

**“IT FELT LIKE HE WAS IN MY SKIN:”**

**INTERCULTURAL LEARNING ABOUT MEDIATION**

**IN HAITI**

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A mediation workshop participant in Port-au-Prince, Haiti, in response to my inquiry regarding what his mediator in a short role-play did that was effective, responded: “He appeared interested in me. He kept visual contact. It felt like he was in my skin.”<sup>1</sup> This response occurred approximately ninety minutes into a one-day session and after the workshop’s first role-play focused on gathering information from one of four neighbors involved in an escalating conflict. This role-play followed brief presentations describing workshop goals, demonstrating a conflict, reviewing common dispute resolution options by applying them to our demonstration,

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<sup>1</sup> Notes of participant comments at workshop on November 12, 1998, on file with the author [hereafter Participant Comment]. Much of the data in this article comes from notes I made recording participant comments and translations of written remarks participants shared on the workshop evaluation forms distributed and collected at the end of every session.

surveying information gathering techniques, and discussing short videotaped vignettes illustrating effective and ineffective questioning behaviors.<sup>2</sup>

This participant's response impressed me. I initially thought that these comments suggested that the participant playing the mediator role had grasped the importance of communicating acceptance of and interest in disputants and had produced behavior consistent with that understanding. I inferred that these remarks signaled that the commentator had experienced the value of a mediator choosing and performing these behaviors. I also believed that these remarks demonstrated the commentator's acceptance of the importance of providing public, behavior-based feedback to enhance learning for performers and other participants, a feature of my workshop design.<sup>3</sup>

Reflecting further on these comments revealed that my initially positive impressions rested on several culturally rooted assumptions. I assumed the "appeared interested in me" phrase, if interpreted accurately,<sup>4</sup> was intended to reinforce effective mediator behavior. I also

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<sup>2</sup> This sequencing reflects many cultural assumptions and influences which are discussed later. See notes 187, 190-197, 200-202, 227, and 357 *infra* and accompanying text.

<sup>3</sup> Cultural influences often affect willingness to engage in public critique. For example, Latinos and Latin Americans have been characterized as generally unwilling to engage in critiquing. Rosita Daskal Albert, *A Framework and Model for Understanding Latin American and Latino/Hispanic Cultural Patterns*, in *HANDBOOK OF INTERCULTURAL TRAINING* 327, 334 (Dan Landis & Rabi S. Bhagat, eds., 2d ed. 1996). Mexican Americans have similarly been described as generally seeking to not offend others, to avoid directly questioning another's actions, and to refrain from sharing public criticisms. *Id.* We learned that although some Haitian participants were reluctant to share public feedback, many did voice specific and interesting behavioral evaluations. See notes 354-356, 360-368, 387-388, 421-424, 433-434, and 440-443 *infra* and accompanying text. Others were willing to give us specific, written constructive criticism. See notes 249-255, and 262-264 *infra* and accompanying text.

<sup>4</sup> As explained in more detail *infra* note 297 and accompanying text, the accuracy of my notes depends upon the skill of the interpreters used as well as my ability to hear and write what was interpreted. Participant comments during these workshops were usually made in Haitian-Creole, occasionally in French. English was seldom used by participants during workshops except at breaks. We used simultaneous interpretation to save time during these portions of our sessions.

assumed that the “kept visual contact” and “in my skin” components of this comment had positive meanings. Earlier interactions in other workshops had suggested that many Haitians felt comfortable with and frequently used a steady but not constant approach to eye contact that for most Americans<sup>5</sup> conveys interest and respect rather than intimidation or insensitivity to status differences.<sup>6</sup> I further assumed that “in my skin” connoted a sense of receiving empathy,<sup>7</sup> a use of imaginative imagery<sup>8</sup> to describe a particularly powerful and personal form of the mediator being with him.

Only later did I identify and question these culturally influenced assumptions underlying my interpretations of this comment. I wondered whether the “appeared interested in me” phrase connoted a preference for strong, subjective connections between mediators and participants that

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I made my notes regarding the interpreted comments of participants either during or shortly after these workshops.

<sup>5</sup> Analysis of cultural influences must necessarily articulate generalizations because differences within cultural groups usually are greater than behavioral variations between them. David W. Augsburger, *Conflict Mediation Across Cultures: Pathways and Patterns* 18 (1992) [hereafter *Mediation Across Cultures*]; Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes: How to Negotiate Agreements Without Giving In* (2d ed. 1991).

<sup>6</sup> See, e.g., Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *Clinical L. Rev.* 33, 43 (2001); Neal R. Goodman, *Cross-Cultural Training for the Global Executive*, in *Improving Intercultural Interactions: Modules for Cross-Cultural Training Programs*, 34, 45 (Richard W. Brislin and Tomoko Yoshida, Eds., (1994) [hereafter *Cross Cultural Training Modules*]; Ted Singlis, *Nonverbal Communication in Intercultural Interactions*, in *Cross Cultural Training Modules*, supra at 268, 279. Workshop participants commented that eye contact is important in Haiti and that steady but not constant fairly describes appropriate adult to adult eye contact. Participant Comment, November 11, 1998.

<sup>7</sup> Empathy is usually described as an “ability to put oneself in another’s place, to know others’ experiences from their perspective, and to communicate this understanding to them in a way that is meaningful, while at the same time recognizing that the source of one’s experience lies in the other.” Colleen Mullavey-O’Byrne, *Empathy in Cross-Cultural Communication*, in *Cross Cultural Training Modules*, supra note 6, at 205; see also notes 408-412 infra and accompanying text.

<sup>8</sup> One scholar claims that “Haitians have a highly developed sense of imagery and imagination.” Charles Arthur, *Haiti: A Guide to the People, Politics, and Culture* 76 (2002).

extend beyond the neutral relationships American mediators typically establish.<sup>9</sup> My cultural influences<sup>10</sup> and experiences with Florida's court-connected mediation system<sup>11</sup> conditioned me to think that mediation should be done by persons not closely related to disputants to pursue process objectives of neutrality and impartiality.<sup>12</sup> However, many different cultural traditions suggest that mediators should come from networks of people who know disputants well.<sup>13</sup> These traditions emphasize a third party's trust and social connectedness to disputants and their conflicts as an important way to hold participants together while helping them resolve

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<sup>9</sup> The Florida Standards of Professional Conduct for Mediators require mediators to disclose "any close personal relationship or other circumstance, in addition to [current, past or possible future representational or consulting relationships with parties or attorneys and any pertinent pecuniary interests], that might reasonably raise a question as to the mediator's impartiality." Fla. R. Cert. & Ct.-Appt. Mediators 10.070(b)(2). After making this disclosure, they must state their belief that this close relationship or other circumstance will not affect their ability to act impartially and check with the parties to see whether they wish to continue. These rules reflect western cultural preferences for formal, impersonal, and abstract processes. See *Mediation Across Cultures*, supra note 5, at 192. Other cultures manifest preferences for informal, subjective, and connected processes. *Id.*

<sup>10</sup> I live in a society in which relationships are largely single-stranded making their preservation often less crucial. Kevin Avruch, *Culture and Conflict Resolution* 82 (1998). Adjudicatory remedies are well developed and create cultural notes of fair play and professionalism heightening the value of seeking impartial and unbiased mediators. *Id.* at 84.

<sup>11</sup> The Florida legislature enacted a comprehensive statute in 1987 that gives trial judges broad discretion to order civil cases to mediation subject to rules adopted by the Florida Supreme Court. See Act effective Jan 1., 1988, ch. 87-173, ss 1-6, 1987 Fla. Laws 1202, 120205 (codified as amended in scattered sections of Fla. Stat. ch 44 (2002)). An estimated 200,000 family, circuit civil involving claims in excess of \$5000, and county court claims of less than \$5000 are ordered to mediation annually. I am a Supreme Court certified family, circuit, and county court mediator and teach a small claims mediation clinic at the University of Florida's Levin College of Law.

<sup>12</sup> Little specific agreement exists regarding the meaning of these terms and they are often used interchangeably. Kimberlee K. Kovach, *Mediation: Principles and Practice* 123-24 (2d ed. 2000). Neutrality is often said to include not having a stake in outcomes and freedom from conflicting interests. *Id.* at 124-25. Impartiality typically connotes freedom from bias or favoritism, commitment to aid all participants, and refraining from playing adversarial roles. *Id.* at 125. Some scholars question whether true neutrality or impartiality is possible. See, e.g., Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *L. and Soc. Inquiry* 35, [need jump cite] (1991); Deborah Kolb et al., *When Talk Works: Profiles of Mediators* [need page cite] (1994).

<sup>13</sup> See John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures* 78 (1995) [hereafter *Preparing for Peace*].

problems.<sup>14</sup> The possibility that an “inside my skin” feeling was negative rather than positive also emerged later.<sup>15</sup>

This example demonstrates a few of the complex challenges involved in intercultural<sup>16</sup> mediation instruction. This article analyzes the challenges that arose in my experience designing and presenting conflict resolution and management workshops in Port-au-Prince and three other cities in Haiti. This opportunity allowed me to join an increasing number of American-based dispute resolution professionals traveling outside of the United States as alleged “conflict

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<sup>14</sup> See M. Abu-nimer, *Conflict Resolution Approaches: Western and Middle Eastern Lessons and Possibilities*, 55 *Am. J. of Econ. & Soc.* 35, 43 (1996); M. Abu-Nimer, *Conflict Resolution in an Islamic Context*, 21 *Peace & Change* 22, 30-31 (1996); and Kevin Avruch, *supra* note 10, at 84.

<sup>15</sup> Others use inside the skin as a negative metaphor as in getting under someone’s skin. For example, discussing the mediation that led to the 1994 restoration of Jean-Bertrand Aristide as President of Haiti, American Robert Pastor commented:

“The basic lesson is that a good mediator needs to get into the shoes of his adversary.

This is very well understood, but the problem sometimes for the government, particularly when an issue becomes as controversial as this one, is that it’s easier for government officials to try to get under the skin of the adversaries than to think about ways to get into their shoes.” Restoring

Democracy to Haiti, in *Mediating Deadly Conflict: Lessons from Afghanistan, Burundi, Cyprus, Ethiopia, Haiti, Israel/Palestine, Liberia, Sierra Leone, and Sri Lanka*, 11, 17 (Dana Francis, ed., 1998). But see Cole Porter, *I’ve Got You Under My Skin* (1936). Metaphors supply windows into cultural terrain, directing attention in particular ways by mapping one meaning onto another. Michelle LeBaron, *Bridging Cultural Conflicts* 23-25 (2003). Intercultural transfer of metaphors, however, can be tricky. See Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1997 *J. Disp. Resol.* 1, 3 (arguing seamless communication unattainable in intercultural interactions); Angela McCaffrey, *Don’t Get Lost in Translation: Teaching Law Students to Work With Language Interpreters*, 6 *Clinical L. Rev.* 347, 351 (2000) (illustrating difficulties of interpreting idiomatic expressions accurately). Context, as always, is critical. Few would ascribe a positive connotation to an “inside my skin” feeling in the context of discussing tick fever, lyme disease, or chiggers.

<sup>16</sup> I use the term intercultural to connote interpersonal interactions with persons from cultures other than their own. Kenneth Cushner and Richard W. Brislin, *Intercultural Interactions: A Practical Guide* ix (2d ed. 1996). These interactions also are often called cross-cultural. *Id.*

resolution experts.”<sup>17</sup> It gave me, a mediator from one set of cultural and linguistic contexts, an opportunity to work with Haitian citizens who possess different cultural traditions and languages.

This article describes the evolution of an approach that used one-day workshops to present American ideas about mediation and its core behaviors of questioning and listening to diverse groups of ordinary citizens not affiliated with judicial and legal systems. It analyzes advantages and disadvantages of this approach. It reports my learning regarding the deep cultural influences that accompany my notions of conflict, mediation, and core information gathering and respect giving behaviors in mediation that came from my intercultural interactions.

Focusing on questioning and listening behaviors in mediation, this article explores the ways that many of my ideas about how to perform these tasks effectively transferred to Haitian culture and contexts. It shares many lessons learned from my experiences attempting this transfer. Like many who have traveled similar paths, I learned far more than the participants with whom I worked. This article shares my lessons to inform other traveling mediation instructors who may make similar journeys.

Whether using one-day sessions made inter-cultural sense supplied the broad question I sought to answer as I investigated the transferability of my ideas about effective questioning and listening behaviors. This article argues that this approach, while far from ideal, contributes

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<sup>17</sup> See Christopher Honeyman: *Have Gavel, Will Travel: Dispute Resolution Innocents Abroad*, 1, unpublished paper on file with author, also available as *Convenor Newsletter*, Vol. 2, No. 2, [www.convenor.com](http://www.convenor.com). Interest in democratic decision-making and cooperative dispute resolution has increased in the past twenty years. Susan T. Wildau, Christopher W. Moore, & Bernard S. Mayer, *Developing Democratic Decision-Making and Dispute Resolution Procedures Abroad*, 10 *Med. Q.* 303 (1993). Since starting the Haitian project, I have had the great fortune to learn more about intercultural transfer of dispute resolution ideas and behavioral suggestions by working in four mediation workshops in Kampala, Uganda, sponsored by the International Law Institute of Kampala; a three day commercial mediation training sponsored by the Polish Arbitration Association in Warsaw, Poland; and two-day workshops on family mediation and general dispute resolution theories sponsored by the Malaysian Bar Council and the University of Malaysia in Kuala Lumpur, Malaysia.

value. It contends that the design and presentation of these workshops, while flawed in many respects, responded effectively to the conditions and circumstances this project confronted as it evolved. It concludes that this approach, particularly when enhanced with changes stemming from lessons learned, supplies a valuable, although admittedly tentative, step on the long journey needed to develop indigenous mediation systems in Haitian organizations.

## **I. DESIGNING AN INTERCULTURAL PROJECT**

### **A. Project History**

I was in Port-au-Prince talking about mediation because I agreed to participate in the last four rounds of conflict resolution and management workshops in Haiti. I was asked to replace instructional team members who designed the initial workshops, put together an explanatory booklet for them, and present the first two rounds but then could not continue working on the project because of scheduling conflicts. All workshops were sponsored by two grants from the United States Department of State, Office of Citizen Exchanges<sup>18</sup> and arose from its request for proposals for conflict resolution training in Haiti.<sup>19</sup> These grants were administered by the Center for Governmental Responsibility at the University of Florida's Levin College of Law.<sup>20</sup> The

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<sup>18</sup> These programs cost \$316,632 consisting of \$199, 164 from the United States Department of State, and \$117,468 from the University of Florida.

<sup>19</sup> The grant solicitation sought "applications from non-profit institutions . . . to conduct a conflict resolution program for Haiti. This exchange will teach peaceful means of solving conflicts to . . . community leaders . . . [and] consist of one or two U.S. trainers conducting conflict resolution in Haiti and will include a follow-on for selected workshop participants in the U.S." Undated grant solicitation document on file with author. The top down origin of our project meant that none of our work was directly solicited by any specific organization or group in Haiti. This constrained developing ongoing programs in Haiti. See notes 78, 482-484 *infra* and accompanying text.

<sup>20</sup> This Center is the state of Florida's premier legal and public policy institute. It was founded in 1972 with grant funds from the McIntosh Foundation of South Florida under the leadership of former Deans Richard Julin and Jon Mills, who also directs this Center. Its staff now includes ten research faculty members who teach in the Levin College of Law and develop funded research opportunities for law students. This Center offers teaching and research programs in environmental protection and development, historic preservation, election law, health access

project included eight trips to Haiti<sup>21</sup> and three visits to Florida by Haitians who had participated in our workshops in their country.<sup>22</sup>

I did not participate in the initial fact gathering, needs assessment, and design phases for this project. These initial stages included two one-week trips to Haiti in September, 1995, and October, 1996. To gather information and assess needs these visits included interviews with government ministers, lawyers, judges, police administrators, law faculty and teachers, labor union members, participants in non-governmental organizations, and American personnel working in rule of law and administration of justice programs then underway in Haiti.

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issues, and policy development and governance in emerging democracies including conflict resolution in Haiti and the specialized Center for American Law Studies at Warsaw University. In the past two decades the Center has received more than \$6 million in contracts and grants and produced more than 300 publications, presentations, productions, and programs.

[www.law.ufl.edu/cgr](http://www.law.ufl.edu/cgr).

<sup>21</sup> The Haitian visits occurred in September, 1995 for fact-finding, October, 1996 for needs assessment, and in December, 1996, August, 1997, April, 1998, November, 1998, April, 1999, and October 2000 for workshop presentations. I participated in the 1998, 1999, and 2000 visits. My first visit to Haiti occurred in November, 1997, when I received a Senior Specialist's grant from the United States Information Agency to deliver a three day dispute resolution and a two-day negotiation workshop in Port-au-Prince.

<sup>22</sup> Thirty-nine Haitian participants visited Florida on three separate occasions; 15 in April-May, 1997; 13 in August-September, 1998, and 11 in March, 2002. All had participated in workshops in Haiti. No published criteria were used to make these selections. Most selections were made by JoAnn Klein, CGR's administrator for these grants, in consultation with Americans and Haitians working with the US embassy in Port-au-Prince. Director Klein and her colleagues sought to identify Haitian participants who seemed committed to developing dispute resolution systems in their organizations and groups and appeared to have abilities and resources to follow through. While in Florida Haitian participants visited community and court-connected dispute resolution programs, observed actual small claims and peer mediations, attended negotiation and mediation classes at Florida and Florida State law schools, and received tours of the Florida Supreme Court and prison facilities. Collaborations during these visits occurred with the Levin College of Law's Institute for Dispute Resolution, the Florida Dispute Resolution Center, The Florida Growth Management Conflict Resolution Consortium, the Alachua County Volunteer Small Claims Mediation Program in Gainesville, the Peer Mediation Program at Cobb Middle School in Tallahassee, the North Campus of Miami-Dade Community College, and the Farmworker's Association of Apopka, Florida.

The Citizen Exchange Program's conflict resolution initiative was a small part of a much larger economic commitment to rule of law development that followed President Clinton's decision in September, 1994, to send 20,000 American troops to Haiti to restore the democratically elected government of President Jean-Bertrand Aristide.<sup>23</sup> Between 1995 and 1999, the United States government provided \$97 million in assistance to Haiti's justice system.<sup>24</sup> Approximately \$70 million was directed to recruiting, training, and equipping the

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<sup>23</sup> Jean-Paul Aristide was elected President of Haiti in 1990 by 67% of the vote in an election monitored and declared free and fair by international observers. *Libete: A Haitian Anthology* 144-45 (Charles Arthur & Michael Dash, eds., 1999) [hereafter *Libete*]. Inaugurated for a five year term in February, 1991, Aristide lasted only seven months before ousted by a military coup. *Id.* at 145. The Haitian military government presided over a repressive, violent campaign against organizations that supported Aristide and the *ti legliz*, or little church, representing the progressive current with the Catholic church. *Id.* More than 5,000 Haitians were murdered and thousands more were beaten and tortured. *Id.* Twenty thousand American troops acting with authorization from the United Nations entered Haiti in September of 1994 to restore constitutional order and maintained security until the UN took over responsibility in March, 1995. Charles Arthur, *supra* note 8, at 29; see generally Bob Shacochis, *The Immaculate Invasion* (1999).

<sup>24</sup> GAO Assessment of United States Judicial and Police Reform Assistance in Haiti, Hearing before the Committee on International Relations, House of Representatives, 106<sup>th</sup> Congress, 2d Sess., September 19, 2000, Serial No. 106-183, <http://www.house.gov/internationalrelations>, U.S. Gov't Printing Office 69-534CC, Serial No. 106-183 [comments of Chairman Benjamin A. Gilman] [hereafter GAO Assessment]. The Haitian justice system certainly needed this infusion of aid. See notes 115-125 *infra* and accompanying text.

Troubling and questionable aptly characterizes many decisions made by the United States government towards Haiti throughout the past two centuries. Haiti was founded in 1804 as the result of the only successful slave revolt in recorded history, an act which at the end of the eighteenth century challenged the prevailing view that blacks were incapable of revolutionary insurrection and the existing norms regarding plantation slavery systems. *Libete*, *supra* note 23, at 315. Concerned about the example this black insurrection could have on its plantation slavery system, the United States did not recognize Haiti as a sovereign nation until 1862. *Id.* Following earlier examples of France, Germany, and Great Britain, the United States in 1872 received \$89,260 for allegedly illegal detention of American nationals. The US in 1879 demanded \$2.5 million dollars for another allegedly illegal detention of an American national. Jean Metellus, *Haiti: Perspectives* (1996), in *Libete*, *supra* at 218. This behavior helped Haiti inaugurate the concept of third world debt. *Id.* U.S. Marines were sent to occupy Haiti in 1915 to counter the growth of German influence and interests in light of the country's strategic location near the Panama Canal which opened a year earlier. *Libete*, *supra* at 210. They stayed until 1934. Opposition to the American occupation was muted at first until U.S. authorities introduced a

Haitian National Police and the remaining \$27 million was allocated to improving the training of magistrates and prosecutors, the management practices of judicial institutions, and the access of Haitian citizens to dispute resolution systems.<sup>25</sup> The Citizen's Exchange grants program directed

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system of forcibly recruited labor gangs to perform public works projects such as building roads. Id. A new Haitian constitution partially drafted by Franklin D. Roosevelt, who was then an assistant secretary of the navy, ended the prohibition of land ownership by foreigners in Haiti and many American companies acquired land for agricultural, mining, and other commercial pursuits. Id. The overall effect of the American occupation from 1915 to 1934 reinforced existing power structures and their resulting inequities. Id. at 211. A Haitian described this occupation by writing: "They [the Americans] act like barbarians, for they have established nothing but a coarse materialism, the religion of money, the workshop of force and success." Normil Sylvain, *A Haitian View of the Occupation (1927)*, in *Libete*, supra at 224. Following the 1959 Cuban revolution, the United States granted generous aid to Francois Duvalier's dictatorship, overlooking its blatant disregard for democratic values and human rights because it stood valiantly against Communism in the hemisphere. *Libete*, supra at 211. The United States also backed the former World Bank official, Marc Bazin, who lost the 1990 presidential election to the radical Catholic priest Jean-Bertrand Aristide. Id. at 213.

Racism has affected America's relationship with Haiti. From its birth, the United States along with the European powers whose colonies surrounded the new country, "viewed the Haitian revolution as a dangerous example which threatened the colonial system and the institution of slavery upon which that system was built." *Libete*, supra note 23, at 209. Racist views of Haiti continued into the twentieth century. " 'Imagine,' marveled William Jennings Bryan in 1920, 'niggers speaking French.'" Bob Shacochis, supra note 23, at 12. " 'I don't care if you dress them up and put them in the palace,' opined the commander of the Marines during the 1915-34 American occupation of Haiti, 'they're still nigs.'" Id. During this American occupation "decidedly racist marine memoirs" entitled *Black Baghdad and Cannibal Cousins* were "filled with smug digressions on the subject of white supremacy." *Libete*, supra at 316. Concerns continue today regarding the vastly different treatment accorded Haitians and Cubans who land their boats uninvited on Florida's coast lines. See Edwidge Danticat, *Children of the Sea* (1993), in *Libete*, supra at 197.

<sup>25</sup> GAO Assessment, supra note 24. [comments of Jess T. Ford, Associate Director, International Relations and Trade Issues, National Security and International Affairs Division, U.S. General Accounting Office]. The United States has been Haiti's largest donor since 1973 contributing approximately \$1.04 billion in assistance between 1995 and 2001. U.S. Department of State: Background Note: Haiti, 8, April, 2002, <http://www.state.gov/r/pa/ei/bgn/1982.htm> [hereafter State Department Background]. The United States did this before, establishing a significant new political force by reforming the Haitian military during the American occupation of Haiti from 1915-34. Michel-Rolph Trouillot, *Haiti: State Against Nation* (1990), in *Libete*, supra note 23, at 57.

at conflict resolution training came from the emphasis on improving access to dispute resolution systems.<sup>26</sup>

The University of Florida's grant submission proposed a train-the-trainers approach directed at community and other grass roots level leaders and citizens who were not reached by programs underway or planned. The proposal targeted leaders and members of formal and informal local organizations not affiliated with existing judicial and law enforcement institutions<sup>27</sup> who would teach other groups and citizens. Haiti has hundreds of non-governmental organizations.<sup>28</sup> Florida's grant focus proved successful as the workshops in which I participated were hosted by diverse groups in Port-au-Prince with varied interests including CNEH, *Confederation Nationale des Enseignants d'Haiti*, a teacher's union; *Fam Yo La*, a women's rights organization; COFAL, a women's group that works with prisoner's rights and to improve prison conditions; OPODEC, *Organization Populaire le Development de Carrefour-Feuilles*, a worker's group; COHADDIE, a human rights group emphasizing children's issues; law students at the State University of Haiti and Quisqueya University; and mixed interest and affiliation groups in the smaller, rural cities of Gonaives, Jacmel, and Mirabelais.

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<sup>26</sup> This program was administered by the United States Agency for International Development and consisted of 4.5 million dollars between 1994-1999. Tom Carter, U.S. Funding Has Little to Show in Reform of Police and Judiciary, *The Washington Times*, September 20, 2000.

<sup>27</sup> Supporting grass roots organizations is an important and underused approach to development in Haiti. For example, an estimated \$3 million in aid distributed by the US National Endowment for Democracy between 1986 and 1990 went to several organizations in Haiti but "completely ignored the hundreds of grassroots organizations that eventually coalesced in Lavalas," the political movement that elected John Paul Aristide in 1990. William Robinson, *Low Intensity Democracy in Haiti* (1994), in *Libete*, supra note 23, at 233.

<sup>28</sup> More than seven hundred non-governmental organizations were working in Haiti in 1996. Jennie M. Smith, *When the Hands Are Many: Community Organization and Social Change in Rural Haiti* 27 (2001).

The project's focus and preliminary fact-finding and needs assessment work produced two important decisions. First was to emphasize short programs that give some information to many participants rather than using more typical formats of one or two week sessions providing more coverage to smaller enrollments. Concerns were repeatedly expressed during assessment and fact-gathering visits that many community leaders and group members would find it difficult to attend multi-day programs, particularly those that required traveling to and staying in other cities. In addition, most Haitians fortunate enough to have jobs<sup>29</sup> cannot easily leave them or their family commitments to participate in workshops lasting several days or longer.

As one of the poorest countries in the world,<sup>30</sup> estimates suggest that although Haiti's per capita income is US\$250, a majority of its rural population earn less than US\$100 a year and survive well below the World Bank's absolute poverty line.<sup>31</sup> More than a quarter of the children in Haiti suffer malnutrition and 85% of the rural population is unable to obtain even 75% of daily caloric needs.<sup>32</sup> Haiti is also the least economically developed country in the Western Hemisphere.<sup>33</sup> Health, education, transportation, and other basic services outside Port-au-Prince and three other regional capitals are astonishingly inadequate.<sup>34</sup> Life expectancy

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<sup>29</sup> It has been estimated that as many as seven out of ten adults in Haiti are either unemployed or do not have a regular occupation. Charles Arthur, *supra* note 8, at 29. An estimated 100,000 Haitians are employed in the formal economy meaning only 1 in every 400 adults have jobs with regular wages and hours, workplaces, and minimum benefits such as sick pay and holidays. *Id.* at 46. Ninety percent of these jobs are in Port-au-Prince. *Id.* at 47. An estimated one million Haitians work in an informal sector encompassing occupations such as self-employed traders, artisans, casual laborers, porters, shoe-shiners, and gardeners. *Id.* A vast majority of Haitians are underemployed, working for a few hours a day or a few days a month. *Libete*, *supra* note 23, at 113.

<sup>30</sup> State Department Background, *supra* note 25, at 7.

<sup>31</sup> Jennie M. Smith, *supra* note 28, at 26.

<sup>32</sup> *Id.*, see Charles Arthur, *supra* note 8, at 29.

<sup>33</sup> State Department Background, *supra* note 25, at 7.

<sup>34</sup> For example, only one physician exists for every ten thousand Haitians and the ratio is higher in rural areas meaning that nearly half the population has no access to health care. See Charles

ranges from 43 to 55 years, more than half of Haiti's children do not go to school, thirteen percent of Haitians have easy access to potable drinking water, and six percent have dependable electricity.<sup>35</sup>

The second decision was to present the workshops and accompanying materials in Haitian-Creole which, along with French, is one of two official languages in the country.<sup>36</sup> This choice was made to ensure maximum participant understanding because Haitian-Creole is spoken by virtually all Haitians and is used for most everyday communication.<sup>37</sup> French, on the other hand, is spoken by only about 10% of the population.<sup>38</sup> French is the language primarily used for official judicial business and the linguistic barrier this creates for the vast majority of

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Arthur, *supra* note 8, at 29. Thirteen percent of Haitian children die before reaching age five. *Id.* at 32. Haiti has the lowest level of school enrollment in the Americas and no schools exist in some rural areas. *Id.* at 30. Teleco, the state-owned telephone company, provides only 60,000 telephone lines to a country with a population approaching eight million. *Id.* at 50. EDH, the state electricity company, provides sporadic power to Haiti's cities with outages occurring frequently, and often no electrical service goes to rural areas. *Id.* In June, 1993, Port-au-Prince had twelve garbage trucks in running condition to collect an estimated sixteen thousand tons of solid waste produced daily in this urban area. P.J. O'Rourke, *All The Trouble in the World* (1994), in *Libete*, *supra* note 23, at 120. Urban and rural roads are in poor condition and after riding on them several times I can personally verify the saying that "Haitian roads are a free massage." *Id.* at 121.

<sup>35</sup> See Charles Arthur, *supra* note 8, at 29-32; Jennie M. Smith, *supra* note 28, at 26-27.

<sup>36</sup> Haitian-Creole was not recognized as an official language in Haiti until 1987 when a new Constitution was adopted. *Libete*, *supra* note 23, at 260, Haitian-Creole emerged as a common language for citizens snatched from different regions of Africa and forced into slavery to support what became the richest of all French colonies, Saint Domingue. Charles Arthur, *supra* note 8, at 17-18. Spain ceded present day Haiti to France in 1697 and one estimate suggests that the number of slaves grew from 2000 in 1681 to more than a quarter of a million by 1780. *Libete*, *supra* note 23, at 17-18. Haitian-Creole combines elements of French, Spanish, English, and African languages with a majority of its words having a French origin. *Id.* at 255.

<sup>37</sup> Albert Valdman, *Creole: The National Language of Haiti*, 2 *Footsteps* 36,

<http://www.indiana.edu/~creole/creolenatlangofhaiti.html>.

<sup>38</sup> *Id.*

Haitians has been used to deny justice to them.<sup>39</sup> Expanded use of Haitian-Creole is seen as an important way to facilitate participation in Haiti's political and economic life.<sup>40</sup>

Initial project staff<sup>41</sup> prepared a 40 page booklet to distribute at workshops. It briefly surveyed dispute resolution options of avoidance, consensual resolution through negotiation and mediation, adjudication, and the use of force; introduced value claiming and value creating negotiation;<sup>42</sup> outlined a typical American mediation process and several characteristics of an effective mediator; reviewed communication materials on active listening,<sup>43</sup> sending effective messages, and constructive questioning; and sketched guidelines for institutionalizing dispute

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<sup>39</sup> Marguerite Laurent, Forces Against the Development of an Independent Judiciary in Haiti, 10 Nat'l Bar Ass'n Magazine 12, 14 (1996).

<sup>40</sup> Albert Valdman, *supra* note 37.

<sup>41</sup> This staff consisted of Joan Flocks, a Florida law graduate who had worked in Haiti in the Peace Corps before attending law school; Tim McClendon, a staff attorney with the Center for Governmental Responsibility at the Levin College of Law; Jon Mills, a Professor of Law who directs the Center for Governmental Responsibility and was the Dean at the Levin College of Law from 1999 to 2003; Bob Moberly, a Florida law professor who now teaches at the University of Arkansas; Sharon Press, who directs the Florida Dispute Resolution Center in Tallahassee; and Tom Taylor, Assistant Director of the Florida Conflict Resolution Consortium in Tallahassee. Only Sharon Press remained on the teaching team when I joined it in 1998. Tim McClendon continued to assist JoAnn Klein in the administration of our visits to Haiti and used his fluency in French to resolve many problems.

<sup>42</sup> This way to frame negotiation theoretically captures the inescapable tension that exists in virtually all negotiations between competing to gain individual advantage and cooperating to create joint gains. See David A. Lax & James K. Sebenius, *The Manager at Negotiator: Bargaining for Cooperation and Competitive Gain* 30-35 (1986). Professors Mnookin, Peppet, and Tulumello define creating value as building negotiation outcomes that, "when compared to other possible negotiated outcomes, either makes both parties better off or makes one party better off without making the other party worse off." Robert H Mnookin, Scott R. Peppet, & Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 12 (2000).

<sup>43</sup> Active listening encompasses actions that respond effectively to what others say. See Robert F. Cochran, Jr., John M.A. DiPippa, & Martha M. Peters, *The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling* 42 (1999). It includes verbal responses such as questions that incorporate something said or implied and statements that reflect the cognitive and affective components of what was said. *Id.* at 40-42. Many scholars essentially equate active listening with reflective statements. *Id.* at 42. My workshops in Haiti and this article adopted this narrower view. See notes 293, 405-412 *infra* and accompanying text.

resolution programs. This booklet was translated into Haitian-Creole by Charmant Theodore, a Haitian-American Professor of Romance Languages at the University of South Florida. It was provided to all workshop participants. This staff also developed a three-day workshop covering these topics that used lectures, two one-hour role-plays, a longer simulated negotiation and mediation, and two thirty minute planning exercises done in interest groups.

This team presented three-day workshops using their design in the Haitian communities of St. Marc in December, 1996, and Gonaives in August, 1997. It presented two-day versions in Haiti's capital of Port-au-Prince on those same visits. Consensus from team members suggested that two-day sessions accomplished almost as much as three-day workshops since neither format permitted extensive coverage nor intensive practice. In addition, participant feedback from these sessions consistently requested that the workshops provide more practical and less theoretical information. I then joined the project with an invitation to design an alternative approach that might work in shorter formats. Although a two-day framework remained an envisioned option, no workshops of that length occurred in the remaining four rounds of workshops in which I participated. My four visits to Haiti involved only one-day, six to seven hour, or half-day, three to four hour, sessions.<sup>44</sup>

## **B. Workshop Design Decisions**

My challenge was to design a short workshop that would be culturally relevant and practically useful to large groups of Haitian citizens with diverse interests from varied occupational settings who presumably encountered different kinds of conflicts. Anticipated

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<sup>44</sup> I ended up presenting the workshop I designed at 13 full-day [6 to 7 hours] and 4 half-day sessions on week long visits to Haiti in April and November of 1998, April, 1999, and October, 2000. One workshop in Gonaives, a rural city more than a hundred miles from Port-au-Prince, was scheduled for two days but travel delays resulted in essentially a nine hour presentation extended over a two-day period.

cultural differences complicated the task of designing something relevant. Disparate assumptions about what is appropriate in human interaction influence and can confuse, distort, and hinder intercultural communication.<sup>45</sup>

Scholars of intercultural communication define culture as a dynamic, growing, inter-related set of processes involving shared mental perceptions that help group members act externally and internally.<sup>46</sup> These shared perceptions contain the categories and implicit rules that persons use to interpret communications, behaviors, and events.<sup>47</sup> They give meaning to their acts and their interpretations of the behavior of others, supplying basic frameworks for

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<sup>45</sup> See *Mediation Across Cultures*, supra note 5, at 25; Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* 14-15 (rev. ed. 1997). Professor LeBaron argues that culture is “integral to understanding conflict,” and “cannot be separated from it” but “does not cause it.” Michelle LeBaron, supra note 15, at 4.

<sup>46</sup> See Raymond Cohen, supra note 43, at 12; G. Fontaine, *Managing International Assignments: The Strategy for Success* 2 (1989); Paul R. Kimmel, *Culture and Conflict* 455, in *The Handbook of Conflict Resolution: Theory and Practice*, 453, 455 (Morton Deutsch and Peter T. Coleman, Eds., 2000). Culture may be “one of the two or three most complicated words in the English language.” R Williams, *Keywords* 87 (1983), cited in Kevin Avruch, supra note 10, at 6. Over fifty years ago American anthropologists found 150 definitions of culture. *Id.* at 6. My understanding of culture and my use of the concept here agrees with Cohen in rejecting notions that culture is: (1) homogenous because it does not provide clear and unambiguous behavioral instructions and it contains internal paradoxes and contradictions; (2) a thing that can exist independent of human actors; (3) uniformly distributed among group members; (4) something that individuals possess only one of because everyone belongs to plural cultures; (5) simply custom; and (6) timeless in the sense that it never changes. *Id.* at 14-16.

<sup>47</sup> See Paul R. Kimmel, supra note 46, at 455; Michelle LeBaron, supra note 15, at 10; J.D. Spradley and D. McCurdy, eds, *Conformity and Conflict: Readings in Cultural Anthropology* 2, (1989). Shared perceptions influence the way persons develop their languages to name things. English and French speakers, for example, use the word octopus derived from a description of the creature's shape with eight or many tentacles or legs. German and Swedish speakers use a word that focuses on the creature's function as a fish while dialectical Arabic describes it by referring to a behavioral characteristic of acting cunningly. Guy Oliver Faure, *Conflict Formulation: Going Beyond Culture-Bound Views of Conflict* 40, in *Conflict, Cooperation and Justice: Essays Inspired by the work of Morton Deutsch* (Barbara Benedict Bunker & Jeffrey Z. Rubin & Assoc., eds., 1995).

sending, receiving, and understanding verbal and non-verbal communications.<sup>48</sup> They mould values, attitudes, and behaviors.<sup>49</sup> They also supply behavioral recipes for observing norms of personal etiquette, conducting relationships, and handling other human interactions.<sup>50</sup>

Conflict exists in all societies and disputing appears in all cultures as a normal and inevitable component of human existence.<sup>51</sup> Not surprisingly, definitions and understandings of conflict and specific approaches to resolving disputes vary considerably between cultural and linguistic groups.<sup>52</sup> The ways conflicts are defined reflect different value patterns<sup>53</sup> and influence divergent dispute resolving approaches.<sup>54</sup> Shared cultural perceptions influence

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<sup>48</sup> Paul R. Kimmel, *supra* note 46, at 455. These frameworks include mental schemas and action scripts, networked cognitive structures that contain plans for dealing with recurrent situations or assimilating new matters into existing knowledge sources. See Raymond Cohen, *supra* note 45, at 36-37. Cultures provide “systems of shared understandings and symbols that connect people to each other, providing them with unwritten messages about how to express themselves and how to make meaning of their lives.” Michelle LeBaron, *supra* note 15, at 10.

<sup>49</sup> See Susan Bryant, *supra* note 6, at 50; Intercultural Sourcebook 3-5 (D.S. Hoppes and Venturas, eds., 1979).

<sup>50</sup> See Kevin Avruch, *supra* note 10, at 36-37; Raymond Cohen, *supra* note 45, at 12. Cultures “gather people into belonging, tied by shared identities. . . .” Michelle LeBaron, *supra* note 15, at 10.

<sup>51</sup> *Mediation Across Cultures*, *supra* note 5, at 18-19.

<sup>52</sup> See, e.g., *Mediation Across Cultures*, *supra* note 5, at 17-18; Guy Oliver Faure, *supra* note 47, at 39; Paul R. Kimmel, *supra* note 46, at 453-54; *Preparing for Peace*, *supra* note 13, at 10.

<sup>53</sup> See *Mediation Across Cultures*, *supra* note 5, at 19. In one culture unwelcome words or deeds may be met with “immediate violence, in another with covert attack . . . while a third moves toward compromise and reconciliation.” *Id.* What constitutes conflict in one culture comprises a difference of opinion or behavior in others. *Id.* at 23. For example, “[a] serious insult in one setting---crossing one’s legs or showing the sole of one’s foot---is a matter of comfort in another. . . [while][a]n arrogant challenge in one culture---putting one’s hands on one’s hips---is a sign of openness in another.” *Id.*

<sup>54</sup> Kevin Avruch, *supra* note 10, at 24-25. A definition of conflict emphasizing scarcity of status, power, and resources suggests dispute resolution processes involving contention and struggle. *Id.* A definition of conflict emphasizing differing perceptions invites resolution processes involving talk, negotiation, and mediation. *Id.* Western cultures are more likely to see conflict stimulated by acts offensive to individuals while eastern societies are more likely to see it generated by acts offending groups. *Mediation Across Cultures*, *supra* note 5, at 29.

attitudes, behavioral norms and action habits regarding how conflicts are perceived, expressed, managed, and resolved.<sup>55</sup>

Scholars recommend learning about relevant cultures and customs before attempting intercultural dispute resolution work.<sup>56</sup> This helps prevent newcomers from missing important cues, misinterpreting data, misreading meanings, and confusing primary and secondary issues. Any of these errors makes action choices likely to fail when doing or teaching about dispute resolution in cultures other than their own.<sup>57</sup>

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<sup>55</sup> See *Mediation Across Cultures*, supra note 5, at 22; Susan Bryant, supra note 6, at 40.

<sup>56</sup> See, e.g., Michael Elliott & Kendra Brichtle, *Transfer of ADR to Central and Eastern Europe: Opportunities and Barriers Facing Mediation Practitioners*, 17 (2001) (unpublished paper on file with author) (asserting foreign professionals need cursory understanding of culture at a minimum); Christopher Honeyman, supra note 17, at 2 (arguing that among team members knowledge of relevant cultures is nearly essential); Jan Jung-Min Sunoo, *Some Guidelines for Mediators of Intercultural Disputes*, 6 *Neg. J.* 383, 387 (199 ) (asserting that responsible mediators and dispute resolution practitioners should make “make every effort to learn about the cultural and social expectations” of the persons they will deal with); Susan T. Wildau et al., supra note 17, at 307 (contending that consultants should be familiar with problems host society is addressing and aware of effective approaches and procedures that are available inside those cultures).

<sup>57</sup> *Mediation Across Cultures*, supra note 5, at 25. For example, when Soviet Premier Nikita Khrushchev visited the United States during the 1950s and gestured with clasped hands hold over his head, he was communicating a signal of friendship in Russia’s common culture. For most Americans including this author who was then a young boy, this gesture communicated a threatening, malevolent meaning of forceful victory over our country. See Paul R. Kimmel, supra note 46, at 458-59. Improving cross-cultural communication skills benefits professionals working in this country by improving their abilities to interact effectively with clients and patients from different cultural traditions. See Susan Bryant, supra note 6, at 38-41; Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 *Fl. Coastal L.J.* 219, 219-221 (2002). Conflicts between a client’s culture and American individualistic, adversarial justice systems occur frequently. Susan Bryant, supra at 46-47. For example, a battered Chinese woman who had killed her husband and possessed a strong self-defense claim refused to plead guilty to a misdemeanor “because she did not want to humiliate herself, her ancestors, and her children by acknowledging responsibility for the killing.” *Id.* at 47. Another female client seeking political asylum was reluctant to provide evidence of her “persecution by showing an injury to an area of her body that . . . [she] was committed, by religion and culture, to keeping private.” *Id.*

Knowing common cultural influences, however, does not accurately predict how individuals will behave.<sup>58</sup> Humans belong to and are influenced by multiple cultures.<sup>59</sup> In addition, all human groups contain as much behavioral variation within as among them.<sup>60</sup> Assuming one group membership inflexibly determines a person's future behavior ignores human complexity<sup>61</sup> and improperly stereotypes<sup>62</sup> by denying individuals their freedom to choose actions purposefully.<sup>63</sup>

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<sup>58</sup> See, e.g., *Mediation Across Cultures*, supra note 5, at 18; Kevin Avruch, supra note 10, at 105; Michelle LeBaron, supra note 15, at 18.

<sup>59</sup> See Kevin Avruch, supra note 10, at 15; Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 1996 *Am. U. J. Gender and Law* 269, 273-74. Professor LeBaron lists the following common cultural identities: "race, ethnicity, age, nationality, geographical setting, socioeconomic class, able-bodiedness or disability, sexual orientation, language, religion, profession or job role, and gender." Michelle LeBaron, supra note 15, at 10. Much early research literature privileged ethnic, tribal, or national cultural influences over those that stem from other group, structural, professional, or institutional settings, Kevin Avruch, supra at 12, and may influence the common error of conflating cultural influences. See Cynthia A. Savage, supra at 274.

<sup>60</sup> See, e.g., *Mediation Across Cultures*, supra note 5, at 18; Kevin Avruch, supra note 10, at 19-20; Roger Fisher et al., supra note 5, at 167.

<sup>61</sup> See, e.g., Kevin Avruch, supra note 10, at 12; Michael D. Lang & Alison Taylor, *The Making of a Mediator* 29-30 (2000); Bernard Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* 72-74 (2000); Cynthia A. Savage, supra note 59, at 274. Professor LeBaron articulates a valuable perspective for analyzing the complexities presented by differences often labeled cultural. She suggests that it is useful to think of starting points, differing places where people begin communicating and behaving; currencies or ways of acting in the world; and worldviews containing three dimensions: "social and moral, practical and material, and transcendent or spiritual." Michelle LeBaron, supra note 15, at 10-11. Assuming that future behavior will flow from one cultural identification or aspect of cultural orientation ignores this complexity. *Id.* at 35.

<sup>62</sup> See Roger Fisher et al., supra note 5, at 167; Cynthia A. Savage, supra note 59, at 273-74. Making assumptions about someone's future behavior based on their group affiliations is insulting as well as factually risky. Roger Fisher, et al., supra at 168. As Professors Fisher, Ury, and Brown warn, "the 'average' Japanese tends to favor more indirect methods of communication and negotiation but individual Japanese span the full gamut of negotiating styles. One prominent minister in Japanese government is famous for his brash 'American-style' negotiating---which is not at all typical of many Americans." *Id.* at 167.

<sup>63</sup> The belief that humans design the behaviors involved in conflicting, negotiating, and mediating even if not aware of these choices and the reasoning which underlie them provides a crucial component of the clinical teaching method which I have used for more than 30 years. Don

Scholars admonish using knowledge about general cultural influences on conflict resolution carefully. Although cultural influences do not reliably predict future behavior, they provide broadly useful information about behavioral preferences, action tendencies, and accepted practices.<sup>64</sup> Although a full range of behaviors may happen everywhere, cultural influences affect the frequency with which these actions typically occur.<sup>65</sup> Knowing probable action frequencies, norms which reinforce some behaviors and discourage others, and actions likely to predominate helps negotiators and mediators plan, adjust, and evaluate what they say and do.<sup>66</sup>

Gaining knowledge about cultural influences on conflict resolution behaviors in Haiti proved difficult because I found no literature exploring these topics in Haitian cultures and

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Peters, Mapping, Modeling and Critiquing: Facilitating Learning Negotiation, Mediation, Interviewing, and Counseling, 48 Fla. L. Rev. 875, 879-80 (1996) [hereafter Mapping, Modeling & Critiquing]. Humans routinely design courses of action aimed at changing existing circumstances into preferred situations. Chris Argyris & Donald A. Schon, Theory in Practice: Increasing Professional Effectiveness 205 (1974). Helping law students and lawyers identify what action theories they typically use and what assumptions and behaviors might work better, and then reflect on what they actually did in real and simulated contexts, helps them learn to behave purposefully and increase their professional skill. Mapping, Modeling & Critiquing, supra at 878-80. As Professor Cohen notes, [m]ost negotiations . . . are dyadic encounters where an individual has a great deal of power to shape the environment.” Jonathan R. Cohen, When People are the Means: Negotiating with Respect, 14 Georgetown J. Legal Ethics 739, 775-76 (2001). Mediators who do not examine the assumptions and question the beliefs underlying their behaviors are “merely talented mechanics” who lack “ability to evaluate success or failure of interventions” and the “tools and resources to learn from each experience.” Michael D. Lang & Alison Taylor, supra note 61, at xii.

<sup>64</sup> See, e.g., Mediation Across Cultures, supra note 5, at 18; Roger Fisher, et al., supra note 5, at 166-68; Michelle LeBaron, supra note 15, at 37.

<sup>65</sup> Bernard Mayer, supra note 59, at 73.

<sup>66</sup> See Roger Fisher, et al., supra note 5, at 166; Getting in step with the values and behavioral norms of persons with whom you are dealing helps negotiators and mediators succeed. Id. Professor LeBaron warns that while these generalizations usefully illustrate “broad differences and patterns,” they can equally deceive and mislead. Michelle LeBaron, supra note 15, at 35-36. All cultural groups contain broad behavioral variations, all cultures are in flux, and everyone has multiple cultural identities that arrange themselves differently over time. Id. at 35. Individuals do not always act under the influence of any one of their identities but rather blend these cultural messages in diverse ways and respond differently depending on “context, social dynamics, individual personality, mood, and a host of other factors.” Id. at 35-36.

contexts. They were not investigated as part of the needs assessment and fact-gathering visits. I found nothing published regarding negotiation or mediation in Haiti.<sup>67</sup> Also, Haiti is not included in any published research studies that identify and analyze consistent strands of cultural differences such as general tendencies toward individual or collective world views and high or low context communication.<sup>68</sup>

These two fundamental cultural differences, emphasizing individual or collective values and communicating indirectly or directly, probably affect conflict resolution perceptions, values, attitudes, and behaviors more than other factors that scholars have identified.<sup>69</sup> Individual

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<sup>67</sup> One intercultural scholar notes that the International Monetary Fund or the World Bank is not likely to prepare handbooks on how to negotiate most efficiently with counterparts in obscure countries and then gave Haiti as an example. See Kevin Avruch, *supra* note 10, at 45-46. The only article I found regarding dispute resolution in the Caribbean said nothing about cultural patterns, tendencies, and influences and it was published after my last visit. See generally Albert K. Fiadjoe, *Of Conflicts and Dispute resolution Processes*, 10 *Caribbean L. Rev.* 58 (2000).

<sup>68</sup> See, e.g., Charles M. Hampden-Turner and Fons Trompenaars, *Building Cross-Cultural Competence: How to Create Wealth from Conflicting Values* 2000 (analyzing managers from 40 countries); Geert Hofstede, *Culture's Consequences* (1980) (analyzing 55 countries); Terry Morrison, Wayne A. Conaway, and George A. Borden, *Kiss, Bow, or Shake Hands: How to Do Business in Sixty Countries* (1994) (analyzing 60 countries).

<sup>69</sup> The other factors include: (1) universalism or particularism; (2) specificity or diffuseness; (3) ascribed or achieved status; (4) inner or outer direction; and (5) sequential or synchronous time. Charles M. Hampden-Turner and Fons Trompenaars, *supra* note 68, at 11. Professor Hofstede identified five work-related values that influence negotiation: (1) power distance encompassing the degree of inequality in a society; (2) collectivism or individualism; (3) masculinity or femininity incorporating notions of assertiveness and empathy; (4) uncertainty avoidance; and (5) long term versus short term orientations. Geert Hofstede, *supra* note 68, at 14-15. Professor Salacuse identified these ten ways that culture affects negotiation: (1) objective in terms of whether contract or relationship supplies primary goal; (2) attitudes in terms of win/lose or win/win; (3) personal styles from informal to formal; (4) communications from direct to indirect communications; (5) time sensitivity from high to low; (6) emotionalism from high to low; (7) agreement form from specific to general; (8) agreement building from bottom up to top down; (9) team organization from one leader to consensus; and (10) risk taking from high to low. Jeswald W. Salacuse, *Ten Ways That Culture Affects Negotiating Style: Some Survey Results*, *Neg.J* 221, 223 (1998). Professor Brett and others published an empirical investigation of how individualism-collectivism, power distance, high-low context, and monochronicity-polychronicity differences affected negotiating to create joint gains. Jeanne M. Brett, et al., *Culture and Joint Gains in Negotiation*, 8 *Neg. J.* 61 (1998).

perspectives hold that individuals are primary and conflicts are owned and should be resolved by privately asserting and negotiating rights and pursuing adjudicative remedies.<sup>70</sup> Collective perspectives hold that communities are primary and, because conflicts threaten communal concerns, individuals should collaborate and seek informal resolutions that preserve social harmony.<sup>71</sup> Low context communications convey meaning primarily by words spoken and written and tend to be direct, open, explicit, and, occasionally, confrontational.<sup>72</sup> High context

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<sup>70</sup> *Mediation Across Cultures*, supra note 5 at 8. Individual and collective provide starting points for ways humans think of themselves and define their roles and relationships. Michelle LeBaron, supra note 15, at 60. Individual perspectives promote ideas of the self as “independent, self-directed, and autonomous.” *Id.* at 61. Western negotiation theory contains individualistic assumptions that bargainers are “able to make proposals and concessions and maximize gains” in their self-interest. *Id.* Parents holding this orientation reward their children for “initiative, personal achievement, and individual leadership.” *Id.* An individualistic starting point includes individual goal setting and action to achieve outcomes, ultimate individual autonomy and accountability, and emphasizing equality including the ability of others to make their own personal choices. *Id.* at 64. These different perspectives “connect at some point . . . because all groups are made up of individuals and all individuals find themselves in relationship with various groups. *Id.* at 61. In addition, humans change these starting points in response to contextual and other factors. *Id.* at 62.

<sup>71</sup> *Mediation Across Cultures*, supra note 5, at 8. Collective perspectives promote ideas of the self as “connected in a web of relations” who are “supports, their guardians . . . [and] actually extensions of themselves.” Michelle LeBaron, supra note 15, at 60. Decisions should be made in consultation with these important relations rather than individually. *Id.* at 61. Parents holding this orientation reward their children for “obedience, cooperation, deference to elders, and acting in harmony with family values.” *Id.* A collective starting point emphasizes not making individual decisions that disrupt group harmony and cohesion, extensive consultation when making decisions, accepting accountability to groups, and honoring hierarchy and accepting direction from individuals with higher status. *Id.* at 64. A mediation service in a Canadian province serving South Asian immigrants experienced difficulty generating agreements that lasted because it followed a western, individual tradition of having only the parents participate, ignoring the cultural tradition of these parents that other decision makers, including grandparents, aunts, uncles, siblings, and cousins, play important roles in major life choices. *Id.* at 60-61.

<sup>72</sup> See, e.g., Edward T. Hall, *Beyond Culture* 91 (1976); Paul R. Kimmel, supra note 46, at 460; Michelle LeBaron, supra note 15, at 55. Low context cultures “place more emphasis on asking for what you want” and more reliance on words than the nonverbal domain. Michelle LeBaron, supra at 55-56. Low context communicators tend to take things at face value, decouple roles and functions from status and identity, focus communication on accomplishing tasks efficiently, and ignore indirect cues. *Id.* at 59-60. A low context mediator working with two Chinese-Canadian

communications convey meaning primarily by custom, tradition, ritual, and tone, and tend to be indirect, closed, nuanced, implicit, cautious, and non-confrontational.<sup>73</sup>

These differences contribute to additional and perplexing variety in preferred conflict resolution approaches that include emphasizing contracts or relationships, attitudes toward time and expressing emotions, appropriate formality levels, non-verbal communication factors including eye contact, physical proximity and touching, and opening and closing rituals.

Accepting that Haitians demonstrate as much variation within their normal behaviors as occurs between their customary approaches and mine,<sup>74</sup> I found no published research suggesting general tendencies, reinforcing norms, predominate behaviors, or accepted actions in any of these common areas of difference to guide my design efforts.

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parents, believing that the son should live near both parents, ignored a suggestion by one that the child live with his grandmother in Hong Kong and solicited more ideas. Rather than staying on the Hong Kong option even though both parents liked it, using a high context communication approach they respected the mediator as an authority figure, discussed their work schedules, lifestyles, and relationships with their son, and indirectly and politely returned to grandmother placement later in the conversation. *Id.* at 58-59.

<sup>73</sup> See, e.g., Edward T. Hall, *supra* note 72, at 91; Paul R. Kimmel, *supra* note 46, at 460; Michelle LeBaron, *supra* note 15, at 55. High context cultures rely on communication “implicit in the context surrounding it rather than being named explicitly in words. Michelle LeBaron, *supra* at 55. Physical settings and telegraphing of ideas rather than spelling them out are used frequently. *Id.* Professor Augsburg describes a mediation of an incident involving a stolen sheep that featured extensive yet indirect communication, took two weeks to resolve, and placed a higher priority on social harmony than finding “truth” or assigning blame. *Mediation Across Cultures*, *supra* note 5, at 219-20. Professor LeBaron asserts that “Western cultures tend to gravitate toward low-context starting points and Eastern and Southern cultures tend to employ high-context communication.” Michelle LeBaron, *supra* at 55. She also cautions that this difference is a helpful way of making educated guesses but functions poorly as a predictor of future behavior because most people use direct or indirect speech depending on context and general tendencies vary by gender, region, generation, urban-rural, and many other difference dimensions. *Id.* at 57.

<sup>74</sup> *Mediation Across Cultures*, *supra* note 5 at 18; see note 60 *supra*.

The very short time frame presented another huge challenge because it provided little opportunity to do very much.<sup>75</sup> My general inquiry asking what can be done effectively in six to seven hours produced a response from a British colleague with extensive intercultural dispute resolution experience that it probably provided sufficient time to take participants out for a meal and a few drinks.<sup>76</sup> We ensured that all of our full-day sessions included a lunch catered by local citizens usually affiliated with sponsoring organizations.

Short-term involvement in actual intercultural conflicts has been identified as bad practice because building long-term relationships provides the best way to avoid interventions that produce harm rather than benefit.<sup>77</sup> Even though individual workshops did not last long, our project did not intervene in actual conflict. Our project was conceived and funded as a traveling initiative with no specific Haitian home sponsor. Although having established Haitian organizations with whom we could collaborate repetitively would have helped generate more

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<sup>75</sup> See Kevin Avruch, *supra* note 10, at 107 (arguing that it is “hubris of the worst kind to believe that a weekend training of semiscrpted role-plays or simulations has one thinking like a Bosnian Muslim whose family perished in a latter day concentration camp, an Israeli Jew who grew up breathing the air of the Holocaust, a Palestinian Arab who grew up breathing the air of the 1948 Calamity, or a Hutu or Tutsi with memories of rivers and bloated bodies”). The Florida Supreme Court, for example, requires twenty hours of instruction followed by observing four county court mediations conducted by a certified mediation and then doing four county court mediations under the supervision of a certified mediator to gain certification as a county court mediator in Florida. See Fla. R. Cert. & Ct.-Apptd. Mediators 10.010(a)(1) and (2).

<sup>76</sup> Comment of Bill Yates, Mediator with International Alert, at the Conference on the Reflective Practice/Best Practices in Building National and Regional Conflict Resolution Systems, March 30, 2001.

<sup>77</sup> Christopher Honeyman, *supra* note 17, at 2-3. The dispute resolution practitioners who developed this guideline concluded that it flowed from a “first, do not harm” guiding ethic, emphasizing the dangers that can result when participants hear something different and more sweeping than neutrals unfamiliar with local contexts intend. *Id.* at 2.

long-lasting impacts,<sup>78</sup> our project's five year life built long term relationships with more than a dozen Haitian citizens committed to resolving disputes effectively.<sup>79</sup>

My short time frame allowed little time for extensive activity seeking to elicit from participants their cultural knowledge regarding interpreting and expressing conflict and what does and does not work in resolving it. Called elicitive<sup>80</sup> or emic in anthropology,<sup>81</sup> this approach seeks to begin training programs with and build them on local insights, understandings, and experiences.<sup>82</sup> It aims to help participants raise their knowledge to explicit levels and use it to construct appropriate conflict intervention and resolution approaches for the problems they face.<sup>83</sup> It seeks to use what is commonly understood by and readily available to participants. It strives to avoid attempts to transfer concepts encased in jargon and potentially counterproductive assumptions from other cultures.<sup>84</sup> It also maximizes chances that workshops will provide relevant and practical information.

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<sup>78</sup> See Wildau, et al., supra note 17, at 314 (arguing “the right in-country partners . . . are one of the most critical factors in the ultimate success of a consultation); see also notes 478-480 infra and accompanying text.

<sup>79</sup> The concern is that these parachute trainings can do harm rather than good because of inability to build on site relationships and to learn what others before have done and how those who live there have received it. Christopher Honeyman, supra note 17, at 3. Our project developed a cadre of trained citizens, many of whom visited Florida. These citizens included lawyers, teachers, business men and women, and college students. All indicated that our work had value. We endeavored to contact them on subsequent visits and several helped us present workshops. A general spirit and attitude of goodwill was also identified as an important component of dispute resolution work abroad. *Id.* These practitioners mentioned as an example of goodwill demonstrating “practical and visible kind of respect . . . [such as] subjecting oneself to the long train rides that locals must take because their budgets often will not allow air travel.” *Id.* Although Haiti lacks a train system, we subjected ourselves to the same dusty, bumpy, pot-hole filled roads that Haitians travel when we left Port-au-Prince to do workshops in rural Gonaives, Mirabelais, and Jacmel.

<sup>80</sup> Susan T. Wildau, et al., supra note 17, at 307; *Preparing for Peace*, supra note 13, at 55-62.

<sup>81</sup> *Mediation Across Cultures*, supra note 5, at 35; Kevin Avruch, supra note 10, at 61-62.

<sup>82</sup> *Id.*

<sup>83</sup> *Preparing for Peace*, supra note 13, at 55, 64-65.

<sup>84</sup> *Id.* at 81.

An alternative approach, called proscriptive<sup>85</sup> or etic,<sup>86</sup> brings theory, practice, and vocabulary from the presenter's culture to the participants' culture with no adaptation other than linguistic translation. This approach often assumes that the imported material is neutral technology, has a high degree of universality, and is not embedded with cultural assumptions and influences.<sup>87</sup> It risks communicating that imported material provides the right way to think and act and that a workshop's goal is for participants to learn by conforming their perceptions and behaviors to the models presented.<sup>88</sup>

Intercultural presentations often combine elicitive and prescriptive approaches to maximize the strengths and minimize the weaknesses of each.<sup>89</sup> Although scholars and practitioners recommend extensive use of the elicitive or emic approach in intercultural conflict resolution,<sup>90</sup> they acknowledge that the degree of emphasis it receives connects to contextual factors.<sup>91</sup> Using the elicitive approach consumes considerable time,<sup>92</sup> particularly when

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<sup>85</sup> Id. at 39, 47-53.

<sup>86</sup> *Mediation Across Cultures*, supra note 5, at 35.

<sup>87</sup> *Preparing for Peace*, supra note 13, at 51.

<sup>88</sup> Id. at 38. Professor Lederach describes learning this lesson by a paradigm-shifting experience at the beginning of his first workshop in Guatemala. After providing an overview of the western mediation process, he sought to demonstrate it by inviting participants to play the husband and wife in a role-play he had written based on a local situation he learned from a Guatemalan. When he asked for comments after an hour long demonstration, the first speaker addressed the participants and said "you two looked like gringos!" Id. at 37-38. Our fact-finding team was encouraged to emphasize that we were not importing a U.S. system because many Haitians fear American systems. Fact Finding Notes on file with author at 5, October 21, 1996 [hereafter Fact Finding Notes].

<sup>89</sup> See, e.g., Kevin Avruch, supra note 10, at 68-72; *Preparing for Peace*, supra note 13, at 40; Susan T. Wildau, et al., supra note 17, at 308. An approach integrating both perspectives "minimizes cultural imposition, expands cross-cultural awareness and learning, promotes local empowerment, and increases the probability that the consultation project will be effective in building appropriate and effective dispute resolution systems, procedures, and skills." Susan T. Wildau, et al., supra at 308.

<sup>90</sup> See Christopher Honeyman, supra note 17, at 4; Susan T. Wildau, et al., supra note 17, at 308.

<sup>91</sup> See *Preparing for Peace*, supra note 13, at 63 (describing his personal challenge to recognize when and where a prescriptive approach is useful).

language interpretation is needed. Descriptions of successes with this approach have involved sessions lasting at least four days and often longer.<sup>93</sup> Lacking that much time, I chose to combine proscriptive and elicitive by using an accepted approach of beginning with etic presentations and seeking to move as far as possible in our limited time to emic understandings derived from participants.<sup>94</sup> I hoped this approach would help me learn what, if any, aspects of my notions of effective questioning and listening behaviors in mediation transferred usefully to common Haitian cultural contexts and conflicts.<sup>95</sup>

Narrowing coverage supplied another design decision mandated by the limited time frame. I saw no way resolution options, negotiation, mediation, and designing institutional systems, the complex topics covered minimally in the workshop booklet, could even be introduced helpfully in the available time. Pursuing such an ambitious agenda would leave no time for anything other than describing our views and experiences regarding these topics in prescriptive ways. Each new area presented prescriptively risks a confusing and ultimately unhelpful intercultural transfer. This ambitious agenda also would leave no time for eliciting participant knowledge, discussing presentations, and doing and debriefing role-plays.

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<sup>92</sup> See *id.* at 68.

<sup>93</sup> *Id.* at 37, 73 (describing 4 day workshops on conflict resolution and mediation for groups of church leaders in Central America and a one year long program in Costa Rica meeting with a group twice weekly). A survey of over 20 American dispute resolution professionals working in the newly independent states of Eastern Europe and former Soviet states showed that training workshops usually lasted “around a week.” Michael Elliott & Kendra Brichle, *supra* note 56, at 10. I have had success following and adapting Professor Lederach’s suggestions in my five day mediation workshops in Kampala, Uganda.

<sup>94</sup> See *Mediation Across Cultures*, *supra* note 5, at 38; J.W. Berry, *On Cross-cultural Comparability*, 1 *Int’l J. of Psych.* 124 (1966).

<sup>95</sup> John Paul Lederach criticizes using this approach in longer workshop formats. See *Preparing for Peace*, *supra* note 13, at 38, 121. My experiences demonstrated many of the problems Lederach predicted. See notes 301-303, 309-311 *infra* and accompanying text.

I chose to cover only two of the four topic areas developed in the earlier team's agenda, dispute resolving options and mediation. Deleting negotiation allowed me to avoid attempting to condense into a narrow time frame a theoretically complex set of assumptions and behaviors<sup>96</sup> subjected to strong cultural influences affecting values, norms, motivations, and strategic perceptions.<sup>97</sup> Not covering systems design and institutionalization let me sidestep my ignorance of Haitian organizations and their individual contexts, strengths and challenges.

Our project's non-judicial and non-commercial focus suggested that community mediation supplied the closest American analogue to approaches that our participating organizations were likely to develop. Except for unions and schools which might establish contractual provisions or rules requiring mediation, most Haitian organizations would have to rely on voluntary participation in resolution systems. Deleting institutionalization also sidestepped difficult challenges of generating voluntary use of mediation, problems that American mediation systems generally have not resolved satisfactorily.<sup>98</sup>

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<sup>96</sup> Negotiation is a complex process to map theoretically because it involves multiple overlapping and independent perceptions and operations. Mapping, Modeling, and Critiquing, *supra* note 61, at 887.

<sup>97</sup> See Jeanne M. Brett, *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions about Cultural Boundaries* 6-14 (2001); note 69 *supra*.

<sup>98</sup> Generating voluntary mediations in community dispute resolution centers has not been easy. Research suggests that mediation programs that depend upon voluntary participation attract relatively few participants even when offered free. See Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 *Will. L. Rev.* 570-71 (1997). The Dade County, Florida, community dispute resolution program, one of the pioneer projects in Florida, closed in 1995 in part because of a disappointingly low caseload. See Sharon Press, *Institutionalization: Savior or Saboteur of Mediation?*, 24 *Fla. St. U. L. Rev.* 903, 906 n.11 (1997). A voluntary mediation program attached to the University of Florida's student services office, launched in 1996 with 12 graduate and law students whom I helped instruct as mediators, generated only seven cases that entire academic year on a campus with more than 42,000 students. Don Peters, *Oiling Rusty Wheels: A Small Claims Mediation Narrative*, 50 *Fla. L. Rev.* 761, 770 n.20 [hereafter *Oiling Rusty Wheels*].

Encouraging Haitians to learn and then teach skills to resolve or manage conflicts through mediation struck me as the best use of our limited time.<sup>99</sup> I chose to emphasize mediation for three reasons. Scholars contend that third party intervention which seeks to help disputants resolve or manage conflict occurs in all cultures throughout our world.<sup>100</sup> We had some evidence that mediation was used occasionally in some segments and sectors of Haitian life. Haiti's labor and commerce code has provisions authorizing mediation to begin dispute resolution.<sup>101</sup> We learned that Justices of the Peace in Haiti have a duty to attempt mediation and conciliation but this does not dependably happen.<sup>102</sup> We also learned that Haitians occasionally consult clergy, family elders, aldermen, NGO leaders, or others with authority to help them informally resolve conflicts.<sup>103</sup>

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<sup>99</sup> See William Ury, *The Third Side: Why We Fight and How We Can Stop* 113, 115-16, 125-31, 143-49 (Penguin Paper ed. 1999) (arguing that everyone has an important role in preventing conflict by de-legitimizing violence, teaching tolerance, and helping resolve conflicts that emerge by mediating).

<sup>100</sup> See, e.g., *Mediation Across Cultures*, supra note 5, at 191 (the experience of mediation is a universal one); *Preparing for Peace*, supra note 13, at 93 (mediation has universal facets and performs several functions in all cultures; and Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 20 (2d ed. 1996) (asserting mediation has long and varied history in almost all of the world's cultures).

<sup>101</sup> Fact Finding Notes, October, 1992, p.2. Although our workshops seldom drew commercial lawyers or judges as participants, we heard no indication and saw no evidence that established labor mediation programs and systems exist in Haiti.

<sup>102</sup> Id. at 9, 26. We were told that persons with disputes come to the Justice of the Peace [*juge du pais*] who listens without keeping a record. The Justice will try to resolve it informally and whatever follow up occurs depends on the judge. We were also told that follow up frequently did not occur because Justices typically work from 10:30 a.m. to 2 p.m., are underpaid, need to work extra jobs to survive, and often are simply "lazy." Id. at 6. Again we saw no evidence of any systematic uses of mediation in connection with Justice of the Peace courts either in Port-au-Prince or on our four visits to more rural areas outside the capital.

<sup>103</sup> Id. at 8.

Scholars also advocate teaching mediation as a good way to help communities resolve conflicts that cannot be prevented.<sup>104</sup> Mediation gives people frustrated by unsuccessful negotiation an option other than resorting to self-help remedies involving coercion and violence.<sup>105</sup> Haiti has suffered a violent history beginning with one of the most ruthless and bloody legacies of colonial mistreatment during the French administration of Saint Domingue.<sup>106</sup> This included the brutal dictatorships of the Duvaliers, who killed an estimated 30,000 political opponents,<sup>107</sup> and is likely to continue into the future.<sup>108</sup> Anecdotal information suggests that

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<sup>104</sup> See William Ury, *supra* note 99, at 129-30 (advocating that teaching joint problem solving through value-creating negotiation and mediation helps prevent conflicts and resolve those that cannot be prevented).

<sup>105</sup> See Kevin Avruch, *supra* note 10, at 80-81.

<sup>106</sup> Many historical accounts document the cruelties practiced against Africans enslaved in Haiti, or Saint Domingue as it was called then. Jennie M. Smith, *supra* note 28, at 18. Carolyn Fick writes that “punishment, often surpassing the human imagination in its grotesque refinements of barbarism and torture, was the order of the day.” Carolyn E. Fick, *The Making of Haiti: The Saint Domingue Revolution from Below* 34 (1990). This led to one of the most extraordinary revolutions in modern history when former slaves won their freedom and founded the second democracy in the western hemisphere in 1804.

<sup>107</sup> See Charles Arthur, *supra* note 8, at 22-24. Haiti has experienced a tortuous political development featuring political instability, two American invasions, and brutally repressive dictators. Two distinct views of how Haiti evolved emerged immediately after the revolution and await reconciliation today. *Libete*, *supra* note 23, at 45. A small but powerful minority composed primarily of mulattoes who had been free and owned property before the revolution sought to inherit and keep the wealth formerly held by the French. The black, ex-slave majority of the population sought the opportunity to farm their own land. *Id.* The small elite group soon engaged in a century’s worth of struggle for control of the state apparatus through the presidency while the majority retreated to rural agricultural and distanced themselves from political life. *Id.* Coups d’etat and political uprisings became common and of the 21 presidential administrations between 1843 and 1915, only 2 managed to complete their terms. *Id.* at 47. One commentator offered this summary of Haitian governmental leadership:

“[Duvalier] and his parasitic entourage had left behind an economy, an ecology, and a human landscape traumatized to the brink of no return, but he was hardly worse than most of the other thirty chiefs of state, strutting chancellors of misleadership and kleptocracy, who had preceded him. Jean-Jacques Dessalines, revered today as the father of Haitian independence, crowned himself emperor in 1804 and waged a civil war against the light skinned mulattoes—the ever present elites in Haiti’s all-important war against the hierarchy of race. Almost without exception, the men who followed Dessalines contributed enthusiastically to Haiti’s mythic legacy of avarice and tyranny and, like

contemporary Haiti is generally a violent society,<sup>109</sup> that many Haitians lack concepts and skills for dealing with conflict other than avoidance or force,<sup>110</sup> and that problem solving by negotiating to work things out seldom occurs.<sup>111</sup> Sofia Clark d'Escoto, a mediator working with the Department of Human Rights and Protection in Port-au-Prince, told us about an unpublished

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Dessalines himself, were subsequently assassinated, or deposed by insurrections and shipped into luxurious exile. If any single feature---other than its pariah status---had defined the nation throughout its course of independence, it was the lack of political self-discipline. On and on, the country marched in place, dirtied and shunned, bearing its perpetually dismal image of *sauvagerie*. The truest aspirations of Haiti's founding father, modeled on the libertarian doctrines of the French and American revolutions, failed to conjugate. For almost two centuries, there had been only one overriding point of view in command---singular---and one verb tense---present. Me, now. The ideology of infants." Bob Shacochis, *supra* note 23, at 14-15.

<sup>108</sup> Charles Arthur, *supra* note 8, at 71. Arthur predicts that Haiti's political future "is almost certain to be volatile." *Id.* The United States State Department warned against travel to Haiti on February 5, 2001, because of unstable conditions including "bombings in public areas, politically motivated killings, and indiscriminate gunfire directed at pedestrians in Port-au-Prince. State Department Travel Warning, February 5, 2001; see note 507 *infra*.

<sup>109</sup> See Jennie M. Smith, *supra* note 28, at 32 (comment of Canadian who was a member of the Civilian Police Force of the United Nations charged with supervising and training the new Haitian police force, founded in 1995 to replace the previous, infamously corrupt and abusive, force). As Graham Greene wrote in his famous novel set in Haiti, "Violent deaths are natural here. He died of his environment." Graham Greene, *The Comedians* [need page] (Penguin ed. 1967). Violent crime including armed robbery, car-jacking, and shoot outs between rival criminal gangs is increasing. See Charles Arthur, *supra* note 8, at 37. During our last visit in October our interpreter was mugged on her way to one of our workshops and our van had to drive around a dead body in the middle of a street near Quisqueya University where another of our sessions occurred.

<sup>110</sup> Jeannie M. Smith, *supra* note 28, at 32.

<sup>111</sup> *Id.* Haitians indicated that "problem solving skills are very limited here," *id.* at 20; and that many are quick to engage in violent rhetoric, *id.* at 25, and to demonize the other sides in conflicts. *Id.* at 19. A Haitian sociologist with a PhD. From Columbia University whom I met in our hotel dining room, told me that Haitians "generally don't have a reciprocal notion of negotiating, of giving to get." Workshop Notes, October 2, 2000. He also that Haitians will typically "seek to maximize self-interest" and "if they have a chance, they will grab it all." *Id.* His description fit the behavior of many Haitian presidents throughout its history. See note 107 *supra*. During much of the 19<sup>th</sup> century the fight for the Haitian presidency became a fight for the spoils that accompanied it. "Once in control, the incumbent and the clique around him, anticipating that it would only be a matter of time before rival groups would conspire to unseat them, moved quickly to plunder the state coffers and fleece the treasury." *Libete*, *supra* note 23, at 47.

study of five different land disputes in rural regions of Haiti that found that areas with mediators had better chances of avoiding violence when these conflicts were resolved.<sup>112</sup>

In addition, mediation supplies a dispute resolution process that can help overcome deficiencies in a country's legal structure.<sup>113</sup> It can supplement judicial systems perceived to be corrupt and provide effective conflict resolution systems where little respect for or access to existing legal systems exists.<sup>114</sup> The Haitian judicial system lacks independence from the executive branch.<sup>115</sup> Members of the army and the Haitian police have threatened, beaten, and

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<sup>112</sup> Fact Finding Notes at 18-19, October 23, 1996.

<sup>113</sup> Raymond Shonholtz, Strengthening Transitional Democracies Through Conflict Resolution: Conflict Resolution Education, Training, and Global Development, 552 *Annals of Am. Acad. Pol. Sci.* 139, 142 (1997).

<sup>114</sup> *Id.* One motivation for developing court-annexed mediation in new democracies was to supplant the perceived corruption of existing legal systems. *Id.* Weak legal systems lacking public respect have stimulated efforts to build mediating processes in Russia, the republics of the former Soviet Union, and some African nations. *Id.* Mediation systems lacking a dependable rule of law underlying them, however, create major challenges enforcing agreements. See Paul E. Salem, A Critique of Western Conflict Resolution from a Non-Western Perspective, 9 *Neg. J.* 361, 367-68 (1993). Several participants asked questions reflecting concerns how disputants can enforce mediation agreements which are not honored.

<sup>115</sup> GAO Assessment, *supra* note 24 [comments of Jess T. Ford, Associate Director, International Relations and Trade Issues, National Security and International Affairs Division, U.S. General Accounting Office, summarizing GAO's review of assistance provided to the Haitian justice system]. Associate Director Ford stated that before the American military intervention in 1994, the Haitian military controlled the judiciary, dominating it with political cronies, and influencing the appointments of magistrates and decisions made by them. *Id.* This left the judiciary widely regarded as inefficient and corrupt. *Id.* He also concluded after reviewing the American assistance program from 1995-2000 that the judicial sector "has not undergone major reform and as a result lacks independence from the executive branch." *Id.* He noted that it has "an effective internal oversight organization that is unable to stem corruption. *Id.* Marguerite Laurent, Chair of the Haiti Task Force of the International Law Section of the National Bar Association and the Haitian Lawyers Leadership Network, argues that: "[J]ustice in Haiti is for sale and has always been corrupt. The rich and powerful in Haiti have been above the law and have controlled and prevented the development of an independent judiciary." Marguerite Laurent, *supra* note 39, at 13. Judges at all levels, both retrained and newly appointed, are continuing the long-established practice of allowing their rulings to be influenced by bribes or political considerations or both. Charles Arthur, *supra* note 8, at 36.

sometimes killed judges, prosecutors, and lawyers.<sup>116</sup> Judges and prosecutors often are afraid to issue arrest warrants or investigate cases involving the military, police, or wealthy civilians.<sup>117</sup> Corruption and extortion exist at every level of the Haitian judicial system.<sup>118</sup> Police are paid to arrest political rivals, judges and prosecutors demand payment before issuing orders or starting investigations, bureaucrats arbitrarily impose taxes not authorized by laws, and jailers demand food before families can visit prisoners.<sup>119</sup>

The Haitian judicial system provides services only to a small segment of the country's population.<sup>120</sup> It enjoys little respect from most Haitians.<sup>121</sup> People avoid contact with it unless they have no other choice.<sup>122</sup> Many judges, especially the lowest level judges de paix, have neither been to law school nor received any judicial training.<sup>123</sup> Haiti's judicial system also suffers from serious personnel shortages, and inadequate buildings, equipment, vehicles, legal texts, and supplies.<sup>124</sup> Congressman Delahunt, during a review of aid to improve the Haitian judiciary, noted: "when we talk about what happens within the judiciary, do not visualize a picture where computers are available because the problem is one of pencils and paper available."<sup>125</sup>

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<sup>116</sup> National Coalition for Haitian Refugees, *No Greater Priority: Judicial Reform in Haiti* (1995), in *Libete*, supra note 23, at 67.

<sup>117</sup> *Id.* at 67-68.

<sup>118</sup> *Id.* at 68.

<sup>119</sup> *Id.*

<sup>120</sup> GAO Assessment, supra note 24 [comments of Associate Director Jess T. Ford]. An estimated 60% of Haitian citizens have no meaningful access to Haiti's judicial system. Fact Finding Notes at 5.

<sup>121</sup> Pre-workshop visits learned that many Haitians believe that most judges are corrupt and inept, Fact Finding Notes at 4, have a tremendous amount of skepticism against judicial authority, *id.* at 19, and that Haiti has never had a functioning judicial system, *id.* at 5.

<sup>122</sup> National Coalition for Haitian Refugees, supra note 116, at 68.

<sup>123</sup> *Id.*

<sup>124</sup> GAO Assessment, supra note 24 [comments of Associate Director Jess T. Ford].

<sup>125</sup> *Id.* [comments of Congressman William D. Delahunt of Massachusetts].

Limited time and anticipated cultural differences also persuaded me to focus my design on only a limited portion of the mediation process that I teach in the United States. I looked for core components of mediation, functions that need to be performed regardless of cultural setting and context.<sup>126</sup> Theorizing that people everywhere want to talk and be heard, understood, and respected when they are in the midst of conflict helped me isolate the component of gathering perspectives from disputants in ways that pursue these objectives.<sup>127</sup> This encompasses creating and conducting a process which lets disputants verbally express their conflict experiences and explore what might be done to resolve them.<sup>128</sup> It also lets participants personally experience the respect and empowerment that come from having their grievances, concerns, experiences, and feelings heard and acknowledged.<sup>129</sup>

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<sup>126</sup> See *Mediation Across Cultures*, supra note 5, at 195 (describing six functions mediation performs regardless of cultural setting); *Preparing for Peace*, supra note 13, at 93-96 (describing five facets described as basic aspects and components necessary for any third party process interventions in social conflict).

<sup>127</sup> Professor Lederach identified this as a universal facet of third party intervention. *Preparing for Peace*, supra note 13, at 94-95.

<sup>128</sup> See, e.g., *Preparing for Peace*, supra note 13, at 95 (contending that gathering perspectives provides opportunities for mediation participants to “express and air their grievances and concerns”); Sally Ganong Pope & Robert A. Baruch Bush, *Understanding Conflict and Human Capacity: The Role of Premises in Mediation Training*, in *Designing Mediation: Approaches to Training and Practice Within a Transformative Framework* 61, 62 (Joseph P. Folger & Robert A. Baruch Bush, eds., 2001) [hereafter *Designing Transformative Mediation*]; (arguing that parties report high satisfaction in mediation when they are “able to deal with the issues they felt were important, had the opportunity to present their views fully, had a sense of being heard, and were helped to better understand each other); John Winslade & Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution* 70 (2000) (asserting that mediators typically elicit telling the story of the conflict early in the process).

<sup>129</sup> Professor Lederach believes that “most crucial is the element of legitimating a recognition and acknowledgment of the person or groups involved,” letting them be “heard and taken seriously.” *Preparing for Peace*, supra note 13, at 94. David W. Augsburger captures this in three functions that he asserts mediation performs regarding of cultural setting: allowing talk in natural, comfortable, mutually intelligible verbal style; permitting ventilating anger in free, appropriate fashion; and facilitating receipt of an increased sense of power and person worth from the attention that signals that concerns are important. *Mediating Across Cultures*, supra note 5 at 195. William Ury argues that the essence of mediation is listening attentively to people in

Realizing that simply discussing ways to accomplish these objectives might not satisfy earlier participant feedback to make sessions more practical, I theorized that questioning and listening behaviors supply the essential actions that mediators use to perform these tasks. Questioning and listening choices constitute the behavioral core of most tasks that American mediators perform<sup>130</sup> because they supply primary building blocks of interactive communication processes.<sup>131</sup> The booklet prepared by the earlier team contained short sections presenting information about these topics. Studies also show that American law students increase their questioning and listening abilities after instruction.<sup>132</sup> I decided to combine American ideas about the effective performance of these core mediation behaviors with a presentation of mediation's encouragement of perspective sharing as the first and central substantive feature of

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dispute, asking them what they really want, and urging them to think hard about the costs of not reaching agreement. See William Ury, *supra* note 99, at 145.

<sup>130</sup> See Mapping, Modeling & Critiquing, *supra* note 63, at 895 n.33.

<sup>131</sup> Michael O. Lang & Alison Taylor, *supra* note 61, at 121.

<sup>132</sup> *Id.* The questioning and listening behaviors needed to encourage mediation participants to tell their stories and to hear them deeply are very similar to the actions needed to interview clients effectively. See Kimberlee K. Kovach, *supra* note 12, at 44-45. Students increased their use of open inquiry after studying and practicing instructional materials advocating the value of this action choice in interviewing contexts. See, e.g., Don Peters, You Can't Always Get What You Want: Organizing Matrimonial Interviews to Get What You Need, 26 Cal. West. L. Rev. 257, 284 n.84 (1989-90) (students used an average of 7% open inquiry in actual client interviews after ten hours of instruction as opposed to an average of 2% before); Paula L. Stillman et al., Use of Client Instructors to Teach Interviewing Skills to Law Students, 32 J. Legal Ed. 395, 401 (1982) (law students increased their use of open questions after simulation-based instruction). In addition, students have similarly increased their use of active listening. See, e.g., John L. Barkai and Virginia O. Fine, Empathy Training for Lawyers and Law Students, 13 Sw. U. L. Rev. 505, 526-27 & nn.63-64 (students increased empathy scale measurements from a pretest mean of 2.46 to a post-test mean of 4.91 on the Truax Accurate Empathy Scale); Peters, *supra*, at 279 n. 69 (students increased average use of active listening from 7% to 15% of total responses in actual client interviews).

the workshop's design. Action theories<sup>133</sup> predicting intended effects accompanying question-phrasing and listening choices supplied the core of this effort.

To expand coverage if time allowed, I also decided to continue emphasizing questioning and listening by introducing how these behaviors underlie other important ways American mediators facilitate movement toward consensual conflict resolution.<sup>134</sup> These movement-facilitating options include exploring interests by helping disputants identify and articulate what they really want.<sup>135</sup> Interests reflect disputants' needs and desires, motivate human actions, and touch the core of conflicts.<sup>136</sup> Culture often influences how interests are perceived, defined, and prioritized between self and others.<sup>137</sup>

Helping disputants identify and explore what alternatives they possess if they do not reach a consensual agreement provided another component of American mediation included in the workshop design.<sup>138</sup> Seriously identifying and assessing costs of not reaching agreement

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<sup>133</sup> Action theories are generalizations about which behaviors are likely to produce intended effects and why. See Chris Argyris & Donald A. Schon, *supra* note 63, at 3-6; Mapping, Modeling & Critiquing, *supra* note 63, at 878; Donald A. Schon, *Educating the Reflective Practitioner: Toward a New Design for Teaching and Learning in the Professions* 255-91 (1987).

<sup>134</sup> This choice reflects the author's bias towards a problem-solving focused, resolution-oriented, agreement-centered approach to mediation. This approach has been analyzed and criticized as a satisfaction orientation. See Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* 15-32 (1994).

<sup>135</sup> William Ury describes this as an essential aspect of mediation. See William Ury, *supra* note 99, at 145. Bernard Mayer suggests that mediation generally pushes "people to move beyond their focus on what it is they want to a somewhat deeper consideration of why they want it, or their interests." Bernard Mayer, *supra* note 61, at 219. Exploring interests falls within Professor Lederach's universal mediation facet of negotiating. *Preparing for Peace*, *supra* note 13, at 94.

<sup>136</sup> See, e.g., Roger Fisher, et al., *supra* note 5, at 40-41; Bernard Mayer, *supra* note 61, at 207; Karl A. Slaikeu, *When Push Comes to Shove: A Practical Guide to Mediating Disputes* 26 (1996).

<sup>137</sup> Jeanne M. Brett, *supra* note 97, at 83-89.

<sup>138</sup> William Ury identifies the task of urging disputants to think hard about the costs of not reaching agreement as a universal component of resolving conflict. William Ury, *supra* note 99 at 145. Professor Lederach includes it as a culturally-influenced formula under the universal mediation facet of helping disputants negotiate. *Preparing for Peace*, *supra* note 13, at 94.

often helps persons in conflict move toward resolution. Cultural influences significantly affect how alternatives are perceived, defined, and evaluated.<sup>139</sup> Concepts of framing and reframing supplied the other component of American mediation that was introduced briefly, with continued emphasis on questioning and listening behaviors.<sup>140</sup>

I hoped that this narrowed emphasis within the mediation process would sidestep several issues that seemed likely to carry strong cultural influences. It avoided presenting a comprehensive staged model of the mediation process which, from an American perspective, begins with the mediator's opening remarks and the parties' initial statements, and then alternates joint session and caucus conversations.<sup>141</sup> Cultures have different introduction and trust-building rituals that are designed to develop rapport and encourage conversations<sup>142</sup> that do not necessarily coincide with the formal beginning scripts American staged mediation models present. Cultures also define getting down to business differently.<sup>143</sup>

Attitudes toward how mediators should facilitate negotiation presumably vary by culture. My narrowed focus de-emphasized anticipated cultural differences regarding topics that spark

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Bernard Mayer argues that mediators routinely help people think through their choices and apply appropriate amounts of pressure to encourage them to move toward resolution. Bernard Mayer, *supra* note 61, at 210-11.

<sup>139</sup> See Jeanne M. Brett, *supra* note 97, at 98-103.

<sup>140</sup> Frames influence how people perceive and interpret behaviors, communications, and situations, and how they make decisions about them. See, e.g., Mark D. Bennett & Michelle S.G. Hermann, *The Art of Mediation* 87 (1996); Christopher W. Moore, *supra* note 98, at 217-18; and Linda L. Putnam & Majia Holmer, *Framing, Reframing, and Issue Development*, in *Communication and Negotiation* 128, 129 (Linda L. Putnam & Michael E. Roloff eds., 1992).

<sup>141</sup> See Dorothy J. Della Noce, *Mediation as a Transformative Process: Insights on Structure and Movement*, in *Designing Transformative Mediation*, *supra* note 128, at 71, 72-74 (critiquing the domination of stage models as examples of "unexamined, taken-for-granted, common sense" of the mediation field). Encouraging Guatemalan participants to use an American staged mediation model might have contributed to Professor Lederman's experience when an observer characterized his countrymen playing disputant roles as looking like Gringos. See note 88 *supra*.

<sup>142</sup> See Susan Bryant, *supra* note 6, at 74-75.

<sup>143</sup> *Id.*

disagreement in American mediation practice including whether mediators may evaluate claims or should use only facilitative behaviors,<sup>144</sup> and how they should balance goals of impartiality with autonomous and informed decision-making when mediators possess important knowledge that disputant's lack.<sup>145</sup> This narrowed focus also avoided culturally influenced issues concerning balancing relationship and agreement goals, ending mediations, and drafting settlement documents.<sup>146</sup>

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<sup>144</sup> This debate rages in law reviews and dispute resolution literature and focuses on whether mediators may evaluate cases or should only facilitate parties' negotiation. See generally James J. Alfani, Moderator, Evaluative Versus Facilitative Mediation: A Discussion, 24 Fla. St. U. L. Rev. 919 (1997). An empirical study based on interviews with more than 80 Florida mediators showed extensive concern with fundamental value dilemmas when different objectives of the mediation process conflict. See Robert A. Baruch Bush, The Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, 1994 J. Disp. Res. 1, 43. One central concern reflected in this study, creating dilemmas reported more frequently than any other type, concerned tensions between promoting party self-determination by engaging only in facilitative behaviors, and encouraging agreement by more directive interventions including providing information, suggesting solutions, giving advice, and making recommendations. *Id.* at 22-28. This conflict reflects competing visions of mediation that are frequently labeled facilitative and evaluative. Compare Lela P. Love, The Top Ten Reasons Why Mediators Should Not Evaluate, 24 Fla. St. U. L. Rev. 937 (1997); with James H. Stark, The Ethics of Mediation Evaluation: Some Troublesome Questions and Tentative Proposals, From an Evaluative Lawyer Mediator, 38 S. Tex. L. Rev. 769 (1997).

<sup>145</sup> See, e.g., Jacquelyn M. Nolan-Haley, Court Mediation and the Search for Justice Through Law, 74 Wash U. L.Q. 47, 87 (1996) (arguing that parties who decide without knowledge of their legal rights are not exercising informed choice); James H. Stark, *supra* note 144, at 795 (noting that mediation contains the inherent and conflicting goals of "avoiding conduct that favors one side over the other, and fostering party empowerment through informed consent"); Donald T. Weckstein, In Praise of Party Empowerment---And of Mediator Activism, 33 Willamette L. Rev. 501, 502 (1997) (arguing that parties who are not aware of important information or available alternatives are prevented from exercising effective self-determination).

<sup>146</sup> Whether mediations should focus on generating agreements, repairing relationships, or transforming disputants by empowering them and giving them recognition generates considerable controversy and debate in America. Compare Robert A. Baruch Bush & Joseph P. Folger, *supra* note 134 (arguing that mediation should seek to transform disputants by providing recognition and empowerment), with Karl A. Slaikeu, *supra* note 136 (arguing the purpose of mediation is to reach agreements settling disputes and solving problems), with John Winslade & Gerald Monk, *supra* note 128 (arguing for a narrative approach to mediation).

I suspected that new methods were needed to make redesigned workshops more practical and less theoretical. More than thirty years of teaching clinical legal education courses conditioned me to equate a call for more practical information with a need to increase experiential learning activities. My experiences confirm that adults will generally use well designed experiential learning activities productively.<sup>147</sup> My clinical education experiences also influence me to prefer mixing brief theory presentations with live and videotaped demonstrations applying these concepts and providing frequent opportunities to interact with these ideas through discussions and role-plays. Live and video taped demonstrations provide concrete examples of ideas and concepts presented in lectures and readings.<sup>148</sup> They encourage participants to create mental images of effective task performance, an important threshold step in developing skills.<sup>149</sup>

My design needed a culturally relevant, practically useful approach to demonstrating and experiencing this narrowed range of topics. The design had to accommodate potentially large numbers of participants because we imposed no attendance limits. Collaborating organizations invited participants and attendance at our seventeen workshops during the last four rounds averaged thirty-five persons with a high of 59 and a low of 18. The approach also needed sufficient breadth to provide value to participants with varied occupational experiences and interests who presumably dealt with common disputes containing significant contextual

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<sup>147</sup> Experiential learning activities can easily draw on adult learner's existing knowledge and deal with tasks that they need to perform in their work. Adults typically learn best if their reservoir of personal experience is used in educational endeavors and the subjects covered relate to tasks that they must or may do. See Malcolm Knowles, *The Adult Learner: A Neglected Species* 57-63 (4<sup>th</sup> ed. 1990); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning and the Teaching of Social Justice in Law School Clinics*, 2 *Clinical L. Rev.* 37, 47 (1995). Acting in role-plays engages both cognitive and affective dimensions of learning and creates a sense of personal discovery through choosing and exercising behaviors, exploring the consequences of those choices, and constructing meaning. *Mapping, Modeling & Critiquing*, supra note 63, at 883.

<sup>148</sup> *Mapping, Modeling & Critiquing*, supra note 63, at 882.

<sup>149</sup> *Id.*

differences. The different environments in which mediation occurs in America frame and shape how it is conceptualized and performed and mediation practice often adapts to the context of the problems and institutions in which disputes are situated.<sup>150</sup>

My limited time meant that role-plays would have to be short to provide frequent experiential learning opportunities. Short and focused role-plays present specific situations requiring action choices and can highlight important behaviors that can often get overlooked in longer simulations.<sup>151</sup> They can connect to one fact scenario to save reading and preparation time.<sup>152</sup> They also can generate both repetitive practice opportunities, which are critically important in skills development,<sup>153</sup> and valuable discussions.<sup>154</sup> I decided to combine demonstrations with multiple experiential learning opportunities by creating one role-play containing several issues. This permitted viewing and discussing short video-taped examples of effective and ineffective questioning and listening behaviors and then practicing these tasks in short, focused role-plays done in small groups.

Importing role-plays supplies a common component of prescriptive intercultural teaching and can create situations where participants work on situations that have no connection to their cultural, contextual, and conflicting experiences. These problems can be ameliorated by basing

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<sup>150</sup> Carrie Menkel-Meadow, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices*, 11 *Neg. J.* 217, 218 (1995).

<sup>151</sup> *Mapping, Modeling & Critiquing*, supra note 61, at 888-89 n. 28.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 885, see Gordon H. Bower & Ernest R. Hilgard, *Theories of Learning* 77-78 (5<sup>th</sup> ed. 1981); Joseph D. Harbaugh, *Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education*, in *Clinical Legal Education: Report of the Association of American Law Schools---American Bar Association Committee on Guidelines for Clinical Legal Education* 191, 205 (1980); Don Peters and Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 *N.Y.L.Sch. L. Rev.* 169, 173 & n.15 (1990).

<sup>154</sup> See Bruce M. Patton, *Some Techniques for Teaching Negotiation to Large Groups*, 11 *Neg. J.* 403, 406 (1995).

experiential learning exercises on local situations and contexts.<sup>155</sup> Once again, however, neither published literature nor earlier needs assessment and fact-gathering phases provided specific guidance regarding broadly applicable Haitian conflicts and contexts.

A neighborhood dispute seemed likely to encompass a wide variety of participant experiences. Unlike many underdeveloped countries, Haiti features extensive land ownership by poor citizens<sup>156</sup>, although the parcels of land tend to be small.<sup>157</sup> Ownership and other disputes between abutting land owners frequently arise.<sup>158</sup> In addition, an estimated two-thirds of Port-

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<sup>155</sup> See Preparing for Peace, supra note 13, at 37, 50 (describing interviewing many people from Central America about their family and community conflicts and problems and creating fifteen role-plays developed from real-life situations in Central America).

<sup>156</sup> See Marguerite Laurent, supra note 39, at 13. After the revolution a majority of the surviving population, the black ex-slaves who bore a deep-seated antipathy toward the plantation system, sought the opportunity to farm their own land. *Libete*, supra note 23, at 45.

<sup>157</sup> Power struggles led to the mulattoes establishing a republic in the south led by Aleandre Petion who, to prevent a black backlash, distributed state land selling over 150,000 hectares to more than 10,000 persons. *Id.* at 46. Petion's successor, Jean-Pierre Boyer, reunited Haiti and after unsuccessful efforts to tie rural works to large landowners, reverted to distributing state owned land in small parcels to individuals. *Id.*

<sup>158</sup> Many Haitians commented on the problems determining land ownership in rural areas and the frequent disputes this generates. Fact Finding Notes at 3, October 21, 1996 and 11, October 22, 1996. Unfortunately, disputes about land ownership disputes are often hard to mediate and frequently need an adjudicatory ruling favoring one claimant or the other. Quiet title claims, for example, are seldom mediated in Florida. Land ownership disputes can be particularly vexing in Haiti for several reasons. Sale and transfer of land has never been adequately recorded in Haiti. *Liberte*, supra note 23, at 82. Many peasant farmers simply took possession of unoccupied plots and successive governments complicated ownership situations by granting formerly owned state lands as a way to seek support or placate opposition. The Napoleonic legal system passes land not just to an eldest son but to all children creating plots of decreasing size. *Id.* at 83. It was estimated in the early 1990s that the average size of Haiti's 620,000 farms is less than one hectare. *Id.* The absence of official land deeds and titles has left illiterate peasants vulnerable to expropriation. *Id.* Wealthy absentee landowners hire soldiers to intimidate judges and lawyers representing peasants in land disputes. National Coalition for Haitian Refugees, supra note 116, at 67. American companies took advantage of the US occupation of Haiti from 1915 to 1934 and a repeal of a constitutional provision prohibiting foreigners from owning land and expropriated large amounts. Fifty thousand Haitians had their land expropriated in northern Haiti. Suzy Castor, *L'Occupation Americaine d'Haiti* (1988), in *Libete*, supra at 223-24.

au-Prince's two million inhabitants live in densely congested slums<sup>159</sup> which breeds extensive and difficult disputes between neighbors.<sup>160</sup> A neighborhood conflict connected with my sense that community dispute resolution provided the American model that seemed most appropriate for most of the organizations and groups with whom we hoped to work. It also avoided the cultural and legal differences that a family problem was likely to present because of Haiti's extensive affiliation with Roman Catholicism,<sup>161</sup> pervasive embrace of voodoo practice,<sup>162</sup> and use of civil law based on the Napoleonic Code.

The result was a simulation entitled A Difficult Situation. This simulation created escalating problems between neighbors encompassing a failure to return borrowed gardening tools, a trampling of a garden by children playing soccer, a destruction of a fence erected to keep people away from the garden, a collision between a tap-tap, the colorfully painted vans used for public transportation in Haiti, owned by one neighbor and the sixteen year old son of the other family, and mutual threats of violence by each family toward the other.<sup>163</sup> All of this was briefly

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<sup>159</sup> Charles Arthur, *supra* note 8, at 11. Cite Soleil, for example, consists of 5 square kilometers where more than 400,000 people live. *Libete*, *supra* note 23, at 112. Fifty-one percent of this population lives in two rooms, 43% in one room. Catherine Maternowska, *Coup d'Etat and Contraceptives: A Political Economy of Family Planning in Haiti* (1996), in *Libete*, *supra* at 121. On average, eight people live and sleep daily inside these cramped quarters. *Id.*

<sup>160</sup> We were told that "fighting among all members of family was common," that houses are "too small for ten people," and that hardly a week goes by without violent outbursts. Fact Finding Notes at 25, October 24, 1996.

<sup>161</sup> State Department Background, *supra* note 25, at 1. Haiti is estimated to be 80% Roman Catholic and 16% Protestant. *Id.*

<sup>162</sup> *Id.* An often repeated cliché is that Haiti is "80% Catholic, 20% Protestant, and 100% Voodoo." *Libete*, *supra* note 23, at 259. The Haitian government and the Catholic Church periodically attacked Vodou which merely drove it underground, deepening the secrecy and mystery surrounding it. *Id.* at 258. Since the US occupation of 1915-34, Protestant missionaries to Haiti have sought, without success, to eradicate Vodou. EPICA/Voices for Haiti, *Beyond the Mountains, More Mountains* (1994), in *Libete*, *supra* at 174-75.

<sup>163</sup> Creating separated residences, fences, gardens, and business ownership certainly tilted my exercise toward wealthier Haitians, probably departed from the actual experience of many participants, and clearly reflected my cultural influences. A dispute resolution consultant

described in five paragraphs on one page. Roles included the husband and wife in each family so that three person groups could feature disputants played by participants of either gender.

Separate short role-plays were written for each of the three segments in the workshop's design: questioning, listening, and helping disputants move from conflict toward resolution.

I also wrote seven short vignettes demonstrating questioning, listening, and movement-generating behaviors keyed to factual issues in the Difficult Situation scenario. These vignettes were based on American theories of effective action. They included demonstrations showing ineffective and then effective questioning and listening behaviors and one vignette showing skilled actions exploring interests, identifying and evaluating agreement options, and reframing. Applying my belief that videotape demonstrations should be short, the seven vignettes together lasted nine minutes and fifteen seconds or about a minute and a half for each clip.

These demonstrations were filmed at my law school in Haitian-Creole<sup>164</sup> using Professor Theodore to play the role of the mediator while University of Florida law and graduate students played disputants. I prepared transcripts of these vignettes which were translated into Haitian-

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working in Russia generated laughter when talking about an example of two property owners fighting over a fence between their yards. The laughter was caused because the participants knew no one who owned a house since everyone lived in high rise apartments. Michael Elliott and Kendra Brichle, *supra* note 56, at 17. My need to create several issues for focused role-playing and an ignorance of actual neighborhood issues produced these decisions. No participants criticized the economic, class, or cultural bias of these choices. The general relevance of the exercise, however, was constructively criticized. See notes 249-255 *infra* and accompanying text.

<sup>164</sup> After one of the first uses of this tape, a Port-au-Prince lawyer who had attended a session given by the earlier staff, and then visited Florida, responded to my request for feedback by asking "what language were these people speaking." Workshop Notes on file with author, April 22, 1998 [hereafter Workshop Notes]. Although she was mostly kidding, I learned that Haitian-Creole as spoken in Florida differs in some respects from the version spoken in Port-au-Prince. In another session where we had our interpreter read a videotape script because we lacked playback equipment, an energetic audience correction of an interpretive error concerning an angry statement by one neighbor that he would "split the liver" of the other suggested that this metaphor suggested by Professor Theodore was still vibrant in Haiti. Workshop Notes Participant Comment, April 21, 1998.

Creole and distributed to participants to help them follow watching the videotape or to substitute for it at workshops where video playback equipment was not available. To demonstrate an approach to workshop design, I also wrote one or two-page discussion point summaries for each of the vignettes. These also were translated into Haitian-Creole and distributed to participants during the workshops.

The workshops asked participants to enact brief portions of the Difficult Situation scenario in nine focused role-plays keyed to different issues and events in it. These role-plays were done in sets of three with one set assigning questioning tasks, another presenting listening opportunities and challenges, and the third containing one segment regarding exploring interests, one dealing with identifying and evaluating no agreement options, and one covering reframing. A color-coded system<sup>165</sup> was used to encourage participants to form and reform three person groups for different exercise sets while ensuring that everyone rotated through roles as mediator, disputant, and observer, who was in charge of leading feedback sessions. My design allowed each participant to have three experiences in each role with equal chances to practice and experience questioning and listening behaviors and one opportunity doing each task exploring the three movement-generating approaches.

The disputant instructions were the longest in each set because they provided information needed to make a five minute role-play viable. Mediator instructions contained only a paragraph

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<sup>165</sup> The focused role-plays were color coded red, blue, and green and reproduced on paper bearing these colors. Participants were asked to count off 1, 2, 3, 1, 2, 3, etc. before role-playing began and colors were asked to each number. Then participants needed to remember their number and obtain the correct colored set of materials distributed in sets of three (one set for questioning, another for listening, and the third for generating movement approaches). Participants were also asked to form different groups by holding their colors high and making sure they made red, blue, green triads with different people each time we started a different set. Although these instructions invariably produced spectacular confusion for the first set of questioning role-plays, most groups quickly grasped the method behind this madness and enjoyed varying their interactions throughout the day.

suggesting the focus for the exercise while the observer instructions typically presented several short paragraphs describing the context and suggesting specific behaviors to identify and evaluate. All role-play instructions consumed less than one page to limit reading<sup>166</sup> and preparation time. All were translated into Haitian-Creole and, to encourage subsequent use, sufficient copies were shipped on each visit so that every participant received a full set at the close of every workshop.<sup>167</sup>

Using this triadic approach meant that all short role-plays occurred in a caucus setting where participants playing the mediator met with one disputant outside the presence of the other. This was done to permit multiple short exercises in triads, not to suggest that most mediation should occur in caucuses.<sup>168</sup> This choice to use caucus settings exclusively occasionally raised culturally influenced suspicions about whether mediators could be trusted to keep caucus information confidential and concerns about finding space needed to conduct separate meetings.<sup>169</sup> It removed opportunities to practice challenges confronted in joint sessions when

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<sup>166</sup> This design decision may have overestimated adult literacy. Current estimates suggest that it is between 55 to 60%. See note 270 *infra*. We frequently saw participants reading instructions collaboratively, an encouraging sight from one perspective but not an approach that preserved little elements of surprise written into the listening and movement generating role-plays.

<sup>167</sup> Everyone took a complete set and we never had extras left after visits. We also learned that many participants used them in later workshops that they presented. See notes 478-480 *infra* and accompanying text. I will be happy to provide an English copy of the video vignette transcripts, discussion point summaries, and role-play instructions to anyone who requests a set of these materials.

<sup>168</sup> Some mediators advocate no or limited use of caucuses in conflicts where continuing relationships are probable. See Kimberlee K. Kovach, *supra* note 12, at 164-65. Working through difficulties in joint sessions strengthens relationships and builds problem solving skills for future disputes. It also avoids creating perceptions of mediator bias, temptations for participants to behave dishonestly out of the presence of others, and situations where mediators learn information that hampers going forward. *Id.* Studies show, however, that caucuses often enhance problem solving. *Id.* at 165.

<sup>169</sup> Finding space to caucus privately in Haiti can be challenging. Rural courthouses, for example, are small, often having only one or two rooms. People often crowd around and look through windows which are inevitably open since air conditioning is virtually non-existent. Workshop

disputants choose to use aggressive, attacking, and coercive communication behaviors.<sup>170</sup> This choice also permitted clearer focus on questioning and listening behaviors.

American mediation highly values participation by those who are involved in the conflict and possess the most resources to identify and implement resolutions.<sup>171</sup> Similarly, helping people learn how to mediate empowers participants to voice their concerns and evaluate what approaches work best for them.<sup>172</sup> I sought to replicate this dynamic by encouraging short discussions within each triad after each role-play.

After these interactions we led brief question and answer sessions with the entire group. I hoped that these frequent, short role-plays and feedback sessions would encourage participants to talk to and learn from each other regarding how these aspects of mediation can best be done in their organizations and groups. Furthermore, I also hoped they and our subsequent large group

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Notes, April 23, 1998. We often had child and adult faces pressed against open windows to the rooms in which we presented workshops in Port-au-Prince. These open windows permit the sounds of traffic, sirens, roosters, other animals, heavy rains, and music to join our workshop conversations. Several these rooms were also small and crowded, prompting several participant evaluations recommending larger, less crowded space for future sessions.

<sup>170</sup> See Bernard Mayer, *supra* note 61, at 204-07 (arguing that mediators to create or redesign areas for effective communication and negotiation while managing conflictual behaviors and expressions of emotion). I created additional confidential information to let participants mediate the entire Difficult Situation scenario in a longer role-play on a second workshop day but we never used this material because of time limitations.

<sup>171</sup> See *Preparing for Peace*, *supra* note 13, at 32.

<sup>172</sup> *Id.* at 67, see *Mapping, Modeling & Critiquing*, *supra* note 63, at 892-904 (arguing that American law students need to be helped to recognize where they are and where they need to travel to develop skill performing mediating and negotiating tasks). We learned that many Haitian participants were likely to be more interested in how we presented workshops than in what we presented. Fact Finding Notes at 7, October 22, 1996. This was demonstrated by many workshop evaluation comments expressing that participants liked: “how we were welcome, how they took the time to listen to us,” Workshop Evaluation Comment, October 3, 2000 [hereafter Evaluation Comment]; “how the speakers were so dedicated to helping us understand,” Evaluation Comment, April 14, 1999; “how happy the speakers were in answering questions, Evaluation Comment, October 3, 2000; “how they put everyone at ease,” Evaluation Comment, October 4, 2000; “how enthusiastic the speakers were,” Evaluation Comment, April 15, 1999; and “how Don and Sharon worked together.” Evaluation Comment, April 14, 1999.

discussions might expose ways that our notions of effective mediating behavior either did or did not fit Haitian cultural traditions and conflict contexts.

## **II. PRESENTING MEDIATION WORKSHOPS IN HAITI**

Sharon Press, my co-facilitator, and I led seventeen workshops based on this design on four visits to Haiti. We used my design in thirteen full-day and four half-day workshops that attracted six hundred Haitian participants. Seven of the thirteen workshops in Port-au-Prince occurred in the conference room of what was then called the United States Information Service next door to the U.S. Embassy. Six occurred at facilities owned or borrowed by sponsoring organizations. The workshops in Jacmel, Mirabelais, and Gonaives occurred in less conventional settings. We used a small community center in Jacmel into which 29 people somehow squeezed; a disco in Mirabelais where we used the stage lit by red and blue footlights while 48 participants sat around tables on the dance floor; and a spacious, dirt-floored barn in Gonaives where 59 participants sat on rickety wooden folding chairs and roosters entered and exited freely. None of these venues contained additional rooms in which participants could have practiced caucusing if we had used role-plays that also included joint sessions.

My videotaped demonstrations touched concerns about using appropriate technology in international development. These concerns warn that attempts to transfer what works technologically in modernized settings to traditional contexts often produces counterproductive effects.<sup>173</sup> My videotapes did not cause any harm but they also did not produce the hoped for

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<sup>173</sup> See *Preparing for Peace*, supra note 13, at 28-29. A classic example from Africa concerns the building of a \$2 million dollar ice-making, fish-freezing, and cold storage plant on the shores of Lake Turkana, a semi-desert body of water in Northwest Kenya. Blaine Harden, *Africa: Dispatches from a Fragile Continent* 177-79 (1990). A team of Oslo-based consultants arrived in 1971 to study how to maximize profits from tilapia, a delicious fish with firm, white flesh found in abundance in Lake Turkana. The Kenyan government agreed with the recommendation and Norad, the Norwegian Development Agency, supplied the money. By the plant's completion in

change sustaining effects.<sup>174</sup> Although we were able to use video technology to enhance most of our presentations,<sup>175</sup> my hope that copies of this tape could enhance future workshops led by our participants confronted the reality that video playback equipment is generally not economically accessible in Haiti.<sup>176</sup> I left a copy of the video with each sponsoring organization but received no indication that any of them used the tape in subsequent workshops that they later described presenting.

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1981, the Norwegians and Kenyans began to realize that chilling fish from 100 degrees to below freezing with diesel powered generators driving the coolers would cost far more than the fillets were worth. The plant operated for a few days before its freezers were turned off and it became Africa's most handsome, and most expensive, dried fish warehouse. *Id.*

A related example from Haiti concerns the Creole pig disaster which eradicated almost the entire national pig population. The United States paid the Duvalier regime to kill these pigs because an outbreak of African Swine Fever in the neighboring Dominican Republic and spread along the Artibonite River to Haiti's Artibonite Valley. Although Haitians contend that the virus was not as lethal there as elsewhere and that the epidemic may have actually ended before the slaughter began, a 13 month long campaign to slaughter Haitian pigs occurred at a cost of \$U.S. 23 million dollars. For more than 500 years this pig had adapted to Haiti's climate, topography, and vegetation, and every peasant family could raise one or two without much expense or trouble and then sell them when fully grown to raise cash. These pigs also served as a garbage disposal system by eating wastes and a variety of harmful insects and worms. A program to repopulate Haiti with pigs from the US was a disaster as these imported pigs were neither suited to Haiti's harsh conditions and nor distributed widely among the poorer, peasant farmers. The Creole pig disaster cost Haitian peasants \$600 million dollars, destroyed a way of life in this survival economy, and has been described as the "worst calamity ever to befall the peasant." Bernard Diederich, *Swine Fever Ironies* (1985), *Liberte*, supra note 23, at 104-05; see Charles Arthur, supra note 23, at 42.

<sup>174</sup> Effective development requires not just solving immediate problems but sustaining change. See *Preparing for Peace*, supra note 13, at 28. This is best accomplished by seeking solutions inside host countries using resources that are available and local. *Id.*

<sup>175</sup> We were able to show our video demonstrations in all but three of our seventeen workshops although frequent power outages often disrupted our ability to screen all vignettes. The USIS room we used had two large, wall-mounted monitors that enhanced using this technology at the seven workshops presented there. We were able to bring a USIS video playback machine and monitor to three other sessions including the one in Mirabelais. We could not use the video tape in Gonaives, Jacmel, and one of the Port-au-Prince workshops.

<sup>176</sup> Only Quisqueya University had its own functioning video equipment. Using our videotape in other workshops required sponsoring organizations to borrow equipment from individual members or other sources. It also often generated technical problems and frustrations caused by small monitors that made it difficult for all participants to see and hear the video tape.

Radio is the most commonly used and important mass communication medium in Haiti.<sup>177</sup> During the 1980's, the Bishop's Conference station, Radio Soleil, was the first station to broadcast in Creole, provided Haiti's primary source of uncensored news, and helped organize and unify opposition to the Duvalier dictatorship.<sup>178</sup> I learned during visits that radio was used much more frequently by workshop participants to communicate subsequent messages about conflict resolution and mediation instruction programs. Therefore, preparing potential radio scripts in Creole for collaborating organizations to modify would have provided a technologically appropriate option.<sup>179</sup>

Participants seemed to enjoy and value the video demonstrations. Evaluation comments included that the videotaped demonstrations: "helped me understand better"<sup>180</sup> and "helped clarify what I had learned."<sup>181</sup> Many participants requested more video demonstrations and positively evaluated this methodological choice, writing they liked: "how they [Don and Sharon] explained the content of each videotape after watching them"<sup>182</sup> and how "every time they are about to cover a topic, they allowed us to experience it first. . . [and] [t]herefore we were more motivated to listen."<sup>183</sup>

## A. INTERCULTURAL LESSONS

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<sup>177</sup> Radio Soleil (1993), *Libete*, supra note 23, at 153.

<sup>178</sup> *Id.*

<sup>179</sup> For example, participants wrote: "I wish that we had this type of information . . . on the radio," Evaluation Comment, October 3, 2000; "we need to spread this information on radio," Evaluation Comment, November 9, 1998; and "we can improve by conducting this seminar in Creole . . . on the radio . . . so that everyone can take advantage." Evaluation Comment, October 3, 2000.

<sup>180</sup> Evaluation Comment, April 12, 1999.

<sup>181</sup> Evaluation Comment, April 14, 1999.

<sup>182</sup> Evaluation Comment, April 14, 1999.

<sup>183</sup> Evaluation Comment, October 2, 2000.

Attempting to teach mediation theories and behaviors abroad provides numerous opportunities to develop awareness of one's own deep cultural presumptions. Cultural influences are frequently invisible when people who share perceptions, values, schemas, and behavioral norms interact.<sup>184</sup> However, interacting with persons from different cultural and linguistic traditions can make these invisible influences visible.<sup>185</sup>

Perceiving oneself as culturally influenced supplies an ongoing and necessary component of intercultural learning.<sup>186</sup> Developing awareness of the cultural assumptions and influences, implicit in the information a traveling mediator presents, provides a threshold step for intercultural learning.<sup>187</sup> Presenting and reflecting on these seventeen workshops certainly helped me learn the immense degree to which my views about conflict and mediation are influenced by my cultural traditions and experiences.

For example, different attitudes about time that often are culturally influenced surfaced consistently at the beginning of our workshops. Applying our cultural traditions about time derived from individualistic, low context attitudes glorifying scheduling and closure,<sup>188</sup> we

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<sup>184</sup> See Susan Bryant, *supra* note 6, at 40; Michelle LeBaron, *supra* note 15, at 10-11.

<sup>185</sup> Professor LeBaron argues that we should employ a process she labels "mindful awareness" to come "to know our inner contours" in order to see "the effects of both blind spots and ways of paying attention on how we make meaning." Michelle LeBaron, *supra* note 15, at 12. Professor Bryant argues that teaching law students about the influence of culture on how they practice gives them opportunities to learn how their invisible cultural lens affects how they judge others from different contexts to be "truthful, rude, intelligent or superstitious based on attributions . . . made about the meaning of their behavior." Susan Bryant, *supra* note 6, at 40.

<sup>186</sup> *Id.* at 49. Professor Bryant argues: "Knowing ourselves as cultural beings is key to being able to identify when we are using biases or stereotypes, when we are misinterpreting or filling in, and why we are judging people as different." *Id.* at n.56. She also contends that we must accept that our cultural influences "may create roadblocks to understanding others," and that by "accepting the blinders that shape our understandings of others, we can feel less frustrated by setbacks and not judge ourselves too harshly for having prejudices and biases, as long as we are committed to growth and change." *Id.*

<sup>187</sup> See *Preparing for Peace*, *supra* note 13, at 121.

<sup>188</sup> See Raymond Cohen, *supra* note 45, at 33-36.

announced that our workshops would begin at either 8:30 or 9:00 a.m. We consistently left our hotel in Petionville, seven miles up the mountain from the U.S. Embassy near the harbor in Port-au-Prince, at 7:00 a.m. to beat the traffic jams that strangle the few direct routes in the city.<sup>189</sup> We never successfully avoided these jams and spent from 60 to 80 minutes in our rented van traversing these seven miles. We always arrived shortly before the scheduled beginning times of our Port-au-Prince workshops.

Invariably, we saw less than ten participants at scheduled beginning times. Participant numbers slowly increased over the next thirty to sixty minutes and usually reached the session's maximum by ninety minutes after scheduled starting times. For example, my first Port-au-Prince workshop was scheduled to start on April 22, 1998, at 8:30 in a large classroom at the State University of Haiti's Faculty of Law and Economics. While we arrived at 8:15 a.m., only eight participants had shown up by 8:54 a.m. We started thirty-eight minutes late from our perspective at 9:08 a.m. with 18 participants present. Attendance at this workshop ultimately reached thirty.<sup>190</sup>

I understood that participants had to deal with the same traffic jams we experienced, often using undependable public transportation, and had to handle additional morning challenges such as getting their children off to school. I also suspected that some of this behavior resulted from cultural influences generating a more synchronous or polychronic approach to time.<sup>191</sup>

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<sup>189</sup> The number of motor vehicles in Haiti jumped from 70,000 in 1994 to 120,000 in 1999. Charles Arthur, *supra* note 8, at 14. The traffic jams these vehicles produce on the few direct routes in Port-au-Prince have been accurately described as "unending." *Id.* at 88.

<sup>190</sup> Workshop Notes, April 22, 1998.

<sup>191</sup> The study of time, called chronemics, includes how people use, structure, interpret, and understand its passage. Myron W. Lustig and Jolene Koester, *Intercultural Competence: Interpersonal Communication Across Cultures* 223 (3d ed., 1999). "Time may be approached as monochronic---sequential, tangible, and schedule-focused---or polychronic---fluid, cyclical, and unstructured. Michelle LeBaron, *supra* note 15, at 42.

Rather than approaching time as sequential and scarce, termed monochronic, a polychronic view perceives time as holistic, expansive, and even circular.<sup>192</sup> Rather than valuing punctuality, scheduling, and expecting that meetings should start “on time,” a polychronic approach to time anticipates doing multiple things and arriving at meetings when the “time is right.”<sup>193</sup>

I never resolved how to handle this situation effectively. Assessing my options let me experience slight, culturally influenced frustrations at having to accommodate colleagues who approach time differently.<sup>194</sup> We usually chose to spend about a half hour chatting to those who were there “on time”. The conversations built rapport but often felt awkward since we had to converse through our interpreter. Then we started thirty to forty minutes “late”, knowing that only about one half of the ultimate group of participants were there. Sharing our concerns to influence future behavior made no sense because we would not see this same group the next day.

I never felt entirely comfortable starting while knowing that many participants were not yet there because my culturally influenced, scheduled, and sequential use of time, introduced workshop methods and presented information upon which later experiential learning units were built.<sup>195</sup> I also had difficulty letting go of the fact that delaying starting longer lessened chances

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<sup>192</sup> See *id.* at 42-43; Judith N. Martin and Thomas K. Nakayama, *Intercultural Communication in Contexts* 186 (2d ed., 2000).

<sup>193</sup> See, e.g., Charles Hampden-Turner and Fons Trompenaars, *supra* note 68, at 295-316; Myron W. Lustig and Jolene Koester, *supra* note 190, at 186-87; Judith N. Martin and Thomas K. Nakayama, *supra* note 191, at 225-27.

<sup>194</sup> See Raymond Cohen, *supra* note 45, at 35. Different sense of time creates common cross-cultural challenges. Michelle LeBaron, *supra* note 15, at 42. These differences “can cause or escalate conflict, especially when they are outside conscious awareness.” *Id.*

<sup>195</sup> This type of careful sequencing flows from low context cultural influences that prefer using analytic, linear, and sequential logic to define and explain situations. See *Mediation Across Cultures*, *supra* note 5, at 34. The concept of skills training “is a product of Westernized culture and reflects many of its culturally learned assumptions.” Paul B. Pederson & Allen Ivey, *Culture-Centered Counseling and Interviewing Skills: A Practical Guide* 85 (1993).

of completing the coverage contemplated in my workshop design.<sup>196</sup> Starting later than scheduled contributed to our general inability to cover the reduced agenda and to provide nine role-play experiences. Getting participants to honor times scheduled to return from breaks and lunch, presumably because of pleasant, informal interactions they enjoyed during these interludes, also proved challenging.<sup>197</sup> These culturally different approaches to time typically reduced our already time pressured workshops to six hours or sometimes even less.

The direct way we began workshops by introducing our goals and session plans, demonstrating a conflict, discussing common conflict communication behaviors, and connecting reviewing resolution options to the simulated incident reflected our culturally preferred opening rituals.<sup>198</sup> Sharon began by thanking participants for attending,<sup>199</sup> surveying occupational

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<sup>196</sup> My need for efficiency and closure reflects my cultural biases toward individualism in terms of setting goals and acting to accomplish them. See Michelle LeBaron, *supra* note 15, at 64. It also reflects my psychological type preference for judging or interacting externally in ways that plan, schedule, and push toward closure. See Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 *Drake L.Rev.* 1, 19-20 (1993).

<sup>197</sup> The challenges were not as severe as those encountered in a workshop in Russia where lunch lasted two hours and dinner started at 3:30 p.m. Michael Elliott & Kendra Brichtle, *supra* note 56, at 12.

<sup>198</sup> See Susan Bryant, *supra* note 6, at 74-75 (stating that every culture has introduction rituals and scripts). Misunderstandings and conflicts arise because of these differences and “[s]ome of the most well-known involve U.S. Americans with their get-down-to-business attitude meeting the more diffuse Japanese, who focus on relationship building before addressing specifics.” Michelle LeBaron, *supra* note 15, at 66.

<sup>199</sup> Sharon sought to communicate how participants honored us by attending because demonstrating honor and respects between hosts and guests regardless of social standing provides an important opening ritual for rural Haitians. Jennie M. Smith, *supra* note 28, at 9-10. This customarily occurs in the countryside by calling out “one,” meaning honor, before entering someone’s yard. The visitor then hesitates until hearing the welcome, “respe” (respect) before entering the yard. *Id.* The name of the organization that sponsored our workshop in Mirabelais, on the central plateau of Haiti bordering the Dominican Republic, was the Honor and Respect Foundation.

experiences and interests,<sup>200</sup> and asking what kinds of conflicts they typically encountered.

Then, eschewing ice-breaking rituals to introduce participants to us and each other because of limited time, large anticipated groups, and difficulties of integrating late-arriving participants, we got down to business.

Some cultures view getting down to business without first engaging in informal and friendly interactions as rude and abrupt.<sup>201</sup> We explained this decision to make it transparent,<sup>202</sup> connecting the value of doing ice-breaking exercises to start longer trainings with fewer participants to our goal of modeling one approach to teaching others to mediate.<sup>203</sup> We never received any written or oral comments suggesting that our direct, getting down to business approach was rude or abrupt, perhaps because we followed the introduction quickly with interactive short role-plays in which participants made personal connections.

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<sup>200</sup> For example, Sharon's survey at our last workshop in Jacmel revealed 10 participants working in some educational capacity, 7 affiliated with religious organizations, 5 doing community development work, 4 involved in law enforcement, 2 in banking, 2 in the arts, and 1 in counseling. Workshop Notes, October 5, 2000.

<sup>201</sup> Id. at 75 n. 140; see M.E. Zuinga, Families With Latino Roots, in *Developing Cross-Cultural Competence: A Guide to Working With Young Children and their Families* 151-79 (E.W. Lynch & M.J. Hanson eds., 1998).

<sup>202</sup> Transparency describes the willingness to share the thoughts and ideas that generate decisions. See Michael Moffitt, Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent, 13 *Ohio St. J. Disp. Res.* 1, 2 (1997). Transparent mediators are willing to share the concerns and reasons underlying their process decisions and do not hide behind a veil of professional expertise. Michael D. Lang & Alison Taylor, *supra* note 61, at 146.

<sup>203</sup> We consistently sought to relate what we were doing in workshops to ways our participants might consider using to instruct others. Some evaluation comments implied that we achieved some success, including: "the materials will help us resolve conflicts better," Evaluation Comment, April 14, 1999; "we can . . . use these examples in the school system," Evaluation Comment, April 14, 1999; "we need to teach . . . [people who are in school] to listen before they react, Evaluation Comment, April 15, 1999; "we can improve by conducting the seminar in Creole in the schools, on the radio, and on television," Evaluation Comment, October 3, 2000; and "with those materials we will continue the good work," Evaluation Comment, November 10, 1998.

We inserted our conflict demonstration within the workshop's first thirty minutes to model the importance of teaching mediation by doing things other than simply talking. Haitian legal education follows the continental European model of professors lecturing to large enrollments with little use of small group or experiential learning approaches. We suspected this approach also governed other educational levels. Sharon suggested that we stage a dispute about ownership of a large plastic bottle of water after our first two workshops in Gonaives. The temperature in the non-air conditioned barn reached ninety-five degrees Fahrenheit and I kept borrowing short drinks from the bottle she brought in her briefcase. Unscripted and interpreted simultaneously as action unfolded, we demonstrated how verbal and nonverbal communication usually provides an initial frame for conflict. We acted out how communication in American conflicts typically and rapidly escalates from positional statements including justifying arguments, to arguments attacking each other's arguments and then each other, to polarized speech featuring name-calling, and ultimately to an impasse requiring another resolution option.<sup>204</sup> Participants usually were surprised when the conflict erupted. Then they typically smiled and occasionally laughed as they watched us grab and tug the water bottle, listened to us escalate our voice tones, and heard us choose increasingly intemperate language.

This demonstration reflected many individual, low-context cultural assumptions which shape my perceptions and understandings of conflict and communication in conflict. It showed

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<sup>204</sup> Our actual respect and affection for each other, and our enjoyment of working together, usually kept us from taking the name-calling phase as far as it might otherwise go. Borrowing an old Harlem Globetrotter gag from my childhood, I also occasionally, and arguably inappropriately, ended the skit by ensuring that the cap was back on the bottle of water and then attempting to douse Sharon with its contents. Although this usually provoked laughter, men acting violently toward women is not a joking matter in our culture or in Haiti. Fact Finding Notes at 25, October 24, 1996 (asserting that there is much violence within families in Haiti with spouse and child abuse not uncommon). A man unexpectedly brought two fresh, cold bottles of water to us during one of Port-au-Prince workshops in the middle of our staged conflict which produced considerable amusement for participants.

individualistic influences in the ways the conflict was triggered by an individual rather than collective offense - my attempted appropriation of Sharon's bottle of water. It demonstrated how the conflict and attempted resolution was immediately owned by individuals asserting instrumental objectives seeking to vindicate ownership rights.<sup>205</sup> The skit also modeled direct confrontation through action-oriented, solution-focused, specific, and ultimately combative speech, all of which are consistent with low context cultural influences.<sup>206</sup>

This demonstration probably had little relevance for participants holding a collective world view which tends to see conflicts triggered by violations of a group's normative expectations and best handled indirectly through relationship networks and shared contextual understandings.<sup>207</sup> The conflict communications demonstrated were far from the indirect, ambiguous, cautious, subtle, and non-confrontational methods of expression that high context cultures prefer.<sup>208</sup> The communication choices in the skits disrupted harmony, a primary value,<sup>209</sup> and also demonstrated a lack of appropriate politeness and good taste from a collective and high-context perspective.<sup>210</sup>

We hoped that this demonstration touched a common human context of disputing ownership of tangible property and provided a culturally relevant introduction to conflict. We also hoped this might show participants why mediation could play a role in their organizations in

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<sup>205</sup> See *Mediation Across Cultures*, supra note 5, at 29.

<sup>206</sup> See *Mediation Across Cultures*, supra note 5 at 28; Jeanne M. Brett, supra note 97, at 105.

<sup>207</sup> See *Mediation Across Cultures*, supra note 5, at 30.

<sup>208</sup> See *id.* at 28.

<sup>209</sup> Jeanne M. Brett, supra note 97, at 105.

<sup>210</sup> See *Mediation Across Cultures*, supra note 5, at 91. Intercultural dispute resolution requires sensitivity to direct versus indirect confrontation approaches arising from individual-low context and collective-high context differences because choosing an approach that culturally offends the other party may expand disputes from the underlying issues to procedural and interpersonal concerns. Jeanne M. Brett, supra note 97, at 107.

order to motivate them to undertake to learn about this process.<sup>211</sup> Participants generally enjoyed the skit and a few identified specific ways it was helpful in their evaluation comments, writing: “I liked the way Don and Sharon engaged in a conflict about the water; this example was very clear to me”<sup>212</sup> and “I liked the skit put together by Don and Sharon. It showed us how conflicts can arise.”<sup>213</sup> Nothing in the translated evaluation comments suggested collective or high context culturally-influenced objections to this skit or its value in mediation training.

This demonstration permitted introducing and applying the four ways of resolving conflict that appear to exist in all cultures: avoidance, consensual agreement through negotiation and mediation, adjudication, and force.<sup>214</sup> We did this to introduce and explain our decision to emphasize mediation in our short workshop. Avoidance through walking away, letting issues rest, accepting status quos, and leaving conflicts unresolved seems to be the preferred response to most disputes in most cultures.<sup>215</sup> We explained that Sharon might choose this approach in the skit because the value of the water bottle is slight, she has to work with Don for the rest of the session, and no other option seems reasonably available. This choice, however, might leave Sharon with uncomfortable feelings flowing from the reality that she did not assert her interests<sup>216</sup> and lost something she correctly perceived she owned. It also might generate desires for future revenge against Don.

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<sup>211</sup> Malcolm Knowles argues that the first task of a facilitator of adult learning is to help participants become aware of how learning this subject can help them. See Malcolm S. Knowles, *supra* note 147, at 57-58.

<sup>212</sup> Evaluation Comment, April 14, 1999.

<sup>213</sup> Evaluation Comment, November 10, 1998..

<sup>214</sup> See P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective 1* (1979); Karl A. Slaikeu, *supra* note 136, at 16.

<sup>215</sup> See Karl A. Slaikeu, *supra* note 136, at 17.

<sup>216</sup> See Michelle LeBaron, *supra* note 15, at 43 (arguing that avoiding conflicts that matter creates a situation like holding a ball under water where a slight shift of pressure can make it pop up with great force); Douglas Stone, Bruce Patton, & Sheila Heen, *Difficult Conversations: How to*

The next category seeks a consensual outcome in which Sharon and Don agree to resolve their dispute on their own without a third person or institution telling them what it should be.<sup>217</sup> This category includes negotiation which Sharon and Don attempted unsuccessfully and mediation where a third party helps them resolve their dispute without ordering any particular outcome. As our skit showed, individual, low context cultures tend to encourage negotiation first. Collective, high context societies, on the other hand, often prefer mediating initially.<sup>218</sup>

To preview our workshop's skills focus, we emphasized that while mediators lack authority to decide disputes, they routinely encourage disputants to tell their stories fully<sup>219</sup> and to listen to these narratives respectfully.<sup>220</sup> We explained the advantages of encouraging Don and Sharon to do that, framing the situation as a problem which can be resolved rather than a struggle that needs to be won or avoided. We also mentioned that mediators can help disputants like Sharon and Don negotiate more constructively by encouraging them to communicate more

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Discuss What Matters Most xvii (1999) (stating that not speaking up when avoiding leaves us feeling taken advantage of and wondering why we didn't assert for ourselves while robbing the other of an opportunity to improve situations).

<sup>217</sup> Consensual resolution options include negotiation and mediation and occur in all cultures. See Karl A. Slaikou, *supra* note 136, at 16; note 100 *supra* and accompanying text.

<sup>218</sup> See *Mediation Across Cultures*, *supra* note 5, at 32-33.

<sup>219</sup> Mediators, to be effective, "have to listen to all of the parties carefully and give each one an opportunity to present his or her most powerful argument in an effective way. . . . [and to help] each participant carefully and realistically think through his or her choices at various points in the process. . . ." Bernard Mayer, *supra* note 61, at 195-96. Parties in mediation in America typically receive greater chances to talk and be heard in mediations than they do in adjudicatory processes like arbitration and litigation which "look at most conflicts through the prism of relevancy, admissibility, and procedure." Kimberlee K. Kovach, *Mediation in a Nutshell* 37 (2003) [hereafter *Mediation in a Nutshell*].

<sup>220</sup> See John Winslade & Gerald Monk, *supra* note 128, at 6 (arguing that careful, respectful listening is a key part of mediation); see notes 398-415 *infra* and accompanying text. Although the importance of respect is universal, "[d]ifferent ways of seeing and communicating respect exist whenever . . . cultural boundaries" are crossed. Michelle LeBaron, *supra* note 15, at 75.

cooperatively,<sup>221</sup> consider their alternatives to agreeing, evaluate the predictable costs of these options, and explore resolution options other than a rights-based orientation focusing on ownership. We indicated that Sharon and Don might want to explore possibilities including sharing this water while agreeing they will apportion the cost of purchasing the next one in an acceptable ratio, alternating supplying bottles, mutually affirming the value of their relationship, and apologizing for their intemperate language.<sup>222</sup> We also mentioned that agreements reached in mediation frequently leave no one as dissatisfied as Sharon was when she walked away to avoid further conflict. Finally, we noted how both Don and Sharon may end up more satisfied because a mediated interaction gives them opportunities to talk, be listened to and respected, and strengthen their relationship.

We next reviewed the adjudicatory option of asking a third party, either a judge or an arbitrator, to decide the dispute. We noted that this was not useful because it would take too long,<sup>223</sup> cost too much when measured against the value of the water bottle,<sup>224</sup> and predictably

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<sup>221</sup> Mediators alter the structure of conflict interactions. Bernard Mayer, *supra* note 61, at 192. Disputants must alter their conflict approaches to “accommodate the participation of someone with whom they are not in conflict.” *Id.* Disputants often change “the way they present issues, communicate, and express their emotions.” *Id.* If necessary, mediators can suggest specific ground rules for productive communication. See, e.g., Kimberlee K. Kovach, *supra* note 12, at 109 (suggesting mediators should explain specific ground rules for the process such as prohibitions against interruptions during their opening statement); Christopher W. Moore, *supra* note 100, at 202 (suggesting that there is no one way to establish behavioral guidelines because disputants in tense situations may need direction from mediators while parties in less polarized situations may not); Joseph B. Stulberg, *Taking Charge/Managing Conflict* 63 (1987) (suggesting that mediators should establish appropriate tone for discussions sharing their expectations about what can and cannot be done).

<sup>222</sup> Mediation, unlike adjudication which seldom makes apology part of available remedial relief, values and permits basic human expressions such as those linked to apologies and statements of forgiveness. *Mediation in a Nutshell*, *supra* note 218, at 37; see generally Deborah Levi, *The Role of Apology in Mediation*, 72 *N.Y.U.L.Rev* 1165 (1997).

<sup>223</sup> Using a viable, functioning, respected legal system can resolve disputes effectively but in ways that typically consume a lot of time. See *Mediation in a Nutshell*, *supra* note 218, at 35. Professor Kovach argues that “[i]n most instances mediation may provide a more timely

harm or end the relationship by generating a loser as well as a winner.<sup>225</sup> As our participants knew well, Haitians lack access to a reliable and trustworthy adjudicatory forum<sup>226</sup> which additionally lessens the value of using this option.

We applied the fourth common dispute resolution option, force through coercive, often violent self-help, by pointing out that it had disadvantages for Sharon given apparent differences in size and physical strength. We noted that coercive self-help usually risks mutual harm by escalating violence through the use of weapons or involvement of family members and friends. We also emphasized that violence ultimately solves nothing despite its common glorification as an appropriate dispute resolving response.<sup>227</sup> We ended this unit by emphasizing that mediation often supplies a superior option that communities and organizations can develop and implement on their own.

Next, we presented questioning and listening sequences in a linear fashion by first exploring behaviors involved in encouraging disputants to talk and then looking at effective listening actions. This design reflected my culturally influenced preferences toward breaking tasks into their component behavioral parts and analyzing each unit separately.<sup>228</sup> Many cultures, however, prefer a more holistic approach that keeps all parts together and seeks to

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resolution. Because mediation is informal and flexible, strict procedures which draw out litigation matters are avoided. Where time is of the essence. . . a mediation could take place in a matter of days or even hours.” *Id.* As noted earlier, Haiti lacks a viable, functioning, respected legal system. See notes 115-125 *supra* and accompanying text.

<sup>224</sup>Most of the time mediation saves money. *Mediation in a Nutshell*, *supra* note 218, at 35.

“Parties save the expense for extensive litigation, including costs for experts, depositions, and attorneys fees.” *Id.* An estimated 150 billion dollars is spent on legal costs in the United States every year. William Ury, *supra* note 99, at xvi.

<sup>225</sup> Mediation provides more opportunities to resolve disputes while preserving relationships than other options. See *Mediation in a Nutshell*, *supra* note 218, at 37-38.

<sup>226</sup> See notes 115-125 *supra* and accompanying text.

<sup>227</sup> William Ury, *supra* note 99, at 125.

<sup>228</sup> See Kevin Avruch, *supra* note 10, at 92; *Preparing for Peace*, *supra* note 13, at 81.

understand tasks and challenges as a whole.<sup>229</sup> Some participant comments during workshops that revealed efforts to resolve the entire controversy rather than handling small parts of it may have reflected this cultural orientation.<sup>230</sup>

My clinical experiences incline me to articulate reasons why particular actions will predictably produce intended effects..<sup>231</sup> This type of analytical activity creates action theories which proceed from the premise that humans design the behaviors needed to perform communication tasks such as gathering information respectfully in mediations.<sup>232</sup> My workshop design incorporated accepted American action theories for gathering information that arbitrarily separate encouraging and questioning tasks from listening behaviors to facilitate focused and sequential analysis and learning. Although some American law students find this degree of analytical compartmentalization difficult, no participant workshop or evaluation comments raised this objection.

After showing and discussing the videotaped demonstrations of questioning, participants practiced these and other aspects of mediation in the first set of three focused role-plays based on the neighbors' dispute depicted in the Difficult Situation scenario. Then, we repeated this process for listening and, if time permitted, for the one video demonstration. and role-play for identifying interests, exploring agreement options, and practicing reframing possibilities. Most

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<sup>229</sup> Id.

<sup>230</sup> See note 369 *infra* and accompanying text.

<sup>231</sup> Mapping, Modeling & Critiquing, *supra* note 63, at 878; see Chris Argyris & Donald A. Schon, *supra* note 63, at 3-6 (1974); Donald A. Schon, *supra* note 133, at 255.

<sup>232</sup> Chris Argyris & Donald A. Schon, *supra* note 63, at 17-18; Mapping, Modeling & Critiquing, *supra* note 63, at 879. Without understanding the underlying theories that influence and shape their practices, mediators are “merely talented mechanics” who try one tool after another without knowing why a particular tool might be useful and what results are likely to flow from it. Michael Lang & Alison Taylor, *supra* note 61, at xii. Understanding the reasons underlying particular actions helps mediators assess likely consequences, evaluate behavior choices, and learn from their experiences. Id. at 20.

workshops completed the questioning and listening sequences and one, sometimes two, of the third set of demonstrations and role plays.

Workshop participants enjoyed role-playing as virtually everyone seemed engaged actively doing them in every workshop. I was gratified to see participants talking to each other in animated ways during these portions of the workshops. Participants wrote that they liked how “everyone participated,”<sup>233</sup> how “everyone worked together to show us ways to resolve conflicts,”<sup>234</sup> how role-playing “helped in understanding conflict resolution better,”<sup>235</sup> and how “working in groups . . . was exciting.”<sup>236</sup> They indicated that they valued how they “were able to put everything into practice”<sup>237</sup> and some commented positively about the value of playing both mediator and disputant roles.<sup>238</sup>

Role-playing seemed to create a shared and supportive learning environment. Evaluation comments included: “I liked how everyone communicated with each other;”<sup>239</sup> “I enjoyed listening to other Haitians like myself speak;”<sup>240</sup> “the exercises allowed everyone to participate and learn from each other;”<sup>241</sup> and “I enjoyed sharing my thoughts with people I did not even know.”<sup>242</sup> Many participants remarked on the positive atmosphere that role-playing created in

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<sup>233</sup> Evaluation Comment, November 10, 1998.

<sup>234</sup> Evaluation Comment, April 13, 1999.

<sup>235</sup> Evaluation Comment, November 10, 1998.

<sup>236</sup> Evaluation Comment, October 2, 2000.

<sup>237</sup> Evaluation Comment, October 2, 2000.

<sup>238</sup> For example, one participant wrote: “This workshop had different aspects for me because I played the role of mediator, spectator, or victim. Therefore, it will help me put myself in the other person’s shoes if I am ever involved in a conflict.” Evaluation Comment, November 9, 1998.

<sup>239</sup> Evaluation Comment, April 14, 1999.

<sup>240</sup> Evaluation Comment, April 15, 1999.

<sup>241</sup> Evaluation Comment, November 12, 1998.

<sup>242</sup> Evaluation Comment, November 9, 1998.

the workshops, noting that they liked “working in groups, like families,”<sup>243</sup> “how everyone respected each other,”<sup>244</sup> and “how everyone was so accepting and understanding.”<sup>245</sup>

The neighborhood dispute depicted in the Difficult Situation scenario received mixed evaluation. Many participants rated it positively, writing that what they liked most was “the exercises,”<sup>246</sup> “the conflict between Jean, Marie, Henri, and Louise,”<sup>247</sup> “the conflict between the two families where they let the children destroy the garden because they could not get along,”<sup>248</sup> and “the scenario made me ask myself whether the adversary’s family would take revenge.”<sup>249</sup> Other participants questioned the transferability value of this scenario, writing “I hope next time we work with examples that relate more to Haiti,”<sup>250</sup> “we need to use more typical Haitian scenarios to help us become more aware,”<sup>251</sup> “the techniques used are not adequate for Haitian society,”<sup>252</sup> and “everything went fine except they don’t know what’s going on in Haiti.”<sup>253</sup> Several mentioned a need for a more elicitive or emic approach by writing “participants should be able to put together their own skit about conflict resolution,”<sup>254</sup> “we need to listen to the participants by giving them an opportunity to present their own examples,”<sup>255</sup> and “we can improve by having more exercise about conflicts that people are more likely to encounter.”<sup>256</sup>

## **B. LANGUAGE CHALLENGES**

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<sup>243</sup> Evaluation Comment, November 10, 1998.

<sup>244</sup> Evaluation Comment, November 12, 1998.

<sup>245</sup> Evaluation Comment, October 3, 2000.

<sup>246</sup> Evaluation Comment, April 13, 1999.

<sup>247</sup> Evaluation Comment, November 9, 1998.

<sup>248</sup> Evaluation Comment, April 12, 1999.

<sup>249</sup> Evaluation Comment, April 14, 1999.

<sup>250</sup> Evaluation Comment, October 4, 2000.

<sup>251</sup> Evaluation Comment, April 13, 1999.

<sup>252</sup> Evaluation Comment, April 15, 1999.

<sup>253</sup> Evaluation Comment, April 15, 1999.

<sup>254</sup> Evaluation Comment, April 15, 1999.

<sup>255</sup> Evaluation Comment, April 15, 1999.

<sup>256</sup> Evaluation Comment, October 4, 2000.

Cultural influences link deeply and intricately to language.<sup>257</sup> The primary way humans interact is language and speaking contextually creates meaning.<sup>258</sup> Language guides, and sometimes constrains perception and cognition, providing doors to nuanced interpretations of socially configured associations, events, behaviors, and responses.<sup>259</sup> Shared language understandings helps bind societies together by giving them “a common universe of meanings.”<sup>260</sup>

At the core, mediation is a communication process and there is no greater barrier to effective communication than the inability to use the same language.<sup>261</sup> Neither I, Sharon, nor anyone else on our administrative team spoke or understood Haitian-Creole, the language spoken by virtually all Haitians and the one into which our workshop materials were translated and our English comments interpreted. Not having anyone speak the language used by workshop participants and materials sends a none too subtle signal of non-respect,<sup>262</sup> a fact noted by several participants. Evaluation comments included “it would be great if the seminar was conducted

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<sup>257</sup> Michael Elliott & Kendra Brichtle, *supra* note 56, at 20; Susan Bryant, *supra* note 6, at 87.

<sup>258</sup> Nancy Bonvillain, *Language, Culture, and Communication: The Meaning of Messages 1* (3d ed. 2000).

<sup>259</sup> Raymond Cohen, *Resolving Conflict Across Languages*, 17 *Neg. J.* 17, 19 (2001).

<sup>260</sup> *Id.* at 20.

<sup>261</sup> Ileana Dominguez-Urban, *supra* note 15, at 6-7.

<sup>262</sup> Having knowledge of the relevant language by at least some members of a team is recommended as “nearly essential” for intercultural dispute resolution teaching and intervening. Christopher Honeyman, *supra* note 17, at 4. Our violation of this recommendation, however, apparently is not uncommon. Interviews with 23 American dispute resolution practitioners working in former Soviet states and Eastern Europe showed that very few had experience with the language of the host country in which they worked and that all relied on interpreters. Michael Elliott and Kendra Brichtle, *supra* note 56, at 20.

directly in Creole,”<sup>263</sup> “it would be great if the professors could speak French or Creole,”<sup>264</sup> and “the speakers need to learn how to speak Creole.”<sup>265</sup>

The language chosen for dispute resolution instruction may generate controversy and surface historic or political tensions in multi-lingual societies.<sup>266</sup> I learned this when our decision to use Haitian-Creole instead of French produced critical participant reactions, particularly in sessions in Port-au-Prince. For example, many lawyers, law professors, and economics professors insisted that we use French at our first workshop at the State University of Haiti’s Faculty of Law and Economics. Two days later a new interpreter working with us in a workshop in Port-au-Prince responded to an audience request to use French, forcing us to intervene and explain that we were using Haitian-Creole for policy reasons. We then added this explanation to our introductory remarks as another demonstration of transparency.

I also learned that Haitian-Creole is primarily a spoken language for many Haitians who, while literate in their understanding of this language, find reading it challenging and time consuming. Haitians apparently get little practice reading Haitian-Creole because most newspapers and books are published in French.<sup>267</sup> Participants commented that, “some people read and understand French better,”<sup>268</sup> “some people are more comfortable reading French,”<sup>269</sup>

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<sup>263</sup> Evaluation Comment, November 9, 1998.

<sup>264</sup> Evaluation Comment, November 9, 1998.

<sup>265</sup> Evaluation Comment, November 11, 1998.

<sup>266</sup> Michael Elliott and Kendra Brichtle, *supra* note 56, at 20. Using English can create issues of conveying inappropriate privilege when not all participants speak English fluently. *Id.* Using Russian interpreters in Estonia produced political tensions because even though Russian was the most common language, participants shared a preference for speaking either Estonian or English. *Id.*

<sup>267</sup> The first weekly newspaper published in Haitian-Creole did not appear until 1990. *Libete*, *supra* note 23, at 260. Haitian writers face a difficult choice whether to publish in French or Creole. *Id.* at 15.

<sup>268</sup> Evaluation Comment, October 2, 2000.

<sup>269</sup> Evaluation Comment, November 10, 1998.

and some “only read French.”<sup>270</sup> Demonstrating either this difficulty or literacy challenges,<sup>271</sup> I frequently saw participants reading role-play instructions to each other.

My design choice to limit each role-play to no more than one page to minimize time spent reading did not account for these challenges. We typically allotted ten minutes, twice what I anticipated would be necessary, for reading before participants performed each role-play. I also learned that having our interpreter read the one page introduction to the Difficult Situation scenario saved the seven to ten minutes it took for participants to read it themselves.

Our language deficiencies necessitated hiring interpreters.<sup>272</sup> It also required using consecutive interpretation where either we or workshop members spoke and then those comments were transferred to the other language.<sup>273</sup> We used consecutive interpretation for all segments of workshops except the water bottle conflict and participant responses during role-play debriefings. This slowed presentations considerably, consuming even more of the limited time available.<sup>274</sup> It also helped me learn the importance of comprehensive and interactive preparation with interpreters.<sup>275</sup>

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<sup>270</sup> Evaluation Comment, November 10, 1998.

<sup>271</sup> Haiti’s national illiteracy rate remains high, Charles Arthur, *supra* note 8, at 31, with estimates suggesting a 48% adult literacy rate. State Department Background, *supra* note 25, at 1.

<sup>272</sup> “Interpretation means the unrehearsed transmitting of a spoken or signed message from one language to another. Interpretation is distinguished from ‘translation,’ which related to written language . . .” William E. Hewett, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* 31 (1995), as cited in Angela McCaffrey, *supra* note 15, at 349 n.3.

<sup>273</sup> Angela McCaffrey, *supra* note 15, at 363.

<sup>274</sup> Consecutive interpretation slows down communication. See Michael Elliott and Kendra Brichle, *supra* note 56, at 20. It has been estimated that it takes as much as 30 to 60% more time to communicate using consecutive interpretation. Susan T. Wildau, et al., *supra* note 17, at 317.

<sup>275</sup> Language challenges can be lessened by greater interactions with interpreters. Michael Elliott and Kendra Brichle, *supra* note 56, at 20. Working with interpreters before presentations, including training them in conflict resolution practice and theory, helps ensure accurate interpretation. *Id.* Dispute resolution professions working in central and eastern Europe have used participating NGOs rather than outside professional interpreters to improve accuracy. *Id.*

We were forced to use several interpreters in Haiti who varied in skill and familiarity with workshop topics and concepts. These rotating relationships plus the short amount of time we spent in Haiti on each visit generally prevented us from integrating interpreters into our team as co-trainers.<sup>276</sup> Just as an interpreter got familiar with our content and language during one visit, scheduling and other conflicts often forced us to hire others for our next visit. For example, the interpreter we were able to use for both our April and November, 1998, visits developed impressive knowledge of mediation, visited Florida with the second group of Haitian invitees, and then appropriately started using these skills working with a community development non-governmental organization that he founded and directed. However, this choice forced us to use three new interpreters during 1999 and 2000 visits. Also, arriving in Port-au-Prince late on Sunday afternoons before our first Monday morning workshops, and then working full days thereafter, left little time to educate and interact with new interpreters.

I learned how difficult it is to transfer accurate meanings from one language to another. Many words in one language have no direct corollary in other languages that capture the same meaning.<sup>277</sup> For example, the words ‘mediate’ and ‘compromise’ do not have corollaries with positive meanings in Farsi because the closest Farsi terms connote notions of meddling for mediating and disadvantaging someone for negotiating.<sup>278</sup> When U.N. Secretary General Waldheim’s statement that he came to Tehran to mediate a compromise regarding the release of

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<sup>276</sup> Interpreters can provide much more than simply a surrogate voice for trainers. Susan T. Wildau, et al., *supra* note 17, at 317. “Interpreters who understand the value of the concepts and skills” presented who “can accurately render both . . . content and enthusiasm” can function as co-trainers. *Id.*

<sup>277</sup> See Michelle LeBaron, *supra* note 15, at 47. There are no equivalents in Gaelic for the words yes and no. *Id.* Professor LeBaron describes an incident where a Chinese woman who grew up in Tahiti and decided to leave her husband found it difficult to explain her decision to her father who spoke only a Chinese dialect. Her father’s language contained no word equivalent to the word love in French. *Id.* at 46-47.

<sup>278</sup> Roger Fisher, et al., *supra* note 5, at 33.

American hostages was interpreted as intending to meddle to disadvantage Iranians, his car was stoned by an angry crowd.<sup>279</sup> In addition, words may have several meanings which can create confusion across languages when they overlap in some ways but not in others. The word peace in English means freedom from war while shalom in Hebrew adds a sense of positive reconciliation and friendship.<sup>280</sup> The Arabic word salaam also means absence of war but lacks the meaning of friendship and reconciliation found in shalom.<sup>281</sup>

Some words may have many linguistic possibilities in another language which challenges accurate transfer of meaning. Professor Lederach, for example, generated eighty Spanish words that connote or relate closely to conflict.<sup>282</sup> Still other words and concepts present interpretative challenges transferring to new languages where no corollaries exist.<sup>283</sup> Haitian-Creole presents numerous situations where corollary concepts and words are lacking because it is a relatively new language which scholars claim needs to modernize and enrich its lexicon to deal with new domains.<sup>284</sup>

I also learned how much academic jargon my language about effective questioning and listening behaviors contains and how this complicates accurate transfer to another language. Like idiomatic expressions where meaning comes from independently ascribed interpretations

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<sup>279</sup> Id. Similarly, in the Czech Republic the word collaborate, which contains a positive meaning in American dispute resolution contexts, is associated with informing to the KGB. Michael Elliott & Kendra Brichle, *supra* note 56, at 20.

<sup>280</sup> Raymond Cohen, *supra* note 258, at 21.

<sup>281</sup> Id.

<sup>282</sup> Preparing for Peace, *supra* note 13, at 75.

<sup>283</sup> Susan Bryant, *supra* note 6, at 87.

<sup>284</sup> See Albert Valdman, The Linguistic Situation of Haiti 94, in *Haiti: Today and Tomorrow* (Charles R. Foster and Albert Valdman, eds., 1984).

rather than from common understandings of component words,<sup>285</sup> academic labels often challenge accurate meaning transfer. Professor Lederach notes that the important concept of measuring negotiation progress against one's best alternative to a negotiated agreement, captured in the English acronym BATNA,<sup>286</sup> translates unhelpfully into Spanish as MAAN, or *major alternative a un acuerdo negociado*.<sup>287</sup>

Similarly, the labels of open and closed when applied to how questions may be phrased,<sup>288</sup> which were central to my questioning presentation because they describe the degree of freedom of response encouraged by how inquiry is articulated,<sup>289</sup> were difficult to transfer to Haitian-Creole. General and specific supplied the first effort which was later revised to broad and narrow. Neither fully captured the dynamic of encouraging unfocused or focused responses. Learning this helped me appreciate that my labels of open and closed are similarly vague and do not automatically communicate question phrasing choices providing greater or lesser freedom to respond. The specialized English meaning of these words in the context of questioning action theory derives only from the connections between the behavioral predictions these words

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<sup>285</sup> Angela McCaffrey, *supra* note 15, at 351. Movie titles frequently contains idioms which complicate transferring them to other languages. *Id.* at 350. *City Slickers*, for example, was titled in Europe as *Love, Life, and a Cow*. *Id.*

<sup>286</sup> See Fisher, et al., *supra* note 5, at 91-102.

<sup>287</sup> *Preparing for Peace*, *supra* note 13, at 80. Lederach noted that for many persons at a grass roots level with whom he worked, this phrase was difficult to understand cognitively and hard to use practically. He concluded that the phrase “simply rang of sophistication, complexity, and professional technique, something foreign.” *Id.* at 80-81.

<sup>288</sup> See Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 81 (describing five categories of questions categorized by imagining questions as funnels designed to catch or receive information and identifying the degree of openness in the funnel); see also notes 332-336 *infra* and accompanying text.

<sup>289</sup> See Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 81 (arguing importance of using the most open phrasing appropriate to situations to give parties the most freedom to tell what they believe is important without feeling interrogated or controlled); see also notes 340-346 *infra* and accompanying text.

imply<sup>290</sup> and the labels these terms carry. Both leading and suggestive as descriptive labels of generally ineffective question forms which encourage particular responses<sup>291</sup> also proved difficult to transfer accurately.

Our interpreters also struggled to find satisfactory Haitian-Creole terms for the concepts of paraphrasing content<sup>292</sup> and acknowledging feelings,<sup>293</sup> essential components of my ideas about active listening,<sup>294</sup> another problematic phrase. The central concepts of the third demonstration videotape and role-play set, framing, reframing, identifying underlying interests, and exploring agreement alternatives, also proved difficult to transfer accurately to Haitian-Creole. I should have prepared a written glossary defining these key terms for our

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<sup>290</sup> Open questions, for example, encourage more freedom to respond, facilitate story-telling, communicate interest in and respect for respondent agendas, permit avoiding uncomfortable details, and often produce unexpected and important information. See Don Peters, *supra* note 132, at 267-68. Closed questions, on the other hand, focus more specifically, generate more accurate detail, emphasize questioner agendas more than respondent agendas, and may squelch story-telling and seek uncomfortable details prematurely. *Id.* at 269, 276.

<sup>291</sup> Leading or suggestive questions contains words encouraging specific and particular responses. See note 335 *infra*.

<sup>292</sup> This describes the action of restating what speakers have said about facts, interests, and objectives in different words. Doing this demonstrates that what speakers have said was heard and understood. It produces clarifications and corrections of misunderstandings and often motivates additional communication. It also requires carefully attending to speakers and valuing their agendas which communicates respect. See notes 406-412 *infra* and accompanying text.

<sup>293</sup> This describes the action of hearing, understanding, and restating in different words the emotional dimensions of speaker's communications and present experiences. It requires taking another's perspective, entering their world and seeing how they experience it, and then reflecting that understanding in statements which acknowledge these emotional dimensions non-judgmentally without analysis, reassurance, or advice. It communicates caring, respect, and empathy. See notes 406-412 *infra* and accompanying text.

<sup>294</sup> Clinical legal educators, borrowing from psychologists and therapists, teach that listening include active actions of paraphrasing content and acknowledging feelings as well as passive behaviors of remaining silent, avoiding interruptions, and communicating interest and listening through culturally appropriate non- and quasi-verbal approaches. See Don Peters, *supra* note 132, at 278-81.

interpreters.<sup>295</sup> Although our interpreters performed effectively and generally received high evaluations, important levels of understanding were inevitably lost by these transfer difficulties. These losses were aggravated by time limitations which usually prevented careful follow-up questions and discussions requiring consecutive interpretation.

Our language deficiencies prevented us from learning as much elicitively as we desired. Except for a few participants who spoke French, virtually all role-playing was done in Haitian-Creole. Our inability to understand this language prevented us from observing whether participants understood, used, modified, criticized or rejected the action theories we presented. Soliciting simultaneous translation of randomly selected role-plays seemed too intrusive so we seldom knew whether small groups were working on assigned tasks except for hearing the comforting sound of the word “tap tap” in the two focused scenarios involving this colorfully painted form of public transportation in Haiti. Occasional observations by our translators reported that participants were talking about relevant issues raised in role-play materials approximately 70% of the time. We also had difficulty judging when to end role-plays so we often let them run longer than we would have in the United States because participants seemed animated and engaged. This further stressed our limited time and allowed enterprising groups to move well beyond the few issues focused in each exercise.<sup>296</sup>

Furthermore, not understanding Haitian-Creole also prevented me from discerning subtle but important elicitive information about ways participants conceptualized conflict and communicated about it. I learned nothing from small group discussions of the experiences that followed immediately after role-plays because these conversations occurred in Haitian-Creole.

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<sup>295</sup> Professor Brett recommends discouraging jargon and making available glossaries defining, explaining, and interpreting key terms. Jeanne M. Brett, *supra* note 97, at 146.

<sup>296</sup> I was always surprised hearing that occasionally participants resolved the entire controversy in ten minute exercises which attempted to focus on one aspect of a much larger dispute.

Although we always engaged in full group debriefing discussions after each small group discussed their experiences, I found it very hard to follow-up comments during these sessions. Asking questions seeking to generate deeper discussions typically proved difficult. It frequently generated initial confusion and sometimes seemed to create defensiveness when respondents apparently felt singled out in front of large groups often composed of strangers. It always consumed limited time due to the need for consecutive interpretation. Despite occasional successes, several time-consuming, unrewarding, and mutually frustrating experiences convinced Sharon and I to adopt a general strategy of not following-up during debriefs. We limited ourselves to asking for examples for what the mediators did that worked well, what did not work so well, and what the participants learned from playing the disputant roles. We then paraphrased or summarized the responses,<sup>297</sup> trying to connect them to earlier lectures, discussions, and video demonstrations.

A veteran of decades of interactive, experience-based clinical teaching and mediation training, I missed hearing the specifics of interactions and participant reactions. I enjoy using both to continue my learning by generating new insights about concepts and approaches. I also regretted my inability to use participant insights as clues to ways to let experiences evolve in directions that these comments suggest might be particularly valuable. Debriefing role-plays frequently reminded me how much I enjoy nuance to keep my participation new and challenging. It also underscored how frustrated I felt having neither the ability to discern nor the time to explore nuances potentially embedded in participant comments.

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<sup>297</sup> Frequently paraphrasing and summarizing can be a useful way to communicate interculturally, particularly when using consecutive interpretation. Doing this also let us demonstrate and model the behaviors we espoused which can supply an effective teaching technique and learning opportunity. See Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* 39 (2001) (arguing the best way to encourage disputant to change their behavior is to model the actions you seek).

Our use of simultaneous interpretation of participant responses during our debriefing of role-plays undoubtedly generated less than accurate interpretations. To save time, we encouraged our interpreters to provide only general interpretation conveying the gist of messages rather than striving to reconstruct the specific words used.<sup>298</sup> This produced some strange responses from our perspective.<sup>299</sup> It also generated my sense that as interpreters became more familiar with the action theories we were communicating, they occasionally used their interpretive freedom to shape responses to make them more consistent with what they thought we wanted to hear.

### **III. TRANSFERRING QUESTIONING AND LISTENING THEORIES**

This article analyzes only the transferability of the general questioning and listening theories reviewed in short lectures and discussions of video tape demonstrations because all of our workshops presented them. Our four half-day workshops typically covered both questioning and listening video segments and included two questioning role-plays and one listening practice opportunity to ensure that participants had one opportunity to play mediator, disputant, and observer roles. Our one-day workshops typically covered the four questioning and listening video clips and all six questioning and listening role-plays. This section does not analyze the application of these general theories to specific tasks involved in framing and reframing, identifying interests, and exploring agreement alternatives because our half-day workshops never

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<sup>298</sup> See Susan T. Wildau, et al., *supra* note 17, at 318.

<sup>299</sup> During a workshop in Port-au-Prince, for example, while discussing how mediators should respond to the strong emotions demonstrated when a participant cries, I asked how Haitian culture generally treated the issue of whether men should cry publicly. A male participant response, as interpreted, was “it’s important for a man to cry, otherwise he will get a headache.” Participant Comment, October 4, 2000.

got this far and most of our full-day sessions included only one or two of the generating movement taped demonstrations and scenarios. In only two of our thirteen full-day workshops did we complete all seven video segments and nine role-plays.

To gather data for this analysis, I initially outlined my interest in cultural transferability and expressed my hope that participants would receive the ideas we presented critically. I encouraged participants to use and modify those that fit and reject those that do not work for them and their contexts.<sup>300</sup> I then occasionally asked questions regarding whether these ideas about questioning and listening fit participant experiences and contexts, what questioning and listening behaviors worked well, which actions did not succeed, and what options would have worked better. Using simultaneous interpretation I noted participant responses to these questions as well as relevant comments regarding broader debriefing questions that we asked. This analysis also incorporates participant workshop evaluation comments that implicate transferability of American questioning and listening theories.<sup>301</sup>

Learning about cultural transferability proved to be challenging. Participants did not readily identify and discuss cultural aspects of their behavior,<sup>302</sup> probably because these

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<sup>300</sup> Professor Lederach calls this a “sensitive-prescriptive approach” and argues that it is “clearly preferable to an approach that outright suggests a model with little room for adaptation.” *Preparing for Peace*, supra note 13, at 110.

<sup>301</sup> Brief, written evaluation comments from the two of the four visits have been translated into English by Creole-fluent law students working for me as research assistants. These translated comments include the five workshops on the November, 1998, visit presented to 208 participants and the four workshops during the most recent October, 2000, trip encompassing 103 participants. I also should have added specific questions to the written evaluation formed prepared by earlier team members. Reluctance to increase the length of this document and to intrude on the existing grant proposal and its approval kept me from taking this step which might have produced more general information and empirically compelling data.

<sup>302</sup> For example, only one of 1,146 translated written evaluation comments participants submitted after workshops mentioned questioning. Ten mentioned listening. Workshop Comments from April, and November, 1988 visits, and October 2000 visit. The fact-finding team was warned

influences seldom seem obvious. Most of us deal primarily with persons who share our assumptions, perceptions, and traditions. Because these influences are generally shared widely and regarded as natural and normal, little reason exists to identify, evaluate, and discuss them.<sup>303</sup> Like the natural inclinations and tacit knowledge that influence particular actions in certain contexts,<sup>304</sup> persons within the same culture typically act without fully identifying and analyzing the reasons underlying their behaviors before they perform them.

Meaning emerges as adult learners compare and connect new ideas to their experiences.<sup>305</sup> This comparing and contrasting occurs as learners locate ideas in existing knowledge banks and place them in relationship to things already known.<sup>306</sup> Presenting action theories about question phrasing, passive listening, and paraphrasing and acknowledging active

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that Haitians who did not understand the workshops would simply listen, not ask questions, and then go away without knowing. Fact-Finding Notes at 7, October 22, 1996.

<sup>303</sup> Kenneth Cushner and Richard W. Brislin, *Intercultural Interactions: A Practical Guide* 7 (2d ed. 1996).

<sup>304</sup> Effective action requires knowing its underlying theory which includes the elements of the behavior, their causal and other relationships, and the effect various stimuli will have on the conduct under different conditions. Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 *Md. L. Rev.* 223, 247 n.63 (1981). This applies whether the actions involving riding a bicycle, asking a question, listening to another's verbal and non-verbal messages, and preconscious or tacit. Often this knowledge is unsophisticated or tacit. Condlin, *supra*, at 247 n.63. All possible options would seem equally attractive and persons would not know how to act without some sense of what to do. *Id.* Thus, theory is a prerequisite of any effective action even when actors are unaware of it. *Id.*

<sup>305</sup> See *Preparing for Peace*, *supra* note 13, at 9. Professor Bellow argues that “[a]ll learning is rooted in those images of ourselves and the symbolic world in which we live which order and explain our perceived environment.” Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in *Clinical Education for the Law Student: Legal Education in a Service Setting* 374, 383 (1973).

<sup>306</sup> *Id.* at 43. As Professor Bellow notes, “[u]nderstanding is necessarily ‘anchored in events and relations that arise out of experience’ and give language statements about phenomena their context and meaning. *Id.*, citing Jerome Bruner, *On Knowing: Essays for the Left Hand* [need p. cite] (1962).

listening choices gave participants something to contrast and compare with their normal patterns of behaviors and beliefs.<sup>307</sup>

My analytic objectives required participants to compare quickly - without time to reflect on contrasts, which was an understandably difficult task. In my experience, spending time in another culture helped me learn and better understand the influences exerted by my own culture.<sup>308</sup> My learning occurred in a gradual, evolving process spanning four visits and seventeen workshops.<sup>309</sup>

I made a mistake by not articulating the cultural assumptions of my action theories once I understood them.<sup>310</sup> Articulating the cultural norms which animated my action theories would have helped participants examine their cultural assumptions to identify similarities and differences.<sup>311</sup> It would have communicated more explicitly the cultural influences and potential

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<sup>307</sup> Bernard Mayer, *supra* note 61, at 87.

<sup>308</sup> *Id.*

<sup>309</sup> Bernard Mayer, an experienced intercultural dispute resolver and trainer, argues that it very hard to acquire knowledge of one's cultural influences until "one has experienced other cultures in some depth." *Id.* Professor Lederach describes a similar "slow and painful process of self-awareness" regarding how much his training style has been dominated by a proscriptive approach. *Preparing for Peace*, *supra* note 13, at 63.

<sup>310</sup> See *Preparing for Peace*, *supra* note 13, at 121. I corrected this mistake in subsequent mediation instructional experiences abroad by preparing overheads that summarized the cultural assumptions embedded in my suggestions regarding effective questioning and listening, and spending workshop time discussing them explicitly.

<sup>311</sup> See Susan Bryant, *supra* note 6, at 64-67 (arguing that having lawyers consider similarities and differences with clients helps them see how cultural factors may influence interactions particularly in information gathering tasks); Bernard Mayer, *supra* note 61, at 87 (arguing that articulating cultural norms from which people operate makes it easier to develop awareness of how their practices and patterns might differ from those of others).

limits of the action theories I presented.<sup>312</sup> It would also, however, have consumed more of our limited time.<sup>313</sup>

## A. QUESTIONING

Mediators should not make decisions for disputants<sup>314</sup> but rather they should use a limited behavioral menu of asking, listening, and asserting<sup>315</sup> to help parties negotiate.<sup>316</sup> The skills section of our workshops began with questioning action theories to reinforce conceptualizing a mediator's role as facilitating negotiation rather than telling parties to do particular things.<sup>317</sup> Learning and applying this concept was challenging as participant

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<sup>312</sup> Preparing for Peace, *supra* note 13, at 121. Professor Lederach argues that it is not sufficient for trainers to say, as I did, "This is a North American model of mediation. It may or may not be applicable here." *Id.*

<sup>313</sup> Learning from my Haitian experiences, I now typically devote at least three hours to these topics in the longer workshops I have taught in Malaysia, Poland, and Uganda. This time includes a short general presentation on cultural influences, a small group discussion of cultural influences on conflict definition and resolution in the host country and how participants believe American approaches differ, presentations on specific cultural underpinnings of action theories concerning questioning, listening, and generating movement options, and an opportunity to develop locally relevant role-plays in small groups.

<sup>314</sup> This provides the essential process determinant of mediation distinguishing it from adjudicatory options such as arbitration. A careful analysis of many processes used in America and other countries, as well as many traditional approaches, demonstrates significant confusion about this. E.g., Alison Gerencser, *Alternative Dispute Resolution Has Morphed Into Mediation, Standards of Conduct Must Be Changed*, 50 Fla. L. Rev. 843, 846-47 (1998). Many traditional approaches using chiefs or elders, for example, are essentially mediation and arbitration combined because the facilitator first tries to help the parties reach agreement and if that does not occur, decides.

<sup>315</sup> Virtually everything American mediators do consists either of asking questions, passive or active listening to participant communications including answers to their questions, and assertions that make statements. The various task areas implicated in most American mediations, such as process explaining and commenting, framing and reframing, identifying and analyzing interests, finding and exploring alternatives to mediated agreements, and generating solutions by expanding agendas, fractionating, exploiting differences, brainstorming, trading, and inventing, all rest on combinations of questioning, listening, and asserting behaviors.

<sup>316</sup> Karl A. Slaikeu, *supra* note 136, at xiii.

<sup>317</sup> See Douglas Stone, et al., *supra* note 215, at 164. "Asking rather than telling" usually characterizes effective mediation. Michael D. Lang & Alison Taylor, *supra* note 61, at 60. People usually respond more positively when they are invited to take a role in shaping their

comments included “I was not impartial, I was trying to find out who was wrong and who was right,”<sup>318</sup> “the mediator was not on my side,”<sup>319</sup> and “[the mediator] told the party what to do rather than asked.”<sup>320</sup>

The workshops then left the universally applicable facets of mediation<sup>321</sup> to propose specific behavioral approaches to encouraging sharing perspectives and telling stories as a way to begin solving problems, preserving relationships, and healing.<sup>322</sup> Humans tend to organize their experiences, perceptions, and concerns in the form of stories.<sup>323</sup> People then often use stories to make sense of events, relationships, and conflicts.<sup>324</sup> We began with North American influenced action theories suggesting that asking questions skillfully lets mediators encourage parties to tell their stories and helps everyone learn information that can enhance negotiation.<sup>325</sup>

Effective questions encourage participants to tell their stories and share their views.<sup>326</sup> They often generate more information than face to face negotiations between disputants. This

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behavior than when they are told what to do. *Id.* at 63. Less is more is usually a good general rule for mediators to follow. Keeping a low profile and encouraging parties to do most of the talking helps mediators avoid becoming another participant with an agenda to pursue. Deborah M. Kolb & Associates: *When Talk Works: Profiles of Mediators* 477 (1994).

<sup>318</sup> Participant Comment, October 4, 2000.

<sup>319</sup> Participant Comment, April 20, 1998.

<sup>320</sup> Participant Comment, April 23, 1998. Another observer indicated the mediator sided with one perspective by arguing, inaccurately, “look, this child is dying.” Participant Comment, April 21, 1998.

<sup>321</sup> Professor Lederach argues that gathering information and helping participants negotiate are universal aspects of mediation found in all cultures. See *Preparing for Peace*, *supra* note 13, at 93-96.

<sup>322</sup> *Id.* at 94-95.

<sup>323</sup> John Winslade & Gerald Monk, *supra* note 128, at 3.

<sup>324</sup> *Id.*

<sup>325</sup> Bernard Mayer argues that effective communication including questioning stems from intention, not technique, and that caring about what others are saying is the key. Bernard Mayer, *supra* note 61, at 121-22. Professors Stone and colleagues argue that curiosity opens up stories while certainty closes them. Douglas Stone, et al, *supra* note 215, at 37.

<sup>326</sup> See Karl A. Slaikeu, *supra* note 136, at 56.

occurs because information is seldom distributed equally among negotiators,<sup>327</sup> disputants often assume that they have all the data they need,<sup>328</sup> and mediation provides unique opportunities for confidential caucusing which allows more conversations focused on important topics including underlying interests and needs.<sup>329</sup>

Our questioning theories initially emphasized the importance of asking questions in ways that demonstrate genuine caring, curiosity, and interest.<sup>330</sup> We cautioned against using questions to inform, persuade, control, and attack.<sup>331</sup> The core questioning action theories we presented concerned culturally-influenced insights that emphasize attending to how questions are phrased.

These action theories posit that questions may be phrased in different ways that vary the breadth of information they seek and affect relationship dimensions between persons asking and persons expected to answer.<sup>332</sup> These theories create a labeling scheme to describe different types of question forms keyed to the breadth of information they invite.<sup>333</sup> Questions that

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<sup>327</sup> See Douglas Stone, et al, supra note 215, at 8; Robert Mnookin, et al., supra note 42, at 21.

<sup>328</sup> Douglas Stone, et al., supra note 215, at 8.

<sup>329</sup> See Robert A. Baruch Bush, What Do We Need A Mediator For?: Mediations Value-Added for Negotiators, 12 Ohio St. J. on Disp. Resol. 1, 25-2 (1996); Carrie Menkel-Meadow, supra note 150, at 226.

<sup>330</sup> See, e.g., Bernard Mayer, supra note 61, at 121-22 (arguing that effective communication including questioning stems from intention, not technique, and that the key is caring about what others are saying); Douglas Stone, et al., supra note 215, at 37 (arguing that curiosity encourages others to share their stories while certainty discourages open disclosure); and John Winslade & Gerald Monk, supra note 128, at 75 (arguing that mediators should display an attitude of empathic curiosity containing a genuine attitude in every person).

<sup>331</sup> Questions can be used to mask persuasion, exercise control, attack positions, and put words in speaker's mouths. See Lavinia E. Hall, Finding Alternatives to Litigation in Business Disputes, in Deborah M. Kolb et al., supra note 316, at 299; Douglas Stone et al., supra note 215, at 173. A survey of prominent American mediators showed that although questions are used to gather information, they are also frequently used to promote specific ends including masking suggestions and teaching without lecturing. Deborah M. Kolb et al., supra at 472.

<sup>332</sup> Mapping, Modeling, and Critiquing, supra note 63, at 894.

<sup>333</sup> Professors Bennett and Hermann recommend viewing questions as funnels for encouraging and gathering information and remembering that the encouragement and type of information

encourage respondents to select topics or broadly seek information on aspects of subjects are called open questions.<sup>334</sup> “Please continue” and “what are your concerns” demonstrate broadly open and topic-specific open question phrasings. Questions that seek specific data by directing respondents to focused aspects of identified topics are called closed questions.<sup>335</sup> “How long have you lived on this land?” exemplifies a closed phrasing that selects a specific topic, residency on a plot of land, and focuses on one aspect of the topic, the length of time the respondent has resided there. Questions which employ phrasing choices that suggest answers are called leading questions.<sup>336</sup> “You have a deed for this land, correct?” demonstrates a leading phrasing that seeks confirmation of the answer supplied. Questions which combine more than one inquiry in the same interrogative statement are called compound questions.<sup>337</sup>

These action theories also posit that virtually all topics can be approached either by effective phrasing choices asking open or closed questions and or generally ineffective decisions

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obtained is related to the openness of the funnel. Mark D. Bennett & Michele S.G. Hermann, *supra* note 140, at 79.

<sup>334</sup> See, e.g., James J. Alfini, Sharon Press, Jean R. Sterlight, & Joseph B. Stulberg, *Mediation Theory and Practice* 123 (2001); David A. Binder, Paul Bergman, & Susan C. Price, *Lawyers as Counselors: A Client-Centered Approach* 70-71 (1991); Paul B. Pederson & Allen Ivey, *supra* note 194, at 131; Don Peters, *supra* note 132, at 267. Some scholars prefer the label open-ended. See Kimberlee K. Kovach, *supra* note 12, at 117.

<sup>335</sup> James J. Alfini, et. al., *supra* note 333, at 123; David A. Binder, et al., *supra* note 333, at 72; Paul B. Pederson & Allen Ivey, *supra* note 194, at 131; Don Peters, *supra* note 132, at 269.

<sup>336</sup> Professors Binder, Bergman and Price note that this phrasing choice creates questions that “are little more than outright assertions, accompanied by either a tone of voice or language clue” that a particular answer is desired. David A. Binder, et al., *supra* note 333, at 72. Professor Stulberg explains that leading questions have “two components. First, the answer is contained in the statement of the question. Second, the person who is asked the question can respond only by saying yes or no.” Joseph B. Stulberg, *supra* note 220, at 78.

<sup>337</sup> Compound questions are multiple questions being asked as one. James J. Alfini, et. al., *supra* note 333, at 124; Kimberlee K. Kovach, *supra* note 12, at 118. They frequently combine open and closed inquiry and often demonstrate thought verbalizations more than careful choice an appropriate inquiry form. See Don Peters, *supra* note 132, at 272 n.46.

to use leading or compound formulations.<sup>338</sup> These theories then encourage mediators to select question forms that accomplish their informational and relational objectives.<sup>339</sup> These theories assume that mediators will usually seek to encourage story-telling and gather information in ways that allow disputants to narrate fully.

American mediation scholars recommend selecting open question forms extensively, particularly during joint sessions when all participants are present, at the beginnings of caucuses or private sessions with one or more but not all parties, and whenever new topics surface.<sup>340</sup> Open questions provide the greatest freedom for respondents to talk about what is important to them<sup>341</sup> and often generate unexpected but important information.<sup>342</sup> They omit the specific

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<sup>338</sup> See David A. Binder, et al., *supra* note 333, at 70. Studies show that lawyers often have difficulty avoiding leading questions when gathering information in initial interviews with clients. E.g., Carl J. Hostika, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 *Soc. Prob.* 599, 605 (1979) (average of 25% of lawyer's questions were leading in almost 50 observed legal aid interviews); Don Peters, *supra* note 132, at 271 n.45 (average of 21% of all questions asked in 30 taped and transcribed interviews at the University of Florida Levin Law School's Virgil Hawkins Civil Clinic were leading). Law students have also demonstrated difficulty avoiding asking compound questions in initial interviews. Don Peters, *supra* at 272 n.46 (average of 22% of all questions asked in 30 taped and transcribed interviews were compound).

<sup>339</sup> See Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 79 (arguing that skilled mediators remain aware of the effects of their questions and choose them with a purpose); *Mapping, Modeling, and Critiquing*, *supra* note 63, at 894-95 (using a negotiation example to argue that "asking questions skillfully requires rich "pre-act cognitive analysis and . . . sophisticated post-act reflection").

<sup>340</sup> See, e.g., Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 80-81; Kimberlee K. Kovach, *supra* note 12, at 92; Joseph B. Stulberg, *supra* note 220, at 77.

<sup>341</sup> See, e.g., James J. Alfini, et al., *supra* note 333, at 123 (arguing that open questions gives disputants chances to share their experiences and shape the dialogue); *Oiling Rusty Wheels*, *supra* note 98, at 799 (arguing that open questions allow respondents to use their memory patterns and associational frames to narrate information they think is important); Joseph B. Stulberg, *supra* note 220, at 77 (arguing that open questions let parties respond by elaborating on a topic in their own words).

<sup>342</sup> See David A. Binder, et al., *supra* note 333, at 73-74 (noting that open questions often produce details that cover the same ground as a series of closed questions and emphasizing the difficulties of thinking of all the factors to ask about in focused ways); Mark D. Bennett & Michelle S. G.

focus provided by closed and leading questions that can distract respondents or bias answers.<sup>343</sup>

They communicate respect to respondents by signaling confidence in their ability to provide important information and willingness to listen to whatever they want to say.<sup>344</sup> They also permit respondents to avoid discussing specific, sensitive facts or events early in mediations which allows time to pass and rapport and trust to develop; this may make it easier to discuss potentially unpleasant topics later, usually in caucuses.<sup>345</sup> They frequently produce longer responses that provide more opportunities to use another core set of action theories our workshops emphasized, active listening.<sup>346</sup>

My action theories proposed that mediators should generally use closed question forms to set the stage for open questions, to clarify or reassure participants who seem confused or uncertain by the breadth of open phrasings,<sup>347</sup> to elicit specific details, usually in caucuses,<sup>348</sup>

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Hermann, *supra* note 140, at 17 (arguing that open questions encourage talking broadly with no relevancy limits helps expose the roots and complexities of conflicts).

<sup>343</sup> Douglas Stone, et al., *supra* note 215, at 174.

<sup>344</sup> See David A. Binder, *supra* note 333, at 73; Don Peters & Martha Peters, *supra* note 153, at 186; John Winslade & Gerald Monk, *supra* note 128, at 128.

<sup>345</sup> See David A. Binder, et. al., *supra* note 333, at 73. Professor Kovach warns that mediators must not narrow their focus too soon. Kimberlee K. Kovach, *supra* note 12, at 116.

<sup>346</sup> Professor Stulberg argues that mediators cannot learn whether participants are “angry, upset, committed, or nonchalant if all” they do is respond briefly to a series of closed or leading questions. Joseph B. Stulberg, *supra* note 220, at 77. See also David A. Binder, et al., *supra* note 333, at 74, notes 407-415 *infra* and accompanying text.

<sup>347</sup> See, e.g., David A. Binder, et al., *supra* note 333, at 74-76 (arguing that closed questions can help respondents inhibited by narrating or uncertain about what information open questions seek); Dwight Golann, *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* 71 (1996) (arguing that simple questions about facts or dispute backgrounds can help get disputants accustomed to speaking with the mediator); Kimberlee K. Kovach, *supra* note 12, at 116 (acknowledging that closed questions are appropriate when confusion exists).

<sup>348</sup> See James J. Alfani, et al., *supra* note 333, at 123 (arguing the best use of closed questions is towards the end of mediations); Kimberlee K. Kovach, *supra* note 12, at 118 (contending that closed yes/no or either/or questions work best during negotiation and agreement drafting stages).

and to check in with disputants regarding process directions.<sup>349</sup> We suggested generally using open forms more than closed phrasings<sup>350</sup> because mediations seldom need to focus on precise factual and detailed analysis until identifying, clarifying, and confirming agreement specifics. We warned that early and extensive selection of closed forms may make participants defensive, leave them feeling like they never had a chance to tell their story<sup>351</sup> and miss important information. We also recommended avoiding leading and compound phrasing choices<sup>352</sup> even though harmful effects of these choices can often be ameliorated by caring attitudes and respectful voice tones and non-verbal behaviors.

We illustrated our presentation of these action theories by showing and discussing the two video clips devoted to questioning action choices. The first showed ineffective question phrasing choices<sup>353</sup> as the mediator, early in a joint session with Henri, used only focused

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<sup>349</sup> See Dorothy J. Della Noce, Robert A. Baruch Bush, & Joseph P. Folger, *Myths and Misconceptions About the Transformative Orientation*, in *Designing Transformative Mediation*, supra note 128, at 52 (recommending frequent checking in with parties, using closed questions to ask where they would like to go next).

<sup>350</sup> See, e.g., James J. Alfini, et al., supra note 333, at 123 (arguing that mediators should use open questions predominantly during early stages of mediation); Mark D. Bennett & Michelle S.G. Hermann, supra note 140, at 42 (mediators primary questioning task is to ask open questions); Kimberlee K. Kovach, supra note 12, at 120 (open questions good at beginnings of mediation).

<sup>351</sup> See, e.g., David Binder, et al., supra note 333, at 77 (arguing that too many closed questions can leave respondents “feeling that they never had a chance to say what was really on their minds”); Mark D. Bennett & Michelle S.G. Hermann, supra note 140, at 79 (contending that closed and leading questions harm open dialogue by causing respondents “to feel pressed, defensive, challenged, or cut off”); Joseph B. Stulberg, supra note 220, at 79 (arguing that use of leading questions leaves participants defensive, terse, and no longer considering the mediator impartial).

<sup>352</sup> American mediation scholars support this recommendation. See, e.g., James J. Alfini et al., supra note 333, at 124 (explaining that compound questions often confuse respondents and generate confusing answers and mediators should avoid them); Joseph B. Stulberg, supra note 220, at 79 (arguing for a general rule that mediators should not pose leading questions).

<sup>353</sup> The design decision to show ineffective choices first followed by more effective actions was intended to build participant confidence before they used these behaviors in the focused role-plays that followed the questioning and listening units. Identifying positive action choices

inquiry forms by asking four closed questions, one leading, and one compound question. Participant responses after watching this video segment suggested that messages in my questioning action theories were understood and accepted.<sup>354</sup> They included comments that the mediator was “too aggressive,”<sup>355</sup> made “too many interruptions,”<sup>356</sup> and that “questioning is torture.”<sup>357</sup> The second clip illustrated effective question phrasing choices and showed Henri providing more and unexpected information invited by the mediator’s open inquiries.

The workshops then moved to the first set of three role-plays based on the Difficult Situation scenario. Each role-play reflected my culturally influenced focus on specific facts and issues built into this situation.<sup>358</sup> They asked participants playing the mediator role to gather information about the fence that was torn down, the gardening tools allegedly wrongfully retained, and the collision between Henri’s tap tap and Paul, the son of Jean and Marie. Notwithstanding this directive focus flowing from my cultural bias, debriefing the three

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facilitates learning by reinforcing what should be repeated in identical or similar contexts. Mapping, Modeling, and Critiquing, *supra* note 63, at 921.

<sup>354</sup> The discussion notes I prepared for instructor use to demonstrate workshop design may limit the value of this conclusion. Participants had Haitian-Creole versions of these documents in front of them as we discussed the role-plays and they could have influenced their responses.

<sup>355</sup> Participant Comment, April 22, 1998.

<sup>356</sup> Participant Comment, April 22, 1998.

<sup>357</sup> Participant Comment, April 22, 1998. I attempted to reframe this as information gathering but was told later by a Haitian-American lawyer who was accompanying us on this trip that interrogation and torture have the same derivative root in Latin.

<sup>358</sup> Culture influences how people think and communicate during conflict. Bernard Mayer, *supra* note 61, at 79. American culture values “so-called objective presentations heavily loaded with facts.” *Id.* Professor Lederach argues that posing open questions about factual matters presents “a rapid pace of direct talk and self-disclosure where cognitive skills of analysis and issue identification are prominent.” *Preparing for Peace*, *supra* note 13, at 105. This creates an American culturally derived process format and structure that is “direct and analytical, assuming a considerable degree of trust.” *Id.*

questioning role-plays also generally confirmed the view shared by many participants that “open questions work”<sup>359</sup> and this questioning theory “fits in Haiti.”<sup>360</sup>

Role-play debriefs occasionally produced impressive feedback comments regarding mediator performances that suggested understanding and acceptance of my questioning action theories. For example, one participant shared this description of the mediator’s performance:

“First question was short, brief, ‘Louise, how are you?’ Second question was an open question, ‘explain what happened.’ Third question continued on with explanation using an open question, ‘what happened next?’ The majority of questions were open so that he could get more information.”<sup>361</sup>

Another shared that:

“Mediator did an excellent job because respected steps of the process. First question was explain to me this problem. It let me talk about it. Second question was how do you know in fact that these children broke the fence. This let me say even more.”<sup>362</sup>

Participants mentioned experiencing positive and negative aspects of question phrasing choices when they played disputant roles. Responses included “I felt good, secure, able to tell my story and postpone difficult topics,”<sup>363</sup> “[getting just closed questions made me feel] like the mediator wasn’t interested,”<sup>364</sup> “she asked me how much money do I want for my

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<sup>359</sup> Participant Comment, November 12, 1998.

<sup>360</sup> Participant Comment, October 2, 2000.

<sup>361</sup> Participant Comment, November 12, 1998.

<sup>362</sup> Participant Comment, April 23, 1998. This feedback and the comments in note 360 supra reflect the important action choice of asking multiple open questions consecutively. Research suggests that American law students have considerable difficulty doing this. A review of thirty taped and transcribed initial interviews with clients showing divorces showed only ten instances where the next response by the student lawyer after asking an open question was another open question. Don Peters, supra note 132, at 299 n.129.

<sup>363</sup> Participant Comment, October 2, 2000.

<sup>364</sup> Participant Comment, October 4, 2000.

tools and I didn't want to ask for money so I felt uncomfortable,"<sup>365</sup> and "I felt trapped by the way she was asking questions."<sup>366</sup> Participants playing a mediator role commented that "[I] learned what the parties actually wanted because one wanted dollars for the value of the fence while the other wanted to rebuild it,"<sup>367</sup> "I was curious, I wanted to know what the party had to say, why the conflict happened, [and] more details,"<sup>368</sup> and asking effective questions "wasn't that easy because I was always trying to ask a leading question to get information."<sup>369</sup>

I wondered whether occasionally circular, vague, and general narrative responses to debriefing questions reflected a culturally different approach to information gathering. For example, asking what the mediator did well often produced responses like this one:

"The mediator did some good work. He talked to the party and asked what can you tell us about this problem. He knew that there was violence and that the fence was torn down so he said that violence begets violence. Eventually the party understood what the mediator was trying to do. The mediator said don't go to court because eventually you'll end up spending money. The party was very grateful and thanked the mediator."<sup>370</sup>

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<sup>365</sup> Participant Comment, April 22, 1998.

<sup>366</sup> Participant Comment, October 4, 2000. Other relevant comments included: "the mediator unfortunately asked a rather complicated compound question consisting of three parts," Participant Comment, April 23, 1998; and "the mediator didn't ask open questions to [let the party] explain what happened, [the party] could have said more but didn't get the chance," Participant Comment, April 12, 1999.

<sup>367</sup> Participant Comment, October 2, 2000.

<sup>368</sup> Participant Comment, October 4, 2000.

<sup>369</sup> Participant Comment, October 4, 2000. Other participants shared comments that needed follow up. For example, "the mediator was very open in his information gathering. First question was how do we solve this problem. Second question do you think there should be a payment. Third question was it really Jean and Marie that tore down the fence," Participant Comment, November 10, 1998; and "I felt very at ease, comfortable to ask questions. When was the fence built? How was it torn down? What effort was used to build it? Who broke it down?," Participant Comment, November 10, 1998.

<sup>370</sup> Participant Comment, April 23, 1998.

Professor Lederach argues that a preference for story-telling using proverbs, fables, and analogies reflects holistic thinking which keeps parts together and understands events and problems as a whole.<sup>371</sup> He contrasts this with the analytic thinking which drives North American dispute resolution and breaks stories into their component parts to gather information about them separately.<sup>372</sup> Haiti has been described as an oral culture with a long tradition of proverbs.<sup>373</sup> No participant debriefing comments, however, included proverbs, fables, or analogies. Consultations with Haitian colleagues and Haitian-American lawyers who accompanied us on one trip suggested that these circular responses reflected a cultural tradition of telling stories more than an inclination to avoid direct communication. These colleagues also indicated that these responses may have stemmed from not understanding what effective feedback is or a reluctance to provide detailed comments publicly in large group settings.

No participant debriefing comments or questions suggested that my information gathering focus toward facts and analytic issues was inappropriate or that it should have focused on stories and metaphors.<sup>374</sup> No participant comments or questions challenged the individual and low context communication assumptions that underlie the analysis of ways to phrase direct questions targeting facts, issues, interests, alternatives, and solutions.<sup>375</sup>

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<sup>371</sup> Preparing for Peace, *supra* note 13, at 81.

<sup>372</sup> *Id.*

<sup>373</sup> *Libete*, *supra* note 23, at 284.

<sup>374</sup> See Bernard Mayer, *supra* note 61, at 80 (suggesting that some cultures communicate meaning in conflict through these methods far more than through objective, analytic emphasis on facts and issues).

<sup>375</sup> See *Mediation Across Cultures*, *supra* note 5, at 32-33 (arguing that western cultures use low context dispute resolution approaches that value confrontation, self-disclosure, assertiveness in expressing demands, flexibility in negotiation, and adaptability in compromise and collaboration while high context cultures prefer indirect communication, emotional distance, protection of face, and delay to let emotions cool); Jeanne M. Brett, *supra* note 97, at 104-98 (discussing the challenges in direct versus indirect confrontation when negotiating).

Direct questions may discomfort mediation participants with strong collective and high context communication orientations because they might find focused inquiries threatening and inappropriate.<sup>376</sup> No participant comments or questions raised issues implicating high context communication concerns that applying these questioning theories produced inappropriate bluntness and insensitivity to status, ritual, role, and nuance.<sup>377</sup> None suggested that alternatives to direct questioning, such as making suggestions and awaiting responses,<sup>378</sup> deferring to a higher status possessed by mediators,<sup>379</sup> or reaching agreements to help mediators avoid face loss,<sup>380</sup> would be more appropriate.

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<sup>376</sup> See Jeanne M. Brett, *supra* note 97, at 104-07 (arguing that direct confrontation through face to face questioning and other verbal interchange is often inconsistent with cultures who prefer to deal with conflict indirectly); Colleen Mullalvey-O'Byrne, *Intercultural Communication for Health Care Professionals*, in *Cross Cultural Training Modules*, *supra* note 6, at 171, 187 (arguing Western medical model of direct questioning is considered impolite and rude in cultures where interpersonal communication is indirect).

<sup>377</sup> Augsburger captures the difficulty a low context communicator would have gathering information in a high context culture well with the story of two Malaysian families. *Mediation Across Cultures*, *supra* note 5, at 96. The daughter of a high class family and the son from a lower class family fell in love and sought to marry. The son's mother approached the girl's family to explore whether the marriage was acceptable. Refreshments consisting of tea and bananas were served. The mothers talked about the weather, life in the village, and many other topics but never mentioned the children or the possibility of marriage. The son's mother left and told her son that the marriage was unacceptable because tea and bananas are not typically served together. This subtle cue avoided a direct discussion that would have caused face loss for both mothers. *Id.* Demonstrating cultural difference, the East African lawyers with whom I have worked in Kampala laugh at this story because tea and bananas are frequently served together in their region of the world. They, along with most American mediators, would neither identify nor understand this high context cue.

<sup>378</sup> Jeanne M. Brett, *supra* note 97, at 64-70.

<sup>379</sup> See *Mediation Across Cultures*, *supra* note 5, at 102 (arguing that cultures which accept and value hierarchy often defer to persons with authority). At the SPIDR conference in Albuquerque in September, 2000, a judge from Singapore explained the more than 90% settlement rate in her small claims court by invoking these deferential traditions.

<sup>380</sup> *Id.* at 97 (describing a Japanese tradition of using a mutually respected third party which produces a desire by persons in conflict to find a resolution to save the face of this influential person).

Participant questions generally accepted the questioning action theories presented. They often reflected concerns about these action theories that are frequently expressed in America. Participant questions included “don’t open questions encourage too much rambling by parties”<sup>381</sup> and “how do you shut disputants up?”<sup>382</sup>

Responding to these questions let us acknowledge that while open questions may not be effective with participants who are extremely verbose,<sup>383</sup> mediators should listen to virtually everything participants say initially to build trust and avoid missing something that might be important ultimately.<sup>384</sup> Choosing closed forms or making process comments using “I messages”<sup>385</sup> can usually counter repetitive rambling once mediators ensure that the responses are adding nothing new to their or other disputants’ knowledge.<sup>386</sup>

The most frequent concern voiced about my questioning action theories challenged how open questions will fare with a generally distrustful population. Dr. Obas Roman, an English-speaking psychologist who attended one of our workshops, indicated that Haitians “tend to be very suspicious and not likely to reveal much in response to open questions.”<sup>387</sup> Other participants commented that “you have got to trust the mediator, otherwise [disputants] won’t tell you

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<sup>381</sup> Participant Comment, April 22, 1998.

<sup>382</sup> Participant Comment, April 22, 1998.

<sup>383</sup> See David A. Binder, et al., supra note 333, at 75.

<sup>384</sup> Patience is an important mediator attribute. See Kimberlee K. Kovach, supra note 12, at 40; Joseph B. Stulberg, supra note 220, at 71. Mediators must ensure that all parties are given a chance to speak fully and tell their stories completely to hear and understand these communications. Joseph B. Stulberg, supra at 71. Mediators should essentially keep their mouths shut and let everyone “talk, talk, and talk until . . . [they] start repeating themselves. Id. at 73.

<sup>385</sup> I messages “speak in terms of one’s own concerns, needs, or feelings. Bernard Mayer, supra note 61, at 129. They generally work more effectively than you messages which convey judgment of others and generate defensiveness. Id.

<sup>386</sup> See James J. Alfini, et al., supra note 333, at 123 (arguing that one of the best uses of closed questions is “with disputants who volunteer a lot of information and the mediator is trying to limit their domination of the mediation”).

<sup>387</sup> Workshop Notes, November 10, 1998 (Comment of Dr. Obas Roman).

anything,”<sup>388</sup> and “[the mediator’s performance was] very good because the person was honest enough to give complete answers.”<sup>389</sup>

In response, we shared and endorsed Dr. Roban’s suggestion that mediators may have to “ask closed questions first.”<sup>390</sup> We emphasized that closed questions can reassure suspicious participants by communicating that specified and limited information is sought.<sup>391</sup> They can also build confidence in the process of responding to questions.<sup>392</sup> We also re-emphasized that gathering information in confidential caucuses can help suspicious participants learn to trust that mediators will help them negotiate and not tell them what to do or betray confidences.<sup>393</sup> We further shared that in America mediators win trust gradually by demonstrating that they are truly impartial.<sup>394</sup> This requires avoiding judgmental language, ensuring balanced conversations, and honoring confidentiality.

## **B. LISTENING**

My next set of action theories argued that listening behaviors help mediators shift from deciding and persuading to learning and facilitating.<sup>395</sup> We emphasized that humans have deep desires to feel heard and know that others care enough to listen.<sup>396</sup> Sharing that many American

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<sup>388</sup> Participant Comment, November 12, 1998.

<sup>389</sup> Participant Comment, October 12, 1999.

<sup>390</sup> Workshop Notes, November 10, 1998 (Comment of Dr. Obas Roman).

<sup>391</sup> See David A. Binder, et al., *supra* note 333, at 76.

<sup>392</sup> See *Id.* at 77; Don Peters, *supra* note 132, at 269-70.

<sup>393</sup> See Karl A. Slaikeu, *supra* note 136, at 91 (arguing that caucuses provide mediators with opportunities to demonstrate trust and acceptance of participants with guarantees that their views and emotions will not be shared with others or used against them).

<sup>394</sup> Thomas Colosi, *The Role of the Mediator, in Negotiation: Readings, Exercises, and Cases* (Roy J. Lewicki, et al., eds. 2d ed., 1993).

<sup>395</sup> See Bernard Mayer, *supra* note 61, at 121-22 (arguing that effective communicating differs from persuading, evaluating, and problem solving); Douglas Stone, et al., *supra* note 215, at 164 (arguing that listening helps shift from persuasion to learning).

<sup>396</sup> See Douglas Stone, et al., *supra* note 215, at 163.

mediation scholars argue that listening is the most important mediator activity,<sup>397</sup> we suggested that effective listening requires genuine, natural actions that communicate caring about what participants say.<sup>398</sup> We also proposed that skilled listening requires achieving an internal mental state that allows accurate reception and understanding of verbal and non-verbal messages.<sup>399</sup>

Applying my cultural bias toward breaking tasks into components and using American labels for these parts, we next presented the idea that skillful listening requires passive and active behaviors.<sup>400</sup> We suggested that essentially passive actions of remaining silent,<sup>401</sup> letting others talk while avoiding interruptions<sup>402</sup> and using culturally appropriate non-verbal behaviors that

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<sup>397</sup>Mark D. Bennett, *supra* note 140, at 75 (arguing that effective mediation is based on effective listening); Nancy H. Rogers & Richard A. Salem, *A Student's Guide to Mediation and the Law* 12 (1987) (arguing that listening to receive messages is most important part of mediator's role); Gerald A. Slaikeu, *supra* note 136, at 47-48 (arguing that listening is the chief feature of what mediators offer and that whenever they are in doubt, they should "listen, and then listen again").

<sup>398</sup> See, e.g., Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 78 (arguing that effective listening as has much to do with intent and attitude as it does with specific behaviors); Jonathan R. Cohen, *supra* note 63, at 746 (arguing that "[o]ften how one acts is just as important, if not more important, than what one says"); Mayer, *supra* note 61, at 120-22 (arguing that effective listening requires genuine, natural actions that require focused energy, communicate caring, and tolerate difficulties and differences).

<sup>399</sup> Mark D. Bennett and Michelle S.G. Hermann, *supra* note 140, at 77-78.

<sup>400</sup> See David A. Binder et al, *supra* note 333, at 49-54; Oiling Rusty Wheels, *supra* note 98, at 787-88 n.47.

<sup>401</sup> Use of and comfort with silence may have strong cultural influences. See Paul B. Peterson & Allen Ivey, *supra* note 194, at 108-09. International students attending American universities have occasionally displayed tendencies toward the use of silence that exceeded the comfort level of their American counselors. *Id.* For example, one American university's counseling center diagnosed all the students from a particular cultural group as distracted because they did not respond to questions promptly, learning later that in this culture brief periods of silence before responding to questions signaled respect and careful consideration of one's response. *Id.*

<sup>402</sup> See Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 75 (arguing that mediators cannot listen and learn from participants well when they are talking). Most American and Western Europeans are culturally inclined to value speaking turns with one person talking at a time, taking one subject at a time, and avoiding interruptions. Bernard Mayer, *supra* note 61, at 80. In many other cultures, however, "overlapping conversation is natural and acceptable, and most conversations are characterized by several people talking at once, often about different subjects." *Id.*

communicate attending to, encouraging, and interest in speakers<sup>403</sup> generally promotes accurate reception and understanding of messages.<sup>404</sup> We also advocated that mediators should demonstrate listening and understanding actively<sup>405</sup> by paraphrasing or summarizing information in, and acknowledging feeling dimensions of, messages they receive from disputants. Objective information can be paraphrased using statements that communicate what speakers said about these particular topics or events or summarized in longer messages that capture several important points shared. Emotional dimensions and feelings can be acknowledged by short statements that acknowledge these elements such as “this angered you” or “you felt frightened when you saw the tap tap strike your son.” Called active listening, using these behaviors helps mediators focus their attention on speaker’s messages,<sup>406</sup> clarify their understandings of them,<sup>407</sup> motivate additional communication,<sup>408</sup> and communicate empathy.<sup>409</sup>

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<sup>403</sup> Cultural influences also generate wide variations in appropriate attending behaviors. For example, American culture generally interprets leaning forward slightly toward speakers as an appropriate non-verbal attending behavior that conveys caring for and interest in them and their messages while in other contexts this action could be interpreted as intimidating. See Paul B. Pederson & Allen Ivey, *supra* note 194, at 109. Similarly, American culture generally considers that nodding one’s head is a positive response and an appropriate non-verbal way to communicate an expectation that the speaker should continue talking. David A. Binder, et al., *supra* note 333, at 50. Cambodian culture, however, generally considers forward head nodding as a negative response. Colleen Mullavey-O’Byrne, *supra* note 375, at 188.

<sup>404</sup> See David A. Binder et al., *supra* note 333, at 49-52; Joseph B. Stulberg, *supra* note 220, at 71.

<sup>405</sup> These actions prove that a speaker’s message has been heard and understood while passive listening choices only implies that hearing and understanding have occurred. Don Peters, *supra* note 132, at 278-79. Until they feel listened to, participants often repeat their messages, find new words to express the same things, and often talk louder. Douglas Stone, et al., *supra* note 220, at 167. It is often vital that mediation participants feel heard and understood, ideally by other disputants but at a minimum by mediators. Dwight Golann, *supra* note 346, at 71.

<sup>406</sup> Emphasizing this form of listening helps mediators concentrate on speakers and their messages. See Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 75; Karl A. Sliakou, *supra* note 136, at 227. Doing this helps mediators tune out internal distractions unconnected to speaker messages, remain open to learning new information, and avoid prematurely judging through concluding they know what speakers mean or how to solve problems presented. See Mark D. Bennett & Michelle S.G. Hermann, *supra* at 75-76.

Receiving paraphrases, summaries, and acknowledgements demonstrates that messages have been understood.<sup>410</sup> Providing this feedback proves understanding and conveys respect.<sup>411</sup> Many persons feel a strong need to repeat themselves until they receive feedback proving that their messages have been understood.<sup>412</sup> Many also are unwilling to negotiate until they feel that they have been understood.<sup>413</sup>

After applying this action theory to the two listening demonstration vignettes showing different approaches to eliciting and listening to information from Marie about events immediately after Henri's tap tap struck her son, Paul,<sup>414</sup> we ran and debriefed the listening role-

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<sup>407</sup> See, e.g., Mark D. Bennett & Michelle S.G. Hermann, *supra* note 140, at 83 (arguing active listening responses ensure receiver got the message sent correctly); Kimberlee K. Kovach, *supra* note 12, at 43 (arguing active listening allows listeners to check with speakers about accuracy of message received); Don Peters, *supra* note 132, at 279 (arguing that active listening provides a useful mechanism for confirming and clarifying objective information speakers communicate).

<sup>408</sup> Being heard and understood makes speakers feel better about persons who demonstrate their understanding and about the process of communicating. Don Peters, *supra* note 132, at 79. This helps mediators build trust with participants. John Winslade & Gerald Monk, *supra* note 128, at 6 (arguing that careful, respectful listening is a key part of the trust building process). An empirical analysis of thirty actual divorce interviews in a law school clinical program showed that two-thirds of feeling acknowledgements produced additional information after confirmation of the emotional dimension of the message. Don Peters, *supra* at 279-80 n.71.

<sup>409</sup> Acknowledging the emotional dimensions of a speaker's statement accurately and non-judgmentally powerfully communicates that the recipient can enter the speaker's world and see if from that perspective. Don Peters, *supra* note 132, at 280. It proves that the recipient is, in a sense, feeling with, and not for, the speaker, the crucial distinction between empathy and sympathy. *Id.*

<sup>410</sup> Robert F. Cochrane, Jr., et al., *supra* note 43, at 42. Professor Egan notes that "the ultimate proof of good listening is good responding." Gerald Egan, *You & Me: The Skills of Communicating and Relating to Others* 136 (1977).

<sup>411</sup> Robert F. Cochrane, Jr., et al., *supra* note 43, at 42.

<sup>412</sup> Douglas Stone, et al., *supra* note 215, at 106-07.

<sup>413</sup> See *id.*

<sup>414</sup> My notes contain few participant comments from discussions of these demonstrations. We often lectured through this portion in an effort to complete as many role-plays as possible and that undoubtedly contributed to this situation. The obviousness of these demonstrations as examples of ineffective listening (with interruptions, prematurely focused questions, and ignoring Marie's sadness) and effective approaches (no interruptions, three content paraphrases, two feeling acknowledgements, and open questions) may have been a factor. Participants readily

plays. Several workshop evaluation comments and participant responses during our debriefing conversations suggested our listening action theories made sense in Haitian contexts. Written evaluation comments included: “I enjoyed learning how to listen;”<sup>415</sup> “[the workshop] helped me become more patient and more wise in listening to other people;”<sup>416</sup> “I became a better listener;”<sup>417</sup> and “what I liked the most was the fact that the mediator did not take sides. . . that he really took his time to listen to both sides.”<sup>418</sup> Workshop participants verbalized that “it’s in our culture to listen;”<sup>419</sup> and “my mediator was effective, I felt listened to and my feelings were understood.”<sup>420</sup>

Transferring passive listening action theories seemed unlikely to infringe on many culturally influenced behavioral patterns because these ideas require deferential, non-assertive conduct. These behaviors communicate respectful deference that is likely to comport with collective and high context orientations.<sup>421</sup> Several participant comments suggested that ideas

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identified the ineffective action choices the mediator in the first clip made as demonstrated by these comments from our workshop on October 4, 2000, concluding that the mediator: “didn’t take time;” “kept interrupting;” and “dealt with emotions like everything was okay.” Unvoiced difficulties transferring these action theories to Haitian contexts problems may have also contributed.

<sup>415</sup> Evaluation Comment, October 2, 2000.

<sup>416</sup> Evaluation Comment, October 3, 2000.

<sup>417</sup> Evaluation Comment, October 4, 2000.

<sup>418</sup> Workshop Comment, October 5, 2000.

<sup>419</sup> Participant Comment, October 5, 2000.

<sup>420</sup> Participant Comment, November 9, 1998.

<sup>421</sup> See *Mediation Across Cultures*, supra note 5, at 110 (arguing that silence communicates without invading); Bernard Mayer, supra note 61, at 77 (suggesting that silence and nonverbal acceptance is more validating and less embarrassing to many persons than assertions of the content or emotional dimensions of their communications); American lawyers and others accustomed to individualistic, low context orientations often find using active listening challenging. See David A. Binder, et al., supra note 333, at 46 (arguing that most American lawyers are too busy asking questions and giving advice to take the time to listen). American law students learning mediation skills often become frustrated when confronting “how poorly they listen.” Janet Weinstein, *Teaching Mediation in Law School: Training Law Students to be Wise*, 35 N.Y.L.Sch.L.Rev. 199, 205-06 (1990).

about effective passive listening actions transferred to Haitian contexts readily. These included comments from observers and disputants that participants playing mediator roles such as: “his eye contact and physical gestures [told me he was listening];”<sup>422</sup> “he was telling me to continue with his eyes;”<sup>423</sup> “[my] mediator heard me and didn’t interrupt despite the fact that I was holding to my position;”<sup>424</sup> and “nodding of head and body movements [encouraging listening] were good.”<sup>425</sup> My favorite passive listening moment came after lunch in Gonaives when I analogized passive listening to how audience participants were behaving, complimented them for doing it so well, and then noticed three participants dozing.<sup>426</sup>

Action theories regarding active listening present potential culturally rooted obstacles to inter-cultural transfer. Paraphrasing or summarizing objective information or acknowledging emotional dimensions in what speakers say requires direct, assertive, and potentially intrusive behavior.<sup>427</sup> The theories predicting that these actions will provide respect and motivate further communication flow from individual and low context cultural orientations.<sup>428</sup> Behaving consistently with these action theories, particularly when acknowledging emotional dimensions

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<sup>422</sup> Participant Comment, October 3, 2000.

<sup>423</sup> Participant Comment, October 3, 2000.

<sup>424</sup> Participant Comment, April 23, 1998.

<sup>425</sup> Participant Comment, April 23, 1998.

<sup>426</sup> It is possible that these three participants were following a culturally-influenced tradition, often found in Japan, of closing their eyes while I addressed them as a sign of respect. Andrew Sagaratz, *Resolution of International Commercial Disputes: Surmounting Barriers of Culture Without Going to Court*, 13 Ohio St. J. Dis. Res. 675, 687 (1998). I doubt it.

<sup>427</sup> See, e.g., Susan Bryant, *supra* note 6, at 75 n.142; Bernard Mayer, *supra* note 61, at 77; Carrie Menkel-Meadow, *supra* note 150, at 223.

<sup>428</sup> See Colleen Mullavey-O’Byrne, *supra* note 7, at 216 (arguing that low context cultures emphasize the verbal mode to communicate empathic understanding and in training programs to enhance empathic communication skills); Theodore M. Singlis & Paul Pederson, *Conflict and Mediation Across Cultures*, in 2 *Improving Intercultural Interactions: Modules for Cross-Cultural Training Programs* 184, 196 (Kenneth Cushner & Richard W. Brislin, eds., 1997) (arguing that persons raised in individualistic cultures are often taught to express their emotions verbally while people raised in collective cultures learn to control their emotions and express them in less direct, more subtle ways).

of messages, may threaten or discomfort individuals whose expectations and behaviors are governed by collective and high context orientations.<sup>429</sup> Silence and careful reading of nonverbal and other subtle communication clues may supply more culturally sensitive and appropriate responses when dealing with these individuals.<sup>430</sup>

No participant comments or questions indicated collective or high context communicating objections to transferring these action theories to Haitian conflicts and contexts. Dr. Roban, the English-speaking Haitian psychologist who attended one of our workshops in Port-au-Prince, said that active listening “fits Haitian culture well.”<sup>431</sup> Another participant shared that “it is in our culture to listen.”<sup>432</sup>

I observed effective active listening done by mediators in two role-plays performed before a larger group and interpreted simultaneously.<sup>433</sup> Comments from participants suggested that they understood and experienced applications of these theories as valuable. Participants playing either disputant or observer roles noted: “I knew he was listening to me because he

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<sup>429</sup> See Susan Bryant, *supra* note 6, at 75 n.142 (hypothesizing that a client who feels reluctant directly naming the way she is feeling may feel uncomfortable with an active listening response acknowledging the emotional content of a message); Bernard Mayer, *supra* note 61, at 77 (arguing that some people, even in middle-class America, do not want their emotion acknowledged in order to feel heard).

<sup>430</sup> Bernard Mayer, *supra* note 61, at 77 (arguing that for many quiet physical and emotional presence or nonverbal acceptance is more validating and less embarrassing than an active listening response acknowledging feelings).

<sup>431</sup> Participant Comment, November 10, 1998.

<sup>432</sup> Participant Comment, October 5, 2000.

<sup>433</sup> The participant playing the mediator role in a generating movement role-play done before the remaining group in Gonaives acknowledged feelings skillfully by saying “that disturbs you a great deal.” Workshop Notes, April 20, 1998. I also observed a simulated mediation done by a student mediator trained by an earlier workshop participant which featured skillful summaries after each disputant presented their initial story. Workshop Notes, April 21, 1998.

asked me back questions based on what I had told him;”<sup>434</sup> and “[the mediator] kept telling Henry he was right, he didn’t try to repeat what Henry was saying in his own words.”<sup>435</sup>

Transferring action theories regarding acknowledging feelings confronts challenges because while people from different cultures experience the same range of emotions in conflict, they display significant variety regarding which emotions are considered acceptable and how they may be expressed.<sup>436</sup> My listening role-plays asked participants to display commonly experienced, conflict-related emotions of anger, anxiety, and fear of physical harm.<sup>437</sup> Some cultures discourage external expression of strong emotions, causing either suppression or indirect and subtle expression.<sup>438</sup> My inability to understand Haitian-Creole kept me from observing how participants responded to role-play instructions to communicate their feelings<sup>439</sup> and what cultural variations their responses contained or suggested.

Participant comments and questions raised no objections to ideas about acknowledging these feelings in this simulated neighborhood dispute which suggests that these action theories were generally accepted. Dr. Roban said that “Haitians are very expressive and willing to share their emotions.”<sup>440</sup> Participants had difficulty applying these theories as demonstrated by the constructive criticism their efforts produced. Participants playing disputant and observer roles noted: “the mediator moved on to information gathering too quickly, she should have allowed

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<sup>434</sup> Participant Comment, October 3, 2000.

<sup>435</sup> Participant Comment, November 12, 1998.

<sup>436</sup> Bernard Mayer, *supra* note 61, at 75-76.

<sup>437</sup> *Id.* at 75 (arguing that people everywhere respond with anger if insulted and fear if attacked).

<sup>438</sup> *Id.* at 76.

<sup>439</sup> Many American law students possess a limited emotional vocabulary. The difficulties they face role-playing emotions realistically often complicates learning empathic communication behaviors through acknowledging emotions.

<sup>440</sup> Participant Comment, November 10, 1998.

more time to ventilate;”<sup>441</sup> “my mediator didn’t really understand me because I was mad all the time, he kept trying to find out information;”<sup>442</sup> and [my mediator wasn’t hearing my anger] so I told him I wasn’t being listened to and I was going to leave.”<sup>443</sup>

My most effective interactive exchange in all of the workshops occurred when one participant said that: “this mediation was very difficult because the woman was so angry. Despite all the questions I asked her, I could not calm her down.”<sup>444</sup> Immediately after this statement was interpreted, I said “this was a frustrating experience for you,” and the participant quickly responded to the transfer of my comment by saying, “*oui, oui.*”<sup>445</sup> Dr. Roban said later that my demonstration of active listening was “very realistic.”<sup>446</sup>

Questions participants raised about active listening theories and behaviors explored concerns that Americans learning to negotiate and mediate frequently express. Sharon was asked whether the purpose of a summary was “to get the party to trust you or to make him more amenable to solutions.”<sup>447</sup> She answered “both,” asserting a commonly held view that mediators first build trust by demonstrating understanding and then move forward to explore resolution possibilities. An American transformative vision of mediation, however, criticizes this view as too focused on settlement and employing active listening as an instrument used to find agreements.<sup>448</sup>

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<sup>441</sup> Participant Comment, November 10, 1998.

<sup>442</sup> Participant Comment, November 12, 1998.

<sup>443</sup> Participant Comment, October 2, 2000.

<sup>444</sup> Participant Comment, November 10, 1998.

<sup>445</sup> Participant Comment, November 10, 1998.

<sup>446</sup> Workshop Notes, November 10, 1998.

<sup>447</sup> Participant Comment, April 23, 1998.

<sup>448</sup> See Dorothy J. Della Noce, *Seeing Theory in Practice: An Analysis of Empathy in Mediation*, 15 *Neg. J.* 271, 283-84 (1999); Dorothy J. Della Noce, *Recognition in Theory, Practice and Training*, in *Designing Transformative Mediation*, *supra* note 128, at 96, 100.

I was asked: “doesn’t paraphrasing content signal that the mediator favoring one party over the other?”<sup>449</sup> Responding to this question let me emphasize that understanding does not equal agreement<sup>450</sup> and that words intended to actively demonstrate understanding should avoid language that judges or evaluates the objective information paraphrased.<sup>451</sup> Another participant raised a concern that acknowledging feelings communicates agreeing with one of the parties by “taking sides with them.”<sup>452</sup> I suggested in response that mediators should acknowledge feelings as a value neutral way of demonstrating understanding without communicating commitment to any perspective.<sup>453</sup> I also explained that doing this requires balanced attention to speakers because demonstrating understanding to one but not other disputants easily suggests favoritism.<sup>454</sup>

## CONCLUSION

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<sup>449</sup> Participant Comment, November 12, 1998.

<sup>450</sup> Robert H. Mnookin, et al., *supra* note 42, at 47 (arguing that active listening is a “value-neutral mode of observation” simply requiring the expression of “how the world looks to the other person).

<sup>451</sup> See, e.g., James J. Alfani, et al., *supra* note 333, at 122 (arguing that mediators always describe disputes in “less explosive, non-judgmental language than the parties have used to characterize their situation”); David A. Binder, et al., *supra* note 333, at 60 (arguing that these ineffective language choices too often result from desires to evaluate information or give advice); Kimberlee K. Kovach, *supra* note 12, at 139 [emphasizing importance of mediators using neutral language].

<sup>452</sup> Participant Comment, April 13, 1999.

<sup>453</sup> See, e.g., James J. Alfani, et al., *supra* note 333, at 118 (suggesting that mediators do not “endorse each person’s perception as ‘right or wrong’ but . . . [rather] acknowledge their concerns as ones in which in fact they possess and which constitute benchmarks of settlement possibilities”); Robert H. Mnookin, et al., *supra* note 42, at 47 (describing active listening as a journey where listeners “describe and explore another’s perceptual world without commitment”); John Winslade & Gerald Monk, *supra* note 128, at 6 (arguing that mediators need to communicate that they grasp the depth of each party’s distress “without appearing to collude with each party’s problem-saturated descriptions of the other).

<sup>454</sup> Mediators are responsible for establishing and maintaining a balanced negotiation and discussion process. Michael D. Lang & Alison Taylor, *supra* note 61, at 179. Balance requires each disputant experience sufficient time, opportunities to speak, and encouragement and support. *Id.*

Evaluation comments and data suggest that our workshops gave most participants positive learning experiences. Our approach seemed successful at defining mediation, contrasting it with other dispute resolution methods, and introducing ideas about questioning and listening behaviors. Our workshops permitted participants to interact with these ideas in concrete ways by discussing videotaped demonstrations and role-played applications. They helped participants expand understandings of how mediation works, develop new thinking about ways to help disputants negotiate, and generate confidence in confronting conflict.<sup>455</sup>

The numerical evaluations of the workshops were consistently and strongly positive. For example, 97% of the 105 responses received from the four workshops in October, 2000, either strongly agreed (64%) or agreed (33%) that the sessions provided a basic understanding of a constructive approach to conflict resolution.<sup>456</sup> Ninety-eight percent either strongly agreed (67%) or agreed (31%) that the workshops enhanced their mediation skills.<sup>457</sup> Ninety-three percent rated the role-plays as either excellent (59%) or good (33%).<sup>458</sup>

The core action theories concerning questioning and listening presented in the workshops appeared to present valuable information for participants. No evaluation comments in the “how

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<sup>455</sup> Preparing for Peace, *supra* note 13, at 52 (arguing that prescriptive approaches like that primarily employed in our workshops can help people understand conflict resolution techniques and strategies, learn concrete, new ideas, expand their thinking, and build confidence in resolving conflict effectively).

<sup>456</sup> Workshop evaluation data compilation on file with author. The ratings were similar for the 162 written responses received from the five workshops in April, 1999, with 69% strongly agreeing and 30% agreeing; and for the 193 responses from the five workshops in November, 1998, with 63% strongly agreeing and 28% agreeing. *Id.*

<sup>457</sup> *Id.* The ratings were similar for the 162 responses from the five workshops in April, 1999, with 68% strongly agreeing and 28% agreeing; and for the 191 responses from the five workshops in November, 1998, with 60% strongly agreeing and 30% agreeing. *Id.*

<sup>458</sup> *Id.* The ratings were similar for the 162 responses received from the five workshops in April, 1999, with 66% rating the role-plays excellent and 26% judging them good; and for the 178 responses from the five workshops in November, 1998, with 59% rating the role-plays excellent and 34% judging them good. *Id.*

to improve” section or elsewhere in our short feedback form mentioned changing or replacing these action theories.<sup>459</sup> These action theories encountered virtually no articulated resistance connected to cultural influences even though they dealt with specific ways of performing the universal mediation task of gathering information respectfully. No comments or questions raised concerns about the compatibility of our action theories with a collective cultural orientation even though Haitians value family strongly<sup>460</sup> and have rural, agrarian traditions of pooling community resources, called *lakou*,<sup>461</sup> and cooperatively sharing labor, termed *konbit*.<sup>462</sup> Both extended family and cooperative labor traditions are diminishing, however, as poverty and the collapse of traditional agricultural economies compel young Haitians to leave the countryside and try to find a living in urban areas, particularly in Port-au-Prince.<sup>463</sup>

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<sup>459</sup> Some comments may imply criticism of question and listening action theories including “they don’t know what’s going on in Haiti,” note 252 supra; and “the techniques used are not adequate for Haitian society, Evaluation Comment, April 15, 1999. The most intriguing comment followed the workshop on November 10, 1998, sponsored by COFAL, a women’s group that works on prisoner’s rights issues. Although not possible to follow up because the forms were completed anonymously, a participant intriguingly wrote: “you can improve by trying to understand the Haitian mentality because it is different and also very special.” Evaluation Comment, November 10, 1998.

<sup>460</sup> See Jennie M Smith, supra note 28, at 80 (describing the importance of both extended and nuclear families supplying labor for the small scale agriculture that occupies the bulk of Haiti’s peasantry). One of the visiting Haitian groups attended one of my mediation clinic classes and participated with my students in a values identifying and prioritizing exercise does in small group discussions. All of the Haitian groups prioritized family members more highly in their value systems than did the American law student groups.

<sup>461</sup> A *lauou* is a compound around which a small number of houses are erected so that families can share responsibilities and poor resources. Charles Arthur, supra note 8, at 28; Libete, supra note 23, at 80-81; Jennie M. Smith, supra note 28, at 80. Scholars have described the Haitian peasant as “often self-centered and individualistic . . . [yet] also capable of acting with others to resolve pressing concerns when left with no other option. *Libete*, supra at 85.

<sup>462</sup> *Konbit* is the Haitian-Creole term for collective effort, most frequently volunteer collaborations to do major agricultural tasks that cannot be done alone. Charles Arthur, supra note 8, at 29; Jennie M. Smith, supra note 28, at 84.

<sup>463</sup> See Charles Arthur, supra note 8, at 29; Jennie M. Smith, supra note 28, at 80.

Our action theories also did not encounter articulated objections connected to notions that appropriate communication should emphasize high context dimensions of hierarchy, ritual, role, subtlety, and nuance. Influenced by the French and American revolutions, Haiti was born with a call to “live free and independent”<sup>464</sup> and Haitians have struggled consistently, often with little international awareness or support, to escape tyranny.<sup>465</sup> No evidence suggests that Haitians accept a hierarchical world view that accords status to a few<sup>466</sup> even though one percent of the country controls more than half of its wealth.<sup>467</sup> Although a vast majority of Haitians historically have displayed ambivalence about political participation, change in Haiti comes only when this majority organizes and participates.<sup>468</sup>

The generally smooth transferability of American action theories about questioning and listening to Haitian contexts was undoubtedly aided by the impact of U.S. culture depicted in broadly distributed Haitian media and spread by Haitians living in the United States and Canada. Apart from local news, ninety percent of the television programming available in Haiti stems from North America, primarily the United States.<sup>469</sup> Haitian television stations carry without translation, interpretation, or adaptation exactly what the average American viewer watches:

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<sup>464</sup> Extract from the Proclamation of Independence written and read on behalf of Jean-Jacques Dessalines by his secretary, Boisrond Tonnerre, in Gonaives, on January 1, 1804, in *Libete*, supra note 23, at 44.

<sup>465</sup> Haitians have struggled to gain independence from their French colonial rulers, resisted American efforts to restore a form of involuntary servitude, see note 24 supra, and fought against Duvalier. See Arnold Antonin, *The Long Unknown Struggle of the Haitian People* (1978), in *Libete*, supra note 23, at 150-52 (describing workers’ and farmers’ struggles against Duvalier between 1957 and 1978).

<sup>466</sup> This supplies a core component of most collective, high-context cultures. See *Mediation Across Cultures*, supra note 5, at 32.

<sup>467</sup> Jennie M. Smith, supra note 28, at 21.

<sup>468</sup> Amy Wilentz, *The Rainy Season* (1989), in *Libete*, supra note 23, at 110.

<sup>469</sup> Jean-Claude Martineau, *Haitian Culture: Basis for Haiti’s Development* (1996), in *Libete*, supra note 23, at 244.

situation comedies, dramas, sporting events, talk shows, and movies.<sup>470</sup> Seven of ten radio stations in Port-au-Prince play foreign music exclusively, most of it from the United States.<sup>471</sup> This popular cultural invasion floods Haitians with constant visual and aural examples of perspectives and behaviors flowing from America's strong embrace of individual rather than collective orientations and low rather than high context communication.<sup>472</sup> Rural Haitians, for example, complain that this barrage of American television, movies, and music undermines the morals of Haitian youth, particularly in the cities.<sup>473</sup>

In addition, an estimated two million Haitians have left Haiti to seek either better economic opportunities or political exile.<sup>474</sup> Over one million live in North America.<sup>475</sup> These overseas Haitians sent an estimated \$300 million to family remaining in Haiti annually during the 1990s.<sup>476</sup> They return to visit Haiti periodically<sup>477</sup> and influence the evolution of Haitian cultural beliefs, tendencies, and behavioral patterns.<sup>478</sup>

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<sup>470</sup> Id. I was able to watch two Monday night football games on ESPN and the first Bush-Gore Presidential Debate on CNN in my hotel room in Petionville.

<sup>471</sup> Id.

<sup>472</sup> America is the prototypical individualistic, low context communicating society. E.g., Samfrits Le Poole, John Wayne Goes to Brussels, *Management Review* 58-60 (October 1989) reprinted in Roy J. Lewicki, et al., *Negotiation: Readings, Exercises, and Cases* 553-57 (2d ed. 1993) One shudders to contemplate the impact that a steady diet of Seinfeld, Archie Bunker, Emenem, etc. can have on the cultural traditions of a poverty-stricken, neighboring country.

<sup>473</sup> Jennie M. Smith, *supra* note 28, at 6. Complaints are also made that this barrage of American popular culture demonstrates how American democracy "has no respect" which can be seen "in the way Americans dress and act." Id. This in turn is often seen as a concern that would undermine the establishment of a true democracy in Haiti. Id.

<sup>474</sup> *Libete*, *supra* note 23, at 176.

<sup>475</sup> Id. at 182. The largest communities are in Southeast Florida, metropolitan New York, and Montreal, Canada. Id. This has created a significant brain drain exemplified by the frequently cited statistic that more Haitian doctors live in Montreal than in Haiti. Id. at 180.

<sup>476</sup> Id. at 182.

<sup>477</sup> Ninety-five percent of the approximately 50,000 persons who visited Haiti in 1999 were Haitians from abroad returning to visit relatives and friends. Id.

<sup>478</sup> See Charles Arthur, *supra* note 8, at 39 (arguing that the largest and most influential group is the Haitian diaspora in North America). Cultural tendencies and behavioral patterns are fluid

The one-day workshop format produced concrete, positive results. Several participants used all or some of the materials to present workshops in their groups and organizations. Many did this through the Toussaint-King Center in Port-au-Prince.<sup>479</sup> Many used aspects of the action theories we presented and the materials we distributed to teach mediation in schools. One participant who came on the first Florida visit, Nathan Dorsanivil, established a peer mediation program at the private school that he directs outside of Gonaives.<sup>480</sup> Radio and television presentations about mediation have been offered by participants through the Toussaint-King Center and other sponsors. A few disputes have been mediated by participants through the King-King Center.<sup>481</sup>

The design decisions made about language and time before I joined the project drew the most frequent responses suggesting improvements for the workshops. We received numerous suggestions and recommendations to use French instead of or in conjunction with Haitian-Creole

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and constantly adapting and evolving even though they are rooted deeply in ongoing or past social practice. Kevin Avruch, *supra* note 10, at 16, 20 (arguing that “culture is to some extent always situational, flexible, and responsive to the exigencies of the worlds that individuals confront”).

<sup>479</sup> This volunteer staffed organization began during the international embargo of Haiti after Aristide was ousted by the Haitian military in 1991. Fact Finding Notes at 27, October 25, 1996. Sponsored by contributions from Haitian businesses, members have attended seminars on conflict resolution and non-violence at the Martin Luther King Center in Atlanta, Georgia. *Id.* Members often do television and radio programs and have incorporated mediation ideas and practices into this effort. *Id.* We toured the impressively restored building which houses this organization in Port-au-Prince.

<sup>480</sup> We visited Nathan’s school on April 21, 1998, after finishing our workshop in Gonaives. It was gratifying to meet the ten 16 to 17 year old students, in their school uniforms of pink shirts or blouses and navy slacks or shirts, who served as peer mediators. We observed them role-play and I couldn’t help noticing that the student mediating the exercise asked several skillfully phrased open and closed questions, summarized objective information effectively after each student playing a disputant completed their opening remarks, and acknowledged feelings appropriately.

<sup>481</sup> Obtaining accurate data was complicated by not having any specific home bases in Haiti and turnover in the interpreters we used and the US Embassy staff who helped us. The information in this paragraph summarizes what we were told in our last two visits in April, 1999, and October, 2000.

in our presentations and materials. Allocating more time for the workshops was the most frequent suggestion and recommendation.<sup>482</sup> Participants wrote that they wanted more time to “ask questions;”<sup>483</sup> “address their own experience;”<sup>484</sup> “do the exercises;”<sup>485</sup> “[let] participants . . . come up with their own mediation techniques;”<sup>486</sup> “reflect on the problems presented;”<sup>487</sup> “[have] more interaction with the speakers;”<sup>488</sup> “develop each topic in more detail;”<sup>489</sup> “give criticisms;”<sup>490</sup> and “not feel rushed.”<sup>491</sup> Two or three days was the format recommended most frequently although no one suggested ways to resolve the economic, scheduling, and facility problems that generated the original choice to use one-day sessions. None of our organizational sponsors asked for a longer format before or during any of our visits.

These experiences in Haiti taught me several important lessons that will improve future workshop designing decisions. I will improve the one-day format by presenting explicitly the cultural assumptions underlying the questioning, listening, and generating movement action theories that provide the present design’s core. I also will do more training for our interpreters and redesign our evaluation form to seek more feedback about cultural transferability.

Assuming economic, facilities, and sponsor problems can be resolved, I would return to a two-day format to enhance the design decisions that seemed to work during the one-day efforts. Adding a day permits concluding the third section presenting these ideas and their video

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<sup>482</sup> Devoting more time to workshops was mentioned in 29% [86 of 295] of the written responses to the section of our evaluation form asking “how can we improve.”

<sup>483</sup> Evaluation Comment, April 14, 1999.

<sup>484</sup> Evaluation Comment, April 14, 1999.

<sup>485</sup> Evaluation Comment, April 14, 1999.

<sup>486</sup> Evaluation Comment, April 14, 1999.

<sup>487</sup> Evaluation Comment, April 14, 1999.

<sup>488</sup> Evaluation Comment, April 15, 1999.

<sup>489</sup> Evaluation Comment, April 12, 1999.

<sup>490</sup> Evaluation Comment, November 10, 1998.

<sup>491</sup> Evaluation Comment, October 2, 2000.

demonstrations. It gives everyone three opportunities in focused role-playing to experience mediation as mediator, disputant, and observer. An extra day also permits more elicitive activity.

My Haitian lessons suggest that participants will benefit from small group opportunities early in workshops to discuss cultural influences and their perceptions of how conflicts in Haiti differ from America and what these variations should mean for effective mediating.<sup>492</sup> This introduces cultural influences and communicates that our action theories contain cultural biases. It also encourages participants to examine their cultural influences and how they influence effective and ineffective negotiating and mediating behaviors.

After completing my existing nine role-plays, I would ask participants in small groups to create and then perform short but full mediation role-plays letting them capture, experience, and discuss relevant issues, contexts, and solutions.<sup>493</sup> Doing this permits multi-interest groups to subdivide into more need specific triads where everyone presumably knows common conflicts and can benefit from discussing and then role-playing how they might be resolved through mediation. It also allows participants to mould the action theories we presented into forms that fit Haitian contexts and cultural traditions for gathering information, demonstrating understanding, providing respect and empowerment, exploring core needs and interests, framing and reframing, and assessing non-agreement alternatives.

A final value of our workshops may lie in their role of generating hope and optimism that Haitian citizens can resolve conflicts consensually and develop approaches and systems that pursue this objective. Conflict resolution requires hope and optimism. Hope may be necessary to power all actions that are not instinctive.<sup>494</sup> Hope helps negotiators move toward cooperation

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<sup>492</sup> See *Preparing for Peace*, supra note 13, at 115.

<sup>493</sup> *Id.* at 101-04.

<sup>494</sup> Lore Segal, *My Grandfather's Walking Stick, or the Pink Lie*, 63 Soc. Res. 931, 932 (1996).

and away from competition.<sup>495</sup> Hope as optimism also helps negotiators create rather than simply claim value.<sup>496</sup>

Effective mediators display hope and optimism regarding the fundamental competence and ability of disputants to resolve their conflicts.<sup>497</sup> They look past immediate conflict saturated situations which frequently generate self-absorption, insecurity, defensiveness, and negative communication.<sup>498</sup> They avoid attributing counterproductive behaviors flowing from these common aspects of conflict to inherent character flaws.<sup>499</sup> Instead, skilled mediators display respect and empowerment by communicating that they grasp the depth of disputants' distress while not accepting or colluding in conflict-saturated descriptions and behaviors.<sup>500</sup> They demonstrate faith in possibilities that things can be different and persistence in encouraging disputants to use more positive frames of events and outcomes.<sup>501</sup>

It takes hope and optimism to transform conflict resolution from destructive to constructive by replacing fighting with negotiating and coercion with consent.<sup>502</sup> Both are needed to educate others about consensual dispute resolution, create mediation centers and clinics, publicize their availability, and develop systems that encourage or mandate use by disputants.<sup>503</sup> Evaluation comments indicated that some participants took hope and optimism

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<sup>495</sup> See Jennifer Gerada Brown, *The Role of Hope in Negotiation*, 44 *U.C.L.A. Law. Rev.* 1661, 1677 (1997).

<sup>496</sup> See *id.* at 1676-77.

<sup>497</sup> Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of Transformative Mediation Practice*, in *Designing Transformative Mediation*, *supra* note 128, at 20, 27.

<sup>498</sup> See *id.*

<sup>499</sup> *Id.*

<sup>500</sup> John Winslade & Gerald Monk, *supra* note 128, at 6.

<sup>501</sup> *Id.* at 186-87.

<sup>502</sup> See William Ury, *supra* note 99, at xix.

<sup>503</sup> See *id.* at 7-10, 13-18, 125-31, 144-49 (arguing that all conflict is three-sided in the sense that it implicates interests of others than the disputants, that this third side needs to get involved in

from their workshop experiences, including: “I felt really good and am sad that I have to leave,”<sup>504</sup> and “when I walked into the seminar I felt empty but when I walked out of there I felt inspired.”<sup>505</sup>

Only Haitians can do this important work in and for Haitian organizations and groups. Many workshop evaluations suggested growing awareness of this need in Haiti.<sup>506</sup> This need was underscored by an election in May of 2000 whose validity was questioned by Organization of American States’ monitors, and its aftermath,<sup>507</sup> which destabilized Haiti and contributed to increased political and random violence.<sup>508</sup> These developments ended our project

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teaching others how to resolve disputes consensually and provide mediation services to help solve problems).

<sup>504</sup> Workshop Evaluation, November 10, 1998.

<sup>505</sup> Evaluation Comment, April 12, 1999.

<sup>506</sup> Workshop evaluation comments included: “In Haiti, people often do not want other people to learn how to mediate conflict. . . . we need a lot of work in that area,” April 12, 1999; “we need mediator[s] in Haiti because Haiti is always faced with political conflicts,” April 12, 1999; “conflict resolutions are very important in a country like Haiti because we find conflict everywhere,” October 2, 2000; “we need to continue on this path so that Haitians can get out of the situation they are in right now,” October 3, 2000; “it is very important to resolve conflicts in Haiti, it is our biggest problem,” November 9, 1998; and “continue this program everywhere in Haiti to show Haitian people that they are brothers, they have the possibility to solve their . . . conflict with each other,” November 10, 1998.

<sup>507</sup> This election was largely peaceful and Aristide’s Lavalas Family Party won a landslide victory. Charles Arthur, *supra* note 8, at 28. Losing parties accused Lavalas of fraud and intimidation and Organization of American States electoral observers concluded that the new Provisional Electoral Council used the wrong method of calculating Senate vote percentages, “mistakenly giving outright victories to a significant number of Lavalas Family Senators who should have contested a second round runoff.” *Id.* Run-off elections went forward in August and November of 2000 amid protests from and without participation by opposition parties and official results gave Aristide the presidency with 92% of the votes left his Lavalas Family with 26 of 27 senate seats and 73 of 83 seats in the House of Deputies. *Id.*

<sup>508</sup> The United States State Department warned against travel to Haiti due to unstable security, noting: The Haitian government has failed to contain certain violent and dangerous incidents, including bombings in public areas, politically motivated killings, indiscriminate gunfire directed at pedestrians in Port-au-Prince, and incidents directed at diplomatic facilities and vehicles. State Department Travel Warning, Feb. 5, 2001. We saw disturbing evidence of this deteriorating stability on our last visit in October 2000. Our interpreter narrowly escaped a mugging attempt on her way to our first session and JoAnn Klein and Tim McClendon’s car had

prematurely.<sup>509</sup> They also left me and my colleagues hoping<sup>510</sup> that perhaps the windows of optimism, along with some of the information, action theories, and role-played practice our workshops provided will help our Haitian friends survive this latest chapter in Haiti's challenging journey.

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to navigate around a dead body in the highway near the site of our third meeting. Seeing the fear in the faces and hearing the sadness in the voices of Haitians with whom we worked closely was very troubling. One of the Haitian women who works at the US Embassy and with the Toussaint King Center described seeing a murder during a car jacking in September, 2001, on a major Port-au-Prince road that we traversed many times.

<sup>509</sup> We were neither to schedule our last visit to Haiti in the spring of 2001 nor arrange the last visit of Haitians to Florida later that year even though both were contemplated by our renewed grant.

<sup>510</sup> Cathleen Schine's definition of the grammatically incorrect but persistently used adverb "hopefully" fits, as she writes:

"Hopefully means 'God willing' in a secular world. Hopefully means: I don't know if there is a God, I don't know if the world makes sense, I don't know if there is a meaning or order or heaven or hell, but please let everything turn out O.K. It is a prayer to no one, a plea for help from an individual to he knows not what, a shout of confidence in one's existence (I'm here! Whether you are or not!), a tender call for understanding, a cry of love for love." Cathleen Schine,

"Hopefully" Springs Eternal, N.Y. Times, June 20, 1993 (Magazine), at 12, cited in Jennifer Gerada Brown, *supra* note 494, at 1661.