session.

III. FAMILIES AND CHILDREN ACROSS CULTURES

A brief analysis, and some basic anthropological questions, will allow us to examine not only *how* this “kidnapping” could occur and what signs would indicate that it might occur, but also what influences affect the child in the larger family picture, and therefore what a mediator will need to understand about the family’s—and each parent’s—culture, when working with two parents on what is best for their child. Where does the family (meaning parents and child) reside? Is the location near either of the parents’ extended families? Do the parents have large families? Are they tight-knit? Is one parent visiting family in another country often? What role does the larger family play in this smaller family unit? What role does the community play in this smaller family unit? What customs does the family adhere to? What is the hierarchy within the smaller family unit? The larger? What roles does each parent play in the family? Are these roles culturally defined? Are there cultural expectations of each parent? How does each parent’s culture define what is “best” for a child?

Mediators should not pass judgment in deciding whether one culture or one parent’s country is better than another to raise a child in. Yet, there are cultural underpinnings that may affect a mediator’s demeanor and the way he or she conducts the mediation. What is the socio-political climate in the country of each parent and how will it affect the child’s upbringing if living in that country? What is the parent’s religion, and the parent’s attitude toward the other parent’s religion? Does the parent’s country have laws and customs in place to care for the child—i.e. if the child is abused—or an appropriate education system for the child? How does a country’s culture define a child’s “best interest”—is it better for a child to reside primarily with one parent, or to see both parents as frequently as possible, as a general proposition?

There are also “newer” ways of being a family, created by science or changing social norms that are not necessarily acceptable to all cultures. Each may play some role in both how a mediator approaches a family and how the parents seek to resolve their dispute: adoption, surrogacy, same-sex parents, children who are genetically related to only one of their parents, foster parents, other relatives as parents (such as grandparents), or preferences of one gendered parent over another.

Families are usually defined by blood relationship, or by a legal relationship sometimes referred to as “in-laws.” A child binds two people who are not related by blood (except in a culture where it is both legally and

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

normatively acceptable to procreate with a blood relative). “Legal rights may be lost, but the blood relationship cannot be lost.”⁴⁸ Blood relatives share a common identity—they share particular genetic traits. Even though two parents are not related, the fact that they have had a child together binds them. Often a parent will assume that when he or she decides to end the relationship with another parent, it will be permanently severed. This is *not* the case, unless they also intend to sever their relationship with the child that they share. A child binds two people together as much as blood does. Therefore, even though the parents may not legally be related to one another anymore (for instance, they may have been granted a divorce), they have a binding tie to one another, and so long as each parent wants to play a role in the child’s life, the parents will have to acknowledge the existence of each other.

A child may have more than one family—perhaps a family with his or her mother and the mother’s companion, and a family with his or her father and the father’s companion. Grandparents, cousins, aunts, or uncles play a role in the child’s family. Depending upon the culture, those more distant blood relations may play a significant role, and a person’s culture may dictate that it is in the best interest of that child to maintain those family relations, even if the law does not provide for it as a consideration in determining custody. What if one parent’s culture believes in circumcision or other rights of initiation into a community while the other parent’s culture does not? These are issues that most often will not be addressed by a court, and if they are, they are considered as part of a multitude of factors. In mediation, however, parents have the flexibility to discuss cultural decisions about their child’s upbringing more readily, and at times can make mediation more contentious, and other times can make the mediation a better option for the entire family. However, it also puts the mediator into a difficult role, especially if that mediator is unfamiliar with certain cultural customs, or uncomfortable with certain ways of caring for the child.

Is it the mediator’s role to pass judgment on particular cultural conduct? Different cultures assign different roles to parents and children. There are issues of hierarchy within the family, and cultural conduct that must be adhered to, lest there be an issue of losing face within the cultural

48. DAVID M. SCHNEIDER, *AMERICAN KINSHIP: A CULTURAL ACCOUNT* 24 (2d ed., The Univ. of Chicago Press 1980) (1968).

community.⁴⁹ Nearly every culture has some form of “family” or family-like community in order to perpetuate itself. There are always children, lest a culture die out. Therefore, there will continue to be fights over being able to raise a child in the culture of that child’s caregiver.⁵⁰

In the United States, all jurisdictions apply what is termed the “best interests of the child” standard when their judiciaries are making custody decisions. This amorphous and vague term is usually established by a statute or case law that indicates the factors that a court must review in deciding what constitutes the “best interests” of a child. Some jurisdictions, like the District of Columbia,⁵¹ have a presumption that joint custody is in the best interests of the child. However, each case is different and each child is different, and it may be premature to say that one particular custody arrangement is in the best interest of most children. Culture is a factor that is often overlooked. In some instances, a court should not consider culture, to avert a situation where it may erroneously assume a culture could be detrimental to a particular child, without a full understanding of that culture. In other instances, a court should look to culture as one of the myriad factors that will influence what is in the child’s “best interests.” Is it important for a child to be influenced by his or her parent’s cultural background? What if one parent convinces a fact-finder that he or she will raise the child to acknowledge the other parent’s cultural background? A person’s faith may influence much of that person’s culture, habits, customs, and code of conduct. Should a court delve into the constitutionally thorny issue of religious upbringing when determining what is in a child’s best interests? Should a mediator? As an example, in Minnesota, its “best interest” statute specifically provides that a judge may consider the “child’s cultural background” in determining what is in that child’s best interests.⁵² Maryland courts may consider religious teachings as part of a “best interest” analysis.⁵³

Is it acceptable to have both parents teach their child culture? Will immersing a child into different, and sometimes competing, cultures confuse

49. Claude Levi-Strauss, *Structural Analysis in Linguistics and in Anthropology*, in KINSHIP AND FAMILY: AN ANTHROPOLOGICAL READER 145, 148 (Robert Parkin & Linda Stone eds., Blackwell Publishing 2007).

50. David M. Schneider, *What is Kinship All About?*, in KINSHIP AND FAMILY: AN ANTHROPOLOGICAL READER 257, 263 (Robert Parkin & Linda Stone eds., Blackwell Publishing 2007).

51. D.C. CODE ANN. § 16-914(a)(2) (2009).

52. MINN. STAT. ANN. § 518.17 subd. 1(a)(10)-(11) (West 2009); Solangel Maldonado, THE ROLE OF RACE, ETHNICITY, AND CULTURE IN CUSTODY DISPUTES 4 (unpublished ABA Family Law Section Spring 2008 meeting CLE meeting materials 2008).

53. See *Bienenfeld v. Bennett-White*, 605 A.2d 172, 182 (Md. Ct. Spec. App. 1992).

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the child? In *Henggeler v. Hanson*,⁵⁴ a couple adopted two children from Korea. The mother relocated with the children while the father sought a change in custody.⁵⁵ The result was that the mother was given primary custody of the children, and a deciding factor reflected the father's denial of the existence of the children's Korean heritage, while the mother displayed deep sensitivity to it.⁵⁶

In *Marriage of Gambla*,⁵⁷ the mother was African-American and the father was Caucasian. The mother was given sole custody, and the court examined the fact that the mother expounded on how she could teach the child about being a black woman. "In some cases, one can reasonably conclude that a judge's cultural biases influenced the custody determination despite the judges' assertion to the contrary or the presence of a neutral (non racial, ethnic, or cultural) factors."⁵⁸ A mediator, at least in the United States, is supposed to be a neutral third party to the dispute, and therefore is arguably less likely to interject cultural biases into the process. However, mediators have a great responsibility and power, and their biases can certainly affect the flow and productivity of the mediation, and whether the mediation is ultimately successful.

In *Schultz v. Elremmash*,⁵⁹ a Catholic American mother was granted custody of her child over the Muslim Libyan father. While stereotypes may arguably have played some role in this outcome, it was clear that the court looked at the fact that the mother was determined to teach the child about her father's heritage as well as her own (such as upholding Muslim dietary restrictions for the daughter).⁶⁰ The court felt that the father was not inclined to do the same.⁶¹

In *Rico v. Rodriguez*,⁶² the father was given primary residential/physical custody of the child. The mother, of Mexican heritage, would allow the child's older siblings to babysit, and had extended family members play an active role in child-rearing.⁶³ The mother acknowledged that these are

54. *Henggeler v. Hanson*, 510 S.E.2d 722, 724 (S.C. Ct. App. 1998).

55. *Id.* at 724.

56. *Id.* at 725.

57. *In re Marriage of Gambla*, 853 N.E.2d 847, 849 (Ill. App. Ct. 2006).

58. Maldonado, *supra* note 52, at 7.

59. *Schultz v. Elremmash*, 615 So.2d 396, 400 (La. Ct. App. 1993).

60. *Id.* at 399.

61. *Id.*

62. *Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005).

63. *Id.*

cultural traits familiar with Latin American families.⁶⁴ Clearly, in much of the U.S., this is not what is traditionally done, and that appears to have affected this decision.⁶⁵

In *A.A. & F.A., Restitution of Son*, an Argentine decision of the Buenos Aires Court of First Instance,⁶⁶ the court ordered the child returned to Israel from Argentina. Israel was determined to be the child's "habitual residence" and the court noted that the child had adopted Israeli customs, traditions, habits, and behavior. The court stated that "habitual residence constitutes a sociological point of connection."⁶⁷ The court, however, did defer the child's return to Israel for two months because of Israel's political-military situation, which it found was apt to cause anxiety to the child.⁶⁸

In *Nunez-Escudero v. Tice-Menley*,⁶⁹ the court noted that the Hague Convention's Article 13 defenses will cause a court to examine people and circumstances in the child's habitual residence (which in this case was Mexico) to ensure a child's protection. The question arises, however, of whether the court would show bias—what if the country of habitual residence were Cuba? Iraq? Some other country that does not espouse U.S. American "ideals" or is in a "state of war"?

In *Van Sickle v. McGraw*,⁷⁰ the father resided in Alaska and the mother in Michigan. The child was of Tlingit heritage (a Native-American group that primarily resides in Alaska and Canada).⁷¹ The court found that the child's culture was more likely to be recognized and fostered in Alaska where the father resided.⁷² In *Rooney v. Rooney*,⁷³ the court ordered that the child reside with the father during the school year and with the mother during the summer.⁷⁴ The mother was Tlingit, and the court ordered the father to expose the child to the mother's Tlingit family and culture.⁷⁵

In *Marriage of Kleist*,⁷⁶ the mother was very insistent that she have primary physical custody. She relied very heavily on the fact that she was of

64. *Id.*

65. See generally *id.*

66. *A.A. & F.A., Restitution of Son*, October 5, 2001, www.hcch.net/incadat/fullcase/0487.htm.

67. *Id.*

68. *Id.*

69. *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995).

70. *Van Sickle v. McGraw*, 134 P.3d 338 (Alaska 2006).

71. *Id.*

72. *Id.*

73. *Rooney v. Rooney*, 914 P.2d 212 (Alaska 1996).

74. *Id.*

75. *Id.*

76. *In re Marriage of Kleist*, 538 N.W.2d 273 (Iowa 1995).

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Hispanic culture, and it was her belief that Hispanic mothers parent in a very specific manner that requires them to be face-to-face and one-on-one with the child at all times.⁷⁷ The court found this persuasive and gave the mother primary custody of the child, and found that the father could adequately parent without the child being in his primary care.⁷⁸

In *Giampaolo v. Erneta*,⁷⁹ the court spoke about the Argentine civil code and the concept of *patria potestas*, which is used in many Latin American countries. The court stated “*patria potestas* denotes the set of rights and duties belonging to the parents in respect to the person and property of their children, for their protection and integral education, from the moment of their conception and while underage and not emancipated.”⁸⁰ However, what if a parent does not care to teach a child about the child’s cultural heritage? Is that detrimental to the child? Should the parent be required to do so? In this case, the mother did not want to teach the parties’ daughter of her Argentine heritage, despite the child having lived in Argentina for eight out of ten years of her life.⁸¹

In addition to case law, a review of certain international laws reveals that culture should play a primary role in family dispute resolution. The 1993 Hague Inter-Country Adoption Convention, Article 16(1)(b) provides that the state of origin of a prospective adoptee shall “give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background”⁸² if the child is to be adopted.

The United Nations Convention on the Rights of the Child premises the convention on “taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child.”⁸³ Article 20(3) provides that “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”⁸⁴ Article 29(c) provides for “[t]he development of respect for the child’s parents, his or her

77. *Id.*

78. *Id.*

79. *Giampaolo v. Erneta*, 390 F. Supp. 2d 1269 (N.D. Ga. 2004).

80. *Id.* at 1277.

81. *Id.* at 1282.

82. Convention of Protection of Children and Co-Operation in Respect of Intercountry Adoption, art. 16(1)(b), May 29, 1993.

83. United Nations Convention on the Rights of the Child, Preamble, Nov., 1989 available at <http://untreaty.un.org/English/TreatyEvent2001/pdf/03e.pdf>.

84. *Id.* at art. 20(3).

own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own,”⁸⁵ and stresses “friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.”⁸⁶ Finally, Article 30 provides that:

[A] child belonging to . . . a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practi[c]e his or her own religion, or to use his or her own language.⁸⁷

Culture shapes the way a person parents, the way a family is formed and functions, and who may belong to a family. While many do not consider culture in this context, it is clear that culture must play a distinct role in a child’s life.

IV. MEDIATION

Parties can reach resolutions through mediation that they may be unable to achieve if they go through the court process. Culture affects the communications between parties and mediator. It also affects the way of defining a family and what is best for a child. In addition, culture affects the mediation process. “[T]he parties most directly invested in a dispute are usually the least able, are in the worst position, and are the least equipped to settle the dispute constructively.”⁸⁸

From culture to culture, each has developed unique patterns of managing differences and resolving disputes. Each constructs its repertoire of conflict behaviors, its hierarchy of values, its code of laws. The study of conflict patterns is the study of contrasts. Out of the same basic needs, fears, and hopes, humans have created ways of dealing with competition, frustration, and aggression that reverse and reflect each other and that would, if brought together, complete each other.⁸⁹

The role a mediator must take is culturally defined. Should a mediator explore legal and social consequences with the parents? Punish the perceived wrongdoer? Raise additional conflicts? Channel the conflict into an institution or ritual? Act as a go-between? Summon kin or the community for retribution? The end goal of a mediation is also culturally defined: “support for one party, neutral assistance to both, destruction or execution of the wrongdoer, the return of equal injury, exact compensation,

85. *Id.* at art. 29(c).

86. *Id.* at art. 29(d).

87. *Id.* at art. 30.

88. AUGSBURGER, *supra* note 1, at 5.

89. *Id.* at 22.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

reduction of tension, modification of future behavior, restoration of harmony, or some other desired outcome.”⁹⁰

One international parental kidnapping project that has demonstrated party satisfaction and positive results is the United Kingdom non-governmental organization Reunite. It has reported on its mediation project at length. One consideration gleaned from the Reunite mediation project report is that Hague Convention applications are treated as emergency business, and that a statutory objective is to have a final resolution within six weeks of commencing a Hague case. The mediation, therefore, must run parallel and be completed in no more than six weeks, but often less time. Is this sufficient time for a mediator to build relationships with these individuals? This is a strict timeframe – what must a mediator do in order to ensure that the relationships are sufficiently established? How often must a mediator meet with the parties and for how long? Reunite held three sessions over a two-day period, with each session lasting a maximum of three hours.⁹¹ Is this sufficient to take into account cultural differences and the necessary facework a mediator must perform to adequately run the mediation? In addition, Reunite also sets forth all terms in a Memorandum of Understanding, where both parents could seek legal advice.⁹² Will the written agreement reflect a mutual understanding between the two parents? What if it is difficult or impossible to accurately translate the agreement from one language to another?

“Attempted intervention or mediation by one external to the culture inevitably misses cues, scrambles data, and confuses primary and secondary issues at best. At worst such an outsider utilizes tactics least likely to facilitate an opening of communication that will clarify differences and enable conciliation.”⁹³ Does an international parental kidnapping mediation need a mediator from one culture? Both cultures? Should the mediator employ a cultural broker or interpreter?

“[Conflict] [r]esolution aims somehow to get to the root causes of a conflict and not merely to treat its episodic or symptomatic manifestation, that is, a particular dispute.”⁹⁴ How can a mediator delve so deeply in such a

90. *Id.* at 19–20.

91. *See generally* REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE, *MEDIATION IN INTERNATIONAL PARENTAL CHILD ABDUCTION: THE REUNITE MEDIATION PILOT SCHEME*, 8 (2006) available at <http://www.reunite.org/edit/files/Mediation%20Report.pdf>.

92. *Id.*

93. AUGSBURGER, *supra* note 1, at 24-25.

94. AVRUCH, *supra* note 3, at 26.

condensed time frame, and without full knowledge of one or both parents' culture?

At times, a third party intervenor is used to correct a power imbalance between the parties. This strategy is often referred to as the "empowerment" of the weaker party.⁹⁵ This causes the third party intervenor to work in a non-neutral manner, opposite to the traditional role of U.S. mediators. Neutrality is a Western cultural concept of mediation, and is not necessarily the norm across cultures. It comes from Western viewpoints of self-determination, individualism, and freedom to make one's own choices. However, this is not how mediation is necessarily used in other cultures. "One of the first American cultural presuppositions to be questioned . . . is that the best mediator is completely impartial and unbiased, ideally unconnected, in fact, to the parties or their concerns."⁹⁶

For whatever reasons—purely cultural ones like American notions of fair play and professionalism, or structural-cultural ones like class – the idea that the only possible mediator is impartial and unbiased was a very strong one in early theories and practice . . . The ethnographic record in general does not support the existence of the uninvolved third party as either the norm or the ideal.⁹⁷

Mediation tends to be a more viable alternative to resolving a dispute for those cultures that, in general, tend to "avoid conflict," such as high context cultures. "[M]ediation aims to preserve and restore social relationships by leaving the parties in charge of their own negotiation and its outcome, often mixing in doses of therapy as part of the process."⁹⁸ What educational credentials should a mediator have? Should a mediator have a therapy background? The German model of mediating international parental kidnapping cases utilizes both an attorney-mediator and a therapist-mediator as co-mediators. It can be helpful to partner with another third-party intervenor of a different culture who can guide you, in addition to the parties, in seeing things from a new perspective. Mediators can also use a cultural broker—however this adds another person to the mix, which may complicate logistics.

Mediation and other third-party processes are open to the issue of culture, and in fact, may be the best means of resolving disputes when culture is involved. In the U.S., "[w]e look to courts to reveal the truth, and often they do . . . It's about winning."⁹⁹ Deborah Tannen views U.S. courts

95. *Id.* at 49.

96. *Id.* at 83-84.

97. *Id.* at 84.

98. *Id.* at 82.

99. DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE*, 131 (1998).

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

as a way of waging a war—two sides against one another to “slug it out.”¹⁰⁰ What is clear from Tannen’s descriptions are that U.S. courts involve a very public way of trying to resolve a dispute—the record of the court is public, the proceedings are normally public, and litigation involves bringing in witnesses, such as neighbors or employers, and others who are not necessarily involved in the parties’ family life, all to prove certain points. Many cultures do not see this as a constructive means of resolving a dispute. In the U.S., court is increasingly being looked to as a last resort. However, the U.S. idea of self-determination, fairness, and justice look to these trials as a way for an impartial individual to weigh the facts, apply a law, and reach a decision. In the case of two parents who must have an ongoing relationship with one another because they share a child, litigation can exacerbate bad feelings—in litigation, you bring forth all the dirt you can dig up about the other parent. Each side leaves the courthouse feeling as if his or her dirty laundry has been aired for the world to see, causing much resentment. Some cultures are more concerned about preserving reputation in the community and harmony within the family after the conflict has been resolved—which indicates mediation as a more appropriate form of dispute resolution. Not all judicial systems involve the U.S. style (i.e., advocates who present a case to a judge). “In the German and French systems, fact gathering is controlled by a judge, not by attorneys. The judge does most of the questioning of witnesses, and the judge’s goal is to determine what happened, as nearly as possible.”¹⁰¹

Families develop their own norms and signals for communicating, many of which are outside the radar of outsiders. Intimate partners become adept at reading each other’s facial and body language and are often more aware of each other’s nuances than someone from outside the family would be. When high-context cues cross cultural lines, many will be missed by outsiders.¹⁰²

Some cultures require special “accommodations” or formats to their mediation. Some cultures involve other decision-makers than the mother and father of the child. “When everyone was not at the table, agreements were made that were later discarded because everyone needed for the landing was not involved in the takeoff.”¹⁰³ Whom should mediation involve in the process?

100. *Id.*

101. *Id.* at 132.

102. LEBARON, *supra* note 4, at 58.

103. *Id.* at 60.

The Council of Europe, Committee of Ministers, drafted a Recommendation with regard to Family Mediation, noting the benefits as: improving communication between family members, reducing conflict, producing amicable settlements, providing continuity of personal contacts between parent and child, lowering the social and economic costs of divorce, and reducing the length of time otherwise required to settle matters. Specifically, the Council noted that a mediator must be “impartial and neutral,” and if engaged in international mediation, should undergo “specific training,” although it does not note what specific training.¹⁰⁴ Over ten years ago, organizations recognized the value in using mediation to resolve international parental kidnapping disputes.

V. TRAINING OF MEDIATORS

[S]ince most of us will never become . . . experts in many other areas than our own, and that the plane ride to Jakarta . . . is too short to learn all you really need to know about Indonesian Islam, you should at least be aware—*really* aware—that when you land you won’t be in Kansas any more, and therefore that, as you enter your first negotiating session, such fundamental notions as deference, social distance, responsibility, and personhood will be different from those you have come to expect.¹⁰⁵

Recognize that “cultural differences may easily exacerbate potential or existing social conflicts, or stand in the way of their transformation and peace-building, because they affect the dynamics of communication between cultures.”¹⁰⁶ A mediator is in a unique position to bridge a gap in communication. He or she may use culture as a tool to reach creative solutions that a court would never entertain. These multi-cultural mediations require training in the mediation process itself, family issues, international laws, and a firm grasp of how to use culture instead of allowing it to be a hindrance.

Whatever our level of privilege we engage in cultural judgments of others, often based on a quick appraisal of their apparent identities. We assign attributes, traits, and likely behaviors to others within seconds of setting eyes on them. Even when we are culturally sensitive we can catch ourselves in this act, finding that our training helps us more to interrupt the reflex than to prevent its use.¹⁰⁷

104. Council of Europe, Comm. Of Ministers, *Recommendation No. R (98)1 of the Committee of Ministers to Member States on Family Mediation* (Jan. 21, 1998).

105. AVRUCH, *supra* note 3, at 105.

106. *Id.* at 82.

107. LEBARON, *supra* note 4, at 19.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

When mediating a case, it is important to understand the implications of “trust.”¹⁰⁸ In some cultures, it is important to build trust with the parties before delving into the difficult issues at hand. In other cultures, trust can only be built after the mediator demonstrates an aptitude for handling the case a particular way. A mediator therefore has a difficult task—what must the mediator do to build trust, and when must this endeavor be undertaken? If undertaken at the wrong time, it could lead to a wholly unsuccessful mediation.

In addition, “[a]pologies are deeply important to many people.”¹⁰⁹ “In ordinary human relations, acknowledging guilt or taking responsibility is the first step in setting things right.”¹¹⁰ In the U.S. justice system, admitting guilt or even taking responsibility may “hurt” one’s legal case. Therefore, if there is also a pending legal case, the parties may be unwilling to engage in the one thing that the other party needs to hear in order to settle matters—acknowledging responsibility. How can a mediator be trained to deal with this? Some cultures may be “conflict avoidance” cultures, and therefore a mediator may have to adapt—such as by separating the parents from one another and shuttling between them in order to allow the parent from the conflict avoidance culture to feel comfortable. However, what if the other parent prefers direct communication? Are you prejudicing this parent?

Many mediators separate individuals immediately upon the outset of a mediation. They put mom in one room and dad in another room, and the mediator shuttles back and forth between the parents. However, the mediator must be aware that “[p]eople in many cultures feel that arguing is a sign of closeness.”¹¹¹ Not allowing the parents to hear one another or even engage in some argument may prevent them from working toward a resolution. In fact, one of the greatest obstacles in cross-border mediations (where a mediator is in one city, mom is in another, dad is in another, and perhaps attorneys representing each are in more cities) is how to effectuate face-to-face meetings. Especially when parents have little money to travel, how can you engage two people whose culture may need the individuals to see one another to resolve their dispute, when you are on a telephone?

In the U.S. it is also commonplace to praise individuals—perhaps a mediator may praise the parents for choosing a “less adversarial” means of

108. TANNEN, *supra* note 99, at 134.

109. *Id.* at 148.

110. *Id.* at 149.

111. *Id.* at 209.

resolving their disputes. How does each individual and his or her culture receive praise like this? If the person comes from a culture that values an individual's accomplishments, praise is necessarily a good thing. However, if a person comes from a culture that values the group, the person may see praise as embarrassing, inappropriate, or boastful. A mediator must find the correct balance to motivate two differently cultured individuals towards reaching a common goal,¹¹² while not seeming to side with one over the other.

Mediators need to be trained to deal with emotion. Not only are family law cases very emotionally driven, but different cultures are comfortable with different levels of showing emotion.¹¹³ It may be necessary to accommodate emotionally expressive behavior in order to effectuate a successful mediation—is the person someone who must show emotion in order to feel heard? Is the person one who hides emotion, perhaps in an attempt to save face?

A mediator needs to prepare for the mediation—to acknowledge potential obstacles to good communication and potential obstacles that may impede the mediator's ability to work with the parents. Mediation will end up involving more than just problem-solving, but may also need to have a focus on relationship-building. While a mediator may have some basic information about the parties prior to the mediation, the mediator may need to delve deeper and establish rapport with each individual, without demonstrating any type of preference for one over the other, which may be difficult if the mediator shares one of the parties' cultural backgrounds.

Mediators must learn how to deal with the issue of "shame." Shame can play a different role depending upon the culture of the individual. If the person is from a "high context culture", then "standing, reputation, and honor are paramount."¹¹⁴ "Outward appearances are to be maintained at all costs."¹¹⁵ The mediator must assure that there is no loss of face within the mediation. This may be difficult if the mediation is geared toward a speedy resolution, such as in an international parental kidnapping case, especially if judicial proceedings have already begun. A low context culture may be more preferential to "practical expedients with grand conceptual schemes," and to "be businesslike and to the point."¹¹⁶ How does a mediator balance?

112. *Id.* at 215.

113. TANNEN, *supra* note 99, at 215.

114. RAYMOND COHEN, *NEGOTIATING ACROSS CULTURES* 75 (U.S. Institute of Peace Press, 1997).

115. *Id.* at 75-76.

116. *Id.* at 83.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Usually at the outset of mediation, the mediator will outline the “rules” of the mediation—the guidelines that the mediator will follow and the practical progression that the mediation will take. This is not necessarily the best approach to reach a resolution in all cultures. Should the mediator dictate the rules, or let them unfold after the parties begin their discussions? What if the mediator chooses hard and fast rules that do not fit the communication style of the parties? Will the mediator be able to modify the rules, or will he or she be inflexible and unable to do so without feeling the need to start from the beginning?

How will the mediator end the mediation? If the parties reach an agreement, or a meeting of the minds, how is this agreement codified? In the U.S., in particular, the legal climate dictates that any agreement should be in writing, outlined in as much detail as possible. However, does that hold true for all cultures? “As the lawyerly negotiator understands it, the objective of the entire negotiating exercise is the drawing up of a detailed, binding contract that will withstand legal scrutiny by other lawyers.”¹¹⁷ A party who comes from that more “lawyerly” culture may expect the mediation to unfold in a manner that will allow him or her to make a “logical case for their point of view, appealing to certain acceptable criteria of ‘evidence’ such as the facts of the situation, mutual interest, foreseeable consequences, equity, and especially points of law, existing rights, and relevant precedents.”¹¹⁸ The parties need to be told from the outset that a mediator *will not* make a decision for the parties. Mediation is a voluntary process and the parties are expected to make their own decision. Many family mediations unfold in which one side will make a cogent legal argument to the mediator as to why they should “win.” The mediator should be able to translate that legal argument into the proper communication that will make sense to the other party, especially based upon their culture.

Another obstacle which mediators must be trained to handle is that in an international parental kidnapping case: there is one parent in one physical location, another parent in another physical location, multiple attorneys, perhaps translators, and then the mediator. The mediation may need to take place via telephone conference, and some mediation work may be done via e-mail. Is this workable? Will this work with a cultural background that needs to develop a strong relationship before trusting the mediator to work on the case? Can this be done without meeting in person? What if the

117. *Id.* at 135.

118. *Id.* at 136.

mediator meets with one parent in person and one by telephone? Does this cause or suggest a bias?

A mediator must ask the following questions to assess how culture may affect his or her mediation: Does the parent place an “emphasis on tasks or on relationships”?¹¹⁹ Does the parent prefer “direct dealing or indirect dealing”?¹²⁰ Does the parent express emotions, or is he or she reserved?¹²¹ Does the parent place value on speed, efficiency, and a quick pace, or on a slower pace, deliberateness, and the long term?¹²² Does the parent place a “value on rank, gender, age, or other status”?¹²³ Does the parent mean “yes” when he or she says “yes”?¹²⁴ Or does “yes” mean “I will do my best, it is possible, or we will have to see,” and “no” mean “I like some aspects of what you propose, but we will have to work further on specific pieces”?¹²⁵ Does the parent value community, “group harmony[,] and wholeness versus competition and focus on individual needs”?¹²⁶ What roles do “relationships, and rules, even written versus unspoken,” play?¹²⁷ Does the parent prefer “give and take” or a collaborative process?¹²⁸ Does the parent emphasize privacy and confidentiality, or “openness, transparency, and community involvement”?¹²⁹ Does the parent view the mediator as powerful, respected, and known, or neutral, powerless, and unrelated?¹³⁰

The German model of mediating international parental kidnapping cases uses two mediators—one man and one woman. One is from the legal realm and the other from the psycho-social sphere. Should mediators be trained in this model? “In any case two mediators should be present in the bi-national mediation, of whom at least one speaks the language of the other partner. They should also be familiar with the respective legal rules and cultural idiosyncrasies of the other country, or be prepared to familiarize themselves

119. Peter Woodrow & Christopher Moore, *What Do I Need to Know about Culture? Practitioners Suggest . . .* in A HANDBOOK OF INTERNATIONAL PEACEBUILDING: INTO THE EYE OF THE STORM, 89, 100-03 (John Paul Lederach & Janice Moomaw Jenner eds., 2002).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Woodrow & Moore, *supra* note 119, at 100-03.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

with them.”¹³¹ The mediations are held in a block on a weekend, where possible (i.e. Friday afternoon to Sunday).¹³² Other issues are often addressed, such as access, custody, residence, and maintenance.¹³³ The German system banks on the fact that if both mediators originate from both cultural and legal systems, then both parents will be more likely to comply with any result coming from the mediation.¹³⁴ Similarly, the European Parliament Mediator for International Parental Child Abduction, which was established in 1987, uses two mediators: one man and one woman, one lawyer and one non-lawyer, each mediator fluent in both languages of the parties in the dispute.¹³⁵ The Hague Permanent Bureau has suggested that in current mediation programs, countries have opted to use two mediators, one from each nationality of each parent.¹³⁶ The Permanent Bureau suggests that this is for the mediation to appear impartial; however, it has also noted that this may detract from impartiality, as a parent may identify with his or her co-national mediator and feel that this person could be an ally or provide him or her legal counsel.¹³⁷

In a practical case study of a dispute between Germany and the United Kingdom, mediators noted that the parents’ cultural differences first became apparent when they arrived for the first session: “The mother was a central-European-looking woman, the father, owing to the dark colour of his skin, could easily be identified as a British citizen of Asian descent.”¹³⁸ If mediations are not done in person, a mediator may have more difficulty observing some cultural differences, thereby tailoring his or her mediation style.

131. Carl Eberhand & Christina Wicke, *Mediation Projects in Hague Cases: Developments in Germany*, XII JUDGES’ NEWSL. 49, 51 (Hague Conference on Private Int’l Law, The Hague, Neth., 2007) available at http://www.hcch.net/index_en.php?act=publications.details&pid=4152.

132. *Id.* at 51.

133. *Id.*

134. *Id.* at 52.

135. European Parliament, *The Role of the Mediator for International Parental Child Abduction*, at 2 (2007), <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=154> (last visited Apr. 20, 2009).

136. Sarah Vigers, *Note on the Development of Mediation, Conciliation and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980*, HAGUE CONF. ON PRIVATE INT’L LAW 1, 16 (2006), available at http://hcch.e-vision.nl/upload/wop/abd_pd05e2006.pdf.

137. *Id.* at 16.

138. Christoph Paul, *Practical Case: Mediation within the Framework of a German-English Child Abduction*, 2 (unpublished, on file with author).

In a mediation that involves multiple cultures, it is imperative that a mediator be trained to deal with additional issues, beside the basic access schedule and custody. Will the child receive language instruction in a particular language? Will the child be raised in a particular religion? How will the child learn about both parents' cultures (especially when not with that parent)?¹³⁹ In a practical case study, mediator Christoph Paul noted that a child, Simon, had an Asian appearance, like his father.¹⁴⁰ Therefore, the mediators were attuned to the fact that Simon would need to maintain a good relationship with his father in order to strengthen that personality and cultural trait.¹⁴¹ Mr. Paul also noted that although the child spoke German, the father spoke only English.¹⁴² The mother agreed to enroll the child in English-speaking classes so that the child could communicate with the father.¹⁴³ The agreement specifically stated that the mother would not try to raise Simon in a way that would isolate Simon from his father's cultural background, and vice versa.¹⁴⁴ These are not usually part of a mediation agreement and not often addressed by a court, but are very relevant in international parental kidnapping mediations.

VI. CONCLUSION - GUIDELINES FOR MEDIATORS

Mediators must be aware of the cues that parents may be sending one another during a mediation. These two parents have usually lived with one another and share a child together. They know the most intimate details of each other and can communicate on a different level. If a mediator misses cues provided by the parents, which often occurs when the cues are related to cultural norms that are unfamiliar to the mediator, the mediator may lead the parents down a circuitous path. The mediator may suggest possible resolutions that clearly would not fit into the parents' ideas of how to resolve this dispute. If the parents are from cultures that would not question a mediator's authority, a mediator's inappropriate suggestions for resolution could simply lead the mediation down an inconsequential path.

In assessing a parent's culture, the mediator should start by asking the parents to introduce themselves in their own words, instead of simply reading about the parent in a file; the way they introduce themselves and what they stress as important will demonstrate a glimpse of their cultural

139. *Id.* at 3.

140. Paul, *supra* note 138, at 3-4.

141. *Id.* at 4.

142. *Id.* at 3-4.

143. *Id.* at 4, 6.

144. *Id.* at 6.

[Vol. 9: 3, 2009]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

views—whether they focus on their family, their history, their education, their career, et cetera. Mediators must also reflect upon their basic mediation training. Some of the skills learned as part and parcel of a mediation training, such as active listening or repeating what has been said, do not translate well into other cultural contexts.¹⁴⁵ Mediators should be prepared to have their authority questioned, either directly or indirectly. In some cultures, particularly Middle Eastern settings,

[P]rofessionalism is not a sufficient or legitimate base for intervention in a public or community conflict and certainly not in interpersonal disputes. Legitimacy is gained through the third party's relationship and influence on one or more of the parties. Such legitimacy is derived from age, clan, tribe, political position or other sources of social status, and not from neutrality or impartiality.¹⁴⁶

Mediators must recognize that many cultures prefer non-neutral intervenors, especially for personal and private disputes.¹⁴⁷ Often the parties also require other stakeholders' involvement to reach a decision they feel is best for the child, such as grandparents.

Even if a mediator is meant to be a neutral individual, whether by the mediator's choosing, the parties' choosing, or that of some overseeing body, is the mediator ever really neutral? The mediator brings forth his or her own cultural biases, whether overt or internal.¹⁴⁸

Mediators should explore certain tools often used by other cultures in intervention, even if uncomfortable or unfamiliar, such as stories that will allow others from a different culture to see things from a different viewpoint; rituals that allow acknowledgment of feelings; myths that highlight embedded values and ways of being; and metaphors that can convey nuances and limitations of the mediator.¹⁴⁹

The best third party mediator is one who has credibility. However, credibility is likewise something that is defined differently in each culture.¹⁵⁰ Credibility could be inherent, such as through gender, generation, and nationality.¹⁵¹ It could be conferred through education, association with high status people or with respected bodies. Credibility can come from

145. LEBARON, *supra* note 4, at 127.

146. *Id.*

147. *Id.*

148. *Id.* at 275.

149. *Id.* at 276-84.

150. *Id.* at 286.

151. LEBARON, *supra* note 4, at 286-87.

expertise via linguistic fluency, conflict fluency, or cultural fluency.¹⁵² It could be congruent, such as when the mediator's values and philosophy fit with the parties.¹⁵³ Or, credibility could be tied to actual results.¹⁵⁴

Should the mediator share a culture with one of the participants? Should there be two mediators, one from each parent's culture so that the two mediators may communicate with one another and not "miss" cultural cues from the parties? Should a mediator or mediators be entirely neutral and share neither parents' culture? "Attempted intervention or mediation by one external to the culture inevitably misses cues, scrambles data, and confuses primary and secondary issues at best. At worst such an outsider utilizes tactics least likely to facilitate an opening of communication that will clarify differences and enable conciliation."¹⁵⁵

To be successful in cross-cultural parental kidnapping mediations, mediators must be able to: (1) strike the proper balance between people whose culture separates people from their problems and a culture that must give equal attention to both the person and the problem; (2) understand when the parties' culture calls for open self-disclosure or when it is better to put a person behind closed doors, usually as a means of saving face; (3) know when a person's culture will require that person to take individual ownership of actions versus when the person comes from a more collectivistic culture that requires more than just that person to participate in the process – and appropriately involve other stakeholders and decision-makers in the process; (4) strike a balance between the parties who need immediacy, directness, decisiveness and those who need to take more time, allow adjustments to be made, accommodations to emerge, and acceptance to emerge; (5) know and understand the cultural underpinnings of the parties' opening positions – do they start off with bottom-line positions or do they inflate what they ask for under the assumption that it would help them to reach a more agreeable resolution; (6) know how to manage the parties' cultural expression of their emotions – some cultures simply cannot work in a situation where emotion is expressed very openly and directly; others need this open expression to be able to then move past the emotion to concrete resolutions; (7) understand the cultural use of "yes" and "no;" and (8) know how the culture dictates the final agreement – will implementation of the agreement simply take care of itself, or does this culture dictate ongoing interpretation and open channels for problem-solving?

152. *Id.* at 287.

153. *Id.*

154. *Id.* at 286-87.

155. AUGSBURGER, *supra* note 1, at 25.