

Mediation Conference 2014
Mediator's Qualifications and Skills
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INTRODUCTION

Mediation is one of the most effective forms of dispute resolution in Hong Kong as well as throughout the world. Mediation was originally used in labour, and consumer disputes and in international negotiations, but it has now become a formal complement to the judicial process. It is widely used in divorce, civil and commercial proceedings and even in public law disputes. The areas for undertaking mediation are ever expanding. One reason for this growing popularity is that many people believe that mediation provides a more effective, satisfactory and harmonious, and less costly way to resolve disputes.

Mediation has always been something of a mystical art. Behind closed doors, skilled individuals somehow find ways to work out compromises amongst people who disagree intensely over important matters. The mediator, as the pivotal player, actively constructs the way such that a dispute can be resolved. They participate in the definition of the problems, setting the agenda and arranging the meetings, facilitating controlled flow of communication and information, and have a direct impact on the agreements in order to be feasible and workable. A mediator is influential in the process of mediation, the sphere of influence much depending on the incidence of personal qualities.

With the increasing popularity of mediation, mediation service providers and mediation training are proliferating in a rapidly increasing rate in Hong Kong.

¹ This paper is prepared in collaboration with Ms April Lam and Ms Ada Law of the Mediation Information Office, Judiciary of the Hong Kong Special Administrative Region.

In August 2012, the Hong Kong Mediation Accreditation Association Limited (“HKMAAL”) was formed for the accreditation of mediators in Hong Kong. HKMAAL is not a training institution. Through its Mediation Accreditation Committee (“MAC”), standards are set for the accreditation of mediators, approval of training courses, as well as other mediation professionals such as trainers, coaches, assessors and supervisors, etc.

FACILITATIVE APPROACH TO MEDIATION

With apparent consensus, Hong Kong has adopted the facilitative model as the orthodox or dominant model of mediation. Facilitative mediation is focused on providing a structure and agenda for discussions, and to that end, helping the parties find a resolution of the dispute on their own. Unlike an evaluative mediation process, mediators adopting the facilitative model typically do not evaluate the merits of the parties notwithstanding that they may have expert knowledge of the subject matter in dispute. They do not take on an advisory role or make predictions about the outcome of litigation. They are not allowed to direct the parties to a particular settlement. Instead, the mediator facilitates communication and negotiations of the parties. They act as keeper of the process, but not the contents or the outcome.

The established infrastructure for mediation training in Hong Kong is based on the facilitative approach. Candidates are assessed on various aspects including the proper role of mediator (e.g. being impartial and neutral), confidentiality (distinguishing confidential information which cannot be disclosed as opposed to open), communication skills (e.g. body language and acknowledgment of emotions), attitudes and behavior (e.g. being patient and assertive), control of the process (e.g. ability to manage conflicts and handle challenges), as well as negotiation skills (e.g. understanding parties’ interests and avoiding impasses).

EXPERTISE IN THE SUBJECT MATTER OF THE DISPUTE

Many professional bodies have developed mediation within their disciplines. It is often asked whether a mediator should be an expert in the subject matter of the dispute. Indeed this is often an agonizing choice for the clients.

In many cases, the parties prefer a mediator with knowledge of the subject, expecting him to have a quick grasp of the issues, or to share with them his knowledge. In other cases, the parties may prefer a mediator without specialist knowledge, avoiding the mediator's preconceived idea of what form the settlement should take, allowing the parties to come up with their own solutions. The argument often is whether expertise in the subject matter will be detrimental to the mediator's objectivity. There is no single or simple answer. It very much depends on the nature of the dispute, and the parties' expectations of the mediator. When the subject is more technical or complex, a mediator with expert knowledge may help the parties focus on key issues.

Empirical studies have shown that successful mediators with different background such as business, construction, legal, social work or academic, and from different countries, often share the similar view that a mediator's expertise in the subject matter is not a prerequisite qualification.

According to the research by *McEwen and Maiman*², high rates of settlement and levels of participant satisfaction seem to occur regardless of styles or the philosophical orientation (such as facilitative or evaluative) of the individual mediator. Instead proper mediation training as well as personal qualities of the mediator have a more direct impact on the process and outcome of mediation.

² McEwen C.A. and Maiman R.M., "Small Claims Mediation in Maine: An Empirical Assessment", *Maine Law Review*, 1981

D. Hoffman ³, an experienced lawyer mediator in the United States, mentioned that when faced with parties who pressed on his knowledge of the divorce law (such as asset division, custody and maintenance arrangements), he as mediator would send them off to lawyers for the answers to those questions. It is because the ethical principles would forbid him from mixing the two roles of mediator and lawyer, and mediators who were not lawyers would be prohibited from practicing law. He strongly believed that parties who sought legal or expert advice from the mediator would minimize the roles of lawyers and experts in the resolution of their dispute, and would inject a high degree of contention into the process, which in turn would undermine the reason for choosing mediation.

The assessment criteria set out by the MAC explicitly states that a mediator is refrained from giving advice, whether on law, industry practice or technology. In other word, the mediator is not expected to embody expertise pertinent to the subject matter. The mediator's task is to encourage and assist the participants in evaluating the risks, benefits, and the alternatives available to them, as well as to ensure a level playing field by suggesting adequate information be sought outside the process. When a mediator considers that the participants are not informed of their rights, he or she should encourage them to seek independent legal or expert advice before entering into an agreement. The primary decision making for the resolution of a dispute rests with the participants themselves.

MEDIATORS WITHOUT SUBJECT MATTER EXPERTISE

While the research findings suggested that expertise in the subject matter of the dispute is not of paramount importance, why would mediation still work then? To answer this, one needs to understand the underlying ethos of mediation.

³ Bowling D. and Hoffman D, *Bringing Peace into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution*, San Francisco: Jossey-Bass, 2003. p.176

By definition, mediation is a voluntary process of dispute resolution in which an impartial third person intervenes with the consent of the participants and assists them in negotiating a voluntary and informed settlement. In mediation, the decision making authority rests with the participants themselves. The role of mediator includes assisting the participants in defining the issues, reducing the obstacles in communication, exploring the alternatives, and helping them to arrive at an agreement that is fair, efficient and sustainable.

Mediation works on the principles of communication, negotiation, collaboration and self-determination. According to *Bowling and Hoffman*⁴, the root cause of almost every conflict is emotion, a block that prevents the parties from seeing the conflict with objectivity. Therefore the very nature of mediation work is dealing with interpersonal disputes. Mediation is a search for the invisible bridge that connects every living being with each other, and is a design for creating a different future. Mediation provides a safe forum for the participants to air their grievances and vent emotions. By deploying skills of active listening, reframing the issues, creating doubts, and suitably intervening, the mediator helps the participants to make their own decisions for the future. The information emerging from the discussions moves the parties towards resolution.

The underlying goal of mediation is to encourage parties to consider the overall interest of all the parties while limiting the consideration of their own positions. In the words of *Fisher and Ury*,⁵ interests motivate people and are the silent movers behind the hubbub of positions and one ought to look for mutual gains whenever interests conflict. Seen this way, the answer is that personal qualities and attributes of a mediator contribute to an effective and workable mediation.

⁴ Bowling D. and Hoffman D, *op. cit.* p.151

⁵ Fisher R., Ury W. and Patton B., *Getting to Yes: Negotiating Agreement Without Giving In*, New York: Penguin Books, 2011.

COMPETENT MEDIATOR

From the observations above, we see that mediation involves exploration and interaction amongst people. Mediators are engaged in creating a relationship for and with the parties — a relationship that the mediator's personal qualities will influence the parties' ability to negotiate successfully. Then what are the personal attributes of a mediator that bring mediation into effect?

Various researchers have put forth their views of what constitutes a competent mediator. They evolved from reflection of their own experience as mediator, and observation of the work of others. The researches empirically documented that effective and competent mediators have more in common than in difference — the personal qualities of a mediator have a direct impact on the effectiveness of the process and outcome of mediation.

According to *Bowling and Hoffman* (2003), the development of mediators proceeds in three stages:

1. Skills training and technique learning stage

Novice mediators are taught the skills on active listening, reframing and prioritizing the issues, the need to focus on interests, and helping the parties to generate options. They are also expected to strive for opportunities in co-mediation with experienced mediators and learn through observation, debriefing and supervision.

2. Intellectual understanding stage

Experienced mediators should have a deeper understanding of how and why mediation works, and to be able to structure the process for the participants, and in turn derive personal satisfaction from their work.

3. Ongoing personal development stage

The mediator develops the ability to reach a deeper level of personal relationship with parties. The mediator has growing awareness of how his or her personal qualities influence the mediation processes. They do not merely mediate, they “become” and “create” mediation. This stage is the most challenging and vital aspect of the development.

W. Simkin and N. Fisandis (1986) catalogued in their list what they believed to be the necessary qualities for an effective mediator:

1. Patience
2. Sincerity
3. Wit
4. Physical endurance (of a marathon runner)
5. Probing skills (of a psychiatrist)
6. Wisdom (of Solomon)

Boulie (1996) suggested that successful mediators are empathetic, non-judgmental, patient, optimistic, persistent, trustworthy, intelligent, creative and flexible, and that they possess common sense and a good sense of humour.

Gary Gill-Auster and Lois Gold (1993) described the qualities of a mediator’s presence as an important factor affecting the mediation process. The magic lies with the mediator’s ability to exert influences in the process. Apart from being physically present, the importance of presence relates to the qualities the mediator brings into the room that trigger interactions of the parties and with the mediator, and the changes wrought by those interactions. “Presence” was further elaborated as composed of:

1. being centered;
2. being connected to one’s governing values and beliefs and highest purpose;
3. making contact with humanity of the participants; and
4. being congruent.

These qualities, when mastered well, can increase a mediator's effectiveness and enable him or her to harness the healing potential of the mediation process.

*Stephen Goldberg*⁶ in a survey of what essential strengths and techniques contribute to the success in mediation on some experienced mediators, concluded that "rapport" as the key contributory factor. He described rapport as encompassing empathy, trust and a relationship of understanding. What's more, a mediator's genuine concern for the parties cannot be taught but must come from and be developed from his or her own personality. For Goldberg, "rapport" is recognized as a necessary prerequisite for success in mediation.

QUALIFICATION AND ACCREDITATION

Qualification refers to the education, training and experience possessed by a mediator. The very best and competent mediators think of mediation as a mind-shift. It is a distinct profession and anyone who wants to become part of it must have to learn it, not simply as a given because one is already good at dealing with people. And professionals think of improving the abilities in the field and keeping up with new knowledge, techniques and discoveries in the field. Training cannot be replaced by experiences and personal drive.

Training

Competent mediators should have sound knowledge of mediation theories and practice. They should master well the methods for resolving conflict. Parties should be made to understand the nature of mediation, be prepared and committed to participate in the process, and motivated effectively to

⁶ Goldberg S., "The Secrets of Successful Mediators", *Negotiation Journal*, July 2005

communicate with each other. Their interests should be transferred into possible options, and ultimately to arrive at a settlement which is realistic and workable.

Professional Development

Competent mediators should aspire to mediation being regarded as a profession. So they should all embrace accreditation as a way to define their status and ability to meet requisite standards and an independent confirmation of their competence.

Apart from acquiring general knowledge and procedural training in mediation, competent mediators should have a clear understanding of the professional ethics, standards and responsibilities. He or she should be ready to disclose the extent of their training and experience to potential clients or clients upon request.

Moreover, competent mediators should be eager to participate in continuing education. They should respect the complementary relationship between mediation and other dispute resolution professions. They should actively join in with other mediators and related professionals for professional development. Some mediators have gone further to promote the advancement of mediation by participating in research, evaluation and public education.

Personal Attributes

Mediation is ultimately a “people-oriented and personality-driven business”⁷. Training is no substitute for personal qualities and experience. The personal qualities do indeed contribute most to the competence of a mediator. Successful and competent mediators have the following attributes in common:

1. Love to Mediate

⁷ Krivis J. and Lucks N., *How to Make Money as a Mediator (And Create Value for Everyone)*, San Francisco: Jossey-Bass, 2006. p.34

Competent mediators regard mediation as a way of life. They live, breathe, eat and sleep with mediation. They feel born to do mediation and embrace mediation skills naturally in everyday life whenever there is a different in point of view. They do not view their work as “just a job” but more as “a calling”.⁸

The great strength of competent mediator lies in his or her mentality in reflecting the importance of creating a problem-solving environment and genuinely working out a creative process for the parties than pressuring on settlement for every mediation. They focus on “doing the footwork, then letting go of the outcome”.⁹ They have the pure intentions of aligning the parties and mediation process in a positive direction rather than doing all the things aim at securing settlement outcomes.

2. A People Person

Mediation deals with people through facilitating communication. Competent mediators possess the ability to “reach out, understand, connect and care about what happens to a wide variety of people”.¹⁰ They enjoy making friends, and are able to connect positively with others by showing a genuine interest in their well-beings and immersing in their situations. Being an expert listener, a competent mediator can be fully in touch the clients’ thoughts.

3. Embracing Trust

Competent mediators unilaterally identify the key to their success is that their clients feel they can be trusted with. After all, the mediator is

⁸ Krivis J. and Lucks N., *op. cit.*, p.19-20

⁹ Bowling D. and Hoffman D, *op. cit.*, p.237

¹⁰ Krivis J. and Lucks N., *op.cit.*, p.200

in a unique position to gather confidential information from opposing parties. The most competent mediators are often the ones who inspire others to trust them and who hold that trust sacred.¹¹ They are balanced and fair in their approach and project their impartiality and self confidence. They should be able to help clients grapple with life-affecting issues arising in the mediation.

4. Emotional Intelligence

Creating an opportunity for the expression of emotions is conducive to the resolution of conflicts. Allowing emotion to emerge in a mediation requires mediators to have a high degree of emotional intelligence.¹² Managing their own and that the parties' emotions is central to the work of a mediator. They should feel "comfortable" with, not afraid of, emotions.¹³ Competent mediators should be able to recognize that different individuals and situations require the use of different approaches. They should treasure every opportunity in employing "emotion" as a powerful mediating tool. To paraphrase Peter S. Adler, without the ability to deal with emotions, it is unlikely that any resolution reached will last.

5. Social Awareness and Social Skills

Social awareness relates to a mediator's understanding of other individuals and social systems.¹⁴ Managing other's emotions requires understanding others and see things from their perspectives, or putting themselves into the shoes of others. Effective listening can lighten the

¹¹ Krivis J. and Lucks N., *op.cit.*, p.201

¹² Bowling D. and Hoffman D, *op.cit.*, p.155

¹³ Krivis J. and Lucks N., *op.cit.*, p.164

¹⁴ Bowling D. and Hoffman D, *op.cit.*, p.159

tension in most situations. He or she is always the first person to provide the party the acknowledgment that he or she has been heard.

Competent mediators often show empathy in the process. At the same time, they educate the parties to achieve higher degree of empathy for each other.¹⁵ They should be non-directive in speech and behavior and be able to read non-verbal cues. This competency lies with the mediator's social skill of influence which allows him or her to get information from the parties. On the other hand, competent mediators should be addressing the parties' concerns instead of just aiming at gathering information.

6. Persistent and Optimistic

Competent mediators well understand the importance of persistence and optimism in every mediation. They have the capacity to tolerate and contain ambiguity. They value their advantage of detachment from the conflict and often find themselves the only one in the room who believes that a solution is possible.¹⁶ This optimism in turn allows him or her to be persistent in the face of the parties' discouragement and affects the parties' actions positively during the process. They value conflicts as an adventurous journey or even an opportunity for change. Conflicts may open dialogue for people and that competent mediators can always comfortably embrace conflict and from there they find opportunities in all situations and good in all people.

7. Lateral Thinking

Conflicting and emotional parties typically get confused, overwhelmed and lost perspectives in the mediation process. Competent mediators,

¹⁵ Bowling D. and Hoffman D, *op.cit.*, p.160

¹⁶ Bowling D. and Hoffman D, *op.cit.*, p.241

however, as perfect listeners and communicators, are able to go beyond right and wrong, good and bad, and take apparently dissimilar facts and discern within them a deeper pattern or meaning and then give directions to disputants.¹⁷ They have the capacity to make the mediation process clear and linear in its progress. Competent mediators can help parties to connect between pieces of information that seem to be totally unrelated and form the bases for further exploration of issues and interests.

MEDIATION PROFESSION IN HONG KONG

Mediation as a profession is still developing in Hong Kong. Quality assurance of the skill and integrity of mediators is thus an important factor in maintaining and enhancing public confidence in the use of mediation in Hong Kong.

Mission of HKMAAL

HKMAAL was founded and joined in by the various mediation accreditation bodies in Hong Kong, with support by the Judiciary and Department of Justice. It has the mission to become the single accreditation body for mediators in Hong Kong. Since its setting up, over three quarters of the mediators in Hong Kong have migrated to HKMAAL. Although HLMAAL is not the exclusive mediators' accreditation body in Hong Kong, it has set the standards for the training and accreditation of mediators in Hong Kong comparable to the generally accepted standards internationally. Together with its disciplinary mechanism, it gives the public assurance of standards and integrity of its accredited mediators. HKMAAL has been actively promoting a culture of best practice and professionalism in mediation in the territory, strengthening Hong Kong's position as an international dispute resolution centre.

¹⁷ Bowling D. and Hoffman D, *op.cit.*, p.241

HKMAAL and MAC work at:

- (1) setting and reviewing standards for accredited mediators, supervisors, assessors, trainers, coaches and other professionals involved in mediation in Hong Kong;
- (2) setting standards and assessing the suitability of relevant mediation training courses in Hong Kong and experience required for persons to be accredited;
- (3) maintaining panels of mediators, assessors, family supervisors who have met the requirements;
- (4) reviewing issues pertaining to the development and training of mediators, assessors and family supervisors; and
- (5) establishing complaint procedures and deal with disciplinary actions.

The members of HKMAAL and MAC are drawn from a diverse background, including representatives from the Judiciary, Department of Justice, the professions of mediation, legal, engineering, architecture, and surveying etc, and from the community.

Core Competencies

The Mediator Assessment Form 1 issued by the MAC is the basis of the assessment where the assessor recommends whether a candidate shall be accredited as a mediator of the HKMAAL panel.

The HKMAAL standards for accreditation of mediators in relation to the mediator's knowledge and expertise are comparable with the international standards and professional practice.

In a micro view, a candidate should demonstrate his or her knowledge of the mediation procedures, identify and summarize key issues for setting up agenda, manage the parties, effectively exercise skills in relation to active listening, paraphrasing, reframing, facilitating communication, handling challenges, enhancing rapport, helping parties to a future focus on interests and options, ensure contingency plans, and fine tune the settlement terms, etc.

In a macro view, a candidate is assessed on his or her overall skills, behaviour and general demeanour in the mediation process. Through his or her efforts as a mediator, the candidate is expected to achieve several main outcomes, namely:

- a. the parties are able to understand the nature of mediation and are prepared and committed to participate in the mediation process;
- b. the parties are able to communicate effectively such that they have a better understanding of the issues which need to be resolved some of their interests regarding these issues and their differences in respect of the issues;
- c. the parties are more ready and more willing to commence negotiating solutions with each other upon moving into next round of sessions;
- d. the parties are be able to transfer their interests into some possible options, start the bargaining process and arrive at settlement, if possible, at the second mediation session;
- e. the parties are able to finalize the terms and conditions of their settlement or, otherwise, the candidate is able to get them to consider the way forward; and
- f. the parties have a workable and realistic written settlement agreement written up by the mediator.

Accreditation

The above set of core competencies for assessing the standards of mediators are comprehensive and of high standards. They are the guidelines to help potential mediators realize the demanding challenges of current mediation profession. They draw on international expertise and experience coupled with the contemporary literature and research findings on what constitutes the qualities of a competent mediator. The established criteria contained in the Mediator Assessment Form 1 can be regarded as the consensus on the essential and good practice of a qualified mediator held locally and internationally.

The MAC is also tasked to approve training courses with the view to ensure that their contents and the coaches and trainers of those courses are of requisite standards.

A candidate is assessed by a qualified assessor. After attending the 40 hours training course (Stage1), the candidate may proceed to undergo accreditation assessment (Stage 2). Since July 2013, HKMAAL has started accrediting mediation training courses and conducting Stage 2 assessment.

Although there is no legal requirement for mediators to be accredited, the fact that nearly 1,700 of about 2,200 mediators in Hong Kong has vouched for the general acceptance of the standing of HKMAAL.

Continuing Professional Development

HKMAAL accredited mediators are required to meet CPD requirements in order to maintain accreditation. Mediation is a dynamic process, thus involving ongoing education and interaction with peers are integral parts of a mediator's world.

Future Development of HKMAAL

A stringent common accreditation system coupled with a robust disciplinary mechanism is extremely important for the mediation profession. It shall give quality assurance to the public in the use of mediation in resolving disputes. The role of HKMAAL is being increasingly recognized by the alternative dispute resolution community and other professional bodies. It will be contributory to the promotion of the best practice and professionalism of mediators and a mediation-friendly environment in Hong Kong.

CONCLUSION

In this paper we have seen the importance of training and accreditation and development of the mediation profession as means of quality assurance. Notwithstanding that mediators may come from different professions and all walks of life, we have seen the key attribute of a successful mediator is the ability to channel parties' past grievance to constructive force for the future, to narrow down respective differences for the common good, and to bring peace out of war. Given that mediation is a human process, there is no replacement of personal experience and qualities, and sharing of experience with fellow professionals is most beneficial. Thus, cross-fertilization through continuing professional development is important. HKMAAL is committed to such cause, and strives to see the increasing acceptance of mediation as an important dispute resolution process in our society.

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