

IBA e-book

Mediation Techniques



the global voice of
the legal profession™

Editor: Patricia Barclay

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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

Reality Testing

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*Every disputant is in love with his case.
As a mediator, my job is to break up the affair.*
David Shapiro

Reality testing is the technique of inviting a party to adjust his perceptions of the claim. A party may overestimate the likelihood of success on the merits, or the other side's ability or willingness to pay. He may have an unrealistic assessment of his alternatives to settlement. The transaction costs of continuing the dispute in court may not have been accurately addressed. He may not have confronted business, competitive, or psychological obstacles to a successfully negotiated conclusion of the dispute. The purpose of reality testing is to help to eliminate those obstacles.

Reality testing is a necessary part of mediation. Intelligent and rational parties, advised by competent counsel, may have laboured long and hard to place a value on a claim or defence, and discussed the weaknesses and strengths of their position. Good counsel will have put probabilities on success at various junctures of the litigation process, and together they will have lived with the matter for months, sometimes years.

Now along comes a mediator, who has just learned about the matter for a few hours, seeking to cast doubts on all this good work. Why would a mediator put herself in such an unwelcome and vulnerable posture?

By reality testing, the mediator is testing the positions of the parties, inviting reassessment and forcing an articulation of certain hitherto tacit assumptions. In the process of reality testing, counsel and client may discover that they have not always been starting from the same place, or using the

same logical analysis of the situation. They also may not have accurately or thoroughly assessed the situation from the perspective of the other side. The more specific the mediator's probing, and the more determined the mediator is in following-up each area of reality testing, the more useful the exercise is to the parties.

There are many ways to start off this type of inquiry. Note the distinctions among these questions:

- What do you see as the main weaknesses of your claim?
- What do you see as the main strengths of their defence?
- What do you think they perceive as the biggest weakness in your claim? Do they have a logical basis for that? In other words, do they have a point (however misguided it may be)?
- If you were in their position, how would you attack the logic (or the facts or the conclusions) that underlie your demand?
- So do you think that, from their perspective, they are behaving rationally when they offer XXXX?

The intent of this series of questions is to encourage a realistic – dare one say objective – view of the status of the negotiation process. The discussion undermines the 'demonisation' of the opponent that is an inevitable product of longstanding conflicts, and assists each party in assessing the bid/ask gap in a more productive way.

Another series of questions tests the solidity and sophistication of a party's BATNA:

- If we don't get an agreement today, what's your best-case scenario?
- What's the worst thing that might happen to you if we don't get this done today?
- How much does your counsel project it will cost to take this matter to the end of discovery? Through a motion for summary judgment prior to trial? To the eve of trial? To the end of trial? To appeal, in the event that the trial doesn't go as you expect it will?
- How much of your own time is being spent on this case and away from your business? Do you expect that will decrease or increase if we fail to end it today?
- Do your other customers and competitors and vendors know that you have this lawsuit going? What impact do you think it will have on your good will and your business reputation if this has to go to trial?
- Does your boss have a view on this? Does your wife?

There are risks in posing reality-testing questions. One risk is that the mediator may be perceived as being rhetorical. If one is going to ask these questions, one must be prepared to listen to the answers and to pursue what

is unclear. Why do you say that? What do you base that on? And one should take care in each case to say, 'I think I understand how you're going about this, and I follow you'. Even in reality testing, everyone needs to be validated.

Another risk is that a party may feel she is being coerced. Too often, mediators who think they are being clever are in fact brow-beating the parties they are trying to help. It is too easy for a tone of voice or an arch of a brow to give the suggestion that there is a right and a wrong answer to a question when the mediator honestly intended to provoke discussion, not bear down with implied shame or humiliation.

A third risk is that the mediator may be viewed as offering an indirect or implied evaluation of a claim or defence. Great care must be taken to avoid that perception (unless it is intended) by prefacing one's questions with such disclaimers as: 'Well, you know your business better than I do, so let me just ask you ...' or 'Your counsel has given you a far more reliable piece of advice on this than I could, so let me just ask what your sense is of'. The goal of reality testing is, after all, to provoke a change of the party's assessments and assumptions, not to give the party the fruits of your own wisdom. They have legal counsel already – what they need now is an invitation to make a fresh assessment.

Reality testing is particularly helpful when it focuses on business, rather than legal, questions. Why do you think that your co-venturer breached the agreement? How does she think she might profit by making that move? What have you heard on the street about the possibility of a bankruptcy filing? Would the other side consider it attractive to lower the unit price but extend the term of the agreement? Why? Why not? How did you come to that conclusion? What if the other side thinks differently, rightly or wrongly – what would the consequences be for you?

Reality testing can take many forms. It is not a discrete set of tools to be used at a discrete stage of the mediation process. It often arises spontaneously and its form reflects the nature of the claim itself. And sometimes it just doesn't work.

I once got an employer to agree to accommodate a physically disabled employee in every way she sought – including a change in supervisor. When I relayed this success to the claimant, she unexpectedly made an additional demand of \$100,000.

Why do you need \$100,000?

Because they hurt my feelings and caused me months of grief.

Why \$100,000? Why not \$50,000 or \$200,000?

Okay, \$200,000.

Why would they pay you that?

They better if they want me to go away.

But they don't want you to go away; they want you to continue to work for them. They might think that's a lot of money, especially since your annual salary is \$35,000. Have you heard of any other employee who was paid \$100,000 to settle a case? Have you read in the paper about anyone getting \$100,000 to settle a case? Did any lawyer even give you the opinion that you could get \$100,000 to settle this case?

No, no, no.

So if we don't settle this today, you figure you will tell the judge (in four years or so, when your case comes up) that they treated you badly because of your disability, and they will say that they fixed every one of the problems by arranging everything you asked for, and you will say you also want \$100,000, and the judge will say sure, makes sense, pay her?

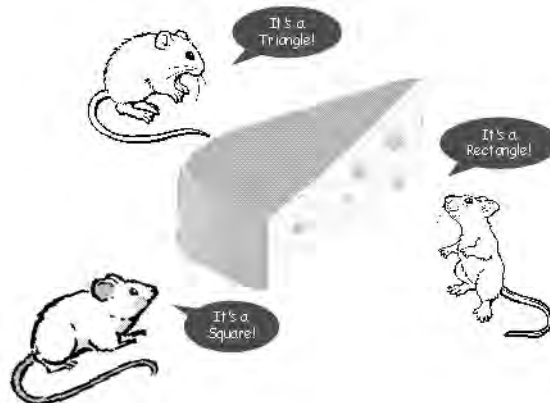
Yup. Or I at least want to have a try.

What do you think they will say when I walk into the other room and say that you want \$100,000?

They can say what they want. But you tell them.

Even persistent reality testing will not have an effect on an irrational or obstinate party. But most business parties are commercially rational, in the end. And failing to press the matter would mean failing to engage in one of the unique values that a mediator adds to the negotiation process. In the real world, attorneys cost something. Juries are uncertain. Arbitrators sometimes err. Laws change. All claims and defences must be discounted for mere uncertainty.

Moreover, reality testing, properly conducted, will often dispel a major obstacle to settlement: concerns of the other party's bad faith. I carry the following diagram with me to my mediations and it has proven quite helpful from time to time:



The mere fact that one's opponent has a different assessment of the claim does not mean they are lying or stupid. It may mean that they are viewing the same set of facts and the same body of law from a different but equally valid perspective, and basing their assessments on different but equally valid assumptions. Testing a party's view of the other side's assessments and assumptions can be enormously helpful.

The great American jurist Louis D Brandeis once wrote that: 'The logic of words should yield to the logic of realities.' [*Di Santo v Pennsylvania*, 273 US 34, 43 (1927)]. In business disputes, the logic of the law should yield to the reality of commercial markets. Reality testing, if done with empathy, sensitivity and genuine curiosity, can be an enormously effective tool to achieve this end.