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Mediation Techniques



the global voice of
the legal profession™

Editor: Patricia Barclay

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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

How to Use Experts in Mediation

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Experts can be an invaluable resource to help resolve certain disputes, but like all mediation tools the specifics of the dispute must be analysed to determine what would be most helpful in achieving a resolution. Many, and probably most, disputes do not present issues that suggest that the use of an expert would be helpful in the mediation, although the expert might well be useful, or even crucial, or if the matter proceeds to adjudication. At the mediation stage the additional expense, often considerable, associated with retaining an expert can be reason enough not to engage such services. In addition one must consider whether it might lead to an escalation of the dispute or an undesirable emphasis on who is 'right' and interfere with a more interest based resolution. But in appropriate cases experts can enable the settlement and provide solutions to end the dispute. The two most prominent uses of experts in mediation are what are referred to in this article as 'technical experts' and, with respect to discrete issues, 'early neutral evaluators.'

Technical experts

Experts can be effectively used at a mediation to address issues that raise technical questions. Most commonly they are used to cover engineering matters but they can also be useful in many other areas of specialised expertise such as knowledge of custom in the trade in the particular industry or ability to build a damage analysis. The expert on such matters can be an independent expert retained by the parties for the case or can be an employee of the party with specialised expertise. The expert in the first instance serves to educate the parties as to the respective positions of the parties and the

basis for those positions. But the expert can often provide a much more valuable service. Having the experts engage in some back and forth about the issues in dispute can often narrow the areas of difference and eliminate certain disputes as compromises are reached. For example, disputes as to construction projects can sometimes be resolved issue by issue as the experts discuss each problem, brainstorm and price out possible solutions, and try to come to consensus as to acceptable solutions.

Early neutral evaluators

If the parties are stuck on a particular issue of fact or law that is absolutely blocking their ability to move towards settlement, a single independent expert can be brought in to provide either a binding or a non-binding opinion on that point. This is a tool only to be employed where absolutely necessary and useful. The mediator should, of course, first work himself or herself, to vigorously test the parties' positions and, with the parties consent, speak to the potential strengths and weaknesses of each position. It must always be remembered that retaining the expert to serve in this function, with the equivalent of a mini-trial in the midst of the mediation, will add to the cost and delay the resolution. However, in some cases using an early neutral evaluator will make the difference between settling and not settling. For example, whether or not the statute of limitation lapsed may be an issue as to which the parties have an absolute disagreement and which is obstructing meaningful discussion.

Preparation for expert in mediation

Before the mediation, if the case is one in which the use of technical expertise might be useful, the mediator should raise the possibility of bringing in party employees with the requisite technical knowledge and ask if experts had already been retained by the parties. Careful consideration should be given to the parties' views as to whether it would be helpful to include such experts in the mediation. In all cases, whether in-house or independent experts are coming should be part of the normal review of who will be attending the mediation as it is important to avoid having one side be blindsided by having the other party bring an expert to the mediation without advance notice.

Maintaining the confidentiality of the information exchanged should be formally agreed. A specific discussion as to whether and how any statements or positions taken by the expert can be used in any subsequent proceedings is important. Absent of such protections, as the mediation is often at an early

stage of the experts' review, positions or statements taken at the mediation may subject the expert to damaging cross examination as the expert's opinion evolves with greater familiarity of the case.

Often the experts are simply part of the informal discussion around the mediation table. But if formal presentations are to be made by the experts, advance discussion of the details including the length of any expert presentations and the nature of the presentations, eg, PowerPoint, and graphics, is essential to set the stage for an even handed process.

Using experts is not the norm in mediation but there are cases that revolve around complex technical issues and cases that present singular matters on which expert guidance can be helpful. It is a tool that every mediator should keep in his or her tool box.