

Facilitated Dialogue Model: A Rebel in ADR?

*[Mediator secrets] enable parties separately to unburden themselves to the mediator, so as to receive assistance which would be otherwise unavailable to them.*¹

—Lord Briggs

What is the Facilitated Dialogue Model (FDM)?

In the current global landscape where change is rapid, Alternative Dispute Resolution (ADR) must continue to evolve and respond to new circumstances. In this spirit, we offer an original approach that re-imagines the use of assets called “mediator’s secrets” and “private information” in a process called Facilitated Dialogue Model (FDM). FDM is a directive, fast-paced, time efficient model for a neutral facilitator to conduct direct dialogue between clients in conflict, but it is not simply a version of facilitative mediation.

In our process, mediator secrets and private information are related and important concepts. Michel Kallipetis expanded on Lord Briggs’ comment and identified what he called “private information”:

an important part of the mediator’s role is to encourage

the parties to trust him or her with private information, their views, hopes and fears about the dispute that they do not wish the other party to know. Lord Briggs calls them ‘mediator’s secrets.’ Thereby the mediator becomes uniquely apprised of aspects of all parties’ attitudes to the dispute (such as their ‘must haves’, ‘cannot live with’, ‘would like to haves’) which may enable the mediator to promote a compromise route which would not occur to them, sufficiently meets their different secret concerns, and forms the basis of a durable settlement...Lord Briggs accurately observes: “it enables the parties separately to unburden themselves to the mediator, so as to receive assistance which would otherwise be unavailable to them”.²

Private information and mediator’s secrets are assets that may not—but ought to be—widely utilized in ADR.



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FDM permits an ADR practitioner to use these assets in a more directive way that we call FDM Knowledge. This use includes the design of a questionnaire and the development of an agenda that provides the platform for the parties to have a direct dialogue with each other. Their dialogue leads to an expanded form of collaboration with the potential for a mutually satisfying agreement.

What is novel about FDM?

FDM is novel in:

- (a) its active use of mediator’s secrets and private information; and
- (b) its time efficiency. The entire FDM process takes no more than 5.0 hours and can be completed in as few as 5.0 days.

Who is FDM for?

FDM requires:

- (a) a retaining client, as distinct from participants, who has a legal, financial and/or contractual authority over and who nominates potential participants
- (b) a facilitator who is experienced, intuitive, observant, analytical and skilled, and
- (c) participants who are articulate, diligent, committed, collaborative, and are able to engage in a direct dialogue with each other.

In no particular order FDM participants could include:

- civil, commercial and corporate lawyers

- chief executive officers
- team leaders in fields such as sports, manufacturing, medicine, and technology.

Suitability and Criteria for FDM

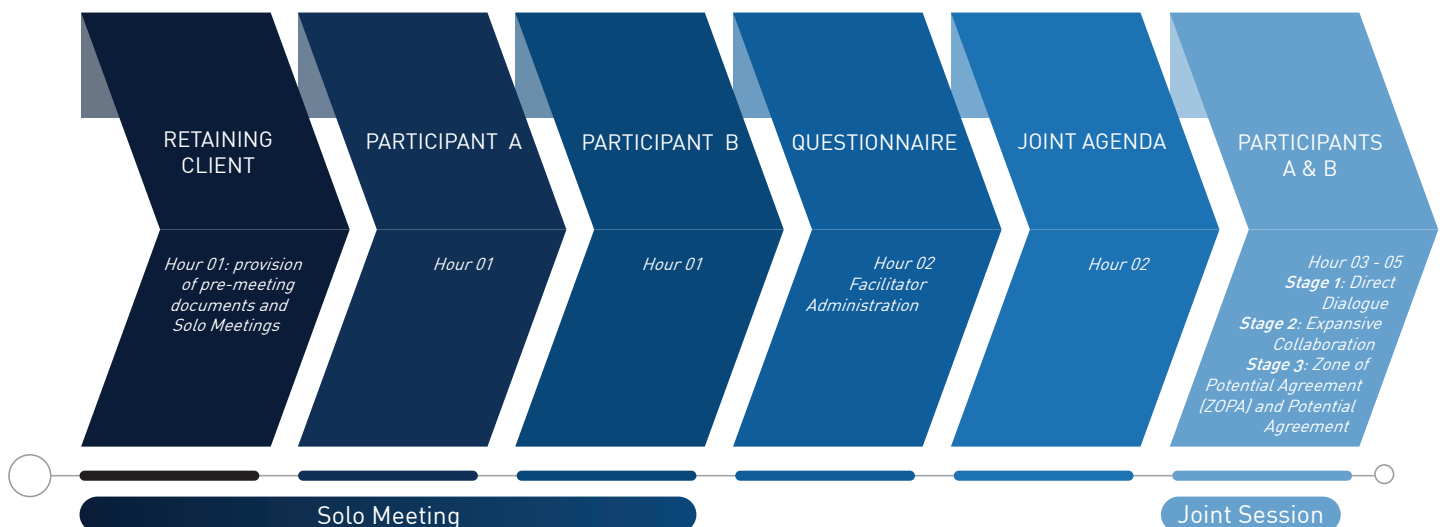
FDM may be applied in business and commercial sectors where time, financial restraints, and overall efficiency are paramount. The entire FDM process was created to take no more than 5.0 hours and could be completed in as little as 5.0 days. Additionally, FDM was specifically developed for conflicts that have been in existence for less than one-and-a-half years. In our design, conflicts that have lasted longer may be too positional and complex for FDM. FDM does not preclude access to other ADR or litigation options.

FDM participants engage in a time-defined dialogue where they speak directly to each other and are not permitted to restate, summarize, or rebut what has been said. FDM was not designed for entrenched interpersonal conflicts, family, and estate matters or similar disputes.

As with all ADR, FDM is private, confidential, and voluntary. The facilitator meets with the retaining client and provides an overview of the process, benefits, and roles and responsibilities. The retaining client exercises critical judgment in selecting the participants and conveys to them the value of FDM to them and the organization.

Stages of FDM

A flow chart overview is provided below for ease of reference. Each step shown on the chart is described in more detail below.



Step I: Solo Meetings

Once the retaining client secures the agreement of the participants to engage in FDM, the facilitator meets with each participant separately to briefly outline the process, their specific roles and responsibilities, and opportunities/benefits.

In explaining the joint session protocol, the facilitator informs participants that there is no restatement or rebuttal and that participants have an active role in identifying potential threads of “Expansive Collaboration,” an FDM Technique explained below in Step IV.

At the conclusion of the solo meetings, the facilitator notifies the participants that they will simultaneously receive a customized questionnaire. Participants are required to return their completed questionnaire to the facilitator within 12–24 hours.

Step II: Questionnaire

The questionnaire is composed of three questions:

- Question 1: participants are directed to identify no more than 3 issues (with a strict, word count limit) they each wish to communicate to the other;
- Question 2: participants self-identify what role they may have contributed to the situation(s);
- Question 3: participants explore their Best Alternative to a Negotiated Agreement (BATNA), Worst Alternative to a Negotiated Agreement (WATNA), and bring other solutions and considerations to the table.

The facilitator analyzes the question 1 responses only and uses their professional skills (such as reframing, rephrasing and negotiation) to build a fused agenda composed of no more than three items. The agenda should cover all of the confidential topics identified in the questionnaire and build the platform that will permit direct dialogue.

Questions 2 and 3 responses are exclusively and confidentially for the facilitator's use. This information is one of the key sources of “private information” which constitutes what we call “FDM Knowledge.” One of the novel features of FDM is that the facilitator explicitly directs participants via the questionnaire to provide secret information in a clear and concise way. The questionnaire informs participants that the information they confidentially disclose in questions 2 and 3 will be used to develop a foundation for Expansive

Collaboration in the joint session. The facilitator's use of this secret information to develop a strategy in the joint session is one aspect of FDM's technique.

Step III: Agenda

The facilitator uses the responses from question 1 to prepare an agenda for the joint session that maintains participant confidentiality and uses neutral language to captures all issues. The ability to effectively reframe participant language and create agenda categories expansive enough to capture all issues are instances of FDM techniques.

Once the agenda is prepared, the facilitator simultaneously sends the agenda to the participants 12–48 hours prior to the joint session date to give participants the opportunity to decide and practise what they want to say in direct dialogue. The agenda is accompanied by specific instructions:

- (a) each agenda item is allotted a specific amount of time. This time is tightly controlled by the facilitator;
- (b) the agenda has a maximum of 3 items; and
- (c) participants are to speak exclusively to the issues identified in the agenda.

Step IV: Joint session

The date of the joint session is determined by the facilitator, and the session is no more than 3.0 hours in total, including breaks. It consists of three stages.

Stage 1 – Direct Dialogue

The facilitator opens the meeting with a brief reminder of the benefits of the process, participant roles and responsibilities, and mutually-agreed standards around respectful dialogue. For agenda item #1, the participants take turns speaking and listening in equal measure. At the conclusion of agenda item #1, a break is called. This pattern is repeated for remaining agenda items.

After the participants have concluded their speaking and listening roles for all of the agenda items, a further break is called. This concludes the direct dialogue stage. When the break is over, the facilitator informs the participants that they are moving to a stage called “Expansive Collaboration” where their input is encouraged based on what they just heard in their listening roles.

Stage 2 – Expansive Collaboration

Whilst maintaining professional neutrality, the facilitator garners the FDM Knowledge from questions 2 and 3 to formulate a strategy that will elicit comments and questions for Expansive Collaboration.

Expansive Collaboration goes beyond the traditional ADR understanding of the word “collaboration.” Authors like Adam Kahane³, Nobukhosi Ngwenya and Liza Rose Cirolia⁴, John Forester⁵ and Malcolm C. Burson⁶ use terms such as “stretch collaboration,” “communicative collaboration,” “conflict gradient,” and “community/collaborative.” Common to all of these terms is the recognition that Expansive Collaboration is “a critical skill for coordinating the ideas and contributions of diverse sets of people...”⁷. Unlike classical collaboration that requires the parties to work together to produce a mutually and equally satisfying outcome that meets as many of their interests as possible, Expansive Collaboration requires less mutuality. In this regard it is less idealistic; the parties’ cooperation can be as minimal as fingers touching, rather than a full hand-shake. What is important is that the parties are committed to working together on finding some common ground.

The facilitator’s ability to use the secret information provided by the participants in the returned questionnaire and plan a strategy for Expansive Collaboration are components of the FDM technique. Expansive Collaboration may lead to the broadest Zone of Potential Agreement (ZOPA).

Stage 3 – ZOPA and Potential Agreement

The facilitator guides participants towards a future-focused, enhanced collaborative plan of action that may lead to an agreement. Ideally, such an agreement respects divergent positions and offers the widest possible ZOPA. For example, one participant may have 60% of their needs met and the other participant 40%. A 60/40 split, or any other combination, is perfectly acceptable as long as both participants are in agreement.

An FDM case which illustrates ZOPA was a commercial dispute involving two adjacent property owners who required gate access to a shared property line. The owners were extremely polarized, and the completed questionnaires revealed that both of them insisted on exclusive possession. One of the agenda items for the joint session asked the owners to explore all current gate access options, and in direct

dialogue one owner proposed a technology option (virtual padlock) for the first time. The other owner accepted, as it permitted 24/7 monitoring.

How Long Does FDM Take?

The entire FDM process was conceptualized to be time-efficient (5.0 hours) and expeditiously results-oriented (may be completed within a standard work week). Additionally, the following elements illustrate the time-efficiency of FDM:

- At the conclusion of the solo meetings, the questionnaire is simultaneously sent to the participants with a direction that the participants complete and return the questionnaire within 12–24 hours;
- After receiving the completed questionnaires, the facilitator prepares an agenda that is delivered simultaneously to both participants with a turn-around time of 12–24 hours;
- The pre-agreed date for the joint session is held 12–48 hours upon receipt of the agenda.

Benefits of FDM

FDM navigates all the traditional professional skills and ethics for ADR practitioners, including independence, neutrality, confidentiality and transparency. In addition, FDM may give ADR practitioners the means to build opening trust with the participants, and it allows them to ethically and effectively leverage FDM Knowledge to build a fused agenda. Appropriate use of FDM Knowledge leads to enhanced collaboration and an enlarged ZOPA which in turn may lead to agreement.

Concurrently, FDM offers advantages to the organization:

- (a) highly-focused and efficient problem identification;
- (b) customized, facilitator-designed questionnaire and agenda which provides a focused platform for participants to have a direct, specific dialogue;
- (c) enhanced collaboration that adapts the traditional rules, leading to an expansive ZOPA;
- (d) expedited process designed to be completed in 5 hours or less over multiple days; and
- (e) a scalable process which may include more than two participants.

Another completed case which illustrates the benefits of

FDM was a commercial dispute involving a Canadian retailer and a U.S. electronic manufacturer over delivery of goods with an impending holiday shopping deadline. The traditional shipping routes (air, rail, sea and road) from the U.S. to Canada had been disrupted because of global crises. In ZOPA, the participants were encouraged to explore previously untapped road transport routes. There was a recognition that returning trucks may be under-utilized northbound. The parties agreed to explore this untapped route in their agreement. The result was that empty produce trucks were used to ship the goods to Canada within the required contractual delivery time.

Conclusion

In a non-scientific survey of our colleagues, we learned that many jurisdictions and practice areas globally have shifted to virtual delivery. We also observe a revolution in the practice of offering ADR services to clients within the majority of the international corporate and commercial world. This includes the challenge of ethical service delivery that preserves core principles of confidentiality and transparency, while balancing the imperative to be efficient and expeditious. These professional changes offer the opportunity for ADR practitioners to conduct national and transnational meetings virtually (e.g. Zoom, Teams, WebEx), thus reducing the cost and time associated with physical travel and increasing our professional “green footprint.”

From a sampling of conferences, journals, publications and blogs within the ADR sector⁸, it appears that ADR practitioners are continually seeking ways to:

- (a) expand client self-determination;
- (b) recognize time and fiscal responsibility;
- (c) are more directive;
- (d) are transparent and analytical; and
- (e) support clients in being more collaborative and diligent.

These foundational elements are incorporated into FDM.

The combination of the advanced skills of the facilitator, FDM Knowledge, and FDM techniques forge a process which provides the option for an agreement containing divergent and unequal positions if the participants agree to such. FDM permits experienced ADR practitioners to modify some deeply-held and established professional practices in a way that is still legal and ethical. In FDM, sacred traditions and principles such as confidentiality and neutrality are re-formatted and re-imagined (through the questionnaire and agenda) and yet continue to be transparent. Our premise is that FDM is unique and a rebel in ADR. 🏠

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