

One Reflection

by Brad Honoroff

We met wonderful people. We ate spectacular food. We progressed in our understanding of a complex and fascinating culture. In turn, we opened up opportunities for three extraordinary young Chinese law students. We shared pieces of Boston culture. We offered up American cuisine — from home cooking to fast food to seafood. We traded stories, facts, ambitions and ideas. Our colleagues here came together in a heartwarming collaborative effort. Easily sufficient reasons for the undertaking. But is there more?

On reflection over our professional and cultural exchange — both our work in China last year as well as the program we put together for Nancie, Nicole and Puwei — I believe there is another, perhaps less obvious rationale. It begins with the lesson that all of us learned the more we conversed about mediation in China and mediation in the U.S. It turns out that the words themselves don't convey all that much — or that similar words may be misleading in that they refer to very different processes. Indeed, as Nicole's article points out, in China the word mediation means very different things in different contexts. If all we did in our cultural exchange were to trade paper definitions, we would most likely be politely talking past one another. It became important to get up close and personal to watch what was actually taking place. And Puwei concludes that the transfers of mediation processes will not be swift nor easy, requiring significant education and groundwork. Moreover, it's not just a matter of words and definitions. The Chinese government may pass a new law supporting mediation but our sophisticated observers, both here and there, suggest that by words alone we don't know what that means.

This lesson should not be a surprise. A good understanding of our own mediation processes reminds us that when we are mediating a dispute, we

are doing so against the backdrop of the norms and understandings of the participants and their communities. If we are mediating a civil dispute that has been brought to court, for example, we are mediating at least in part “in the shadow of the law.” The parties shape their expectations by the alternatives they may have if we can't reach a mediated resolution, and those in turn are shaped by their legal rights as well as their ability to enforce those rights. If that context is significantly different, the mediation itself will of necessity be different as well. So we have Nancie's profound twin insights, that ADR depends on a well-developed “civil society” and that China's civil society looks less mature and independent than the one he sees in America.

This isn't a reason for pessimism about the potential for our professional exchange. Mediation after all is an extremely flexible process — or rather part of a family of related processes. One example of its adaptability comes out of our own practice and similar practices in the local dispute resolution community, as observed by our visitors. In our office we are busy mediating civil disputes that may typically be in our trial courts. We also have an active family practice, in which we mediate a good number of divorces. As visitors watch both these aspects of our mediation work, they see what may look like two very different processes. In the civil disputes, lawyers are active participants, private caucuses are the norm, and the mediator rarely enforces a rule that parties share all their financial information. In a divorce mediation, the lawyers are often not at the table, private caucuses are the exception, and the mediator may be called upon to enforce a ground rule that parties share their relevant financial information. These two areas of work require different skills for the mediators, we often use a team approach for the divorce mediations,

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and the two areas may even call for different ethical obligations. Different contexts — marital disputes and civil court disputes — give rise to very different processes, even within the same office in but one jurisdiction.

If mediation is flexible enough to allow for successful adaptation for these different circumstances, the family of ADR forms should be flexible enough across cultural contexts. So rather than pessimism, this is a plea for getting past the formal

discourse, for looking carefully and deeply into actual contexts, for refraining from application of rigid concepts, for seeing how different processes can arise for different situations. That is, it's an argument for "on-the-ground" exchanges with careful well thought out theft of ideas and concepts that might work in a very different context. For progress in that effort, just look back to the insights of Nancie, Nicole and Puwei. ■



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