

Give your mediation process a check-up

Seven questions to ask yourself about your approach to mediation

By Jonathan Schauder and Shawn Whelan¹

All experts, whatever their field, have clear and coherent theories to underpin their actions. For example, a physician doesn't tell you that they are going to take their best shot at curing an illness. They have a sound understanding of human disease, based on years of research and testing, that informs their diagnosis and prescription.

However, many mediators admit that they often "fly by the seat of their pants," relying purely on their instincts more often than they should. They may either lose track of their theory in the "rough and tumble" of the process, or find that their theory isn't sufficiently comprehensive to enable them to help the parties move through difficult moments towards resolution.

If you have ever lost track of your mediation process, here are seven questions with which you can give yourself a quick diagnostic "check-up." These questions are based on two important and well-accepted theories: that mediation is the facilitation of negotiation; and that every negotiation can be observed, diagnosed and improved by reference to its seven constituent elements. (This "seven elements" theory is based on research undertaken by the Harvard Negotiation Project (HNP), and is predominantly outlined in the work of Roger Fisher. HNP is a specialist division of Harvard Law School.)

Seven questions to ask yourself

1. Interests

Does your approach to mediation encourage the parties to take into account the range of needs, concerns, hopes and fears that they bring to the table?

Many mediators get trapped by the same assumption that parties to a dispute typically make: that the dispute, or at least its resolution, is only about financial gain or loss. Consequently, their approach is focused on facilitating narrow, short-term deals between the parties - deals that often demonstrate little creativity or broader vision.

Expert mediators test the parties' thinking by helping them reflect on the range of interests motivating their positions. They appreciate that the most productive way of creating value in the mediation is to encourage the parties to identify and share their broad range of needs, hopes, goals, and fears. In this way, truly satisfying settlements can be built around the parties' interests in intangibles like reputation and relationship, as well as their more tangible financial goals.

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2. Options

Do you have a method for facilitating creative problem-solving during the mediation process?

Your answer may depend on whether you see mediation fundamentally as a creative problem-solving process, or as a process that inherently requires a compromise based on the incremental trading of concessions. Like many mediators, you may believe that mediation should maximise joint gains, but feel uncertain about how to enable a process that is collaborative, creative, and yet protects all parties from exploitation.

Expert mediators have a range of appropriate option-generating tools at their disposal, from brainstorming to multi-stage problem-solving processes. The most effective methods all separate the process of *inventing* options from that of *deciding* on a final outcome.

3. Alternatives

Do you ensure that the parties consider what they will do if the mediation doesn't lead to agreement, and are you able to reality-test any threats to walk out?

Expert mediators lead each party through an investigation of the consequences of non-agreement – either in their intake processes, or in private sessions. This enables the parties to realistically assess at any point whether to stay and negotiate, or whether walking away may be more beneficial to their interests.

In addition, mediators who inquire about each party's alternative to negotiation are better able to deal with any bluffs and threats by the parties. By asking probing questions in private session, they can reality-test the consequences of such threats without giving their own substantive evaluation or opinion.

4. Standards

To what extent do you encourage the parties to persuade each other with arguments based on legitimacy?

Most mediators can identify when a party is persuading the other on the basis of threats or incentives. Expert mediators understand that persuasion occurs at a third level as well: the level of legitimacy, which involves the discussion of objective *standards*. The legitimacy of a party's argument is obviously increased when they offer standards such as independent research, accepted legal precedents or industry benchmarks, common commercial practices, and so on, to support their views.

A mediator should neither provide these standards nor argue the legitimacy of parties' perspectives. However, expert mediators can distinguish between persuasion based on coercion and that based on arguments of legitimacy. They can then lead the parties to

identify relevant standards that are more objective than “my opinion” or “our policy” and to evaluate those standards.

If it is impossible to establish a single agreed standard, expert mediators can suggest inexpensive and efficient processes to help everyone to agree on what might be legitimate in a given situation. Such processes might, for example, include referral to a technical expert or a QC for an opinion on specific questions.

5. Relationships

Do you consciously help the parties manage their relationships in mediation?

Parties to mediation have sometimes given up on their relationship with their counterpart, and often are unable to manage their negotiation in a way that protects and promotes their relationship. For example, the common practice of adversarial bargaining sacrifices relationships for (possible) short-term substantive gain, or settlement. This approach frustrates long-term interests, which rely on maintaining a strong ongoing relationship. It also ignores the need for a relationship that’s sufficiently productive in the short term to enable the parties to reach and successfully implement a deal.

Expert mediators have the capacity to understand the current relationship dynamic in the dispute, to help parties manage the relationship, and to help the parties explore relationship issues in the mediation independently of the substantive issues. Another example of effective relationship management that can be included even in short mediations is encouraging the parties not only to resolve the current dispute, but also to consider how they might work together to either avoid or properly manage future conflict.

6. Communication

Consider your communication skills. Do you demonstrate and foster effective communication skills in your mediations?

Most negotiators see effective communication as a function of advocacy and assume that listening during a negotiation is “weak”. This belief is based on the thinking that while you’re talking, you look confident and you’re in control. As a mediator, do you make the same assumption, and find yourself talking too much? Or conversely, do you listen so passively that you neither demonstrate understanding nor have any role in assisting the conversation?

Expert mediators manage the process by demonstrating exceptional skills in interactive listening. Rather than taking total control over the conversation, providing their own opinion, or sitting passively, the mediator helps the parties to connect by asking questions, clarifying meaning and ensuring mutual understanding. In doing so they also demonstrate respect for the parties, and consequently enhance their own relationships with the parties (and hence their ability to manage the process). They also find that parties who are communicating poorly often learn and adopt better practices as the mediation progresses.

7. Commitments

Do you help the parties develop commitments that are realistic, operational and clear?

Have you ever left a mediation uncertain about the deal that's been done, or have the parties ever reported that, since the completion of the process, they have been unable to implement the agreed plan of action? If so, you're not alone; unfortunately, many mediations end in vague or incomplete commitments. This usually occurs because negotiators are in a rush or because the parties don't realise that they are making promises on which their counterparts are relying.

Expert mediators pay close attention when parties are making commitments, realise the importance of developing robust and detailed agreements, and ensure that the parties are aware of all responsibilities agreed to. In doing so, they ensure that the parties clearly understand the commitments made and can realistically expect to implement them.

How was your check-up?

If any or all of this seems alien to you, never fear. Many mediators are now realising that ongoing mediation training is a critical area of professional development, and that by becoming more systematic and organised in their thinking they can significantly improve their practice.

If you want to know more about how you can improve your mediation approach, you can contact organisations like CMA to find out what mediation skill development opportunities are available in Melbourne and around Australia.

The authors are consultants and mediators with CMA, based in Melbourne. CMA runs mediation training workshops, including Monash Law's Masters-level course in Negotiation, Mediation and Process Management.