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Questions to experienced commercial mediators - August 1999

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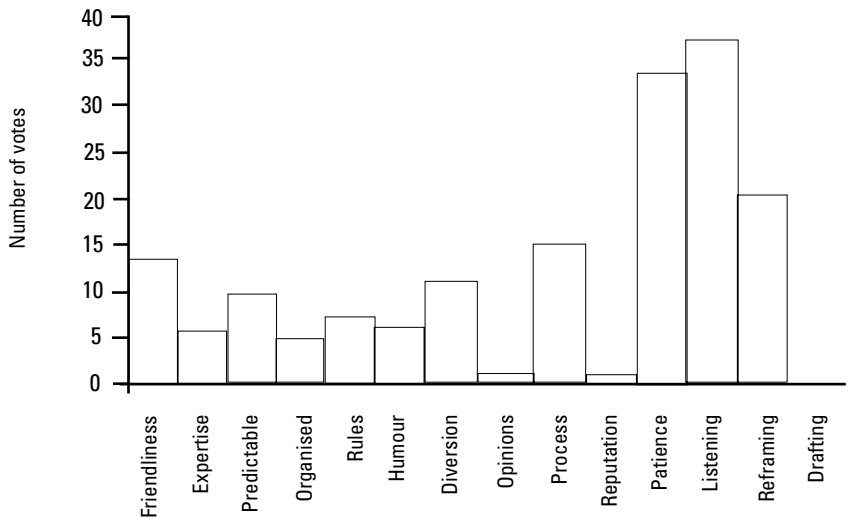
Surveying ADR practitioners

Questions to experienced commercial mediators — August 1999

Here are some of the questions and responses referred to in the previous article by John Wade. It is has not been possible to include all the individual comments and observations of the respondents.

	Never	Occasionally	Often
1. Which of these (or analogous) interventions do you use?			
(a) No adequate disclosure, no mediation	20	16	4
(b) Insist on written legal advice from each lawyer	29	8	3
(c) Lawyers sit at far end of table	18	12	9
(d) 'I want to see clients without their lawyers'	8	22	12
(e) Without full authority to settle, no mediation	10	13	17
(f) Intake meetings are essential	4	14	23
(g) 'There's no point having a mediation, you are too far apart'	34	6	–
(h) 'There's no point having a mediation unless X attends'	13	26	2
(i) Divide disputants into separate rooms and shuttle offers	4	17	20
(j) 'That argument is unlikely to succeed because …'	30	8	3
(k) 'Here are the risks you take if you proceed to a court …'	5	20	15
(l) Congratulate/summarise progress	–	12	29
(m) 'I want to see lawyers without clients'	2	26	13
(n) Normalise — 'it's common for people in your situation to …'	9	18	14
(o) 'I'm going to put these questions on the whiteboard'	8	16	17
2. What behaviours/beliefs/emotions do you see jamming the negotiations/mediation?			
(a) A lawyer who has given wildly optimistic advice	–	24	17
(b) Lawyers who themselves have become antagonistic/ emotionally involved	2	25	14
(c) A client(s) who is not listening to his/her own lawyer	3	35	3
(d) Poor summary and preparation of facts, BATNAS, offers, issues, transaction costs etc	2	25	14
(e) Concentration on legal questions and missing commercial interests	1	22	19
(f) Uncertainty of legal rules and the shadow of the law	4	27	9
(g) Rollercoaster of emotion	2	22	13
(h) 'Entrapment' – disputants have invested too much in the conflict	2	24	13
3. What helpful behaviour have you seen from skilled helpers (lawyers, accountants) before or during mediations?			
(a) Provide mediator with short written summaries of facts and evidence	–	16	22
(b) Provide mediator with short written summaries of legal issues, rules and arguments	2	23	14
(c) Provide mediator with short written summaries of commercial questions, risks and a range of possible solutions	14	18	8
(d) Suggest possible causes of conflict and reasons for jam	8	22	10
(e) Suggest mediator interventions which may be helpful	5	27	7
(f) Encourage clients to speak	1	21	18
(g) Are obviously prepared and organised	–	13	27
(h) Use non-inflammatory language	–	14	26
(i) Use outstanding communication techniques of appropriate questions, summaries, politeness, 'what if …' proposals etc	4	24	13
(j) Consult readily with mediator about breaks, hurdles	3	22	15

➢	Essential	Preferable	Not necessary	Ranked as one of five top priorities (votes not in preference)
4. Assume you are involved personally as a disputant in a dispute over management and distribution of profit in a large business. What features would you realistically like to find in your chosen mediator?				
(a) Warmth and friendliness	13	25	4	13
(b) Substantive expertise in the area of dispute — for example, law, accounting, engineering	5	23	14	6
(c) Follows a predictable mediation process	8	21	10	9
(d) Highly organised	11	24	6	5
(e) Stickler on process rules, good behaviour, speaking in turn	7	23	13	7
(f) Good sense of humour	10	25	6	6
(g) Excellent diversion strategies	14	21	5	12
(h) Ready to express strong opinions and give strong advice	1	5	34	1
(i) Strong opinions on process, but reluctant to give opinions on judicial outcomes	17	16	7	15
(j) Protects the reputations of lawyers	5	11	27	1
(k) Persistence and patience	38	4		33
(l) Excellent communication skills — listening	39	2		38
(m) Reframing, summarising skills	31	9	1	21
(n) Good drafter of documents	4	16	24	–



Ranking of five Top Priorities in a Mediator

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