香港和解中心
Hong Kong Mediation Centre

Journal on MEDIATION

ISSUE NO. 1 · AUGUST 2011

香港和解期刊

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PREFACE 序言

「香港和解期刊」面世了，我借此机会感谢编辑委员会所有成员为期刊付出的宝贵时间和贡献，投稿人士的积极参与和分享，再加上香港律师会、香港大律师公会、香港大学、香港中文大学和香港城市大学对编制此期刊的支持，以及中心在国内及海外合作夥伴对投稿邀请的积极回应，依赖各方支持，期刊得以顺利刊行。

近年来，在香港特区政府的推动下，本地调解服务进入高速发展的新里程，市民对调解知识和服务的需要相应增多。香港和解中心一直心系本地调解发展，积极参与本地调解训练、推广、服务、政策谘询等，推动本地调解发展，使更多人得以使用调解去解决纠纷。除与各政府部门及机构合作推动本地服务之外，本中心一向十分重视培训工作。在过去数年，中心不断开拓与本地大学，社会服务机构，地区团体合办调解课程，同时为个别政府部门及机构员工提供短期调解课程。目前，本中心已有800多位来自不同行业的认可和解员，包括法律行政人员、医护人员、会计师、工程师、社工等等。

我希望期刊能够促进本地及亚洲的调解工作，改进及优化地区之间的相关交流与分享，成为本地、国内及海外调解机构之间的合作与交流的平台。

谨再次向所有参与出版本期刊的机构及人士致衷心感谢。

曾炳超
香港和解中心会长
二O一一年八月

ACKNOWLEDGEMENTS 鸣谢

This journal, being the first journal on mediation in Asia, is intended to publish both Chinese and English articles contributed by authors from Hong Kong and different localities. This journal includes articles from practical application to theoretical research, opinion, experience and case sharing. The purpose of this journal is both for academic researchers and practising mediators; it encourages the sharing of mediation knowledge and experience for the benefit of those interested in mediation. I would like to express my gratitude to all who contributed to this journal including the editorial board, sponsoring organisations, authors and staff of the Hong Kong Mediation Centre, without their support, the completion of this handbook would have been impossible. Special thanks are to our editorial board members including Mr. Simon Ip from the Law Society of Hong Kong, Mr. Robin Egerton from the Hong Kong Bar Association, Dr. Katherine Lynch from the University of Hong Kong, Dr. Sarah Elisabeth Hilmer from the Chinese University of Hong Kong, Dr. Fozia Nazir Lone from the City University of Hong Kong, Ms. Annita Mau, Ms. Jessie Hung, Ms. Anna Ho and Dr. James Chiu from the Hong Kong Mediation Centre, and Mr. Rick Wong in coordinating the publication. Their untiring review of all articles before publication was necessary to ensure the quality of this journal. All their contributions are duly noted and I am sure that this journal will be a good common platform for anyone interested in mediation to share their common interests. In addition, I would also like to thank the council of Hong Kong Mediation Centre for the creation of this journal and its support in this worthwhile project. Once again, thank you all.

Professor Raymond H.M. Leung
Editor in Chief
August 2011

INTRODUCTION OF HONG KONG MEDIATION CENTRE

Hong Kong Mediation Centre (HKMC) was established in 1999. It is a legal entity in the form of a company limited by guarantee which has the status of a charitable institution recognised by the HKSAR's Inland Revenue Department. The composition of HKMC is a group of professionals in various fields who are committed in the promotion of using mediation to resolve disputes in order to enable Hong Kong to become a harmonious society.

CALL FOR PAPER

Hong Kong Mediation Centre launches the Journal on Mediation with its first issue published in August 2011. The Journal provides coverage and analysis of the related issues in a full spectrum in the rapidly developing field of mediation following the Civil Justice Reform in Hong Kong in 2009. The Journal features a diversity of topical issues ranging from emerging mediator's techniques, case analysis to new models of the mediation process. The Journal is sent to all relevant government departments, related organisations, Hong Kong Mediation Centre's supporting and cooperating organisations and all its panel accredited mediators.

Articles are called from the region and will be reviewed by at least two reviewers. The Journal has a distinguished editorial board with extensive academic and professional background to ensure the Journal's high academic standard and maintain a broad international coverage. Further information can be obtained from Hong Kong Mediation Centre at 2866 1800 or its web site www.mediationcentre.org.hk.

香港和解中心简介

香港和解中心于1999年成立，获香港特别行政区确认为慈善机构，成为香港首家取得非牟利身份的调解组职。中心由一群致力倡议调解的本地专业人士组成。随著香港特别行政区政府积极推动调解，社会各界对调解服务的需求不断增加，香港和解中心将继续履行目标和使命，促进社会和谐。

邀请来稿

香港和解期刊创刊号于 2011 年 8 月出版。期刊就香港、国内及国际调解服务的发展作出深度讨论及分析研究。本期刊涵盖多个与调解相关的专业常识，例如和解员的技巧，及分析和解个案。期刊派送给相关政府部门及组织、相关法律机构、香港和解中心合作夥伴及中心认可和解员。

香港和解中心诚意邀请各相关机构、读者及会员投稿以惠泽香港、国内以至世界各地的读者。所有稿件将由至少两名资深审稿人检阅及审定。本期刊编辑委员由各界学术及专业人士组成，以确保期刊之学术质素及其国际认可性。

如有任何查询，欢迎联络香港和解中心（电话：2866 1800）或本中心网页：www.mediationcentre.org.hk。

What makes a good mediator?

Prof. Raymond H.M. Leung

ABSTRACT Many mediators have tried hard to become good mediators. They have taken many courses provided by different organisations and experts. They have read plenty of publications on mediation. They have participated in mock role play for mediation. They have the initiative to become good mediators. The author intends to analyse the elements that a good mediator possesses and how one can become a good mediator. This paper will focus on the psychological qualities and personality of a good mediator.

Many recent court decisions indicate that skilled mediators are able to achieve results that are satisfactory to both parties. It is often beyond the power of lawyers or courts to achieve. In Dunnett v Railtrack [2002] 2 All ER 850, "The mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the disputes on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide".

In a more recent case iRiver Hong Kong Ltd v Thakral Corporation (HK) Ltd [2008] 4 HKLRD 1000, "The mere fact that negotiation between solicitors fails to result in a settlement does not mean that the parties would not benefit form mediation conducted by a skilled mediator". The court has indicated that a skilled mediator with necessary skill, expertise and experience can help the parties to explore their respective needs and interests, and therefore can arrive at a solution

that is acceptable to all. This is often something that a neutral third party can do and lawyers acting for parties will not be able to achieve. In this case, the Court of Appeal expressed regret that the parties had not explored mediation as a means to settle their differences. Damages of HK$1 million were awarded with costs incurred of HK$4.7 million. It began in 2004 and the appeal was concluded in 2008. It is important for us to appreciate that having a good mediator on a case can often turn around the outcome of a dispute.

Elements of a Good Mediator

In addition to all the relevant basic mediation training of a mediator, one should look at three basic elements in a mediator: the expertise, personality/character and abilities of the mediator. These elements make good mediators.

A mediator needs to have the following attributes:

a) Good personality

b) Good character

c) Ability to build rapport with the parties

d) Good emotional control

e) Ability to focus

f) Good flexibility

g) Good language abilities

a) Good personality

A mediator needs to be sensitive, concerned about detail and have foresight in relation to the outcome of the mediation. A mediator needs to react appropriately and effectively to various situations during mediation. If parties react violently to an issue, the mediator will need to reframe immediately. A mediator needs to be observant and observe details. Small gestures of parties are important and may lead to resolution of the mediation. Every sentence, eye contact or expression of the parties needs to be observed by the mediator. The ability to identify problem issues is also a key skill of a mediator. Early detection of problem areas will enhance the confidence of the parties in the ability of the mediator. At times, the mediator will need to foresee a certain outcome from certain statements made by parties. One needs to understand that certain questions may cause discomfort to the parties. The mediator must avoid such forms of questioning.

b) Good character

Character is a person's higher esteem. It reflects an individual's conduct, values and global views. A person's character distinguishes persons from one to another. A mediator needs to have good character in order for the parties to entrust their interests with the mediator. The mediator must be impartial without self-interest, deterministic, self confident, honest, fair, humble and patient, and exercise justice.

A mediator needs to handle situations with calmness, confidence, in-depth thinking, completeness and good analytical skills. A strong sense of responsibility towards the righteousness of issues, and ability to draw out the strengths and weaknesses of people's character will help a mediator determine when option exploration is appropriate. All these good characters will assist a mediator to achieve an equitable result.

A mediator also needs to have high moral standards, logical thinking and a sense of appreciation. Moral standard means that the mediator needs to have a righteous mind towards issues. A mediator needs to do the right thing for the parties. He must have the right attitude towards what is right and wrong. He must not be afraid to inform parties when something is not right as per a normal person's interpretation. His sense of patience, sense of responsibility, sense of mission, sense of curiosity and sense of self-esteem are all attributes that make good mediators.

These attributes help the parties to trust and respect the mediator.

c) Ability to build rapport with the parties

Strong beliefs of the parties in a mediator's ability to settle disputes are essential for the mediator to achieve settlement with the parties. Strong rapport with the parties helps to establish these beliefs and gain confidence from the parties. It puts the mediator into a positive mode of mind when discussing disputes with the parties. His thinking needs to be creative, flexible, logical and of good judgment. The mediator can evaluate the validity of the evidence presented and the state of mind of the parties. He can turn emotional elements of the mediation into logical and reasonable solutions.

d) Good emotional control

A mediator needs always to be in a stable state of emotion especially during hearings. It is often the case that parties blame the mediator for not doing his job or think that the mediator is not impartial. A mediator will need to react to these circumstances in a cautious and sensible manner. A mediator's reaction can change the situation of mediation. One needs to maintain impartiality and remain objective. When faced with unreasonable parties, the mediator will need to adjust his own emotional state in order to carry on with the mediation. The mediator always needs to control his own emotions in order not to affect the outcome of the mediation. Good reasoning by the mediator will help the parties to gain confidence and respect toward the mediator.

The mediator's position may sometimes be threatened when tested by the parties. The mediator needs to stand firm in his handling of situations. Calmness in handling situations is essential especially when handling difficult situations. Some mediators may react to situations quickly but lack an understanding of the details or impulses. One needs to analyse the issues in detail and present the details to the parties. However, the depth of the details needs to be carefully scrutinised before making any presentation. The mediator shall only refer to sufficient detail to achieve settlement of the dispute. One needs to balance the level of disclosure in order to achieve trust with the parties.

e) Ability to focus

A mediator needs to focus on the direction of resolving disputes. Early indication of the direction during the conduct of the mediation is important. Emotions can often be the driver of mediation. Action is the result of this factor. The mediator can make use of emotions in mediation. The positive and negative emotions of the parties are involved. The mediator needs to use the positive emotions of the parties to assist settlement. The parties may be emotional and agree to settle under certain terms and conditions. The mediator should make use of this situation and carry out reality checks with the parties. The mediator needs to be consistent in order to maintain focus on the direction of resolving disputes. Difficult situations often discourage the mediator during the mediation. Mediators need to keep trying to find options to resolve these difficult circumstances.

f) Good flexibility

A mediator needs to adjust to the pace and issues of the parties during mediation. When to use strong words and when to soften up the situation is important. The mediator needs to be flexible in his approach. Quick and thought-out reactions of the mediator towards issues are critical to gain the trust of the parties. The parties need to feel that the mediator is in control at all times and the mediator's reaction towards issues will inform the parties of such message.

g) Good language ability

The language used in presentation is essential during mediation. Deeper expression and emphasis come from different languages. The parties need to feel effective in their language of choice. The confidence level can also be increased through common dialect and similar traditions. Common ground can easily be achieved.

A mediator needs to use the following in his presentation and dialogue: 1) Clear and precise sentences; 2) Simple and easily understandable sentences; and 3) Logical and systematic sentences. These factors reflect that the mediator has a clear understanding of the concerned law, with a logical analysis of the issues and an understanding of the truth of the issues, and demonstrate the straightforward and impartial quality of the mediator. The parties will then respect a mediator

possessing such excellent qualities.

Conclusion

The above gives an overview and analysis of the abilities and personalities of what makes a good mediator. A good mediator is not only one who has taken all the mediation courses in town with the basic knowledge but one with training through practice, and with good character and personality. The basic skills of a mediator can be trained in formal settings such as a mediation course but the other elements described in this paper require practice in case handling abilities, case management skills and the mediator's own initiative to learn. Mediation is an art and must be learnt through practice. Exposure through interaction with people, learning from others and sharing of information can all assist a mediator to become a better mediator.

Acknowledgement

I would like to thank all the council members of the Hong Kong Mediation Centre for giving me the inspiration and opportunity to write this article.

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PROFILE

Prof. Raymond Hai Ming Leung is a qualified Fellow Engineer of ICE, ASCE, HKIE, Society of Builders, HKICM and HKIArb & SMIEEE, with a Master's degree in Construction Management from the University of Toronto, Canada and a PhD in Information Engineering from the Chinese University of Hong Kong. He is also an experienced Mediator and Arbitrator. He has been involved in a great number of mediation and arbitration cases related to Construction, Property, Import/Export, Telecommunication, Loan Agreement and Shareholders' Disputes. In addition to Prof. Leung's position as Founding President and Governor of the Hong Kong Mediation Centre, he has promoted and provided training in mediation/arbitration for over 20 years. He is also a Past President of the Hong Kong Institute of Arbitrators, Editor in Chief of the HKMC Journal on Mediation, General Editor of 'Hong Kong Mediation Handbook' and 'China Arbitration Handbook', an Adjunct Professor teaching 'Dispute Resolution for Engineers' at HKUST, a Member of the Working Party for the Reform of the Law of Arbitration in Hong Kong and draft Arbitration Bill, Mediation Task Force and is on the Law Reform Committee on Conditional fee. He is also involved in a number of arbitration and mediation organisations in China and overseas.

Judicial insistence on taking mediation seriously

Ms. Priscilia T.Y. Lam

ABSTRACT This article places emphasis on the fact that practitioners and parties should take mediation seriously. This approach has been stressed by Courts in various cases and in a recent decision of Faith Bright Development Ltd v Ng Kwok Kuen & Ors [2010] 5 HKLRD 425, the Court reminded practitioners of the importance of conducting litigation in compliance with the new Rules of High Court and Practice Directions and stressed that there would be deleterious consequences of non-compliance. There are intrinsic benefits to mediation whether successful or not. Therefore, the parties should not attempt mediation on a "tick-the-box" basis. In mediation, the parties should put their differences aside in order to find a common ground to resolve the dispute to their mutual satisfaction.

Civil Justice Reform (CJR) came into effect on 2 April 2009. It heralded a new approach to civil litigation by the introduction of an array of measures and reforms designed to bring about prompt and economic resolution of judicial disputes between parties through the courts. One major initiative was the requirement for mediation and for it to be taken seriously and early in the litigation process.

It is important to know the requirements under the CJR for mediation as it can have deleterious consequences for practitioners and the parties if they are not or not sufficiently adhered to. A number of Orders under the Rules of High Court (RHC) govern the requirements for mediation. Order 1A of the RHC sets out

the underlying objectives of the rules whilst Order 1B sets out the power of the Court in relation to case management. Parties and practitioners have a duty to assist the Court to further the underlying objectives. Case management is governed by Order 25 which stipulates that parties have to file and serve the Timetabling Questionnaire in accordance with Order 25 rule 1(1) and the Practice Direction 5.2. Further, parties have to file a Mediation Certificate in compliance with paragraph 9 of Practice Direction 31. This Practice Direction 31 came into effect on 1 January 2010, so it has been around for over a year but it appears that the seriousness of it has not sunk in with legal practitioners.

There have been instances where practitioners have failed to comply with the new rules and practice directions. In the recent case of Faith Bright Development Ltd v Ng Kwok Kuen & Ors [2010] 5 HKLRD 425, Registrar K.W. Lung commented that some of the solicitors had forgotten about the CJR and that they remained in the old era before it came into force. Registrar Lung took the opportunity to remind those who had been ignoring or forgetting the changes under the CJR of the importance of the Timetabling Questionnaire and the Listing Questionnaire under Order 25 and Practice Direction 5.2. Registrar Lung explained that the Court would tighten its grip on active case management at the stage of Case Management Summons and that it would heavily rely upon the Timetabling Questionnaire filed by the parties in order to chart the proper course for the future conduct of the proceedings.

Due to the additional work that the parties have to do after the close of pleadings, it is beneficial to consider and conduct mediation at this stage and to apply for a stay of proceedings for a short period of time. In order to show the approach of the Court in dealing with mediation matters and issues, I quote various judgments so parties have a better understanding and apprehension as to the view and the rulings of the Court. Registrar Lung in Faith Bright Development Ltd v Ng Kwok Kuen & Ors [2010] 5 HKLRD 425 at paragraphs 25 and 26 stated:

"The more economical means for the resolution of the parties' disputes will be by way of mediation. If parties are agreeable to conduct mediation to resolve their disputes, the Court will consider whether a short stay of the proceedings should be ordered. At that stage, there will be other outstanding matters

such as discovery, preparation of the witness statements, expert evidence etc. It will therefore be costs saving if settlement can be reached without those preparations. This is a good reason for staying the proceedings pending the outcome of mediation. However, the Court may refuse the application for a stay if the other party refuses and there is evidence that there have been delays on the part of the applicant. Much depends on the circumstances of each case.

Whether the proceedings are stayed for mediation or not, the Court will also, in the same Case Management Summons hearing, make decision for future conduct of the matter if mediation fails to reach settlement for parties. A Case Management Conference will be fixed for the parties. The Court will give sufficient time to the parties for the preparations so that when they return to the Court for the Case Management Conference, the matter should be ready to be set down for trial. In giving the liberal allowance of time for the parties' preparations for the trial, the Court will usually make it clear to the parties that it will not entertain any further application for adjournment at the Case Management Conference without exceptional circumstances. The Court will also be more ready to impose draconian order by way of "unless order" even if it entertains such application for adjournment."

It is quite apparent that under the CJR the Court is concerned with giving the parties an opportunity to settle their dispute through mediation but at the same time pressing the parties to prepare themselves for trial by attending to pre-trial matters according to a strict time frame.

Registrar Lung at paragraph 28 sets out the considerations which the handling solicitor should use as a checklist for the preparation of the Case Management Summons and places the necessary emphasis on mediation:

(1) Mediation Certificate – advise clients on costs and to seek information from the Mediation Information Centre at the High Court Building, which is free of charge;

(2) Discussion with the solicitor of the other party or parties on the issues of disputes and the best course to take for the resolution of clients' disputes;

(3) Timetable for parties to make arrangement for mediation;

(4) Should there be a short stay of the proceedings, if so, for how long? If not, what are the reasons?

(5) The further conduct of the proceedings and the best course to take in order to save time and costs if mediation fails;

(6) Fill in the Timetabling Questionnaire with caution;

(7) Where there is an application for leave to adduce expert evidence at the trial, beware that the Court will raise the following issues at the hearing:

(a) the part of the pleadings on which expert evidence is required;

(b) the names of the experts, the areas of expertise required with specific directions on the framing of the questions for the experts to answer for the resolution of the disputes;

(c) single joint expert to be appointed, if not, why not?

(d) Timetable for joint meeting of the experts on a without prejudice basis to work out the single joint report, in which the experts set out the issues agreed and the issues in dispute, with their respective reasons to support their views in disputes;

(e) The time for the compilation of the single joint report;

(f) If parties consider it is not appropriate to have joint meeting between the experts and to compile a single joint report, the reasons for it.

In some cases, parties go to mediation but they do not genuinely seek to resolve the dispute but only seek to "tick-the-box" in order to avoid an adverse costs order being imposed upon them in the future. In other cases, the Courts have emphasised how a skilful mediator can help parties to resolve a dispute and that parties should not underestimate the effectiveness of mediation. In Supply China & Logistics Technology Limited v Nec Hong Kong Limited HCA 1939/2006, Lam J at paragraph 14 explained the importance of mediation in assisting parties to resolve disputes and it is stated that "Mediation is in substance third party neutral assisted negotiation. It has a better prospect of

success than the usual inter partes negotiation because of the involvement of a neutral who has the necessary skill and expertise in helping the parties to explore their respective needs and interests with a view to come to a solution acceptable to all parties. That is so even in cases where mediation is compared with inter partes negotiation conducted through the parties' lawyers. By the very nature of the different role played by a lawyer acting for a party, there are things that a skilled mediation can achieve which such lawyer cannot. Thus, unreasonable refusal to participate in mediation even after the court suggested the parties to do so is a conduct relating to the litigation that should be taken into account when the court deals with question of costs."

Also, in the case of Dunnett v Railtrack plc [2002] EWCA Civ 303, the Court of Appeal stated that "But when the parties are brought together on neutral soil with skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide. Occasions are known to court in claims against the police, which can give rise as much passion as a claim of this kind where a claimant's previous horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away."

In a case involving a claim for several millions of dollars, the parties went to mediation and settled the matter. This case illustrates how effective mediation can be, and on a basis that at first blush would seem unlikely or inconceivable in the formal litigation process. The key to achieving settlement was that one party offered an apology to the other side who relinquished the amount claimed in lieu of the apology. In this dispute, it was a question of honour and not money and that is how the matter was resolved. The mediation achieved what litigation could not as litigation would invariably put a monetary value on the issue in dispute whereas mediation addresses the parties' actual wants and desires which may not have a monetary value.

It is my view that a skilled mediator can assist parties to put their differences aside and find a common ground from which to resolve the matter to their

mutual satisfaction. There is also a significant consequential benefit to an unsuccessful mediation, as long as it has been done properly, and that is, the parties will invariably narrow the issues and identify the real dispute between them through this process which may result in a settlement before or at trial.

PROFILE

Ms Lam Tsz-ying, Priscilia was called to the Bar in Hong Kong in 2000 and she has been in active practice in a myriad of areas of law including commercial and contractual litigation, matrimonial law, personal injuries and criminal trials and appeals. In 2009, Ms Lam became a Fellow member of the Hong Kong Institute of Arbitrators and an accredited mediator of the Hong Kong International Arbitration Centre. Ms. Lam has been appointed as mediator in various cases in Hong Kong and has through which she has on numerous occasions assisted parties to reach settlements in their disputes.

Ms. Lam obtained her law degree from the University of Hong Kong. After that, she attained two Masters of Laws, one being a Masters of Chinese Law from the University of Hong Kong and the other one a Masters of Arbitration and Dispute Resolution from the City University of Hong Kong.

The Facilitative Evaluator's Model — The Way Forward to Lifting Hong Kong's Success Rate in Mediation

Dr. Kan Fook Yee PhD (CUPL)

ABSTRACT

Against the background of facilitative mediation being the dominant model of mediation and the poor rate of success for all court connected mediations since the CJR, coupled with some personal experience of failure through the use of the facilitative model in real mediation cases, this article was written by the author with serious reflection on whether the strict adherence to the facilitative model of mediation can really meet the demands and needs of the users of mediation in the market. The author's argument for the facilitative evaluator's model as the way forward to lifting Hong Kong's success rate in mediation is primarily based on the works of Leonard L. Riskin which explicitly provide detailed analyses of mediator orientations, strategies and techniques by way of a grid, known as Riskin's Grid, while the later article in 2005 is intended as a redress to his earlier unrealistic ignorance of the role and influence of the parties and their lawyers, to be simultaneously at work which may be demonstrated by way of "new new grids", throughout the entire process of mediation. In view of the common law principle on liability, the article also contains a reminder to any practitioner who intends to use the evaluative model of mediation to take out indemnity insurance, even though the mediation agreement may contain a proviso of immunity for the mediator.

Introduction

In various other jurisdictions of the world, the author has noted from their journals and publications that there are serious debates on the facilitative and evaluative models of mediation.[1] However, with apparent consensus, Hong Kong ended up with the facilitative mediation model being upheld as the only orthodox method of mediation to be adopted. This is probably because mediation was such a new concept in Hong Kong, as it was only from 1st January this year under the CJR of the High Court, that mediation became almost mandatory for all litigants. For the launching of the reform, the peers from 2008 had somehow proscribed that mediation practitioners would accept the facilitative model as the only model of mediation in Hong Kong. As a result, the established infrastructure for the practitioner was such that all trainers taught only facilitative mediation and all accredited mediators had to gain their accreditation by submitting themselves to an assessment of theories and practice of facilitative mediation. The side-effect of this was that those candidates who were regarded as natural evaluators, would suffer relatively higher failure rates in the accreditation assessment. Anyhow, all had apparently gone well since with facilitative mediation, until on 4th April this year, at a one-day conference, The Hon. Mr Justice Poon dropped a small bomb-shell to the audience by his welcome remarks which revealed a success rate for all court connected mediations since the CJR as being only 30% (some of which may yet represent positioned settlement), which no doubt stunned the entire audience and raised at the same time a number of questions, chief of which was: What went wrong? However unacceptable the above exposition might sound, one needs to take the matter further to find out its cause. Some speakers attributed it to the practice of sham mediation. Some others attributed it to the low mediation fees offered. Yet, no one made any reflection on the universal adoption of the model of mediation itself, the facilitative model.

It was against this background, coupled with some personal experience of failure through the use of the facilitative model in real mediation cases that prompted the author into some reflection on whether the strict adherence to the facilitative model of mediation can really meet the demands and needs of the users of mediation in the market, for example, the shrewd business minded litigants and their legal representatives who are entitled to look for positive

results from mediation, whether or not they may represent win-win situations. This, to a certain extent, may also represent the practical needs of the Courts which would very much expect more than a 30% settlement success rate.

The Facilitative Versus the Evaluative Model

Enough authoritative and in-depth writings have been published on the legitimacy, the creativity, and the effectiveness of the facilitative model of mediation to which the author also subscribes and which therefore need not be repeated here. However in the real world, it is not the mere people skills, process skills and management skills of a mediator that can bring about settlements in dispute mediations. In a complex business world, it is rather the ability of the mediator to look into the minds and the needs of the shrewd parties and the ingenuity and creativity of thinking coupled with the required subject matter expertise of the mediator that have to be put together to produce a settlement. After all, it cannot be taken for granted in all cases that prior to mediation literally no genuine efforts have been made by the parties themselves and their legal representatives to attempt to arrive at a settlement through "without prejudice negotiations". Hence it would be impracticable to assume that how the parties and their advisors failed in their prior negotiations, may nonetheless be easily overcome in a mediation that ensues with a facilitative mediator whose basic training toward dispute resolution is based on the premise that, left to themselves, parties are able to work with their counterparts, are capable of understanding their situations and can develop better solutions than what the mediator might create. If all this were true, they would probably have reached some kind of settlement already without further ado. Hence, it is only natural in the ensuing mediation for the parties to require some advice and guidance from the mediator as to how their disputes may be settled, whether based on law, industry practices or technology. In other words, for those parties who have gone through serious negotiations before they appear in mediation, they would prefer an evaluative mediator with pertinent subject matter expertise. As argued in the article introducing Riskin's Grid, "the evaluative mediator, by providing assessments, predictions, or direction, removes some of the decision-making burden from the parties and their lawyers. In some cases, this makes it easier for the parties to reach an agreement".[2]

In another article entitled “Mapping Mediation: The Risks of Riskin's Grid” by Kovach and Love, in which some U.S. States' attitudes concerning the practice of mediation have been cited, one can find support for use of evaluation in mediation which may be summarised below[3]:

a. Virginia

Since it has been recognised that mediation differs from other dispute resolution processes in that it allows the parties to determine their own resolution, the adopted standards of ethics state that the principle of self-determination is integral to mediation and that the mediator is required to describe his style and approach to the parties prior to the process and that the parties agree to that style and approach.

b. Florida

While the mediator qualifications advisory panel takes a strict view prohibiting all evaluation or provision of legal advice by mediators, some attorneys prefer mediators who evaluate the strengths and weaknesses of a case and the probable court outcome. Some practising mediators also oppose the panel's strict stance. Accordingly, consideration has been given to a revision of the rules that would allow evaluation that does not interfere with party self-determination.

c. Texas

In practice, in spite of statuary provision to the contrary, parties often expect evaluations of lawsuits on the merits as a key component of mediation.

d. Minnesota

Here, “evaluative mediation” is tentatively endorsed and mediators may offer opinion about the strengths and weaknesses of a case and it is acceptable for the mediator to suggest options in response to parties' requests, but not to coerce the parties to accept any particular option. A study of practising lawyers in Minnesota indicates that most lawyers want mediators to give their view on settlement ranges once impasse occurs because they think the mediator's opinion might help to settle the case.

It is such a liberal American attitude towards evaluation in mediation as referred to above that has cast doubt for the author as to the effectiveness of the facilitative approach and the need for hard and fast adherence to it in practice. This however is not to say that the author does not accept the definition of a mediation process as one in which the neutral person does not impose judgment on the parties but rather facilitates communication and understanding among them. The compromise as the author sees it, lies in evaluating without weakening the development options by the parties themselves, advice and opinions tending to assist rather than to coerce parties into determination and the advantage to be gained from subject matter expertise that normally goes with the evaluative techniques of the mediator. And if I may spell out clearly what these evaluative techniques are meant to be used, they may attract less criticism from the facilitative camp, as they may very well be the same techniques used by themselves, save that questions may be used instead of statements and even if statements are used, they may bear a much lesser degree of directiveness. In fact the kind of evaluative techniques I advocate to be used are none other than those included in the 4th Quadrant of Riskin's Grid which are:

Help parties evaluate proposals,

Help parties develop and exchange (interest-based) proposals,

Help parties develop options that respond to interest,

Help parties understand interest.[4]

As to the claim of erosion of party autonomy by an evaluative mediator, this can be avoided by the mediator having to make a prior declaration before engagement whether he will be evaluative oriented in his approach.[4] In the model shown in the Annexure, which the author has designed for his future mediation cases, the legitimate use of it will be covered by a clause in the mediation agreement which is to the effect that notwithstanding the mediator having undertaken to use the facilitative approach in the process, in the event of an impasse or near impasse and subject to the consent of both parties, as a last attempt to achieve a settlement, the mediator may be allowed to cross the barrier and use the evaluative approach.

Should this opt-in clause be included in a mediation agreement and carried into

effect, the mediator must realise that his role as a facilitator is replaced by that of an evaluator and as such he will incur liabilities to the parties and requires indemnity coverage.

The Alternative Way Forward

This is an ever changing world and it has been changing faster and faster in the last 20 years in all areas of development whether scientific, technological or economic with innovation being the key word. Some 16 years after his "Mediator Orientations, Strategies and Techniques" (1994), L. Riskin published his "Replacing the Mediator Orientation Grids Again: The New New Grid System",[5] which was considered necessary by him, despite his old Grid of Mediator Orientation forming for many years the basis for many training programmes since. What he found was that evaluating and facilitating were not really opposites and most mediators used techniques that fell into both these categories, and that the old grid failed to distinguish between the mediator's behaviour that unrealistically ignored the role and influence of the parties and their lawyers.[6] What this New New Grid intends to focus on is the allowance of an enormous range of decisions in and about a mediation to be made by the participants as much as they may aspire to do so.[7] The principal purpose that can be drawn from this new authoritative work of Riskin is that there is much to be gained from establishing an explicit decision-making process that offers opportunity for all participants, mediator, parties and lawyers to influence all important issues at any stage of mediation, even at the very preliminary stage of predispositions on problem-definition.[8] Save that this "new new grid" of mediator orientation may in principle result in a completely evaluative process of mediation, if the mediator's influence is strong or if participants all have strong will, the outcomes from all-participant interactions may become too complex such that problem-definition may shift its emphasis, resulting in a prolonged process, apart from its being not an easy process for an inexperienced mediator to harness, and this "new new grid" may nonetheless be upheld as commanding a great prospect to represent the alternative way forward in the future, though I would for the time being be contented with my Mixed Model which may in essence be a "facilitative cum new grid model".

Note 1: Reference Papers 1-8

Note 2: Infra Ref. Paper 1, p.44

Note 3: Infra Ref. Paper 2, pp.84-87

Note 4: Infra Ref. Paper 1, p.35

Note 5: Reference Paper 9

Note 6: Infra Ref. Paper 9, p.127, sub-title: Problems with the Old Grid Para.1&2

Note 7: Infra Ref. Paper 9, p.128, sub-title: Two Matters Highlighted Para.1

Note 8: As for Note 7, the penultimate para.

The Mixed Model

Opening

The Backdrop

(White board)

Setting the house in order before opening

Prologue

1. Mediator's self-introduction

(Emphasis should be put forth by the Mediator that the Parties themselves are in control and not the Mediator, which therefore calls for suitable empowerment of the Parties by him. The Mediator needs to generate an atmosphere of rapport and engage himself in a friendly and relaxed manner.)

2. Parties' self-introduction

3. Mediator explains:

- Mediator's code & approach
- Ground rules to be observed by the Parties

Act One

In joint session

Scene 1: P1 opens his case, then M summarises
P2 opens his case, then M summarises

Scene 2: P1 replies to P2 with/without further points
P2 replies to P1 with/without further points

Scene 3: Subject to order under the ground rules, M allows Ps to freely exchange

Scene 4: M summarises the issues and with consent of Ps decides the agenda for the next stage

Act Two

[Setting the scene for Ps to transform their positions to interests and needs and to develop options for settlement]

Back-drop

(White board)

Joint & separate sessions

Scene 1: Here, M's skill in helping Ps to transform their positions is very much needed, as well as his ability to recognise Ps' interests and needs

Scene 2: M's skill in empowerment is in no less demand to encourage Ps to generate options which need to be discussed in detail one by one with reality tests

Scene 3: Granted that Ps ultimately agree on certain options which satisfy both Ps' interests and needs, M may proceed to the next stage, Act Three,

OR

Scene 3a: Impasse appears likely, M proceeds to Act Three A

Act Three

Back drop

Reality tests on options & Draw up Settlement Agreement

Scene 1: M performs the last reality tests on the agreed options together with Ps

Scene 2: If Ps are not represented by lawyers, M will assist them to draw up a settlement agreement

OR

Act Three A

[Ps in impasse or near impasse, upon which M may fall back on the saving clause in the Mediation Agreement and switch to the facilitative evaluative model in order to avert the situation of impasse]

Back-drop

Overcoming the impasse

Scene 1: Firstly M offers to Ps the option of terminating the mediation or continuing the mediation with the evaluative approach as provided in the saving clause of the Mediation Agreement. (Assuming that Ps' consent is given, mediation continues)

Scene 2: M takes Ps in turn into private session(s) and based on his subject matter expertise, M offers his fair and honest evaluation and advice(s). (Knowing though he is protected under the saving clause, M nonetheless should strive to preserve as much as possible his neutrality and impartiality.)

Scene 3: M may bring Ps back together again in joint session hoping that Ps may, with new perspectives in their minds, work out a solution. (If need be, M may have more private sessions with the Ps in order to reach an agreement.)

Scene 4: Act Three repeated.

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PROFILE

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Professional Development of Mediators: Process and Implications

Ms. Hung Kit May Beatrice

ABSTRACT Concerns related to the professional development of mediators should be properly addressed in view of the rapid development of mediation in Hong Kong. This article discusses the process of professional development of mediators and the implications for mediation training, CPD and Train-the-Trainer programmes. An integrative approach should be adopted in organizing these activities so that training, accreditation and continuing professional development schemes can be planned, implemented and evaluated from a long-term developmental perspective. This is essential for mediation as an emerging profession in Hong Kong to develop and serve its role – to promote harmony in society.

Introduction

One and a half years have passed since Practice Direction 31 came into effect on 1 January 2010. The use of mediation as a means to resolve conflict is becoming more common in Hong Kong. It has extended beyond the conventional territories to new frontiers, such as Compulsory Sale cases for development under the Land (Compulsory Sale for Redevelopment) Ordinance. This situation is both encouraging and worrying. There is a risk that the application of mediation may be developing at a much faster rate than the profession itself, particularly in the areas of maintaining professional standards and ensuring the quality of mediators.

The professional development of mediators has received insufficient attention despite the rapid increase in the significance of their role in Hong Kong. The Report of the Working Group on Mediation released on 8 February 2010 has briefly touched upon this topic, and ended with just a recommendation that 'information on the Continuing Professional Development requirements (if any) of mediator accrediting organisations should be made available to the public' (Report of the Working Group on Mediation, 2010). Mediation is becoming an important profession in Hong Kong, but the professional development of mediators has not been given the high level of attention that it deserves.

This article discusses the process of professional development of mediators and the implications for mediation training, CPD and Train-the-Trainers programmes. An integrative developmental framework is suggested for the organization of these activities. The author considers it timely to discuss these issues, so that mediation as an emerging profession in Hong Kong can be further developed, and a top quality mediation service can be provided to meet the growing needs of our society.

Professional Development of Mediators

According to Bowling and Hoffman (2003), the development of mediators proceeds in three stages:

1. Learn skills and techniques.
2. Acquire a deeper understanding of why and how mediation works.
3. Change self-perception from TO DO mediation to TO BE a mediator.

Lang and Taylor (2000) conceptualised the professional development of mediators in four stages: Novice, Apprentice, Practitioner and Artist.

Stage One: The Novice

The novice mediators have no previous training in mediation. They are interested in learning and are excited about gaining the knowledge and skills of the mediator, understanding the nature of mediation practice, and experiencing the role of the mediator. The novice mediators have a beginner's mind – open, unassuming and eager to learn. To develop basic competency, mediators

in this stage need models and examples, as well as training and experience, accompanied by constructive feedback from trainers.

Stage Two: The Apprentice

The apprentice mediators have a working knowledge of some of the principles and skills of mediation. Having completed a basic mediation course and participated in role-plays, they have developed a sense of how mediation works. Yet they lack experience in interaction and in putting their knowledge and skills into practice. The apprentice mediators need more experienced mediators to serve as mentors to provide guidance and supervision, and to help them obtain the practical experience needed to develop competence. At this stage, the apprentice mediators maintain a thirst for knowledge and seek additional training to enlarge their repertoire of skills.

Stage Three: The Practitioner

Practitioner mediators are accomplished professionals. They are well regarded by their peers, and their services are valued by their clients. They work with purpose and care. They bring their knowledge and skills together with sufficient experience to know when and how to mediate in positive, constructive and effective ways. They are usually trainers for novices and mentors for apprentices. Practitioner mediators tend to view themselves as capable, skilful and proficient. Their professional performance, however, may become patterned and stiff if they do not progress further in their professional development.

Stage Four: The Artist

Artist mediators have the same knowledge and skills as practitioners, but they are inventive, bringing their own interpretation to the application of their knowledge and skills and applying them in novel and idiosyncratic ways. They are inquisitive, seeking opportunities to test and polish their strategies and skills. They are open to novelty, have a passion for experimentation, and love to learn. They are creative, not just functional. They are self-reflective and self-motivated, constantly striving to improve their own performance and search for professional excellence.

Attaining Artistry in Mediation

Mediation is both a practice and an art. Attaining artistry in mediation practice is the ultimate goal of professional development. Artistry is the search for excellence that transcends the boundaries of practice models, and is the key to professional satisfaction and competence. To attain artistry requires three essential elements: practice skills, theoretical knowledge and the ability to make useful and appropriate connections between theory and practice. 'Artistry is attained when mediators are sufficiently grounded in, skilled at, and knowledgeable about the key components of mediation that they can bring their own unique perspective and interpretation to bear on the practice' (Lang and Taylor, 2000). Mediators must develop the ability to synthesise knowledge and skills in the moment of interaction, and to integrate theory and technique into a series of strategies and interventions. They must be able to conduct self-reflection both during and after mediation, so that they can continue to learn and improve their effectiveness.

Essence of Professional Development

Attaining artistry is extremely important if mediators are to meet the increasing challenges they face nowadays. How mediators can achieve artistry is the central concern of professional development programmes. To achieve this end, different processes of change are required for mediators at different stages of their professional development.

Novice to Apprentice: From Learning to Acquisition

Novices start off with little knowledge about mediation. Their initial interest in mediation may have been sparked by conversations with colleagues or friends. Or they may consider mediation as an alternative to their current occupation. Novice mediators in Hong Kong usually have their own profession. They may experience role confusions and role conflict when they switch from one role to another. To become apprentice mediators, they need to acquire the unique values, philosophy and mindset of mediation, and differentiate them from those of their own profession. They need to acquire mediation knowledge, skills and techniques and learn how to put them into practice. Above all, they need to acquire the specific attitudes and qualities of a mediator, so that mediation can

be conducted effectively as a means of dispute resolution.

Apprentice to Practitioner: From Acquisition to Integration

The concept of 'Integration' has gained increasing recognition as the central quality of a good mediator. 'Integration' is defined 'as a quality of BEING in which the individual feels fully in touch with, and able to marshal, his or her spiritual, psychic, and physical resources, in the context of his or her relationship with other people and with his or her surrounding environment' (Bowling and Hoffman, 2003). 'Integration' signifies the transition of the mediator from feeling that 'I am someone who mediates' to realizing that 'I am a mediator'. It also signifies the transition from seeing mediation as work to be done to seeing it as an integral part of one's own identity.

Self-awareness is an essential element in the achievement of this stage. Hung (2009) highlighted three aspects of self-awareness which are particularly important for the process of integration:

(1) Personal assumptions about truth, human nature and the nature of the dispute.

(2) Personal factors such as motivations, biases and experience.

(3) Perceptions of the parties.

Heightened awareness in these aspects enables the mediators to be aware of the limitations of their personal views and actions, and consequently, the efficacy of their professional performance.

Practitioner to Artist: From Integration to Reflection

Mediators who have attained artistry have the following characteristics:

(1) They engage in a continual process of self-reflection.

(2) They are willing to see perspectives other than their own.

(3) They use the process of experimentation to test their observations, perceptions, and formulations of the parties and the disputes.

(4) They are willing to experience surprise.

(5) They do not see themselves as experts, and they acknowledge that both they and their clients have expertise to bring to the process of mediation.

(6) They are lifelong learners, open to new information, new strategies and new techniques.

These features enable the mediators to improve themselves continuously in search for professional excellence. As early as 1983, Schon pinpointed the ability of mediators to conduct reflective practice as the prerequisite for developing these characteristics (Schon, 1983). 'Reflection' is the process by which professionals think about the experiences, events, and situations of practice and then attempt to make sense of them in light of their understanding of relevant theory (Lang and Taylor, 2000). Reflection can occur both during mediation (reflection in action) and after mediation (reflection on action). It nurtures exploration and discoveries that will lead to an increased repertoire of skills and enhanced ability of the mediator to modify his mode of intervention. It often leads to new insights to approaching the problem.

Implications for Professional Development Programmes

The essence of professional development of mediators has important implications for professional development programmes. Such implications can be considered from three aspects: mediation training programmes, CPD programmes and train-the-trainers programmes.

Mediation Training Programmes

Basic mediation training courses in Hong Kong usually focus on the process of mediation, including the structure and phases of mediation, the essential communication skills, management of the mediation process and the effective mediation skills (Report of the Working Group on Mediation, 2000). The theoretical aspects of mediation have usually been assigned a less important place. Yet theoretical knowledge provides the basis by which mediators can conduct reflective practice and further improve their mediation effectiveness. Therefore, basic mediation training courses should include more coverage of the theoretical basis of various mediation approaches and mediation skills. Only with adequate theoretical knowledge will mediators be able to evaluate the appropriateness and effectiveness of their strategies and actions.

To assist novice mediators to acquire the necessary knowledge and skills of mediation practice, feedback from the trainers is of utmost importance. Trainers should equip themselves with the necessary skills in debriefing and giving feedback, so that the participants may learn efficiently and effectively.

Continuing Professional Development

'Continuing Professional Development is the systematic maintenance, improvement and broadening of knowledge and skills, and the development of personal qualities necessary for the execution of professional duties throughout the practitioner's working life. It is a well-known system, and being practiced across professions' (Hong Kong Mediation Centre, 2009). This system has been incorporated in most mediator accreditation organisations in Hong Kong. The content of current CPD programmes varies and may consist of training activities and/or professional activities. In addition to these CPD activities, the Working Group on Mediation recommended that 'encouragement should be given for experienced mediators to assist newly accredited mediators to obtain practical mediation experience' (Report of the Working Group on Mediation, 2010). This is achieved by involving new mediators as assistant mediators so that they may gain insights while working together with the experienced mediators.

While these activities will definitely broaden the skills and enrich the experience of mediators, training should be provided to assist them to integrate these aspects into their own approach and behaviour repertoire. Only through the process of integration will these activities make an impact on mediators and enhance their performance. Otherwise mediators may just attend these activities for the sake of meeting CPD requirements, thereby defeating the purpose of the whole system.

To further assist mediators to attain artistry, training in the area of reflective practice should be provided (Schon, 1987). Mediators should acquire the skills to conduct self-reflection, both during mediation and after mediation. Such ability is crucial for mediators to become lifelong learners, continuously monitoring, evaluating and reflecting on their own performance to achieve efficacy and finally artistry.

Train-the-Trainers Programmes

The success of all professional development programmes depends invariably on the quality of the trainers. Trainers should fully comprehend their roles and functions when they conduct training programmes for mediators at different stages of professional development. Train-the-Trainers programmes should be organised to prepare and equip the trainers for serving these roles.

Trainers for basic mediation training programmes should possess effective debriefing skills, besides presentation and teaching techniques. Debriefing is a semi-structured process by which the facilitator, once an experiential activity is accomplished, asks a series of progressive questions that help the participants to reflect on what happened and acquire important insights. Good debriefing skills enable the participants to gain the most from role-plays and other experiential activities. Trainers should also possess prescriptive coaching skills, which help them to shape the participants' performance to meet the requirement of professional mediation practice. These skills include identifying the participants' needs, demonstrating the correct technique or the proper application of the technique, and analyzing and evaluating a particular move or intervention made by the participants.

Experienced mediators who provide guidance and supervision for newly accredited mediators should possess effective mentoring skills. They should understand their roles and functions as mentors and how the assistant mediators can be guided to achieve competence in mediation practice.

Trainers who are responsible for reflective practice programmes should possess effective elicitive coaching skills. The elicitive approach is based on the belief that the mediator's knowledge is a resource for learning and the coach is a catalyst for learning to take place effectively (Lederach, 1995). It is an interactive process in which the coach asks questions that encourage mediators to uncover for themselves what was effective or ineffective and to identify possible explanations for such outcomes. The coach supports learning by helping mediators identify the rationale of their strategies and evaluate the impact of their interventions on the parties. In this way, the mediators will be guided to reflect on their own behaviour and improve their own performance.

An Integrative Professional Development Framework

The previous discussion highlighted the intricate relationship between mediation training, continuing professional development and train-the-trainers programmes. An integrative framework is therefore needed so that these programmes can be planned, organised and evaluated from a developmental perspective. Below are some suggestions for the design and organization of these programmes.

For Prospective Mediators

Content of training: Theory and practice of mediation

Focus of training: Understanding mediation / Learning mediation approaches and techniques

Trainer's competence: Debriefing and other basic training skills.

For New Mediators

Content of training: Consolidation and Enrichment activities / Mentorship programmes

Focus of training: Adoption of Mediation mindset and orientation / Acquisition of mediation skills / Development of professional ethics, attitudes and qualities / Application of mediation

Trainer's competence: Mentoring and prescriptive coaching skills

For Practising Mediators

Content of training: Integration and Self-reflection activities

Focus of training: Increasing self-awareness / Integration of mediation practice / Self-evaluation and improvement / Lifelong learning

Trainer's competence: Elicitive coaching skills

Further research is needed to examine the significance of these elements in

improving the performance and effectiveness of mediators.

Conclusion

Concerns related to the professional development of mediators should be properly addressed in view of the rapid development of mediation in Hong Kong. The quality assurance issue extends far beyond the discussion of mediator training and accreditation schemes. Mediation training, CPD and train-the-trainers programmes should be planned and organised from an integrative developmental perspective. It is essential for mediators to achieve professional excellence in their practice, which is vital for mediation to serve its role in our society.

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PROFILE

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中国古代调解制度与情理法

郑琴渊 BBS，MH

内容提要 ABSTRACT

在中国数千年历史中，调解作为一种重要的纠纷解决机制，在促进和谐、敦睦邻里、稳定社会秩序等方面发挥著重要的作用。本文从原始资料中探讨中国调解制度的起源，对中国古代民间调解、官方调解和官批民调进行分析，阐述古代调解制度是如何穿插在错综复杂的情理法情境之中；同时，以现代调解角度看中国调解制度的发展。

关键词：调解制度 民间调解 官府调解 官批民调

Throughout the several thousand years of history of China, mediation was regarded as a vital dispute-resolving mechanism. Mediation was developed for the promotion of harmony, mirth in neighbourhood and stability in society. This paper intends to probe into the root of the Chinese mediation system and to analyse ancient Chinese societal mediation, semi-official mediation and government-instructed mediation through the study of ancient classics. Meanwhile, this paper investigates the Chinese mediation system from the modern point of view.

中国最高人民法院院长王胜俊在**2011**年**3**月**11**日召开的全国人大第十一届第四次会议上指出：“加强诉讼调解，推动多元矛盾纠纷解决机制建设，最高人民法院制定《关于进一步贯彻“调解优先、调判结合”工作原则的若干意见》，指导各级法院更好地运用调解手段化解矛盾，努力实现案结事了人和。”及“加强诉讼与非诉讼相衔接的矛盾纠纷解决机制建设，发挥人民调解组织、社会团体、律师、专家、仲裁机构的作用，通过在法院设立人民调解工作室等做法，引导当事人就地、就近选择非诉讼

方式解决纠纷。”显见中国政府加强推动选择调解方式解决纠纷的决心，被西方学者誉为“东方经验”，“中国特色”的解纷方式的势头必然会继续冒升。那么中国调解制度的起源是怎样的？古代社会的调解与老百姓的生活又有什么关系呢？让我们踏上三千多年的中国法制发展历程，寻找中国古代调解制度的印记，细阅我们的祖先如何把“和解”与“情理法”之间的微妙关系渗透入实际生活中，进而发挥其独特的魅力。

一、中国古代调解制度的起源

中国调解制度的起源，现在实难以考究，但在战国时期的《韩非子 • 难一》典籍中是有迹可寻，文献中这样描述：“历山之农者侵畔，舜往耕焉，期年，甽亩正。河滨之渔者争坻，舜往渔焉，期年而让长。东夷之陶者苦窳，舜往陶焉，期年而器牢。仲尼叹曰：‘耕、渔与陶，非舜官也，而舜往为之者，所以救败也。舜其信仁乎！乃耕藉处苦而民从之。故曰：圣人之德化乎！’”学者解说道：历山的农民田界不清，舜到历山，与农人一起耕地，一年后，划分清楚了田界。在河滨以打鱼为生的渔民争夺有利的地势，舜到河滨与渔民一起打鱼，一年后渔民争相将好的地势让给长者。东夷制作陶器的陶工制作的陶器不结实，舜到东夷与他们一起制陶，一年后陶工制出结实的陶器。韩非子引用孔子的评论说，舜原本没有管理农耕、渔猎和制陶的职责，只是因为风气败坏，舜以德“救败”，所以到了历山等处，以仁义、诚信和自我的表率作用化解了纠纷。[1]

根据《周礼 • 地官 • 调人》的记载，西周时期设“调人”，职掌为“司万民之难而谐和之。”调人是当时的官衔，负责调解民众之间的争端，坊间的小事多由调人负责处理。可见远在三千年前的西周年代，中国已有较为完备的调解制度，这一点不容否认，这些记载可参见《礼记》及《周礼》，也可以从考古发现中的文献及青铜铭文中寻得踪迹。[2]

《唐律疏议》中有“义绝离之”条文。即“若夫妻不相安谐，谓彼此情不相得，两愿离者。”《唐律疏议 • 户婚律》规定：“诸犯义绝者离之，违者，徒一年。若夫妻不相安谐而和离者，不坐。”《唐律》规定由官方介入，强制令处于恩尽义绝或感情破裂的夫妇通过和解方式离异。说明“和解制度”在唐代已被引用于婚姻立法。

1. 曾宪义（2009）：《关于中国传统调解制度的若干问题研究》转载自《中国法学》，2009年第四期，第35页
2. 胡留元、冯卓慧（1989）：《长安文特与古代法制》，北京：法律出版社

中国古代调解制度不但被中原地带的汉人所推崇，少数民族也以此作为稳定治理地方的法宝。由蒙古人统治的元代，《通制条格 • 十六卷》中的“理民”篇记载：“诸论诉婚姻、家财、田宅、债负、若不系违法重事，并听社长以理喻解，免使妨废农务，烦扰官司。”足见当时的统治者倾向于由乡绅调理民间的琐事，可以节省时间，人们不至于延误农务生计，除非涉及重大案件才惊动官府。

明朝把调解制度发挥得淋漓尽致，规定在州、县以下设“申明亭”和“旌善亭”，二者皆为具有调解功能的坊间组织，由当地德高望重的老人、州长、族长、里长、邻长等担任调解员。《大明律集解附例》中记载：“凡民间应有词状，许耆老里长准受于本亭剖理。”《太祖实录》曰：“命有司择闾高年人公正可任事者，理其乡之词讼。若户婚、田宅、斗殴者，则会里胥决之。事涉重者，始白于官。若不由里老处分而径诉县官，此之谓越诉也。”又巡按四川监御史何文渊言：“太祖高皇帝令天下州县设立老人，必选年高有德、众所信服者，使劝民为善。乡闾争讼，亦使理断。下有益于民事，上有助于官司。”明末清初的著名学者在《日知录》中记述：“洪武中，天下里邑，皆置申明、旌善二亭，民有善恶，则书之，以示劝惩，凡户婚、田土、斗殴常事，里老于此剖决。”[3]当时的“申明亭”成为解决坊间争端的平台，促进社区和谐、邻里融洽；“旌善亭”则起扬善惩恶、教化群众的作用。

明朝的“申明亭”制度被清朝所沿用，《大清律例》注道：“州县各里，皆设申明亭。里民有不孝、不弟、犯盗，犯奸一应为恶人，姓名事迹，具书于板榜，以示惩戒，而发其羞恶之心，能改过自新，则去之。其户婚、田土等小事，许里老于此劝导解纷，乃申明教戒之制也。”

由以上资料看来，调解制度的意识早在四千多年前的舜帝时期开始萌芽，先秦时期的西周对调解制度已有较为具体的规定，把调解制度列入治理地方体制，后被历朝所沿袭，并因时因势损益，延续至今。

二、中国古代的主要调解形式

在中国数千年的历史中，调解作为一种重要的纠纷解决机制，在地方行政领域发挥重要作用。中国古代人们心中的法是“天理”、“国法”、“人情”三位一体的结合，这

3.《日知录（清）顾炎武 · 卷八》http://www.guoxue123.com/biji/qing2/rzl/008.ht

种多元的观念是古代中国占支配地位的法观念。调解制度是如何穿插在古代社会错综复杂的情理法之中，本文尝试透过民间调解、官府调解和官批民调三种形式对此予以阐述。

(一)情理为先的民间调解

民间调解是指当产生争议时，邀请"中间人"出面调解，以使争端得到解决的活动。民间调解的"中间人"主要包括乡长、族长、德高年劭的老人以及地方官员等。民间调解包括宗族调解和邻里调解两种。古代中国是一个宗族社会，同姓或同宗聚居是一个原则，家法族规是宗族内成员必须遵守的行为规则。当宗族的成员之间发生纠纷之后，家法族规成为宗族首领居间调解的法律依据。需要强调的是，宗族首领不但可以调解宗族成员之间的纠纷，还可以对违反家法族规的成员进行处罚，且这种处罚是法律所认可的。例如唐朝宰相长孙无忌在《唐律疏议序》中阐述道："刑罚不可驰于国，答捶不得废于家，时遇浇淳，用有众寡。"《大清会典事例》也明确指出："族长及宗族内头面人物对于劝道风化户婚田土竞争之事有调处的权力。"这说明宗族调解具有一定的强制性，并非当事人完全自愿的接受调解。法律承认宗族首领手握调解权和处罚权，形成了国法家规的双重规则体系。邻里调解是指由亲友、邻居、长辈或贤良人士作为"中间人"的调解方式。邻里调解方式灵活，没有时间、地点、调解形式的限制。邻里调解遵循自愿原则，调解人由当事人自愿选定。邻里调解由于"中间人"在当事人双方享有极高威信，所以调解方案往往都能得到落实。

(二)情理法兼备的官府调解

官府调解，又称司法调解，它是指在官府长官的主持下对民事案件或轻微刑事案件的调解。依法裁判虽然是官府的职责，可讼清狱结被作为考核地方官的重要标志，因此官府调解也异常盛行。相传孔子为鲁国司寇时，常息讼甯人、施以教化。《荀子•宥坐》记载，孔子认为："对于百姓应该以教化为主。百姓不孝，罪不在民，而是为政者教化不到的缘故。为政者不行教化而一味以刑惩罚，与杀无辜之人没有什么两样。"清朝乾隆时，袁枚为上元县令，"民间某娶妻甫五月诞一子，乡党姗笑之，某不能堪，以告孕后嫁诉其妇翁"。此案倍受民众关注，"翌日，集讯于庭，观者若堵墙"。而袁枚坐堂后，并没有直接进行审讯，而是"公盛服而出，向某举手贺"，致使"某色愧，俯伏座下"。之后，经过袁枚耐心劝导，"众即齐声附和，于是两造之疑俱释，案乃断，片言折狱，此之谓矣"。[4]官府调解与宗族调解，均具一定的强制性，在当事人接受官府调解后，不得再以同样的事由进行诉讼。

（三）调解为先的官批民调

官批民调是指官府接到诉状后，认为情节轻微或事关亲族伦理关系及当地风俗习惯，不便公开传讯，便将诉状交与族长、乡保进行解决的一种调解制度。族长、乡保接到诉状后，应立即召集原、被告双方进行调解。因此有学者认为，官批民调是一种半官半民性质的庭外调解，[5]乡保如调解成功，则上呈说明案件事实及处理意见，请求官府销案；调解不成，则需说明理由，然后交与官府处理。中国古代县级以下的基层组织，如乡里、保甲、村社、宗族等，其负责人是官府在村社的代理人。如上文所述，这些人对宗族内部的纠纷有著官府赋予的合法裁判权。诉讼到官府的一些案件，或因案情轻微，或县官认为其是非曲直由邻里判断更为公正，就会发回交由这些基层调解人审理。由于民事纠纷多产生于乡里族里之间，宗族首领与治安官员更容易获知纠纷发生的真实原因，而州县官员却未必能获知详情，官批民调这种调解方式，更为实际地认识到诉讼中事实审理与法律审理的区分问题，是一种非常有效的调解方式。

三、改善中国调解员服务制度的若干意见

古代的调解制度，凝聚了人类崇高的情操，以及求同存异、和睦共处、息事宁人的理念；在一定的法律依据、行为规范、社会共识、道德教育下，充份发挥其稳定社会秩序、促进邻里和谐的作用，这股中华民族的智慧结晶值得后人借鉴。喜见现在中国的调解制度在原有的基础上推陈出新，持续发展，迈向现代国际社会的趋势及踏上配合国情需要的轨道。中国最高人民法院院长王胜俊在全国第十一届人大会议提交的工作报告中说道:“积极推动建立人民调解、行政调解、司法调解相结合的‘大调解’工作体系，加强三者之间在程式对接、效力确认、法律指导等方面的协调配合，共同化解社会矛盾，促进社会和谐稳定。”这是一个艰巨的工程，雄伟的鸿图，许多法律界人士、学者、人民都寄予厚望，笔者在此寄语一二以示支持：

（一）完善调解员的培训及考核制度

欲要调解服务顺利推广，首要工作是提升调解员的素质。调解员是调解工作的灵魂，主要职能是：“协助争议人参与讨论有关纠纷事项，为争议人提供中立环境，安

4. 张晋藩（1988）：《清代民法综论》，北京：中国政法大学出版社，第287-288页

5. 同注1，第39页

排及举行不同的讨论会议，制订及执行调解、协商规则或指引，以及制造融洽和谐的气氛，协助争议人解决有关纠纷。”[6]世界各国各地对调解员的培训和考核都有严格的规定及一定的要求，在诸多中外学者的文献中，不难看到对中国调解员素质的相关评论，不容否认的一点是“良莠不齐”。根据中华全国人民调解协会的统计，全国现时约有429万人民调解员。这些调解员如何经培训和考核获得资格？哪支机构具有授予调解员资格的职能？对调解员的基本要求有哪些？根据《中国法律年鉴》统计，以2003年1月至9月、2004年、2005年为例，民事一审案件分别是4410236件、4332727件、4380095件；调解各类纠纷的案件分别有449.22万件、4492157件、4414233件，可见调解员的需求量之庞大。为确保各类调解服务的品质，提升以调解为有效的争议解决机制，当局应建立健全的调解员选聘、培训及考核等制度。幅员辽阔的中国，除了在各地区设立调解委员会，还应考虑订立首席调解员制度，由资深的专业调解员出任，执行各调解委员会定期培训计画和调解员认证制度，确保辅助其它调解员和提高素质。

（二）妥善处理法与情理的关系

调解的功能，主要是自愿参与、当事人自主、省时省钱、免伤和气，最重要的是会议内容和过程全部保密。现时中国各地仍盛行人民调解，调解员是来自街道办、居民委员会、村民委员会，当事人的单位主管、妇联领导等，调解会议往往在公开的情况下进行，或凭单方面的意愿展开“调停”或“劝和”，凭动之以情、晓之以理来平息纷争，最常见的例子是邻里争执、夫妻不和、工友之间的纠纷。在此特别一提，中国《老年人权益保障法》中规定：“老年人与家庭成员因赡养、扶养或者住房、财产发生纠纷，可以要求家庭成员所在组织或居民委员会、村民委员会调解，也可以直接向人民法院提起诉讼。调解前款纠纷时，对有过错的家庭成员，应当给予批评教育，责令改正。”立法的原意是引入调解制度，令家庭成员复和，不致于扯断家庭纽带及造成感情上的伤害，是一项弥补法律弱点的补救方案，但所属单位的某些负责人仅凭个人的主观意志，把调解会议的内容或相关人士的名字公开并进行批评，以示教育和惩戒。当今社会讲求“平等、民主、自治”，注重个人私隐，讲求尊重人权。当局开展调解工作时，必须要求调解员恪守保密原则，对法与情理之间的关系应该用现代法治手法予以妥善处理。2009年8月最高人民法院发布的《关于建立健

6. 江仲有（2004）：《调解技巧》，香港：万里机构，第62页。

全诉讼与非讼诉相衔接的矛盾纠纷解决机制的若干意见》对调解的保密原则作出明确的规定，可惜基层调解的旧习民俗没有因时因人制宜。

（三）调审分离促进调解制度的公平性

近年来，中国调解制度快速发展，自“能调则调、当判则判、调判结合，案结了事”十六字指导原则确定以来，各地法院纷纷加强调解工作力度，掀起“调解大跃进”的浪潮，调解率不断攀升，逐年刷新。根据报导，有许多法院把调解个案数字、调解率作为法官考核的指标，以重庆云阳法院为例，调解率上升一个百分点，法官年终考核就加一分。功利化必然的诱发下，为了争取考核高分，法官对不宜调解的或当事人一方不愿意接受调解的案件作出“强行”或“诱导”的调解行为，不但达不到案结了事，反而加深了当事人的反感，激化矛盾，积怨加深。这明显是组织定位不准确、人员角色错位的问题。现代西方社会的调解服务，始终恪守著一些基本原则，例如：法官不能介入当事人的调解，调解与裁决必须分离。西方社会的调解服务中心多数是非牟利机构或专业人士组织，各调解机构备有自己的调解员名册，调解员来自不同专业领域，均训练有素，经验丰富。法官只能退休或离职后才可以担任调解员。以香港为例，有香港大律师公会、香港律师会、香港调解会、香港和解中心、英国仲裁学会（东亚分会）、香港仲裁司学会、香港建筑师学会、香港测量师学会等7个非牟利机构提供各范畴的调解服务，并成立联合调解专线办事处，为需要使用调解服务来解决纠纷的人士提供专业服务。目前，中国有许多学者主张调解改革的重点放在调审分立或分离的设计上，学者认为，调审分离能促使司法制度提高其严肃性、调解制度的公平性。“由于立法上的调审合一，调解人员的角色冲突使其常常自觉或不自觉地对当事人以劝压调、以判促调、以拖促调、以利诱调，以促调解成功，这种随意性容易破坏司法的严肃性，失去诉讼调解应有的对公平正义的追求。”[7]

既有特质，也颇具风土气息的中国特色调解制度，在今天“司法大众化”的环境下，如何能达到鉴古知今、稳健发展的目的，有许多问题值得深入探讨，笔者在此抛砖引玉，冀各界友好指正点评。

7. 范 愉 (2000)：《非诉讼纠纷解决机制研究》，北京：人民大学出版社，第六章 第三节

作者简历

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郑女士身体力行提倡终身学习的理念，于**1995**年获北京大学法律系颁授的法学硕士学位，现为岭南大学社会学及社会政策系博士候选人，香港和解中心调解员、土地审裁处（建筑物管理案件调解服务）认可调解员。

调解成功的系统分析与八种技巧

张竹生

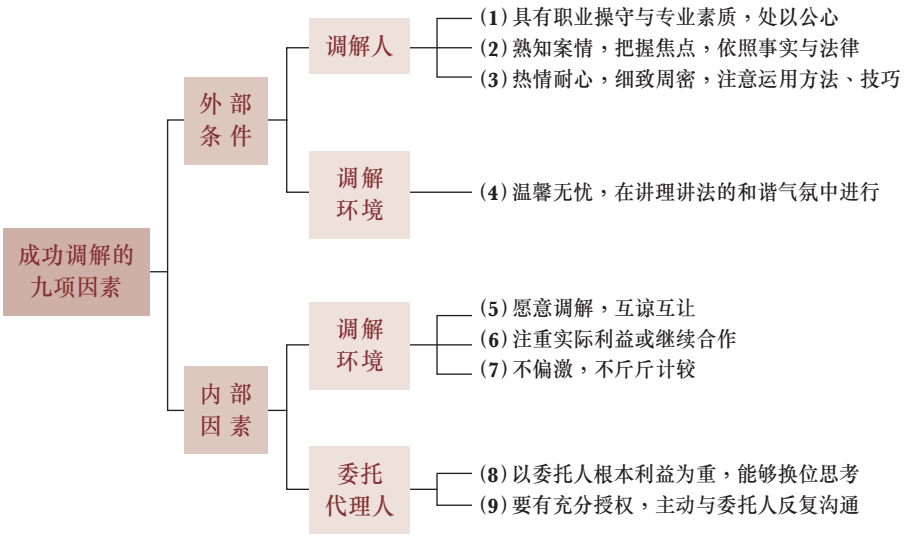
内 容 提 要 调解，作为发扬中华民族“和为贵”及“和气生财”等传统哲理与美德的纠纷处理方式，在我国民间、行业以及行政机关、司法机关和仲裁机构中得到了广泛的应用。随著中国社会主义市场经济的深度发展,调解在构建和谐社会中必将发挥更加重要的作用。因此，对调解的关键与技巧的再学习再认识，有著新的现实意义。本文将主要从仲裁调解的角度，试对调解的成功关键及八种技巧作一初步探讨。

一、系统分析注重技巧是化解矛盾使调解成功的关键

在市场经济的发展中，各个经济主体之间存在著相互依存、共荣共利，既合作又竞争的关系，当他们之间产生纠纷不能自行协商解决而依法提请调解时，调解人应如何具体地认识该矛盾的各个侧面，并创造必要的条件去促使矛盾转化并化解呢？笔者根据二十几年从事调解与仲裁，并成功和解两百馀件案例的实践，认为应注意以下几个方面的系统分析及认识。

首先，是对促使调解成功的内部因素与外部条件的系统认识。

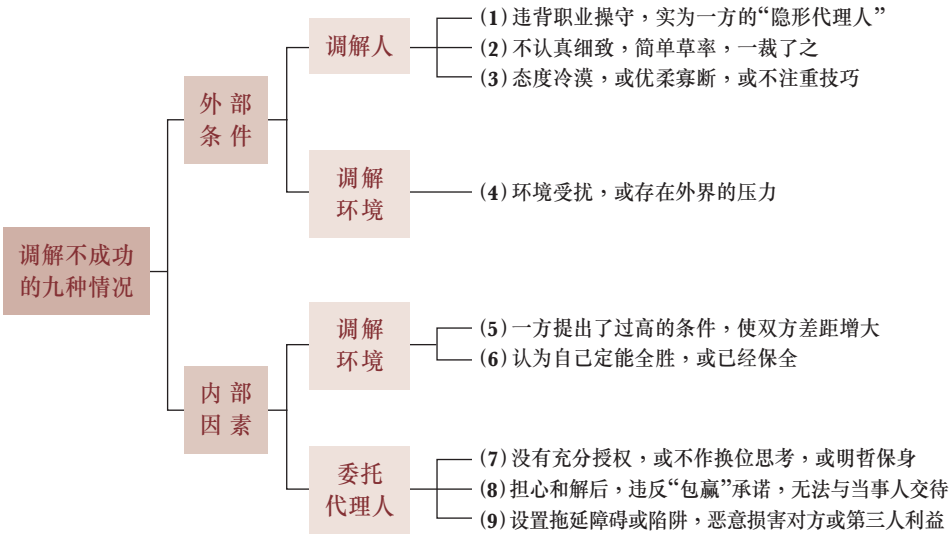
影响调解成功，一般有以下双方当事人内部的五项因素及外部的四项条件。现以下列图表简示：



这就是说，要使调解成功，调解人必须在适合的软硬调解环境下，充分发挥自己的主观能动作用，积极热情、耐心细致地促使矛盾对立的当事人双方的内因转化，互谅互让，达成和解。要注意的是，调解结果不能违反法律规定，不能侵害第三人的合法权益。

其次，是对仲裁调解不能成功的内部与外部原因的系统认识。

影响调解不成功，一般有以下九种情况，详见下列图表简示：



在这里，要特别注意债务方的委托代理人恶意拖延时间，使迟来的公正变成不公正，以及恶意设置和解陷阱，损害债权人利益的情况。笔者作为调解人，就曾经经历了这样一个沉痛的案例。开发商L公司将设计图设计及实测报告认定的自行车库当成汽车库高价卖给购房人T，T接房后发现自己的汽车因车库太矮开不进去后，遂提请仲裁，请求裁决L公司因欺诈而加倍赔付。在仲裁调解期间，L公司的委托代理律师一方面表示要在相同仲裁事项的十几个系列案件中与购房人T特别和解，并主动起草了“和解协议”交给T，但又迟迟不交给该开发商盖章确认，拖延调解时间长达三个多月；另一方面又诱骗T说，反正开发商已承认以较高的条件与你和解，你就不用去银行交按揭款了。T误信为真，和解期间未向银行交纳月供按揭款。后来仲裁庭裁决了加倍赔偿，L公司不但不予履行，反而通过银行以T连续两个月以上未交按揭月供款违反贷款合同为由，对该房进行回购，要求人民法院解除贷款合同，使购房人T陷入长达数年之久的讼争中。该项事件的教训是十分深刻的，在这里总结提出，请各位同行遇到类似情况时能注意避免。

最后，在系统分析的基础上特别注重技巧，是开启调解成功之门的钥匙。

作为调解人应在调解过程中，对该案矛盾的性质、状态、证据、法律事实、过错程度、责任大小，以及对双方主体及其代理人的心态、要求、依据、理由、协商状况等等进行全面而综合的系统分析。通过这种分析，找出促使该项矛盾，由对立转变为统一的有利条件，找出化解阻碍调解成功的主要因素与方法。这些条件与方法的运用，就是本文拟进一步探析的调解技巧。

在仲裁调解过程中，适时地运用技巧，往往是使双方当事人的认识很快接近，找到利益平衡点而达到仲裁调解成功与“双赢”的关键点。比如，笔者曾作为中国粮油进出口SC公司的委托代理人，亲身体会了北京中国国际经济贸易仲裁委员会沈达明、曹家瑞与庄惠辰等资深仲裁员与义大利FM公司达成仲裁调解的这一调解艺术。该案是进口方罐生产线设备的品质争议，经仲裁庭先后两次长达六天的开庭与辩论。首席仲裁员休庭前提出双方可以自行和解。休庭后，我方当即主动约请外方律师进行协商。由于争议的焦点——生产线设备品质问题的是与非已经明朗，而外方公司的根本目的与利益在于建立良好的信誉与形象，以求进一步打开中国市场，经过八个多小时的谈判，外方已经承诺赔偿40万美元及部分配件给中方。这时，贸仲秘书处传来资讯，说仲裁庭很关心这次协商，首席仲裁员于午夜3点打来电话要中方“适可而止”。最后，中方放弃了原定180万美元的目标，在不退还该设备的情况下，索赔121万美元，在收到外方开出的信用证后申请撤回仲裁请求从而达成和解并顺利

履行。这个和解成果，不仅使中方获得了达仲裁庭拟裁决数额三倍多的经济补偿，同时也使外方达到了在中国建立良好商业信誉的目的。在本案中，前辈们运用的“适时暗示”技巧，起到了促使中方公司快速降低“底线”而使矛盾及时化解达到双赢的关键作用。

二、八种调解技巧的应用探析

调解技巧，是调解人在调解中调和、化解矛盾，有效及时地解决争议的技巧、策略与方法。它具有明确的目的性、随案的灵活性与很强的应用性等特点，它是涉及心理、法理、语言、逻辑、教育等多学科领域的一门综合艺术。通过实践及学习兄弟调解人的成功经验，我们试探性地总结出以下八项技巧，现分叙如下：

（一）掌握案情，理清责任

作为调解人，掌握所调解案件的案情，以及在认识上梳理清楚是谁方的过错与应承担多大的责任，是一个逐渐深化的过程。在仲裁调解中，一般说来有三个阶段：一是组庭后庭审前，仔细阅读双方提供的证据与材料作出初步的认识；二是庭审中质证后，对可采信的证据与法律事实结合相关法律规定，作出进一步的判断；三是庭审结束并经仲裁庭合议后，根据共同一致的或多数调解员的意见，作出较成熟的判定。

这种分析结果，是在调解中用以抓住“软肋”与“契机”，“暗示”各方当事人，使其互谅互让，达成和解的重要依据。当然，对于各方当事人来说，勿须在调解中将是非曲直弄个一清二楚，以避免对抗并营造和谐的气氛，有利于达成和解。

（二）宣扬和谐，达到双赢

这种在调解时对双方的宣传工作是十分必要的，一要向双方当事人讲明仲裁调解的优势和好处，突出和谐与亲和；二要向债权方讲明可由此避免对方当事人不当地利用人民法院的监督程式，拖延债务的偿付，易于自动履行；三要向债务方说明在解决此纠纷后与对方继续合作或尽快抓住从事获取新效益的机遇，从而达到“双赢”。此外，在调解中要及时制止一方使用攻击性或贬低对方的语言，引导双方真诚协商。当调解中出现较大的差距或对抗时，可以暂时中断面对面的调解以缓和冲突，进行背靠背地分别输导或择日再行调解。

总之，要向双方宣扬调解的特点及“和为贵”、“和气生财”的传统哲理，使双方在和

谐的气氛中进行友好协商。

（三）分析心态，促成互谅

毛主席在成都会议期间，曾提出大家应该去看看成都武候祠的一副对联："能攻心则反侧自消，从古知兵非好战"、"不审势即宽严皆误，后来治蜀要深思"。联系调解，也应是一个"攻心"以促使平衡心态化解矛盾，"审势"以使理性思考而权衡得失的过程。要提倡调解人注意探索使用"调解心理学"，比如：要从双方的利益要求及其对抗心理进行分析，到底影响和解的症结在哪里；要及时使用印象法、聊天法、感染法、降温法与倾听法等缓解双方的情绪冲突，克服当事人的心理障碍；要灵活使用肯定法、说理法、转移法、暗示法、类比法、台阶法等调整当事人的心理需要，寻求适当的和解条件等等。有时，仲裁申请人的出发点并不是金钱利益，而是"打赌气官司"，想要通过仲裁的裁决治一治对方，出口恶气。而在调解过程中，双方调解参与人的心态也是在变化的，仲裁调解人要及时捕捉这一变化，进一步分析利弊，抓住各方弱点，拉近双方距离，从而促成互谅与调解成功。

此外，**调解人要注意引导双方在认识和考虑利害问题时"换位思考"**，"要得公道，打个巅倒"。即劝导双方当事人在考虑自己利益的同时，也要设想对方是怎样考虑他的利益，因而在决策和解之前，就要互相"相让"和"想到"。

（四）不抓辫子，事前声明

这就是说，必须在调解开始前，先行告知双方四大事项：一是调解中的六个原则，即尊重当事人自愿原则，调解人独立公正原则，以事实责任为基础原则，合法不损害第三人利益原则，公平合理以和为贵原则，保守调解秘密原则。二是进一步表明如果调解不成功，双方当事人在调解过程中所发表的解决争议的意见、观点、陈述、认同表示、否认表示、承诺或要求，均不得作为以后任何仲裁程式、司法程式和其他任何程式中提出的请求、反请求或答辩的依据。三是明示在调解进行中，秘书不作笔录，双方不作记录或录音，任何一方均不得利用调解设置陷阱或拖延时限。四是调解的前提是双方当事人完全自愿，调解中任何一方要求终止调解，即转入其他法律程式。

（五）了解底线，裁意暗示

调解中的**所谓“底线”，一般是指双方当事人在调解前或调解中为表示和解诚意而互谅互让的最低主张债权或最高承诺债务的额度及其它意思表示**。调解人要通过分别的谈话了解各自的底线，才能估量双方利益的平衡点和确定进一步调解的症结所在。双方的这个底线，在调解中是可以改变的，经过协调与启发，是可能相互靠近而合为一条底线的。

在促进双方当事人的底线差距缩小的调解技巧中，“裁意暗示”是一种有力的手段。**所谓裁意暗示，就是调解人在掌握了案情与责任的基础上，根据双方底线之间的差距以及和拟判裁方案之间的差距，对一方或双方当事人进行可能判裁结果或理由的非明示性告知**。比如，对一方当事人分析说：直接判裁难说有更好的结果。这种暗示及其程度，要根据调解进展情况灵活地运用与掌握。

（六）分合交替，热情耐心

分合交替，就是说在调解的具体方式、时间、地点甚至参加人上要根据双方当事人的意愿及调解的进程需要，灵活地掌握与进行。比如，“背靠背”方式与“面对面”方式的结合，让当事人选定的调解员做当事人的工作，让当事人的上司或朋友做当事人的工作等等。有的案件中，需要法定代表人或经理亲自参加更好，与他们直接对话可能更易达成和解；而另外的案件中，则可能老总来了反而不好办。近日，我们在调解中就遇到了这种情况，有一个房屋买卖合同争议案，申请方请求**210**万元，被申请方认可**110**万，在首次调解中本来双方的特别授权律师，已经谈到**130**万了，第二次请债权方一女老总来，由于她未参加整个庭审过程与考虑对方的抗辩意见，结果反将底线升至要求**170**万，而对方一看此景，又将**130**万缩减到只付**90**万，反而拉大了底线差距。因此，调解中的参加人选择，要因案因人而异。

热情耐心，是指仲裁调解人在态度上要晓之以理，动之以情。与裁决时的法、理、情不同，调解中要情、理、法，体现和谐、公平与公正。白居易说：“感人心者，莫其乎情”。只有通情，才能达理，情不通则理不顺，理不顺则调必败。只有通情又达理，才能拨动当事人的心弦。这就要求我们一要热情，善于营造和谐的气氛，二要耐心，要运用适当道理与技巧经过耐心细致的工作，甚至经过多次的反复，力争达成和解。

（七）适时居中，平衡利益

调解，主要是协调双方当事人讲利益，而不是评判是非，也不是简单的“和稀泥”。既不能以牺牲一方的经济利益来达成和解，也不能以牺牲效率花过长的时间来寻求所谓公正。我们在这里提出“适时”，就是要注意掌握调解中的进度与时机，在双方的方案及底线差距过大，经过反复工作不能接近时，应即时终止调解程式，果断转入合议判裁阶段；而在双方底线有靠近的可能与趋势时，应平衡双方利益，适时居中，口头提出一个双方都较易接受的建议方案。

这里所说的**平衡利益，主要是在分析双方的核心利益、可让步利益或共同利益的基础上，引导双方理性地权衡自身利益，互谅互让，从而试探性提出模糊的或具体的方案**。有的仲裁员不主张由调解人提方案，认为这有可能被将有较大让步的一方“误解”为不公平公正。笔者认为，由于已经事先声明了“不抓辫子”，只要不违法，在调解中不管使用何种方法，只要能实现和解，就是好的成功的调解技巧。

（八）文书跟进，及时履行

仲裁调解有一个很大的优点是：一方面比之单纯调解，所制作的调解书或裁决书具有法律强制力；另一方面比之单纯仲裁，又更易得到履行。**调解中，双方达成和解协定后，应立即制作并发送调解书或裁决书为好**。这一方面可以让当事人少跑路，也省下送达时间，另一方面，可防“夜长梦多”与“节外生枝”出现。在实践中，我们还探索出由债权人适当让步达成和解后由债务人“抱起钱来领调解书”，以及在当事人互负债务和解后，由共同信任的调解机构充当代收代付的中间人协助及时履行等方式，很受各方当事人的欢迎与称赞。

综上所述，高度重视促进调解成功并注意仲裁调解技巧的探索与应用，是当代调解人的一种现实责任和历史使命。笔者也深信，经过诸多同仁的共同努力，中国的调解制度将在构建社会主义和谐社会中，发挥越来越重要的作用。

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作者简历

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论大陆人民调解组织功能区别与目标差异 — 以劳动服务站、消费者协会、司法附设调解机构为典型

肖晟程

内 容 提 要 人民调解组织作为大陆地区各类调解组织的中坚力量，在化解纠纷矛盾方面起到了重要的作用。对于三种不同类型的人民调解组织，笔者以基于基层自治背景的劳动服务站、基于工商行政背景的消费者协会、基于司法背景的司法附设调解机构为典型，对三类人民调解组织的功能及目标做出实然性描述与概括。劳动服务站的调解目标在于保持劳资关系与集体利益的相对稳定。消费者协会调解目标可以概括为通过消费者的投诉、意见，借助背景行政力量，规范、净化市场竞争秩序，保障弱势消费者的合法权益。在司法附设调解实践中，各地法院均需要以自身有限的司法资源最大限度地实现当事人的诉讼利益，实现“公正”与“效率”两大司法价值的衡平。在保持企业生产持续利益的层面上，基层自治背景的劳动服务站所追求的目标实际上与劳资纠纷双方所追求的最终目标相统一。在保障社会消费功能持续运作的层面上，基于工商行政背景的消费者协会所追求的目标实际上与消费纠纷双方所追求的最终目标相统一。维系法律制度的公信，成为司法附设调解机构与纠纷双方所追求的最终目标。

关键词：人民调解组织；劳动服务站；消费者协会；司法附设调解机构

绪论

合法原则与自愿原则是指导大陆地区调解工作的两大原则，各类调解组织在前述原则的指导下，开展有权范围内的调解工作。大陆地区的调解类型主要包括人民调解、行政调解、仲裁调解和诉讼调解等类型。其中人民调解组织作为大陆地区各类调解组织的中坚力量，在化解纠纷矛盾方面起到了重要的作用。一般认为大陆地区的人民调解组织主要包括以下类型：(1)基层自治背景的人民调解组织，主要包括村、社区的人民调解委员会、劳动服务站等调解组织；(2)专业行政背景的人民调解组织，主要包括消费者协会、行业协会等调解组织；(3)司法背景的司法附设调解组织。[1]由于大陆各类人民调解组织在资金来源、人员构成上很大程度上需要依附于其设立的背景机构，相对于港、澳、台地区自发形成设立的民间调解组织，大陆各类人民调解组织在组织运作、调解功能、目标实现上均存在不同。本文中，笔者对于大陆人民调解组织中立性问题暂不作考虑，亦不对其应然完善、发展趋势等问题做出评价与判断，仅就大陆人民调解组织功能区别、目标差异做出实然性描述与概括总结，以期为今后研究大陆地区人民调解组织的学者提供参考。对于三种不同类型的人民调解组织，笔者以基于基层自治背景的劳动服务站、基于工商行政背景的消费者协会、基于司法背景的司法附设调解机构为典型，对三类人民调解组织的功能及目标做出实然性描述与概括。

一、基于基层自治背景的劳动服务站调解

(一)劳动服务站简介

劳动服务站是由基层村委会或社区委员会设立的人民调解组织，位于劳资纠纷日益增长的珠三角地区，主要负责处理这些基层一线劳资纠纷，。虽然名字中带有“劳动服务”字样，但其并非劳动行政部门的下属或派出机构，其主要工作人员由村委会或社区委员会派出，村委会或社区委员会的拨款是其主要资金来源。以东莞市长安镇为例，该镇总计有十四个基层劳动服务站，基本涵盖了长安镇辖区内的所有社区。根据来源于东莞地区的资料，该地区90%以上的劳资纠纷在劳动服务站的调解下得以化解。[2]

1. 也有学者将司法附设调解归类于诉讼调解的范畴，此类学者取诉讼调解概念的广义范畴，即任何与诉讼司法相关的调解活动都可归纳于诉讼调解的范畴之类。本文中，笔者取诉讼调解的狭义概念，即诉讼内的调解活动是为诉讼调解。

(二)劳动服务站调解功能

1、通过朴素道德情感认同，换取劳动者利益让步。劳动服务站工作人员来自当地基层自治组织，多数没有接受过专门的法学教育，其法律素养相对较低。劳动服务站工作人员在调解工作中，主要通过其对基层现实的了解，对当地人民道德情感的把握，在朴素道德情感上唤起劳动者的认同，从而换取劳动者对其期望利益的让步。例如，在劳动者索要离职经济补偿时，如果企业没有存在欠薪事实，调解人员可能会告知劳动者不要对"血汗钱"之外的"横财"太过执著，应该"脚踏实地"开始新的工作。

2、利用本地优势，要求企业支付补偿。外来企业需要租赁当地村委会、社区委员会的土地与厂房，并且企业的日常生产运作也离不开当地村委会、社区委员会的支持与配合。劳动服务站调解人员利用基层自治组织的这一优势，在调解过程中可能会要求企业以经济补偿化解纠纷的方式，换取今后生产运作的顺利开展。企业反复斟酌各项利弊后，可能会选择通过经济补偿劳动者的方式化解其与劳动者之间的紧张关系。

(三)劳动服务站调解目标

劳动服务站一方面作为劳动者的服务组织，需要在调解中为劳动者提供利益支持；另一方面，作为其背景的基层自治组织，需要企业能够持续经营以换取包括地租(房租)、第三产业发展在内的长期利益。由于各基层社区、村之间存在招商引资的竞争关系，每年集体成员利润分成高低直接影响居委会或村委会人员的去留。在实际调解操作中，各村委会(居委会)实际上存在为保持相对竞争优势而各自为阵，并对某些过于"照顾"劳动者的调解结果给予共同排斥。[3]以上现实决定了劳动服务站的调解目标在于保持劳资关系与集体利益的相对稳定。

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2. 经劳动服务站调解化解的劳资纠纷具体总数暂无法统计，但通过同期法院受理的劳动争议案件数量，可粗略估算其调解成果。2005年东莞市人民法院劳动争议案件的收案数量为2871件，2006年为5778件，2007年为6481件。2008年东莞市人民法院拆分成三大基层法院之后，2009年仅东莞市第二人民法院受理劳动争议一审案件就达到6690件。

3. 在调研中，笔者了解到一例典型案例：经过某劳动服务站调解，某台资企业赔偿一工亡劳动者家属总计40万元的相关赔偿金。虽然此次劳动争议经过调解圆满解决，但该劳动服务站负责人却遭到部分劳动服务站负责人的非公开谴责。有人认为此调解案例实际上间接抬高了类似劳动争议的调解金额标准，不利于其他服务站今后开展相关工作。

二、具有工商行政背景的消费者协会调解

(一)消费者协会简介

大陆地区《消费者权益保护法》第31条规定："消费者协会和其他消费者组织是依法成立的对商品和服务进行社会监督的保护消费者合法权益的社会团体。"大陆地区《消费者协会章程》第2条也规定："中国消费者协会是由国家法律确认、国务院批准成立的保护消费者合法权益的全国性社会团体。"相对于强大的生产者和经营者来说，消费者无疑处于弱势地位，单纯依靠消费者个人的力量无法更好的维护自身的合法权益，于是产生了消费者协会组织。

从大陆地区各级消费者协会的结构来看，一般由工商行政管理、技术监督、物价、卫生等政府职能部门和行业管理部门、行业协会、新闻单位、社会团体以及消费者代表组成。消费者协会办事机构设在省一级的工商行政管理局，其领导机构为理事会，实行单位理事制，理事由理事单位选派，理事会下设办事机构，日常工作由秘书长负责，会长一般由同级工商局领导担任。

(二)消费者协会调解功能

1、接受消费者投诉，微观层面上解决个别消费纠纷。以四川省成都市消费者协会人民调解委员会为例，该协会具体的调解程式是：第一步，受理——依据消费者申请受理本辖区内的消费纠纷；第二步，调解——消协人民调解委员会调解消费纠纷时，应当指定一名人民调解员为调解主持人；第三步，签订调解协议——经调解成功，应当制作书面调解协议，调解失败的，做好后续告知工作。[4]

2、发布消费预警、进行公开点评、主动参与政策协调，宏观层面上解决多数消费者的消费纠纷。这一层面上的调解工作则主要是由国家一级或者省一级的消费者协会出面进行。1985年春，刚成立的中国消费者协会收到关于冷暖风机的投诉，反映该类所谓的小空调品质低劣，容易引发火灾。中国消费者协会及时发布消费警示，使得该系列冷暖风机事件最终在消费者协会及其他有关部门协调下得到较好的处置。其他经过消费者协会斡旋、协调得以处置的典型案例还包括：(1)要

4. 参见四川省人民政府网站，http://www.sc.gov.cn/zwgk/zwdt/szdt/200812/t20081224_456054.shtml，存取时间2010年12月5日。

求大陆地区酒店变更“中午12点前退房”的霸王条款；(2)要求饮食行业停止收取餐具消毒费；(3)要求电视购物频道完善其付款模式；(4)2001年的三菱帕杰罗安全隐患召回事件。[5]在笔者撰文期间，针对多数消费者反映中国铁道部最新修订的《铁路旅客运输规章》中存在的不合理规定，中国消费者协会再次要求铁道部门就运输规章中不合理的格式条款进行修改。

(三)消费者协会调解目标

消费者协会主要由各级行政部门组成，其成员一般来源于背景行政单位，资金主要依靠各地财政维系。由于以工商行政管理部门为代表的行政机关与消费者不存在直接管理隶属关系，而与生产经营者之间存在一定程度上的管理关系，因此，消费者协会调解目标可以概括为通过消费者的投诉、意见，借助背景行政力量，规范、净化市场竞争秩序，保障弱势消费者的合法权益。

三、具有司法背景的司法附设调解机构

(一)司法附设调解机构简介

司法资源有限与纠纷矛盾不断膨胀的矛盾，促使大陆地区法院探寻建立一种附设于司法，却独立于诉讼之外的调解模式。主要通过在法院附设专门机构，整合各种纠纷解决资源，为诉讼外纠纷解决机制提供便利，创造条件，引导诉讼内纠纷解决机制，保障功效，实现诉讼与非诉讼的有效衔接，使案件繁简分流，提高审判效率，降低诉讼成本。此类机构人员一般由法院内部人员会同各类调解组织派驻法院的常驻人员所组成，经费主要由设立法院及派驻组织共同承担。

(二)司法附设调解机构功能

1、以法律为准绳，以道德、行为准则为补充，为各类纠纷当事人提供解纷方案。司法附设调解机构由于其本身依附于法院之特性，其内设人员法律素养一般高于其他调解组织人员，提供的纠纷解决建议与方案一般也是基于法律相关规定，并以其他道德、行为准则为补充。此类功能的推出，主要是因为纠纷进入法院这一纠

5. 部分案例参见《中国消费者协会6大维权典型案例出炉》，载于2010年3月15日《扬子晚报》。

纷解决主体后，双方当事人往往已经做出多次沟通、协商、协力厂商调解等尝试，对纠纷相对方的底线以及各类法律规定早已了然于心。因此，单纯依据朴素道德观念或者管理优势已经无利于纠纷的解决，而是需要熟悉法律的专业人员给予纠纷双方专业性的建议和方案。

2、以司法效力作为保障，为各类纠纷当事人提供终局的强制执行保障。根据《最高人民法院关于建立健全诉讼与非诉讼相衔接的矛盾纠纷解决机制的若干意见》的相关规定，经行政机关、人民调解组织、商事调解组织、行业调解组织或者其他具有调解职能的组织调解达成的具有民事合同 性质的协定，经调解组织和调解员签字盖章后，当事人可以向有管辖权的人民法院提出确认其效力的申请。该意见赋予法院对司法附设调解机构经过调解所达成协议进行确认，并最终赋予该协议强制执行力的权力。

(三) 司法附设调解机构目标

司法附设调解机构主要通过自身调解机制，整合各类调解力量为司法服务，实现对内缓解法院审判压力，化解大陆各地法院“案多人少”困境，对外消除群体事件隐患，达到案结事了要求的实效。在司法附设调解实践中，各地法院均需要以自身有限的司法资源最大限度地实现当事人的诉讼利益，实现“公正”与“效率”两大司法价值的衡平。

四、影响人民调解组织功能之因素

(一) 调解人员因素之影响

1、调解人员职业性质之影响。由于大陆地区专职从事调解的人员数量相对有限，多数调解人员属于兼职性质或者同时在其他机构挂靠职位。调解人员的职业性质容易影响调解人员的纠纷处理方式。如果与被调解方存在一定管理关系，则调解人员往往会对存在管理关系的被调解方施加更多的压力，以促使调解的达成。同时，调解人员可能动用其职业所特有的权力，对纠纷进行分析与调查，例如消费者协会在调解纠纷中，往往会动用工商、质检等职能部门对所涉及的营业对象进行调查。

2、调解人员法律素质之影响。由于调解人员法律素质参差不齐，使得调解人员在使用法律分析纠纷方面存在不同取向。对于相关法律了解不多的调解人员可能

会通过朴素道德观念对当事人进行协调与说服工作，同时可能灌输给当事人“厌诉”、“息诉”的传统观念。对于相关法律比较熟悉的调解人员，往往会基于本身所掌握的法律知识对纠纷做出预判，并基于预判结果开展接下来的调解工作。

（二）背景机构因素之影响

1、背景机构所涉利益之影响。与被调解物件存在直接利益关系的调解组织，往往需要在纠纷化解与利益维持之间寻找平衡点，即纠纷处理以不影响利益团体的最大利益为目标。对于可能损害其利益的调解结果，可能持相对消极的处理态度。但是，此类利益关系格局中也有积极的一面，即调解组织为保证其背景机构的最大利益，往往会选择可持续发展的折中调解路线。

2、背景机构管理内容之影响。与被调解物件存在管理关系的调解组织，一般希望借由纠纷解决达到与其治理双赢的效果，即通过个别案例，举一反三，及时纠正所管辖范围内的错误举措。例如，消费者协会在调解处理各类行业霸王条款时，一般会要求其行业主管部门出具公开指导意见，纠正普遍性的错误规定，从而达到纠纷解决与行业治理双赢的效果。

（三）所涉纠纷内容因素之影响

商品经济越发达，民事关系越丰富，所产生的民事纠纷也越趋于多样化。不同纠纷本身所具有的特性，同样影响调解组织功能的发挥。以前述劳动争议为例，由于劳动者存在维系生活的必要，而企业也同样存在维持生产的要求，如何权衡维护劳动者生存权与维持企业经营权的轻重，成为劳动服务站最需注意的问题之一。再以消费纠纷为例，由于消费者人数众多，而部分行业的行规同样由来已久，因此，如何保护人数众多的消费者利益又不至于破坏某一行业长久以来业已形成的运行模式，也是消费者协会最需注意的问题之一。

五、纠纷三方目标之统一 — 人民调解组织目标差异性分析

调解的一般目标在于定纷止争，但也应该看到纠纷当事人双方与调解方在纠纷调解过程中存在各自不同的利益追求。大陆人民调解组织的资金来源、人员构成特徵决定其非营利性质，大陆人民调解组织已身所追求的目标除了定纷止争这一表层目标外，还与其设立的初衷要求，以及当事人双方的利益追求之间存在密切关系，并最终形成不同人民调解组织的目标差异性格局。笔者以前述基于基层自治背景的劳

动服务站、基于工商行政背景的消费者协会、基于司法背景的司法附设调解机构为例，阐述大陆地区不同人民调解组织之间的目标差异性。

（一）以生产持续为目标

劳动者在劳动争议纠纷中索求的各项赔偿，往往是基于其在企业生产中所付出的各项劳动而计算得出。个别案例看来，劳动者在离职之后，其与离职前的企业不再存在利益关系，但若放眼宏观社会生产层面，劳动者索求各项赔偿，系基于其维持自身提供劳动力的基本生存所续。缺乏了劳动者的生产是不可能维系的，因此劳动者在劳动争议纠纷中的索求，其根本目标还是以保证再次劳动为目的。企业在劳动争议中需要支付的各项赔偿，基于前述理由，乃是属于对劳动者提供劳动的补偿。同样，为可持续获得劳动者提供的剩馀价值，企业必须给予劳动者合适的经济利益，以刺激劳动者不断提供其劳动力。虽然从单一劳动纠纷看来，某一企业提供补偿后，不再享有该劳动者的劳动力，但宏观看来，所有企业依然是通过不断的补偿换取劳动者为整个生产行业提供持续的劳动力。也正是基于生产持续的目标，劳动服务站需要企业能够排除劳资纠纷的干扰，持续获取利益，从而继续为本地的经济做出贡献。因此，在保持企业生产持续之利益的层面上，基层自治背景的劳动服务站所追求的目标实际上与劳资纠纷双方所追求的最终目标相统一。

（二）以消费持续为目标

消费者在消费纠纷中索求的各项赔偿，主要是基于其物质支付未能获得等价的物质或服务所得。不论是微观还是宏观层面上，消费者所追求的一般是消费关系安全并可持续这一目标。生产经营者再生产的动力亦是基于消费，缺乏消费者的消费，生产经营者的盈利则无从谈起。而消费者协会一方面既是维护消费者权益的社会团体，另一方面又具有工商行政背景，该双重身份均要求消费者协会保障市场的正常交易秩序，维护社会消费功能的持续运作。因此，在保障社会消费功能持续运作的层面上，基于工商行政背景的消费者协会所追求的目标实际上与消费纠纷双方所追求的最终目标相统一。

（三）以法律制度维系为目标

如前所述，纠纷进入法院这一纠纷解决主体后，双方当事人往往已做出多次沟通、协商、协力厂商调解等尝试，对于纠纷相对方的底线以及各类法律规定早已了然于

心。此时纠纷双方虽仍以己方利益为基础，但法律制度对于纠纷双方而言，已经具有不可替代的公信力。司法附设调解机构也必须以法律为准绳，客观、公允地向双方提供可供参考的调解建议和方案。此时，维系法律制度的公信，成为司法附设调解机构与纠纷双方所追求的最终目标。

作者简历

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准备 — 调解的成功之道

Preparation – The Road to Success in Mediation

朱海晖

内 容 提 要
ABSTRACT

在中国内地，调解是审判机关解决纠纷的一项重要手段，如今的法官也极为重视以调解方式结案。笔者根据多年的二审立案调解实践经验，结合参加香港高级和解课程培训班的心得，发现如果在调解前能够做好心理、精力、资源、策略、细节等各项准备，能够了解和把握当事人的心理和行为，以法官自己的言行积极影响当事人，并与当事人进行有效的沟通，调解其实可以大有作为。因此，笔者在本文中试图从二审立案前的调解准备进行分析，提出自己的见解和做法，以期对他人的实践有所帮助。

In mainland China, settlement is a very important tool for the judicial department when resolving conflicts and is seen today by judges as a highly useful way to end cases. The author has many years of experience in mediating trials at the intermediate level and rich knowledge gained in advanced courses on mediation in Hong Kong. Armed with these powerful means, the author has discovered that successful settlement hinges on proper preparation performed mentally, physically, resource-wise, strategically and in regard to the specifics of the case as well as the sufficient understanding of the participants' state of mind and their actions. A judge who can fully grasp these aspects while communicating effectively with all participants will be able to achieve great success in settling cases. Thus, in this book, the author will seek to aid willing readers by analyzing and giving insights into the mediation process preceding litigation at the intermediate level.

近期我参加了东莞市第二人民法院和香港和解中心举办的香港高级和解课程培训班，别开生面的课程，仅说一句“获益良多”远不足表达我内心的感受。也许是因为自己在东莞市中级人民法院长期从事调解工作，有许多关于调解的想法和观点已经在较大的工作强度下被淡化或漠视了。直到上了这个和解课程，与香港的和解导师、自侃为“调解发烧友”的香港和解员们接触交流后，我才对自己的调解工作重新进行审视和反思。

香港的和解员类似于中国内地人民调解员的角色，香港的和解制度、程式与内地法院的调解制度、调解程式是存在差异的，但香港和解员的和解工作与内地法官的调解工作还是有许多共同点的，如中立、公正、保密。就和解与调解工作共同点中的精髓我认为可以概括成两个字，那就是“准备”。准备，是通往调解成功的必经之道。

一、心理准备

应对每一个调解案件都要有打硬仗的心理准备，不要因为当事人简单地说一句“我不想调解了，你们判吧”就轻易放弃调解。即便是在当事人明确表示其没有调解意愿的情况下，仍要问清不同意调解的原因。很多当事人并非内心不同意，只是他们有情绪要宣泄，待其宣泄完后，劝导其理性处理问题时，大多还是愿意接受调解的。

二审立案调解的历程，让我对“山重水复疑无路，柳暗花明又一村”这句诗有很深的感悟。总之，做好心理准备，要面对的困难也许有很多，当事人之间在走过仲裁和一审程式后，互不信任甚至有敌对情绪是正常的，但如果当事人对调解员有猜忌或不满则是危险的。取得当事人的信任，耐心地与各方共同探寻调解的出路，希望就在前方。

二、精力准备

要精力充沛地应对每一个调解案件，至少可以体现在以下方面。

第一，自信的、带有鼓励性的开场白，这样可以营造一个积极、乐观的调解气氛。第二，到位的眼神和肢体语言。这样可以让当事人感觉到你是在专心地、关切地聆听他的陈述，对你产生信任感。第三，快捷地理解争议，娴熟地运用各种调解技巧应对不同的调解场面。比如在当事人陈述双方达成共识的地方时，立即予以放大和鼓励；而在当事人产生争执时，保持敏锐触觉，观察当事人的情绪波动，防止或阻止一方当事人攻击或骚扰另一方当事人的情况出现，设法通过自己的调解艺术控制

场面、平息纠纷。

以上几点如果没有足够精力是难以完成的，而在这些方面表现优秀的调解员，一定也是个人魅力十足的成功调解员。

三、资源准备

案件能否调解成功，资源准备是很关键的一步。对于资源准备工作，香港的和解员很形象地将其形容为“挖料”。具体该“挖”些什么：

（一）当事人接受调解的原因是什么

调解员要设法让当事人说出他的隐忧。例如劳动争议案件中，劳动者经过劳动仲裁和一审后，费时较长，劳动者本身经济困难，想早日结束官司；或是已经另外找到工作，继续打官司会耽误工作，还增加诉讼成本等等。如果调解员能“挖”出这些情况，并在当事人对调解方案犹豫不决时适当引导当事人考虑这些因素，调解成功的可能性会有很大幅度的提高。

（二）尽早找出决定案件能否调解的关键人物

调解员在调解案件时，应该洞察哪些是握有决定权的人，哪些人只是充当传声筒的角色。比如买卖合同案件中，买方的“话事人”是谁？是公司的董事长、总经理，财务总监，亦或法律顾问？卖方的“话事人”又是谁？是当事人本人、合夥人还是当事人的妻子？有些案件还会有“半路杀出个程咬金”的情况，这个人可能是双方信服的权威人士，也可能只是一方的亲戚朋友或只是律师助理。但在当事人中途谘询他的意见时，他的观点能左右当事人的决定。调解员如果清楚哪些人是案件的关键人物，他的思路和观点是什么，就能做到有的放矢，加快调解的步伐。否则，调解方案有可能像被玩“丢手绢”游戏一样，一个抛给另一个，在没有接触到关键人物之前，调解员一直在跟传声筒对话，但得不到有实质内容的回应。因此，调解员要尽早找到案件的关键人物，打歼灭战；否则，变成打消耗战和持久战，那就是下策了。

（三）了解律师在个案中的作用

调解员要清楚律师在个案中的调解立场。该案律师本人的观点是主张调解还是判决，他在本案中是促成还是阻碍调解的进程，调解员要从其言谈举止中分析观察。

有些律师因为种种原因是主判不主和的，调解员应该设法了解当事人本人或关键人物的意愿，否则调解很容易陷入困境。

四、策略准备

常言“兵来将挡，水来土掩”。在做资源准备工作时，多向当事人发问开放式问题（就是带有“为什么”、“如何”、“怎样”、“有什么方案”、“有什么想法”等字样，可能让当事人有多种回答的问题）；在希望当事人遵守诉讼程式或得到其认可同意时，可以多问封闭式问题（例如“是不是”、“会不会”、“能不能”等只能让当事人给出一个回答的问题）。

在拟定调解方案时，让当事人表明是否存在可替代现有调解方案的更佳方案；在调解陷入僵局时，让当事人表明调解不成时所预料到的最坏打算。这些引导都是促进调解的好办法。

在调解走入死胡同时，引导当事人转弯或攀高。考虑能否将当事人的特定利益转化为一般利益，将当事人固有的价值观转化为更高层次的目标。

当然，策略不是教条，调解员有“足智”又能“多谋”的话，能准备许多别出心裁的策略来应对调解。这让我想起一位调解经验丰富的法官，他曾试过将一对离婚案件的双方当事人约在他们第一次见面的酒家，坐在他们拥有共同回忆的桌前进行调解，双方触景生情，最终尽释前嫌，和好结案。

五、细节准备

细节是普通人可能看不到，但敏感的人能看见的东西。例如面对双方势力不均等的场合，调解员要注重公平，并对弱势一方表现出尊重并给予适当的关怀。又如调解员要注意在不同场合的坐姿和肢体语言：面对双方当事人进行调解工作时，在坐姿上不要总倾向于其中一方，眼神也要时刻兼顾双方。而在与一方当事人单独交谈时，则可以上半身稍倾向对方，让其感觉到关注。另外，调解员要注意时间的掌控。法院的调解工作比较灵活，在与各方当事人单独交谈时没有具体的时间限制，有时调解员觉得哪一方比较难做工作就主攻哪一方，把另一方当事人搁在门外苦等。这种情况下，调解成功固然是好，调解不成，在门外苦等的当事人可能就有猜忌了，法官在与对方密谋什么吗？所以与双方当事人单独交谈的时间要尽量持平，体现程式公平。

为了提高调解成功率，使更多的当事人能够握手言和，调解员必须充分认识到准备工作的重要性。通过努力不懈的学习和探索，最大限度地发挥自身潜能，提高自身的调解艺术水准，为促进社会和谐和稳定服务。

作者简历

朱海晖，女，现任东莞市中级人民法院立案庭调解、速裁组法官。自东莞市中级人民法院于**2006**年被广东省高级人民法院指定为全省立案调解试行单位以来，开始大力推进立案调解，特别是二审立案调解。二审立案调解，是指案件经过一审法院判决后，一方当事人或双方当事人不服该判决，上诉至二审法院（即中级法院），中级法院在二审立案时对该案件进行调解。由于案件在一审（劳动争议案件还需要经过仲裁和一审）时已经进行过调解，因此在二审立案调解时，一般来说调解难度会比较大。笔者有幸在近几年间一直致力于东莞市中级人民法院的立案调解工作，仅于**2009**年间，组织调解案件三千余宗，成功调解案件**598**宗，为此曾获广东省高级人民法院颁发的“广东省优秀法官”，东莞市政府、市委颁发的“东莞市先进工作者”等荣誉称号。

COOPERATING ORGANISATIONS WITH HONG KONG MEDIATION CENTRE

HKMC has established cooperative partnership with over 30 peer organisations in the Mainland and other parts of the world. With such agreements in place, we can further promote and share the knowledge and experience in the practice of mediation in the region. The existing partners are as follows.

1. China Conciliation Centre of China Council for the Promotion of International Trade (CCPIT)
2. Beijing Arbitration Commission
3. Shanghai Branch of China International Economic & Trade Arbitration Commission
4. Shenzhen Arbitration Commission
5. Harbin Conciliation Centre of China Council for the Promotion of International Trade
6. Dalian Arbitration Commission
7. Shangdong Conciliation Centre of China Council for the Promotion of International Trade
8. CCPIT (Sichuan)
9. Wuhan Conciliation Centre of China Council for the Promotion of International Trade
10. Liaoling Institute of Arbitrators
11. Hunan Loudi Arbitration Commission
12. Zhuhai Arbitration Commission
13. Shangdong Weihai Arbitration Commission
14. Hebei Conciliation Center
15. Huizhou Arbitration Commission
16. Chengdu Arbitration Commission
17. Arbitrators and Mediators Institute of New Zealand (AMINZ)
18. Singapore Mediation Centre
19. Cebu Mediation Foundation, Inc. (CMFI)
20. Guangzhou Arbitration Commission
21. Shantou Arbitration Commission
22. Wuhan Arbitration Commission
23. Nanjing Arbitration Commission
24. Capital Mediation Centre
25. Centro de Arbitagens Voluntarias do Centro de Comercio Mundial Macau
26. Qingdao Arbitration Commission
27. Wenzhou Arbitration Commission
28. Delhi Mediation Centre
29. Indonesian Mediation Center
30. Malaysian Mediation Centre
31. Philippine Mediation Center
32. No. 2 People's Court of Dongguan City

香港和解中心合作伙伴

为提高调解的效益，香港和解中心乐意与社会大众，本地及海外机构合作共同缔造和谐新机遇。目前我们与世界各地30多个和解/调解机构合作，共同推动更专业、更全面的调解服务，同时令我们的服务进一步衔接至世界各地。合作伙伴包括：

1. 中国国际贸易促进委员会/中国国际商会调解中心
2. 北京仲裁委员会
3. 中国国际商会仲裁院/中国国际经济贸易仲裁委员会上海分会
4. 深圳仲裁委员会
5. 中国国际贸易促进委员会哈尔滨调解中心
6. 大连仲裁委员会
7. 中国国际贸易促进委员会山东调解中心
8. 中国国际贸易促进委员会四川调解中心
9. 武汉调解中心
10. 辽宁省仲裁学会
11. 湖南娄底仲裁委员会
12. 珠海仲裁委员会
13. 山东威海仲裁委员会
14. 河北调解中心
15. 惠州仲裁委员会
16. 四川成都仲裁委员会
17. 纽西兰仲裁、调解员协会
18. 新加坡调解中心
19. 菲律宾宿雾调解基金会
20. 广州仲裁委员会
21. 汕头仲裁委员会
22. 武汉仲裁委员会
23. 南京仲裁委员会
24. 首都调解中心
25. 澳门世界贸易中心仲裁中心
26. 青岛仲裁委员会
27. 温州仲裁委员会
28. 德里调解中心
29. 印尼调解中心
30. 马来西亚调解中心
31. 菲律宾调解中心
32. 东莞市第二人民法院

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