

WHAT MAKES A GOOD MEDIATOR?

Gaining the confidence of the parties in the opening address is key.

We all know that not every good quality can be embodied in one person. Nor is it possible in this short column to detail every good quality that one might wish for in a mediator, so here are just a few.

It is arguable that mediation is an acquired skill – not an exact science. An experienced mediator once suggested that as long as one understands the basic “tools of trade” a mediator should be able to effectively mediate any dispute, and it does not matter that the mediator has no specialist background in the subject of the dispute. However, many litigators might take issue with this suggestion.

So, how do you know if you have a good mediator?

When the mediator first meets the opposing parties before the mediation he or she should be able to sense the atmosphere between the parties which will dictate the extent to which he or she might go in endeavouring to create a relaxed environment for the mediation.

During the mediation a good mediator will hopefully gain the confidence of the parties in the opening address. In one sense the content of the address is important and should deal with the rules to be agreed on for the conduct of the mediation. In another sense the manner in which the address is delivered is equally important. Some mediators suggest the use of subtle humour in mediations to relax the parties. This is a special talent that must not be attempted unless the mediator is confident that it will work. Standup comedy is the

toughest gig in the world, so mediation is not the place to cut one's teeth.

Engaging the parties' attention during the opening address is critical but mediators often find the representative of a party (who has likely been to many mediations) showing obvious restlessness during the mediator's opening. Sure, he or she may have heard it all before but that demeanour could potentially undermine the position of the mediator in the eyes of the disputants.

Although an accredited mediator must abide by the practice standards including the obvious obligations to display impartiality, maintain confidentiality, act in a fair manner and avoid conflict of interest, a good mediator will sense the dynamics and the momentum during the exchanges between the parties and will react to information as it arises. Often it's just instinct which has been developed through experience that can dictate the way that a mediator might deal with a particular situation.

A good mediator will encourage the parties to each provide an outline of the dispute from their perspective to enable the mediator to prepare well and have a good understanding about the issues in dispute before the mediation. This is not always possible as, at VCAT for example, the mediator usually only has sight of the file on the morning of the mediation.

If your mediator isn't making eye contact it might indicate that he or she is likely not listening as intently as he or she should. Bill Clinton was famous for many things, but

when his eyes locked on to the party he was conversing with, his eyes didn't leave that person until the interaction was complete. He would listen as if the person he was engaging was the only person in the room. He would also make a point of addressing the person by name.

As long as the parties are communicating with each other a good mediator will resist the urge to interrupt. I recall being told in my training to “feel the back of the chair” when the parties are talking (i.e. lean back and keep quiet) unless of course the conversation becomes overheated and intervention is necessary.

A good mediator will endeavour to keep the parties together as long as possible and should resist the urge or request to unnecessarily separate the parties (where appropriate), and will bring them together after private sessions even after resolution appears to be hopeless. There are occasions where parties have been about to leave after negotiations have broken down and have been encouraged to go back to a joint session purely to close off the mediation session – and that has resulted in further discussion culminating in settlement, often to the surprise of even the mediator.

I suppose the words “work hard and never give up hope” should be the mantra of every good mediator. ●

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