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Culturally Speaking: The Art of Cultural Mediation

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Mediating legal disputes requires understanding the four basics: 1) Duty, 2) Breach, 3) Defense, and 4) Damage. This is almost universal in all civil and criminal actions, with minor differences. But not so in cultural Mediation, where it is mandatory to consider **OTHER** - an acronym explained below.

In a civil action, the duty is created by law or agreement. The breach is caused by breaking the law or a promise. The defense could be public policy or an intervening cause. The damage must be tangible and lawful. In a criminal action, criminality is the willful commission/omission of a forbidden/required act; the defense is a reasonable reaction, and the penalty is to prevent repeated crime and to compensate the victim.

Handling mediation in a cultural setting must consider an additional five factors: Opinion, Tradition, Health, Education, and Religion. OTHER applies especially to family law disputes that are deeply rooted in cultural grounds. What follows will define each factor and its application to the mediation process and mediators.

[O] OPINION:

In a cultural setting, it is the logic behind the "my way or the highway"

mentality. The invisible wall that separates the divorcing party from the real world, the other party, the mediator, and the process. It is the basis for narcissistic behavior - a barrier to resolving disputes, be it marital property, children, or support. As a self-serving conviction, it sees the legal system as being prejudicial. It requires untying the knot by teeth instead of hand. The judges and mediators are influenced and biased based on the color of their skin, gender, politics, religion, or origin. It is the source of aggressive attitudes and spousal violence in most cultural disputes. It leads to "taking the law into your own hands," resulting in a higher risk of injury and harm to self with the hope of harming the opposing party.

In a cultural setting, mediation may be treated as an excuse to slow down the process, adding to the litigation cost and forcing an unfair settlement. Some view this as a vehicle to deny having a day in Court and being heard by a fair judge, and is considered as a sign of weakness and inefficiency. Mediation may be suitable for the scandalous divorces of the rich, or for hiding out-of-marriage pregnancies. To combat these perceptions, sustainable mediation requires challenging and changing negative attitudes first; otherwise it will be a bridge to now-

here. The mediator must appear as a force defending David in the battle with Goliath rather than umpiring a friendly game. The mediator must convince the parties that mediation is not a sham meant to serve one party, and must convince them that he is not prejudiced and/or in cahoots with another. Since an extra-marital affair is the prevalent cause of a cultural divorce, showing sympathy for the female opponent may be misinterpreted as unethical and unprofessional interest.

[T] TRADITION

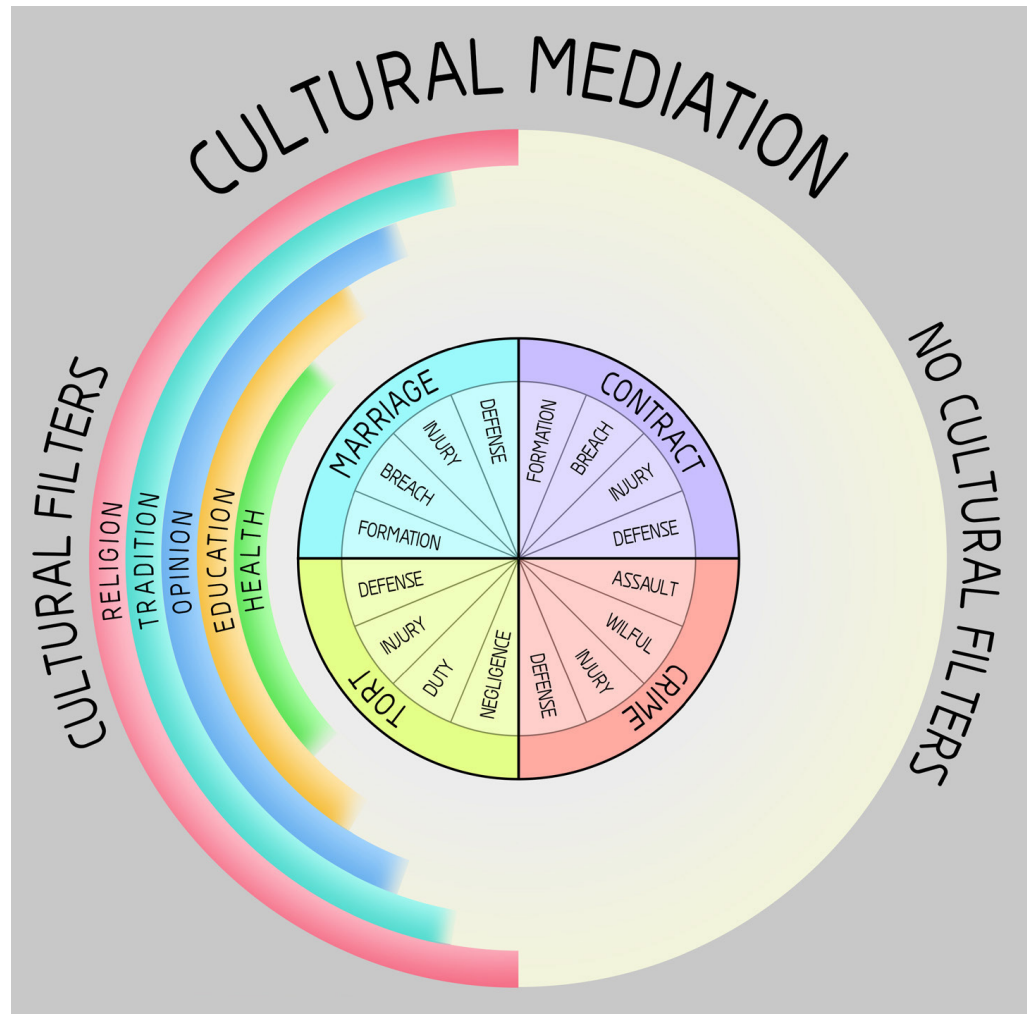
Tradition is the invisible backpack that controls and navigates the behavior of the litigants and the mediator. We enjoy certain music, dancing, clothing, food, handshaking, and talking better than others without knowing why.

We identify ourselves with one ethnicity (Asian, African, European, Middle Eastern, Far Eastern, Near Eastern) without being born abroad and, sometimes, without learning or speaking the language. Tradition makes us who we are. It is more than where we were born, or where our parents came from. It is the geographical, historical, language, literature, art, and identity by which we visualize and define ourselves.

Tradition also dictates a just and lasting decision in litigation and mediation. The most famous cultural mediator in religious history is King Solomon. Yet he has been accused of ordering the splitting of a baby in half for the two claiming mothers. In hindsight, it seems to be helping and rewarding the fraudulent and false mother because the real mother expected to save her child by objecting to the King's order and withdrawing her demand. Yet, assuming all facts of the story are verifiable, King Solomon's unusual order reflects the tradition in which the decision is made where sharing a child between contesting parents is not allowed. A modern King Solomon in California must learn and understand the traditional motivations behind many cultural claims. In a similar situation, sharing custodial time between two adverse parenting claims may be legally permissible as in the best interest of the child, but is culturally unacceptable and could be a prescription for child abduction across the cultural divide.

[H] HEALTH

In Farsi, we say, "Healthy mind, Healthy body." It reflects the belief that a healthy body and mind are inter-related. Good people do not do bad things. Injurious actions are products of uncontrollable minds. Forty years ago, Fumiko Kimura, a 32-year-old Japanese mother, drowned herself in Santa Monica beach with her four-year-old son and six-month-old daughter. The incident occurred 10 days after she learned her husband had an extra-marital affair, and the husband's lover came to the couple's apartment and offered to take her life as a gesture of shame. Kimura made her husband dinner, drew a bath, and washed his feet. The next day, she took her children by bus to Santa Monica and walked into the ocean. A lifeguard saved her, but the children died. In the ensuing criminal



proceeding, she raised the defense of an unhealthy mind as a defense and pled guilty to the reduced charge of manslaughter. But there is more to this story.

In a cultural setting, the parties' health and injurious actions must be observed in the light of the traditional environment. Mediators must be open to the fact that unhealthy actions may be a byproduct of unhealthy customs and traditions. Wife beating is allowed to tame a shrew, and the rule of thumb exonerates violence provided the stick is no thicker than the judge's or the husband's thumb. The tradition of Oyako-Shinju, or parent-child suicide, was behind Kimura's tragic act. Honor killing is a cultural practice. In "A Separation" a 2011 Oscar-winning Iranian classic, the husband's (Nader) reaction to the wife's (Simin) shameful conduct is violence. Not against the wife, but rather the husband's through self-beating. In the cultural setting, a mediator must be open to looking below the surface of the behavioral iceberg to understand the cause, effects, and the relief to remedy the wrong.

[E] EDUCATION

Education in the cultural setting is not book learning. In Farsi, it is said, "Education is easy; humanity is difficult." It reflects the belief that wisdom in the cultural setting has little to do with attending an Ivy League law school or decorating your resume and office with JD or LLM certificates. Knowledgeability is an internal, self-developed intelligence process. It is good fortune to have a cultural mentor guiding you in understanding the excellence of cultural behavior. It is the ability to learn and apply scholastic materials in gaining insight into the cultural interests and norms of your geographical and historical origin. After all, none of the three most influential religious leaders, Moses, Jesus, or Mohammad, are known to have attended school. In Islam, the divinity of the Quran is based on the belief that Mohammad was unable to read or write.

Culturally, a mediator is seen as a mentor and a wise educator. The mediator must be able to infer the true meaning of the words spoken, the documents signed, and the acts

performed in a cultural setting. Law is to serve the culture, not otherwise. A religious ceremony must be recognized as marriage if it is to maintain the pending immigration status of one or the parties as single. Having a second wife is not bigamous if the marriage is on paper only and to support the second spouse and her family in the war-torn land. Physical discipline of children is common in maintaining the cultural lifestyle. Mediators must know that understanding cultural clients is magnified by the inability to communicate and understand other languages, language, and body movements. Between Afghanistan and Iran, there are more than 150 spoken languages, and many truths are lost in the translation of Farsi, Dary, and Pashto - even by certified Farsi and Afghani translators.

[R] RELIGION

Religion is more than belief in the supernatural. It is the internal force that creates disputes and prevents their resolution. In a cultural setting, opinion is the highway to communication, but religion dictates the rules of the road. Religion is the primary source of justice and self-identification. A temple, a church, or a mosque is more than a place of

worship. They are maidans for making, nurturing, and exchanging ideas. Many transactions, real or personal, marriages, and travel decisions sprout from relationships rooted in gatherings in places of worship, directly or indirectly. Transactions and marriage may or may not be a religious event or a covenant, yet it has a cultural and spiritual component. There is a difference between entering into a transaction and officializing it. Many cultures value and enforce handshake transactions despite a lack of registration or recording.

Mediation has roots in religious belief. For a cultural litigant, the mediator is, or must become, an Omni-knowing "see-er," not a legal technician. Many disputes in California and elsewhere are mediated increasingly by individuals connected to religious institutions rather than legal specialists. Focusing on family law, contrary to its secularization, sectarianism plays an increasing role in the creation and dissolving of California marriages. A civic divorce without its religious concomitant is lawful yet incomplete. The moderators must be familiar with at least three models of religious divorces: Catholic, Iranian, and Jewish models. In the Catholic model, a

civil divorce is forbidden but may be annulled by the Church. In the Iranian model, the divorce is allowable but must be registered with Iranian authorities under Shari's law. In the Jewish model, civil and rabbinical marriages and divorces are created and live side by side. Resolving cultural disputes requires a worldly vision not taught in law schools or learned in California Family Codes. It is beyond the limited bandwidth of the California Court system reflected in the Judicial Council or local rules. Being an effective cultural mediator requires understanding cultural litigants and learning the factors that culturally control and motivate them. Mediation without considering the underlying cultural factors is akin to securing an iceberg solely by its visible tip. In the language and wisdom of Iranian poet and philosopher Saadi Shirazi, that is akin to fortifying a foundation by adorning the portico.

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