MEDIATING LIKE A MARTIAL ARTIST
(or Mediating with Mind and Body)

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1. THE PROCESS OF MEDIATION

Mediation is now an invaluable adjunct to litigation and an important tool in any young lawyers kit of techniques to assist with the resolution of their client's disputes. As only 5% of litigated matters go on to final determination by a judge, the ability to assist parties with the early, effective and collaborative resolution of a dispute has become a worthwhile skill. As well, with new legislation like the federal government's, *Civil Dispute Resolution Act 2010* in force, and similar legislation proposed for New South Wales, it is now vital for young lawyers to know about the best ways to employ alternative dispute resolution processes, especially mediation.

The NSW Law Society definition of mediation, is as follows:

> Mediation is a process in which a mediator independent of the disputants, facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants.
>
> The mediator does not impose a solution upon the disputants. It is not his/her function to attempt to coerce a party into agreement nor should he/she attempt to make any substantive decision for the parties. He/she may raise and help the parties explore options for settlement. It is not the mediator's function to give legal advice to the parties.

[1] **About the Presenter**
Derek Minus is a specialist in resolving business and interpersonal conflicts. Accredited as a mediator in 1992 he has mediated or conciliated over 1,000 matters privately in all types of disputes or as a member of the CTTT or the WCC. He is an accredited Family Dispute Resolution Provider and a specialist in conducting the joint mediation and then the arbitration of legal disputes. His particular experience as an Aikido martial arts practitioner for over 35 years means he is often sought out to handle high conflict, emotionally charged partnership breakdowns. He practices as a barrister-at-law, nationally accredited mediator and Chartered arbitrator at Mediation & Arbitration Chambers, Sydney.

Mediation then, is nothing more than an assisted or *facilitated* negotiation.

However, there has for many years been an ongoing debate as to what the precise nature of the mediator's "facilitative" intervention should actually be. For example, should the mediator take a hands-off role by assisting each party to reach their own solution, or instead, actively conduct an investigation, propose solutions for adoption and give expert legal opinion and advice to break down the parties adherence to their positions, in the hope of getting them to settle?

2. MEDIATOR STYLES

Mediations conducted by prominent ex-judges, court registrars and many senior legal practitioners are unrecognisable from the processes that are taught and recommended to new mediators. Lawyers have evolved a style of legal "settlement" mediation, where the parties are in separate camps (often) in separate rooms, with the mediator moving back and forth between them, exchanging offers and imposing their viewpoint on the likely success or otherwise of the party's case.

In these mediations, lawyers play a protective, cocooning role, preventing their clients from speaking even on those brief occasions when they are together with the other side. This destroys one of the greatest features of mediation - the ability of the parties to play a direct role in their own dispute.

Many ex-judges and legal practitioners are more comfortable with this style of process than one which involves dealing with the a party's angst and anger. In fact, it is often the unabashed intention of selecting this process and this style of mediator in the first place. Often a lawyer wants as mediator, some prominent ex-jurist, who will "tell" their client that they are being unreasonable and ought to settle. This settlement style is also known for cramming the mediation into a single day, then mediating without a break, with significant pressure brought to bear on a party to decide on a settlement before they are allowed to leave. Once

an "agreement" is reached it has to be recorded then and there in case the parties have a change of mind.

This is the antithesis of a good resolution. A good agreement should be strong enough to last until the following day, after a party has gone home, after they have had the chance to "sleep on it" and after they have told the influential people in their lives about it. If the agreement reached at mediation cannot pass those tests then it will not last in the longer term and not provide a beneficial outcome to the parties.

Opposed to this settlement style is a "transformative" approach. Here the real value of the mediation lies in the ability of the mediator to keep the parties together and talking to each other. The transformative mediator recognises that the parties know far more about the dispute than their lawyers ever will, because it is the parties who know the entire history of the relationship, the nuances and side issues. It is important to remember that these same parties at some earlier time, made the decision to enter into a commercial and contractual relationship for their mutual gain.

Every dispute has many dimensions. Putting the parties to the dispute in close contact with each other allows them to explore the range of significant and influential aspects of the relationship. A skilful mediator will be able to follow the parties around long enough to share with them the different perspectives of the reason for the breakdown and then lead them jointly to explore the bases for the possible settlement of their dispute.

This "transformative" style of mediation aims to be people centred. Baruch Bush and Jo Folger who have championed this approach to mediation describe it as being focussed on empowerment and recognition. Rather than a search for a single answer, the transformative style allows for parallel, personal and multiple "truths" to co-exist. Each person's perspective or narrative is welcomed and accepted. There is no fact finding by the mediator and the only people who are at liberty to question a party's perception of the truth (and only then to the extent

that the response is useful in assisting with resolution of the dispute) should be another party. The mediator is chiefly concerned with managing expectations and sharing and examining options to resolution.

3. MARTIAL ARTS AND THE RESOLUTION OF LEGAL DISPUTES

A discussion of martial arts and mediation would seem to have very little relevance to the work of lawyers, either now or historically. However, from biblical times, people have engaged in trials of martial strength as a way of settling disputes, we only have to think about the battle between David (of the Israelites) and Goliath (of the Philistines)[2].

In 50I A.D. King Gundebald, of the Burgundians, legally established the "judicial duel" or trial by combat. He prescribed that:

> "Whenever two Burgundians are at variance, if the defendant shall swear that he owes not what is demanded of him, or that he is not guilty of the crime laid to his charge; and the plaintiff, on the other hand, not satisfied therewith, shall declare that he is ready to maintain, sword in hand, the truth of what he advances; if the defendant does not then acquiesce, it shall be lawful for them to decide the controversy by dint of sword. It being just that every man should be ready to defend with his sword the truth which he attests, and to submit himself to the judgement of Heaven."

Gundebald's example was followed all over western Europe, and gradually "wager by battel" became an accepted part of the medieval system of justice. In England, trial by combat was the only honourable means of deciding a matter of right, from the time of the Norman Conquest until the alternative of the grand assizes of twelve knights or trial by jury was instituted by King Henry II in 1166.

In his *Commentaries on the Laws of England*, Sir William Blackstone[3] reports that the reason for allowing "wager by battel" was for the sake of such claimants as "might have the true right, but yet by the death of witnesses, or other defect of evidence, be unable to prove it to a jury." According to Blackstone, Pope Nicholas I also suggested that it was allowable "upon warrant of the combat between

[2] Old Testament, Book of Samuel, Chapter 17 verses 1 to 58.
[3] Volume 3 at p 338

David for the people of Israel of the one party, and Goliath for the Philistines of the other party."

Astoundingly, the right to choose trial by combat, although restricted to cases of treason or murder, continued on as part of English law until the nineteenth century. It was last invoked in 1817, when a certain Abraham Thornton was charged with the murder of a girl called Mary Ashford. No doubt advised by a clever lawyer, he claimed the right to 'wage his battel'. After considerable discussion, the Court of Appeal decided in Thornton's favour, Lord Ellenborough holding that:

> "The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, not as we may want it to be. Whatever prejudice, therefore, may justly exist against this mode of trial, still, as it is the law of the land, the Court must pronounce judgement for it."

It was not until 1819, by an act of parliament, 59 Geo III. C. 46 that the English Parliament abolished the right to appeal to the judgement of God in single combat.

Whether the fighting was done by a party's warrior champion, or its legal advocates, the object of the contest was the same, to **establish the truth**. In the trial by battle, the principals would first swear an oath attesting to either their innocence or the perjury of the alleged wrongdoer and call upon God to judge them. The outcome was therefore not seen to be the result of superiority in arms (although most often that is what it was) but an indication of God's divine judgement.

4. THE PROBLEM OF RATIONALITY

People do not come to conflict logically, but emotionally. That is, we do not analyse ourselves and our situation to logically deduce, "*well I must be in conflict*". It works the other way. First we have the reaction then we rationalise it. Our reactions may not even be rational or fit with the actions of the proto-typically defined rational, economic man or in law, the reasonable man.

Although there may be a rational way to play any game of strategy or conduct any negotiation, people may not choose to play that way. They may not understand the correct way to play, particularly where the situation is novel. Or they may not be able to accurately count, or calculate the expected return on any particular action in order to make a valid judgement about the expected utility of their move. Even if they are able to correctly calculate the right move, they may choose nonetheless, not to take it. Sometimes that "choice" will not be a conscious determination but rather an emotive and unconsidered selection, for example a decision to "do the opposite" to confuse or destabilise an opponent.

Researchers who have studied people's game playing experiences have found that players were often more interested in beating their opponent's score than in maximising their own. That is, they were more interested in winning despite the fact that the very strategy they had adopted meant that they were at risk (as in fact often resulted) in both of the parties losing. People apparently gained satisfaction just from competing against the other person and the opportunity to beat them was sufficient for them to risk losing overall.

Despite an *a priori* preference for integrated and co-operative solutions, which may even be rationally preferred on the basis that they represent the best possible outcome, people in conflict do not necessarily choose them. Howard Raiffa found out as much.[4] In his book, dealing with the art and science of negotiation, he explained how he found out that what he had taught was not practically useful, as the people with whom he was negotiating simply did not act rationally as the theory required them to do. Professor Sanchez who outlines Raiffa's experiences in her paper, summarises the usefulness of the concept of the rational man, this way[5]:

> This model of the "rational economic man," influential as it continues to be in law and economics literature (and in the bargaining analysis of adherents to that field) portrays the intelligent human actor as one who is

[4] Howard Raiffa *The Art and Science of Negotiation,* Cambridge, Mass., Belknap Press of Harvard University Press (1982)

[5] Sanchez, *"Back To The Future of ADR,"* at p697.

> primarily motivated to maximize his own gains ... One "material" problem with the rational actor model, as Raiffa discovered, is that its prescriptive ideals are often defied by rational men and women.

5. WORKING WITH EMOTIONS

People are emotional beings. Their emotions can dictate their actions, even when a calm, rational appraisal of a situation would lead to a different course of action being chosen. As William Ury[6], co-founder with Roger Fisher, of the Harvard University program on negotiation, describes it this way:

> "Human beings are reaction machines. The most natural thing to do when confronted with a difficult situation is to react - to act without thinking."

In essence, human beings are driven by their feelings as much as by their thoughts. Whereas our thoughts contain the reference material and information for our decisions, our feelings and emotions provide the colouration and emphasis about how we personally come to judge the value of an outcome from any other one. According to Harvard negotiation practitioners, Roger Fisher and Daniel Shapiro[7]:

> "Our whole life equips us to know about emotions - anger, fear, disgust, guilt, sadness, affection, joy, pride, and so on. We bring to our daily life a rich repertoire of skills to deal with the emotions of others. Regrettably, we tend not to employ these skills sufficiently in our legal practice in trying to settle cases."

Where the focus of our legal practice is on the delineation of legal argument for presentation to the judge who will make the ultimate decision, we do not tend to pay sufficient attention to the emotional feelings of the parties involved in the dispute. Their emotional hurt and upsets are not viewed as significant to the ultimate outcome of the legal process in which we are engaged. So when the legal process moves on to mediation for the resolution of their conflict, the tendency can be to continue to ignore the parties' emotional states and their feelings, as being real or important factors in achieving a settlement.

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[6] William Ury *Getting Past No: Negotiating with Difficult People.* New York, N.Y.: Bantam, 1993

[7] *Beyond Reason: Using Emotions as You Negotiate*, Random House Business Books, 2005

This is a mistake, as focusing on the emotional dynamics of the parties (including their lawyers) can lead to transformative outcomes that surpass the expectations of even the parties themselves. Recognition (and validation) of another person's emotional perspective if utilised carefully, can positively promote settlement. That is the reason why a simple apology, if genuinely delivered at the appropriate moment, can be the culmination of the settlement process, and sometimes a sufficient outcome.

6. COMPETITION VERSUS COOPERATION

Professor Sanchez in her review of the historical development of ADR[8] noted that the impetus for the institutionalisation of ADR within the US legal system was due mainly to pragmatic and political solutions to deal with trade and workplace relationships[9]. But she explains, these developments, were underpinned by theories of law reform propounded by Roscoe Pound, the Dean of Harvard Law School and his contemporary Mary Parker Follett, an influential management consultant and social reformer.

Mary Parker Follett was a proponent of creatively handling the human dynamic of disputants engaged in a joint struggle. Follett saw that an integrative solution to a conflict was possible and preferable to the alternatives of "domination" by third-party decision makers (through the making of binding court orders) or "compromise" (split the difference type settlements reached by the parties themselves, or their lawyers).[10]

For Follett the "creative dynamic" of conflict, if handled integratively, could work to unify disputants in a joint struggle to communicate beyond the "destructive

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[8] Valerie A. Sanchez, *"Back To The Future of ADR: Negotiating Justice and Human Needs,"* Ohio State Journal on Dispute Resolution 18 Ohio St. J. 669: (2003)

[9] Problems in maritime and interstate commerce transactions and labour-management relations gave rise to the Federal Arbitration Act 1925 which an provided for the enforcement of contract disputes and the Wagner Act 1935, which set out a legislated system of rules for governing collective bargaining between labour and management .

[10] Carrie Menkel-Meadow, "Mothers and Fathers of Invention: The Intellectual Founders of ADR," Ohio State Journal on Dispute Resolution 16 Ohio St. J. 1: (2000) at p8 quoting from Mary Parker Follett, Prophet of Management: A Celebration of Writings From The 1920s (Pauline Graham ed., 1996).

dynamic" caused by their differences, enabling each to see aspects of the other's positions as "complementary" in relation to each other, and therefore as potentially unifying.[11]

At Harvard University in the early 1980's, the Harvard programme on negotiation, an interdisciplinary exercise dubbed the "Negotiation Roundtable" was a forum for sharing ideas about negotiation and dispute resolution. One product of this collaborative programme was "Getting to Yes", a widely published and studied textbook on principled negotiation, which appeared at this time.[12] It provided a prescriptive, formulaic approach to negotiation that relied on both parties to a dispute behaving cooperatively and establishing outcomes on the basis of objective criteria.

Despite the book's success and the continuing popularity of the programme set up to teach it, the ideas have been criticised by many commentators as naïve. In a world where competition is entrenched, ignoring competitive impulses presents an unrealistic basis for managing real conflict. Despite the appeal of a theory of principled and fair negotiation to our sense of fair play, rationality and ethical stance, it cannot alone provide a robust solution for dealing with negotiations that involve non-cooperative adversaries.

A classic illustration of this type of situation, was the tension surrounding nuclear proliferation and the arms race between the two superpowers of the 1950s, the USA and the USSR. In particular, the decision whether to build a hydrogen bomb (that used atomic *fusion)* a much more powerful and destructive device than the existing and originally developed atomic bombs (that used a process of *fission*). On a rational basis, each side would prefer that no one built the bomb (a cooperation strategy) rather that both build it at great cost and so create further tensions (the competition strategy). But there is always great pressure to be the

[11] Sanchez, *"Back To The Future of ADR,"* at p685.
[12] Roger Fisher, William Ury, et al. *Getting to Yes: Negotiating Agreement Without Giving In,* New York, N.Y., Penguin Books (1983)

first one to have a new weapon (in this case a superbomb), either to get the upper hand militarily or out of fear of being the one without it.

In 1949, the General Advisory Committee to the Atomic Energy Commission, headed by J. Robert Oppenheimer (a brilliant scientist who had managed the successful development of the Manhattan Project that created the first nuclear devices that were used in Japan) advised against developing the hydrogen bomb.

Their report said:

> *"In determining not to proceed to develop the Superbomb, we see a unique opportunity of providing by example some limitations on the totality of war, and thus eliminating the fear and raising hopes of mankind."*

Oppenheimer personally presented these recommendations to the US Secretary of State, Dean Acheson. Acheson later confided to his chief nuclear adviser:

> *"You know, I listened as carefully as I know how, but I don't understand what Oppie is trying to say. How can you persuade a hostile adversary to disarm 'by example'"?*[13]

Put another way, how can you persuade an antagonist with whom you are in apparent conflict and who is mistrustful of your own intentions, to act cooperatively?

7. WESTERN VERSUS EASTERN WARFARE

What is needed is a different basis for developing techniques of negotiation and dealing with conflict. One that assumes as a starting-point, that parties may be uncooperative as well cooperative, or even downright aggressive, and may move between these different states at different times. Such techniques will be ones that have been proved to be robust solutions used over many years and maybe even many centuries, for dealing with real conflicts, ones that can result in the

[13] Poundstone *Prisoner's Dilemma* at p130.

ultimate resolution, the death of one, or other of the participants. We are of course then talking about warfare.

Mankind has a continuing history of dealing with disagreement and disputes by taking up arms. The urge to fight (and compete) with others for resources whether territorially based, artificial or even imagined, is just as much a feature of our genetic and psycho-social make-up as the urge to socialise and cooperate, if not more so.

It might at first glance seem illogical to look to techniques of killing and warfare for insights into how to overcome these very inclinations, and so realise peace. But peace does not exist in the absence of war, as its very definition requires an understanding of, and the existence of its opposite[14]. Conflict as an agent of change can be a unifying force as well as a destructive one.

From ancient times, the preferred approach of the Western style of warfare, was generally to meet the enemy at an agreed field of battle, head-on in a clash of cataclysmic proportions that led to thousands of men being killed or injured. It was said of the Greeks by Herodotus, that:

> The Greeks, as I have learned are accustomed to wage wars in the most stupid fashion due to their silliness and folly. For once they have declared war against each other, they search out the finest and most level plain and there fight it out. The result is that even the victors come away with great losses; and of the defeated, I say only that they are utterly destroyed.[15]

The First World War clashes on the western front, were the modern day continuation of this ancient western battle practice. With both sides positioned in opposing trenches on featureless, lowland plains, attacking each other in turn with fusillades and frontal assaults, the losses were enormous. In battle after battle, troops were sent in directly against opposing positions and thousands died

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[14] Lao-Tzu (trans. by Ch'u Ta-Kao), *Tao Tê Ching,* London, Unwin Paperbacks (1976), Chapter 2.
"When all in the world understand beauty to be beautiful, then ugliness exists.
When all understand goodness to be good, then evil exists."

[15] HERODOTUS, The Histories (7.9.2) at p60.

in each attack as a result. At Passchendaele[16], the low point of the 1917 campaign, over 400,000 casualties resulted from just two months of fighting. If the First World War was won on the playing fields of Eton, then surely the sporting advice to *"Hold your ground"* was the guideline by which the war was prosecuted and the reason so many soldiers met their death in needless battles.

In counterpoint to the Western approach, the Eastern way of warfare suggested moderation and manoeuvre. The Western urge to overcome and totally subjugate its "enemies" is at variance with classic Eastern treatises on the subject of warfare. In perhaps the best known of these[17] it is said:

> 1. Generally in war the best policy is to take a state intact; to ruin it is inferior to this.
> 2. To capture the enemy's army is better than to destroy it; to take intact a battalion, a company or a five-man squad is better than to destroy them.
> 3. For to win one hundred victories in one hundred battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.[18]

These sentiments are also found in the Tao Te Ching[19] the Taoist book of practice of the Way. In Chapter 60 we find the admonition:

> Govern a great state as you would cook a small fish (do it gently).

and in Chapter 68:

> The best soldier is not soldierly;
> The best fighter is not ferocious;
> The best conqueror does not take part in war;
> The best employer of men keeps himself below them.
> This is called the virtue of not contending;
> This is called the ability of using men;
> This is called the supremacy of consorting with heaven.

In reading these quotations, it is important to note that the concession of cooperation, even though the result of a superior ethical attitude, was offered not

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16 Robin Prior and Trevor Wilson *Passchendaele : the untold story,* New Haven, Yale University Press (1996) at p 186.

17 Sun-Tzu (trans. by Samuel B. Griffith), *The Art of War,* New York,, Oxford University Press, Oxford University. (1963)

18 Sun-Tzu *The Art of War* at p77.

19 Lao-Tzu *Tao Tê Ching*

out of a weakness but out of strength. In this way it differs from many Western people's views of cooperation as requiring concessions to appease the opponent.

The deciding difference in the Eastern context, was the way in which opponents went about the process of reconciling their differences, whilst avoiding costly confrontation. These considerations infuse both the Eastern perspective about, and their practice of, warfare.

Nowhere is this better illustrated than in the classical warrior period in Japan during which time warrior codes of conduct (*bushido*) and ethical standards for personal honour in the conduct of war, were established. Japan was for hundreds of years, one of the bloodiest theatres of warfare. From these bloody struggles, the practice of martial arts was raised to a form of art by warriors (the samurai) who were at the very peak of the social and administrative society organisation. During this period, the samurai perfected their equipment (the Japanese sword or *katana*, the samurai's primary weapon, is today regarded by many as the finest metal weapon ever produced by any country), their techniques for utilising their weapons and the accompanying attitudes and philosophy of combative deployment.

As a result of historical incident[20], Japan is one of the richest places to study arts which focus on the integration of cooperative attitude in the practice of conflict. It was in the period of intense and enforced peace, during which the martial arts were both favoured (as the retained practice of the samurai ruling class) and emasculated (to prevent uprisings by disaffected groups of warriors) that the practice of "*do*" forms, ways of self cultivation and self development, proliferated.

[20] Following his unification of Japan, Tokugawa Ieyasu (1542-1616) after winning the battle of Sekigahara in 1600, issued two edicts. The first to close Japan's borders and expel those few foreigners who had gained entry, thereby limiting foreign access and influence and quarantining Japanese culture. The second, the establishment of an absolute caste system forbidding social mobility and the carrying of arms by any but the samurai class. Together these edicts had the effect of fossilizing the samurai warrior arts in a state of suspended development for 265 years, effectively bringing them into the modern age technically and philosophically, largely unchanged.

If the highest point in the practice of a martial art was to be able to "*forget the technique*" then the level of "*do*" required the practitioner to "*forget the self*" in the practice of the form[21].

8. MINDFULNESS OF THE MEDIATOR

What is the "mind" of the skilful mediator? Is there a particular state of mindfulness that we can associate with mediation because it underlies and underscores the right way of practice? I argue that there is, and it is a frame of mind that has been known to Eastern adepts since ancient times.

There are two results I seek to draw from this analysis. First that the "right mind" is associated more with the approach of the transformative mediator, who is not seeking any particular outcome, than the mediator that is solely focussed on achieving a settlement. Second, and this is a corollary that is I believe unexpected and frightening for the Western trained lawyer; that the activities of the "right minded" mediator must necessarily require of them, less involvement, analysis and interference then would be expected from someone with their credentials.

The facilitative mediator, should approach the mediation with a certain mindfulness. The Japanese call it *mushin*[22] a word of which the full import is difficult to grasp by Westerners. Literally it means "no thought" but this does not indicate that the mind is empty of all thoughts, rather that the practitioner is not overwhelmed or diverted by his own desires. These desires are distractions that can take many forms. Hopes for a successful resolution, expectation of results, anticipation of likely circumstances or stages that will occur or especially ego-driven "solutions" which the mediator may try to impose on the parties. Instead the mediator is concerned with the here and now. Of course he understands that the parties have come to the mediation because they want closure and resolution. As well there may be significant financial implications, property settlements or expectation of monies owed under contract, the receipt of which may be a

[21] Donn F. Draeger *Classical Budo,* New York,, Weatherhill (1973) at p33.

[22] "mu" nothingness, "shin" mind. Also "fudoshin" or immovable mind, referring to a mental state of tranquillity allowing the person to act with complete composure in any situation.

driving factor for one or both of the parties. There may be other external pressures, the matter may have been filed already in a court for which he first hearing date is drawing close and the mediation may be a mere step along the way to that final adjudication.

The idea of emptying the mind of all thought is a not only a difficult concept to grasp, but often an insurmountable practice for the Western mind, especially that of the professional technician, who has been trained to make discriminations, employ categorisation and above all, deliver explanations of what is, or is not true.

The practice of "no-mind" was described by the Zen monk Takuan[23] in a letter written to a sword master[24] as:

> The mind that thinks about removing what is within it will by the very act be occupied. If one will not think about it, the mind will remove these thoughts by itself and of itself become No-Mind.[25]

And he quoted an old poem that says:

> To think, "I will not think" –
> This, too, is something in one's thoughts.
> Simply do not think
> About not thinking at all.

Leonard Riskin, the noted mediator who has done much to advance the debate about mediator qualities, has also proposed that mediators need to apply the concepts of mindfulness in order to overcome problems which: "stem in part from certain narrow, adversarial mind-sets that tend to dominate the way most lawyers think and most legal education is structured".[26]

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[23] Takuan Soho (1573-1645)

[24] The sword master was Yagyu Matazaemon Munenori (1571-1646), head of the Yagyu Shinkage school of swordsmanship the official school of the Tokugawa shogunate. His father was Yagyu Tajima no Kami (1527-1606) the second headmaster of the Shinkage Ryu and sword training instructor of the shogun Yoshiaki, Draeger Classical Budo at p73.

[25] Fudõchishinmyõroku, The Mysterious Record of Immovable Wisdom. Soho Takuan (trans. by William Scott Wilson), The Unfettered Mind: Writings of the Zen master to the Sword master, Kodansha International Tokyo; New York (1986)

[26] Leonard L. Riskin, "The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients," Harvard Negotiation Law Review

But although the No-Mind is everywhere throughout the body, it is placed no where[27]. It is the state of mind most suitable to allow the parties to follow their own path to solution. The mind that is fixated at some point or in opposition will not be able to move freely. Therefore the mediator does not hold on to any fixed answer to the conflict that is brought to the mediation. There may be boundaries to freedom of movement (for example, what can legally be done with property or whether children can be removed from the jurisdiction) but there is no right answer, if there was then the matter would have already be settled as the parties would readily know what it was.

Where the parties are stuck at some position or other an evaluative mediator will generally find it impossible to resist intruding into their dispute. Many evaluative mediators, are experts in the field concerning which the dispute is about (e.g. family law, building claims, intellectual property etc). They practise and advise in this area. It is then only natural for them, particularly where the parties are struggling to find points of agreement, to intrude and offer the solution. Their proposed solution may even be technically "right", in that their suggested resolution is correct in law and most probably would in all probability be the most likely decision to be reached by a competent court charged with deciding the matter.

However, this type of interference is dangerous, as if it is not immediately rejected it creates an unwarranted interference with the parties' own solution frame. Now instead of only having two energetic points to join, there are now three. The difficulty of this is simply demonstrated. Whereas it is easy to connect any two points with a straight line, it is generally impossible to do more than approximate the relationship between three points. The introduction of the mediator's own "solution" can make the process of resolution or unified settlement even more difficult than it was at the start of the mediation process.

Mindfulness in the Law and ADR: Spring (2002)

[27] Takuan The Unfettered Mind at p33.

Unfortunately, faced with this energetic crisis, the expert evaluative mediator, may put pressure on the parties to get them to agree with his or her suggestion thereby reducing the energetic points to one – theirs! This is then, not an example of the mind of the mediator which is "everywhere throughout the body, but placed no-where" but clearly a mind fixated on arriving at only one conclusion.

Also it is most likely, particularly if the parties are assisted by legal representatives who have attended the mediation, that the disputing parties have already received similar advice. The very fact that the matter has not settled before the mediation has occurred, is an indication that the dispute has other aspects (other energies) which are significant to one or other of the parties and a level of complexity that makes it more than a simple one-dimensional dispute about legal interpretations. Often matters of emotional significance are involved. How one party or someone close to them has been treated by the other party may be an issue that leads to a view that the party has failed to act reasonably, or a moral judgment that an individual's personal code of conduct has been "wronged".

All of these perceptions can lead to arguments about principles and a fixation that a trial of the matter will prove one person, or the other, to be "in the right".

9. THE CONCEPT OF CONFLUENCE

Confluence is the powerful, flowing together of two separate and individually distinct streams of thought or action. Just like two great rivers meeting and joining, they flow on together by becoming increasing mixed, so that at some point it is impossible to distinguish the original elements of one or the other[28].

The Japanese call this "*aiki*", harmonising energy (literally *ai* – together and *ki* – universal energy). The word ai-ki-do is made with the addition of the term *do* – way, means the method or the way for *aiki.* Aikido is also the name of a Japanese

[28] Like the flowing together of the Amazon River and the River Negro.

martial art that was developed around the middle of the last century by Master Morehei Ueshiba (1883-1969) a martial arts practitioner whose life spanned the ancient and modern eras in Japan.

The significance of Aikido for the modern-day mediation practitioner, is that it offers consistent principles for dealing with conflicts involving (either passive or aggressive) non co-operative adversaries. Whilst seeking joint, integrated solutions, following the Aikido principles allows a practitioner to employ a non-violent response to aggression combined with a flexibility of movement to neutralise and harmlessly redirect the aggressive energy of the attacker.

Using the actions of *aiki*, aggressive non-resistance is impossible. The *aiki* practitioner's strategy in dealing with a resistive and non-cooperative adversary is not to force, pull or push, fight or flee from them but to **follow them**! And after establishing a mutual centeredness, to let them lead you to where **you** want to go. This is what Professor Ury describes as, "letting the other person have your way".

The power of confluence, used in this way is overwhelming. The sole or single power of one person, is overwhelmed by the joint force of both people acting together. The uniqueness is that the initiation comes from us, not giving in or getting out of the way but powerfully going with totally blending, with the others strength and intention. This is not just about using a person's power against them, it is using that power with them. Often in the very practice of this process both parties are changed and their directions are altered from the original course each individual had intended. When this occurs in a dispute resolution environment, the room takes on an energy that was not there before. Rather then the slow grinding forward of the settlement process with a word or phrase changed here or a difference split there, it is as if people are propelled forward by a seemingly endless flow of energy. The process to resolution takes on a life of its own, so much so that at the conclusion, (usually a lawyer) for one party may well say to the mediator, "*Looks like we didn't need you* (to mediate) *for us after all*".

The genius of Master Ueshiba's development of Aikido was not just in perfecting a physically powerful self-defence form but in transcending the need to employ it. He explained the intention of the art as follows[29]:

> "Aikido is not a technique to fight and defeat the enemy.
> It is the way to reconcile the world and make human beings one family."

In this way he was following the inclinations and experiences of other Japanese martial arts "kenshi" or sword-saints. These were individuals who proved themselves in combat and after many years of study and research (and with the assistance of divine inspiration) had transcended mere technique and reached a point of invincibility.

As Master Ueshiba said:

> There are no contests in the Art of Peace.
> A true warrior is invincible because he or she contests with nothing.
> Defeat means to defeat the mind of contention that we harbor within.

10. SOME STRATEGIES

Japanese martial exponents who had reached a level of sophistication which transcended the mere use of weapons for killing, described their art as *heiho*, sword strategy. Here then, are some of the strategies they engaged in, and an explanation for their use in a dispute resolution process.

1) *Accept, Accept, Accept.*
Do not to react, but focus on controlling your own behaviour.

Acceptance of the energetic situation does not mean agreement. But it provides a powerful basis from which to understand what is really going on. By not resisting and arguing but instead seeking information and direction from the other party, the practitioner gains insight into the "real" situation. By not reacting (and by

[29] Kisshåomaru Ueshiba *The Spirit of Aikido,* Tokyo ; New York, Kodansha International : Distributed by Kodansha International/USA through Harper & Row (1984) at p9.

responding with a mind emptied of self focussed thought) we become able to move beyond the point of conflict and see the greater situation, including opportunities not previously in vision.

Aikido practitioner and dispute resolution author, Tom Crum, tells this charming story of the power of acceptance in his book, "The Magic of Conflict":

> My wife and I once had our early morning mediations punctuated daily by the sound of an automobile horn announcing to our neighbour that his ride to work had arrived. I was increasingly irritated by this and one day said to my wife, "if I had powers, I'd give that guy four flat tires."
>
> "That," said my wife, "is why you don't have powers.
>
> Her remark moved me to serious contemplation, and a few day s later I announced, "If I had powers, all I'd really do is burst his horn."
>
> "That's a bit better," she said.
>
> Further serious contemplation. One morning I declared, "I've got it! If I had powers, I'd see that his horn didn't work in this neighbourhood."
>
> "That's a bit better yet," she said.
>
> I was now quite puzzled, because I thought I had finally discovered the "right action."
>
> At last I realized, "if I had powers, I wouldn't be distracted by that horn."
>
> "Yes," said my wife.

Aikido offers physical techniques to improve personal ease, stability and self-control under stressful and demanding situations, especially involving interactions with other people. This involves the concept of "centering" to bring the energy (spirit) back to a point of repose. For the Japanese, the spirit resides in the lower belly or "hara" at the "tan tien" or one-point, which equates with the physical centre of gravity of the body.

2) *"Do not intend to wound ... but to kill[30]"*

If provoked to fight the swordsman is advised to dispatch his foe without concern or delay, for combat is to be treated as a final and deliberate act, not one to be engaged in lightly. All the more reason therefore not to brandish the sword to

[30] Attributed to Miyamoto Musashi (1584–1645) one of Japan's most celebrated swordsmen

threaten[31], for this behaviour will inevitably lead to injury, certain loss of face and desire for revenge. It was therefore better to keep the sword sheathed than to draw it in a display of anger and aggravation.

This simple message is an object lesson in "not reacting", recognising that emotive action, which is not justified in the situation, is to be avoided. Professor Ury[32] described this as *"going to the balcony"* to step back, collect your wits and see the situation objectively. He also used the analogy of Japanese swordsmanship in quoting the famed warrior, Miyamoto Musashi's admonition to take *"a distanced view of close things"* by looking at an opponent as if he were a far-off mountain in order to distance oneself from your natural impulses and emotions.

3) ***Find the gap between stimulus and response***

Step to the side, to disarm your opponent and diffuse his negative emotions; his defensiveness, fear, suspicion and hostility.

Unlike more conventional fighting systems that employ essentially linear movement, Aikido promotes the use of a circular response to attack. This allows the Aikido practitioner to "get off the line" and avoid the frontal assault movement which can cause the opponent to dig in their heals and hold fast to their ground. It also allows the Aikido practitioner to avoid the opponent's attack.

By stepping off the line and maintaining connection, the Aikido practitioner can move to the opponent's side without fear of injury, as they are not moving into conflict with the opponent but into harmony. At the opponent's side they are no longer threatening but instead aligned with their opponent's line of vision. From here they can appreciate their opponent's unique perspective and grasp how they may have come to their particular (mistaken) belief. They are seeing the situation from the unique perspective of their opponent's position.

[31] In the West, referred to as *"rattling the sabres"*.
[32] Ury *Getting past No: negotiating with difficult people* at pp16-17.

The following "Zen" story illustrates the gap between the reaction to stimulus and the thoughtful response:

> A soldier named Nobushige came to the Zen monk Hakuin and asked:
>
> "Is there really a heaven and a hell?"
>
> "Who are you?" inquired Hakuin. "I am a samurai", the warrior replied.
>
> "You, a soldier!" sneered Hakuin, "What kind of ruler would have you as his guard? You look like a beggar". Nobushige became so angry that he began to draw his sword.
>
> Hakuin continued: "So you have a sword! Your weapon is probably to dull to cut off my head." Nobushige drew his sword.
>
> Hakuin remarked: "Here open the gates of hell!"
>
> At these words the samurai, perceiving the master's insight, put away his sword and bowed.
>
> "Here open the gates of heaven", said Hakuin.

4) ***He who draws fast, draws last.***

Warriors throughout history have dueled for survival. Often evenly matched with the same sword or gun, yet one survived and one died.

Which was better, to draw first or last? To get the advantage of reaching for the gun, or drawing the sword first (the so called "first strike" capability)? Or to stay relaxed (but alert) and only respond to the other's aggression?

In the "western" movies of 1950's America, it was simple, the good guy (a man in a white hat) always drew his gun after the bad guy (the man in the black hat) and won, because he had the moral upper hand. But the logic of physical movement would dictate that the gunslinger who draws his gun first would have a clear advantage over the person who waits to draw his gun, where they are of equal skill. Niels Bohr, the Danish physicist, Nobel laureate, and researcher of the structure of the atom, who enjoyed relaxing by watching American westerns, noticed that the man who drew first invariably got shot. Bohr speculated that this was not just the result of superior skill but that the intentional act of drawing and shooting, was slower to execute than the action in response.

According to BBC reporter Tom Feilden: "Here was a hypothesis that could be tested, and with the aid of cap guns hastily purchased in a Copenhagen toyshop, Bohr duly proved it. In a series of mock gunfights with colleagues Bohr always drew second and always won.[33]

To the Japanese swordsmen, this was not a matter of conjecture but of practice. The idea of "keeping the sword in the scabbard" was an admonition not to react to threats or insults. The sword was only drawn after the opponent had moved to draw his weapon but then with the conviction of one who is about to be killed. Only the way of survival required that the opponent be sacrificed and then only at the last, final moment when no other way of escaping the conflict was available

Recent research from the University of Birmingham confirms this strategy, that it is best to wait for the other person to make his move. In a series of "laboratory gunfights" with pistols replaced by electronic pressure pads, researchers found that participants who reacted to their opponent's movement were on average 21 milliseconds faster to the draw.

The moral of the story is support for the voice of caution and tolerance in dealing with aggressive behaviour. If and when action has to be taken, it is better to move from the situation that is prepared to one which is unknown.

5) ***In conflict – maintain Connection.***

Moving in a circular fashion, the Aikido practitioner is also able to employ centrifugal and centripetal forces to dislodge an opponent from his or her pre-determined position. This circularity of movement also allows the Aikido practitioner to deal with both single and multiple attackers.

By continually moving tangentially to any attack, the Aikido practitioner can keep one person between himself and the other attackers, thereby always having a human shield. The key focus is never to allow the energy of movement to stop, freeze or be held. To do so would allow one or other opponent to pin the Aikido

[33] BBC Today program entitled *The gunfighter's dilemma*

practitioner, by words or actions at some point. By continuing to move in a veritable "dance of energy" the Aikido practitioner is able to touch and draw together each person as an energetically attuned facilitator.

It is important to note that in employing this approach, the opponent is not resisted. Unlike the classical, western, martial approach of confronting the opponent up front "with the facts", as they may be understood, instead the opponent's ideas and particular point of view of the truth, is welcomed and included. Also their energetic appearance is not shunted, diverted or explained away. It is respected as to its full measure and degree. In this way the opponent is not marginalised or ignored.

The skill of the Aikido practitioner is in working and moving with this energy in a way that does not contend, much like a leaf, being carried along on a swiftly flowing stream. What is so significant about this approach, is that the volatile, aggressive and angry individual is accepted and their energy given free rein, but it is directed and led harmlessly away from where it can do damage. The Aikido practitioner in never trying to stop the opponent's energy is not burdened or weakened by it, but rather buoyed up by the extra energy the opponent provides.

This process of getting alongside someone and bringing them with you, is exemplified in Professor Ury's story of President Lincoln[34], who when chastised for referring sympathetically to the Southern rebels, is reported to have observed: *"Do I not destroy my enemies when I make them my friends?"*

[34] Ury *Getting past no : negotiating with difficult people* at p146.