



IN STYLE •
HONG KONG
SYMPOSIUM

KUALA LUMPUR
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Mediating Intellectual Property Disputes

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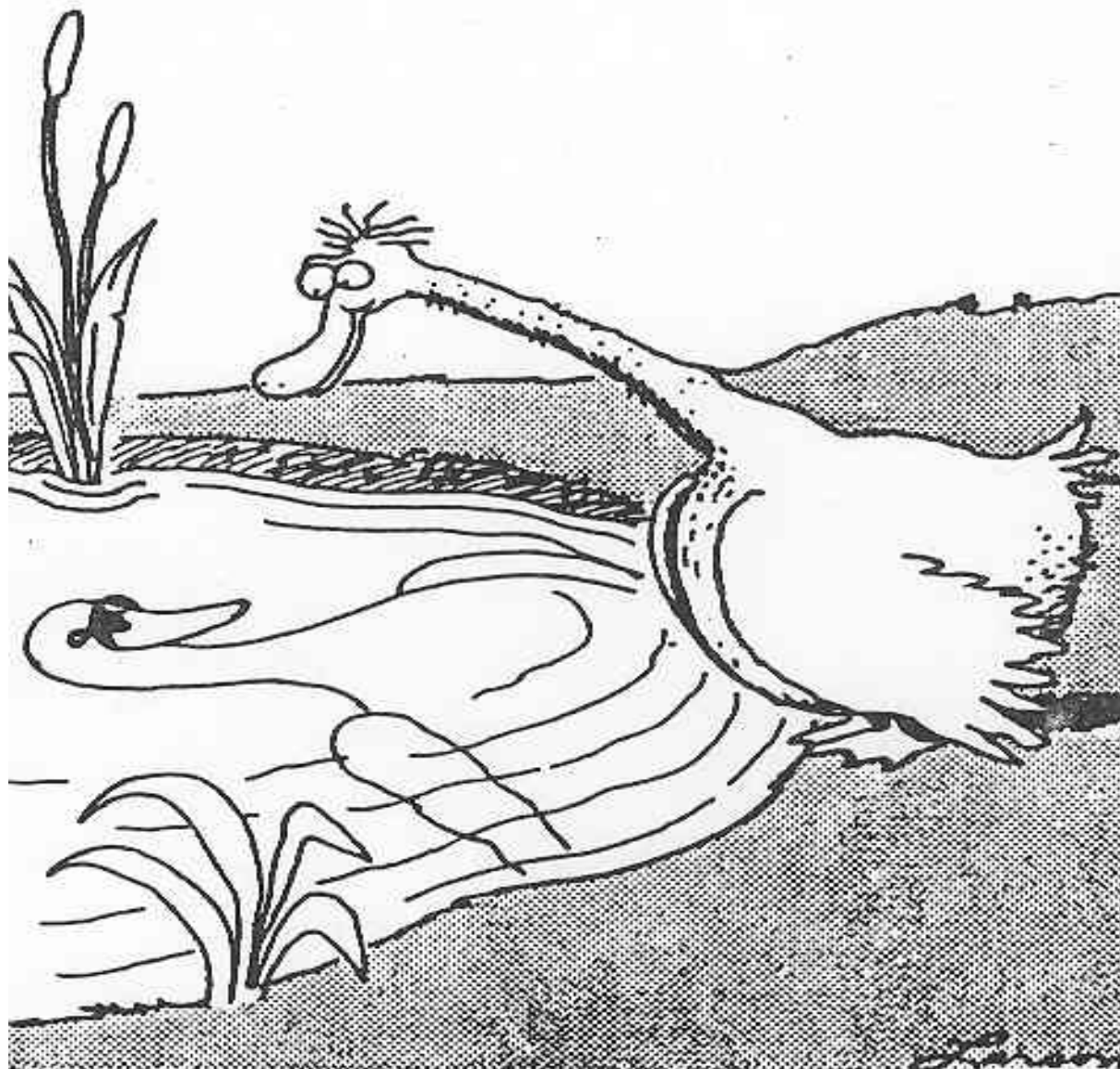
**Council Member of the Hong Kong International
Arbitration Centre (HKIAC)**

How to manage
legal risks?

Mediating Intellectual Property Disputes

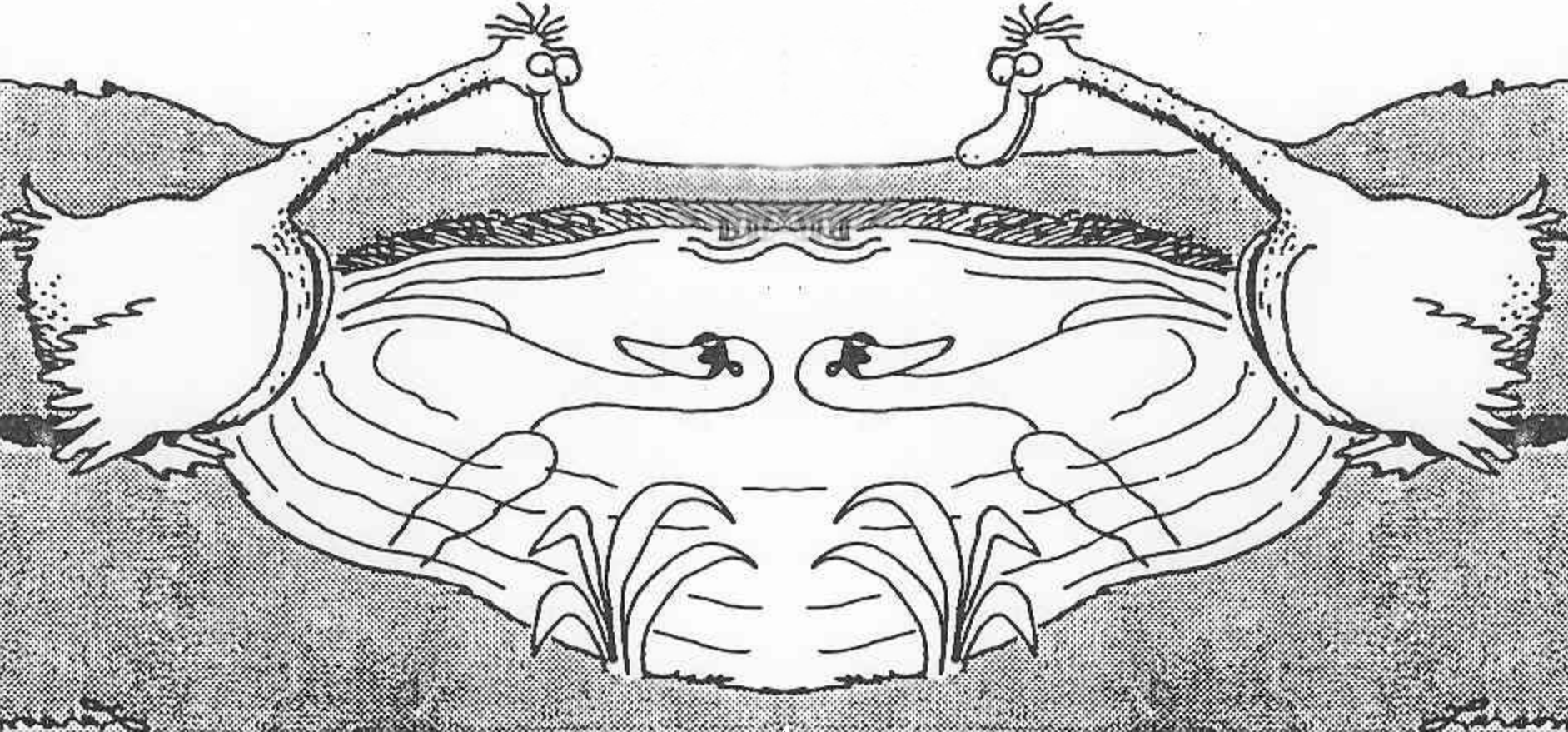
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**FACILITATIVE/EVALUATIVE
MEDIATION
TECHNIQUES/STYLES**



Plaintiff's View of their Case

Defendant's View of their Case





"We should have gone to mediation."

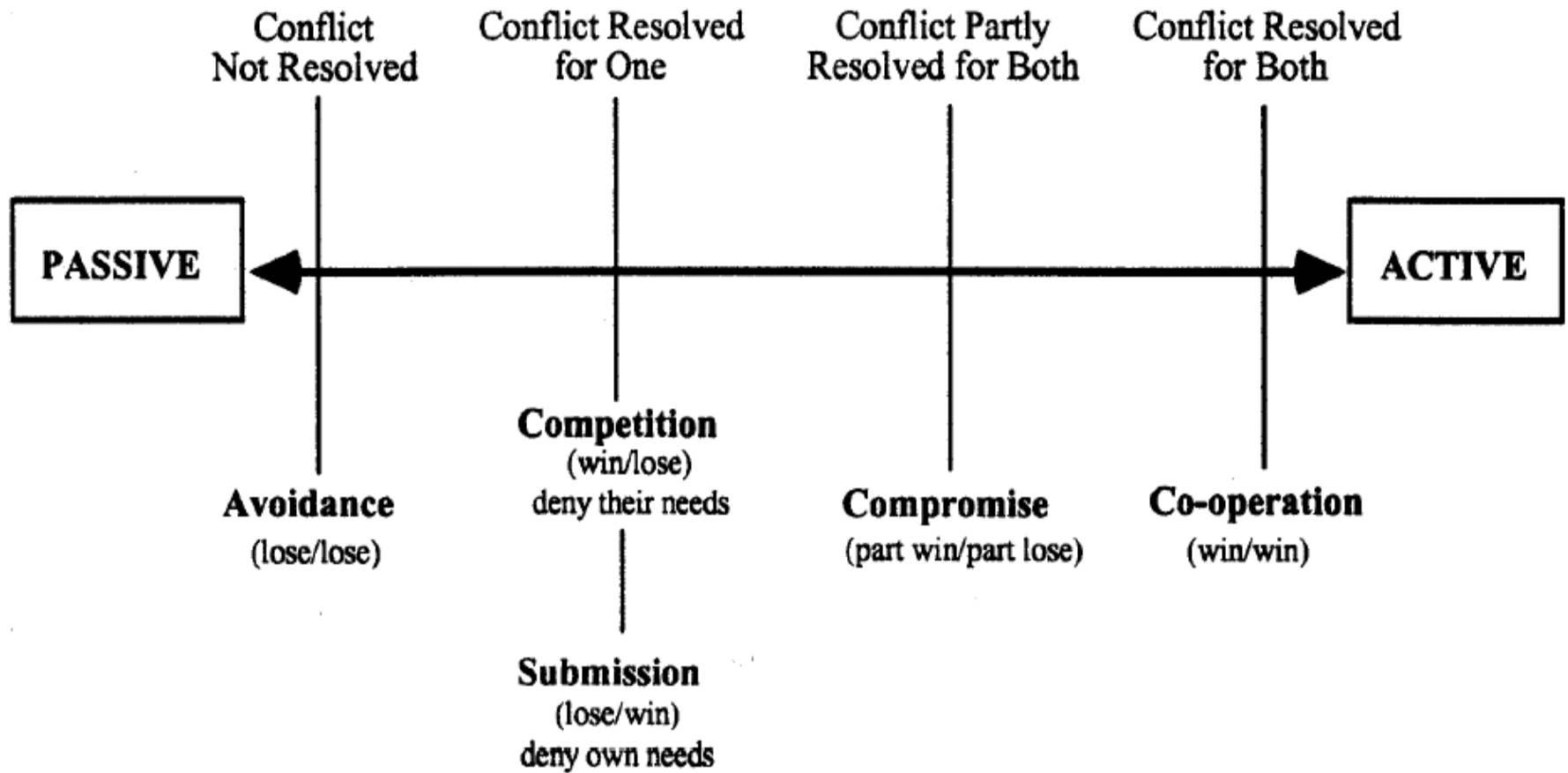
Perceptions

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- Should Intellectual Property disputes be mediated?
 - Negotiation
 - Early Neutral Evaluation
 - Mediation-Arbitration
 - Arbitration-Mediation
 - Arbitration
 - Litigation



Approaches to Dispute Resolution



What is Mediation

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“Mediation is one means of approaching conflict. Regardless of how it may be defined, mediation is only that: one approach which may be more or less effective in facilitating the resolution of some conflicts with some people under some circumstances.”

Tillet (1990)

Defining Mediation

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Mediation is a consensual process in which a third party (or third parties), works with the disputing parties to help them explore, and if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute.

In essence there are two forms/styles of mediation

- *Facilitative Mediation*
- *Evaluative Mediation*



The Corner-Stones of Mediation



- Confidentiality
- Ownership by the Parties
- Neutrality and impartiality
- Avoiding assumptions
- Respect, empathy and genuineness
- Open and honest
- Flexibility



Mediation

In essence Mediation is an informal process in which a “*third-party neutral*” assists others to reach a negotiated settlement.

Mediation is assisted negotiation

Mediating IP Disputes

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- is the cost of litigation going to be disproportionate to the disputed amount?
- are the complexities of law, fact and relations likely to result in lengthy proceedings with a high possibility of appeals?
- are the issues highly complex or do they involve numerous parties?
- are the parties involved in multiple actions?
- are the parties deadlocked in existing settlement negotiations?
 - are the parties likely to have a continuing relationship after the dispute?
- are the issues sensitive or would they require the disclosure of sensitive information?
- do the parties desire resolution without publicity?

Benefits of the use of Mediation to Resolve IP Disputes

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- Speed
- Cost
- Control over the Process
- Control over the Outcome
- Creative Settlement possibilities
- Cross-Jurisdiction resolution in a single forum
- Continuing with Relationships
- Confidentiality
- Mediation as an aid to subsequent arbitration or litigation proceedings

Types of IP suitable for settlement by Mediation

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- disputes about the licensing of IP rights;
- disputes concerning the infringement of IP rights;
- disputes over patent entitlement, e.g. whether co-inventor was employee or consultant;
- disputes over patent/trade mark ownership, e.g. whether employee developed invention in their own or Company time; or
- disputes over patent inventorship, e.g. the significant contribution made by a third party.

Styles of Mediation

FACILITATIVE

EVALUATIVE

Facilitative Mediation

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- Facilitative mediation is the original style of mediation.
- Facilitative mediators seek to "facilitate" the negotiation between the participants.
- The goal is to help everyone achieve their interests and to reach a durable (long lasting) agreement.
- Facilitative mediators tend to believe that participants can reach lasting agreements if given enough information, time and support.
- The facilitative mediator usually does not comment on what would happen if the case went to court (at least not initially).
- Generally speaking, facilitative mediators tend to come from all backgrounds (non- legal and legal backgrounds).

Evaluative Mediation

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- Evaluative mediation is concerned primarily with reaching a deal.
- This style of mediation focuses more on expected court outcome and less on the parties' interests.
- Evaluative mediation may be a good choice if you just need to "get it done."
- If the matter is coming up in Court, the lawyers may suggest using an evaluative mediator with the hope of reaching a deal and avoiding going to Court.
- Often evaluative mediators will have a legal background.

FACILITATIVE mediators do **NOT**
suggest solutions

EVALUATIVE mediators evaluate
& suggest solutions

Facilitative mediators

ASK

Evaluative mediators

TELL

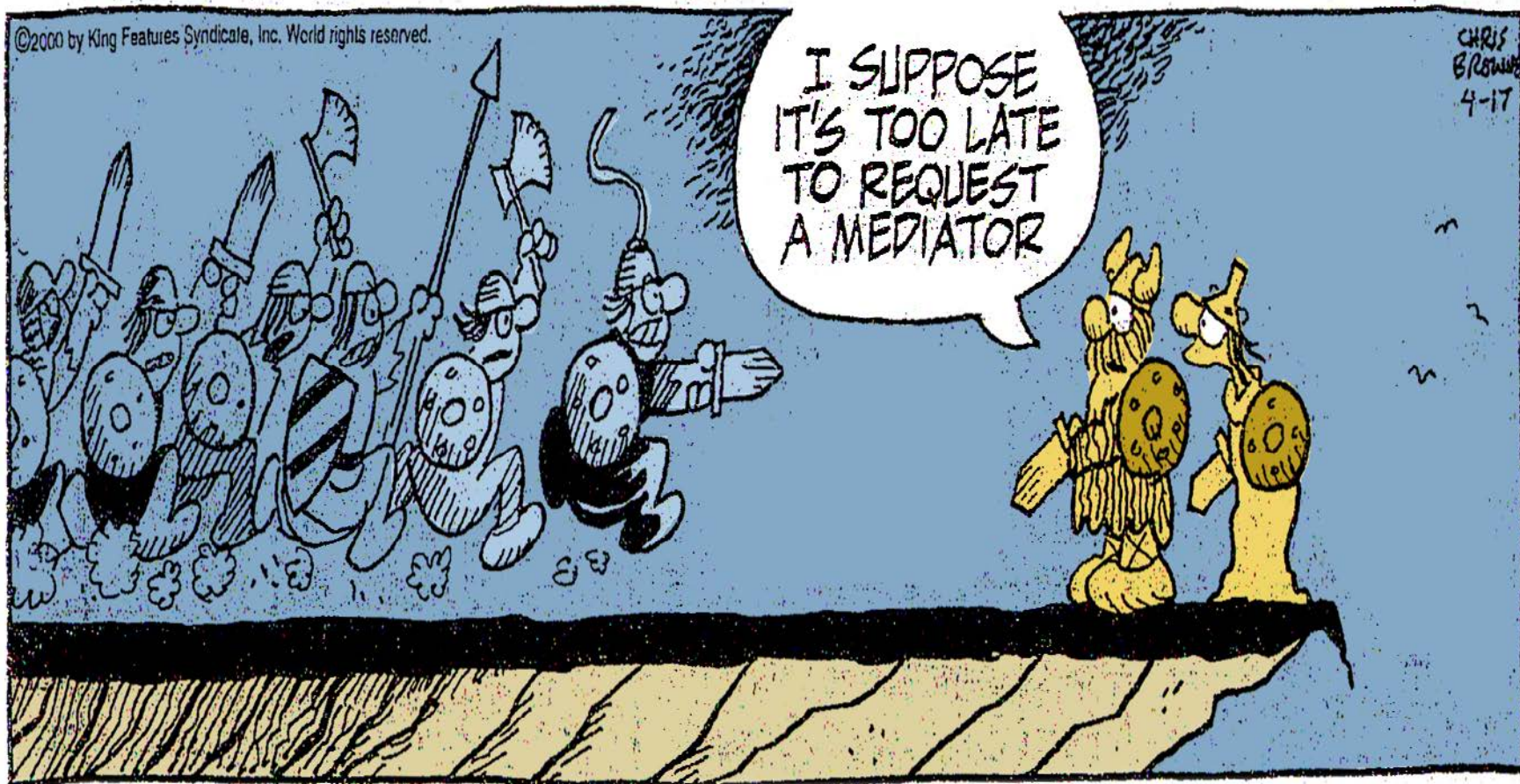
NO POWER

The mediator has no power to
decide
the dispute

Hagar the Horrible

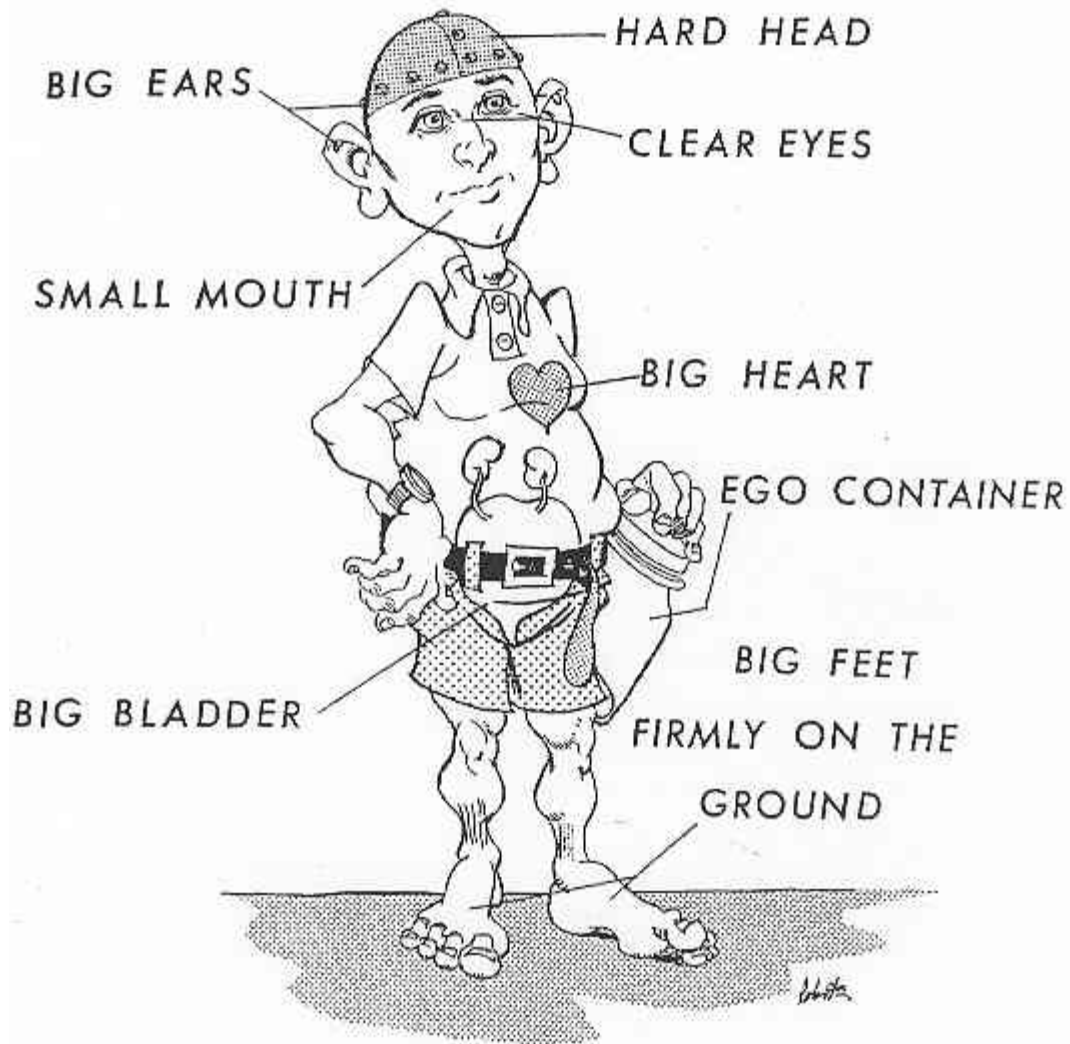
by Chris Browne

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So What does it take to be a mediator?

Attributes of a Mediator



Establish criteria

Create Doubts

Review the Relationship

Engage in contingent Bargaining

"If they were to __, what could you do?"

"For you to __, what would you expect them to do?"

Narrow the differences

Save Face

Emphasize Progress

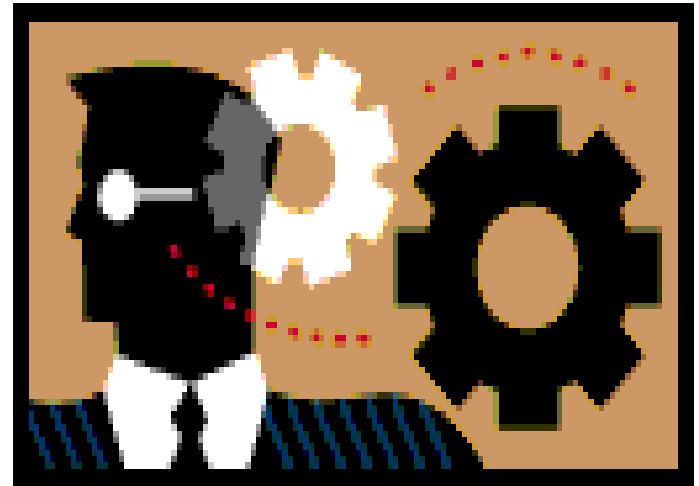
MEDIATORS FIND SOLUTIONS by HELPING PARTIES NEGOTIATE

Uncover Interests
Prioritize Interests
Brainstorm Options
"What could they do...?"
"What could you do...?"

Personal Qualities of a Mediator



- Listening skills
- Patience
- Common sense
- Ability to close
- Ability to summarise
- Analytical skills
- Ability to keep confidences
- Ability to recognise the issues
- Lateral thinking
- Neutrality
- Persuasive ability
- Persistence
- Creativity



Iron Laws of Mediating



- No one will make a difficult decision if there is any possible way to avoid it.
- All specific disputes have to end sometime
- No settlement is entered into without some doubt and some trust





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*“Do not find fault,
find a remedy.”*

Henry Ford

Thank You