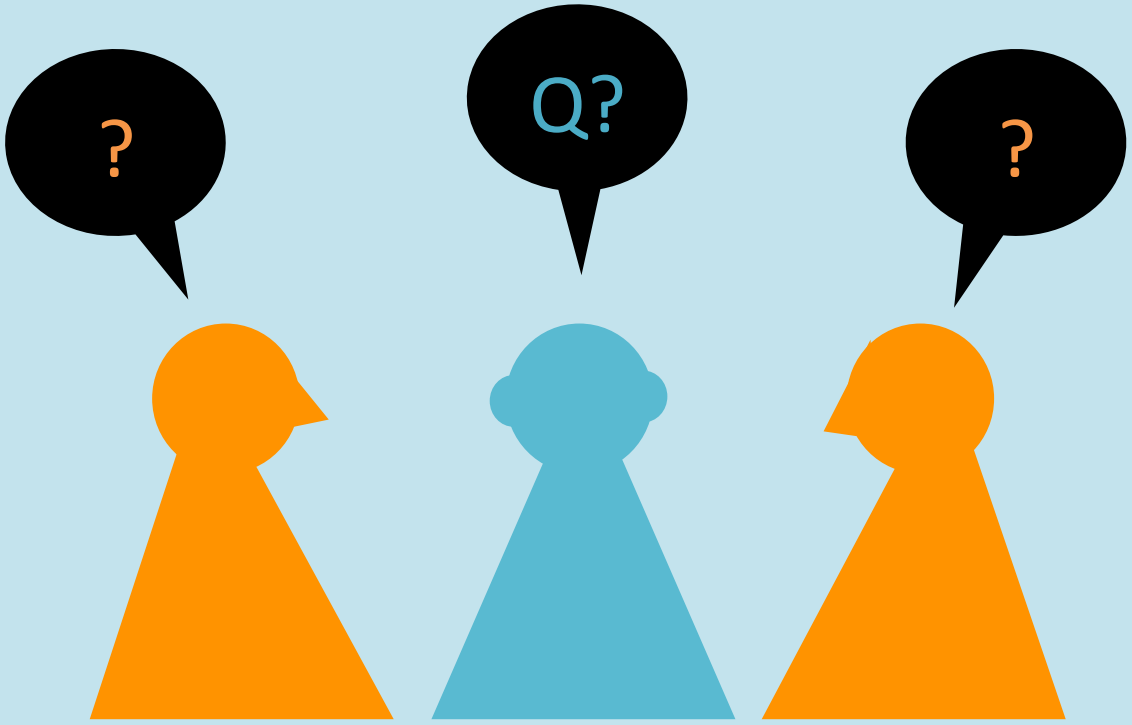
The Who, What, When, Where and Why of Mediation



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The Who, What, When, Where and Why of Mediation

First Edition

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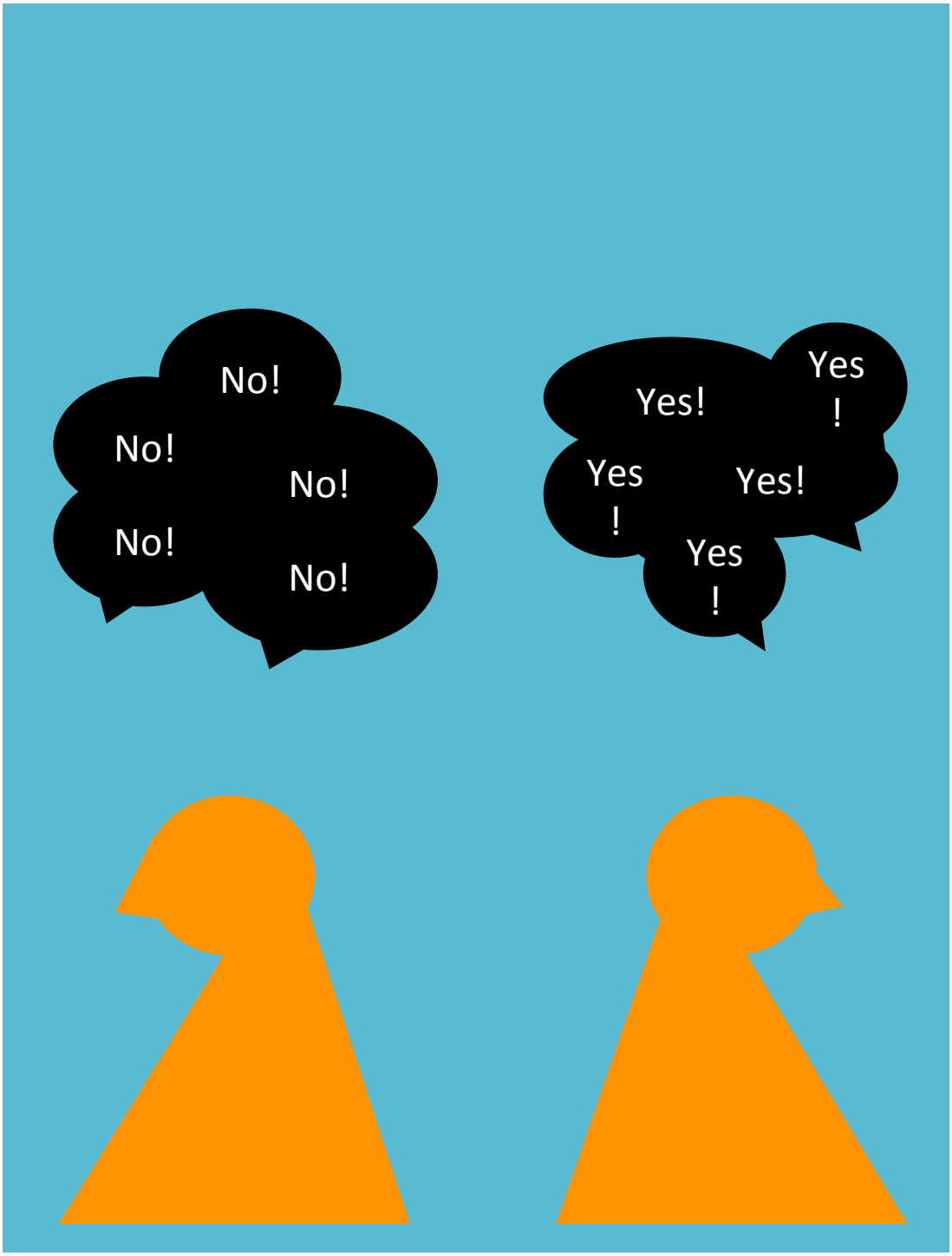
Chapter 1

Questions about Alternative Dispute Resolution



What is ADR?

We all like acronyms – ADR stands for alternative dispute resolution. Typically it covers alternatives to litigation, such as negotiation, mediation, conciliation, arbitration, collaboration, etc.

In recent years, some ADR professionals have queried why their chosen methods of dispute resolution are labelled as alternative! Many of these methods have existed as long as humanity has been able to communicate (i.e. negotiation) or since people realised that someone may have skills in helping a negotiation (i.e. mediation). However, at least for the moment, ADR is a convenient umbrella term to cover an ever expanding and deepening range of options for people in conflict.

What is mediation?

Here is the most important point to remember – mediation is an opportunity. Mediation is voluntary, consensual, confidential and party-centric.

Mediation is a process that is used to solve disputes. It is often described as a facilitated negotiation. The disputing parties negotiate to seek a solution, but they are assisted by a neutral and independent third-party, the mediator. The simplest mediation would literally involve three people sitting down to talk – each side and a mediator. In mediation as in life things often get more complicated. For example, parties may want to have lawyers with them, or experts in the issues, or supporting parties (e.g. friends or family). The issues at stake may relate to any type of dispute. Mediation is routinely used to solve small claims, commercial disputes or family issues. However, it has also been used to solve durable and violent conflicts.

Sometimes people describe mediation by explaining what it is not. It is not arbitration or litigation, where a third party will make a decision for the parties as to the correct solution. In mediation, the solution must come from the parties themselves.

There are less formalised rules in mediation than with arbitration or litigation, for example there are no rules of evidence or procedure, which must be followed. The parties with the guidance of the mediator are free to determine how best to conduct their mediation. If the parties decide it should be held outside, or over the phone, or through shuttle diplomacy, they can make these decisions.

Mediations may result in an agreement between the parties, which is usually documented as a settlement agreement that is a legally enforceable contract. Alternatively, there may not be an agreement at the end of the mediation, in which case the parties must decide how to proceed.

In either case, whether there is a settlement or not, it is most probable that the parties will have gained a new understanding of the dispute, their own interests and the perspective of the other side.

What is arbitration?

Arbitration is a means of settling a dispute, where the parties appoint an arbitral panel to make a decision based on fact and law. The arbitral panel typically has one or three arbitrators. The arbitrators will hear evidence and submissions from each side and make an award.

The process is very similar to litigation. There is increasing concern that arbitration is becoming the new litigation. This is caused by the introduction of extensive rules of evidence and procedure into the arbitration process.

There are still some key differences between arbitration and litigation. Parties select their own arbitrator. Much as parties may want to choose their own judge this is not how the courts work. For arbitration, the parties can consider the arbitrators' background and expertise to select the person they think will be best placed to make a wise decision. Some arbitrators may have expertise in a particular area for example, finance or medicine. Their subject matter expertise may make parties want to chose them as they will understand the technical aspects of the dispute.

Another key difference from litigation, is that arbitral awards are very enforceable. If you receive an arbitral award against another party whose business is based in another country, you may need to go to that other country to seek assets to fulfil the award. With a court judgement there are many complexities to doing so, however, arbitral awards are supported by treaties, which make them very transportable. For parties who are involved in an international dispute this can be a key consideration.

Arbitrations typically take place under the rules of an organisation such as the HKIAC or the ICC or UNCITRAL depending on the choice of the parties either pre-dispute (e.g. arbitration clause in their contract) or post-dispute. Arbitrations may either be administered by the organisation meaning that they will make arrangements for scheduling, rooms, etc. or they may be ad hoc in which case the arbitrators will typically make the practical arrangements.

What is negotiation?

Every small child learns to negotiate – one more biscuit, another hour before bed, etc. Seemingly this ancient art is hardwired for humans.

At its best negotiation involves two sides discussing a problem and constructively creating the best solution. Often, negotiation in the face of conflict falls short of this standard. People make decisions in the absence of information, or without considering all the options. One side may be more powerful or have better resources. This can result in an unequal agreement.

Often when parties are stuck in a dispute they can only see win /lose options. It is this attitude that they bring to the negotiating table. In a mediation, the mediator is there to help the parties move through this to a productive negotiation resulting in a durable solution.

What is collaboration?

Collaboration is a form of family mediation, which changes the dynamics. In collaborative practice, the lawyers representing each party agree that if the mediation does not work they will not represent the party in any subsequent litigation.

Collaborative practice sees the collaborative practitioner, the parties and the lawyers as part of a team who are seeking to find the best result for this family. They may employ the services of a financial advisor or child therapist to ensure that all the aspects of the separation / divorce are thoroughly covered.

How is mediation different from arbitration?

Ask a party who is experiencing both processes and you will hear many responses.

Mediation is an opportunity for the parties. At the heart of practice, is a belief that people have within them the best solution to their dispute. The mediator will work with both parties to assist them to recognise this solution.

At the heart of arbitration practice is a belief that an arbitrator who is an expert in law or fact or arbitration has the best answer to the dispute.

In terms of process, mediation is party-centric and is adaptable to the needs and wants of the parties. If the parties want to have a simple conversation or if they decide to include lawyers, experts and documents, that is their choice. A mediator should guide the parties to the best process for them to have a meaningful dialogue but at the end of the day it is up to the parties.

Arbitrations are conducted in accordance with a formalised set of rules (e.g. ICC, UNCITRAL, HKIAC) and will typically include procedures for hearings, submissions and evidence. This makes arbitration much more similar in process to litigation.

Arbitrations will result in a decision from the arbitral panel. The parties are bound by the award made by the arbitrator as they have submitted to the arbitration. These awards are highly enforceable thanks to international treaties.

Mediations may result in a settlement agreement, but they may also end in deadlock. The parties may not settle their dispute as the settlement must be consensual and voluntary. Unlike arbitration, the mediation will not guarantee a result.

How is mediation different from litigation?

Mediation and litigation are like apples and oranges. Mediation is party focused whereas litigation is focused on procedure. Mediation is an informal process where the parties decide on the solution to their dispute with the assistance of a neutral and independent third party. Mediation is collaborative and litigation is adversarial.

Litigation also involves a neutral and independent third party, the judge. However, unlike a mediator, the judge is not there to solicit the solution from the parties, instead the judge will hear the evidence presented by the parties and hand down a judgment. What are some of the characteristics of litigation?

The judge is charged with administering the law and thus will be required to ensure that procedural rules are strictly followed and that the judgment is based on her determination as to fact and law. In litigation the parties have given up their right to determine how the process will occur and what the result will be.

Although many parties in litigation feel absolute confidence in the rightness of their position, at least 50% of these people are wrong. Litigation leads to a winner and a loser. In mediation, the settlement agreement may not reflect 100% of what a party wants but it is likely to represent a collaboration that they can live with – and the best settlement agreements give parties solutions they could not have created without mediation.

As compared to mediation, litigation is a long process due to the many required procedural steps. Parties are required to act as adversaries where they present their best case to the judge in order to convince her of the rightness of their assertions.

How is mediation different from negotiation?

The answer in a word is the ‘mediator’.

Mediation as a process grew out of negotiation and they share many similarities. They are both voluntary and consensual. They are both creative and informal.

However, the key difference between negotiation and mediation, is the presence of the mediator. A mediator is trained to help facilitate the negotiation. This means more than setting an agenda and providing ground rules. Skilled mediators are adept at keeping the parties on track. They are able to know when the parties need time to vent and when they need to be steered back to a productive discussion.

Although, constructive negotiations can exist without mediators, a mediator will often help the parties to understand aspects of their dispute that they have not previously considered. This understanding may encompass:

- The parties’ underlying motivations and interests
- The true causes of the dispute
- How the party’s own actions contributed to the dispute
- Creative options for settling the dispute

What is med-arb or arb-med?

Med-arb usually refers to a process where mediation and arbitration are combined. For example, the parties may start arbitrating a dispute and then agree to attempt mediation. Or they may commence mediation and then when they are unable to reach agreement, agree to arbitrate (i.e. arb-med).

What is unusual about this is that the same person may act as both mediator and arbitrator. In China this practice is relatively common, however, in western jurisdictions this practice is often viewed with concern. There is concern that it is difficult, if not impossible, for someone to act as both mediator and then arbitrator. As a mediator you may well learn confidential information, which you may have to ignore when sitting as a decision maker.

The practice of arb-med has now been specifically recognised in Hong Kong by its inclusion in the Arbitration Ordinance (Cap. 609).

What are the pros / cons of mediation?

What are the pros of mediation?

- More control for the parties
- More creative solutions
- More constructive communication
- More efficient and less expensive than other options
- Confidential process

How about the cons?

- No publicity, sometimes disputes concern public issues which need to have public results
- Mediation is informal and if your dispute concerns violence, safety or criminal activity it may not be appropriate
- If the parties are not able to negotiate freely either because of intimidation or power imbalance or some other reason, then mediation is not an appropriate choice. Parties need to be able to negotiate for themselves as the mediator will not be able to step in and advocate on their behalf
- Mediation requires work from the parties – you need to be focused and creative and communicative. Not all parties are willing to make this effort.

Does mediation work?

Yes. It depends.

As a process mediation does work. As mediation is confidential there are no public sources of information about settlement rates. However, government funded mediation programmes do typically report settlement rates. For example, FINRA publishes a settlement rate of approximately 80%. For every 10 disputes that are mediated by FINRA, 8 result in a mediated settlement agreement.

As mediators are trained to say, if you have made it to the mediation you are more likely than not to reach settlement. Settlement agreements are one way to measure success. Some mediators count settlement agreements like notches on their belt. However, the ethos of mediation also provides for other forms of success? For example, has the mediation process led to an increase in understanding of:

- the dispute?
- the parties' interests?
- their ability to manage disputes better in future?

Although a settlement agreement is one measure of success, a wise mediator will also consider other factors in order to deem a mediation successful.

How can mediation help me?

Mediation can help people in different ways. If you are in a dispute, then mediation can provide you with an effective, structured process to uncover a settlement with the other side.
If you are stuck in a conflict with someone else and negotiations keep degenerating into shouting matches, the mediation can provide a structure and a neutral person to help move you forward.

By using a mediator, you will have the opportunity to learn things about your dispute, your motivations and those of the other side, your conflict style and those of the other side, amongst other things. Mediation is designed to enable 'learning conversations' which help the parties to learn more about each other and themselves whilst resolving the dispute, which brought them to the table.

If you are involved in mediation, this is your opportunity to learn about yourself and about how to manage future disputes in a more productive manner.

How can mediation help my business?

Mediation can provide businesses in dispute with the opportunity for control, creativity and constructiveness.

Although people in business disputes often seem fixated on a monetary amount, there is often a broken relationship or broken trust lying beneath the breach of contract or failure to deliver.

Mediation is a problem solving process. In business, people focus on results and costs. Mediation can seem to be about people and relationships and therefore irrelevant to business disputes.

But what business operates without humans? What commercial relationship is conducted without humans? Business is founded on trust and relationships. Therefore, mediation is well suited to take into account the human aspects of disputes whilst providing a platform for problem solving.

Mediation provides an opportunity to solve the dispute creatively. Maybe instead of a simple monetary amount there is future business to be done. Perhaps instead of a winner-takes-all litigation, the parties should mediate to ensure that they can work together in a future project (e.g. Hong Kong construction industry).

Perhaps the dispute that seemed intractable is based on a lack of good communication. This is something that a skilled mediator can help the parties to understand and to construct a plan for communication together.

For those who seek the bottom line, mediations are typically faster and cheaper than litigating or arbitrating disputes.

Why is the government encouraging mediation?

Much research has been done in many countries around the world, but litigation is generally viewed as expensive, time consuming and adversarial. There is support for mediation because it is typically less expensive, quicker and more constructive.

The Hong Kong Government has taken various steps to encourage parties in disputes to use litigation. They have introduced a new Mediation Ordinance which provides a statutory basis for mediation and its' confidentiality. In addition, the Hong Kong Government has created a 'mediate first pledge' campaign which encourages companies to sign up to a pledge that they will consider and attempt mediation for their disputes before other steps are taken.

In addition, given the aftermath of the Lehman crisis, the Hong Kong Government has set up with the HKMA and SFC, the Financial Dispute Resolution Centre. The FDRC assists parties with a limited range of financial disputes, which meet their strict criteria.

The Hong Kong judiciary conducted a huge review of civil justice in Hong Kong, which resulted in a series of reforms known as CJR (Civil Justice Reform). One of the key reforms is known to lawyers as Practice Direction 31. Practice Directions provide guidance to lawyers and parties from the judges as to how they will manage cases. Practice Direction 31 requires lawyers and parties to consider mediation as they prepare their case for trial.

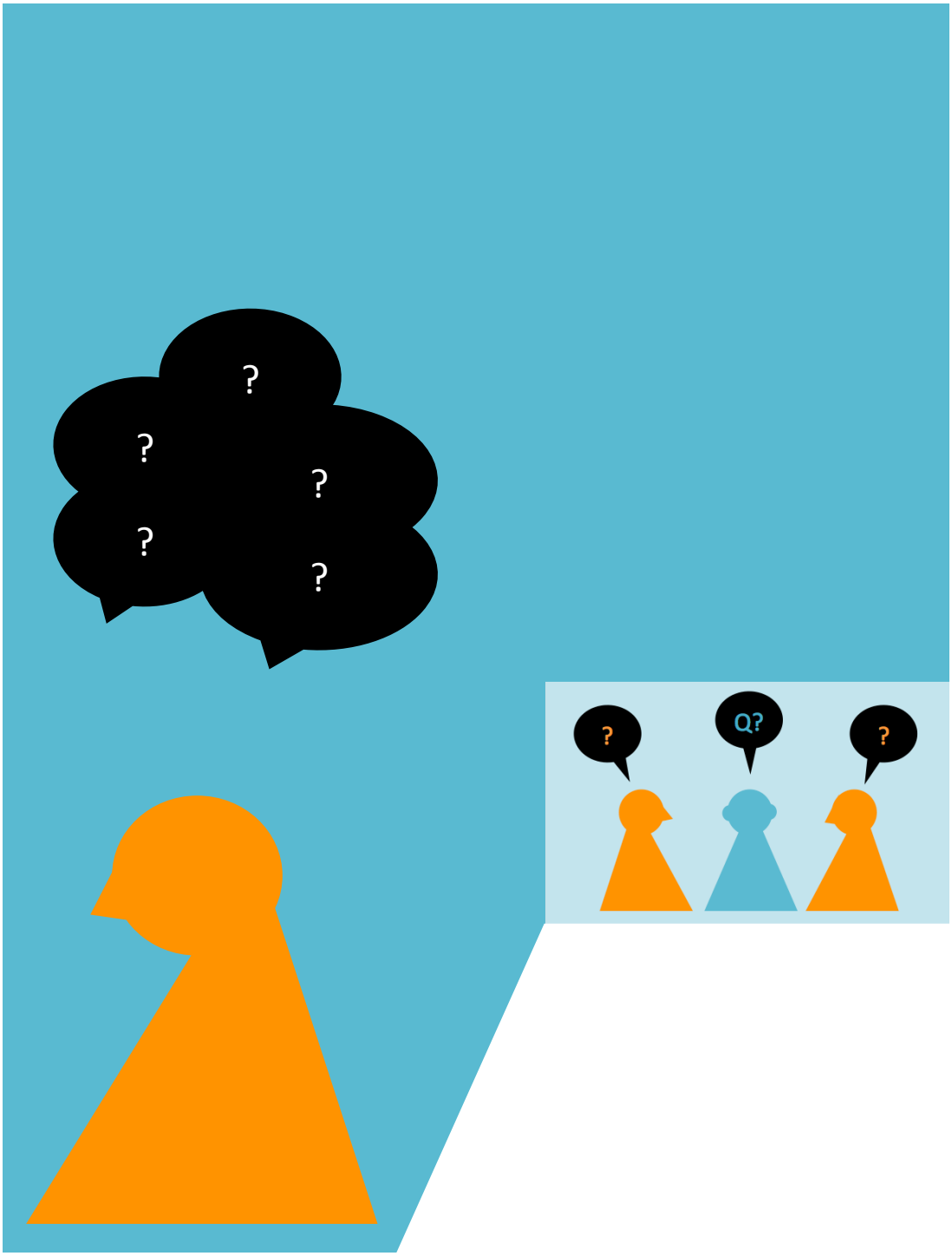
What if?

This is the most powerful question in mediation.

What if this dispute were resolved today? What if you no longer had to dedicate time and energy to fighting this cause? What if you and the other side were able to move forward to re-establish your relationship or conduct further business?

Some mediators will use this as a question in caucus to prompt parties when considering their options. It can be liberating for party to consider life without the dispute. Even if the dispute is just commercial, relationships of trust and mutual benefit may have been overturned by events. There is an emotional and psychological cost to conflict which parties may be unaware they are paying. They may also be unaware of how much of their life has been taken over by the dispute. For some parties this can be a way of clinging to a relationship with the other side, but it prevents all sides from advancing in their lives and moving beyond the conflict.

Chapter 2 Questions about what happens before mediation



What happens before the mediation?

The time before a mediation is a great opportunity to prepare for the mediation. You should ensure that you have a discussion with he mediator about what will happen during the mediation. You should also discuss with the mediator who will be attending the mediation.

You should give careful thought as to who should attend the mediation with you. If you are legally represented then you may want your lawyer to attend with you. If the other side will attend with a lawyer you may want to consider whether you need a lawyer with you.

If you have someone that you usually involve in your decision-making, you may want to consider bringing them to the mediation to support you. If they are not able to come then you may want to make sure they will be available for your phone calls.

Even more importantly, if the mediation concerns someone else then you will want to discuss with the mediator bringing them along. For example, if this is a family mediation and there are children, you may want to discuss whether the mediator could conduct a child-inclusive mediation. This may not always be appropriate if the children are very young, but for older teenagers they may want to participate.

In addition to who will be there, you should consider if you need to bring any documents or information. Ideally the mediation will not be a repeat of past arguments where you and the other side trade blows. The point of the mediation is to move forward and to seek a solution. However, if there is information that you think could help the discussion then you should consider bringing that with you.

The mediator will want to arrange the timing and location for the mediation. There are practical arrangements that will need to be agreed with the other side. You should ensure that you have time to attend the mediation. Although mediations may take no more than a couple of hours, they may run longer than planned. If you are close to a settlement it can be crucial to be able to stay for that last hour.

The mediator may also start talking to you about what could happen during the mediation. You should think about what your expectations are and if they are reasonable. Being mentally prepared can really help to make the mediation session more productive.

What happens before the mediation? (continued)

You should think about what you are willing to offer or accept. Do not go with a closed mind, but if you have some ideas this may be a starting point this can be helpful to move the mediation forward.

If you have any questions about the process or any concerns you should discuss them with the mediator. For example, if you are nervous about being in the same room as the other side, you should let the mediator know. It may be possible for you and the other side to sit in separate rooms, or to have ground rules that could make you feel safe and comfortable.

If your dispute is very complex, then the mediator may ask you and the other side to prepare a mediation brief for them setting out the details of the dispute. This may be confidential to the mediator only or it may be shared with the other side, depending on what you agree. This can be helpful in terms of helping you to analyse the dispute and also for the mediator to see what is important to you at the beginning of the session.

If you do have a lawyer representing you then make sure to speak with them before the mediation. If you are in the middle of litigation then your lawyer may want to give you guidance about what information you can share.

Although mediations are confidential, you cannot unlearn what you have learnt.

Should I use a mediation clause in my business contracts?

Yes.

Including a dispute clause in your contracts does not mean that you will end up in a dispute, however it will mean that you have clear pathway of processes to use. For example, dispute clauses usually provide for a tiered process where mediation is the first step. Arbitration or litigation may be the final process if the mediation does not work.

As a non-adversarial process, resolving disputes through mediation may allow the parties to continue doing business in the future. By going to court, it is unlikely that the relationship can be salvaged.

Mediation is typically quicker and less expensive than litigation. Both of these considerations are of great interest to businesses. By offering a more efficient process, mediation can reduce the amount of time and resources committed to a dispute.

What if I can't offer the other side money?

It seems nowadays as if money is the only answer to so many problems. Especially if you are stuck in a dispute, it is possible that the other side has said they want money to solve the problem.

Although this may be the case, it is also what we have been trained to expect as a society. The courts are limited in what they can give parties and unless you can fix a dollar amount to what you want it can be difficult to achieve anything else.

It is especially worth mediating a dispute if you do not have the money to pay the other side. Mediations empower people to be creative. It may be that there is something else you can offer, for example, services or future business or work.

Or it may be that asking for money is the only option that someone is able to communicate. Often when there has been a breach of trust or an emotional or physical injury people need more than money. Sometimes they need to hear that the other side is sorry. Or maybe they need to be able to tell their story to explain what the dispute has cost them in physical and psychologically. Narrative mediation is based on the belief that for some parties sharing their story, making the other side understand the extent of what they have done, is sufficient to enable them to move forward.

Don't think that money is the only reason people get into disputes. Without doubt it is often what they talk loudest about but there are many reasons why people get into disputes and money is only one type of solution.

Mediators are trained to help you and the other side understand what is motivating you in the dispute and what it is that you really want to resolve it.

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What if I am scared of the other person?

This can be a real issue. Everyone reacts differently to being in a dispute. Obviously some people will become angry and emotional. They may become aggressive.

If you have concerns about how reactive the other side may be then you must raise these with the mediator before the mediation begins. It may be that you can arrange good ground rules about how everyone will behave and these may be enough.

Or you may need to have other people present to give you a sense of security. Potentially the entire mediation can take place in different rooms with the mediator walking back and forth between the rooms.

One new method of mediation is to do the mediation by telephone. Usually this is because the parties are not in the same place, however, it could also be used if you had safety concerns.

There are lots of ways in which the mediator can help to make the mediation safe and secure for everyone. If you are worried speak up.

Can we do a telephone mediation?

Yes! Telephone mediations are usually used when people are in different countries. Although most mediators prefer to be in the same room as the parties and thus be able to use non-verbal cues to gauge progress, it is possible to arrange a telephone mediation.

As with any process decision, you and the other side need to agree how the telephone mediation will work.

If I know I am going to win in court, why should I mediate?

Most parties and many lawyers are confident about the strength of their case. You have considered the events in question, the lack of credibility of the other side, the reasonableness of what you want, etc. and it is impossible that a judge could rule against you.

However, every day people are surprised to learn that court cases are win/lose and that even though they had a strong case, they did not win.

Going to court is a risky enterprise. Litigation is designed as a win/lose proposition. Once you have presented your case the judge will make a decision based on her findings as to fact and law.

There is another way to resolve disputes. Mediation seeks to find a win/win solution. Rather than a winner take all approach, mediation provides a space where:

- there may be more information
- there may be more than one solution
- people can learn about their motivations
- people can learn about the other side's perspective
- people may develop a new way of managing conflict

There are lots of reasons to consider mediation. In essence the key one is control. If you litigate then in essence you are acknowledging that you cannot come up with a solution to this problem and you are asking the judge to make a decision for you.

Mediators believe that the parties who have lived with the dispute have the solution within themselves. Mediators believe that with the proper environment and encouragement people are able to solve problems for themselves. Empowering parties to take control of their dispute is a key reason why many mediators start working in this area.

In addition, mediation gives the flexibility to parties to be creative. Rather than take a monetary amount, maybe the dispute could be resolved with an apology and guarantees of future work?

Lastly, mediation not only provides the conditions for control and creativity, it also provides a constructive atmosphere. If you are in a dispute with a business partner, this may represent the end of a long relationship. Would you rather never have the chance to work with them again and make more money? Or would you rather find a way to communicate effectively and repair a relationship so that you can work together in future?

What if only I want to mediate?

Mediation is voluntary so both sides will need to agree in order for mediation to proceed. If you want to try mediation, and the other side has refused, some mediators may be willing to speak to other side about mediation.

It may be a lack of understanding that has prompted the refusal. A mediator may be able to respond to concerns about the process or cost which have held back the other side.

At the end of the day, no one can be forced to mediate but sometimes a refusal to mediate is based on ignorance of the process rather than a rejection of the promise of mediation. It is worth finding out why the other side does not want to mediate to see if there is a workaround.

What is the agreement to mediate?

If you and the other side have decided to mediate, then the mediator will ask all the parties to sign the agreement to mediate. The agreement sets out the basic conditions, which will govern the mediation. The agreement to mediate will usually include clauses dealing with:

- the mediator's role – clarification that the mediator is independent, neutral and not there to make a decision
- confidentiality – reinforces that all information disclosed during the mediation is subject to confidentiality, unless an exception is available
- parties' participation – may include the parties agreeing to be cooperative
- termination of the mediation – will clarify that either party or the mediator may terminate the mediation at any time

To see an example of an agreement to mediate have a look at the HKIAC website.

What should I bring to the mediation?

An open mind would be the best starting point possible.

The easy answer is whatever you want. However, as a mediator I would urge you to bring documents / evidence what are helpful to move your discussion forward.

Mediation is an informal process so generally people do not bring evidence or documents. However, if you want to discuss specific evidence or documents then you should bring them.

Depending on how much preparation there is you may have already discussed with the mediator what you want to bring to the mediation.

Just remember, mediation is an opportunity to approach this problem differently to the way you approach a court case. If you do bring something think about how it will impact the discussion. Will it help move the conversation forward or will it just reignite old arguments?

Who should attend the mediation?

Whoever needs to be there should attend. You should consult with your mediator as to what will be the most productive combination of people.

The parties to the dispute are an obvious choice. If they are legally represented then usually lawyers will also attend the mediation.

However, it is important to consider whether there are any third parties who should also attend. For example, is there someone that the party regularly consults e.g. a business partner or family member? If so, it may be better to have them in the room to support the mediating party rather than at the end of a phone line. In addition, it gives them the benefit of hearing all the information that the party is using to make a decision, rather than a second-hand repetition.

On occasion, a supportive third party can work with the mediator to help the party consider the reality of their situation and options.

Or the mediation may relate to a family mediation in which case there may be children or elderly family members whose future are being determined as part of the mediation. There are specific types of mediation structured to include the thoughts and opinions of children (child-inclusive mediation) and the elderly (elder mediation).

Are there any rules for mediation?

Mediators may practice subject to the rules or code of a particular group e.g. HKIAC in Hong Kong. In addition, there are also mediation rules issued by different organisations such as UNCITRAL.

In general, all mediators agree that they need to be independent and neutral. Many rules focus on requiring mediators to ensure there is no conflict of interest. Mediators should be held to high ethical standards as they are involved in disputes where people may be at their most vulnerable.

In terms of process, some mediators may work to specific rules based on their professional affiliation, or the parties may select a set of mediation rules e.g. UNCITRAL conciliation rules. As an informal process, there is much flexibility available to the parties to determine what process makes the most sense for their dispute and circumstances. For example, whilst many mediators prefer to have all the parties discuss issues together in a joint session, it may not be possible due to excessive animosity or safety concerns. It may be necessary for the parties to be in separate rooms with the mediator moving between each room.

What if I am confused?

Know that you are not alone. Life is confusing enough, but if you add onto that the many emotions and concerns that a dispute will bring, many people are confused.

The mediator is there to help you consider information and offers you may receive during the mediation. They are not there to judge anyone and good mediators genuinely want to help people achieve the right solution for them.

If you are confused about the process or about the details of an offer then make sure you speak up and ask. This may mean asking the other side to clarify something or it may mean asking the mediator for help. Mediation is a wonderful process, but it does mean that the parties (as well as the mediator) have to work hard to achieve a settlement. So speak up and ask for help!

How much does mediation cost?

Not as much as litigation! Not as expensive as a supplier that you can no longer deal with! Not as expensive as a family where the communication between divorced parents has broken down!

Mediators charge fees for their work. This may be an hourly fee reflecting their experience and expertise, or it may be a set fee for a pre-agreed number of mediation sessions. Fees per hour usually range from HKD2,000 to HKD20,000 you should discuss this with your mediator when you are selecting a mediator for your dispute. The cost of continuing to be in conflict, or of litigating a case can be significantly more than any amount paid to a mediator.

How long does mediation take?

How long is a piece of string? Generally mediation sessions where the parties are sitting down with the mediator last for a couple of hours. Depending on the complexity of the mediation, you may need several sessions to resolve an issue.

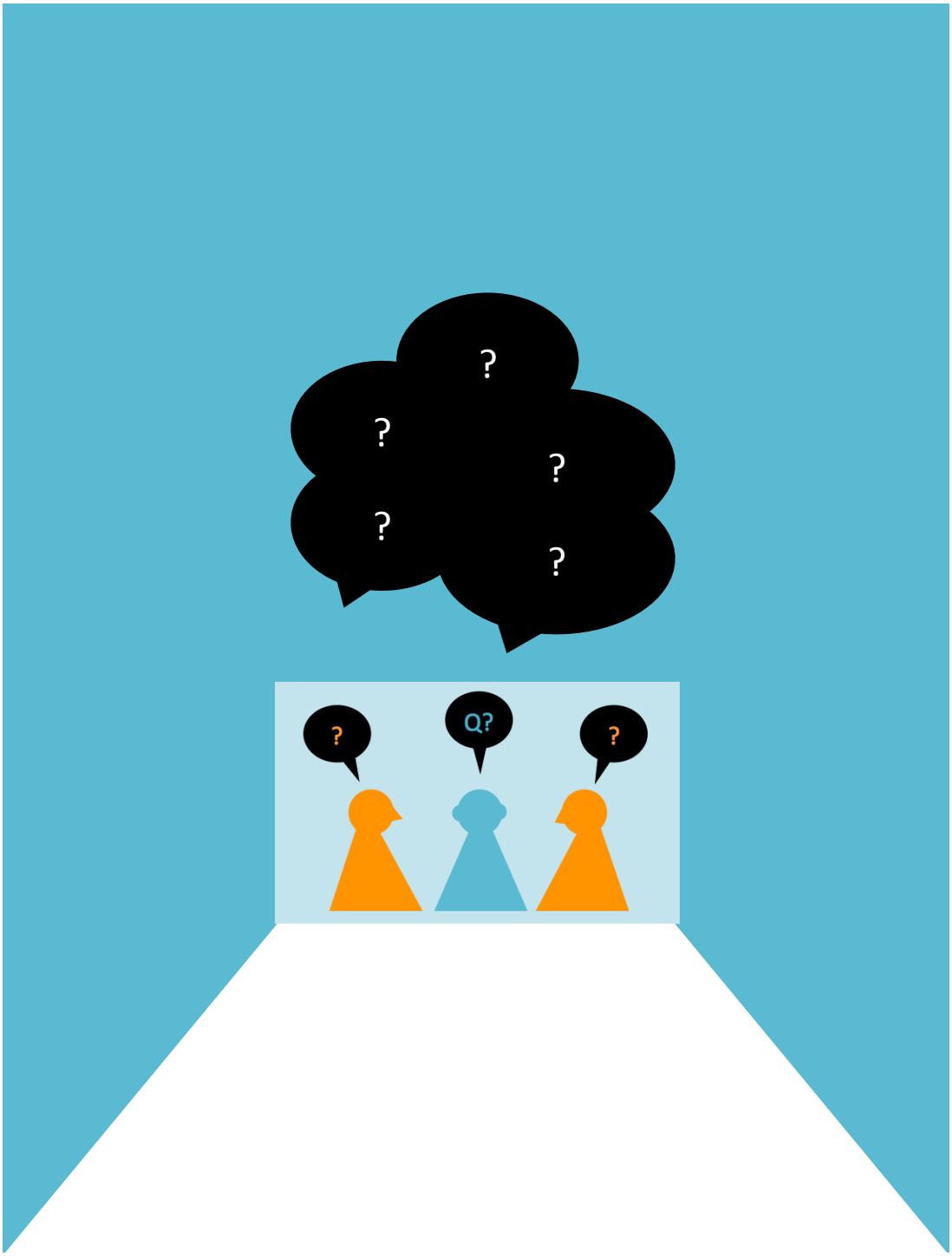
Mediation takes as long as you and the other side need. However, bear in mind that mediation is generally fast than arbitration or litigation.

Who pays for mediation?

Usually both sides will pay equally for the mediation. This makes sense as both sides are in the dispute and will both benefit from a solution.

However, if one party has more financial resources, they may pay a greater share of the mediator's fees. This needs to be discussed and agreed between the parties and the mediator. It needs to be clear to all the parties that the mediator will not be influenced by the fact that one side may pay more of the fees.

Chapter 3 Questions about what happens during mediation



What happens during a mediation?

Mediation is party centric, meaning that it is focused on the needs of the parties. With guidance from the mediator, parties have a lot of power to determine the process of mediation.

Generally parties are content to be guided by the mediator as to the best structure for the mediation session.
Introduction

Typically, the mediation session will begin by the mediator introducing themselves and the process. They may spend some time clarifying what the stages of the mediation will be. Even though you may have discussed this with the mediator already, just like an airline safety briefing it is important to have this time. The mediator will be doing many things during the introduction, including setting a tone of polite and constructive communication for the session.

Party statements

Then each party may explain the issue from their perspective. This is important as it allows everyone the chance to explain what is important to them and what problems have led to the mediation session.
This can be a time of learning as well. It may be that you have spent much time telling this dispute story to family and friends without considering how the other side may see it. Or it may be that one of the reasons you want to mediate is that you want the chance to tell your story to the other side, so that they can hear about the impact of the dispute on your life. Following each side's story the mediator may ask questions to clarify their understanding.

Common ground

In the Hong Kong process model, the mediator would typically see if there is any common ground that can be identified. This means are there any points on which you both agree – even if you were unaware of them. Although your relationship has disintegrated now, perhaps you both acknowledge that at one time this was a healthy and productive relationship. Acknowledging these points can be very helpful to setting a good atmosphere for the discussion.

Agenda setting

Then the mediator may suggest the issues, which they have identified and work with the parties to set an agenda for the session. This is also an important step. You may not have been able to agree on anything with the other side for a long time. Setting an agenda together is a concrete example of how you can work with the other side to accomplish something.

What happens during a mediation? (continued)

Joint session
Usually the session will include discussion of the agenda items. This is called a joint session i.e. all the parties are in the room. During the session, either party or the mediator may decide that it would be beneficial for the mediator to meet privately with each party. This is known as a caucus.

Caucus
The mediator during the caucus will speak confidentially with each party. In Hong Kong the normal practice is that anything you say to a mediator during the caucus is confidential, unless you give them permission to share the information with the other side. However, in other countries, mediators may tell you that if you want something to be treated as confidential you must tell them. Be careful and note how the mediator will treat your conversation.
The caucus can be very helpful. Sometimes parties need a break from the joint session. It can become tense and stressful during the joint session and the caucus can provide some breathing space. There may be information that you do not want to share with the other side, but you do want to share with the mediator. You may want to rehearse how to make an offer or see if that offer is realistic. These are all things that can happen during the caucus.

Offer / counteroffer
At some point either in joint session or caucus, an offer may be made. This may lead to a counter offer or acceptance. This stage of the mediation can last for some time.

Settlement
If an offer is accepted, then the mediator will help the parties to prepare a settlement agreement. If both sides have lawyers then the mediator will usually get the lawyers to prepare the draft. If there are no lawyers present then usually the mediator will prepare the draft settlement agreement.

No settlement
If no offers are accepted then the mediation may continue or it may come to an end. If both sides feel that they have explored all the options and are still at an impasse then they may terminate the mediation without a settlement.

Termination
If the mediator feels that there is no progress or has ethical concerns about the mediation, he may terminate the mediation.

What is a caucus?

A caucus is a private meeting between one side and the mediator. Usually, the mediator will keep whatever is said during the caucus confidential unless you give permission for them to share the information with the other side. Some mediators take the opposite approach and will only keep information confidential if you tell them to. Make sure you confirm with the mediator what their practice is before you share information during the caucus.

A caucus is great opportunity for you and the mediator. The mediator has the chance to get a deeper understanding of your interests and positions. They may make suggestions or help you to understand some of the information shared in the joint session. You may have information you felt uncomfortable sharing with the other side. A mediator can listen and may help you to find a way to share the information if that would be constructive.

If you have ideas as to how to settle the dispute but are too nervous to share them during the joint session a mediator can help you to consider what would be reasonable and also prepare how to make the offer to the other side.

What is a joint session?

A joint session occurs during the mediation when both parties are in the room. Although it can be difficult for people to be in the room together, a joint session is an important part of the mediation. For example, sometimes parties need to have the experience of telling their story to the other side. This can only be achieved in a joint session.

It may be that the parties really need to share their perspectives and discuss the dispute in detail. This can only happen in the joint session. The direct conversation is extremely important to achieving the promise of mediation.

Mediators are able to act as shuttle diplomats moving between different rooms, but most strongly prefer it if the mediation provides the parties with a means of communicating with each other. The mediator can communicate an offer to the other side, but it will have significantly more impact (for both sides) if communicated in a joint session.

What is the minimum participation level?

Mediation is a voluntary process so no one can compel participation.

Sometimes the parties will determine ahead of time how much time they need to spend at the mediation. For example, in Hong Kong, the Mediation Notice (Practice Direction 31) will include a specified minimum participation level e.g. how long will the mediation be?

In addition, the agreement to mediate will usually include a clause requiring co-operation and good faith from both sides.

Bear in mind, this is the minimum. If you want to get the most out of the mediation session then approach it with an open mind and heart.

Can I keep the notes of the mediation?

The key point to note is that what happens in the mediation is confidential. Typically the agreement to mediate will include a confidentiality clause. In Hong Kong, the confidentiality of mediation is now protected by statute (Mediation Ordinance).

You may want to keep notes to remind yourself of offers that have been made. Or while the other side is speaking you may want to make notes so that you do not forget to make a point. These are all reasonable things to do during the mediation. However, be careful that the notes and information will be confidential.

Most mediators let clients know that if they make any notes during the mediation, that these notes will be destroyed once the mediation is completed. You may find this a good practice to help protect the confidentiality of the mediation session.

Where will the mediation happen?

Mediations can happen anywhere where there is space and quiet. I once mediated outside under a tree when the electricity was cut to the courts. It made for a relaxing and constructive mediation.

Typically mediations occur in meeting rooms – perhaps your mediator will have their own space, or the lawyers representing the parties may offer their office space. There are also some professional spaces, which rent rooms for mediation.

If you are looking at where to hold your mediation, then you should look for a couple of things:

- Is there space for a joint session room and also separate caucus rooms for each side?
- Do the rooms have sufficient space? With whiteboards? Is the space purpose built for mediation? Or just for normal meetings?
- Are the rooms private? i.e. are the rooms sound proof? Can people outside the room see any information on the white board?
- Are the rooms comfortable and well designed? Do they enhance the chances that you will have a productive session? Or are they poorly lit and filled with uncomfortable furniture?

Don't forget you may be in the mediation for several hours and you will want to be in an environment, which supports negotiation and collaboration.

What if we hit a stalemate?

If this was a negotiation then that might be the end. One of the great benefits of mediation is the presence of a third party who has been trained to assist parties through stalemate.

Mediators are trained to focus on the flow of the negotiation. If they sense that parties are becoming tired or stuck on a point, they may change the topic, or suggest a break. If the stalemate is extreme, they may suggest a caucus to speak privately with each side. In the joint session a mediator may ask an open question to stimulate further discussion.

The mediator may help by working with each party to generate options. The mediator may help a party consider what is possible for them even if it a creative solution not previously suggested.

Your mediator is your best resource; so make sure to use them.

What is option generation?

Sometimes it seems as if the only two solutions to a problem, yours and theirs. When you are in a dispute, you may find that either you or the other side become very attached to a favourite solution, long after it is obvious that this will never happen.

Option generation is a technique used by mediators to help the parties come up with more than one solution. By use of questions and listening, the mediator will help the parties to consider other angles and options. In negotiation theory, the parties are often described as negotiating for a share of the pie. The assumption is often that there is a fixed pie i.e. there are only the known solutions, which the parties have already rejected.

Option generation is one way in which mediators help the parties to expand the pie. This technique helps the parties to be creative, to consider what is really driving the dispute and how they may respond to that in a new way.

What can happen at the mediation?

Dare to dream. A mediation session may turn a dispute, which is consuming your time and wellbeing into the past.

Mediation presents both parties with an opportunity to move forward with the past resolved. At its best mediation assists the parties to a durable solution, one which they can both live with and which respects both sides. Mediation can enhance understanding of yourself and the other side. In their hearts great mediators want to provide the parties with tools to manage their disputes better in future.

Can I bring a friend to the mediation?

Yes, but think carefully. Will this person be there to support you? Or will they disrupt the mediation? Remember they will also be bound by confidentiality.

Make sure to speak with the mediator before the mediation if you are thinking about bringing someone with you. You may need to arrange with the other side who each of you will be bringing. Whoever you bring will need to understand that the mediation is confidential and that they will be just as bound by confidentiality as you are.

What if I want to stop the mediation?

Mediation is voluntary. No one can force you to mediate. If you feel at any time during the mediation that you are not comfortable or that you want to stop, tell the mediator.

The mediator will not stop you from leaving the mediation, but they will listen to what is worrying or upsetting you. If they can, they will come up with a solution. Please give the mediator a chance to help you before you leave the mediation.

Can I contact other people during the mediation?

Yes, but.

If you need to speak to someone for support or to help you make a decision then you will be free to do so. However, remember that the mediation is confidential and that you cannot talk to people outside the mediation. If there is someone that you need to consult with then it would be better to make sure that your supporter is available for the mediation.

Can my lawyer help me during my mediation?

Your lawyer may be able to attend the mediation with you. If so then she will be able to provide you with support and counsel throughout the process.

Some people are uncomfortable speaking in public and may ask their lawyers to do all the talking in the mediation. I would ask you to reconsider. There is a real benefit to using your own words for your own benefit and for the increased understanding of the other side.

Rather than use your lawyer as an advocate, use her as your trusted advisor. When the other side presents information or options you can use your lawyer's experience and knowledge to help you assess new ideas. Make the most of having access to a lawyer.

Do I have to talk to the other side during the mediation?

Mediation is voluntary. If you don't want to speak to the other side then you do not have to and no one will make you. However, the mediation process works best when each side communicates. By not speaking you will be making it harder to achieve a settlement.

It is possible to conduct the entire mediation with each side in a separate room. The mediator will move between each room in what is called shuttle diplomacy. However, it is not the most efficient or meaningful way to communicate, as all messages will go through the mediator. Consider carefully whether this is necessary or whether with support from the mediator and ground rules you can manage to talk in a joint session.

However, there may be reasons why you do not want to speak to the other side which go beyond awkwardness or anger. If you have safety concerns then you need to share these concerns with the mediator as soon as possible.

What if I get upset? Or the other side gets upset?

It is normal to find disputes upsetting. Especially if you have not been able to resolve them with the other side and you are now sitting in a room with a third party trying to work on a solution. It is not surprising that people in mediation sometimes express anger, frustration and bitterness.

Sometimes it is necessary. Sometimes people need to show the other side how angry or frustrated they are. Sometimes venting is a necessary part of working through a dispute.

While it can be helpful to express emotion, a good mediator will make sure that this does not overwhelm the process or the parties. Don't be afraid of expressing emotion but remember that the mediation has a bigger purpose. Don't lose sight of your goals just for the satisfaction of getting to shout at the other side. If you are worried then speak with the mediator before to see how they can help you manage your emotions.

What if I can't agree with the other side?

Mediation settlements are voluntary. No one can force you to agree.

Just because you have agreed to mediate does not mean that you need to agree with the proposed settlement. If you do not agree, then there will be no settlement agreement. Make the most of your time with the mediator; think carefully about why you do not want to accept the offer. Is there any way in which it could be amended that would make it more acceptable to you?

If you or the other side has commenced legal proceedings then it is likely that you will consider restarting the process. After the mediation your options are still open and you can consider how you want to proceed.

What issues can be discussed in mediation?

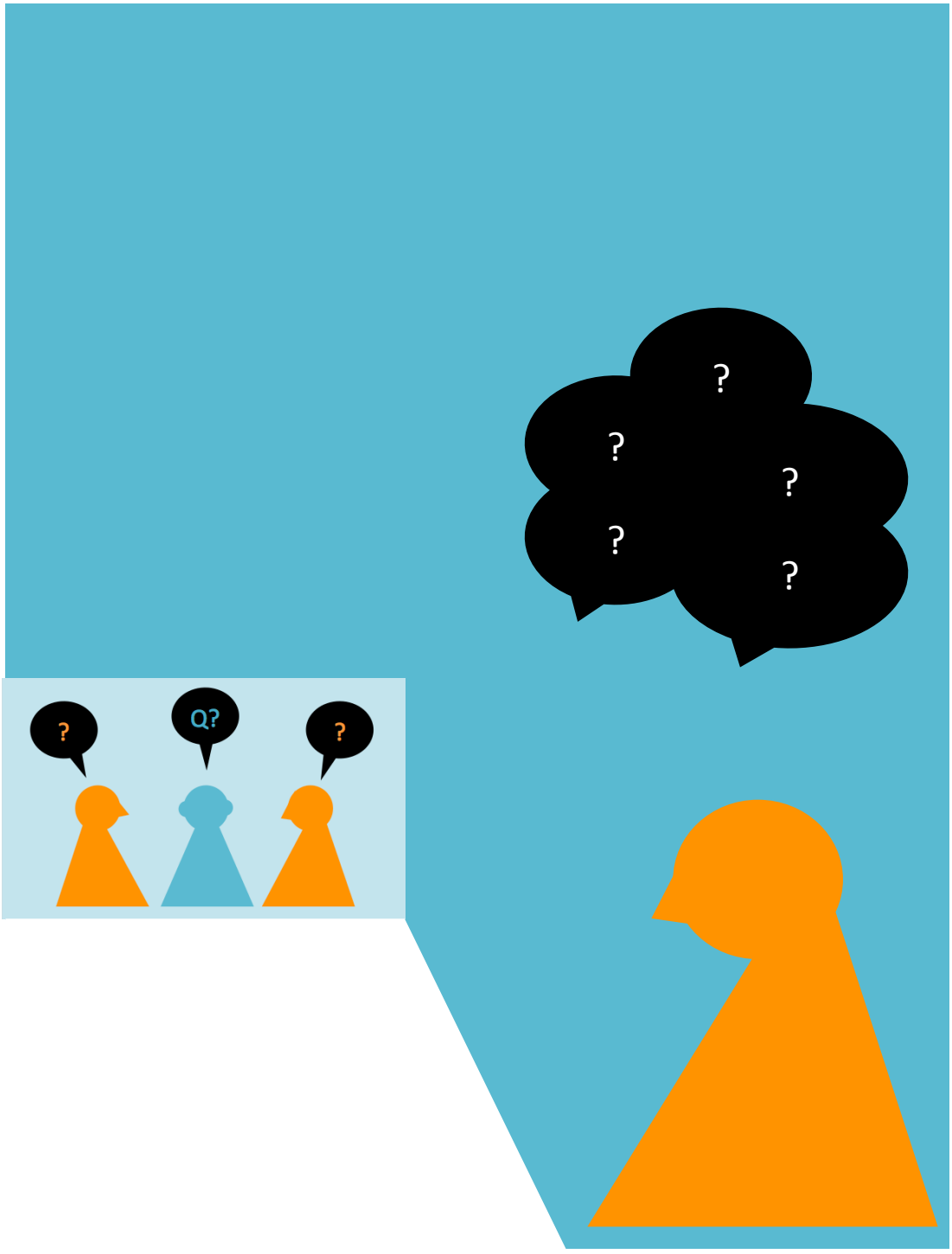
Whatever is on your mind can be discussed.

However, remember mediations are hard work. This is an opportunity for you to solve your dispute. The mediator will help you and the other side to set an agenda at the beginning of the mediation. This will provide a framework for what you will discuss.

When the agenda is being set it is important that you speak up and make suggestions about issues you want to cover. Even if the other side does not think that they are relevant, if you think that they should be discussed, speak up.

It may be that during the mediation, what seemed to be a dispute about money, becomes a dispute about trust or communication or pride or safety. The mediator is trained to help discuss issues, which can be challenging. It may be necessary to talk about issues that underlie the dispute even if they are not in the open.

Chapter 4 Questions about what happens after mediation



What if there is no settlement?

Sometimes mediation does not result in a settlement agreement. In these cases the parties need to consider their next steps.

For example, the parties may have had an agreement before the dispute about how future disagreements would be handled (a 'dispute clause'). If so, then they need to refer to this dispute clause.

Parties may consider that they need to take legal action and may consult or continue to consult with lawyers.

One factor to be aware of is that sometimes parties are not ready to settle during the mediation. However, the discussion they have had begins a process, which leads them to settle in the weeks after the mediation. A good mediator will make themselves available to the parties if they can be of assistance to help with this post-mediation settlement process.

If the mediation has occurred during the litigation process, then lawyers need to be aware of the need to refocus their litigation efforts and move forward with the action.

How are settlements enforced?

Mediation settlements are recorded in a settlement agreement. A settlement agreement reached through mediation is like any other contract. If there is a breach of the terms, then the party who wants to enforce the agreement may take legal action to seek damages.

If there are problems with getting the other side to act as they promised under the settlement agreement it may be productive to have another session with the mediator.

What if I want to settle after the mediation?

Sometimes people need time to consider new information or ideas. Mediations are typically held over a day or a few days. If you have attended a mediation and decide that you do want to settle after the mediation, most mediators will agree to help the parties communicate.

If you have a lawyer helping you then make sure to speak with them about what you would like to do and why you have now decided you would like to settle.

It is not unusual for people to settle their disputes in the weeks following the mediation.

Is there a record of the mediation?

If there is no settlement agreement then there is no official record of the mediation. Mediators do not keep records of mediations. You may find that you or the other side take notes but these will be subject to the confidentiality of the mediation process.

If we settle what will happen?

Firstly, congratulations!

If you manage to agree on a solution with the other side during the mediation, this will be recorded in a settlement agreement. The settlement agreement is a contract and therefore legally binding.

If you and the other side have lawyers, then usually your lawyer and the other side's lawyer will draft the settlement agreement. If there are no lawyers, then the mediator may agree to prepare the settlement agreement.

No matter who prepares the settlement agreement, you should make sure that you read it very carefully make sure that it is accurate and says what you want it to say before signing it.

Can I tell people what happened in the mediation?

The short answer is ‘no’. One of the key principles of mediation is that it is confidential. All the parties will have signed the agreement to mediate which will usually include a reminder that mediation is confidential.

The Mediation Ordinance now gives a statutory basis to confidentiality. The Mediation Ordinance also provides examples of situations in which information can be disclosed.

Can I use information from the mediation in my court case?

From the question, I assume that the mediation did not work out and that you did not end up with a settlement. The mediator and your lawyers will have explained that the mediation process is confidential. This includes any information that you learn during the mediation.

You cannot unlearn what has been learnt, but you cannot make reference to any information from the mediation during your court case. Consult with your lawyers as the Mediation Ordinance does provide for disclosure in certain circumstances.

Chapter 5

How-to Questions about mediation

How do I start a mediation?

If you are in a dispute with someone then you may want to suggest to them that you find a mediator to help. If you are reluctant to suggest this to them, then you may want to find a mediator.

Mediators can approach the other side for you and see if they are willing to mediate.

If you are already working with a lawyer, then they may discuss the option of mediating the dispute with you. They can approach the lawyers for the other side and also work to find a mediator.

How can I find a mediator?

There are several ways to find a mediator.

Many mediators get work through word of mouth. Ask your friends, relatives and business contacts if they have had a good mediation experience and could recommend a mediator for your problem.

If you are using a lawyer, then they may be able to recommend a mediator to you with whom they have had a productive session.

In some places, like Hong Kong, mediators may also be accredited by an organisation (e.g. HKIAC, HKMAAL). In Hong Kong, mediators may be either on a general panel (i.e. accredited to mediate any type of dispute other than family disputes) or on a family panel (i.e. accredited to mediate only family disputes).

You may want to use a mediator who is experienced in a particular type of dispute. For example, someone who is an architect or engineer may be a good choice for construction disputes as they will understand the context.

How can I use mediation before I have a dispute?

This is a great question. For businesses, make sure that you include a dispute resolution clause in your contracts, which provides for mediation. This can save lots of arguing later when you are in a dispute and provide a clear path to mediation.

For individuals, there are many practical lessons you can use in the real world which come from mediation practice. Disputes are inevitable, but how you deal with them is not. By using some of the principles and techniques from mediation you may find that your disputes provide understanding and lead to more meaningful resolutions.

Many mediators also offer conflict coaching for individuals and businesses to teach new approaches to dealing with conflict. This can be a simple method like exploring how our perspective can shape the way in which we react to others. Or it may be offering techniques for asking questions to seek the underlying basis for the argument.

One new area in which mediators are helping organisations and companies is dispute system design (DSD). A mediator will work with an organisation to understand where and how conflict is arising and then work to develop a system to deal with conflict. The motivation is not to stop conflict from happening but to provide a mechanism, which will ensure an efficient and constructive resolution.

How can I find the right mediator?

Look for PASSION. Resolving disputes is hard enough, you need someone who is committed to the process and passionate about their work.

There are many mediators of every type and with many different types of expertise. Think about your dispute and what you feel comfortable with. However, don't forget at it's base mediation is a process involving people and you should have someone who believes passionately in the process. Whilst you can daydream if you are doing something like hanging out the washing, mediators need to be committed and engaged.

Make sure that you speak with the mediator about how they approach mediation so that you can get a feeling for how they will handle your session. You may want a mediator with a particular style, range of experience or professional expertise.

How can I prepare for mediation?

Mental Preparation

You may have lived with your dispute for along time and feel that you know everything about it and are ready for the mediation, think again. You may have told your story many times to many people, however this is a fresh opportunity to tell your story with the hope of resolution.

Think about how you will present your perspective to the mediator and to the other side. What do you want to communicate to them? It may be anger, pain or frustration. But there may be questions you want to ask. Think about what you may want to ask the other side.

Whilst your story of the dispute will be familiar to you, how the dispute appears from the other side's perspective may be something you have given no consideration to.

You should think about what it would take to settle the dispute. What are you willing to give up and what are you willing to receive? What do you think the other side want? What is realistic? A good mediator will work with you during the pre-mediation phase to help you prepare to ensure that the mediation has the best chance for success.

Most excitingly you should think about what would it mean to resolve the dispute. What would your life be like if the dispute was resolved? How much time, emotional energy and resources would be freed up to grow your business or get on with your life? This can seem like an impossible dream, but some mediators will ask the 'what if' question as a way of helping people to visualise a future without the dispute.

Practical preparation

There are lots of questions that need to be addressed before you arrive at the mediation session.

- Who will attend?
- What information / documents do you want to refer to or use at the session?
- Will everyone have lawyers?
- How much time do you think the mediation will take?

Talk with the mediator about these queries to help you to prepare.

Chapter 6

Questions about mediation for lawyers

How can I help my clients during the mediation?

Remember that this process is for the client. It is not adversarial. There are no winners or losers. This is not the time for grandstanding. Your role is that of trusted advisor. It is perhaps one of the earliest and most rewarding roles a lawyer can have. How can you support your clients? Encourage them to speak. Many clients are intimidated by legal proceedings, but mediation has an informality that should empower the client to speak for himself or herself. There are many benefits to having the client speak directly, such as encouraging communication and impact. Direct communication is something that is often lost in conflict. Parties either cease communicating as they hurl abuse, or they employ proxies to communicate on their behalf. This lack of direct communication can hinder the chances of reaching resolution. Sometimes people need to hear the words from the other person.

As part of the mediation process, your client will need to consider options, which are presented either by the mediator or the other side. Your role is to help consider the reasonableness of any suggestions. In mediation, the goal is a durable solution. This means a solution that meets the needs of the parties, which they can honour. Your help in assessing information and offers and then preparing options is invaluable to your client.

If the options translate into a settlement then you will need to prepare the settlement agreement usually with the help of the other side's lawyer. Make sure you take the time to understand the offer and also your client's expectations of the offer. When you draft, draft carefully.

Speak up! If there is something happening during the mediation that is of concern then speak up and let the mediator know. It could be concern about the safety of your client or it may be the attitude of the mediator. It can be very difficult for parties who are immersed in their dispute to raise these issues. If you are concerned about the mediator, there may be logical reason why they have done something but it is important for the parties to have absolute confidence in the process so ask.

How can I help my clients during the mediation? (continued)

Although mediations typically result in a settlement, you should be prepared for what happens if there is no settlement. Bear in mind where the case is in the litigation process. If you are convinced that the other side is mediating in bad faith then you may need to help your client by advising them in respect of disclosures. If the other side views the mediation as a fishing expedition, then you do not want to provide them with information, which they may try and acquire in subsequent proceedings. Mediation is confidential, but if your client shares information it may provide the other side with fresh ideas about where to look.

The last one is hard for lawyers to hear and only applies to some, but leave your ego outside the session. This process is for your client as they will live with the consequences of the mediation, whether that is a settlement or continued conflict. I have been in mediations where the lawyer was so fixated on 'beating the other side' that they forgot to let their client make a decision about settlement. You may be the most articulate person in the room with the best understanding about the issues but this is not about you. Help your client by approaching the mediation with your skills as an advisor honed to perfection and your professional pride left at the door.

How can the mediator help me with my client?

You may have had concerns about the case or the advisability of litigation, which can be difficult to communicate to the client. Talking with the mediator can be a helpful tool to start these conversations. Mediators employ a tool called reality testing to help parties consider options.

It may well be that is in your client's interest to have a negotiated settlement. Although you may have negotiated with the other side, it may have been relatively adversarial. Working with the mediator can help with generating more creative options and also presenting them to the other side.

What is the repeat player advantage?

Most people only experience serious disputes and litigation occasionally in a lifetime. For a large organisation, they may regularly be involved in disputes. The repeat player advantage suggests that the party who has experience of using a process will have benefits over a first time user. For example, the repeat player will know how the system / rules / procedure works. This will enable them to prepare and anticipate outcomes better than the novice.

For certain processes such as mediation and arbitration, this may even include a familiarity with the mediator or arbitrator. Some academics suggest that this familiarity may lead mediators / arbitrators to give advantages to the repeat player during the process. For example, an arbitrator who knows a party well may readily agree to an extension of time for them to file a document based on his experience of their previous reliability, whereas a first time party may not receive this type of concession.

There is concern that this advantage goes beyond making the process easier to also lead to greater success for repeat players. Significant amounts of research and theoretical conjecture have been devoted to this issue.

How does mediation help my client?

Even the most adversarial lawyer will acknowledge that litigation can impose a heavy toll on litigants. By providing clients with a structured process aimed at problem solving, mediation can provide your clients with the opportunity to end the dispute.

There is also an opportunity for lawyers as well, to return to the old honourable model of acting as a trusted advisor rather than as an attack force.

If my client has a good case why should I advise them to mediate?

The stick and the carrot.

Firstly the stick, globally the judiciary has been encouraging the use of ADR by litigants. In Hong Kong the introduction of Civil Justice Reform (CJR) has lead to various changes in the way in which cases are managed in Hong Kong.

Litigants and lawyers have an obligation to the court to assist with the efficient resolution of cases. Practice Direction 31 requires lawyers and litigants to certify that they have considered mediation. If mediations is unreasonably rejected then there may be adverse costs consequences.

But there is also a carrot, even if you have a good case there is always the chance that you will lose before the judge. There are no guarantees in litigation. How much better then for the client to control the outcome by agreeing to a negotiated settlement? There are also real benefits to the client. For example, they may end up with a more creative solution then they could achieve in court. Or the mediation may make it possible for the parties to salvage their relationship, this is particularly important in family situations where co-parenting requires a level of co-operation post the divorce.

What are positions and interests?

Positions are the things we often discuss in disputes, they include statements like:

- I want more money
- I want the tree cut down
- I want my car fixed.

It is easy for people to understand a position. Often that is the end of the discussion in disputes. However, mediators will try and get parties to understand what interests underlie their positions.

Interests are the reasons, which make us ask for something. For example, your position may be 'I want money to fix my car', whereas your interest would be why you need the car e.g. to get to work. Or 'I want the doctor to pay me $10,000' which may be covering an interest in having the doctor apologise for the pain and suffering of the patient.

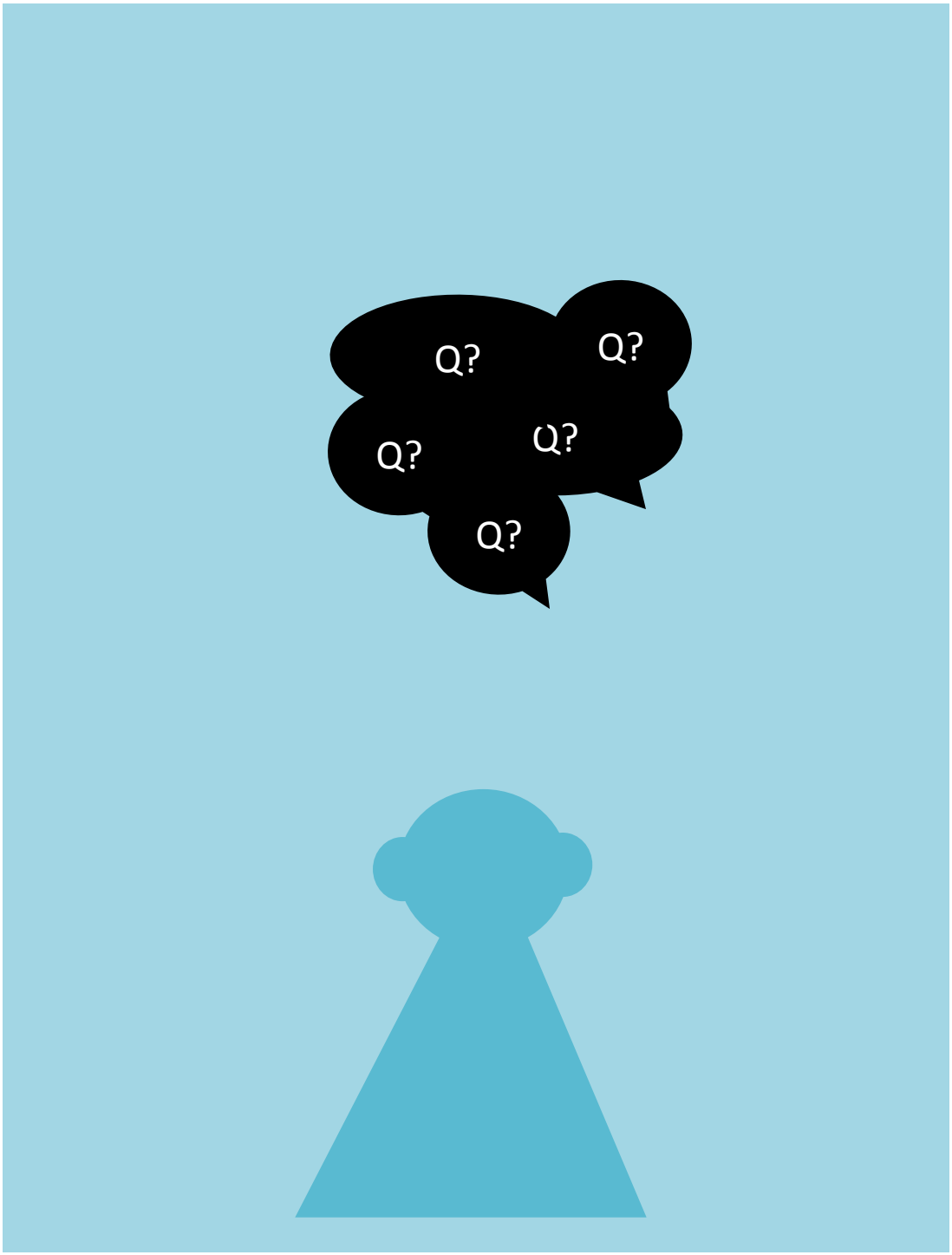
In litigation and arbitration, people rarely get to explore anything beyond their positions. In mediation, the mediator will focus on helping the parties to understand their interests and those of the other side.

Should I continue to prepare for trial while mediating?

Obviously sometimes mediation does not result in a settlement agreement. However, continuing to prepare for trial can mean that the client incurs significant costs. You should discuss with your client the likely outcomes of the mediation and whether they are willing to incur the costs of preparation while trying to settle the case.

Chapter 7

Questions about mediators



What is a general mediator?

In some countries there is no system of accreditation for mediators and they can accept any type of mediation work. Other jurisdictions have an accrediting body, which may accredit mediators or maintain a panel of members.

In Hong Kong mediators who are accredited by a local organisation (e.g. HKIAC, HKMAAL) will register with either the general panel or the family panel. Mediators on the general panel are accredited to conduct all type of mediation apart from family mediation. For example disputes concerning business, construction, workplace, etc. are all considered to be part of the work of a general panel mediator.

What is a family mediator?

In some countries there is no system of accreditation for mediators and they can accept any type of mediation work.

In Hong Kong mediators who are accredited by a local organisation (e.g. HKIAC, HKMAAL) will register with either the general panel or the family panel. Mediators on the family panel are accredited to conduct family mediations only. They have received training, which specifically addresses the special dynamics at work in a family mediation.

What qualifications do mediators have?

In many countries, mediators attend a course lasting from 28 to 40 hours to receive mediation training. In Hong Kong, the accreditation course is 40 hours long and applicants must then be assessed in two role-play mediations to be considered for the panel.

Many mediators rely on the techniques introduced in the course but also on their life experience in order to mediate. There are a small number of master' degrees available in mediation. In the US, the Straus Institute of Dispute Resolution has a reputation for excellence. The benefit of postgraduate study for mediators is that you can be exposed to range of specialist areas and ancillary subjects which enhance your understanding of the mediation process. For clients this can translate into a more productive mediation experience.

What if the mediator is biased?

This is a tricky question. Sometimes when people are in conflict it can appear as if the world is against them. Only those who loudly endorse their view of the dispute can be trusted. Everyone else is working against them!

Although there are occasions where a mediator may display bias, there are also situations where bias may be perceived. I would advise you to speak up. If something has happened during the mediation session that causes you concern speak to the mediator. Give the mediator the opportunity to explain or change their behaviour.

Although mediators are often described as neutral, in fact many of them are omni-partial i.e. on everyone's side. This can be confusing for parties. In reality the mediator is not biased for or against either party, their goal is to help the parties come to a resolution. At the end of the day, the mediator is only an advocate for the process.

Will the mediator give me advice?

Mediators are not there to make decisions or to give advice. Generally the mediator will make this clear in their opening statement. If you need advice then you should consider seeking either a trusted advisor or a lawyer. The mediator is there to manage the mediation process and to work with you, but they will not give advice.

Are all mediators lawyers?

Some mediators are lawyers or even retired judges. However, a mediator can come from any background. For example, a person may become a mediator and make reference to their existing profession e.g. surveyor, engineer as this can assist them to understand the context of the dispute. However, there are also many people who become mediators because they like people and believe in the process.

Will the mediator hear evidence and make a decision?

This goes to the heart of mediation. Mediators are not there to make a decision like a judge or arbitrator and this is the key difference from those processes. The parties have to do work hard in mediations to make their own decisions.

This is the opportunity presented by mediation to parties that they can retain control of their dispute. It enables the people who have the most interest in the outcome and who know the dispute best have the chance to formulate a solution.

Although the parties may present information during the mediation, mediation practice does not encourage the parties to present evidence as they would in a court case. The reason for presenting their perspective is based on communication and understanding rather than as forming an evidential basis for negotiations.

What does a mediator do?

Whatever they need to, to move the process forward. In mediation theory, Leonard Riskin created a grid, which helped to define mediation styles ranging from facilitative to evaluative, narrow focus to broad focus aligned on two axes. Riskin created a 'New New Grid', which switched out facilitative and evaluative for elicitive and directive but the two axes remain the same. Sometimes mediator travel north and east to New York and sometimes they travel south and west to California. Mediators will read the people and the situation and use whichever tool seems appropriate. Professor Jim Craven explains that this is why mediation is both a science i.e. learn the tools and an art i.e. learn when to use them.

What are the different types of mediation?

There are as many mediation styles as there are mediators. However, Leonard Riskin has created a useful means of analysing mediation styles. His New New Grid outlines how mediators may be narrow in their focus or broad. Courts are usually narrow in their focus, only the issues, which have been pleaded, will be considered. Whereas mediators may decide to be broad in their focus, for example in the dissolution of a partnership, the dispute may be centred on the assets but the mediator may decide to broaden the discussion to include the partners' relationship.

In addition, another key dichotomy is elicitive or facilitative, and directive or evaluative. In elicitive or facilitative mediation, the mediator seeks to facilitate the discussion but not to guide it. The facilitative mediator will work on getting the parties to communicate their perspectives and views. However, a directive or evaluative mediator may make suggestions, he may give the parties a 'mediator's proposal' which sets out how he thinks the dispute could be solved.

Within these broad frames, there also exist different mediation practice, which has developed out of history and necessity. For example, transformative mediation is less focused on problem solving than typical mediation. In transformative mediation the focus is on story telling and sharing, this enables increased understanding. Transformative mediation is looking to transform the relationship between the parties.

How is mediation different from therapy?

Typically therapy seeks to address a health issue, mediation is primarily focused on problem solving. Although mediators make use of psychology to understand people's attitudes to conflict or how best to facilitate the negotiation, there is no element of psychological counselling in mediation.

Who is in charge of mediators?

This depends in each country whether this is a central authority that supervises mediators. In Hong Kong, mediators may be accredited by the HKMAAL. If so, then such organisations will receive and handle complaints against a mediator.

Will the mediator tell the other side what to do?

Mediators are not there to tell anyone what to do. They may pose questions and test the reality of expectations or opinions but they are not going to tell people what to do.

Mediation is an opportunity for both sides to keep control of their dispute. Rather than having some disengaged third party tell you what will happen with your dispute, you get the chance to construct your own future.

Will the mediator be on my side?

No – just as you wouldn't want the mediator to favour the other side in the dispute, the mediator will not take sides.

Mediation is essentially optimistic as it believes that the parties have the ability to resolve their own dispute, given the proper environment. You are on your side and that should be more than enough.

Chapter 8

Questions about mediation principles

If mediation is so good, why isn't everyone mediating?

I am sure there were cavemen who held out against fire and wheels as well. Modern mediation is a new way of handling disputes. Traditional mediation, which has existed slightly less long than disputes, was based on a sense of community and belonging. Usually, the village elder would be called upon to resolve the dispute. As people left communities with strong links traditional mediation ceased to have a role in urban centres.

The last few decades have seen the rise of modern mediation. Mediation is still in its infancy and like everything it takes time to get the message out.

Is mediation confidential?

Each country will have its own practice and legislation about mediation confidentiality. In Hong Kong mediation is confidential unless disclosure is permitted or required by law. The recent Mediation Ordinance sets out the statutory basis for confidentiality and exceptions to the principle.

What if the other side is not acting in good faith?

This is a serious problem. Achieving a durable solution through a negotiated settlement is based on the good faith of the parties. If you have concerns that the other side is not acting in good faith then you should raise this with the mediator. Give them a chance to address this problem with the other side. It could be a perception issue or it could be a genuine lack of commitment to the process.

As a voluntary process, you are free to withdraw from the mediation so you may need to do so. If you are mediating in Hong Kong and have filed a Notice to Mediate under Practice Direction 31 then you will need to consider the minimum participation specified in your agreement.

If the other side is not acting in good faith and the mediator establishes this then they may terminate the mediation on the basis of their ethical concerns.

What are the principles of mediation?

There are a few key principles of mediation and then some that may be open to debate. The generally accepted principles of mediation include:

- Party self-determination: this is the belief that people have the ability to solve their own problems. As a result, mediations provide scope for the parties to make decisions about process as a forerunner to making decisions about the solution.
- Voluntary: no one can be forced to mediate or to accept a solution. Mediation is a voluntary process, which means that both sides need to be willing to mediate in order for the process to go ahead. Once you are in a mediation you are under no obligation to accept any offers.
- Neutral: the mediator will be impartial as to result. The mediator should not have a preferred solution. The only interest that the mediator will have in the solution is that it is a durable solution i.e. one which meets the needs of the parties and with which they can live.
- Confidential: mediation is a confidential process, unless the law requires disclosure. This is one of its main components as parties may be encouraged to share information and be more open to communicate with the other side.
- Efficient and informal: mediation is more efficient and less formal than litigation or arbitration.
- Forward-looking: mediation looks to the future once the dispute is over, unlike other methods like litigation and arbitration, which focus on what happened.
- Creative: mediation encourages creativity. The parties themselves come up with the solution and are not limited to the application of strict legal principles or precedent.

What disputes can go to mediation?

Almost any dispute can be mediated. From the schoolyard to the nation state, mediators have worked to help the parties resolve their dispute.

Most people experience dispute within a relatively narrow band: business; family; neighbours; employment; etc. – and all of these can be successfully mediated.

However, there are some issues, which may call for a different approach. For example, if the dispute is one that involves public principles or human rights then you may want to use litigation as it will ensure a public decision.

In regard to some cases, mediators have raised ethical concerns about the legitimacy of using a mediation process. For example, in cases where there has been abuse, or criminal activity, it is less likely that both sides will have equal power. Although mediation is used in the criminal sphere, mostly for juvenile issues, there are concerns about the type of case that should be mediated.

When shouldn't I mediate?

If your dispute involves an issue of public importance then you may want to consider litigating to ensure that the case results in change. The example usually referred to are cases in the US relating to civil rights. If those cases had been mediated each individual may have won a personal victory but they would have done nothing to change society.

There may be safety issues around mediating. Perhaps you are involved in a family dispute and your partner has been abusive in the past. You may not be able to mediate safely.

If the other side has a hold over you and you are unable to mediate in your own best interests then you may want to consider alternative routes to resolution. Mediation has negotiation at the heart of the process and if the power imbalance between the parties is extreme then it may not be possible to have a negotiation.

In addition, as a negotiation, mediation requires that both parties act in good faith. If the other side is mediating cynically to seek information then you should consider terminating the mediation. Please discuss this with the mediator as they may be able to find a solution.

There are also cases, which cannot or should not be mediated because of their subject matter. For example, criminal cases are the responsibility of the state. There are some mediations which address specific issues in the criminal world but they tend to focus on juvenile issues.

At the end of the day, if you are uncomfortable with the process or the thought of mediating then this may not be an appropriate process for you. However, if you have already engaged a mediator, I would urge you to discuss your concerns with the mediator in case they can be addressed.

Is offering to mediate a sign of weakness?

As a mediator I would say no. Offering to mediate is a sign that you have decided to retain control of your dispute and that you are confident enough to believe that you are capable of finding a solution.

Do I have to mediate?

No, mediation is voluntary if you do not want to mediate no one can force you to mediate. However, if you have already engaged a mediator then I would urge you to discuss with the mediator why you don't want to mediate as they may be able to address your concerns.

How can I make someone mediate?

Mediation is voluntary and no one can be forced to mediate. However, if you want to mediate and the other side is resisting, you may be able to get the mediator to help. The mediator may be willing to have a discussion with the other side to understand their reluctance to mediate and possibly to address their concerns.

What can I learn from a mediation?

Mediation is a process that provides an incredible background to learning. Through the mediation process you can learn about:

- Your needs and wants
- Your interests - what is driving you
- What the dispute is about to you and to the other side
- That there are multiple perspectives to every dispute
- That you have the ability to solve your own issue
- How to handle disputes in future

Is mediation fair?

Mediators want to help parties achieve a durable solution. But a good mediator does not want to push parties to settle whatever the costs. A durable solution is one, which both parties are able to live with which provides them with enough of what they need to make it worthwhile.

However, there is no arbiter assessing mediations to determine if the settlement agreement is fair. With the freedom to take charge of your dispute comes the responsibility to make a wise decision for yourself.

Is mediation legally binding?

Nothing in mediation is binding until it is written down in the settlement agreement. If you reach a settlement during the mediation then you must make sure you record the terms in a settlement agreement before you leave the mediation.

The settlement agreement is a contract like any other and therefore legally binding.

Can a mediator act as my witness?

No. Mediation is confidential and the contents of discussions are generally not admissible. Mediators usually include terms in the agreement to mediate specifying that they will not act as witness in subsequent proceedings. Courts have supportive of the special nature of the mediator's role.

Who wins in mediation?

If the mediation session goes well and the parties increase their understanding and achieve a wise and durable solution, then everyone wins.

Mediation does not really think about disputes in terms of winning / losing, these are adversarial concepts.

What is a durable solution?

A durable solution is one, which the parties have decided meets their needs, and is something they can live with. It may not represent 100% of their positions but it will provide enough of what both sides need. It represents a wise solution to the dispute.

At what stage of my dispute can I use mediation?

If you have a lawyer, then you should discuss with your lawyer what stage of proceedings you are at and how mediation may be used.

If you are not litigating your dispute, then any time! It may be the first day after the initial argument or it may be five years since you have spoken, this is the right time to mediate.

What is common ground?

At the beginning of the mediation session, the mediator may try to highlight areas of common ground. These are factors, which may have been forgotten or obscured which show that there is a community of interest between the parties. It may be that there was once a good relationship, or it may be that they are both in business and need to get back to work. Some will be more meaningful than others but the point is to remind the parties that they are not so far apart as they may seem.

When is the best time to mediate?

Now.

Do I need a lawyer to mediate?

No, you may already be litigating your dispute in which case your lawyer can be very helpful in the mediation process. However, if you are in a dispute and no one is litigating then you can attend a mediation without a lawyer.

If the other side is legally represented and will be attending with their lawyer then you may want to consider having someone with you.

Why should I mediate?

See all of the above.

Suggested Further Reading

Dr Kenneth Cloke

The Crossroads of Conflict A Journey into the Heart of Dispute Resolution (Janus Publications 2006)

Resolving Conflicts at Work: Eight Strategies for Everyone on the Job (2005)

Mediating Dangerously: The Frontiers of Conflict Resolution (2001)

Thomas W. Porter

The Spirit and Art of Conflict Transformation: Creating a Culture of Justpeace (Upper Room 2010)

Christopher W. Moore

The Mediation Process: Practical Strategies for Resolving Conflict (Jossey-Bass 2003)

Dr Fred Luskin

Forgive for Good (HarperOne 2003)