

IBA e-book

# Mediation Techniques



the global voice of  
the legal profession™

Editor: Patricia Barclay

# Mediation Techniques

Editor: Patricia Barclay



the global voice of  
the legal profession®

Published by

International Bar Association  
10th Floor, 1 Stephen Street  
London, W1T 2AT  
United Kingdom

Tel +44 (0) 20 7691 6868

Fax +44 (0) 20 7691 6544

[publications@int-bar.org](mailto:publications@int-bar.org)

[www.ibanet.org](http://www.ibanet.org)

ISBN 978-0-948711-23-7

Copyright © International Bar Association 2010

This publication is protected by international copyright law. All rights reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior permission of the publisher.

Edited by  
Patricia Barclay

## Mediation Techniques

# Contents

<b>Introduction</b>	<b>1</b>
<i>Patricia Barclay</i>	
<b>Prior to Mediation</b>	
<b>Practical Considerations When Thinking About Mediation</b>	<b>5</b>
<i>Fernando Eduardo Serec</i>	
<b>Issues for Mediation Clauses</b>	<b>11</b>
<i>James A Graham</i>	
<b>Drafting International Mediation Clauses</b>	<b>15</b>
<i>Rahim Molloo and Justin Jacinto</i>	
<b>Difficulties (not only) in Germany of Proposing Mediation: How and when to bring up mediation if it is not a contractual obligation</b>	<b>23</b>
<i>Rouven F Bodenheimer</i>	
<b>Tips and Hints</b>	<b>29</b>
<b>Quick and 'Dirty' Alternatives to Mediation</b>	<b>31</b>
<i>Erik Schäfer</i>	
<b>What to Look for in a Mediator</b>	<b>37</b>
<i>Paul M Lurie</i>	
<b>Pros and Cons of Co-mediation</b>	<b>41</b>
<i>Renate Dendorfer</i>	
<b>Selecting a Venue and Related Logistics – it's all about Risk</b>	<b>43</b>
<i>Amanda Bucklow</i>	

<b>Tips and Hints</b>	<b>49</b>
<b>Exchange of Materials in Mediation</b> <i>Duncan Glaholt</i>	<b>53</b>
<b>Preparing to Act as Counsel at Mediation</b> <i>Rashda Rana</i>	<b>61</b>
<b>Preparing the Parties for Mediation</b> <i>Eunice O’Raw</i>	<b>65</b>
<b>BATNA and WATNA</b> <i>Arshad Ghaffar</i>	<b>71</b>
<b>Tips and Hints</b>	<b>75</b>
<b>The Mediation</b>	
<b>Mastering the Opening Address</b> <i>Siegfried Elsing and Danielle Mathiesen</i>	<b>79</b>
<b>Alternative Ways of Opening: Mediating Through Positive Emotions</b> <i>Thierry Garby</i>	<b>85</b>
<b>Opening Statements</b> <i>Joe Tirado and Amanda Greenwood</i>	<b>89</b>
<b>How to Use Experts in Mediation</b> <i>Edna Sussman</i>	<b>93</b>
<b>The Importance of the Interaction between the Mediator and the Parties’ Attorneys</b> <i>Robert S Peckar</i>	<b>97</b>
<b>Tips and Hints</b>	<b>103</b>
<b>Confidentiality in Mediation – the Common Law Tradition</b> <i>Jonathan Lux and Marie-Louise Orre</i>	<b>105</b>
<b>Confidentiality in Mediation – the Civil Law Tradition</b> <i>Peter Ruggle</i>	<b>111</b>
<b>The Use of Joint and Separate Meetings</b> <i>Claus Kaare Pedersen</i>	<b>119</b>
<b>Recognising the Interests of Constituents Who are not in the Room but May Be Relevant to the Outcome of a Mediation Process</b> <i>Inés Vargas Christlieb</i>	<b>125</b>
<b>Tips and Hints</b>	<b>129</b>
<b>Brainstorming to Generate Options</b> <i>Prathamesh Popat</i>	<b>131</b>

<b>Developing Options</b>	<b>135</b>
<i>Agada Elachi</i>	
<b>Using Business Tools in Mediation</b>	<b>139</b>
<i>Patricia Barclay</i>	
<b>Reality Testing</b>	<b>143</b>
<i>F Peter Phillips</i>	
<b>Pros and Cons of Making the First Offer</b>	<b>149</b>
<i>Jawad Sarwana</i>	
<b>Objective and Legitimate Offers and Counter Offers</b>	<b>153</b>
<i>Michael Hawkins</i>	
<b>Tips and Hints</b>	<b>157</b>
<b>The Mediator's Use of Law</b>	<b>159</b>
<i>Sriram Panchu</i>	
<b>Aggression in Mediation</b>	<b>163</b>
<i>Francis O Scarpulla</i>	
<b>Using Decision Tree Analysis to Break an Impasse in Mediation</b>	<b>167</b>
<i>George J Siedel</i>	
<b>MEDALO: A Recent Positive Experience in Switzerland Or Using Baseball Arbitration to Break a Mediation Impasse</b>	<b>173</b>
<i>Birgit Sambeth Glasner</i>	
<b>Acknowledgments and Apologies in Mediation – it's not always about the Money</b>	<b>177</b>
<i>Patrick C Campbell</i>	
<b>Tips and Hints</b>	<b>181</b>
<b>Post Mediation</b>	
<b>Closing the Mediation Where a Settlement Has Not Been Reached</b>	<b>185</b>
<i>Charles Middleton-Smith</i>	
<b>After Mediation</b>	<b>189</b>
<i>Peter Ruggle</i>	
<b>Enforcement</b>	<b>193</b>
<i>Mark C Hilgard and Jan Wendler</i>	
<b>Tips and Hints</b>	<b>199</b>

## **Special Situations**

<b>Mediation and Collaborative Law and Practice</b>	<b>203</b>
<i>Christophe Imhoos</i>	
<b>Aspects of Mediation within a Traditional Culture</b>	<b>209</b>
<i>Kenneth Counter</i>	
<b>Mediation and Cultural Differences</b>	<b>213</b>
<i>Nikolaus Pitkowitz</i>	
<b>The Insurer's Point of View</b>	<b>217</b>
<i>Russell McMenamain and Patrick Fennelly</i>	
<b>From Tension to Cooperation and Development: Negotiating and Mediating in Disputes over Natural Resources</b>	<b>223</b>
<i>Angéline Fournier</i>	
<b>Tax Mediation in the Netherlands</b>	<b>229</b>
<i>Jurgen Kuiper</i>	
<b>Mediation with a Government Party</b>	<b>235</b>
<i>Matt Liu and Edgar Chen</i>	
<b>Settlement of Family Disputes Through Mediation – Challenges</b>	<b>239</b>
<i>Prashant Popat</i>	
<b>Working with Parties with Disabilities</b>	<b>243</b>
<i>Leslie Alekel</i>	
<b>Mediating Multiparty Disputes</b>	<b>249</b>
<i>John Sturrock</i>	
<b>Mediation in Construction</b>	<b>255</b>
<i>Roberto Hernández-García</i>	
<b>Using Mediation Techniques to Support M&amp;A</b>	<b>261</b>
<i>Patricia Barclay</i>	
<b>Tips and Hints</b>	<b>265</b>

# 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](http://www.ibanet.org).

**Patricia Barclay**

*Co-Chair, IBA Mediation Techniques Subcommittee*

# Pros and Cons of Making the First Offer

Jawad Sarwana

*Karachi, Pakistan*

[info@abrahamslaw.net](mailto:info@abrahamslaw.net)

One of the most frequent questions people ask about negotiation tactics is ‘should you make the first offer or wait for the other party to put their offer on the table first?’

Conventional wisdom seems to suggest that it is better to wait for the opponent to make the first offer. The reason given for this is that at the start of negotiations discussions are often vague and an opening offer provides the opponent with valuable information too early in the negotiation process. The first offer gives the opponent an indication of where the lower end of the zone of potential agreement (‘zopa’) lies and clues about acceptable agreements. This may allow the opponent to work further downwards of the zopa to the detriment of the giver of the information. Moreover it is also possible that in response to the first offer the other side may offer misleading information in an attempt to get a bargaining advantage. It is therefore wiser to wait for the other side to speak first than make the mistake of a first offer.

Most academicians, researchers and scholars have now come to disagree with this conventional wisdom. They contend that research and statistical studies have established that the party who opens first gets a huge advantage during bargaining particularly when the party making the first offer comes well-versed and prepared to the negotiating table. In such a situation the first party making the opening offer is more likely to succeed in fulfilling its hopes and desires than the other who chose to delay making its offer and decided to suppress its emotions. The reason for this is two-fold: (i) the power of anchoring; and (ii) relationship enhancement.

Anchoring is the principle that the first time a number is thrown out during negotiation, the discussion will naturally revolve around that numerical

value and all other financial possibilities will arise out of and/or in relation to the number. The numerical value attached to the offer tends to have a 'magnetic effect' as it pulls judgments of the parties throughout the rest of the negotiation to the first number; hence the numbers are known as 'anchors'. Research into the effect of anchoring strongly suggests that a party's response to an offer is highly influenced by any number that enters the negotiation process and the first number introduced in the process enjoys a powerful negotiation advantage.

Professor Adam D Galinsky, from the Kellogg Graduate School of Management, contends that anchors affect the judgment of even those who think they are immune to such influence. He basis this on research into the phenomenon of anchoring conducted by Greg Northcraft and Margaret Neale which involved price lists for properties provided by real estate agents; and on similar research by Thomas Mussweiler of the Institute of Psychology at the University of Wurzburg involving the value of used cars quoted by car mechanics in Germany. The reason that anchors affect peoples' judgments is that during negotiations, each point under discussion has both positive and negative qualities, ie, qualities that suggest a higher price and qualities that suggest a lower price. High anchors selectively direct attention towards an item's positive features whereas low anchors direct attention to its negative features. Hence in the above-mentioned studies, a high list price directed real estate agents' attention to the house's positive attributes (such as spacious rooms or a new roof) while pushing negative attributes (such as a small yard or an old furnace) to the back recesses of their minds. Similarly, a low anchor led car mechanics to focus on a car's worn belts and ailing clutch plates rather than its low mileage and pristine interior. Professor Galinsky argues that more aggressive and extreme first offers lead to a better outcome for the person who made the offer as the numbers are anchored nearer to the seller's number with the zopa. However, if the first offer is too aggressive and falls completely outside the opponents zopa, the same may be perceived as an insult and scare and/or annoy the other side and perhaps even cause the other side to shut down negotiations and walk away.

Another advantage of making the first offer is gaining a relationship advantage. Research and studies have found that the first offer correlates to the party's confidence and sense of control at the negotiation table and enhances its relationship status. A numerical value as a first offer which is supported by a considered rationale justifying the offer as reasonable also enhances the stature of the party making the first offer. Once the first offer has been made, the party framing the justification and rationale for such offer is in a position to set a positive tone for discussion. Making the offer first also gives a positive impression to the other side that the party making

the offer is interested in continuing its relationship beyond the current dispute/differences with the other side. On the other hand, the opponent receiving the first offer, particularly if the numerical value is at the lower end of its zopa, is forced to counter the offer with criticism and explain why the offer made is either wrong or unreasonable. Thus the opponents' frame of reference to object to the first offer is likely to be defensive and clothed in negative language during the course of negotiation.

Yet another advantage of making the first offer relates to the satisfaction with the outcome of the negotiation. According to research one of the best predictors of a successful negotiation is the number and size of concessions exchanged between the parties. Making a first offer, particularly if it is an aggressive and high offer, enables the maker to grant concessions and allow the opponent the opportunity to extract a perceived 'better deal'. An opponent who is satisfied that he has reached a duly bargained outcome will be more likely to respect the terms of the agreement leading up to a mutually beneficial outcome for both parties.

Of course, there is no hard and fast rule in negotiation. There can be situations in which it would not be advantageous to make a first offer. For instance, when there is inadequate information regarding the other party or it is apparent that the other side is better informed about the issues being negotiated and possesses superior market and industry information. It would be unwise to make the first offer in such cases as it would be difficult to explain the basis for the numerical value. Another instance, according to Professor Margaret Neale of Stanford Graduate School of Business, when it makes sense to wait for the other side to make an offer, is 'when you honestly believe that the other side dramatically values the object of the exchange at a much higher rate than you do'.

This does not mean that the party not making the first offer will always end up on the losing side. After all the opportunity to make an offer first is not available all the time. In such an event, a counter-offer should be based on the same information as one used to construct a first offer. Suffice to say, counter-offers should also be framed to explore the other side's BATNA as well as gather more information about the issue and the market/industry. A positive attitude will always help make a more confident, effective and respected negotiation regardless of who makes the first offer.