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Message from the Chair

Rona G. Shamoon

I write this message still savoring the priceless publicity received by our Section in the July / August *State Bar News*. As we begin our fifth year as a Section, we have grown from 760 dues-paying members in April of 2009 to 1,675 in April of 2012. As I reflect on this amazing progress (due of course in no small part to the indefatigable efforts of our past and present membership chairs), I have also considered that perhaps some of this success is also due to who we are and what we are about—helping disputants to find better and more successful ways of resolving their differences.

I came to my first meeting of the NYSBA Dispute Resolution Committee (several years before it achieved "sectionhood") wearing my litigator's hat. Having practiced at that time for more than a decade as counsel in domestic and international arbitrations and litigations, mediation was not a big part of my everyday vocabulary. In fairness, my firm is often hired by clients looking for muscular advocacy, who are not at all interested in hearing about mediation, much less engaging in it. And yet, over the years, having seen the potentially corrosive effect of long-term litigation on both entities and individuals, it did cross my mind from time to time that there ought to be a better way. A colleague, friend and mentor of mine once told me that there was an old French curse that went, "May you be involved in a lawsuit in which you are in the right."

In any event, after joining the ADR Committee, I began to learn more about mediation, early neutral evaluation, collaborative law and other techniques designed to avoid the more bloody, painful and protracted aspects of litigation, and to consider anew the value of a well-drafted arbitration provision that creates an efficient and effective process tailored to the parties' specific needs. Don't get me wrong, I am not a pacifist or a believer in appeasement, and recognize that sometimes full-out, no-holds-barred litigation is necessary. There is no doubt that it takes parties who are reasonable (or at least have the capacity to achieve reasonableness) on both sides of the table to compromise on both process and / or outcome. I also recognize that although some cases may be susceptible to settlement early on, others may take a considerable amount of time and exposure of underlying facts before they can achieve *denouement*. Yet I have come to firmly believe that a well-trained and skilled mediator can often be indispensable in bringing the parties to an earlier and considerably more satisfactory settlement than the parties could have achieved on their own.

I have also come to believe that part of the blame for our overly litigious society lies in cultural norms that equate "winning" with success and compromise with weakness, when, in fact, it is the weakest and most insecure among us who most often refuse to compromise. For some plaintiffs, suing has become a sport or an occupation (or sometimes a little bit of both) and "I'll sue you" has become a ubiquitous threat in the American vocabulary. I, for

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Mediating the Multi-Cultural Fugue of Divorce Mediation

By Alla Roytberg

> "The poetry, the atmosphere, the intensity of expression, the beauty of the preludes and fugues grip, overwhelm, and stimulate us. Let us not be afraid.... " Carl Friedrich Zelter, the teacher of Felix Mendelssohn (letter to Goethe, 9 June 1827)

Although many of us live in the most multi-cultural State and City in the world, for New York mediators a dispute between participants of unfamiliar cultural, religious and ethnic backgrounds brings unprecedented challenges. In her article on Neuro-Literacy, Pauline Tessler rightly points out that "our clients experience divorce as an extended human transition of operatic dimensions, with emotionally exhausting peaks and valleys involving betrayals, bad faith, and narcissistic wounds that call into question identity, core values, and even the will to survive."[1] Add to this a mix of centuries' old beliefs, traditions and rituals, sprinkle it with a committee of advisors, comprised of family, clergy, and community elders, and you get a cacophony of contrasting voices which exacerbate an already looming emotional headache of a human being facing a divorce.

My office is located in Queens, the most ethnically diverse county in New York State. Families of all backgrounds, languages and faiths from all over the world arrive and make their homes in tightly knit Queens communities—Chinese, Korean, Japanese, Haitian, Indian, Bukharian, Italian, Hispanic, African, Russian, Iranian, Hindu, Moslem, Greek Orthodox, Catholic, Jewish, and Buddhist...just to name a few.

Each family's cultural story is unique. Some spouses' backgrounds are identical. Others may share same faith and culture, but vary in degree of observances. And then there are those where spouses, their parents and siblings experience great discord over diversity of religions, languages and cultural norms. Amid this medley of conflicting cultural stimuli and knowing full well that he has to help the parties negotiate a viable agreement under New York law, a mediator needs extra skill and sensitivity to help each party identify his or her own voice, help it mature and fully understand its own needs and interests. Only after each participant explores cultural, legal and religious themes in his / her own community and decides which of them to retain and which to discard, can he or she begin to effectively communicate with the other and negotiate a compromise.

A mediator who helps two Western-minded spouses navigate the legal and emotional process of divorce is similar to a composer of a sonata. During its Exposition participants formulate their individual melodies of needs and interests. During its Development, contrasting themes communicate with the aid of a mediator-composer-conductor who gently guides their dialogue, by looping and re-framing with the goal of helping them reach a somewhat altered Recapitulation and, ultimately, a successful Coda of a Settlement Agreement. But for a mediator-composer of a multi-cultural mediation, the process does not consist of clear melodies and arpeggio accompaniment. Rather, it is a fugue, a polyphonic composition, with themes and variations working in tandem and moving forward, increasing in intensity and transforming into something new and different. The mediator's job is to ensure that while each party experiences a transformation of his / her own voice horizontally, both continue to progress within a framework of contrapuntal rules in harmony towards a common resolution.

THE FIRST MEETING: Before writing the first bars, the composer of a multi-cultural mediation carefully listens to each instrument and determines if it is able to express itself without the help of others. In ideally structured American divorce mediation, two spouses address their needs and interests with a neutral mediator, who facilitates the conversation, provides neutral legal information and helps them reach an agreement on each important item that needs to be addressed in a separation or a divorce. In that structure there is an assumption that each spouse is, at least, able to articulate what he or she needs or wants in order to move forward. But what if that assumption is incorrect? What if a 45 year old woman from India is unable to articulate her needs and interests without consulting with her older brother, who has been her advisor in all financial matters even after her marriage? What if a 43 year old Bukharian[2] man is unable to decide or even discuss what type of post-separation parenting time he would want with his children without the involvement of his parents, or sometimes, even his grandparents? A mediator would be unable to help the parties move forward in their dispute without understanding, first of all, who are the important advisors in their lives, and secondly, whether these people may need to be more directly involved and even present in the mediation process.

In closely knit communities and cultures, marriage is more than just a union of two individuals. Rather, it is a joining of two families, two separate groups of people. In a divorce, families of each marital partner are stigmatized by their community. In extreme cases, a wife's family may even try to persuade her to remain married despite presence of abuse. For members of those groups, the most

important value is for a family to "save face" in front of others. They often go to extremes to discourage divorce and hide evidence of mental illness. After all, if discovered, the family will be labeled as socially or genetically impaired for generations to come. Divorce brings shame to the family. Sadly, community leaders and clergy often reinforce these views and divorcing parties, especially the woman, find themselves isolated both from the secular and religious spheres of their familiar world.

HELPING EACH SIDE FIND HIS/HER OWN VOICE: In a multi-cultural mediation, each person's theme is often first presented by one uncertain voice. It needs time to explore itself, vary in tone and mood, and finally evolve through theme and variations before it can begin to negotiate with the other. The mediation process is uniquely well suited for this self-exploration to take place. No court would provide sufficient time and space for it, and, if a settlement is not reached quickly, a judge would issue an order forcing compliance.

Indira's view of her own existence is initially informed by her family, his family and the communal norms of the world she grew up in. She needs time to explore herself as a subject, to learn what her needs and interests may be. Perhaps a mediator's room provides her with her very first opportunity to do so. It is invaluable for her future life. The mediator as a master composer can provide the space and time for her voice and theme to develop, evolve and mature. And be careful not to mention therapy. In her world, therapy is unacceptable. At least she is not yet ready for it. If you merely insist on therapy at the outset, you will lose her and not help her. With gentle guidance, by providing a steady baseline as her violin explores its initial melody in all of its variations she can reach an epiphany of self-understanding and only then begin to perceive her needs and interests in a way that is often taken for granted by any New York teenager.

A violin does not know how to communicate with a cello. And here is a violin that is played by series of musicians, each with his different system of beliefs. Her traditional Hindu family says one thing, Americanized girlfriends suggest something else, and years of cultural preconditioning instill fears and promise hopes for the future. A Muslim woman may want the freedom and equality provided in America and yet she fondly recalls childhood memories of praying with her grandmother and maintains a strong spiritual connection to Islam. What to retain and what to discard? How to move forward, face separation and divorce and yet safeguard treasures of her ancient culture? Will she find a place within her community post-divorce? Will she be forced to abandon her past completely? As she and her husband separately explore their own themes and variations—identities, pasts, presents and futures—the mediator-composer listens and strives to understand each party's unique cultural view of what is right and wrong, fair and unfair, moral and immoral.

Eventually, violin and cello achieve a variation that would allow them to communicate with each other in a Stretto of exchanges and negotiations on the same subject, repetitions and accelerations, that intensify, transform and finally reach a fuller realization under a mediator's gently guiding hand. Only the mediator-composer can know the moment during which each person's individual voice has reached the precise point of being able to fully express itself to the other. Only the mediator can gingerly guide the joint conversation and help it move forward.

LEARNING ABOUT CULTURAL DIFFERENCES: Hindu and Bukharian religious and cultural practices are vastly different. However, both cultures are characterized by tightly knit family structures and centuries' old history of how disputes get resolved in their communities.

How does a mediator maintain a delicate balance between honoring the cultural and religious rules and rituals that a family has held sacred for hundreds if not thousands of years and, on the other hand, help people understand U.S. law and come up with agreements that are considered fair and legally enforceable under our modern civil system? Does "E pluribus unam" really work? When people from these types of communities arrive in the United States, do they blend in, or stay separate? Do they adopt our laws or devise ways to avoid them or manipulate them to suit their own cultural norms? In one of my litigation cases, a husband in an Albanian family that has resided in the U.S. for nearly 20 years and where both partners were U.S. citizens, went to the "old country" and obtained a divorce without notice to his wife, while his matrimonial action was already pending on the trial calendar of a New York court. In prior decades Bukharian men were participating in religious marriages, but refused to register their marriages under civil law, because they were advised that, in case the marriage did not work out, they could avoid having to share property acquired in their name. In the same community families and clergy ignored spousal abuse, until someone advised the women to start obtaining Orders of Protection. Ultimately, that advice evolved into a practice of "teaching the husband a lesson" where many Bukharian women obtained Orders of Protection whether or not real abuse or threats actually existed. While the men manipulated the system to avoid equitable distribution, women did the same in order to Americanize their husbands—an odd way to force cultural change in a traditional world. Similarly, other minority cultures in the U.S. have developed variously culturally oriented strategies instead of assimilating into society such that they have retooled the law to suit their cultural needs.

THE LEGAL ENLIGHTENMENT SPEECH: The moment has finally arrived for the "Legal Enlightenment Speech." "I understand and appreciate the richness and incredible value of the X tradition and that under X the

idea of dividing property that you feel you worked so hard for during the time you were married is incredibly unfair. Unfortunately, here we have to consider the law of the State of New York. Your agreement must be viewed as fair and equitable by a court. And, if you cannot reach a settlement here, your divorce will be governed by New York law and decided by a New York court."

In a multi-cultural mediation a mediator's neutral explanation of applicable law is extremely important. In most cases, the spouses have not sought legal advice. This is the first time they hear about support, equitable distribution of marital assets and co-parenting. Some of these laws greatly contradict their legal expectations. They often seem genuinely unfair and drastically different from the social norms of their original culture.

When people from other cultures first enter the mediation room, their views on marriage and divorce are based on their customs and beliefs. According to standard definitions, we view a marriage as a legalized union, sanctioned and dissolvable only by law. But what laws do the parties to a multi-cultural mediation think of? A Muslim man may consider himself divorced and free to remarry once he pronounces the Talaq, a statement that he is "divorcing his wife." For him marriage was sanctioned by a deity and can be dissolved the same way. In Old England divorce was first allowed only through a private act of Parliament, and it took centuries of ideological changes for divorce to become an acceptable way to end marital strife. In India arranged marriages are still common. Even in China, old customs and beliefs often override Communist-era gender equality in divorce legislation.

We are trained to think of divorce as a process of reallocating finances and providing for the children. In traditional societies a woman may be discouraged from study or work during the marriage. When I asked Maryam, a 42 year old Pakistani woman with two children, why she never finished college or got a job, she said, "I tried to go to school, but he was complaining about it. Also, we were living with his parents. And his mother needed me around to prepare meals."

What happens if these people end up in court where New York law is forcefully imposed? They will have no time to consider it and adopt it. They will have no opportunity to reach a result that would comply with the law and yet honor their centuries' old beliefs. In that process, the "loser" is less likely to obey the court's order. He is more likely to view himself as a victim of an unfair system, the one he does not belong in and does not understand.

And what about therapy? Ultimately, the spouse who will continue to conform to prior cultural norms will usually refuse therapy. He "does not need it"! He's empowered by his clergy, community and family. The nonconforming spouse is more likely to be open to it, because he or she is the one who wants something different than what is customarily accepted in the community. Financial independence for a woman? Custody or more parenting time for a man? By seeking to alter for themselves centuries' old gender roles, these people are likely to be discarded by their communities as awkward, inconvenient and even dangerous. Most of my immigrant older clients seek divorce after being persuaded to do so by their Americanized children, who grow tired of witnessing cultural inequality at home, which greatly contrasts with their secular U.S. experience outside.

RECONCILING CULTURE AND U.S. LAW. Some beliefs can withstand time. But what about those that are contrary to our society's laws? How does a mediator deal with an Iranian man who has several wives, or a Bhutanese man who feels entitled to marry a second wife, because the first wife did not "give" him sons? Or a Sicilian father who hits his teenage son after the son announces that he is gay? We cannot "honor" these beliefs and many of these people would not voluntarily participate in therapy or wish to "transform." For them, the U.S. legal system provides a reality check, a common denominator to which all will be reduced if they don't reach a settlement during mediation. It will cost more money, take more time and not provide a more favorable resolution. They clearly have an incentive to remain committed to the mediation process.

Ideally, after each participant has had ample time and opportunity to explore his or her own theme with variations and then effectively move forward through a negotiation process, informed by full understanding of the other's needs and interests and New York law, both parties, with the help of the mediator can find a way to honor their religion, retain their treasured cultural identity and best aspects of their tradition and, in harmony with laws accepted in 21st Century New York, conclude their Agreement and move forward with their lives in a respectful way. And we, as mediators, can help make this happen.

Endnotes

1. Pauline H. Tesler, *Neuro-Literacy for Collaborative (and Other) Lawyers*, NYSBA New York Dispute Resolution Lawyer, Fall 2011, Vol. 4, No. 3, p. 47.
2. Bukharians are Jews from a Muslim country of Uzbekistan. Uzbekistan is a former republic of the Soviet Union. The Bukharian community retains a mixture of Jewish religious beliefs, Muslim customs and is influenced by Soviet cultural domination.

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