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Bargaining in the Shadow of the Tribe and Limited Authority to Settle

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Abstract

There are a number of predictable hurdles faced by negotiators and mediators. One of these is the tendency of negotiators to say or raise suspicions that they do not have authority to settle. Rather they must first consult with influential outsiders or constituents.

The types of outside influencers are described, and a routine process is suggested to identify important constituents or "tribes"; then to normalize, reframe and turn this barrier into a standard problem solving question such as, "How to manage any influential outsiders?"

Thirteen possible responses to this question (each with inevitable advantages and disadvantages) are systematized for mediators and negotiators to learn and possibly "add value" to any negotiation.

KEYWORDS: mediation, negotiation, outsider influence

BARGAINING IN THE SHADOW OF THE TRIBE AND LIMITED AUTHORITY TO SETTLE

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Aim

The aim of this article is to identify and catalogue a number of responses anecdotally used by negotiators and mediators who discover that there are influential outsiders exerting power over the visible negotiators.

Introduction

It is rare for an individual present at a negotiation or mediation to have "unlimited" authority to settle or make decisions. Even the most rugged individualist usually has someone looking over his/her shoulder. This may be a spouse, child, business partner, CEO, board of directors, shareholders, head office in Chicago, club or church members. We are all part of some "system" or "network" of influences. These people in the background, sometimes in the shadows, can be described as supporters, influences, bosses, stakeholders, third parties, constituents, outsiders, armchair critics, bush lawyers, sticky beaks, nosey parkers,[1] ratifiers, destabilisers, tribal members, intermeddlers, cheersquads,

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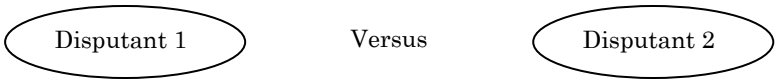
1 A "stickybeak" is "an inquisitive, prying person"; and a "noseyparker" is "a person who continually pries; a meddler" per *The Macquarie Dictionary of Australian Colloquialisms*, (1984), p.299, 220.

principals, hawks, doves or moderates[2]. Here in this article, the terminology of "the tribe" will often be used.

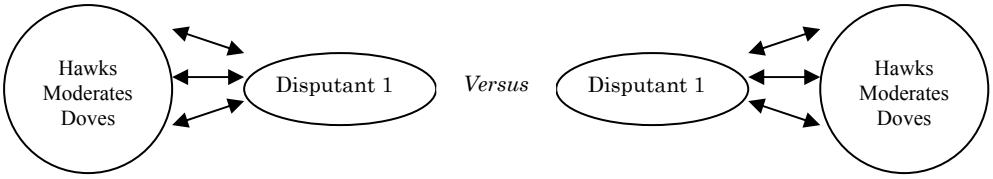
The visible negotiator can be labelled an agent, representative, spokesperson, mouth-piece, pawn, victim, channel, or go between.

The constituents may be physically present during a negotiation or mediation as an audience; or absent in body but present in spirit and influence.

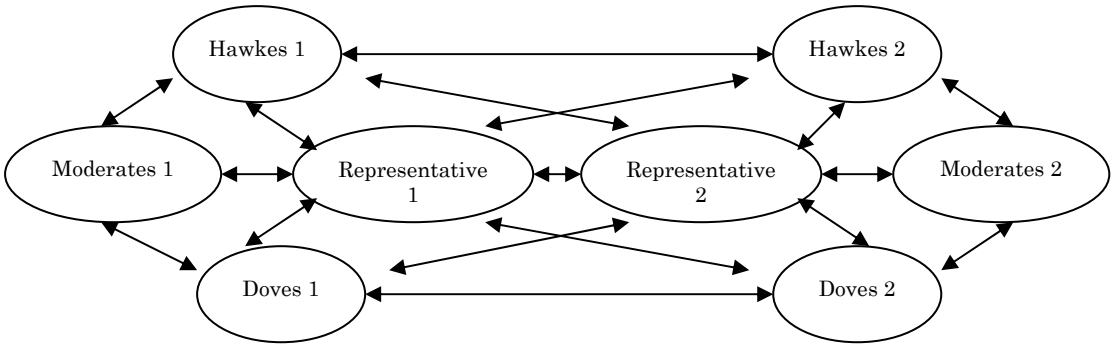
A dispute between mythical rugged individualists is symbolized by:



A more normal dispute can be visualized as follows:



or



2 A "hawk" is a competitive member of a group who has a clear solution as a goal which is perceived as "winning", and who is prepared to engage in contentious tactics, sometimes including violence, in order to "win" in the short term. A "dove" is a person whose major goal is peace and non-violence, achieved by peaceful methods including yielding, even if achieved at short- term costs. A "moderate" is a person whose goal is to find a solution acceptable to all disputants and interest groups, by a combination of mild contentious tactics, negotiation, face-saving and compromise.

Moore characterizes constituent groups as either 'bureaucratic' or 'horizontal'. Bureaucratic constituents are the hierarchy of decision-makers in companies, government agencies, tribes, schools and many other institutions. 'Horizontal' constituents are friends, relatives and co-workers whom a disputant feels obliged to consult and listen to.[3] The following case study illustrates the discovery of a powerful horizontal constituent, namely a spouse.

Case Study 1--Ambushed by a Powerful Spouse

A cotton factory owner contracted with an expert factory designer and builder to renovate sections of his mill for $2 million. When the renovations were complete the owner was disappointed as the promised rate of production did not eventuate until three months thereafter. The new machinery often did not work during the first three months. The factory experienced repetitive "down-time". Accordingly, the factory owner withheld the last payment of $250, 000 to the renovator. Incensed, the renovator commenced court action in one state (the state of the contract) to recover the last installment. Predictably, the factory owner cross-claimed, in the state where the factory was actually constructed, for three months of diminished profits, being around $1million. The entrenched parties and lawyers were required to attend mandatory mediation.

After lengthy and sometimes vitriolic negotiation between the two teams at the table (eleven people in total), the mediator took the two CEOs for a walk down the street. Standing under a tree for an hour with the mediator reframing and asking 'what if' questions, led to a settlement between the two CEOs. However, the tough renovator CEO suddenly announced, "Of course I will not be able to settle this today. I will have to run this all past my wife".

The mediator reframed, placated the other irate CEO and retreated with the renovator CEO in order to phone his wife. In a carefully orchestrated conversation, the mediator spoke to the wife (with the husband present) and praised the husband, explained what progress had been made, empathised with her suffering and loss, brainstormed on the risks of

Various Meanings of "Authority to Settle"

* **Legal Authority**
* **Persuasive Authority**
* **Reasonable Outcome Authority**

3 C. Moore, *The Mediation Process* (1996) 343-347.

Most negotiators have 'authority' and willingness to settle as long as the settlement provides a 'good' or a 'reasonable' outcome that will placate the various members and factions in their tribe. However if any outcome is emerging or imminent outside those vague criteria, then their legal authority, moral willingness and nerve tends to wobble or fade away.

Thus for most negotiators, the accurate answer to the question 'Do you have the authority to settle this dispute?' is 'yes and no'; or 'it depends'; or 'I do have authority, but I will tell you later if I have willingness'.

At law school, neophyte lawyers tend to be inculcated with the sometimes unhelpful fiction that there is only one 'client', and that definitive 'instructions' should come from the client, not from outsiders. That is a useful administrative fiction in a courtroom, but is entirely unhelpful for the work of lawyers and mediators as interviewers, negotiators and problem-solvers.

Lawyers and mediators can relate many tales of how at the end of a negotiation one disputant suddenly and coyly says, 'I just have to make a phone call [before I sign the agreement]'. To which the others exclaim 'But I thought you said you have authority to settle…!' To which the ambusher says 'I do, but….'

The concept of 'authority to settle' has a number of different possible meanings. The word 'authority' equates with the many gradations of power.[4] Thus a negotiator may have 'authority' in one sense, but not in many others. To illustrate this proposition the many categories of 'power' or authority can be reduced simplistically to just three – 'legal', 'persuasive' and 'reasonable outcome' authority.

Legal Authority

First, an individual or representative of a tribe may have *legal* authority. That is, the individual can 'bind' others because (s)he has signing rights for club, a partnership, or a corporation, or for some other group. These 'rights' to commit others legally will usually be contained in a document signed by the members or friends. Alternatively, the representative may as owner or director or manager have implied authority to bind others. Sometimes at negotiations and mediations, a representative produces an irrevocable written authority signed by each member of the family or group (s)he represents.

4 R.J. Lewicki, D.M. Saunders, J.W. Minton, *Essentials of Negotiation* (1997) Ch 9; B. Mayer 'The Dynamics of Power in Mediation and Negotiation' (1987) 16 Mediation Q 75; J H Wade 'Forms of Power in Family Mediation and Negotiation' (1994) 8 Australian J of Family Law 40

In disputes about personal injuries, it is common for a plaintiff to insist that the negotiating insurer for the defendant must "have authority to settle up to the limit of the claim". Insurers can use a variety of tactics to respond to this routine request.

Legal authority is always powerful, particularly when the agreed *immediate* obligations can be enforced by a court – such as the payment of money, retirement of directors, or transfer of land. It is less powerful when it relates to promises for the group to co-operate, trade, or help in ongoing *future* obligations.

Persuasive Authority

Secondly, an individual or representative of his/her tribe may have *persuasive* authority. Persuasive authority can be described as the ability, demonstrated by history and moral courage, to work persistently to convince the various factions within a tribe to comply and co-operate. Many negotiators with legal authority, (eg CEO's, presidents, individual family members), have weak persuasive authority. They will not exercise their legal authority for fear of retribution from their free-wheeling tribe, family or shareholders; and even if they sign a legally binding document, few in their tribe will thereby be persuaded to comply with future obligations.

At a recent mediation in which the writer was involved, one indigenous Aboriginal person present had strong legal authority. She was the director of a corporation and the named plaintiff in the litigation. Clearly, she could personally sign a legally 'binding' settlement. However, her persuasive authority wavered each evening as the hawks in her tribe verbally assaulted her with: 'It's a matter of principle'; 'You're giving up too early'; 'It's not fair' etc. She was ultimately helped to settle legally by a personal written risk analysis, minimal ongoing settlement obligations, and some small concessions to help persuade her disappointed constituents.

Reasonable Outcome Authority

Thirdly, a negotiator or representative at a negotiation or mediation may have '*reasonable outcome'* authority. That is, (s)he has either legal and/or persuasive power to enter into agreement so long as its terms come within a pre-defined range. The range is predetermined by a legal document, conversations with constituents or the perceived current approval of (a majority of? powerful members of?) his/her tribe. Often tribes, head office, constituents or family members give negotiators a limited band of authority as they define 'reasonable outcome' narrowly in their favour or to reflect perceived current 'market' rates. Therefore, it becomes important to know whether the negotiator also has a measure of *persuasive* authority so that (s)he can convince the reluctant tribal

groups, with skill and moral courage, to expand their narrow band of acceptable outcomes.

For example, when dealing with an experienced insurance adjuster in personal injury negotiations, it is normal for him/her to have clear legal authority to settle to the limit of the claim *and* reasonable (dollar) outcome authority. Experience and courage also give him/her considerable persuasive authority with head office if the settlement moves towards unusually high dollar amounts, and/or unusual mixes of apology, physiotherapy, nursing assistance, and building of wheelchair-friendly facilities.

Legal Rules Requiring 'Authority to Settle'

There are now many statutes and rules of court which require that where a court orders a mediation, then each disputant must send a representative who has 'authority to settle' to that mandatory meeting.[5]

Likewise, some case-law interpreting the possible and fluctuating meanings of 'good faith' in negotiations and mediation has predictably required attendance by representatives with 'authority to settle'.[6]

These statutes and case-law do not resolve the general question of what to do about influential outsiders. However, they do create some extra pressure in mandatory mediation situations where a party sends along a clerk or lawyer who blatantly has no legal authority to sign a settlement. Of course, even if a

5 *Uniform Civil Procedure Rules* (Queensland) r.326(2) 'The mediator may decide whether a party may be represented at the mediation and, if so, by whom'; *Alabama Civil Court Mediation Rules*, rule 6 (2003): [S]omeone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session; *Northern District of California ADR Local Rules* 6-9 (2) (2003): 'A unit or agency of government satisfies this attendance requirements [at mediation] if represented by a person who has, to the greatest extent feasible authority to settle, and who is knowledgeable about the facts of the case…'; *Florida Rules of Civil Procedure*, Rule 1.720 (b) (2003) '[U]nless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present: (1) The party or its representative having full authority to settle without further consultation…' (3) 'A representative of the insurance carrier who is not such carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand on policy limits, whichever is less, without further consultation.'

6 eg J. Lande, 'Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs' (2002) 50 *UCLA L. Rev* 69; Native Title Act 1993 (Cth) s.24NA; *Western Australia v Taylor* (1996) 134 FLR 211 ('good faith' obligations are more onerous in native title disputes than in commercial disputes); K. Kovacs, 'Good Faith in Mediation – Requested Recommended, or Required? A New Ethic' (1997) 38 *S. Texas L. Rev* 575.

representative has express written authority from an outside group or organization, this does not mean that the representative *will* sign unless the settlement is within a range approved by tribal members. 'Legal' authority to sign a piece of paper does not necessarily include 'persuasive' or 'reasonable outcome' authority.

Thus the question of 'Do you have authority to settle?' is too simplistic to be helpful in many types of disputes. The word "authority" has too many possible meanings. The three possible answers: 'yes'; 'no'; or 'it depends' are all only partially true. Moreover, three further important qualifications need to be made. A negotiator or mediator may:

- actually *know* that a person present at the table does not have 'authority' in one or more meanings of that word;
- suspect that whatever the representative's confident affirmations may be, (s)he does *not* have 'authority' in one or more senses of that word;
- suspect or know that an agent's declaration that (s)he does *not* have authority to settle, is a normal negotiation *good cop – bad cop tactic*. The real or fictional constituents or principal will growl from a distant back room and enable the agent to plead 'I'm sorry, my boss is being really tough. My hands are tied. That is the best I can do etc., etc.'

How can a mediator or negotiator respond when (s)he knows or suspects that there is limited "authority" (in whatever sense) to settle?

Two vital tasks for any mediator or negotiator is to identify:

1. Who are the influential outsiders/constituents/tribal members behind each visible negotiator?
2. How can these influential outsiders be managed/included/excluded?

Who are the influential outsiders in any dispute?

A mediator or negotiator can attempt routinely to discover who are key tribal members, by asking standard questions during preparation documentation, telephone calls and private meetings with each of the 'parties'. For example, these questions include:

- The writer's standard mediation information pack requires parties to complete written homework which includes the following question 'Do any third parties (eg relatives, creditors, friends) have an interest in the

matters which you are concerned about and have listed above? If so, please specify names and interests.'[7]

- 'If you reach an agreement which is less favourable than you hoped for, is there anyone in the background who might be critical of you?'
- 'Are there any important people in the shadows to whom you will need to sell the outcome of the mediation?'
- 'Do either of you have armchair critics or constituents who are looking over your shoulders?'

Obviously, some disputants do not disclose to a mediator that they will need to convince influential outsiders about any outcome. They lie, or are embarrassed, or over-estimate their own influence over their constituents. At a later stage of preparation, or at the joint mediation meetings, when the mediator has earned further respect, (s)he may be able to locate the outsiders in the shadows, ever-present in spirit, though absent in the flesh, by more direct questions such as:

- 'How will Mary, the head of your department, feel about that sort of result?'
- 'Your wife appears to have suffered a lot as your business struggled. How does she feel about this mediation?'
- 'Most insurers I meet have an authorized range, but then need to make phone calls once the recommended result is outside that range. I assume that is also true for you?'
- 'You will go through blood, sweat and tears at the mediation. That will change your perspectives. Are there any club/church/party members sitting calmly back home ready to criticize your efforts?'

Despite all this tactful investigation, a mediator may not be told until the fateful request by one party to make a phone call at the "end" of the mediation. The mediator may meanwhile live with ignorance or suspicions. This mediator has been ambushed several times after a settlement has been reached, when one party blithely announces, 'Of course, I will not be able to sign today. I have to talk to X first.'

Likewise, many parties who have assured everyone that they 'have full authority to settle' have taken the mediated agreement back to their constituent organizations and been torn to shreds by bitterly disappointed hawks. The second case example illustrates this dynamic.

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7 JH Wade, *Representing Clients at Mediation and Negotiation*, (2000), pp.118-124. See J.R. Johnston and L.E.G. Campbell, *Impasses of Divorce* (1988) ch 2, 'Unholy Alliances and Tribal Warfare' suggests that pressure from relatives is one of the three primary causes for sustaining conflict between highly-conflicted couples.

Case Study 2--Temple Troubles

'Facts' of Dispute:

One pioneering group built a large church/temple (the 'liberals'). More recent members of the temple ('traditionalists') disagreed over absence of headgear and use of chairs in the temple. Disagreements escalated to harsh words, punches, calling the police to the temple. Assault and defamation writs were issued. Subsidiary disputes arose over who was a 'member' eligible to vote; the validity of a hurried election; the use of temple funds by 'liberals' to pay lawyers; the history of which faction's members had given more money to the temple; and plans to spend money on a church car park and extensions.

The two factions applied to the Supreme Court for declaratory orders on the validity of elections, appointment of a temporary administrator, and if necessary, sale of the temple. The judge gratefully referred the bulging court file to mandatory mediation.

Causes and stage of conflict:

Initially values (tradition versus modernity); then relationship and name-calling; then loss of trust, suspicion and stereotyping; deep intra-psychic hurts from the past; family tribes in background; data conflicts about 'justice', predicted judicial behaviour and the history of conversations and money; 'matters of principle'; few listening skills.

Interventions:

With help of lawyers the mediator identified the four most influential 'representatives' from each faction; met four times for four hours; drafted problem solving questions; reported in writing after each session; used vigorous reframing; strong interruptions to keep the parties on track and constant mini-lectures on past-future and non-denigration.

Outcome:

The eight agreed: to six months 'space' with each faction supervising alternative Sunday services; to money being collected and kept in separate accounts; on an interim management committee on which none of the most conflicted persons would sit; to return and review in six months when people were calmer. However, this detailed written

> agreement was allegedly then vehemently opposed by both sets of constituents (the 'absent tribes').
>
> The mediator then set up a meeting with the whole temple to explain process; and to praise the eight dispirited representatives publicly. The meeting was cancelled after rumours of bombing the meeting by hawks in each group were telephoned to the mediator by the concerned eight. (The case is still languishing in court lists).

If the outsider or tribal member is a professional adviser, such as a lawyer or accountant, it is especially problematic if they remain 'outside' the negotiation meeting. Lawyers are often excluded due to expense, and sometimes due to busyness or poor diplomacy skills. (The writer regularly meets lawyers who suggest that they should 'stay away' from the mediation until drafting time arrives, as they 'have become part of the problem'.) However, their personal interests in clarity of drafting, closing legal loopholes, avoiding dissatisfied clients, preserving professional reputation, and avoiding professional negligence allegations, mean that they inevitably (and appropriately) will want consultation, time and modifications once the insiders reach agreement.

No doubt there are sometimes darker sides to the interests of a minority of outside professionals, including fee generation, 'churning' the conflict or egotistical need for control. Whether legitimate or dark, these interests of professional advisers need to be identified, and tend to encourage adjournment of negotiations and mediations until they can be 'present' in body or by telephone.

How to Manage Any Influential Outsiders?

If key tribal members are identified (or suspected) during the routine preparation, or at any subsequent time during a mediation, how many ways are there for a negotiator or mediator to respond to this information? Set out below are standard responses to add to the mediator's toolbox.[8]

All have advantages and disadvantages.

(1) Refuse to negotiate
(2) Adjourn until influential figures are "present"
(3) Carry on regardless
(4) Normalise
(5) Ask ritual "authority" question

8 Eg J.H. Wade, 'Tools for Mediator's Toolbox: Reflections on Matrimonial Property Disputes' (1996) 7 *Aust D R Journal* 93.

(6) Insist on written authority within:
- subjective range?
- objective range?

(7) Contract to use best endeavours to sell the agreement

(8) Opinion from an evaluative mediator or expert

(9) Speak to outside authority **before** negotiation

(10) Consult with outside influences **before** the negotiation and arrange decision-making process

(11) Mediator explains settlement/progress to outside authority **before** anyone else

(12) Warn of dangers of reneging – "What if …?"

(13) Throw tantrum

(1) Refuse to Negotiate

The first response to knowledge or suspicion about influential outsiders is to refuse to negotiate or mediate.

- 'I am not willing to waste time and money talking to some middle manager, lackey, puppet, or person without authority to settle.'
- 'This will just inflame the situation. We will reach a deal with him/her and the club members will then renege.'

This refusal to negotiate may lead to further conflicts or litigation, subsequent lying about authority to settle, or the emergence of the influencers from the shadows.

(2) Adjourn Until Authority Figures are "Present"

The second response follows normally from the first. That is, one or more disputants may refuse to negotiate or mediate on major questions, unless and until key authority figures are 'present' in person or are available on the phone or teleconferencing facility during the mediation or negotiation.

In many conflicts, such brinkmanship is futile as those with persuasive or legal power are too many, too distant, too expensive or too busy to appear.

Nevertheless, many mediations and negotiations are organised creatively to enable:

- an auditorium of constituents and families to be present, witness, speak and vote
- a CEO from overseas to be 'present' via teleconferencing, or telephone

- travel of key family or board members to an all day (and sometimes all night) meeting in a convenient central location.

The presence of numerous influential people creates constant logistical challenges of expense and co-ordinating calendars. However, once these logistical difficulties are overcome, they provide helpful pressures to 'find a solution now that all of us are here'. One possible method to manage time is to encourage many people to attend, on the express condition that the number of speakers will be limited to those who are nominated representatives, or to those given the microphone or some other 'talking symbol' by the mediator. This method has been used effectively in large town hall meetings between angry residents and local councils.

Nevertheless, this solution of 'adjourn until …' will be opposed strongly by middle managers and family members who fear the presence of their own bosses or family during the mediation. These outside authorities may be resentful for the inconvenience of attending; critical of the disputant for 'being unable to sort this out by yourself'; and dangerously judgmental of their own tribal representative if too many skeletons come out of the closet during the mediation.

The writer has been involved in several mediations where the presence of CEOs or patriarchal grandparents has eventually pressured the outcome, but such presence has been resisted strongly by their own tribal members, (middle managers, lawyers and adult offspring), who feared loss of face during frank discussions and accusations. Some successful business people are ashamed that their ageing wealthy parents continue to have such critical power over their own life decisions. One of the mediator's tasks in those cases was to find strategies to save face for the squirming representative or offspring.

Additional opposition to this 'adjourn until X can be present' option, will sometimes come from the *other* disputants. That is, one set of disputants objects to 'interference' and 'delays' due to the proposed presence of the other disputant's 'officious boss', 'nosey brother', 'pushy husband', 'aggressive union member' or 'opinionated accountant'. These legitimate objections and perceptions can usually be reframed ('so you would like X to work alone/independently?' 'So you are worried about the dynamics if X is present?'). The objector can then be challenged by questions such as 'If Y does not attend, will X ever settle?' 'How will you feel if X wants Y to check any deal you reach?' 'How can you ensure that the brother/boss/accountant/wife gives an informed opinion, rather than an ignorant reaction?'

The writer as mediator standardly uses similar questions to persuade one disputant that (s)he should consent to and welcome the presence of an 'appropriate' influential spouse, accountant, or wise friend to 'help' another disputant. Despite sometimes initial resistance, the persuasion has always succeeded on the basis that it is 'better to have a visible influence, than someone

whiteanting[9] in the background'. This exercise always involves a further task of trying to find 'extra helpers' to equalize numbers present for each faction at the mediation/negotiation.

With a few notable exceptions, the presence of the outside influence has been essential, or at least helpful in order to find a resolution.
In some highly escalated family and church conflicts, the influential outsiders (eg new spouse; angry elder) have been made 'present' only by the mediator having access to them by phone.

Children as Powerful "Outside Influencers"

One common group of powerful influencers who are often not 'present' at negotiations and mediations, are children. Parents have legal power to make decisions about their children but sometimes have limited persuasive power, particularly over teenagers in industrialized societies.

Some mediation procedures have been devised to 'include' children by the symbolism of empty chairs; by the mediator acting as advocate for the children's generalised interests; by the mediator interviewing the children alone before the joint sessions with the parents; by an advocate appearing on behalf of the children[10]; by an expert psychologist submitting a written report on behalf of the children.

Case Study 3—Three Wise Children

The writer once arrived at a mediation to find a letter addressed to him 'as mediator' from the parties' three children aged 17, 11 and 7 years and signed by them all. The letter set out in profound fashion what the three children wanted as outcomes to the mediation. All their suggestions were contrary to the express wishes of one or both parents. The mediator immediately phoned the 17 year old daughter and found a person wise beyond her years. She wanted her parents to see the letter. However, the mediator decided with her to disclose the receipt but not the contents of the letter, being concerned about ramifications for the children. Upon disclosure of the receipt of the letter by the mediator, one of the parents predictably phoned the eldest daughter and reprimanded her. Nevertheless, the dysfunctional and grieving parents gradually negotiated solutions which 'happened' via hypothetical questions from the mediator to

9 A 'white ant' is a termite which eats timber in houses leaving a veneer of strength, which however collapses under the slightest pressure.

10 L Fisher and M Brandon, *Mediating With Families: Making the Difference* (2002), Ch 5.

> reflect their three daughters' wishes. This unique expression of "outsider influence" has never happened again.

(3) Carry on Regardless

The third response to the mediator's suspicions or knowledge of key influencers, or absence of 'complete authority to settle', is to say nothing and continue the process.

Some mediators may decide that even opening the questions of 'Do you both have authority to settle?' or 'How to identify and manage influential outsiders?' is so inflammatory, complex and time-consuming that it is better not discussed. Arguably, the topic will remain safely buried, either because no substantive resolution is reached or recommended (so no telephone calls need to be made); or the settlement is within the 'agent's' range (again, so no telephone calls need to be made); or it is so routine for certain disputants (eg middle managers, some insurers) to make phone calls, that it is not necessary to discuss what is normal. Moreover, if a settlement is reached and approval is then sought from an outsider, and this procedural ambush causes offence to the other party, then in those (statistically few?) cases, the conflict can be 'managed' at that stage. Why clumsily anticipate what may not turn into a problem?

Other mediators have seen many negotiations stumble and fail due to the influence of tribal members. These mediators may be reluctant to 'carry on regardless' or 'wait and see what happens' in relation to these hovering armchair critics.

(4) Normalise

The fourth response to the perceived pressure from outsiders, is for the mediator to give one or more 'normalising' speeches. The aim of these speeches is to attempt to convince one of the disputants that the need for outside ratification is 'normal'; is not devious; is not normally part of a good cop-bad cop negotiation tactic (though it could be that!); that competent negotiators do not fuss over this procedural step; and that progress can be made despite the need for outside approval. For example:

> Jill, in my experience it is normal for middle managers in large businesses or government to seek approval for the agreement you hope to reach today. They cannot risk their jobs by settling without higher level approval. If you insist on them having full authority to settle, their easiest escape is to leave the decision to a judge; then they will avoid being blamed for the outcome.

These kinds of speeches by the mediator may assist a disputant to persist with the negotiation/mediation, rather than prematurely choose option one – namely, refuse to negotiate.

(5) Ask Ritualistic "Authority" Question

The fifth possible response to the mediator's knowledge or suspicion that one or more of the disputants will need to consult an outsider before signing any settlement, is for the mediator to ask ritualistically, 'do you have authority to settle this dispute?' This question can be asked in writing in the preparation documents required to be completed by each disputant. Alternatively, this question can be asked or re-asked at both private and joint meetings. Presumably, some mediators are hoping for a confident or mumbled 'yes' as an answer.

The mumble or the body language may suggest a lie or more complex motives. A more precise and tactical answer could be, 'Yes, I have complete authority to settle this dispute so long as the outcome is fair/reasonable/in the range. If it is an unusual settlement, or one out of the normal range, then obviously I will have to consult my superiors/constituents/family. I assume that you would have to do likewise if you were in my position.'

Whatever answer is given, it leaves the mediator with some unresolved tensions. A confident affirmative answer may well be a lie or a mask to complexity; a mumbled affirmative answer will raise suspicions; and a 'correct' tactical and qualified affirmative may open a detailed discussion of the meaning of 'reasonable'; and a negative answer may lead to option one – a refusal to negotiate.

The practice of a mediator or negotiator to ask this 'authority' question ritualistically, may encourage attendance by 'powerful', or authorized people. However, affirmative answers definitely will not preclude telephone calls and adjournments in order to consult others as settlement approaches. This may lead to standard cries of 'deception'; 'liar'; 'I told you they are not to be trusted', which situation the mediator can attempt to manage via reframing and one of the twelve other responses in this article!

Nevertheless, the ritualistic authority question anecdotally is used commonly (and apparently effectively) in production-line evaluative mediations involving monetary claims against insurers. Repeat players know that the answer 'yes' conceals normal and manageable complexity.

Conversely, in certain cultural groups the influence of community opinion is very strong. These cultures have sometimes been categorized as 'high power distance' and 'collective'.[11] For example, extensive consultation is normally necessary when negotiating with most Malaysian, Arab, Aboriginal and Japanese organisations.

11 See R.J. Lewicki, D.M. Saunders, and J.W. Minton, *Negotiation* (2003) ch 11 for a summary of G. Hofstede, *Culture and Organisations: Software of the Mind* (1991).

In such cultures, the question, 'Do you have authority to settle?' is itself an absurdity and an embarrassing sign of ignorance on the part of the questioner. An affirmative answer may save face for the questioner, but will not reduce normal extensive consultation outside the negotiation room. It requires cultural expertise and careful planning to identify who the key influencers in the deciding community are and by what process are the "outsiders" to be consulted.

(6) Insist on Written Authority to Settle Within Subjective Range or Objective Range of 'Fairness'

The sixth possible response is for a mediator or negotiator to insist that some or all of the disputant(s) produce a written (and irrevocable) authority to settle. This written step may appear to provide more certainty than the ritualistic oral assurances set out in the previous response.

However, in reality, those who draft such written authorities know that they provide little certainty that the alleged agent will act upon the apparent authority. Why?

This is because an authority can be drafted in one of two ways – subjectively or objectively. A subjective written authority gives the agent the power to enter into such agreement as the agent believes is 'reasonable', 'fair', 'appropriate' or 'reflecting common commercial practices'. All these words leave the agent with such a broad discretion that if (s)he believes that the outcome is anything other than 'advantageous', (s)he may want to consult with the influential constituents anyhow (to protect his/her job or reputation or safety). That is, the representative's broad 'legal' authority is qualified by his/her certain knowledge that (s)he has limited 'persuasive' authority.

An objective written authority supposedly gives the agent more certainty and less discretion. For example, 'my sister is hereby given irrevocable authority by me to settle this dispute with X on my behalf for an amount not less than $400,000.'

However, asking for a written objective authority to be created and shown to a mediator has at least two problems which anecdotally makes such documents rare. First, by defining outcomes in dollar amounts, this restricts creativity in packaging solutions. Secondly, and more seriously, a written objective amount or range is a dangerous document to show to a mediator. This creates the potential for a key piece of information, namely the 'reservation' or 'walk-out' figure, to be leaked to the other side.[12]

12 See Lewicki ibid at ch 3 for an analysis of the vital 'insult', 'target' and 'reservation' zones which are consciously or subconsciously present on each side of every negotiation.

A wise negotiator, understanding the risk of information leaks in negotiation and mediation, would probably set out a false reservation figure (eg 'not less than $600,000') in the written authority (or refuse to write a specific authority). This falsely 'authorised' figure still leaves confidential negotiation margins (advised orally) for the wise agent to work with. Similarly, it is common practice for insurers of defendants in tort cases (eg personal injury, medical negligence and contractual defects disputes), to assure plaintiffs that they 'have authority to settle up to the limit of the claimed amount'. This ritualistic liturgy about 'legal' authority, is of course silent about the representative's 'reasonable outcome' and 'persuasive' authority.

Thus if a mediator ever receives a confidential written objective authority from one party, (s)he cannot confidently assure the other disputants that the document is of any relevance, or that telephone calls to influential outsiders will not be made.

Ironically, an experienced negotiator may develop the following practice even if pressured into giving a (false) written objective authority from his/her constituents. Upon settlement being imminent, (s)he will still insist on making a real or fictional lengthy phone call to his/her outside constituents. This lengthy charade aims to give the impression that the settlement was outside his/her permitted range, and that the opposition has a good outcome, so that their post-settlement regrets might be minimized.

Accordingly, it is not clear if and when subjective or objective written forms of authority will be helpful to modify the influence of outsiders on the stability of negotiations or mediations. Minimally, they may help some constituents to be more reluctant to renege if their representative recommends a particular outcome.

(7) Agree to Use Best Endeavours

The seventh possible response to the mediator's (or negotiator's) knowledge or suspicion that one or more of the disputants will need to consult with influential outsiders before settling is to negotiate for the agent to use his/her 'best endeavours' to sell the outcome to the constituents.

This option may seem weak. However, the writer and other colleagues have used it successfully on a variety of occasions.

This response anticipates a standard type of conversation between the negotiator (N) and his/her constituents (C) after a mediation or negotiation.

For example:

C : 'How did the mediation go last night?'

N : 'Well, we reached agreement. It is not all that you hoped for.'
C : 'What did you agree to?'
N : 'Well, there are four basic provisions as follows ……'
C : 'That doesn't seem very fair. Why did we get so little? Are you happy with that outcome?'
N : 'Well, I am not happy, but in the circumstances ……'
C : 'If you are not happy, why did you agree to it?'
N : 'Well, it was the best I(we) could do. The mediator put us under some pressure to be realistic.'
C : 'We will need some time to reconsider this. It is very disappointing. I certainly will not sign/ratify. They must be laughing about ……'

This standard disclose, disappoint, defend and blame language is clearly foreseeable between some agents and tribes. Many representatives at mediations are in an unenviable position of martyrdom by the awaiting tribal hawks.[13]

This predictable pattern may encourage a wary mediator to go through the following steps. First, ask each negotiator (privately and perhaps publicly) 'What if you reach an agreement which you believe is satisfactory but which disappoints your constituents/members/family?' Secondly, the mediator asks 'What if the post-settlement conversation with your constituents is as follows…' (mimics the disclose, disappoint, defend and blame language)? In the writer's experience, the representatives tend to nod glumly.

Thirdly, the mediator asks, 'Would you (each) be prepared to return to your club/constituents and highly recommend the outcome you reach (tomorrow, next week, next month etc)? There is no point working hard for an agreement if you then allow that routine and undermining conversation to occur. You might as well abandon the mediation now.'

The negotiators can usually be persuaded to agree orally or in writing as follows:

'If we reach an agreement after working hard at the mediation through a range of possibilities, we will not report back to X in a half-hearted fashion. We will unanimously report back to X about the issues, the options and will unanimously and enthusiastically recommend the outcome we reach as satisfactory, workable, and the best option available. We will endeavour to 'sell' the outcome to our constituents.'

13 See J.Z. Rubin & S.H. Kim, *Social Conflict-Escalation, Stalemate and Settlement* (2003) for an analysis of changes to social structures and psychology which tend to perpetuate conflict.

The early discussion of this option may normalise the forthcoming dynamics, and give the representatives time to prepare for, and courage to confront, the inevitable group of armchair critics.

Of course, this response, like all the responses, is far from infallible. The writer has used it very successfully with groups of representatives. Conversely, in a dispute involving division of an inheritance between two family factions, the writer as mediator isolated one key representative from each faction in a room and worked with them until a recommended outcome was reached. Both agreed to sell that outcome strongly to the waiting camps. One did, while the other immediately recanted when faced with his angry relatives: better to conform than to confront.

(8) Opinion From an Evaluative Mediator or Expert

Following the previous response, there is an eighth method to help the representative save face, job, and safety; and to create doubt for any angry hawks lurking among the constituents.

This involves hiring an evaluative mediator who is respected in the field in which the disputants are disputing; and/or bringing to the mediation or negotiation an expert in the field as an observer and commentator.

At the end of the mediation or negotiation, the expert and/or evaluative mediator then writes a note on his/her letterhead for the middle managers or agents to take back to head office or to their constituents. The note states shortly that not only have the representatives communicated skillfully, but also they have reached an outcome which is 'within the range'; or the 'best of the range of outcomes available'. These letters or clauses may assist the middle manager representatives to 'sell' the deal back at home, and to minimise danger to their own jobs, safety and reputations.

Evaluative mediators can serve many interesting functions.[14]

Even without an opinion in writing, the use of a respected expert in the field of dispute enables the parties to fend off their bush lawyer tribes and relatives by saying that 'the mediator has been working in this field for over 30 years and (s)he said that this is the kind of split-the-difference mid-range order that a court usually makes'.

The writer often includes in settlement documents a preamble, introduction or notation, which briefly sets out what happened at the mediation, indirectly praises

14 See J.H. Wade 'My Mediator Must be a QC' (1994) Aust D R J 161; also Wade, *Representing Clients at Mediation and Negotiation* (Bond University DRC, 2000) pp 93-95.

the representatives for their persistence and skills, and for avoiding certain risks of ongoing conflict. One aim of this written version of history is to assist the weary representatives against hostile hovering hawks.

(9) Consult with the Outside Authority/Influence Before Negotiation

The ninth possible response of a negotiator or mediator to the real or suspected existence of an influential outsider is to consult with that outsider before the joint mediation sessions begin.

The writer has used this approach for over a decade in the majority of disputes where he acts as a mediator.

The process now has a routine and is as follows:

- The mediator meets with each identified 'party' both over the phone and in person.
- At those meetings influential constituents are identified (eg spouses, business partners, relatives) and the mediator asks permission to contact those influential people. Permission has never been refused, though some parties want to have a discussion of the advantages and disadvantages of this contact.
- The party is asked to contact the outsiders and prepare them for the phone contact from the mediator.
- The mediator phones each outsider and asks him/her a series of standard questions to assist the mediator develop hypotheses on possible causes of conflict, interventions, glitches, risks if the conflict continues, and substantive outcomes.[15]
- The mediator clarifies whether the outsider wants any of the information provided to the mediator to be kept confidential.[16]
- The mediator makes no disclosure to the constituents of facts or perceptions received from any other person unless authorized to do so.

In the writer's experience this routine process, though sometimes expensive and exhausting[17], has provided the following benefits:

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15 The writer has labeled these 'The Five Humble Hypotheses' and suggests that every mediator and negotiator should consciously develop these hypotheses in writing before commencing any mediation or negotiation.

16 See later under response 10 for a short discussion on the topic of outsiders and confidentiality.

17 In one industrial dispute mediated by the writer, there were 29 constituent groups 'in the shadows' behind the actual seventeen 'representatives' at the ultimate negotiation table. In hindsight, even though the dispute settled, the intake process with so many factions was too exhausting for the aging mediator.

(1) The mediator gains new perspectives on the key hypotheses necessary to arrange a successful mediation;
(2) The outsider feels included in the problem solving process and is far less inclined to undermine participants' expectations and outcomes;
(3) The mediator's standard questions begin to create doubt and lower the expectations of the constituent(s). They may have had little or no experience of systematic problem solving, or be too emotionally involved to do so.
(4) The constituents begin to respect the mediator and the complexity of the task ahead.
(5) The constituents again feel included if the mediator also arranges for a process to consult them on the day of the joint mediation, or as the mediation progresses.

This standard preparation process is one where a mediator can clearly 'add-value' to an unassisted negotiation. It is sometimes considered to be subversive and inflammatory (though may be tactically effective) for a negotiator alone to try to have confidential conversations with the tribal members of the 'opposing' negotiator.

(10) Consult with Outside Influences Before the Negotiation and Arrange Decision-Making Process

There is a tenth important response which every mediator and negotiator needs to have in his/her conceptual and linguistic repertoire when outside tribal members are obvious or unearthed. This response is to insist upon and organize a 'decision rule' within each group of constituents.[18]

There is a variety of methods by which groups can decide to make decisions.

> *In decision-making groups, the dominant view is to assume that majority rules and at some point take a vote of all members, assuming that any settlement option that receives more than 50 percent of the votes will be the one adopted. Obviously, this is not the only option. Groups can make decisions by dictatorship (one person decides), oligarchy (a small but dominant minority coalition decides), simple majority (one more person than half the group), two-thirds majority, broad consensus (most of the group agrees, and those who dissent agree not to protest or raise objections, and true unanimity (everyone agrees). Understanding what decision rule a group will use before deliberations begin will also significantly affect the group process. For example, if a simple majority will make the decision in a five-person group, then only three people need to agree. Thus, any three people*

18 See R.J. Lewicki et al, *Negotiation* (2004) pp 349-358.

> *can get together and form a coalition – during the meeting or even prior to the meeting. In contrast, if the rule will be consensus and unanimity, then the group must meet and work hard enough to assure that all parties' interests are raised, discussed, and incorporated into the group decision.*[19]

That is, during preparation for mediation *between* parties, the mediator facilitates discussions *within* each of the parties' tribes on the key question – 'By what process will the group make a decision?'

For example, a mediator can typically go through the following steps:

(1) Brinkmanship and Doubt Creation

'I am not willing to mediate unless both groups decide clearly on how they will vote to approve or disapprove their respective representatives' recommendations.'

'No group can agree unanimously on what day of the week it is; so don't come back to me with a unanimity rule.'

'I am also not willing to accept a 'wait and see' or 'we will work it out later' voting process. That is a recipe for failure. We all know that some of you will be disappointed with the outcome, and some will be able to live with that same outcome.'

(2) Facilitate Agreement on Each Group's 'Decision Rule'

'If you wish, I can meet with each group to develop an answer to this key question 'How will we make a decision as a group at the end of the mediation?"

'If you wish, I can tell you a range of ways other groups like you have made decisions. You can add those to your list of possibilities before deciding.'

(3) Write Out and Publicise and 'Decision Rule' of Each Group Before the Joint Mediation or Negotiation Begins

This third step is helpful as it reduces the chances of a whole group later reneging on their decision rule; and encourages negotiators who can see that the decision-rules may be a way of controlling hawks on their own team, or on the opposition's team. Without a visible decision

19 Ibid, p356..

rule in place, a skilled hawk can exploit the inevitable post-recommendation or post-settlement regrets within a group, and organize rejection of almost any negotiated or recommended agreement. The following case example illustrates the use of a pre-determined intra-team decision making process.

Case Study 4 – Face Saving Decision Rule

A mediation occurred between two factions of a church. Both wanted to acquire the church property and exclude the other for a host of alleged miscommunications, misdemeanours and personality defects. Vitriolic litigation had commenced to appoint a trustee for sale of the church.

The two factions were represented at the mediation by 7 and 8 elders respectively. One lawyer took the mediator aside and said that his group of seven could never agree to any outcome as two ("hawks") of the seven had paid all his legal fees; were deeply hurt; and wanted victory as a "matter of principle".

The grateful mediator sent each faction away to determine "How to make a decision at the end of the mediation?" The seven decided upon 5 to 2 majority decision; the 8 upon a 5 to 3 majority decision. This was publicly announced.

Eight hours later, a group of two from each faction reached a recommended outcome which they agreed to "sell" hard to their colleagues. They succeeded. The faction of 7 predictably voted 5 to 2 in favour of the recommended package with the two hawks dissenting.

The pre-existing decision rule then enabled both hawks to make speeches that they did not like the outcome, but they were men of honour, and would comply with the agreed majority vote by their friends.

Confidentiality and Third Parties

Where a mediator wishes to make direct contact with tribal members or constituents, this raises a number of questions about confidentiality including:

To what extent is a mediator able to discuss any information –

(1) given by one party privately with *that* parties' constituents?
(2) given by either party privately with the *other* parties' constituents?
(3) discussed between the parties in joint sessions with any constituent?

The normal short answer in law, ethics and strategy to all three of the above questions is that the mediator should obtain the clear consent (preferably in writing) of each individual disputant, before (s)he discusses what *that* same individual disputant said, with *any* outsider or constituent.

As a matter of wise strategic management, a mediator should also disclose early to all disputants that (s)he proposes to speak to or consult with any influential outsider.

For example, assume that there is a business dispute between Bill and Mary. If a mediator believes it is helpful to speak to Bill's influential sister, then the mediator should (as a matter of law and ethics) obtain the written consent of Bill; and normally (as a matter of good strategic management and preventing surprises) also advise Mary and persuade Mary that this is a wise procedure. Mary has no legal right of veto over the mediator's discussions with Bill's constituents about Bill's concerns. Nevertheless, in the writer's experience as a mediator, he has always been successful in persuading each party that these discussions with both their own and the other's constituents are essential to reaching a durable agreement.

Additionally, after any joint discussions between disputants, the mediator should, as a matter of law, ethics and strategic wisdom, obtain the consent again of both parties to discuss everything, or everything less specified confidentialities, with key outsiders from either side.

Ideally to create clarity, these ad hoc consents to, and advices by, the mediator should be foreshadowed in writing in the standard terms of the written mediation contract. For example, 'The parties of the mediation acknowledge that it is a contractual condition of the mediation that mediator has the discretion to speak to and consult influential outsiders whom any party may identify and who have the ability to stabilize or destabilize their negotiations and agreement.'

Some mediators attempt to spread the legal and moral cloak of silence over influential constituents who become involved in 'background' discussions. They attempt to do this by oral declarations to the outsider that the discussions are 'confidential'; or by requiring that the outsider sign a confidentiality clause. For example, the clause might read:

Confidentiality Agreement

Name: (Block letters) ……

As a condition of my being present or being consulted or participating in this mediation between (X, Y and Z)

I agree that I will unless otherwise compelled by law preserve total confidentiality in relation to any exchanges that may come to my knowledge whether oral or documentary concerning the dispute and passing between any of the parties and the mediator or between any two or more of the parties during the course of the mediation.

Dated …… (Signed) …….

As with all confidentiality clauses, the legal effect of such a clause is, and will remain, unclear at the edges. The list of exceptions to the various meanings of 'confidentiality' will continue to fluctuate with time, fashion and jurisdiction.

Nevertheless, in the writer's experience, the risks of unhelpful 'disclosures' by the mediator and by outsiders to other people have always been considered to be minor by the parties when balanced by the following factors:

(1) the benefits of obtaining an eventual agreement and a more stable agreement;
(2) the reality that influential outsiders will be told everything that occurs during the mediation anyhow (notwithstanding occasional or ubiquitous confidentiality clauses);
(3) the mediator being a listener to and a questioner of the influential outsider, with a minimum of disclosure *to* that outsider.
(4) the ability of the parties to flag for the mediator that certain vital information is not to be disclosed to influential outsiders.

(11) Mediator Explains Settlement and Progress to Outside Authorities *Before* Anyone Else

This is another vital response which every mediator needs to add to his/her toolbox in order to deal with armchair critics who are eagerly awaiting the outcome of the mediation or negotiation.

This practice can helpfully complement the previous two responses, namely consulting with outsiders and organizing a decision-rule, *before* the negotiation or mediation. After each mediation session, the mediator strives to report to the influential constituents *before* or at the same time as their own representative negotiator does so. This can be done by phone, fax or email with copies being given simultaneously to the representative. This enables the representative to build upon the interpretation and language of the mediator's report. It will also reduce the predictable dilemma for the representative of reporting, disappointing, defending, and blaming.

The aims of this response are to:

(1) Protect the negotiator from hostile outsiders.
(2) Create doubt for the armchair critics.
(3) Give the negotiator and the critics a new set of words, metaphors and expressions to describe the historical events at the mediation. These words can profoundly influence simmering hostile perceptions and emotions.
(4) Avoid a defensive negotiator too readily "blaming" the mediator or the mediation process for the outcome. (This goal also reflects a personal marketing interest of the mediator.)
(5) Develop further trust in the mediator by being transparent and by modelling problem-solving skills.

The writer uses this practice regularly when organizing mediations which involve influential outsiders. It sometimes requires persuasion to convince a representative of the potential benefits to the representative, if the mediator provides the first feedback to the waiting constituents.

(12) Warn of Dangers of Reneging – 'What If …?'

Mediators and negotiators usually have a range of phrases to exhort disputants to perform their agreements, despite pressures from outsiders to renege.

These may have the effect of preparing the disputants for such pressures, and giving them a practiced repertoire of language when placed under such pressures to renege.

This preparation is particularly important in those disputes where there is a necessary gap in time between agreement and ratification of the agreement by constituents or a court. For example, in family, native title, environmental, succession and human rights disputes it is normal for a mediated or negotiated agreement to require court approval before the agreement becomes legally binding. As many lawyers can nervously testify, this pause provides a dangerous gap of days or weeks when one or more parties can be pressured by constituents or self-doubt to renege.

Examples of the language routinely used by the writer, as mediator or by other mediators, include as follows:

- 'What will you do in the next week when some of your supporters criticize you for reaching this agreement?'
- 'How will you respond to your fellow committee members when they say 'you should have negotiated better terms'?'
- 'Would you like to practice that speech with me?'
- 'If either of your constituents want you to renegotiate this agreement, they should be aware of common difficulties to such a request. If they want to renege once, why not two or three times or more? It may be easier for you to litigate rather than spend time and money reaching a succession of agreements which are easily undermined by armchair critics.'
- 'You have both done well to reach this agreement. However, please be aware that you are both carrying a fragile egg which can be dropped during the three weeks before a judge approves this agreement. What can you do if you suspect that the egg is about to be dropped? Some people agree on a contingency process such as….'
- 'In my opinion, you have gained four clear benefits from this agreement – privacy, an ability to open a new business, discounted spare parts, and payments to cover all out of pocket expenses. Can you emphasise to the hawks back at head office that they risk losing all of these gains if they try to re-open the settlement?'[20]

(13) Throw Tantrum

This response involves the mediator expressing strong and theatrical disapproval when one party suddenly suggests that (s)he needs to consult with an influential outsider. This confrontation would normally take place in a private meeting. The brow-beating mediator has the goal of pressuring the wavering negotiator into signing immediately, rather than passing responsibility to outsiders.

A mediator's exhortations might be as follows:

- 'I can't believe that at this stage of the mediation, you want to make a phone call! What kind of message will that send to the other side? They are likely to walk out angrily and not come back.'
- 'You have all put in so much work to reach this agreement. And now you want to risk it all with a break so that you can talk to your relatives?'

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20 A mediator can have a helpful role in coaching representatives to use language including words of 'gain', and 'risk of loss'. J S Hammond, R L Keeney and H Raiffa, *Smart Choices – A Practical Guide to Making Better Decisions* (1999); J H Wade, 'Risk Analysis in Mediation and Negotiation: How to Help Clients Make Better Decisions' (2001) 13 *Bond Law Review* 462

- 'You can't do this Mary! Your reputation as a negotiator will be in tatters. In the future, they will insist on negotiating with anyone but you.'

The writer has not used the fake tantrum in these circumstances, but has anecdotally heard of others trying this intervention. It obviously has many risks for the mediator, including allegations of duress, or ignorance of other more suitable interventions, or a walk-out.

Conclusion

This article has identified and systematized thirteen possible responses to influential tribes and outsiders before, during and after mediations or negotiations. There are probably other responses or hybrids which could be added from the repertoires of experienced mediators and negotiators. Obviously, each response has advantages and disadvantages.

In the writer's opinion, this is another common hurdle in negotiations where mediators can add value to 'unassisted' negotiations.[21] First, the mediator can question strategically in order to identify influential outsiders; secondly, pose a neutral problem solving question (eg 'how to respond to influential outsiders?'); and thirdly, be aware of and, if possible practiced in, the thirteen responses to this question.

This analysis raises challenges for the systematic training of mediators; and questions for research on the actual behaviour of mediators and negotiators in relation to managing the influence of outsiders; and about the rate of use of each of these responses in different areas of conflict and culture; and about what evidence, if any, can be collected to measure and predict the rate of 'success' of each response to ubiquitous outside influences.

21 For a list of common hurdles to negotiation and mediation, see Appendix A. Discussions of several of these hurdles can be found in Lewicki, *supra* note 8, at ch 12; Hammond et al, and Wade, supra note 17; R Mnookin, (ed) *Barriers to Conflict Resolution* (1995); J H Wade, 'The Last Gap in Negotiations – Why is it important? How can it be crossed?' (1995) 6 *Australian Dispute Res J* 93.

APPENDIX A

Standard Hurdles and Glitches Which Mediators and Negotiators Encounter Routinely

What responses are available to each standard hurdle?

- Duelling Experts
- Influential outsiders
- Lack of authority to settle
- Insult zone offers
- Unwillingness to make offers
- High emotion
- Personal attacks/sniping
- Data chaos
- No risk analysis or goal definition
- Overconfident negotiator
- Poor preparation
- Unwillingness to come to negotiation/mediation
- Emerging unfair agreement
- Lying
- Hiding information
- Undue emphasis on legal issues
- Reactive devaluation
- Overwhelmed negotiator
- Unhelpful mediator
- Last minute add-ons
- Last gap
- Post settlement regrets
- Post settlement drafting jams
- Non-performance of agreements
- Ending “unsuccessful” meetings

APPENDIX B

ROB and BEV versus CAL

STAGE 1

In the following scenario (1) who are the possible/probable constituents/tribal members behind the visible parties to the conflict?; and (2) make an initial guess whether each is a hawk (H), moderate (M) or dove (D).

Common Facts

A young married couple, Rob and Bev, bought a dream house and farmlet in the hills near the beachside town of Porpoise Bay in 1996 for $250,000 cash.

Since 1988, Rob had been writing affectionate letters to his estranged father Cal in the U.K.encouraging him to travel to Australia and live with them. Rob described in the letters how he could build a 'granny flat' for his father to live in.

Cal came to Australia for a few visits and eventually decided to move in 1998. Bev's parents had given Rob and Bev some money and soon after Cal transferred from U.K. in 1997 the sum of $65,000 into Rob's and Bev's bank account.

Cal moved to Australia in 1998 and was asked by Rob and Bev to purchase the building materials to build this granny flat. He wrote a cheque for $45,000; and Rob used his own labour to build the flat; and gave Cal a list of how the $45,000 was spent on materials. The flat was attractive to Cal and was situated about 80 metres from the main house.

Cal spent another $25,000 furnishing the flat and lived there (with occasional trips abroad) for 3 years.

In 2001, tensions developed between Cal, Rob and Bev. Allegedly, Cal (now 79 years old) had possession of an illegal pistol, walked around his flat and garden naked (not an uncommon practice in Porpoise Bay) and 'dropped n' uninvited to visit Bev and the two young children at the main house. Many harsh words were spoken, though Cal was a man of few words.

Eventually, Rob called the police to search for Cal's pistol. They only found a few cartridges. Cal's stepson obtained an apprehended violence order against Rob for threats allegedly made by Rob.

Cal was told to leave and went to stay with his step-son and his wife, Mary, in a spare bedroom in town. The locks on the country flat were changed by Rob and it remains empty.

Cal went to see a lawyer who filed a claim against Rob and Bev for either debt of $135,000 or an interest in the property. Rob and Bev have limited savings, are both studying, and trying to care for their two young children. Cal allegedly wants to return to the flat; Bev and Rob say that he has burned his bridges. Bev says that she is now fearful of Cal.

A senior mediator is asked to travel to Porpoise Bay in five days time to 'fix' the problem. A preliminary court hearing will occur in 8 days' time, though this is likely to be adjourned for a final hearing within the next 10 months.

STAGE 2

As a mediator (or negotiator), select a procedure or strategy to manage the constituents on "each side".

Constituent/Tribal Member	**Suggested Procedure(s)**