

ALTERNATIVE DISPUTE RESOLUTION

The Power of Advanced Testing in Mediation: How Strategic, Well-Timed Questions Help Move Parties Past Impasse and Toward Resolution

By Andrew Nadolna

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When I attended mediation as a client—often with significant settlement authority—what I appreciated most about the process was having my views of the case tested by the mediator. This would often occur late in the day, after I deployed my negotiating strategy and its limits became apparent.

At this point, the best mediators would interject a few well-placed questions or comments that helped me think a little differently about where we currently were and what might be possible. Whether or not I settled, I always appreciated those moments. In essence, what I was responding to was a technique I call “advanced testing.”

What is it and how can lawyers and clients get the most value out of it?

Understanding the Limits of Traditional Reality Testing

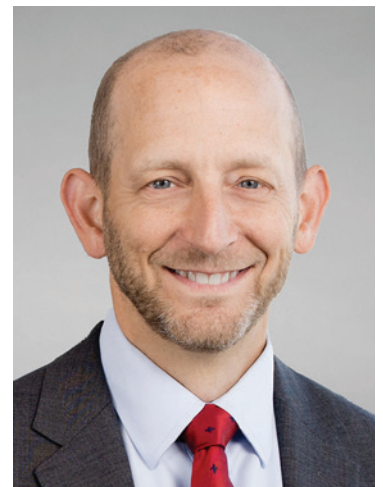
Counsel and parties usually come to mediation steeped in positions that have been developed and pursued over time. They are invested. They

have been thoughtful and strategic in pursuit of their goals and are not easily swayed to change course. This mindset often naturally leads to reactivity. For every point raised, there is a response.

Mediators often resort to reality testing to probe the parties' positions.

Reality testing is done through questions about strengths and weaknesses, as well as litigation costs and risks. The best questions accept the parties' views but test the boundaries and strength of those views by probing about what happens next if there is no settlement.

Reality testing is an unfortunate name for a very useful tool, since its name may imply a party isn't being realistic. I don't view reality testing in this



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way. I refer to this tool as simply “testing.” We will get to the “advanced” part of this a bit later.

Setting the Stage: Pre-Mediation Preparation and Early Caucuses

Most parties and counsel come to mediation having done their homework and with a strategy that is grounded in reality in terms of strengths and weaknesses of their case. And their positions will have been refined through some sort of pre-mediation process with the mediator.

Prior to most mediations, the mediator will have thoroughly studied a set of shared mediation briefs, perhaps received confidential supplements and conducted joint and/or *ex parte* calls in advance. This will allow the mediator to be fluent in the dispute and formulate questions that can confirm whether the parties and the mediator understand the counterpoised views. The experience of preparing the briefs and engaging in the calls will often lead to each side sharpening their strategies and positions for negotiating purposes. In most cases, this pre-work effectively takes the place of the joint session, and it does so in a way that isn't likely to cause reactivity.

Building Trust and Insight in the First Caucus

At the session itself, most parties want to dive in. The first separate caucus will often turn out to be the longest and most involved discussion about the merits of the case that day and is often the first time that the mediator, client and counsel talk at length (pre-session calls are usually, but not always, limited to the mediator and counsel).

While the caucus will often feature questions or comments from the mediator, at this stage the mediator may still be calibrating views with the parties and learning and adjusting to just how strongly held certain positions are. Mediators will often use testing questions at this stage. How do you think this argument will play?

How does this issue get decided? How long until you get to a decision? At what cost? How do you think about this? These inquiries further an

understanding of factual and legal positions as well as the intensity of those positions. The early testing will often touch on not just legal positions, but also emotional, business and/or reputational considerations—all of which can have an impact on settlement decisions.

The first breakout caucus is also a trust-and-relationship-building exercise between counsel, client and mediator. The conversation should aid in developing trust and empathy, which is the foundation for working together. Testing questions that also build on strengths can help advance the ball here too by demonstrating the mediator understands risks flow both ways.

After the first individual caucuses, or as part of them, opening offers will be made (if they were not already made) and negotiations will usually make some progress. Things often slow as the parties approach the limits of their positions. At this point, the mediator can ask follow-up testing questions to keep the negotiations grounded.

Questions are often received and answered a little differently as the frame of the settlement negotiations gets narrower. After all, it is the mediator's job to offer gentle but persistent reminders of why everyone is there. Even so, each side will likely believe they have adequately accounted for risk in their positions and the other side has not. Consequently, there may be a gap too large for the parties to bridge. Maybe they will agree to end the session and pursue a litigated or arbitrated outcome.

When Negotiations Stall: The Opening for Advanced Testing

This is when advanced testing can be most effective and the parties may want to invite a mediator to engage in such testing. Some level of trust has been established. The client may signal to counsel that they want to know what the mediator thinks. Often counsel will ask the mediator, “Are we crazy? Are we missing something? What do you think?” My answer to the first two questions is almost always a genuine no.

It is very rare in my practice that either side has missed an issue or is taking a position that is unsupportable. Usually, I have legitimately contested cases with genuine issues in dispute. So, rather than accepting an invitation to potentially share an opinion that might conflict with theirs and create unnecessary tension, I turn to advanced testing to deal with the question of what I think.

To me, the earlier steps, the calibration exercise, the relationship building and the deeper conversations along the way have set the stage for advanced testing and laid the groundwork for more focused discussions about where the negotiations have led.

The Impact of Advanced Testing on Movement and Resolution

Advanced testing questions (and comments) should be extremely well informed, well timed and contextually accurate. They should reflect everything the mediator has learned so far. And the questions (or comments) should focus on just a handful of pivotal points or maybe even just one. Such questions can be framed around likely jury instructions; what items might be in a judgment, if one is entered (situations of mandatory pre-judgment interest come to mind or attorney-fee shifting); or what a non-expert judge or jury might think about a critical issue or piece of evidence.

These are not interrogative or cross-examination questions. Those would lead to reactivity. The questions should come from a place of empathy and understanding and have the capacity to adjust the parties' views enough to create movement. It is nearly impossible to come up with a list of these questions in advance; their power comes from context and calibration.

Often I temper my questions with a personal anecdote about making settle-or-litigate decisions on significant disputes and living through adverse

litigated outcomes. Anecdotes create an atmosphere for self-assessment and pragmatic evaluation, deepening the appreciation for what an adverse outcome might look like, or just allowing a party to share their own concerns.

Recognizing When Advanced Testing Is Working

As a mediator, I am not seeking feedback or argument on what I am saying, and I usually get none. The first sign that the advanced testing has been helpful is when counsel says, "Can you give us a minute?" Or there might be a slightly longer pause in the conversation, which will prompt me to ask, "Do you want to have a chat without me?" When I step out, counsel and their client can discuss the results of the testing.

After I am invited back in, I'm not always sure how the testing was received. Counsel may need to address or clarify something I said earlier. I do not expect that a party will admit to me that I have made an impact. Advanced testing is not about a mediator winning an argument. The ultimate barometer of effective testing is movement—positional or monetary.

Advanced testing is an essential benefit of having invested in the mediation process, educated a third-party neutral on the case and developed a working relationship with that neutral, and then receiving feedback that helped move the parties closer to settlement.

At its best, advanced testing is respect in action. The mediator will have met counsel and the parties where they were and helped move them forward respectfully. When counsel and their clients get that kind of input, mediation provides a benefit even if the case does not settle that day.

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