

# Mediation Training Manual

National Mediator Accreditation System 2015



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# Mediation

## A guide to practice

### Purpose of this training manual

Since 2008 the practice of mediation in Australia has been regulated by the National Mediator Accreditation System (NMAS). While anyone can use the title of mediator to describe their profession, the NMAS has established a voluntary industry standard for best practice of facilitative and evaluative mediation. Mediators who seek national accreditation under this system and who want to display the post-nominal of NMAS in marketing materials or on their website are required to complete training meeting the NMAS approval standard requirements and to pass NMAS assessment by a Registered Mediator Accreditation Body (RMAB).



This training manual was composed to meet the requirements of the NMAS Approval Standard and to provide practitioners new to mediation practice with the minimum knowledge, skills and understanding of ethical practice requirements to perform facilitative mediation services. The training manual is to be used in conjunction with an NMAS approved mediation training course of at least 38 hours in duration, for example the mediation and conciliation training developed by Peace and Conflict Studies Institute Australia (PaCSIA). This training manual was developed by PaCSIA and we make it available free of charge under a [Creative Commons Share Alike Licence](#) under the condition that the authors and PaCSIA are acknowledged and any changes to the content and structure of the manual are clearly displayed.

The training manual serves as a learning tool complementing face-to-face mediation training, but also as a resource for practicing mediators and conciliators needing to research specific

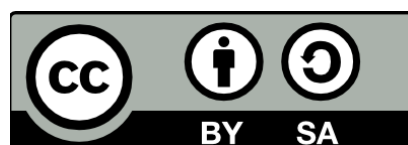
practice problems or looking for further information. To assist with further research, each chapter of the training manual provides references for further research and study.

Facilitative mediation, as it is envisaged in this manual, is based on human needs theory and a human relations paradigm. Underlying this is the idea that people can constructively resolve their differences and disputes when they communicate amicably with each other and discuss needs, concerns and hopes in a safe environment. These theoretical underpinnings are the core of mainstream conflict resolution practice and scholarship.

As such, concepts, theories and ideas are drawn from a variety of sources, both from practitioners and from academia. Where possible these sources were fully acknowledged, however, much of the theory and practice has been shared, discussed and published in various places, online and offline. Sometimes it is difficult to determine the original source of a concept or idea, and while the authors have taken great care to do so, they may have failed in some instances. Should there be any concerns about copyright violations, we apologise for this and ask that a potential copyright holder contact PaCSIA immediately to discuss remedy. We also encourage feedback and constructive critique with regards to the content and ideas presented in this training manual. It reflects the approach to practice of the authors and their understanding of the requirements of the NMAS. These understandings may not be universally applicable and therefore we invite practitioners and trainers who disagree to engage in a professional dialogue and reflective practice with us to develop these concepts further.

A special thank you goes to Leanne April Simon, who has proof-read and edited the final draft of this manual and has created the diagrams. **All images used were purchased from shutterstock.com and are subject to their licensing policies.**

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# 1. Learning mediation through reflective practice and action learning

It is useful to begin a training manual for facilitative mediation with a brief chapter on learning in general, and specifically, on how to learn mediation. According to the NMAS mediation includes a number of distinct areas of **knowledge** as well as a series of **skills** necessary for facilitating conflict conversations and negotiation. As such, mediation requires cognitive understanding of concepts and theories, as well as the ability to operationalise these theories and to transform them into actual mediator **interventions** in the form of questions, statements, summaries, reflections and reframes. This is practical work that is about how we communicate with others. For most people communication is hardly a conscious process and often we do not even remember afterwards, what specific questions or statements helped a conversation to move along. It is our view, that good mediators need to be constantly mindful of the way they communicate and that they should practice and hone their communication abilities and skills and use them very deliberately. The concept of “reflective practice” captures this.

## 1.1 Reflective practice and action learning

*“Ultimately, the effectiveness of mediators, the appropriateness of their chosen focus, how active they are, and the kind and amount of direction they provide depend on their ability to be an effective ‘reflective practitioner’ (Schön, 1983). This concept of professional practice was originally proposed by Donald Schön, a philosopher with a specialty in systems and organizational change, who advocated bringing reflection into what professionals do. He posited a process of ‘knowing in action’, in which professionals ‘think on their feet’ and engage in reflection-in-action.”*

*“I have learned how important it is to the quality of my service to clients to step out of the river periodically and take time to think and reflect on what I do and why I do it. Sharing my reflections with others deepens their value to me. Invariably, when I plunge back in after this time out, I am refreshed and renewed. [...] This is the point of a reflective practice and its value in my work: it allows me to be more fully present to whatever direction emerges during mediation and thereby respond with more authenticity.”*

The above statements by two well-known scholar practitioners<sup>1</sup> highlight the importance of reflective practice. The concept is also related to what David Kolb has called “action learning” in his work on adult education. Kolb argues that adults learn best from a particular

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<sup>1</sup> Moore, C., The mediation process, 4th ed., Jossey-Bass, 2015, p. 45 and Reitman, J.W., The personal qualities of the mediator, in Bowling, D. and Hoffman, D. (eds.), Bringing peace into the Room, Jossey-Bass, 2003, p. 235.

experience, on which they reflect and which they analyse to understand more abstract concepts and rules. Then they plan how to use the ability or knowledge gained and put it into practice through active experimentation. This creates another new experience which can then be reflected upon and analysed, forming an action learning cycle.<sup>2</sup>

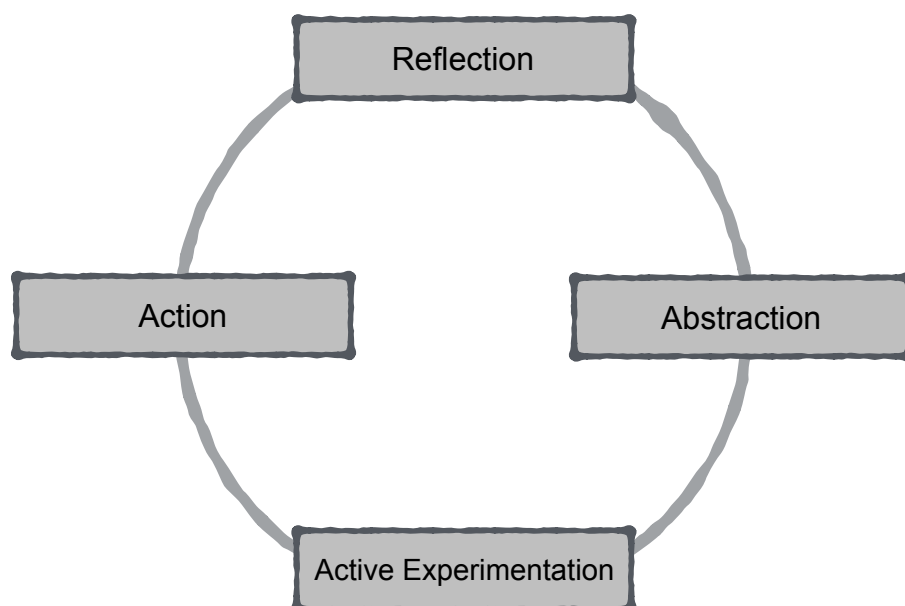


Fig. 1.1 *Action Learning Cycle*

**Reflection** is “the process by which professionals think about the experiences, events and situations of practice and then attempt to make sense of them in light of the professionals’ understanding of relevant theory”.<sup>3</sup> **Reflective practice** is “the ability to think divergently, to be unfettered by the limits of conventional wisdom, and to accept the challenge of the novel circumstance to develop a new approach or analysis”.<sup>4</sup>

Brandon and Robertson give a number of examples of ways to engage in reflection:<sup>5</sup>

- Finding a quiet space to recall a specific mediation event, ‘listen’ and recount the story that unfolds (by oneself or with a colleague), notice and learn from when you were present and not present, plan and record what you were satisfied with and an action step to overcome what you failed to employ or forgot, what you would repeat and what you would change
- Self-assessment tools
- Informal supervision (self or with peer)
- Formal supervision (with more experienced and knowledgeable mediators)
- Mentoring
- Coaching

<sup>2</sup> Kolb, D. A., *Experiential learning: experience as the source of learning and development*, Prentice-Hall, 1984, p. 33.

<sup>3</sup> Lang, D. and Taylor, A., *The making of a mediator: developing artistry in practice*, Jossey-Bass, 2000, pp. 18-19.

<sup>4</sup> Lang, D. and Taylor, A., *The making of a mediator: developing artistry in practice*, Jossey-Bass, 2000, p. 120.

<sup>5</sup> Brandon, M and Robertson, L., *Conflict and dispute resolution: a guide for practice*, Oxford University Press, 2007, pp. 30-35.

- Observation of other mediators.

Lang and Taylor suggest, that in order to change mediation practice it is not necessary to change *what* you think, but *how* you think about your practice. For continuous development, practitioners need to keep going back and reviewing the basics as well as adding new skills and knowledge to their repertoire. However, simply going back over the basics and thinking about them in the same habitual way, may mean that no new insights are gained. “Mediators cannot help but see the world in ways that are familiar and comfortable.”

## 1.2 Characteristics of reflective practitioners<sup>6</sup>

- They engage in a continual process of self-reflection, abstraction, planning and experimentation.
- They rely on theory to guide, inform and critique practice.
- They use the process of experimentation to test observations, perceptions and formulations of the experiences, beliefs and needs of clients.
- They are willing to see perspectives other than own and embrace surprise.
- They are open to new information about their practices and see themselves as lifelong learners.
- They do not see themselves as experts, but acknowledge that both they and their clients have expertise to bring to bear on the conflict situation.

## 1.3 Suggested reading

Brandon, M. and Robertson, L., Reflecting in and on practice, in Brandon, M. and Robertson, L., Conflict and dispute resolution: a guide to practice, Oxford University Press, 2007, Chapter 12, pp. 226-241.

*For a list of questions for reflective practice, see the appendix.*

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<sup>6</sup>Lang, D. and Taylor, A., The making of a mediator: developing artistry in practice, Jossey-Bass, 2000, p. 123.

## 2. Defining facilitative mediation and its underlying principles

Mediation is notoriously difficult to define and mediation services have developed differently in different countries and fields of practice. Mediators have significant variations in background, training, education, techniques and operational style.<sup>7</sup> Mediation processes are used in highly formal commercial contexts, but also informally within community or family settings. In the following section we present three popular definitions of mediation to point out similarities and differences.

### 2.1 Definitions of mediation

National Alternative Dispute Resolution Advisory Council:<sup>8</sup>

*“Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.”*

Mediator Standards Board, National Mediator Accreditation System, Practice Standards:<sup>9</sup>

*“Mediation is a process that promotes the self-determination of participants and in which participants, with the support of a mediator:*

- (a) communicate with each other, exchange information and seek understanding*
- (b) identify, clarify and explore interests, issues and underlying needs*
- (c) consider their alternatives*
- (d) generate and evaluate options*
- (e) negotiate with each other; and*
- (f) reach and make their own decisions.*

*A mediator does not evaluate or advise on the merits of, or determine the outcome of, disputes.”*

<sup>7</sup> Boule, L., Mediation: principles, process, practice, 3rd ed., LexisNexis Butterworths, 2012, p. 14.

<sup>8</sup> NADRAC, Dispute resolution terms, 2003, p. 9.

<sup>9</sup> MSB, NMAS Practice standards, 2015, Part III, S.2.2, p. 9.



“Mediation is a conflict resolution process in which a mutually acceptable third party, who has no authority to make binding decisions for disputants, intervenes in a conflict or dispute to assist the parties to improve their relationships, enhance communications, and use effective problem-solving and negotiation procedures to reach voluntary and mutually acceptable understandings or agreements on contested issues.”

What is common to all three definitions is that they are descriptive in nature and aim to present the features and practical interventions undertaken by mediators. All the definitions also focus on what we would call “facilitative” mediation. In facilitative mediation, mediators control the process of conversation during the mediation conference but they do not give advice or determine the outcome of the dispute. Mediators, as such, act as facilitators of communication to help the parties analyse and understand their conflict and their different positions and points of view. They also assist the parties to communicate constructively and to explore their underlying interests, needs and concerns.

Additionally, mediation contains an element of negotiation and mediators therefore assist the parties to negotiate with each other if necessary. Another commonality is that mediators are generally considered third parties, or people not directly associated with the dispute. Moore speaks of a mutually acceptable third party. As such, at least in an Anglo-Australian or Eurocentric understanding, mediators often have no previous dealings with the parties, have not acted as an advocate or advisor to either party and are not financially or legally involved in the dispute themselves. Such understandings vary significantly, and in many situations it may be preferable to have a member of the family or even a legal advisory mediate a specific matter. This is all determined by the willingness of the participants to accept a particular mediator and mediation process.

There has been a lot of discussion and scholarly debate on what should be the outcome of a mediation and also how to define success in mediation. For some mediators, success is defined in assisting parties to reach a contractual agreement, some form of settlement. For other mediators the most important feature is voluntary and informed decision-making and self-determination. It might very well be the case, that parties in a successful mediation decide not to settle a dispute and to take the dispute to court or to find other alternatives to settlement. This school of thought argues, that making settlement the end goal of mediation induces mediators to use strongly interventionist techniques and to (gently) coerce parties to agree with each other, even if that is not in the best interest of the parties. These practitioners and scholars argue that informed decision-making and party empowerment are much more important for resolving (instead of just settling) conflicts. The latter argument has found its way into the definitions of the NMAS, which also emphasises self-determination and

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<sup>10</sup> Moore, C., *The mediation process: practical strategies for resolving conflict*, Jossey-Bass, 2015, p. 19.

decision-making instead of agreement. The NMAS is the dominant voluntary industry standard in Australia and the basis for this training manual.

## 2.2 Mediation and Alternative Dispute Resolution (ADR)

Mediation is also often called an Alternative Dispute Resolution (ADR) process. Originally, this meant an alternative to court litigation. In Australia and the United States, the meaning of the acronym “ADR” has changed from “alternative” to “appropriate” dispute resolution, which seems to indicate the common use of ADR in the daily routines of businesses and citizens.<sup>11</sup> Common law countries have developed a plethora of ADR processes which are often used parallel to each other or in an escalating order of intensity of third party intervention (for example: conflict coaching, mediation, conciliation, med-arb, case-appraisal, mini-trial etc).<sup>12</sup> Courts and tribunals in Australia often have some discretion with regards to choosing the most appropriate process of dispute resolution and may utilise other processes than mediation.

Many state-based providers of dispute resolution services offer conciliation instead of mediation, in particular in fields, in which the disputing parties require education or information about existing laws or where more interventionist practice is deemed favourable. The most common definition of conciliation in Australia is the one provided by NADRAC:<sup>13</sup>

“Conciliation is a process in which the parties to a dispute, with the assistance of a neutral third party (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise or determine the process of conciliation whereby resolution is attempted, and may actively encourage the participants to reach an agreement.”

This definitions highlights some of the differences between different dispute resolution processes. While the definition describes a process which is very similar to the NADRAC definition of facilitative mediation above, in **conciliation** the dispute resolvers can provide advice with regards to the merits of the dispute and can even suggest terms for settlement. This provides more opportunities for conciliators to influence the dispute resolution process, but it also requires more responsibility. Often, conciliators need to be experts with regards to the laws that influence their particular field of practice or have other expertise which they provide to disputing parties when requested. Conciliation is used by, for example, the Anti-

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<sup>11</sup> Astor, H. and Chinkin, C., *Dispute resolution in Australia*, 2nd ed., LexisNexis Butterworths, 2002, p. 78.

<sup>12</sup> Spencer, D. and Hardy, S., *Dispute resolution in Australia: cases, commentary and materials*, 2nd ed., Thomson Reuters, 2009, p. 25.

<sup>13</sup> NADRAC, *Alternative dispute resolution definitions*, 1997, p. 5.

Discrimination Commission of Qld, the Residential Tenancies Authority in Queensland or the Victorian Accident Compensation Conciliation Service.

Some of the state-based conciliation services employ large numbers of conciliators and resolve thousands of cases every year. Conciliation is often a good starting point for novice mediators who want to gain experience and establish their career in the field.

## **2.3 Core values of facilitative mediation**

### **2.3.1 Voluntariness**

The principle of voluntariness originally meant to distinguish mediation from court litigation, in which the courts can mandate appearance and also impose a decision on the parties even against their will. When mediation started to become an alternative to litigation in North America, Australia and Europe, voluntariness was often pointed out as a key advantage of the process.<sup>14</sup> Since then, in particular in Australia, the idea of mandatory mediation was introduced. Currently nearly all Australian courts can refer a case to mediation, even sometimes against the explicit wishes of the parties. Therefore attendance at mediation may no longer be voluntary. What has not changed, is that the decision-making in mediation is voluntary. If a party chooses not to agree to anything or even to end the process, then this is their prerogative. The worst repercussion in mandated mediation cases could be a court order for costs against the party. While mandatory referral does impact on the openness and willingness of parties to engage constructively, research in Australia shows that mandatory referral to mediation can still lead to agreements and reduce court lists. In some European countries, the idea of mandatory referral is being rejected and practitioners and scholars argue that also participation in mediation should be voluntary to ensure the most effective process.

### **2.3.2 Confidentiality**

While most litigation procedures are conducted in a court that is open to the public, most mediations are private and confidential. Moreover, parties who wish to preserve their reputation or who wish to keep the dispute itself private may opt to use mediation precisely because of this feature. On the other hand, confidentiality can also be highly inappropriate in situations where disputes involve whole communities or organisations or where it is culturally inappropriate to discuss matters of importance behind closed doors.

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<sup>14</sup> Boulle, L., *Mediation: principles, process, practice*, 3rd ed. LexisNexis Butterworths, 2012, p. 64.

The NMAS makes the following suggestions with regards to confidentiality:<sup>15</sup>

## **9. Confidentiality**

- 9.1. A mediator must respect the agreed confidentiality arrangements relating to participants and to information provided during the mediation, except:
  - (a) with the consent of the participant to whom the confidentiality is owed;
  - or
  - (b) where non-identifying information is required for legitimate research, supervisory or educational purposes; or
  - (c) when required to do otherwise by law;
  - (d) where permitted to do otherwise by ethical guidelines or obligations;
  - (e) where reasonably considered necessary to do otherwise to prevent an actual or potential threat to human life or safety.
- 9.2 Before holding separate sessions with different participants, a mediator must inform participants of the confidentiality which applies to these sessions.
- 9.3 With a participant's consent, a mediator may discuss the mediation, or any proposed agreement, with that participant's advisors or with third parties.
- 9.4 A mediator is not required to retain documents relating to a mediation, although they may do so should they wish, particularly where duty-of-care or duty-to-warn issues are identified."
- 9.5 A mediator must take care to preserve confidentiality in the storage and disposal of written and electronic notes and records of the mediation and must take reasonable steps to ensure that administrative staff preserve such confidentiality.

### **2.3.3 Neutrality, impartiality and fairness**

The concept of neutrality was, and is still, very controversial in mediation. Originally, many practitioners defined the role of the third party mediator as a "neutral outsider" with no financial or other connections to the parties who would facilitate the mediation process in an impartial and neutral manner. Clearly, this understanding of the role was influenced by the way judges are being described in most jurisdictions around the world. Conflict resolution scholars have criticised the idea that mediators or judges can be fully neutral and objective. Mediation is a process that is based on a view of social reality that places human relations and subjective experiences at its centre. Social reality is constructed through interaction and therefore an external neutrality does not exist. Boulle writes that the "most prevalent view advanced in the contemporary literature is that concepts such as neutrality, impartiality and independence have not absolute qualities, but are dependent on context, relationships and other subjective factors."<sup>16</sup> While we acknowledge that some mediators introduce themselves in their opening statements as neutral or impartial third parties, we suggest instead to talk

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<sup>15</sup> MSB, NMAS Practice standards, 2015, Part III, S.9, p. 12.

<sup>16</sup> Boulle, L., *Mediation: principles, process, practice*, 3rd ed. LexisNexis Butterworths, 2012, p. 71.

about “the role of the mediator as guiding the parties through a fair process”. We suggest to our parties that they inform us if they believe we act in a biased way or if they feel treated unfairly by our actions. That way the process of mediation can itself be discussed with the parties to find a suitable and respectful way for the conference to continue. We also believe in the notion that mediators are not impartial, but that they are “omni-partial” and work for all the parties in a balanced and equidistant way. Such notions of balancing support become important when mediators decide who should go first during a particular process phase and how they offer air time to both parties. It is advisable to do this in a balanced manner so that the parties feel that they are being treated equally. The NMAS requires mediators to conduct the process in an impartial manner and to adhere to ethical standards of practice:<sup>17</sup>

## **7. Procedural fairness and impartiality**

- 7.1. A mediator must conduct the mediation in a fair, equitable and impartial way, without favouritism or bias in act or omission.
- 7.2. A mediator must identify and disclose any potential grounds of bias or conflict of interest before the mediation, or that emerge at any time during the process.
- 7.3. A mediator must not mediate in cases involving a conflict of interest without the informed consent of the participants, and then only if, in the mediator’s view, the conflict would not impair his or her impartial conduct of the process.
- 7.4. A mediator must support participants to reach agreements freely, voluntarily, without undue influence and on the basis of informed consent.
- 7.5. A mediator must provide participants appropriate opportunities to speak to and be heard by one another in the mediation, and to articulate their respective interests, issues and underlying needs.
- 7.6. A mediator must ensure, so far as practicable, that participants have had sufficient time and opportunity to access sources of advice or information necessary for their decision-making.
- 7.7. A mediator must encourage and support negotiations that focus on the participants’ respective interests, issues and underlying needs and must encourage participants to assess any proposed agreements accordingly and with reference to their long-term viability.

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<sup>17</sup> MSB, NMAS Practice standards, 2015, Part III, S.7, p. 11.

### 2.3.4 Constructive communication

In the definitions of mediation under the NMAS, the first area in which mediators support parties through their conflict is the area of communication. Facilitative mediation is primarily a process designed to enhance and improve the communication process between the parties. The underlying theory of facilitative mediation posits that, if parties can interact constructively with each other then they will also be able to resolve their differences. The facilitative model of mediation itself is a structured conversation which provides a number of steps to assist parties to communicate clearly about their needs, interests and concerns. Mediators support this structure through a range of interventions to improve interaction and communication, such as summarising and reflecting emotions, reframing, questioning and transitions. These will be discussed in more detail in chapter 6 of this manual. Suffice it to say that, as constructive communication is a core principle of the process, mediators should monitor the quality of communication between the parties and time their interventions accordingly. When the parties communicate well with each other very little intervention is required, but when there are heated and hurtful exchanges the mediator often needs to take more control to provide a safe and constructive environment for discussion. This also applies to the mediator. It makes little sense to engage the parties in a debate about the merits of the process or to interrogate a party to catch them in a lie. Instead of this, mediators should role model constructive and respectful communication, balance air time for parties, and reflect emotions to let the participants know that they have been heard and that their feelings matter. This also means not forcing the parties to talk about certain topics that they do not wish to talk about or to make offers for settlement if they do not want to do that.

### 2.3.5 Self-determination and informed decision-making

The perceived importance of voluntariness and neutrality as core values in mediation has declined as mentioned above. Instead, many scholar practitioners emphasise the importance of self-determination and party autonomy.<sup>18</sup> Self-determination involves the direct participation of parties in the resolution of their own disputes and assumes that the parties themselves are the experts on their own conflict. Mediation, therefore, centres on the person and provides flexibility in process to accommodate the needs of the parties instead of subjecting them to the rules of the justice system.<sup>19</sup> Additionally, in pure facilitative mediation there is no legal or other standard against which rights and responsibilities of parties are measured against. This means the parties are free to introduce the content that they choose and any decisions made do not have to fall within the gamut of what is available in litigation. In practice, there are some limits to this party autonomy in that mediators are ethically required not to assist with mediation outcomes which endanger or disadvantage third parties and they are legally required not to participate in criminal activities. Nevertheless, the principle of self-determination allows parties to craft agreements that would not be possible in litigation

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<sup>18</sup> Boulle, L., *Mediation: principles, process, practice*, 3rd ed. LexisNexis Butterworths, 2012, pp. 82-83.

<sup>19</sup> Boulle, L., *Mediation: principles, process, practice*, 3rd ed. LexisNexis Butterworths, 2012, p. 84.

or arbitration and to achieve creative outcomes that generate value. This provides a different quality of outcome to most other dispute resolution processes.

## **2.4 Other approaches to mediation**

Facilitative mediation is not the only approach and model of mediation. Different fields of practice have produced different approaches to conducting mediation. In the following section, we briefly present the major points that differentiate some of these different approaches. The list is not exclusive and often approaches and models overlap and utilise similar interventions.

### **Settlement/evaluative mediation**

- Mediators guide parties to reach settlement according to legal (or other) rights and entitlements and within their anticipated range of court, tribunal or industry outcomes.
- Mediators with expertise in substantive areas of the dispute (most often the law relating to the dispute), not necessarily in the mediation process.
- Provide information, advise and persuade parties, bring professional expertise to bear on content of negotiations, predict outcomes, and reality-test.
- High intervention by mediator, less party control over outcome, quasi-arbital in style.
- Encourages incremental bargaining towards compromise.
- Limited procedural intervention by mediator, positional bargaining by parties.
- Blurs mediation and arbitration distinction, additional responsibilities and liabilities for the mediator.
- Common in commercial, personal injury, trade practices, matrimonial property and anti-discrimination disputes.

### **Therapeutic mediation**

- Deals with underlying causes of parties' conflict with a view to improve their relationship through recognition and empowerment.
- Mediators with expertise in counselling, psychology or social work.
- Use of professional therapeutic techniques before, or during, mediation.
- Decision-making postponed until relationship issues have been dealt with; less outcome-oriented.
- Can lead to resolution of relationship rather than just settlement of dispute; responsive to party needs.
- Could be prolonged and terminated without agreement; sometimes confuses counselling and mediation roles.
- More common in family, workplace and other continuing relationship disputes.

### **Customary mediation**

- Refers to customary forms of dispute resolution.

- Is not a style per se, but refers to a multitude of different processes.
- Often aims at restoring community harmony and not at satisfying individual interests.
- Mediators are community elders, chiefs or other respected personalities.
- Often knowledge about the customs of the community is very important.
- Rare in Western contexts.

### **Transformative mediation**

- Different model of mediation from the facilitative model.
- Based on *The Promise of Mediation* by Bush & Folger.<sup>20</sup>
- A process in which a third party works with parties in conflict to help them change the quality of their conflict interaction from negative and destructive to positive and constructive, as they explore and discuss issues and possibilities.
- Mediator does not control the process but follows the parties' discussion.
- Improves party decision-making and communication.

### **Narrative mediation**

- Based on social-constructionist theory and the idea that people construct their personal reality through stories.
- Mediators deconstruct the dominating discourses of the parties and help to uncover and develop new and less conflict-prone stories.
- Mediators use predominantly questions to achieve this.
- Narrative mediation allows for people whose voices are less dominant to have their stories heard and can accommodate cultural difference better than other models.

### **Solution-focused mediation**

- The solution focused model was developed during the 80s by De Shazer, Berg and colleagues at the Brief Family Therapy Center in Milwaukee, USA.
- Proposition: the development of a solution is not necessarily related to the problem (or conflict).
- The clients are the experts. Builds on their strengths.
- Focused on the future as defined by clients and not on the past.
- Can be quicker and more positive-focused.
- Leaves out important stories of the past relationship.

### **Restorative justice and victim-offender mediation**

- Focuses on improving relationships and on repairing the harm done by acts of crime or antisocial behaviour.

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<sup>20</sup> Bush, R.A.B. and Folger, J., *The promise of mediation: the transformative approach to conflict*, Jossey-Bass, 2005.



- In restorative justice processes all stakeholders affected by an injustice have an opportunity to discuss how they have been affected and to decide how to repair the harm.
- Common in schools and also as an alternative to punitive criminal justice. Also used in some community disputes and in disputes between Indigenous and settler peoples.
- Utilises different processes, from facilitative mediation between victim and offender to circle processes and group conferencing.

## Conflict coaching

“Conflict coaching is a process in which a coach and client communicate one-on-one for the purpose of developing the client’s conflict-related understanding, interaction strategies, and interaction skills.”<sup>21</sup>

- Conflict coaching is sometimes used when only one party volunteers to attend mediation and the other party rejects mediation.
- Conflict coaching can make use of different approaches to conflict resolution, such as interest-based problem-solving, narrative approaches or solution-focused approaches.
- Coach and client work to develop a better understand of the situation and to develop constructive strategies for the client to improve the conflict situation with the other parties involved.

## 2.5 Suggested reading

Boulle, L., Mediation: principles, process, practice, 3rd ed. LexisNexis Butterworths, 2012, Chapter 2, pp. 12-48.

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<sup>21</sup> Jones, T. and Brinkert, R., Conflict coaching: conflict management strategies and skills for the individual, Sage Publication, 2008, p. 5.

### 3. The nature of conflict and how it affects the mediation process

Before mediators can assist parties in a dispute or conflict, they need to know more about the situation. For example, a tenancy dispute about the cost of repairs that the landlord claims after the end of the tenancy may have different underlying root causes.

One case may simply be about communication and data, such as when the landlord has not provided receipts for the repairs to the tenant, and the tenant feels that the claim was made up. A simple exchange of receipts is often enough to resolve the matter accordingly. In another case the dispute about the repairs may only be the tip of the iceberg of a conflict which has gone on throughout the whole tenancy and which involves miscommunication, insults from both sides against each other, constant complaints from neighbours about the tenant and violations of privacy protection by landlord. This conflict is obviously quite different to the first one and will involve different strategies to resolve or might even be unsuitable for mediation.

Mediators should have an understanding of the root causes and effects of conflict and how their interventions can assist the conflict parties to deal with it constructively. The first question that arises is one of a fundamental nature. What is conflict? How can it be defined, categorised and understood? What is the difference between a conflict and a dispute and how does this impact on the practice of mediation and conciliation?

#### 3.1 Some definitions of conflict

The Oxford English Dictionary defines 'conflict' as:

*An encounter with arms; a fight, battle.*

*A prolonged struggle. Fighting, contending with arms, martial strife. The clashing or variance of opposed principles, statements, arguments.*

In the English language the word conflict is often used as a synonym for dispute, disagreement, or problem without there being clear distinctions as to what the difference is. Conflict also often invokes negative feelings of adversity, stress, struggle, and fighting and many conflicts can lead to violence and other dysfunctional responses. On the other hand, conflict holds the potential for change, transformation, and improvement of static structures and systems. Conflict is unavoidable and essential to the ongoing processes of history and to social change and transformation. Conflict in itself is neither good nor bad. It is the responses to conflict which can be constructive or destructive to human relationships.

#### 3.2 Problems, disputes and conflicts

A **problem** can be resolved by management: by agreement on how something can or should be done. For example, two people who need to meet to discuss a topic may have a problem in finding a mutually convenient time. They can resolve this by mutually managing their time and communicating with each other. Problems are usually manageable, and problem-solving skills are an essential part of everyday life. When problems are not managed adequately they can develop into disputes.

A **dispute** arises when two or more people or groups perceive that their interests, needs, or goals are incompatible and they seek to maximise fulfilment of their own interests or needs, or achievement of their own goals (often at the expense of others). Disputes require that one or all of the stakeholders somehow communicate their goals to each other, often in the form of positions (e.g. "You owe me \$500. If you don't pay by next week I will sue you."). Common ways to manage or settle disputes are through bargaining or negotiating, and the outcome is often reached through compromise: to obtain that which is most important, one party may yield to the other on that which is less important. Dispute settlement is often by agreement, and settlement processes can be conducted with or without a third party facilitator, they can be voluntary (e.g. negotiation or mediation), or imposed (e.g. arbitration or court order).

A **conflict** arises when two or more people or groups perceive that their values or needs are incompatible – whether or not they propose, at present or in the future, to take any action on the basis of those values or needs. While problems and disputes relate to specific actions or situations, a conflict can exist without such a specific focus. Two parties can be in conflict because of what each believes, regardless of whether any action or communication has been taken or initiated between them. For instance, religious conflict exists because one person or group opposes the religious belief of another person or group. Conflicts relate to deep human needs and values. Sometimes they are expressed through problems or disputes, which may be the superficial manifestation of a conflict.

### 3.3 Maslow's hierarchy of human needs

Abraham Maslow published the following hierarchy of human needs in his 1943 paper A Theory of Human Motivation. More basic human needs are at the lower levels of the pyramid. These needs often take priority over the satisfaction of higher level needs.

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<sup>22</sup> Tillett, G. and French, B., Resolving conflict: a practical approach, 4th ed. Oxford University Press, 2010, p. 8-9.

For example, if someone is worried about their livelihood (e.g. a place to sleep, enough food to survive) it will be hard for them to negotiate higher level needs such as achievement or respect by others (e.g. finalising a contract).

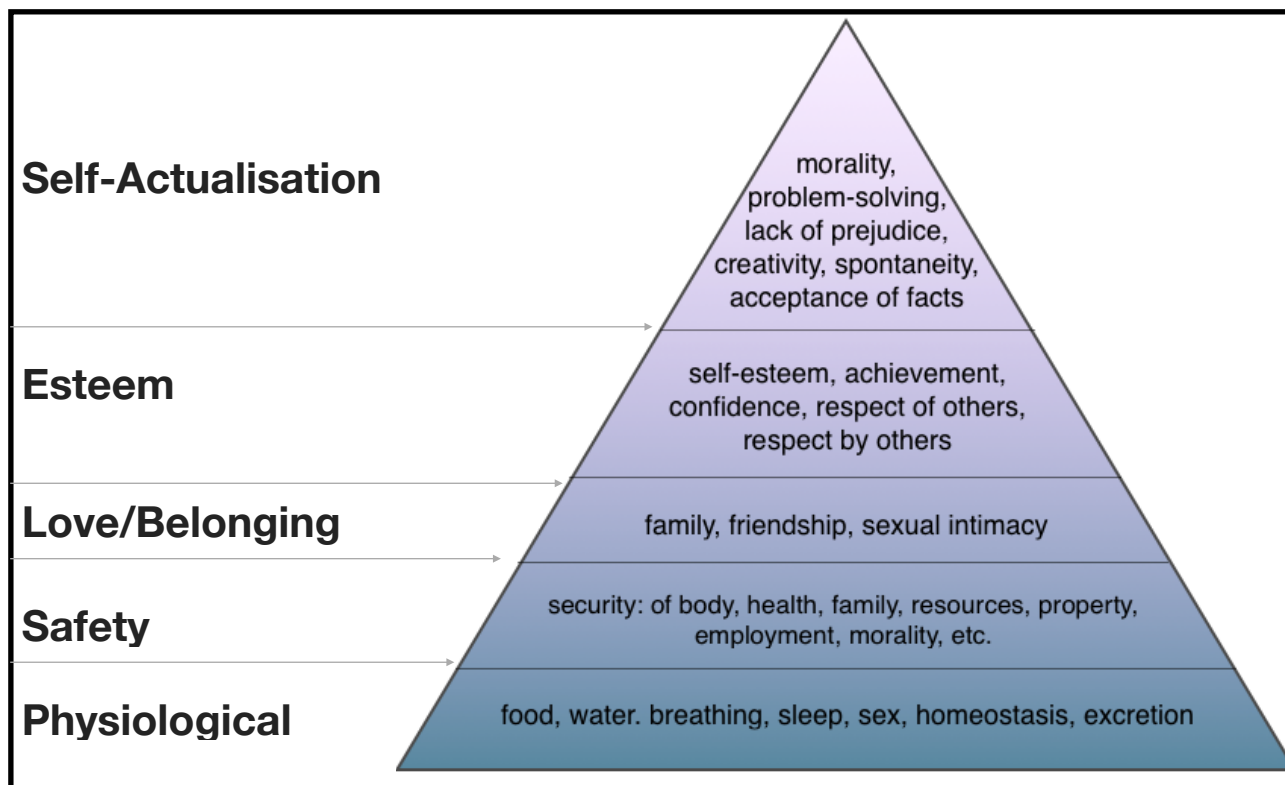


Fig. 3.1 Maslow's hierarchy of human needs

### 3.4 Locations of conflict

Conflict can be located at the **intrapersonal**, **interpersonal**, **intragroup**, and **intergroup** level. It normally arises out of competing needs or values, such as needs for physical or social security, recognition, self-esteem, or freedom to engage in culturally meaningful behaviour. Often it involves at least two parties who disagree over the distribution of material or symbolic resources or perceive their underlying cultural values and beliefs to be different. The incompatibility of these needs is often based on perception rather than reality.

### 3.5 Sources of conflict

Conflict can arise from different lifestyles, roles, values, world views, symbolic actions, structural deficiencies and systemic problems, habit, power, change or fear of change, language, individual and group dysfunction, and the (perceived) unfairness of distribution of assets, wealth, power, or land.

Values and needs are often closely related. Values are those beliefs that have significance for an individual. They can include, but are not limited to, religious, political, social, and moral

beliefs. Cultural values help humans to create world-views and influence the way in which they see the world and construct their reality.

Causes of conflict can be proximate or immediate, or can be hidden or underlying and require careful analysis and communication with the conflicting parties to uncover. Underlying conflict manifests itself in the cumulation of disputes, extreme responses to disputes or a lack of capacity to deal with them despite considerable effort to resolve them. A number of models have been developed to assist in identifying the source of conflict.

One such model is known as "Moore's Circle of Conflict" developed by Christopher Moore.<sup>23</sup>

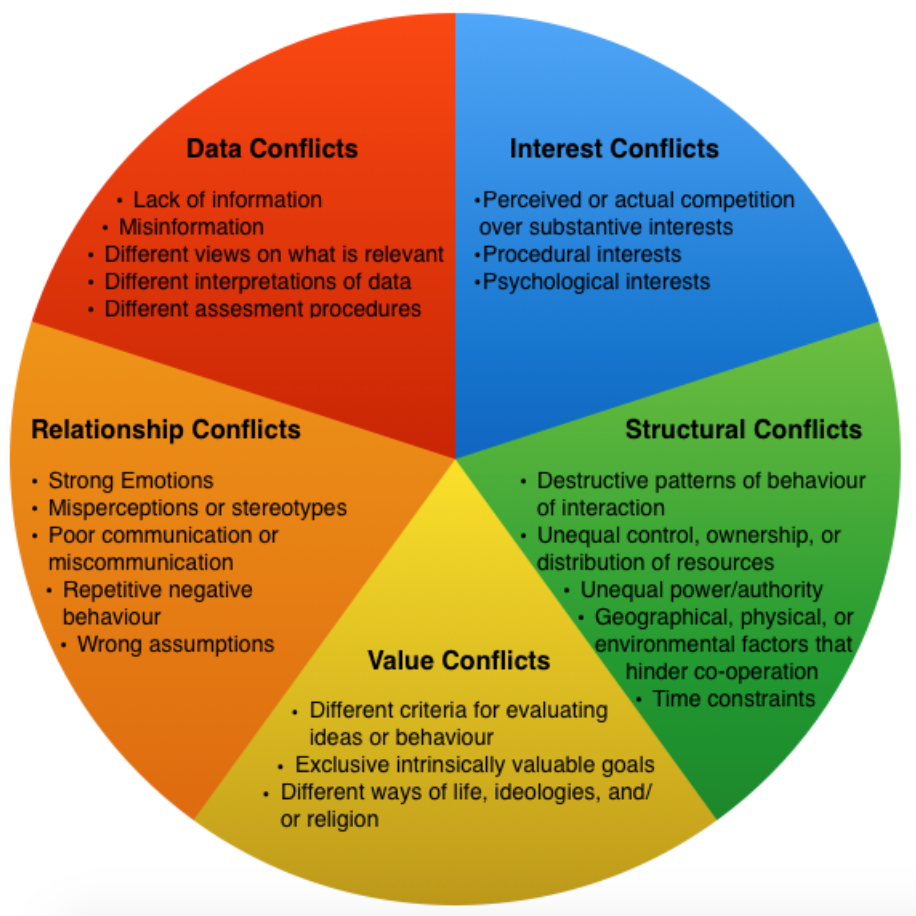


Fig. 3.2 Moore's circle of conflict

<sup>23</sup> Moore, C., The mediation process: practical strategies for resolving conflict, Jossey-Bass, 2003, p. 64-65.

### **3.6 Strategies for dealing with sources of conflict**

#### **3.6.1 Interest conflicts**

- Search for compatible interests as a starting point and design solutions to meet those interests.
- Use objective criteria for incompatible interests.
- Trade interests that mean little to one side and a lot to the other.

#### **3.6.2 Data conflicts**

- Check the interpretation of the data (e.g. perspective, source, accuracy etc.).
- Compare information with the other party- this may uncover wrong information.
- Encourage that parties seek out missing information.
- Listen, ask questions, clarify.
- Use independent experts.

#### **3.6.3 Relationship conflicts**

- Demonstrate empathy through active listening. People who feel listened to are more likely to listen to you. This increases the opportunity for understanding differences and constructive communication.
- Explore the history of the relationship and how it has changed.
- Vision a more constructive relationship and ask parties what steps need to be taken to get there.
- If a personalities of different negotiators clash, think about exchanging the negotiators.

#### **3.6.4 Structural conflicts**

- Acknowledge structural inequalities, and that they may impact on the parties.
- Can structures be altered?
- Reallocate ownership of the conflict to overcome power imbalance.

#### **3.6.5 Value conflicts**

- Check whether the values are really incompatible and mutually exclusive.
- Value conflicts are rarely negotiable, but they can be explored and parties can learn from each other about their different values. This might help them to find ways to maintain the relationship.
- Reframe the value conflict as an interest conflict, as interests can be traded and altered without loss of integrity.
- Encourage parties to agree to disagree, and to develop options on how to move on without compromising their values.

### 3.7 Stages of conflict

Conflict is dynamic, interactive, and constantly changing. No two conflicts are identical, but some conflict analysts argue that a structure of conflict can be identified which is common to many conflicts. Conflict does not evolve along linear stages, can move forwards and backwards between stages, and even skip stages altogether or stagnate at a certain stage. Commonly identified stages include:<sup>24</sup>

**Formation:** discomforts, anxieties, fears, problems.

**Escalation:** misunderstandings, differences, disputes, incidents.

**Crisis and endurance:** state of open violent conflict, protracted violence, stalemate.

**Improvement or de-escalation:** conciliatory gestures, ceasefires, start of negotiations.

**Settlement or resolution:** change of behaviour, end of direct violence, peace agreements, settlement of dispute, feelings of hostility may remain.

**Reconciliation and reconstruction:** acknowledgment of responsibility on all sides, restitution, political, social and economic reconstruction, reconstruction of relationships.

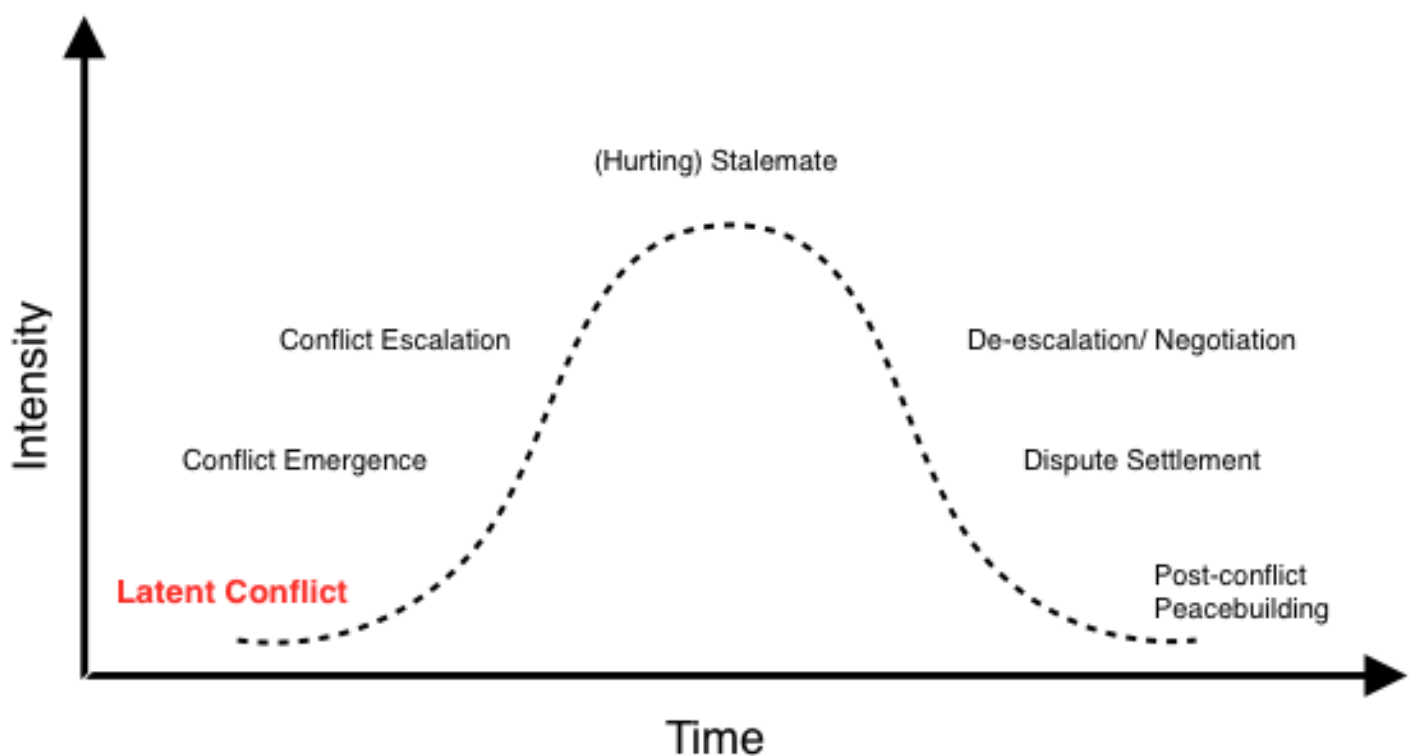


Fig. 3.3 Latent conflict stage

<sup>24</sup> International Alert, Resource pack for conflict transformation, Part 2, p. 12-19. For the diagram below see Brahm, Latent conflict stage, Beyond Intractability, Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: September 2003 <[http://www.beyondintractability.org/essay/latent\\_conflict/](http://www.beyondintractability.org/essay/latent_conflict/)>.

### 3.8 Responses to conflict

According to Kraybill et al.<sup>25</sup> people respond to conflict in varied ways. One person will retreat into silence; another will openly confront; a third will begin to negotiate. The same person may respond differently to different types of conflict. These reactions arise not only from the nature of specific conflicts, but also from personal history, which deeply shapes each person's attitudes and beliefs about conflict. Influences that have special impact include:

- Relationships with siblings and childhood friends.
- Responses to conflict modelled by parents, teachers, and public figures.
- Images and attitudes presented by the media, especially television, movies, and the Internet.
- Social factors such as serious deprivation and poverty.

Although we all have very different personalities, experiences, hopes and fears, most people tend to feel and behave in some fairly consistent ways when they are in conflict. These things tend to be true about people in conflict:

- They generally don't think clearly;
- They often behave inconsistently;
- They tend to be fairly self-absorbed, stuck in their own perspective;
- They find it difficult to communicate effectively with the other person; and
- They find it hard to think about the other person's perspectives or needs.

How people actually respond to conflict depends on a range of factors such as their personalities, past experience with conflict, and the context in which the conflict has arisen. However, most people tend to have a particular conflict style that is their usual preference.

Let's consider these five typical responses to conflict:

1. **Avoidance** – when a person would prefer to pretend the conflict does not exist and does not want to actively engage with the other person to attempt to resolve the conflict.
2. **Accommodation** – when a person simply gives the other person what they want in order to resolve the conflict.
3. **Competition** – when a person actively tries to 'win' the conflict and does not care at all about the other person's needs.
4. **Compromise** – a 'give-and-take' approach to resolving the conflict, where a person gives up some of what they want in order to get part of what they want.
5. **Collaboration** – where both parties work together to see if they can come up with a resolution that meets both of their needs.

It is difficult to say that any given response is always the best one. For example, in some cases avoiding the conflict might be the appropriate response (for instance, if the matter is really trivial and raising it with the other person will make a mountain out of a mole hill).

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<sup>25</sup> Kraybill, R. et al., *Peace skills: a manual for community mediators*, Jossey-Bass, 2001, p.12-13.



However, generally speaking, the effective management of conflict is best promoted by a collaborative approach. This is because a collaborative approach is based on strong communication and attempts to take into account both parties' needs and concerns.

### **3.9 Resolving and transforming conflict**

Invariably the resolution and transformation of conflict requires communication between the conflicting parties and sometimes the intervention of third parties. There are many processes for dispute resolution, conflict management, and conflict transformation, which may not all be suitable at a particular stage of the conflict. They need to be carefully timed and administered to prevent further escalation, contain conflict before a crisis is reached, settle disputes, resolve underlying conflict, and ultimately help parties to reconcile and transform their relationship. Particularly where conflict is structural and relationships are oppressive, dispute resolution processes alone might do little to improve the overall situation.

Responses to conflict and particular ways of managing, resolving, and transforming it are culturally specific. Ways that are seen as destructive and of little effect in one culture can be effective and authentic in another culture. Differences in conflict management and resolution practice hold the potential for more misunderstandings and potential exacerbation of the conflict. Therefore clarification and interpretation of interventions and responses can be an important part of conflict management and resolution processes. Creating dialogue and opening communication channels is the first step to improve the situation and assist in conflict transformation.

### **3.10 Suggested reading:**

Tillet, G. and French, B., Resolving conflict, 4th ed., Oxford University Press, 2010, Chapter 1, p. 1-19.

## **4. Overview of the facilitative model of mediation**

### **4.1 The nature of facilitative mediation**

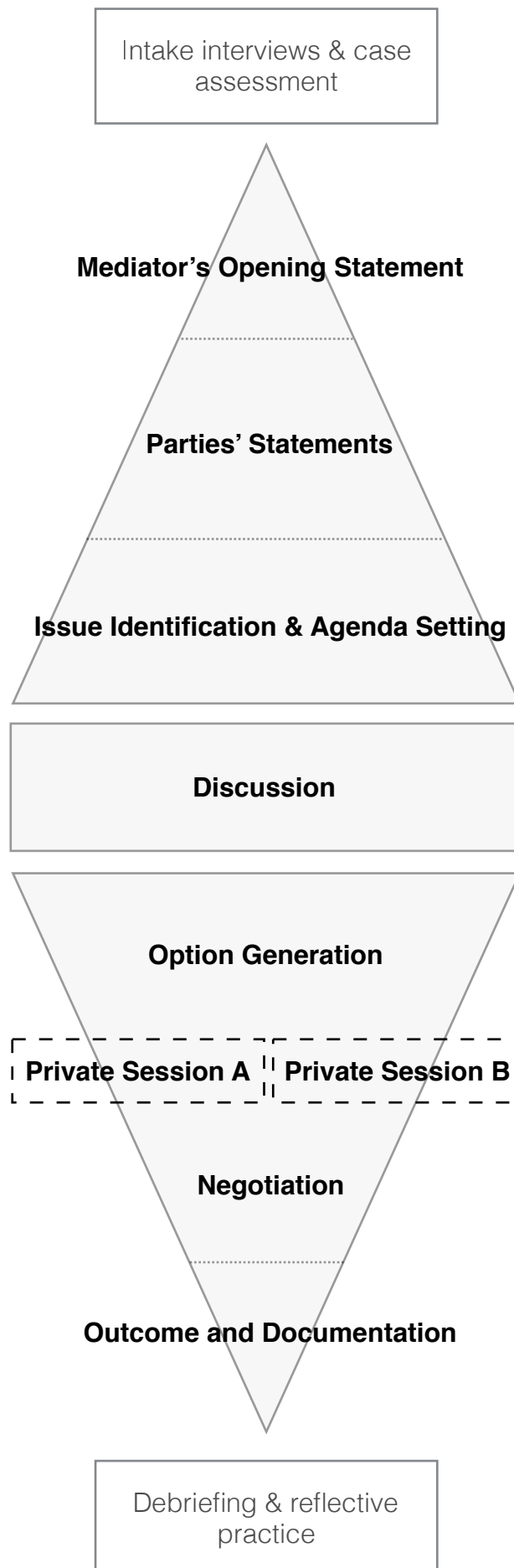
At its core facilitative mediation is a conversation that is guided and structured by the mediator. The mediator and the parties together shape the quality, effects and mood of this conversation. Given that the parties often ask for the services of a mediator when their communication is difficult or if they have not been able to reconcile their differences by themselves, it is in our view a central role of the mediator to provide structure, reduce stress and elicit information that will help the parties make informed decisions about their best ways forward. We believe that mediators should assess everything that they do and plan their interactions and interventions through this lens.

Ask yourself, if your intervention or statement actively supports informed party decision-making, if it reduces stress and if it helps the parties to communicate more constructively. We do recognise that there is a quite a bit of personal judgment on behalf of the mediator about what is constructive communication and how parties should talk to each other. Some mediators are more comfortable with robust discussion, raised voices and highly charged situations than others. Some mediators themselves present a more reserved or a more engaged manner to the parties. There is no perfect approach and it is as much influenced by the personality and experience of the mediator as it is by the identities and actions of the parties.

### **4.2 The facilitative mediation model**

Over time mediation practitioners have developed a staged model of how the mediation conference could or should unfold and have fine-tuned and practiced this model. While it is only a model and mediation offers flexibility to change and further develop this model, it works very well for many thousands of facilitative mediators. Different textbooks on mediation present the model in different diagrams, from circles to diamonds to hourglass figures. We do not pretend that there is one best way and we encourage you to read different publications and to use the model that speaks best to your practice. We find the model on the following pages very useful and have this the underlying framework for our practice, but it is entirely up to the individual practitioner.

# The Facilitative Mediation Process



#### 4.2.1 Intake and case assessment

- Before mediation is conducted, mediators need to contact all parties that need to participate and discuss the process with them.
- Mediators also assess whether mediation is the appropriate process, and discuss potential benefits and risks with clients.
- The aims of intake and case assessment are to inform clients about the mediation process and to give them an opportunity to consider if the process is appropriate. As outlined in the definition of mediation under the NMAS, the aim of mediation is to foster self-determination of participants. This starts with the intake and case assessment.
- Intake can be done in person, over the phone, or even via email or with the help of questionnaires or checklists. Mediators should also provide prospective clients with an outline of the process, descriptions of their roles and the mediator's roles, as well information about fee structure, confidentiality, and voluntary participation.
- It is advisable to discuss any written information provided to clients again in intake and to make reference to it.
- The following questions can help with intake:
  - "What brought you to mediation? What are you hoping to get out of the process?"
  - "Have you been to mediation before? Would you like me to describe how mediation works?"
  - "After hearing about the process, do you have any concerns about your participation?"
  - "Participation is voluntary and you can make your own decisions; there is no pressure to agree. Do you think there is anything that could impact on your decision-making and that concerns you?"
  - "When you and the other party talked in the past to try and sort out the issues, why did that not work? What stood in the way?"
  - "Do you have some ideas on how to resolve this conflict that could also be acceptable to the other party?"
  - "What are you going to do if this does not work? What are your alternatives to mediation?"
- It is important to assess whether both parties in mediation can make informed decisions in the process or if there is anything that stands in the way of their free and informed decision-making. Such issues could include power imbalances, lack of information or legal advice, mental capacity, any kind of addiction or substance abuse, trauma due to loss or injury, difference in world views, or cultural inappropriateness of facilitative mediation.
- Special care needs to be taken if there are any allegations of previous violence or other safety concerns, both for the parties and for the mediator. Mediators should only provide their services if they feel safe and if they think their parties will be safe.
- Like a private session, intake is confidential and the mediator will not tell one party what the other has said. If parties want to provide information to each other they should be

encouraged to think about how to do that in the actual mediation in the most constructive manner.

- Mediations should ensure parties know that the intake is confidential, and should not refer to any information from the intake during the actual session.

#### **4.2.2 Mediator's opening statement**

- The mediation starts when the parties arrive and are greeted by the mediator. Most mediators then launch into an explanation of the process and its underlying principles.
- The mediator's opening statement:
  - Informs parties of the nature of mediation.
  - Provides introduction and reassures parties that the mediation conference is the right choice.
  - Provides introductory mini-ritual.
  - Explains process and order of events.
  - Allows for clarification of roles and last questions.
  - Highlights important procedural issues, such as voluntary participation, confidentiality of information, what happens if a party wants to terminate the mediation, and how private sessions work.
  - Should be positive and goal-oriented.
  - Should be delivered in plain language.
  - Establishes ground rules.

#### **4.2.3 Parties' statements**

- Allow each party to make their first contribution without interruption and to satisfy their need to have their say and be heard.
- Provide information to the mediator about the parties' concerns and starting positions.
- Provide opportunity for each party to hear the other's view in the each other's own words.
- Confront each party with the other's case, in order to create doubt about their own position.
- Should deal with broad themes, and not matters of detail (brief statements).
- Either after each individual statement, or after both parties have delivered their statements, mediators summarise what they have heard.
- Summarising reassures each party that their concerns have been noted and will be dealt with.
- Gives the mediator the opportunity to check that she/he understood everything correctly.
- Makes the other party hear the statement for the second time in the mediator's words; this changes the frame of reference.

#### 4.2.4 Issue identification and agenda setting

- Mediator develops short headings or themes for discussion that acknowledge the parties' concerns and needs.
- Provides structure and clarity to problem.
- Reframes the dispute in non-blaming terms.
- Subdivides dispute into smaller individual parts to be dealt with separately.
- Reassures each party that their concerns have been noted and will be dealt with.
- Serves as a roadmap for discussion, with items to be checked off.
- Provides a basis for parties to prioritise the order for issues to be dealt with.
- Change from one-sided view to problem-solving attitude.
- Uses non-value-laden language.
- It is useful to have three or four agenda items to allow flexibility in discussion.
- Agenda is often drafted on a whiteboard.
- De-legalises and de-monetises dispute.

#### 4.2.5 Discussion and exploration

- Mediator works with parties through agenda and encourages parties to speak to each other about the different points.
- This phase is often the longest phase of the process and allows for the exchange of more details about the problems encountered.
- Information and views are exchanged. Both parties are asked to share their views with each other.
- Mediator encourages parties to talk about past, present and future. It is often good to start with the history of the relationship, and then move to the impact of the conflict on both parties.
- Mediator asks both parties how the conflict is impacting on them, their business, family life, spare time, health, etc.
- In case of impasse parties can return to agenda for guidance and address the next point on the agenda.
- Mediator often decides who will start talking about a specific topic, and should balance this evenly.
- Mediator reflects important emotions and points if they are expressed strongly.
- Mediator summarises every few minutes where the discussion is up to, and when parties transition to a new topic. These summaries are often joint summaries acknowledging the views of both parties.
- Mediators use a lot of reflected speech and paraphrase what one party has said and then transition to the other party and ask for comments, clarification, or elaboration on the topic.
- If parties display moments of recognition or formulate authentic apologies, this should be supported by summaries and by allowing the other party to respond.

- When parties have discussed past and present impact of the conflict and all agenda topics, mediator can transition into option generation by asking parties if they have ideas on how to make the situation better.

#### 4.2.6 Option generation

- Mediator encourages parties to generate options that meet their needs and concerns.
- Parties are reminded that there is no commitment from either side at this stage.
- Encourage parties to think outside the box and to be creative in their option generation.
- Parties are encouraged to formulate linked offers which address their interests.
- Parties evaluate options and reality-test possible agreements. Mediators should not provide their own opinions about the value of options but always leave this to the parties.
- If parties do not wish to present options, mediator can either return to discussion phase or ask parties to vision what a resolved situation or a conflict-free situation would look like. Sometimes this is a stepping stone to ideas on how to move forward.

#### 4.2.7 Private sessions

- Provide relief from destructive emotions and high tension and allow relevant parties to express emotions in private.
- Provide space and time for weaker or disempowered party to recover.
- Help to establish whether there are any concerns which have not yet been dealt with.
- Occur when mediator believes there is additional information which she or he will not obtain in joint session.
- Attempt to overcome impasse by changing dynamics.
- Engage in reality-testing with positional or intransigent party.
- Coach parties in constructive communication and productive negotiation strategies.
- Provide risk-free environment for considering options.
- In case of termination, allow for last-minute consultation with parties.
- Timing private sessions appropriately can be difficult. Private sessions should not be initiated just because the mediator finds it difficult to work with both parties at the same time. Often a good time for private sessions is when some options have been discussed but there is an impasse because parties do not want to commit to offers.
- Use the following questions to structure your private sessions:
  - “How do you think the mediation is going?”
  - “Is there anything that you would like to mention now that you were uncomfortable mentioning in the joint session?”
  - “If you think about the options and ideas that have been raised before, which ones could work for you?”
  - “What are you going to do if you cannot work it out today with the other party?”
  - “How do you think this offer will sound to the other party? How do you need to present it so that they can accept it?”

## **Toolbox: utilising private sessions to their full advantage<sup>26</sup>**

Private sessions are helpful to allow parties to relax and to discuss things that they do not want to discuss in public. But they also can hinder the process and lead to unnecessary shuttling of information if not used wisely. Mediators may use more than one private session and private sessions can be interspersed with joint sessions in the conference. The following steps help a mediator run successful private sessions:

**1. Explaining confidentiality rules:** What is said in private session stays in private session unless. Instead of shuttling information mediators should encourage parties to rehearse the offer with the mediator and then state it themselves during the next joint session.

**2. Ascertaining what the party thinks of the process so far:** A useful and empathic way of launching into a private session is to give the party an opportunity to express their views on the progress of the conference. A mediator could ask for example: 'How do you think the conference is going so far?'

**3. Raising new issues:** Sometimes parties are uncomfortable raising issues while the other side is in the room or on the phone. The private session gives the party a chance to have a private word with the mediator and to address these issues. Mediators can ask parties if there is anything else that they would like to discuss in private.

**4. Uncovering the bottom line:** Often parties feel more at ease talking in private about the limits to which they are prepared to go in their negotiations. If the mediator assesses that the party is positional he or she can create doubt in that position by helping them to identify the underlying interests for all parties.

**5. Reviewing the agenda and exploring issues in more depth:** The mediator can explore issues that are more important to one party and less important to the other in more depth in the private session. Mediators should encourage parties to explore the issues from both sides and to imagine what the other side's opinion would be. The mediator can also allow a party to revisit an issue which could not be explored to the fullest extent in the joint session.

**6. Reality-testing entrenched positions:** More reframing and issue identification can often uncover the interests behind strongly defended positions. This part of the private session is also a good point to develop a Best Alternative To A Negotiated Agreement (BATNA) and explore the Worst Alternative To A Negotiated Agreement (WATNA).

**7. Testing options and generating new ones:** Options which have been raised in the joint session should be reality-tested with each party. Sometimes this leads parties to generate new options. They should be encouraged to raise these with the other side in the next joint session again. Options can also be bundled into packages which can then be presented to the other side.

<sup>26</sup> Based on Charlton, R. and Dewdney, M., The mediator's handbook: skills and strategies for practitioners, Lawbook Co., 2004.



**8. Encouraging parties to step into the other's shoes:** When options are evaluated during private session it is often a valuable exercise to suggest a role reversal and ask the party to evaluate the option from the other's perspective.

**9. Rehearsing final negotiations:** In face-to-face and telephone conferences the parties are encouraged to state any offers they want to make to each other after the private session themselves. Offers are therefore not reframed by the mediator. It is important to rehearse offers with the parties before the end of the private session so that they are delivered in a cordial and productive manner. Mediators can ask parties: 'How would you present this offer to Martin/Kisane? Why don't you practice on me for a moment'? They can then coach clients on how to state their offers and options in a way, which makes them more likely to be accepted, while maintaining neutrality and impartiality.

**10. Treat the second party the same as the first:** When launching into private session with the second party it pays to use exactly the same process and to start the private session as if it was the first one. Otherwise parties may raise issues of bias or assume that the rest of the conciliation will be a shuttle process.

**11. In emergencies fall back to shuttle negotiation:** In cases where there are a lot of emotions involved and parties have traded insults or refuse to negotiate productively it may be more productive to use shuttle negotiation than to reconvene for a joint session. Mediators are advised only to make use of this option when it is absolutely necessary as the main advantages of conferencing are lost this way. Please note that it is normally not permitted to shuttle information in an NMAS assessment role play and this can lead to immediate failure of the assessment.

**12. Stick to the time frames:** Before private sessions are initiated mediators should let parties know how much time they expect to spend with either party. Mediators should provide equal time to each party and stick to these time frames. Even if private sessions can be resolved very quickly with one party, the party should still be given the whole amount of time. It pays to give the waiting parties tasks like re-evaluating their options or reading an important fact-sheet while the mediator talks to the other party. If private sessions go longer than expected, it is advisable to go back into joint session and to initiate another round of private sessions later instead of spending more time with one party than with the other.

**13. Don't sympathise with a party:** Sometimes parties in private session attempt to pull the mediator onto their side and ask him or her to agree with their 'strong' position or agree that the other side acts 'unreasonably'. While both sides are in the room it is easier not to react to these comments. Mediators should be guarded in their reactions in private session. While it is important to empathise with a party a mediator should not agree to any such manipulation to make the party feel better.

#### 4.2.8 Negotiation

- If negotiation directly follows on from private sessions, it is advisable to give the parties time to exchange statements or make offers. They should never be forced to do so. A mediator can simply start the stage by thanking the parties for speaking to her or him privately and by giving them an opportunity to make comments.
- Further discussion consideration of options.
- It is useful to ask hypothetical questions in this stage to elicit potential offers and linkages between issues. For example: “Nelly, you have said that the most important issue for you is a public apology from the company. Just imagine for a moment if this was provided, would this help you to accept the offer that was put on the table with regards to paying for your medical expenses?”.
- Mediators also consistently summarise progress, as well as different stages of offers and options, and often link them on the whiteboard to the respective agenda topics.
- Mediators should discourage parties to re-open resolved issues.
- Ensure all issues have been dealt with. Sometimes it is useful to tick them off.
- When a solution or potential agreement is visible, engage in thorough reality-testing of the agreement for unforeseen contingencies. The focus is on helping the parties to make the wisest decision about their future.

#### 4.2.9 Outcome and documentation

- When an agreement or partial agreement is made, summarise it first and check with both parties that this is what they meant.
- If there are more complex legal issues, or if the parties are legally represented, it is advisable to suggest that the legal representatives draft the agreement, sometimes in the form of a deed.
- If parties do not wish to utilise legal advisors and are requesting a simple written agreement, it is ok to help them with the language. Ensure that you use as much as possible the language of the parties.
- Agreements should be drafted in consultation with parties and in the parties’ own words.
- Use simple, clear and unambiguous language as required by the parties.
- Avoid more than three levels in a paragraph.
- Document should be set out in logical order.
- Use same words for same meaning.
- Agreements should contain the essential information about WHO does WHAT WHEN, WHERE and HOW?
- Fall back clauses: What happens if the actions agreed on are not fulfilled?
- Mediators often then take a break, draft the agreement in writing and print it out to the parties. The parties then double-check the agreement and make any changes that are necessary. Only when all parties agree on the wording, then the agreement is signed and a copy is provided to each party. Often the mediator also retains a copy.

- Finish the mediation with a statement of thanks for the commitment and good wishes for future relationship or as appropriate.
- If the mediation is not finished on that day, clearly discuss new dates and make sure parties take note of them.
- If the mediation finishes without agreement, ask the parties to discuss where they want to go now and if they have any questions that the mediator could answer about future procedure.
- It is possible to offer parties to return to mediation if there are problems arising out of the agreement. Costs for this need to be made clear to the parties at this stage.
- If there is significant acrimony between the parties, ensure that one party leaves first and maybe provide an opportunity for the other party to stay back so that they do not confront each other outside the mediation rooms. Discuss any safety concerns with the party and take appropriate actions if necessary.

#### 4.2.10 Debriefing and reflective practice

- Many mediation services offer structured opportunities for debriefing with colleagues and also supervision sessions in which practitioners can discuss their work, including successes and challenges.
- Some solo mediators use debriefing sheets (similar to journals) to record important recollections from the mediation for future learning.
- The purpose of debriefing is to better understand the dynamics of the last mediation session, to celebrate successful interventions, and to analyse difficulties and dynamics to improve future practice. Clear documentation of dynamics and issues can also help a practitioner to find suitable theoretical or practice literature to further research effective best-practice approaches.
- Debriefing also provides an opportunity to become conscious of the practitioner's own emotions, reactions to the process and the parties and how they impacted on the mediation.
- Useful debriefing questions (either for a journal or for debriefing with colleagues or supervisors) are:
  - "What went well in the last mediation? Identify three interventions that I performed that helped the parties towards better decision-making and constructive interaction?"
  - "What did I find challenging? What pushed my buttons? What did I find uncomfortable? Why was that?"
  - "Is there anything I would do again that worked or anything that I would not want to do again in a future mediation?"
  - "What have I learned from this mediation about my practice and myself?"

#### 4.3 Suggested reading:

Boulle, L. and Alexander, N., Mediation: skills and techniques, 2nd ed., LexisNexis Butterworths, 2012, [Chapter 5, p. 11-156](#).

## 5. Appropriateness of mediation and mediation intake procedures

Before a mediation conference can be conducted, mediators need to assess, whether mediation is the appropriate dispute resolution process for the case. This is often done through an intake interview, in which the mediator contacts each party privately to explain the process and to discuss the party's views, concerns and objectives for the mediation. Such intake processes can be conducted face-to-face, over the phone or sometimes even online or through email. The NMAS discusses the importance of intake and screening for appropriateness in the following section:<sup>27</sup>

### **3. Conducting mediation: Preliminary conference or intake**

3.1 In the preliminary conference or intake the mediator must ensure that participants are provided with the following:

- (a) a description of mediation and the steps involved including the use of joint sessions, separate sessions and shuttle negotiations;
- (b) information on how to provide feedback or lodge a formal complaint in relation to the mediator.

The preliminary conference or intake may be conducted by a person other than the mediator.

3.2 The preliminary conference or intake includes:

- (a) assessing whether mediation is suitable and whether variations are required (for example, using an interpreter or a co-mediation model in culturally and linguistically diverse communities or introducing safeguards where violence is an issue).
- (b) explaining to participants the nature and content of any agreement or requirement to enter into mediation including confidentiality, costs and how they are to be paid.
- (c) identifying who is participating in the mediation and to what extent participants have authority to make decisions.
- (d) advising participants about the NMAS and how it can be accessed.
- (e) assisting participants to prepare for the mediation meeting including consideration of any advice or information that may need to be sought and/or exchanged.
- (f) referring participants, where appropriate, to other sources of information, advice or support that may assist them.
- (g) informing participants about their roles and those of advisors, support persons, interpreters and any other attendees.
- (h) advising participants about how they or the mediator can suspend or terminate the mediation.
  - (i) confirming each participant's agreement to continue in the mediation.
  - (j) deciding venue, timing and other practical issues.

<sup>27</sup> MSB, NMAS Practice standards, 2015, Part III, S.3, pp 9-10.

Some of the information that needs to be provided to participants during the intake will be repeated again at the start of the mediation in the mediator's opening statement. A thorough intake might allow the mediator to be a bit briefer in the opening statement, but often it is actually worthwhile for parties to hear the information twice to ensure that it is understood. During or after the intake interview the mediator then considers whether mediation is at this point in time the appropriate process for dispute resolution. The following factors may play a role.

## **5.1 Factors to consider when determining appropriateness of mediation**

- Factors relating to the parties.
- Factors relating to the nature of the dispute.
- The causes of the dispute.
- Policy issues.
- Fairness and equity issues.
- Safety concerns.
- Public interest.
- Timing.
- Other relevant circumstances beyond the immediate confines of the dispute.

### **5.1.1 Factors favouring mediation**

- High complexity of dispute.
- Continuing relationship between disputants.
- Possible outcome is flexible and allows room for creative solutions.
- Desire to keep proceedings confidential.
- Parties have attempted to resolve the dispute but have met an impasse.
- Costs of litigation are disproportionate to benefit gained.
- Parties can agree to treat each other with respect and listen to each other.
- Willingness of the parties to try mediation.

### **5.1.2 Cases that are often unsuitable for mediation**

- Risk or allegations of child and/or sexual abuse.
- Risk of violence or history of violence between parties.
- Where a party is unwilling to honour basic guidelines of the mediation process.
- Where mediation is used as a delay or information gathering tactic.
- Where one of the parties is so deficient in information or negotiation skills that any ensuing agreement would not be based on informed consent.
- Where the parties may reach an illegal agreement or disadvantage an unsuspecting third party.

### **5.1.3 Factors favouring evaluative mediation or conciliation**

- Matter involves expert or legal issues.
- Liability is not an issue.
- Expert opinion has been sought by one or both parties before commencement of proceedings.
- One party is government entity or insurer.
- Parties have desire to keep matter confidential or private.

### **5.1.4 Factors favouring arbitration or litigation**

- Receiving a binding and enforceable opinion is relevant.
- Parties wish to avoid negotiations with the other side.
- Matter involves quantification of a dispute.
- Liability is contested.
- Matter involves legal issues or specific expertise such as trade usage.

## **5.2 Tips for managing intake interviews and screening**

- Contact each party individually (sometimes by phone).
- Build rapport and establish trust.
- Get a general idea of what the conflict is about.
- Ensure informed consent to proceed and establish what parties hope to achieve out of the process.
- Assess parties for willingness to proceed and for capacity to negotiate.
- Probe for power imbalances and factors that make mediation unsuitable.
- Organise logistics and explain process.
- Send parties agreement to mediate, process description, NMAS practice standards, confidentiality agreement and fee structure and ask them to sign and return.
- Ask parties to prepare for mediation by preparing a brief opening statement and to think about what outcome they would like to see.

## **5.3 Suggested reading:**

Boulle, L. and Alexander, N., Mediation: skills and techniques, LexisNexis Butterworths, 2012, Chapter 2, p. 21-41.

## 6. Communication and interaction in conflict and negotiation

At the core of mediation and conciliation processes are communication skills. Both, mediation and conciliation, are focused applications of interpersonal communication skills. Communication skills are used as some of the major tools in conflict resolution to change the negative interactions of the parties to positive and constructive engagement with each other and the conflict itself. In this chapter we discuss some basic theories explaining how communication works and introduce a number of micro-skills, such as active listening, summarising, reflecting and reframing, which enable mediators to encourage constructive conversations.

### 6.1 Rapport building

Rapport is the ability to demonstrate empathy and behave in a manner that is honest, ethical, trustworthy and respectful. A mediator's success depends enormously on how well she or he can develop rapport with the parties. Mieke Brandon and Leigh Robertson discuss the importance of rapport in the following section:<sup>28</sup>

“Active listening while demonstrating empathy helps mediators to build and maintain rapport with the parties. In research into successful mediators, Goldberg (2005, pp. 365-73) found overwhelmingly that the reason for mediators' success was their ability to develop rapport with the disputing parties. The mediators surveyed understood rapport to mean their ability to demonstrate empathy and treat each individual with respect. Goldberg states that mediators maintained rapport by acknowledging the parties' concern and demonstrating empathy with their pain without necessarily agreeing with their point of view. These mediators also enhanced their credibility by honest, ethical and trustworthy behaviour, which helped the parties open up, take the mediator into their confidence, share more information, and generate creative solutions. Rapport is often described as the ingredient that establishes a connection or positive feeling with another person. A lack of rapport can be experienced as negative feeling or a sense of having nothing in common.”

Rapport is built in many different ways. Brandon and Robertson believe that body language plays an important role. Body language of mediators needs too be congruent with the

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<sup>28</sup> Brandon, M. and Robertson, L., Conflict and dispute resolution: a guide for practice, Oxford University Press, 2007, p. 149.

messages that they want their parties to receive in order to build and maintain rapport. Mediators also need to be aware of the body language of their parties as body language can convey misunderstanding, puzzlement, distrust, disagreement, support, encouragement, enthusiasm, and agreement. Another important aspect of the person-situation-context of the mediation is the space, in which the conference takes place. Brandon and Robertson suggest the following with regards to space and rapport building:<sup>29</sup>

*“The way space is used including personal space and how mediators or parties sit or stand also influences how open and cooperative the communication is. Focusing wholly on who is speaking, signalling with body posture that they are listened to and holding the appropriate level of eye contact indicates that the mediator is attentive and interested in what is being said. Mediators should bear in mind that people from different cultures have different comfort zones in terms of personal space, direct eye contact and listening posture.”*

*By moving back or forth in the chair mediators can non-verbally signal different levels of pressure on the parties. Watch for the party who tends to confront the mediator or even argue. If they are sitting directly opposite make sure to move to a more diagonal position to change the dynamics. Similarly, mediators can signal through body language for more cooperation from a party by sitting more closely next to that party, for instance in private session or shuttle mediation, rather than sitting directly opposite. “*

## 6.2 Interpersonal communication in mediation

Communication is a complex process that involves a dynamic, rather than static, relationship between the participants in the communication. A model that describes how messages between the participants in communication are sent, and how our brains make sense of them is the *Skill Model of Interpersonal Communication* developed by Hargie and Dickson.<sup>30</sup> Hargie and Dickson argue that interpersonal communication is purposeful, that people are sensitive to the effects of their actions and that they modify their behaviour in light of the feedback that their actions produce. Interpersonal communication relies on perception for people to make sense of their environment and the actions and messages invoked by other people. The information gleaned from our sensory organs is then translated and mediated to create a response (message). Actions and reactions take place within a person-situation-context that also influences the communication taking place. For an illustration of this model see figure 6.1 below.

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<sup>29</sup> Brandon, M. and Robertson, L., *Conflict and dispute resolution: a guide for practice*, Oxford University Press, 2007, p. 149.

<sup>30</sup> Hargie, O. and Dickson, D., *Skilled interpersonal communication: research, theory and practice*, 4th ed., Routledge, 2004, pp. 22-41.



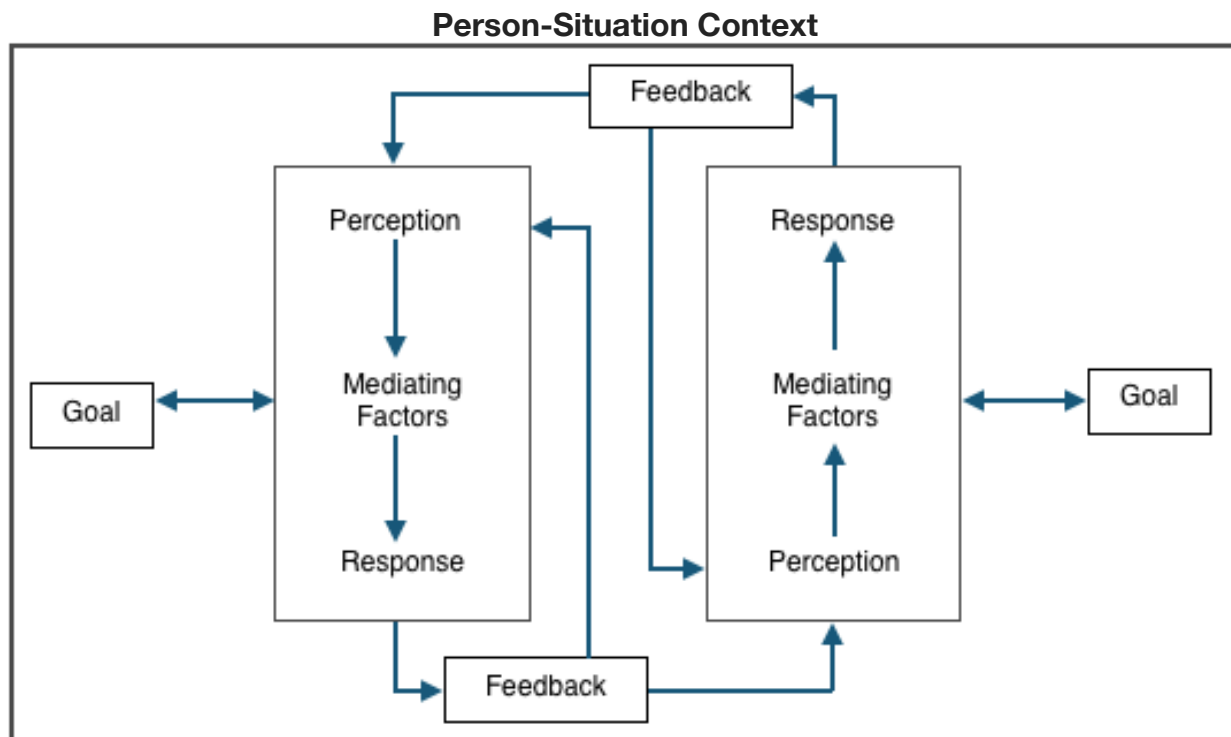


Fig. 6.1 Skill model of interpersonal communication  
based on the work of Hargie and Dickson

### 6.2.1 Frameworks and filters of perception

We interpret information through our personal frameworks. Personal frameworks are made up by our values, attitudes, beliefs, and life experiences. Personal frameworks may be likened to wearing a pair of spectacles: everything you see is filtered through the glass lenses. Personal frameworks operate as communication filters to modify how a message is sent (in terms of verbal, vocal and visual), and how the message is received (in terms of the meaning of the message for the receiver).

People will interpret messages so that they are consistent with their values, attitudes, and beliefs. Therefore the same message may be interpreted in as many different ways as there are people to receive the message. For example, what is meant as constructive critique or an offer of support might be received by the other person as patronising and or belittling depending on the history of the relationship, external factors, emotional mood etc.

### 6.2.2 Person-situation context<sup>31</sup>

Participants in communication bring their own personal 'baggage', such as:

- Knowledge
- Motives
- Values

<sup>31</sup> Hargie, O. and Dickson, D., Skilled interpersonal communication: research, theory and practice, 4th ed., Routledge, 2004, pp. 23-24.

- Emotions
- Attitudes
- Expectations
- Dispositions

Interaction is also co-determined by the parameters of the situation in which people communicate:

- Role demands
- Rules
- Physical setting

### **6.2.3 Mediating factors and responses<sup>32</sup>**

Mediating factors are the processes which regulate the relationship between the goal being pursued, the perceptions of events and what people decide to do about them. They also influence how goals are formulated and how the person-situation context is perceived and understood. These processes include cognitive processes, as well as emotional (affective) processes.

- Cognitive processes:
  - encoding,
  - knowledge organisation,
  - storage and retrieval,
  - inference processes,
  - response generation.
- Affective processes:
  - how and when emotions are experienced,
  - how emotions colour the meaning attached to events.

Mediating factors lead to responses, such as plans and strategies on how to answer questions or how to present certain views.

## **6.3 Active Listening**

Quite possibly the most important skill for a mediator is the ability to listen actively and effectively. Listening is more than just processing auditory information. It encompasses the assimilation of both verbal and non-verbal messages, as well as the demonstration that the listener pays attention and attempts to understand the verbal and non-verbal signals being emitted by the speaker.

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<sup>32</sup> Hargie, O. and Dickson, D., Skilled interpersonal communication: research, theory and practice, 4th ed., Routledge, 2004, pp. 237.

### 6.3.1 The Listening Process<sup>33</sup>

When we listen to others there are a range of mental processes operating. As we listen, we attempt to evaluate what the speaker is saying, plan what we are going to say in response, and covertly (often subconsciously) rehearse our response. While these processes are an inherent part of interpersonal interaction, they should not interfere with the act of listening per se. Thus, we should not be concentrating so much on what we intend to say that we stop paying attention to what the speaker is saying.

In relation to the actual reception of verbal messages, there are three factors which should be borne in mind:

**1. Reductionism:** We can only cope with a limited amount of information, and so if we are presented with too much detail it is necessary to reduce this in order to retain it. Again, care must be taken to ensure only less important elements are lost.

**2. Rationalisation:** This refers to the process whereby we attempt to make incoming data fit more easily with our own experience. To facilitate such assimilation we may rationalise it in three ways. Firstly, we may attribute different causes to those presented (e.g. a mediator could assume that the unwillingness of a tradesman to make necessary repairs is due to the fact that the tradesman has not been paid for previous work, while in reality the tradesman is unable to complete the job because she or he has a sick child at home that needs care). Secondly, transformation of language may occur.

**3. Change in the order of events:** Where the information received contains a chronological order or a set sequence, this can be mixed up either by the parties or in the mind of the mediator. This is particularly true when the stories from both parties do not add up or when the parties are telling the events in a different order. Particularly where a long history of events during the conflict relationship of the parties is the source of the dispute, the danger of misunderstanding the sequence of events is increased.

### 6.3.2 Obstacles to Effective Listening<sup>34</sup>

**1. Speech/thought rates:** The average rate of speech is between 125-175 words per minute whereas the average 'thought rate', at which we assimilate information, is between 400-800 words per minute. The spare thought time that we have when listening to others often tempts us to think about other things. It is essential to ensure that this spare cognitive

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<sup>33</sup> Based on Dickson, D. et al., Communication skills training for health professionals: an instructor's handbook, Chapman and Hall, 1989.

<sup>34</sup> Based on Dickson, D. et al., Communication skills training for health professionals: an instructor's handbook, Chapman and Hall, 1989.

capacity is taken up with activities which facilitate listening, such as deliberate head nodding or asking open questions when the speaker gets stuck.

**2. Distractions:** The listening ability is impaired if the environment contains too many intrusive distractions which divert attention away from the speaker. This would include people talking in the room, telephone ringing and so on. Likewise, it is difficult to attempt to listen attentively to two separate sources simultaneously, and indeed this type of dichotomous listening should be avoided. This has implications for choosing a suitable room for mediation conferences. If mediation or intake are conducted over the phone, it also helps to advise parties during telephone conferences to speak after each other and not at the same time.

**3. Inattentiveness:** Listening is hard work, and requires constant concentration. As a result, if the listener is tired, or has something preying on his or her mind, he/she is less likely to listen in an efficient manner. Again, planning difficult conversations such as face-to-face and mediation conferences ahead of time to ensure that the mediator has enough time to prepare and is in good mental and physical condition is essential.

**4. Mental set:** The initial frame of mind of the listener and their preconceptions of the speaker can influence how the latter's message is received and interpreted. Judgments about the speaker are often made on the basis of age, sex, dress, appearance, status etc. Sometimes disputants are evaluated on the basis of certain stereotypes (lazy and unorganised single parent or uncaring and arrogant bank employee). In this way, more attention is paid to who is speaking rather than what is being said. Good listeners need to be aware of their own biases during social encounters.

**5. Individual bias:** Listening can be impaired when an individual distorts the message being received, owing to their own personal situation. Thus, the mediator who is in a hurry may choose not 'hear' a message because they know it will entail an extended interaction with the party. On the other hand, seriously concerned or desperate parties may choose to ignore unpleasant facts being detailed by the other party because they are too threatening or disturbing. Another example of individual bias occurs where someone does not listen simply because she or he wishes to speak, and get his or her own message across, regardless of what others have said.

**6. The speaker:** Quite often the cause of ineffective listening lies with the speaker. If the speaker has a severe speech dysfluency, speaks at an extremely fast or slow rate, has a marked foreign or regional accent, or is being deliberately vague and evasive, it will be very difficult for the listener to cope.

**7. Blocking:** Sometimes listeners employ blocking tactics if they do not wish to pursue a certain line of communication. These techniques include referring the speaker to someone else ('you have to speak to work supervisor and he is not in the office right now'), responding selectively to only part of the message, or changing the topic completely.

### 6.3.3 Improving Active Listening

During interpersonal encounters mediators should make an effort not only to listen to others, but also to actively demonstrate both verbally and non-verbally that they are listening. This is not as simple as it sounds. Listening is a hard job, and requires a great deal of effort and concentration to sort out the relevance of various points and to consider their possible relationships. In addition, listening can be a time-consuming activity particularly where the mediator has already encountered similar situations and can easily deduce possible solutions to the parties' dispute. Active listening allows a mediator to achieve a number of functions including the following:

- To focus specifically upon the verbal and non-verbal messages being communicated by the disputants;
- To gain a full, accurate understanding of the disputants' situation;
- To communicate interest, concern, and empathic attention;
- To encourage full, open, and honest communication;
- To develop a more non-directive, client-centred style of interaction.

### 6.4 Reflecting

Reflection is also an important part of active listening. Reflecting is when the mediator says back to a party what the mediator believes the speaker has just expressed, including the content of what was said and any emotions that the party revealed while speaking. An effective reflection will most likely elicit a response from the party like "Yes, exactly!" or "That's right, and also...".

Reflection assists parties to become clear about what they are thinking, and to feel heard and understood. Reflecting is particularly powerful when it highlights important emotions such as anger or sadness or when it emphasises situations of disempowerment or confusion. Reflecting that "you did not know that your actions would cause so much trouble to the other party" or that "when you received the message you were so shocked that you could not think clearly for the rest of the afternoon" often highlight to the other party that problematic actions were done without ill will and that sometimes conflict escalation occurred because of a series of unfortunate circumstances.

Reflecting is often done in succinct statements that capture the emotion presented by the speaker. Bolton provides the following example:<sup>35</sup>

Fred: I was so sure I'd be married by now. One relationship after another fails.  
Rick: It's really discouraging.  
Fred: Sure is. Will I ever find the right person?

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<sup>35</sup> Bolton, R., *People skills: how to assert yourself, listen to others, and resolve conflicts*, Simon & Schuster, 1987, p. 52-53.

According to Bolton, Rick has picked up that Fred could be experiencing the following emotions: loneliness, anger, frustration, fear, discouragement or a combination of these. Rick chooses to reflect discouragement and Fred affirms that this is what he feels.

#### 6.4.1 Naming and expressing emotions

Books on communication skills and conflict resolution often provide vocabularies of emotions that can be used to reflect what is felt back to a speaker. It is important that mediators develop their own language and vocabulary to find emotional expressions that fit their use of language and comfort level. A basic typology of emotional states can be derived from the work of Paul Ekman, an American psychologist, who is most well-known for his work on micro-expressions of emotions. Ekman and his colleagues have developed the following list of universal emotions that are displayed by people from many if not all cultural and ethnic backgrounds:<sup>36</sup> anger, fear, sadness, disgust, contempt, surprise and happiness. It is also useful to consider the intensity with which an emotion is displayed and to reflect some of this intensity back to the speaker. It makes a difference if someone is only slightly annoyed or if they are experiencing raging anger.

The following table provides a list of different expressions of the universal emotions discovered by Ekman and Friesen:

Weak expression	Universal emotion	Strong expression
Annoyance	<b>Anger</b>	Rage
Concern	<b>Fear</b>	Terror
Disappointment	<b>Sadness</b>	Sorrow
Dislike	<b>Disgust</b>	Revulsion
Disdain	<b>Contempt</b>	Hate
Interest	<b>Surprise</b>	Shock
Comfort	<b>Happiness</b>	Bliss

#### 6.4.1 Key communication blockers

Reflecting opens up communication, shows speakers that they have been heard and encourages further elaboration. Sometimes people do exactly the opposite, and their actions can become communication blockers. Mediators and conciliators are generally reminded **not** to use the following actions, as they are barriers to effective communication:

- Interrogating: An endless series of closed questions, “What about...what about ...”
- Embarrassing: “You’re always hopeless at this sort of thing”
- Bossing: “Do this”

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<sup>36</sup> Ekman and Friesen, A new pan-cultural facial expression of emotion, 1986.

- Patronising: “I’ll help with this, because I know you can’t do it alone”
- Redirecting attention: “What about that phone call you had to make”
- Preaching: “The only moral thing to do is ...”
- Threatening: “If you don’t ... I’ll ...”
- Interrupting: “... yes, but”
- Dismissing: “Whatever... now how about”
- Stereotyping: “People like you are always...”

## 6.5 Non-verbal communication

People do not just communicate verbally. On the contrary, some researchers have claimed that up to 55% of the messages that people communicate are communicated non-verbally through body language. 38% are communicated through paralanguage (non-verbal aspects of speech such as intonation), and only 7% are communicated verbally.<sup>37</sup> Interpreting body language can be difficult and observers easily make mistakes. Nonetheless, body language conveys important messages and often helps mediators assess how well a conference is going. Mediators should also be aware of their own body language and not convey messages of boredom or criticism when parties are speaking.

In mediation body language, or non-verbal communication, can be used in two ways:

- To improve the impact of our own communication.
- To help us understand what the other party means.

### Four key points

- In general, words convey data, facts, information; body language conveys attitudes, feelings and emotions.
- Beware of cultural differences.
- On its own, a gesture, facial expression or tone can be highly ambiguous. (Is he touching his nose because he’s telling a lie - or because it’s itching?) But taken together, words, facial expression, gestures and tone provide a ‘meaningful cluster’.
- If the words and the body language tell you different stories, reflect this inconsistency and ask the person whether they are maybe uncomfortable about something.

## 6.6 Summarising

Summarising bears similarities to reflecting, but it focuses more on the verbal content of the message. Bolton, who calls it paraphrasing, defines the process in the following way:<sup>38</sup>

*“A paraphrase is a concise response to the speaker which states the essence of the other’s content in the listener’s own words.”*

<sup>37</sup> Hargie, O. and Dickson, D., *Skilled interpersonal communication: research, theory and practice*, 4th ed., Routledge, 2004, pp. 46-47.

<sup>38</sup> Bolton, R., *People skills: how to assert yourself, listen to others, and resolve conflicts*, Simon & Schuster, 1987, p. 51.

Summarising is one of the most important skills of a mediator. Some experienced trainers and practitioners even suggest that whenever a mediator gets stuck and does not know how to progress the conversation further, they should summarise. It certainly slows down the conversation and creates some breathing space for the parties, and the mediator, which often leads to a constructive turning point or way forward.

Summaries should be concise, and capture the essence of what a party has said. They do not need to repeat everything that was said, otherwise summarising becomes “parroting” which is rarely constructive. Sometimes it is useful to verbally repeat powerful phrases, important metaphors or technical language, but otherwise the summary should be in the mediator’s own words.

There are a number of specific points in the mediation when summarising is particularly important:

- Mediators summarise the parties’ statements either immediately after each statement, or after both statements have been delivered. These summaries should capture the structure and chronology of the party statement, and also the concerns or goals that the party has with regards to the mediation. Statements are best summarised individually to clearly show to each party that they have been heard and understood, and to assist the other party in really listening to the statement.
- Summaries often conclude the different stages of mediation and are a very good way to transition from one stage to the next, for example from the discussion stage to the option generation stage. These summaries should capture the main points discussed or agreed upon in the preceding stage.
- During the discussion, option generation, and negotiation stages mediators should summarise the progress of the discussion regularly to assist parties in remembering what was discussed, and what needs more attention. These summaries take the form of joint summaries in which the mediator mentions the points that both parties have raised. Sometimes it is useful to point out who said what, in particular if there is disagreement over certain points.
- When parties strongly disagree with each other, it is useful to summarise this disagreement (and also potential sub-points that they agree on), and to point out that the parties have different views or values. This ensures again that both parties feel heard and understood.
- Options and ideas for solutions are often best summarised on the whiteboard for everyone to see. Then they can be refined and ticked off.
- When a potential agreement is found, mediators should summarise the different clauses and actions agreed upon very carefully including exact details about times, dates, and who does what. This ensures that the agreement is clearly understood and allows for



reality-testing of vague or unrealistic agreements. After the agreement has been committed to writing, the mediator should read it back to the parties and give them written draft copies. It is also useful to summarise the main goals and concerns of the parties verbally and to ask them if the agreement addresses all points that were raised during the early stages of the mediation.

## 6.7 Transitioning<sup>39</sup>

Transitioning is a skill that is closely related to summarising. Mediators summarise the statements and contributions to parties and then invite the other party to comment or to present their own view. Through this technique, they encourage the parties to talk directly to each other, and to communicate constructively with each other, to find possible solutions to the conflict. Brandon and Robertson suggest the following:<sup>40</sup>

In a facilitative approach to mediation, mediators encourage the parties (and their advisors if present) to communicate directly with each other across the negotiation table. Mediators do this by using transitions to foster dialogue between the parties. The word transition comes from the Latin *transitio*, meaning act of going across. This action encourages parties to explain, clarify and describe behaviours, consequences, emotional reactions and assumptions about each of their motives that resulted in the incident that caused their dispute. In using a transition the mediator 'brings across' the main points of what one party says about the dispute to the other party. A transition helps the parties to communicate more effectively, in exploration, about How, When, What, Where, and Why the dispute arose and the effect of the emotional and behavioural responses between the parties."

### Examples of transitions:

- Brett, can you explain to Rachel where you found stains on the carpet...
- Rachel tell Brett how you think this happened...
- So Maria, you said you dispatched the courier with the documents on Wednesday of last week. Cordelia can you tell Maria when the documents arrived at your office?
- Manuel can you tell Helena why this is so important to you?... Helena how would you consider the situation hearing this, tell Manuel...

<sup>39</sup> Brandon, M and Robertson, L, Conflict and dispute resolution; a guide to practice, Oxford University Press, 2007, p. 154.

<sup>40</sup> Boulle, L., Mediation: principles, process, practice, LexisNexis Butterworths, 2005, p. 188.

- Gus, you seem very annoyed by what the Brian, the insurance representative, just told you, what in particular do you feel so frustrated about? Can you talk directly to Brian and explain it to him?.
- Nazim, can you explain to Beth how that proposal might work? [...] Beth tell Nazim what you like about that proposal and what might need to be tweaked to satisfy both of you.
- Santiago, what is your response to Arthur's claims? [...] Arthur, you heard Santiago's explanation; what, if anything, do you suggest can fix the problem?

## 6.8 Questioning

There are a number of key question types that mediators use to assist their active listening, to diagnose the dispute, to acknowledge what the parties say, and to help them to formulate workable solutions. Each serves a purpose in eliciting information and responses.

### Open questions

- Encourage parties to respond and expand, to provide more information.
- How, what, when, where and why questions.
- 'Tell me more about ...', 'What happened then?', 'Why is that important?'

### Narrowing questions

- Help the parties to focus on a particular issue when they get side-tracked.
- 'Tell me more about the car', 'Concentrate on...'

### Checking questions/statements

- Clarify the mediator's understanding and help to emphasise certain party statements.
- 'Is it correct that...?', 'Did you say...?'
- 'So you feel...', 'That was painful...'

### Hypothetical questions

- Help to formulate offers and reality-test.
- 'If you could get an early settlement, then...?'

### Closed/leading questions

- Can be answered with a 'yes' or 'no'.
- The question itself suggests the answer.
- Can discourage parties from providing more information (and therefore are generally not helpful in mediation).
- 'Did you think that he was being dishonest', 'Did you ask anyone else to help?'

## Neutral questions

- Help to examine a situation without value judgments on behalf of the mediator.
- ‘What speed...?’, ‘What size was it?’

## 6.9 Reframing

Reframing is also closely related to summarising, and is another important skill for facilitative mediators. It is closely linked to the concept of personal frameworks.<sup>41</sup> All parties communicate within a certain frame of reference, based on how they see the world. While ‘framing’ is carried out pro-actively, ‘reframing’ is a reactive mediator intervention. The goal of reframing is to change the frame of reference in order to get the parties to think differently about things, or at least to get them to see things in a different light.

Reframing is a way of responding to the speaker that both validates the speaker’s statement and provides a constructive basis to address the issues. Skilful reframing is a valuable skill because it helps parties move from generalities, attacks, contradictions, and blaming behaviours. It can be thought of as putting ‘spin’ on what has been said to bring about a positive outcome or pattern of thought. The mediator changes the communication by moving it from one language to another with the view that it might be more palatable to the other side. The mediator acts in this way, as a ‘translator’.

Reframing can help to:

- Shift the focus from positions to interests and human needs.
- Remove value-laden language.
- Remove emotional ‘toxicity’.
- Move from past problems to future possibilities.
- Either state the issue in more general terms or break down the problem into smaller, more manageable parts (depending on the situation).
- Frame positional statements in the form of a problem.

It should be noted that the use of reframing is quite controversial in mediation. While the skill is accepted and even seen as essential for facilitative mediators, it is frowned upon by other mediation practitioners. Transformative mediators view reframing as a manipulative technique that ultimately disempowers parties. Reframing, when done badly, can exacerbate conflicts and create perceptions of bias from one or both parties. Mediators should also be aware that reframing relies on their own judgment and personal bias, and that their view of the situations might be unacceptable to parties. It is therefore useful to offer reframes as possibilities and to check with parties if reframes are acceptable. Reframing certainly changes perception of the situation and proves that there is significant power in the use of language to change social

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<sup>41</sup> Boulle, L. and Alexander, N., *Mediation: skills and techniques*, 2nd ed., LexisNexis Butterworths, 2012, p. 177.

reality. In our view, skilful reframing offers new perspectives to parties, even if they may not like these perspectives. While this can be seen as manipulative, it ultimately offers choice. Skilful mediators will always point out that parties can reject such choices, correct the mediator, and remain within the conflict frame of their own choosing. However, sometimes the authority of the mediator or other factors may unconsciously coerce a party into accepting a frame that is ultimately not workable for them.

#### 6.9.1 Functions and examples of reframing<sup>42</sup>

- It can **detoxify language** by removing accusations, judgements, and other verbal stings and barbs.
- It can **focus on the positive** by removing reference to negatives.
- It can **focus on interests** by removing reference to positions.
- It can **focus on the future** by removing references to the past and reframing future needs and interests.
- It can **mutualise problems** by avoiding one-sided definitions and reframing to dual-sided formulations.
- It can **soften and qualify demands**, threats and negotiation 'bottom lines'.
- It can turn an absolute demand or a position into **one possible option**.

#### Example of reframing:

**John:** The real estate agent is a complete idiot. He never answers my calls and is unable to give you a straight answer. Every time I ask about the repair bills he says that he will get back to me.

**Mediator:** John, you are very frustrated with the situation. Communication with the real estate agent is a real issue in this matter. And it sounds like you also look for some clarification in regards to the repair bills, is that right?

**John:** Absolutely. If the real estate agent could just give me a straight answer about what the handyman did and what he charged, then we could work something out.

**Mediator:** So if the repair bill situation could be clarified you would be willing to negotiate an agreeable solution with the real estate agent?

**John:** That's right. I just want to get this over and done with and move on.

**Mediator:** Um-hmm. Thank you, John. If I can just summarise this. According to John this issue is mainly around clear communication and for him to understand what repairs were done and how much they cost. If this can be clarified, he is willing to negotiate a solution and put this matter to rest. How do you see this, Peter (real estate agent)? Does this work for you?

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<sup>42</sup> Boulle, L. and Alexander, N., Mediation: skills and techniques, 2nd ed., LexisNexis Butterworths, 2012, p. 180.

### Activity: Reframing

Complete a response using a range of reframes:

- 1.** I can't work with this awful noise! He/she is trying to destroy my career!
  
- 2.** He is always late for work and then we never get the job done on time and I don't get to see my kids in the evening!
  
- 3.** I demand \$15,000.00 in damages to pay for my medical costs and the pain and suffering.
  
- 4.** The accounting needs to be done properly, otherwise nothing else counts!
  
- 5.** I can't agree to that! This is not good enough.
  
- 6.** She always spoils the children and then they don't stop demanding things from me.
  
- 7.** The director will never agree to that. The offer is unacceptable.
  
- 8.** You are a liar! This is not what happened.
  
- 9.** Bill is badmouthing me in the community. These lies are making life here for me impossible.

## 6.10 Reality testing

Sometimes parties get caught up in the excitement of the mediation or conciliation process and rush towards a particular outcome without thinking it through carefully. The mediator's role is to assist the parties to make an informed decision, and sometimes this means slowing the parties down and double-checking how informed their decision is. In a sense, the mediator is acting as the 'devil's advocate' in this role. Reality testing involves asking the parties questions to:

- Raise doubts about the viability of an option for settlement
- Encourage the parties to seek more information
- Ensure that the parties realistically assess proposed options
- Fine test possible agreements
- Ensure the short-term and long-term viability of any proposed choice
- Clarifying what parties realistically expect of any proposed option

Reality testing can be quite confronting for parties, asking them to face up to the realities of their situation, options and alternatives. For this reason, mediators usually engage in reality testing with parties in private sessions.

Here are some examples of reality testing questions that a mediator may ask when a party expresses that they intend to stop the mediation and continuing with the litigation process:<sup>43</sup>

- Which of you is going to win?
- Questions about the risk of having evidence rejected, possibly providing some personal input on orders to produce evidence and the associated risks and time involved, or that of any expert required.
- How long will it be before the proceedings finish?
- Is time an important aspect for you?
- If you lose, will you give up?
- What if you win, will that solve everything?
- What if you lose, what would that mean to you?
- How much more will the proceedings cost you (in terms of money and stress)?
- Have you compared these costs with the financial interest?
- What does continuing the proceedings mean for you?
- Would you like to be on friendlier terms with the other party? Are these proceedings helping in that respect?
- Are you accustomed to solving problems yourself? Can you still do so in these proceedings?

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<sup>43</sup> Pel, M., Referral to mediation, Sdu Uitgevers, 2008.

## 6.11 Encouraging empathy and honesty in mediation<sup>44</sup>

Empathy is different from sympathy: the two processes are, in fact, mutually exclusive. In **sympathy**, the subject is principally absorbed in his own feelings as they are projected into the object and has little concern for the reality and validity of the object's special experience. Sympathy bypasses real understanding of the other person, and that other is denied his own sense of being.

**Empathy**, on the other hand, presupposes the existence of the object as a separate individual, entitled to his or her own feelings, ideas, and emotional history. The empathiser makes no judgments about what the other should feel, but solicits the expression of whatever he does feel and, for brief periods, experiences these experiences as his own. The empathiser oscillates between such subjective involvement and a detached recognition of the shared feelings. Secure in his sense of self and his own emotional boundaries, the empathiser attempts to nurture a similar security in the other (Paul, "Parenthood: Its Psychology and Pathology").

Mediators sometimes encounter disputes in which both parties tell vastly different stories that do not add up, and where it is difficult to ascertain the truth behind both parties' recollections of the events. Mediation conferences, whether conducted face-to-face or on the phone can help to encourage the parties to communicate empathetically and honestly.

Everyone in conflict has different perceptions of what happened, who caused it, and why. Each side tells stories that are accurate and honest– for themselves, as requests for communication, empathy, and authenticity. Both sides also tell stories that are inaccurate and dishonest– for each other, as literal facts, and as requests for surrender or acceptance of blame.

In conflict, everyone views the world from the inside out and finds empathy and honesty difficult with those they detest or by whom they feel detested. Their willingness to accept responsibility is distorted by their need for sympathy and support, or their desire to make themselves appear right by making others appear wrong. It is almost like everyone in conflict wears a mask that can only be observed from the outside. They respond to attack egocentrically and suffer from silent self-doubt, poor self-esteem, and denial. Although the disputants may see their own intentions as honourable, they are at odds with the effects their actions have on others. Their feelings are too important to risk discussing openly, so they repress or externalise them.

People in conflict take deliberate steps to protect themselves from the truth, because they know the consequences could compel them to leave the comfortable, albeit dysfunctional

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<sup>44</sup> Based on Cloke, K., *Mediating dangerously*, Jossey-Bass, 2001, pp.25-40.

patterns they have created. They easily forget what it is like not to be in conflict, and adjust to living in environments that are rife with dissension. That is why communicating honestly and empathetically is so important. Talking honestly about what happened, exploring what both parties contributed to the conflict and why, accepting responsibility for what they could have done better, and discovering within themselves not only their opponents, but deeper, more authentic parts of themselves can empower disputants to improve their conflict behaviour and to resolve their differences.

Mediators can encourage parties to communicate more honestly. It is important to keep in mind that honesty without empathy becomes brutal and judgmental, while empathy without honesty turns sentimental and ineffectual. To reach deeper levels of honesty, greater empathy is required to disarm defensiveness and judgment. To build greater empathy, deeper honesty is needed, to keep it from feeling false and to make it practical.

Any truth mediators or conciliators seek to elicit from others requires an equal openness to hearing the same truth from the mediator. People intuitively apprehend whether mediators are willing to be deeply honest. If they sense that they are not, they will interpret requests for honesty as manipulation or prying. Acknowledging this need for personal honesty on behalf of the mediator or conciliator means that the mediator becomes less of a neutral and impartial third party, and the mediation or conciliation becomes more of a three-party-process, in which the mediator or conciliator joins the conflict to model empathic listening, honest questioning, and equanimity in accepting painful answers.

## 6.12 Explaining in mediation<sup>45</sup>

In everyday usage the verb 'to explain' has two meanings. One of these emphasises the intention of the explainer ('I explained it to him but he was too stupid to understand') while the other highlights the success ('I explained it to him and he was able to do it'). In professional contexts like mediation or conciliation it is the latter usage which is employed, and in this sense, to explain is 'to give understanding' to another person. Thus, if the recipient does not comprehend what he has been told, it is arguable that the problem has not been fully explained. Mediators need to explain the structure of the mediation, the roles and responsibilities of parties, and potential outcomes such as agreement or termination. The role of a conciliators goes even further in that conciliators often also explain legal or technical issues to the disputing parties. Both mediators and conciliators also often explain the motives and concerns of one party to another. It makes sense to look at the way that explaining works in interpersonal communication and how explanations can be improved. Explaining is particularly important during the intake process when the mediator explains mediation and the roles and responsibilities of the parties.

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<sup>45</sup> Dickson, D. et al., Communication skills training for health professionals: an instructor's handbook, Chapman and Hall, 1989.



Hargie and Dickson differentiate two levels of explanation:

**Level 1:** At this simple level, explaining involves giving information of a descriptive or prescriptive nature, and involves telling, describing or instructing. For example: “After I have spoken to you and you have explained the situation to me I am going to call the other party for the intake interview and listen to their side of the story.”

**Level 2:** At this more complex level an explanation provides understanding in the mind of the listener, by going beyond simple description to reveal causes, make links, give reasons, demonstrate relationships etc. For example: “We have now had an opportunity to discuss the major concerns that brought you both here to mediation. Both of you have already expressed that you would like to resolve this dispute and you have made a number of suggestions already on how this could work. In this next stage, I am going to ask you to come up with and to discuss the ideas on what could be done to repair the damage and improve the situation. The purpose of this discussion is to come up with as many ideas as possible and maybe to find some creative ways forward that could benefit both of you. This also means, that nothing said need to be considered as a final offer. Unless you agree on a final outcome at the end of the process, all ideas are simply suggestions that can be discussed and evaluated. So please, feel free to consider even less conventional outcomes. Sometimes these ideas spark the best solutions. I am going to write down all of your ideas on the whiteboard. Does that make sense to you?”

### 6.11.1 Functions of explanations

Depending upon the context, the skill of explanation serves a number of purposes, namely, to:

- Provide information
- Simplify complexities
- Correct mistaken beliefs
- Give advice
- Aid in compliance with necessary procedures
- Highlight the important elements of any procedure
- Offer reassurance and reduce uncertainty
- Justify one’s actions and recommendations
- Increase client satisfaction
- Ensure client understanding

### 6.12.2 Features of explanation

Effective explanations often contain the following component elements:

#### **Planning**

In some instances mediators will have more opportunity to plan an explanation than in others. When planning, consideration should be given to the following three aspects:

- The identification of the key elements in the problem to be explained
- The relationship between these elements and how they can best be linked during explanation
- The ability level, background knowledge, and possible reactions, of the recipient of the information

## Presentation

This is the crux of the explanation. How the explanation is presented will determine how successful it is. Good explanations should be brief, appealing, cover the essential points and highlight the important bits. This can be achieved by taking into consideration the following points:

- **Speech fluency:** Messages are more clearly understood when delivered in a clear and fluent style, with the use of short sentences and avoidance of ‘ums’, ‘ers’, etc.
- **Reducing vagueness:** Ambiguous terms such as ‘plenty’, ‘big’, and other similar expressions can cause confusion for clients and should be avoided. The mediator should use specific, rather than vague, expressions.
- **Pausing:** By using pauses appropriately, the mediator or conciliator can move at a moderate pace and thereby ensure they do not cover too much material too quickly. Research evidence also illustrates the importance of speaker pauses in facilitating the understanding and recall of information by listeners.
- **Using appropriate language:** Dispute resolution professionals, like all groups of professionals, have a specialised terminology which can facilitate communication within the profession. However, the use of such ‘jargon’ should be avoided when dealing with clients, or if technical or legal terms are used they should be concisely explained. Another pitfall to avoid is the use of culturally or socially inappropriate language that may not be clearly understood by the listener.
- **Providing emphasis:** Important parts of a message can be emphasised verbally and/or non-verbally. Verbal emphasis can be achieved by repetition of the important points, by using verbal cues (‘This is very important...’); and by verbal foci (‘First...second...third’; ‘major’; ‘crucial’ etc.). Emphasis can also be achieved non-verbally by, for example, raising or lowering the volume of voice; and by hand gestures, facial expressions, sudden body movements etc.
- **Using examples:** These relate new and unfamiliar concepts to situations with which the listener is already familiar.
- **Summary:** It is often useful to briefly recap the main points covered, especially if the explanation has been quite lengthy. This helps listeners to assimilate and retain the information presented.
- **Expressiveness:** The manner in which an explanation is delivered can influence its effectiveness. In particular, the demonstration of enthusiasm, concern, friendliness and

humour by verbal and non-verbal means can make an explanation more appealing and interesting for the listener.

- **Structuring explanations:** Explanations should follow a logical sequence, moving from the known to the unknown and from the simple to the more complex. In order to do so it is necessary to ascertain at the outset what the client already knows or believes. It also involves informing clients in advance of what is to be said, so that they can 'tune in' to the explanation.

## Feedback

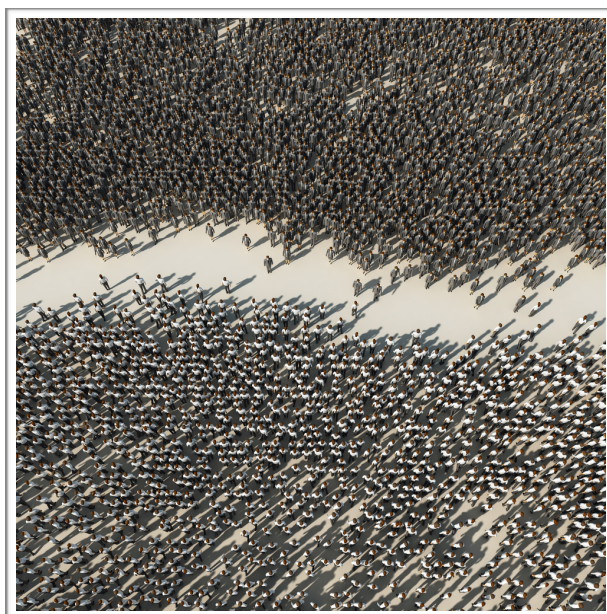
In order to evaluate whether an explanation has been successful it is necessary to obtain feedback from the listeners. This can be achieved by the following methods:

- Attending to the nonverbal expressions of listeners to identify signs of confusion, puzzlement, or bewilderment
- Asking listeners if they understand. The danger here, of course, is that many clients are likely to respond in the affirmative, regardless of whether they understand or not
- Asking specific questions designed to test comprehension. To overcome the likelihood of any embarrassment, the mediator can take the blame for any possible failure by using expressions like: 'I don't know whether I explained that very well, can I just check...'; 'This is quite difficult and I may have gone too quickly...'
- Asking disputants if they have any questions
- Asking listeners to summarise the explanation, or complete a procedure if a practical task is involved

## 6.13 Suggested reading:

Bolton, R. People skills: how to assert yourself, listen to others, and resolve conflicts, Simon & Schuster, 1987, Chapters 2 and 4.

## 7. The intersection of culture and conflict



Cultural difference affects mediation and conciliation in powerful ways, even when the parties appear to outwardly share many commonalities. Mediators who develop effective cultural analyses are often more successful in avoiding cultural misunderstandings than are mediators who posit cultural differences as irrelevant or as being amenable to being set aside within the professional culture of mediation. In contemporary conflict resolution practice almost every mediation or conciliation is imbued with issues of cultural difference and difference in meaning-making, therefore we consider it of utmost importance that mediators understand about their own cultural backgrounds and the cultural underpinnings of the facilitative processes that they use and how these can impact on parties from different cultural backgrounds.

### 7.1 Some thoughts about culture

Culture is one of the most common words in our vocabularies, but also one of the most difficult words to understand. Culture can refer to the way people dress, what they eat, which religion they follow, how they respect their elders and peers, and to a million other characteristics. Beneath the surface level of appearance lie the deeper levels of culture, the values and worldviews. What has shaped a certain way of clothing? What values lie beneath particular dietary requirements that we often easily attribute to “culture”? And what happens when these deeply personal and communal worldviews meet other worldviews that may uphold different values or understand human existence in a different way? Does land only have a material or monetary value, or is it imbued with spiritual significance? Can rivers or forests be persons? Do our ancestors or future descendants have a voice in our decision-making and negotiation processes? What are the roles of women, men, or other genders in

our communities or societies? All of these questions are connected to the cultures of the people involved.

Sometimes a conflict develops. When we think about culture and conflict we often think about negative terms: culture wars, clashes of culture, incompatibility and denial of human rights. However, those often awkward encounters with different cultures can also spark enormous creativity and be the catalyst for much-needed renewal. Culture lies at the heart of this renewal. Because culture affects all of us at the core of our being, it also lies at the core of our understanding of conflict and how we deal with conflict. While this chapter cannot provide a comprehensive answer to the intricacies of how culture and conflict (resolution) connect, we offer some insights, warnings, and encouragement.

### **7.1.1 Popular myths about culture<sup>46</sup>**

- An individual possesses but a single culture.
- Culture is custom, tradition, surface-level etiquette.
- Culture is timeless, especially so called “traditional” ones.
- Culture is simply one more variable in conflict resolution.
- Culture is homogenous.
- Culture is a thing.

### **7.1.2 What does the literature say about culture?**

Here we paraphrase a number of descriptions and definitions of culture by well-known conflict resolution scholars and anthropologists:

- One of the two or three most complicated words in the English language (Raymond Williams).
- The lens through which we see the world (Kevin Avruch, John Paul Lederach).
- The collectively shared, often subconsciously held, assumptions about what is natural and normal; it represents how things simply are (Johan Galtung).
- The conceptual paradigm in which all behaviours originate (Stella Ting-Toomey).
- A large part of cultural schemas are subconscious: Culture has ‘an underlying, hidden level [...] that is highly patterned – a set of unspoken, implicit rules of behaviour and thought that controls everything we do. This hidden grammar defines the way in which people view the world, determines their values, and establishes the basic tempo and rhythms of life. Most of us are either totally unaware or else only peripherally aware of this’ (Edward T. Hall).
- The man-made part of the environment (including architecture, instruments, values, norms, beliefs, rituals, ideas, paintings poems etc.) (Melville J. Herskovits)
- Cultures are fluid, always changing (Michelle LeBaron).

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<sup>46</sup> Avruch, K., Culture and conflict resolution, United States Institute of Peace Press, 1998, pp. 14-16

### 7.1.3 The culture trap

There is a famous poem by John Godfrey Saxe (1816-1887) which describes how six blind men encounter an elephant:

It was six men of Indostan  
To learning much inclined,  
Who went to see the Elephant  
(Though all of them were blind),  
That each by observation  
Might satisfy his mind

The First approached the Elephant,  
And happening to fall  
Against his broad and sturdy side,  
At once began to bawl:  
"God bless me! but the Elephant  
Is very like a wall!"

The Second, feeling of the tusk,  
Cried, "Ho! what have we here  
So very round and smooth and sharp?  
To me 'tis mighty clear  
This wonder of an Elephant  
Is very like a spear!"

The Third approached the animal,  
And happening to take  
The squirming trunk within his hands,  
Thus boldly up and spake:  
"I see," quoth he, "the Elephant  
Is very like a snake!"

The Fourth reached out an eager hand,  
And felt about the knee.  
"What most this wondrous beast is like  
Is mighty plain," quoth he;  
"'Tis clear enough the Elephant  
Is very like a tree!"



The Fifth, who chanced to touch the ear,  
Said: "E'en the blindest man  
Can tell what this resembles most;  
Deny the fact who can  
This marvel of an Elephant  
Is very like a fan!"

The Sixth no sooner had begun  
About the beast to grope,  
Than, seizing on the swinging tail  
That fell within his scope,  
"I see," quoth he, "the Elephant  
Is very like a rope!"

And so these men of Indostan  
Disputed loud and long,  
Each in his own opinion  
Exceeding stiff and strong,  
Though each was partly in the right,  
And all were in the wrong!

**Moral:**

So oft in theologic wars,  
The disputants, I ween,  
Rail on in utter ignorance  
Of what each other mean,  
And prate about an Elephant  
Not one of them has seen!

When we encounter people from other cultures, we sometimes act like the blind men in the poem. We attempt to understand what is foreign to us from the basis of our own experience. We interpret the way in which we see the world as the normal way and label everything else as foreign or "other". We use categories which make sense within our worldview to make it easier and more comfortable to deal with difference. This is an anthropogenic view of social reality based on our own personal and collective experience that may not be accurate or commensurate with the views of other people.

## 7.2 Cultural assumptions in mediation and conciliation

Naturally we employ the same techniques when we are dealing with conflict and ways to resolve it. Our conflict resolution processes, like conciliation and facilitative mediation, are a product of our worldview and understanding of how to deal with conflict. That means they may be inappropriate for dealing with people from different cultural backgrounds. Conciliators and mediators who deal with diverse clients are well advised to develop cultural fluency and to be able to adapt their conflict resolution process to the diverse needs of their clients.

There are a number of observations that can be made about facilitative mediation, and also conciliation that express this inherent cultural bias. They include but are not limited to the following:

- Mediation is a linear process that breaks down conflicts into manageable parts and encourages parties to discuss each part separately to come up with solutions and options. People who are more holistic or diffuse thinkers find this structure highly constraining and distracting.
- Mediation and conciliation assume that all conflicts can be dealt with by speaking directly about the underlying needs of the parties. This assumes individual needs and also that individuals make decisions by themselves. People from collectivist cultures find this often quite disturbing. Additionally, directly talking about certain problems can be considered impolite or outright threatening.
- Mediation and conciliation encourage conflicting parties to talk directly to each other. There can be a variety of cultural reasons why this is not appropriate- from safety and security concerns, to issues about not losing face in front of the other party, to issues of who is allowed to access and express certain knowledge or who is allowed to talk to whom in terms of social status, gender or age.
- Putting so much emphasis on talking can devalue the importance of rituals of reconciliation, exchanges, prayers, or other ceremonial processes that are more important than talk to some disputants.
- Mediation and conciliation often only apply to the immediately involved parties without consideration for their extended families, communities, spirits, or past and future generations.
- Mediation and conciliation - at least as they are practiced in European and Anglo cultures - emphasise rational and calm talking and view the expression of strong emotions such as anger as dysfunctional. This can be highly constraining for some disputants.



### 7.3 Developing cultural fluency

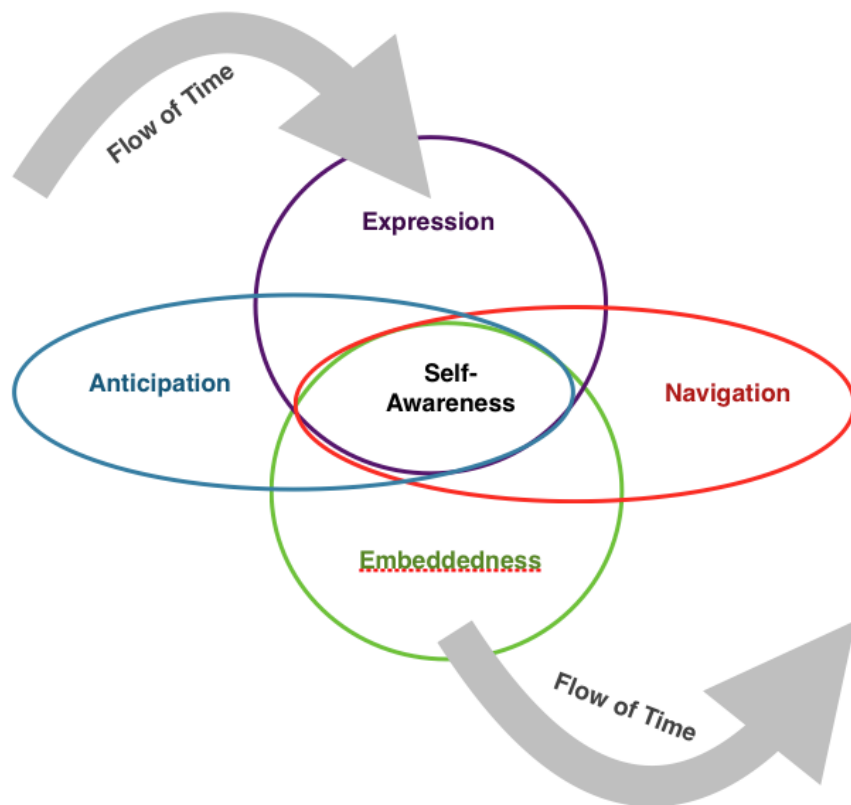


Fig. 7.1 Cultural fluency. LeBaron, M. and Pillay, V. Conflict Across Cultures. Intercultural Press, 2006, p. 62.

Cultural fluency is our readiness to anticipate, internalise, express and help shape the process of meaning-making. It refers to being comfortable with challenging intercultural encounters, being aware of how our own cultural starting points impact on our interaction with others, and of being able to “pull back” and not do things we would normally do because they could be perceived as offensive.

Cultural fluency helps to:<sup>47</sup>

1. anticipate a range of possible scenarios about how our future relationships will evolve in unfamiliar cultural contexts;
2. remain conscious of unfamiliar cultural influences that come to be embedded in our meaning-making process;
3. express what is deep down in our cultural assumptions, in a way that is understandable to others unfamiliar with our meaning-making patterns; and to
4. navigate the turbulence of cross-cultural dynamics in order to jointly develop ways to go forward together with people who understand the world in a very different way.

<sup>47</sup> LeBaron, M. and Pillay, V., Conflict across cultures, Intercultural Press, 2006, p. 58.

Cultural fluency means internalised familiarity with the workings of culture, the currents of the underground rivers inside us and the others around us. We usually think of fluency in relation to learning a language. To be fluent in a language is to be comfortable with it so that accessing the words to express ideas is not a conscious choice-making and versatility in understanding and interpreting behaviours and implicit rules. Fluency means knowing the idioms, symbols, and something of the history, art, and experience of those who speak it. Fluency means befriending a language, coming to know what it is capable of revealing, appreciating its nuances, and what it has trouble expressing. Fluency is best built by engaging those who are at home in the language we seek to acquire. When we turn to cultural fluency we find that the best way of increasing our own cultural fluency is putting ourselves in situations that stretch us, where we encounter culturally unfamiliar people and situations, observe our responses, and develop resourcefulness and flexibility. As we learn to recognise cultures' influences and see their effects on perceptions and attitudes, behaviours, and interpretations, we are better able to understand subtle nuances and relate well across differences.

Conflict resolution researcher Kevin Avruch reminds us that mindfulness and awareness also play an important role in the development of cultural fluency:<sup>48</sup>

*One of the ways to find it is through a quality that's important for practitioners called mindfulness, awareness. What you're mindful of in particular here is the possibility of variance in cultural issues. Then what do you do about them? Knowing about them is not all that you need to make something work, but it goes a long, long way. If you're aware of them as a third party then you know that there are face issues, and that you have to protect the party whose concerns are with face. You may have to educate the low context party about face issues separately in a caucus or something like that. Again, education, protection, awareness are things that you, as a third party, would be aware of. In a sense, what I'm saying is you have to be a cultural analyst in addition to being a conflict analyst. These are things that will help the communicational flow. These are not silver-bullet-solutions to the problem, necessarily. Ironically, of course, one of the things that can happen if you really remove most impedances in negotiation, and you get clear communication, is that a conflict may appear more intractable after efficient communication than it did before. We owe our parties that.*

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<sup>48</sup> LeBaron, M., Bridging cultural conflicts: a new approach for a changing world, Jossey-Bass, 2003, p. 41.

One way to acquire cultural fluency is to immerse ourselves in other cultures and try to delve beyond the surface level of food and clothing, to develop a “thick” definition of culture. By seeking unfamiliar experiences and sharing these with the people whose cultures we experience, we often learn a lot about our own culture and starting points and may be able to better anticipate potentially conflictual situations. If immersing yourself in a different culture is not an option, then learn as much as you can about the culture from a range of sources. Read widely about the cultures with which you will be interacting, use books, journals, magazines, novels. Watch movies about that culture, particularly documentaries and movies made by members of the culture. Talk to a range of members of the culture. Talk with members of your own culture who have worked or lived in the culture.

#### **7.4 Suggested reading:**

LeBaron, M. and Pillay, V., Conflict across cultures: a unique experience of bridging differences, Intercultural Press, 2006, Chapter 2.

## **8. Managing multiple parties and negotiation dynamics in mediation**

Sometimes parties wish to attend conciliation or mediation with the support of family members or advocates. This changes the dynamics of the dispute resolution process. Ultimately, it is up to the mediator to decide who attends the session, however, it is important to respect the parties' wishes and to adjust the process accordingly. Support people can be legal or technical advisors, family members and friends, or people working for disability, mental health or other support services. Given how common it is to have parties' legal representatives attend commercial mediation conferences, we discuss the advantages and disadvantages of lawyers in mediation below.

### **8.1 Advantages of lawyers having a role in mediation**

- Experience in analysis of disputes
- Experience in dealing with legal issues
- Can be objective or detached from a situation
- Have knowledge of prospects if the dispute is litigated as a BATNA
- Are familiar with procedures such as mediation
- Are experienced in preparing cases for court and in detailed analysis of the facts

### **8.2 Disadvantages of lawyers having a role in mediation**

- Undue focus on legal issues, legal rights, and precedent (shifts away from a discussion of underlying interests)
- Are likely to have an adversarial approach ('rights based')
- Inexperience in dealing with emotional interests
- Often under time constraints
- Have own need to impress clients and other lawyers
- May view mediation as less worthy of preparation than litigation

### **8.3 A lawyer's role includes**

- to persuade and negotiate
- to communicate and persuade
- to protect client (provide legal advice)
- to appear reasonable and calm, in command and confident

## 8.4 Managing multiple parties and their representatives

Sometimes more than two parties are affected by the dispute. Mediators encounter multi-party situations for example in disputes over wills or in more complex construction disputes where a variety of sub-contractors are part of a project. Charlton and Dewdney recognise the following features of multi-party dispute resolution:<sup>49</sup>

- The matters tend to be more complex, involving a multiplicity of issues
- A number of different groups tend to be involved
- Not all the issues affect each of the groups
- There can be no standard procedure for conducting multi-party mediations and a flexible approach is essential. Suggestions about a proposed procedure need to be canvassed in consultation with the representative groups.
- Co-mediation is particularly useful in multi-party mediations

Multi-party conciliation and mediation almost always require very thorough intake procedures and pre-mediation consultation with all affected parties. Mediators need to assess whether their procedures are suitable for the particular dispute. If there are, for example, 5 different sub-contractors, a head contractor and a client involved in a construction dispute, it might be impossible to convene a conference with all parties at the same time simply because of the difficulty of managing the communication of so many people. In such a case a structured shuttle negotiation process may be more suitable to deal with the matter. Other strategies include asking the parties to name representatives of the different interest groups to cut down the number of speakers.

## 8.5 Dealing with high levels of emotion and value conflicts

The expression of feelings and emotions can often be uncomfortable – both for those expressing the emotion and those witnessing its expression. In the early days of negotiation and mediation teaching, it was often argued that the expression of emotion impedes rational thinking and exposes vulnerabilities. However, more recent research on emotions tells us that their suppression can have detrimental effects while their expression often assists with problem-solving.<sup>50</sup> When working with emotions, we need to be aware of their effects on ourselves, how our emotions influence our own thinking and behaviour, and their interpersonal effects, that is how our emotions influence others.

### 8.5.1 How can we manage our own feelings?

Feeling an emotion can influence our thinking and also how we treat others. For example, feeling angry may lead us to make irrational decisions and behave in a competitive way. We

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<sup>49</sup> Charlton, R. and Dewdney, M., *The mediator's handbook: skills and strategies for practitioners*, Lawbook Co., 2004, p. 158-162.

<sup>50</sup> Shapiro, D., *Untapped power: emotions in negotiation*, in Kupfer Schneider, A. and Honeyman, C., *The negotiator's fieldbook, the desk reference for the experienced negotiator*, American Bar Association, 2006, p. 265.

may appear hostile to others and, in return, they may be less likely to cooperate with us. The first step in dealing with our own emotions is to be aware of them and to recognise them for what they are. We can do this by actively monitoring our thoughts and physiological arousal (for example heart rate, sweating etc.). Once we have recognised our emotions, we can manage them. This may require taking steps to remain calm, positive, and focused under pressure. The literature is full of suggestions for what one can do to remain composed. These include:<sup>51</sup>

- Counting back from 10.
- Deep breathing.
- Taking a break.
- Visualising a relaxing place.
- Shifting from tense to relaxed body language.
- Ignoring upsetting remarks.
- Thinking of a good excuse to walk away in a dignified manner.
- Tensing and releasing leg muscles.
- How can we manage feelings in others?

### **8.5.2 Managing the emotional expressions of parties**

Our feelings can affect others and their feelings can affect us. In conciliation and mediation, we often have to deal with other people's emotions. The steps for doing this effectively are similar to those we take when dealing with your own emotions. First, we need to identify the emotion and then we need to manage them constructively. Recognising emotions in others is not always easy, as some people cover up their feelings. If a person does not actually tell you what they are feeling, some indicators that may assist you with figuring out how they feel include their facial expression, tone of voice, and body language. For example, a high-pitched tone of voice may indicate that they are excited or surprised, while a stiff posture may indicate stress and anxiety.

Often the best way to manage other people's emotions is to acknowledge them verbally. Active listening assists with acknowledging other's emotions. Listen carefully and acknowledge what you have heard. To help them recognise how they feel, you can reflect back to them what you heard them say. Hearing you say their emotions out loud will be powerful and meaningful and increase their understanding of how they feel. You can also assist them by asking open, inquisitive questions, such as "what has contributed to you feeling this way?", or "how did you feel in this situation?". For a vocabulary on emotions useful in mediation see section 6.4.1 of this training manual.

In private sessions, you may be able to do some coaching to assist the other person in expressing their emotions in an effective manner. You can assist them to understand the impact expressing an emotion may have and think about ways of reframing what is said to

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<sup>51</sup> Fisher, R. and Shapiro, D., *Beyond reason, using emotions as you negotiate*, Penguin Group, 2005.

make it less detrimental. You can ask questions such as “how do you think X would respond to that statement?”, and “how could you say that so that it is less hurtful?”. For example, if they wish to say “you’re selfish and self-absorbed and dump all your work on me”, they may be able to reframe this to a less antagonistic, yet equally expressive statement, such as: “when you ask me to do lots of work and leave before I do, it means I don’t have time to make dinner for my kids and it makes me feel like you don’t appreciate what I do”. Coaching them to express their emotion in a less antagonistic way does not ask them to hide it, but to concentrate on how they feel rather than lay all blame on the other person.

## **8.6 Power imbalance and violence**

Mediators and conciliators must be able to recognise power imbalance and other issues relating to control and intimidation, and take appropriate steps to manage the mediation process accordingly.<sup>52</sup>

### **8.6.1 What is power?**

Power is the ability to influence the decision-making processes of people whom we are in a relationship of interdependence with. In negotiation or mediation, it allows parties to use leverage and to force others to accept their terms of agreement.

### **8.6.2 Perceptions about power**

The perception of power is more important than the objective conditions of power. Therefore, a party will, within limits, be at an advantage when they perceive themselves to be more powerful and they will be at a disadvantage when they perceive the other party to be more powerful than they.

Even though mediators have limited formal authority, that is, they cannot impose a binding decision, they do have considerable potential power regarding their ability to affect perceptions, attitudes, and behaviour of parties. The role of a mediator in exercising such power is particularly important in circumstances when there is a power imbalance between the parties.

#### **Power is...**

- The ability to influence others.
- Based on perception and actual power.
- Altered by the choice of strategies and tactics.

### **8.6.3 Power in conflict situations<sup>53</sup>**

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<sup>52</sup> MSB, NMAS Practice standards, S.6, p. 11.

<sup>53</sup> Based on Boulle, L. and Alexander, N., Mediation: skills and techniques, 2nd ed., LexisNexis Butterworths, 2012, pp. 299-301.

There is rarely a conflict where the power is equally balanced between two parties. This will be true for a number of reasons:

- The parties derive their power from different sources
- Power is situation-specific - it will change with the circumstances
- Power must be assessed not just at its source but also at its point of impact
- Power needs to be accompanied by a willingness and capacity to use the power

There are theories which suggest that the mediation process can address an imbalance of power using absolute neutrality to ensure a fair outcome. However, there is also an argument that if two unequal parties are treated equally, the result is inequality.<sup>54</sup> It is up to the mediator to manage this tension and to make decisions to ensure the fairest possible process.

Mediators need to be able to educate, coach, and empower particularly weak or timid parties about potential sources of power. This might assist the parties to access sources of power, in order to more effectively participate in the process. Similarly, the mediator might also need to limit the power or influence of stronger parties

Mediators also need to recognise their own sources of power in order to:

- manage and maintain a fair mediation process;
- be mindful of how they influence the mediation process.

#### 8.6.4 Sources of power in mediation

Difficult situations and impasse often arise in conciliation when parties perceive a power imbalance between them. Sometimes they refuse to negotiate or move from their positions because it is 'a matter of principle' or because they are less worried about losing money and want to 'pay the other side back' for perceived injustices which are often derived from the perception of being shoved around by the more powerful party. Below are common sources of power encountered in mediation:<sup>55</sup>

- **Formal Authority:** Formal authority refers to an association with the formal government or other authorities. Sometimes parties in mediation represent local, state, or federal government and this often gives them the perception of being more powerful than the other party. Conciliators who work for government services also derive much power from their position of formal authority which grants them control over the conciliation process.
- **Expert/Information Power:** Often parties in a mediation conference possess different amounts of information on negotiation strategies, legal rights and obligations, financial and other matters. Being more knowledgeable about these things often confers a certain amount of confidence and assertiveness to state and defend a position.
- **Associational Power:** Refers in general to power that is derived from association with other powerful people or organisations. This could mean being part of industry networks,

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<sup>54</sup> Astor, H. and Chinkin, C., Dispute resolution in Australia, Butterworths, 1992.

<sup>55</sup> Based on Mayer, B., The dynamics of power in mediation and negotiation, (1987) 16 Mediation Quarterly p. 75.



having access to the boards of organisations, or sway within a corporate community such as the body corporate of an apartment building.

- **Resource Power:** Means control over financial assets and other resources. One party has more time, money, legal advice, and other assets that strengthen his or her position.
- **Procedural Power:** The power to influence the process of dispute resolution. Obviously mediators and conciliators themselves draw on this source of power, for example through their ability to terminate the process and to make decisions about who starts and what is being discussed. In legal processes procedural power can also refer to knowledge of the legal rights and obligations, or the ability to delay procedures.
- **Sanction Power:** Refers to the ability to punish the other party. Implied threats of harm or the threat to evict people or destroy certain assets are sometimes encountered during the process.
- **Nuisance Power:** Refers to the ability to annoy and distract the other party in the negotiation. It sometimes overlaps with sanction power. Continued emotional aggravation of conflict tends to wear most people out. After a while, a disputant is willing to pay any price just to end the contact and hopefully return to a normal life.
- **Habitual Power:** Means the ability to maintain the status quo. Negotiating and initiating change is expensive, energy-sapping, and unpredictable for the party that wants to change the status quo. For example, in a situation where one party is asking for money or property back from the other party, it is difficult for the party who does not have direct possession or control. In situations where parties negotiate access to children, the party who is the major caretaker of the children has more habitual power.
- **Moral Power:** Moral power can be tapped by appealing to moral values and social or religious norms and standards.
- **Personal Power:** These are the personal characteristics of the parties in mediation. Examples are memory for detail, denial or fear of the emotional realm, charisma and attractiveness, intolerance and inflexibility, level of risk aversion, communication skills, persistence and patience, self-esteem, ethnicity, cultural background, and gender.

#### 8.6.5 Dealing with power imbalance in mediation conferences<sup>56</sup>

The perception of power imbalances between the parties is common in mediation and conciliation. Conciliators and mediators should often ask themselves where the perception comes from and should try to confirm whether their assessment is true before they act. Power constantly shifts during the process and a party who appears weaker in the beginning may suddenly hold all the cards. If mediators think that they need to address a power imbalance the following strategies might be useful.

#### **Interventions for increasing the power of weaker parties:**

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<sup>56</sup> Based on Boulle, L. and Alexander, N., Mediation: skills and techniques, 2nd ed., LexisNexis Butterworths, 2012, p. 302.

- Empower parties by helping them identify and strengthen their power base. This can be done by explaining and identifying BATNAs ('Best Alternative to a Negotiated Agreement'), referring parties to get legal advice or coaching them in positional and interest-based negotiation.
- Explain the process, and make sure that parties understand the nature of mediation and its particular advantages and disadvantages.
- Give parties the opportunity to tell their full story and insist that the other side listens without interruption.
- Enforce the mediation guidelines to avoid intimidation from the other party.
- Use separate sessions to check whether the seemingly weaker party is satisfied with the progress of the negotiation and if any issues still need to be addressed that have not been identified in joint meetings.
- Coach parties how to respond to needs and demands from constituents such as children, parents, other relatives, friends, and new partners.
- Teach skills like assertiveness and emotional self-help to parties that have trouble stating their demands.
- Adjourn or terminate the mediation if power imbalance cannot be addressed and is preventing one or both parties from making wise and well-informed decisions.
- Inform the weaker party about alternatives to mediation, such as litigation or arbitration.
- Change the process by using shuttle mediation, telephone mediation, face-to-face conference, or email mediation.
- Allow parties to use support people, advisers and access to information necessary for wise decision-making.

### **Interventions for reducing the power of stronger parties**

- Control the communication process by asking the parties to address the mediator and not each other.
- Create doubt in the mind of the stronger party by pointing out weaknesses in their argument (factual, legal, or procedural).
- Identify downsides of proposed future acts and threats.
- Reality-test proposals and offers that disadvantage the weaker party.
- Threaten to terminate the mediation if certain behaviours are not controlled properly.
- Terminate the mediation if the proposed settlement is clearly 'out of range'.
- Encourage co-operative behaviour and model good communication skills.
- Openly address power tactics such as setting artificial deadlines as to coerce the other party into agreeing to a proposal. This often defuses the tactic.

### **8.6.6 Violence**

Power, aggression, abuse, and violence are often connected. When violence, abuse, or aggression arise in mediation, the mediator must evaluate whether the violence, in an

incipient stage, might be addressed early to prevent it growing (with a view to continuing the mediation), or whether to terminate the mediation.

Because aggression, abuse, and violence can escalate rapidly, effective mediators and conciliators will try to detect violence in the early stages of the process and try to de-escalate the conflict.<sup>57</sup> This might be done by discouraging hostility, using calm body language to change the tone and atmosphere, or even asking participants about why they are being aggressive.

Ultimately, mediators need to ensure a safe space for discussion before, during and after the mediation and threats of violence or even the break-out of violence is almost always intolerable. If a history of personal violence exists between parties, this should be discussed extensively in intake procedures and mediators need to feel completely assured that they can guarantee the safety of participants. Using mediation spaces that have access to security systems or alarm buttons and that offer separate entrances and exits for parties can help with this situation, as can using video and telephone mediation.

Additionally it should be pointed out that mediation or conciliation should never be used to “negotiate” whether violence has taken place between parties in their previous relationship. Allowing a perpetrator to “buy off” a victim to prevent a complaint to police or other services only legitimises the use of violence and could even encourage the perpetrator to continue this behaviour. On the other hand, it can be very empowering for victims to confront their perpetrators and to tell them about the impact of the violence in a safe and controlled environment. It might even lead to changes in behaviour or acknowledgement of the harm done.

These situations are very difficult to control and very demanding for mediators and no mediator should feel afraid to reject a request for mediation, to refer the parties to a more appropriate service provider or to explain to them why mediation is inappropriate.<sup>58</sup>

## 8.7 Impasse

Impasse or deadlocks occur because a substantive, emotional or procedural interest has not been satisfied. When the parties are caught in a deadlock, they dig in their heels, refuse to consider collaborative options, and often return to a communication that includes bickering and insults. To break the deadlock, the mediator should consider what can be changed in relation to the process, the emotional aspects (the relationship) and the substance of the mediation.

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<sup>57</sup> Deutsch, M. et al. (eds.), *The handbook of conflict resolution: theory and practice*, Jossey-Bass, 2006, p. 526.

<sup>58</sup> For a much more detailed and informative discussion of mediating in situations of violence see Boule, L. and Alexander, N., *Mediation: skills and techniques*, 2nd ed., LexisNexis Butterworths, 2012, pp. 304-307.

### **8.7.1 Changing the process**

- the parties' use of the process
- where the mediator is in the process
- the parties' perceptions of the process
- the parties' understanding of the process
- the responsibility for the process
- the negotiation strategy

### **8.7.2 Changing how the parties relate to each other**

- the mediators/conciliators
- the mode of mediation
- the speed of the discussion
- the physical environment
- the style of the negotiations
- the perspective on what's important
- the order in which the issues are dealt with
- the way the mediator uses his/her voice
- the isolation of the discussion
- why the mediation is happening

### **8.7.3 Changing the substance**

- assumptions the parties are relying on
- the information that is available
- the views that are being negotiated
- the order in which issues are being deal with
- the issues which have been decided
- the pattern of the negotiation
- the options that are on the table
- the offer on the table

## **8.8 Suggested reading**

Boulle, L. and Alexander, N., Mediation: skills and techniques, LexisNexis Butterworths, 2012, Chapter 10.

## 9. Ethical challenges arising in mediation practice

Ethical challenges in mediation and conciliation beyond the standard difficulties discussed in the previous chapter are relatively rare. Nonetheless, it is important for mediators to be aware of their own ethical boundaries, of the codes of conduct they practice under, and of relevant legislation. As an unregulated free profession, mediation does not have any official codes of conduct or ethical standards that mediators are required to adhere to. The NMAC Practice Standards only refer to other existing professional ethical requirements that practitioners might fall under. This refers to practitioners who may also be admitted as legal practitioners, counsellors or other professionals with a professional code of ethics. However, not all mediators operate under such other ethical guidelines, and it is also questionable whether the other professional requirements would apply to the practice of mediation or conciliation.<sup>59</sup> This module cannot provide guidance to all possible scenarios or codes of practice. Instead we will discuss a number of scenarios that can create ethical challenges for mediators.

Michele Riley categorises some of the major ethical dilemmas faced by mediators as:<sup>60</sup>

- **Neutrality dilemmas**

- Relationships with parties
- Personal feelings about parties

- **Confidentiality dilemmas**

- Disclosure by mediator to one party of information revealed by another party in caucus;
- Disclosure by mediator to outsiders

- **Self-determination dilemmas**

- Solution is unfair to one party
- Solution is unfair to an outside party
- Solution is illegal or against public policy

- **Other ethical problems might arise where the mediator:**

- Engages in the unauthorised practice of giving legal or financial advice or counselling;
- Demonstrates poor judgment (e.g. failing to deal with a significant power imbalance, bias, etc.).

Mediators may also come across ethical dilemmas in the course of a mediation that are not typical or specifically covered by a code of conduct (e.g. where the mediator's personal values are impacted by what is happening in the mediation).

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<sup>59</sup> Sourdin, T., *Alternative dispute resolution*, Thomson Reuters, 2016, p. 501.

<sup>60</sup> Riley, M., *Ethical considerations in mediation*, conference paper, Asia Pacific Mediation Forum, Malaysia, 2008.

Where a mediator faces a tricky ethical dilemma in mediation, there are a number of options:

- Leave it alone;
- Address it with the parties indirectly by reality testing / doubt creation;
- Confront the parties with your dilemma;
- Take a break and seek advice (from supervisor or ethics advisory body);
- Terminate the mediation and withdraw as mediator;
- Report and take the consequences.

As a result of practice implications, mediators and conciliators could face situations which trigger emotional reactions and have practice applications. These situations are often experienced as ethical dilemmas, where mediators have competing thoughts, feelings and reactions about what they should do in given circumstances. These reactions stem from their attitudes, values, and beliefs. What becomes an ethical issue for one mediator may not necessarily be an ethical issue for another. Consider the following ethical dilemmas and how you would respond to them.

### 9.1 Activity: Ethical dilemmas

**Read through the following ethical dilemmas and find your own solutions.**

1. You mediate a neighbourhood dispute in an apartment complex. One elderly neighbour complains about the loud heavy-metal music that he is exposed to every weekend in the late evenings. You like heavy-metal music yourself and play in a heavy-metal band. You think the neighbour is exaggerating the complaint.

What would you do, if anything?

2. While listening to the discussions between two conflicting parties, you realise that your children go to the same school as the children of one party. It is most likely that you are going to run into each other after school.

What would you do, if anything?

3. In private session, one party tells you that they have no intention to settle and that they only see this mediation as an opportunity to test the other party's case since they will lodge a claim in court. In the private session with the other party, you hear that they want to prevent litigation since they are going to move to a different country and could not come back for a trial.

What would you do, if anything?

4. You are mediating a personal injury dispute between the injured person and an insurer. During the discussion, the injured party tells the insurer how difficult their situation is after the injury because her husband also suffers from prostate cancer and needs radiotherapy. You yourself are in a very similar situation and have difficulty coping with the topic.

What would you do, if anything?

5. You are conciliating a residential tenancy dispute between a tenant and a real estate agent. The agent claims that the tenant has abused his staff when she/he came around to do the final inspection. He claims that the tenant sexually harassed the staff member and so traumatised him/her that s/he had to take a week off work. The agent wants to claim damages for this assault from the tenant. The tenant has a very different story and claims that the sexual harassment came from the real estate staff member and s/he was traumatised. S/he is also contemplating to report it to the police if the matter of the bond does not settle in his/her favour.

What would you do, if anything?

6. You are mediating a dispute between a car repairer and a supplier of spare parts. The repairer was taken to court by a customer after the brakes on a repaired car failed, causing an accident and property damage. The repairer blames the accident on a faulty spare part manufactured by the other party, and wants compensation for the damage to the customer and to their reputation.

A few days after the first mediation session, you take your elderly parents car for service and you notice that the car service uses the same brand of spare parts than the ones in dispute in your mediation. The parties had chosen mediation because of its confidentiality.

What would you do, if anything?

## **9.2 Marketing and advertising mediation ethically**

Generally mediators are free to advertise their services in whatever fashion they find useful to grow their business. There are no advertising restrictions with regards to mediation. The NMAS Practice Standards require in s10.1 c viii that mediators market and promote their services honestly. This means the mediator should ensure that public statements promoting the business are accurate. Mediator should not make guarantees about results (but may provide client feedback if approved by both clients).

The mediator must also provide information to parties about all fees and charges for services. They must also obtain agreement from the parties as to how fees will be shared. Fee arrangements should be included in any written agreement with the mediator. A mediator must not make fees contingent on the outcome of mediation. A mediator may act pro bono or leave the fees to the discretion of the parties.

## **10.3 Suggested reading:**

Sourdin, T., Alternative Dispute Resolution, Thomson, 2016, p. 501-511.



## 10. The law relevant to mediators and to the mediation process



Disputants often engage in mediation or conciliation as an alternative to court trial. Therefore, many disputes are about litigable claims and counter-claims and the mediation process as well as the outcome of the process can have legal implications. While it is not required that mediators are legal practitioners, it is important for mediators to have at least a cursory understanding of the legal issues that commonly arise as part of the mediation process and also the potential contractual obligations that arise out of the provision of mediation services.

### 10.1 Agreements to mediate

Most mediators require the parties to sign an agreement to mediate. This is a contractual document which defines and regulates the roles and responsibilities of the mediator and the parties. Agreements to mediate are signed by the parties and the mediator either before or at the start of the first mediation session.

Mediation agreements usually include terms relating to:

- The appointment of the mediator.
- The role of the mediator.
- Conflicts of interest.
- Cooperation by the parties.
- Authority to settle and representation at the mediation.
- Confidentiality and any reporting of outcomes.
- Termination of the mediation.
- Exclusion of liability and indemnity of mediator.
- Cost of the mediation and payment of mediator's fee.

Should parties reconsider the use of mediation, break confidentiality, or show unacceptable conduct, the mediation agreement is what mediators can rely on to justify their actions and to protect themselves from liability claims. If the parties refuse to pay for mediation service received the mediation agreement is also the legal basis on which mediators can claim to be recompensed. As legal contracts the requirements for mediation agreements to be valid are determined by the law of contracts applying to the particular agreement.

## 10.2 Confidentiality

One reason why parties prefer mediation is that it can offer a private and confidential way of settling disputes. Court trials are public and can endanger the reputation of businesses or expose parties to further scrutiny of their actions. Courts and governments have recognised this desire for privacy and the protection of information exchanged in mediation to provide incentives for parties to settle their disputes outside the formal court system. Mediation and conciliation are also said to provide spaces in which parties can act more creatively and jointly search for win-win solutions because they are not constrained by the threat of having their offers and statements used against them later.

On the other hand, the functioning of the legal system and the administration of justice require transparency and publicity of actions and communication. Courts require access to what information is disclosed to assess whether parties may have defrauded each other or misrepresented their case. In general judges find it easier to make fair and just decisions if solid information and evidence are available.

These two public interests can be considered to be in competition with each other. Some commentators fear that without protection of confidentiality the use of mediation and other alternative dispute resolution processes would decline and put further strains on the court system. Because of this, mediation and conciliation are extended considerable protections of confidentiality in most Australian jurisdictions. If the process is part of a court-mandated mediation scheme, or if the conciliation occurs under specific legislation (for example the *Residential Tenancies and Rooming Accommodation Act 2008 Qld*), information exchanged during the mediation is normally considered confidential and inadmissible in later court processes.

Private mediators protect mediation processes through confidentiality clauses in the agreements to mediate that parties sign at the beginning of the process. A sample confidentiality clause is provided in the annex.

### 10.2.1 Confidentiality clauses

Mediation agreements commonly include a clause that sets out terms of confidentiality by which the parties and the mediator agree to be bound. Typically, the clause will explain the

extent of confidentiality in relation to information disclosed and all statements made at the mediation. The clause may address:

- The extent to which information exchanged in the mediation is privileged (not able to be used later in court).
- Comments made in the mediation are without prejudice.
- The extent to which discussions will not be disclosed to parties external to the mediation (as far as the law applies).
- When the law requires disclosure.
- If the matter progresses to litigation what, if any, information gained or statements made in the mediation may be used.
- Confidentiality agreements may also include clauses relating to future disclosure, subpoena or call to give evidence in relation to:
  - Any settlement proposal whether made by a party or the mediator.
  - The willingness of a party to consider any such proposal.
  - Any statement made by a party or the mediator during the mediation.
  - Any information prepared for the mediation.

### 10.2.2 Confidentiality under the NMAS

The NMAS makes the following provisions with regards to confidentiality:<sup>61</sup>

#### **9 Confidentiality**

9.1 A mediator must respect the agreed confidentiality arrangements relating to participants and to information provided during the mediation, except:

- (a) with the consent of the participant to whom the confidentiality is owed; or
- (b) where non-identifying information is required for legitimate research, supervisory or educational purposes; or
- (c) when required to do otherwise by law;
- (d) where permitted to do otherwise by ethical guidelines or obligations;
- (e) where reasonably considered necessary to do otherwise to prevent an actual or potential threat to human life or safety.

9.2 Before holding separate sessions with different participants, a mediator must inform participants of the confidentiality which applies to these sessions.

9.3 With a participant's consent, a mediator may discuss the mediation, or any proposed agreement, with that participant's advisors or with third parties.

9.4 A mediator is not required to retain documents relating to a mediation, although they may do so should they wish, particularly where duty-of-care or duty-to-warn issues are identified.

9.5 A mediator must take care to preserve confidentiality in the storage and disposal of written and electronic notes and records of the mediation and must

<sup>61</sup> MSE, NMAS Practice Standards 9.1 to 9.5. to ensure that administrative staff preserve such

Our recommendation is to use mediation clauses incorporating the confidentiality suggestions of the NMAS Practice Standards, and to discuss this with the parties if required. It is also often useful to discuss whom the parties are going to communicate with after the mediation, and to even develop joint statements about the outcome of the mediation that are agreed upon as part of the mediation agreement.

### **10.2.2 Without prejudice privilege**

“Without prejudice” is a legal privilege which prevents written and verbal communications that are made during the course of genuine negotiations conducted with a view to settling an existing dispute from being disclosed in a court hearing if the matter does not settle. If a statement or offer is made “without prejudice”, the common law accepts that the parties have agreed to keep it confidential in certain circumstances.

The conditions for what is considered communication without prejudice are:

- a litigious dispute exists between the parties;
- the communication is made with the express or implied intention that it would not be disclosed to the court if the negotiation fails;
- the purpose of the negotiation must be to attempt to effect a settlement.

The courts have investigated a number of limitations of the without prejudice privilege in the following cases:<sup>62</sup>

- Communication not part of the negotiation for settlement.
- Statements are unqualified admissions concerning objective facts.
- Misleading and deceptive conduct as referred to in the Competition and Consumer Act 2010 (Cth).
- Communications create an offer and acceptance and thereby a contract.
- Communications constitute criminal conduct.
- Communications prevent the court from being misled.
- Communications constitute tortious conduct.

### **10.3 Payment of the mediator**

Agreements to mediate will generally include a clause relating to the cost of the mediation. The agreement may include a schedule of fees and a clause outlining who is liable to the mediator for the mediator’s fee.

It is common for the parties to the mediation to agree to pay the fees and cost of the mediation in equal shares. The agreement may then stipulate the manner in which the fees and costs are to be paid. In Australia mediators set their fees themselves. They generally

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<sup>62</sup> Boulle, L., *Mediation: principles, process, practice*, LexisNexis Butterworths, 2015, p. 675.

range from AUD50 per day (for community mediation) to AUD12,000 per day (for commercial mediation).

#### **10.4 Enforceability of a mediated agreement**

Another issue that is commonly raised with regards to mediation is the enforceability of mediated agreements. It is useful for mediator to discuss the differences between non-binding goodwill agreement and a contract with the parties. Sometimes parties do not want any form of agreement at all, and sometimes it is necessary to create legally binding deeds with the help of legal representatives.

In very general terms, when an agreement is written, the parties have a contract, if the conditions for a contract are fulfilled (offer, acceptance, and consideration under the law of contracts). Such a contract is enforceable in a court just like any other contract. If a party does not fulfil their obligations then the other party has to sue for breach of contract. In family disputes and other court-mandated matters it is possible to turn these contracts into consent orders of the court and thereby make them directly enforceable.

Sometimes a mediation results in an agreement about some issues, but not all. In this case, a mediator should help the parties write an agreement on the issues which have been agreed upon and the other unresolved issues might be addressed at a later stage or using another process (such as arbitration).

#### **10.5 Liability of mediators**

In order for a mediator to be liable in contract or tort, the mediator must be proven to have:

- A duty of care to the client
- Breached that duty of care
- Caused foreseeable loss to the client

The consequences of this have meant that many mediators include standard exclusion clauses in both their mediation agreement and every settlement agreement, which state that the parties have had legal advice and that they have entered into an agreement freely. There are very few cases in which mediators have been sued successfully as it is often very difficult to show that the behaviour of the mediator caused the loss to the client. This is particularly the case when mediators adhere to the facilitative model and the potential mediation outcome are developed by the clients themselves and decided upon by the clients without intervention by the mediator. Mediator who practice a hybrid model under the NMAS (in which they provide advice and suggestions) do so at a much higher risk of being held responsible for the quality of their advice.

#### **10.6 Suggested reading:**

## 11. Mediation accreditation under the NMAS

In 2008 the National Mediator Accreditation System (NMAS) was introduced in Australia. The NMAS is a voluntary standard which is supported by major industry bodies, such as Resolution Institute or the Australian Mediation Association (AMA). Mediators who want to apply for accreditation have to meet certain requirements under the standards. They also have to apply to Recognised Mediator Accreditation Bodies (RMABs), and may have to undertake an assessment of their mediation skills. After the introduction of the standards an umbrella organisation, the Mediator Standards Board (MSB), was founded. All RMABs and a number of other training providers in Australia are members of the MSB. Under the guidance of the MSB board the NMAS standards were revised in 2015.

### 11.1 Requirements for accreditation<sup>63</sup>

- Good character and capacity to perform professional practice
- Undertaking to comply with Standards
- Pay the MSB registration fee
- Insurance
- Membership of organisation with complaints scheme/professional support
- Competence (education, training, experience)

Training requirements:

- Minimum 38 hours of training within 24 months
- Two accredited and experienced instructors
- One accredited coach for every three participants in two simulated mediations of at least 1.5 hours duration
- Nine simulated mediation sessions: 3 as mediator
- 2 with written debriefing feedback from different coaches

### 11.2 Initial accreditation<sup>64</sup>

- Simulated mediation of at least 1.5 hours duration
- Assessor observes mediation or video recording of simulation without providing any coaching to the applicant during the simulation
- Assessment criteria reflecting the knowledge, skills and ethical principles articulated in the Practice Standards
- Feedback on the assessment given to the applicant

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<sup>63</sup> MSB, NMAS Approval standards, S.2, p. 3.

<sup>64</sup> Ibid.

- Or comparable training and assessment or experience, education and assessment

### 11.3 Accreditation renewal requirements<sup>65</sup>

- Every two years.
- Sufficient practice experience:
  - 25 hours of mediation/co-mediation/conciliation; or
  - In special circumstances, 10 hours (plus top-up training)
- At least 20 hours of continuing professional development:
  - Participating in education
  - Reflecting on practice
  - Providing professional development
  - Credit for related professional CPD
  - Learning from practice
  - Self-directed learning
  - Other means approved by the MSB on application by an RMAB

### 11.4 Suggested reading

Mediator Standards Board, National Mediator Accreditation System, 2015, available at <http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>

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<sup>65</sup> MSB, NMAS Approval standards, S.3. pp. 5-6

## 12. Appendix

### 12.1 Reflective practice and debriefing questions

- What went well?
- What did you do well?
- What would have been helpful for you to have done this perfectly? What would have been good enough?
- What would you have needed to do to for this to have gone differently?
- How do you work best? What are your aspirations as a mediator? How do your actions tie in with your practice?
- What do you need to be clearer on? How would you know when you got there?
- Helping the mediator looking at it from different angles 'walk around the statue' lets journey around the statue, e.g. what was presented in the case.
- What would the mediator have liked to have happened?
- If things had gone well what would have happened? How would you know?
- What could the parties have done differently?
- Which techniques do you think would have been useful?
- Whose problem is it?" "How can you contribute to bring change about?
- Is there an issue that needs to be addressed & is not being addressed?

### 12.2 Sample agreement to mediate<sup>66</sup>

#### Agreement to mediate

Names of parties: \_\_\_\_\_

Brief description of dispute: \_\_\_\_\_

The parties agree to enter into mediation and appoint \_\_\_\_\_ ("the mediator"), with the intention of reaching a consensual settlement of their disputes. The mediator accepts this appointment. They further agree and understand that mediation will take place on the following terms:

1. The mediator is a facilitator who will assist the parties to reach their own settlement. The mediator will assist the parties to communicate with each other, exchange information and seek understanding, as well as to identify and clarify dispute issues and underlying needs, consider alternatives to a mediated agreement, and help to them to generate and evaluate options and negotiate with each other.
2. The mediator will not make decisions about 'right' or 'wrong', tell the parties what to do, or impose a decision on them. Any comments, opinions, suggestions, statements or

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<sup>66</sup> Based on Sourdin, T., *Alternative Dispute Resolution*, Thomson-Reuters, 2016, pp. 688-691 and Boulle, L. and Alexander, N., *Mediation: skills and techniques*, LexisNexis Butterworths, 2012, pp. 397-402.



recommendations made by the mediator are not binding on any party. The parties reach their own decisions in the process.

3. The mediator is not required to offer legal advice nor provide legal counsel. Where applicable, each party is advised to retain his or her own lawyer or other adviser in order to be properly counselled about his or her legal interests, rights and obligations.
4. The mediator will abide by the Practice Standards as provided by the National Mediator Accreditation System (NMAS) published by the Mediator Standards Board.
5. If the mediator becomes aware of any circumstances that she or he considers might affect her or his capacity to act fairly and to treat the parties equally, s/he will inform the parties, who will then decide whether to continue the mediation with the mediator. The parties accept that the mediator's ordinary personal and professional relationships with lawyers and corporate and government officials do not affect her or his capacity to act impartially.
6. The mediation will be conducted in a manner that the mediator considers appropriate to a fair and constructive resolution of the dispute in accordance with the Practice Standards of the NMAS.
7. It is understood that in order for mediation to work, open and honest communications are essential. Each party agrees to cooperate and act constructively and courteously throughout the mediation, and comply with reasonable requests and process interventions given by the mediator.
8. The mediation conference will be held on \_\_\_\_\_ (insert date). Each party must attend the whole mediation conference or send a representative with full authority to settle the dispute binding to the party.
9. A party may appoint legal practitioners and other support people only with the approval of the mediator. A person representing or assisting a party must act consistently with that party's obligations.
10. As part of the mediation, the mediator may schedule a preliminary conference at a time or place convenient to the parties to discuss each party's views and needs for the mediation and to agree on a timetable and other preliminaries. These conferences will be held separately with each party and the mediator will not provide any information provided by one party to the other.
11. All written and oral communications, negotiations and statements are made in the course of mediation will be treated as privileged settlement discussions and are absolutely confidential. Therefore:
  - 11.1. The Mediator will not reveal anything discussed in mediation without the permission of both parties. It is understood that the mediator is not required to maintain confidentiality if he has reason to believe that a child is in need of protection or if either party is in danger of bodily harm or there is imminent danger to property.

- 11.2. The parties agree that they will not at any time, before, during or after mediation, call the mediator or anyone associated with the mediation as witnesses in any legal or administrative proceedings concerning the dispute.
- 11.3. The parties agree not to subpoena or demand the production of any records, notes, discs or the like of the mediator in any legal or administrative proceedings concerning the dispute.
- 11.4. The exception to the above is that this Agreement to Mediate and/or the Settlement Agreement (if the mediation leads to one) may be produced in any subsequent court proceedings.
- 11.5. The mediator will return or destroy all documentation other than the Agreement to Mediate and the signed Settlement Agreement.
12. Participation in the mediation is voluntary. A party may terminate the mediation at any time after consultation with the mediator.
13. The mediator has a discretion to terminate or suspend the process at anytime.
14. The parties decide if they require a written or oral agreement and if they consider their agreement binding in the form of a contract or simply a goodwill agreement. If a Settlement Agreement is reached at the mediation, the mediator, with the consent of the parties, may assist them in writing down the heads of agreement or the agreement terms. If the parties desire to have the agreement recorded as a deed, they undertake to contract a legal practitioner to do so.
15. It is understood that full disclosure of all relevant and pertinent information is essential to the mediation process. Accordingly, there will be a complete and honest disclosure by each of the parties to the other and to the mediator of all relevant information and documents. This includes providing each other and the mediator with all information and documentation that would usually be available through the discovery process in legal proceedings. If either party fails to make such full disclosure, then any agreement reached in mediation and subsequently confirmed by the lawyers for each party is at risk of being set aside in later court proceedings.
16. The mediator will not be liable to a party for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent. The parties, together and separately, indemnify the mediator against any claim for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent.
17. The parties agree to share the costs of mediation. Each party is responsible for paying its own costs and expenses of the mediation. The costs of the mediation are the following:
- 17.1. For the preliminary conference, all preparation time and the first four hours of the mediation session: AUD1500.00 plus GST (AUD750 plus GST to be paid by each party to the mediator).

17.2. Time beyond the first four hours of the mediation session will be invoiced at AUD150.00 plus GST per hour (AUD75.00 plus GST to be paid by each party per hour).

17.3. Room hire will be organised by the mediator and charged to the parties at cost.

17.4. The fee for the preliminary conference, preparation and the first four hours plus room hire is to be paid in advance prior to the preliminary conferences.

17.5. Any additional fees are to be paid within 30 days from the receipt of the invoice.

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Party 1 name	Signature	Date
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Party 2 name	Signature	Date
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Mediator	Signature	Date
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### 12.3 Sample confidentiality agreement<sup>67</sup>

#### Confidentiality agreement

As the condition of me being present at or participating in this mediation I agree to preserve total confidentiality in relation to the course of proceedings and all exchanges within the mediation that may come to my knowledge, whether oral or documentary, concerning the dispute passing between any of the parties and the mediator or between two or more of the parties within the mediation, unless otherwise compelled by law.

This agreement does not restrict my freedom to disclose and discuss the course of proceedings and exchanges within the mediation within the organisation and legitimate field of intimacy of the party on whose behalf or at whose request I am present at the mediation, including the advisers and insurers of that party, provided always that any disclosures and discussions will only be on this same basis of confidentiality.

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Participant name	Signature	Date
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<sup>67</sup> Based on the confidentiality agreement from the Office of Consumer and Business Affairs Retail and Commercial Leases Mediation Scheme (South Australia) published in Boulle, L. and Alexander, N., Mediation: skills and techniques, LexisNexis Butterworths, 2012, p. 403.

## 12.4 Sample mediation agreement

### **Mediation agreement**

In the dispute over a maintenance pump installation contract between Coral Views Aquarium (55-90 Coral Esplanade, Gold Coast) and Aquarium Technology Centre Pty Ltd. (72-24 Ridge Rd, Gold Coast), the parties have engaged in mediation on 18 August 2016. After discussing the different issues and exchanging views and proposals the parties have decided to settle the dispute according to the following terms:

1. Coral Views will pay in full invoice no. 542287 issued on 23 July 2016 immediately and provide proof of payment to Aquarium Technology Centre before close of business on 19 August 2016.
2. Aquarium Technology Centre immediately returns to work to finish the installation of pumps and systems for stage 2 of the project according to the original contract between the parties.
3. All work carried out on site at Coral Views will be personally supervised by Sandy Peterson, manager and owner of Aquarium Technology Centre.
4. Aquarium Technology Centre will provide space for the remaining specimen of tanks 04, 08, 13, 14 and 16 in display tanks at Pacific Fair Shopping Centre Broadbeach which are managed by Aquarium Technology Centre. This is on the condition that the water quality has been confirmed by a technician from Coral Views. The water quality testing will occur on 19 August 2016 at 10.00am. Aquarium Technology Centre will also provide a written letter of approval from Pacific Fair Shopping Centre that the centre management approves the storage of the animals and coral in the tanks for the purposes of a short-term special exhibition including signage advertising Coral View.
5. At the end of stage 2 of the pump installation Aquarium Technology Centre will provide water quality readings to Coral Views and the parties will decide together whether the work has been carried out according to the contract.
6. Only after stage 2 has been completed as agreed by the parties in section 5 of this agreement will the parties engage in stage 3 of the project. If the parties cannot agree on successful completion then Coral Views will have the right to terminate the contract after delivery of stage 2 with no further financial obligations for stage 3.
7. In case that further problems or disputes arise out of the implementation of this agreement or the further implementation of the original contract, the parties agree to return to mediation in accordance with the fee schedule provided by the mediator in the Agreement to Mediate.
8. The parties agree to keep the deliberations that have taken place during the mediation confidential between employees of their respective companies, not including this mediation agreement.

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Thomas McIntire, Coral Views

Signature

Date

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Sandy Peterson, ATC

Signature

Date