The Mediator's Log

A Mediation Story

An interactive companion to equip mediators and advisers, in training and practice

By John Sturrock QC

What happens when you are the mediator and you start another mediation day?

better conversations
better outcomes

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Part 1: The Day Commences

Engaging the Participants

08.45: The mediator arrives at the venue, the office of one of the solicitors. These days, few parties seem to mind where the mediation is held, even if the location is that of the other side's lawyer. More important is that the environment is comfortable and that the catering is good.

Resource: How to set up a venue for mediation

Question: What factors need to be taken into account when deciding on and preparing the venue?

08.46: The mediator's assistant is already here. She is able to brief the mediator on the room allocations and inform him that one of the parties has arrived. More importantly, they reflect on the late arrival of an expert report from one party the night before, wondering how that will affect attitudes in the other room. They speculate a little on how long the mediation may take but quickly remind themselves that mediation is like the proverbial piece of string…. and that it is impossible to predict the outcome or the timescale. The mediator reminds his assistant that the more they focus on the process and the less they worry about the outcome, the more likely it is that a satisfactory resolution will ensue. Easy said…..

Question: How does a mediator prepare? How does he/she avoid pre-judging?

09.01: In the corridor en route to the first private meeting with the claiming party, the mediator pauses and glances at the agreement to mediate to remind himself of the names of those attending. Remembering names is crucial and he often draws a mind-map of the players as an aid. But, occasionally, even that fails and he mixes up the names just at the wrong moment. An occupational hazard in a fast-moving day, where little things can make a big difference….

Resource: A Draft Agreement to Mediate

Question: When you think about the margins, what are the little things that make a difference to any negotiation?

09.02: Knocks on the door and enters. The atmosphere is slightly tense. That late report has had an impact on the lawyers in particular. The mediator looks around the room, finds the client and extends a hand. She is anxious and the mediator knows that his first task is to reassure. Building what the experts call "rapport" is the foundation for any mediator. If the client trusts the mediator and his or her ability to handle the day's discussions effectively, the whole process has a greater prospect of a successful outcome. The mediator introduces himself and his assistant to others in the room. He discusses briefly the late arrival of the report with the solicitor in charge of the case, a fairly senior litigation partner. His objective is both to recognise the inconvenience caused and to encourage a positive view of the fact that the position is now clearer. But there is no doubt that, as the latest in what is perceived as a series of impediments, this has not helped. The lawyer is concerned about whether he can properly advise his client. The mediator suggests an early meeting with the solicitor for the other party.

Question: What builds a good working relationship or rapport? What does an adviser need to do to prepare effectively for mediation?

09.09: The main conversation in this initial meeting is with the client. She is keen to explain her circumstances and the impact on her life, job and future of the events on the day in question. The mediator listens intently. He says little at this stage and uses the conversation to reaffirm the confidentiality of any discussions in that room, knowing that this will have been covered already by the solicitor who has considerable experience in mediation. When pressed for a comment on the behaviour of the other party's chief executive, the mediator reminds the group that his role is not to judge, pass judgment or offer a view. The client is clearly upset, not just by the events of the past but by the uncertainties of the day and the strangeness of the situation. The mediator explains how the day may unfold and makes clear that the client does not need to do or agree to anything with which she is not happy.

Question: What are the points which need to be covered at the outset about the mediator's role and the process? What can an adviser say to a client in advance to prepare him or her?

09.24: There are some formalities to cover. This includes the question of decision-making when it comes to the crunch later in the day, as almost inevitably it will. Is there anyone else with whom the client needs to speak? If so, who and how will they be contacted? They discuss timing and whether anyone has any time pressure later in the day. The financial expert has a flight to catch at 6.30. Hopefully, his presence will not be required by then anyway though, as they have often invested a lot of time in the client's case, many experts like to be there until the end. That is not always a good thing if their influence is disproportionate…. Everyone else is able to stay for as long as it takes. The mediator encourages the lawyers in the room to begin thinking about what might be included in any resolution agreement. He reminds them that there is nothing worse than starting drafting from scratch after agreement is reached.

Resource: Draft Outline Resolution Agreement

Question: What other points about the process need to be covered at the outset? How important is it to have the decision-makers personally present? What is the benefit of mentioning the resolution agreement at this stage? What are the disadvantages?

09.27: That other document, the agreement to mediate, needs to be signed. It has been circulated, revised and checked in advance by all concerned and the senior solicitor confirms that all those in the room can sign. The mediator thanks everyone, checks whether the client has any other questions and leaves, heading for the next room……..

Resource:

Question: How does the mediator pace him/herself?

10.03: Time for the gathering of all participants. The mediator's practice is to bring everyone together in one room for an informal meeting, some food, mingling and scene-setting. The mediator chats to his assistant and reflects on the purpose: humanising the process is important for people who may not have met before, or who may have formed views about their counterparts on "the other side". For clients, it can be a difficult moment (and can never be forced) which can lead to a sense of relief, acknowledgement or at least recognition. The last time the clients met before today's mediation was highly stressful for both.

Question: How can clients be prepared for these moments?

“I wish we had this conversation a year ago….”

10.11: The mediator taps a glass and begins what he customarily describes as his “carefully prepared, spontaneous, improvised comments”. “Firstly, thank you all for coming …. This is not an easy matter….if it was, we wouldn’t be here……the important thing today is that, for this to work, you need to help each other….the paradox is that it only works for you if it also works for you” he directs his remarks to the clients particularly. “This is a great opportunity…. Later in the day, you will have choices to make, ultimately, it will be entirely up to you … I encourage you to make only one assumption today: that everyone is trying their best.” He knows that this is a bit of a set-piece. He also knows that it is a useful way to mark the transition from the opening stage to the next series of more in-depth meetings.

Question: What are the ideas that a mediator can helpfully include at this stage?

10.17: Time for a break: first though, the mediator has asked the clients to stay behind and meet privately with him. This is one of those occasions when the lawyers are content for this to happen, judging that the clients can handle this without support. The clients sit, rather awkwardly at first, side by side. The mediator gestures with a hand and the “defender” client begins…..”I am glad we are here. I really want this to get sorted today. This should never have happened. I wish we had this conversation a year ago….. but, when you did that to us……” The atmosphere changes…..

Question: What factors would an adviser have in mind in discussing such a meeting with a client? How should the mediator handle the meeting?

Part Two

Exploring what it's about

10.18: …In that moment, the mediator has to decide whether to intervene or not. On such judgments could the success of the day depend. He has already undertaken not to allow the short meeting of clients to become tetchy, assuming that his presence would provide a check on any tendency to reopen old wounds. He chooses to remain silent, watching intently as the claimant reacts. "It wasn't my issue…if your team hadn't botched the job initially….." A pause: "Look, let's not get into that now. That's not why we are meeting here." "OK, you're right ….. As I say, I want to get this sorted." "So do I, we need to move on." The mediator breathes an internal sigh of relief. The clients have corrected themselves, at least for the moment. It is far better this way. The whole point of the mediation process, after all, is to enable the clients to take responsibility wherever they can. This is not always easy, as some clients like to have their lawyers lead and do not wish to be exposed. Some lawyers are protective of their clients. There's always a balance to be struck.

Question: When should a mediator intervene? What are the factors to consider?

10.22: The mediator senses that the purpose of the short meeting has been achieved: a re-engagement of the two key players and, apparently, a common understanding of the primary purpose of the day. Sometimes, such a meeting can go on for a considerable period. On this occasion, it seems better to take stock now. He summarises the position: "It's not unusual for this sort of thing to happen. It is unsatisfactory for you both but I see this frequently. The key now is to explore the options for a resolution. Your lawyers are here to help and you have expert advice too. For the first part of the day, we'll have each team set out how it sees things and what needs to happen. We've agreed that the claimant's team should go first and then the others can take a break and consider what has been said before setting out their picture. I'll come and see each of you in your rooms first, in about five minutes."

Question: What has the mediator said which may be premature? Why?

10.25: After a quick comfort break, the mediator returns to the main room to chat to his assistant. "What do you think?" he asks. "That was interesting," she replies. "I think there's quite a bit under the surface that might spring up again." The mediator agrees. He knows how volatile the situation might still be if the clients think that the other is not really making an effort or is seeking an advantage. This is where the expertise and common sense of the lawyers is really important. Lawyers face a number of choices: one is whether to be wise counsel to the client, acting as a modifying force if the client gets upset or angry, or to back up the client forcefully and reinforce any feelings of hostility. The mediator remembers a speech a few years back by Sir David Edward, then judge in the European Court of Justice, when he observed that the biggest risk to lawyers is over-identification with the client. "We'll go and have a quick chat in each room", he suggests……..

Resource:

Question: How do advisers cope with the balance to be struck between advising and protecting the client and client autonomy and choice? And between associating with the client's position and keeping some detachment? What are the influences that can affect them?

10.45: The morning is moving on. It has been agreed that, at 10.55am, everyone will gather in the main room for the claimant's team to make a presentation. The room is laid out as a board-room with one long table and chairs on either side. "Hopeless", murmurs the mediator. He and his assistant set about unhinging the tables and moving them into a rather ramshackle triangle. A bit of adjusting and re-allocation of chairs and the job is done. They discuss who will sit where. The physical dynamics of what is known in the business as a "joint meeting" are important. The plan is to enable the claimant's team to sit in such a way that they can easily address the other team, without doing so directly across the table in a confrontational manner. Parties often poke fun at the mediator for this furniture rearranging but usually come quickly to appreciate the benefit which a more open arrangement brings.

Question: What might be the best environment for such a meeting? What factors should the mediator have in mind? What are the various possibilities for layouts for meetings in mediation?

11.01: "Let's get started." All the participants are now in place. The mediator turns to the solicitor for the claimant. "Peter, you are choreographing this I think. Do you wish to start? Just a quick word to the others. I'd ask you to listen to what is being said. Listen for something new. Don't just think about rebutting. You'll get your opportunity in a while and this is an opportunity to understand where Peter and his client are coming from today." The mediator has already talked privately to the defending team about the importance of appearing to be interested, making eye contact and acknowledging the presence of everyone in the other team. The benefit of the short private meeting of the clients is now clear: the awkwardness between them is at least reduced and it is easier for them to focus on what is being said.

Question: At this key moment, if you are the "listening" side, what specifically should you be doing? If you are presenting, what do you need to take into account?

What does the mediator need to do to ensure that this stage is really useful?

11.05: The solicitor commences. His first point is about the late report. The mediator immediately realises that he has forgotten to convene the meeting of the two solicitors which he had proposed in that first meeting nearly two hours ago. There is a bit of friction which might have been avoided had he brought them together privately. The mediator is annoyed with himself but the moment has passed and, fortunately, the defending solicitor acknowledges the inconvenience and explains that his expert had been away on holiday until three days ago.

Question: How does the mediator keep on top of everything? What if he/she forget to do something important?

11.08: It has been agreed that the claimant will speak. She begins and it is clear that she is struggling with having to recall the events of several months ago. As her voice falters, there is a different kind of tension in the room…..

Question: As an adviser, how do you prepare your client for this moment?

Part Three

Exploration Continues: Getting to the heart

11.09: "This has ruined my career and family. I had a solid professional role and a really good future. I have had to put everything on hold. I have been demeaned and humiliated. The cost to me is .....huge. I did everything I could. The Department wanted a fall guy and they chose me. I had warned about the time pressure. But no-one would listen. I stood up and was side-lined as a result. I went out on a limb and got the contract signed. You can't run a business like this." The mediator wonders if all the careful planning so far was about to go out of the window. And yet, this was exactly what she felt. Mediation is not about pushing under the carpet what needs to be said. Indeed, mediation is often represented as like having your day in court, except in a way which would be unlikely to happen in a court under the conventional conditions for taking evidence from witnesses.

There was more scope here to say – and hear –what needed to be said - and heard. What this situation really tested was the skill of the lawyers in managing the expectations of clients and the mediator's careful steering beforehand. The defending party had been advised to expect this from the claimant. Their reaction was crucial however.....

Question: How might a mediator prepare a party and the lawyers to manage this meeting? What about the lawyers' role?

11.21: The claimant's solicitor had finished delivering a measured and yet direct analysis of his client's entitlement and the dangers to the defending team of not reaching agreement today. His experience in advocacy had come through, but not in an adversarial way. This was not advocacy of the sort seen in a court-room or tribunal. He had carried out his preparation meticulously, assessing the strengths and weaknesses on each side. He had not sought to hide the risks to his client. Indeed he had played up the risks to all concerned. By doing so, he turned what might be thought to be his client's vulnerability into a positive. Be in no doubt, he had said, that the consequence of not resolving this will be bad for all concerned.

Question: What are the key skills for the "advocate' in this setting? What preparation does an adviser need to undertake? What points should an adviser cover at this stage? What approaches will tend to work? What might create difficulties? How can the mediator help?

11.22: In the earlier days of mediation, convention had led to both parties making a "position statement" in the opening "joint meeting". Often, this just involved a forceful repetition of what was recorded in writing already. This mediator, in common with many others, reckoned that this tended simply to reinforce the antagonism and polarisation which had brought parties to this point in the first place. So, on this occasion, he had already flagged up that a break would occur when the claimant's team had set out their stall. "Ok, thanks for the courteous way in which you have listened" he looks at the defending team. "And, Mrs A, thank you for the way in which you spoke, along with your lawyer. As I mentioned before, we are going to take a break now. We'll return to this room to hear what Mr B and his advisers have to say, not as a rebuttal but to build on what has been said already. Any concerns at this stage? Ok, please go back to your rooms. I'll check with both rooms shortly. "

Question: What are the benefits of this approach rather than having formal presentations at the outset of the day?

Specifically, what should be the benefits of having a break? What other considerations might the mediator take into account?

11.25: The mediator asks his assistant for an assessment. “That was just like the role plays in the training course,” she says. “Everyone says that”, comes the reply. “In reality, I guess there are only a limited number of ways in which humans react to each other in conflict – all that changes are the facts and context.” He had heard somewhere that there are four or five major themes in all literature, the human condition being universal. “We’d better go and see how the defending folk are getting on”.

Question: What might these themes be? How can understanding them help us to prepare for our roles?

11.28: The atmosphere in the room is more relaxed than the mediator might have expected. The participants have a general reflection on what has happened and then move to how the response would be handled. The mediator knows that it would be very easy for this room simply to try and refute the allegations made. Even done courteously, that might not work. Time for AA, RR, EE. This was one of his most used coaching tips, simple yet effective to engage people who genuinely needed to be valued and have their concerns acknowledged. Time for the flip chart....

Resource:

Question: How might this tool be used in different situations? Why would this approach tend to work? In what ways can a mediator act as coach? How should a flip chart be used? What about other visual aids?

11.48: Later than anticipated, but necessarily so as the next meeting was an important part of the first stage of mediation – and its conclusion - the parties reconvene in the plenary room. But there is one key person missing...

"Our client has decided that she does not want to be in this session". The claimant's solicitor is slightly sheepish as there had been no hint of this ten minutes ago when the mediator checked with her room. "She feels that it will be too much". The mediator knows that challenging this in front of the whole room would be insensitive. In any event, he always said to those concerned that they did not have to do or say anything that they did not wish to. It was the claimant's prerogative not to take part. And, yet, everything had been planned so that she could hear what the other party had to say - and to help everyone, including the claimant, to move forward. That was the point of AA, RR, EE.

Question: How can a mediator prepare for unexpected events which do happen in spite of careful planning? What about the adviser's role at times like these?

11.54: The mediator knocks on the door and moves to the seat nearest to the claimant. "How are you doing?" he asks.

Resource:

Part Four

Moving on and summarising

12.42: ….The last 45 minutes has been tough. The claimant had decided to listen to what the defending party had to say. Their lawyer had been careful not to inflame matters and had offered an expression of genuine regret to the claimant; not an apology as such, which was not appropriate, but a recognition that things had not worked out as anyone would have wished. While such an acknowledgement would often come from the client, on this occasion it was easier and better for it to be offered by someone who could be more dispassionate. The lawyer has also explained why his advice to his client was that a court would not find in the claimant's favour. While mediation is not simply about assertion of legal rights, it provides an opportunity to address the other client in a way which may be unique. For that client to hear, directly and in private, what her opposite number is being told by their lawyer gives a different perspective and often provides a better understanding of risk. It reinforces the reality that, in litigation, respectable and well-regarded lawyers are offering different advice to their clients. At times like this, the mediator was often prompted to mention recent research which reveals that lawyers, like the rest of the population, tend to be over-optimistic about risk and the prospects of success.

Resource:

Question: What are the implications of this for lawyers in practice? How best can a mediator work with this sort of material? In what other ways might perceived risks be conveyed to the other party?

How much do we know and really understand about the concept of risk?

12.45: It is now time to move on. The parties have lunch in their rooms. The mediator pauses to take a couple of sandwiches but prefers to keep moving. He is well aware that there is a lot of ground to cover before the day is over. Momentum is critical – neither too slow nor too fast. Often parties and advisers can be frustrated by apparent lack of pace – or too much haste. If anything, however, the pace needs to pick up as the day progresses.

Question: What can be done to manage expectations? What tensions are there around momentum, pace and taking time?

12.50: The mediator enters the defending party's room. There is a sense of relief that the most difficult part of the day, in personal terms, may have passed. The mediator jokes about the excessive supply of sandwiches that they seem to have been provided with. Lightness of touch is essential to maintain working relationships and to give some relief from the intensity of the day. It is often forgotten that people are condensing into one day that which may have taken months or years to build up and may take a similar time to resolve if these negotiations are not productive. "What do you think still needs to be said before we can move on to the next stage?" he asks.

Resource:

Question: How familiar can a mediator be with the parties? How can you make good use of the double-edged sword of humour? And when might it go wrong?

What are the key questions which a mediator can ask to ensure progress during the day?

13.10: It is time to summarise the discussions. “You are concerned that the claimant and her team are still unrealistic about what a court might do? And that you may need to run over the legal risks again….. Apart from that, the key now is to make progress on how to sort this out. Apart from the money side, what else is there to deal with? You have mentioned consultancy work and another project in the wings. How realistic is that? What about the reputational aspects? This was featured in the financial press some time ago, you said. How important is that? Can I suggest that you start to think in detail about these aspects and what you might say to the claimant? On the legal analysis, my sense is that you won’t need to rub this in. As a colleague of mine often says, you don’t need to hear the penny drop. I think you should assume that they have heard you and got the message. You can’t expect them to agree with you …and remember their lawyer was fairly clear that they accepted they had risk…I would focus now on what you can do to help her to move on. Think about it in her shoes. Assume she has family members back home. If she accepts a deal today, what does she need to be able to say to them to explain what has happened? One of my mentors, William Ury, calls it the “victory speech”…you have to help her work out what she will say to her outside constituency… that may be as important as persuading her, especially if they have all invested a lot in this. OK, I’ll leave you with that to work on….”.

Resource:

Question: What tools does a mediator have in his/her kit to help parties to move on and avoid being stuck?

What tasks can the mediator set for parties and advisers? What is their purpose?

13.20: Back in the mediator's room, the mediator picks up a piece of fruit. His assistant asks about financial claims. "These are often a substitute, at least in part, for other things", the mediator responds. "Money seems to be the only way to address the wrongs but, if you leave money until later, you can often find other things of real value to add to the range of solutions. You need to find out what the parties really need, not what they say they want, or what the court pleadings say. Often, they don't know themselves until you ask them although good lawyers will often have worked with them to explore their real interests in advance. What do you think the claimant really needs?" "A way to start back in business with a good project" comes the reply. "She said that at one point early on in the second meeting." "Well spotted," confirms the mediator. "And, if so, we need to explore that soon…… Let's go and see how she is."

Question: How does a mediator spot the important points? How does he/she structure negotiations to be most effective?

How can mediators and advisers help clients to move from wants to needs in a way that identifies what really matters to them, identifying interests and separating these from positions they may take?

13.25: There is laughter in the claimant's room. "What's going on here?" asks the mediator. "I see you've not left any of the profiteroles. How was your lunch?" It is clear that the careful handling by the defending lawyer has helped to reduce the tension and remove the fear that the claimant had that she would be the subject of some sort of personal attack. "What more do you think you need to say, or that they don't understand, before we can move on to trying to resolve this?"

Resource:

13.40: "In summary, then, while you are still not exactly happy with what was said, you accept their recognition of what you have been through? Let's close that chapter for now and look at what you really need out of this so that you can wake up tomorrow with this behind you and a new chapter to open. How would that feel?"

Question: What other particular ideas are likely to help someone to look forward rather than back?

Part Five
The Experts Appear

14.00: It is time for a meeting of the legal advisers. The mediator favoured working with the lawyers as much as possible. Just as bringing the clients together to talk could help to build bridges, encouraging collaboration by the lawyers was usually constructive. It gave them the opportunity to talk openly about the situation as they saw it, reminding their opposite numbers of the legal aspects but also focusing realistically on what could and could not be achieved. Without breaching client confidentiality, they could often suggest courses of action or agree what might be said to clients to help them to make progress. The mediator would often ask apparently naïve questions in order to draw out the underlying issues. "What about the experts? Are they relevant anymore?" "Yes, we need to have their views on valuation and what should have been done with that other contract". "We certainly don't agree with your guy". It was clear that there was a source of conflict which might need to be addressed. "How about bringing them together and asking them to present to each client directly?" asked the mediator. "It can often be really useful for the client to hear what is being said on the other side. Again, it's about understanding risk, not persuading either side that they are right or wrong." "But would we be present?" asks one lawyer. "I'm not particularly happy about them being alone with the clients". "That's not a problem", replies the mediator, "but maybe your role can be as an observer in this session?"

Question: How does the mediator exercise judgment about the combinations of meetings: who to meet, when and where? How can advisers help make the best use of meetings?

14.20: It has been agreed that the mediator would meet with the experts first and discuss with them what the main differences were between them. Although they had prepared reports, as usual these played up the strengths of the party they had been asked to advise. The mediator knew from experience that, when experts actually sat down and talked through the issues together and gained a better understanding of the other perspective, the differences would often diminish. Or, at least, the reasons for the differences would become clearer. It was remarkable how highly experienced professionals could reach different views based apparently on the same facts. The reason was usually an incomplete or (unconsciously) partial approach, reliant as they were on the information provided to them. It was far better that they reached greater consensus – or indeed made concessions – now, in this confidential process, than after several days of cross-examination in a court. While this prospect troubled some lawyers, most appreciated the value of bringing clarity at this stage.

Question: How can experts and other specialist or lay people help in mediation? What are the benefits? The risks? What should a mediator seek to achieve in working with experts and others?

14.25: "What are the biggest differences between you?" asks the mediator. "Can you rank them in order, so that we can focus on what really matters? And can you identify why it is that you have these differences? When you've done that, I am going to ask you to come through to the main room together and take each topic in turn and I'll ask you to tell the clients where you differ and why." The experts know each other well – and have a mutual respect - so, on this occasion, such a prospect is not too uncomfortable for them. (The mediator recalled some instances when this was not so. Such situations needed careful management). Nevertheless, the mediator is aware that professional prestige is to some extent at stake, especially as the lawyers would be watching. After all, like others, the experts relied on the lawyers for work. Would that influence them? In theory, not at all. But even the mediator was aware that future revenue streams could have a sub-conscious effect on how a professional performed. Did that ever have any impact on mediators too, he ponders.....?

Resource:

Question: What unconscious biases are likely to affect lawyers, mediators and experts in mediation?

14.45: The mediator has left the experts to talk and to prepare a rudimentary schedule of key issues. He gathers the others together, having made sure that he updated the clients on what was happening. It is that stage in the afternoon when people would begin to wonder if progress could be made. The mediator would use the term “wading through treacle” to describe the time it sometimes took to work through the issues. Experience taught him that trying to cut through things too quickly could backfire if niggling doubts or uncommunicated issues surfaced late in the day at a time when a resolution was in sight. Patience was therefore the supreme virtue. On the other hand, dwelling overmuch on events in the past could cause the mediation to get bogged down. It was a fine balance, a judgment call each time…..

Question: How can the mediator ensure that those involved trust his or her judgment? How can the advisers help at this time?

14.55: “Ok, let’s get started. This meeting is to invite the two experts to set out where they are coming from. They have a lot in common but there are a number of matters where you are each receiving different advice from them. You need to understand why and the implications for decisions you need to make today".

Question: How can the mediator help parties and experts to identify and present differences, understand the reasons for them and how the differences impact on negotiations?

15.15: There is a degree of frustration. One expert has rather dug himself in, or so it appears. He looks less comfortable with the subject matter. All of this is useful, from the mediator’s perspective. The experts’ performance at this stage is simply another fact in the overall matrix of risk. It gives the lawyer on that expert's side the opportunity to make an assessment of what might happen if the matter came to court. Again, better to know now…… On the other hand, the natural instinct was not to allow this to become undignified. The lawyer for the other party had already asked a rather dismissive question of this expert, notwithstanding that it had been agreed that the lawyers would simply observe. The mediator is quick to remind everyone of this ground rule. One of the mediator's roles at this stage is to ask apparently anodyne questions of both experts but, having read the papers in depth, he is able to identify some key issues. One question reveals that neither expert has considered a particularly significant consequence of a calculation they have each carried out.

Question: To what extent should a mediator engage in technical detail? What are the benefits and risks of a meeting like this? What is the adviser’s role?

15.30: A break has been taken for reflection in the private rooms. The mediator and his assistant ponder the cupcakes that someone had placed in their room. “I think we need to move on soon,” observes the mediator. “We needed to show that the experts are unlikely to agree, nor to be persuaded by each other, but we can’t let that become an impediment. It is what it is. Time for a reality check."....

Question: How does a mediator avoid being sucked into giving undue attention to the legal, expert or factual merits of the matter? How does the mediator help the advisers and clients avoid being polarised at this stage in mediation? If you are an adviser, what do you need to keep in mind?

Part Six
Testing reality: "what if...?"

15.40: The mediator has invited the lawyers into his room. Given the passage of time, conversation is now brisk and matter of fact. “I doubt that we’ll get much more from the experts” suggests the mediator, “but at least the clients can now see that there is a different perspective from the other room. I would like to check up on that calculation though. What effect does that have?” The lawyers agree that hearing the experts have been useful, perhaps more useful than might have been anticipated. “I think that my client was quite shocked to hear that there might be a different approach on that second point,” says one, “but it’s still difficult to get across the idea that a court may find against our expert.” “And the calculation is frustrating,” comments his counterpart. “Why on earth…..?” The mediator was aware that meetings like this were delicate and that neither lawyer wished to say anything that might appear to weaken their client’s position. At the same time, and paradoxically, this kind of conversation was what loosened up the negotiations. It is important that the lawyers now do what they could to help their clients make the choice about whether to resolve matters today or not. The mediator reminds them of what he had said in that first gathering: that they need to help each other.

Question: As a lawyer, what considerations are in your mind at this stage? How far should a mediator go at this stage in encouraging openness and frankness among the advisers?

15.51: As the lawyers depart, the mediator gestured to the claimant’s lawyer to wait behind. “How do you see it?” he asks. “It’s a bit of a struggle” is the reply. “This has left a deep scar”. “How can I help?” asks the mediator. “I think she needs to hear from you. There is a limit to what I can say without losing credibility…..It’s been a tough one.” Such momentary asides often turned the day around.

Question: What do you need to bear in mind as an adviser when you have opportunities to interact with the mediator? As a mediator, how do you create such opportunities?

16.03: "It's been a long day," acknowledges the mediator. The claimant nods. "But it's important to remember that we are condensing into one day something that has taken months to get here and will take months – or longer – to resolve if it's left to some other process. Remember what we discussed about new chapters. Let's consider what would happen if this doesn't settle today". The mediator spent less time these days on BATNAS, WATNAS and risk analysis as many skilled lawyers now carried this out effectively with their clients. But, quite often, it remained useful for the mediator to act as an independent prompter of reflection on what would happen if agreement could not be reached. "What if you don't reach a deal today?" he asks. "I can't really contemplate that," replies the claimant. "This is eating my life up." "I can see that", says the mediator. "But you probably need to have a benchmark for deciding what will work for you." He turns to the lawyer" "What will happen next if there is no agreement today?"

Question: What are the options for testing reality in mediation?

16.27: It has been a tough session, with figures on the flip chart, the mediator's rudimentary decision-tree analysis, the usual conversation about the asymmetry of litigation and about the onus on the claimant to establish a number of things. The mediator frequently deferred to the lawyer, asking for his agreement or disagreement with propositions the mediator was putting. "Feel free to disagree," he would say to the claimant. "Or to reject any of this when I'm out of the room. My job is to raise all this with you, to make sure you have all the information so that you can make an informed choice". He looks at his watch. "It's nearly 4.29" he says. "That's nearly always the low point in the day! This is the point when you wonder if this can ever move on. Well, it's remarkable how the pace can pick up. Let me ask you, what do you really need out of this now? Assume that the other team can't give you all you have asked for, and bear in mind the cost in money terms and in other respects of not reaching agreement, what realistically will work?"

Resource:

Question: How can advisers help at this stage? What are the risks at this stage?

16.43: Moving to the other room, the mediator's assistant asks what he thinks will be the outcome. "I really don't know," he replies. "And the more I do this work, the less I am interested in the actual solution. I know that, if I let the process do its job, the more likely it is that an outcome will be reached. If I start to think about a particular result, I might influence things in that direction". The mediator knows, of course, that there will come a point where he will be testing and probing very hard around the consequences of not moving in particular directions and indeed might need to give an "impression" of what was and was not likely to work. It was a fine balance as always. And there was always the "Lord Not Very Bright" routine which he occasionally followed in each room as he speculated what might happen to the parties if a judge got out of bed on the wrong side….for them.

Question: How can a mediator keep focussed on process at this stage and avoid worrying about the actual outcome? And how does a mediator strike the balance between apparent indifference to the outcome and encouraging parties to move forward sensibly?

17.10: After a discussion about reputational risk and what the media might say if the matter became public, the mediator asks the defending client what he thought the claimant might need. "If you were in her shoes…."

Part Seven

Creative Problem-Solving: Moving Forward

17.30: The exercise of getting in the claimant's shoes had been more cathartic than the mediator could have imagined. All the theory about viewing a situation through someone else's eyes, and the recent books about cognitive traps and confirmation bias and the like, were all very well but if, in practice, the theory fell flat, what use was it? The mediator referred to this material more now than ever before. After all, recent years had seen a proliferation of writing on such topics. And here, once again, at the right time and in the right way, assisting a party to alter his or her viewpoint, even if only for a few moments, enables a new perspective to be taken. The defending client has crossed a rubicon. He now understands at a deep level what had happened. That does not mean he agrees with it. But he understands.

Resource:

Question: How can you getting someone to position themselves, metaphorically, in the others' shoes? What are the various techniques?

17.35: "She'll need some help to go forward," he suggests. "A recommendation, some money, maybe a new contract. The money is hard. I can't see the board being happy about that. But she was good most of the time. I can say that. And I can put it in writing. I'd need to think about a contract. What it would look like. What we can realistically cover." "Why don't you chat about that?" suggests the mediator. "I'll need to talk to my contracts manager back at the plant". "Remember the agreement you signed about confidentiality," warns the mediator. This was a grey area – he is keen to maintain the formality of confidentiality but not to let it get in the way. A discussion with a company colleague is perhaps covered by the agreement anyway. "Tell you what, why don't I say to [the claimant] that you are looking at possibilities and that you'd like to talk to your contracts man. That way I can introduce the topic in a low key way and get her agreement to you doing so. Keeps us all covered. And can I mention the recommendation? I'll have a short meeting and let you know asap."

Question: What would you do to ensure that confidentiality is maintained without undue formality? How else might confidentiality inadvertently be broken?

17.45: Back in the defending party's room, there is an atmosphere of business-like attention to detail. The whole mood has changed. "We can talk about a contract, needs to be short term but it may be enough to get back on the road again. And I can do a small cash payment as part of that contract. Not separate but within the payment provisions of the contract. Makes it more sellable." "What are the figures?" asks the mediator. What he hears worries him. He knows what is in the mind of the claimant from an earlier remark by her lawyer. "How will that go down?" he asks. "The danger is that you undermine your whole strategy by offering something so low that she considers it derisory and insulting. That could lead her in the opposite direction." This is a flip-chart moment. He gets up and draws rudimentary lines on the sheet, showing with an "x" and a "y" the dangers of making what might be perceived as unreasonable proposals. He tries to avoid the acronym "ZOPA" so beloved in the jargon. He talks about the theory of first-mover advantage, never an easy one as it applies to both sides. Then he sits down and pauses.

Resource:

Question: How far can the mediator go as a coach in this sort of situation? What are the risks?

17.55: "We need to think some more" opines the solicitor. "We can't afford to throw this away. There's the other matter to think about….." There is an anxious glance between client and advisor. A quick moving on. But, once again, in that moment, the mediator realises that there is more going on here than he will ever know. When observers talked about "justice" and the need for the mediator to make sure that "justice" is done, what they often did not appreciate is that there is nearly always more going on than the mediator will ever be aware of. In his view, it could not be a mediator's job to assess the rightness or wrongness of a resolution, but just to make sure that the process works really well and that clients and advisers make as well-informed decisions as they can. They can always walk away, a point sometimes forgotten by those who would equate mediation with the judicial process. Nothing is binding until….

Question: How important is "justice" in mediation? What does it mean? Should the mediator seek to achieve "justice"?

18.00: “Let’s look at a realistic figure” suggests the mediator. “My impression is that you can go considerably further without in any way doing harm to yourselves. My sense is that even at £x, the claimant will be below anything that she would contemplate.” This is tricky territory. “Impressions” and “senses” could convey ideas based on understandings the mediator had gained from his discussions in the other room. “Is that what she said?” asks the client. “You know I can’t refer to anything said in the other room without permission. I won’t be telling her your figures unless you authorise me to do so.” A mediator’s stock response and such a fine line…

Question: What can a mediator do to convey information between parties without breaching confidentiality? How might this change during the day? How much of this is judgment and how much should be inflexible? What should an adviser be looking out for?

Part Eight

Negotiating Towards a Resolution

18.10: The mediator has checked with both rooms about refreshments. The catering staff have gone home and the coffee, in those ubiquitous flasks, is lukewarm. By this stage, people tended to nibble on biscuits and the sandwiches left over from lunchtime, which were becoming less edible by the minute. The more wary avoided the prawn sandwiches… It is agreed to keep going without a formal break in the hope that progress can be made soon. Mindful that this is nearly always the wish, the mediator nevertheless asks his assistant to remind him about trying to get some pizzas delivered in about an hour's time. Food, liquid, blood sugar levels, all require consideration. Eating together has potential to change the mood. He recalls those other occasions when early evening food had been provided by the venue. This had created opportunities for him to position the key decision-makers next to each other as they ate. In these moments, conversation often led to creative solutions, such as an offer to make a donation to charity in lieu of a contractual claim. Honour was addressed and faces saved by such a proposal. The fact that the principals came up with it over food seemed to give it additional mileage. Ah well, pizza will have to do this evening. …

Question: How do you build these opportunities in, as a mediator? As an adviser?

18.12: Rather than taking the defending party's proposals direct to the claimant's room, the mediator needed to take time to find out what the claimant was now thinking after their previous discussion about the risks of not resolving today. Amazingly, it was nearly 90 minutes since their last full discussion. Far too long, thought the mediator, though he had popped in to mention the suggestion that the defending principal needed to discuss matters with the contracts manager – and generally to reassure that the reason he was taking so much time was because progress was being made. He had encouraged the claimant to go for a walk and get some fresh air. She had done this and seemed more focussed now as a result. "I need to move on," she said, "What are they saying?" The mediator was firm about not being, as he put it, a "mere messenger," nor did he see himself as a deal broker. He disliked taking offers and counter-offers back and forward, especially if these were at the extreme end of the spectrum. He viewed this as rather unsophisticated negotiation. Indeed, on occasion he had invited a party to convey their apparently derisory proposal direct to the other party. That usually led to further conversation….. He much preferred to draw parties together by managing expectations and helping them to get as close as possible before presenting them with formal proposals.

Question: What are the benefits of the traditional role of a mediator as a broker, moving between rooms with offers and counter-offers? The disadvantages?

How does the mediator manage the use of time at this stage?

18.17: “They, like you, wish to see this brought to an end,” he said. “And my sense is that they can move further than you might have thought earlier, indeed further than you might have expected. All that good work that you, your lawyer and your expert did in earlier meetings has had its impact, which is the whole point. Just as you have learned from them, too….”, he added for balance. “Apart from the money side, what value would you place on a short term contract to get you back up and running again? And with a reference that emphasises the positive work you did on the project last year? How would these help you get started again?” The claimant looked relieved. “That could make a difference,” she said. “I really need to get my confidence back. Where would it be? Who for? How long?” “These would all need to be discussed,” responded the mediator, “but if we can get these moving in principle, I can get you round the table with them.” “But the money is important too,” the claimant was again anxious, “I have lost a lot and all these legal costs…..” Nearly always, in these situations, the legal costs became a relevant factor. The mediator had seen emerging deals falter because the legal costs outweighed the sums in dispute, or at least those being contemplated in settlement. Not an easy moment for the lawyers either. One of the conundrums in litigation is that cost and time often obscure the real underlying issues. The mediator was tempted to quote Abraham Lincoln: discourage your neighbour from litigating. Point out that the nominal winner is often the real loser. In other words, victory in court will, in many instances, be a pyrrhic one.

Question: What can advisers do to anticipate that costs can complicate or even impede an emerging resolution? How can they reduce the risk of a resolution being lost or hindered by this issue?

18.30: The mediator now had a feel for what would work for the claimant. He began to talk about how the defending party was thinking, as he had been authorised to do. It was useful to be able to weave in their thinking after hearing from the claimant. The mediator could choose what to say and when. As he had said, he was not a mere messenger. This enabled him to work with the parties to try and build the best possible solution. Or, as he would often say, ensure that each felt that they had achieved as much as they could. The value of a mediator should be that the claimant should know, for example, that she had pushed the other side to the maximum they would offer on the day, and the paying party should know that they were paying the minimum that a claimant would accept. That was, after all, the key role that a mediator could play, adding something that was sometimes too difficult to achieve in direct negotiations by parties themselves, who could never be sure just how far they could go without feeling compromised.

Question: How realistic is this? What are the risks? Benefits?

18.35: "May I take this to the other room?" asked the mediator. The claimant looked at her lawyer. He nodded. "It's time to make progress and there is nothing there that we don't want said to them."

Question: For a mediator to be able to do this, what needs to have happened before this moment in time?

Part Nine

Getting down to specifics

18.37: The mediator paused in his private room with his assistant. This was the time when it was easy to rush things. People were getting tired. A mediator's adrenalin could pump too fast as the end seemed to be in sight. Many a false dawn…. This was the time when rushing from room to room trying to pin down a settlement could backfire. This was the time when a mediator could be tempted to take over the burden of resolution and implicitly (or explicitly) take on the responsibility for reaching a conclusion. It remained the parties' problem. They needed to remain responsible for it. It was a fine balance. The mediator had to encourage, cajole, test reality, resist inappropriate game play, be prepared to let them blow it, and yet…. "What do you think..?" asked the assistant. "Let's see" came the reply.

Question: What will help the mediator to keep focussed so late in the day?

18.40: "How are you getting on with the terms of a contract? I think we should try to get that worked up before dealing with the money. And the wording of the reference?" The mediator had decided to take the initiative on this occasion in the defending party's room. "In my experience, it is usually best to deal with the non-monetary aspects first if possible. It is often the case that the money claim is a substitute for other things. Or at least in part. I have seen large claims significantly reduced when other elements are on offer. Value is not just found in the cash. The trouble is that we tend to view these disputes through the lens of what a court can do, which is always going to be more limited….." He realised that his attempt to be encouraging was turning into a bit of a homily. Not the best use of time at this stage…

Question: Apart from encouraging parties and their advisers to draft the terms of what might be agreed, what else can help to keep them focussed on a solution and assist in addressing specific issues?

18.45: "So, that is what we can do" the client has summarised the position after his further conversations with his contracts manager. "That's helpful" responds the mediator. "I appreciate that this is not easy. How about the reference?" It is clear that not much work has been done. He turns to the lawyer. "I wonder if you and [the claimant's solicitor] could have a short meeting and try to come up with a wording? It's really more than a reference, this will be important for the claimant as she seeks to build a new approach to her business. …. Now, onto the numbers…. One of the problems is going to be costs. Have you any idea what these might be for her?" After a quick discussion, the mediator reveals the total, as he has been authorised to do. There is apparent shock all round. "It is what it is," the mediator is aware that, in this room, the costs are probably even higher and that the expressions of surprise are a little overdone. "Last time you told me what you can do overall on the figures. My sense is that the claimant will need a good bit more, probably starting with a "2". But let's see how we get on with the contract and the reference."

Question: How does the mediator manage the exchange of information at this stage?

18.50: "I'd like to take these specific terms to her and invite the lawyers to try and get the bare bones of a reference." The seed has been planted on the number. It is time to use the other aspects to help lever the parties to a place where they could make choices. "By the way, have you got the resolution agreement in draft? Let's not leave that until the end." This is the first time that the mediator has hinted that he thinks that resolution might be in prospect. And he is careful with his caveat. "I don't want to pre-empt anything and don't assume that we are home and dry but I don't want to spend another couple of hours drafting from scratch if you do resolve this in the next hour." Often, he invited parties to start to put together a resolution agreement quite early in the day. It helped to keep the lawyers (especially if there were a number of them) occupied and focussed on looking ahead to an agreed outcome rather than dwelling on the past.

Question: What needs to be included in a resolution agreement?

19.10: The short meeting with the claimant has gone well. The contractual proposals seem to be broadly acceptable. The mediator has now called the two lawyers into his room. Ostensibly this is to discuss the terms of the reference. But, in reality, it is to get them talking about the figure which will help their clients complete an agreement. “There is still a bit of a gap” says the mediator. “What can be done?” He is content to let the lawyers chat for a few minutes. This is where skilful and courageous lawyers are able to do their best. Some of the best lawyering in mediation occurred at moments like these. After all, most disputes were resolved by lawyers negotiating like this. The mediator took the view that his role, wherever possible, is to help the lawyers and their clients to regain their ability to negotiate with each other. The mediator’s role then begins to diminish. As ever, there is a balance to be struck. If it was easy, they wouldn’t be here. In reality, however, the heavy lifting has been done to a large extent. There would still be the odd dangerous moment however….

Question: What marks out really good lawyers in negotiation? What specific attributes would we notice?

Part Ten
The End Game

19.26: It is really down to the money now. Everything else is slotting, like a complex jigsaw puzzle, into place. That fact alone gives the process momentum and gives the parties the incentive to persevere and reach a conclusion. It was often forgotten that research – and experience – showed that most people, even in the most difficult of disputes, wish to resolve matters and move on. For everyone, risk aversion, sunk costs, intuition, confirmation bias and so on could operate to impede that desire. But, in the end, the mediator muses, the human instinct is more cooperative than combative and his job is to harness that instinct and help the players to override the contrary motivations.

Resource:

19.28: Back to the claimant's room. "How are you bearing up?" the mediator inquires. "Time for pizza?" He knows that blood sugar levels will be low and there is still a bit of ground to cover. It will help to have some food to sustain the teams at this stage. Fortunately, there is a take away pizzeria nearby. One of the legal team offers to check with both rooms and do what is required. Hawaiian is the mediator's preference…."We are getting there" the mediator says, "Perseverance is now the key - and reality. Where have you got to on the figures?" He can see that the lawyer has been working on the flip chart. No attempt is made to conceal the figures from the mediator. He invites them to talk him through what is written up. The approach appears to be to focus on what the claimant really needs to be able to walk away and get started afresh, with costs paid. This re-alignment from entitlement and rights to needs and interests is refreshing and the mediator is quick to acknowledge that. It seems that what she needs is still higher than what the defending party is able to offer but the gap will be closer now. "I think they will struggle with that", the mediator offers a view. "Of course, we don't know, it's in their interests to sort this too. But I think we need to get a move on. Can I take this analysis to them? I don't think you compromise yourselves by showing this. It may just help them to understand better what they need to do." He wonders about inviting the lawyer or even the claimant herself to present the figures to the other side but quickly concludes that he can probably do so more effectively. At least at this stage. …..

Question: When would it be beneficial to have the client or adviser take on this role? When can the advisers be completely open with the mediator? What factors does a adviser need to take into account when working with the mediator at this stage?

19.47: "So, there we are" the mediator summarises to the defending team. "From her point of view, and that of her advisers, this makes sense and moves them away from that figure beginning with a "2". It's time to bite bullets I think. Maybe even time to formulate an offer." "Could you give us some time to think?" the lawyer is looking thoughtful. "Of course…"

Question: Why is it important to give parties and advisers space at this time?

19.50: The mediator's assistant looks at her pages of notes. "Could we not just have got to this in the first hour….." "What do you think?" smiles the mediator. "Ask yourself how likely that would have been given what we saw and heard early on. You have to give it time. That is what is frustrating for people of course. At the end, it sometimes seems so obvious. But if it was that easy…we wouldn't be here. It's necessary to go through the stages. It's only a day after all and they have been at this for months. And if they don't resolve it……" There was a knock on the door. "Can we have a chat?" It is the lawyer for the defending party. "Come in" replies the mediator. "Here is what we think we can do….." the lawyer begins to set out his and his clients' thinking.

Question: Why does it seem necessary to go through all these stages to get to this point?

20.02: "Go back and see if that is possible" suggests the mediator. He has heard enough to know that the gap is closing significantly. There still has not been a formal proposal put on either side. That was how the mediator liked to work. Avoiding putting either party in a situation where they were fixed to a position, boxed in or needing to save face. Trying to minimise the offence which could be caused by over- or under- pitching. If he could help to manage the movement on numbers so that each party felt it was being listened to, was not compromised and was getting the best deal it could, that was the objective. A knock on the door again. "We can do that but there's not much more room," says the lawyer. "That's really helpful, thank you," responds the mediator. "May I take that and use that in my own way?" "Over to you," is the smiling reply.

Question: What is the mediator's strategy here? What are the pros and cons?

20.15: The mediator deliberately changes his approach. It is more business-like, matter of fact. He looks at the claimant. “I think there is scope for some movement. I’d like to have a chat with your lawyer if I may?” The claimant indicates that she is comfortable with this. By this stage, the trust built up over the day is such that no one is in doubt that both lawyer and mediator are working for a solution in the best interests of all concerned. They leave the room and head for comfortable chairs in the foyer. The building is deserted now. “Here is where we are,” says the mediator. “It’s about the best they can do. I might get another 10k out of them. But only if your client can say she would accept that sum if offered. Can you help her with that?” The bluntness of the question seems quite in order at this stage. “Leave it with me” the lawyer is already on his feet, heading back to the room to speak to his client.

Resource:

Question: When is it preferable to let an adviser work with the client without the mediator present?

20.23: “She can do that” the lawyer comes back to the foyer. “Ok, I’ll be back soon. Wait here.” The mediator leaves and returns shortly after with the other party’s lawyer and addresses him in front of his counterpart. “Here’s where we are…… If you can offer that, perhaps on the basis that if the claimant says she will take it you can make the offer, I think we are going to get there.” He looks at the claimant’s lawyer for confirmation. “Agreed” comes the affirmation.

Question: What do we notice about the roles in this segment?

20.35: “Well, here we are,” the mediator welcomes the two principals to his room. “Seems like a long time since we first met together this morning. Lots of water under the bridge…. I prefer, if possible, for the principals to complete the deal if they can. I think you are both able to do so. You have broad agreement now on the contractual matters and the reference. The lawyers still need to get the wording right but, with goodwill and good sense, that can be done briskly this evening in the resolution agreement. And I think you are nearly there on the figures.” He turns to the defender client who immediately reacts. “I would like to thank you for all your time today. I know it has not been easy,” he says directly to the claimant. “But we want this to end well. So we are prepared to offer you……” The claimant leans forward with a hand outstretched. “Thank you,” she says quietly. “That works for me. I can move on now. If only we’d had this conversation three months ago……”