

State Courts Annual Training for Court Volunteer Mediators
28 June 2024



NOT
How to **Botch** a Mediation

Presenter:
David Lim
Mediator
Mediation Trainer
former District Judge

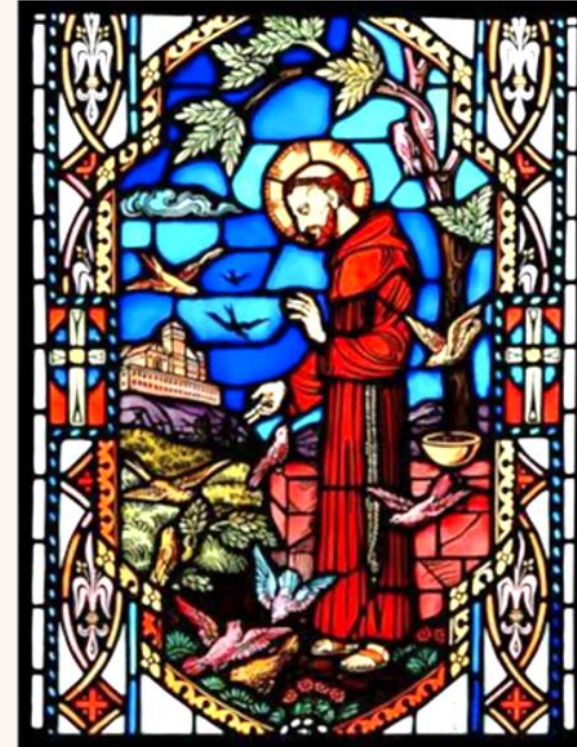
HOW to **Not** Botch a mediation

(presenter: David Lim)

INTRODUCTION

- Mediators are instruments / channels of peace.
- Our role is to help disputing parties —
 - find a way to amicably resolve their dispute;
 - make peace with each other;
 - restore order & peace in their own lives.
- Mediators foster a conducive environment for disputants to talk through the dispute openly, rationally & objectively.
- The aim is to help parties gain —
 - a fuller & more objective perspective of the dispute situation;
 - a better & more empathetic understanding of each other's concerns.

so that they can find their way towards resolving the dispute in an amicable, mutually acceptable way.



"Let me be a channel of peace.
Where there's hatred, let me bring love;
Where there's injury, pardon;
Where there's despair, hope;
Where there's darkness, light;
Where there's doubt, faith..."

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FACTORS THAT COMPLICATE THE MEDIATOR'S TASK

- animosity & mistrust;
- negative emotions;
- refusal / inability to communicate or engage constructively with each other;
- desire for vengeance;
- unrealistic expectations;
- unreasonable or exorbitant demands;
- no experience with mediation;
- scepticism regarding the mediation process.



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CHALLENGES IN COURT-BASED MEDIATIONS

1. Legal proceedings have commenced:
 - dispute has reached its peak;
 - communication & relationship have broken down;
 - parties perceive that a judicial decision is the only solution;
2. Legalistic mindset:
 - focus on legal rights & remedies;
 - original problem no longer relevant;
 - limited scope for creative or pragmatic settlement options:
 - D pays up / parties compromise / C withdraws claim;
 - preference for monetary compensation;
3. Limited duration for mediation:
 - generally capped at half a day;
 - limited number of adjourned sessions;
 - need for mediator to work efficiently & expediently.



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KEY POINTS IN TODAY'S PRESENTATION

1. Common lapses.
2. Possible causes.
3. Adverse effects.
4. Recovery & damage control measures.
5. Avoidance.
6. Case illustrations.



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9 WAYS TO BOTCH A MEDIATION

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1. POOR RAPPOR BUILDING

- The level of **trust, confidence & cooperation** a mediator gets from the parties depend on the **quality of the rapport** built with them.
- Factors that help build rapport:
 - warm & friendly demeanour;
 - eye contact;
 - appropriate body language;
 - communication style & language;
 - empathy & active listening.



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1. POOR RAPPORT BUILDING *(continued)*

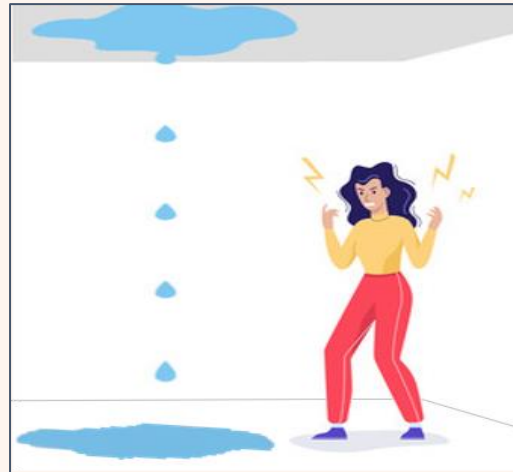
- Building good rapport involves demonstrating to the parties that the mediator —
 - respects them;
 - is committed to helping them resolve the dispute;
 - is neutral & fair;
 - is patient & prepared to hear & understand them;
 - is empathetic;
 - is sincere, genuine & authentic;
 - is easy to relate to & comfortable to work with;
 - is confident, competent & trustworthy as a mediator.
- The quality of the rapport built can make or break a mediation.
 - CASE ILLUSTRATIONS

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2. IGNORING EMOTIONS

- Dealing with negative emotions is part & parcel of a mediator's work.
- It is unpleasant & uncomfortable, but crucial.
- To ignore the parties' emotions & just focus on the substantive issues is unwise & potentially detrimental to the mediation.
- CASE ILLUSTRATION:



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2. **IGNORING EMOTIONS** *(continued)*

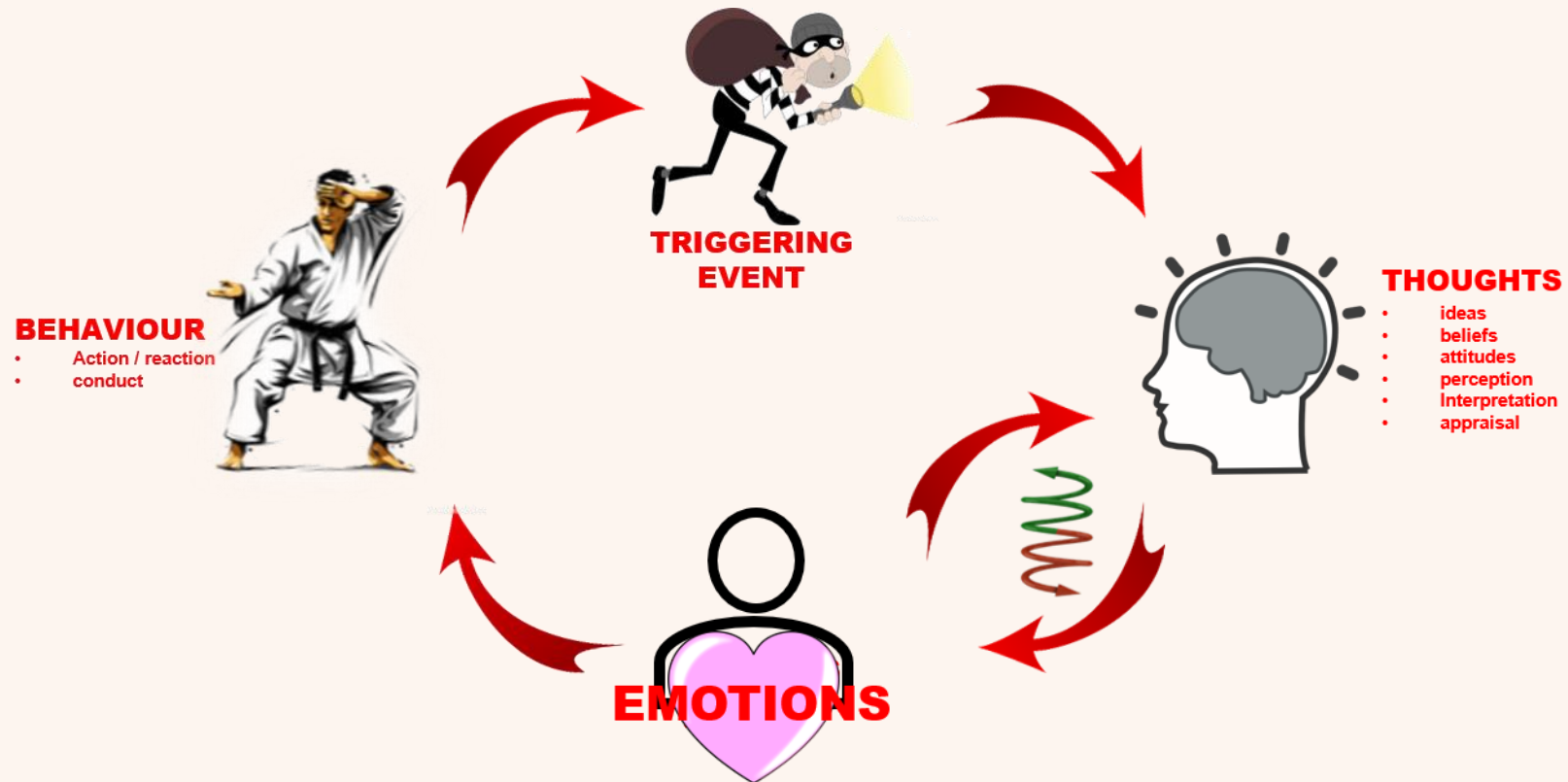
- **Negative emotions are often a **distress signal**:**
 - **often expressed in attention-catching ways:**
 - crying / raised voices / strong or hurtful language / aggressive body language, etc.
 - **can influence a person's —**
 - **manner of communication / expression;**
 - **cognitive abilities:**
 - information processing;
 - critical, analytical or rational thinking / reasoning;
 - problem-solving.
 - **motivations / decisions / actions.**
 - **can impede / derail the negotiations;**
 - distract attention from substantive issues;
 - hinder thought & decision-making processes;
 - engender mistrust;
 - complicate communication;
 - foster entrenchment / positional bargaining.



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2. **IGNORING EMOTIONS** *(continued)*

- How (negative) emotions arise:



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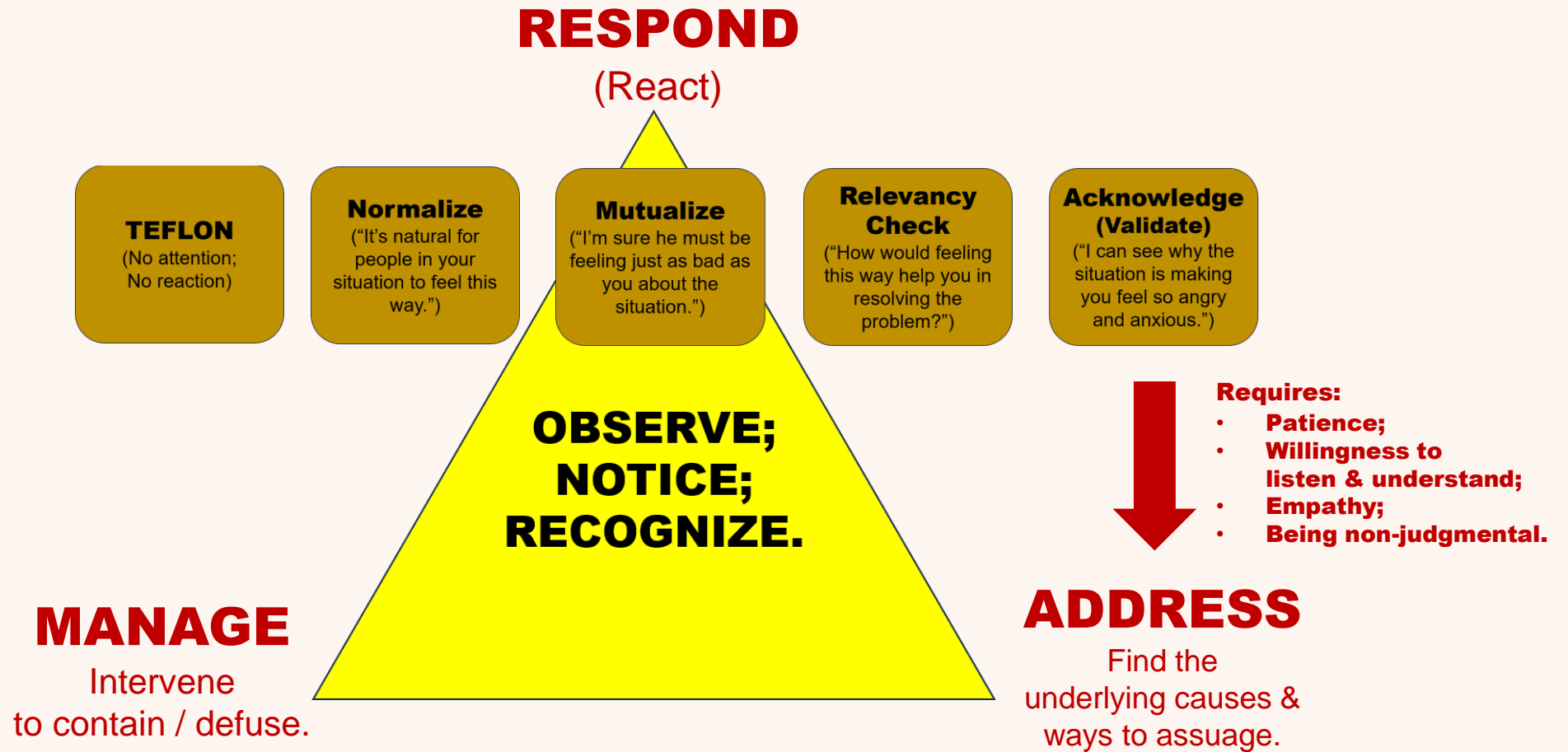
2. IGNORING EMOTIONS *(continued)*

- Possible thoughts underlying certain negative emotions:

	Anger	Sadness	Anxiety	Frustration	Fear	Hurt
Causes	<ul style="list-style-type: none"> Perceived Injustice Past grievance Frustration 	<ul style="list-style-type: none"> Loss Helplessness Regret 	<ul style="list-style-type: none"> Lack of information Fear of unknown Stress Worry 	<ul style="list-style-type: none"> Thwarted desires Unmet expectations Repeated disappointment 	<ul style="list-style-type: none"> Uncertainty Perceived threat or harm Lack of confidence 	<ul style="list-style-type: none"> Sense of betrayal Feeling wronged Feeling disrespected
Expression	<ul style="list-style-type: none"> Raised voices Harsh language Aggressive body language 	<ul style="list-style-type: none"> Crying / sobbing Sombreness Dejection 	<ul style="list-style-type: none"> Nervousness Irritability Lack of focus 	<ul style="list-style-type: none"> Impatience Irritability Complaints 	<ul style="list-style-type: none"> Hesitation Avoidance Withdrawal 	<ul style="list-style-type: none"> Impatience Irritability Complaints

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2. IGNORING EMOTIONS *(continued)*



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3. MISSING THE REAL PROBLEM

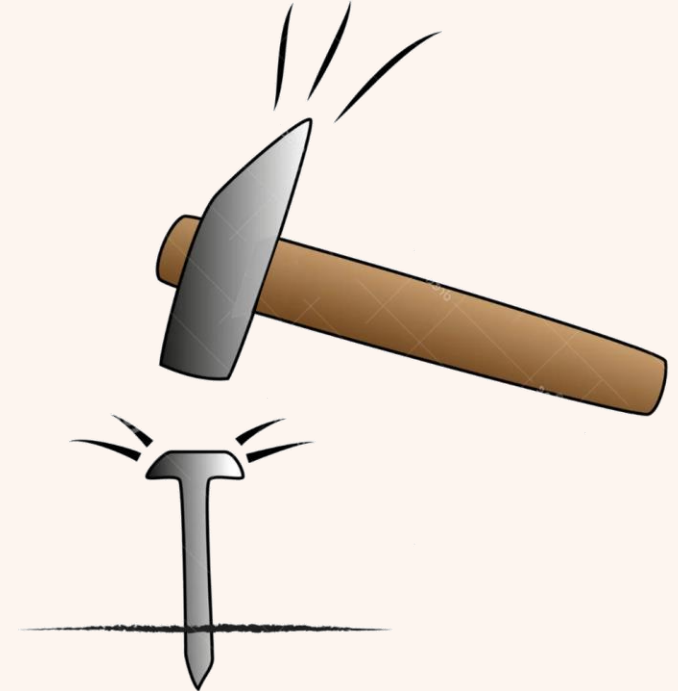
- In litigated cases, parties must —
 - plead / frame their dispute as a legally recognized cause of action;
 - seek legally available remedies.
- The pleaded case may not reflect the real problem.
- The mediator needs to listen —
 - **ACTIVELY;**
 - **ALERTLY;**
 - **INTELLIGENTLY.**
- Risks of not identifying the real problem:
 - asking irrelevant questions;
 - eliciting irrelevant information;
 - exploring irrelevant issues;
 - working towards the wrong solutions;
 - failing to resolve the dispute / exacerbating or escalating the dispute.



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3. MISSING THE REAL PROBLEM *(continued)*

- Being able to conceptualize the actual problem will give the mediator a clue how to facilitate the mediation conversation & explore the issues relevant thereto.
- Questions for reflection when listening to parties:
 1. On the face, what is this dispute about?
 2. Are there indications that the problem is actually something else?
 3. If so, what seems to be the real problem?
 4. How can I help the parties see what the real problem is?
 5. How can I help them resolve the real problem?



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3. **MISSING THE REAL PROBLEM** *(continued)*

- CASE ILLUSTRATION:



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4. POOR TIME-MANAGEMENT

- Good time-management is crucial in court-base mediations, given their limited durations.
- The mediator needs to ensure that the time given is spent **efficiently, expediently & productively** so that —
 - all the relevant issues are sufficiently considered & discussed;
 - all viable settlement options are thoroughly considered;
 - parties are able to make a considered, informed decision whether or not to settle.
- Poor time-management can lead to the following disadvantages:
 - insufficient consideration & discussion of critical issues;
 - reduced confidence in the mediator and/or mediation process;
 - waste of time & costs;
 - hasty, ill-considered decision-making by parties.



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4. **POOR TIME-MANAGEMENT** *(continued)*

- How a mediator may unwittingly squander mediation time:
 - **Talking excessively**
 - loquaciousness / verbosity;
 - protracted opening statement.
 - **Interjecting too frequently / unnecessarily**
 - e.g. - unnecessary summaries / paraphrases / reframing.
 - **Giving too much air time to one party**
 - verbose / domineering party;
 - other party may feel sidelined & lose trust in the process;
 - waste of time if same points keep being rehashed.
 - **Dwelling too much on past events / fact- or fault- finding**
 - mediator's role is not to determine fact or fault;
 - priority should be to elicit relevant information to move the matter towards possible settlement.
 - **Having no structure / agenda / direction**
 - mediator must facilitate the session in a systematic and structured manner;
 - aim is to help parties move from disagreement towards agreement;
 - an agenda helps the mediator —
 - facilitate a systematic and structured conversation; &
 - ensure that all essential issues are discussed.



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5. INSUFFICIENTLY DISCUSSING SIGNIFICANT ISSUES

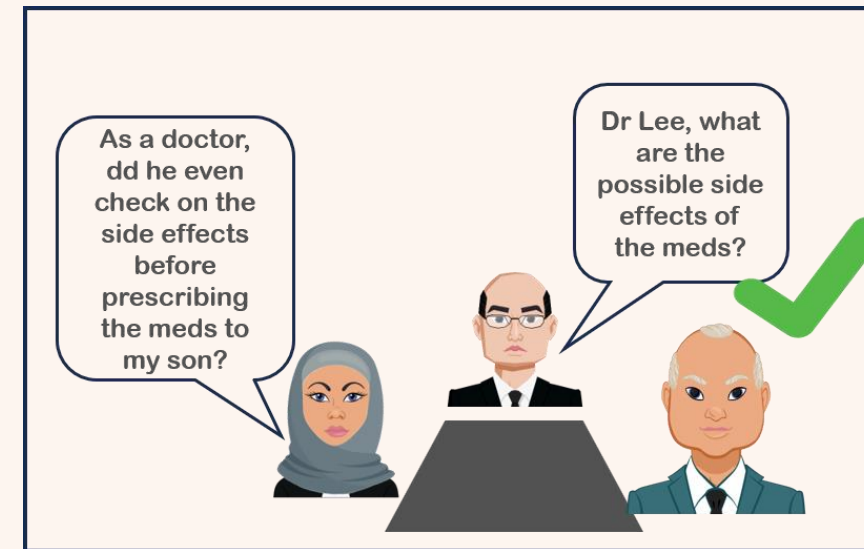
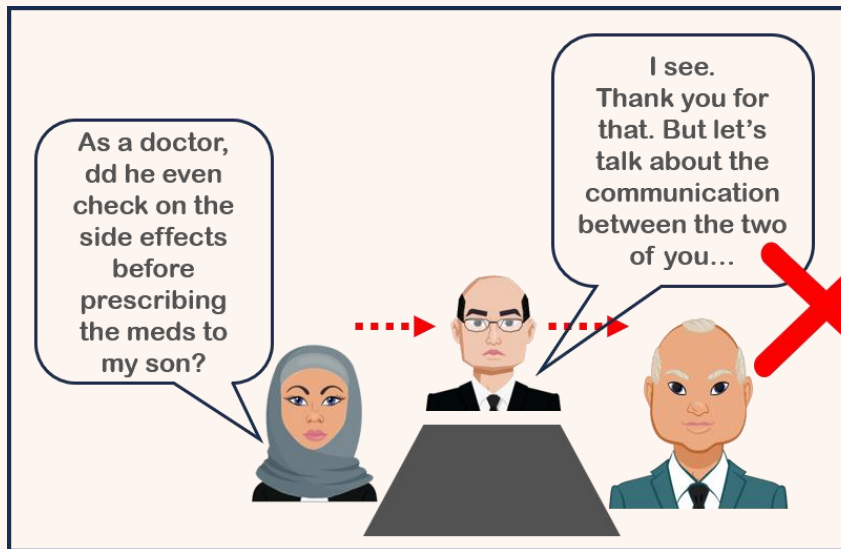
- The Mediator must ensure that all critical issues are sufficiently considered & discussed
 - This enables parties to make an informed decision whether & how to settle.
- Otherwise —
 - faults can appear & disagreements can arise when preparing the settlement agreement;
 - parties may become frustrated & disillusioned with the mediation process and/or the mediator;
 - the mediation may collapse.



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5. INSUFFICIENTLY DISCUSSING SIGNIFICANT ISSUES *(continued)*

- EXAMPLE:



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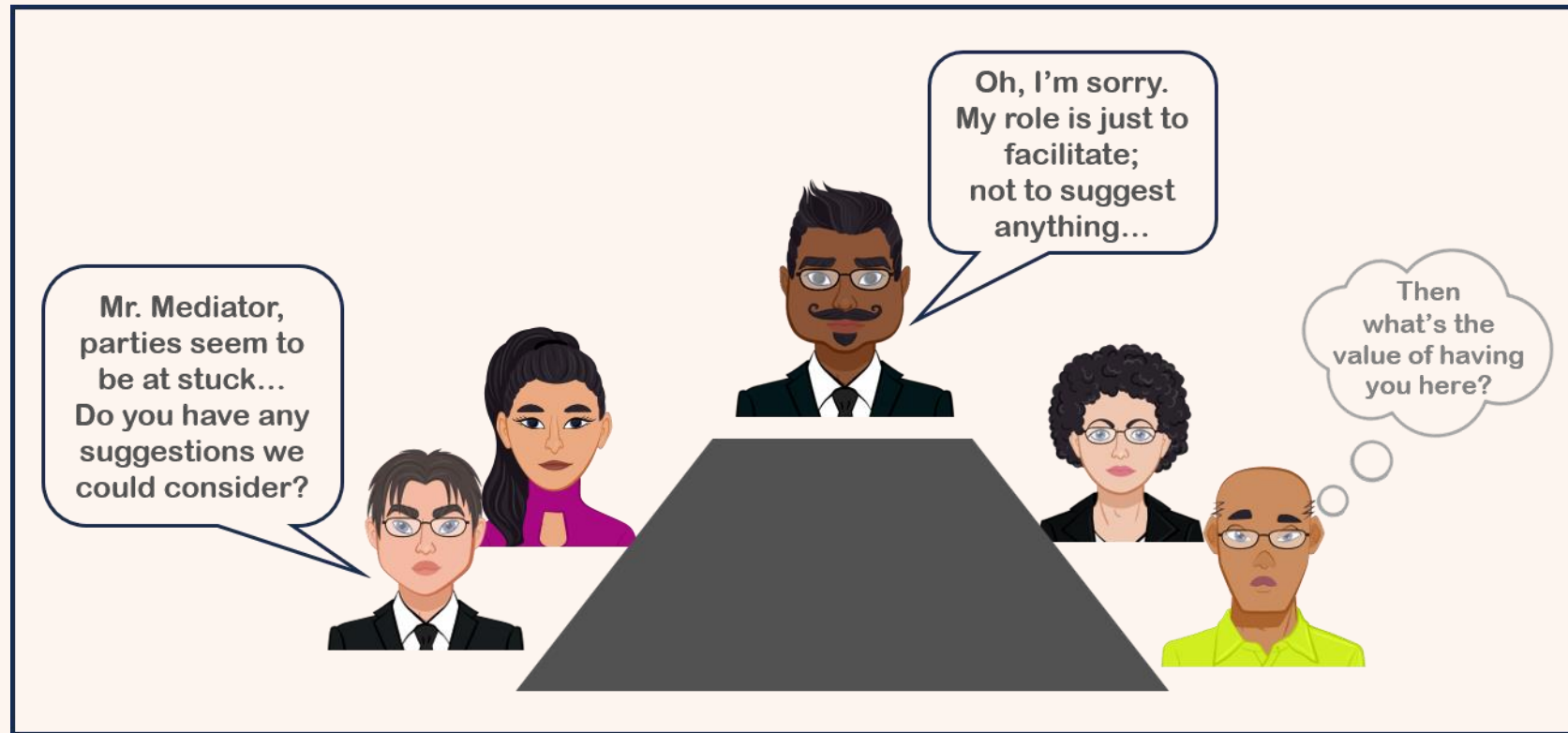
5. INSUFFICIENTLY DISCUSSING SIGNIFICANT ISSUES *(continued)*

- The mediator needs –
 - to listen actively, alertly & intelligently;
 - to have the foresight as to the relevance & usefulness of a point or issue brought up by a party:
 - Does it give a clue as to the underlying concerns of a party?
 - Might it open new perspectives to help the parties to reach a better understanding or clear misunderstanding?
 - Might it provide an idea for a possible settlement option?
- Following through with exploring a significant issue means —
 - consciously dedicating some time and effort to facilitate an in-depth discussion so as to –
 - obtain a fuller understanding;
 - determine whether & how it might be helpful for resolving the dispute.

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6. NOT HELPING WITH IDEAS WHEN NEEDED



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6. NOT HELPING WITH IDEAS WHEN NEEDED *(continued)*

- **Should mediators suggest solutions?**
 - **No**, because parties must be given to create, take ownership of, & commit to their own solutions?
 - **Yes**, to help parties avoid an impasse / move forward when they do not have any ideas of their own?
- **Why some parties might not take well to brainstorming for solutions:**
 - acrimony;
 - unwillingness to collaborate;
 - fear of rejection;
 - genuine lack of ideas;
 - self-interest;
 - preference to hear ideas from a respected neutral third party.

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6. **NOT HELPING WITH IDEAS WHEN NEEDED** *(continued)*

- A mediator needs to be **helpful & value-adding**.
 - if parties could resolve on their own, they wouldn't need a mediator;
 - mediator can **tap on personal & professional experiences** to help the parties;
- **Conditions for suggesting solutions:**
 1. Suggestion should be **couched as a suggestion**:
 - E.g. *“How about ...? / What do you think of ...? / Do you think it might work if ...?”*
 - not as an advice / admonition / directive.
 2. Mediator must **respect the parties' PREROGATIVE whether to consider or adopt the suggestion**:
 - If yes, explore and see where it goes;
 - If no, respect it, drop the suggestion, move on to another idea.



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6. NOT HELPING WITH IDEAS WHEN NEEDED *(continued)*

- Are parties less likely to take ownership of, or feel less committed towards, a mediator-suggested solution?
 - IMHO, NO.
 - Two ways such ownership & commitment can arise:
 1. Parties think up & create their own solution.
 2. Parties (with no ideas of their own) are willing to —
 - accept;
 - adopt / adapt;
 - work with;
 - abide by / adhere to,a suggestion given to them by the Mediator (or some other 3rd party).

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7. **SIDELINING THE LAWYERS**



- Most parties in MC & DC cases are represented.
- Lawyers have the duty to advance & protect their clients' legal rights & interests.
- By now, most lawyers should know about mediation & its advantages:
 - some are trained mediators.
 - some have undergone training as mediation advocates.

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7. **SIDELINING THE LAWYERS** *(continued)*



- Court-based mediations involve litigated cases where —
 - parties are seeking a judicial determination in accordance with their respective legal rights;
 - mediation is meant to help parties resolve the dispute without going for trial;
 - the legal position & the parties' rights & liabilities thereunder constitute the —
 - **CRITERIA &**
 - **ALTERNATIVES**
- that parties will consider when deciding whether & how to settle.

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7. **SIDELINING THE LAWYERS** *(continued)*

- Lawyers —
 - know their **clients** better than the mediator;
 - know the **case** better than the mediator,
 - know **what would / would not persuade their clients**;
 - know **how their clients feel** about the matter and **how they need to be persuaded**;
 - may also know the **facts and the relevant law** better than the mediator;
 - know where their **clients' zone of possible** agreement lies.
- **Clients tend to take the cue from their lawyers** because the clients pay the lawyers to advise them.
- The mediator needs to build the best rapport with the lawyers to get the best trust, confidence & cooperation from them.



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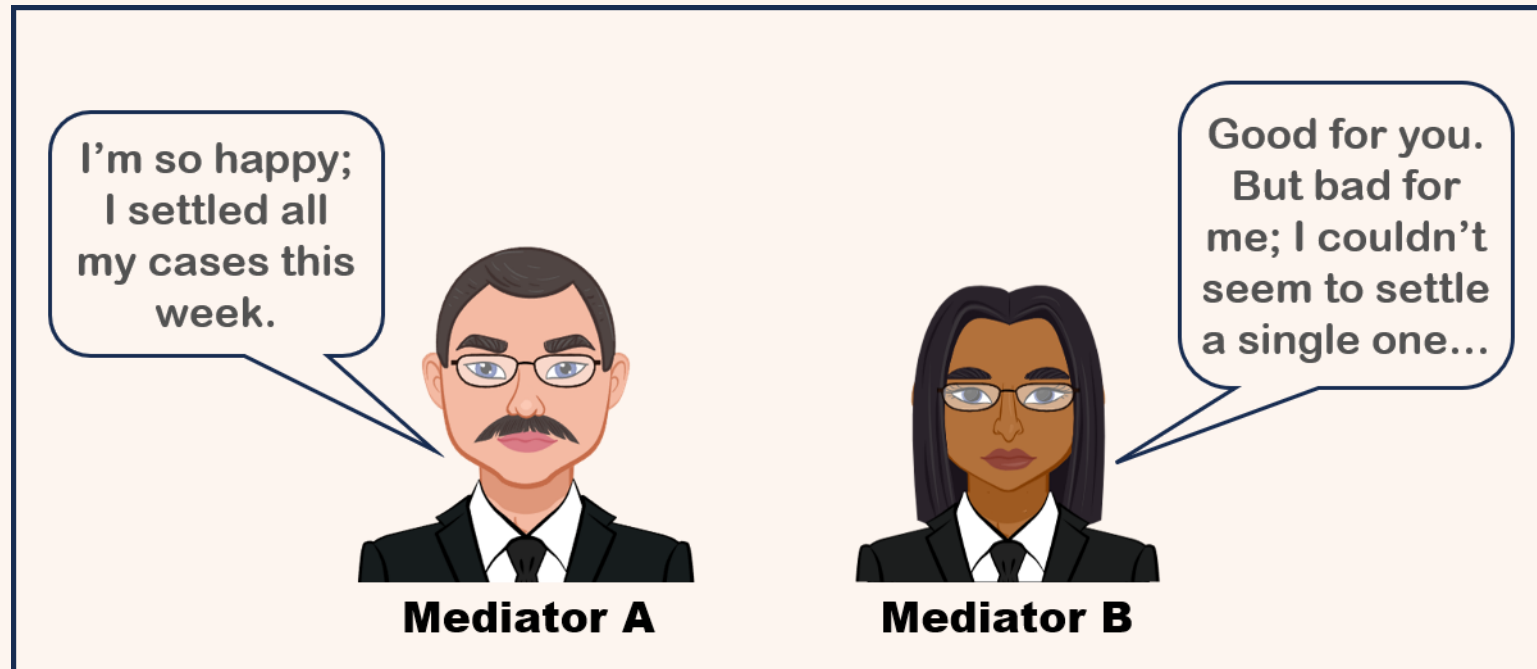
7. SIDELINING THE LAWYERS *(continued)*

• **CASE ILLUSTRATION:**



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8. BEING TOO CONCERNED WITH SETTLING



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8. BEING TOO CONCERNED WITH SETTLING *(continued)*

- mediation is a voluntary process:
 - parties have prerogative to decide whether & how they wish to settle;
- outcome of a mediation depends on the parties' willingness / ability to compromise & reach consensus with each other;
 - this is beyond the mediator's control;
- mediator's role:
 - not to mandatorily settle the case;
 - to facilitate a comprehensive discussion of all critical issues;
 - to enable the parties to make an informed decision as to whether or not to settle;
- mediator must **accept & respect whatever decision parties make**;
- mediator **must not remonstrate with, or try to force, pressure or manipulate the parties to settle** against their wishes.

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8. BEING TOO CONCERNED WITH SETTLING *(continued)*

- How being overly concerned with settlement can lead a mediator astray:
 1. **Misplaced priorities:**
 - less concern with parties' interests than with settlement for settlement's sake;
 2. **Anxiety & stress:**
 - urgency and/or desperation to make parties settle so as to maintain one's settlement rate;
 3. **Pressuring / manipulating parties:**
 - being overly robust or overbearing when reality-testing;
 - magnifying negative aspects of parties' alternatives;
 - exercising undue influence (e.g. fearmongering) on parties;
 4. **Taking advantage of power imbalances:**
 - asserting greater pressure or influence on the party who appears to be —
 - weaker;
 - more easily persuaded;
 - more likely to cave in & settle.

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8. BEING TOO CONCERNED WITH SETTLING *(continued)*

- Pressuring parties to settle may —
 - cause the parties to perceive mediator as —
 - Unprofessional / unethical;
 - biased;
 - unconcerned with their interests;
 - discourage parties from settling;
 - give parties grounds to —
 - lodge complaint for misconduct / breach of ethics;
 - seek to vitiate the settlement agreement.

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8. **BEING TOO CONCERNED WITH SETTLING** *(continued)*

- Some parties may not be **psychologically or emotionally ready** to settle.
- Mediators should give them time to reflect & consider.
- Forcing them to make an immediate decision may —
 - meet with resistance;
 - forfeit the chance of a settlement.
- Consider granting a short adjournment to a status conference so as to give them time to reflect and decide properly.
- **CASE ILLUSTRATION.**



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9. LOSING YOUR COOL

- Occasionally a mediator may encounter a difficult party.
- Common traits of a difficult person:
 - displays a combination of negative emotions;
 - anger / agitation / aggressiveness, etc.;
 - rude, disrespectful, antagonistic towards mediator;
 - self-entitled, demanding, difficult to please;
 - unclear as to what they really want;
 - inflexible, uncompromising and persistent;
 - tends to see things only from their own perspective;
 - self-righteous, defensive and argumentative;
 - tends to quibble with settlement terms or add new last-minute conditions & demands.
- Such behaviour can —
 - cause the mediator to lose his/her cool;
 - annoy the other party and cause them to walk out of the mediation.



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9. LOSING YOUR COOL *(continued)*

- Consequences of a mediator losing his/her cool:
 1. may create animosity between the mediator and the difficult party:
 - complicates the situation;
 - distracts mediator's attention from a possible underlying concern that needs to be addressed;
 2. may cause party to perceive / accuse the mediator as being biased, unhelpful & unprofessional;
 3. may reflect poorly on the mediator's ability to handle challenging situations or dynamics;
 4. may cause the mediator to lose control of the process leading to a breakdown of the mediation.



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9. **LOSING YOUR COOL** *(continued)*

- Difficult behaviour may be a **distress signal / cry for help**.
 - it is usually not about, or directed personally at, the mediator;
 - as with negative emotions, the mediator needs to **recognize, manage & address** the difficult behaviour.
- Possible causes of difficult behaviour:
 - feeling of disempowerment:
 - party can't bring themselves to deal with the other party;
 - the mediator becomes a convenient target for venting;
 - anxiety to achieve a certain outcome;
 - insecurity / inability to trust anyone (including the mediator);
 - narcissistic tendencies:
 - self-centeredness / sense of entitlement / demandingness / need for attention / lack of empathy / manipulateness, etc.
 - fear of making wrong decisions:
 - hence entrenchment in certain views / positions / demands
 - quibbling with settlement terms / inserting last-minute additional terms.



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9. **LOSING YOUR COOL** *(continued)*

- **Mediator's responses:**

1. maintain professional stoicism;
2. give yourself time & space to reflect before responding;
3. call out the behaviour & check out its underlying causes;



4. gently point out the unhelpfulness of the behaviour, & give time to cool down, reflect and regain composure;
5. if instructed, convey the other party's final offer for consideration;
6. if the difficult behaviour persists, discontinue the mediation.
 - Record your reasons.

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CONCLUSION

- Mediation is a noble & gratifying task that aims to transform a dispute into understanding & agreement.
- However, it is also a delicate endeavour with many challenges & complexities.
- Hence the mediator must always stay aware of the potential pitfalls & diligently avoid common lapses so as to –
 - attain the highest possible trust, confidence & cooperation of all persons involved in the mediation;
 - ensure that the process remains expedient, effective & impartial; and
 - foster an environment where all parties feel heard, respected, & empowered to reach an amicable resolution.

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CONCLUSION *(continued)*

1. Build the best rapport with everyone involved in the mediation as early as possible.
2. Recognize any negative emotional dynamics, & manage & address them as soon as possible.
3. Listen actively, alertly & intelligently to grasp the real problem that needs to be resolved.
4. Use the mediation time efficiently, expediently & productively.
5. Ensure that all critical issues are sufficiently considered & discussed so as to enable parties to make an informed decision whether & how to settle.
6. If parties are stuck & seek your suggestions, be forthcoming & helpful, but leave it to them to decide whether or not to take up the suggestions.
7. Enlist the assistance of the lawyers as much as you can; they can be valuable allies.
8. Accept & respect the parties' decision, even if it's not to settle; you would have fulfilled your role if your facilitation enabled them to make an informed decision.
9. Always keep your cool when faced with a difficult party.



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END OF PRESENTATION

PANEL DISCUSSION
Questions & Comments