Wein Mediation
The dispute resolution specialists

The Wein Mediation Method - A Humanist Mediation Model © Alan Wein AM 2016 revised 2024

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“A humanist, narrative engagement style”

“Connecting, engaging and bringing experience and humanity into complex legal, commercial and relationship conflict. Offering hope that the dispute can find a self-determined resolution through a meaningful and purposeful engagement and involvement by all parties with the assistance of the mediator.”

Knowledge, like the universe is always expanding.

Attribution and referencing

In the event that I have not correctly referenced an author or publication or attributed the citation reference correctly, please excuse me for that error, as I wrote this paper as a practice paper and not an academic publication. In the event that there is an incorrect or no reference, please communicate with me and I will make the appropriate correction.

FOREWORD

Mediation is a process which, in one form or another, has been practised since ancient times. There is good evidence of mediation practices in traditional and religious societies. Nowadays, in our industrial societies, it is a process well accepted – whether as a standalone process or as an essential step in most commercial and many other types of litigation.

Much has been written about mediation – particularly mediation models, ethical issues, philosophy and theory. The mediation process is, however, intensely human and operates on many levels engaging the inherent complexity and multidimensional nature of human relations and communications generally, and in a societal and cultural context. It follows that the process does not lend itself to useful consideration in the straightjacket of many of the "mediation models" that are to be found in the literature.

Alan Wein does, in this work, explore in a most careful, insightful and illuminating way these human dimensions, hence the complexity of the mediation process. Alan is ideally placed for this exploration, having had a long and very successful career as a mediator undertaking some of the most complex and multidimensional disputes. Many of these disputes have been very high value commercial disputes – disputes which also generally incorporate these real and significant human dimensions which, if not addressed, may inhibit or prevent settlement. The insights he provides are, as a consequence, extremely valuable and will inform all concerned in the process – mediators, lawyers and parties – with respect to all manner of disputes.

I have no hesitation in commending Alan Wein's work as essential reading for all concerned in the mediation process.

The Hon Justice Clyde Croft
Supreme Court
Melbourne

Introduction

Life is full of complex relationship issues where personalities, life experiences, emotions, intelligences, perceptions and expectations all converge into a theatre for potential conflict and dispute.

As humans, the pathway to resolution of conflict and dispute can occur in two ways - either through an imposed direction, order or judgment of a third party individual or by a self-determined outcome with the assistance of a non-imposing or directing individual.

Ideally, a human issue or set of problems should be capable of resolution through processes and methods that are understood, accepted and embraced by the parties in dispute and those that advise and support those parties. However, many parties in dispute find themselves in the chaos of litigation. This arises from an inability to communicate a willingness to discuss and understand the issues in dispute or from following advice of professionals who may not understand the client's "best interests" or real expectations. The resultant litigation comes with great physical and emotional cost, risk, distraction and uncertainty. The cost is not only borne privately by the parties, but by the State in having judges, courts and personnel available to conduct proceedings.

There is certainly a time, place and need for litigation but it must be as a last resort, only after all alternative resolution options have been considered . This is the policy and modus operandi of most common law judicial systems and appears in the philosophy and strategic thinking of many corporate boardrooms, businesses and organizations.

My approach to high level disputes is to understand the human dynamics and factors at play. Identifying these can unlock the parties and the key issues in dispute and enables resolution to occur through a *dynamic narrative* engagement

in an open, trusting process. This method averts the misery that litigation often causes all parties.

There is no magic to the role of the mediator. The role has been well defined in many reference books and articles. The fundamental challenge is to define the characteristics and methods of process of outstanding mediators and use these to assist others in the development of their own learning and practice. If we can unlock the secrets of success and define the basis of outstanding and successful experience, we improve the science of mediation practice and enable further development of the knowledge base, innovation and creative thinking critical to improving the faculty of mediation as a practice art form. As a lawyer and mediator, my paper will be confined to that genre. However, many aspects of my method and approach may be adopted in other fields of non-litigation mediation practice.

Defining Mediation

The National Alternative Dispute Resolution Advisory Committee (**NADRAC**)provides a good definition of mediation:

"Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement".[3]

Duty of the Mediator

The duty of the mediator is set out in the Mediation Engagement Agreement made between the mediator and the parties. The duty in the Agreement is defined through statutory provisions, court orders and rules, duties, rights and obligations developed through common law. The mediator has discretion in how to fulfil this duty, which is largely influenced by the his or her style, personality and process. The fundamental and imperative duty of the mediator is to assist the parties in bringing about a meaningful, self-determined resolution to the dispute.

The general principles of a mediator's role were defined by Robert Angyal SC, Chairman of the New South Wales Bar Association Mediation Committee**.**[4]

> *"3.4 The mediator has no power to impose an outcome on the parties and thus is not an adjudicator like a judge or an arbitrator.*

[3] National Alternative Dispute Resolution Advisory Committee*, Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution,* September 2003, https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF. *(*

[4] Robert Angyal SC, 'Advocacy at Mediation: An Oxymoron or an Essential Skill for the Modern Lawyer' in M. Legg (ed) *The Future of Dispute Resolution* (Lexis Nexis Butterworths 2013), 3.23.

3.5 The mediator does have power to control the mediation process (who talks next and how long; what issues are discussed; whether the parties are together or separated; when to have lunch, etc.).

3.6 The mediator thus has power to control the process but does not control the outcome of the process.

3.7 Because the mediator has no power to impose a result on the parties, the rules of natural justice do not apply. It is standard practice for the mediator to talk to the parties in private and be told things that must be kept confidential to the party imparting them.

3.8 The mediator can and should help the parties work out what issues (factual, legal and emotional) have to be resolved in order to make settlement possible.

3.9 The mediator can and should help the parties work out what each party needs (as distinct from what it says it wants) to satisfy itself with respect to each issue.

3.10 The mediator can and should help the parties to create and explore options for resolving the dispute. The parties are not limited to results that a court or arbitrator could order. They are limited only by their imagination, by the practicality of the option being considered, and by their ability to agree on it.

3.11 A mediator should not give legal advice or advice about the likely outcome of factual disputes. It is almost impossible for mediators to be regarded as neutral and impartial if they do these things.

3.12 The mediator can and should, however, "reality test" the position taken by a party. This is usually done in a private session, without the other party or parties being present. There is a fine but important line between vigorous reality testing and giving legal advice.

3.13 The mediator can and should help the parties (usually in private) consider how attractive is their best alternative to settling at mediation (usually a successful conclusion to litigation).

3.14 Because the mediator has no power over the substantive outcome of the process, the rules of natural justice do not apply. It is normal practice for the mediator to talk to the parties privately and to be told things by one party that must be kept confidential from the other party or parties."

The National Mediation Accreditation and Practice Standards require a certain level of qualification and understanding and the adoption of mediation "do's and don'ts". I am concerned that theoretical mediation education is too rigid and prevents some practitioners from adopting tailored responses to the mediation at hand in favour of textbook practice standards. The primary duty is to the parties who appoint the mediator to assist them. *What does that duty require?* It requires the mediator to fulfill his or her contractual obligations, comply with practice standards (if practicing under those standards) and follow any legislative or court-ordered directions and provisions. There are some aspects of my method that do not fit neatly within the practice standards toolbox. However, my method allows for wider creative thinking, humanist evaluation and narrative combined with practice standards. It is this addition to the traditional process that requires definition, context and unpacking in order to learn and develop skill. Experienced mediators will expand upon these important tools and the practice standards in order to develop sophisticated and deeper skills and understanding. The "great" mediators have developed an intuitive skill of mediation as an art, rather than a purely theoretical learned knowledge and skill

There have been recent changes in the accreditation and mediation standards requirements that come into effect in July 2024.

Australian Mediator and Dispute Resolution Accreditation Standards (AMDRAS) will begin to be implemented on **1st July 2024** with a 12-month transition period, as the transition from NMAS to AMDRAS.

RMAB's, (Recognised Mediator Accreditation Bodies which are now known as Recognised Providers, will be able to train and accredit mediators under both the NMAS and AMDRAS frameworks. Following this period, the AMDRAS will fully come into effect on the 1st July 2025.

There are a number of Recognised Mediation Providers such as Resolution Institute and the Australian Mediation Association etc. Members who hold their NMAS accreditation through most of the current RMAB's will have their accreditation status automatically transitioned to AMDRAS accreditation as of 1st July 2024.

Following the transition, AMDRAS accredited practitioners will be required to keep a log of their CPD and practice hours. The definition of "practice hours will now include:
up to 5 hours of intake and preparatory work to set up the dispute resolution process.
up to 5 hours of observing a more experienced practitioner.

Practice hours for Level 1 Accredited Mediators has been reduced to 20 hours per 2-year cycle and is 40 hours for each cycle for Advanced and Leading Mediators. CPD remains at 25 hours for each level per cycle.

A Humanist Engagement Mediation Model

Introducing the Model

The Wein Mediation Model is centred on traditions that occurred in ancient tribal or village communities where disputes were resolved initially by the involvement of community elders. These leaders encouraged parties involved to explain the issues and facts in dispute and then facilitated the parties into trying to come to a resolution through round table communication. The elders would only make a determination if the parties were unable to resolve the dispute themselves. The root of self-determined dispute resolution is ancient and has found its way back into modern ADR systems in a more elaborate and formalized manner.

Winslade and Monk state that "conflict is likely because people do not have direct access to the truth or the facts about any situation."[5] My objective is to assist parties to reach that truth by working through the fog of perceptions and expectations to a point where the options of settlement and resolution seem rational, logical and achievable.

There are three components to the Model:

1. The technical framework and structure required to process the mediation

2. The personality, skills, life experience, attitude and character of the mediator

3. The ability of the mediator, the parties and their representatives to get into the “flow” of the process

[5] John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution,* (Jossey-Bass Inc., 2000), 41.

1. The Technical Framework and Structure

There has been a great deal written about the various styles of mediation. In a concise paper by Jon Linden, [6] five principal styles of mediation were defined:

1. Facilitative[7]
2. Evaluative[8]
3. Directive
4. Transformative[9]
5. Narrative[10]

In my view, no single style of mediation fits all dispute situations. Good mediators can mix different formats to meet the dispute, party and process requirements in the best way.

The parties and the mediator need to understand that there are differences in mediation style that may have an impact on both the process and the outcome.

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[6] Jon Linden**,** *Mediation Styles: The Purists vs. The "Toolkit"*, 12 October 2000, Mediate.com, <http://www.mediate.com/articles/linden4.cfm>**.**

[7] Facilitative mediators do not give advice or predict how a court might rule on the situation. Some facilitative mediators will, however, contribute ideas during the brainstorming stage if the parties get stuck, and will help the parties evaluate the options they brainstormed by asking "reality testing" questions. The facilitative mediator "asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analysing options for resolution.

[8] Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. In the Evaluative Style, the mediator uses his skills to help disputants evaluate the positions that they espouse in the mediation. It is characterized by an effort to help disputants evaluate their respective positions and to consider whether they are practical. The evaluative style can be seen as somewhat directive, and the skillful evaluative mediator will be careful not to "impose" his or her opinion, but rather to be illustrative in helping the disputants "reality test" their positions and then help them decide what might be the prevailing position with regard to the facts and perceptions involved in the varying sides and positions. The evaluative mediator often has some expertise "in the substance of the dispute and applies his or her knowledge to offer an opinion of the merits of the case. See Zena D. Zumeta**, J.D**, *Styles of Mediation: Facilitative, Evaluative and Transformative Mediation*, 14 July 2015, Mediate.com, <http://www.mediate.com//articles/zumeta.cfm>.

[9] Transformative mediation aims to strengthen the parties' personal capacity for decision-making and increase their willingness and ability to appreciate perspectives different from their own. The mediator's role is to help the parties enhance the quality of their decision-making and communication, subject only to their own choices and limits. With the mediator's focus on empowerment and recognition, the process can result in not only resolution of the parties' immediate problem but also can cause significant changes in their personal capacities for self-determination and responsiveness to others, both in the instant case and beyond**.** See Tony Belak JD and William Hymes, *Various Mediation Styles and Philosophies*, January 2015, <http://www.mediate.com/articles/HymesFuture.cfm>.

[10] Narrative style of mediation is based on the premise that the positions each party brings to the mediation is a product of their life's discourses. The Narrative style tries to use conversation and discussion to get the disputants to disclose, often unwittingly, the true nature and perception of the conflict. It is done through "story telling" which in effect, allows disputants to express how and why they feel the way they do.

In selecting a mediator, it is important for parties to understand the style that a particular mediator will bring to the process and for the mediator to detail this in his or her opening address to the parties.[11]

The principle of self-determination is central to my Model. The evaluative and narrative mediation styles need to be understood with regard to the principle of 'self determination' that the parties have in mediation and the potential impact that these styles may have on the mediator's actual or perceived impartiality, neutrality[12] and bias.

Reality Testing

In my Model, it is fundamental that the "Ground Rules"[13] of my appointment authorise me to assist the parties in "reality testing"[14] and exploration of the options for resolution with regard to the widest possible "best interests"[15] of the parties. Reality testing involves "techniques used to adjust perceptions that do not conform to the realities of the situation,"[16] In other words, it is the intellectual editing of complex ideas and designing workable solutions. The actual process of reality testing "involves asking hard questions about each party's power and options."[17] It is important that genuine reality testing does not create an actual or perceived breach of impartiality, neutrality and bias and the mediator does not give advice or opinions to the parties. Rather, he or she should reframe and confirm facts and expressed views of the parties and run a process of scenario-building based around those facts and statements.

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[11] It may be necessary to include this in the Mediation Engagement Agreement as well.

[12] Neutrality is preserved where intervention is consistent with control of the process and does not intrude into content or substantive outcome. 'The principle of self determination requires that mediation processes be non-directive as to content.' See Australian Mediation Association, *Practice Standards*, March 2012, <http://www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf>.

[13] See page 14.

[14] **Reality Testing Questions** per John Ford and Associates Workplace Conflict Management Services

1. What do you see as the strengths of your case?
2. What do you see as the weaknesses of your case?
3. What do you see as the strengths of the other's case?
4. What do you see as the weaknesses of the other's case?
5. What is your best-case scenario if you don't resolve this with negotiation?
6. What is your worst-case scenario if you don't resolve this with negotiation?
7. What is the most likely scenario if you don't resolve this with negotiation?
8. Is that better than the most likely negotiated settlement?

[15] See page 15.

[16] Douglas H. Yarn, *The Dictionary of Conflict Resolution*, (San Francisco: Jossey-Bass Publishers, 1999), 372.

[17] Heidi Burgess and Guy M. Burgess, *Encyclopedia of Conflict Resolution* (Denver: ABC-CLIO, 1997), 254.

Reality testing can be a very fuzzy, grey zone, especially within the evaluative or narrative mediation styles. However, it should not be confused as a breach of the mediator's impartiality or neutrality, particularly where there is a power imbalance between the parties, for example, where one party is not legally represented or a scenario is painted that does not accord with the expectations or beliefs of a party. Reality testing does not breach the mediator's duty to the parties and the mediator should not fear walking the tightrope in the thorough and expeditious execution of his or her craft.

When reality testing, a successful evaluative or narrative mediator will never cross the line of giving advice or opinions or jeopardise the parties' right of self-determination. The process of constructive and valuable reality testing must allow the mediator an opportunity to engage the parties in an honest assessment of the issues and options raised and assist the parties in considering issues that arise out of the dialogue, without being judgmental or determinative. Reality testing involves "techniques used to adjust perceptions that do not conform to the realities of the situation."[18]

A genuine process of reality testing will give true definition to a party-based self-determined decision. It enables the parties to obtain a sharper focus on the key issues arising out of the dialogue and realistic scenarios for resolution. The role a good mediator plays in this process is decisive and arises solely out of the content of the dialogue. It is not determinative but quintessential in the overarching ability of the parties to come to and make an informed decision.

Great mediators possess an intuitive ability to engage people in a comforting and trusting confidence, while encouraging a commentary that provokes responses. They are able to adapt and flex to the language and movement and remains open to every possibility and outcome.

[18] Douglas H. Yarn, *The Dictionary of Conflict Resolution*, (San Francisco: Jossey-Bass Publishers, 1999), 372.

2. The Personality, Skills, Attitude and Character of the Mediator

This aspect of the Model is far more decisive yet equally complex to define and rationalise in a beneficial educative and instructive way for lawyers, mediators and students. To a large extent, the Model is based upon developing the intuitive ability of the ‘natural’ mediator to drive the process in an ‘unconsciously conscious manner’.

While there has been some valuable material published regarding the psychological nature of a mediator, the area is still evolving and the reasons why some mediators are exceptional and others ordinary requires greater definition, understanding and study. If we find the answers to what and how to develop and identify exceptional mediators, we can then profile more accurately, select a mediator more suitably and educate and train mediators more appropriately. My objective is to provide a subjective view from inside the mediator’s mind and demonstrate the impact that the mediator’s attitude can have in the outcome of the dispute.

3. Ability to Get into the "Flow" of the Process

In his seminal work, Csíkszentmihályi outlines his theory that people are happiest when they are in a state of *flow*. This is a state of concentration or complete absorption with the activity at hand.[19] It is a state where people are so involved in an activity that nothing else seems to matter. The idea of flow is identical to feeling *in the zone* or *in the groove.* Flow is an optimal state of intrinsic motivation where the person is fully immersed in what he or she is doing. This is a feeling everyone has at times, characterised by engagement, fulfilment and skill, during which temporal concerns (time, food, ego-self, etc.) are typically ignored.

The mediator should submerge into the "flow" of the mediation process. This means unconsciously navigating through the issues, relationships, dynamics and rubrics of possibilities in an instinctive manner, through a structure that is simultaneously organised and chaotic. Within this, the mediator is able to find the common route to resolution at some point in the convergent paths of the parties, advisors and the mediator's own contributions. Ultimately, the mediator must have the emotional intelligence, humanity and intuitive ability to operate within his or her unconscious competent zone.

Csikszentmihalyi characterised nine component states of achieving flow including "challenge-skill balance, merging of action and awareness, clarity of goals, immediate and unambiguous feedback, concentration on the task at hand, paradox of control, transformation of time, loss of self-consciousness, and autotelic experience."[20] To achieve a flow state, there must be a balance between the challenge of the task and the skill of the performer. If the task is too easy or too difficult, flow cannot occur. Both skill level and challenge level must

[19] Mihaly Csikszentmihalyi, *Flow: The Psychology of Optimal Experience*, (First Harper Perennial Modern Classics, 2008).
[20] The autotelic personality is one in which a person performs acts because they are intrinsically rewarding, rather than to achieve external goals. See Mihaly Csikszentmihalyi, *Flow: The Psychology of Optimal Experience*, (First Harper Perennial Modern Classics, 2008).

be matched and high, If skill and challenge are low and matched, then apathy results. For the best outcome, the skill of the mediator must be appropriately matched to the challenge of the mediation. Importantly, the best ideas and options for resolution are generated when the mediator is engaged in the flow of the process.

Deconstructing the Wein Mediation Method

I have developed a highly successful mediation style and model.
The Wein Mediation Method merges learned technical skills, strong experience and personal intuitive and humanist style. The model is a flexible generalist model, not limited by any specific rigid model or process definition. It is based on a ***"humanist narrative, engagement, facilitative style."*** Humanist dialogue entails being mindful each party's humanity, emotion, need for care and innate desire for peace throughout the mediation.[21] This process is actively driven by the mediator who facilitates dialogue and encourages the parties to communicate deep-rooted interests and issues and ignite resolution dialogue through creative problem solving and robust reality testing .

The mediator is the guardian of the process, establishing the **context** and **framework** for the dialogue in a manner that allows he or she to motivate parties to connect, engage and communicate in a constructive way, not limited by the substance of the law or a previously argued position. The negotiation should occur in a 'principled' self-determined way. The mediator is bound in the belief that every legal, commercial dispute is capable of resolution if the parties are willing and the process is properly conducted.

[21] The Gold (1993) humanistic dialogue-driven model of mediation:

1. Demonstrating caring, nonjudgmental acceptance of the person's humanity.
2. Building rapport and emotional connection..."being there".
3. Helping people listen to their innate wisdom, their preference for peace.
4. Generating hope ..."with support, you can do it".
5. Tapping into the universal desire for wellness.
6. Speaking from the heart.
7. Thinking of clients in their woundedness, not their defensive posture.
8. Being real and congruent.
9. Creating safe space for dialogue.
10. Creating a sacred space.
11. Recognizing that a healing presence does not "fix it".

See L Gold, 'Influencing Unconscious Influences: The Healing Dimension of Mediation' (1993) 11(1) *Mediation Quarterly* 55.

My mediation model is a flexible style,[22] not limited by any specific rigid model or process definition. Humanist, narrative engagement style is actively driven by the mediator, unencumbered by substantive rules[23] and uncluttered by stated facts and positions. This method allows settlement and resolution to occur through creative problem-solving and dynamically focused activity[24] in a process of assisted self-determination.

The mediator must maintain confidence in a positive outcome as they navigate through an unconscious maze of creative solutions for problems and hunting for facts, information and openings that could lead to settlement.

A strong, engaging mediator is not 'evaluative'[25] or 'arbitral'. The key focus is to honour the duty to assist the parties in finding a resolution in a style that is narrative and probing rather than passive. A narrative engagement style is not dilutive of a 'facilitation' model. It simply provides a more engaging and constructive definition of a truly informed self-determinative outcome and process.

Intuitive Ability

The type of mediator I want to be and develop is one who can think on their feet and can make decisions akin to walking over rocks across a raging river and

[22] Mediation is a fluid process, which unfolds in response to the interaction between the parties and the mediator. The mediator removes strategic barriers or otherwise facilitates uncovering the existing common ground between the parties. The mediator is not only a facilitator, but also functions as an explorer, a devil's advocate, a trickster, a chameleon, an active listener, an explainer and an all-round-good person. See Robert A. Creo, 'Art and The Artist,' (2006) *Alternative Dispute Resolution Section of the State Bar of Michigan*, 13(1) <www.michbar.org/adr/pdfs/March06.pdf>.

[23] Substantive knowledge is not as important to the skilled mediator as it is to the advocate. Process skills trump substantive knowledge. See Robert A. Creo, 'Art and The Artist,' (2006) *Alternative Dispute Resolution Section of the State Bar of Michigan*, 13(1) <www.michbar.org/adr/pdfs/March06.pdf>.

[24] The mediator is not a remote, neutral, off-stage expert, but rather an active participant in the drama. All negotiators, and especially mediators, are performance artists; against the backdrop of a carefully analysed strategy, with practiced and disciplined technique and skill, they are able to improvise See Robert D Benjamin, *Mediation as Theater and Negotiation as Performance Art*, March 2002, Mediate.com, <http://www.mediate.com/articles/benjamin5.cfm>.

[25] The evaluative style can be seen as somewhat directive, and *the skillful evaluative mediator will be careful not to "impose" his or her opinion, but rather to be illustrative in helping the disputants "reality test" their positions* and then help them decide what might be the prevailing position with regard to the facts and perceptions involved in the varying sides and positions. **See** Jon Linden**,** *Mediation Styles: The Purists vs. The "Toolkit"*, 12 October 2000, Mediate.com, <http://www.mediate.com/articles/linden4.cfm> and Zena D. Zumeta**, J.D**, *Styles of Mediation: Facilitative, Evaluative and Transformative Mediation*, 14 July 2015, Mediate.com, <http://www.mediate.com//articles/zumeta.cfm>.

intuitively glide across the rocks, changing direction and reaching the other side without losing focus or stride.

Csikszentmihalyi posits that the artistic mediator "fosters intuition to anticipate changes before they occur; empathy to understand that which cannot be clearly expressed, wisdom to see the connection between apparently unrelated events; and creativity to discover new ways of defining problems, new rules that will make it possible to adapt to the unexpected."[26]

Exceptional mediators are intuitive and deliver reflex responses driven out of life experience, personality and intellect applied to the situation at hand. Formal training[27] can hone these skills but it is important to remember that they are more than learned skills or a toolbox of techniques and practices.[28]Mediators who possess sensitivity and instinctive understanding are able to operate with an emotional intelligence and control. With this, the mediator is able to focus on a wide and multi-dimensional view of the dispute and the possibilities for resolution.

[26] Mihaly Csikszentmihalyi, *Flow: The Psychology of Optimal Experience*, (First Harper Perennial Modern Classics, 2008).

[27] Mediation recognizes the tension between the rigors of reason and insight and perception and in practice rejects classical notions of the dualism of emotion and logic, which underpin legal analysis. **See** See Robert A. Creo, 'Art and The Artist,' (2006) *Alternative Dispute Resolution Section of the State Bar of Michigan*, 13(1) <www.michbar.org/adr/pdfs/March06.pdf>.

[28] Formal professional education cannot offer the kinds of experience critical for the training of effective mediators. We have become over intellectualized—so caught-up in the throes of our theories that we have shelved our intuitive sensibilities or abandoned them altogether, relying instead on rules and formulas for how to respond. Formal education and training are being given an undue emphasis and tending to displace the development of intuitive abilities and instinctual understanding. Teaching and practicing the strategies, techniques and skills of mediation are as much about unlearning and re-learning as they are about learning anew. No theory can take the place of gut instinct. See Robert Benjamin, Gut Instinct: A Mediator Prepares, April 2002, Mediate.com, <http://www.mediate.com/articles/benjamin6.cfm>.

The Context and Framework of the Method

Opening Address

The mediator's opening address in open session is vital in establishing the framework and context of the process and in breaking down any predetermined outcomes or expectations fixed in a party's mind. The mediator's authority and confidence of the parties is established in the opening few minutes of the mediation. In my opening statements and introduction to the parties and their lawyers' , I ask the parties and their legal representatives to commit to the Ground Rules .

The Ground Rules

- **EVERY** commercial dispute can be resolved!
- Time allowed for this mediation today is_____
- Discuss strict confidentiality and without prejudice discussions
- Explain that I am a lawyer and that I do not provide advice or judge. I am the impartial guardian of process. **You** make the decisions.
- Explain the nature of a voluntary non-adversarial environment. This applies to everyone in the room. Court rules do not apply in this process - only the rules in our Mediation Agreement and any Act that applies.
- Adopt National Mediation Standards
- Abide by the *Civil Procedures Act (Vic) 2010* and Uniform Legal Practitioner Rules.
- Disclose any potential conflict of interest.
- Ensure the right people at the table have authority to make decisions.
- Explain that I will respect and encourage the parties' right to self determination
- Bona fide principled negotiation to get to a resolution:

- Speak respectfully, openly and honestly to get to the truth

- Listen actively and engage in a meaningful dialogue
- Focus on interests and not positions or personal attacks
- Create options for a meaningful resolution and review any offers of settlement
- There should be no fixed view of the outcome and all parties will actively listen and focus on options.
- I give no legal or financial advice or opinions but you allow me to assist you in reality testing issues.
- All parties have the opportunity to speak and be heard by all other parties.
- Handshake oral agreements are not binding. Only a written, signed agreement that **you** write is binding.
- There is no obligation to sign any agreement without the opportunity for each party to get its own independent advice.

The mediator should encourage the parties to seize the opportunity as their first and best chance to resolve the dispute in the most efficient, self-determinative[29] way in parties mutual *best interests*.

At the beginning of mediation, I explain to the parties that; “TODAY is your FIRST and most COST-EFFECTIVE way of resolving the dispute in a SELF-DETERIMINED way. You should use a wide definition of what is in your *best interests*:

- Legal rights breached - rectified or compensated
- What is in my commercial best interests?
- Opportunities lost or foregone being in dispute
- Relationship issues with other party(s)
- Your reputation with other party(s)
- Time, involvement & distraction due to dispute
- Stress / anxiety / emotion in ongoing dispute
- I need to move on & not get bogged in the past

- Risk and costs in litigation.
- Reality test against your expectations and perceptions and against your BATNA (**B**est **A**lternative **T**o a **N**egotiated **A**greement)
- Control over the decision!
- Commercial certainty!
- Resolving the dispute with honour and dignity
- Desire for certainty and finality
- Principle issues within your own “values” e.g. fairness
- Personal issues known only to <u>you</u>
- Other e.g. cultural, social, spiritual factors...etc

Preparation by the parties and their legal counsel is important to the success of the process. The mediator can and should take a proactive role in the pre-mediation stage by encouraging parties and their counsel to prepare short but succinct ‘position papers’ sent to the mediator and the other party on a without prejudice basis.[30] The paper should detail:

- Facts in the dispute
- Claims to be properly articulated
- Characterisation needs to be explicable
- Any evidentiary material to support the claims (substantiation)
- Any relevant law on the issues. This should be settle early so you can focus the parties on commercial negotiations rather than adversarial sparing.
- Quantification of loss and damages.
- Remedy, compensation or resolution sought, clearly articulated and supported.

[30] This should be marked ‘for mediation purposes only’.

Role of Legal Advisers during Mediation

The role of the legal adviser during mediation includes :

- To assist clients during the course of the mediation;
- To discuss with the mediator, the other party's legal representative and their clients any legal, evidentiary, practical and personal matters the mediator or client may raise It is likely that once the client has heard the other party's version, the legal adviser may need to take further instructions from his or her client and perhaps review their legal advice;
- To participate in a non-adversarial manner. Legal advisers are not present at mediation as advocates or to participate in an adversarial courtroom style contest. . A legal adviser who does not understand and observe this is a direct impediment to the mediation process.
- To prepare the terms of settlement or heads of agreement in accordance with any settlement reached for signature by the parties.[31]
- Understanding the "whole clients" needs.
  In a mediation process, lawyers must learn to widen their assessment of what is in their client's best interests and allow the client the opportunity to make a decision with regard to:
    - issues and interests in the dispute;
    - client's attitudes and beliefs with regard to the dispute;
    - case strength and risks;
    - client risk profile;
    - financial ability to run a litigation; and
    - emotional state of the client.

[31] This may be signed before the parties leave if appropriate or in accordance with any timetable agreed for completion of that task.

Why do some mediations do fail?

In my experience with thousands of mediations and referred litigation processes, I believe that there is no commercial legal dispute that cannot be resolved through a well processed and meaningfully engaged mediation process. There are essentially only seven reasons why mediation will fail:

1. Poor mediation process or poor mediator engagement
2. Poor advice – where the lawyer fails to positively influence the client's ability to engage in the process and consider the possibilities.
3. Incorrect characterisation of facts and issues and unrealistic expectations.
4. Poor attitude, egos, insanity or personality of the parties
5. An important issue of law or precedent to be determined
6. The parties are not ready or in a frame of mind to mediate
7. A party believes it has nothing to lose and push litigation as opposed to a self-determinative process.

Model Components

a) Good Faith and Commitment to Process

My mediation model assumes that the parties do not want to continue the dispute or commence litigation. Mediation is a genuine step taken to resolve the dispute commercially and commit to connecting and engaging with the focus on bona fide resolution in good faith.[32]

Good faith also extends to the mediator. The mediator must provide an ethical, impartial and neutral process in which he or she exhibits no actual or implied preference to either party. The mediator's role is to ensure that the process is run ethically and fairly rather than balancing the parties' power or representative capabilities. A party who doesn't understand or needs advice has the right to obtain an understanding and advice but it is not for the mediator to give advice or opinions.

[32] Robert McDougall pointed out the increasing importance of the implied obligation on parties in commercial contracts to act in good faith. A mediation agreement is a contract that is based on a commercial outcome that the parties endeavor to find as an alternative to litigation. As such, implied obligations must find there way into relevance in the contractual relationship as well as relating to the involvement of third party representatives in the process. **Is there a contractual duty of good faith?**
In New South Wales (*Burger King v Hungry Jack's Pty Ltd* (2001] NSWCA 187)) a duty of good faith in the performance of obligations, and the exercise of rights, may be imposed by implication on the parties to a contract. McDougall suggested that the doctrine appears also to have found favour in the Federal Court of Australia: see (by way of example only) *Hughes Aircraft Systems International v Air Services Australia (*(1997) 76 FCR 151) and *Pacific Brands Pty Ltd v Underworks Pty Ltd (2005] FCA 288).* The doctrine has been recognised in Victoria: see, for example, *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum N L(*[2005] VSCA 228) . In that case Buchanan JA, who gave the leading judgment, appeared to accept that an obligation of good faith could be implied into some contracts. His Honour did recognise, in the same paragraph, that it might "be appropriate in a particular case to import such an obligation to protect a vulnerable party from exploitive [sic] conduct which subverts the original purpose for which the contract was made." See Robert McDougall J, 'The Implied Duty of Good Faith in Australian Contract Law,' (2006) 108 *Australian Construction Law Newsletter* 28.

b) Self-Determinative Process

Self-determination is the immutable right underpinning mediation. The mediator's contractual and ethical obligations are to the parties in the mediation. The mediation process further enshrines the values and principles of a self-determinative process, in which the parties make the decisions with regard to the mediation dispute. The mediatior is the *guardian of the process* and the conduit through which the parties are able to make decisions and judgments. The mediator's role is to assist in genuine reality testing and option scenarios whilst always championing the party's rights of self-determination.

In my mediation model, the parties maintain total control of decision making and the mediator will not judge or determine[33] the dispute on behalf of the parties,[34] remaining fully cognizant of the rights and value of self-determination[35] of the parties. The mediator will actively engage and connect with the parties in a non-partisan relationship, encouraging them to communicate interests and issues in the dispute and unlock the truth[36] of the facts. This helps the parties to a point where the options of settlement and resolution seem achievable and sustainable.

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[33] Loretta Moore seeks a wide definition of mediator impartiality, claiming that, "this does not mean ... that the mediator should not raise questions for the parties to consider in reaching a realistic, fair, equitable, and feasible resolution of their disputed matter."

[34] Neutrality as "impartiality," they maintain, values lack of bias, while neutrality as "equidistance" implies a bias towards the empowerment of less articulate or assertive disputants and the interests of unrepresented parties S Cobb, ., and J Rifkin,. 'Practice and Paradox: Deconstructing Neutrality in Mediation,' (1991) 16 *Law and Social Inquiry*, , 41-45.

Wade's definition of "opinion," gives mediators much more latitude, allowing mediators to "make suggestions for the participants to consider." However, it emphasises that "all decisions are to be made voluntarily by the participants themselves, and the mediator's views are to be given no independent weight or credence" J Wade, 'Forever Bargaining in the Shadow of the Law: Who Sells Solid Shadows? (Who Advises What, How and When?), (1998) 12(3) *Australian Journal of Family Law*, ,256.

One way of handling mediator interventions, whether they constitute information, advice or opinion, thus is for the mediator to make them transparent rather than camouflaging them. In other words, the mediator may explain his or her motivation behind the intervention ("process transparency") and its desired effect ("impact transparency") . This approach at least confronts the ethical dilemma in an open and honest manner. M Moffit, M'Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent.' (1997) 13 *Ohio State Journal on Dispute 1*.

[35] The philosopher Hillel understood well; "If I am not for myself, who will look out for me, if I am only for myself, what kind of moral being am I and if I don't act now, then when?"

[36] Viktor Frankl in 'Man's Search for Meaning' - "We must remain aware of the fact that as long as absolute truth is not accessible to us (and it never will be), relative truths have to function as mutual correctives. Approaching the one truth from various sides, sometimes even in opposite directions, we cannot attain it, but we may at least encircle it." Winslade and Monk state that: "conflict is likely because people do not have direct access to the truth or the facts about any situation." See John Winslade and Gerald Monk, *Narrative Mediation: A New Approach to Conflict Resolution,* (Jossey-Bass Inc., 2000), 41.

c) Quality of Humanity[37]

While the mediator must conduct an ethical process and exhibit persistence and wisdom in the reality testing process, the ‘great’ mediators will maintain the full trust of all parties throughout and find a way to express and exhibit empathy and even sympathy in the process. The quality of humanity underwrites the ‘great’ mediators’ style and success. It is primarily intuitive, but can be learned through careful observation of technique, style and language.

The quality of humanity goes beyond emotional intelligence because humanist mediators not only recognise and understand shifts in mood and attitudes and the underlying meaning in the language but tangibly and positively react and respond to them.

[37] Successful mediators may use their own humanity to assist the translation of a legal problem into a human one. The process gives permission not only for the mediator, but also for the participants to humanize the conflict. The process gives permission not only for the mediator, but also for the participants to humanize the conflict. The process gives permission for a host of dynamics absent from adjudication. Creativity, acknowledgment, recognition, apology, forgiveness and choice work in the context of the interplay between uncertainty, risk, emotion, personal and community values. People make important choices in a holistic manner during an asymmetrical mediation process.
Mediation recognizes the tension between the rigors of reason and insight and perception and in practice rejects classical notions of the dualism of emotion and logic, which underpin legal analysis.. **See** See Robert A. Creo, ‘Art and The Artist,’ (2006) *Alternative Dispute Resolution Section of the State Bar of Michigan*, 13(1) <www.michbar.org/adr/pdfs/March06.pdf>.

d) Perceptive and Creative Thinking and Reality Testing

The reality testing role is critical to the success of the mediator. The parties and their legal representatives must have a clear and unequivocal understanding that genuine and robust reality testing is part of the mediator's role. This role description must form part of the opening address, Ground Rules and should be expressed in the Mediation Engagement Agreement.

Disputes often arise due to our use and interpretation of language, unconscious bias and assumption or illogically and poorly rationalised facts and data. The parties to a dispute come to the hearing with preconceived outcome scenarios that trail the parties' attitudes and advice given to them by counsel. There is often an actual or perceived disconnect between the existence of a dispute founded on a legal liability or unlawful conduct and the commercial risk and performance.

Reality testing allows biases and misconceptions about possible success to be overcome. Often asking difficult questions can change attitudes and assumptions. By asking these questions, parties are forced to think carefully about aspects of the dispute they may not have thought through. Also, if their perceptions or thoughts are not accurate, these may be corrected when parties answer reality testing questions. In the end, reality testing can help get parties to the negotiating table and overcome stalemates when they exist. [38]

The skilled mediator must have the ability to unwind preconceptions, neutralise biases and irrational assumptions, without taking a partial, biased view that impinges the parties self determinative role. The mediator must have the ability and insight to explain consequences of different outcome scenarios. The ability

[38] Brad Spangler, 'Reality Testing,' in Guy Burgess and Heidi Burgess (eds.), *Beyond Intractability,* (Conflict Research Consortium, University of Colorado, Boulder, November 2003), <http://www.beyondintractability.org/essay/reality_testing/>.

to crack the truth that enables willingness to compromise and adjust one's expectations and stop chasing ideas and outcomes with no merit or possibility of being achieved.

In addition, mediators must use reality testing to respond when a party may have an unrealistic view of their Best Alternative to a Negotiated Agreement (**BATNA**).[39] Parties who think they have a good BATNA may refuse to engage constructively during the mediation process. This can be an obstacle to settlement. If the party's BATNA is truly better than the proposed agreement, then the agreement will have to be abandoned or changed to accommodate that party.[40]

The mediator must assist the parties in open, intelligent, creative[41] problem solving, and rational reality testing and risk evaluation. The mediator must focus on substantiating facts, claims and issues through gentle, consensual cross examination (in open and private session) in order to access the truth of the dispute. This truth is undeniable (although it may not be admitted), indubitable and mathematically certain, yet is often clouded in the fog of perception and uncertainty that is neither rational nor reflects the facts. Getting to the truth is the craft of the gifted mediator, who looks behind and through easy definitions and simple characterisations. Once the truth is revealed through rational dialogue and understanding rather than fear or the mediator can guide the parties to resolution that has a purposeful meaning.

Inappropriate reality testing occurs where the mediator's reality testing becomes advice, opinion or judgmental decision-making. This impugns the mediator's neutrality and impartiality .[42] Indications of inappropriate reality-testing include:

[39] BATNA or "Best Alternative to a Negotiated Agreement" is a term first introduced in Roger Fisher, William Ury, and Bruce Patton, *Getting to Yes: Negotiating Agreements without Giving* In, (New York: Penguin, 2nd edition, 1991).
[40] Heidi Burgess and Guy M. Burgess, *Encyclopedia of Conflict Resolution*. (Denver: ABC-CLIO, 1997), 254
[41] The creative problem solver is continuously oriented not only to see problems, processes, and solutions in different ways, but also to do things differently to find a solution to the overall problem. In short, the creative problem solver must be oriented to improvise. **See** John W. Cooley, *Creative Problem Solving for Negotiators and Mediators*, (American Bar Association, 2005).
[42] However, robust and difficult reality testing should not allow parties the right to call it improper conduct.

- Badgering by the mediator
- Giving advice or opinions
- Exhibiting partiality
- Conducting questioning that should be done privately in open session

The mediator must have cognitive, perceptive and experiential ability to enable the parties to deconstruct fixed frameworks, expectations and preconceived scenarios.[43] The mediator must be able to disarm parties' emotional blocks and neutralise power imbalances, prejudices, fixed, entrenched positions and any adversarial behaviour by parties or their representatives. The mediator must be able to expose but not call the bluff in a claim or position and have parties see how their acts or reactions may impact upon them. This energy is bound in the experience, personality and intelligence of the mediator and an irrepressible drive to find a resolution . [44]

[43] Open-mindedness is an intellectual virtue that involves a willingness to take relevant evidence and argument into account in forming or revising our beliefs and values, especially when there is some reason why we might resist such evidence and argument, with a view to arriving at true and defensible conclusions. It means being critically receptive to alternative possibilities, being willing to think again despite having formed an opinion, and sincerely trying to avoid those conditions and offset those factors which constrain and distort our reflections. See William Hare, *Open-Minded Inquiry*, 2004, Foundation for Critical Thinking**, <**http://www.criticalthinking.org/articles/Open-minded-inquiry.cfm>,

[44] "Analytical acumen is the ability to rationally access, analyze, and calculate what is required to effectively manage a conflict, to devise a strategy and design a structure to approach the dispute, and learn the techniques and skills necessary to effectuate that strategy. Analytical acumen is about the methodical and systematic study of the nature of conflict from source to management. The ability to reconnoitrer the conflict terrain and develop a strategy to manage the conflict is essentially the same as a General sizing up the battle field and having a plan of attack. For a mediator, negotiator, conflict manager, or for that matter, anyone who must engage conflict, this ability is essential. This is the systematic, analytical piece that requires research and study about how people in conflict can best be approached in order to constructively shift their focus sufficiently to allow an agreement to emerge if at all possible. See Robert Benjamin, *Character Traits Of Working Dogs And Conflict Mediators: 'Systematic Intuition' And Tenacity,* February 2006, Mediate.com, <http://www.mediate.com/articles/benjamin25.cfm>.

e) Mediator Intelligence, Energy and Attitude

Intelligence is both learned formal training and personal experiential learning. Great mediators possess an intuitive ability to engage people in a comforting and trusting confidence, while encouraging a commentary that provokes productive responses. Mediators must be able to adapt and flex to the language and the movement and remains open to every possibility and outcome.
Optimism is key to a successful mediation. Optimism starts with what may be the most extraordinary of human talents: mental time travel. It entails thinking positively about prospects; it helps to be able to imagine ourselves in the future. Although most of us take this ability for granted, our capacity to envision a different time and place is critical for our survival. It allows us to plan ahead and endure hard work in anticipation of a future reward. In *The Optimism Bias: A Tour of the Irrationally Positive Brain,* Tali Sharot states that *"to make progress, we need to be able to imagine alternative realities, and not just any old reality but a better one."*[45]

The values and principles the mediator lives by will influence the his or her approach. Kenneth Cloke defines values as "priorities and integrity-based choices." These are found in our daily behaviours and decisions. Cloke comments that "in this way, they are creators of integrity and responsibility, builders of optimism and self-esteem, and definitions of who we are. They become manifest and alive through action, including the action of sincere declaration."[46]

The mediator must generate positive energy and integrity in order to engage and connect with all parties and project a strong charismatic presence[47] and

[45] Tali Sharot, *The Optimism Bias: A Tour of the Irrationally Positive Brain* (First Vintage Books Edition, 2012).
[46] Kenneth Cloke, *Building Bridges Building Bridges Between Psychology And Conflict Resolution – Implications For Mediator Learning*, October 2008, Mediate.com, <http://www.mediate.com/articles/cloke7.cfm>.
[47] Presence refers to a mediator's ability to bring all aspects of themselves to the mediation: body, heart, mind and spirit and in all other respects remain the most important personal qualities a mediator needs, See Helen Collins, The Most

humanist[48] quality. This should enshrine trust, respect, authority and rational emotional intelligence in the theatre of conflict,[49] yet not appear to dominate or impose unreasonably upon a decision maker. The mediator must possess a dynamic optimism[50] and a single-minded focus, confidence and self assured belief in a successful outcome. Beyond this, he or she should recognise the opportunity for a cathartic or transformative experience[51] and the platform for constructive dialogue through an ability to detect a change in attitude and understand where and how to influence parties' outlooks through strategy, new facts, experience, principle or ideas. Above all, the mediator must have a single-minded determination, persistence and tenacity to overcome obstacles and focus on the possible triggers that will open up opportunity for a meaningful outcome by exploring and probing ideas and creative possibilities for the parties to consider.

Important Personal Qualities a Mediator Needs, February 2005, <https://icfml.files.wordpress.com/2014/11/the20mostimportantpersonalqualitiesamediatorneeds_collins2005.pdf>, A mediator must be remarkably and uniquely present – a full participant. At the same time, and more fundamentally, the mediator must be present in a manner that embodies an understanding that she or he has no significance at all to the dispute and its resolution … The mediator must function within a paradox: how to be central and matter not at all. See DA Hoffmann, 'Paradoxes of Mediation' (2002) *American Bar Dispute Association Resolution Magazine*.

[48] Successful mediators may use their own humanity to assist the translation of a legal problem into a human one. The process gives permission not only for the mediator, but also for the participants to humanize the conflict. The process gives permission not only for the mediator, but also for the participants to humanize the conflict. The process gives permission for a host of dynamics absent from adjudication. Creativity, acknowledgment, recognition, apology, forgiveness and choice work in the context of the interplay between uncertainty, risk, emotion, personal and community values. People make important choices in a holistic manner during an asymmetrical mediation process. Mediation recognizes the tension between the rigors of reason and insight and perception and in practice rejects classical notions of the dualism of emotion and logic, which underpin legal analysis.. **See** See Robert A. Creo, 'Art and The Artist,' (2006) *Alternative Dispute Resolution Section of the State Bar of Michigan*, 13(1) <www.michbar.org/adr/pdfs/March06.pdf>.

[49] Artistry combines and integrates all the resources the mediator has at their disposal: their knowledge (objective and subjective), their personal qualities and abilities, and their technical skills and abilities. When artistry is being exercised, 'others notice the difference not only in the product but also in the process by which it is produced' See, MD Lang and A Taylor, *The Making of the Mediator: Developing Artistry in Practice* (Jossey-Bass, 2000).

[50] Dynamic optimism is an active, empowering, constructive attitude that creates conditions for success by focusing and acting on possibilities and opportunities and *interprets* experience positively, and *influences* outcomes positively. The optimistic response to a bad experience is to look at it as a particular event, not an omen of perpetual failure, and to learn from it in order to correct course and home in on the desired goal… and involves a confident drive to continually improve oneself and one's circumstances. See, Max More, *Dynamic Optimism,* 1998 <http://www.maxmore.com/optimism.htm>.

[51] There is something in the realm of mastery and excellence that happens at apex moments when strategy, impact, problem, solution, cause and effect, and intervention and results converge. Think of it as a moment of grace. P Adler,2003, 'Unintentional Excellence: An Exploration of Mastery and Competence,' in D Bowling and DA Hoffman (eds.) *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Mediation Process of Conflict Resolution* (Jossey-Bass Publishers, San Francisco, 2003) 72.

f) Multi-Tasking

Multi-tasking in mediation can be defined as “simultaneously keeping an eye on the process, emotion, content, individuals, flow of information, power issues, verbal and nonverbal messages and much more.”[52]

Anyone who has conducted mediation knows that it involves thinking quickly on your feet, and on a number of levels at once, looking for possibilities and improvising.[53] This is because “most complex disputes require risk assessment and management. There are seldom clear choices and certainly no guarantees. Mediators, by definition, work in this terrain of ambiguity, which requires a multivalent thinking frame.”[54] Successful mediators are able to:

- shift between roles;
- transform situations;
- tolerate ambiguity;
- engage in lateral thinking; and
- manage complexity.

Hoffman writes that because mediation is an intricate process, mediators must have the capacity to manage a “breathtakingly intricate matrix of psychological issues, negotiation dynamics, communication problems, subtleties of inflection and body language, barriers of gender, culture, race and class, and

[52] S McCorkle and MJ Reese, , *Mediation Theory and Practice* (Pearson Education, Boston, 2005) 33,34.

[53] Learning to read the mood of the room, making a move to change the direction of mediation depending on the mood, developing a repertoire of moves, and making a move for its shock value are all improvisational assets for mediation. See Lakshmi Balachandra, Frank Barrett, Howard Bellman, Colin Fisher and Lawrence Susskind, ‘Improvisation and Mediation: Balancing Acts’ (October 2005) 21(4) *Negotiation Journal* 425.

[54] RD Benjamin, ‘Managing the Natural Energy of Conflict: Mediators, Tricksters and the Constructive Use of Deception’ in D Bowling and D Hoffman (eds) *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact on the Process of Conflict Resolution* (Jossey-Bass, San Francisco, 2003) 94.

disagreements about legal issues and the facts that gave rise to the dispute." [55]
As a result, multi-tasking is fundamental to the mediator's role. This allows mediators to "operate and
feel comfortable, in an environment that is dynamic and ever changing, and where 'behaviours and events are confused mixtures of right and wrong'
They need a 'conceptual agility that allows rapid and responsive shifting of frameworks and meanings toward constructive, and to be able to constantly process and hold information so they can use it to inform and guide the mediation."[56]

[55] DA Hoffmann, *Confessions of a Problem-Solving Mediator*, 1999, Boston Law Collaborative, <http://www.bostonlawcollaborative.com/blc/78-BLC/version/default/part/AttachmentData/data/2005-07-problem-solving-mediator.pdf?branch=main&language=default>.

[56] DT Saposnek, 'Style and the Family Mediator' in D Bowling and D Hoffman (eds) *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact on the Process of Conflict Resolution* (Jossey-Bass, San Francisco, 2003) 250-252.

g. Emotional Intelligence and Mindfulness

Emotional intelligence is defined as “the ability to perceive accurately appraise, and express emotion; the ability to access and/or generate feelings when they facilitate thought; the ability to understand emotion and emotional knowledge; and the ability to regulate emotions to promote emotional and intellectual growth.” [57]

The mediator must possess a high level of emotional intelligence,[58] empathy[59] and peripheral reflective thinking in order to structure or deconstruct the process on a multi-dimensional level. Emotional Intelligence serves to improve the process of mediation by honing mediator awareness. The mediator should recognise that furthering intuitive self-knowledge enhances positive interaction between parties.[60]

The mediator's emotional intelligence is what provides him or her with a sense of timing to know when to intervene during an unfolding conflict. The mediator has to be fluid and detached to the extent necessary to piece the mediation together while at the same time being mindful of changes. Emotional intelligence also allows the mediator the ability to deal with difficult issues that may touch at the core of a person’s emotions and feelings and even expose the flaw in a person’s claims, in a sensitive and carefully engineered style - handling denials, objections, anger, guilt and deflection - is fundamental to a humanist mediator.

[57] John D Mayer, Peter Salovey and Mark A Brackett, Emotional Intelligence: Key Readings on the Mayer and Salovey Model ((National Professional Resources Inc, 2004) 35.

[58] In the book Emotional Intelligence, Goleman tells us that this emotional entrainment is the heart of influence (117), that we influence others through our feelings. When our moods align we build rapport (117) and that our physical attunement allows our moods to align. See D Goleman, *Emotional Intelligence* (Bantam Books, New York, 1995).

[59] Empathy is our connection to others, both their perceptions and feelings. It is how well we understand their point of view and their emotional attachment.

[60] [Conflict Resolution Training for UNM Faculty, Chairpersons, and Central Administrators Linda Sonna. Psychology, UNM Taos. Ellie Trotter. Biology. John Trotter. Vice-Dean, SOM; Cell Biology. Faculty Dispute Resolution. FDR FACULTY MEDIATORS (www.unm.edu/~facdr/Spring%202005%20Newsletter.pdf] The University of New Mexico, Albuquerque

Salovey and Mayer concluded that the emotional facilitation of thought can lead to "more effective reasoning, decision-making, problem solving, and creative expression. More specifically, reasoning with emotion allows an individual to:
(1) use emotions to redirect attention to important events;
(2) generate emotions that facilitate judgment, memory and decision making;
(3) use mood swings as a way to consider and appreciate, multiple points of view; and
(4) use different emotions to encourage creativity and different approaches to problem-solving and creativity.

The experiencing individual must determine the event that triggered the emotion and further must establish what the emotion means in the context of the particular situation. The management of emotions encompasses the individual's ability to regulate his or her emotions and to respond appropriately to the emotions of others.[61]

In the context of mediation, these are the individuals who can intuitively employ all four branches of emotional facilitation simultaneously, by sensing a shift in the emotion in the room, identifying this in the moment, understanding the origin of the change in dynamic and addressing the changing emotional state naturally.

Mindfulness is the "cultivation of conscious, non-judgmental awareness away from mechanical thoughts and actions."[62] Mindfulness can assist mediators because it provides methods for calming the mind, enhancing concentrating, experiencing compassion and empathy and achieving an awareness of thoughts, emotions, and habitual impulses that could interfere with good judgment, building rapport and motivating others. More specifically, mindfulness allows mediators to

[61] John D Mayer, Peter Salovey and Mark A Brackett, Emotional Intelligence: Key Readings on the Mayer and Salovey Model ((National Professional Resources Inc, 2004) 64. PETER SALOVEY & JOHN D. MAYER, EMOTIONAL INTELLIGENCE: KEY READINGS ON THE MAYER AND SALOVEY MODEL 35 (Peter Salovey et al. eds., 2004) P.64
[62] Gretchen Rubin, *The Happiness Project* (Harper Paperbacks, 2011).

make better judgments about how the mediation process should work because it enables them to maintain a focus on goals.[63]

The mediator must be insightful and able to read all aspects of the play and change course without losing a heartbeat and manage all dimensions of the process with regard to relationships, emotions, psychology, behaviour and language and constantly process and reconfigure the course of the mediation. Emotional intelligence and mindfulness assist mediators in doing this effectively.

Courtney Chicvak in her Paper described this intuitive ability of the mediator to change the emotional dynamic of the process. [64]

[63] Courtney Chicvak, 'Concretizing The Mediator's Je Ne Sais Quoi: Emotional Intelligence And The Effective Mediator' (2013-2014) 7 *American Journal of Mediation* 13; Peter Reilly, 'Mindfulness, Emotions, and Mental Models: Theory that Leads to More Effective Dispute Resolution' (2010) 10 Nevada Law Journal 433, 436-438.

[64] "The missing link, or je ne sais quoi, that allows mediators to develop such admirable reputations, and, subsequently, viable careers in the area of mediation, is a mediator's awareness of and possession of emotional intelligence during the course of the mediation process. A subset of the theory of multiple intelligences, emotional intelligence is defined as "the ability to perceive accurately, appraise, and express emotion; the ability to access and/or generate feelings when they facilitate thought; the ability to understand emotion and emotional knowledge; and the ability to regulate emotions to promote emotional and intellectual growth." See Courtney Chicvak, 'Concretizing The Mediator's Je Ne Sais Quoi: Emotional Intelligence And The Effective Mediator' (2013-2014) 7 *American Journal of Mediation* 13

g) Comfort with Chaos and Ambiguity

I often encounter situations where I find it difficult to understand the true nub of the dispute, especially where it has been influenced by masses of legal process, court books and lawyer-to- lawyer communications. I enjoy the challenge of such matters and find the disorder and chaos[65] in the facts, issues and people (but not the process), a real ally to me in my task. The mediator must be able to navigate through the fog of doubt and in the shadows of uncertainty and embrace ambiguity[66] and contradictions as potential sources of resolution The mediator must recognize and manoeuvre around an impasse.[67] Chaos and uncertainty can provide the mediator with the entrée to a resolution which no one else perceives. This is the talent and skill of the competent mediator. Ultimately, the mediator must be able to dance with doubt and romance with the prospect of resolution.

[65] Chaos theory is really about finding the underlying order in apparently complex random data and systems. The first true experimenter in chaos (The Butterfly Effect) was a meteorologist, named Edward Lorenz. In 1960, Edward Lorenz of MIT,

[66] Mediators, by definition, work in this terrain of ambiguity, which requires a multivalent thinking frame. See RD Benjamin, 'Managing the Natural Energy of Conflict: Mediators, Tricksters and the Constructive Use of Deception' in D Bowling and D Hoffman (eds) *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact on the Process of Conflict Resolution* (Jossey-Bass, San Francisco, 2003).

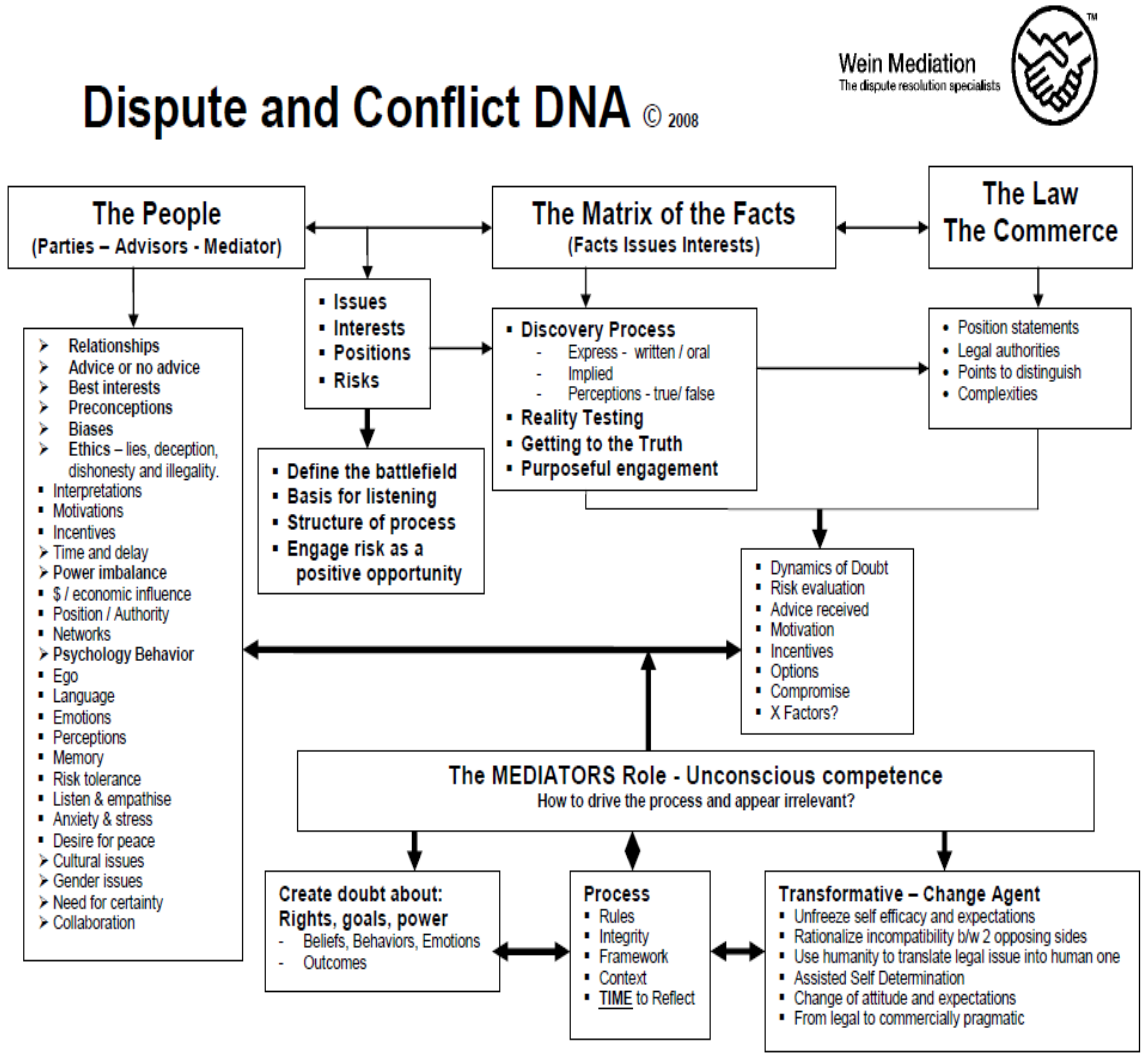
[67] Move towards, not away from, an impending impasse. Consider encouraging a likely impasse to come about sooner rather than later. This allows for some assessment as to whether or not this is the real thing or just an unfounded fear and minimizes the threat. Use the frustration generated by the impasse to advantage. In some instances, encourage the parties to become frustrated. Authentically encourage the parties to work hard to solve the problem. Gather information, generate, discuss and test options. If they are to become frustrated, do not resist, allow it to happen so that the full effect of "letting go' can be realized. See Robert Benjamin, 'The Joy Of Impasse: The Neuroscience Of 'Insight' And Creative Problem Solving,' February 2009, Mediate.com, http://www.mediate.com/articles/benjamin44.cfm.

h) An Adjournment - The Value of Time to Reflect and Incubate

The mediator must understand the importance and value of an appropriate adjournment that allows the parties to investigate reflect and obtain advice. It is important that the parties do not feel "compelled to make decisions too quickly… [and that they] feel 'safe' enough to make decisions efficiently."[68] The momentum of the moment should not be lost through poorly timed adjournments or mediator or party laziness to pursue a positive line of settlement. The follow up session after an adjournment mediation session can also trigger the path to settlement or provide the opportunity to reconvene an initially failed session.

[68] Ibid.

Appendix A



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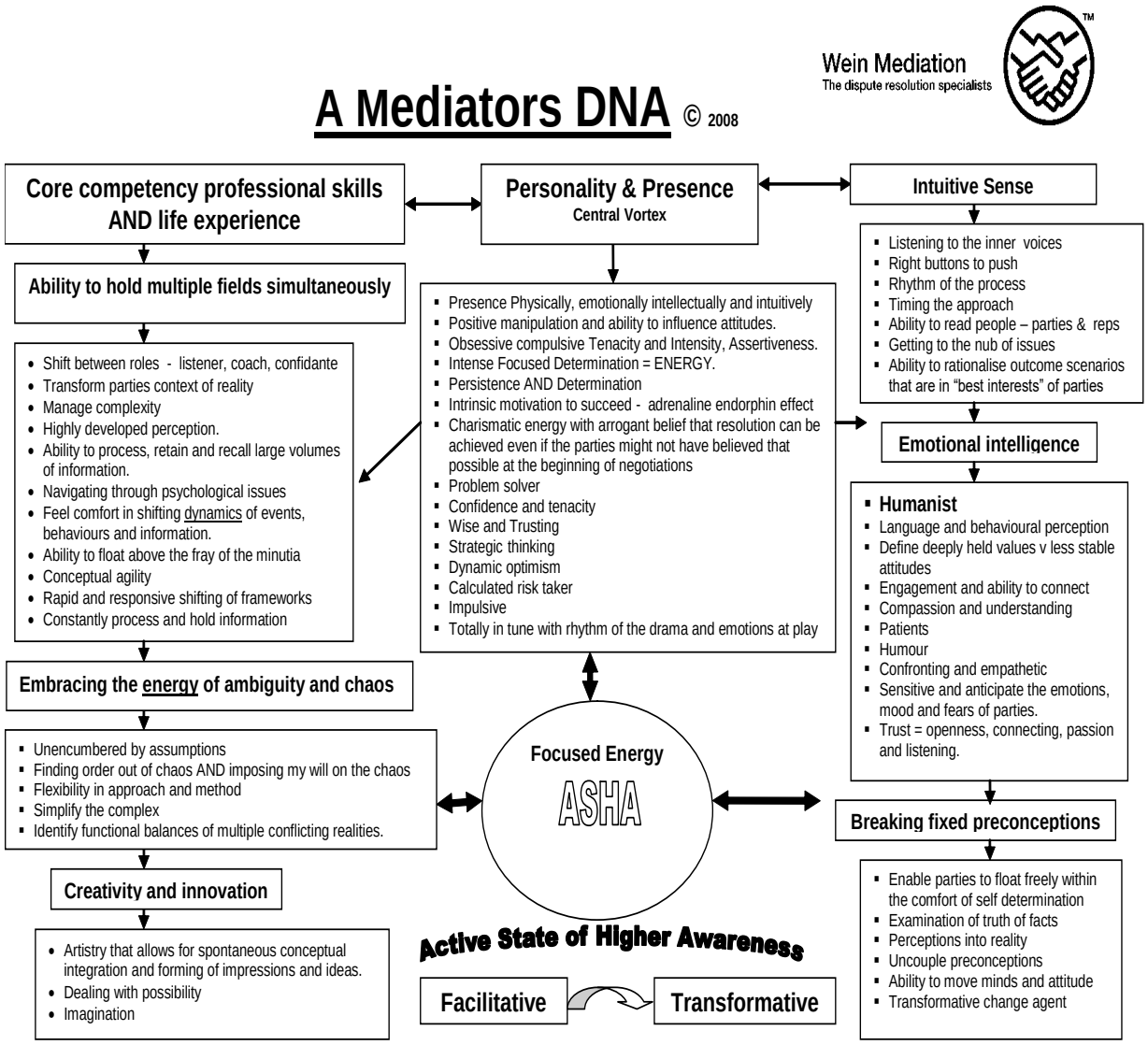
Appendix B


Wein Mediation
The dispute resolution specialists
A Mediators DNA © 2008
Core competency professional skills AND life experience
Personality & Presence
Central Vortex
Intuitive Sense
Ability to hold multiple fields simultaneously
Shift between roles - listener, coach, confidante
Transform parties context of reality
Manage complexity
Highly developed perception.
Ability to process, retain and recall large volumes of information.
Navigating through psychological issues
Feel comfort in shifting dynamics of events, behaviours and information.
Ability to float above the fray of the minutia
Conceptual agility
Rapid and responsive shifting of frameworks
Constantly process and hold information
Presence Physically, emotionally intellectually and intuitively
Positive manipulation and ability to influence attitudes.
Obsessive compulsive Tenacity and Intensity, Assertiveness.
Intense Focused Determination = ENERGY.
Persistence AND Determination
Intrinsic motivation to succeed - adrenaline endorphin effect
Charismatic energy with arrogant belief that resolution can be achieved even if the parties might not have believed that possible at the beginning of negotiations
Problem solver
Confidence and tenacity
Wise and Trusting
Strategic thinking
Dynamic optimism
Calculated risk taker
Impulsive
Totally in tune with rhythm of the drama and emotions at play
Listening to the inner voices
Right buttons to push
Rhythm of the process
Timing the approach
Ability to read people – parties & reps
Getting to the nub of issues
Ability to rationalise outcome scenarios that are in "best interests" of parties
Emotional intelligence
Humanist
Language and behavioural perception
Define deeply held values v less stable attitudes
Engagement and ability to connect
Compassion and understanding
Patients
Humour
Confronting and empathetic
Sensitive and anticipate the emotions, mood and fears of parties.
Trust = openness, connecting, passion and listening.
Embracing the energy of ambiguity and chaos
Unencumbered by assumptions
Finding order out of chaos AND imposing my will on the chaos
Flexibility in approach and method
Simplify the complex
Identify functional balances of multiple conflicting realities.
Focused Energy
ASHA
Breaking fixed preconceptions
Creativity and innovation
Artistry that allows for spontaneous conceptual integration and forming of impressions and ideas.
Dealing with possibility
Imagination
Enable parties to float freely within the comfort of self determination
Examination of truth of facts
Perceptions into reality
Uncouple preconceptions
Ability to move minds and attitude
Transformative change agent
Active State of Higher Awareness
Facilitative
Transformative

Notes