Mediation, Negotiation and Conflict Management Skills Training

Spring 2015
(Compendium from 2005-2015)

Flip Chart Notes

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Compendium of Flip Chart Notes 2005 - 2015

Differences and Disputes, Why do they arise, why don't they resolve?

- Thoughtlessness
- Communication breakdown
- Lack of knowledge / information
- Personality clash / different styles
- Ideologies
- Humanity
- Hidden agenda / underlying issues / suspicion
- All think we're right / sense of entitlement
- Ego / pride
- Systematic Failure / missing early warning signals
- People Make Mistakes
- Uncertainty / ambiguity
- Fault:
    - Wrongs
    - Blame
- Frustration
- Fear of loss of face
- Perceived abuse / imbalance of power/ lack of control over events and reactions
- Greed
- Costs / Money
- Unrealistic / different expectations / objectives / values / perceptions / beliefs / assumptions
- Interpretation / Misinterpretation
- Wants / needs mismatched
- Unwillingness to compromise / see other side
- Different perspectives
- Entrenchment
- Failure to listen / systems prevent listening
- Social embarrassment
- Unforeseen circumstances
- Stubbornness / defensiveness / avoidance / denial / deference
- Mistrust and lack of trust
- Misunderstanding / language
- Layers of dispute
- Delays in decision-making / lack of time
- Bureaucracy / institutionalisation / hierarchies/ history
- Incompetence
- Lack of respect / imagination / resources / creativity / flexibility / empowerment
- Personal /institutional baggage/ history
- Slight on professionalism
- Bias / prejudices / vested interests
- Cultural differences
- Vulnerability / feelings of threat
- Bullying / victimisation
- Personal feelings e.g. hurt
- Polarisation / entrenched positions
- Vicious cycle
- Lack of understanding of objectives
- Control issues
- Tribalism
- People think they want their own way
- Conflict can be enjoyable / self-affirming
- Win/lose paradigm / Adversarial mindset
- "Day in Court"
- Lawyers may not encourage resolution
- Different resources
- Want a third side to decide
- Too many parties
- Underlying purpose / Motivation / Agenda
- Lack of Accountability
- Cautiousness
- People don't want resolution / in love with conflict / systems depend on disputes
- Different levels of importance to people
- Competition / jealousy
- Being taken advantage of/Need for justification/Injustice
- Lack of reciprocation
- Lack of confidence in the process
- Fear of end-game
- Stereotyping
- Black and white thinking
- Fear of change
- Not feeling heard
- Culture of entitlement; rights v's responsibilities (in the individual sense)

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Symptoms of Conflict / Effect on Individuals in Dispute

- Emotion
- Loss of Control
- Sacrifices
- Depression
- Loss of Focus
- Unproductive / reduced performance
- Withdrawn / isolated / rejected
- Avoidance of emotion / situation / argument
- Personalisation
- Inadequacy
- Waste of time
- Damaged relationships
- Hurt
- Disappointment
- Suppression – Shutting Up
- Loss of energy
- Anger – (Can't) Vent / annoyed
- Shock / panic
- Entrenched
- Say what not mean
- Fear of Failure / fear of resolution
- Fear of Exposure / Publicity
- Stress / anxiety
- Loss of health
- Lack of Concentration / judgement
- Loss of/Low Self Esteem / morale
- Loss of Confidence in self and others
- Defensive / aggressive / retaliation
- Protect self and own interests
- Loss of trust
- Frustration / Indignation
- Resentment /shame
- Cost – more disputes (time/money/personal/business)
- Distraction from business / failure to meet objectives
- Loss of talent
- Loss of creativity / opportunity
- Mistaken perceptions / misunderstood
- Empowering / energising / enjoyment
- Motivating!
- Forgiveness
- Bitter
- Intrigued
- Powerlessness/De-motivation
- Bored

What do people want from a conflict?

- To win
- To save face
- Closure
- Recognition
- Apology
- Explanation
- Assurance it won't happen again
- To be heard / listened to
- To be understood
- To avoid consequences
- To move forward
- To be treated with respect
- Validation
- Resolution / Solution/Closure/Drawing a Line
- Confidence
- Building Trust
- Someone impartial
- Recognition / Engagement
- What people need may not be what they want

Why is negotiation the preferred option?

- Lower cost / less time
- Parties participate / retain control
- Safe opportunity to deconstruct & reconstruct
- Opportunity to have your say / be heard
- Certainty / manage risk / influence outcomes
- Preservation of relationship / morale / minimise stress / anxiety
- Should be quicker, but can fester
- Parties are keen to negotiate if they think they are going to lose
- Public perception
- There is always a risk in Court of the decision going against you
- Easy to organise
- Opportunity to be creative / expand range of outcomes
- Confidential
- Greater satisfaction
- Builds capability to resolve in the future

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The Power of the Pause

- The pause gives other parties time to listen and reflect
- Can be used as a tool
- Can diffuse a heated situation better than language
- Allows you to think before you speak and to consider response
- Make notes
- Attention grabber
- Adds emphasis and authority
- Breath and take stock
- May increase the pressure on the individual

What Builds Rapport?

- Respect
- Trust
- Body Language
- Being open
- Eye contact
- Sympathetic mirroring, but not to excess
- Trust
- Acknowledgement
- Acceptance
- Exploration
- Explanation
- Reassurance
- Recognition
- Common ground

What Destroys Rapport?

- No response back
- Mixed messages
- Criticism
- Lack of knowledge
- Discourtesy
- Dishonesty

Reflections on Listening Exercise

- It's very difficult not to ask questions / butt in
- You have to concentrate – pay attention to the details, listen at the margins
- You have to shut out everything else – ignore the distractions
- Can be quite stressful
- Easier when you have an interest
- Can be a lot of internal noise from your own thoughts
- Active listening is a skill, which we need to learn
- Can help by nodding, smiling, body language – non verbal cues
  80% of conflicts arise out of miscommunication

Forms of Questions

Open

Keep them short and simple – one point

- -Who
- -How
- -Why
- -What
- -Where
- -When

Closed

- You think you know the answer
- One danger of knowing the background is that you assume you know all the answers and ask closed questions
- These only allow the respondent to reply "yes" or "no"

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Good Questions to Ask

- The best questions are future-focused
- How would you like to feel this time next week? / Where would you like this process to be this time next week?
- What options/choices are available to you?
- What happens when you consider separate the problem from the person?
- Where will you be if this process fails?
- What was it like when things were good between you?
- What (non-monetary) price are you paying as this conflict continues?
- What would you need to communicate if today were your last ever conversation with X?
- What else can you offer?
- What are your emotions?
- What would the press-release of this say about you?
- What would your victory speech say? What would the other side's victory speech say? How could you each help write the others?

What Does a Mediator Add?

- Impetus – gets things going – avoids loss of face – a catalyst
- Provides a vehicle / platform by which two parties can come together –gives the parties the beginning of a relationship, as they are working together
- Structure – a safe space to move things forward
- Powerlessness of the mediator v Power of the Process – in Powerlessness lies Power
- Creativity – presents a new vehicle for reaching solutions
- Positivity

Common Mistakes of a Mediator

- Counselling the parties rather than mediating
- Imposing the mediator's ideas / solution on the parties
- Over controlling / directive / argumentative
- Working at own pace
- Inflexible
- Making assumptions
- Being evaluative / Pre-judging
- Breaking confidentiality
- Poor listening, cutting in
- Not intervening when it's appropriate to do so
- Dismissing options
- Not using the pause
- Failure to summarise
- Lack of preparation
- Not understanding authority issues/loss of authority
- Poor use of language
- Closed questions
- Not concluding all outstanding issues
- Owning the problem – it's the parties problem and their solution
- Not picking up on clues from the parties
- Wanting to be everybody's friend
- Trying too hard / becoming over involved
- Rushing / Cutting short
- Failing to properly update each side as to time-scales
- Giving up / Patronising
- Over encouraging
- Being a counsellor / advocate
- Sympathising as opposed to Empathising
- Partiality/Judging
- Taking notes inappropriately
- Showing frustration/exasperation
- Putting pressure on parties

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Mediator Skills

- Calm empathy
    - Composed body language / speech / tone
    - Listen, summarise
    - Reflect back
    - Gravitas/credibility / quiet confidence
- Impartiality / Multi-partial?
    - Equal airtime / eye contact for both parties
    - Even handedness / trustworthy
    - No expression of mediator's own opinion
- Explain Role / Process authoritatively
- Not an adviser: "from what you have told me.." "As I understand it.."
- Self aware / Awareness of own bias, and of others' preferences/differences
- Active listening
- Agility of thought / appropriate movement of process
- Involve – check the parties' understanding
- Get them to speak – open questions
- Encouragement
- Ownership of the process belongs to the parties
- Fluidity / Flexibility in using the process, working with people, within a structure
- Explaining that the process is voluntary – safety
- Organisation / preparedness
- Avoids jargon, able to reframe, paraphrase, reflect back
- Respect for people – separate people from the problem, individuals from the issues
- "Empathetic objectivity"
- Controls own emotions, manages others', defuses tension
- Allows parties some control, exercises some control
- Models good skills
- Non-threatening / non-judgmental / reassuring
- Takes time, enables parties to do the work / time management
- Avoids going to solutions early
- Analysis and distillation
- Lightness of touch / quiet strength
- Ability to distil
- Separating people from the problem
- Authenticity
- Compassion / Humility / Humanity
- Emotional control – empathy with authority
- Creativity
- Intellectual understanding
- Juggling
- Full of care
- Head – a lot of what we do in life is "head driven" – it is important we understand why we do what we do
- Body – the physical way we conduct ourselves, our posture, the signals we give off
- Soul – our spiritual intelligence (regardless of faith/religion)
- Curiosity
- Resilient
- Builds rapport

Mediator Qualities

- Energy
- Enthusiasm
- Engagement
- Empathy
- Encouragement
- Empowerment
- Exchange (of information)
- Persistence
- Patience
- Perseverance
- Perspiration
- Preparation (not over much)
- Precision
- Passion
- Humility, responsibility, courage and discipline
- Quiet Authority
- Present, mindful and thoughtful

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Every Mediation..... A Balance

- People - Issues
- Detail - Big picture
- Specific - Global
- Widening - Narrowing
- Opening up - Closing / Tidying
- Support - Challenge
- Past - Present - Future
- Measured - Momentum
- Slower - Faster
- Focussed - Fuzzy
- Driving Pulling back
- Legal - Personal - Commercial
- Content - Process
- Coaching - Directive
- Calm - Energised
- Together - Separate
- Pastoral - Practical

Lessons from the Role-play Sessions

- Preparation is hugely important
- Consider environmental factors, room & layout, space for self, benefit of getting out for walks, etc.
- Be respectful
- Top and tail each session with the confidentiality point
- Open questions are powerful
- Think before speaking
- Dig a little deeper
- Ask one question and STOP!
- Don't rush – take and give time
- Pace
- Choose words
- Non verbal
- Concentrate in the moment
- Parity
- Find balance
- Don't let your own agenda drive proceedings; work with people where they are
- Consider side issues which may affect the mediation process
- Listening at the margins and in the moment, and not thinking ahead, picking up from answers
- Pay attention to detail
- Find out what you need to know
- Summarise
- Understand the theory of conflict
- Clarify
- Pause & re-frame
- Encourage / reassure
- Avoid assumptions
- Encourage parties to communicate – reassurance – you, process
- Silence is OK
- Importance of breaks – short / longer – take stock / time
- Beware of perception of being judgemental
- Remember how easily trust can be broken
- Be aware of the self
- Expect the unexpected
- Let it flow and maintain control!
- Compartmentalise effectively
- It's not the person, it's their behaviour
- Conscious incompetence
- Flexibility, multi – faceted
- Don't jump to conclusions
- Clear purpose
- Ask the obvious question
- Employ certain phrases that work for you
- Be yourself
- reactive devaluation
- check own biases
- no right or wrong
- don't make automatic assumptions, and apologise for these when they happen

Language / Jargon

- "Differences" not "disputes"?
- "Outcome" / "resolution" / "agreement" / "action plan" not "settlement"?
- "Recognition / "acknowledgement" or "apology"
- "Stepping stones"
- "Meeting together" or "joint session"

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- “Private meeting” or “one to one”
- “Opening statements” or “discuss how see things”
- “Issues” / “factors” / “positions” / “explore”
- “Drill down”
- “Brainstorming / mind-mapping”
- “Let’s park” or “leave to one side/come back
- “Parties / other side” or “name/participant”
- “Caucus”
- “Milestones
- “Process” or “do today”
- “Framework”
- “Without prejudice” or “without effect”
- “Exploration”
- “Non-binding””
- “Facilitate”
- “Confidentiality”/ “rapport”/ “engagement”/ “resolution”
- “Unpack”
- “Reframe”

Language – Component Parts

7% Verbal

- Every word must be carefully chosen
- Provide clarity for your audience and have respect for their level
- Precision is key
- Sift out inferences/assumptions
- A mediator’s job is to express, not impress
- Be aware of violent and non-violent language – re-frame to neutralise

38% Vocal

- Tone
- Volume
- Speed of delivery
- The pause between information imparted
- Pitch & range – no need for monotony

55% Visual

- Be mindful of your entry to the room
- Be mindful of your dress & appearance; when in doubt, go more formal, rather than less
- Eye contact – should be 80% of the time
- Energy; retain yours, even when tired, simulate it when necessary, but remember that authentic is better and plan for this
- Posture
- Gesture (but not overly so)
- Facial expression
- Self-control (controlling physical manifestation of your emotions on the picture-book of your face)
- Pause and elongate the process
- Don’t fidget – it’s non-verbal leakage!
- Use of space
- Watching – opposites attract, but only if a magnet!

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Choices

- "Problem" "Opportunity"
- "Justification" "Explanation"
- "Blame" / "Fault" "Responsibility"

- **P**ersonalise **I**ndividual Respect
- **P**roblem **I**ssues
- **P**ositions **I**nterests

Modes & Phases

Early Stages

- Open questions
- Opening up issues / living with uncertainty
- Open / inviting / relaxed / more laidback
- Listening / gathering of understanding

Later Stages

- More closed / focused
- Narrowing issues
    - clarity
    - focus
    - direction
- More demanding
- Challenging
- Tidying up
- Business-like tone
- Influencing the parties to think constructively
- Posing what if? questions, hypothesising
- Put parties in the other's shoes
- Generating options – range of possible outcomes

(See Appendix)

Transitions

- Change of pace / location / topic / grouping

Use of Flip Charts

Purpose

- Engages people – assists understanding
- Lifting eyes and engages creativity
- To contrast assisting parties and aide memoire
- Generate ideas / involve parties / measure progress / clarify / gives structure / plan next meeting / collaborate
- Externalise ideas
- Emphasise progress / reinforcement
- Offer ideas to be challenged
- Method to reframe / control conversation
- Visual - symbolic
- Buys thinking time
- Record agreement as you go
- List of points / clarify
- Can track change / difference / common ground / shared experience
- Change tone / dynamic
- Focus for discussion on the problem, not people / on issues not positions

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- Prioritise / distillation
- Enables joint-working
- Marks the journey / records contribution
- As a focal point, it is an authoritative tool
- Makes an impact
- Shared record – reduces risk of error / misunderstanding
- Reality check – focuses mind
    - agenda
    - issues
    - options
    - possible solutions
    - figures
- Pause: gather thoughts
- Ask for any further suggestions
- Diffuses tension
- Brainstorming
- Acknowledges – demonstrates understanding
- Instant saving

Tips / How to Use

- Ask permission to use
- Identify purpose
- Big enough writing / legible / quick / clear / simple
- Avoid numbering / preferences
- Don't prioritise - Use bubbles or bullet points
- Watch spelling / Use colour (but beware that some colours can't easily be read)
- Move chart towards the people / Stand to the side (avoid "teacher mode")
- Few words / brevity / cues / bullet points / diagrams / graphics and other visuals
- Capture the essence, not the surplus
- Sit down between adding things – don't dominate / lecture
- Parties' ideas – own words or reframed? e.g. "topics" not "wants"
- Maintain confidentiality in use – clear / cover up
- Who writes? You? Party? Second / assistant mediator? Control the process / control the pen
- Avoid wish lists
- Language: accuracy / reframing, using neutral or positive words, keep it simple
- Maintain confidentiality – think about windows and open doors / take paper away after mediation? Give to a party to take away?
- Think about the positioning of the chart
- Use lower case for main body of text
- Be meticulous when using precise figures
- Put the sheets on the walls – as a reminder
- Avoid solidifying the position
- Use to assist pause / taking stock
- Avoid use at the wrong time
- Don't allow it to be a momentum-killer
- Re-frame dangerous/destructive language
- Use clear headings which accurately describe the content/aim of the meeting e.g. successful family relationship

Preparation for mediation

- Ask yourself "What assumptions have I made"
- Read the papers the parties have supplied
- In technical cases it helps to know the jargon
- Transparency of the process

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- Venue
- Confidentiality -outside contact – phone calls
- Names -very important to get the right balance
- Seating -move it around if you want to
- Assumptions -don't assume you know who's hurt
- Meetings -can be the keys to unlock the process
- Mini mediation -within teams
- Strategy -remember the big picture
- Cues/Clues -don't let the bigger picture stop you seeing smaller issues arising
- Pace -very important, you can get a lot of information across

Centring

- Leadership Embodiment – Wendy Palmer
- 1. Uplift: breath in – up spine; breathe out – down spine
- 2. Expand – supportive hands on balance
- 3. Settle – soften shoulders

Negotiation/ Deadlock – when the going gets tough

- Normalise "Let's have a chat"
- Summarise : gains / progress / identify the issue
- Acknowledge emotion
- Acknowledge parallel lines
- Productive pressure
- Remind the parties of their objectives / big picture / what really matters / priorities
- Remind the parties of the consequences of no resolution
- Be positive – look forward
- Move from Small to Big Picture – and vice versa
- Widen perspective – visualise future
- Mutualise / common ground / reframe
- Give to gain / concessions and gains: "You don't have to blow out someone else's candle to let your own shine".
- Match pace and tone
- Problem solving approach
- Set agenda / target
- Set tone with positive acknowledgements & re-frame negative language
- Keep asking questions – "What am I missing?", "Why is there a block?"
- Test assumptions / perceptions
- Reality testing
    - "What will the judge decide"
    - "What factors…"
    - Not a "magician"
- Other side's shoes / perspective
- Objective / external criteria
- Exchange information
- Keep options open
- Commercial realism
- Avoid bottom line thinking
- Walk to the abyss in non-threatening way / take to the edge / go to the balcony
- Settlement now looks more attractive
- Use everyday language
- Hypothesise – "what if…?"
- Ask 'Cloke' questions
- Risks – assess, analyse, manage
- BATNAS / WATNAS / RATNAS/ Consequences
    - Legal
    - Costs
- Non-monetary costs (stress, time, reputation)
- Focus on interests not positions
- Ease off / keep calm
- Coach in negotiation skills
- Help to save face
- Parallel lines – Park issues
- Give parties responsibility: "What can you do to make a difference"
- Change grouping / teams / environment / dynamics / venue / seating
- Change your topic/tact/tone/position
- Test for durability / workability / practicability
- Taking a break / take stock / Go for a walk
- Be honest
- Live with discomfort
- Let the process do the job!
- Don't work too hard: "as little as possible, as much as necessary"

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- Seek advice if permissible
- Good questions: “What are the bright spots?”
  “what worked?” “what opportunities?” “what could you say to surprise them?” “If resolve today, how will you feel?” “what is it really about?” “what can you do that might change the situation?” “how can you persuade them?”
- Bringing everyone together
- Work with advisor / team dynamics
- Risk assessment
- “What are the risks?”
- Use the flip chart to drill down to specific questions e.g. expenses or costs.
- Benchmark against the future e.g. “when you wake up tomorrow, how will you feel if this has worked/not worked?”
- It is YOUR choice, YOUR responsibility (not the mediator’s!)
- Negotiation / Deadlock: Unlocking Relationships
- Summary: take stock / set the scene / reflect on what has already been discussed
- Use phrases such as “This really matters”, “Were there any good times?”, “Tell me about some of the good times”, “Would you like to be able to do something about the current situation?”
- Moving from the past to the future
- What needs to happen? What is the cost of you holding onto [x]? Can you find a way to let go?
- What needs to be different? *Let the participant work this out for themself – do not tell them how to feel.*
- What needs to be done today? What do you need to be able to say? What ensures that this will work for both of you? What does he/she/they need to say to you?
- Use of role play “Assume I am A, say what you need to say to me…”
- What else?

Best
Alternative
To
Negotiated
Agreement

Worst
Alternative
To
Negotiated
Agreement

Realistic
Alternative
To
Negotiated
Agreement

Reality Testing

- Make them think
- Specific open questions – under the surface
- Body language
- Take them to the brink, bring them back
- Re-evaluate what is important
- Change the benchmark
- Offer opportunity to stop the mediation
- What are the alternatives? BATNA/WATNA
- Move from ‘wants’ to ‘needs’
- Engage emotions
- Normalise frustrations
- Pause, silence
- Saving face
- Avoid becoming adviser

Strategic Exchange of Information

- Be calm
- Listening, watching, acknowledging, referring back
- Timing
- Purpose
- Tone
- Words / reframing
- Preparation
- Confidentiality
- Specific authority
- Mediator is not a mere messenger
- Take stock at end of meetings
- Explain role of mediator
- Changing atmosphere / encouraging change of view /behaviour / signs of hope
- Seating position varies
- Permission / incentive / explanation
- Precision important

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Dealing with Emotion

- Be calm, honest, listen, watch, acknowledge, reflect back
- Silence can stop emotional reactions - pause
- Conversational techniques – more exploring – looping back
- Catharsis – allow to vent
- Focus on practical issues
- Challenging in an empathetic way – but still challenging, reality checking
- Change atmosphere – mirroring or leading
- Normalise, reassure that emotion is OK
- Keep process safe
- Take care with language, measured?
- Empathy, not sympathy
- Seating, posture, eye contact, tone, nodding
- Take a break – pause
- AA, RR, EE (Acknowledgement, Apology, Recognition, Reassurance, Explanation, Engagement)
- Reframe
- Appropriate humour
- Remind of Objectives
- Options/choices
- Avoid self-justification if challenged
- Emphasise role of mediator, responsibility of party / remind of mediation agreement

Tasks

Ask the party to think about

- Strengths & weaknesses on both sides
- Good points & bad points of parties' cases
- Pros & cons
- Support / justification
- Objective criteria
- Options
- Alternatives
- Get them to use flip chart!
- Pick up in subsequent meetings

Challenges to the Mediator

- Let the parties have their say – if they want to vent spleen, let them
- Usually this problem occurs in private sessions
- You can try and remove an individual in a team who is holding the process back
- Challenges over what the other party have said to you require careful reiteration of the confidentiality of the process – try to give a positive response
- When frustration sets in around 4pm remain positive, play up the positive, remind them of the progress already made
- Remember the flexibility in the process – don't just follow a check list
- Look for underlying concern, don't make assumptions
- Deal with discretely and frankly

Notes/Note-taking

- May need to record some key things
- While you are Summarising is a good time to make notes
- Take a break to make notes if helpful
- Don't hold your pen/click your pen whilst the participant is talking!

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Reframing

- Mutualise / Neutralise
- Focus on the positive
- Focus on the future
- Rub out bottom lines
- Taking the sting out of comments
- Detoxify the language
- Global → Specific
- Specific → Global
- Frame in time to avoid parties cementing their positions
- Change the perspective - 75% chance of a win becomes 25% chance of losing
- Get one party to reframe what other said: to check understanding

Ethics & Professional Conduct

- The Code of Conduct in the Standard Documents gives a framework for regulation
- Competence – quality assurance
- Conflict of Interest – think carefully about relationships that might effect your position

Role of Lawyers and other Advisers

- Respect for all, work with them
- Build rapport
- Usually vital to the process if involved: look for “random” opportunities to meet and chat
- Recognise different and difficult roles
- Recognise the advisor’s stake
- Change groupings if helpful – parallel meetings. Change group dynamics.
- Involve them, engage them in finding solution, helping client to address real issues
- Understand their needs and concerns too
- Role: advocate, advisor, negotiator, friend, challenger, drafter

When the Going Gets Tough

- Pause – regroup/time out/reflect
- Get parties to work it out
- Use inclusive language
- Be yourself
- Lightness of touch/Appropriate use of humour
- Breathe
- Change dynamics – yours: e.g. body position; theirs: e.g. room
- Ask questions
- Stick with the process
- Review progress made so far
- Summarise/task/flip chart
- Honesty – take stock/own up to mistakes
- Wind back – use flexibility
- Help save face
- Beware cultural differences
- Use different groupings
- Go to balcony/Abyss
- Get in others shoes

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NLP Presuppositions

See Appendix 3, p 27

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The Mediation Process

Preliminary Meetings

- Allow you to grasp the underlying issues and arrange practical matters.
- A vital part of the mediation process
- Confidentiality underpins the whole process, the authorisation of the transfer of information is vital
- Venue can be decided
- Timing, taking into account travel times and if/when parties have to leave
- Cost, who pays for the venue and the fees
- Who will be present
- Authority/Gathering the key players – the people in the room must have authority or be able to get it, even out of hours
- Agreement to mediate, getting the full names of all those attending
- Stressing that the mediation is entered into in good faith – best endeavours to resolve
- Start Times for Parties – this can be staggered
- Draft Resolution Agreement
- Assistant/Co-Mediator
- Exchange of Documents, the tactics and strategy
- Solicitors Collaborating on documents and discovering what are the issues
- The Contents of the Summary and the Language used
- Signatories to the Agreement, including the parties, their advisors and others
- Check mediation experience of parties/advisors
- Set out the guidelines of the process for the parties
    - Opening Presentation by each party
        - Language
        - Impact
    - Coach
    - Decide who will speak
        - Party, or
        - Solicitor
    - The process is flexible
    - Meetings can be either joint or private
    - Flexibility
    - Variety
    - Creativity
- Preparation makes an enormous difference
- Collaboration should be encouraged
- Role of Solicitors
    - Advisor
    - Guide
    - Counsel
    - Advocate
- Risk Analysis Sheet / Questionnaire
- Ongoing Discussions

Preparation for Mediation Day

- Agreement to mediate
  Establish who is going to be there
    - names
    - roles
    - relationships
    - authority

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- Venue
  - check the rooms
  - seating
  - heating
  - toilets
  - lunch
  - sound proofing
  - arrive early
- Welcoming
  - think about staggering the arrival times of the parties
- Subject
  - read summaries, not a forensic examination, but appear informed
  - find the issues
  - areas of agreement and areas of dispute
- Options
  - think about possible options

Initial Private Meetings

Purpose of the meetings

- Welcome/shake hands
- "How are you?"; small talk
- Check first names are OK – or not
- Intro/ role(s)/ process/ principles
- Ask: been involved in mediation?
- Explain purpose of the session. Build rapport – pick up cues and clues
- Use open body language and eye contact
- Put the parties at ease, reassure, be attentive, respectful, conversational style
- Listen to them, let them talk, take time, Empathy, avoid sympathy
- Acknowledge the history
- Ask (open) questions
- Gain their trust
- Lay firm / safe foundation
- Check any time constraints
- Invite them to take breaks
- Attend to physical / emotional comforts
- Explain exactly how the next few meetings will develop – process management, Framework
- Clarify / discuss role(s)
- Establish positive and safe environment eg through every day language / positive terms
- Avoid colluding
- Normalise emotions / reframe language
- Manage expectations, minimise surprises, may take time
- If challenged (e.g. "be quick") remind them that it's their day / responsibility / of mediator's role
- Check authority for decision-making – "anyone else who should be consulted?"
- Be positive – the vast majority of mediations settle
- Reassure them on confidentiality /safety / effectiveness of process
- Names, establishing how everyone would like to be addressed in the joint meetings
- Help all to prepare for joint meetings/presentations with hypothetical questions / mutual language
- Coach appropriately
- Sign Agreement to Mediate - explain
- Encourage participation / openness to move forward
- Set positive tone / model behaviour / establish authority
- Be relaxed, calm, flexible, attentive
- Show understanding, acknowledge fears and uncertainty
- Humour may help
- Don't oversell – may be tough moments
- "Anything else?"
- Keep big picture in mind / options open
- Manage time well
- Matching body language / use of strong clear hand gestures as appropriate
- Pick up non-verbal cues
- Even-handed, non judgmental / impartial
- Invites questions
- Distinguishes process/ content
- Say if not comfortable
- Focus on interests / needs / present / future
- Use of checklist / review notes
- Not prescriptive
- Keep your eyes on the horizon
- Voluntary/decision is theirs
- Ask permission to pass on info
- 3 words: opportunity, choice, responsibility

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Relationship between Initial and Joint Meetings

- Don't have too much repetition - it can disengage people
- Be focused in the initial private meeting
- Find out/ help the parties find what they want to say in their opening statement in the joint meeting
- If they use aggressive language you can help reframe it before the parties meet
- Work out who will speak first in the joint meeting

Opening Joint Meeting

- Think who you will bring into the room first.
- Arrange seating carefully; check on comfort (water etc)
- Re-affirm with parties that they have the chance to achieve something
- Check time-restrictions, if any
- Acknowledge uncertainty / discomfort / state of affairs – Rapport and empathy
- Assure the parties it is a confidential process
- Provide general pointers; useful to listen without interrupting, etc.
- Outline the Mediator's role: model behaviour / non judgemental – no "rabbit out of hat"
- Re-emphasise it is an opportunity to be taken – "I'm here as long as it takes"
- Encourage each party to speak openly: "Emotion can be OK" / Encourage speaking from the heart, rather than just the brain or the pocket
- Remind parties of the voluntary nature of mediation – their responsibility – encourage to persevere
- Set out how the day goes – setting the scene / tone / introductions
- Confirm authority – "chair" the meeting not judge
- Mediator is there to help you find a solution / without prejudice
- Decide on order of events – manage process / timetabling / agenda / review times / outline structure / order of presentations
- Identify / put aside / clear up any side issues that might get in the way of resolving the issue in focus
- Impartiality – parity of attention / eye contact
- Minimise prompts (nodding head, etc.)
- Explain that it may take time and that there should be breaks
- Ask each party to speak to each other and the other to avoid interrupting them, decide who goes first
- Managing expectations, be realistic, honest and positive
- Be a non anxious presence
- Emphasise commonality when you find it
- Mutualise joint issues / find common ground / reframe neutrally
- Be frank about the realities, normalise them / matter of fact and positive tone, don't react, say what you want to say
- Focus on future
- Reinforce confidentiality, summarise / recap / reinforce other key points e.g. authority?
- Watch jargon: interests, positions, issues, presentation, we/you
- Roles, principles, process
- Observe non verbal communication
- Pause – "answer size" gap
- Invite questions
- Build in time for reflection
- Lightness of touch, thank each party
- Holds "the edge of the ring"/ watch for cues and clues
- Use of silence / listening
- Paints horizon of agreement
- Easy use of notes
- Use of flip chart to summarise issues and keep control
- Remind both parties that it is not a court of law – encourages openness

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- Encourage normal greeting of parties, providing this has been set up with both parties in prior meetings
- Thank parties for being present, acknowledge that it isn't easy

S – Scene Setting: Opportunity for parties to present their views
P – Process re-explained
A – Airplay: equal for both parties, but not tit-for-tat
C – Calm, control and continuity from mediator
E – Engagement of parties to find common ground

Dealing with Interruption

- Allow to play out a little
- Reminder about agreement / guidelines / use as reference point
- Non anxious presence – keep calm
- Tough / get on with it!
- Use physical and verbal means to control (e.g. strong hand gesture)

Guidelines

(Careful not to make this sound as though you are ticking off a list! Some of the below may be more appropriate for the joint meeting(s).)

Voluntary
Authority
Confidential
Agreement
Non Judgmental/Non Binding
Time / Timing

After Presentation

- Thank each side for listening
- Thank them for their openness and frankness
- Explain that the process will be hard work
- Time Limits, reminding that the process may continue into the evening
- Goal is consensus between the parties
- Realistic expectations should be encouraged
- Each helping the other side to find a solution
- Summarise to clarify issues / topics
- Ask if there are any questions
- Indicate who you will see first and why
- Give an indication of the time to be spent with each party, but nothing to be read into the time taken

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Further Private Meetings

The Exploration /Understanding Stage

- Take time: before enter room: “what is my purpose?” “what want to achieve?”
- Invitation to enter the room
- Reassure on confidentiality / disclose only “if agreed and appropriate”
- Think about seating
- Let the Party Speak – conversational / allow a good balance of air-time between parties
- Seek understanding – open questions – conversation – eg what do you want to talk about? How do you feel the opening session went? What did you not say? Tell me…”Check-in”
- Move away from concepts of right & wrong
- Express empathy (what’s up?)
- Actively listen – make eye contact & give full attention
- Learn new info, helps with understanding of the past
- Objective – “What are you looking to get out of today?” Eg
    - -An Apology?
    - -An Explanation?
    - -Money?
- The Underlying issues – what really matters? Separate the person from the problem
- Remember the extent of your role – not a counsellor or psychotherapist
- Ask hypothetical questions; test the grey areas
- Concerns / Interests / Needs / Wants / Desires – what matters? What is important? What is really going on?
- Themes / Reactions
- What else? / Other issues / Picking up / Probing – but non-judgemental
- Listen – Nod – Affirm –acknowledges: cues and clues – look for point of change
- Matching / Mirroring / Leading / Relaxed body language
- Maintain impartiality – do not collude
- Plenty of space for answers
- Full understanding sought
- Listening attentively – minimal prompts
- Confidentiality – draw out information, even if seems muddled / messy
- Remind of the safety of the process and recap on confidentiality whenever necessary
- Parties can express their feelings and concerns – their agenda
- Uses time efficiently - set Tasks (make sure these are specific)
- Careful use of language / reframing / be aware when language is destructive and address it
- Challenge the impact of a message – how will it be received? Not interview / investigation / interrogation / interruption, but some probing
- Admit when you didn’t understand something & seek re-cap
- Re-phrase when there might be a misunderstanding
- Firm process management
- Exchange of information to help the process along – takes initiative and get express permission / discretion to use – not just a messenger
- “Anything else?” / “What else would you like to ask me?” – genuine question
- Keep an eye on time, take time, break if helpful, keep all parties informed
- Note-taking only if necessary
- Air time – 30:70%? 20% 80%?
- Paraphrases / summarises / recaps / encourages more / Uses alternatives to questions
- Park some issues – can’t deal with all, come back later
- Involvement / influence of others
- Confirm confidentiality eg of notes
- Avoid focussing on any one solution/option
- Keep options open / encourage a party to think more broadly
- Explore other’s perceptions
- Respect process and expectations of need for give and take
- Don’t go too fast
- Some humour may help!
- Past / present / future – be aware – shift focus
- Moves between big picture and detail
- Check on what is confidential
- Be prepared to show ignorance: “what does that mean?” “I do not claim to be an expert in….”
- Add the ‘what else?’ question at the end

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Next Steps

Summarise
Confidentiality / Confirm
Repeat/Reframe / Rapport
Authority / Acknowledge
Precision
Is there anything else?
Tasking/Time

The Options / Negotiation Stage

- Picks up on where the party is at
- Check in – "how are you" etc
- Progress acknowledged (and summarised)
- Concessions
- Ask how they think the other side will react/feel
- Offers / trade-offs / options
- Let them simmer
- Change focus / pace picks up / business like
- Forward-looking / "Possible ways forward?", opportunities
- Park issues to make progress elsewhere
- Encourage creativity – "What if…"/play with ideas
- Have another joint meeting to review process
- Risk analysis / reality check
- Costs of no agreement?
- BATNA / WATNA (flip chart)
- Flipchart language / parties' words
- Pros and cons
- Priorities/Preferences
- Future Deals
- Alternatives after options
- Challenge / hypothesise: "What about?"
- Reality check/ challenging without judging
- "If it does not work out?"/ What seems obvious may not work – "look over the cliff"
- Big picture / objective criteria to deals
- Benchmarks for decisions
- Listen at the edges
- Mediator may have more air time, be more active 50:50?
- More two-way discussion – still intimate
- Business-like, problem-solving tone, less tentative than in exploration, working hard
- Encourage gain:gain
- Take a different perspective
- Other person's shoes - "If you were him, what would you be looking for?"
- We can play around with figures
- Option development and option assessment
- Financial side
- Communication
- Draw together package, precision, clarify, get detail
- Probe practicalities – get under the surface
- Summarise/clarify
- Ask party to summarise
- What else to aid making of package?
- Happy with summary?
- Seek permission to take offer to the other room
- Making progress – keep up the momentum
- Maintain rapport
- Be realistic, practical, workable, "the real world"
- Tasks important
- Use of flip chart (to record)
- Brainstorm
- SCRAPIT
- Use discretion in exchange of information: timing, content, effect – takes initiative
- Not a mere messenger
- Let parties do the work / decide / make choices / take responsibility
- Keep options open, don't force
- Summarise options – "what would they look like?" / "what would need to be put in place?"
- Develop criteria for assessing options and priorities
- Explore again as necessary – open questions

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- "What else?", "What is missing?" always look for something more
- Persistence, perseverance, patience
- Pushing and backing off
- Living with uncertainty
- Manage expectations regarding the next stage
- Courage
- Anticipate / plan next steps
- Permission to take information to other room
- "Straw man" – safe to knock down
- Care re numbers – let them do the arithmetic!
- Go at the pace of parties with numbers
- Recap confidentiality – "anything useful you want me to take across? / what can I take to the other room? I'd like to mention ...."
- Encourage parties not to refer to each other as "the other side"
- Keep lower priorities in the frame
- Brisk business like tone
- Systematic approach to assessing options
- Work in parallel lines if it helps (developing more than one option at once)

Further Joint Meetings

- Further Joint meetings can be useful throughout the day
- You can vary who is present at the various joint meetings
- It is important everybody understands why a joint meeting is being called and is prepared: Why? What? How? Who?
- Give parties time to prepare
- Parties should start to talk directly in appropriate situations
- Mediator should chair: recap, identify progress, repeat purpose, provide structure; parties do the work – mediator may be silent, but alert
- Care with confidentiality
- Maintain energy/momentum
- Encourage, don't rush / manage expectations

Decision Stage & Resolution

- It is the parties' responsibility to reach and write up the agreement
- Joint meetings? What, how and why – set up well, prepare, manage expectations, agenda
- Use positive/encouraging tone/language/body language: "going well", "making progress", normalise, common ground, calm
- Keep up the pace and momentum: "winding forward" / possible ways forward, pull it together / change dynamic
- Not binding until concluded – keep it open / safe / confidential
- Do not rush to a conclusion; take it a stage at a time
- Encourage active participation: let them do the work, keep alert, calm, responsibility with parties
- Deal with all the issues / recap
    - Public statements
    - Ongoing litigation
    - Transfer of money
    - Time
    - Tasks if necessary
- Be precise & specific, detail vital – use flipchart
- Use some closed questions / probing
- Issues not agreed still need attention
- Documenting? Recording? Heads of Agreement? Requires accuracy
- Summarise/reframe
- Remind of confidentiality, if helpful, check, clarify, reflect, questions, suggestions – may still need to explore

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- Make it workable, practicable, realistic
- Commercial reality
    - Durable
    - Achievable
    - Assurances
- Maintain integrity of the process
- Step back when appropriate; physically ‘sit back’ if appropriate
- Take time, pause if required
- Give credit to the parties
- Acknowledge time spent and work done
- Finalise terms / check everyone is happy / reiterate need for legal advice if appropriate
- Make copies of any agreements and send/give to relevant persons
- Shake hands wherever possible
- End well!

After that…

- Sometimes client initially regrets decisions they made and needs support through that
- Sometimes tough advice is needed from the solicitors
- Very unusual for deals not to stick
- If a deal is not done, depending on the reasons, the mediator may have a continuing role
    - If time – mediator has a role in reorganising
    - If issues – mediator should call/follow up – day should end up beat so negotiation can continue – cases often settle later

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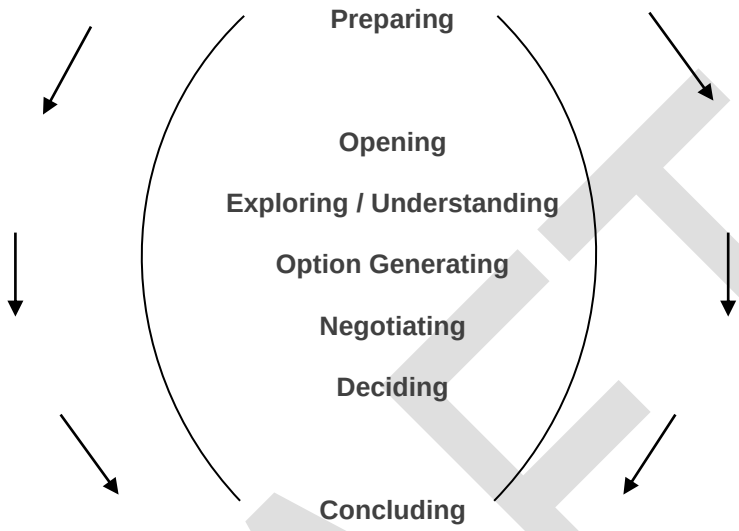
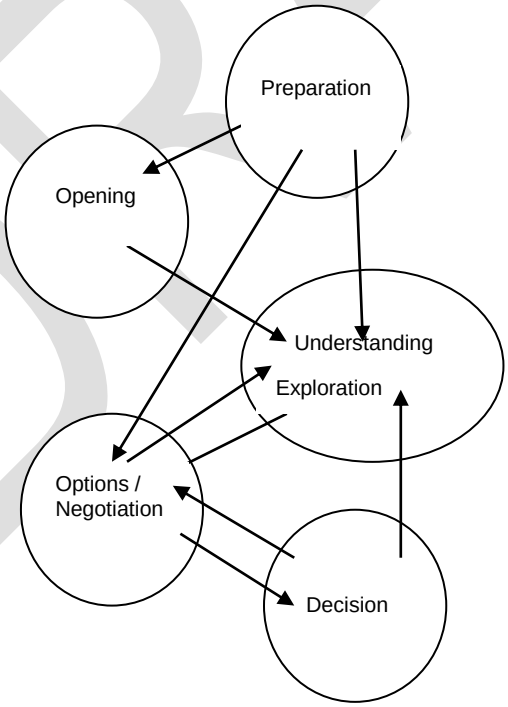
Appendix 1

The Shape of Mediation



The Interrelationship of the Phases of Mediation – 'P.O.U.N.D.



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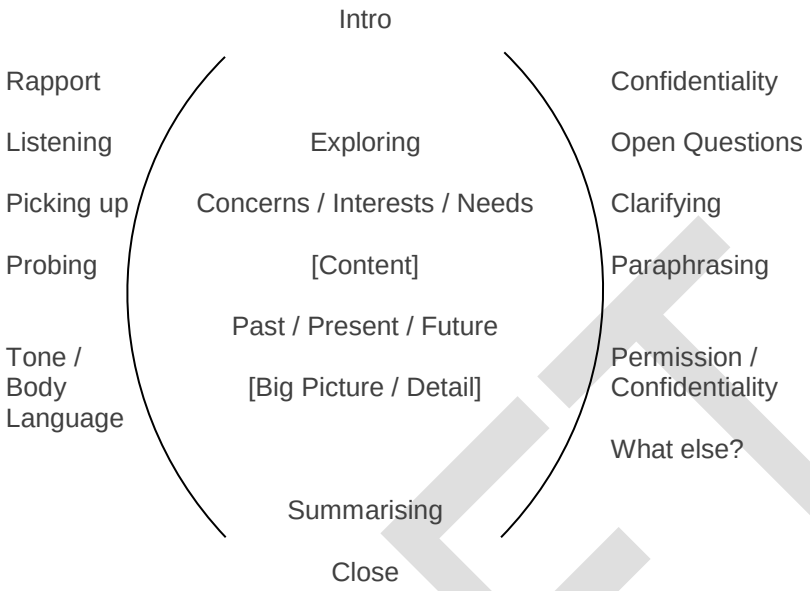
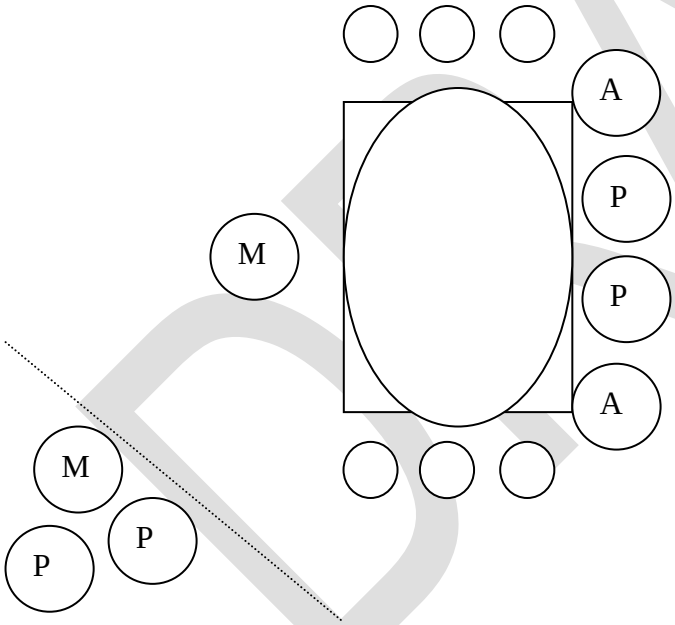
The Shape and Content of a Private Meeting



Seating Possibilities



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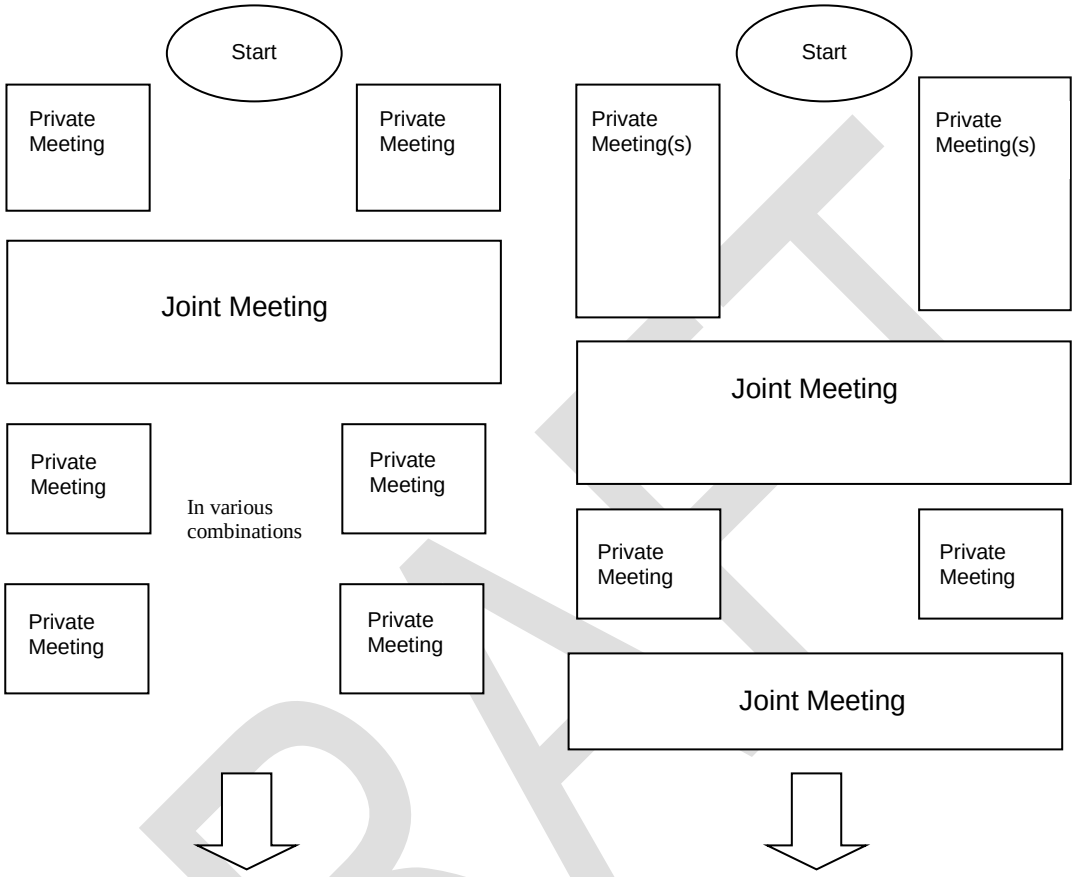
Meetings can be varied to suit the parties

(These are illustrations only)



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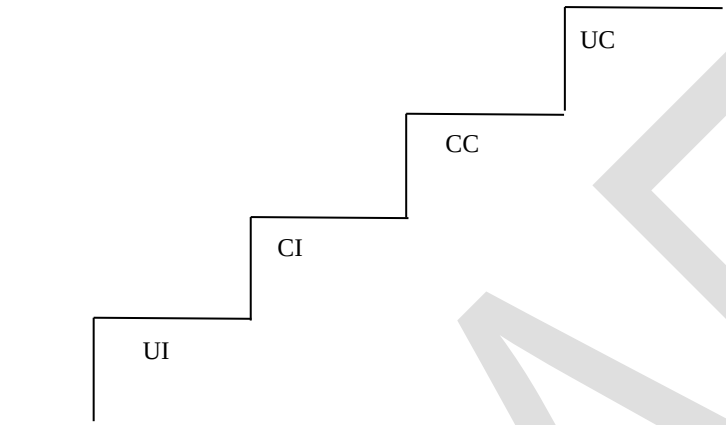
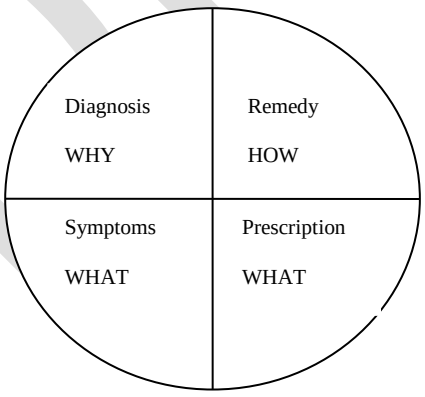
Appendix 2

Some Tools

1. Habits and change



2. Harvard Circle Chart



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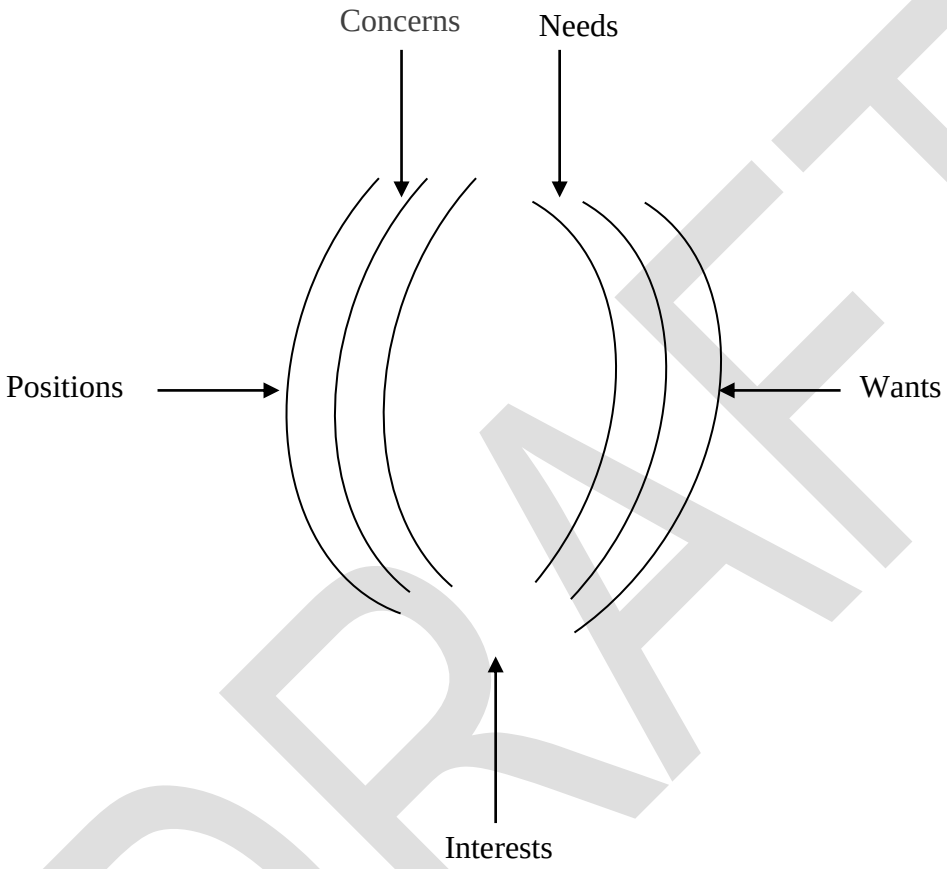
3. Under the surface



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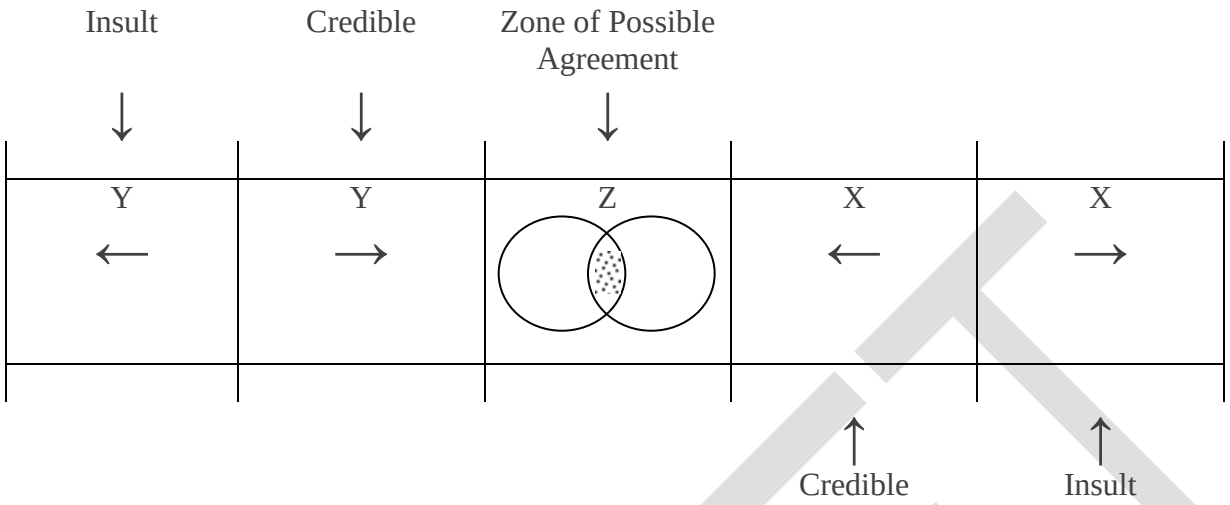
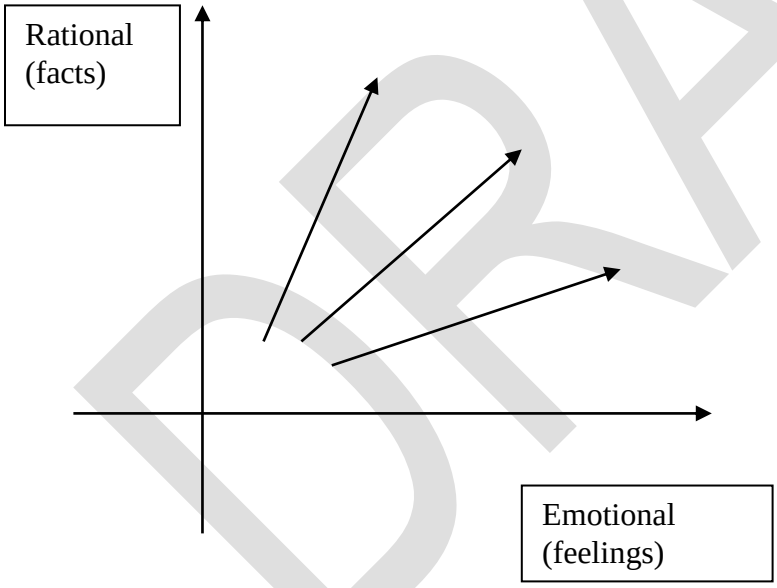
4. Making Offers



5. Expanding your range and acknowledging many dimensions



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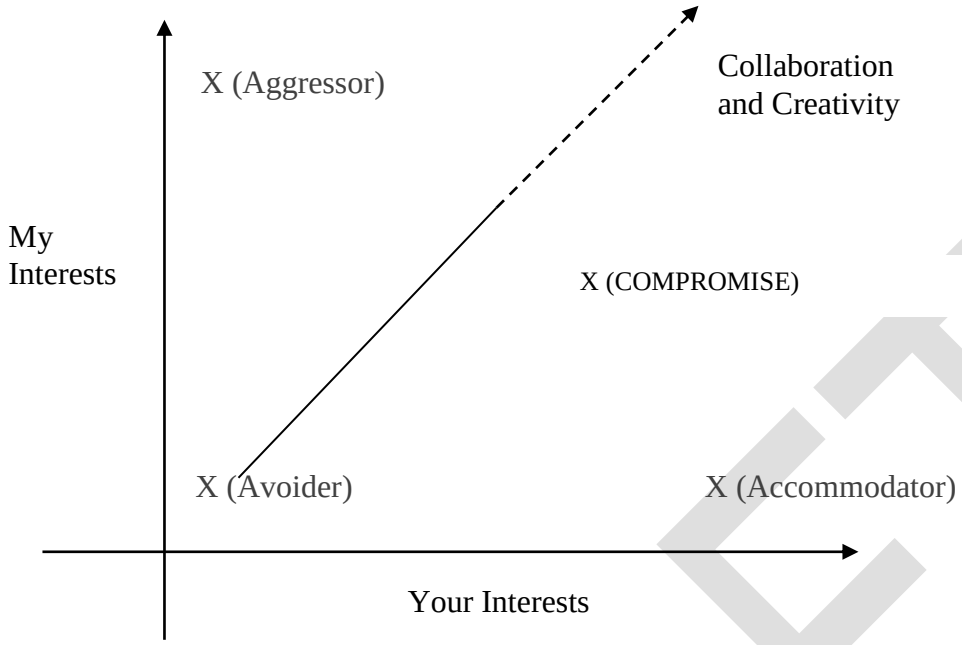
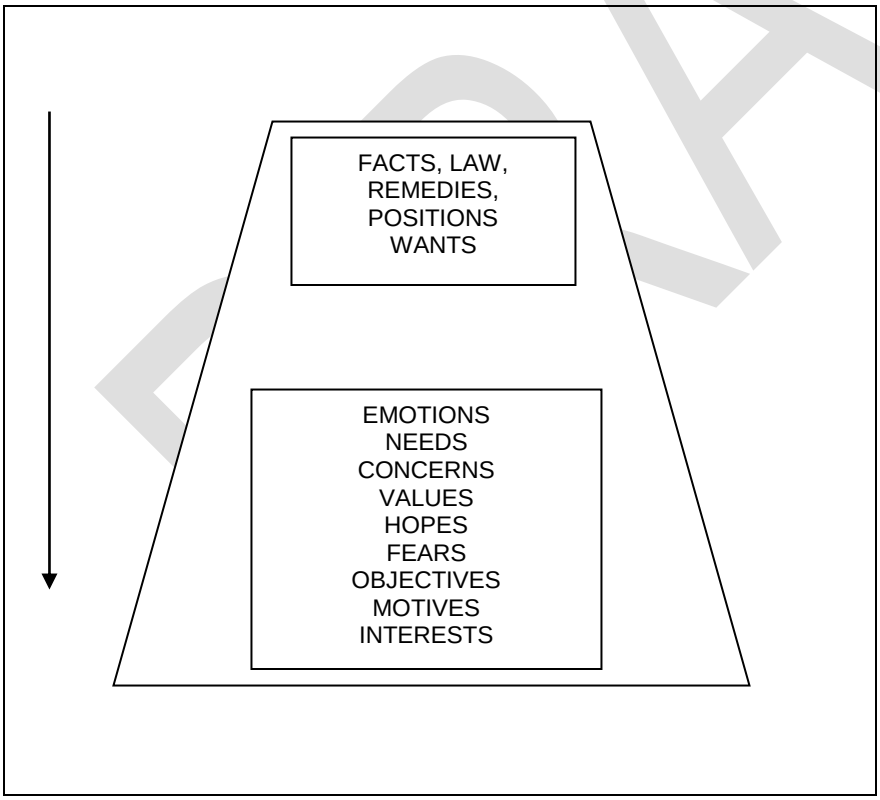
6. Collaboration and Creativity



7. Getting beneath the surface – The Iceberg



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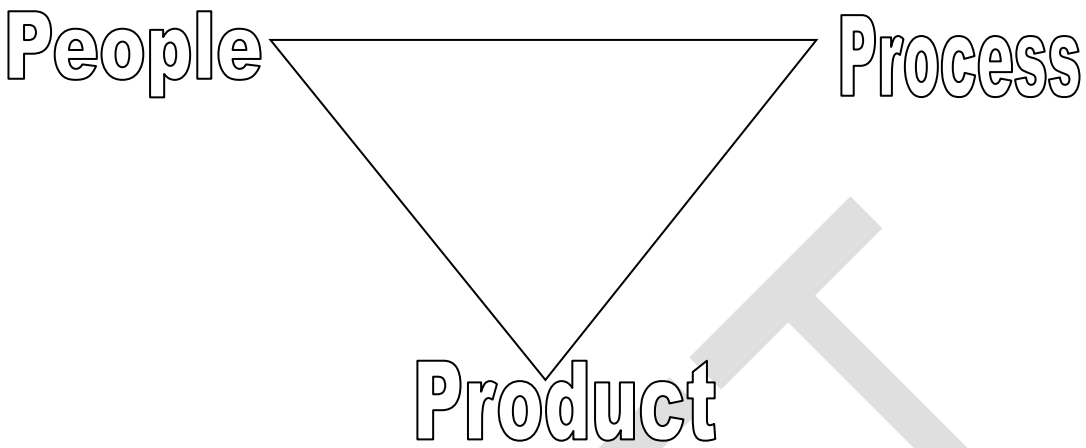
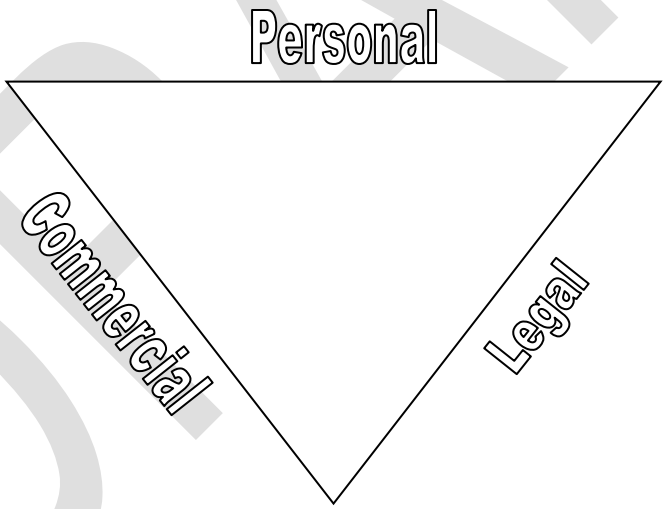
8. What a mediator works with





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Appendix 3

NLP Presuppositions

- The map is not the territory
- The meaning of any communication is the response it gets
- Mind and body are parts of the same system. Change one and you affect the other
- The person with the greatest flexibility of thinking and behaviour is likely to have the greatest influence
- It is possible to find a positive intention behind all behaviour
- People have all the resources they need to make whatever changes they choose
- There is no such thing as failure, only feedback
- There is a solution to every problem
- If it's possible in the world then it's possible for me, if only I discover the how
- The identity of the person is different from the behaviour they demonstrate
- Energy flows where attention goes
- People make the best choices available to them at the time

(With thanks to Core Mediator, David Fraser!)

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