

IBA e-book

# Mediation Techniques



the global voice of  
the legal profession™

Editor: Patricia Barclay

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Edited by  
Patricia Barclay

## Mediation Techniques

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

**Patricia Barclay**

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# The Use of Joint and Separate Meetings

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## Introduction

Experienced mediators differ in their attitudes towards the use of joint or separate meetings. Some mediators believe that the joint meeting forms the basis of mediation and that separate meetings ('caucuses') should be held only if there is a particular and exceptional reason to do so, whilst other mediators prefer an extensive use of separate meetings especially in the exploration stage and during negotiations. Sometimes mediations are carried out in joint meetings without any separate meeting whereas the converse is rarely the case. However, in some mediations it may be appropriate and relevant to conduct the entire process in separate meetings only, for instance where the parties (or one of them) are too fraught to be in the same room or to hear the other side argue their contentions, or where severe time constraints demand immediate separate discussions.

In some situations separate meetings are considered as an occasional technique to promote productive negotiations<sup>1</sup> whilst in others they are regarded as a regular part of the mediation process.<sup>2</sup>

## Advantages and disadvantages of separate meetings

The debate concerning separate meetings is influenced by different attitudes as to the extent to which the mediation process ought to be a pure facilitative

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1 See Christopher W Moore, *The Mediation Process*, 3rd Edition, 2003, p 371.

2 See David Richbell, *Mediation of Construction Disputes*, 2008, p 73.

process, or whether there is room for the mediator to influence not only the management of the process but also the direction and the content of the negotiations.<sup>3</sup>

In separate meetings the mediator receives information from both parties, sometimes on a confidential basis, so that the mediator may be the only person in the process who knows the whole story from both parties. This places the mediator in a unique position whereby the mediator is able to assist the parties not only in creating a solution that meets their needs but also in ensuring that no possibility of resolution is left unexplored. On the other hand it must be acknowledged that this also opens up the possibility of misuse by the mediator in the form of manipulation of the information gathered.

The parties are rarely completely open-minded towards each other and it is much easier to get the parties to talk frankly about their real interest and needs in separate meetings. In joint meetings the parties will frequently withhold information for tactical or other reasons. Separate meetings also allow the parties to provide confidential information that they would never disclose to the other party.

Separate meetings may also be used to break an impasse, which is a well-known phenomenon in mediation, or to maintain momentum if the discussions in the joint meeting are unproductive.

Other advantages are the opportunity for the mediator to make a reality test of either or both parties' claims, or to clarify misunderstandings and wrong interpretations. If the discussions in the joint meeting are overheated a separate meeting would also allow the mediator to assist the parties to keep focus and get back on track. The separate meetings could also allow the parties to reconsider their strategies if they have doubts as to whether the negotiations are moving in the right direction.

Despite the numerous advantages of separate meetings there are also some disadvantages.

Joint meetings provide the parties with the same experience even though that they may have different interpretations. In separate meetings the parties will each have different experiences, which may lead to misunderstandings and thereby disturb the process towards a solution.

Furthermore, separate meetings do not allow the parties to have the spontaneous and direct impression of the other party's words, actions and reactions (for example to proposals), or their point of views. Rather, they depend on the mediator's report on them.

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3 By this is not meant evaluative mediation where the mediator evaluates the claims and the objections of the parties. This author considers such procedure as merely adjudication or evaluation.

Confidential information received in a separate meeting could in some cases put the mediator in an ethical dilemma, for instance if one of the parties discloses confidential information about some facts which are obviously of importance for the other party. There is no easy answer as to how to resolve such dilemmas. One solution could be for the mediator to terminate the mediation despite any objection from either or both of the parties. The mediator might consider breaching confidentiality, but this could well have serious adverse consequences for the mediator and the process and would only be an option in exceptional circumstances (and this whole issue of confidentiality and its exceptions ought in any event to be covered by the terms of the agreement to mediate). Some mediators avoid this issue by refusing to receive confidential information, but this precludes their receiving information that possibly could contribute to a constructive process and maybe even to a solution.

For most mediators – at least in the commercial field<sup>4</sup> – separate meetings are an important part of the strategy in mediation.<sup>5</sup> However it must be realised that both joint meetings and separate meetings imply challenges for the mediator.<sup>6</sup>

Maybe it would be appropriate to look at separate meetings not as a tool for the mediator (amongst other tools) but rather as an integrated part of the mediation process. The fact is that all elements in the mediation process have the capacity to be either positive and constructive or negative and destructive, depending on the specific mediation, the parties and all other circumstances. In the process the mediator takes a number of decisions which can lead in either direction. It depends on the situation. Similarly there is no easy answer to the question when to have separate meetings. Like all other initiatives, this depends on the individual circumstances and the mediator's judgment. Nevertheless, there are some guidelines, eg, when the parties can no longer work constructively together; when there are underlying issues that need probing but which cannot be achieved in joint sessions; or when parties would benefit from being able to explore options and possibilities privately.

This leads to another point: what is considered to be a separate meeting? Maybe a broader perspective could be useful.

Many mediators hold that the mediation must start with a joint session. However, the start of the joint meeting is not necessarily the first contact with the parties or their advisers. Before this, there will usually have been some telephone conversations or correspondence regarding the agreement to

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4 Some family mediators never use separate meetings.

5 Cf, Christopher W Moore, *The Mediation Process*, 3rd Edition, 2003, p 377, who states that in many disputes it would be impossible to reach a solution without separate meetings.

6 Cf, Henry Brown and Arthur Marriott, *ADR Principles and Practice*, 2nd Edition, 1999, p 174.

mediate and practical matters. Such contact is also part of the process, and of building a relationship between the mediator and the parties. Furthermore, it is rare for the parties to arrive at the mediation venue exactly at the same time. It is normally not considered to be a good idea to install the first arriving party in the joint meeting room, because it could give the other party the feeling that the meeting room has in a way been 'colonised' by the other party and that they are dominating the room. In commercial mediation many mediators choose to install each of the parties in their respective separate rooms on arrival. This further allows the mediator to have an informal pre-meeting with each of the parties, which is also part of the entire process.

Pre-meetings are usually used to talk about practical matters, the forthcoming process and sometimes to get the mediation agreement signed, but it also gives the mediator the opportunity to start to build confidence ('rapport') with the parties, which is crucial in all mediation. All experienced mediators know that the key to success often lies in the beginning of the process and the pre-meeting is an excellent place to start.

Where a number of people attend on behalf of a party, meetings with that party are usually held with all members of the group; but there are times when it could be more beneficial to split the group and meet with only some of them.

### **Information on separate meetings**

The mediator ought to inform the parties about the possibility of having separate meetings as early as possible, ie, when setting up the mediation and discussing the process but at latest in the pre-meeting or at the beginning of the joint session. Otherwise there is a risk that the parties may gain the impression that something has gone wrong, which may lead to unnecessary mistrust or set the mediation off course. The mediator should also invite the parties to request a separate meeting if they feel a need for one.

When the mediator decides to call a separate meeting it is important that the transition is as natural and relaxed as possible.

### **Who to start with?**

The mediator must decide which party he wants to see first. A number of criteria need to be considered and balanced. If the mediator feels that some kind of imbalance between the parties exists, it could be a good idea to start with the party perceived as being weaker. If the mediator has the impression that one of the parties holds a key to resolution or is withholding relevant

information, the mediator could start with that party. If one of the parties has requested the separate meeting the mediator might choose to start with that party. Sometimes the mediator may simply start with the claimant first. However, there is no general rule on who to start with. The mediator must consider what is likely to be the best for the process.

### **The meeting rooms**

The parties must be completely separated. The best arrangement is to reserve a specific room for each of the parties, other than the joint meeting room.

### **The length of separate meetings**

Ordinarily, separate meetings ought to be short, ideally ten to 15 minutes as a maximum. However, there may well be a need for longer, and sometimes very long, meetings in which even the mediator needs to keep the absent party engaged in the process and if necessary periodically informed of the likely time frame.

There is a view that separate meetings with each of the parties should be of the same length. However, this is likely to be impracticable and is only true to the extent that the mediator must be sensitive to the need to avoid any imbalance between the parties, or mistrust of the mediator.

### **Waiting time**

The mediator cannot be at two places at the same time.<sup>7</sup> The mediator must consider how the waiting party could use the time in a constructive way. This may be done by giving the waiting party tasks to do while waiting, for instance making calculations of consequences, considering different issues or obtaining missing information. If the waiting party is left unoccupied for too long, there is a risk that frustration and negativity may set in.

### **Confidentiality**

Most mediators agree that there needs to be scope for the parties to give the mediator confidential information that cannot be released to the other party.

Some mediators achieve this by agreeing with the parties that all information given in a separate meeting is confidential unless otherwise

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<sup>7</sup> In co-mediation the mediators can of course be in more rooms at the same time. The challenges of co-mediation are outside the scope of this article.

agreed. This can be appealing to the parties because it gives them security and control. However, it also narrows the mediators latitude later on in the process. It is rarely possible to know in advance which information may be useful to release and when to do it. If at some point the mediator considers it useful to release some confidential information but has to get consent before doing it, the opportunity to do so could be lost. The mediator is in the unique position of having heard the full story from both parties, so in some mediations it may be in the interests of the parties to leave it to the mediator to decide if and when information gathered from one party should be released to the other. However, generally it is safer to have a rule that nothing is disclosed without specific authority.

If it is agreed with the parties in advance that information given in a separate meeting may be released to the other party unless the party has stated that any specific information must be kept as confidential, it would be a good idea at the end of each separate meeting to specify what information must be considered confidential.

If some of the information is covered by confidentiality and other information is not, the mediator must make and keep an accurate record of that. There are many different methods of doing this. The important thing is to ensure that the mediator does not mistakenly leak any confidential information, since this could damage the party's faith and undermine the whole process.

### **Concluding remarks**

Separate meetings are a very important part of most mediations in commercial disputes. However, there is not any clear answer to the question when to go in caucus. It depends on the specific circumstances in each mediation. In the presentation above is indicated when separate meetings could be useful.