THE MIRROR OF EXPERIENCE

Advanced Mediation Tools and Techniques*

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A man's errors are his portals of discovery.

James Joyce

1 In the last ten years, our increasingly globalised world and its multilayered relationships have resulted in an evolution in the way we think about dispute resolution and conflict management. The number of techniques has increased and alternative dispute resolution ("ADR") is morphing into a study of "appropriate dispute resolution".

2 The arena of dispute resolution has widened to include areas such as the workplace, elder mediation (dealing with the rights and responsibilities of an aging population) and all manner of cross-cultural issues prompting a re-evaluation of traditional notions of fairness, power and communication norms. Appropriateness, like fairness, will always be in the eye of the beholder, especially where people have an emotional stake in the issue.

3 One of the hallmarks of the traditional legal system in Australia is that it is adversarial, and the power to make fair and dispassionate determinations lies in the hands of a neutral and impartial third party, whose intelligence and training qualifies them to wield that power.

4 The National Alternative Dispute Resolution Advisory Council ("NADRAC")[1] has divided ADR processes into three groups: facilitative, advisory and determinative. The facilitative processes are the area where the shift away from the adversarial processes and the dominant assumptions made in that system are most marked. In determinative processes, such as arbitration or expert determination, the "expert", while having a different status to the judge, shares a similar type of power and neutrality to that found in traditional litigious processes. When one moves to the facilitative processes, this is no longer the case.

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* This paper is a distillation of the key points from an interactive session held at the Mediation Conference in Singapore, October 2012. It expanded and took on more depth through the generous contribution of my colleague, Daniel Grynberg, an experienced legal corporate counsel and a reflective practitioner.

1 An advisory body to the Australian Attorney General on dispute resolution.

5 The facilitative processes have long been used beyond the realms of the traditional legal system, within religious contexts such as the church, Sulcha[2] and other areas of community living where elders and respected statesmen are used to assist with disputes. Its use in the formal legal system is more recent, and its relationship with that system more complex. The most common facilitative process used for dispute resolution in the courts is mediation.

6 Although clear definitions of mediation exist, in practice this word has been used extensively to mean many different things. It can mean a purely facilitative process in which the mediator is an expert in process, rather than the subject matter of the dispute itself.[3] It has also been applied to processes used by registrars and judges within the courts in which as well as a facilitation of dialogue, a view on prospects is often expressed. In some contexts this is known as conciliation, but in many others it is also referred to as mediation. Similarly, outside the courts, the use of the word mediation is used to refer to retired judges providing their services as evaluative mediators. "Evaluative mediation" is a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution[4]. These mediators are selected because of their expertise and gravitas, characteristics regarded as useful in the processes.

7 In legal circles, with a high proportion of practitioners being involved in mediation through the courts and with ex-judges, the word "mediation" conjures a process where there is a legal mediator who provides guidance.

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2 A dispute resolution process used by Bedouin communities in the Middle East, which culminates in a "Feast of Reconciliaton"; for a recent application see <http://israelsdocuments.blogspot.com.au/2013/04/a-sulcha-in-kfar-kassem.html> (accessed 12 September 2013).

3 The National Alternative Dispute Resolution Advisory Council defines "mediation" as:

> … 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.

See National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) at p 9, available at <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/DisputeResolutionsTerms.aspx> (accessed 12 September 2013).

4 National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms* (September 2003) at p 7 notes that "*evaluative mediation* may be seen as a contradiction in terms since it is inconsistent with the definition of mediation provided in this glossary", available at <http://www.nadrac.gov.au/publications/PublicationsByDate/Pages/DisputeResolutionsTerms.aspx> (accessed 12 September 2013).

8 For those who want to promote mediation (separate from evaluative mediation) the question of getting parties to the table to mediate and devices for promoting joint sessions, which is at the core of non-evaluative mediation, are crucial. Unless these challenges can be addressed in practice, there is a real risk that non-evaluative forms of mediation will be relegated to the fringes of the legal system. The question of whether this matters is a separate one and beyond this paper.

9 This paper considers the practicalities of getting parties to the table and suggests tools for making joint sessions work even with larger groups. The guidelines in this paper are based on practical experience, talking to parties, other professionals and lawyers.

I. Getting to the table for mediation, intake or defining the dispute

You can lead a horse to water, but you can't make it drink.[5]

10 Often the barrier to mediation is getting all the parties to agree to participate. As a mediator you may be approached by one party or their adviser to mediate a matter. However, they inform you that not all the parties to the dispute agree to participate in a facilitated conversation. Even where a conversation could be useful, in many disputes, it is difficult to get all the parties to the table unless ordered by a court.

11 With the maturity of the market, and the increasing number of disputes, there are more occasions where mediators are asked by sophisticated advisers (legal, human resources ("HR") and insurers) to assist in getting one or more of the parties to the table. This has not traditionally been the mediator's role.

12 Reluctance to come to the table is not surprising. When people are in conflict, even commercial parties, fighting and/or avoidance usually feels more intuitive than anything that requires collaboration, even if the collaboration is just to agree on a third party, or a process. It is important to understand this reluctance and to think about strategies that can assist parties to reflect on the benefits of taking control of the resolution. It is often inappropriate for the mediator to take on the role of persuading the parties to attend. However, providing advice on what might be useful may be both appropriate and helpful. The role of implementation can then fall to a court or an "honest broker". Honest brokers can take many forms: they can be legal advisers who are able to be dispassionate; a disinterested person taking the role of a conflict assessor; or an elder, community leader, religious leader, team leader (in workplaces) or a trusted friend.

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5 This is reportedly one of the oldest English proverbs that is still in regular use today. It was recorded as early as 1175 in *Old English Homilies*, which suggests that it was already old in the 12th century. See <http://www.phrases.org.uk/meanings/you-can-lead-a-horse-to-water.html> (accessed 12 September 2013).

13 Outlined below are some of the common barriers to getting the parties to the table and some suggested ways to overcome them:

A. The process *is the barrier*

(1) The parties have no idea about what mediation is or what it can offer

14 This is not an uncommon experience, and ADR often falls into Rumsfeld's third category of "unknown unknowns"[6] in that participants locked in a dispute are often so consumed with their tactical and strategic considerations of the issues at hand that they simply do not know what they don't know.

15 For a mediator or legal adviser, a traditional response to uncertainty is to provide a brochure to the person outlining the benefits of ADR or mediation. This is akin to getting a description of major medical surgery in a flyer. With neither context nor experience the written word often raises more questions than it answers, and increases the fear.

16 From a litigator, another traditional response is to seek and obtain an order for mediation. An order for mediation, without any other support for the parties or advisers, can often solidify resistance, and if all parties are not appropriately prepared, mediation will often fail at this juncture. Seeking an order also may not allow for proper consideration of the type of mediation or reflection of the importance of the distinctions (whether to try a mediation, or evaluative mediation).

17 There is no easy answer to the question of referral, which sits in the domain of influencing, or the realm of sales or marketing. It is useful to think of what occurs in persuading people to use other types of services. People tend to be willing to try something new if they have a recommendation from a friend (in much the same way we seek recommendations from trusted friends for services as diverse as a doctor or a plumber). Public opinion has also become a trusted source of influence, and has been a very successful business model for sites such as TripAdvisor and SurveyMonkey.

18 One of the oldest techniques used to persuade and influence is to offer a sampler, for example, a trailer for a movie, or a perfume sample at the department store entrance. This helps convince people because they have first-hand experience of what they are signing up for. It is much easier getting parties to the table for a mediation when they feel that they understand the product, or at least they have nothing to lose, and others

6 There are known knowns; there are things we know that we know. There are known unknowns; that is to say, there are things that we now know we don't know. But there are also unknown unknowns – there are things we do not know we don't know. US Secretary of Defense, Donald Rumsfeld (12 February 2002), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636> (accessed 12 September 2013).

who they trust have found it useful. This applies to both the parties and their advisers. The challenge is to provide this experience.

19 In a mediation context, the equivalent of a word-of-mouth recommendation would be to connect with someone who has been through the process, and who is willing to set aside time to talk to the parties. This can be organised by the mediator (for advisers) or by the advisers for represented parties (their own clients or the other side's).

20 In the event it is the legal practitioners who have not been in a mediation, a conversation over coffee with a mediator (not necessarily the person they will use for the process) is often a means to describe some of the ways the process may unfold, as well as an opportunity to discuss the legal adviser's role and other ADR options. Mediators are often happy to undertake a task like this at no charge, given that it builds understanding of the area and possibly establishes a relationship for the future. The other option is for the mediator to connect the litigators with lawyers who have participated in mediations before, and who are skilled and nuanced about the process.

(a) Organising samplers

21 To find an appropriate sampler for the mediation space is difficult. It can be helpful if the mediator can find an effective (short) video of mediation in a similar area to the dispute. A picture is a good way of familiarising people with a foreign process. Sometimes arranging for someone to be involved in watching mediation can be possible. This option is useful where there is a person who may be referring people to many mediations such as the new head of an ADR program in an organisation.

(2) One (or both) parties or lawyers have been through mediation before, and did not like it

22 When a party or lawyer confesses this to a mediator, the temptation is to distinguish oneself as different type of mediator and sidestep the issue. Whether this works is the luck of the draw in that no consideration has been given as to what parts of their mediation experience "did not work". As outlined above, many different but similar processes are called "mediation". It is useful to explore with the parties what might not have worked for them in the past. This is a good time to consider:

(a) what kind of process they need (last time and this time);

(b) what it is they might need to have resolved this time and whether it is the same or different;

(c) who might be the kind of person that can assist them; and

(d) how this process might be undertaken.

In getting them to move from the general to the specific it encourages a deeper analysis and a reflective stance on process rather than subject

matter. This can result in the design of a process that fits the problem and also differentiates it from the previous process. It is also an appropriate and valuable role for the mediator to play in facilitating reflection by legal advisers on the nuance of their ADR choices.

(3) Perceived prospects of the "case"

(a) Stronger case

23 In many circumstances, the legal adviser with the stronger legal case thinks it is tactically unwise to mediate. This is a valid consideration. It may be based on an assumption that competition will yield a better result than co-operation. It may also be based on the assumption that the legal problem is the most important of the issues in the conflict. Often these assumptions have not been tested, and it may be useful to assist the adviser to reflect on both of the assumptions.

24 It is useful to unpack the degree to which collaboration is sought. The aspect of the process that requires collaboration is the agreement to have a discussion and choice of the person to chair the discussion (mediate). Once the choice is made, how that discussion is held (collaborative, competitive, or a mix) is open to the parties. Making that distinction can be useful in allaying the fear of conceding power.

25 As experienced and excellent litigators, it is easy to look through the lens of expertise and forget that there are other lenses. It may be useful to test this with the adviser by providing a range of lenses. In a situation where the parties have an ongoing relationship, it is possible that in winning the legal case they may damage the commercial relationship. In cases where there are other dimensions, it may still be worthwhile considering mediation even if a party has a stronger legal case. Sometimes, where the legal case is strong even where the relationship is broken, co-operation is needed to give effect to an agreement. The payment of moneys where the cost of enforcement action will exceed the amounts paid is one such example. The introduction of a third-party mediator may enable a party with the weaker case to "buy in" to any agreement, making enforcement easier than a more adversarial process would.

26 Contexts in which this may apply include industrial or employment matters, family matters, discrimination matters, or ongoing commercial relationships.

> Example: The reseller of mobile credit card devices rents the credit card units from the manufacturer of the units (the "supplier") and uses them in a business. There are 100,000 units under this arrangement. The reseller sends a notice of cancellation to the supplier requesting that they pick up all units and informing the supplier that they are moving on. The supplier has legal advice that this is an exclusive arrangement for three years, and that the courts will enforce it by specific performance. They intend to move for relief from the court.

> In the event that they are successful in court, the three-year relationship that follows is likely to be difficult. The prospects of growing the reseller/client's spend during the time, or extending the contract after that time, are reduced through the strategy of going to court. In this case, a mediation may offer them the opportunity to set firm boundaries (due to their legal advice) but do it in a manner that maximises the potential of restoring a working trust, and potentially the client's longer-term spend.

(b) Weaker case

27 The flip side of the issue is where a party with the weaker legal case thinks they will be showing weakness if they ask for mediation. This also makes it difficult for them to suggest mediation.

28 This is the kind of situation where compulsory mediation orders by the court have a direct and important role. As a legal adviser, where there is a choice of jurisdiction consideration can be given to filing the matter in a court that has a referral to mediation as its most usual preliminary step (this is not always possible).

29 In the event that there is no court referral available, or it runs the risk of lack of co-operation post referral, another option is to explore whether there is a mutual friend or colleague of the parties who can be approached to broker a mediation without "acting" for a particular side.

> Example: A dispute between two co-authors around copyright where the membership body is asked to broker mediation; or the HR manager participating in a workplace situation refers it to mediation.

B. Policy *or* Precedent *provides a barrier*

30 Where there are policy issues at stake, organisations or people are often reluctant to use mediation on the basis that the confidentiality of the mediation may preclude the policy issue having an airing. There is also sometimes a perception that a facilitative process does not send a strong message about the seriousness of the conduct. This can include situations of workplace bullying, sexual harassment, environmental degradation or findings about error.

31 Underlying this is an assumption that compromise has a limited role in matters of principle. It is important to examine the binary nature of this assumption. Precluding a confidential process may not be in the best interests of one or more of the parties in a particular situation. It may also be possible to meet both objectives – being mindful of the principle, and providing parties with choice by a careful consideration of the goals.

32 This means considering how to structure the process in order to provide the individual with a benefit, while at the same time being

mindful of the broader policy considerations. It will necessitate the parties articulating what they may require from a mediation agreement in order to meet their policy needs. This may be satisfied, for example, by an agreement that the outcome be made public, notwithstanding that the process itself is confidential. Having the policy considerations as an item on the agenda may allow for a mediation to be possible and the policy drivers satisfied.

> Example: A membership organisation adopted a policy to assist its members in stamping out discriminatory behaviour. Within three months of the adoption of this policy document, a senior manager of the membership organisation made harassing and degrading comments to his female direct report, witnessed by six people. The Chief Executive Officer ("CEO") of the membership organisation and the board wanted an investigation, public findings and zero tolerance to send a message. The direct report preferred a confidential process as she felt this was the best way to manage the relationship and protect her job, reputation and well-being. In an intake process with a mediator, agreement was reached that the process would be confidential but that the CEO of the organisation would be a participant and have a say in the range of acceptable options.

C. Logistics *as a barrier*

33 Logistics can be a barrier. Increasingly, ADR is seen as a delay tactic. One or both parties do not want to delay the hearing or distract from preparation for the hearing. This is a problem, particularly where time is of the essence in getting an outcome through court or political processes, or where resources are limited.

34 There are two traditional strategies for this. Both have drawbacks. Where resources are not limited, it may be possible to have two teams simultaneously working on mediation and on litigation (or any other course of action that is available to the parties).

35 Where those kinds of resources are not available, it is sometimes useful to stretch the resources by mediating after court hours using the same team. This can be exhausting.

36 A more lateral solution is not to think of the mediation in the first instance as requiring an agreement on the substantive issues in dispute. It may be possible to work on an agreement (through interest-based negotiation, or mediation) that narrows down the issues in dispute, thereby both foreshortening any potential litigation and in doing so create space to consider further ADR processes.

> Example: In 1994, a dispute arose after an organisation sold music albums sourced from the mixing desk at concerts without the

artists' consent.[7] The albums were clearly labelled "unauthorised". No royalties were paid to artists or music labels, but there was no obvious breach of any law. Those representing the interests of the artists wanted to stop the sales, and commenced a number of claims for copyright infringement and trademark infringement. The use of an artist's material, where no royalty is paid, was seen by the record companies as an issue which required airing in the public domain in order to prompt legislative attention. All parties needed a quick decision for commercial reasons. Through facilitated negotiations the parties were able to agree on a statement of facts. This made it possible to skip lengthy discovery requirements and evidence collection, and enable a public court case based on agreed facts. With a shorter case the matter was placed in the list more quickly and could be finalised, including an appeal, in a much shorter time frame.

D. The parties *are the barrier*

(1) A day in court

37 There are some occasions where parties need to be "heard" by a senior figure in order to feel satisfied. This is often the case where it involves "matters of principle", particularly in a dispute that is closely entwined with a person's identity.

38 In these cases, evaluative mediation or conciliation can be very valuable and appropriate. It may be possible to think about a mediator who has "gravitas" (such as an ex-judge, senior member of the community or senior member of a religious group) and in that way provide the parties with the benefits of ADR as well "being heard" by a senior figure that they respect.

(2) Capacity

39 Mediation depends on the parties having the capacity and judgment to make a decision. This poses a challenge where they do not have the skills to make a decision, or the skills are there but are impaired by the conflict. Where the party (or parties) is impaired by "Amygdala Hijack"[8] as a result of conflict, this can deadlock any attempts at resolution. It can also be dangerous in that people can continue to engage

7 *Musidor BV v Robert William Tansing* [1994] FCA 541

8 "Amygdala Hijack" is a term coined by Daniel Goleman in his 1996 book *Emotional Intelligence: Why It Can Matter More Than IQ* (Bantam Books, 1996). Drawing on the work of Joseph E LeDoux, Goleman uses the term to describe emotional responses from people which are immediate and overwhelming, and out of measure with the actual stimulus because it has triggered a much more significant emotional threat. See further Cinnie Noble and CINERGY® Coaching <http://www.cinergycoaching.com> (accessed 12 September 2013).

in litigation and other strategies with their judgment about the risks severely impaired.

40 In these cases, individual conflict coaching of the party can be a powerful intervention, either on its own or more usually as an adjunct to mediation. Conflict coaching is a process in which a trained coach supports and helps an individual to deal with specific conflict and the decisions that flow from that conflict. It can be used to prepare people to engage more effectively in negotiation and mediation by moving them to a more reflective and considered decision-making framework which integrates both emotion and analysis.

> Example: A senior manager raised a bullying complaint against her direct manager. The HR team investigated and, having interviewed a number of people in the team, did not uphold the complaint. Mediation was suggested to try and restore the relationship between the parties. The complainant wanted to keep her job, but felt let down and unsupported by the organisation and her manager. This resulted in her lashing out in every meeting, making all problem-solving conversations impossible for her. She also felt vulnerable and angry, which made returning to work difficult. Conflict coaching was arranged to work on identifying what boundaries she needed to negotiate in order for her to feel safe and supported. Having identified these goals with a coach, it was easier for her to participate constructively in a joint session with both her manager and the HR team to work on moving forward.

(3) Moving to the table

41 Once the parties agree to go to the table, the question is whether they go together or separately. What is the format for the mediation (casting aside the role of the mediators themselves)? Parties having tentatively come to the table will often be reluctant to engage with each other and will pressure the mediator to run the meeting in private sessions. The mediator can become an expensive conveyor of messages. It is important for both mediators and lawyers to consider whether or not this matters in a particular context.

II. Shall we shuttle? Private session or joint session

42 Mediators and lawyers have strong preferences for running mediations in variations of a couple of general forms: predominantly in joint sessions (all parties in the room) or in private sessions (where the mediator shuttles between the groups).

43 As mediators and lawyers, our preferences are shaped by our habit, culture, training and experience. All mediators and advisers need to be aware that what is best for them is not necessarily best for the parties to the dispute. It is essential to consider the advantages and disadvantages of

joint and private sessions. This allows mediators be reflective of their own preferences and those of the parties. It also allows the fashioning of a combination of joint and private sessions in a way that maximises the effectiveness of the process[9] rather than the mediator's personal preferences.

A. When there may be advantages to the parties and mediators of joint sessions

44 The primary advantages of having mediation in joint sessions (parties together):

(a) It is good for building relationships and new habits between the parties.

(b) If the parties are going forward together, it is an opportunity for each party to assess the capacity of the other party.

(c) It minimises the chances of the mediator to getting it "wrong", adding another filter for the parties.

(d) It provides an opportunity to work through and transform conflict (where that is relevant in a particular matter).

(e) It allows the mediator and the parties to observe behaviour patterns and assumptions and for the mediator to name it from time to time. In that way the parties can question the assumptions or shift the patterns.

Example: In a multi-party mediation of a workplace dispute involving six claims of bullying made against a HR manager, the dialogue became rich about the context in which all parties found themselves. The conversation moved from a thin story about each occasion the complainants had been shut out, not consulted, or bullied, to a richer story about the strains of limited resources, long hours, and the huge demands on everyone up and down the management structure.

B. When shuttle may be necessary or fine

45 Where the relationship between the parties is over, and there is no need to re-establish or transform it, there may be no great benefit in a joint session.

46 There are also occasions where time is of the essence and logistical imperatives make joint sessions impracticable. Contexts include international mediation and Native Title negotiations with multiple stakeholders and dispersed traditional owners.

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9 See also, Geoff Sharp, "In Praise of Joint Sessions" 1st Asian Mediation Association Conference, Singapore (2009).

C. Advantages of private session/shuttle

47 The fact that many mediators choose to keep the parties in separate rooms and shuttle is indicative of the fact that there are solid advantages in individual sessions. The predominant one is that it alleviates stress for both parties and/or mediators who find dealing with conflict difficult. This alone is not sufficient reason to shuffle given the number of advantages that joint sessions afford. The other advantages of separate sessions include:

(a) It moves more quickly (which can be replicated by using strategies below).

(b) It allows a more robust reality testing because there are no other parties in the room.

(c) It offers a safer forum from which to evaluate (assuming an evaluative-type mediator).

(d) Parties can be more honest about obstacles to settlement or restoration of a relationship.

(e) Where there are multiple stakeholders spread regionally, it is easier and less expensive to set up meetings or move between parties.

(f) With smaller numbers (for example, one lawyer, one party) it is also possible to conduct sessions over Skype, making it more practicable when long distances are involved.

(g) Where the dynamics between the protagonists present as a problem, good advisers can work on the protagonists in a robust way, away from the public eye.

(h) The mediator needs less skill in handling chaos and conflict.

Given the strong benefits of both private and joint sessions, there is merit in a process that combines both.

D. Variations on a theme – Benefits of private sessions without losing the connection

48 It is possible to do a combination of joint and private sessions within one mediation. The balance is often a matter of the mediator's style. The skill is to be reflective rather than habitual in exercising that choice. There are also options on who can attend a session, including:

(a) parties and lawyers;

(b) parties alone; or

(c) lawyers alone.

49 Mediators should be cautious about having parties alone without their lawyer's or adviser's prior consent. As a lawyer or adviser, there are

sometimes good reasons why you would encourage the mediator and the parties to meet independently of their advisers. This can include:

(a) allowing a more commercial discussion than a lawyer feels may be appropriate for them to participate in (often for tactical reasons);

(b) providing a break for the advisers to keep them fresh; and

(c) providing a second channel for the advisers, thereby saving time and fast tracking discussions.

The flexibility afforded by different working groups becomes more apparent and useful in complex multi-party disputes.

Example: Six wind farm owners were all involved in a matter that required compensation from the market operator, where legislation provided that compensation was to be determined by an independent dispute panel.

One of the issues in dispute was which data points were to be used for compensation. This applied to only two of the six participants in the dispute. It was arguable whether the rules allowed for two data points to be used for compensation, if only one was used for despatch (legal question), and unclear what the dollar amounts would be (technical question). To determine and agree on the scope of the matters for the panel and the compensation principles, it was agreed to explore these questions in a mediated process.

Given the complexity of the questions and the number of people it affected, it was efficient to have the legal advisers deal with the legal question and technical advisers consider the technical question in separate and concurrent sessions.

E. Summary

50 Based on the discussions above, the following is a summary of the matters that may be useful to consider if the mediator is tempted to run private sessions only and shuttle between them:

Question	Variable	Selection
Conflict style	Parties do not mind heightened conflict and robust discussion	Joint session
	One party is conflict-averse (withdraws)	Consider breaks or separate sessions
Relationship	No relationship and no need for a future	No need for joint sessions

	connection or repair on the part of either party	
	No relationship, but future connection needed (eg, work at the same company, divorce with kids)	Some joint sessions desirable once trust is built
	Strained but ongoing future contact needed	Joint sessions required
Parties' goal	To solve a legal issue and money only	No need for joint session unless the relationship box is ticked
	To repair a relationship	Joint sessions required
	To transform a relationship	Joint sessions required
	To close unfinished business	Joint sessions required

III. Practical tips for keeping track and giving people a voice

51 One of the reasons mediators resort to shuttle mediation in larger sessions is to give people a voice and ensure that they are engaged and comprehend the issues. In mediation with large groups, giving people a voice is often problematic. These challenges have had multiple causes: people who dominate, people who do not want to speak or are too afraid to speak due to a hierarchy, the need to share complex information and the logistics of managing numbers.

52 There are a number of techniques that can be used by the mediator to assist groups in their decision-making, while keeping them in joint sessions. These include techniques for organising the information (co-ordination) and techniques for capturing the information (recording).

53 In multi-party mediations, it is useful to draw from areas of practice that have a wealth of information on how to assist decision-making in large groups. The areas of adult education and facilitation provide many documented tools and techniques.[10]

10 See in particular Judith Kolb, *Small Group Facilitation* (Amherst. Massachusetts: HDR Press, 2011); and Roger Schwarz, *The Skilled Faciliator* (Jossey Bass, 1994).

A. Visual aids for engagement

54 A large percentage of people absorb information visually. Visual aids can be useful in engaging the visual modality and in this way enhance understanding and retention of matters. This can include using a joint agenda, white board, flip chart, sticky notes or, more comprehensively, Talking Paper,[11] a visual tracking tool. Mind mapping, drawing on paper, or using new technology such as Pintara board is also useful, particularly in multi-party mediation.

55 Drawing has the added advantage of giving access to those who may not be fully literate or for working across language groups.

56 Simultaneous capturing of information also saves time. It allows the mediator to record the process in a transparent way and confirm joint understanding with the parties. By providing a more immediate way of providing minutes or notes using a digital photo, it can provide a mechanism to avoid any additional time getting minutes adopted by multiple parties.

57 In multi-party contexts it is also a co-ordination tool providing a reference point for topics and agendas, and the formulation of a group dialogue.

IV. Personal comment in conclusion

People don't resist change. They resist being changed.

Peter Senge

58 Most change is uncomfortable, and it is from dealing with the discomfort that the greatest shifts and transformations can occur. That is the gift of conflict as a change agent. The role of mediation is in large part to provide a safe space for the reflection and realignment that precipitates the change required to resolve the matter.

59 I have roles as both a private mediator and an evaluative mediator predominately in my role as a part-time registrar in the Federal Circuits Court. I have been surprised to see people make shifts and restore relationships that appear doomed, even in commercial matters. This has given me an appreciation for the ability of people to change and the power in that shift.

60 Sometimes parties avoid mediation to avoid the change that will be required for resolution. As mediators, part of our role must be to

11 Talking Paper or Metaplan is a visual tracking tool introduced to assist democracy. See <www.turningforward.org> (tab talking paper) (accessed 12 September 2013).

ensure we support parties coming into the process, particularly where it is something that they want and need, but the fear of it makes it uncomfortable. We must also respect and recognise the line where it may not be appropriate, or it may not be something they want, or are ready for. Recognising the difference is not easy.

61 The understanding of the mechanics of getting parties to the table and the skills and tools for keeping them engaged with each other are critical in assisting to create that space. As a legal practitioner and someone who is comfortable wearing the hat of adviser, I have found it helpful to make some of these decisions and options transparent for myself. In that way I can constantly check whether the choice I am making is for the parties' or a symptom of my personal comfort zone. This insight allows me to shift myself and my practice where required.

> Example: A number of years ago, I was part of a team facilitating a dialogue between a group of Jews and Palestinians in Israel. The program was designed to prepare a cadre of dispute resolvers. It was a difficult session, not conducted in my mother tongue, and punctuated by gesturing, talking over each other and shouting.
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> The mediation team called for a time out to set ground rules for a more civil discourse. This was met with tremendous anger and resistance on the part of the participants. In their view, given the subject matter of the dialogue, civil discourse would be neither possible nor appropriate, and they regarded the request as patronising.
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> A number of the mediation team chose not to continue, finding the space difficult and the dynamic fundamentally lacking in respect. Along with two others, I decided to take some Panadol and continue on the path, notwithstanding my own reservations and discomfort. After one more day, the group had a huge breakthrough in their understanding of each other. Their assessment of what they needed to do in order to reach their own conclusion was, in fact, correct. The problem had been our mediation team's particular frame of reference. It was an important lesson, and I have carried that valuable experience with me ever since.