

Mediator Skills

by G.R.Thomas

For a mediator to be successful he or she must possess a wide range of skills. One of the most important, but perhaps least appreciated, is the ability to actively listen to what a party is saying and to note what the party is not saying. All too often we hear what we expect someone to say rather than what is actually said. It is a fundamental principle that mediators must not prejudge the case nor impose their own prejudices on the parties. Furthermore, a mediator has to be able to tune into “*where the speaker is coming from*” and read the “*sub text*” or hidden messages given out by the parties.¹ This article focuses on one of the most fundamental tools in the mediator’s armoury, that of actively *listening* and taking on board what the parties are saying and acquiring an awareness of what they consciously and subconsciously leave out. The aim of this paper is to show how this skill can be used as a tool to enhance settlement rates.

Prior to the commencement of a mediation, the mediator should be “armed” with at the very least the skeleton arguments of the parties and their statements of case. This background information enables the mediator to prepare for the session and to plan a strategy for the conduct of the mediation. The mediator’s ideas of the case will be formed from these submissions. This scenario relies on the premise that the parties have identified their needs and have provided the mediator with all relevant information in advance.

There is however, a flaw in the assumption that providing this information will ensure the mediator has everything needed to fulfil his duties. The problem is that one or both of the parties may have a “*hidden agenda*.” A failure to deal successfully with such an agenda can fatally damage the process. The question that needs to be asked is, how does a mediator discover what hidden agenda, if any, exist? The answer is simple. The mediator must listen to the parties. Hidden agendas, if they exist, can be successfully dealt with whatever form they take, once they have been identified.

An important point to consider is the assumption that settlement is synonymous with resolution. In most cases it is! There are however, situations where settlement does not result in satisfactory closure for one or other of the parties. The question has to be asked, how can this situation arise? The parties have voluntarily entered into an agreement to settle the case, so they should be satisfied with the outcome, otherwise why settle? The answer may be that the hidden agendas have not been satisfactorily addressed.

Joint and private sessions are equally important stages of the mediation process. They provide the mediator with the opportunity to garner the information needed to assist the parties in their quest for closure. Active listening is important not just for the mediator but also for the parties. A skilled mediator will take steps to ensure the parties are hearing and responding to what the other party says. The most striking example of a failure to listen is where the mediation exposes the fact that there is in fact no dispute at all, simply a failure by the parties to clarify their positions. Once clarification is brought about with the assistance of the mediator the dispute vanishes.

The mediator needs to “*investigate*” the dispute with the parties and to question them if he is to successfully bring the dispute to a settlement. The mediator must build up a complete picture of the case if he is to explore methods of settlement with the parties. To do this the mediator must carefully question, listen to and examine the responses, to hear what the parties are saying and to look at what they are not saying. The skill lies in identifying the parties’ needs, not in dealing with what the mediator considers the parties dispute to be about and to then encourage them to address those needs rather than their stated wants.

Mediators are not judges. The parties are the people who have to agree the terms of a settlement. The parties will have greater confidence in a mediator who actively listens. Listening enables the mediator to get “*on top of*” the case. Active listening is not inherent. It is not necessarily an easy skill to acquire, but it is essential. It is a skill that can be both learnt and cultivated. Doing so is the key to success.

Conclusion The skill of listening is fundamental to the settlement of cases at mediation. It is a “*sine qua non*” of successful mediation practice. To be a successful mediator, listen to the parties

¹ For the most part mediations are conducted in person with the mediator and the parties present at the same venue. There are, however, exceptions to this rule with e-mediation and telephone mediation being championed by some mediators. The latter two forms of mediation require different skills to the face-to-face mediations usually undertaken. This article is not the appropriate place to examine the differences that exist.