Listening for Mediators
Theory-of-Change Symposium
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Russ Bleemer argues that mediators should focus on good listening practices, noting complaints that mediators haven't carefully considered parties' arguments. These complaints spark questions whether mediators and mediation program officials are stretched too thin and are too reliant on pre-session preparation. Russ is the editor of *Alternatives to the High Cost of Litigation*, a newsletter of the International Institute for Conflict Prevention and Resolution (CPR), a New York-based nonprofit think tank.

Listen Up: One way to move the mediation profession ahead is to re-emphasize the most essential skill the profession needs to thrive: listening.

"Many people are unable to hear you unless they feel heard."[1] In mediation, "We actively listen to the participants by giving them a voice and empowering them in an environment where the core principle is self-determination."[2]

Excellent listening should be a given for mediators. Generally, people aren't good at listening and don't admit it.[3] Mediators believe it is a best practice that they routinely perform.[4] It should not be an unattainable aspiration for parties to feel heard in mediation.[5]

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[1]Brian A. Pappas, *How to Listen for Persuasion*, in NEGOTIATION ESSENTIALS FOR LAWYERS Ch. 19 (Chris Honeyman & Andrea Kupfer Schneider, eds., 2019).

[2]Robert A. Creo, Master Mediator column, *Back To Basics: The Playing Field*, 33 ALTERNATIVES TO THE HIGH COST OF LITIGATION 24 (Feb. 2015).

[3]*See, e.g.*, Amy Morin, *9 Mistakes That Make You a Bad Listener*, INC. (Feb. 22, 2016).

[4]Stephen B. Goldberg, *Research Backs Survey Results: Achieving Rapport Is the Key to Getting Mediation Parties to Reach a Settlement*, 24 ALTERNATIVES TO THE HIGH COST OF LITIGATION 99 (June 2006) ("The primary technique relied upon by the mediators in developing rapport was empathic listening.").

[5]*See* Model Rules for the Lawyer as Third-Party Neutral Rule 4.5.6 (2002) (developed by the CPR-Georgetown Commission on Ethics and Standards in ADR). Rule 4.5.6 states, "The lawyer-neutral shall use reasonable efforts to conduct the process with fairness to all parties. The lawyer-neutral shall be especially diligent that parties who are not represented have adequate opportunities to be heard and involved in any ADR proceedings."

Mediation trainers put listening front and center. They teach that listening means hearing.[6]

> [M]ediators who were perceived as good listeners by their disputants were also perceived as more trustworthy. These disputants also reported higher satisfaction with the process, a willingness to recommend that mediator, and perception of fairness from the decision. Carl Rogers, one of the noted fathers of modern psychology, recommended using a mediator who is skilled in listening in order to overcome failures in interpersonal communication. These failures, according to Rogers, are largely caused by people's tendency to judge and evaluate what they hear. A mediator who demonstrates good listening should be able to lay aside personal own feelings and evaluations, listen with understanding to each party and clarify the views and attitudes each holds.[7]

The need for and importance of good listening in mediation is so obvious that listening's essential character may contribute to mediators taking it for granted or overlooking it entirely. Mediators listen – but not always with needed mindfulness or thoroughness.

Get a Load of This: With the development of a genuine mediation culture comes an unfortunate regression. In some parts of the profession, it appears that the same small group of mediators handle the bulk of the cases. Court staffers and elite mediators, in particular, fill their schedules to deal with the flood of requests for their services.

Routinized use of mediation – a very good thing – has been accompanied by routinized procedures. The efficiencies derived from routines mask a troubling evolution that may undermine mediation's strengths of flexibility and creativity.

Procedures ostensibly designed to provide flexibility and efficiency have become a frequent feature of parties' tales about negative mediation experiences. Parties' first contacts with mediation, often through administrators, have become speeches about calendaring procedure and the need to file mediation statements. Court programs push litigants into a queue.

The thriving practices of some private practitioners has many in the profession declaring victory by installing mediation into the legal profession and corporate America.

Most cases settle. So all is well, right?

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[6]*See, e.g.*, a sample Centre for Effective Dispute Resolution-International Institute for Conflict Prevention and Resolution agenda for Advanced Mediation Skills Training allowing for an active listening discussion. *See also* Kathleen A. Bryan, *Use Mediation Training to Be a Client-Centered Lawyer from the Experts*, CORPORATE COUNSEL (March 6, 2014).

[7]Guy Itzchakov & Avraham N. Kluger, *Changing the Other Party's Attitude with High Quality Listening*, in NEGOTIATION ESSENTIALS FOR LAWYERS Ch. 20 (Chris Honeyman & Andrea Kupfer Schneider, eds., 2019).

But what about the ones that don't?

Pay Attention: What is emerging is parties – from individuals on budgets with family matters at stake to corporate parties – who say that their positions weren't heard once they get through the doors of mediation.

Mediators usher parties into the hearing. Some parties who do not settle are ushered out, saying they weren't heard. For people involved in conflict, it's not an unusual reaction.

But still.

Some dissatisfaction isn't a lack-of-preparation problem. In fact, the problem may be the opposite: a reliance on advance preparation that has been promoted as best practice.

Is preparation *hurting* mediation? Of course not. But it's also not unusual to hear participants in unresolved cases say that information provided before the mediation session dominated the mediation.

No one is against increasing preparation. Improving preparation is a worthy and important goal for building mediation confidence and use, and it is well represented in this symposium.[8] It's the bedrock for building the resolution between the parties.

Parties dissatisfied with mediation are frequently reporting – more like muttering under their breaths – that the mediator has sized up the case and is unresponsive to their arguments in face-to-face meetings. The reliance on preparation, according to some disgruntled parties, leads some mediators to rely on their preconceived notions of the case. Parties are complaining about not being heard.

It's not that the advocates and the parties eschew evaluative mediation. Rather, some mediators' reliance on preparation focuses them to move **this** case along – because they have supposedly seen it before – so that they can prepare for the next case.

Am I Really Listening?: To be sure, research shows that "being heard" is, at best, a middle level goal in mediation, both for parties and providers.[9]

Parties often are reluctant to criticize mediation because the process was not as advertised. Perhaps the mediator failed to looked at income, one parent's needs, or the other parent's job difficulties. Or perhaps that legendary private mediator said he's seen

[8]*See* David Henry, The Case for Mediation Optimization Orders (Oct. 17, 2019).

[9]International Mediation Institute, Global Pound Conference Series, Cumulated Data Results March 2016-September 2017 (2017).

cases like this and, without carefully analyzing the issues, urged a party to take the deal.

When parties say that the mediator didn't hear a word about their case, they may be whining. Instead of immediately focusing on the litany of the party's case problems, it is time for mediators to ask themselves the following questions about whether the parties were heard in mediation.

What were my expectations going into the case based on the materials I received before meeting parties in person? How did I reflect that?

Did I focus too much on process details? How many times did I raise calendar issues before and during mediation sessions?

Did both parties discuss the case in caucus with me? Did I give them a chance to make their case and not just present offers? What did I bring to one side based on discussion with the other side in caucus?

Did I analyze the parties' statements with them, face to face? Did I give them a chance to express their feelings?

Was the process an open exchange – or a box with overly-strict time limits?

What, exactly, did I hear about the parties' cases in those matters that didn't settle? How much of it was them, and how much of it was me?

Be Clear about This: Ultimately, most parties are simply acquiescing to the mediation, the provider's calendar, and the program's structure. They are accepting the mediators' expertise, which research shows is at or near the top of the reasons for their selection.

But they are not necessarily endorsing any of it, at least not when they walk into the mediation room. They think that's what mediators need to do. They want a substitute for court. They want a process that gives them a chance to air their views and have them listened to.

Sophisticated advocates and parties want to see their side's case on the table. And their adversaries'. Discussed and analyzed. One-time users have even less reverence for the mediator's resume, structure, and schedule.

Mediators' failure to listen adequately shouldn't be the reason why parties fail to reach agreement. Mediators can easily explain their role and why they are not backing a party's point of view on the case.

If parties wonder why mediators didn't listen or comprehend the party's position, then the mediators' process skills need work. If parties leave their mediations feeling that

they weren't heard, their mediators have undermined their professional responsibility to provide good a mediation process.

When lawyers and litigants start swearing off mediation as just an extra step in litigation, mediators need to ask why – and what they should do to improve their process.

Did You Listen? Did You Hear?: This symposium emphasizes many important points about the business of mediation. Over time, mediators and mediation programs have been quite successful in building it into litigation.

This symposium is a marvelous look forward with suggestions for change. This contribution suggests that it's time to reinvigorate mediation by focusing on a basic skill that makes mediation work and instills confidence in the users.

Some parties always will be unable to reach good agreements in mediation, and some cases always will wind up in court. It happens.

But it's mediators' responsibility to make sure that it doesn't happen because they failed to hear the voices in the room.