

THE REPRESENTATIVE AT MEDIATION AND NEGOTIATION

By Professor John Wade

What is a “representative”?

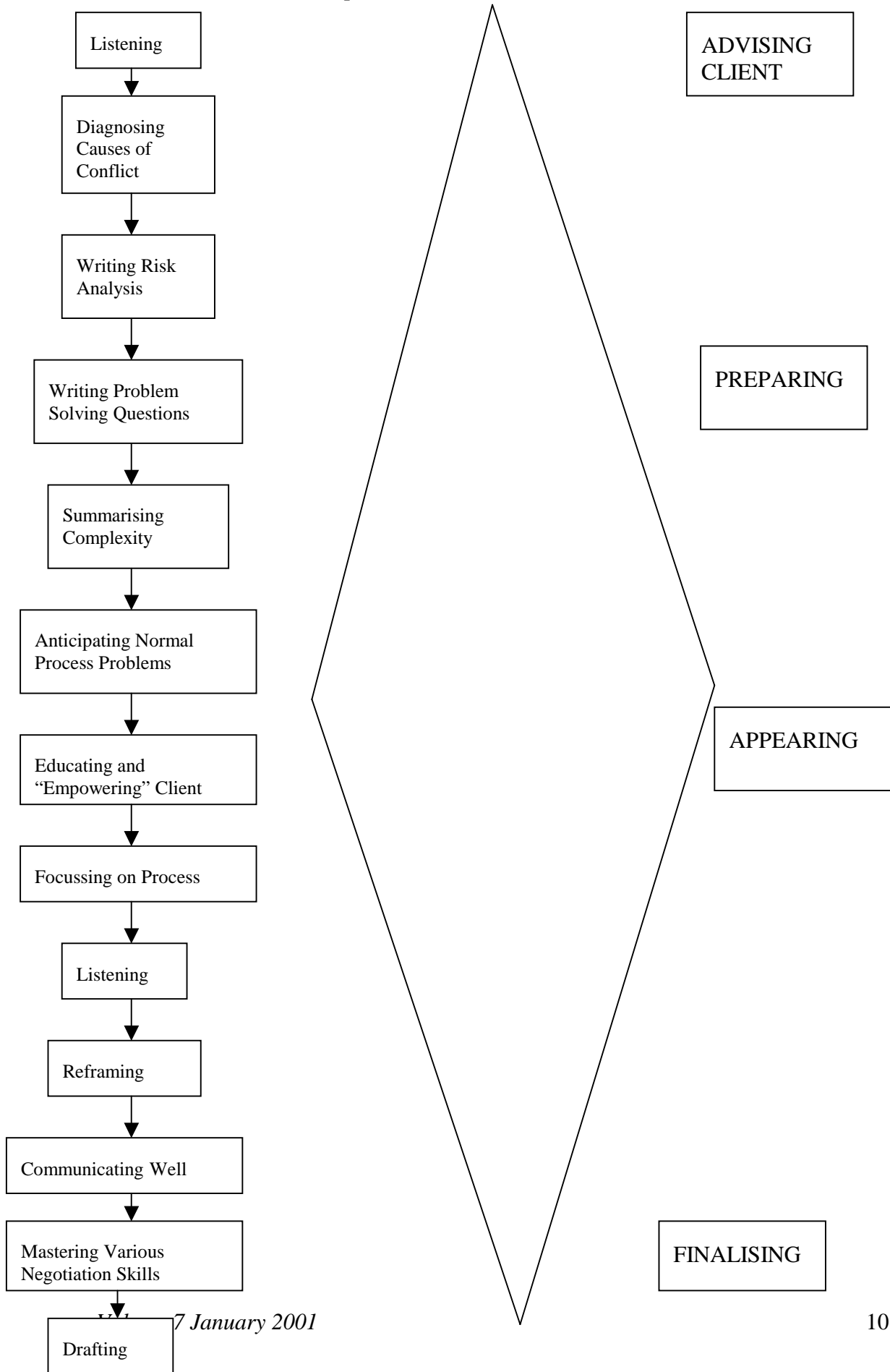
A “representative” is a person who stands, acts, or speaks for another. A representative can be a passive mouthpiece or a messenger for his/her principal, or can actively assist the principal to make a wise decision.

The vast majority of “personal” mediations and negotiations take place without a representative assisting in either preparation or attendance – eg. disputes between friends, club members, employees, spouses. Sometimes representatives assist in personal disputes. These may be friends, relatives, lawyers or union officials.

However, once a dispute involves a business, corporation, partnership, church, nation, employer, bank, insurance company, family, or any “group”, then necessarily that group will be represented by an individual or by a number of individuals. The representative may be an in-house or outside lawyer, an employee, an accountant, a friend, a union official or an ambassador. Thus “representation” is very common and is done not only by a stereotypical “legally” trained representative.

When conflicts are referred to mediation from the courts, and there is money available, it is common for clients to be assisted by representatives with legal experience.

Skills Of A Representative in The Mediation Process



Advantages of Representation

The potential advantages for a disputant being represented at a mediation (or negotiation) are many. They include the following:

1. Two heads are better than one. When trying to make a wise decision, it is helpful to have a friend to bounce ideas off.
2. Intense conflict can cause a disputant to lose perspective. (“(S)he loses the forest for the trees.”; “A lawyer who acts for himself/herself has a fool for a client.” etc.)
3. An experienced and competent representative can:
 - Reduce costs by preparing efficiently;
 - Minimise adjournments of meetings because of disorganised preparation;
 - Reduce over-reaction and walkouts by identifying what are “normal” events;
 - Make suggestions about varying processes or taking breaks;
 - Improve the physical environment for negotiation (eg. seating, time, food);
 - Exercise excellent communication, listening and summarising skills when the disputant(s) lack these;
 - Collaborate with the mediator to diagnose and intervene with a degree of objectivity;
 - Give realistic advice on risks and costs outside the mediation room;
 - Assist an inarticulate or disorganised person to summarise and be assertive;
 - Use a variety of strategies to intervene when a client feels overwhelmed and too readily wants to give up;
 - Make an informed decision when the mediator’s strategies or process are more unhelpful than helpful.
4. Legal representatives are particularly skilled as drafters of agreements. They are accustomed to quickly drafting settlements which cover many predictable contingencies and loopholes.
5. The presence of an influential representative (eg lawyer, friend, accountant) avoids the clumsiness of trying to explain later to that person “what really happened” at the mediation. Instead they witness first hand the pain, concessions, to and fro which led to the agreement. If the influential “representative” or cheerleader is present at the meeting, it is more difficult for them later to be destabilising armchair critics.
6. Many mediators also want legal or accounting representatives to be present at preparation or joint meetings for personal marketing reasons. They want to show the representatives first hand what an excellent job is being done, so that the representatives send the mediator more work in the future.

Disadvantages of Representation

Predictably, there is a range of disadvantages where representatives, legal or otherwise, purport to assist in the preparation for or attendance at a mediation or negotiation. Many of

these disadvantages echo the traditional critiques of the “helping” professions (eg. see G. Egan, *The Skilled Helper*, 5th ed, California: Brooks/Cole, 1994).

Both clients and representatives should constantly consider these disadvantages when deciding to what extent any and which representative should assist in the preparation for and attendance at a mediation. In the writer’s experience as a mediator, a sophisticated group of lawyers has emerged over the last decade, who choose to prepare certain clients at length for a mediation but do not attend the mediation unless special circumstances exist. Conversely, there are other lawyer representatives who always attend.

Some of the potential disadvantages of “involving” the representative of a disputant in the mediation process are as follows:

- **Expense.** A professional representative increases the out-of-pocket costs of the mediation as (s)he must be paid.
- **Minimal preparation.** A paid representative will sometimes attempt to reduce the costs of the mediation by minimising preparation of documents and dispensing with intake or preparation meetings. (“Forget the x-rays; just cut.”)
- **Scheduling complexity.** Scheduling meetings is made more complex as more people try to attend.
- **Incompetence.** Some representatives are incompetent communicators and negotiators.
- **Emotional involvement.** Some representatives (especially friends, relatives and a few lawyers) are emotionally entangled in the conflict and cannot separate their own anguish from the needs of the client.
- **Multiplication of interests.** All representatives bring new interests into the mediation room which potentially make the negotiations more complex (eg. need to save face; need to be paid; need to be seen to be helpful; need to be seen to be aggressive).
- **Loss of control.** Some representatives “take over” from their clients – talk too much, don’t listen, take control, convert the issues into narrow questions which reflect their own expertise. These are some of the recurrent critiques of litigators recycled in another context.
- **Wrong choice of mediator.** Some representatives choose mediators with whom they, rather than their clients, are comfortable.
- **Ignorance.** Some lawyer representatives know little about mediation or conflict management generally. (This group has decreased dramatically in number over the last fifteen years.)
- **Dumping difficult clients.** Some lawyer representatives only refer files to mediation after the client has been over-serviced with warlike behaviours. Or alternatively, they use mediation as a dumping ground for difficult or dangerous clients.
- **Few settlement incentives.** Legal representatives have no clear financial incentives to be efficient negotiators. They will actually be paid *more* if the conflict continues.
- **Quick settlement payout.** Conversely, some representatives have an interest in pushing hard for a quick settlement in order to get paid quickly (perhaps a contingency fee); meet budget, manage heavy work loads; get rid of a troublesome client.

- **Loss of face.** Some representatives have given over-confident or ignorant early advice, and do not want to lose face publicly at the mediation when their over-confidence or ignorance becomes apparent. Therefore they bluster, pontificate or walk out.
- **Avoiding disappointing news.** Some representatives are reluctant to tone down a client's extreme claims. They fear that the client will feel betrayed by an ally, or will shoot the messenger, or will badmouth the representative for being a wimp (and will refuse to pay the representatives fees), so they continue to offer half-hearted support for the client's extreme claims ("I'll follow your wishes/instructions"), while desperately hoping that "someone else" (eg. mediator, Registrar or Judge) will beat up the client, and bear the blame for the client's disappointing outcome.

What advantages and disadvantages have you experienced, of the involvement of representatives in the mediation (or negotiation) process? Set out at least three of each.

Advantages:

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Disadvantages:

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To repeat, the potential advantages and disadvantages of representation provide a sobering challenge, to clients and representatives, to reflect upon the degree of involvement of a representative which will be helpful in each mediation. A competent mediator will want to brainstorm possible answers to this important question with each representative.

(Extract from J.H. Wade, *Representing Clients at Mediation and Negotiation*, Bond University Dispute Resolution Centre: Queensland, 2000)