

## Getting to the “Heart of the Matter” by Laurie Quigley Saldaña

In 2011, mediation “goes Hollywood” with the USA Network’s new drama, “Fairly Legal”, where attorney Kate Reed enters your living room for one hour a week and mediates everything from disputes in the latte line to big dollar corporate feuds. Whether this new “legal drama” will capture the attention of viewers is yet unclear; what is very clear, however, is that an effective mediator will capture and hold the attention of the parties in conflict. While every mediator possesses a unique style, here are some qualities to consider when selecting a mediator.

Although styles may differ, the most successful mediators are **doggedly determined** to reach resolution. Some mediators pound on the parties until they recognize the value of settlement. Others try to use more subtle persuasion. Still others guide the parties to invent their own “win/win” resolution. A good mediator possesses and uses all of these skills, depending upon the facts, personalities, and dynamics of the mediation. But the key element is that the mediator never gives up. The mediator is the person who brings and keeps hope in the room. The mediator stays upbeat, positive, and moves toward resolution at all times. Even in those instances when the case does not resolve at the first mediation, a good mediator follows up and encourages further discussion down the road.

An effective mediator must be **completely neutral**. While this may seem obvious, the smallest nuance may unwittingly cause a litigant or attorney to believe the mediator is biased toward the other side. When parties appear at mediation, most are nervous, skeptical, and distrustful -- so the mediator must be very careful not to ignite emotions unnecessarily. For example, no matter how well the mediator may know one of the attorneys involved in the case, the mediator should not act too familiar. Engaging in more eye contact with one side during joint session? Spending appreciably more time in caucus with one side? These can be fatal to maintaining the perception of neutrality with all parties. Although mediation may be more “relaxed” than the courtroom, the mediator must always maintain the right level of decorum, formality, and neutrality to nurture the trust of the litigants.

No mediator is an “expert” in every topic. However, a basic level of **experience and knowledge** with the subject matter is key. Establishing trust with the parties is a necessary element of a successful mediation; no party will trust a mediator who fails to “speak the language” of the dispute. It may be as simple as: understanding a Mechanic’s Lien in a construction dispute; recognizing the role of Cumis counsel during mediation; appearing knowledgeable about the details of the police report and the injuries of the parties; acknowledging the potential of attorney’s fee awards in employment matters. A good mediator is knowledgeable about the issues, but also unafraid to ask questions when additional information is needed.

Successful mediators know that **empathy** goes a long way. Since 95% of civil disputes never go to trial, mediation is often the “day in court” for the parties. Allowing the parties the

opportunity to vent, and demonstrating sincere understanding of their situation, is priceless. The mediator should be sensitive to the “communication signals” he/she is sending, as all forms of communication -- words, eye contact, body language, intonation -- demonstrate whether the mediator truly appreciates the plight of the parties.

The mediator must **actively listen** to not only what is spoken -- but also what is unspoken. Studies show that people rarely communicate their true feelings and desires in initial conversations. Instead, the mediator must “peel the onion back” with key questions and focused listening in order to understand the parties’ true interests. Listening only to the parties’ positions will not lead to resolution; the mediator must uncover the interests that underlie the positions in order to satisfy the parties’ needs.

Finally, once the mediator has earned the trust of the parties and actively listened to all sides, a mediator should assist in brainstorming **innovative ways to resolve** the dispute. The biggest complaint I hear from lawyers is about mediators who just shuttle numbers back and forth between caucus rooms, without discussing other possible ways to satisfy the parties’ respective interests. One of the biggest benefits of mediation is the flexibility to devise settlements on terms that a judge and jury could not; inviting creativity by the mediator is key.

If the mediator has some (or most!) of these qualities then -- as “Fairly Legal’s” Kate Reed would say -- getting to “the heart of the matter” and finding resolution should be well within reach.

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