MEDIATING IN A HIGHLY DIVERSE AND VOLATILE SOCIETY

By Dan A. Naranjo

"To see a problem in a new light, we need to analyze it from perspectives other than our own. In each case, our power depends on our ability to put ourselves in other people's shoes and to see the world from their point of view."

-**Roger Fisher, International Best Selling Co-author of <u>Beyond Machiavelli:</u>**

<u>**Tools For Coping With Conflict**</u>**, 1994.**

In the fall of 1995, I attended a symposium appropriately entitled "Preparing Our Minds for the 21st Century." The intent was to seed, to provoke, and to help shape new ideas in preparation for the 21st century. It was suggested that our society seemed to be navigating from the established framework of goals, and values to quite another framework. Sociologists refer to these changes as "paradigm shifts." When the old paradigm has decayed and before the new one has taken a firm hold, a disorienting gap or "slack time" develops, and creates great uncertainty and conflict. To help us with the transition -- to help us navigate through the 21st century -- several ideas were presented, yielding new ways of looking at old topics.

Science Imitates life. Life Imitates Science.

The universal language of our society has been science, and quantum physics is reshaping the way we examine and interpret our world. We are beginning to look at the world we live in, and the elements of which it consists, as interrelated organizations, instead of particles. The quantum model focuses more on momentum than position; potential rather than control; relationship rather than compartmentalization. As described in terms of quantum mechanics, we are currently undergoing an abrupt transition from one particular state to another. Yet on a much larger scale, this "quantum leap" is but a phase of our evolution, a phase in our revolution.

Sociologist, and modern day philosopher, Thomas S. Kuhn used the term "paradigm" to help describe the quantum leap, which he outlined in terms of a scientific process. In his most famous work, <u>The Structure of Scientific Revolutions</u>, Kuhn defined the term "paradigm" as simply an example, serving as a model. The horizon lying flat against a curtain of sky, was the example that formed the classical model, or paradigm attesting that the world was flat. From this model, society created what Kuhn calls a "normal science," a widely accepted and practiced group of ideas serving to fix a standard based upon previous scientific revolutions. However, repeated application of the belief that the world was flat gave rise to anomalies, or inconsistencies within the normal

science. Yet, these anomalies were insufficient to abandon the normal science completely. The idea that the world was flat would not be abandoned until the anomalies became so numerous, so irreconcilable, and infamous, that the normal science could no longer be applied. Inability to practice a normal science due to irrefutable discovery brings about a state of crisis, a state in which a society undergoes an abrupt transition from one distinct state to another. That state of crisis delivered us into a new normal science based upon the paradigmatic theory that the world is spherical. However, due to the nature of scientific revolutions, even this paradigm is subject to revision.

With the accumulation of scientific knowledge, heightened access to discovery by virtue of technological advance, and an increased number of pioneers in the science field, the frequency of scientific revolutions has increased. When applied socially, the similar catalysts of revolution apply: accumulation of multi-cultural knowledge, access to foreign cultures through technology, and increase in ethnic diversity. The frequency of the United States' social revolutions in the past century have forced the American professional to reinvent himself repeatedly. The mediator must become aware, and adapt to these paradigmatic shifts. For mediation is the art of ensuring that disputes, or social anomalies assume positive shifts in human interaction, befitting a greater social advancement. As an educator, translator and facilitator for the disputing parties, today's mediator equipped with his or her familiarity with Kuhn's model of the nature of scientific revolutions, will more effectively help to develop solutions among the parties, and further the administration of justice and fairness.

However, unlike scientific revolutions, social revolutions do not always move in a linear fashion toward a proven fact. A shift in social paradigms can be a positive shift, or a negative shift. A positive social paradigmatic shift is a transition from a state of crisis to a state that will accommodate to provide for constructive human exchange (i.e. crisis -fear of another because he or she is different; positive social paradigmatic shift-choosing to be tolerant to those differences). A negative social paradigmatic shift is a transition from a state of crisis to a state in which attempts to remedy the crisis are made by promoting destructive human exchange (i.e. crisis-fear of another because he or she is different; negative social paradigmatic shift – hate crime). In essence social paradigmatic shifts can move forward (toward harmony), or backward (disharmony). The direction in which social paradigms shift are governed most often by empirical data, that is by evidence provided by experience or observation. Social paradigmatic shifts are not an absolute science. Because it is based on empirical data, and because experience and observation are subjective evaluations, there are several arguments for what is a positive and what is a negative paradigmatic shifts. The important thing to maintain is that insight into varying perspectives can give one a better sense of how to differentiate between positive and negative social paradigmatic shifts. Social paradigmatic shifts can take a negative course if the ability to see conflicts from different perspectives does not exist. Author Roger Fisher believes that when coping with conflict, the ability to see from various perspectives is far more important than fact: "The key to the dispute is not objective truth, but

what is going on in the heads of the parties (20)." Although opposing parties may agree on the facts of the conflict, their perspectives differ. Although the mediator may be an expert in pinpointing the knot in the legal fabric, his expertise should lie in being able to pinpoint the knot in the weave of human interaction: "Oftentimes, the process of negotiations within a mediation is less affected by the legal theories associated with a particular case than it is by the human interaction required by the process. As a result, a comprehensive collection of human relations theories taken from the fields of sociology, psychology, and communication are more appropriate than reliance on traditional legal doctrine (Geissler 8)."

In order for social paradigmatic shifts to be positive, the members of a society must begin by making that shift deliberate, directed, and on the basis of varying perspectives. In the case of mediators, professional advance demands socially conscientious navigation. The effective administration of social anomalies and social paradigmatic shifts through the application of justice should be the underlying goal of all mediation. However, there exists another element upon which the application of justice depends. Adaptability.

Cultural Adaptability

Marshall McLuhan's "Global Village" model of world connectedness, illustrates a paradigmatic shift in priorities and values. As we have moved from independence to interrelatedness, and from interrelatedness to interdependence, our capacity for adaptation is called upon with greater frequency. My personal experience indicates a growing number of disputes between parties from opposite ends of the socioeconomic, and ethnic spectrums.

As our national borders become more fluid, and permeable, I mediate more cases between Mexican entities, and U.S. companies. The reputation of the United States legal system has traversed our borders and a growing number of foreign-oriented claims have sought resolution under our present system of justice. Luciano A. Rodriguez, in his writing on the "Cultural Aspects of Trans-Border Mediation of Family Law Matters," addresses this phenomenon:

In Mexico, the mediation process, and alternative dispute resolution mechanisms, except in the case of international trade and commerce, are in their infancy. The development of alternative dispute resolution in Mexico progresses at a fast pace, but is still very far behind Texas. Even more importantly, the cultural assimilation of the mediation process as a method of dispute resolution for legal matters lags even further behind (11).

Bi-lingual and Bi-cultural mediators often find that they serve as liaisons between cultures, and across borders. Although bi-lingual mediators are to be applauded for their resourcefulness, they must also realize that the bi-lingual carries the responsibility of bi-cultural sensitivity. In the case of English and Spanish speakers, bi-lingual implies multi-culture, which for mediators carries the added responsibility of developing an elevated

capacity for adaptation. The mediator in the context of the Hispanic culture will discover that Hispanics are skilled in cultural adaptation, and adaptation has become for them a culture in itself.

In my view, Hispanics have formed interrelated, yet very distinct cultures along the southern fringes of the United States. There exist three culturally distinct and notable concentrations of Hispanics in the United States today: Floridianos, Tejanos, and Californianos. The Hispanic culture of Florida is remarkably different in comparison to the Tejano and Californiano cultures in that it is mostly composed of Cubans. Cubans share a common history of political turmoil. They appear to be the more politically participatory and politically sensitive of the three Hispanic communities, due to their having to adapt to a democratic system of government. Although there are many Afro-Cubans within their populations, Afro-Cubans do not necessarily share in the African-American political agenda. Catholicism is strong amongst Cubans, however Catholicism has been intertwined with ancient Yoruba traditions of Western Africa and has emerged as "Santeria" or "Locumi." The Hispanic community of Texas, primarily made up of Mexicans, has experienced a rejection by Mexican nationals for their presence within the United States ("*Malinche*," a term used by Mexican nationals to refer to the Tejanos as "traitors" has often been applied. However, in the past year Mexico has met the illegal immigration crisis felt along its borders with a positive social paradigmatic shift. Under the guide of Mexican President Vicente Fox, the Mexican government has recently made efforts to reclaim its expatriated Mexican American populations through a program of re-patriation or "*repatriación*".), and a rejection from Anglos for Tejano's presence in Texas. Yet, Tejanos raise the very valid claim that they never emigrated. "We did not cross the border, the border crossed us." Contrastingly, Californian Hispanics, although primarily Mexican, differ from Tejanos, in that they did emigrate to the United States. Currently Californianos are undergoing a struggle to create their own paradigmatic shift that will either follow the Tejano model of community or the Floridiano model. David E. Hayes-Bautista's <u>Los Angeles Times</u> Article " L.A. Tomorrow? Miami (Si!) San Antonio (No!)," states that Cuban-Americans have been portrayed as the "model Latino" community. Hayes-Bautista says that the difference between the Tejanos and Floridianos is that Cubans were met with open arms, and their communities were invested in, while Tejanos have forever been fighting for basic civil rights (1B). Although Cubans Americans and Mexican-Americans may differ on this point, one can see that it is not enough to simply speak Spanish, and assume that all Hispanics will understand the message that is being delivered.

Ultimately, the ability to speak the language of the parties, in the absence of cultural sensitivity, or cultural adaptation, may defeat its primary purpose of breaching the gap between participants in mediation. A student on the subject of negotiating in a pluralist society addressed the complexity of negotiation within a supposedly majorial and supposedly homogeneous population:

Cultural pluralism is a complex system that has only begun to be explored by the most ardent social scientists. Race and ethnicity have been explored, but as mentioned earlier, the impact of cultural differences within the so-called "white" community has not been significantly studied. These differences have a virtually unrecognized impact on who one is, and how one behaves. A person's view of himself and how he behaves have a major impact on legal negotiations. Yet, cultural pluralism is virtually unrecognized in the literature discussing legal negotiations. Much work has been done on the difficulties that will be encountered when negotiations are conducted between citizens of different countries, such as between an American business person, and a government official in Vietnam. However, there is little literature to assist in overcoming the differences that will arise when persons from different subcultures, such as a west Texas rancher, and a New York stockbroker sit down to negotiate Geissler (2).

I am reminded of a story related to me about a large real-estate company that failed to observe cultural traditions, and as a result lost millions in sales. Apparently the U. S. real estate custom of selling homes by posting signs and flags around a house, and having yellow jacketed real estate agents market at doorsteps, offended Japanese home owners. In fact, in Japan, the sale of a home is a very private and secretive affair. Often a family will sell their house only out of pure financial necessity. Japanese home owners often feel shame, or embarrassment at divulging to their neighbors that they can no longer keep their home due to financial constraints. One can begin to imagine the kind of fear that the real estate company struck in the hearts of Japanese home owners when one recognizes that in Japan, the standard uniform for bill collectors and repossessors of personal property is a bright yellow sports coat. After almost a year of unhappy customers and millions of dollars lost, the real estate company had to adapt (better late than never) to these cultural differences and operate in a more culturally sensitive manner.

It is important to note that cultural diversity need not be an impediment, rather it can be advantageous and promising for the mediation process. As each party brings his or her unique culture, individual history and perspective to the negotiating table, it is the role of the mediator to effectively communicate those disparate perspectives to the other side. As the mediator adapts to, and adopts the different perspectives he or she in turn encourages the other parties to do the same. The parties in turn empathize with their counterparts position.

Undoubtedly, empathic perspectives are the fountainhead of resolution. Afro-feminist Patricia Hill Collins mentions the importance of empathy in her "ethic of caring" model for breaching cross-cultural gaps: Harriet Jones, a 16-year old Black woman, explains to her interviewer why she chose to open up to him: "Some things in my life are so hard for me to bear, and it makes me feel better to know that you feel sorry about those things and, would change them if you could." Without her belief in his empathy, Harriet found it difficult to talk (qtd. in Hill Collins 216).

A mediator should also prepare for the fact that cultures are no longer defined along racial, ethnic, or religious lines. Cultures exist within industries and political groups. Police officers, doctors, priests, airline pilots, stock brokers, teachers, web designers, nurses, athletes, reporters, artists, and even attorneys belong to their own unique cultures. The members of these cultures share similar value systems, unique vocabularies, traditions, customs, group agendas, taboos, and daily experiences. A mediator must quickly adapt to these subtle differences to avoid risking confused parties, wasted time, prolonged litigation, and often times even personally offending the participants. As a result of the erudition a mediator must undergo, and the demands made upon him by institutional factors, the mediator runs the risk of adopting a depersonalizing mode of communication. Martin Buber refers to this development as the struggle between two modes of relating to others: "I-It and the l-Thou relationship. According to Buber, the l-Thou relationship is a highly personal, form of communication while the l-It is a more objectifying and depersonalizing form of communication. The l-It relationship, as a result of expertise, professionalism, commercialism, and technology has greatly expanded its scope (ctd. in. Yankalovich 149).

The Minoritarian Stance

A significant evolving dynamic is the phenomenal growth of Hispanics in the United States. According to recent Census data, "The Hispanic population in the United States has grown by more than 58 percent in the past decade, pulling Latinos into rough parity with African Americans as the largest minority group. The new data carries broad political and cultural implications for a nation undergoing major democratic shifts. The figures showed the number of Hispanic people, who have Spanish –speaking ancestry, but may belong to any race including Black, soared to 35.3 million from 22.4 million recorded in 1990. According to Rep. Silvestre Reyes, D-El Paso, Texas, head of the Hispanic Caucus, "This is fairly significant because it spells the transition of the Latino population toward becoming the largest minority in the country. Demographers have long anticipated Hispanics would supplant Blacks as the nation's largest minority. However, earlier census reports had forecasted that development would happen by 2005, not 2000" (qtd. in Travierso, par. 18). On March 25, 2001 the San Antonio Express News reported that Texas is the second largest state in the United States and is the fastest growing, with an official population of 20,851,820. San Antonio Express News' Joe Holly also reported "Texas has more metropolitan areas than any other state, including four with million-plus populations. In the four largest

cities, Austin being the exception, Hispanics are the largest ethnic group. During the past 10 years, the Anglo population increased in 143 Texas counties, the Hispanic population in 227" (1A). Another interesting development is the drop in the "white" populations. Eric Schmitt, also of the San Antonio Express News, points to the racial shift in urban populations, as evidence of the volatility and complexity of change taking place in the United States today. According to Schmitt: "Non-Hispanic whites are now a minority of the total population living in the 100 largest urban centers. Anglos are now a majority in 52 of the biggest cities, down from 70 in 1990, researchers found. Overall, the top 100 cities lost more than 2 million Anglos between 1990 and 2000, with the Anglo share of the total population falling to 44 percent from 52 percent" (9A). From this data Schmitt draws the overtly obvious conclusion that the vitality of cities is dependant upon public officials' ability to attract minorities and to provide them with hospitable environments.

Lisa Navarrete, spokeswoman for the National Council of La Raza, told Hispanic Journal in its April 2001 article on the rapid growth of Hispanics in the United States: "We need to formulate a new paradigm for race and ethnicity in this country. It is not a black-white paradigm in this country anymore, if it ever was" (qtd in Travierso 18). Yet, the United States' racial demographics are destined to be incorporated as part of the nation's folklore. Latin Americans have learned long ago that the classification of peoples based on race is far from exact science, especially when race is determined by the color of one's skin. Racial classifications have become a thing of the past in Latin America, due to the intermingling of European, African, and Indigenous populations. In Latin America a person expressing "white" physical traits often has a mother, father, sister, or brother expressing African or Indigenous physical traits. The conceptualization of a "White-Black or Other" paradigm of racial classification leaves the greater mestizo, mulatto, and Creole populations with no demographic representation. As the borders between our countries become more permeable, classifications should be made on basis of culture not race. The dichotomous paradigm of a white-black society does little to illustrate the reality of the United States' diversity. Furthermore, the grouping of several cultures under one generic label such as "Hispanic" will soon be rendered useless. Even presently to state that the Hispanic population is experiencing growth in the United States says little as to what direction that growth is taking. Does that growth imply a surge in immigrants to the United States? Does that growth signify a greater number of United States born Latinos? Are those Latinos Mexican? Cuban? Bolivian? Racial lines in Latin America could never serve as a genuine classification system, for racial lines are so intertwined that very few could claim to be of a particular race. Latin America has long ago had a far greater ethnic diversity than the United States. As the United States assumes that it is growing more ethnically diverse, what is truly happening is that it is looking more and more like the nations that surround it. The United States is not ground breaking in its cultural diversity. The United States is finally catching up with the rest of the world. The United States is finally joining the "Global Village." Stephen Murdock, the state demographer of Texas, and a professor of rural sociology at Texas A&M University, illustrates the misinterpretations of population growth: "I get a lot of calls from outside Texas that reflect a lack of

understanding that Texas is an old Hispanic state. Most Hispanic Texans are multigenerational Hispanics who are having children. Since about half of the 2 million increase in the Hispanic population is natural increase, it is likely to continue" (qtd. in Holley 1A).

 Thus far, we have examined how pluralism, adaptation, shared responsibility, context, and an evolving dynamic are shaping the world we live in and changing the way we settle disputes. The minoritarian stance is yet another approach to surviving and thriving in the "Global Village." As national borders and lines of demarcation become permeable, and even disappear, no longer will they be as relevant when we discuss society and cultures. As observed by the symposium participants, the truth is that we are all ethnic minorities in the "Village," and that very shortly this cultural pluralism will exist in our country. Looking at San Antonio is like staring into a crystal ball and seeing the United States projected into a near future. San Antonio is unique among U.S. cities, because it now has a 60 percent ethnic majority. The majority speaks two languages, and the numbers are growing exponentially. Minority groups are quickly becoming the majority. We, in the United States are struggling painfully to come to terms with our emerging diversity. As a society we must consider developing new skills for dealing with these phenomena.

        The paradigm shift will require that we neither control, nor impose; that we not govern, nor decide for others, rather, we must develop skills to adjust, compromise, and cooperate. In essence, each one of us must examine how individual contributions of cooperation will be made so as to sustain common enterprise. We must ourselves, as mediators, think like minorities, and encourage others to do so as well. Doing so will greatly improve the administration of justice, and will also provide more groups with access to justice. The more quickly one party is able to empathize and experience a catharsis with the minority perspectives of the other party, the more enhanced becomes the opportunity of reaching a mutually agreeable resolution. The daily experience of minorities is one filled with conflict, introspection, and resolution. Although this cycle may seem obstructing, it is in fact the richness unique to the culture of minorities, and unequivocally a facet of the minoritarian perspective that should be understood by mediators.

 Social Capital

        Social and economic theorists have long wrestled with the ideas of financial capital and intellectual capital. The paradigmatic shift now requires us to think in terms of social capital. Economists argue that democracies and economies exist, and prosper by virtue of social capital, the collective pool of trust, mutual obligation, and the capacity for reciprocal accommodation possessed by a society or community. In essence, these economists are talking about our children.

Social capital is our society's shared asset. As a necessary complement to the market, we invest in social capital when we participate in civic activities. Our notions of fairness, justice, checks and balances, free enterprise, and civic responsibility are best protected and served when we invest our time and effort to improve our communities. It is my opinion that every time a mediator calls the disputing parties around the negotiating table he or she is performing a public service. Every time we teach a party to adapt to a perspective, or to adopt a perspective we have invested in our community's social capital. In my view, a mediator's full participation in the civic life of his or her community will assist in the development of his or her mediation practice.

The mediator is called upon to protect relationships, and encourage peaceable resolutions. The mediator also plays the important role of educator. In 1995, through the San Antonio Bar Foundation, we founded the San Antonio Peacemakers Project. The Peacemakers have joined efforts with the corporate and religious sectors of our community, and are actively involved in grassroots efforts to promote peace, and to curb the rising tide of violence and discord within our city. Proceeds from our fund-raising efforts are used to fund and coordinate grassroots conflict resolution programs in elementary, junior, and high schools. The training is a unique opportunity to bring together youth from surrounding areas, and provide them with a forum to share their visions, and discuss their views about non-violence. Our joint efforts in this project are the beginning of a new tradition that instills hope in the hearts of children throughout San Antonio, and hopefully more children to come. The Peacemakers Project will empower families by teaching them how to work through conflict and disputes by using the tools of alternative dispute resolution. As a result of last years efforts, we received that Criminal Justice Award from the Attorney General of Texas. The Peacemakers Project affords the mediators of San Antonio with the opportunity to invest in the community's social capital.

Mediation: A mission statement

A mediator's job is never done. For the mediator recognizes the incredible need for his or her talents (communication, adaptability, empathy, cultural sensitivity) in the professional and private lives of others. My participation in the Bar Association's enterprises has proven to me that the demand for mediation calls for constant involvement. By virtue of the various elective offices I have had the honor of holding in both the San Antonio Young Lawyers Association and the San Antonio Bar Association, I have discovered the opportunity mediators have to enrich their professional communities. As a U.S. Magistrate from 1981-1989, I discovered the great need for alternative dispute oriented voices within the private sector. Currently, as a member of the Commission for Lawyer Discipline, which has oversight of all grievance committees in Texas, and as one of the symposium's voices from the legal community, I have discovered that the need and the opportunity even more intense.

The most exciting aspect of mediation is the uniqueness of each case.   Because each case is different, the mediator must develop his or her approach in a unique manner so as to accommodate the distinctness of each fact situation.   The mediator's neutrality, his or her pledge to preserve confidence, coupled with a creative and facilitating skill of communication, will usually result in a fair and sensible resolution of disputes. Tomorrow's mediators must learn to listen to the uncomfortable and the unexpected, and teach their clients to do the same. By listening carefully and speaking tolerantly, a mediator will teach others to search for common ground. Our response to the shift in values and perspectives must be a mixture of imaginative adaptation, purposeful cooperation, and a sense of shared inclusive stewardship. The key is for us to navigate the paradigmatic shift, the philosophical framework under which we operate, before outside forces impose the change.

The U.S. justice system is the backbone of our society. It is essential that our citizens believe it to be an open system to which they can turn to for the redress of grievances and the protection of their rights. If there were a perception that the system was closed to anyone, we, as a community, would suffer greatly. I believe alternative dispute resolution is one of our safeguards to complete and unobstructed access to justice. Neither alternative dispute resolution, nor mediation were designed to replace or extinguish our United States system of justice. Rather, the intent is for mediation and alternative dispute resolution to provide an effective method for unclogging our courts, and resolving numerous pending law suits. It is my belief that mediators are making substantial contributions to the administration of justice. Our goal should be a country of fully entitled citizens, originating from all corners of the globe with a significant portion of them fiercely engaged in the maintenance of a humane and civilized justice system, and the preservation of democracy.

Works Cited

Collins, Patricia Hill. Black Feminist Thought. New York: Routledge, 1991.

Fisher, Roger; Elizabeth Kopelman, and Andrea Kupfer Schneider. Beyond Machiavelli:

Tools For Coping With Conflict. Cambridge, Massachusetts: Harvard University,

1994.

Geissler, Wallace H. "Negotiating In A Pluralistic Society." Diss. St. Mary's School of

Law, Course on Negotiations, Spring 2001.

Hayes-Bautista, David E. "Struggle For Basics Left Latinos Little Time For Bigger

Fights." <u>San Antonio Express News</u> 25 March 2001: 1B.

Holley, Joe. "Populating Texas: A Century of Growth. <u>San Antonio Express News</u> 25

    March 2001: 1A.

Khun, Thomas S. <u>The Structure of Scientific Revolutions. 3rd Ed</u>. Chicago, Illinois:

    University of Chicago, 1970.

Naranjo, Dan A. (one of twenty –three co-authors). <u>ADR Personalities and Practice Tips</u>.

    ABA – Section of Dispute Resolution, Washington D.C. 1998. Edited by Alfini

    and Galton.

(You will meet twenty-three people who have transformed their lives and their careers through ADR. You will discover just enough to make you want to get to know them and dispute resolution a whole lot better. The genesis of this paper, now expanded, originated with my article in this ABA publication, first published in 1998).

Rodriguez, Luciano A. <u>Cultural Aspects of Trans-Broder Mediation of Family Law</u>

    <u>Matters</u>. Texas Association of Mediators Annual Conference, 2000. Houston,

    Texas: Omni Houston Hotel, 2000.

Travierso, Maria. "Number of Hispanics Growing Rapidly." <u>Hispanic Magazine</u> April

    2001: 18.

Schmitt, Eric. Census Data Reveal Racial Shift in Big Cities. <u>San Antonio Express News</u>

    April 30, 2001: 9A.

Yankalovich, Daniel. <u>The Magic of Dialogue: Transforming Conflict Into Cooperation</u>.

    New York: Simon and Schuster, 1999.