MEDIATION TECHNIQUES

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# Mediation Techniques


the global voice of the legal profession®

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# Contents

## The Mediation

## Post Mediation

## Special Situations

# Introduction

The Mediation Techniques Subcommittee of the International Bar Association was established to offer mediators from around the world the opportunity to share their practical expertise. It was felt that this would be particularly attractive to mediators from smaller jurisdictions where training may be offered by a limited number of providers and accordingly practice may be developing an undesirable uniformity of style. We have also started to invite high profile academics to the IBA Annual Conference to give a wider number of practitioners the opportunity of learning from them.

We decided to put together a book because although there are many books about mediation most of them concentrate on a single topic or have a bias towards the theoretical or philosophical. We felt that there was a need for a practical collection of tips from and for practising mediators of different styles facing different sorts of issues. We wanted it to be usable by mediators at an early stage in their career but to contain sufficient variety to still be interesting to more experienced mediators.

The format is a series of short essays by practitioners covering the topic from pre-mediation planning through to post mediation follow through, interspersed with pages of short hints and tips to which we hope users will add their own points as their practice develops. The final section of the book deals with the use of mediation in different fields and is intended to provoke debate as to how mediation could be advanced into new areas as well as providing information about topics with which many readers will be unfamiliar. You will find some duplication and much contradiction of advice throughout the book as what works for one person in one situation will be inappropriate for another. It is this flexibility that for many of us makes mediation such an attractive form of dispute resolution.

This book represents a collaboration between more than 50 members of the IBA Mediation Committee who have generously shared their experiences.

It should be understood that the views expressed here are the authors' own and may not represent those of their employers or of the IBA. We all hope that our readers will find it useful and that they will be inspired to come up with new and ever better ways of conducting mediations. We invite you to share your ideas with others and to consider joining our committee of which more details can be found at: **www.ibanet.org**.

**Patricia Barclay**
*Co-Chair, IBA Mediation Techniques Subcommittee*

# Closing the Mediation Where a Settlement Has Not Been Reached

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The subject to be covered in this short piece relates most obviously to the situation in which, on a mediation day, it becomes clear to the mediator that further work is not going to produce a signed agreement. This can arise where there is a gap to be closed, or an issue or issues to be resolved, and all options have been explored, or time simply runs out due to the commitments or exhaustion of any of the decision-makers. Another possibility would be that during the course of exploration of the dispute and its possible resolution it becomes clear that any agreement between the parties cannot be confirmed without the input or buy-in of a further party who is not involved and not available. There could even be missing information without which, for example, the paying party is unable to commit.

In the latter situation it is usually fairly straightforward to agree actions and a timetable. The mediator should be assertive in finding a role in that timetable to ensure that all the work done on the mediation day to neutralise negative positions is not lost to the re-emergence of interpersonal relationship difficulties and reactive devaluation (always thinking the worst of the motivation of the other side and therefore failing to value any reasonable concessions which have been made). This often involves further participation as a matter of goodwill. Additional fees can always be discussed later with the legal representatives, at a calmer time.

Where there is real work still to be done in ascertaining the zone of possible agreement and then finding the settlement number, a good suggestion at the

end of the mediation day is to obtain agreement to a new date – stating that of course this is simply a fall back in case the parties cannot reach closure themselves. Where parties genuinely want to settle (and most do) there is never any difficulty in getting buy-in to such a suggestion.

On occasion, of course, it is by no means as simple as the above would suggest. The mediator as shepherd (or even sheep-dog!) comes to mind in remembering a situation of acute embarrassment on having to explain to one room of people (the hosts) that their opposition guests had simply walked out. The pretext was catching a train and the tactic was to bring forward unexpectedly and at short notice the actual train time that was said to be essential to a successful homeward journey – but the mediator was left with a big question mark in his mind as to whether this could have been prevented. Fortunately, some hard work on the telephone in the following few days bore fruit.

The lesson to be drawn from this tale for the mediator is always to be mindful of the personality and emotional issues even where the mind is engaged mainly on fitting the logical jigsaw of a complete settlement together; always paying attention to what the party might be doing whilst fully engaged with difficult conversations with the other.

Whilst the mediator will always look first and foremost to facilitating the continuing of negotiations, it does happen that it is clear that no circumstances can at that moment be envisaged in which the dispute will be resolved by agreement. Reasons may vary, but it is possible to identify such a situation. In that event my strong instinct would be to encourage all concerned to meet together with me to summarise the efforts made on the mutual decision which has been made to close the mediation. Simply to do this can bring new force or impetus to people's intentions but equally to an obligation to face up to what is being let go. I have known situations where on enquiring a couple of weeks after such a process as to the present position I have been informed by a legal representative: 'Oh yes, it settled without too much difficulty'. It can also happen following such a closing that lawyers having shared the moment of 'failure' of the mediation then adopt a more collaborative approach to subsequent negotiation, the time for aggression having come and gone.

Let me now widen this discussion to a few thoughts of general application. There has grown, in the UK at least, a mentality which regularly equates to 'we must settle on the day at all costs'. This is to some degree understandable where, for example in a commercial dispute (which is my field), the legal charges incurred in preparing for and attending a full day mediation have been estimated to the client as very substantial in their own right, running in some cases into tens of thousands of pounds. So there is pressure to

please the client in being able to close the file as well as submit that big bill. Here the mediator has to be proactive in leading parties to having faith in their abilities to continue to negotiate on the days which follow, offering continuing support and/or meetings as discussed above. It is of note that on many occasions parties bring a very great degree of pressure to bear on their opponents that the deal 'must be done today, or all bets are off'. This raises the temperature at a late stage of the negotiation process, parties are tired and all the old dark places are revisited through threats, perceptions of bullying, etc. This is where a negotiation can break down with blaming and self-justification. Where this seems inevitable, a mediator should be aware of offering options to both sides which show a real hope of later progress, pointing out the damage that can be done by an insistence on hardball behaviour and walk-out threats. While such behaviour has been known on occasion to produce agreement, it can hardly be argued that such an agreement is of any quality. Despite this, the mediator is not concerned in my view with quality: party autonomy dictates that a properly advised party who is prepared to engage with such behaviour should not for a moment be prevented from doing so by mediator intervention.

So the mediator may consider it worthwhile to keep going using all options available; when it appears that there will indeed be no settlement on the day – perhaps because of mediating early and thus insufficient certainty through information exchange, or perhaps the need to feel the pain of the dispute a little longer – to design tasks and timetable, to summarise the options available, to propose questions for reflection. In this way, all concerned may lose the need to measure success or failure on the basis of the 'settle on the day at all costs' model. Mediators may be less tempted to give opinions, and instead provide a more benign kind of advice which fits the commercial context and which the parties can take on board or discard as they choose.