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## LISTENING IN COURT-CONNECTED MEDIATIONS

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### ABSTRACT

As the use of court-connected mediations has received a permanent status as an intrajudicial conflict resolution method, the purpose of this study ( $n = 38/44$  Finnish judges) was to elucidate how listening is used in mediations. The data set one consisted of answers to open-ended questions and was analyzed using thematic content analysis. The data set two consisted of 56 statements that were used to create a personal listening profile for each participating judge. The results suggest that 1) facilitative, evaluative, and transformative mediation models have both shared and different listening goals that require an extensive listening competence from the mediator judges, 2) complexity and relationality characterize listening in facilitative mediations, and 3) most judges sent highly or moderately person-centered messages and were excellent in interpretation and evaluation. These results suggest that the relationality of listening in court-connected mediations is imperative in meeting the needs of the mediating parties. The judges' listening behavior, listening goals, and the listening requirements of each mediation style suggest that the full potential of listening in court-connected mediations is yet to be reached.

In the post-modern legal context, alternative intrajudicial conflict resolution methods, such as judge-led court-connected mediations, have become a reckoned function of civil procedure (Salminen & Ervasti, 2015). One reason for this is the significantly increased caseloads of district courts (Ervasti & Nylund, 2014). In response, court-connected mediation, which is “a voluntary process under the management of the judge that is aimed at parties reaching a mutually satisfactory resolution of their conflict” (Ervasti, 2011, p. 2), was developed as a time- and cost-efficient way of solving cases amicably (Act on Conciliation in Criminal and Certain Civil Cases, 2005; Act on Mediation in Civil Matters and Confirmation of Settlements in General Courts, 2011). Mediation-based reconciliations target the future needs and interests of the parties, whereas litigation makes decisions based on past events (Central Finland District Court, 2019).

From the perspective of communication, court-connected mediations are interaction-based processes that highlight the role of listening (Salminen & Ervasti, 2015), particularly interpersonal listening. According to Worthington and Bodie (2018), interpersonal listening involves cognition and affect, like other types of listening, but the interpersonal context highlights the importance of listeners' behaviors. Listening behaviors are particularly emphasized in dispute situations, where negative emotions may hinder parties' abilities to communicate (Jameson et al., 2010). Most mediator judges rate the ability of the parties to have control over their own disputes through listening and discussion as one of the most important benefits of court-connected mediation when compared to trials (Keppo, 2020). Thus, a more profound understanding regarding listening, which the mediator judge uses when they facilitate mediation between the parties, is needed. This is particularly necessary

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because to reestablish a communication relationship between the disputing parties, the mediator judge, who is an impartial facilitator, needs to construct a psychologically safe space for the parties to communicate while gathering a comprehensive understanding of the content of the dispute and monitoring the communication relationship between the parties (Mayer, 2004). Therefore, the objective of this research, positioning itself within a constructivist, listening-centered approach to legal communication, was to examine the role of listening in court-connected mediations. In this approach, listening is considered the primary process that affects communication outcomes in a professional communication context (Brownell, 2018) and is guided by specific communication goals that stem from certain legal professional tasks (Ala-Kortesmaa, 2015).

## Theoretical framework

### *Court-connected mediations*

According to Salminen and Ervasti (2015), court-connected mediation can be applied using one of two routes. In the event of a conflict, the parties may start the process by applying to the district court for an amicable settlement, or if the dispute is already pending in the district court, the case may be referred to conciliation at the request of the parties. In this case, the trial is adjourned, and the case is referred to a mediator judge for conciliation. If the parties have reached an amicable settlement, this can be confirmed in the district court. If the matter cannot be settled and has been pending, the case will be returned to court.

Court-connected mediations are always voluntary and confidential and are conducted most often between private people and less often between companies (Ervasti, 2011). Discussions and negotiations in court-connected mediations usually take place in joint meetings. Occasionally, the mediator judge can arrange separate private discussions with each party before the parties return to the joint meeting. Even though the process is public, there are rarely any third parties present (GCP 114/2004, 2004).

Although the use of mediations in their current form started to develop in the United States in the 1960s due to general dissatisfaction with the judicial system, in Europe, mediations have long been considered a way to improve citizens' legal rights (Linnanmäki, 2019). Therefore, the European Union has promoted the unified use of mediation in its member countries. The court-connected mediations in Finland (a member of the European Union since 1995) mainly draw from two mediation models that are also widely used in other European countries as well as in the United States: facilitative and evaluative mediation (Mayer, 2004; Riskin, 1996). The third mediation model features the transformative mediation, which is relatively rarely used by mediator judges. Next, we provide a brief overview of these three models.

In facilitative mediations, the mediator judge aims to enable an amicable conflict resolution situation (Mayer, 2004). From the perspective of communication, the premises for facilitative mediation seem highly interactional, because a conflict can only be solved if parties genuinely listen to each other and understand that they have shared interests in their conflict. Therefore, the role of the mediator judge is to increase the psychological safety that the parties experience in the situation by bringing the parties together and listening to them carefully so that he or she can facilitate the interactions and create a positive atmosphere for the discussions. We draw from Itzchakov and DeMarree's (2022) definition of psychological safety, which broadly describes the concept as including a sense of acceptance and inclusion by one's interaction partners. According to Castro et al. (2016), this safety could be produced when listening in non-judgmental, non-evaluative, and non-threatening situations. Kluger and Itzchakov (2022) introduced the concept of high-quality listening, which can be used to establish psychological safety. They refer to high-quality listening as being attentive, responsive, and non-judgmental to one's interaction partner, demonstrating curiosity and attempting to understand one's partner, and validating one's partner's point of view, even when expressing disagreement. The premises for facilitative mediation meet these requirements, as the mediator does not

take a stance on factual matters because of the duty of impartiality (GCP 114/2004, 2004). The advantages of facilitative mediation are that parties are likely to implement the agreement that they created together, and they are more satisfied with the agreement if they have been involved in its formulation (Linnanmäki, 2019).

In the evaluative mediation model (Riskin, 1996), the settlement proposal is a normal part of the procedure (Linnanmäki, 2019). The settlement proposal has a major effect on the premises of evaluative mediation: legal rights and judicial system procedures are emphasized by the judge, and disputes are defined either legally or according to criteria that the parties have agreed to follow. From the perspective of communication, the role of the mediator judge is that of an expert in factual legal matters, not so much in listening or mediation techniques. Therefore, as a listening situation, evaluative mediation can resemble a trial in many ways.

Transformational mediation is the most rarely used model of court-connected mediation. It has received some critique, as some legal professionals consider it too idealistic or therapeutic for legal matters (Linnanmäki, 2019). This is because it was developed to uncover the unused potential of mediations, highlight the potential of mediation in the transforming relationship between disputing parties (Bush & Folger, 2005), and enable change and growth, as the mediator facilitates supportive interactions between the parties and emphasizes their respective roles in finding the solution (Bush & Pope, 2002). From the perspective of communication, this mediation model can be considered interactive and humane because both parties openly narrate, acknowledge, and discuss what has happened (Brazleton, 2019), including the emotional aspects and psychological reasons that might have triggered or might be attached to the conflict, in a psychologically safe setting. Listening can be the key factor in reaching the goals of transformative mediation: the facilitation of dispute resolution, improvement of the relationships between the parties, and the enabling of the personal growth of both parties (Bush & Pope, 2002).

### ***Court-connected facilitative mediations as listening situations from the perspective of mediator judges***

Court-connected mediations, as listening situations, are institutional but private. The listening of the mediator functions as a catalyst between the parties (Solosi, 2015). These mediations have several interactive phases (Ervasti & Nylund, 2014) during which the mediator judge's listening can help in creating a psychologically safe communication atmosphere. One phase is a preliminary separate meeting between the mediator judge and each party. In these meetings, the goal of the judge's listening can be to construct a general understanding of the disagreement between the parties, so the listening operates mostly at the factual content level. Later, they can compare the accuracy of their understanding against the written summaries of the dispute. However, in preliminary meetings, the judge must also understand the relational context of the dispute (Donohue, 2006). This calls for relational listening. In this research, relational listening is defined as what goes on between people communicating rather than the process of creating and sending messages (Brownell, 2018). This means that the focus is on the way in which listeners construct meanings from what a speaker has said. Relational listening takes into account that listeners have perceptual differences, and thus they must negotiate shared meanings as they frame communication situations differently based on their previous experiences and knowledge (Välikoski et al., 2021). This means that the listening focus is on the relational dimension of the interaction between the parties and how they construct meaning from the statements of the other party. This calls for the mediator judge to engage in high-quality listening, which expresses responsiveness (Itzchakov & Reis, 2021). According to Reis and Clark (2013), responsiveness helps people feel socially accepted and lessens concerns about self-worth, which, in turn, increases openness and willingness to consider other's points of view (Reis et al., 2018).

During the first joint meeting, which is the second interactive phase of court-connected mediation, the mediator judges can listen in a manner that creates an atmosphere suitable for amicable negotiations (Jameson et al., 2010). Listening can also be used to help the parties understand each other's

reasons and motives for the dispute and to suggest new ways of thinking about those motives and the dispute in general (Baraldi & Farini, 2011). This is particularly true if the parties consider the atmosphere in the joint meeting to be psychologically safe (Itzchakov & DeMarree, 2022), as that can encourage attitude change without any persuasion attempts. Trego et al. (2010) found that in these meetings, the mediator assists the parties in formulating their arguments by clarifying their views using alternative wordings and establishes links between the parties by verbally acknowledging situations of rapprochement between the parties.

The first joint meeting is often followed by separate meetings, which can be considered the third interactive phase of the court-connected mediation. Maintaining a trustful communication environment in separate meetings encourages interlocutors to share their thoughts more freely during joint meetings. If the communication challenges between the parties are the reason for the separate meetings, Aakhus (2003) suggested that the mediator can ease the situation by calling for the matters raised by the other party to be treated as if they were perspectives to prevent the idea in question from being true or false. Aakhus (2003) also pointed out that as such, the mediator does not appear to promote the rational handling of disagreements through critical discussion. It seems that the mediator must listen carefully to what is realistically possible instead of assuming that the parties would immediately find a solution that would lead to the ideal state of affairs.

Unless the dispute is resolved in the first joint meeting, the fourth interactive phase of the court-connected mediation includes more joint meetings, in which the focus of the mediator judge's listening is on evaluating possible reconciliation opportunities. According to Garcia (2012), in facilitative mediations, this can be done by offering indirect suggestions that reflect the content of what the parties have expressed and can take the form of questions, clarifications, encouragement, or informal discussions. Recently, perspective taking, motivational interviewing, and listening circles have also been noted as techniques that the listener can express to promote attitude change (Itzchakov & DeMarree, 2022) and, thus, enhance chances for reconciliation. All these techniques require slightly different approaches from the listener. McDermott et al. (2001) noticed that parties react to these in different ways, depending on how willing and ready they are to reach reconciliation. Thus, the mediator judge's listening plays a crucial role in assessing the attitudes of the parties.

## Research questions

Court-connected mediation itself and the interaction related to it, which includes a lot and various kinds of professional listening situations, are relatively new phenomena in Finland (since 2006). Therefore, understanding the dynamics and applicability of listening in court-connected mediations has significant professional and academic development potentials. As the facilitation of court-connected mediation can challenge the ways in which a judge usually listens, e.g., in trials, it is important from the perspective of reaching reconciliation to elaborate on listening in this legal communication context. Therefore, the objective of this study was to examine *how listening can be used in court-connected mediations*.

This objective was approached from three different directions. As different listening situations require different kinds of listening, a general understanding of each mediation model as a listening situation must be reached. Thus, we posed the first research question as follows:

**RQ1:** What kind of listening do the different mediation models require?

As facilitative mediation is the most frequently used mediation model in court-connected mediations in Finland as well as in all mediations in the Western world (Lohvinenko et al., 2021), we wanted to deeply investigate the listening it required. Therefore, we formulated the second research question:

**RQ2:** What kinds of listening features are prominent in facilitative mediation?

Based on the features of listening required in court-connected mediation as a listening situation, it was necessary to examine what Finnish mediator judges actually do when they listen in court-connected mediations, which led to the third research question:

**RQ3:** What types of listening behaviors do mediator judges in court-connected mediations engage in?

## Methods

As we wanted to get a more thorough understanding of the research topic phenomena, we chose a qualitative approach to uncover some of the relationships that existed between the intricate layers of our multifaceted research questions. The data collection (two data sets) was conducted during the annual meeting of the Association for Judges at the end of 2018. A total of 50 judges were approached in the meeting by asking them in person if they were willing to participate in a study that examined listening in court-connected mediations. The 46 who volunteered were first asked if they had facilitated at least 10 court-connected mediations, and the 44 who had done so were provided with data gathering forms, pencils, and erasers. Participants were asked to give their consent for the use of their data in a research project that would be conducted within 5 years of data collection. The anonymity of the participants was guaranteed. Their data were stored in an external hard drive that was password-protected and stored in a locked office. There was no need for the IRB procedure of our university, as the research did not include vulnerable subjects, and no university personnel or students were included in the participants.

The first dataset ( $n = 38$  judges) was obtained from a survey with 18 open-ended questions regarding three themes: 1) eight questions about communication and listening in facilitative and evaluative mediation models, 2) six questions about the person-centeredness of the messages that the participants sent as listeners, and 3) four questions about the participants' emphasis on emotion recognition. The participants spent approximately 20 minutes writing their answers to the questions. The number of participants in the first dataset was lower than that in the second dataset because 6 of the 44 participants opted out from responding to the open-ended questions.

We used thematic inductive analysis (Mayan, 2009) to analyze the qualitative data (dataset 1). Our analysis contained five phases.

The first phase, preliminary review of the data, started the inductive exploration of the data. During this phase, we kept rereading the data until we became fully familiar with it. We noticed that some recurrent answers related to certain ideas started to emerge. For instance, the participants referred to listening as “a useful tool when trying to understand the emotional side of the premises of the parties.” We made notes of our early impressions.

In the second phase, initial coding development, we started organizing the data in a systematic and meaningful way. We used open coding, which Braun and Clarke (2006) have defined as not having pre-set codes but developing and modifying codes as the data is worked through. The first phase had given us an idea about codes that we could use, so we coded the answers individually by making notes to the margins of the data, line by line. For instance, when the participants talked about what they did with their listening in court-connected mediations, we wrote down codes like “paraphrasing,” “helping,” “reasoning why,” and “elaborating feelings.” To ensure the reliability of our coding, we compared the coding afterward and resolved possible differences in the emphasis that was given to some themes through discussions.

In the third phase, theme development, we focused on developing themes from the codes that were created in the second phase. According to Braun and Clarke (2006), each theme must be broader than

the codes that were created. Our themes were predominantly descriptive. Some codes fitted into more than one theme, so there was slight overlapping with some of the theme content. We talked a lot about the theme development, and based on these discussions, we agreed that some of the previously created codes, such as “superficial,” were marginal. Therefore, we discarded them and focused on the consistently emerging ones in the theme development. The initial themes are discussed below.

### ***Critical listening***

We noticed that some initial codes referred to the kind of listening that covered functions such as understanding, evaluating, and forming an informed opinion. We placed these codes under the critical listening theme.

### ***Informative listening***

Some codes covered listening behaviors that referred to learning, grasping, and understanding. We decided to place these codes under the informative listening theme.

### ***Evaluative listening***

We had discovered codes that described listening behaviors such as examining, evaluating, and interpreting. We decided to gather them under the evaluative listening theme.

### ***Relational listening***

Some data described listening behaviors that were related to communication relationship establishment and maintenance. In the previous phase, we had named those with codes “focusing on the relationship,” “expressing interest toward the speaker” and “being non-judgmental.” These codes were placed under the relational listening theme.

### ***Dialogical listening***

We decided that codes that described listening behaviors which indicated that there was a mutual attempt to discuss the relational and topical meaning making processes in the relationship, such as seeking for and creating shared understanding, belonged under the dialogical listening theme.

### ***Empathetic listening***

Finally, we noticed that there were a few codes that all referred to offering support and understanding feelings and emotions. We combined those codes under the empathetic listening theme.

In the fourth phase, review of the themes, and fifth phase, defining themes, we reviewed the initial thematic categories. We realized that as the themes should be distinct and identifiable (Braun & Clarke, 2006), some of the themes needed to be merged to form a larger, overarching theme. When we started merging themes, we worked together and had ongoing discussions. Eventually, we reduced the number of themes from six to four. A good example of this is the factual listening theme, which describes the type of listening used to reach the shared goal of listening at the content level. This theme was formed from two previously distinct themes: critical and informational listening. The other theme that we formed by merging two other themes was judicial listening. It combined elements of informative and evaluative listening that we noticed were aiming at a legally sound reconciliation. This means that the elements of informative listening can be detected in both defined themes. Another new theme, facilitative listening, was formed by combining elements of relational and dialogical listening as we noticed that they aimed at creating a psychologically safe space and facilitated parties’

participation and understanding of each other). The last new theme, empowering listening, we formed by combining elements of dialogical and empathetic listening that aimed at facilitating empowerment and personal growth. Again, this shows that these two defined themes both have features of dialogical listening.

We also looked at the listening goals that kept emerging in the data. Their coding was a lot more straightforward. Two emerging codes were grouped to form a main theme that we named “content-level listening goals” and six codes were combined to form another main theme called “relationship-level listening goals.” When we formed the goal-related listening themes, we reflected them against the main listening themes described above to make sure they aligned in a sound manner. These main and subcategories are shown in [Table 1](#).

The second dataset ( $n = 44$ ) consisted of listening profiles that we qualitatively and manually compiled using 56 statements regarding listening behavior, emotion recognition and importance given to emotions in court-connected mediations.<sup>1</sup> The qualitative approach was chosen because we wanted to gather a descriptive understanding regarding the listening behavior of the participants and the total number of them was too low for valid statistical analyses. The first 36 of 56 statements drew from the self-reported the HURIER Listening Profile (Brownell, 2018), a listening test, which assesses the strengths and weaknesses of a respondent’s listening behavior and skills. The statements that are presented in it form six subscales (six statements under each subscale): hearing, understanding, remembering, interpreting, evaluating, and responding. As we were curious to see some evidence of the cognitive listening processes that the participants apply in their professional setting, we instructed to think about a court-connected mediation situation and estimate on a 5-point Likert scale (1 = almost never, 5 = almost always) how frequently they engage in listening behaviors that the given statements describe. As we knew that valid statistical analysis was impossible due to the low number of participants, we simply wanted to see frequencies and percentages of their choices.

The last 20 of 56 statements concerned information regarding person-centeredness, emotion recognition, and importance given to emotion recognition. These statements were formed by drawing information from previous literature regarding person-centeredness (Burleson, 2003), emotion recognition (Fersini et al., 2012; Hurley et al., 2014), and the different mediation models that all focus on different aspects of the dispute (Ervasti, 2011; Linnanmäki, 2019). Some examples of the statements are: “I think that at the core of the conciliation procedure are facts, not feelings or impressions,” “I enjoy the emotional challenge of listening to feelings in a conciliation process,” and “I encourage the parties to openly discuss their feelings.” We observed the degree of person-centeredness in the messages that the participants self-reported to have sent as listeners (1 = low, 5 = very high), how they recognize emotions in court-connected mediations (1 = never, 5 = always), and how important they consider emotion recognition to be in those situations (1 = no emphasis, 5 = very strong emphasis). Again, we were only interested in seeing directions that the answers of the participants took, so we counted frequencies and percentages of their responses. Based on the responses, we manually created an individual yet anonymous listening profile for each participant.

When creating the profile, we looked at the results of each participant, for instance, who had gotten a high score in interpreting, the importance they gave to person-centeredness (high, medium, or low) and emotions (high emphasis, medium emphasis, low emphasis) as well as emotion recognition (recognizes always, recognizes sometimes, recognizes never), and the additional information they provided regarding the mediation style they preferred to use in court-connected mediations. Again, due to the low number of respondents, we treated the data as if it was qualitative and the participants had literally written down, for instance, “I give high emphasis on the importance of emotions in X situation.” Combining the data qualitatively showed us interesting relationships between listening behaviors, person-centeredness, and emotions.

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<sup>1</sup>More information regarding the manual data gathering can be obtained from the 1<sup>st</sup> author.



**TABLE 1.** Thematic categories for listening and goals.

DEFINED THEMES	FACTUAL LISTENING	JUDICIAL LISTENING	FACILITATIVE LISTENING	EMPOWERING LISTENING
INITIAL THEMES	Critical listening	Informational listening	Relational listening	Dialogic listening
CODED EXAMPLES FROM DATA	understanding evaluating forming an opinion	learning grasping understanding	focusing on the relationship being non-judgmental	seeking for and creating shared understanding
DEFINED THEMES	to reach reconciliation	CONTENT- LEVEL GOALS to reach reconciliation in a legally sound manner	to create a psychologically safe space for mediation to facilitate parties' understanding of each other's emotions	Empathetic listening understanding feelings and emotions offering support RELATIONSHIP-LEVEL GOALS to facilitate participation to understand motives to facilitate personal growth

## Results

### *Listening in different models of mediation*

The first research question sought to identify the kind of listening required by the different models of mediation. The judges reported that at the content level of listening, all mediation models have the same purpose: to reach reconciliation. Even though different models of mediation give slightly different emphases to content-level listening, their general listening focus appeared to be on specific information regarding the circumstances, motives, and events that the parties disclose:

It takes time to get people to talk about their reasons. Small details are often the biggest indicators of motives that are usually fueled by emotions. Emotions manifest themselves in a variety of ways, so particular focus needs to be paid to the details. (J3)

Therefore, owing to the main purpose of the mediations, the content-level listening of mediator judges can be described as fact-based.

However, the results of the thematic analysis showed that in addition to the reconciliation goal, the different mediation models also had other content- and relationship-level listening goals. These goals appeared to affect listening:

I tend to lean toward the evaluative mediation model when the dispute focuses on financial matters, but if the dispute is about the custody of the child, then I choose facilitative model. Then the most important goal is to restore the relationship between the parents enough so that they can discuss the matters related to the child in a civilized manner. (J20)

The goals and the listening used to achieve those goals are illustrated in [Table 2](#).

As [Table 2](#) indicates, all mediation models call for factual listening. However, the most often used facilitative mediations combine that with facilitative listening, which targets a mutual understanding of the dispute. The judges reported that, typically, the parties had lost all trust in each other, as they could not find a solution to their dispute without an impartial mediator; therefore, this trust needed to be redeveloped first. Awareness of listening in general was considered a key factor: “I focus on sequential elements, emotions, and relational positions when I try to create an atmosphere for empathy and compassion” (J11). This allowed the parties to become aware of the mediator judge’s listening through the listening behavior containing summaries, as they reflected the clarity regarding facts, emotions, issues, and needs that have been brought up.

An interesting feature of the less used evaluative mediation model is its seeming lack of relationship listening goals. Instead, this mediation model seems to have an additional content-level listening goal: the mediator judge not only tries to reach a reconciliation goal but also does it in a legally sound manner. Therefore, participants indicated that the mediator judge’s listening was to be focused strictly

**TABLE 2.** Listening required in the different models of court-connected mediation.

	Facilitative mediation model	Evaluative mediation model	Transformative mediation model
Shared content-level listening goal	To reach reconciliation → factual listening		
Additional content-level listening goal		To reach reconciliation in a legally sound manner → judicial listening	
Relationship-level listening goals	To understand the motives of the parties, to facilitate them in understanding each other, and to create trust between them → facilitative listening		To facilitate active participation, empowerment, and personal growth → empowering listening

on legal facts: “In evaluative mediations, I try to listen so that I can create an objective overview of what has happened and recognize the relevant legal merits of the case” (J2). As the legal accuracy goal is reached with knowledge and interpretations combined with experience, listening to the arguments of both sides calls for judicial listening. This is because judges reported that in evaluative mediations, their listening was often informative and evaluative like listening in trials. This means that they listen for key words and concentrate on remembering legally relevant descriptions and details. However, the informality of the mediation situation seems to tempt the parties to include persuasive elements in their descriptions. As listening is done with legal fairness in mind, the mediator judge must engage in evaluative listening that focuses on both the content and relationship levels of the message expressed by the parties.

The transformative mediation model, although rarely used, places heavy emphasis on the relationship-level listening goal in addition to the content-level listening goal of reaching reconciliation. The participants were relatively aware that listening in this mediation model seeks elements that can activate participation, increase dignity and trust, and empower disputants to solve their conflict and recognize each other’s needs and interests. The results suggest that empowering listening responds best to these needs:

Transformative mediation is all about understanding how the parties feel. People are motivated by happiness, sadness, anger, and so on. If I don’t understand what emotions the parties go through and what emotions exist between them, it is hard to help the parties reconcile. (J6)

However, the participants mentioned that the other listening goal embedded in this mediation model is to enable the personal growth of both parties, suggesting that empathetic listening is also required. It allows the mediator judge to identify the skills that the parties lack for making a constructive change because listening is conveyed with messages that are highly empathic, informal, and explanatory.

### ***Features of listening in different phases of facilitative mediation***

The second research question focused on the different listening features typical of facilitative court-connected mediation, which is used most often in Western mediations and Finnish court-connected mediations. The results indicated that complexity was the main feature that characterized listening in all phases of this mediation model among participants. Listening in facilitative mediations can be considered complex because the mediator judge’s listening carries the dual task of listening to the content and observing the relationship constructed in the communication process:

If I fail to listen to elements that tell me about the actual dispute and about the relationship between the parties, the probability of the parties reaching reconciliation decreases greatly. Or if I don’t openly express that I have paid attention to both the dispute and the relationship, the parties seem to be less content with court-connected mediation as a legal process. Then, they maintain their negative attitudes toward the other party and the legal system as an institution (J21).

When the factual listening of the mediator judge covered both the content and relationship levels of the message, participants reported helping the parties see the unfair situation in a constructive light. This caused them to be more likely to be open to alternative solutions, express interest in interactions, and perceive a higher possibility of a positive outcome for both parties.

The necessity of listening to the relationship between the mediating parties was consistently brought up in the mediator judges’ responses. When the judges tried to encourage the parties to jointly search for explanations that both could accept, they emphasized the dialogic nature of relationship building: “I pose open-ended questions to both parties and acknowledged the emotions that the parties express. Then I try to place the emotions in a larger perspective so that the parties could see the positive effect of the reconciliation on a wider scale” (J30).

The complexity of listening had slightly different emphases on different phases of the facilitative court-connected mediation process. In preliminary meetings that the mediator judge held with the parties separately, relationality-directed listening was seen as key to the construction of a confidential

communication relationship with the parties. Further, a listening goal that made listening more complex in the preliminary meetings was the monitoring of the communication behavior of the parties:

I try to ask a lot of questions so I would get them to talk with me and be able to get a feel of how the parties express themselves. It also gives me some insight into how ready the parties are to discuss with me and with each other and to understand the whole mediation procedure. (J6)

This information acquired with the dialogue in the preliminary meeting was then used to decide how to communicate with the parties during the mediation process.

In joint meetings, the judges tended to invest in the communication relationship by being simultaneously very patient but also very observant listeners. Much time had to be spent on building trust and creating a communication atmosphere in which the parties felt safe enough to talk about the core issues. After a sufficient level of trust had been reached, the feature emphasized in the mediator judges' listening was selectiveness. The judges' said that they focused on asking open-ended questions that elicited enough information from the parties so that they would understand the perspective of the other. They also monitored the nonverbal communication of the parties and their use of space to create a comprehensive understanding of the relational dimension of the dispute.

To reach reconciliation, after the first joint meeting, the mediator judges used separate meetings to map out the mediation atmosphere and to gather more detailed information about the dispute: "The parties are usually more willing to disclose sensitive emotional or factual information when the other party is not in the same room, so I ask mostly explanatory questions from both parties" (J4). In separate meetings, descriptions and explanations were at the heart of listening. The mediator judge also tried to reassure the parties that their specific points of view had been heard. This was done by offering intermediate summaries that showed listening behavior and by describing the situation and emotions with alternative words to enable the parties to have a new perspective that was acceptable to both parties.

### ***Finnish mediator judges as listeners in mediations***

The third research question examined the kinds of listening behaviors do Finnish mediator judges engage in in court-connected mediation listening situations. The features examined were strongest and weakest listening abilities (Brownell, 2018), person-centeredness and emotion recognition. Based on the results, 76% of the participants seem to actively engage in listening behaviors that emphasize the relationship-orientation of listening in court-connected mediations. In addition, they pay attention to the content of the speakers' messages. Four of them ( $n = 44$ ) reported in their answers to the open-ended questions that even though in trials they consciously focus on content, they also observe the relationships between the people present in the trial:

"In trials, I usually look at the notes that I make while I listen. At the same time, I try to observe the parties, their facial expressions, their responses to what the other party says. Sometimes having to analyze it all feels slightly draining. (J31)

According to the judges, getting used to paying attention also to relationships makes it easier for them to switch from a more formal communication environment to a less regulated professional communication situation.

When the participants participated in the data gathering, they were asked to evaluate their strongest and weakest dimensions of listening. Almost all mediator (40 of 44) judges self-reported their best listening abilities to be hearing, interpreting, and evaluating, and assumed that their remembering and responding-related listening had room for improvement. The statement responses confirmed their strengths in interpreting and evaluating, but contrary to their assumption, their hearing ability received the lowest scores [64% got a total score of 12 points (max. 30 points) or under in the subscale of hearing].

The results suggest that 76% of the mediator judges ( $n = 44$ ) sent highly or moderately person-centered messages, and 24% of them sent low person-centered messages. Among all the mediator judges, 41% placed high, 24% placed moderate, 17% placed low, and 18% placed no emphasis on emotion recognition. Their responses also indicated that mediator judges who sent highly person-centered messages often seemed to place a strong emphasis on emotion recognition and actively observed others' emotions. If they sent moderately person-centered messages, they usually placed moderate and low emphases on emotion recognition, even though they self-reported usually noticing emotions that were shown. Low person-centered messages were related to those participants that reported that they did not usually notice emotions, nor did they give any emphasis on emotion recognition.

## Discussion

The goal of the present study was to examine listening in court-connected mediations. Our findings highlight two conclusions related to the applicability of listening in that context. The first conclusion is that facilitative court-connected mediations call for highly relational, high-quality listening. This finding is supported by Goldberg (2005) and Goldberg and Shaw (2007), who reported that in mediations, communication relationships between mediator judges and the parties of the dispute are not stable and definitive; thus, the entire mediation can lead to an unsuccessful result if the judge does not listen carefully enough to offer the parties the kind of mediation support that they need. Our findings emphasize the role of support: the more the mediator judge can create a psychologically safe space for the parties and facilitate the reconstruction of a functional communication relationship between the parties by applying facilitative and empowering listening and focusing on the relational cues that they send, the more likely the communication atmosphere is suitable for reconciliation negotiations. When the mediator judge understands the relational context of the dispute, we can assume that they can better build trust between the parties. This finding resonates with that of Edmondson (1999), who discovered that a listener can create psychological safety by setting a stage, inviting participation, and responding productively. This finding is also supported by the study conducted by a study by Alberts et al. (2005) which found that the parties were more satisfied with the mediator and mediation process and its outcome when the mediator used a facilitative style rather than a problem-solving style. The more the mediator used communication that indicated that the relationship between the parties mattered, the fairer the mediator and mediation process was for the parties (Alberts et al., 2005).

Traditionally, judges' listening focused merely on the factual content of messages (Ala-Kortesmaa, 2015), but recent research (Ala-Kortesmaa & Välikoski, 2023, forthcoming) indicates that judges also listen to nonverbal and other cues that give information regarding the atmosphere of the communication situation and the relations between parties. This is an important change, as the more established and safer the communication relationship is in a court-connected mediation, the more likely the parties are to elicit the kind of information that helps the mediator judge facilitate reconciliation. Therefore, we claim that facilitative listening enables the use of factual listening, and that the use of various listening methods can be considered highly useful in mediation. The connections between different listening behaviors and listening goals are illustrated in Table 3.

As can be seen from Table 3, certain types of listening behaviors facilitate reaching certain listening goals. For instance, factual listening is used for reaching reconciliation and judicial listening for reaching reconciliation in a legally sound manner. Facilitative listening is used for creating a psychologically safe space and facilitating parties understanding of each other's emotions, but also for facilitating understanding in general and understanding motives that arise. These last two goals overlap with the goals of empowering listening, which is used also for facilitating empowerment and personal growth. This conclusion regarding listening behaviors and goals expands 2012) discovery that the experience of both being listened to by the judge and the other party and having their (the party's) views considered is related to reaching an agreement. In other words, the mediator's

**TABLE 3.** The connection between listening behaviors and listening goals.

DEFINED THEMES	FACTUAL LISTENING		JUDICIAL LISTENING		FACILITATIVE LISTENING		EMPOWERING LISTENING	
INITIAL THEMES	Critical listening	Informational listening	Evaluative listening	Relational listening	Dialogic listening	Empathetic listening		
CODED EXAMPLES FROM DATA	understanding evaluating forming an opinion	learning grasping understanding	examining evaluating interpreting	focusing on the relationship being non-judgmental	seeking for and creating shared understanding	understanding feelings and emotions offering support		
DEFINED THEMES	CONTENT-LEVEL GOALS				RELATIONSHIP-LEVEL GOALS			
INITIAL THEMES	to reach reconciliation	to reach reconciliation in a legally sound manner	to create a psychologically safe space for mediation	to facilitate participation	to facilitate empowerment			
			to facilitate parties' understanding of each other's emotions	to understand motives	to facilitate personal growth			

facilitative listening facilitates both the relational goals and the dispute matter-related reconciliation goals of the mediation.

This notion regarding facilitative listening and its use leads us to our second conclusion. As alternative conflict resolution procedures seem to lead to an increasingly less formal direction (Fiadjo, 2004) or toward a stiffer, more legal direction (Linna, 2017), we suggest that court-connected mediations also have room for development because the potential of listening has not been sufficiently exploited. This conclusion is based on the fact that as different court-connected mediation models emphasize different aspects of listening, and as Finnish mediator judges engage in different kinds of listening behaviors, certain kinds of listening behaviors seem more suitable for certain mediation models than others. According to the listening behaviors that the participants self-reported, most mediator judges were relatively well adapted to the listening requirements of the most-used facilitative mediations. However, some of the mediator judges clearly focused on the content of the messages and did not invest as much in the relational level of the communication relationship. Their listening behaviors were fact-based and reflected those typically associated with a judge in a trial. As evaluative mediation model calls for relatively light emphasis on relationship level of the communication relationship, the listening behaviors of the judges that send low person-centered messages could be most applicable in those types of evaluations.

Judges that lead facilitative mediations must pay particular attention to the underlying issues and unspoken emotions that emerge in the conversations between the parties and the mediator judge

(Solosi, 2015). Highly person-centered messages can be used to help relationship restoration, so we suggest that facilitative and transformative mediations would benefit from mediator judges who send high or moderate person-centered messages and who are particularly good at interpreting and understanding. This finding is supported by the findings of Itani et al. (2019), who suggested that persons with intrinsic motivation are more likely to practice listening skills that increase value creation with the speaker when serving others. Goldberg (2005) and Goldberg and Shaw (2007) indicated that in mediations, communication relationships between mediator judges and the parties of the dispute are not stable and definitive, so the whole mediation can lead to an unsuccessful result if the judge is not listening carefully enough to offer the parties the kind of mediation support they need.

The evaluative mediation model requires the listener to approach topics efficiently from various perspectives and be comfortable with multifaceted and challenging information, because in evaluative mediations, the mediator judge expresses their listening behavior by offering a concrete conciliation suggestion in which different aspects are evaluated carefully from the legal point of view (Ervasti & Nylund, 2014). In our research, mediator judges who sent moderate or low person-centered messages, encouraged others to reason their opinions, and focused on essential legal matters seemed like the best fit for this mediation model based on their listening behaviors. This is because in evaluative mediation, the communication seems to focus directly on reaching reconciliation (see Aakhus, 2003; Trego et al., 2010). As evaluative mediation does not emphasize the relationship level of messages as strongly as other mediation models do, it also suits listeners who send moderate or low person-centered messages and are particularly good at evaluating. In general, the legal evaluativeness of mediation varies from one evaluative mediation to another, and some judges emphasize legal evaluativeness more than others (Linnanmäki, 2019). As listening in evaluative mediations is judicial and does not focus on the relationship between parties, the relational communication in them cannot necessarily be considered a priority, as the way disputes are solved in them includes the aspect that sometimes it may result in unnecessarily adversarial relational positions and conflicts that can escalate beyond what the situation demands (Curhan et al., 2022).

Even though the transformative mediation model is rarely used in Finnish and other Western court-connected mediations, the results of the study refer to the direction that the listening requirements of transformative mediation could be met best by listeners, who send extremely highly person-centered messages, place high emphasis on emotion recognition, and have lots of experience in implementing the facilitative mediation model. This is because in the transformative mediation model, it is expected that in an ideal situation, with the help of the mediator judge, both parties can communicate their needs, create options, come to a rational agreement, and stick to it (Bush & Pope, 2002). This finding seems to expand the notion of Gordon and Chen (2016), who discovered that feeling understood can be leveraged to both restore the relationship between parties of a dispute and work as a buffer against relationship dissatisfaction after the conflict, as it offers practical information about the listeners that could be placed as mediator-judges to transformative mediations.

Our study shows that the Ministry of Justice and other legal authorities could benefit from our results when offering communication and listening training for mediator judges. Although court-connected mediation is a professional listening situation that emphasizes the role of listening in facilitating mediations, according to Ervasti (2011), currently, only a fourth of district court judges have received three or more days of basic mediation training, and only a tenth of them have undergone two days of advanced mediation training. This suggests that mediator judges are expected to self-evaluate both their ability to conduct mediations and their listening competence and seek training if they consider it necessary.

In practice, those judges who recognize that they prefer to listen to the content rather than focus on the relationship building aspect of mediations, could be assigned cases that require more evaluative mediation, and more experienced, person-centered judges could focus on the transformative mediation model. This could create three kinds of benefits. First, the parties may reach settlements more easily and comply with the agreements when they feel that the mediator was able to offer the kind of mediation that they were looking for when they sought mediation and that they received proper

support from the judicial system. Second, mediator judges could mediate cases that better match their listening behavior. Alternatively, if a mediator judge recognized a need for training regarding how to express supportiveness and manage conflict situations more diplomatically, such activity could be offered to improve the quality of services that the judicial system offers for citizens. Third, the judicial system could benefit from increased cost and time efficiency, as courts could allocate mediation cases more appropriately.

## Limitations and future research

Although this research offers a novel approach to communication and listening that takes place in court-connected mediations, it also has some limitations. Its major limitation is that the number of participants. Therefore, we could not examine possible statistical intercorrelations between the different variables, which could have further enhanced our analysis and discussion. However, the small yet authentic data sample also had its benefits, as it enabled the manual creation of extensive personal listening profiles with person-centered aspects for all participants. The data gathered are unique in their representativeness because the judges who participated represented circa 10% of all Finnish district court judges (A. Pajuniemi, personal communication, January 27, 2022).

Some of the defined themes that we discovered in the thematic analysis contained same initial themes. This overlapping is a phenomenon that describes well the flexibility of listening. Different themes share partially similar features but the combinations they form in different types of listening situations make them stand out as distinct, defined themes. Therefore, we considered the overlapping an asset regarding the application of various listening behaviors in court-connected mediation instead of seeing it as a possible challenge to the conducted thematic analysis.

In the future, we suggest repeating this study with a larger participant group and to include more questions that compare listening in mediation and listening in trials. If such research focused on the listening behaviors of mediator judges and which mediator judges have a high turnover, the results could be significant to both academia and the Ministry of Justice. A fascinating research topic would also be to examine if matching certain listening behaviors with a certain mediation style could increase the work satisfaction of mediator judges and bring in some cost benefits. This could also provide interesting information regarding how different professional dimensions of listening affect procedural interactions in mediation (Ala-Kortesmaa, 2015).

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No potential conflict of interest was reported by the authors.

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