

KELLEHERS AUSTRALIA

Negotiation and Mediation

The techniques and skills required to negotiate or mediate (legal) problems are often overlooked or misunderstood. These skills are well understood by the Kellehers team and deployed regularly for our clients.



Figure 1 Prof Lela Love and Hubert Algie 'in action' with a practical demonstration

In recognition of his experience in this field, Hubert Algie, again, accepted the invitation to lecture on these topics at Humboldt University's summer school, working with international experts in Berlin.

Some of the expert lectures included Professor Lela Porter Love, director of the conflict resolution faculty at Cardozo Law School in New York City, one of the most successful and highly ranked schools in this field in the United States.

Professor Jörg Fedkte is a lecturer at both Tulane (USA) and Passau (Germany) Universities. He has a wealth of experience as a mediator and negotiator working throughout the Middle East as a consultant for the German Government, assisting in dispute resolution and constitution drafting. Professor Moti Mironi, an experienced academic and industrial law negotiator from Israel, is currently among other things on the mediation panel of WIPO (World Intellectual Property Organization) and CAS (Court of Arbitration for Sport).



Figure 2 Prof Fedkte and Prof Mironi preparing the students for their negotiation.

Dr Greg Bond, is a practicing mediator in Germany and throughout Europe, and a Lecturer at the Technical University of Wildau (Germany).

These experts amongst others brought their wealth of experience to the course, with discussion on localized disputes, among national theatre companies, as well as Europe along with international disputes such as Brexit and within the Court of Arbitration for Sport system.



Figure 3 Christian Hartwig, faculty member with, Prof Fedkte and Dr Bond debriefing the morning's class

The annual two-week teaching program attracts students from all over the world.

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This Newsflash brings together some helpful tips for negotiation and mediation garnered from this course in Berlin.

Listening

Listening is easy, right? Not quite. The skill of active listening is vitally important in both negotiation and mediation. Sure, we generally 'hear' what people say, but often we miss important parts of what is being said. We can become distracted either by a desire to speak next, or with our own thoughts or preconceptions.

Active Listening is distinct. It involves a more complex interpretation and understanding of the significance of what we hear. Skills for an active listener can be divided into three main clusters: **Attending Skills, Following Skills, and Reflecting Skills.**

Attending Skills are generally concerned with the physical environment for example, your posture, surrounding environment, eye contact. Some describe Attending Skills as listening with your whole body.

Following Skills are directed at opening dialogue, while retaining space for the other party to speak. This is done with infrequent, but open-ended questions and attentive silence.

Reflecting Skills close the active listening loop by reassuring the speaker that she or he has been heard and understood. Reflecting, in a natural and un-robotic way, is difficult. It requires the listener to restate the feeling or content of what was communicated and demonstrate a real understanding and acceptance of that feeling and its content. This can be done by paraphrasing what was said to reflect feelings or content.

Active Listening is a great skill in general. Next time you are with a friend for coffee try some of the active listening skills. See how you go and the impact it has on your conversation.

Trust

Trust is critical. Once trust is lost, it is almost impossible to rebuild. With trust, parties can find themselves making agreements of surprising value with minimal risk of breach or subsequent enforcement costs.

The negotiator or mediator can aid trust building by some simple approaches –

1. Promise little;
2. Always do what is promised; and
3. If for some reason a promise cannot be kept, communicate that quickly to the other party.

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Negotiation

Negotiation is, generally, a dialogue between two or more parties working to reach an agreement.

When negotiating either yourself or for someone else, it is important to identify the Zone Of Possible Agreement ('ZOPA'). A clear ZOPA allows a negotiator flexibility to adjust as new information comes to light, while ensuring the negotiator does not overstep or misunderstand her or his authority. In practice, it is rare to have a complete picture of the ZOPA for each party, i.e. you usually don't know the highest and lowest figures of the other party. But understanding your ZOPA, or that of your client and, as far as possible, the other parties likely ZOPA will aid the best outcome and create value for both parties overall.

Both the negotiator and client need a clear understanding of what is their Best Alternative To a Negotiated Agreement ('BATNA'). The reverse of this is also worth understanding clearly, i.e. the Worst Alternative To a Negotiated Agreement ('WATNA'). Clearly understanding the 'walk away' option(s), ensures parties do not over commit, get carried away during negotiations or overzealously bargain for a better deal due to personal interests.

'Anchoring' occurs when a party communicates a particular position, after which the negotiation becomes centered or anchored to this. For example, if a party sets a figure of \$2M in relation to a settlement offer, it is likely to anchor the parties towards a settlement figure in that region. However, if a party unrealistically anchors, this can possibly harm or end negotiations. For example, from a \$2M anchor, it may be difficult to accept \$1,000. Negotiating parties need to carefully consider any anchoring positions.

Mediation

Mediation, is a process where a neutral third person assists parties to reach consensual settlement. Mediation can take many different forms. The Berlin summer school teaches a 'classical' form of mediation – based on the Harvard Technique.

A mediation can broadly involve the following steps:

1. Mediator's Opening Statement;
2. Information Gathering;
3. Problem Identification/Agenda Setting;
4. Problem Solving / Options / Brainstorming;
5. Reaching agreement / Writing Agreements.

At the **Information Gathering** stage, the mediator's key challenge is distinguishing between **Issues** and **Interests** of the parties. Generally, '**Interests**' are underlying needs or desires which motivate people (e.g. respect, friendship or safety). Whereas '**Issues**' are likely particular matters in dispute being something controlled or blocked by one party which the other needs.

After Information Gathering, a Mediator then works with the parties to set and confirm an Agenda. **Issues** usually all go onto an Agenda, but **Interests** do not always form an agenda item.

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The mediator then assists the parties to work in an orderly fashion through **Agenda** items. This can involve further Information Gathering, as well as **brainstorming** and workshopping of options. Techniques that a mediator can use to assist the parties include role play, framing creative ideas, caucusing and rotating the parties between isolated times and times together.

Should the parties reach an **Agreement** on some or all of the matters in dispute, it is vitally important that the mediator, while congratulating them for this achievement, exercises caution in helping to form an agreement. In an ideal world, the mediator should act merely as a scribe for the parties. However, formalizing an agreed outcome from a mediation is an important step in avoiding problems or gaps in deliverables on the agreement by working through the specifics of the agreement including **WHO, WHAT, WHEN, and HOW?**

Whilst many of these skills appear simple and/or obvious, their delivery and management in practice is nuanced and complex. Meticulous preparation and planning is vital for any successful negotiation and mediation.

Beyond legal practice, these skills are helpful in everyday life and can help you better connect and understand those around you.

Kellehers is happy to assist in negotiated dispute resolution. Hubert Algie has a proven record of success.

Hubert Algie
4 September 2018
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