Texas Wesleyan Law Review

Volume 15 | Issue 3 Article 3

7-1-2009

The Art of Mediating Civil Lawsuits

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DOI: https://doi.org/10.37419/TWLR.V15.I3.2

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Mike Amis

"art: the conscious use of skill and creative imagination; implies a personal, unanalyzable creative power (the art *of choosing the right word)"*[1]

INTRODUCTION

Bearing in mind the definition of the word "art," the Author proceeds with a mixture of trepidation and bravado in committing to print his description of the "unanalyzable." What follows is the Author's sharing of the methods with which he approaches and conducts his role as a mediator of civil lawsuits, crediting most, if not all, he has learned to his trainer, Steve Brutsche (1947–1991), and to the hundreds of lawyers who have appeared as advocates in mediations he has conducted over the past nineteen years. The discussion will generally follow the chronological flow of a typical day of mediation and will direct particular attention to the close of the session.

THE MEDIATION PROCESS

Effective mediation of civil lawsuits (including disputes that have not yet been articulated in the form of pleadings presented to a court but that have been defined sufficiently to engage lawyers on at least one side) is indeed a *process.* There is a beginning, middle, and end. This process is in essence a meeting chaired by someone: (1) who has been trained in mediation and can capably apply the authorities, statutes, and any order governing the session; (2) who invites equally the trust of the parties and counsel, usually meaning someone who has knowledge of the context of the dispute and the dynamics which govern the path along which prospective or continued prosecution of the claims and defenses in the courts or other forums might take; and (3) who is neutral, meaning the mediator has no stake in the outcome and is truly concerned with the matter only as an advocate of a settlement the parties might voluntarily reach.

The foregoing is basic, but the mediator quickly learns that each of these elements will be strongly tested by counsel and clients whose paramount concern, understandably, is what they perceive to be in their best interest that day and how best to achieve it through whatever means they might employ. The challenge for the mediator operating in the legal context is that he or she must build a bond with *both* the lawyer and the client. The mediator is there to support the lawyer's commitment—mandated by Texas' Disciplinary Rules and its

1. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 65 (10th ed. 1993).

Lawyer's Creed—and to serve the best interests of the client. The mediator must be alert at the outset for one or both counsel wanting to take control of the session, dictate the format, often insisting that a joint session be disregarded, and that "let's just get started, not waste time; we'll know in the first 30 minutes whether or not it will settle" attitude. Experienced mediators will use all their communication skills in getting the parties and counsel to engage in a joint session so as to lay the framework for an effective session and process. Establishing the opening stage often calls for a "mini-mediation" and is critical for the work that follows. The mediator may caucus as to the format of the joint session separately with each party and his or her counsel, or separately caucus with just counsel, to set agreed-upon ground rules. The "opening stage" begins with a joint, or convening, session chaired by the mediator followed by separate, initial, private caucuses by the mediator with each side (a "first caucus"). In this stage, the mediator establishes his or her credentials with the parties, the format and agenda that the session will follow, and, in the first caucus with each, gathers as much factual and contextual information as practicable. Also, this first caucus is the preferred time to encourage any venting that should, or must, occur (See Appendix A for the axiom that "a case cannot settle on top of unexpressed emotion"). Here, the mediator's goal is to spend about twenty (20) percent of the time talking and eighty (80) percent of the time listening.

THE COMMUNICATION SKILLS OF THE MEDIATOR

Appendix A to this article sets forth the core qualities and communication skills that enable the mediator successfully to establish and guide the process through all stages. An experienced attorney who displays the qualities and skills set forth in Appendix A will be an effective, professional mediator. The Author believes that early on in his or her training the mediator *must adopt and thoroughly develop* a system of communication (much like the immersion process in learning a foreign language) so as to study, test, and build on the communication skills that will give the mediator the highest confidence and presence. This system comprises much of the mediator's unique, "personal, unanalyzable creative power" and is no more easy to describe than the technique of an artist with paint and brush, the style of a popular vocalist, or a golfer's swing. Appendices A, B, and C to this article are the resources of such a system. There are certainly other excellent systems and resources, just as there are different methods for many activities, but the point is this: the mediator should pick one and plunge its depths. The Author has yet to exhaust the possibilities behind the works of Covey,[2] Tim Gallwey's insight into the dynamics

2. STEPHEN COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE: POWERFUL LESSONS IN PERSONAL CHANGE (1989) (referring to Habit Number Five).

DOI: 10.37419/TWLR.V15.I3.2

of Self One and Self Two,[3] and the full substance of the abbreviated statements of Brutsche in Appendices A and B.

Whatever particular system the mediator adopts must be consistent with the ethical requirement that the mediator foster the parties in determining their own decisions rather than the mediator's seeking to dictate a decision. The mediator in the opening and interim (or "middle") stages seeks first to understand and, then, in the closing stages has the ability to speak with understanding as a catalyst sparking the process to closure. Any such "system," or method, has its unique, separate vocabulary and is rooted in the sources upon which that particular teacher-author has built a foundation. Switching systems, or failing to develop fully any one of them, entails the same risk of confusion as a golfer changing teaching pros or litigants substituting counsel in the middle of the case.

THE OPENING STAGE: THE MEDIATOR'S CONDUCT OF THE JOINT SESSION AND THE FIRST CAUCUS

The mediator convenes the mediation session with all parties and counsel together with an opening statement that establishes five elements: (1) qualifications and background of the mediator; (2) the rules governing the confidentiality of the process and the session; (3) a commitment by each party and counsel that each is entering the session with the intention to resolve the matter if at all possible, i.e. to negotiate in good faith; (4) that each side is present with a person who is either the principal sued or is a representative with authority and capacity to engage in the negotiating process that will take place, and to commit that party to a written mediated settlement agreement should he or she so approve; and (5) that the time to be spent in mediation within the discretion of the mediator be identified and agreed upon. As one can see, these elements are simple enough, although in a given case difficult to apply. Mini-mediations can arise over any one of these elements, with separate caucusing. The Author prefers to resolve any questions over any of these elements with counsel prior to formally convening the joint mediation session so as to obviate any surprises with all present. If the parties appear pursuant to a court order issued by a Texas court, counsel might question soliciting the commitment to "negotiate in good faith" by reason of the 1992 Houston Court of Appeals decision in *Decker v. Lindsay,*[4] holding that under the governing mediation statute in Texas, parties cannot be ordered to negotiate in good faith.[5] That being said, it is still beneficial to gain the response from each side as to this commitment, and that

3. See W. TIMOTHY GALLWEY, THE INNER GAME OF TENNIS (1974), as an example of the "Inner Game" books.

4. Decker v. Lindsay, 824 S.W.2d 247, 251 (Tex. App.—Houston [1st Dist] 1992, no writ).

5. TEX. CIV. PRAC. & REM. CODE § 154.002 (Vernon 2005).

response, whatever it may be, will bring candor and integrity to the process. In covering these elements in his or her opening statement, the mediator begins to observe the demeanor of the people present, to listen for what is said—and unsaid—in any presentations made by the parties, and to note non-verbal clues, such as facial expressions and body language. It was Stephen Covey in his *Seven Habits* who widely publicized in recent years the research that body language is sixty (60) percent of peoples' communication and that effective listening is the most important communication skill.

Upon establishing the ground rules of the session, the mediator turns over the meeting to the parties, normally beginning with the plaintiff, or claimant, inasmuch as the plaintiff has brought the lawsuit or the claim. The mediator encourages each side to make an uninterrupted presentation after which the mediator and the parties may engage in follow-up statements, questions, or any other dialogue that would promote settlement and not be destructive of that effort. Here the mediator is establishing the anchors that he or she will rely on throughout the session. The effective use of the joint session, most experienced mediators would agree, is a great frontier still to this day. The art of drawing one's opponent closer rather than pushing them farther away calls for creativity, maturity, and wisdom. Many disputes arise from false assumptions fed by ineffective or incomplete communication. This session is an excellent opportunity, should the personalities, emotions, and temperaments permit "to unbundle the sticks," as one mediator puts it. An effective joint session skillfully handled is a most productive event. Apologies, concessions of obvious dilemmas, principled resolve kindly presented—what Acland would term "constructive aggression"—delivered with sincerity, respect, and kindness are options all available to the advocates and parties to lead to early and favorable resolution. Usually, the parties conclude this meeting without exchanging proposals, as client and counsel wish to meet with each other and assess both with and without the mediator what has transpired. The mediator then begins a process of caucusing separately with each side and, in so doing, generating opening proposals.

A Good First Caucus

A good first caucus is essential in that the mediator asks open-ended questions, often difficult for new mediators experienced as trial lawyers and judges who have been trained to "nail things down" through leading questions and cross examination. The discipline of the lawyer is to shape things and place matters *under* control. The goal of the mediator in this session is to have things *out of* control—it is only then that the mediator can listen with a "third ear" and learn what is truly behind the conflict, what is important to that side, and what the driving forces *towards* settlement might be. The mediator asks five (5) questions, referred to as the "five-question technique."

The verbiage and timing may vary, but these questions must be asked: what are the strengths of your position? what are your weaknesses? what are the foreseeable results should you not settle today? what do you perceive or understand to be your opponent's settlement objectives ("bottom line")? what are your settlement objectives today? Mediators are loathe to solicit bottom-line, drop-dead ultimatums at any time in the process and, especially so, in this opening caucus. A sixth question the Author often solicits is, "What do they perceive your bottom line to be today?" The mediator's necessary discipline in this first caucus is, first, to ask these questions (of course, the phrasing may vary: "What concerns you about the case?" versus "What are your weaknesses?"), not to interrupt, and not to challenge the answers. Empathic listening is called for with the only goal being to receive their intended message. In this way, the mediator learns how candid the parties are and, possibly, what their true underlying interests are. Follow-up questions can fill the mediator in on the case's context, as well as any indirect factors which may be as relevant to the parties as the formal prosecution of claims or defenses, e.g. an undisclosed terminal illness of a party. "I go to where they are, I don't require that they come to where I am," is how one mediator expressed it. Without challenging their logic, the mediator solicits an opening offer, within that party's range of settlement, which would still give the party room to move. The mediator then repeats the same process with the adverse party or parties, an effort requiring self-discipline to put mentally on the shelf the material learned in the first caucus with the opposing party, to judiciously convey the first offer, in this case, from the Plaintiff and, then, to solicit the Defendant's opening offer. The mediator in this stage is building trust and confidence, allowing any venting, and, in Covey's words, building up deposits in the emotional bank account of the parties and, often, the lawyers as well.

"THE GAP" AND THE INTERIM CAUCUSES

Following this initial exchange of offers, a normal scheme of negotiation can begin, which can be discarded at any time should the circumstances warrant. This is more of the "unanalyzable part," and there are no rules other than two. The mediator may suggest any combination of meetings that would advance discussions or any other technique or ideas, limited only by his or her creativity and consistent with the mediator's core qualities. It is wise for the mediator to assume when caucusing with one side that the absent party is present so that the mediator not say anything that the absent party would take offense. The mediator should ask, "Is what I am about to do or suggest going to help us move towards a settlement?" If the answer is "yes," then fine, do it; if the answer is "I'm not sure" or "no" then why do it? This is the "inner game" Gallwey describes taking place in the mind between Self One and Self Two; Self One being the conscious ego,

including one's natural pride, and Self Two, our unconscious self, "egoless" which employs unconscious instinct, training, and experience. Some can operate easily out of this Self Two, while others must practice and grow its increase with more effort. The mediator can learn to "practice being in the gap." This concept is Covey's gift to mediators when he articulates the principle of: (1) stimulus, (2) gap, (3) response. Simply stated in the mediation context, the mediator receives stimuli throughout the session in the form of language (verbal and non-verbal), physical activity (frustration leading to a walk-out, sudden or planned), and other conduct, such as interruptions, illnesses, or incapacity of various types. The mediator cannot control and should ordinarily not try to control a given stimulus. However, as Covey points out, the mediator *can* control his or her response to the stimulus. There is, by definition, a "gap of time" between any stimulus and the mediator's response. It may be only an instant or it may be a lengthy delay that is within the control of the mediator as the advocate of settlement. In this gap, the mediator, true to his or her proper role, uses all available tools and knowledge to choose the response that is most appropriate at that time to furthering settlement. It may be urging the parties to make one more offer or it may be to refrain from advocating they continue, depending on the particular circumstances.

Covey broadens the concept of "the gap" by stating that what one does in the gap to determine one's response to the stimulus is the key to all human growth. This practice comes into play most frequently in the interim caucus stage which is the part of the process most difficult to define: it is the stage between the first caucuses and the closing caucuses and involves digging deeper into the matters covered in the first caucus, raising risks by the mediator—the mediator *is*, after all, primarily a courier of risk, an agent of reality as well as an agent of optimism. This interim stage is within a framework of the exchange of working offers. One approach the mediator can take in risk-elevation is to be knowledgeable about the contested issues of fact in the case and, creatively, think of which facts, if they existed, would be inconsistent with a party's factual theory of the case and, also, which facts, if they existed, would be consistent with the opponent's factual theory of the case. Questions developed along these lines allow the parties to ponder and respond on their own initiative. The mediator is a salesperson for settlement, and good sales people know customers are more likely to buy if they come to their own conclusions that the product is what they need. "SPIN®" in author Neil Rackham's *The SPIN® Fieldbook*[6], is an acronym for the types of questions that effective sales people use to determine the interests and needs of customers: *s*ituation, *p*roblem, *i*mplication, and *n*eed-payoff questions. These

6. NEIL RACKHAM, THE SPIN SELLING FIELDBOOK: PRACTICAL TOOLS, METHODS, EXERCISES, AND RESOURCES (1996).

four types of questions mirror closely the questioning the mediator employs throughout the process, with problem (contextual) and implication questions dominating the interim caucuses. For example, a plaintiff who is a tax accountant may feel very strongly about his or her claim arising out of an investment, but the court setting the case for trial during the months of January to April would substantially affect his ability to serve clients during tax season.

In the first and interim caucuses, the mediator and the parties should explore all the different potential structures of settlement, more relevant in cases involving business relationships. Most mediators work toward a single-text or funnel approach to narrow alternatives so that the parties as soon as practicable can be negotiating on one or two points, usually an amount of money to be paid. A rule of thumb is that the parties may explore different structures early and that it is very difficult to switch successfully to a new structure late in the session.

TYPES OF OFFERS

There are four types of offers and normally they are made in sequence as follows: safe, working, serious, and closing. A "safe" offer is an offer which the party making it has no expectation that it will be accepted. The opening offers are normally safe offers, a way to begin the negotiation and if the mediator announced that a safe offer had been accepted, the party making it would be shocked. A "working" offer is one that reflects that progress is being made. These offers are often very informative as to where a party might proceed to resolve the matter and are often responses to offers made by the other side. They serve as vehicles to learn further where true interests lie, either confirming what has been discussed in earlier caucuses or in uncovering previously unknown interests and information. The mediator can be in alignment with the party's dilemmas in the negotiation and still remain neutral regarding the party's position, stated objectives, or "bottom lines." The mediator seeks to remain ignorant of the party's "bottom line" even if the party wishes to declare it for two reasons. First, there is the obvious difficulty the party will have in backing away from a declared bottom line, having announced the proverbial line in the sand. Second, the party may truly not know its bottom line, either through lack of preparation in coming into the session or because of changed circumstances during the session—one reason why mediation is truly a "process." The mediator's questions and risk assessment, both in and outside the mediator's presence, during the individual caucuses often result in a shift in any so-called bottom line. The progress from a working offer to a "serious" offer is hard to describe. Many mediators strive to stay in a separate caucus with the client and counsel as much as possible, exiting only upon their request. The Author often suggests that the client and the counsel spend time

alone in order that the counsel may have an opportunity to consult with, and counsel, the client being unimpeded consciously or unconsciously by the presence of the mediator. For example, it is then that fee arrangements may be safely discussed and adjusted to accommodate settlement and that the counsel's secret concerns such as impeaching testimony or unavailability of a key witness can be discussed intimately without disclosing same even to the trusted mediator. A dramatic shift in the session occurs when the first "serious" offer is conveyed.

Serious and Closing Offers

The paramount question in any mediation session is: "Can these parties exchange serious offers today?" A "serious offer" is defined as follows: the party making the offer thinks that the party receiving the offer might actually (not "should") accept it. Everything in the session leads up to, and flows from, the making of a serious offer.

The general rule is that a serious offer from one side will beget a serious offer from the other side. Armed with all previously-learned information, the mediator will use all of his or her intelligence, experience, and energy to attempt sparking a serious offer. Good self-questions for the mediator to ask are "what has to happen before we can get a serious offer on the table?" and "what can I do to help these folks generate a serious offer?" When serious offers are exchanged there is a dramatic shift, and the parties move towards each other almost irresistibly into the area of closing offers where what is called "the magic" of mediation occurs, with parties now working together to arrive at settlement. The somewhat cynical observation that "money heals all wounds" generally is true in that where several elements or deal points are involved, agreement on the monetary element will serve to drive agreement on the ancillary items. It is at this stage that the mediator, having obeyed Covey's invective to "seek first to understand" now seeks "to be understood" with his or her suggestions on how to move around remaining obstacles. The mediator, based on the progress made in the session, discourages destructive tactics, allows the parties to test and, often, re-test rejected proposals. The mediator shepherds the finalization of the complete deal terms which shall fully and finally resolve the matter assisting the parties then and there to reduce it to an enforceable written agreement, usually to be superseded by a further compromise settlement agreement. The mediator at this time in the process is to be extra alert to hold the settlement together in service to the parties, all of whom will be most disappointed if the settlement were to fall apart. This completes the transformation of the conflict that began when the first serious offer was conveyed.

IMPASSE-BREAKING TECHNIQUES

The phrase "impasse-breaking techniques" usually applies to stratagems the mediator employs when the negotiation is either dead, meaning at least one party has refused to budge, often voicing, "we're done; it's over," or giving an ultimatum that the other side will have to "get real" to continue the negotiation. Chapter 12 of *When Push Comes to Shove*, listed in the bibliography, Appendix C, has a good discussion on this subject. Impasse can occur at any stage of the process (usually at a point at which either working offers or serious offers are being exchanged). However, what one side perceives as an outrageous opening offer can prevent the negotiation from ever getting off the ground, with demands that the party making the offer try again, do better, and in effect negotiate itself. The methods by which the mediator can remain true to role are as numerous as circumstances and creativity allow. The most common in the Author's experience are (1) shifting the environment by calling meetings with all parties and counsel, with just the lawyers, or with just the clients (the latter being with their lawyers' consent); (2) soliciting specific proposals which might be a next step and maintain the negotiation; (3) proposing brackets, or ranges, within which negotiations can continue; (4) with permission of both parties, presenting an arbitrary mediator's proposal in confidence to each side, also called a "blind bid," with the mediator indicating only "settlement" in the event of two "yes" answers and "no settlement" if there are two "no" answers or one "yes" and one "no." Many experienced mediators advocate use of the mediator's proposal only as a last resort and if there is no settlement, feel that the session must end. The Author is not in this camp and believes failed mediator's proposals may not be the final effort available so long as no harm will be done by continuing (Rule Number One for any action contemplated by the mediator: "Above all, do no harm."). Questions the mediator may ask at this point are: "What must (or can) happen to generate a further proposal?" Or, "What would have been an acceptable offer at this point, not that you would have accepted it?" Or, "If they had done what you wished, what would you have done?" And, "Assuming we leave now, what happens next?" This last question throws the party back upon itself and visualizes the dilemma it had coming into the session—the generally disagreeable status quo each side has in litigation. Very few individuals or entities are enamored with litigation in and for its own sake; it is accepted as a necessary instrument to attempt solution of a problem or to change an unacceptable situation. Fleshing out the answers to these questions from the parties who by now in the process trust the mediator can lead to the answer that can unlock the impasse or lead the parties to decide consciously to recess the session.

If all stones have been unturned and no settlement is possible from all good faith efforts, then the process must be considered a success,

and the mediator has performed a worthwhile service. The parties are proceeding to trial based on true, tested, informed consent. One experienced mediator accurately defined a failed mediation as "one in which things could have been done that day which were not and which, had they occurred, the parties would have resolved the dispute." The mediator at this final stage should reflect on the entire process, review all notes, and use his or her ingenuity in a last attempt to stimulate further proposals. One of the core qualities of the mediator is "persistence," and many counsel have indicated that the qualities they are looking for in a mediator are persistence and the ability to close.

Follow-Up by the Mediator

If there truly is no further work to be done on the day of the session, the mediator's work is not over. The mediator's optimism is buttressed by the statistical truth that the case will most likely settle at some later point prior to trial and the mediator will want to stay involved. With the same dedication to task as he or she has demonstrated throughout the session, the mediator wishes to promote and structure an exit of the parties that will provide the best stepping-stone to further development of the settlement track the parties have traveled upon. Before, adjourning the mediator may determine it is productive to bring the counsel or both counsel and the parties together for a go-forward exit plan. Peter Chantilis (1934–1999), an excellent Texas mediator, issued a sound axiom regarding cases at which both principals were present: "Don't ever let them leave without meeting alone with each other and you." Early in the use of mediation, mediators were refreshingly surprised by how supportive counsel were of such meetings, provided the mediator has gained the trust of both sides during the session. The results of such "impasse meeting" have proven their value by dramatic moves or settlements which often ensue.

Conclusion

In 1989, Steve Brutsche announced, "Mediation is here, it works, let's use it!" That same exhortation rings true today. Mediation supports the trial advocate's commitment and obligation to serve the best interests of the client, it supports the trial court's effective and efficient management of scarce public resources, the courthouse, and enables clients to achieve the prompt, fair, cost-effective resolution of their disputes, "Rule Number One" of the civil justice system. A quality product is the mediation of a civil dispute guided by a trained, committed mediator knowledgeable of the context of the case before the court and the art of mediation.

APPENDIX A
Core Qualities of the Mediator and the Art of Communication

by Steve Brutsche (1943–1991)
Founder, Association of Attorney-Mediators ("AAM")

A catalyst facilitates and generates a process, yet remains distinct from its components and results. A mediator functions as a catalyst for the peaceful resolution of disputes through core qualities created and demonstrated by the mediator in the mediation process:

Trust: Trust is at the heart of the mediator's ability to fulfill his or her functions. Often, litigants do not trust each other sufficiently to successfully negotiate a settlement. The mediator provides a "trust bridge" which the parties use to negotiate.

Honesty: Candor and consistency generate trust and reveal and focus the parties' intention and ability to resolve their dispute.

Tolerance: A mediator cannot judge and fulfill her or his function, as to judge is to assume a position not held by the mediator and destroy the mantle of impartiality.

Open-mindedness: To recognize and acknowledge all positions without judgment, agreement or opposition and the willingness to explore all settlement structures.

Gentleness: Hippocrates law of healing, "Above all, do no harm," applies to mediators as well. Harm is not the same as discomfort—often the boil must be lanced before healing can occur.

Joy: Humor and optimism are the grease of mediation.

Defenselessness: A mediator has no position to defend and, therefore, has no need of defenses. The mediator's only "position" is that the disputes in issue be resolved by agreement between the parties concerned.

Generosity: Enthusiastic sharing is the source of joy and satisfaction in the practice of mediation. Generosity does not imply sacrifice—for what is given is received.

Patience: Waiting without anxiety and trusting that the outcome will be appropriate for the parties and will occur at the appropriate time.

Humility: It is the mediator's role to establish and protect the integrity of the mediation process and allow the parties to exercise their right to choose. We cannot truly say a case cannot be settled, only that we are unable to facilitate a settlement at this time.

Faithfulness: Persistence in the face of discouragement, pessimism, anger, frustration, hostility, and stubbornness. Remembering and personifying the parties' commitment to resolve their conflict—especially when they forget! The embodiment of all other attributes.

The Art of Successful Communication

Successful communication results from the combined efforts of the speaker and listener. The speaker attempts to transmit an intended message, which is received and interpreted by the listener. Communication is successful when the speaker's message has been acknowledged by the listener sufficiently for the speaker to experience having successfully delivered the intended message. At each point in this process, the potential for a miscommunication exists. The speaker's expression may be inarticulate, unclear, or affected by emotion, physical illness, prejudice, lack of sophistication, or other limitations. Similarly, the listener's ability to hear and interpret the message may be impaired by parallel limitations. Also, the speaker or listener may incorrectly assume a context of understanding and appreciation for not only the words chosen, but their meaning to the speaker and listener. Thwarted, incomplete or stifled communication is common in litigation. The mediator creates the possibility for successful communication through the mediation process by the use of effective listening.

Effective listening derives from the listener's commitment to receive the speaker's intended message, even if the expression of that message is muddled or incomplete. It involves the heart as well as the head; listening to what is *not* said; recognizing how communications are made, by whom, and from what positions, prejudices, points of view, and limitations, communications originate. Effective listening also requires the listener to consciously recognize and be aware of his or her own limitations, prejudices, emotions, and reaction, and to take those into account in interpreting and translating what is being said.

" . . . having his or her communication understood . . . is at the heart of the success of the mediation process."

Some guidelines for effective listening are: Take personal responsibility for successful communication. Be quiet. Listen empathetically. Be persistent and patient in your listening. Pay attention, concentrate, and avoid distracting actions. Maintain eye contact. Control your emotional reactions. Respond to ideas, not personalities. Do not argue mentally. Focus on the main points. Listen for what a person leaves out or avoids. Identify and adapt to the speaker's method of reasoning. Notice the speaker's emotional reactions and attitudes. Adapt your actions to take into account your effect on the speaker. Avoid assumptions and classifications that categorize the speaker. Recognize your own feelings toward the speaker, subject, and occasion, and allow for them in interpreting the message. Use restatement to confirm understanding and acknowledgment of a completed communication.

One of the most powerful experiences a human being can enjoy is having his or her communication understood and received by another non-judgmental human being. This experience is at the heart of the success of the mediation process. The emotional release that results from a person successfully completing previously thwarted efforts at communication is often the catalyst which allows parties to negotiate an acceptable settlement. Very often, meaningful negotiation does not occur without this emotional release.

Successful communication is a function of effective listening. The essence of effective listening is the listener's commitment to receive the speaker's intended message, even if the expression of that message is inadequate. The mediator generates the context for successful communication in the mediation process by his or her unqualified commitment to listen effectively.

Appendix B

Brutsche's Laws for Mediators and Advocates

1. Above all, do no harm to the parties' status quo in the case.
2. A jury in the box settles cases; mediation is about *early* settlement.
3. Mediation is a process; if you leave out a step, you will usually pay a price.
4. The mediator is the courier of risk.
5. Our only weapon is the trust of the parties.
6. When we see something destructive of the process, we have a duty not to be a part of it.
7. We are to be empathic without agreeing.
8. To agree (with a party/counsel in a separate caucus) is to argue.
9. Don't argue with an angry person; they're crazy.
10. People will tell you what they think will get them what they think they want.
11. It's easier to deposit a check than it is to write one.
12. Don't water barren trees; if it's not working, get off it.
13. When they speak, stop talking and listen.
14. Admit any inadvertent disclosure immediately.
15. Exhibit the core qualities of the mediator and, in so doing, we inspire them to judge themselves.
16. Lawyers are the premier problem solvers of society.
17. Lawyers are good in mediation because they can get there faster and can shift on a dime when they need to.
18. You can confront the situation without being confrontational.
19. Identify and isolate an underminer in the mediation session.
20. If there is repetitive venting, interrupt and solicit an offer.
21. Late venting can be a very positive sign.
22. When the spread is less than the cumulative cost of continued litigation, the case has to settle.
23. The normal rules of negotiation apply.
24. You can explore different structures early but not late.
25. With every conclusion is an implied warranty that they have information to back it up.
26. All right effort bears good fruit.
27. If they're going to get it anyway, why not give it to them?
28. If you need to cuss somebody out to get on with life, go ahead, but the joint session is not a very good place to do it.
29. As a lawyer in the courtroom, after a while you can't ignore the dead bodies on the battlefield.
30. The client will sing the lawyer's praises upon receiving a prompt, fair, cost-effective resolution of the dispute.

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DOI: 10.37419/TWLR.V15.I3.2

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