6-2018

Court-annexed mediations within Singapore: A complex interface between individual place and the court environment

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Book chapter in Pauline Collins, Victor Igreja and Patrick Alan Danaher (eds) *Nexus among place, conflict and communication in a globalising world* (Palgrave Macmillan, 2019). Not to be reproduced or cited without author's and publisher's permission.

Court-Annexed Mediations Within Singapore: A Complex Interface Between Individual Place and the Court Environment

– Dorcas Quek Anderson

Abstract

The concept of the multi-door courthouse emerged in 1976, and many judiciaries now have court-connected mediation programs. Situating dispute resolution services within the courts raises intriguing issues concerning the juxtaposition of adjudicatory and consensual communication processes. Does the convergence of litigation and mediation within the court setting have a discernible impact on the conflict being mediated? Quek Anderson addresses this question by examining the court environment as a 'place' and its effect on the participants' communication patterns and the dynamics of a dispute. This chapter distils learning points from case studies drawn from Quek Anderson's experience of mediating in the Singapore courts. It suggests how mediators in court settings can use these observations to assist in the effective resolution of disputes.

Keywords

Court, Culture, Mediation

A. Introduction

Since the concept of the multi-door courthouse emerged in 1976, many judiciaries have created court-connected mediation programmes to broaden the scope of their dispute resolution processes. Singapore, a common-law jurisdiction within Southeast Asia, is no exception. For more than two decades, the Singapore lower courts have been offering court mediation services. The Singapore State Courts (dealing with civil and criminal cases) and the Family Justice Courts have well-established dispute resolution centres, with mediation services offered by staff and volunteer mediators.

Situating a dispute resolution centre within the courts raises intriguing issues concerning the juxtaposition of adjudicatory and consensual processes. The courtroom is now associated not only with the impartial pronouncement of rights, but also with the amicable resolution of disputes. Does the convergence of litigation and mediation within the court setting have a discernible impact on the conflict being mediated? This chapter addresses this question by examining the impact of the court environment as a "place" on the participants' communication patterns and the dynamics of a dispute. It discusses learning points distilled from case studies drawn from the author's experience of mediating in the State Courts. Finally, it suggests how a mediator in a court setting can take into account these observations to effectively assist in the resolution of the dispute.

B. The concept of place

Place-based research

Much of the scholarship concerning the practice of mediation have focused on techniques and standards, and more recently on the influence of culture. This chapter seeks to analyse the dynamics of a dispute from rather different lenses – the place of the mediation. It seeks to understand how a person's experiences and behaviour are shaped and influenced by the place where the mediation unfolds.

This approach draws inspiration from place-based research, which is inter-disciplinary in nature. The place-conscious inquiry to education, for instance, draws links between place and pedagogy. Gruenewald (2003) has written about how place functions as centres of experience, and how our identity and attributes are shaped by the places we occupy. Additionally, Peat (2002) has highlighted the primacy of place in our human experience.

Our reactions to a place are often triggered by its specific location as well as the metaphysical imagery the location represents. (Somerville, 2010). This understanding of place is particularly beneficial in understanding the court environment. The courtroom, because of its unique connotations, precipitates certain emotions within a person who steps into it. In addition, a person usually associates the courtroom with many popular images and ideas such as independence and the meting out of just recompense. These aspects of the court environment are examined further in this chapter.

Place and culture

Every person in our increasingly globalised world is exposed to a multiplicity of places. This reality makes for rather complex analysis of the nexus between a particular place and human behaviour. Singapore, a cosmopolitan society, has considerable diversity in race, age groups and world views. Within this society, each person will have a unique conceptualisation of a given place, depending on the background and exposure to different influences. The individual in Singapore can probably be described as a bearer of multiple cultures, and not a single one (Avruch, 2003).

This author has commented elsewhere that culture within mediation cannot be simplistically conceived, and a person may not necessarily manifest characteristics that are conventionally attributed to their group. Each person within an Asian society such as Singapore would have different preferences along well-established cultural dimensions such as high or low context communication style, face concerns and power distance (Quek Anderson and Knight, 2017).

In the light of this complex reality, it is challenging to examine the influence of the court environment in isolation, without taking into account the unique cultural preferences of the individual disputant. As such, this chapter's case studies will feature disputants with highly traditional cultural backgrounds, so as to cast light on the exact impact of the court as a place

on their communication patterns. The overarching aim is to gain a situation-specific understanding of how individuals' communication styles change when they undergo mediation in in a courtroom setting.

Additionally, in order to focus on understanding communication and emotional patterns, the chapter will analyse the individual's behavior in relation to well-established dimensions of culture, including direct or indirect communication; the degree of formality in language as well as conduct; emotional expressiveness; face concerns; and whether certain motifs feature prominently in the disputants' conversations.

Many of these dimensions can be traced to Hall's classification of high-context versus low-context cultures. A high-context message has most of its information embedded in the physical context, leaving very little in the explicit part of the message (Hall, 1976). Thus, the high-context individual will tend to use very indirect language and more non-verbal language, expecting the hearer to infer much of the real meaning from the context. The "high-context individual…doesn't have to be specific" and will "talk around and around the point" (Hall, 1976). A person who prefers indirect communication is likely to be emotionally restrained as well. Many scholars have associated Asian cultures with high context communication and conversely, countries in Northern and Western Europe, USA, Australia, Canada and New Zealand, with low context communication (Barkai, 2008). Nevertheless, as argued above, the reality is usually much more complex and varied, particularly in increasingly globalised societies.

Similarly, commentators have written that high context cultures are likely to value "face concerns". One writer observes in this regard that individuals from these cultures tend to be "preoccupied with considerations of symbolism, status, and face" (Cohen,1997). Once again, it is probably more nuanced to focus on what face entails rather than which culture and group is likely to value it more. On this point, Ting-Toomey and Kurogi (1998) have construed face to refer to a sense of favourable social self-worth and projected other-worth in a public situation. When understood this way, the desire to maintain face is present across many cultures, and not merely within Asian contexts. Accordingly, instead of using the high-context versus low-context terminology, this chapter will utilise more specific communication traits such as the degree of directness in speech and how much the participant values face concerns.

In sum, a person is subject to a multiplicity of places, which could include cultural preferences. This chapter examines how a person's unique preferences relating to communication style – such as indirect communication and face preferences – are shaped and influenced by the court as a place.

C. Understanding the courtroom as a place

As explained above, the courtroom as a place could be analysed from two inter-related perspectives – the physical aspects of the court environment and the notions represented by the courtroom.

The notions represented by the court setting

I turn first to the notions that the court generally represents. A layperson very commonly associates the courtroom with the authoritative role of "the law". The law has been frequently personified as blindfolded Justitia or Lady Justice wielding a sword and holding the scales of justice. This image of the law reflects the general understanding of the law's coercive function in regulating human behaviour (Raz, 2009). In the same vein, many legal philosophers have conceived of the law's purpose as controlling and producing compliance, and thus managing and regulating the society (Kelsien, 1967). In this respect, Lady Justice's sword probably connotes the law's use of sanctions to define and enforce legal norms. In short, the law is often understood as being external to the society, with its inherent authority prevailing over individuals' subjective preferences. This understanding of the law is probably linked to the common expression of the "rule of law" governing the society.

There are several other related notions arising from the authoritative role of the law. One is the conceptualisation of law as embodying well-accepted norms associated with rights. Kelsien (1967) wrote, in this regard, about law being a system of hierarchical norms, examined through validity and genealogically connected to a basic norm. The law is frequently associated with these norms that are set out in both legislation and case law.

Another idea relates to the court's crucial role in the assignment of rights as it applies the law. The scales strongly convey the concept of the court being the arbiter of disputes by dispensing justice according to set norms. A court user usually sets foot in the courtroom with the expectation of having his or her rights and legal position vindicated.

The court's role as an arbiter inevitably results in one party being judged more favourably than the other. The scales of justice will eventually have to be tipped only in the favour of one person. The adversarial system in many common-law jurisdictions reinforces the notion of one party being pitted against another and prevailing over the opponent after the court acts as the umpire. Litigation has thus been commonly associated with a contentious and adversarial environment. Furthermore, the court is to perform adjudication impartially and independently "without fear or favour*",* as reflected by the blindfolds on Lady Justice. The law has to be discharged impassively, unmoved by the judge's personal biases.

The physical aspects of the court environment

The physical aspects of the courtroom reinforce the above ideas. The centre for dispute resolution in the State Courts is located at the first floor of the State Courts building. While this centre has been deliberately designed to be separate from the courtrooms and to have a more informal ambience, there are certain features that constantly remind the disputants that they are ultimately in a court setting. Each mediation room has a prominent display of the state crest behind the mediator, subtly reminding them of the coercive role of the law over the society. In addition, certain disputes are mediated by judges in the State Courts. Other disputes are mediated by trained volunteers. The judges who mediate do not preside over the trial in the event that the case is not resolved (State Courts Practice Directions). Certain formalities such as addressing the judge as "Your Honour" are utilised during the mediation. While the judge mediator does not wear the court robe, the physical presence of the judge serves as a reminder of the court's role as an arbiter of the parties' legal rights in the event that no resolution is reached.

In summary, the physical and symbolic aspects of the courtroom engender ideas of hierarchy, legal norms, decision-making, an adversarial approach and the formality of a trial process. The question then is how these notions commonly associated with the courts have an impact on the communication patterns within a court mediation.

D. Communication within the mediation process

Next, it is useful to set the context on how communication takes place within the mediation process. Mediation is generally understood to be a dispute resolution process in which "promotes the self-determination of participants…with the support of a mediator" (Australia National Mediation Accreditation System Practice Standards para 2.2). It is also known as a process of facilitated negotiation (Riskin, 1996). Based on this common understanding of mediation, the process is a consensual one focusing on upholding the parties' self-determination, with the mediator playing a supportive and facilitative role. Moreover, the ultimate aim of mediation is not to arrive at a decision on the merits of the dispute. According to the _Practice Standards, mediation entails the identification of interests, issues and underlying needs; development of options; consideration of alternatives; negotiation; and ultimately, helping the participants "reach and make their own decisions". This facilitative style of mediation stands in contradistinction to a more advisory or evaluative style, which involves the mediator providing advice to the participants (Australia National Mediation Accreditation System Practice Standards para 10.2).

The State Courts subscribe to a facilitative understanding of mediation. Their Practice Directions highlight that the main aim of mediation "is not to determine who is at fault in the dispute". Instead, the "mediator's role is to assist the parties in negotiating and agreeing on a possible settlement to their dispute" (State Courts Practice Directions para 41). Their Code of

Ethics and Basic Principle on Court Mediation specifies party empowerment as one of the key ethical values, stating that the mediator has to "leave the decision on whether and how to settle solely with the parties" (para 3.4.1), and should not "direct, coerce [or] push parties to change their minds even if they personally believe that the parties' choice is not right or beneficial" (para 4.1). Apart from mediation, the State Courts' Centre for Dispute Resolution offers neutral evaluation, which has a very different aim of providing an opinion on the chances of success at a trial.

The stages of the mediation process in the State Courts are largely similar to other models of facilitative mediation. According to the courts' website, the mediation usually starts with a "joint session", when the mediator meets with all the participants and their lawyers. The rationale for the joint session is for all the participants to communicate their perspectives and concerns to one another, leading to mutual understanding. There may subsequently be private sessions with one participant together with his or her solicitor. The private session or caucus is convened to give the individual participant space to share confidential matters with the mediator in a more comfortable setting. There may also be discussion about possible ways to resolve the matter and how that will affect the individual. All these more sensitive matters are best broached in the absence of the other participant.

Both the joint session and private session are held in the same room, due to limited space within the State Courts Centre for Dispute Resolution. The mediator remains within the room throughout the process. The participant who is not part of a private session will leave the mediation room. The mediator may be either a judge or a volunteer mediator. The case studies in this chapter are based on mediations conducted by a judge.

It follows from the above circumstances that the communication patterns within a facilitative mediation process would vastly differ from a formal court trial. First, since the participants are meant to be empowered to make their own choices, they will be given the freedom to express their thoughts throughout the mediation and to speak directly to each other in the presence of the mediator during the joint sessions. It is therefore unlikely for the mediator to discourage them from being emotionally expressive. Also, the State Courts on its website had pointed out that mediation is more informal and flexible than a trial. This would necessarily imply that the language used by the mediators and the participants will be less formal and more conversational than in adjudication. Additionally, the focus on the participants' exercise of their choice means that the mediator encourages them to discuss the factors affecting their decision with him or her, but not to look to the mediator for guidance on how to resolve the conflict.

Finally, given that the mediation process is not premised on fault-finding, the mediator will often encourage the participants to move from a positional and rights-based perspective to a focus on future-oriented solutions that will meet all the participants' interests. This shift in perspective should result in the use of less rights-based language as the mediation progresses. During the joint session, the mediator will usually encourage the parties to refrain from being

accusatory, and to express their view not only about legal positions but other aspects of the dispute. By contrast, many litigators are used to adversarial thinking, which frequently translates into using language that argues in "oppositional modes" of black versus white without greater nuances (Menkel-Meadow, 2000). Adversarial or positional language will tend to highlight the polarizing differences between the parties and how one's legal position is more superior to the other; it is the language that is naturally utilised in trial advocacy in order to persuade the judge or jury in one's favour. Conversely, more collaborative language does not primarily seek to argue for or against a position. In line with interest-based negotiation that was introduced by Roger Fisher, such language will tend to emphasise commonalities, refer to the concerns that underpin the positions and encourage co-operation.

This chapter propose that the *notions commonly associated with the court setting cumulatively accentuate several communication preferences within disputants*, namely, formality and distance in language and conduct; emotional restraint; usage of more positional or direct language; the use of "win-lose" and other positional motifs in language; the focus on legal issues, rights and concepts in the disputants' conversations; the desire to preserve self-face; and the tendency to seek guidance from a person who is in a position of authority.

The next section will illustrate these observations through case studies based on actual conflicts mediated by the author as a former judge mediator in the State Courts. Section 9 of Singapore's Mediation Act 2017 permits disclosure of mediation communications for research and educational purposes as long as the identity of the persons is not revealed. As such, the names of the persons involved in the case studies have been changed and certain details of the conflict have been omitted.

E. Case Studies

Case study 1: Who deserves the inheritance?

This was a dispute concerning the distribution of the estate of a deceased person amongst her family members. The deceased's mother Mdm Lim started legal proceedings against the deceased's husband Mr Tan, asserting that he should have no share in certain assets of her daughter's estate. I was co-mediating this conflict with a fellow judge. When the lawyers first spoke to us, they raised legal arguments as to whether these assets should be excluded from the general pool of assets to be distributed. My co-mediator and I thought that the conflict essentially turned on an application of the correct legal principles. Perhaps a discussion with the lawyers on the applicable legal principles would help narrow the difference between them.

However, we soon learnt that there were much more challenging aspects to this dispute. Mdm Lim's lawyer shared with us that her client was an elderly lady aged around 90 years old. She did not speak English, had a traditional upbringing and was not an emotionally expressive

person. Mdm Lim had been most reticent in sharing her thoughts concerning the conflict with her own lawyer. It was evident to her lawyer that she had very deep-seated animosity against her son-in-law, but her reasons remained unarticulated.

Both my co-mediator and I thought it appropriate for the disputants to communicate with each other in a joint session despite the tension between them. This decision stemmed from our joint belief that the disputants needed to have a better understanding of each person's perspective and underlying reasons for their positions. However, Mdm Lim did not share much as her lawyer anticipated. After being encouraged by us to share more, she mentioned very briefly that her daughter, when alive, had promised that this asset would be given to her and not to Mr Tan. She referred to her rights when asserting that she was entitled to the asset. Beyond these brief points, Mdm Lim did not explain further why she thought that Mr Tan should not have a share in the asset. Nevertheless, we observed that she was visibly distressed, to the point of quivering in anger while speaking. In response to what Mdm Lim shared, Mr Tan maintained that he ought to have a share in the asset according to the applicable legal principles governing the distribution of an estate.

At a private session with Mdm Lim, we requested that she share more about why she was unhappy with Mr Tan. Apart from stating how much she disliked Mr Tan, Mdm Lim was resistant to elaborating. While on the verge of explaining, Mdm Lim had to excuse herself from the session because the tension was making her feel unwell. This took place over a few private sessions. And we were still none the wiser concerning the reasons for her animosity towards her son-in-law. In the meantime, we also spent time with the Mr Tan in caucus. We learnt that he wanted a share in the asset because of his current financial difficulties. He too would not shed much light on the relationship he had with his mother-in-law.

After much coaxing, Mdm Lim finally shared tearfully about how she had taken care of her daughter while she was suffering from a terminal illness. She was constantly by her side, tending to very menial and difficult nursing tasks. As Mdm Lim started recounting this memory, she had to take frequent breaks because of her emotional distress. In addition, she appeared highly embarrassed for breaking down into tears. She went on to share how Mr Tan did not help in caregiving during this difficult time. To make matters worse, he brought home a "mistress" during this time. Mdm Lim found it simply unacceptable for him to have any share in the asset. She thought that he did not deserve it. She also thought that she would be honouring her late daughter's wishes by denying her unfaithful husband a share in the inheritance.

This was a most important piece of information that we obtained after exerting great effort to make Mdm Lim feel at ease in sharing with us, through using more informal and conversational language, and frequent summarising and reframing of what she shared. Unfortunately, this mediation, like all other disputes in court, was scheduled for half a day. Time had run out. The parties thus agreed to return to court for another half day of mediation.

There were a few more rounds of mediation before the dispute was finally resolved. We used this time to help Mr Tan understand how firmly his mother-in-law was maintaining her stance, and how unlikely it was for her to give in to his demands. We also spent much time with Mdm Lim discussing whether she was willing to allow Mr Tan a small portion of the assets. Mr Tan eventually accepted a smaller share in the asset than he had initially demanded.

Reflections

Emotional restraint and positional language

According to Mdm Lim's lawyer, Mdm Lim was not usually forthcoming in sharing her thoughts and feelings with anyone. It is likely that her natural preferences fit the high-context culture described by Hall (1967), leading to a preference for indirect language and emotional restraint. Mdm Lim could also have remained reticent if she were attending another mediation that was not held in the courts. Nevertheless, it is highly likely that the court environment had accentuated her emotional restraint. We noticed how Mdm Lim referred us to her lawyer when we asked her to share her own thoughts. When she did speak in Mr Tan's presence, she made frequent reference to her legal position, using words such as "entitlement" and "fairness". There was visible unease, distress and reluctance to elaborate further whenever she was asked to share her thoughts about any other interests. When she finally shared with us confidentially about her daughter, the tension within her body language and visual expression was so great that she had to take frequent breaks.

I well remember how my co-mediator and I exerted much greater effort than usual, and over many private sessions, to encourage Mdm Lim's intimate sharing of very personal thoughts. Her lawyer also refrained from discussing the legal aspects of the case, so as to create a more conducive atmosphere for her intimate sharing of a painful memory. The court setting very likely posed an additional barrier to our task as mediators in encouraging greater emotional expression in order to understand the underlying reasons for the conflict.

Time constraints

Time constraints presented another challenge to the mediation. Having only 3 to 4 hours for the first mediation session, we were hard pressed for time to encourage Mdm Lim to be more forthcoming. However, just as Mdm Lim was "warmed up" and starting to share with greater detail, we had to postpone the mediation to another day. This meant that additional time had to be devoted in the next mediation session to recover the lost momentum and to allow the mother to once again "warm up" to the point where she was comfortable to share more. This case study well illustrates how time constraints may short-circuit the mediators' efforts to encourage intimate sharing, which could be essential in certain types of disputes to reach a resolution. The mediator has to arrange for more time to be spent in such disputes to ensure that time constraints in a busy court setting do not inadvertently pose an obstacle to the mediation. Evidently, the place constraints within the court setting potentially disrupt the momentum in a mediation by interrupting the flow of communication at crucial moments that could bring about breakthroughs in the mediation.

Case Study 2: Defamation and a matter of "face"

The disputants in this case were members of a traditional Chinese association. Three of them filed a claim in defamation against a fellow member. The plaintiffs, aged between 70 and 80 years old, were prominent figures in the Mandarin-speaking community. They also held leadership roles in the association for a number of years. During one association meeting, they openly voiced their opinion on a contentious issue. A journalist who observed the meeting proceedings interviewed the defendant, who belonged to the opposing faction within the association. The next day, the defendant's criticism of the three plaintiffs was reported in a local newspaper.

Before entering the mediation chamber, the plaintiffs were peering at me through a glass panel, looking skeptical. When the mediation started, I soon found out why they were skeptical. Some of them remarked that they did not expect the judge to be so young. Clearly, the large age gap between us had triggered doubt within them concerning my ability to conduct the mediation. Their expectations reflected a preference for a high degree of power distance between them and the judge mediator. Their doubt certainly did not seem to bode well for the rest of the mediation.

As the mediation continued to unfold, I noticed how the disputants used positional bargaining language more frequently. As discussed earlier in section D, such language is typically used in the adversarial court setting, and is characterised by words aimed to show how one's position is superior to the other. During the joint session, the plaintiffs stressed how the defendant was "clearly wrong" in his behaviour, had to be "held accountable" by the law and ought to apologise to them. Their language alluded frequently to the themes of justice and legal rights. They also drew a clear distinction between "us versus him", stressing how the defendant undoubtedly was on the wrong side of the law. When the defendant suggested that the fault could also lie in the journalist who could have misquoted him, the plaintiffs flatly rejected this argument, stating that this was further indication that the defendant was not willing to be accountable for his actions. They frequently asked me for affirmation of their views, such as whether I agreed that they had a strong case against him for defamation and should pay damages. At the end of the joint session, despite my efforts to facilitate mutual understanding of perspectives through active reframing and neutralisation of their words, the disputants appeared to be more entrenched in their respective views.

During the private session, the plaintiffs continued to be entrenched in their demands. Additionally, I observed how "face" concerns seemed very crucial. They stressed that they were of high standing in the local community and were well respected within the association. They again asked me to affirm their opinion about the defendant's conduct. I did not seem to make much headway in encouraging them to consider the defendant's perspective or reduce some of their demands. Whenever there was any discussion about the uncertain outcome of litigation, they would retort that justice would certainly prevail in court. They demanded a

substantial sum of compensation to be paid to each of them and a public apology to be published in the newspapers.

This dispute was mediated for more than one session, with each session lasting around 3 hours. The principal reason for the impasse was the positional stances adopted by all the disputants. The defendant wanted to pay a relatively low sum of money, but the plaintiffs felt that his suggested quantum was an affront to them and not truly reflective of the damage caused to their reputation. The defendant and his lawyer then suggested that a certain portion be paid to charity. The plaintiffs were amenable to this proposal, but indicated that the charity had to be chosen by them. The final points of contention related to who should bear the expense of publishing the apology, and the size of the apology in the newspapers. The plaintiffs thought that it was only right for the defendant to pay these expenses. A settlement was finally arrived at after the parties called the press and agreed on a specific text size for the apology with a cost that was not too exorbitant.

It is noteworthy how the plaintiffs' attitude towards me changed drastically towards the end of the mediation. At that moment, there was an impasse on the quantum of damages to be paid. Far from being skeptical, the plaintiffs now remarked that I had handled the mediation very wisely thus far. They then requested for my advice on the best way to settle. This development ran counter to the facilitative mediation style that aims to assist the participants themselves to make a decision without getting advice from the mediator. Hence, I used this opportunity to discuss with the plaintiffs and their lawyer the range of amounts that the defendant was likely to agree to pay them.

Reflections

Face concerns

This conflict underscores the peculiar effect of the court setting on a person's face concerns. I could discern, from the start of the mediation, that face concerns and power distance were important to the plaintiffs. What I failed to discern was how the joint session in a court-connected mediation could accentuate these preferences. When all the parties with their respective lawyers were facing one another in the mediation room, the plaintiffs probably felt a more acute need to protect their self-face in the presence of their opponent and the judge mediator. The enhanced need to protect face led to the plaintiffs emphasising the strength of their legal position and depicting the parties in dichotomous terms. They did not want to concede to any weakness to their case in the presence of the defendant. Hence they swiftly dismissed any suggestion that the journalist had a part to play in publishing the defamatory statements.

Moreover, the plaintiffs' preoccupation with face concerns could have caused them to look to the mediator as a decision-maker rather than a facilitator of negotiations This perception could have been exacerbated by situating the mediation in the courts, a place that they readily associated with persuasion, rights and decision-making. To ensure that the mediator thought

the best of them, the plaintiffs were effectively seeking to persuade me as the mediator to support their point of view. Their stance made it challenging for me to encourage them to make their own decision instead of seeking guidance or being excessively concerned about my opinion about them. Face concerns, together with an adversarial perspective, resulted invariably in their increasing use of positional language that underscored their differences. Not surprisingly, all the disputants were more entrenched in their relative positions at the end of the joint session. It is posited that there would have been a difference if the mediation were to be conducted in a more informal setting. It is very likely that their concern to preserve self-face would not be so strongly triggered if they were not reminded of their claim in court.

What is more, these face concerns, once accentuated, permeated the rest of the mediation in ways I had not imagined. Every element of the settlement had to be carefully crafted to meet their face concerns. The quantum to be paid to each of the plaintiffs had to be substantial enough. The apology was a non-negotiable aspect of the settlement. In addition, the defendant had to pay to advertise the public apology. As the mediator, I found it tremendously difficult to diminish the prominence of face concerns in the plaintiffs' minds. The court setting, together with the way I had structured the mediation, appeared to increase the plaintiffs' desire to preserve self-face. "Face" issues had now become a crucial interest within the mediation, and the settlement itself had to accommodate this interest.

Ensuring independent decision-making

This case study also highlights a common occurrence within court-connected mediation, that of the disputants asking the mediator for guidance. Here, the plaintiffs asked me for advice at the last mediation session. As shared above, power distance seemed to be very important to them, as reflected by the skepticism they expressed at facing a judge much younger than them. However, the misalignment between my personal attributes and their preferred power distance seemed to diminish over the course of the mediation. Instead, the formal language used and the setting of the mediation could have caused them to focus on my position as a judge, and to then seek advice from me.

The tendency for a hierarchy-conscious person to ask the mediator for guidance is heightened by the court setting. The judge, the courtroom, the court crest and the court formality cumulatively remind the parties of the authoritative power of the court. Most laypersons readily associate the judge mediator with the determination of rights and consequently expect a pronouncement on the merits of the case. I have often stressed in the mediator's opening statement that I will not be making a determination despite my title as a judge. Nevertheless, there have still been frequent requests for advice and guidance. Role confusion easily occurs when the judge takes on the function of a mediator, leading to the risk of disputants being unduly influenced by the judge in deciding whether to settle.

F. The potential impact of the courtroom as a place on the conflict

These two case studies collectively illustrate how certain communication patterns are potentially intensified by the court setting, resulting in a change of dynamics of the dispute being mediated.

The lack of intimacy in conversation

One likely result is the lack of intimacy in the disputing parties' conversations. When sharing their perspectives on the conflict, the disputants may prefer to err on the side of greater formality and respect because of the court setting. They will then avoid using informal and colloquial language. The judge, who is also supposed to be impartial and independent, may also be formal in his or her interactions with the parties. The prominence of court decorum tends to stifle any emotional outbursts. In this connection, I have come across many parties who have apologised profusely for any anger or strong emotions shown. They seem to implicitly assume that such displays of emotions are not appropriate in the court setting.

These communication patterns lead to a curious air of formality in the disputants' communication, which could vastly differ from their habitual way of communication. A high degree of emotional restraint also makes it unlikely for the parties to verbalise their thoughts readily and to communicate at a more intimate level. In the first case study, we as co-mediators had to spend time developing rapport with the habitually reticent Mdm Lim over many private sessions before she was finally willing to share candidly with the mediators about her anger towards her son-in-law. She refused to speak much to him in the joint session apart from referring very vaguely to her claim. At the end of the mediation, the distance between her and the son-in-law was probably much wider than when the mediation commenced. The prolonged use of formal language and emotional restraint can severely constrain the opportunity for resolution. By contrast, my most successful mediations usually had pivotal moments in which the disputants started talking to each other comfortably using their usual colloquialisms and emotional expression, almost forgetting that they are in the presence of lawyers and a judge. Such moments have usually marked a significant breakthrough in the parties' mutual understanding, leading to fruitful negotiations.

There are very significant consequences arising from a lack of intimacy in mediation discussions. It is most challenging for the mediator to facilitate mutual understanding when the parties are speaking to each other in a highly formal and distant way. The lack of intimate communication will pose a major obstacle to settlement in conflicts stemming from relational difficulties or miscommunication. Even if a settlement were arrived at, there could merely be a superficial settlement on monetary terms, without a diffusing of the tension and a reconciliation in the relationship. There is, in other words, no genuine resolution of the conflict.

In such circumstances, the court mediator needs to exert extra effort and hone his or her skill to encourage the disputants to be comfortable and have rapport with the mediator, and to speak as they would naturally in a normal conversation. As seen in the first case study, this potentially

requires additional time and a high degree of patience. The mediator may also intentionally adopt a less formal tone and style of conversing in order to counter the influence of the formal court setting, and to encourage the parties to feel at ease with conversing with the mediator and expressing their innermost concerns.

The "entrenching" and "polarising" effect

Next, the predominance of positional language, as well as frequent reference to themes relating to justice and fairness, tend to polarise the disputants. As argued above, the court is typically associated with the meting out of justice according to legal norms. The court's determination in a judgment inevitably results in one party prevailing over another. While the mediator may periodically remind them about the purpose of mediation, the court environment constantly encourages them to conduct themselves in an adversarial way and to put the other participant down through the use of accusatory or deprecatory words. Moreover, the lawyers sometimes exacerbate the adversarial atmosphere by interjecting with legal arguments, causing their clients to continue emphasising the strength of their case.

It is intriguing that parties who allude to their legal positions tend to also use confrontational and direct language. This was very apparent in the second case study. Although the plaintiffs came from a traditional Chinese background which is usually associated with a high context culture (and consequently, indirect communication and less confrontational stance), they were surprisingly blunt and direct in criticising the defendant in his presence. It is suggested that the adversarial court as a place, with its predominant focus on legal principles, made it easier for the plaintiffs to adopt a positional stance. The court environment provided a convenient pretext for them to communicate in a confrontational and direct manner, even if they were not usually inclined to be direct in their language.

Without the mediator's careful intervention, a conversation replete with direct and positional language easily descends into a confrontational exchange concerning the disputants' differing legal positions. It is not inconceivable how a prolonged conversation along such lines would lead to the disputants to be more entrenched in their own views and less open to consider other perspectives. By way of illustration, the parties in the defamation dispute referred extensively to their legal rights during the joint session. In particular, the plaintiffs repeatedly characterised the defendant's conduct as being reprehensible. Such accusations of course prompted the defendant to be defensive and to maintain his lack of blameworthiness. The parties were extremely polarised at the end of the first joint session. As described earlier, the rest of the mediation was very challenging because of the heightened tension between them that was brought about by their confrontational style of communication.

The emphasis on "justice" and "fairness" also results in the content of the mediation being centered on legal issues and the likely outcome at a trial. For instance, a mediation concerning defamation may feature arguments about whether the relevant words can be correctly considered defamation, and whether there are valid defences such as justification and fair comment. There may also be reliance on case precedents while discussing the quantum of

damages that is likely to be awarded for the loss of reputation. Together with the tendency to use formal language, a disproportionate focus on legal issues has an entrenching effect because it encourages the parties to adopt extreme legal positions. The disputants are also more likely be preoccupied with seeking to understand the likely outcome at a trial, than in a more mediational reflecting on the interests underlying their positions. In addition, any settlement that they arrive at is likely to be limited to an agreement on discrete issues, without going deeper to address the real reasons for the conflict.

The court mediator therefore has to guard against the entrenching effect that is precipitated by the parties' instinctive responses to the court setting as a place. Although the goal of mediation is to resolve a conflict, the court setting may, ironically, hamper resolution because the participants readily associate the court with an adversarial style of communication and a narrow focus on legal rights. As such, the mediator has to expend more effort in reframing positional statements and in encouraging the parties to look beyond their legal positions. In situations when the disputants seem to refer excessively to legal positions, the mediator could shorten the time devoted to the joint session to minimise confrontational and positional exchanges.

There are many other ways for the mediator to make efforts to overcome the effects of place on the communication patterns of the participants in the court setting. Some court mediators speak to the lawyers in private, reminding them to allow their clients to be the main spokesmen during the joint session. Otherwise, a joint session that starts with lawyers presenting their opposing arguments would set the wrong tone, encouraging their clients to reiterate their lawyers' submissions on the law. Some other mediators speak only to the lawyers, without their clients present, when each counsel is sharing his legal position with the mediator. A vigilant mediator would also be sensitive to the impact of the lawyers' statements. Sometimes, a lawyers' comments effectively shift the focus of the conversation to the merits of the case, detracting the parties from fruitful negotiations. A skillful mediator would be alert to this change of emphasis, and intervene to re-direct the disputants' focus. A keen awareness of the potential entrenching and damaging effect on a conflict communication of a court as a place for communicating a conflict can help the mediator to be strategic in his or her interventions.

When it is a matter of "face"

As set out in section B, a person with prominent face concerns is very conscious of his or her self-worth in a public situation. It is suggested that a person's face concerns would be substantially heightened when he or she is placed in a court setting. The participant is likely to be acutely conscious of the need to vindicate himself before the court, even though he or she is participating in a consensual process.

The second case study shows how the place, with the formality of a court setting very readily accentuates face concerns. The plaintiffs utilised positional language and formality to portray themselves in their perceived most positive light during the mediation. They continued doing so when talking to me in private, stressing their excellent reputation within the community. It

became increasingly apparent to me that face concerns had morphed into a key interest that had to be addressed in every aspect of the settlement terms.

The court mediator has to discern whether a person's face concerns are being intensified by the place of a court setting, causing him or her to be unduly positional and defensive in the presence of the opposing party. Much of the mediator's discernment has to be informed by a careful observation of the disputants' expressions and body language, which may reflect a hardening of position in reaction to the other person's statements. A person who values face may also regularly ask the mediator for affirmation of his or her position (e.g. "Would you not have acted like I did?" or "Don't you agree with me that he acted unreasonably?"). Such a person may express great concern in the private session that the mediator believes him instead of the opposing party. These remarks indicate a strong desire to give the mediator a favourable impression.

More importantly, the court mediator has to be acutely aware that the prevalence of face concerns could run counter to the facilitative style of mediation. The participant who is preoccupied with persuading the mediator is likely to ask the mediator to make a determination or to give directions on the way to settle. However, the facilitative mediator will not make a determination and aims to shift the focus to the participants' own circumstances and solutions that meet their needs. Once the court mediator is more keenly aware of how the court as a place can trigger face concerns, he or she can devise a variety of mediation interventions, such as minimising the extent of "confrontation" between the parties, helping to convey proposals in a way that maintains the person's face and encouraging the disputants to think of options that could meet face concerns. These interventions could help prevent the participant's excessive focus on what the mediator thinks of him or her, and how the person is perceived vis-à-vis the other participant.

Settling for the "right" reasons

It was argued earlier that the allusion to "justice" and "fairness" motifs potentially creates an entrenching effect on the conflict. There is one other impact of the predominance of these motifs – the disputants become keenly conscious of the potential consequences of litigation. The mediation takes place against the prominent backdrop of the law. It is held after a suit is filed in court. If the mediation does not result in a settlement, the case reverts to the usual procedural journey culminating in a trial. At the mediation, the presence of the judge mediator and the physical setting of the court serve as stark reminders that the process is ultimately taking place in a formal setting and the shadow of the law.

Because of the proximity of the mediation process with court adjudication, the disputants are often concerned about the costs and time involved in bringing the matter to trial, as well as the likelihood of being successful at litigation. The court as a place serves as a constant reminder of the potential of litigation, even while the participants are undergoing mediation. It is therefore not uncommon for many conversations within the mediation to revolve round the

potential implications of not settling and proceeding for a trial. There are often somber discussions between the party and the lawyer about impending legal costs and weighing them against the likely benefits of litigation. The negative consequences of the uncertain outcomes of litigation often weigh too heavily in the person's mind as he or she decides to arrive at a settlement in a mediation.

In addition, the person may be unduly influenced to settle because of the judge mediator's comments. As argued in an earlier section, the courts are usually associated with the authoritative or coercive role of the law. The judge embodies the authority embedded within the law. Disputants who have high power distance will be readily overwhelmed and influenced by the authoritative position of the judge mediator. In the second case study, the plaintiffs expressly requested for a suggested way of settling the dispute. While it was certainly very tempting for me to propose a specific solution, I was concerned that they would simply adopt my proposal without weighing all the relevant factors carefully. The strong desire to avoid the costs of a trial, coupled with the susceptibility to be influenced by a judge mediators' comments, may cause the disputant to settle too quickly for the "wrong" reasons.

Admittedly, the cost of litigation may be a legitimate consideration for a settlement. However, there is a great risk in a court mediation for this factor to be attributed excessive weight at the expense of giving proper consideration to other equally valid factors. For instance, the person may not accord weight to the potential benefits of proceeding to trial in his or her particular circumstances, such as obtaining a definitive ruling on an issue and vindication of one's rights when there is fraudulent or dishonest conduct by the other party. It is therefore suggested that there is a greater need within court mediation to ensure that the negative aspects of litigation and place do not loom larger than necessary, such that the person does not carefully weigh them against other countervailing factors. Otherwise most settlements would be arrived at very reluctantly principally because of the fear of litigation, the influence of the judge mediator and the place location in which communication around conflict occurs.

As much as the court mediator is keen for a settlement to take place, his or her role as a mediator in a primarily facilitative mediation is to ensure independent and voluntary decision-making by the disputants. However, the court as a place puts constraints on autonomous decision-making by encouraging excessive preoccupation with the consequences of a trial. The mediator operating in a court setting thus has to counter the adversarial setting of the court by intentionally facilitating conversations concerning other factors important to the participants apart from the cost of a trial. The mediator also has to ensure that the disputant has adequate space and time to carefully consider the implications of settlement, rather than make a hasty decision prompted principally by the fear of litigation. Furthermore, the judge mediator has to be keenly aware of how his or her statements made in a court setting may inadvertently influence the disputant to give disproportionate weight to the spectre of litigation. Such an awareness should lead to vigilance and care in making any suggestions or comments to the parties concerning the possible outcome at a trial.

The clock is ticking

Finally, the court mediator operates under immense time pressure. In the Singapore State Courts, each dispute is allocated half a day or around three hours for the first mediation session. As shown in the first case study, some complex disputes fraught with heightened emotions may require more time. Mdm Lim was ready to share her thoughts candidly with the mediators only towards the end of the allocated time. It was rather untimely that the mediation had to be stopped at this juncture, and rescheduled to another time. On the other hand, the interval between mediation sessions is beneficial for some disputes. Some parties have used this time to share more information with one another, to process their emotions and to consider carefully the implications of reaching a resolution. Nonetheless, the first case study illustrates how time is a constraint within the court setting, leading to potential loss of momentum and additional time being devoted at the second mediation session to recover the lost momentum.

The court mediator may inadvertently quicken the pace of the mediation despite the parties' preference for a more leisurely pace. I was brought to this realisation when I talked to one disputant. I had earlier mediated another dispute involving her business. She shared very candidly that she felt rushed during the earlier mediation. She thought that this was one reason why no settlement was arrived at. I learnt that she negotiated privately with the other party after that mediation and they eventually reached a resolution on their own. This conversation certainly made a great impact on me, reminding me of the potentially adverse effect of time pressures and the need to slow down the pace of mediation when the parties require it.

G. Conclusion

The mediation process is meant to be a counterpoint to a court trial. A court-connected mediation, however, tends to infuse the mediation process with court-related notions and an adversarial communication style. The court setting may, ironically, engender obstacles to resolving the dispute. This is inadvertently brought about by the court being a place connoting a high degree of formality, the enforcement of legal rights, positional and adversarial dialogue and authoritative decision-making.

This chapter has highlighted the ways in which a person's use of language, emotional expression and regard for authority may be impacted by the place of a court setting. A person's preference for emotional restraint, indirect language and preservation of face are accentuated by the notions associated with the court setting. The participant may also tend to confuse the mediator for a decision-maker and fail to grasp the importance of making their own choices, thus causing incongruence with the facilitative mediation style. The chapter has also illustrated how the dynamics of the mediation discussions are subtly but surely influenced by the court environment when these communication styles ensue. There could be a substantial entrenching and polarising effect between the disputing parties, due to the excessive use of adversarial language. There could also be a lack of intimate communication because of the preference for indirect language, and this could prevent a resolution of the deeper underlying causes of the

conflict. Finally, the inherent time constraints of the place of the court pose yet another obstacle to resolution, as the momentum leading to resolution may be abruptly disrupted.

The impact of the court as a place cannot be underestimated. Even as the courts seek to expand its range of dispute resolution processes, there may still be inherent limitations on how much the mediation process can flourish within the court setting without being affected by the adjudication framework. The court mediator who is keenly attuned to the effect of the court mediation as a place has to work hard to redress the effect of place and is arguably better equipped to counter the adverse aspects of the court setting's influence and to facilitate the resolution of the dispute by using all the techniques of a collaborative instead of adversarial communicator.

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