

MATA

Mediation and Training Alternatives

MEDIATOR SKILLS

An effective mediator of civil and commercial disputes does not need to be an expert in law; indeed s/he does not need to be a lawyer. The most effective mediators have strong inter-personal skills and are able quickly to form quick relationships of trust and understanding with all the people present at the mediation. This paper outlines some of the key skills and techniques necessary for a mediator to be effective.

The most common term for building a good relationship is to demonstrate **empathy** with the individuals. Building empathy particularly involves being able to listen, show interest, value feelings and to be accepting of the person without being judgemental.

Listening Well

Being a good listener implies not talking (very much)! It means being prepared to listen to what the other person has to say without interrupting or taking over the conversation. It means **hearing** what is being said and demonstrating that you have heard. It means leaving silence, and not filling the space, and encouraging the other person to carry on by giving a few gentle prompts. It also means not bettering their story with one of your own. It is not easy being a good listener!

A mediator needs to gather information and encourage people to talk. The measure of how effective s/he is being is the balance of 'air time'. If the mediator is occupying more than, say, 20% of the speaking time then s/he is probably talking too much. It is worth stepping back and checking why this might be. It could be that the mediator is not asking encouraging questions, or that the speaker is uncomfortable, or that there is a particularly sensitive issue lurking below the surface that has yet to be liberated. The mediator needs to be 'in tune' with the speaker in order to recognise, and respond to, these possibilities.

Being in Harmony

Empathy has a physical dimension. The space between the speaker and listener (personal space), the desk or computer screen between them, the body posture, the tone and pace of voice and the words that are used are all potential barriers to being in harmony (or building rapport) with a person. For harmony to be created there needs to be a respect of a person's own space, and being too close, or too distant, can inhibit rapport. Sitting behind a desk or table, sitting on chairs of different height, or, worst of all, being distracted by a computer screen, keyboard or wristwatch, are all challenges to creating and maintaining rapport. Good rapport is created by matching the speaker's body position (standing, sitting, walking) and posture (relaxed, energetic), and by

using the voice pitch, tone and even words (jargon, metaphor) that are similar, without mimicking the speaker.

The effective mediator will create an atmosphere that is comfortable and unthreatening to the parties, will demonstrate interest and will 'honour' the individual by ensuring that her or his actions and words are in harmony.

There are other skills used by an effective mediator which have a considerable effect on the course of the mediation. The style and method of questioning, the ability to challenge without appearing to be partial and the reframing of negative or adversarial statements into positive, more conciliatory words, can be a key to helping the parties to move on.

Questioning and Challenging

Of course, different types of questions can be effective at different times, but some types of questions are rarely appropriate in a mediation. These include **leading** questions where the questioner indicates the expected answer, and **multiple** questions where the questioner asks the same question in several different ways and confuses the listener en route. The best questions are simple and short.

When the mediator is gathering information, particularly in the Exploring Phase, **open** questions are the most appropriate. Questions that start "How....?" or "What....?" or "Why...?" or "Tell me about...." invite the listener to speak at length, whereas **closed** questions invite a "Yes" or "No" answer that provide little or no information. Of course, there are times when closed questions are appropriate, particularly to obtain confirmation of understanding or acceptance of an offer, but they are not appropriate for encouraging people to speak. The use of **hypothetical** ("What if....?") questions is a powerful technique when exploring possible solutions. It depersonalises the suggestion and allows it to be examined dispassionately.

Challenging questions can be used to great effect, particularly when reality-testing. The challenge to the mediator, however, is to be sure that the questions are worded so as not to imply criticism or judgement of the party's position.

Summarising and Reframing

Summarising is a valuable method of:

- Checking understanding
- Demonstrating that the listener has heard
- Focussing on key issues
- Allowing parties to change what they have said
- Putting order on to an otherwise disordered statement
- Changing the direction of a conversation
- Buying time

It is particularly important not to move on from summarising until the party has said "Yes". This ensures that there is a common understanding and that the mediator and party are in agreement. Waiting for confirmation allows the party

to review what has been said and then to adjust the emphasis or interpretation.

Reframing is adjusting, reordering or changing the words of a statement to give it a more positive meaning. For example, a party may make a statement such as “My bottom line is £100,000”. Such a definite statement early in a mediation may cause deadlock later and risk the party losing face. A reframe could be something like “So money is important to you in any settlement”. This gives the party space to manoeuvre should that become necessary later in the mediation.

Summarising and reframing can provide real opportunities for progress in a mediation and can overcome blockages, help save face and enable parties to adjust their position in safety.

As well as having, and using, some key skills an effective mediator will have a ‘tool-box’ of techniques to use when appropriate during a mediation. Most common would be reality-testing, ‘standing in other’s shoes’ and using a flipchart.

Reality-Testing

Parties in a dispute will build their strongest case in the knowledge that some movement will be necessary if a settlement is to be achieved. Often, as the fight drags on, the flexibility disappears and parties become more entrenched. Mediation provides an outlet from such positions, although there is often a certain amount of pain in the process (sometimes for the mediator!).

Most reality-testing will occur in the Negotiating Phase when the parties are struggling to find a settlement that is acceptable to all. It may be, however, that some reality-testing is appropriate, and necessary, in earlier phases. For example, if a party firmly states at the beginning “I want.....”, it may be appropriate for the mediator to ask “Why?”. There could be some underlying issue not yet revealed; or it may just challenge how realistic such a position is if parties want to find a settlement.

Techniques commonly used in reality-testing include;

- Risk assessment (or reassessment in the light of what has emerged in the mediation)

- Challenging assumptions upon which a party may be making an assessment

 - Predicting the outcome in court (or arbitration)

 - Calculating the cost, including management time, of proceeding through court

 - Exploring the reasoning behind settlement offers

 - Standing in the other’s shoes.

Reality-testing is part of the mediator’s responsibility to help parties reach a settlement. Parties may not like being put in this position so well-judged timing and careful phrasing of the reality-testing are very important.

Standing in Other’s Shoes

A valuable technique for the mediator is to get each party to 'step into the other's shoes' and view the issues from that perspective. Parties see the same facts and events differently, hence the dispute. This is compounded when their legal advisors interpret the facts in the way best suited to their case. Getting parties to understand why the other is interpreting the same situation differently can enable them to see the dispute in a new light, and even help them to accept that the other's position may not be as unreasonable as first assumed. It will also help them to construct a settlement that takes account of these insights.

Getting parties to 'stand in the other's shoes' is a useful technique for the mediator when being asked to take settlement offers to the other side. Asking "How do you think they will react?" is a common challenge in reality-testing an offer.

Using Visual Aids

Some parties may use computerised presentations in mediations and some mediators may have risk analysis programmes in reserve. The use of electronic aids in mediation is bound to increase. However, the visual aid or technique that some experienced mediators most often use is writing on the flipchart. The effect can be dramatic. Not only can it present the reality of a situation, or clarify where the real issues are, it can also be a tool for changing the dynamic of a meeting. Getting people to focus on what is being written takes them away from focussing on each other and can therefore change an otherwise confrontational situation.

There are, of course, techniques for using the flipchart that make its use most effective. Mixing colours (but not using yellow!), writing in capital letters and using graphics all help to make the use of a flipchart interesting and powerful. Mediators who are in the habit of using the flipchart regard it as an indispensable tool.

The key skills and techniques outlined above are but a few of those used by the effective mediator. There are many more, and each mediator will use them in subtly different ways. In the end it is the personality and the way that the mediator relates to everyone present that will dictate whether the skills and techniques are effective.

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