

U.S. Mediators in Latin America: The Importance of Cultural Intelligence

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Abstract: *The purpose of this article is to present the U.S. Mediator with information on what to expect and how to prepare for mediating disputes in Latin America. The article explains how the cultural diversity in the region can complicate the mediation for reasons and in ways that may not be anticipated. To that effect, this article is divided in four main parts followed by a conclusion: Chapter I: The Global Perception of Mediation, Chapter II: U.S. Lawyers as Mediators in Latin America, Chapter III: Understanding Cross-Cultural Communication, Chapter IV: Cross-Cultural Mediation Framework and Chapter V: Conclusion.*

Chapter I: The Global Perception of Mediation

As a commercial mediator trained in New York and other parts of the east coast of the United States, I am a part of a large Alternative Dispute Resolution (“ADR”) community. Within that ADR community there is a global perception of mediation regardless of the subject matter being mediated. As mediation develops in the world in general, it is embraced as a process when a neutral third party assists in the resolving of a conflict through the use of specialized negotiation and communication techniques. It is a process where the parties are encouraged to earnestly participate. While some U.S. courts mandate it, mediation is usually contractual or voluntary with an intention of reaching a settlement. With this intention, the mediator must have patience, fortitude, perseverance and common sense. The mediator must be a pragmatic as well as a dynamic facilitator equipped with an arsenal of negotiation and communication capabilities. This arsenal must be amply equipped with the ability to be an effective listener, to understand human dynamics, and to articulate as well as summarize an exchange. With no power of his/her own to resolve the conflict, the mediator must move the parties through the process of fashioning their own resolution. Notwithstanding, the mediator’s (often an attorney) course of expertise may

be a useful resource to the parties in the event the parties are inclined to request a neutral case evaluation or perhaps assistance in the drafting of the agreement.¹

Chapter II: U.S. Lawyers as Mediators in Latin America

Despite different approaches to developing and learning law and legal rules, most legal educational endeavors in U.S. and Latin American systems primarily and sometimes exclusively, require learning legal concepts, principles, rules and doctrines. While both systems emphasize the learning of the law and adjudicatory contexts, there is limited focus on how to whet one's skills to better understand human behavior and the development of problem-solving or interest-based negotiation skills.² While all U.S. commercial mediators likely understand that disputes beset economic, business, relational, and procedural concerns, there are cultural considerations when mediating in different or unfamiliar territory. For example, let us look at language translation. Mexico is the most populated Spanish speaking country in the world. The Law of Linguistic Rights recognizes 68 Mexican indigenous languages.³ This is not uncommon throughout Latin America as it is a complex landscape where moving region to region provides no consistency in language.⁴ Even when the parties do speak English, we should not assume that all of the words or expressions translate to English in the same way.

There is a proliferation and flourishing of mediation in Latin America. Countries such as Argentina, Brazil, Chile, Colombia and Mexico are expanding their reliance on mediation.⁵ Undoubtedly, certain studies assisted in generating such acceptance. In Argentina, after a study spanning the years 1995 to 2000, of 157,000 cases that were dealt with through mediation, only

¹ Mediation is defined in Black's Law Dictionary as "a private, informal dispute resolution process in which a neutral third party, the mediator, helps disputing parties to reach an agreement." ... In a voluntary effort, the mediator facilitates communication between parties and encourages settlement. Jul 2, 2001.

² Philip Gentry, Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Legal Education, 17 Clinical L. Rev. at 136 (2008).

See also Richard J. Wilson, Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance, and Conformity in the Global South, 8 Clinical L. Rev. 137-139 (2002).

³ Mexican Languages, Ideal Education Group Education 1989-2020, <https://www.donquijote.org/mexican-culture/history/languages-mexico/>

⁴ Greenberg, Joseph H. "The general classification of Central and South American languages", in: Men and cultures; selected papers of the 5th international congress of anthropological and ethnological sciences, Philadelphia, September 1956 PP. 791-4

⁵ How Important is ADR to Latin America- Dispute Resolution Journal VOL. 58, NO. 1 Author(s): Feb 2003 Alejandro Poniaman.

34.8 percent were returned to court for adjudication.⁶ Subsequently, Argentina enacted Law 26.589 of 2010 on Mediation and Conciliation,⁷ on a federal level to “promote direct communication between the parties to resolve the dispute out of court.” Most Latin American legal systems prefer the regular use of mediation to resolve conflicts in areas of law where mediation or ADR in general is not totally excluded.⁸

U.S. mediators began venturing into Latin America during a time when the U.S. had little to no stake in the subject matter of Latin American mediations. Relationships are good between the U.S. and Latin American countries. In the winter of 2012, The United States Institute of Peace (USIP) assembled a diverse group of mediators to discuss their practices and experiences from Latin America including their experience with taking on sole matters and participating on panels in Latin America. The overall opinion was that U.S. mediators are in demand.⁹ In this context, and before undertaking such an endeavor, arguably the U.S. mediator should understand the historical, social, and legal culture of the parties in order to appreciate partisan perceptions as well as be able to purpose common and separate concerns. This is a challenging undertaking given the diverse geographic region; the mediation landscape is constantly shifting due to legislation, politics and cultural divergence. Additionally, the fact that there is not a single language used in the region, and that many regional idiosyncrasies exist, complicates things further.¹⁰ This is a challenging mediation environment for a neutral mediator that is expected to “...frame conversations in ways that counter selective and partisan perceptions, exploit shared and independent interest, and investigate resolutions that promote mutual gain”.¹¹

⁶ Commercial Mediation in the Latin Americas by H. Otero and A.L. Torres *Transnational Dispute Management* Vol 13 Issue 2 June 2016

⁷ See David Pitts, ADR Expert Says Mediation Working Well in Argentina; available at <http://iipdigital.usembassy.gov/st/english/article/2003/08/20030818142033nworbd0.281994.html#axzz3jJb92Svq>; see also <http://www.fundacionlibra.org.ar/estadisticas/Mediacion-2013.pdf>.

⁸ Commercial Mediation in the Latin Americas by H. Otero and A.L. Torres *Transnational Dispute Management* Vol 13 Issue 2 June 2016.

See also Law 26.589/10 available at <http://infoleg.mecon.gov.ar/infolegInternet/anexos/165000-169999/166999/norma.htm>; see also Mariana Hernández Crespo, Securing Investment: Innovative Business Strategies for Conflict Management in Latin America in ADR in Arnold Ingen-Housz, *Business Practice and Issues Across Countries and Cultures* 449, 472 (Wolters Kluwer 2011).

⁹ United States Institute of Peace: Mediation in Latin America Panelist Discussion press release February 23, 2011.

¹⁰ Greenberg, Joseph H. "The general classification of Central and South American languages", in: *Men and cultures; selected papers of the 5th international congress of anthropological and ethnological sciences*, Philadelphia, September 1956 PP. 791-4

¹¹ Kimberlee K. Kovach, *Mediation: Principles and Practice* 27 (3d ed., 2004); Menkel-Meadow et al., at 266-67.

Chapter III: Understanding Cross-Cultural Communication

While it is necessary to have a command of all types of communication (especially as a U.S. mediator in Latin America), cross-cultural communication is arguably the most important. Successful cross-cultural communication relies to the parties that the mediator has an understanding of the different cultures. The mediator should be able to compare the cultural as well as political differences and demonstrate in his or her communication that the differences are understood and acknowledged. Additionally, it should be understood that often in cross-cultural societies, one culture is often considered “the norm” and all other cultures are compared or contrasted to the dominant culture.¹²

A mediator should understand the code of cultural sensibility. Cultural sensibility refers to how sensibility (“openness to emotional impressions, susceptibility and sensitiveness”) relates to a person’s moral, emotional or aesthetic ideas or standards.¹³ The mediator needs to understand enough to be able to take control and reframe the relationship between the parties. The mediator must be skilled at hearing the noise then being able to communicate the parties’ interest into a framework that all can engage with, reframing the dispute so both parties can understand.¹⁴

As discussed, due to Latin America’s complicated culturally diverse region, many challenges of negotiating, drafting and resolving of Latin American cross-border matters exist. One can choose a word that has different meanings depending on to whom you are speaking and how the word translates for that particular person. Also, it can be unknown to a mediator that certain expressions and gestures can have significant meaning, and may even be out of place or inappropriate, eliciting a particular emotion, positive or negative. A U.S. mediator would benefit from knowing how to navigate around this landscape since the diverse language and culture should certainly influence the mediator’s choice of words as well as behavior. The mediator

¹² Sieck, Winston <https://www.globalcognition.org/cultural-norms/>

¹³ Thompson, D. (1995). "The Concise Oxford Dictionary of Current English". Clarendon Press.

¹⁴ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004)
http://books.google.com/books/about/The_Mediation_Process.html?id=8hKfQgAACAAJ

should review on a case-by-case basis the best way to mediate in a particular cross-cultural environment, having the ability to compare the different cultures in order to effectively communicate cross-culturally. Creating the right environment is crucial to the mediation process.

According to a 2016 global survey from *Culture Wizard*, with respondents from 80 countries, 68 percent reported that cultural challenges were the largest stumbling block to global team productivity and 18 percent reported that their companies have lost business opportunities because of cultural misunderstanding.¹⁵ Most might say that in general people are easier to connect with when they share basic similarities such as culture, language and communication styles. Mutual understanding facilitates the kind of communication that makes relationships smoother, creating less conflict. In virtually every conflict there is emotion—less conflict, less emotion. Mediators want to be successful in dealing with conflict. The words or behaviors that produce emotions both negative and positive are often unknown, especially from culture to culture. Harvard Medical School’s Daniel Shapiro, Ph.D. has launched many successful international conflict resolution initiatives and is an expert in the emotional dimension of negotiation.¹⁶ In his book with Roger Fisher, they define emotion as, “An experience to matters of personal significance; typically experienced in association with a distinct type of physical feeling, thought, physiology, and action tendency”.¹⁷ Their analysis encompasses the role emotions play during a negotiation process. The overall lesson is that there needs to be a strategy for understanding all of the emotions both negative and positive while yielding the positive emotions to use in the negotiation. The positive emotions can add substance and value while the negative emotions can create substantial barriers to negotiation.¹⁸

¹⁵ Yael Zofi <https://www.iabc.com/5-strategies-for-effective-cross-cultural-interactions/>

¹⁶ Daniel L. Shapiro Ph.D. is the founder & director of the Harvard International Negotiation Program as well as an associate professor in psychology at Harvard Medical School/McLean Hospital and affiliate faculty at the Program on Negotiation at Harvard Law School.

¹⁷ Fisher, Roger and Daniel Shapiro. *Beyond Reason: Using Emotions as You Negotiate*. New York, NY: Viking Penguin, 2005, pg. 209

¹⁸ Kimberlyn Leary, Julianna Pillemer and Michael Wheeler. Negotiating with Emotion, Harvard Business Review January-February 2013 Issue: <https://hbr.org/2013/01/negotiating-with-emotion>

Chapter IV: Cross-Cultural Mediation Framework

Then the question that begs for an answer is how does a mediator provide a proper framework for parties in an inter-cultural setting to solve their dispute? One may consider attempting to identify the parties' perceptions of the conflict. Information is the most valuable commodity for any mediator. Patient and purposeful probing will get the mediator much needed information. It is best not to assume anything given that assumptions are a powerful influence on the direction of the mediation. The common advice is for the mediator to rearrange his/her assumptions and put them on the back shelf while doing a calm but deliberate study of the parties. If you want to provide mediation services to Latin American parties, then keep in mind that the parties' position and interest may be mutually exclusive. Be an anticipatory mediator. Before you speak, play it in your head first. The mediator must remember that the message intended is not always the message received. Have an understanding of the parties' conflict and of relevant cultural or social conflict in Latin America. This includes although not limited to inequality, social as well as economic. Having this knowledge, the mediator may decide to keep certain issues off of the table. This brings commonality to the table, encouraging the parties to engage in more constructive communication. Constructive communication often leads to cooperative decision making. Conflicts are managed through dialogue and negotiation. The mediator's objective must be to furnish an environment for dialogue and negotiation, building a bridge that moves conflict over to collaboration.

Chapter V: Conclusion

There will always be cross-cultural misunderstandings when two or more parties or the mediator himself belong to a different cultural background. It is human nature to interpret others' behaviors, values, and beliefs through the lens of our own culture. As a result, when mediating across cultures, we will have to sort out different perspectives in trying to avoid potential misunderstandings that can be barriers to settlement. "*A bad settlement is better than a good trial*", asserts an old Spanish adage.¹⁹ With the increase of mediation in Latin America and the demand

¹⁹ Commercial Mediation In Latin America: A Benchmark Survey of Eight Leading ADR Institutions. By Alejandro Escobar American University Washington College of Law Center of International Commercial Arbitration Baker Botts.

for U.S. mediators perhaps there is a need to overemphasize that mediators should take on the challenge of becoming “culturally intelligent” in order to truly understand the perception of the conflict. Having the objective to promote conversation and to create conditions for people to work together side by side in resolving a conflict, this is a logical place to begin. So, where are you headed next? Who are the parties and what kind of framework can you create that is usable and practical and that will bridge the cultural divide? What will be your plan when “*you’re not in Kansas anymore*”?

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