Emptying Pandora’s box: How mediators can use creativity to take people safely to the edge

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When the lid was put back on the jar, Hope was kept inside. That is why Hope is still found among the people, promising that she will bestow on each of us the good things that have gone away

Aesop’s Fables: A new translation by Laura Gibbs (OUP 2002)

Pandora has gotten a bad rap over the centuries. She has been blamed with opening a jar and allowing the evils of the world to escape to torment mankind. As mediators, we may see parties display varying form of these ‘evils’ every day in the mediation room presenting as high conflict, anger, resentment, revenge, blame, fear, dysfunctional communication, mistrust and hostility. However, it is important to remember that, as with the best in mediation, Pandora was able to hold within her jar, hope. Parties in mediation generally come to the process with little hope or a misplaced sense of hope. As mediators we need to harness and enhance this small sense of hope. We need to instil a hope for change; hope for letting go of the hurts and negativity of the past; hope for a better future and hope for resolution, certainty and a new beginning.

The story of Pandora often attributes her desire to remove the lid to her wilful curiosity. As we will discuss, there are good reasons for mediators to also have curiosity and to open the jar and address the ‘evils’ or negatives that can be released in the conflict we are assisting to resolve. By exposing what lies inside, at the very heart of the conflict, and daring to challenge ourselves, and the parties, we can assist them to move through their conflict and beyond it. As is stated so succinctly in a Zen poem: “Now that my house has fallen down; I have a much better view of the moon.”

Mediators are charged with holding a safe space for parties to resolve their disputes. The tension is that mediators need to do this whilst challenging and taking parties to the precipice to move them past blame and distrust and to a place of hope, collaboration and mutual resolution. Once we have established a relationship of trust and credibility with parties and as we challenge them to share perspectives on the dispute and to acknowledge the other party’s perspective, as well as building mutual understanding and responsibility, we know that we increase the potential of escalating heightened negative emotions such as anger, despair and fear; irrationality of thinking and resistance to behavioural change. The paradox of this is that if we are to bring about real change for parties, then we need to take them safely to a place of discomfort for a period of time; a place of cognitive dissonance where what is being said does not sit comfortably so they can shift their thinking, feelings and behaviour to enable this letting go of the past and their positional stance in the negotiation and consider the possibility of mutual resolution and a future free of this conflict.
Porter describes the work of reconcilers as being required to “stand in the gaps, often tragic gaps and help the sides understand each other”.

(Figure from Hong Kong Family Mediation Service, Advanced Family Mediation Training Manual 2010)

In mediation speak, we hear “Trust in the Process” and whilst this may be good advice for new mediators, it is not enough if we are to take people to the edge in mediation. It is also not enough to have a standard mediator’s toolkit of communication and negotiation skills and strategies to work with high conflict, emotional and difficult parties. We also need to trust in our intuition and experience as mediators if we are to truly enable parties to have those difficult conversations and negotiations and bring about resolution and commitment. We need to move beyond the traditional pose of professionalism which is process, script, systemisation of skills and formality driven; even when these are organisationally and client endorsed and expected. We need to be in touch with our own authenticity, honesty, empathy, energy, and sense of creativity.

Moreover, we need to be aware of the values and premises on which we base our own mediation practice; such as party self-determination, empowerment, a diversity of truths, non-judgemental attitude, transformational change, responsibility, ownership and choice. These values and beliefs are part of a whole. To have one without the other will be to do our mediation parties a dis-service. For example, if we empathise without being honest as to the conflict diagnosis, the parties feel understood but may not shift in their stance, or if we are authentically honest about what may be preventing conflict resolution without showing empathy, the parties may hear judgement and bias and may resist change. Mediators, however, must also not “wrap themselves in a cloak of high principle” but may need to accept that some parties may wish to choose suffering, refuse to let go or move forward, refuse to accept responsibility and / or ownership and may wish to remain in victimhood rather than be empowered. Our responsibility is to assess capacity to do this (e.g. personality disorder traits may preclude this ability) to enable this choice, ensure that there is an informed choice through information and risk assessment and make this explicit through attempts at skilled intervention.

1 Thomas Porter, The Spirit and Art of Conflict Transformation (1st ed. 2010), p. 28
2 Kenneth Cloke, Mediating Dangerously: The Frontiers of Conflict Resolution (1st ed. 2001) p. 82
Today we invite you to come on a somewhat controversial journey that will expand our normal thinking about mediation and extend our frontiers as mediators beyond process and traditional skills and techniques. It is a journey that challenges us to incorporate the traditional with the new theories of conflict management, neuroscience, psychology, intuition and mindfulness to expand our thinking and repertoire as mediators to take parties safely to the edge where it may be risky for them and us, in order to bring about transformation and resolution rather than just a mere settlement of their concerns and issues; or indeed, no settlement.

Settlement in mediation is not difficult and can be achieved with the use of normal skilled process management and a toolkit of basic communication and negotiation skills. Resolution requires mediators to uncover and address the parties’ priority needs, interests, goals and concerns on all levels involved in the conflict: psychological, emotional, relational; procedural; value and belief driven and substantive in nature.

(Figure based on the Triangle of Satisfaction, Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* (4th ed. 2014) p.128)

This requires opening up the dialogue and asking both challenging and heartfelt questions in order to move parties from conflict suppression or oppression to problem solving, collaboration and mutual resolution. This latter process embodies the values for mediation practice as identified above.

To be able to do this safely we need to have confidence in the skills and techniques we can use to open Pandora’s Box. However, we also stress the need for duty of care and the importance of recognising when confidence can become foolhardy. As with doctors, mediators need to ensure that they do no harm. We need to provide a place of safety to allow the exploration of issues and we need to do so confidently. In providing this safe place mediators need to be cognisant of the risks of opening the jar and exposing that which has been suppressed. It is also our duty to recognise when we can no longer hold the safe place and when our actions become foolhardy.
We are certainly not advocating a reckless deep dive into the abyss. As with every profession, mediators need to exercise discretion. We need to be respectful of the parties and the context of their dispute. We need to be cognisant of our own limitations and any limitations imposed by our process, organisation and legal system. We need to be aware of cultural norms and the realities of the situation that the parties are in.

Prior to looking at skills and techniques for opening Pandora’s Box, it is important to emphasise again that these cannot be used early in a mediation process and that they require pre-conditions including sound assessment of capacity; good rapport building with the parties; trust building with the parties so there is a foundation of confidence in the mediator to take them on this journey and transparency and honesty by the mediator regarding the mediator’s process so they can confidently be guided to the edge and back again.

The mediator also needs to have a strong presence in the mediation through his / her listening, awareness and observational skills to be able to both trust intuition and to be able to make continual assessments as to the party’s emotional and cognitive states so as to time interventions appropriately for maximum effect and so as to do no harm.

**Skills and Interventions**

(1) **Opening up the dialogue**

Let’s look at a few different points under the heading of ‘opening up the dialogue’, which we mentioned previously. These include: having a broad orientation; shifting from debate to dialogue and dismantling the false dichotomy of win/lose.

One of the earliest steps in mediation is working with the parties to create the agenda. Agendas are a valuable process tool for various reasons. Obviously they identify the issues that need to be addressed and as an early exercise in collaboration, they provide a micro agreement for the parties. An important benefit of mediator involvement is helping the parties to define and enumerate their issues. What can seem like a single-issue problem can be easily derailed by the existence of underlying and unidentified issues / interests. It can seem counterintuitive but mediators need to simultaneously help the parties to identify clearly the issues in dispute and also to broaden their understanding of the issues involved. As mediators we need to be conscious that if we are to assist parties to open the jar, then we must open up the dialogue.

In 1996 Leonard Riskin famously created his mediator grid outlining how mediator orientations can lead to a greater understanding of mediator tools and strategies.\(^3\) On one axes he suggested mediators could plot their evaluative and directive orientation and on the other whether they defined problems broadly or narrowly. Although he has since revised the use of elicitive for facilitative and directive for evaluative,\(^4\) he has maintained

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the view that some mediators will want to restrict problem definition to a narrow range and others will seek to define problems broadly.

In order to take parties to the edge, a mediator will need to open up the dialogue i.e. be broad in problem definition. This can seem difficult when the parties are resistant to expand the scope of their discussion, but if we fail to surface the issues which lie beneath their conflict then we will be unable to assist the parties achieve resolution.

There is a temptation, often fuelled by the parties and professionals present at the mediation, to label the issues as quickly and painlessly as possible, move through options and then tie up the settlement. We have the opportunity to offer parties much more than this. By creating a safe place we can offer them the opportunity to address the reasons for their conflicts and move towards a greater understanding of themselves and their conflict. Creating the space and time for dialogue in the mediation process, often labelled “Exploration”, is how we facilitate this.

It is not uncommon to see parties come in to mediation prepared with their bottom line. What can follow is a series of moves where the parties try and fit their pre-cut jigsaw pieces together to make a settlement. We need to help the parties take a moment to understand the nature of their conflict so that they can create options for resolution, which address the causes and the symptoms of their dispute as well as each party’s priority needs and interests for resolution.

This can mean slowing the process down to allow the parties time to discuss and process their perspectives and beliefs. As Cloke notes moving from a rights-based process, such as litigation to an interests-based process such as mediation, requires us to reset ourselves and the parties by moving from debate to dialogue. He encourages mediators to consider four forms of dialogue:

i) What is in issue?: Often this is where the parties start and stop the conversation. They may have become so enmeshed in their narratives that talking about what is wrong exercises an inescapable gravity for them. We need to help parties shift from this dialogue by asking: What is factual?; What objective criteria can we apply to this situation?; and by reframing to enable the other side to receive the message.

ii) What is true?: i.e. objective observations; dialogue which focuses on the present, and what can be most difficult for people, acknowledging personal responsibility. This is where parties can move towards problem solving. As we move towards the next level, we need to go deeper with parties and harvest their interests. What are the beliefs and values that are being ignored or disrespected? We need to work with them to aid understanding about what is needed.

iii) What is possible?: What are the interests that need to be met? What are the options? What is realistic and workable? Finally we need to ask questions to move parties to what will the future look like?

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5 Cloke, supra note 2, p. 175
What will happen?: What are the concrete steps and actions each party will take to commit to a solution? There may be timelines and measurable goals. This is where the parties can design their future. Perhaps this is not the one they originally envisaged or dreamed of at the beginning of the relationship, but it may be the one that they can achieve.

Our role as mediators is to guide the parties through these dialogues. We need to respect the parties need to spend time at each stage and be ready to help encourage them to move forward to the next level. This can be a balancing act between allowing a party the space to express themselves and ensuring that there is forward momentum. As mediators we are charged with assisting the parties to problem solve, we cannot discharge this responsibility without ensuring that we give them the structure to do their work. Porter explains that in a relational world, the process we design to resolve the conflict is as important as any solution in order to ensure ownership and success of the decision.

(2) Challenging the False Dichotomy
As we do this, we need to challenge the false dichotomy of win / win and win / lose. In “Getting to Yes” we are taught that negotiations can be turned from win/lose zero sum games into win/win outcomes where each party wins. In litigation, we are presented with the truism of a pitched battle where one party will emerge victorious and the other will lose.

In working with families it is sometimes apparent that neither of these outcomes are realistic. In divorce mediation, we may actually be facing lose / lose or ‘sharing the pain’ outcomes as asset allocation becomes debt allocation and time with children (e.g. Christmas) needs to be divided and shared. In the commercial world, many mediations may also result in lose / lose or ‘sharing the pain’ outcomes. Even the ‘gung ho’ party, who brandishes their belief that they will be vindicated in court, knows on some deeper level that they may have already lost. If every claim and demand was granted, they would still have lost due to the emotional, psychological and relational interests that have been sacrificed in this process. What is the point in winning the battle if they ultimately lose the war?

(3) Listening
We need to challenge these beliefs and work with parties to help them gain a deeper knowledge of themselves. The only way to do that is through faithful adherence to the simplest of our tools, listening and questioning and to extend out toolbox in this regard. It is critical that we listen and help the parties to listen to each other. It is only through listening that we can both share the experience of the pain and also learn how to ‘make things right’. As Porter notes, ‘hearing has consequences, and these consequences can be redemptive’.

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6 Porter, supra note 1, p.77
8 Porter, supra note 1, p. 41
9 Id.
Ken Cloke says that mediators should listen intently, as if we believed that what we hear from the party could change our lives.

(4) Powerful Questions
As mediators we search for the right question: the question that will unlock understanding for the parties; the question that allows the party to experience the revelation of the answer; or the question, which grants permission to change. Without doubt the art of the question is a subtle and difficult one to master. There is also the related and devastating reality of the right question at the wrong time becomes the wrong question.

As mediators, especially in joint session, we need to be conscious of the impact of our questions on the recipient. Is the question appropriate? Is the timing for the question appropriate? Is the question sensitively asked? Will the questions be seen as challenging one party and providing comfort to the other? Will it elicit the information or response we are seeking? Do we need to ask the question in a separate session?

Cloke encourages mediators to use questions to allow the parties to respond to a deeper need for personal transformation. He suggests that conflict behaviours are requests for authentic communication and that as we strip away the mask and reveal the person beneath, the party will be able to experience a release of energy.\textsuperscript{10} Cloke suggests extending the mediator’s toolbox of questions to ask questions such as\textsuperscript{11}:

- Future focused: What is the crossroads at which you are standing at this moment in your life or in this conflict?
- Risk assessing:
  - What is preventing you from moving forward?
  - What price are you paying for this conflict? How long do you intend to continue paying it?
  - Is there anything in this conflict you wish you had done better?
- Addressing relationship / emotional needs:
  - Is there anything positive you can say about the other person / side of this case?
  - Is there anything for which you would like to apologise?
  - What is one thing for which you would like to be acknowledged? What is one thing for which you would like to acknowledge the other person?
- To challenge right and wrong /fact: What did he actually do as you recall it?
- To challenge truth statements: What would have liked for her to have done?
- Re-orienting: Can we get back on track? Are we talking about the real concern / issue here?
- Coaching: Is there a way you could respond less defensively? Can you agree not to use “you” language and accusatory messages?
- Concretising: Can you explain this better by way of an example?

\textsuperscript{10} Cloke, \textit{supra} note 2, p. 121
\textsuperscript{11} \textit{Id.}
• Challenging: Isn’t that inconsistent with what you previously stated about ---?
• Moving forward: Who is going to take the first step? Disengage from conflict? Be responsible for making changes/ this happen?
• Reality testing: What are some of the grey areas in your position? / How might you see your differences as two sides of the same coin?

These are challenging and risky questions for a mediator to ask. The context of asking the question requires almost as much thought as the question itself. In particular the impact of culture on some questions may be critical and should be approach sensitively. For example, a party in a recent mediation was incapable of recognising the other party’s willing acceptance of her perceived obligations to her extended Asian family, even though this was not a legal obligation. More than that she was unclear why his fulfilment of these obligations was even deserving of any acknowledgement, let alone gratitude. When asked by the mediator if she wished to say anything in response to the other party’s willingness to provide financial support to her family, she quickly replied with a “no”. From her cultural perspective of filial piety this was his duty. Be cognisant when structuring questions, that beyond the fog of conflict, some parties may not give you the answer you expect from your cultural or values frame.

Make sure you have a way to build a golden bridge forward in such circumstances so no one loses face, including the mediator. E.g. By quickly switching this question to one of acknowledgement of financial support for her daughter’s (his step daughter’s) education, the party was able to provide a positive acknowledgement to the other and he was able to mutualise this acknowledgement by thanking her for his continued relationship with this child.

As Cloke says, be careful when you are asking questions, the purpose is to lead people to their own answers, not the answer you want them to give.\(^\text{12}\) We need to be aware of our own biases and values when working with parties at this level of deep vulnerability. Designing challenging questions enables mediators to confront the parties with their own beliefs about the conflict and to facilitate a clearer understanding of their own motivations, intentions and interests.\(^\text{13}\)

(5) Reframing Language
When we have stripped away the mask as has been described, we need to provide the parties with a new language for talking about their dispute. Often in mediation, parties will enter the room deeply positional. This will be reflected in their language i.e. the way in which they describe their positions will be based on their concepts of power and / or rights both legal and moral.

Parties who base their positions on rights are easy to identify. They will refer to their lawyers’ opinions; they will speak of their ‘entitlement based on their sacrifice’ or how they ‘deserve a particular outcome’. These words allow only their truth to be recognised. Every statement is a negation of the other party’s position, rights or perspective. They

\(^{12}\) Cloke, supra note 2, at p. 39
\(^{13}\) Cloke, supra note 2, at p. 39
may say things like: “my lawyer tells me that I will definitely get what I want in court; I am entitled to a home because I was not the one that ended the marriage; I am entitled to a bigger cut of the profits because I brought in more clients etc.”.

Parties who base their positions on power may feel the need to be more subtle in their language as they try to retain the appearance of fairness or attempt to collude with the mediator to strengthen their position of control. For example, as they explain that their only concern is for the children, they will describe how: the other parent lacks parenting skills as they were never around; how the children are only comfortable / happy / safe with them; or how only one parent needs to be involved in the children’s lives as an equal involvement of both parents is confusing for the children.

Each of these modes of communicating is less about engaging in an exchange of information and more about an offensive declaration, which they have cognitively anchored to and then continue to affirm through confirmation biases. Although it may feel momentarily cathartic to the party to make these statements, they have a negative impact on communication. They result in a defensive reaction from the other party who justifiably feels they are being attacked. This prevents both parties from engaging in the vulnerable communication, which could provide them with the information they need to resolve their dispute. Porter describes positions as statements of demand framed as solutions, however, they are the party’s preferred solution, and because they mask the underlying needs and interests they can make it harder for people to locate these needs and interests.

By reframing these statements, we can assist the parties to communicate in a manner, which can lead to responses not reactions. For example, rather than agreeing with a party that they are ‘entitled’ to a home, this can be reframed as asking them to explain their need for a home, to explain their fears and concerns about being able to provide a home for themselves.

(6) Diversity of Truths
What is required is for both sides to relinquish their own truth and accept a diversity of truth. For everyone in mediation, their narrative feels true, however, this will not convince the other side that their own equally compelling narrative is less true. More importantly, in mediation judging the correctness of these truths will not bring the parties closer to resolution. Rather we need to allow the parties to comprehend that in life there are multiple truths, that an absolute truth in conflict is elusive. They do not need to accept the truth of the other party’s perspective, but they do need to understand it and they need to understand that for the other party their perspective feels just as invalid. Without this learning they will be unable to create options, which meet needs and lead to resolution. For some parties this will be difficult, not just because they struggle to accept the other party’s perspective but also because of inherent biases. One bias often encountered in

14 Rudiger F. Pohl, *Cognitive Illusions: A Handbook on Fallacies and Biases in Thinking, Judgment and Memory* (2012); see also Carol Tavris and Elliott Aronson, *Mistakes were made (but not by me)* (2nd ed. 2008)

15 Porter, *supra* note 1, p. 112
mediation is the sunk cost bias. This principle from behavioural economics is demonstrated in mediation by a party who refuses to engage with the mediation process because they believe that they have already invested so much in their litigation, they have gone so far down the road of adversarial resolution that they are not able to pull back. For example, a party may come in and remain fettered to their positions; they may say “I’m not here to negotiate”. They may be so committed to the path they are on that they no longer believe there is an alternative outcome. This is patently incorrect, as we all know parties may negotiate up to and through the door of the courthouse, but for a party in the grip of the sunk costs bias there is no choice. Countering this bias is difficult, and as mediators we may need to challenge the party to reconnect with their goals. It is rare in mediation to encounter a party whose goal is to put the lawyer’s children through university or to buy that Porsche for them.

(7) Unpacking strong emotions
The pre-mediation or intake sessions also enable the mediator to analyse the conflict and identify the underlying emotional, psychological and relational interests that have been ignored or harmed in the escalation of the conflict between the parties. The mediator may then make a space at an appropriate time in the mediation for these emotions and feelings to be aired and addressed. This requires careful handling and control of the process. Appropriate questions such as, “Party A would you be able to explain to Party B how this incident made you feel? What was your intention behind this behaviour? How do you think this may have impacted the other person? What are your future hopes for your relationship?” etc. can facilitate this dialogue in a constructive manner.

Skills to manage high conflict personalities as outlined by Bill Eddy will also be valuable tools for addressing emotions once they have been exposed. These techniques can lead to addressing the hurts and grievances between the parties and may often result in a form of apology which may enable the parties to let go of these past feelings and result in positive future focussed problem solving. As a note of caution, these conversations can often be intimate and painful and mediators need to be comfortable with these discussions so as to handle them in an authentic, open, empathic and sensitive manner.

In a mediation involving parties who were coming back to vary their earlier arrangements, the parents faced a challenging situation as both children had severe learning difficulties. As well as working fulltime, the mother had been managing all of the medical, educational and psychological support, whilst the father had been contributing financially. Towards the end of the mediation, the mother broke down into sobs. She cried for about 5 minutes in the joint session as we all sat with her and allowed her to experience and unpack this strong emotion.

As he explained later, the father had never seen her cry and he was deeply moved by the fact that she was so overwhelmed and overcome by her emotions. As a result of this sharing of vulnerability, nothing changed financially, but he asked if he could help

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17 Bond University Dispute Resolution Centre, *Apology* handout from the mediation training manual
shoulder some of the organisational burden and responsibility that she was struggling with. Later, the husband explained that he had never really listened to the complaints from his ex-wife about managing the process as she had always presented a strong, independent woman, but her tears shook him as she gave up words and allowed the authenticity of her emotions to communicate with him.

(8) Addressing the Elephant in the Room
At some stage every mediator experiences the sense that the parties are dancing around an issue, which lies at the heart of the conflict, is acting as a block on movement, or that something unspoken is driving one party’s need to remain in negative intimacy. Our choice is to move towards it or to move away from it, to pull it out and name it, or to turn away and hope that resolving the other issues will be sufficient.

The problem in moving away is that we fail the parties. We fail to provide them with a process, which has the opportunity to resolve their conflict rather than to settle it. We choose to suppress the difficult issues and leave the parties alone to face this unresolved issue without our support and the structure of the mediation process. It is safer for the parties to have this difficult conversation in the mediation room than out there in the wilderness where chaos and escalation may ensue.

Earlier this year, we were sitting in mediation and said, “we need to talk about the elephant in the room”. The question was awkward and embarrassing and from that moment, the parties experienced permission to express their thoughts on this difficult and emotional issue. What makes this moment more remarkable was that the difficult question was asked in front of the entire room without knowing the answer. Once the elephant had been identified a frank discussion followed which allowed both parties to share their concerns and needs for the future.

Why did it work in this case? This type of direct question can backfire and create more conflict. However, in this case the question stimulated the parties to open up rather then to shut down. Given the high emotion involved, this was a potentially risky move.

As you can imagine, no-one starts a mediation with such a question. The asking of such a risky question required several pre-conditions to be met. Firstly, it was asked after rapport and trust had been established between the mediator and the parties. Questions like this can be seen as confrontational and just as a mediator would need to build trust and rapport before asking this question so did the lawyer. The professionals in the room, lawyers and mediators, had all worked together previously and there was a sense of trust and ease. In practical terms, the question was asked respectfully and sensitively. Given the personalities in the room, it was also asked with humour. The humour gave everyone the ability to laugh to release tension without seeming to laugh at the situation or to minimise the gravity of it for the parties.

It may be that your parties come in pulling a string of their own elephants and are eager to put these on the table and discuss them. However, some parties may be personally or culturally incapable of naming the concern and will require your assistance as a mediator.
to do so. This is why pre-mediation or intake sessions with the parties to identify potential “elephant in the room” conversations are so beneficial and important.

(9) Honesty in the absence of trust
It is sometimes crucial to the mediation to be able to address issues of honesty when there is an understanding that you are mediating in the absence of trust between the parties. For example, if we are to be able to ensure children’s safely when with a parent, it may be essential to have a conversation with this parent about cocaine drug taking, particularly if there is a factual past history of such and stays in rehabilitation. To be able to confront this issue openly and to the satisfaction that the other parent can be hard hitting.

The best way to do this is to mix the challenging questions with an empathy statement for the party and then to link the challenge to best interests or self-interests of the parent being challenged. For example, in mediation, this could be done as follows; “I understand that hard drug taking has been an issue for you in the past and that you have worked hard to overcome this in rehab on several occasions. This is not an easy task and I wonder if you may still have a drug issue that we should discuss here? This is of importance as I know that you have said throughout this mediation how much you love your little daughter and that it is important to you that you can have an ongoing relationship with her and that she is safe and looked after well. Could we talk about your drug habit so we can then discuss how you may be able to take steps to protect her when she is with you?”

(10) Choice and Responsibility
Mediators can help the party to understand that they are making decisions in the present. Although they may have started on a path there is no requirement to continue in an adversarial mode. If they do that is a choice that they are making – no matter how much has been spent in time and resources. Helping parties to understand that they have choices and that they are responsible for those choices may assist them in stepping off the carousel. For some people the concept of choice and responsibility is foreign to them and may need to be spelled out explicitly in separate and / or joint session by the mediator in a clear but sensitive manner.

Choice and responsibility techniques are ways of challenging the party’s beliefs about the conflict. Many parties will have only negative beliefs and experiences of the conflict. As we change the language in which the parties describe their conflict into mutual responsibility and choice, we are working to change their understanding of the nature of the conflict. We need to give them an alternative narrative of the conflict, which can reveal: the opportunity, the chance to change, the possibility of learning.

As they come into mediation, something has been broken or lost in their lives, even if they were not aware of it. As parties emerge from mediation, they have the potential to achieve a new life for themselves. Not everyone is released from conflict to a brighter future and it would be wrong to pretend that this is the case. For some parties, they will remain mired in pain, or see every challenge as a punishment, and for some the conflict leads to more limited financial options. However, even for parties whose circumstances
are far from ideal, there is still a choice to be made about whether they move beyond the conflict or remain tethered to it, emotionally and psychologically.

Anchoring is a prime example of tethering and ignoring choice. Whether it is a position about a legal outcome, or a belief about the other party’s need to surrender, parties may come to mediation with anchors in place.\(^{18}\) This cognitive bias describes the tendency for all humans to rely on the first piece of information we receive that supports our case. For example, if their lawyer has told a party that they should walk away with 70% of the joint assets and that any judge would agree, it will be a labour of Hercules to challenge that belief.

Luckily most lawyers are too wise to offer guarantees about what will happen in court, but often parties will hear what they want from legal advice due to confirmation bias. In a recent mediation, after a client had spent some time arguing that the judge would issue a court order to stop a parent from drinking totally, the party was asked to call their lawyer to confirm the understanding. Within minutes it became apparent that the lawyer had not said this and in fact had said that, provided the children in the parent’s care were safe, as an adult, the court was unable to make such an order for the party to stop drinking all together. The party was devastated and needed some time to readjust their thinking before they were able to move on to negotiate constructively regarding the children’s arrangements.

Apart from seeking clarification of the anchor, it may be necessary to risk assess the bias to assist the party to de-anchor. For example, if a party believes that 70% of the joint assets will be awarded to them on the basis of infidelity, it may be necessary to use doubt creation if this is out of the range of legal outcomes. By working with the party to understand the risks contingent on proceeding to court a mediator can help bring the party out of the insult zone and within a range of potential legal outcomes.\(^{19}\)

Risks do not just involve the cost and time of legal battles, but also include: the emotional, physical and psychological costs; the deterioration in any future relationship; the strain on any others, including children, extended family, friends and work colleagues; the distraction from any work or personal commitments; the length of time to resolution; and the potential damage to a party’s ability to move forward.\(^{20}\)

\((11)\) Managing desire for punishment and revenge, clinging to ‘victimhood’ and unmasking the reality

In order to address this behaviour in mediation it is important to gain some understanding of the party’s perspective as to why they are pursuing this behaviour even when it may be to their own detriment. This will require careful questions to draw this out and to enable

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\(^{18}\) Dan Ariely, *Predictably Irrational* (revised ed.), Chapter 2


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the other party to gain this understanding of the effect of some past action on the other party and why this is felt so deeply. All behaviour has a reason for why it has surfaced and it is helpful to assist parties to move beyond the behaviour to the reason; to the actual source of the conflict. Revenge is an escalation of normal anger to a sense of explicit or seething rage. It is usually driven by feelings of shame, humiliation, regret and powerlessness. As such, it needs to be handled even more carefully than anger. Some people still believe in the “eye for an eye” concept and that their sense of extreme anger will only be released if they can punish the other. This will usually require in their view a settlement that is outside the range of normal legal precedent. These parties would prefer this course of action in the mediation than forgiveness, letting go and moving on. Punishment is also closely linked to victimhood which some parties live their life by. They cannot accept responsibility for their role in the conflict and project blame in the mediation onto the other person. We hear words such as “How can you do this to me? You owe me. I gave up my career; life; happiness for you. etc.” Others lie and distort the truth to avoid responsibility or minimise and make excuses for their actions to shift blame. Bringing parties to a place of mutual responsibility, but not necessarily equal responsibility, for the problem or conflict will enable parties to move to mutual responsibility for problem solving and resolution. Cloke describes in “Mediating Dangerously” that we need to put everyone on the hook rather than letting them off the hook. We need to assist parties to discover that both ‘victims’ and those that let the conflict develop and / or escalate are also responsible.

Earlier we talked about cognitive dissonance and the need to take people there in mediation. Use of this diagram and carefully timed mini-speeches regarding victim behaviour being a choice and changing one’s thinking can assist to help party’s feelings in this regard and can assist them to move forward with more positive attitudes and negotiation behaviours. It may also be appropriate to take people to a higher ground in the mediation so that their sense of injury and the strong feelings associated with this can be address not just for themselves but in conjunction with some change to policies or organisational structures that will assist others in the future. This way they can move on with a sense of justice; overcome feelings of shame or humiliation and leave the mediation with a real or perceived sense of restored power and control.

> If we could read the secret history of our enemies, we should find in each [person’s] life, sorrow and suffering enough to disarm all hostility

Henry Wordsworth Longfellow

(12) Drop the Drama and the Poses

Some parties in mediation are prone to histrionics and drama. Whilst ‘victims’ can do this to heighten their pose of being an ‘innocent sufferer’ at the hands of the other party, some parties do drama as a way of life and in the mediation for attention and to gain notice, validation, sympathy and support. There may also be underlying reasons and feelings for why the party is behaving in this manner such as low self-esteem, shame, fear, guilt and / or deep pain and hurt. People who behave in this way are reluctant to show their real self

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21 Cloke, supra note 2, p. 99
22 Porter, supra note 1, p. 18

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and adopt a pose or mask to hide this. Real problem solving based on communication and interest based negotiation cannot be facilitated whilst these behaviours exist in the mediation.

The mediator needs to be able to sensitively assist these parties to drop the drama and the poses and to enable the other party to see and understand the reasons behind these as it is usual for the other party to be viewing this behaviour with disrespect, distain, distrust, insensitivity and dismissal. They in turn adopt the pose of the virtuous party and mask of self-justification. Intervention needs to be done in such a way by the mediator that the mask wearer is not judged negatively as this will only serve to heighten this behaviour and the instinctive negative reactions by the other party. As well as using authenticity and empathy to enable this, the mediator may find it useful to facilitate a conversation to uncover each party’s real intentions in the conflict and separate this from the people involved and the actual effect on them.

Parties may need to be coached in separate sessions how to speak about this and what language they can use constructively to gain the desired effect in the mediation. By so doing the mediator is able to redress the past hurts, address the current effects on the conflict and move parties to a place of recognising the need for resolution.

We recently had a mediation in which one party had made false allegations of kidnapping the children in another country whilst all parties were there on holidays. This was an over-reaction and designed to put negative attention on this matter to try to bring about a falsely held desire for reconciliation. The accused party was extremely hurt by this behaviour and his justification for wanting a divorce and care of the children escalated. The other party was bitterly disappointed by this outcome of her behaviour and quickly escalated the legal proceedings to justify her original behaviour. By the time this reached mediation the emotions and cognitive justifications were very high and the positional stances of the parties extreme. Through the use of all of the above skills and techniques and appropriate mediator attitudes, this matter was resolved and the parties are now sharing the care of the children to assist the parties to de-escalate the drama and drop their poses; to open up the emotions and facilitate the necessary difficult conversations in the children’s best interests and to demonstrate appropriate co-parenting communications and behaviours.

(13) Forgiveness in Parties’ Best Interests
For some parties, they need more than conversation, understanding and redressing of hurts to be able to move forward. They need to come to a place of forgiveness. Whilst this may not be common or necessary in all mediations, it is powerful when it can happen. This will require a deep level of understanding of the parties’ experienced hurts by the mediator and a willingness to spend the time and provide the sensitive and empathic space for a party to work through some intrinsically personal issues and feelings to come to a place of healing and forgiveness. This will start in the Intake sessions and continue throughout the mediation. It will also require transparency and honesty in the process so the other party is aware of this intervention.
In a recent case, we needed to do this with a woman who learned just prior to the mediation that her husband was in relationships and had been for a considerable amount of time with several other people who were transgender and that he had used much of their small pool of financial assets to pay for their surgeries to satisfy their needs. Until this discovery she remained in love with her husband and had very strongly held beliefs about marriage, family and the children’s need for both parents in their lives. When she came to the mediation she recognised that the betrayal of her value system by the other party was preventing her from being able to co-parent with him and to reinforce positively his relationship with their children.

She was in a place of turmoil and inner conflict. Once we were able to facilitate some mutual responsibility for the break-down of the marriage and parties were able to drop their poses around victimhood and self-righteousness, we were able to provide the necessary environment in the mediation for her to be authentic about her inner turmoil and work through this to a place whereby she could forgive her husband for his behaviour. He was able to express his sincere regrets and apologies for the hurts he had caused. We could then move forward in the mediation to resolve matters for the children’s arrangements that would be workable in the future. Cloke talks about making it possible for parties to be able to ‘embrace their suffering’ and to ‘find courage and strength in their victimisation’. Parties need to “giv[e] up all hope of having a better past” if they are to forgive and move forward.

Porter sees forgiveness as a gift from one person to another, but he cautions that this journey must be at the pace of the person who was harmed. Importantly, Porter notes that forgiveness is a gift one gives oneself to free oneself from the harm. In forgiveness, we have the opportunity to transform our story, into a smaller part of our greater life story, and not the defining event.

For example, a couple with a long marriage had spent some months working through a mediation process to finalise their arrangements regarding children and finances. At the end, the final step was to sign the consent summons. We received a message asking if the parties could come back as the husband believed the wife had an issue with the consent summons. However, once we were in the room together, it became clear that this was not a last minute attempt to change the financial balance. The wife had explained during the mediation that she needed acknowledgement. Although, the husband had provided this acknowledgment during the sessions, the wife had not been ready to forgive. She remained as Porter describes it ‘in thrall to the offence’. The consent summons prompted a crisis and at the mediation session, she was able to accept the husband’s acknowledgement. This was helped in part by a story the husband told of the early days of their marriage around a choice of lamb chops for dinner.

23 Cloke, supra note 2, p. 93
24 Cloke, supra note 2, p.90
25 Porter, supra note 2, p.35
26 Id.
27 Porter, supra note 1
and how this symbolically showed their different views around the finances and risk. It also provided an emotional connection and acknowledgement that the wife that the husband had been present and connected throughout the marriage.

(14) Reality Testing and Cautioning ‘Counterfeit Nurturance’ and ‘Dangerous Empathy’
As we have stated, it is risky to encourage parties in mediation to give up their illusions, poses and masks in mediation; however we have also tried to show how important it may be possible for mediators to create hope in mediation for holistic resolution. We need to facilitate heartfelt and open communication through our skills and attitudes of empathy, intuition, mindfulness and awareness. We also need to name behaviours and reality test issues, negotiation behaviours and potential outcomes appropriately. We need to risk assess parties alternatives to reaching agreements and to maximise the potential for best outcomes for both parties.

We believe it is important to examine empathy in more depth as this can be both positive and negative. Sigmund Freud cautioned in his teachings about the phenomena of “counterfeit nurturance”; of the point where too much empathy becomes destructive and where this can then entrench people in their feelings and help to justify their positions. We need to empower parties to be comfortable to change and knowledgeable to know how. D.H. Lawrence also labelled this phenomenon as “the greed of giving”. As professionals, including mediators, we need to be aware that we can gain self-gratification out of using this skill too much and not knowing when to move on from this positive foundation of empathy to open Pandora’s Box and use more risky and challenging skills, we need to carefully balance the tension between empathy and challenge. It requires self-awareness, theoretical knowledge, careful assessment and intuitive planning.

These are skills and attitudes for experienced mediations and should not be expected of new mediators. Mediators may be criticised in mediation or by supervisors, when they challenge too robustly or when they use these more risky skills. Balancing empathy and acknowledgement with challenging and reality testing is a grey area; however, it is an essential strategy and component of mediation if we are to overcome impasse and move parties to resolution through cognitive dissonance and consequent cognitive, emotional and behavioural changes to mutual resolution.

Porter describes how reconcilers live in the tension but that as such we must never succumb to becoming cynical nor just see pure possibility separated from reality as we risk becoming irrelevant idealists.

(15) Redefining Success
What is success for mediators? For some mediators, success is measured in settlement agreements, or numbers of mediations, or referrals from lawyers. We believe that as mediators we need to reconsider our need for, or definition of, success. Success as a mediator is working to the best of our ability with each party to assist them to achieve

28 Porter, supra note 1, p. 28

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mutual resolution. It is also responding as an authentic and humble person to facilitate their growth and understanding of their own conflict, the issues needing resolution and the interests and feeling underlying these. It is a deep belief in the sanctity of the trust placed in our hands and a commitment to honour that trust.

As such this may mean that for some parties there is no settlement or resolution. As one of the fundamental pillars of mediation is party self-determination this demands our recognition of the basic right of the parties to not transform, to not seek resolution. As Cloke notes, everyone has the power, if not the right, to choose suffering.\textsuperscript{29}

We may despair of their choice, but it is without any doubt their right to make this choice. It is their lives and they must live with the resolution or without it. Our role is to illuminate the choices available to each party, to enable that party to make an informed choice. If we have done this then we have fulfilled our role and remained faithful to our obligations.

For other parties we need to acknowledge that they may not be capable of negotiating a resolution with anyone. Recently, we saw a party with narcissistic personality disorder traits who was not capable of empathy, even for his own children who were being subjected to his verbal taunts and criticisms. It prevented him from being able to conceive of any perspective other than his own. As this became apparent during the process, it became clear that there was no path to resolution through the mediation. The party was unwilling to conceive of the other side’s needs, his children’s needs or to consider options to meet them. We need to have faith and perseverance but there are situations where mediation is dangerous to the parties and needs to be stopped.

The price of peace at any cost is not acceptable. Mediation is designed to facilitate collaboration but not capitulation or to endorse coercion. If the process is being abused then we need to be strong enough to step in and terminate the mediation.

**Conclusion**

By unlocking Pandora’s Box we have tried to show that there are additional, albeit more risky, skills and techniques that can lead to a sense of hope for the mediation and the parties; hope for change; hope for letting go of the hurts and negativity of the past; hope for a better future and hope for resolution, certainty and a new beginning.

We have described some of these additional skills and have provided some case examples to illustrate how these can be employed in mediation appropriately. These skills and techniques need to be coupled with appropriate mediator attitudes and behaviours such as: humility; perseverance; persistence; patience (even when the parties or their representatives may be giving up hope); authenticity; transparency; honesty; trustworthiness; realistic confidence in one’s own abilities; self-awareness, presence and clear ethics and values.

\textsuperscript{29} Cloke, *supra* note 2, p. 75
This partnership of skills and attitudes allows us to mediate from the heart, to address the core of the conflict and preserve our professionalism. Like Pandora we can then approach our mediations with courage and hope.