

## **Race and Mediation**

a litigated case

*Dorit Cypis*

12-18-07

In the fall of 2006, I mediated a litigated case through the Los Angeles Superior Court, which involved racial discrimination charges at a worksite. The plaintiff was a young Mexican immigrant male, working as a trucker for the owner defendant who was a middle age German immigrant male. Plaintiff was complaining that defendant was belligerent in his management of him and the other Latin American workers, often shouting at them and refusing to allow them to speak Spanish on the jobsite. He further complained that he was not being allowed to take lunch breaks, was not paid accurately for overtime and was inappropriately fired. Plaintiff's demands included many penalties, interests and fees for not abiding by several employment codes, emotional suffering, lost wages and attorney's fees. The sum was for over \$100,000. His wife and lawyer accompanied the Plaintiff to the mediation. The Defendant did not appear but was represented by one of his jobsite managers, also a young Mexican emigrant male, and by his lawyer.

Opening statements by each party lawyer made it clear at the outset that both parties believed that the other was not only wrong, but also was lying to protect his interests. As the mediator, I began by offering that I recognized that each party believed that he held the truth, but that the truth was not the point. The point was *perception* of the truth, which always depends on personal and social context. It is perception that mediation attempts to mine, reveal and question in order to create a space of believability that can be shared between the parties. I added that truth cannot be proven around a mediation table, but that clearer and deeper understanding of one's own and the other's point of view could allow for a negotiation of each other's differences.

I am not a lawyer but I do have 3 years of study towards a Masters of Dispute Resolution degree from Pepperdine University. I have spent a lot of time with and been taught by lawyers, as well as having spent 100's of hours watching lawyers battle it out in the courtroom theater and 100's of hours spent mediating with lawyers present. My core profession as an artist, exhibiting and teaching nationally and internationally over the past 25+ years, questioning identity, social relations and modes of representation, supports my work as a mediator. I do know something about strategies for breaking down and constructing perception and believability. That is what an artist does, and too, that is what a lawyer does. What a good artist and good lawyer have in common is how to spin an idea, a story, an image, and a belief. As a mediator, I have learned how to listen for the spin and also how to listen for what is not said, the hidden subtext beneath the story, which always drives each party's position and demand for justice, often hysterically and out of proportions.

In this case the cultural contexts as backdrop to the accusation of racism were deep and layered. To understand and to recognize the differences, I kept the parties together in the same room for the first 2 hours, encouraging cross communication and listening. Consider that at the same time as this conflict was occurring, the issue of Immigration, especially in reference to Mexican immigration, was quite emotionally and politically heated nationally and especially locally in Southern California. Consider that the Plaintiff was a Mexican in his 20's and the Defendant was a German in his 60's, with ethnic and generational differences that are quite diverse from one another.

It was hard to get the parties to recognize their differences until I drew a generic, symbolic diagram representing their culturally defined tendencies towards order, Germanic as a grid, Mexican as a labyrinth...each depending on radically different relationships to communication, time and physical space. This visual diagram helped tremendously towards the parties recognizing something of difference in the other. In listening to the Plaintiff respond to funneled questioning, I led him to describe in detail what he felt was offensive to him in how he was treated by the Defendant. Through body language in particular, much of his description defined the offenses as controlling, rigid, confining, limiting, inhibiting...Questioning the Defendant representative about motives for his actions towards the workers brought out his anxiety about work efficiency, safety concerns, loss of productivity and financial accuracy. Having both parties present to hear each other speak and gesture gave each the space to recognize and empathize with the other, to reconsider how one's actions could be experienced in ways other than consciously intended.

The lynchpin though which really turned the tide of the session from accusation and demand towards settlement and reconciliation, was a question I posed to the Defense Counsel who had refused to consider that his client's actions could possibly be experienced as racism. I asked him if anyone at the mediation table, including himself was racist. He answered "no". I replied to him that if you consider that the definition of racism is a provable wrongful racial action, such as recorded or witnessed racial slurs, written statements or physical harm, then, most probably no one around the table was a racist, but, if you consider that the definition of racism is cultural socialization to accept and engage with those who appear most like you and to reject and control those who appear most not like you, then most probably everyone at the table was culturally encoded as racist.

By shifting and expanding the definition of racism from the action/object/incident to the larger context, he could see and accept that we are all inevitably at risk of harming the other to maintain social comfort for ourselves. I could visibly see the shift in his facial and body gestures from tightness to openness, as he heard my words. The Plaintiff party too opened towards a more empathic recognition of the other. Yes, one party may have hurt the other *and* both parties were responsible for only looking out for themselves. Not seeing the other landed both parties into a mirroring paradigm of victim and victimizer.

Thereafter, mutual negotiation settled this case at \$10,000.