

IBA e-book

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

Selecting a Venue and Related Logistics – it's all about Risk

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My heart sinks a little as I step forward towards a familiar, very functional and supremely well organised mediation venue somewhere in Central London. As I sign in, I am greeted as an old friend: nothing is too much trouble for the facilities staff. However, once in the lift, I am already reminding myself to tell the parties that if they need a decent coffee they can find one just around the corner and if sandwiches are not their thing for lunch then there are a number of other choices for interesting and healthy food close by. Above all, I recall the location of the nearest green space with trees and seating and shade or shelter and remember to get everyone's mobile phone number so I can get them back into the room when they are needed. I have my attendance list to hand, prepared with spaces for the numbers.

In the run up to a mediation I encourage the lawyers to select a venue which has a number of features that I believe genuinely increase the *risk* of a successful outcome. It is a hard job. Everyone understands why the elements I propose are desirable and yet invariably the final decision is based on cost and convenience and it is one less risk in what is, after all, a risky business. They usually agree on the offices of one or other of the legal representatives. In practice this is not an ideal environment for getting parties to 'shift perspective'. Neither is it helpful when the host firm 'commandeers' the largest room with the most light and the best chairs!

I remember a time when venues had to be neutral and it was easier for the mediator to achieve their preferences without having to explain why. In the days when mediation was less understood, lawyers were more open to being guided by the mediator: we were the experts. More recently, lawyers

feel more confident in ‘controlling’ the mediation and even have their own trading system for gaining perceived advantages. ‘You can chose the venue, we choose the mediator’ may not be said out loud but I have often been told that this is an example of easy concessions designed to gain advantage for the tougher negotiation later on. The offices proposed may be well appointed but frequently they are not suited to mediation. Too many have acres of glass leading on to corridors to maximise precious light, light which will inevitably be excluded to maintain privacy, or they have no light at all. More significantly, they are a similar environment to what most of the participants are used to and therefore support unconscious repetition of the learned behaviours of corporate and business meetings. The environment hasn’t changed so why should they act differently?

The presence of certain environmental elements improve problem solving, energy management, decision making, risk taking and reaching agreement. Research on this is well hidden and spread across a diversity of specialist areas such as environmental psychology, architecture and design, mental health studies, gang culture, Alzheimer’s disease and more besides. This is not the familiar reading material of either mediators or lawyers.¹

I will share with you my personal check list and explain why these elements make a significant and positive difference to the whole experience of mediation for the parties, their representatives and the mediator and why they increase the risk of settlement.

Natural light

This is the one non-negotiable element for me. I cannot ask anyone to spend the whole day in a room with no natural light. Mediation is stressful enough without creating additional barriers to engagement and endurance. To create the feeling of being ‘entombed’ is neither logical nor helpful to the process. People want to get away and if you turn the [sun]light off, people go to sleep. The effect is exacerbated by the now common use of low energy, low wattage bulbs which are environmentally friendly but not ‘alert human’ friendly.

Access to natural surroundings

Outside space is especially helpful for those who feel strongly about being ‘hemmed in’. In practice the availability of natural surroundings makes a huge difference. I accept that it is a challenge especially in cities, but it is one worth the effort to overcome and they can be overcome with a bit of creative

¹ See: www.amandabucklow.co.uk; *Environment and Mediation - literary review.*

thinking. London, for example, is blessed with many parks, courtyards and squares. I have found that if I want to keep people engaged in the process and build stamina for the difficult parts then the best approach is to give them freedom to leave: literally. Offering opportunities for and encouraging people to walk, sit, think, eat and drink whenever they feel the need generally ensures that they are paying attention to ‘when’ they are needed, and when they are needed, they pay attention. The benefits of time spent in a garden or park are significant and many of my mediations have ‘turned’ during a walk and talk session. Walking side by side is less confrontational than face to face over a table; the mediator can broach sensitive issues more easily. That is a dynamic which is sometimes difficult to achieve with ease and grace in a private room.

Physical exercise is known to release endorphins which increase feelings of well being and that enhances decision making. Walking changes breathing patterns which rebalances the ‘coherence’² of the heart and keeps the pathways open to the neocortex which is where decision making takes place. Nature offers intrinsic interest and a sense of fascination which helps switch the brain into an enquiring or curious state and curiosity has a key role to play in successful mediation especially in reducing the risk of assumptions leading to bunkering.

Furthermore, studies show that there is a faster recovery from stress in response to nature related stimuli than to built settings.³ Comprehensive reviews have been carried out by Hartig, Mang and Evans, Kaplan and Kaplan which show that reducing stress is a major factor in creating the environment for people to change their minds, see the other person’s view and make better decisions.

Natural surroundings help people to develop what Kobasa and Maddi call ‘hardiness’⁴ sometimes referred to as resilience (sustained competence exhibited by individuals who experience challenging conditions). This is a useful strength both in parties and their advisers and identified as essential in effective mediators.⁵ Hardiness is a combination of an internal locus of control (confidence in controlling factors in one’s life through one’s own actions or externally through powerful or influential others), appreciation

2 McCraty R, Childre D, *The appreciative heart: The psychophysiology of positive emotions and optimal functioning*, Boulder Creek, CA: HeartMath Research Center, Institute of HeartMath, Publication No 02-026, 2002. See: www.heartmath.org.

3 For example, after 45 minutes of taxing mental work, a walk in a natural area led to better recovery than a walk in an urban area or reading magazines and listening to music (Hartig).

4 Salvatore Maddi, Suzanne Kobasa, *The Hardy Executive: Health under Stress*, 1984, Irwin Professional Publishing, ISBN 978-0870943812.

5 Bucklow A, *The Skills, Attributes, Strengths and Behaviours of Effective Mediators*, 2006.

of challenge as opportunity and a commitment to self all of which moderate the effects of stress. Deane Shapiro⁶ extends the concept and proposes that a healthy sense of external control, that one's decisions can have an effect, leads to trust and willingness. These are all desirable pre-conditions to finding an agreement.

Nourishment and nurturing

There are two other areas which I find are very beneficial. They are about food and hosting. The mediator is variously director, chair, observer, host and guardian and the care of the parties is an important part of rapport building. It is also a way of demonstrating even handedness and is useful if the mediator senses that there is some undercurrent of 'the others are getting too much of your time'. Conversations over food are an age old way of encouraging rapprochement. If I can, I will arrange the lunch to be in a communal area where people can select their own food. This reduces the risk of lunch arriving just in the middle of a crucial conversation and it gets them out of their private rooms. There is a risk they might have an accidental meeting which could start a useful shift. If there is any chance that this approach might restart communication then I actively create the opportunity. The gesture of offering a bowl or plate of food to another is symbolic and often good manners can overcome inhibitions or reluctance that have been a feature of the previous few hours. I think it is a question of modeling behaviours that are helpful and it is a question of judgment on the part of the mediator whether this will work. In all but the most vexed atmospheres, I find it does.

Choosing a venue which addresses physiological and psychological needs and encouraging people to look after themselves increases their sense of being appreciated. Providing them with the means to do so, including the time, is an important part of momentum. Momentum is not about just keeping going at a pace, momentum is a rhythm which includes slow time. If is difficult for parties to change their minds in front of you, it might be easier for them to say that they have been for a walk and they have been thinking... or that they have had a conversation with so-and-so and 'what about this as a way forward?'

6 Deane H Shapiro, Jr, 'A Control Based Approach to Psychotherapy, Health and Healing' in *Wiley Series on Personality Processes*, 1998, John Wiley & Sons, ISBN 978-0471552789.

Ideal facility	Alternative 1	Alternative 2
Natural light	None	None
Easy access to garden (ground floor) and preferably with water	Access to park. Green space, courtyard with fountain. The sound of water is a bonus.	Rooms with views. Windows that open. Plants/flowers in rooms. Paintings and photographs of nature and particularly mountains. If none of these are available take a couple of books with beautiful images about a subject which encourages curiosity and interest.
Easy access to outside without major security issues. This is important when the mediation extends past normal business hours and when the pressure is frequently at its highest.	General area/reception area which is private to the group but not the private room of any one party. Extra benefit if a communal drinks area is available to encourage 'accidental meetings'.	
Rooms bigger than needed to allow each person to have reasonable private space.	General area/reception area which is private to the group but not the private room of any one party. Extra benefit if a communal drinks area is available to encourage 'accidental meetings'.	
Provide lunch and decent snacks. Low carbohydrate. Protein and salad, fresh fruit. Central food area (to encourage accidental meetings). Large bowls rather than individual servings.	Offer alternatives in the location which include mainly salad/fresh food. Ask assistant to take orders and arrange.	Sandwiches as a last resort! Emergency chocolate supplies.
Jugs of water filled with sliced lemon, lime, orange and cucumber. An attractive alternative for people who usually drink coffee or soft drinks. Water hydrates the brain better and keeps people alert.	Bottles of mineral water with slices of lemon which can also be used for tea.	