

Evaluative Mediation

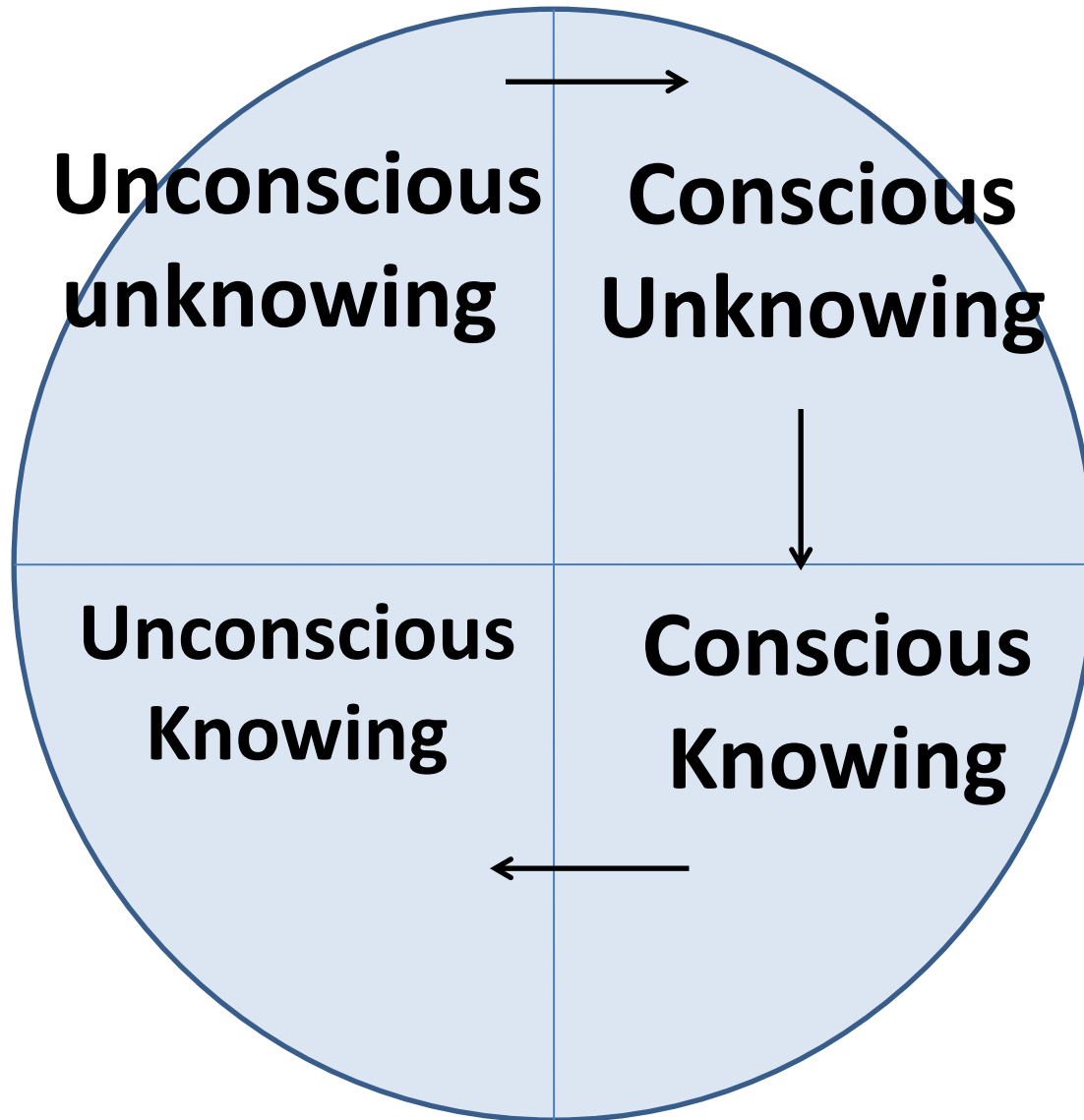
John Wade

Hong Kong, July, 2021

LEARNING STAGES

ZERO TO HERO

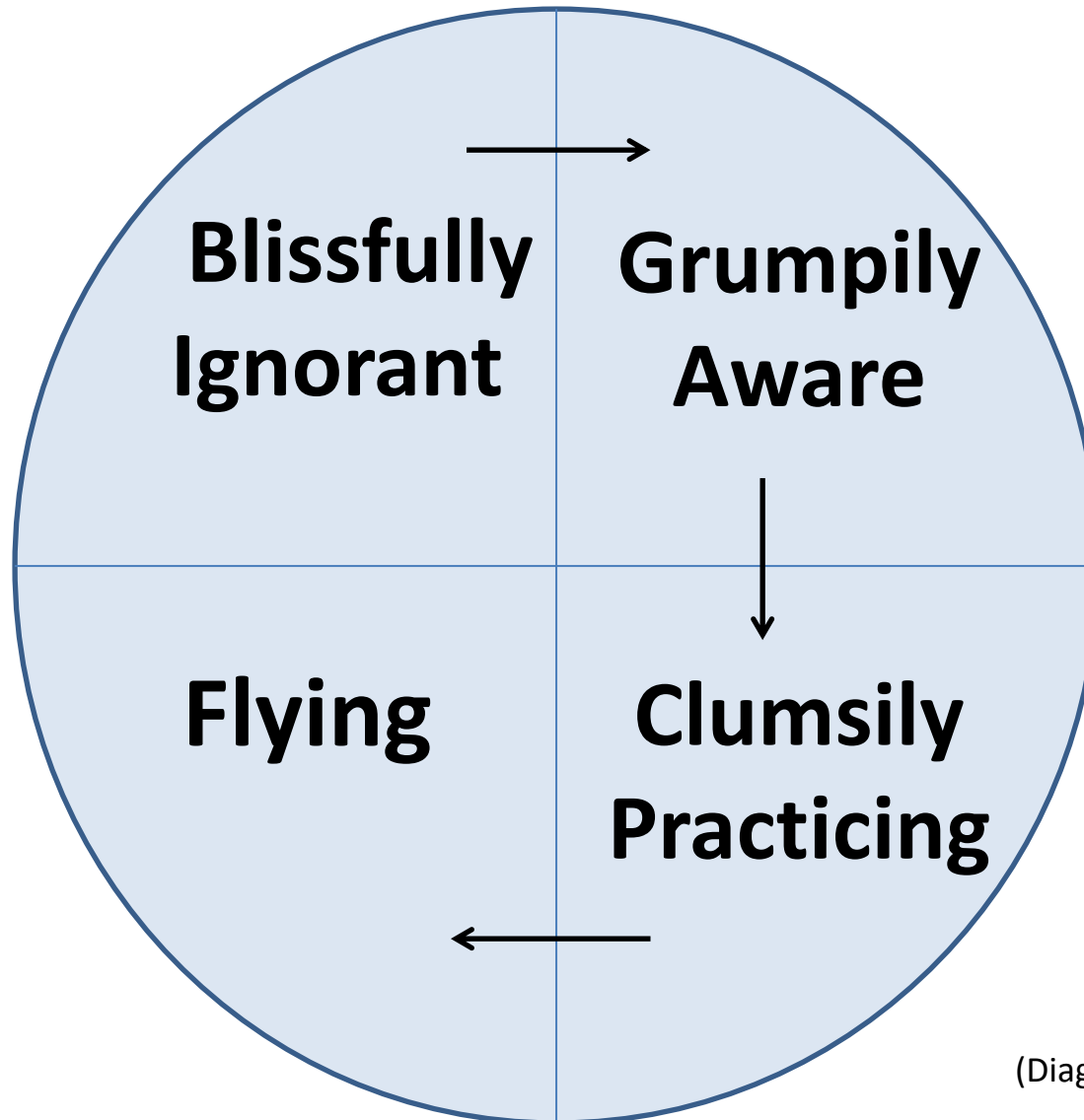
The Gradual Acquisition of Attitudes, Knowledge and Competencies to be a Professional Negotiator or Mediator



Learning Stages

ZERO TO HERO

The Gradual Acquisition of Attitudes, Knowledge and Competencies to be a Professional Negotiator or Mediator



(Diagram thanks to David Bryson
and Shirli Kirshner)

Standard Important Questions Which Arise During a Mediation or Conflict Management Course

调解和争端管理课程中典型的重要问题

- What *variations* are available in the mediation process?
- When and how could and should a mediator give “advice”?
- What conflicts probably need an *umpire*?
- How to deal with ‘*emotional*’ clients?
- How to deal with background ‘*tribes*’?
- How to deal with ‘*duelling experts*’?
- What are the pressures upon and interests of *brokers* to mediation services?
- What *post-settlement* hiccups are predictable?
- How to respond to *post-settlement* hiccups?
- What strategies are available when people become *jammed*?
- How to deal with *data chaos*?
- How to respond to ‘*inequality of bargaining power*’?
- What should a mediator do if a settlement appears to be *unfair*, or out of ‘the range’?
- What *cultural adaptations* may be necessary to skills and process for cross cultural mediations?
- How can mediation services be *marketed* effectively?
- What *measures of ‘success’* can and should be used to compare mediation to other conflict management services?
- What *micro-skills* do successful mediators use?
- How to *diagnose* which process for which conflicts?

Mediation 调解

Second Wave Research Questions

第二波研究涉及的问题

- *Taxonomy* - what categories of mediation exist?
- *Diagnosis* – which conflict types to which kind of mediation?
- *Diagnosis* – what adaptations across cultures and language?
- *Micro-skills* in a successful mediation?
- *Systematic comparison* of cost, user satisfaction, settlement rates and durability of:
 - *Different models of mediation*
 - *Negotiation*
 - *Counselling*
 - *Litigation*
 - *Arbitration*
 - *Hybrids*
- *Referral practices* and values of gatekeepers to mediation?
- How to *market* mediation more widely?
- How to improve standards of mediation practice?

Mediation - 调解

The process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

指在中立方的协调下，由有关各方系统地分解有争议的问题，探讨替代性的解决方法，以照顾各方需求并就争议的解决达成一致的程序。

Folberg and Taylor Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation, San Francisco, CA; Jossey-Bass, 1984.

What is a working description of
EM??

TRADITIONAL DESCRIPTION OF
MEDIATION -----

PLUS—

“and the skilled helper is also ready
to prompt solutions with advice,
ideas and challenges”

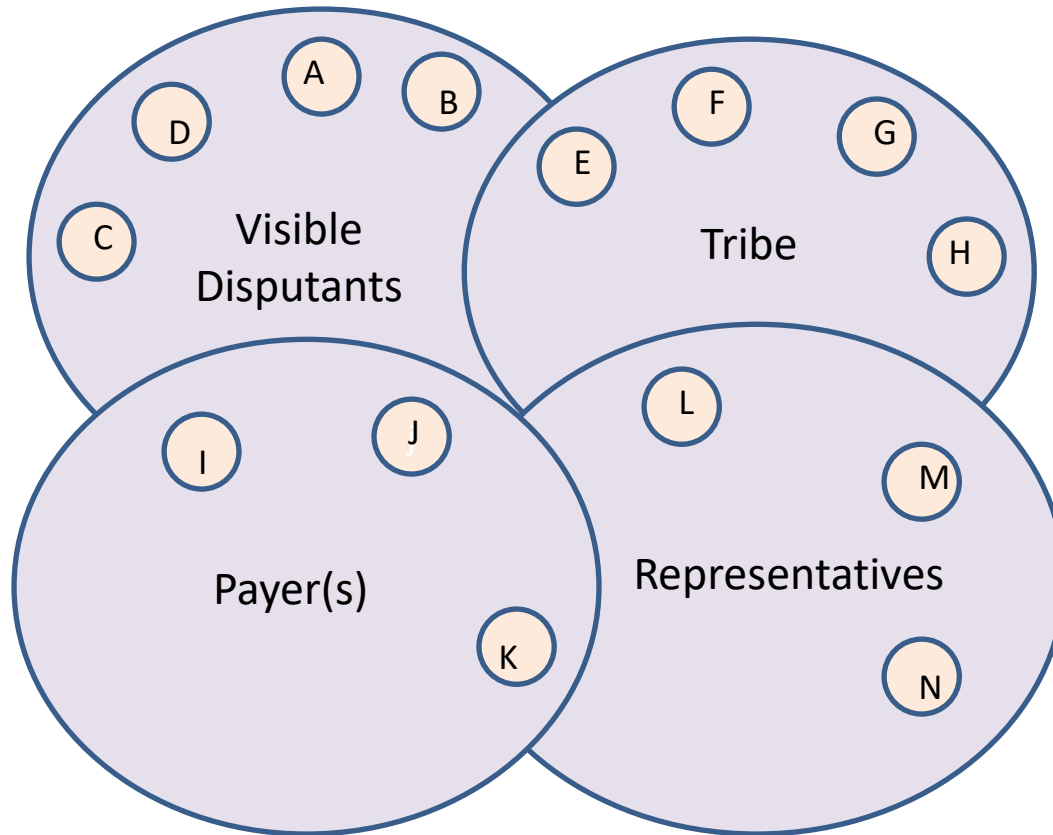
“Evaluative Mediation”-Who Cares About a Name??

- Diagnosis-Right client for the right service?
- Marketing—what does this mediator do well?
- Multi – skilled---or Not?
- Sometimes “laws” apply to different DR services—eg confidentiality, accreditation

Attempt to consider EM from 4 overlapping perspectives

- EM “providers”-- ie the E. Mediator
 - Clients-- ie the disputants
 - Representatives--sometimes being lawyers
 - Referrers to, and payers for, EM—eg govt, employers, relatives.
-
- WHICH perspective is most important for you?

Four types of “clients”



Your experience anecdotally

What do YOU want from a mediator?

What do you NOT want from a mediator?

Quest for “successful” DR processes

- What are the probable elements of being a successful “skilled helper”?
- 1. Consistent Process PLUS---
- 2. Core skills---LARSQ
- 3. Care and Compassion
- 4. Integrity

Mediation Triangles

调解三方关系



What Does Research Say About the Behaviour of Successful Negotiators?

(in the west)

- Plan systematically
- Remember intangibles
- Actively manage coalitions
- Avoid irritators
- Avoid defence/attack spirals (ration “attacks”)
- Use ranges
- Realistically (re-)evaluate fallbacks
- Label behaviour
- Test understanding and summarise
- Ask questions
- Feelings commentary
- Protect your reputation
- Constantly learn from experience

[Rackham (1980); Lewicki (2006)]

Functions of any Mediator (per F. Mosten)

- Host
- Teacher
- Facilitator of Communication
- Referee
- Negotiation Coach
- Emotional supporter
- Reality tester (advice; “challenge”)
- Idea generator
- Recording secretary

ABA Survey - 2008

What do repeat clients and representatives want from their repeatedly hired mediators:

- Preparation
- “Customisation”
- “Analysis” and subtle advice-giving
- Persistence

Conclusion—2008 ABA Survey

The majority of mediators who want “success” in the eyes of clients need extensive and expensive **Preparation:**

- To tease out what is/might be wanted procedurally, emotionally and substantively by members of each group
- To lower some expectations by advice and stories
- To share humble hypotheses on what clients might objectively need
- To encourage regular feedback during meetings on whether the service is meeting expectations.

Mediation - 调解

The process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.

指在中立方协调下，由有关各方系统地分解有争议的问题，探讨替代性的解决方法，以照顾各方需求并就争议的解决达成一致的程序。

Folberg and Taylor *Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation*, San Francisco, CA; Jossey-Bass, 1984.

.PLUS AVAILABLE ADVICE!!!

Why the apparent interest in EM?

- Some clients 😊 like advice
- Some clients cannot “problem solve”
- Some need budget-one-stop-multi-skilled helper
- Mediators hope for more employment?
- Funders need higher success rates for difficult cases
- Over time, reduced turf paranoia between DR providers
- Awareness of own (and Mediator’s!) fallibility--advisers need a second opinion (eg Kahneman)

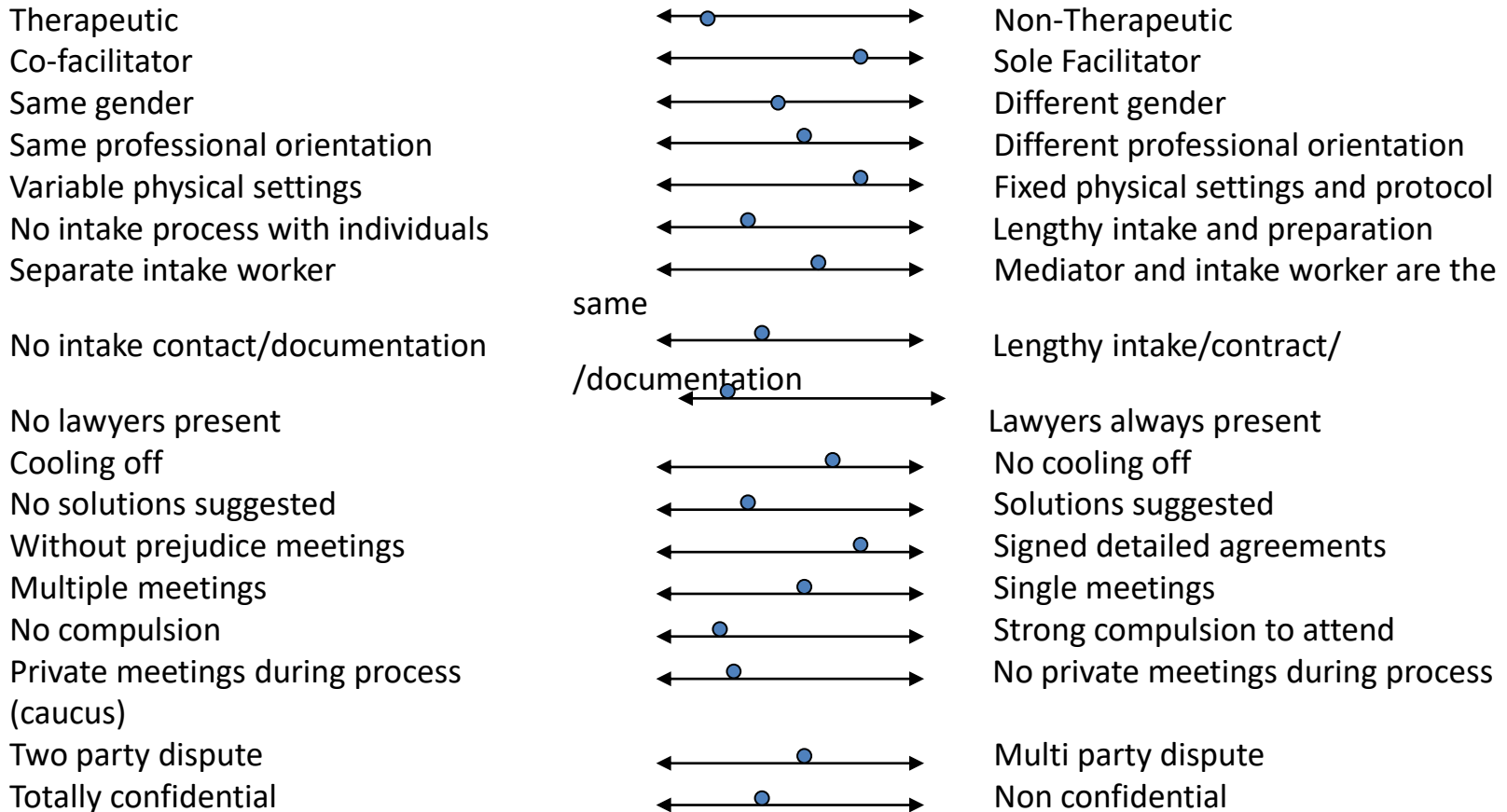
Four (Overlapping) Models of Mediation

四种调解模式

- Settlement 和解
- Facilitative 应导
- Therapeutic 治疗
- Evaluative 评估

The Mediation Abacus

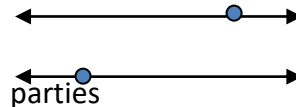
(or “Mediation”, like Arbitration has many meanings)



The Mediation Abacus cont.

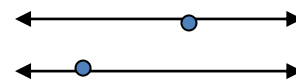
(or “Mediation” has many meanings)

All kinds of conflict dealt with
Heads of agreement recorded



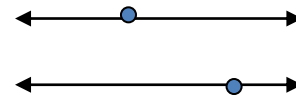
Certain kinds of conflict dealt with
Heads of agreement sent later to immediately

Use of flip charts/whiteboard
Mediator can change to arbitrator role



No use of flip charts/whiteboard
mediator must stay in single role

Graded levels of mediator expertise
Mediator expert in process



Single level of mediator expertise
Mediator expert in substantive area of dispute

Some factors which influence variables:

对可变部分有影响的因素

1. Cost 费用
2. Time available to parties 各方的参与时间
3. Time available to mediator 调解人参与的时间
4. Degree of hostility 相互关系的紧张程度
5. Wishes of parties 各方达成和解的意愿
6. Educational levels of parties 各方的受教育水平
7. Habits of parties, and/or mediator 各方和/或调解人的习惯
8. Cultural comfort levels 文化舒适度

What are some “types” of EM?

- 1. Surprise?-First type > Facilitative mediators!:
- Give constant “Process” advice
- Create general and particular life risk and goal analyses >> which later change into strong “advice”
- Ask questions which narrow “direction”; and amount to indirect advice.

P
R
O
B
L
E
M

D
E
F
I
N
I
N
G

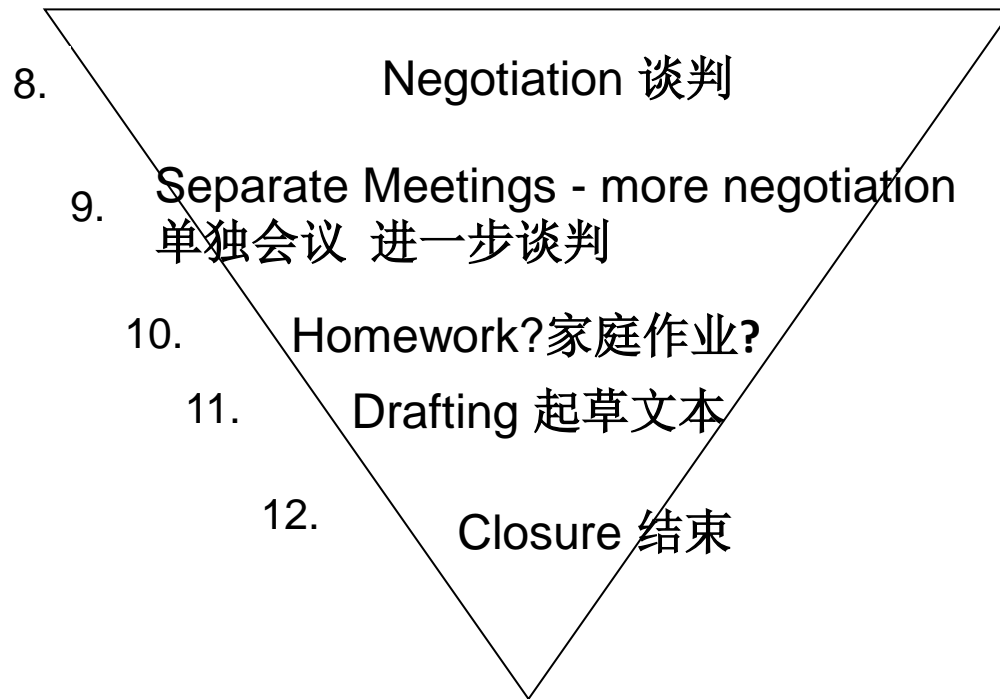
问
题
界
定



D
E
C
I
S
I
O
N

M
A
K
I
N
G

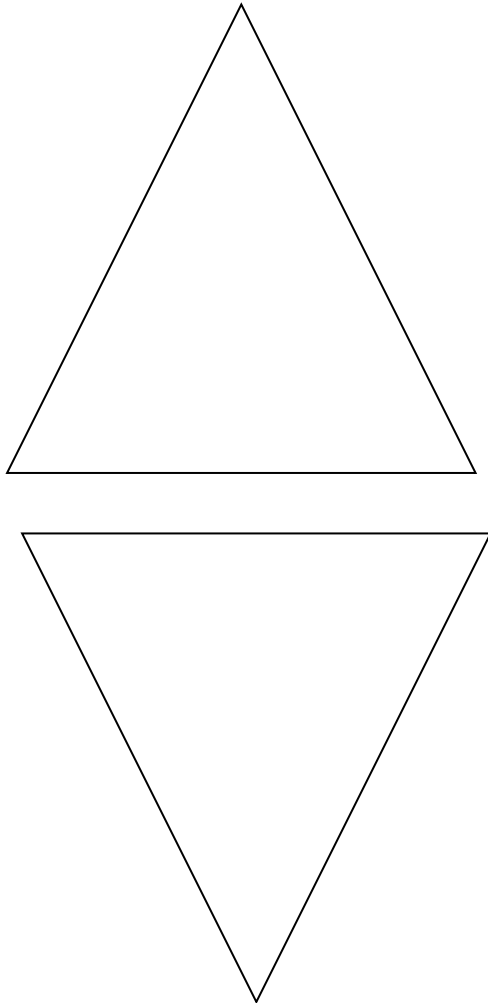
做
出
决
定



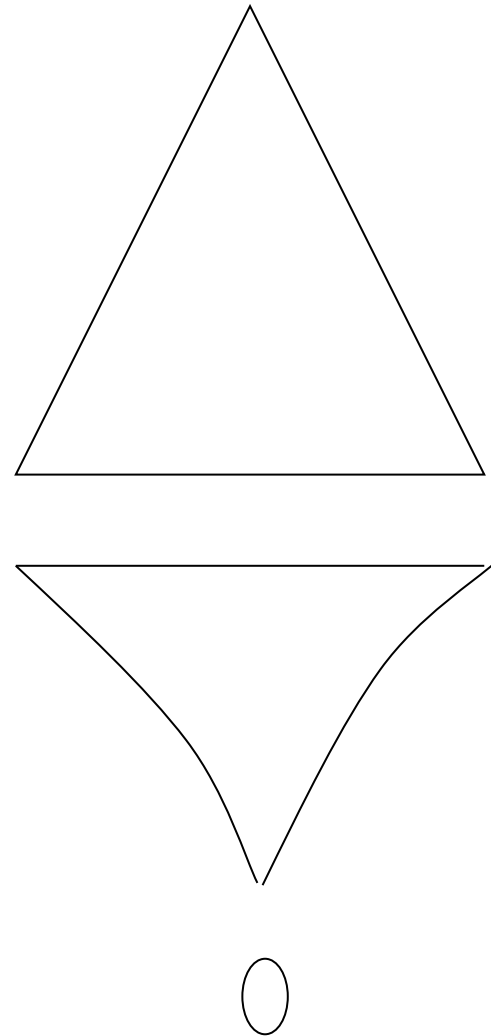
Second Type of EM?—MED-REC

- Standard facilitative process PLUS:
- A Recommendation or Proposal at the end if settlement has not occurred

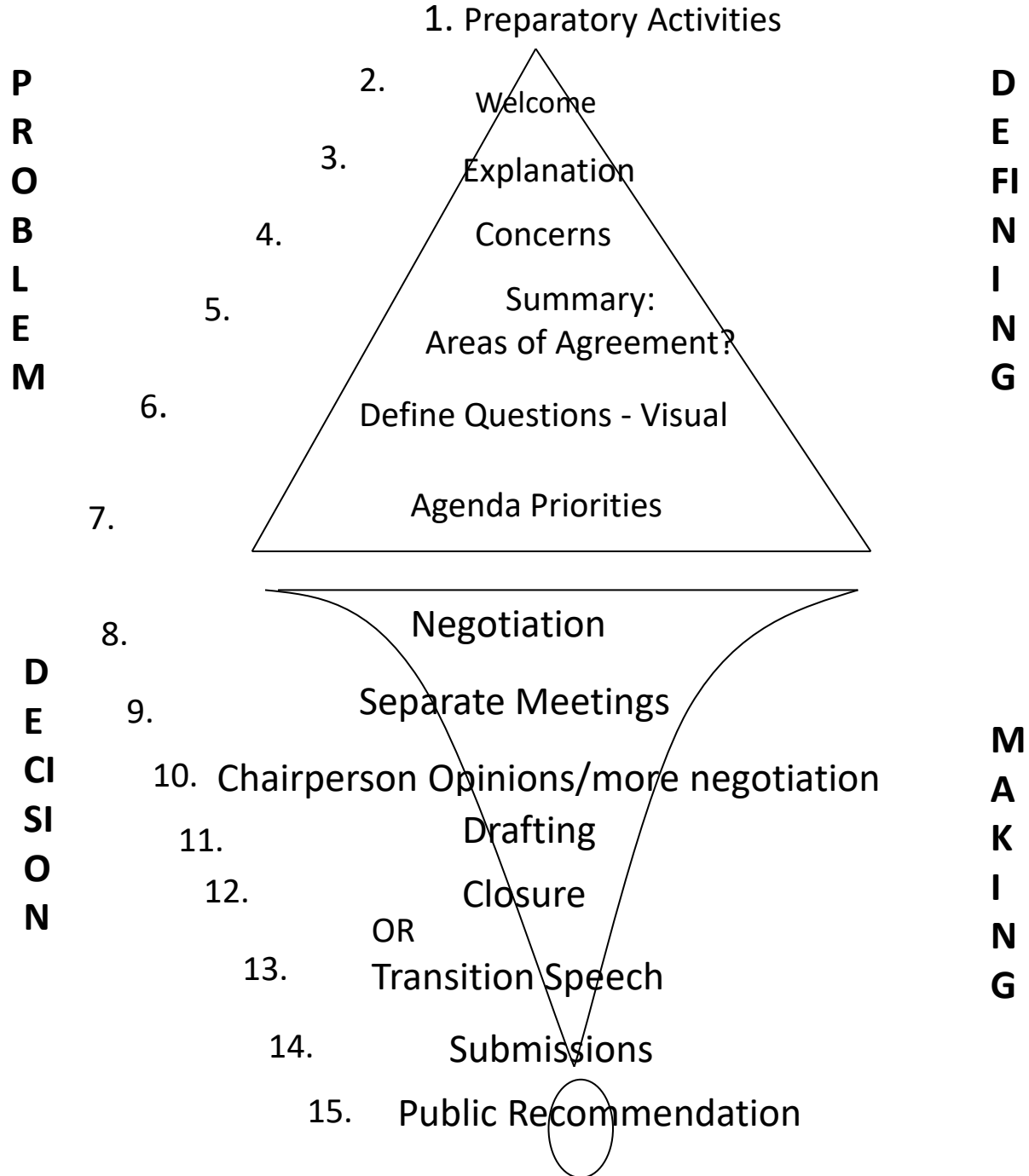
Problem Solving Mediation



Conferencing (Evaluative Mediation Plus Arbitration or recommendation)



MED-REC MODEL



Third EM “type”: SIMSLILC--Aarghh

- Single
- Issue
- Monetised
- Shuttle
- Limited
- Intake
- Lawyer Controlled
- Familiar??—Some lawyers have experienced little else

Common Species?

S I M S L I L C

Mediation

SINGLE ISSUE

MONETISED SHUTTLE

LIMITED INTAKE LAWYER

CONTROLLED

MEDIATION

“DOUBTS”

A classic SIMSLILC mediator creates particular and generalised “doubts” and shuttles offers between rooms

CONCEPT	APPLICATION?
1. FACTS – “You are using different facts....”	
2. EVIDENCE – “There is a document to show....”	
3. CREDIBILITY – “who is more likely to be believed....?”	
4. RULES – “You are applying the wrong rules....”	
5. RULES – Insider knowledge: “That is not how the system works here....”	
6. PUBLICITY/REPUTATION – “What happens when this becomes public?”	
7. DELAY – “If YOU don’t agree today....”	
8. COSTS (Direct) – “The predicted costs of lawyers and accountants are....”	
9. COSTS (Indirect) – “How much time away from business....”	
10. STRESS – “How much sleep....?”	

11.	INCONVENIENCE FOR THIRD PARTIES – “How will your children, boss, friends, feel when subpoenaed, notified....?”	
12.	NOTHING TO LOSE – “(S)he will eventually wear you out/stone in shoe....”	
13.	POWERFUL – “My client has money and connections”	
14.	FLOODGATE – “I cannot create a precedent for”	
15.	OUTSIDE INFLUENCES – “My constituents/members/boss insist that....”	
16.	ALTERNATIVES – “I can do better elsewhere....”	
17.	GOOD COP/BAD COP – “Deal with me or else....”	
18.	EXPERTISE – “Our expert knows more X than yours”	
19.	LOSS OF CONTROL and ESCALATION – “If we don’t reach agreement, this is the likely scenario....”	
20.	RATIONALITY – “You seem to assume that the court, club, system, is wise and rational....”	
21.	OTHER?	

Advice, Opinion, Information?

- “Advice” is communication to another person with the purpose of changing the hearer’s emotions, beliefs and/or behaviours.
- Advice/ information distinction??---shaky?
- Common “information” from the EM?—”Here is a list of (common) options—”

Types of advice? Why distinguish?

- Reduce turf and boundary wars
- Reduce risks of legal or professional liability
- Which kind of advice is helpful for a particular culture or client?
- Which kinds of advice is the EM skilled at giving?
- Promote client choice of outcome where possible?

7 Advice “Types” — which do you want?

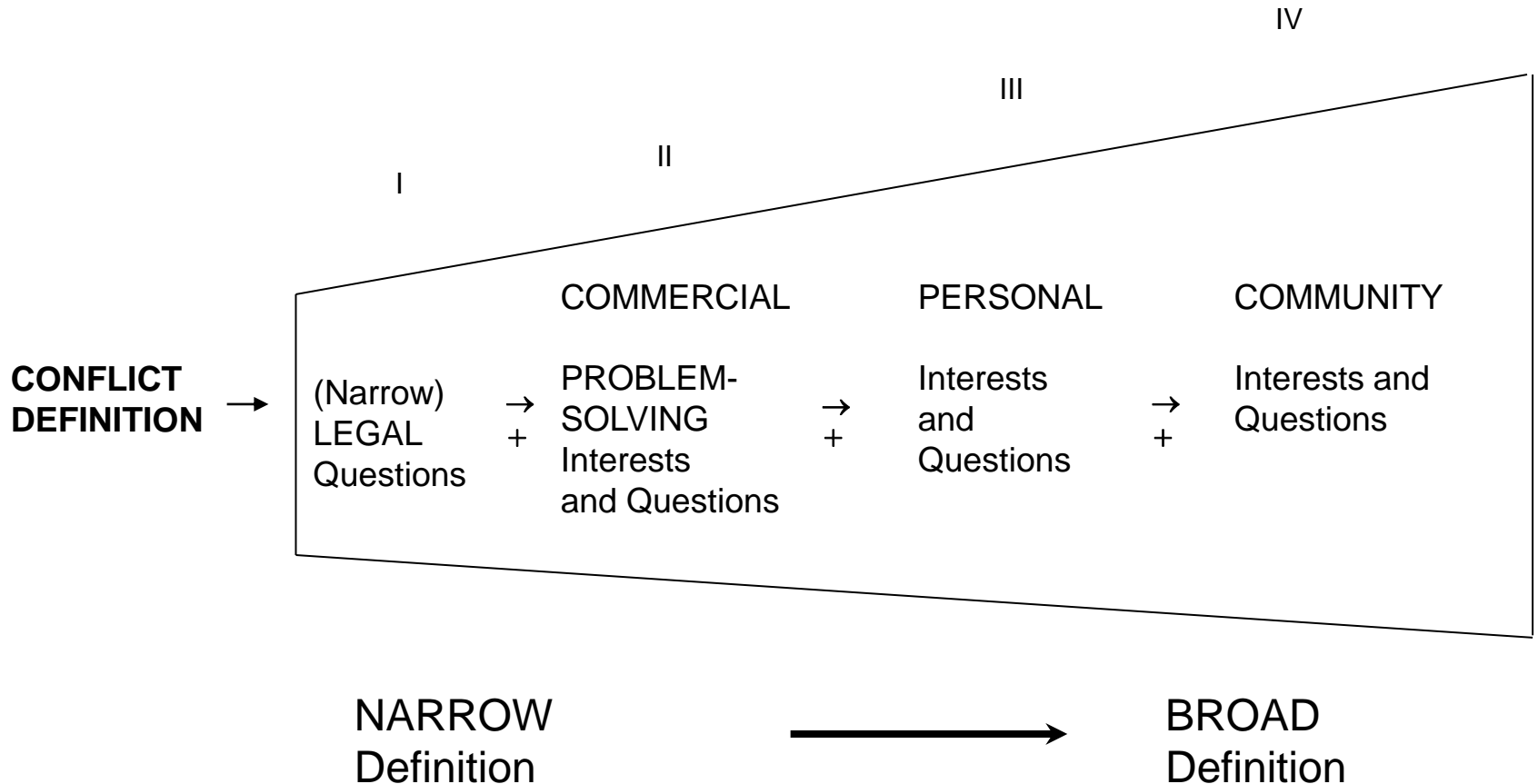
- 1. Procedural
- 2. Revealed, Guessed or Common Life Goals/Risks
- 3. Statistical Patterns of Behaviour
- 4. Systems---dreaded “in my experience”.
- 5. Information—common options/behaviour
- 6. Stories—“I once had a client---”
- 7. Guessed future judicial “reasoning”—legal advice? At last!

Procedural Advice

- What procedural advice do you give as a mediator? (or have heard mediators give?)
- What standard procedural advice would you like any mediator to give?

Levels of Problem Definition

问题界定的（明确）程度



Giving Advice in all types of EM: What is a “particular” RISK ANALYSIS?

- Advice based on revealed and confidential information about client goals and risks
- “Assuming that these 4 things you told me this morning are still important, then you need to—”
- Advice offered in language and diagrams which are understandable
- Where possible, monetising the revealed risks

LIFE GOALS? THIS OFFER?



- To focus on my work
- To avoid becoming bitter
- To regain “control” of my life
- To settle “in the range”
- To reduce risks of paybacks
- To receive at least [\$1,540,000]
- Other ??

FIVE HUMBLE HYPOTHESES

五项基本假设

- What are the **causes** of this conflict? 引起争议的原因?
- What **interventions** might be helpful? 何种干预可能是有效的?
- What **bumps/glitches** are predictable? 可以预见的冲突和障碍?
- What **substantive outcomes** are possible/probable? 可能产生的实质性结果?
- What **risks** if the conflict continues? (**Goals?**) 争端持续下去将带来的风险? (目标?)

Disclose to EM –or Not?

- What could/Should you disclose to the EM?
- When to make “confidential” disclosures?
- Eg—your “real” legal goals and risks?
- Your business and life goals/risks?
- Rate of intended “movement” on each line?
- Possible packages?
- Truth, or Not: Theatrics or Lies?

What is a “generalised” RISK ANALYSIS?

- A shotgun list of the standard risks of conflict and litigation
- Expressed as “in my experience”; systems; statistics; some research; or stories
- In language and diagrams which are understandable
- Without breaching any confidentiality

Eg. Critiques of Litigation and Adjudication

- Results uncertain
- Legal costs higher than outcomes
- Hearings and judgments delayed
- Judges stressed; impatient
- Judges do not understand complex evidence
- Legal categories hide real conflicts
- Legal remedies unimaginative
- Inaccessible to poor and middle class
- Rarely “finalises” conflict
- Results depend on expert’s skill
- Involves constant deceit, ambush, tricks
- Process is convoluted

Critiques of Litigation and Adjudication cont'd

- Disadvantageous to “one-shotters”
- Disputants lose control
- Disputants suffer hidden costs of trauma, absence from work etc
- Myths of justice, rationality and finality hide realities
- Lawyers have few incentives to settle early
- Judges tend to split difference
- DIY litigants confuse and clog courts
- Constant procedural reforms
- Case management multiplies hurdles
- Damaging *publicity*
- Perceived or actually incompetent lawyers or “experts”

“Because litigators rarely win or lose cases, they derive job satisfaction by recasting minor discovery disputes as titanic struggles. Younger lawyers, convinced that their future careers may hinge on how tough they seem while conducting discovery, may conclude that it is more important to look and sound ferocious than to act co-operatively, even if all that huffing and puffing does not help (and sometimes harms) their cases. While unpleasant at first, nastiness, like chewing tobacco, becomes a habit... Without guidance as to appropriate conduct from their elders, either at the firm or at the bench, it is easy for young lawyers not only to stay mired in contumacious, morally immature conduct, but to actually enjoy it.”

Yablon: *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, (1996) 96 Columbia Law Rev 1618.

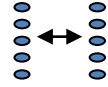
Advantages of Litigation

- Structures to require some disclosure of facts
- Creates time and “distance” between highly conflicted disputants
- Structure gives deadlines – a result is certain
- Requires precise and documented “reasonable” behaviour
- Expert helper (lawyer) gives some *power*; less chance of intimidation
- Sometimes provides a third party official who moderates behaviour and outcome
- Provides *precedent* for similar conflicts
- Provides a public arena for social change when legislatures are too slow
- Public theatre and education concerning certain (un)acceptable behaviour
- Fast interlocutory results
- The public have respect for impartiality of an experienced umpire
- Court orders have enforcement support
- Diagnostic factors – some disputes need an umpire

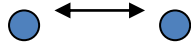
SOCIAL TRANSFORMATION OF CONFLICT

John Paul Lederach, Mennonite Conciliation Service, 1989

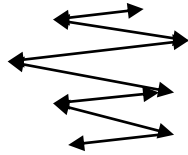
7. Polarisation



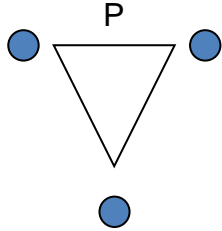
6. Antagonism -> hostility



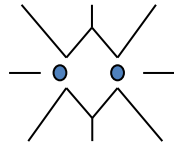
5. Eye for an eye; Reaction and escalation



4. Triangle;
Talk *about* not with.



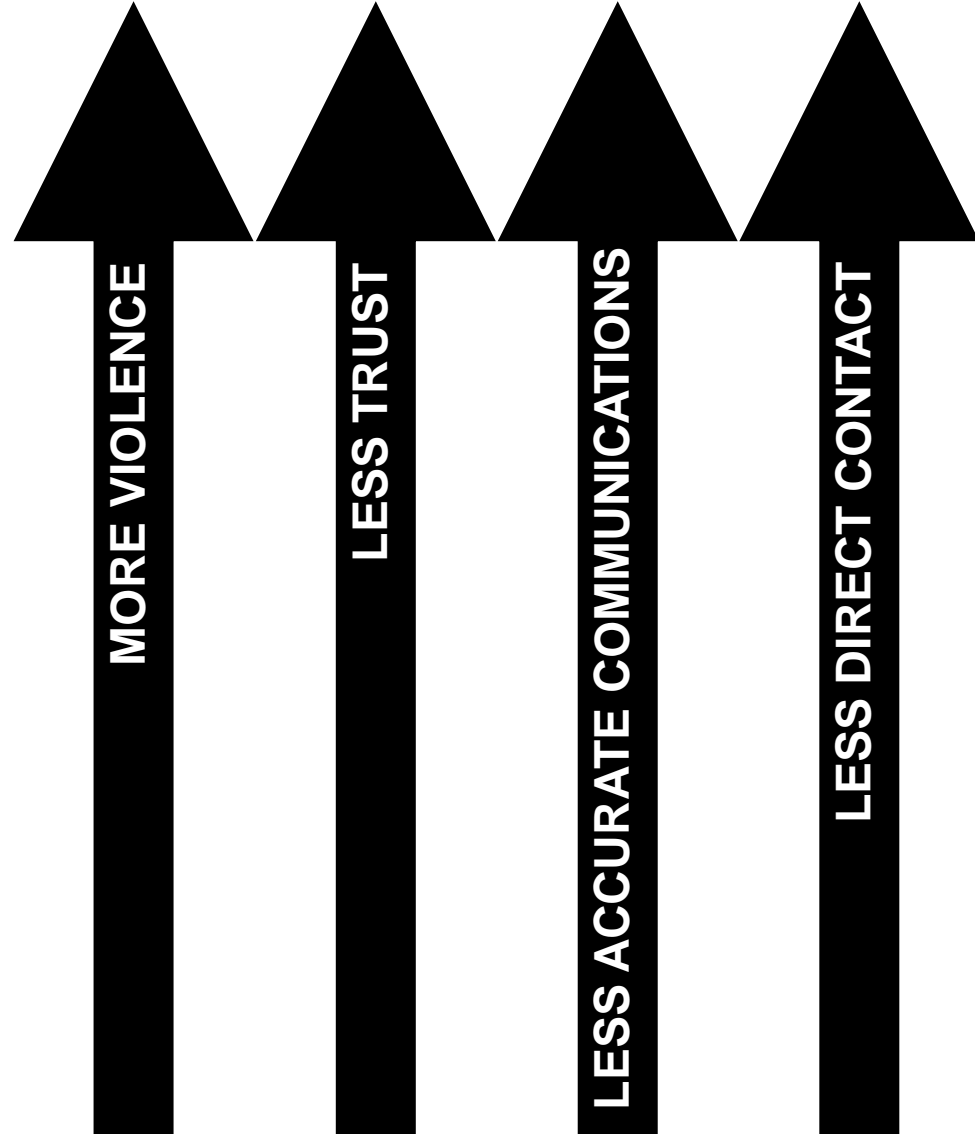
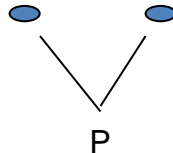
3. Issue proliferation for
specific to general



2. Shift from disagreement to personal
antagonism. Person seen as problem



1. Problem-solving. Disagree, but
share problem



Common Responses of Decision-Makers (per V. Aubert)

- 1. Go away—sort it out yourselves
- 2. Go away—I might get it wrong
- 3. Go away—I'm too busy: join the queue
- 4. Go away—Come back when you have more information
- 5. “Shunting”—I'll refer you to someone else
- 6. First I will consult with the influential—come back later
- 7. Middle of the roadism—I'll split the difference
- 8. Any decision must not open future floodgates
- 9. Any decision must be consistent with past decisions
- 10. I'll make a quick decision—but don't confuse me with litanies of facts
- 11. I'll make a quick decision if I trust this supplicant from past experience
- 12. I'll make a quick decision if the paperwork looks OK.

Supreme Court of New South Wales Court of Appeal

Handley, Sheller and Fitzgerald JA

40907/98 - *Studer v Boettcher* [2000] NSWCA 263

Fitzgerald JA

[63]...it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.

Advice About How/Options to Negotiate?—Yes!

An attempt to influence another
person through the exchange of
ideas or items of value.

PREPARE “DOUBTS”

CREATING DOUBT IN NEGOTIATION AND MEDIATION

CONCEPT	APPLICATION?
1. FACTS – “I have different facts....”	
2. EVIDENCE – “I have a document to show....”	
3. CREDIBILITY – “who is more likely to be believed....?”	
4. RULES – “You are applying the wrong rules....”	
5. RULES – Insider knowledge: “That is not how the system works here....”	
6. PUBLICITY/REPUTATION – “What happens when this becomes public?”	
7. DELAY – “If we don’t agree today....”	
8. COSTS (Direct) – “The predicted costs of lawyers and accountants are....”	
9. COSTS (Indirect) – “How much time away from business....”	
10. STRESS – “How much sleep....?”	

11.	INCONVENIENCE FOR THIRD PARTIES – “How will your children, boss, friends, feel when subpoenaed, notified....?”	
12.	NOTHING TO LOSE – “(S)he will eventually wear you out/stone in shoe....”	
13.	POWERFUL – “My client has money and connections”	
14.	FLOODGATE – “I cannot create a precedent for”	
15.	OUTSIDE INFLUENCES – “My constituents/members/boss insist that....”	
16.	ALTERNATIVES – “I can do better elsewhere....”	
17.	GOOD COP/BAD COP – “Deal with me or else....”	
18.	EXPERTISE – “Our expert knows more X than yours”	
19.	LOSS OF CONTROL and ESCALATION – “If we don’t reach agreement, this is the likely scenario....”	
20.	RATIONALITY – “You seem to assume that the court, club, system, is wise and rational....”	
21.	OTHER?	

Cialdini's Sales Levers

- The Consistency Principle
- The Authority Principle
- The Reciprocity Principle
- The Similarity Principle
- The Scarcity and (converse)
Nothing-to-Lose Principle
- The Coalition Principle

(Robert Cialdini, *Influence- Science and Practice*, 2001)

Potential Advantages of EM

- Mini-trial rehearsal
- Fresh insight about how an “outsider” reacts
- Access to a specialist expert
- Put pressure on own reluctant client or tribe
- Cheap production line of resolution for insurers; poor and middle class
- NB. Protect nervous middle managers
- Culturally, client wants “authority” figure.
- Comfortable zone for lawyers—alleged facts, evidence, arguments, rules, ranges.
- EM is all I have experienced? A known process

Diagnosis—when to use EM?

- Glimpse the variety of judicial behaviours → doubt!
- Wake up call if one or more disputants are deluded and perceived to be stuck in “insult zone” → doubt!
- To gain better understanding of other parties
- Reduce cost, delay and publicity of trial
- Jolt/persuade client who is not listening → doubt!
- NB Justify settlement to critical “tribe”
- Skilled EM is available and affordable
- Expert EM may know “more” than generalist judges?
- Provide foundation for next round of “commercial” negotiations
- NB Culturally, parties/lawyers have no skills in problem solving
- Disputants/lawyers have no experience/comfort other than with EM

Disadvantages of EM

- Habit and misdiagnosis
- Tends to dominate in legal cultures>>misdiagnosis again?
- Lacks analysis of multiple causes/interests/responses
- Slides to shuttle too fast
- Client alienation—loss of future mediation business
- EM lied to; and carries lies; and is distrusted
- Narrow EM field of expertise risks redundancy?

Beyond “Types” of Advice—Nuances about Advice

- Consent—written and oral
- Advice to whom?
- Timing—when in the process?
- Tone?—gradations from hint to insistence
- Words and images--what is in your repertoire?

Standard challenges of EM

- Beyond the standard challenges of all negotiation/mediation----eg
- Hiding key information from EM
- Posturing and theatre
- Perception of EM bias due to past employment
- Lawyer control and clients silenced; “say nothing”
- Distrust of what shuttle EM says/hears/offers in “other room”.
- Poor and middle class can only afford one stop shopping—including drafting.
- How to manage disappointing “news” and loss of face for professional advisers?

Cross Cultural Negotiations

跨文化谈判

- What is a “CULTURE”?
- What are the features of a particular culture?
- What responses are available to negotiate across cultures?

[Lewicki et al, *Negotiation* (2015) Ch 16]

Foster's Eight Influences of Culture on Negotiation/Mediation

的影响调解/谈判的八种文化因素

1. Definition of Negotiation 对谈判的定义
2. Selection of Negotiators 谈判者的遴选
3. Protocol 协议
4. Communication 沟通
5. Time 时间
6. Risk Propensity 风险倾向
7. Groups versus Individuals 小组与个人
8. Nature of Agreement 协议的性质

[D.A. Foster, *Bargaining Across Borders: How to Negotiate Business Successfully Anywhere in the World* (1992)]

Some Cultural Differences That Affect Conflict Resolution

影响争端解决的文化差异

Expressing strong emotions 表达强烈的情绪

- Strong feelings must be gotten out of the way first so negotiation can progress through calm, rational communication. Being objective and reasonable is associated with legitimacy.
- Progress must be made in negotiation *before* participants can let go of intense expressions of emotion. Strong feelings are associated with legitimacy of a concern.

Trustworthiness of mediator 调解人的可信度

- Impartiality is important, therefore someone who is a stranger to all parties is most likely to be trusted.
- Caring and involvement are important, therefore someone familiar who is known and respected by all parties is most likely to be trusted.

Site of mediation 调解场所

- The conflict should be separated from outside influences, therefore a neutral location is best.
- Conflict resolution should take place in a context where the conflict occurs.

Getting to the point 切中要害

- It is important not to beat around the bush; identify and discuss the key issues in a conflict quickly.
- It is rude to name problems too quickly; better to spend some time in casual interaction first.

Issue organisation 问题解决的顺序

- Talk about one thing at a time
- Deal with several topics at once, or move back and forth between issues.

Saving face 保留面子

- Admitting that you have been wrong, or backing down, is unpleasant, but appropriate in some circumstances.
- Losing face is completely unacceptable.

Structure of session 会议流程

- Conflict resolution works best when organisation is formal. There should be clear roles, rules, and demarcation of beginning, ending and the stages in between.
- Conflict is best resolved in a climate of informality that resembles casual, social interaction.

Some Cultural Differences That Affect Conflict Resolution cont'd

Attribution of fault 过错归因

- When someone defends themselves against an accusation, it is a sign of innocence; silence signifies guilt.
- When someone defends themselves against an accusation, it shows they are guilty; to ignore an accusation is a sign of innocence.

Threats 威胁

- Threats represent a real intention to do harm. They are said maliciously.
- Threats represent a safe way to let off steam without doing real damage. They should not be taken literally.

Function of argument 争论的作用

- Heated argument escalates conflict and interferes with finding solutions.
- Heated argument is part of the truth-seeking process and helps resolve conflict.

Active listening 积极倾听

- Nodding, saying “mm hmm,” etc, means, “I am paying attention to you.”
- Nodding, saying “mm hmm,” etc, means, “I agree with what you are saying.”

Being silent while others discuss 他人讨论时保持安静

- Silence is neutral; it simply means someone is not ready to speak.
- Silence represents agreement with what is being said.
- Not speaking when others exchange views is a refusal to help resolve the conflict and is obstructive.

Eye contact 目光接触

- It is natural and respectful to look directly at the person you are talking with. Looking away can signify evasion or deception.
- It is natural and respectful to look away while talking with someone. Direct gaze can signify challenge or attack.

Questions 问题

- Questions indicate interest and genuine concern.
- Questions are a form of attack; it is intrusive to require someone to explain themselves.

(The Mennonite Conciliation Service Training Manual p 128–129)

PREDICTABLE CONFUSIONS IN EAST-WEST NEGOTIATION/MEDIATION
东西方谈判/调解中可预见的困惑

Get to the point	←→	Be indirect
Say what you mean	←→	Be indirect
Go quickly	←→	Go slowly
“Yes” means “I agree”	←→	“Yes” means “I do not want to offend you”
Talk about business	←→	Talk about family
Use first names	←→	Never use first names
Talk	←→	Silence is good
Sign detailed contracts	←→	Sign short contracts, or just shake hands
A contract is final	←→	A contract is only an agreement to talk in the future
Change negotiators at the table	←→	Never change negotiators

PREDICTABLE CONFUSIONS IN EAST-WEST NEGOTIATION/MEDIATION
cont'd

Anyone can speak	↔	Only the boss should speak
Knowledgeable people should speak	↔	Only the boss should speak
I can decide	↔	Many outsiders must be consulted
Include lawyers	↔	Exclude lawyers
Ask many questions to gather knowledge	↔	Ask many questions to show politeness and gain time to think
Argue strengths and weaknesses	↔	Avoid such arguments as someone may lose respect/"face"
Friends must also be commercial	↔	Friends must help, no matter what
Take some risks	↔	Avoid risk

FRENCH –

“Learned Behaviours” as Culture?

1. Begin ABSTRACT – move to detail
2. Find NETWORKS from school or university
3. Formal – title, meals, etiquette
4. Direct and ARGUMENTATIVE
5. Little TIME SENSITIVITY / ie LATE!
6. Low RISK TAKING – ie BUREAUCRATIC - DO NOT TRY NEW THINGS!
7. DOMINANT leader will take responsibility for DECISION (hierarchical)
8. Express EMOTION STRONGLY
9. STRONG BODY LANGUAGE/GESTURES
10. Often INTERRUPT

NORWEGIANS – “Learned Behaviours” as Culture?

1. ON TIME!
2. NO physical contact; distance
3. Reserved; no emotion
4. No TITLES – Jantelov; humility
5. Impressed by “FACTUAL analysis; and TRUTH”
6. Less positional; more reasonable firm
7. SHORT written agreements
8. No “time wasting”; straight to business
9. Focussed on caring; community well-being (“feminine” per Hofstede)
10. DO NOT INTERRUPT

What can and should a Negotiator do in each Cross-Cultural Situation?

在各种跨文化情况下谈判者可能和应该做什么？

❖ Variety of Possible Responses Available:

1. Low Familiarity with other Culture
2. Moderate Familiarity with other Culture
3. High Familiarity with other Culture

Eg *LOW*

1. Always bring a helper
2. Use a skilled mediator
3. Ask other to use *your* approach

Evaluative Mediation

John Wade

Hong Kong, July, 2021

1. Which of these 4 models are you seeing in practice most often?

.....
.....
.....
.....
.....

2. Why is this model so common?

.....
.....
.....
.....
.....

In fact, the variables in the process of mediation are endless. The following “Mediation Abacus” indicates graphically how each mediation can be designed and varied by shifting the abacus bead from one extreme to another.

P
R
O
B
L
E
M

D
E
F
I
N
I
N
G

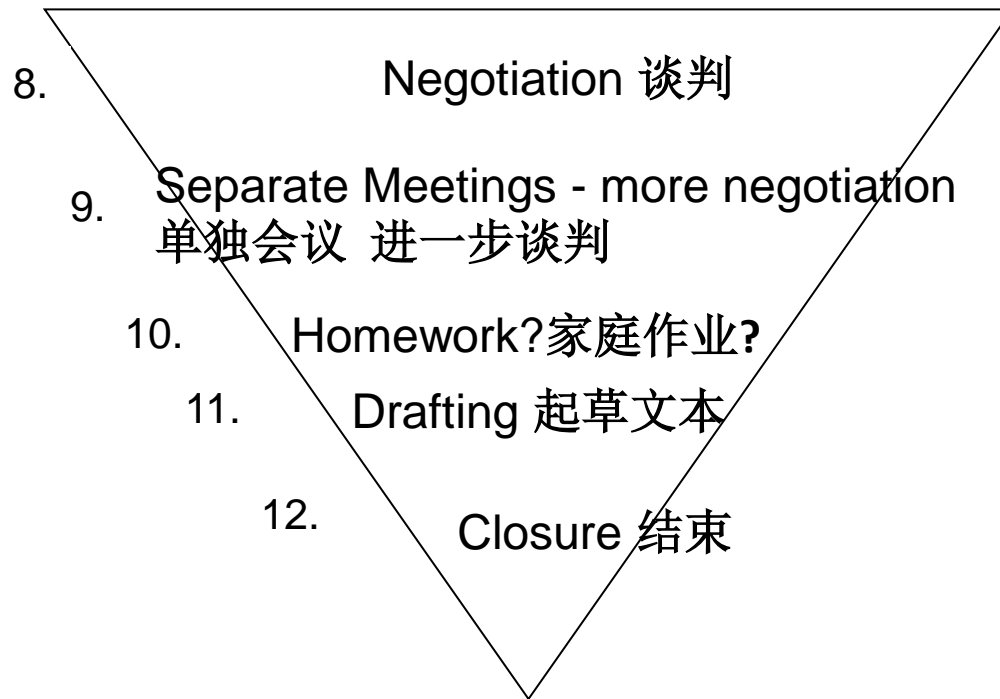
问
题
界
定



D
E
C
I
S
I
O
N

M
A
K
I
N
G

做
出
决
定

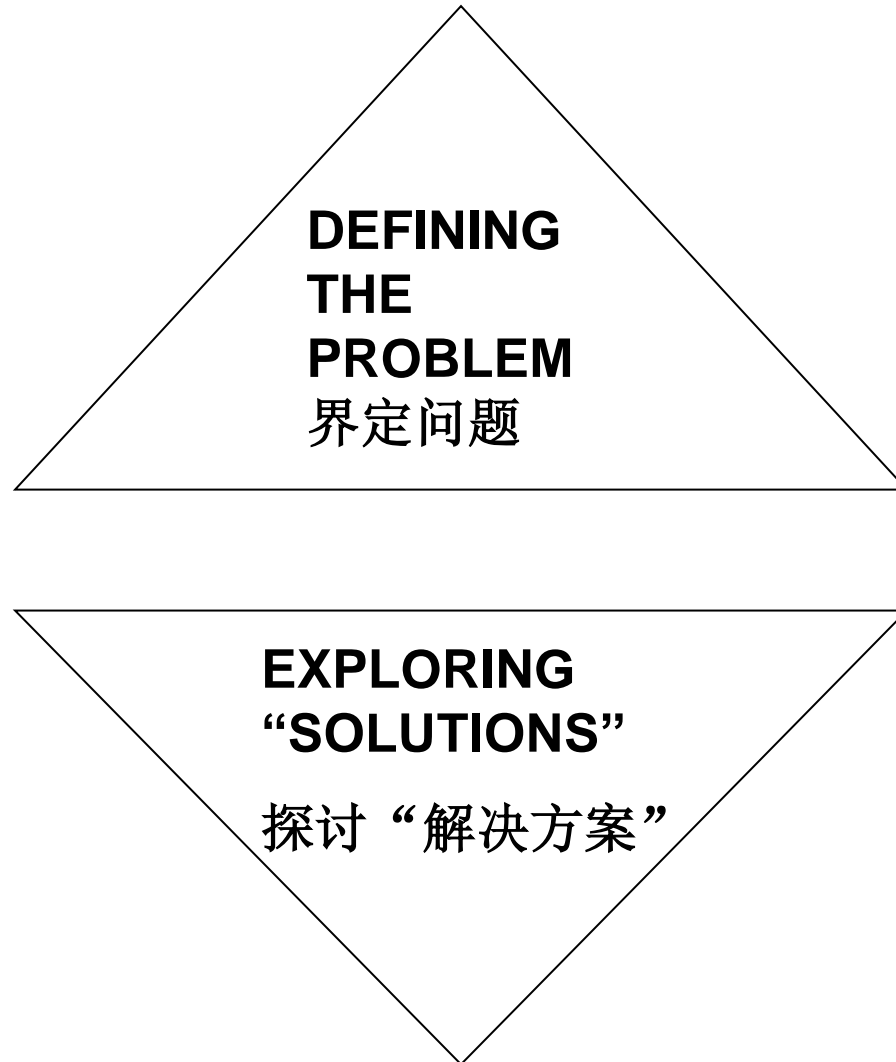


ONE MODEL FOR WRITTEN SUBMISSIONS TO AN ARBITRATOR OR EM

1. Introduction; names of parties; legal representatives; date; telephone; fax; address
2. Chronology of business/contract/dispute
3. Affidavit of financial circumstances
4. Summary chart of assets, liabilities, respective valuations
5. Issues of fact – list
6. Issues of law – list
7. Submissions/arguments on first issue of fact
 - (i)
 - (ii) etc
8. Conclusion – orders sought generally
9. Orders sought specifically (and possibly in the alternative)

Mediation Triangles

调解三方关系



P
R
O
B
L
E
M

D
E
F
I
N
I
N
G

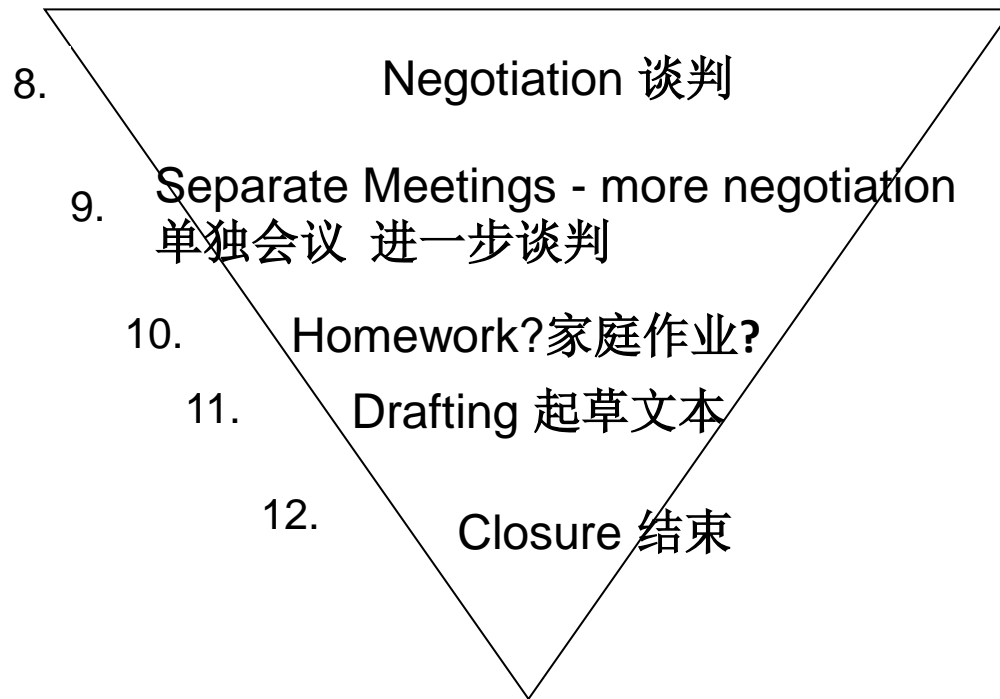
问
题
界
定



D
E
C
I
S
I
O
N

M
A
K
I
N
G

做
出
决
定



EM PROCESS—“BASIC”?

Preparation: advice

Presentations

Separation-create doubt; advice

Offers/Negotiation; more advice

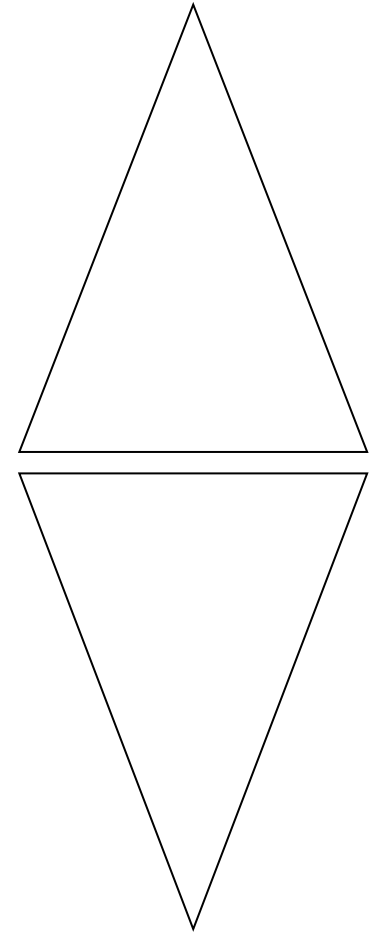
Draft: Summary

Expanding the “Basic” EM Preparation Process?

- Preparation meetings to create in short!! writing:
- 1. “Agreed facts” (and perhaps “goals”)
- 2. Create Agenda of “How” and “What” questions on Currently Contentious Facts, Rules and Outcomes
- 3. Current Ranges (plus History of offers) on each agenda item (“Lines”)
- 4. Submissions/arguments/doubts about each line, topic, “issue”
- 5. “Assuming that—” → preferred solution to each line
- 6. 1-3 Agreed if possible. 4 and 5 swapped and given to mediator.

Skills in Mediation 调解技巧

- Active listening
- Empathy
- Reframing
- Tolerance of high emotions
- (Open) Questioning
- Writing on whiteboards
- Being non judgemental
- Refraining from imposing one's own solutions
- Lateral thinking
- Giving “advice”
- Persistence
- “What if” questions
- Diversion
- Drafting



DIFFERENT OPENING CONCEPTUAL QUESTIONS BY MEDIATORS/NEGOTIATORS 调解开始时调解人/谈判者提出的不同的概念性问题

- **Feelings 感受**
How are you feeling? What do you feel about this situation?
- **Facts 事实**
Can you tell me the background to this dispute?
What is your understanding of the facts?
- **Concerns 所关心的问题**
What concerns bring you here?
What is concerning you at this time?
- **Goals/Aims 目标/目的**
What do you hope to achieve?
What are your aims in this negotiation?
Where do you hope to be in X year's time?
- **Issues 问题**
What are the issues/questions for discussion?
- **Differences 分歧**
What is the history of offers?
What are the current differences between you?
What is the gap between you?
- **Solutions/Wants 解决办法/期望**
What do you want/What do you see as the solution to these problems?
- **Arguments 争论**
What are the arguments for your side?
Can you summarise the (legal) arguments for each side?

FAST Diagnosis—which conflicts to send to (evaluative) mediation?

- All
- All-with onus on avoider
- All-with list of exceptions
- Random chance—eg Wayne Brazil
- All—when court lists are too long
- Monetary limits—small or high?
- List of criteria applied by Registrar?/Parties?Judge?/mediator?
- Dumping: professional exhaustion

Mediators/Negotiators Controlling Information

Possible Wording of Offers

1. RAW FIGURES
2. PROCEDURAL “PACKAGING”
“I will go through offer, and then...”
3. EXPLANATION of HOW FIGURES ARE CALCULATED
4. HINT of MORE OFFERS TO COME:
“At this stage...”
5. SELECTIVE Disclosure/Spin – Emotions
“She is feeling sad...”
6. SELECTIVE Disclosure/Spin – Goals and Risks
“The alternatives are delay, publicity etc...”

STRUCTURE FOR FORMAL SHORT REASONS

(Bernstein p 131)

- (A) Arbitration or EM agreement; date and parties
- (B) Date and method of arbitrator's or EM's appointment
- (C) Procedure – eg documents only; dates of submission
- (D) List of issues of (i) fact; (ii) law
- (E) First issue of fact – “I find..... because.....”
- (F) Second issue of fact....
- (G) First issue of law
 - (i) arguments for claimant....
 - (ii) arguments for respondent....
 - “I prefer the case for because (a), (b), (c)
- (H) My recommendation is in the following terms and orders....
- (I) Date; signature

What follows is a catalogue of barriers to settlement experienced at and after joint mediation/negotiation meetings.

- **Disputants arriving and claiming or hinting at lack of authority to settle**
- **Personal insults**
- **Extreme offers**
- **Unwillingness to make offers**
- **Aggressive dominating representatives**
- **Undue emphasis upon narrow “legal” issues and arguments**
- **Point scoring and sniping**
- **Representatives who have become emotionally involved**
- **Chaotic information**
- **Duelling experts**
- **Lying, exaggerating**
- **Playing good cop/bad cop**
- **Hiding information**
- **Influential outsiders who are driving the conflict**
- **Persistent, overconfident legal or other “expert” advice**
- **Unhelpful mediator**

Cont'd

- **Anchoring** (The strategy of starting negotiations at an extreme position “outside the range” and thereby creating a benchmark. The anchorer can then make progressive concessions and expect concessions in response.)
- **Reactive Devaluation.** The proven tendency to devalue any suggestion or solution emanating from the “opposition” (even if it is a constructive suggestion)
- **Decision Traps.** A number of standard patterns of human perception and behaviour which guarantee unwise decisions.
- **Half-Hearted Analysis.** Clients have not been given simple written and diagrammatic advice about normal *range* of good-day bad-day solutions and standard *risks* attached to each solution. Instead they have been given lazy verbal vagueness about “good chance”, “winning”, “strong case”, “some risks”, no guarantees”, etc.
- **High levels of emotion**
- **Fearful or overwhelmed disputant**
- **Fear of breaches of confidentiality (“leaks”) by the mediator**
- **Last minute add-on offers**
- **Getting jammed on the last gap**
- **Post settlement blues or regrets**
- **Post settlement glitches**
- **How to end an unsuccessful mediation constructively**

POSSIBLE MEDIATOR / LAWYER RESPONSES TO THE “EMOTIONAL” NEGOTIATOR / CLIENT

- Listen & empathise
- Educate & normalise
- Long adjournment
- Short adjournment – tissues and tea
- Refer to counselling / therapy (with letter)
- Repression and denial of emotion
- Ignore emotional cues
- Persistent return to “practical” matters
- Professional as knight in shining armour
- Revert to smaller, interim issues
- Identify and isolate emotional issues
- Written report; plus time to reflect
- Presence of trusted friend
- Begin “therapy”
- Counsellor / therapist present at the initial session
- Ram through an agreement
- Shuttle diplomacy immediately
- Start together; then shuttle
- Cathartic outpouring in one room
- Confide in other party about emotional agenda
- Refer to an authoritative decision maker
- Others?

HOW TO END “UNSUCCESSFUL” MEDIATION (NEGOTIATION)?

- **Ask parties to make closing speeches**
“Anything to say?”
- **Summarise; give structure**
 - mini-agreements
 - areas of jam
- **Summarise in writing**
“I will send you both a written report...”
- **Make optimistic speech**
“You will settle...” – with time; more information; more pain
- **Brainstorm process**
“What will progress with negotiation?”; “I’m stuck at the moment...”
- **Suggest “process” speech**
“In my opinion, you need to go through the following steps... (swap information, Bill and Mary meet).” “Are you willing to agree to this timetable?”
- **Plan next meeting**
“Are you willing to meet again?” “Can we make a time?” “I’m available...”
- **Pause and think**
“I will phone both of you next Friday to ask you upon reflection, how you think this can be progressed.” “We are all weary at the moment...”
- **Silence**
- **Stay, threaten or beg**
“I’m locking the door.” “Crazy to lose this progress...”
- **Just send everyone home**
“They have gone...”
- **Repeat internal risk analysis/life goal with each team**

Course will rotate through 5 overlapping topics

- CONTEXT for EM
- PREPARATION for EM
- PROCESS AND SKILLS for EM
- “ADVICE” methods during EM
- STANDARD HURDLES AND RESPONSES

MODELS OF MEDIATION

	Settlement Mediation	Facilitative Mediation	Therapeutic Mediation	Evaluative Mediation
Also Known as	Compromise mediation	Interest-based, problem-solving mediation	Reconciliation mediation	Advisory, managerial mediation
Main Objective	To encourage incremental bargaining towards compromise, at a 'central' point between the parties' positional demands	To avoid positions and negotiate in terms of parties' underlying needs and interests instead of their strict legal entitlements	To deal with underlying causes of the parties' problem, with a view to improving their relationship as a basis for resolution of the dispute	To reach a settlement according to the legal rights and entitlements of the parties and within the anticipated range of court outcomes
Definition of Dispute	In terms of positions, based on parties' self-definition	In terms of parties' underlying interests – substantive, procedural and psychological	In terms of behavioural, emotional and relationship factors	In terms of legal concepts or industry standards
Types of Mediators	High status (barrister, manager); no necessary proficiency in the process, skills and techniques of mediation	Knowledgeable in mediation process and techniques with no necessary knowledge of the subject matter	Expertise in counselling or social work, with understanding of psychological causes of conflict	Expertise in substantive areas of the dispute, no necessary qualifications in mediation techniques
Mediator's Main Role	Determine parties' 'bottom lines' and through relatively persuasive interventions move them in stages off their positions to a compromise point	Maintain a constructive dialogue between the parties and enhance negotiation process, make process interventions	Use professional therapeutic techniques, before or during mediation, to diagnose and treat relationship problems	Provide additional information, advise and persuade the parties, bring professional expertise to bear on content of negotiations
Other Characteristics	Limited procedural interventions by mediator, susceptible to negotiation tactics	Low intervention role for mediator, parties encouraged to fashion creative outcomes around mutual interests and improve relationships	Decision-making postponed until relationship issues have been dealt with	High intervention by mediator, less party control over outcome
Strengths	Understood by parties, culturally accepted, not difficult to do	Can make most efficient use of negotiation opportunities, controlled by parties	Can lead to 'resolution' rather than just 'settlement' of dispute	Mediator's substantive expertise used, outcome within range of likely court verdicts
Shortcomings	Overlooks parties' needs and interests, can be manipulated through initial ambit claims	May not reach an outcome, can be lengthy, requires skills from parties	Could be prolonged and terminated without any agreement, confuses counselling/mediation roles	Blurs mediation/arbitration distinction, does not teach parties skills for the future, additional responsibilities for mediator
Areas of Application	Commercial, personal injuries, industrial disputes	International and national commercial, community, family, environmental, partnership disputes	Cross Cultural, escalated commercial, matrimonial, parent/adolescent, family networks, continuing relationships disputes	International and national, commercial, personal injuries, trade practices, anti-discrimination, matrimonial property disputes