

QUALITIES OF A GOOD MEDIATOR

Lax mi Kant Gaur
Mediator
Karkardooma Court
Mediation Center Delhi

There can be a long list drawn of the qualities, which a mediator should possess. They sometimes come from how one looks at the mediation or the kind of mediation a person is involved in. The attempt here is to lay down a few basic qualities, which every mediator should have. They are as follows:

Trust

A mediator is nothing but a 'bicholia' or a "go in between", whose office is used by the two parties in a dispute to resolve their dispute. We all are familiar with the role a 'bicholia' plays in fixing marriages between the parties and an active role he plays in the resolution of disputes between the parties if in case any such situation arises at any time in future. We have seen the members of trading communities using the third parties, informally, to resolve their disputes. There is one thing common between such 'bicholias' and third parties resolving the disputes between the parties that they enjoy the trust of both the parties. One can work as a mediator so long as he or she enjoys the trust of the parties. Appointment of arbitrators can be fixed by an agreement between the parties; parties have no choice in choosing their judge but the parties can pick a mediator only when they have a trust in the mediator or they have a reason to believe that they can trust him. The reason for it is simple. Although more often than not a mediator follows a structured process for resolving the disputes but he or she does not maintain any formal record of what transpires in the proceedings. A party may never come to know what goes through the mind of a mediator. In a court proceeding or even in arbitration proceedings both the parties know what is being done in the proceedings. There are no close door one to one meetings by either the arbitrator or a judge with the parties. In case of a mediator on the other hand these close door one to one meetings are his most important tool to discover the real interest of the parties. The parties communicate to the mediator in confidence that their secrets will not be revealed to others unless he or she himself or

herself so desires. All this is possible only and only when they completely trust that the mediator will not act in any one's favor particularly but will work in the best interest of both the parties.

Neutrality

The faith reposed by the parties in the mediator at the time of his appointment needs to be maintained not only till the entire proceeding is over but also there after. This faith *should not only exist but also seen to be existing all the time*. Neutrality is that overt act or those overt acts of a mediator, which give reason to the parties to believe that they can continue to have faith in him. A mediator should never give an impression that he is leaning in favor of any of the parties. His conduct should reflect that he is paying equal respect to both the parties; he is paying equal attention to both the parties; he is not extraordinarily respectful to one of the parties; he is not extraordinarily chatty with one of the parties and so on. This neutrality should get reflected not just inside the mediation room but also outside. *It is the neutrality, which reinforces trust.*

Confidentiality

One of the reasons that the parties opt for mediation is that they do not either want to wash dirty linen in public or if it is a trade dispute they don't want others to know their trade secrets or they know that adjudication of dispute in the open forums like court may lead to their making their financial condition public. The parties to the dispute approach the mediator with the hope that what ever would come to the knowledge of mediator during the proceedings will remain with him only.

In the case of matrimonial disputes as we know once a case is filed in court there is a flurry of allegations from both the sides against each other. Both the parties go out of their way to out shame each other. The result is multiplicity of cases between the parties, reaching the point of no return, making the conciliation between the parties next to impossible. The allegations in mediation proceedings are made , sometimes of very serious nature, in private. The mediator keeps these allegations to himself, refrains from conveying them to the other party unless extremely necessary. In case he realizes that it requires to be conveyed he would suitably tone down these allegations.

Some times the disputes on the face of it look to be entirely different from what they actually are. The parties divulge a lot of personal details to the mediator in confidence that they will not be shared with not just the other party but also with no one else. They

may not be directly connected with the dispute but relevant for negotiations. It is an unwritten promise that a mediator would maintain confidentiality at all costs. Confidentiality is just another facet of trust.

Listen patiently

One should know in most of the cases personal grievances precede the actual dispute or it is the personal grievances, which swell into bigger disputes. When the parties walk into mediation they carry a lot of emotional baggage. They look for an opportunity to offload that from their chest. They look for an opportunity that someone hears them. Most of the time courts do not have the time to hear the parties nor the inclination to hear what is not an issue. Courts look for solutions in terms of law not emotions. It is also true that it is the lawyers who are heard by the court not the parties to the dispute. Mediation offers them this opportunity. Once a party goes with a feeling that he has been heard to his satisfaction then a mediator may consider he has won half of the battle. In case a party gets a feeling that he has not been heard, mediator should consider he has lost the battle even before he had taken up the arms. Chances of mediation resulting in success in such cases are remote.

There is another aspect of it. It is this free talk of the parties, which takes a mediator to the real dispute or core of the dispute or the underlying interest of the parties.

Look dignified; dress appropriately

It is the appearance of the mediator, which conveys the first impression to the parties. They should have a feeling that they are dealing with a person who is here to do business. He is serious about his job. If the conduct of the mediator is not dignified he is not likely to earn the respect of the parties. **It is the respect for the mediator, which builds the trust of the parties in the mediation.** Yet it is important he should not sit with a stiff neck with a detached look, so as to convey that he is indifferent to what is going around him.

Dressing up is yet another aspect of looking dignified. One, however, needs to be careful that he is not overdressed as overdressing itself creates barriers of its own in the effective flow of information between the mediator and the parties.

Do not try to grab all the credit

A mediator may be the chief architect of the final settlement between the parties but still he should not take all the credit for it. Conceptually a mediator only mediates to help the

parties to reach a negotiated settlement. He, therefore, should give credit to the parties to have settled the dispute to get the best deal.

Sometimes parties desire to bring in outsiders into the mediation proceedings, it is not necessary to declare their presence undesirable. Most of the time in the family disputes they bring their relative along. Some of them show a great deal of commitment in resolving the dispute between the parties. If they can be of help in reaching the settlement they can be welcomed.

There are disputes of commercial nature in which the assistance of some expert may also be required to make the parties realize where they stand or clear any misgivings they may have about their position. There are also people who are in a unique position to influence the parties. Their presence in the mediation proceeding is an assurance that what one party has agreed upon would be carried out by the other side.

Never hesitate to give credit to all such persons who have been helpful in getting the dispute settled. It is not just good manners but also a guarantee that they would stay neutral during the implementation stage of the settlement. It would give them a feeling that they have not been working for the parties but for the mediator.

Punctuality

Traditional litigation is not only time consuming but also in such litigations the adhering to schedules is very difficult. Most of the people who opt for mediation do so because they feel that the mediation will yield early results. Their object of coming for mediation would be defeated if it becomes an equally time consuming process.

Unlike the regular courts it is not that hard to stick to schedule framed for mediation. First of all a mediator should not fill his/her plate with too many items, which he/she may find difficult to consume. Stick to the timings. Discourage the postponement of the matter unless it is necessary for finding the solution itself. Sometimes it is necessary to postpone the matter because you want the parties to disengage, giving them time to cool off to

bring down the emotional quotient or reflect back on their positions or consult someone like an elder member of the family before taking a final decision.

They're parties for whom the request for mediation is nothing but a way of buying time or delaying the matter. It is especially true in the case of court-annexed mediations. It does not take time to see through their game. Without being rude such attempts should be nipped in the bud and brief be returned to the referral judge.

Act within four corners of law

Mediation proceedings have the sanctity of law. It gives a mediator the freedom to adopt procedure of his/her own to resolve the dispute between the parties. It must be remembered all the time that a mediator does not sit like a Kangaroo court. He cannot force his way through, which can be said to be against the norms of the civil society and standard principles of law. A mediator cannot be a party to a settlement, which is against the public policy. A mediator cannot follow a procedure, which no reasonable man may approve of. A mediator should never lose sight of the fact that the settlement arrived before him can be challenged if it is patently against the law or the public policy or he adopted the procedure which no reasonable person would ever undertake.

Knowledgeable

There can be situations like in the case of community mediations where it may not be necessary for a party to be educated. It is sufficient that he/she can understand the legitimate concerns of the parties. In case of, however, court annexed mediations or the mediations, which have pronounced legal consequences, it is desirable and sometimes also necessary that he should have some legal background or exposure. Once the negotiations are over a mediator is required to help the parties draw the terms of settlement. These settlements should be such that they would not fall apart once they are tested on the touchstone of law. This can only be achieved if the mediator has the knowledge of the subject matter of the dispute and the law related to it.

Optimism

We claim that mediation proceeds on the realistic assessment of the situations. It looks for realistic solutions. Then a mediator should be a realist not an optimist. In the general sense of the word optimism would mean giving hope for a solution even where the chances of its success are very dim. That is not being real. Then what exactly does optimism mean when it comes to mediation proceedings?

Optimism for a mediator is not something, which comes from any thought process devoid of reality. His optimism is not a result of any religious belief that ultimately faith in God will prevail and everything will turn out to be well. His optimism is a reflection of his attitude that in the given facts of the case he will be able to find creatively solutions acceptable to both the parties to the dispute. It shows up as a self-belief in his skills that he will ultimately make the parties see as to where lay their benefit. It is a part of his self-confidence portrayed in his communication skills by which he can continue to make parties focus on the positive aspects of deliberations and overlook the negative ones. An optimism of this nature promotes rational thinking in the over all environment of the mediation proceedings and leads to positive results.

As stated at the beginning this list is not exhaustive. Every mediator has his/her own style of functioning. He or she learns from his or her own experiences. It would be perfectly alright if he or she draws his or her own list of do 's and don't for conducting a mediation so long as they do not compromise his integrity as a mediator and he and the parties are comfortable with it.

E-mail : laxmikantgaur@gmail.com