



Opening the Mediator's Toolbox: Practical Skills for the Investigator

By Milan Slama and Samantha Blake

Although they have distinctive practices that differ in purpose, goals, and approach, workplace investigators and mediators share certain common objectives. For example, when attempting to resolve a disputed matter, a mediator needs to be able to assess the disputants' moods, perspectives, and objectives in order to help them reach a resolution. Angry parties will not be willing to entertain possible options until their anger has been addressed. Mediators also need to be adept at recognizing and managing different personalities and communication styles in order to create a bridge to resolution.

Workplace investigators can apply many of the skills and techniques employed by mediators to their own practices, most notably to witness interviews. The ability to assess moods, perspectives, and objectives will assist the investigator in gathering information from witnesses, as well as assessing credibility when the time comes to make findings. The ability to recognize and adapt to different personalities and communication styles will often be a determining factor in how cooperative the witnesses are, and whether they willingly provide complete information or give curt, monosyllabic responses.

This article will examine some of the critical skills and abilities in the mediator's toolbox—observational skills, the art of listening, and the ability to relate to people, especially people with difficult personalities—and look at the ways in which workplace investigators can adapt them to their own practices. It will also examine the virtues of patience and perseverance.

Observational skills

Among the many skills mediators must possess in order to be successful in resolving disputes are observational

skills. Having a trained eye and being perspicacious is not only a matter of experience, but also a matter of practice and learning. The mediator must be aware of the parties' cultural and perceptual differences. An example of cultural difference can readily be appreciated by comparing the Chinese and Western traditions of landscape painting. Each addresses visual space differently, showing how the "way of seeing" can differ from culture to culture. An example of perceptual difference is the so-called "*Rashomon* effect," in which different people are asked to provide accounts of the same events but offer diametrically different stories, depending on where they stood, what they were paying attention to at the time, and their own interpretations of what they were seeing and hearing through the filter of their own personal biases and experiences.¹ Various psychological studies have confirmed that individuals are selective in their observations.²

Mediators use their observational skills during the whole mediation process. These skills serve ultimately to achieve some form of resolution between adversarial parties. Observing the parties' behavior, body language, shifting moods, collaborative or competitive postures, and readiness to settle or fight often helps mediators to determine if a resolution is at hand. Observing the intensity of anger of the individual participants, who sometimes hide or try to control their anger, enables mediators to predict the possibility of a settlement or reconciliation.³ Observational skills are useful in detecting power relations between parties, and occasionally between parties and their representatives. The mediator must also pay atten-

¹ This phenomenon is based on the short story of the same name by the Japanese writer RYUNOSUKE AKUTAGAWA (1915), and it was also popularized in the 1950 film *RASHOMON*, directed by the famed Japanese director AKIRA KUROSAWA.

² See RUSSEL K. SHUTT, *INVESTIGATING THE SOCIAL WORLD: THE PROCESS AND PRACTICE OF SOCIAL RESEARCH* (8th ed. 2015).

³ See CAROL TAVRIS, *ANGER: THE MISUNDERSTOOD EMOTION* (1989).

tion to and correctly perceive the manner of communication among the participants in mediation, such as silence, disengagement, or aggression. Finally, mediators must be able to observe the environment or a “scene” where a dispute takes place.⁴

During all stages of mediation, mediators focus on different things. The first stage of the mediation process, the opening statement, helps mediators to see how comfortable or uncomfortable the parties are with each other. During the next stage, storytelling, mediators focus on consistency and factual veracity of the participants’ accounts. Once parties engage in the third stage of negotiation, mediators help navigate parties toward possible solutions by observing whether each party’s approach to bargaining is collaborative or competitive. The last stage of mediation, writing a settlement agreement, depends on such observations.

Workplace investigators can employ similar observational skills in their work. Because workplace investigators must encourage witnesses to provide information and must ultimately determine the most likely version of events when reaching their factual conclusions, it is important for them to hone their skills of observation. Not only should they be attuned to witnesses’ potential cultural and perceptual differences, but they should make every effort to recognize their own, in order to ensure that they weigh the evidence fairly and impartially.

One of the objectives a workplace investigator has when interviewing a witness is to ensure the witness feels comfortable enough to be forthcoming with pertinent information.⁵ An investigator must be aware of that and use observational skills to assess whether a witness’s comfort level is affected by the physical setting where the interview occurs. Does the witness appear to be uncomfortable? Determining whether the setting is conducive to witness candor can be even more challenging for an outside investigator who is not familiar with the particular workplace. What is the layout of the room? Is there a window that allows passing coworkers to see inside? Might people outside of the conference room overhear the conversation taking place inside? Does the size of the table or the placement of the chairs feel imposing or intimidating? Is there any art on display that might be offensive to the witness? Is the office located anywhere near the person who is accused of wrongdoing? Does the witness have any issues of mobility that might present a challenge in the space? By paying attention to and addressing the issues of the environment with the witness, the investigator demonstrates

sensitivity, which in turn encourages the witness to speak more freely.⁶

As with the environment, a workplace investigator’s observational skills can be used to facilitate the investigator’s personal rapport with a witness as they interact. The witness’s manner of communication and comportment can give the investigator important clues to how best to communicate with the witness in a way that will promote cooperation. Is the witness reticent? Does the witness choose his or her words carefully? Does the witness hesitate in response to certain questions and not others? Is the witness’s behavior inconsistent with the subject matter of the interview? An investigator can use these indicators to ask follow-up questions and build rapport. For example, by saying, “I noticed you seemed reluctant to answer my last question. Is there something you are concerned about?” the investigator creates an opportunity for further disclosure.

An investigator can enhance his or her observational skills through exposure to and participation in different cultural and community experiences or by seeking information from colleagues in the field about their own experiences. An investigator can also seek feedback directly from witnesses by asking questions such as, “I don’t want to make assumptions, because I am not in your shoes. Can you explain to me why you found your supervisor’s behavior offensive?” or “Is there anything you think it would be important for me to know that I might not have thought to ask you about?”

The art of listening

As an aspect of observational skills, the art of listening actively is crucial to a mediator’s ability to determine what interests are truly driving the dispute between the parties, which gives the mediator important clues about how to help them resolve their dispute.⁷ Far from being a passive process, listening actively and effectively helps the mediator to determine the flow of inquiry and to ascertain what is the optimal timing to step in with a question, or when to step back and let participants talk. Active listening includes reflecting back to the speaker what the listener has heard and asking follow-up questions for clarification or to gain further insight into the party’s motivations or desires. Listening in this way is an art form that requires a creative approach in response to what the speaker is saying. It can be learned through experience, and often is based on a mediator’s intuitive ability, gained through extensive practice.

Listening serves multiple purposes in the context of mediation. It allows the mediator to gauge the parties’ interests and emotional attachment to particular events or goals, and

⁴ In his essay *Regions and Region Behavior* in *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, 106-140 (1959), ERVING GOFFMAN uses the vocabulary of the live theater, such as backstage, front stage, and decorum.

⁵ See, e.g., AMY OPPENHEIMER AND CRAIG PRATT, *INVESTIGATING WORKPLACE HARASSMENT: HOW TO BE FAIR, THOROUGH, AND LEGAL* 70 (2008 ed.).

⁶ See, e.g., LISA GUERIN, *THE ESSENTIAL GUIDE TO WORKPLACE INVESTIGATIONS: HOW TO HANDLE EMPLOYEE COMPLAINTS & PROBLEMS*, 68-69 (2d ed. 2010).

⁷ See DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 147-162 (1999 ed.).

formulate a strategy for bringing the parties to a resolution.⁸ Listening actively is also an acknowledgment of the speaker's presence and significance. Being "listened to" means a lot to those who believe that they are not heard or that nobody pays attention to what they have to or want to say, and carries a lot of weight.⁹ If a mediator wants to develop rapport with parties, the mediator needs to listen attentively and sympathetically, even if the parties' stories do not make too much sense.

Interviews in a workplace investigation are less formal than depositions, but tend to be more structured and targeted than the listening and questioning that take place during mediation. The communication process during mediation is more free flowing, as the mediator adjusts to the parties' expressed concerns and needs. The challenge for investigators is to connect with witnesses and encourage them to share as much information as possible. Cultivating good listening skills as described above will go a long way toward accomplishing this objective. Similarly to adversarial parties in a mediation, complaining and responding parties in an investigation often have a need to be heard and understood.¹⁰ An investigator who can listen actively and adapt his or her approach as a mediator does will be more likely to foster witness cooperation.

Ability to relate to people

If there is one skill, endowment, or talent mediators must have, it is the ability to relate to people from all kinds of different cultural, class, gender, ethnic, national, professional, and generational backgrounds. Occasionally, mediators have to deal with people who have difficult personalities, and some of them have histories of mental disorders or other disabilities caused by injury or disease. These pose additional challenges to mediators.

There are a number of treatises written on the subject of dealing with difficult people.¹¹ Among the difficult personality types are control freaks and power seekers, people with a victim complex, people with trust issues, high-conflict personalities, chronic complainers, noncooperative silent types, spotlight seekers, know-it-alls, disgruntled employees with a proclivity for sabotage, self-centered charmers, and blamers and accusers.¹²

All of these personality types can be found in every workplace. For some, the work environment may contribute to the behavioral expression of the personality type; others adopt their difficult behavior long before they join the workforce. For example, blamers and accusers avoid taking responsibility for the outcomes of their own actions and

prefer to blame others. Blaming and accusing are learned by many people at an early age, and the "blame game" is encountered in nearly every workplace. People with a victim complex often have been treated discriminatorily or differently from others in the past, and, because of those experiences, often assume in new situations that the same dynamic is at work and they are targets, or are not respected or recognized.

Each of the difficult personality types needs to be approached differently in mediation. First, a good mediator lets them manifest and expose their dysfunctional or inappropriate behavior. Second, a good mediator tries to develop a rapport with them by acknowledging their concerns, worries, and desired outcomes. Third, a good mediator is able to control their disruptive behavior, which can be threatening to other participants in mediation and to the mediation process in general. The mediator employs such safety and security precautions as individual meetings with parties, known as "caucuses," during the mediation session, and uses active listening skills to address difficult behavior before it escalates.

Learning how to deal with different kinds of people and personalities is an arduous task, and no amount of experience or social and emotional intelligence can prepare anyone for all situations and encounters. It requires habitual open-mindedness and the courage and willingness to be challenged. Yet this type of challenge might be the most rewarding for those investigators who are prepared to master the necessary skills.

Consider the example of an investigator faced with a witness who has trust issues. People who have had multiple adverse experiences with other people and institutions may gradually learn not to trust anyone. They might believe an investigator is there to cause them harm or to take advantage of them. They may easily become quickly suspicious about any effort by an investigator to gain information or about the whole investigation in general.

How does the investigator detect a person with trust issues? From the onset of the initial interview, the witness will respond to the investigator's questions with a barrage of questions about potential risks, to whom the information will be disclosed, and "what-if" scenarios related to potentially negative outcomes. The witness might ask questions about the investigator's credentials and affiliations. The character of the investigator might also be scrutinized. The witness will likely exhibit indecisiveness and unwillingness to participate in the interview. An investigator will be more likely to overcome the witness's mistrust by listening actively, being forthcoming about the investigation process, and demonstrating patience, fairness, and sensitivity.

The virtues of patience and perseverance

Patience is a personality trait that enhances the quality of a mediator's interactions with the parties, and is necessary to the process of resolution. Patience often comes with matu-

⁸ *Id.* at 201–216.

⁹ *Id.* at 147–162.

¹⁰ Oppenheimer and Pratt, *supra* note 5, at 90–91.

¹¹ See, e.g., ROY H. LUBIT, *COPING WITH TOXIC MANAGERS, SUBORDINATES, ... AND OTHER DIFFICULT PEOPLE* (2004); DAVID L. WIENER, *POWER FREAKS: DEALING WITH THEM IN THE WORKPLACE OR ANYPLACE* (2002); ARTHUR H. BELL AND DAYLE M. SMITH, *WINNING WITH DIFFICULT PEOPLE* (1997).

¹² *Id.*

riety and wisdom.¹³ The process of mediation also requires patience from all participants.

There are times when mediators have to work with individuals whom they consider to be off-putting, who have morally offensive views, who are not bright, or who are not responsive or cooperative. To deliver good results, mediators need to learn to overcome their personal biases and especially their antipathies toward others. Overcoming these aversions (“warming up” to disagreeable people) takes a lot of patience. If the dislikes and apprehensions related to certain people or certain situations are too deep, however, this might compromise the mediator’s neutrality. It is important for the mediator to recognize when this is occurring and decline to mediate the case altogether, if necessary. Mediators must be willing to take the challenge and be courageous enough either to overcome their dislikes or to be honest with themselves in admitting that they cannot handle certain aversions regarding others.

Similarly, before agreeing to conduct an investigation, investigators must check themselves to see if there is anything about the facts or parties involved that might compromise impartiality.¹⁴ An investigator who is in house or has past experiences with the parties has an added challenge in this regard. An employee who has complained multiple times may challenge the investigator’s patience. An investigator who has a close family member who is permanently disabled because of a workplace accident needs to determine whether he or she can set aside any judgments or predispositions to engage in the process of an investigation in which a violation of disability policies is alleged. Many times, investigators do not learn about their predispositions until they are involved in the investigation. In such a situation, the investigator needs to answer questions such as “Why did I react that way?” “Is it something I need to work on, and what do I need to improve?” “Is this something that relates to my core beliefs, and, if so, should I recuse myself?”

It is natural for investigators to make judgments about witnesses or facts. These judgments can be unconscious and deeply personal, or relatively objective and impartial. They are an inherent part of the investigation process. However, the investigator’s findings are expected to be knowing, fair, and evenhanded. Often, this is easier said than done. It is important for investigators to hone their ability to control their outward demeanor in front of witnesses. Cultivating a “poker face” or a neutral, nonexpressive posture is directly connected to the practice of patience. The investigator needs to acknowledge his or her personal preferences and

dislikes, but suspend judgment and avoid expressing the preferences and dislikes verbally or behaviorally in front of the individuals participating in the investigation.

Information gathering and observation are often painstaking and time consuming. Organizing information, deciding which pieces of information are relevant and which are insignificant, and drawing conclusions demand both patience and perseverance. Perseverance is a trait that is associated with an optimistic personality or outlook.¹⁵ Those who are more inclined toward pessimism might have a tendency to give up sooner than those who believe that a possible solution is at hand. Giving up is not always considered a negative response. It can be reframed positively as “letting go.” Many times, exercises in futility can be prevented by letting things go. While pursuing evidence and other pertinent information, it is up to the investigator, based on the nature of the claims and the facts, to determine how far it is necessary to pursue information, and when to let go. Patience and perseverance are learned and perfected through practice and experience.

Conclusion

There are many other things that mediation practice and workplace investigations have in common. Among them are interpretive skills, the ability to approach goals strategically, and the ability to collaborate. Self-awareness and outward observation are critical traits from which many of the other skills flow. Mediators and investigators can learn from each other to their mutual benefit.



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¹³ The references related to maturity and wisdom can be found in Aristotle’s virtue ethics or Marcus Aurelius’ Stoic philosophy of self-control. See ARISTOTLE, *THE NICHOMACHEAN ETHICS* (Penguin Books, 1953); MARCUS AURELIUS, *THE MEDITATIONS*, <http://classics.mit.edu/Antoninus/meditations.html>.

¹⁴ See, e.g., ASSOCIATION OF WORKPLACE INVESTIGATORS, *GUIDING PRINCIPLES FOR CONDUCTING WORKPLACE INVESTIGATIONS* § 2 (2d Ed. 2014); OPPENHEIMER AND PRATT, *supra* note 5, at 54; GUERIN, *supra* note 6, at 45.

¹⁵ The recent trend called positive psychology, personified by American psychologist Martin Seligman, provides a so-called “optimism test,” which measures the characteristics of the optimistic personality.