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What Some Theories Say; What Some Mediators Know

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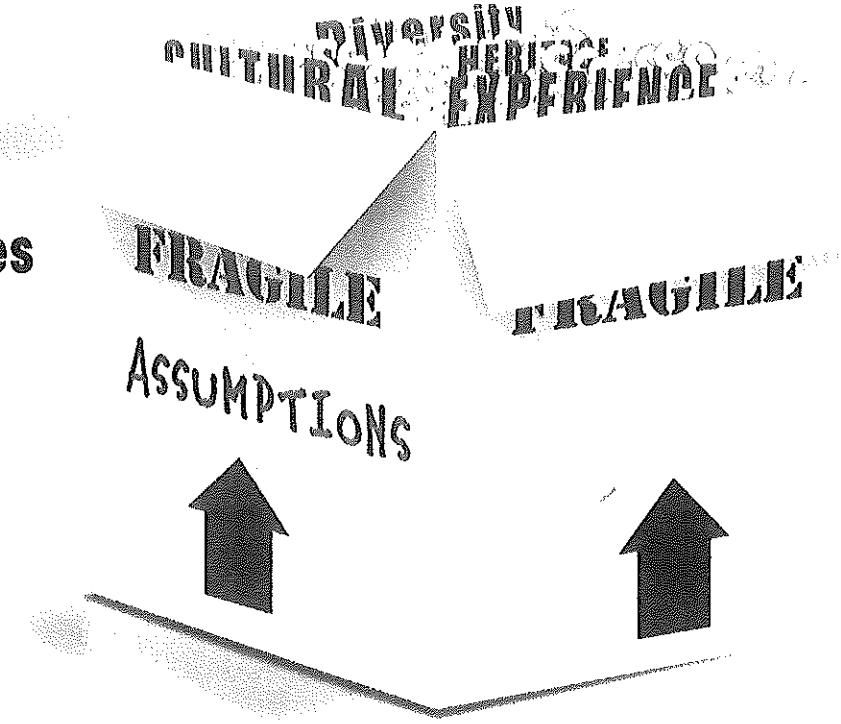

For a generation, scholars on racism in America have argued that minorities probably cannot expect to receive justice through the informal process of mediation. Critical race theory (CRT) holds that minorities will likely find fairness only in a courtroom, where formality and the law constrain pervasive prejudice.

When Professor Richard Delgado published the CRT critique *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution* in 1985, the theory questioned whether minorities should engage in the still-young alternative dispute resolution (ADR) movement. Today, mediation is a fact of life in courthouses around the nation. Currently, the field of ADR faces the question: not *whether* but *how* should programs address the issue of race and potential bias in mediation?

One body of answers arises from a court-connected program rooted in a late 1970s ABA Multidoor Court House Pilot Project in Oklahoma. The Oklahoma Supreme Court's mediation program, Early Settlement, goes beyond aspirational standards; nonbias forms a core principle in the court's enforceable code of ethics for mediators, in place since 1987. The court's standardized training breaks down general principles about fairness into specific parameters to measure mediator competency. The court's training manual further reduces these competencies to step-by-step behaviors, complete with suggested language.

Although this may seem to stifle individual mediator style, it assures fairness does not depend wholly upon the personality or mood of the mediator. Mentoring and monitoring by Early Settlement supervisors—including debriefing with mediators after mediations, telephone follow-up with parties, intermittent observation of even experienced mediators, and continuing mediator education—foster compliance with program protocols.

Using hundreds of observations and analyses of small claims court mediations gleaned over several years, I used real-life experience to inform my scholarly understanding of CRT and ADR. Under my direction, law students trained as Early Settlement mediators interpreted cultural dynamics in some 300 mediations from 2000 to 2004. As program director and clinic instructor, I analyzed their debriefings throughout the period. The results invite scholars and practitioners interested in a holistic approach to rethink conventional wisdom about race and mediation.[1] The results suggest:

1) Fairness for minorities can be achieved in a system that uses mediators as a complement to, not a replacement for, the judge. The judge's positive attitude in referring parties may enhance the success of minority mediators; the judge's presence offers a viable alternative to a possibly unfair settlement.

2) Mediator behaviors that protect against bias, prejudice, and coercion can be taught. In some circumstances, mediation's capacity to facilitate communication can meet a minority party's sense of personal justice better than the constraints of the courtroom.

3) Insofar as race matters in mediation, race probably does not matter as much as gender; and gender probably does not matter as much as socioeconomic class.

The three points summarized above came not from theory, but from actual experience. These observations reflect a bottom-up approach in which informed, systematic observation of subjective behaviors shapes theory, rather than a top-down approach, where abstract theory uses objective, nonpersonal measures to shape facts.

This process of structured self-reflection became

Illustration by Dan Mazanec

embedded in the protocols for Oklahoma City University law students serving as certified mediators in the Early Settlement Central Mediation Program, covering the Oklahoma City metropolitan area of about one million residents. In addition to the court-mandated report filed to provide case statistics, students prepared a separate self-evaluation designed to build a habit of awareness concerning issues of culture, fairness, and method.

Among other things, each mediation clinic student was asked the following open-ended question: "Did ethnicity, race, or national heritage play a discernible role? Was it an apparent factor in the mediation? If so, can you describe how?" The same question was asked about gender.

Unpacking Assumptions: The Role of Judges

Must mediation become more trial-like in order to be fair? Can racial minorities, an "out-group," find justice in mediations that place them in direct confrontation with members of the racial majority "in-group" without the law-trained temperament of the judge to serve as intermediary? The study contrasts this fundamental CRT assumption with experiences in about 125 of the 300 selected cases involving minorities. The CRT preference for trial over mediation rests upon the formal protections found in rules of evidence and civil procedure. Small claims court mediations offer an appropriate testing ground for theory and practice because small claims courts nationwide do not apply rules of civil procedure or evidence, and most parties appear pro se. This leaves the third-party neutral as the significant remaining difference between trial and mediation.

Status and Role of Mediators

The CRT support for trial over mediation assumes that an objective temperament develops in judges over time, restraining personal tendencies toward bias or prejudice. Classic race theory would argue that "majority" mediators cannot be trusted to withhold their personal prejudices nor to acknowledge institutional racism can bias a case. Further, this classic critique views any digressions outside the strictly defined legal issues as an invitation to victimization of the minority party.

The Oklahoma model goes far in addressing the CRT critique. Mediators are not considered fungible with judges. Both the mediator and the judge have roles to play in conjunction with each other. The Early Settlement model, however, embraces a more inclusive idea of what constitutes a legal dispute that challenges the CRT view.

Adopting an approach that perceives cases as more than mere technicalities of law, Early Settlement trains its mediators to use the program's formalized style of communication to elicit from parties their subjective perceptions of the dispute. This creates an expanded concept of the case, which may differ significantly from its legal captioning. This broader understanding of the underlying dispute expands the common ground to build resolution.

A judge typically cannot digress from the trial docket to explore parties' feelings about facts. Culturally framed issues of relationships, respect, and morality have little place in a trial setting. However, these issues must find a forum for expression and resolution, or else the case will likely suffer from poor compliance and reignition of the dispute, making the parties "repeat customers" trapped in the same unproductive behaviors.

The Judge's Power in Framing Mediation Referrals

The self-evaluation required Mediation Clinic mediators to note how the judge directed the case to mediation. Under the Oklahoma Dispute Resolution Act, Early Settlement mediations are voluntary. The judge's tone and manner of referral seemed to have a discernible impact on mediation success when the third-party neutral was a minority and parties were either white or mixed.

Judges' styles ranged from (1) a "bare-bones" presentation of mediation as an option, with neither an explanation of the process nor an endorsement; to (2) an explanation that mediation allows parties to hand-craft a "win-win" agreement that is mutually agreeable, compared to the more harsh, "win-lose" outcome the judge will mandate; to (3) an enthusiastic endorsement of the mediation process combined with a glowing recommendation of the mediator serving that day. Particularly for cases when the mediator was a minority or of a different gender or age group than the parties, the third category of framing helped shape a positive mediation session. Public statements by the judge that he or she respected the process and the mediator transferred to the mediation session itself.

A Transformative Moment Lays Groundwork for Compliance

Early Settlement was fortunate to have judges who generally welcomed mediation for parties to ventilate personal issues, irrespective of whether the mediation resulted in a final settlement. Mediation helped parties better understand their own situation, including how their own actions contributed to the dispute. Many parties had either not spoken at all before the mediation, or their last communication was months or years prior. In such cases, the small claims lawsuit was a means to reinitiate contact. Other parties had never seen the documents shared in the mediation session, which revealed minor technical differences that led to easy resolution. Still others may have declined the mediated settlement because they did not have sufficient time to integrate the new knowledge gained in the session.

Even if the parties did not reach settlement in the mediation, most judges perceived a benefit from the experience. The mediation initiated a transformative event.

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As summarized by one small claims court judge: "When they [the parties] return to me, they are different people. They are ready to listen. They are ready to accept my judgment."

Unpacking Assumptions: The Role of the Mediator

Early Settlement protocols call for the mediator to suspend a session and refer the case to the judge when a severe imbalance of power between the parties invites coercion. How does the mediator distinguish hard bargaining, or differences in styles of communication from coercion or duress? How does the mediator recognize the limits of his or her duty to help the parties reach agreement?

Under the Oklahoma Supreme Court Rules, the mediator has an ethical obligation to encourage active participation by the parties, never to force a resolution, nor to make a decision on behalf of the parties. To maintain impartiality, and avoid giving legal advice, the mediator must "allow parties to independently assess their legal position and/or seek the assessment of an attorney."[2]

More than 100 pages of the *Oklahoma State Mediation Training Manual* cover a variety of specific behaviors designed to ensure such party participation. The initial training and selection process evaluated mediator candidates based upon their observed skills in demonstrating the use of these behaviors, stage by stage throughout mediation sessions. This set of behaviors informed the "Seven Parameters of Mediator Performance" used later for mediator self-assessment and program supervisor reviews.

These parameters include adequate investigation, empathy, persuasion and presentation skills, and reducing tension through effective distractions.

Facilitating Minority and Feminine Styles of Communication

If justice is measured by the dollar amount won or lost in mediation compared to the likely outcome in litigation, then the tally equals success. On the other hand, if a system values a party's right to be heard and to make choices, then the system must acknowledge justice as something more than dollars alone. A mediator's greatest contribution may be to respect styles of self-expression and decision making; supporting the often nonlinear storytelling styles and relational values common to many ethnic cultures and women.

Justice may not be objective but subjective, an active process of human interaction. A party's greater need may be to garner respect—from the mediator, adversary, and others who have become triangulated in the dispute, such as family members, friends, or coworkers. Thus, the mediator's true goal may be to help all involved save dignity, or face.

As Delgado acknowledged a decade after *Fairness and Formality*, "storytelling" and the expression of emotion contribute to genuine, subjective due process. However, the courtroom does not generally welcome emotion or nonlinear narrative, especially when expressed by a minority or female litigant, for "[l]aw is structurally biased against any display of empathy."[3]

Unpacking Assumptions: The Role of Race, Gender, and Class

Race and the Mediator

In my longitudinal study of mediator self-evaluations, an overwhelming majority of the approximately 125 cases involving minorities reported that race, ethnicity, or national origin played no discernible role in the mediation. It is noteworthy that this response dominated nearly every category of mediator-party/witness arrangement.

The mediation initiated a transformative event.

In a multicultural country where race, ethnicity, and national origin often engender volatile responses, the very fact that racial or ethnic identity appeared to play no role is significant. A number of interpretations could explain this fact.

Conceivably, the United States is evolving into a truly color-blind society where both the mediator and parties do not notice or have a predetermined opinion about color. More likely, all participants noticed color. At some conscious level during the mediation, one or more participants opted to make color a secondary consideration. Equally as likely, the mediator steered the parties in a neutral direction by applying mediation protocols. Lastly, it could be that due to judicial framing, race or ethnicity drifted into the background because the judge's style of referral imbued the mediator and the process with the imprimatur of neutrality and respect.

Race Sometimes Mattered

Remarkably few cases reported race, ethnicity, or national origin as a dynamic. Of the approximately 300 cases reviewed, 175 involved white mediators with parties who appeared to be white, American-born, and for whom English was their first language. Shared majority status amongst all participants may have rendered race inapplicable.

Across the board, minority and self-identified mixed heritage mediators articulated heightened intuitive awareness of cross-cultural issues. Sometimes, a minority party sought to use the mediator's minority status to that party's benefit. Through reference to a shared cultural reference point, the party hoped to establish a bond with the mediator, using nonverbal cues, such as body positioning.

In the handful of cases when this occurred, the media-

tor recognized and categorized the behavior. Following protocols, the mediator then took appropriate steps to reinforce even-handedness in dealing with both parties. Sometimes, this proved a delicate balancing act because the perceived emotional bond with the mediator often helped create an atmosphere that encouraged minority party engagement.

In some cases, race played a negative role not only in the mediation, but also throughout the dispute. Rarely, but powerfully, a minority party vocalized a profound and bitter conviction that the entire legal system was biased against minorities. It was not clear whether such outbursts constituted a ploy to gain sympathy from the mediator. The minority party may have felt safer expressing disillusionment during the mediation session compared to the courtroom.

Gender Mattered More; Class Mattered Most

Cases that offered complex opportunities for resolution involved a mediator who shared the same gender as one or both parties. Typically, in family cases the thread of relationship could, if suitably addressed, resolve the entire case. Or, if the mediation could deal sensitively with the painful emotional issues, the parties would more readily accept and comply with the judge's ruling—whether the mediation resulted in a settlement or not.

Interestingly, when a minority mediator conducted a cross-cultural session involving both gender and ethnicity, minority female mediators perceived their gender played a more significant role than race. Minority male mediators generally perceived their gender as a neutral factor. Class or shared work experience may have had more influence, irrespective of the minority or majority status of the mediator.

Throughout all the approximately 125 cases involving minorities, the most consistent variables that played a discernible role in mediation were general literacy and formal education, serving as proxies for socioeconomic class. Imbalances in class among the parties factored heavily in case origination and outcome. For many parties, the original consumer debt or lease problem stemmed from an inability to read and understand written contracts. To moderate this imbalance of power between parties, protocols required mediators to read documents out loud, never assuming that participants could read for themselves. Mediation training taught the third-party neutral to use active listening, restatement, and reframing, ostensibly as a means to educate themselves about complicated business concepts. Mediators blended this nonconfrontational, indirect approach with direct inquiries to the less literate party, checking for comprehension.

Mediators encouraged less literate or articulate parties to take advantage of proffered breaks in the session. By initiating the invitation to separate sessions, the mediator removed the stigma from the disadvantaged party of acknowledging his or her need for additional assistance. Mediation protocols did not permit the mediators to give advice. Instead, mediators were trained to engage parties in visualizing the likely outcomes of various options, encouraging parties to gauge their ability to live with a range of proposed terms, including declining all offers.

Where Do We Go From Here?

It is time to reconsider the CRT critiques of mediation, to evaluate how far we have come, and how far we may yet have to go. It is time to re-examine traditional concepts of objective justice, using a broader, less rigid, and subjective sense of justice aligned with cultural norms.

The answer rests in framing the role of mediation beyond purely monetary outcomes and settlement rates. Court systems must budget resources to support the careful selection, training, and supervision of mediators that serve as the formalized mechanism for interpersonal communication. A combination of complementary services, by the mediator and judge, can provide protection both for the objective goals of the rule of law and the subjective needs of the parties.

This analysis does not suggest that we operate in a truly postrace America. Clearly, it does not suggest that we have moved beyond gender and class as major hurdles. Rather, it underscores that for mediation to be an instrument of justice, mediation must be integrated into a well-organized justice system. This requires public investment in training, meaningful supervision, and continuing education for mediators. A court-connected mediation program that continually and actively monitors its services can adjust protocols to incorporate best practices that meet emerging trends in the docket.

Nationwide, today's court dockets show the strain of a broken economy: an upsurge in debtor-creditor, landlord-tenant, and child support payment disputes. Oklahoma's court-connected mediation program already has in place protocols designed to strengthen the role of the mediator in handling power imbalances, the potential for violence, and appropriate referrals to social services. If the system defines the dispute solely as a matter of law and finances, the outcome is all but a foregone conclusion. The majority, male, upper-class party wins. The minority, female, working-class party loses. If, however, the system values party autonomy and the right to be heard, perhaps only mediation with a suitably selected, trained, and monitored mediator can offer to minorities, women, and the working class a subjective experience of justice that affords human dignity.

The remaining need, which mediators cannot appropriately fill, is to provide adequate, free, or below-cost legal advice for parties in mediation. This vital component in a justice system cannot be ignored. ◆

Endnotes

1. Phyllis E. Bernard, *Minorities, Mediation and Method: The View from One Court-Connected Program*, 35 FORDHAM URB. L.J. 1 (2008).
2. Rules and Procedures for the Dispute Resolution Act, OKLA. STAT. ANN. tit. 12, App. A. § B.
3. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 80–81 (1996).