

Empathy in Mediation Listening Between the Lines

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Like it or not, mediation is a lot more than finding the range for settlement and calculating the midpoint. Most often, emotions play a central role in successful settlement. Emotions can define the scope, direction and outcome of a conflict as much as legal positions or underlying interests. Lurking beneath the surface, most legal disputes have an unresolved emotional component that needs to be addressed. The mediator's ability to listen, discover and acknowledge that component enhances the chance for a successful settlement and a more satisfied client.

While we easily acknowledge the emotional subtext in family and employment disputes, its presence in commercial and business cases is not always recognized. The resolution of these disputes often hinges on attitude, pride and saving face.

The late Roger Fisher, co-author of *Getting to Yes*, and one of the leaders in the world of negotiation and mediation, devoted an entire book to the subject. In *Beyond Reason*, he wrote that, "as lawyers, we favor reason over emotion in legal disputes. We are frustrated when people don't face facts and behave unreasonably." So it's often the mediator's job, to discover and acknowledge the emotional or core concerns of a dispute and help the participants move from negative feelings, which block settlement, to positive emotions which will permit it.

Success at settlement often depends on the mediator's capacity for empathy. Mediators must display empathy to two competing sides while remaining neutral. It is both an emotional and intellectual task; one in which you put yourself in the shoes of the other person in order understand that person's emotions or feelings. A mediator needs to be comfortable with the expression of emotion and curious about the emotional core of a dispute.

To do his or her job well, a mediator must listen to and acknowledge frustration, anger and pain. The best mediators know how to listen without criticism and suspend judgment. Mediators cannot hope to assist participants in settlement without first meeting them where they are emotionally.

If this sounds too touchy feely, consider the results of two surveys about mediation. The first concluded that half of all mediated commercial disputes "get personal." In the second, participants reported that a mediator's capacity for empathy is one of the most important factors in reaching successful settlements.

So how does a mediator show empathy? This practice is more art than science. When asked, I've described what I do in mediation as "listening between the lines." I listen carefully to what the participants tell me and, just as important, I listen for what is not said. Stephen R. Covey, author of the series, *7 Habits*, wrote "in empathic listening you listen with your ears, but also more importantly, you listen with your eyes and with your heart. You listen for feeling, you listen for meaning, you listen for behavior. You sense, you intuit, you feel... you deal with the reality in another person's head and heart."



Judge Elaine Gordon (ret.)

A note from Judge Gordon

Happy New Year from all of us at Gordon ADR. We wish you health and happiness in 2015.

Thank you to all the subscribers of the Connecticut Law Tribune who voted in the recent "Best Of" reader's poll. For the second consecutive year, Gordon ADR was the first place winner in the ADR category.

My column this month is a reprint of a recent article I wrote for the Connecticut Law Tribune. I hope you enjoy it.



To contact Gordon ADR or view Judge Gordon's calendar visit:
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With some callousness, we often talk about the litigant's need to vent. But telling one's story is a necessary step toward resolution. Psychology teaches us that people must feel that they have been heard before they are able to move on and let go of the dispute. This need for catharsis is often overlooked and leads to deadlocks – especially in what appears to be a "nuisance" case or disputes where the parties are excessively unreasonable.

Having sat as a trial judge for 23 years and now with over 400 mediations under my belt, I have a whole new understanding of the role empathy plays in settlement. In a public courtroom, with a steady stream of objections and cross examination, it is nearly impossible for participants to have their emotional needs met. It's just the nature of the process.

Last month, before starting a mediation session, I was cautioned by the lawyers that the case was unlikely to settle because one party was stubborn and unreasonable. While meeting in caucus with his lawyer, the individual spoke at length about his case. His anger was palpable. For over an hour the client talked, not just about the facts of the case, but about his frustration over the damage his business had suffered.

Without interrupting, I listened carefully until the client seemed to sense I heard him. I told him only that I could see this had been very difficult for him. But that was enough. Having vented, and feeling understood, he relaxed and regained some objectivity. Only then could we talk about the dispute and begin to settle the case. Not only did the case settle but, as we were leaving, the client gave me a hug and told me how relieved he was to put this chapter in his life behind him.

Today, we live in a time where clients expect the legal system to recognize their emotional needs. Mediation offers them the opportunity to speak, be heard, and acknowledged. Strong emotions impede clear thinking. Once clients' emotional concerns are met, they can open their minds and see a path to settlement.

Elaine Gordon is a retired Superior Court judge and founder of Gordon ADR. She is a member of the National Academy of Distinguished Neutrals and a Distinguished Fellow of the International Academy of Mediators.



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