

# MEDIATION IN AMERICA

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# What is Mediation?

Facilitated Negotiation



# Stages of Dispute Resolution

- COMMUNICATION
- NEGOTIATION
- MEDIATION
- LITIGATION (including arbitration)



## Types of Mediation

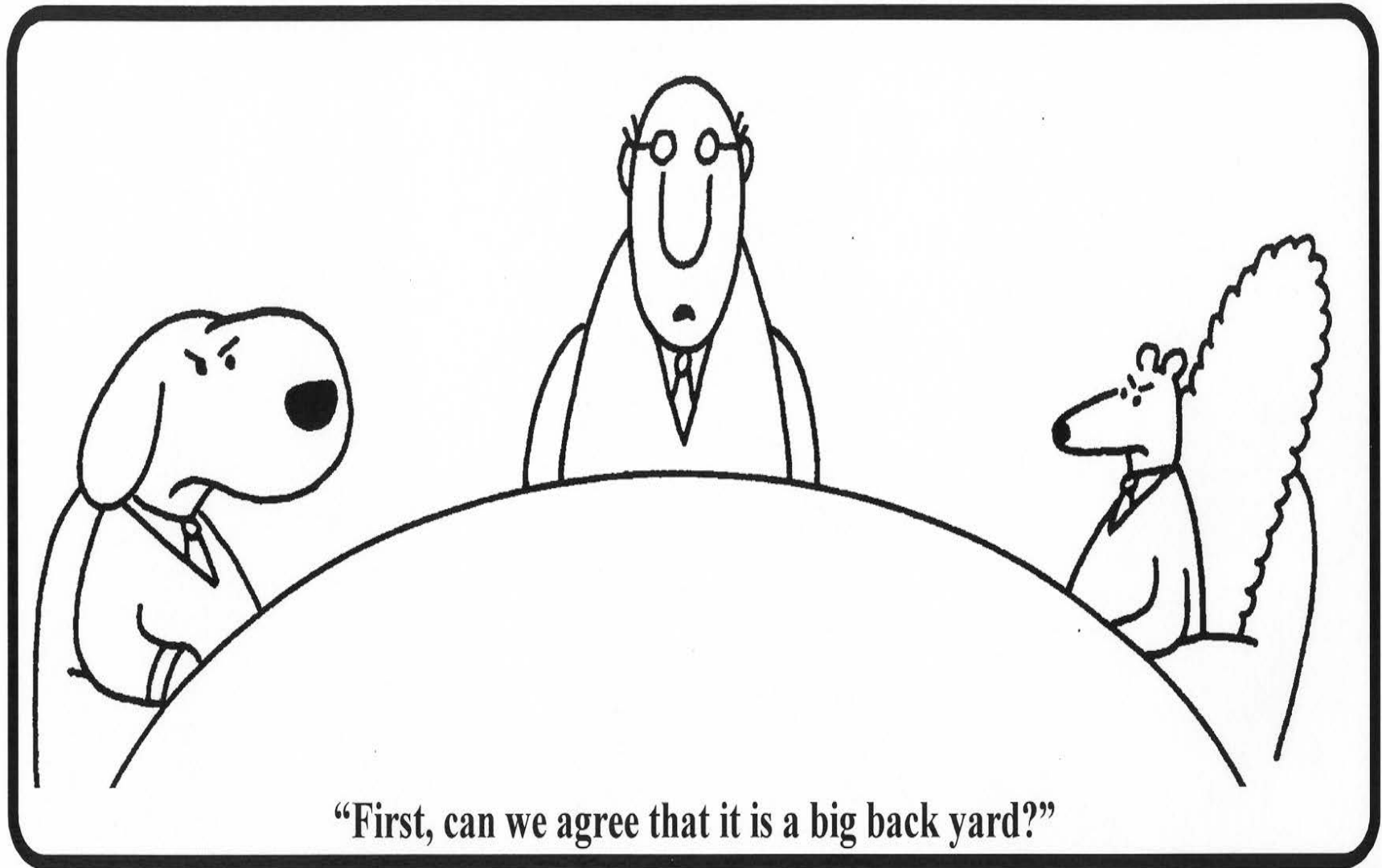
- FACILITATIVE
- EVALUATIVE
- TRANSFORMATIVE

# The Role of the Mediator



- NEUTRAL/IMPARTIAL (western model)
- NOT A JUDGE
- FACILITATE COMMUNICATION

# Getting Yesses



Confidentiality  
(protected by  
statute in  
every state)



WHAT HAPPENS IN MEDIATION  
STAYS IN MEDIATION



CONFIDENTIALITY IN  
CAUCUS—MEDIATOR CAN'T  
SHARE WITHOUT PERMISSION

# Mediation in America: History

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Forms of mediation may be traced to DR methods used by Native Americans

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Court-sponsored mediation brought by early settlers from England

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Early 20<sup>th</sup> Century mediation expanded with labor disputes to avoid strikes

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Legislation relating to mediation began late 70s/early 80s



## Facts and Figures

Estimated 7800 mediators employed in 2016, expected to grow to 8700 by 2026.  
900 in California.



More than 90% of cases settle before court



Mediation is the primary ADR process in federal, state, and local courts



Department of Justice data in 2016 report shows 75% of voluntary ADR proceedings settled; 52% in court-ordered proceedings

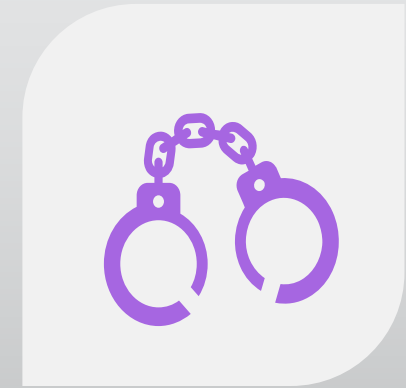


Federal Mediation and Conciliation Service: mediated more than 3200 labor negotiations, settled 87.1% of those cases

# Types of cases



CIVIL---COMMERCIAL,  
LANDLORD/TENANT,  
PROPERTY-RELATED  
DISPUTES, LABOR AND  
EMPLOYMENT, FAMILY



SOME CRIMINAL

# Regulation (mostly none)

28 states have standards for mediators who wish to be recognized by the courts

25 of those states require greater training and experience for family mediators than for civil case mediators

Of the 22 states without standards generally, 9 have standards for family mediators

# Mandatory mediation




MANDATORY FOR CHILD CUSTODY AND  
VISITATION IN CALIFORNIA SINCE 1981  
MANDATORY IN DELAWARE FOR BANKRUPTCY  
AND FORECLOSURE CASES



MOST MANDATORY  
MEDIATION IS COURT-  
ORDERED, RATHER  
THAN LEGISLATIVE

# Why is Mediation Popular?

A decorative graphic in the bottom right corner of the slide. It consists of several overlapping, parallel lines that form a corner-like shape. The lines are colored in a vibrant blue and a dark grey, set against a solid black background. The lines appear to be part of a larger, stylized geometric design.

Abraham  
Lincoln

Discourage litigation. Persuade your neighbors to compromise wherever they can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time.

?	Mediation	Litigation
 Time	days or weeks	months or years
 Money	usually \$800 - \$ 3,000	usually \$20,000 - \$80,000
 Feelings	keep distress to a minimum	hostility, anxiety, depression, misery
 Power	YOU decide	a judge tells you what to do

# Control of Resolution



TRANSPARENCY



NO ONE DECIDES  
FOR THE PARTIES






## Being Heard

Promote  
understanding

Uninterrupted  
opportunities to speak

Discuss real interests

# Possibilities for Creative Solutions



Wider variety  
of remedies  
available

Tailor solutions  
to interests  
rather than  
legal rules

Improved  
Communication/  
Relationships

Positive effects on  
children in custody cases

Less stress

Future disputes less  
likely

# Peaceful End to Conflict

Easier to move  
on without  
winners/losers  
(especially if  
you would have  
been the loser  
in court!)

# Even Where No Resolution, Limit and Define Issues

Narrow questions for court

Partial resolution

Clearer focus for remaining litigation

# Challenges of Mediation



# Emotions



- How much “venting”?
- When to separate the parties

Lack of  
Rules

Uncertainty



SET/ENCOURAGE GROUND  
RULES



ENCOURAGE COMMITMENT TO  
THE PROCESS; BE A  
CHEERLEADER FOR PROGRESS



# Wide Variety of Options



CHANGE MINDSET FROM  
LIMITED REMEDIES  
AVAILABLE IN COURT



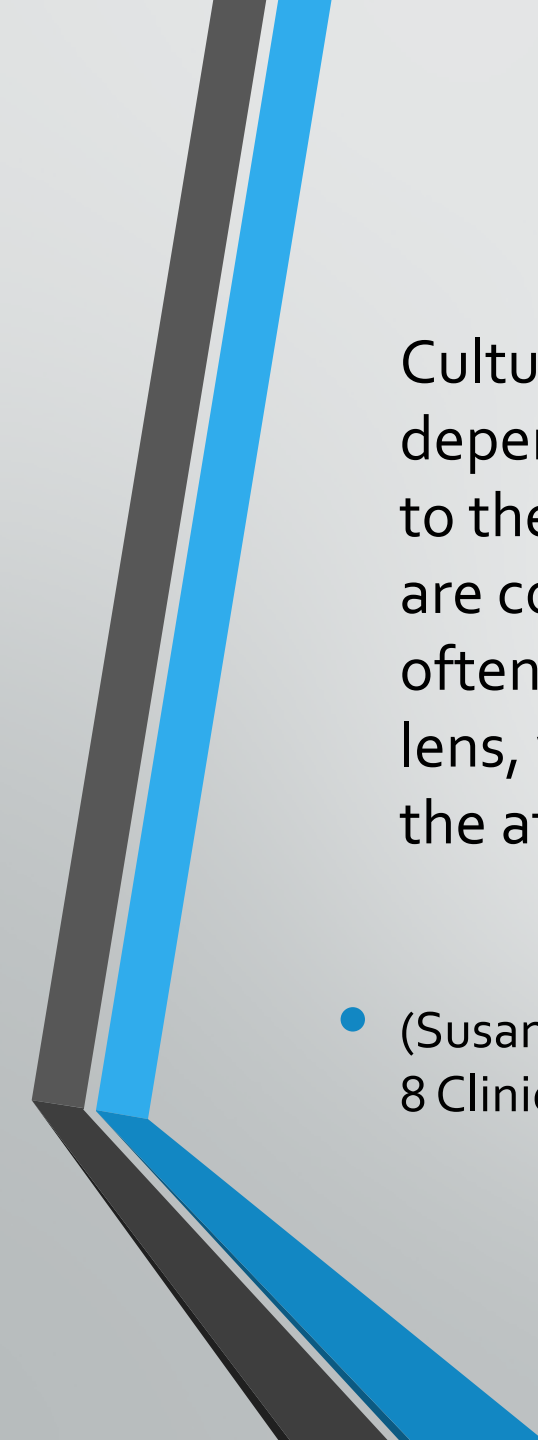
BE CREATIVE,  
ENCOURAGE CREATIVITY



BRAINSTORM

# Mediation and Culture

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Culture is like the air we breathe - it is largely invisible and yet we are dependent on it for our very being. Culture is the logic by which we give order to the world. Culture gives us our values, attitudes and norms of behavior. We are constantly attaching culturally-based meaning to what we see and hear, often without being aware that we are doing so. Through our invisible cultural lens, we judge people to be truthful, rude, intelligent or superstitious based on the attributions we make about the meaning of their behavior.

- (Susan Bryant, THE FIVE HABITS: BUILDING CROSS-CULTURAL COMPETENCE IN LAWYERS, 8 Clinical L. Rev. 33 (2001))

# Cultural Groups and Cultural Norms Can Be Based On:

ETHNICITY

RACE

GENDER

NATIONALITY

AGE

ECONOMIC STATUS

SOCIAL STATUS

SEXUAL ORIENTATION

PHYSICAL CHARACTERISTICS

BIRTH ORDER

IMMIGRATION STATUS

RELIGION

ACCENT

SKIN COLOR

ROLE IN FAMILY

MARITAL STATUS

LANGUAGE

EDUCATION

(In the end, we may each be a culture of one, but cultural elements create connections)

# High Context vs. Low Context



**High-Context:** primary purpose of communication is to form and develop relationships; contextual information is needed



**Low-Context:** primary purpose of communication is the exchange of information, facts and opinions

# Lower Context Cultures

American  
(Northern  
states)

Australian

English  
Canadian

English

German

Irish

New Zealand

Scandinavian

# Higher Context Cultures

- African
- Arab
- Brazilian
- Chinese
- Filipinos
- Finnish
- French Canadian
- French
- Greek
- Hungarian
- Indian
- Italian
- Japanese
- Korean
- Latin Americans
- Persian
- Portuguese
- Russian
- Spanish
- Thai
- Turkish
- Vietnamese

# The Lewis Model (1996)

3 categories of cultures

**MULTI-ACTIVE**

warm, emotional, loquacious, impulsive

**RE-ACTIVE**

courteous, amiable, accomodating,  
compromiser, good listener

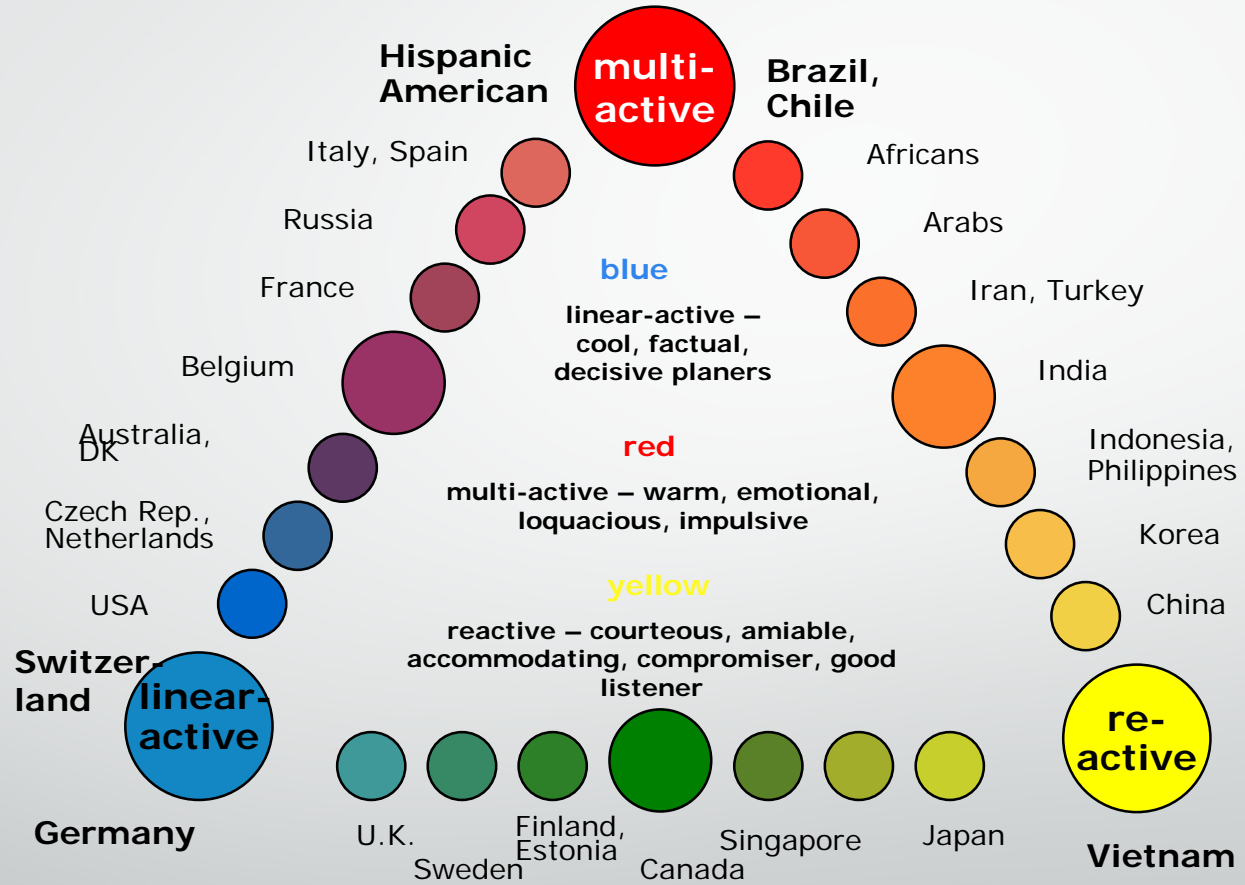
**LINEAR-ACTIVE**

cool, factual, decisive planners

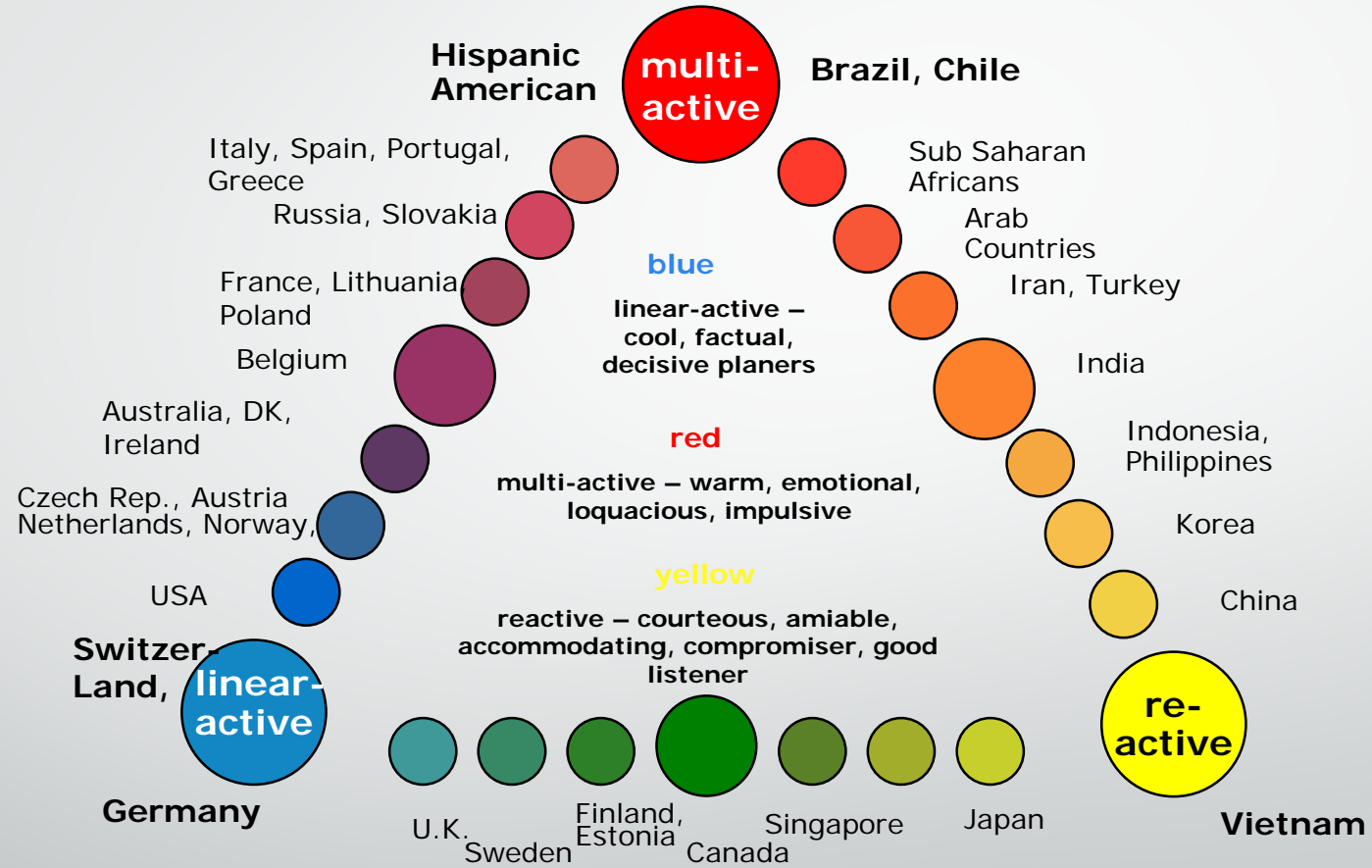
Jochen Luksch, EGGER PHILIPS, ZÜRICH/HAMBURG



# Lewis Model



# Lewis Model





Final Thoughts