

The Role of Questions in Mediation

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Abstract

Mediation unlike arbitration relies on the mediator to guide parties to a successful conclusion as in the end the parties arrive at a settlement. The most important tool in the arsenal of the mediator is the skill to pose the correct question at the correct time. The purpose of asking questions in mediation is to clarify issues in the minds of the disputing parties. This article revisits this question and reminds the mediator again on the importance of questions and suggests solutions.

Introduction

Dispute resolution processes have in the past been divided into distinct processes such as arbitration or mediation. Each of these methods of resolving disputes are subject to their own rules. However with the emergence of hybrid dispute resolution practices such as med-arb new processes have developed. It is now conceivable that a mediator can become one of the arbitrators in the same case. The issue is that the analytical process of the two alternative dispute resolution (ADR) methods namely the required steps taken within the process and the skills and techniques involved in resolving the dispute are varied. However there is a common thread running through both methods namely they involve questions being posed in order to clarify the issues.

Importantly the role of questions varies greatly between the two methods. In arbitration questions are used to clarify issues in the minds of the arbitrators whereas in mediation questions posed by the mediator in simple terms are used to clarify issues in the minds of the disputing parties. This is so as in arbitration the arbitrators will determine the issue whereas in mediation it is the parties who will arrive at a settlement guided by the mediator. This paper will only investigate the role of questions in the mediation process. The purpose of this paper is twofold. First it reminds the mediator of the process and secondly it reminds mediators of posing the correct questions at the correct time for the correct purpose.

This is nothing new but timely considering – as noted above – the emergence of new developments in dispute resolution methods such as med-arb.

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Overview of the Mediation Process

The mediation process – to start with – is very difficult if not impossible to define. Mediation has been described as:

*any moderated conflict resolution discourse, regardless of the procedures, methods or tools applied. That is, except for the mere presence of a mediator, our definition does not place any requirements on the mediation procedure.*²

Boulle on the other hand noted that it ‘merely involves incremental bargaining towards a compromise solution’.³ In mediation, the disputing parties voluntarily undergo an informal dispute resolution process that involves the participation of a neutral third party, who helps the disagreeing parties to arrive at a solution that will be reasonable and agreeable for the parties involved. The mediation process provides an invaluable opportunity to parties that are in discord, to discuss their issues calmly and sometimes voluntarily arriving at a mutually acceptable solution. This is the key difference between, mediation and arbitration. In the latter process, the arbitrator presides over the case and issues an award in accordance with the applicable rules which is enforceable by a court of law. In contrast in mediation, the resolution of the issue comes as a result of negotiations and agreement between all parties involved. By definition, mediation can be distinguished from other forms of dispute settlement like deliberation or argumentation, ‘not on the basis of features of a particular procedure, but rather on the basis of its goal: conflict resolution’.⁴

This difference between the two dispute settlement processes also depicts their difference when it comes to the most effective means of arriving at a favorable solution for the disputing parties.

Mediation offers many advantages to the parties involved. It is a less expensive process for dispute resolution, because in mediation, ‘only one professional is involved, so the cost of resolving the dispute is much less than dispute resolution by the legal system’.⁵ Mediation also helps the parties to save their valuable time because they are not required to have legal representation (though as a rule they do) during a mediation process, and negotiation usually leads to a mutual resolution faster than in any other adversarial legal system including arbitration. Furthermore in many cases legal rules and procedures are not a feature rather the process to come to a mutually agreeable solution of the dispute.

2 Thomas Gordon and Oliver Märker, *Mediation Systems* (2002).

3 Laurence Boulle, *Mediation, Principles Process Practice* (LexisNexis Butterworths, 2nd ed, 2005) 7.

4 Gordon and Märker, above n 2.

5 Joan Kelly, ‘Is mediation less expensive? Comparison of mediated and adversarial divorce costs’ (1990) 8 *Mediation Quarterly* 15-26.

The Mediator's Role

The role of a mediator – as consisting of putting forward questions to the parties – also meets the concept of a ‘process advocate’, as explained by Nathan.⁶ According to Nathan, a process advocate should focus on the fairness of the process, so that the parties may reach an equitable solution.⁷ Being a process advocate, the mediator cannot assume the role of advocate for one party; rather, a mediator should be neutral and faithful to the mediation process alone. In other words the mediator only exists in the process to serve as a facilitator of the communication process.⁸ Furthermore the mediator often enters the picture only when the parties already disagree on certain issues involved in the controversy.⁹

The mediator is tasked to encourage the parties to talk about the issues and try to arrive at a settlement.¹⁰ The important process of the mediator is to direct the hearing by either making statements or directing questions at the parties. The purpose is to steer the parties towards a mutually accepted solution of their problem. Hence a distinction has to be drawn between the skill and function of the mediator and their skills and techniques on the other hand.¹¹ As the mediator operates within the confines of the parties’ complex sequence of moves the skills of the mediator are crucial to guide the parties towards a solution. The mediators thereof by necessity interact intimately with the complicated manoeuvres which are not only initiated by the parties but also by the mediator who has to react, adapt and sometimes retreat from the flow of negotiations.¹² This can be accomplished through appropriate questions that bring to the fore issues that may not be perceived by the parties or require the parties to move away from roadblocks. Most importantly the questions need to focus on the identifiable stage of the mediation process. It should be noted, however, that essentially, the parties still have the final decision as to the process to be followed and the settlement terms to be finalised.¹³ The issue therefore is how can well directed questions to the parties either in caucus or when both parties are present move the process forward? However it must always be remembered that questions by their very nature are either general or contingent interventions in the process.¹⁴ As the words denote the general intervention is made in the normal flow of the mediation process whereas the contingent intervention is a response to a specific problem which is specific to the case at hand. It goes without saying that questions in response to a contingency require more skill than those which are truly tested and follow the normal flow of mediation. However a mediator must always keep in mind that he or she merely facilitates a process of dispute resolution and hence must be always attuned to the entitlement of the parties. Therefore questions directed at one or both parties must be purposefully directing the parties to a mutually desired end without pushing either party in a direction which is moving away from the stated goal and will result in a failure of the process.

6 Laurie Nathan, ‘Modelling Mediation: Evolving Approaches to Mediation in South Africa’ (1998) <<http://www.mediate.com/articles/odendaal.cfm>>.

7 Ibid.

8 Ibid.

9 American Mediation Services, Inc., 2004 <<http://www.amerimeserv.com/privacy-policy.html>>.

10 Ibid.

11 Boule, above n 3, 211.

12 Ibid.

13 The U.S. Equal Employment Opportunity Commission, 2004 <http://www.eeoc.gov/eeoc/history/45th/ada20/ada_cases.cfm>.

14 See Christopher Moore, *The Mediation Process* (Jossey-Bass, 3rd ed, 2003) 57.

Prior to mediation, the parties involved in the dispute are likely to display a degree of hostility towards each other due to their disagreement or conflict. The mediator is responsible for establishing and facilitating some level of communication between the disputing parties, thereby enabling them to listen to each other with less prejudice. There has been a trend away from formal preliminary meetings towards individual contacts between the parties.¹⁵ It allows the mediator to gauge what the expectations of the parties are in settling the dispute. Each party is given the opportunity to learn how the other party views the problem and what they want to take away from the process. In particular the parties can be asked as to their expectations of the role of the mediator.

The preliminary questioning allows the mediator to move to the next stage and make an opening statement to both parties based on what he or she gleaned from the responses of each party in the preliminary stage. It allows the mediator to direct further appropriate questions, directly at the parties involved. By using a proper method of questioning, the mediator can ensure that all parties involved in the dispute resolution process are given the chance to express their opinions and ideas, and that both sides listen to what the other party has to say.

Also, the mediator can help the parties by the use of questioning to overcome their initial emotional position and be able to see reason while issues are discussed.¹⁶ The importance of the opening statement is obvious as it also allows the parties to seek information or clarifications from the mediator.¹⁷ Furthermore the responses and follow-up questions by the mediator will already affect the end result. When the mediator succeeds in making each party understand the position of the other by not only highlighting the differences but also issues where there is agreement, then everyone involved in the process would be assured that the eventual solution takes into account the interests and motivations of all.¹⁸

The Role of Questions

The success of the mediator in making each party involved in the dispute to listen to the other can practically translate into the best solution for resolving the conflict, thus 'giving each party a better sense of the other's case. It also provides the opportunity to test each other's resolve to carry on with the dispute'.¹⁹

The importance of the inquisitive character of a mediator may again resurface even after the parties have ostensibly agreed on a settlement. The real issue is whether the parties turn the solution into a binding contract.

A good mediator should not be content with the fact that the parties apparently reached a solution to the problem. It is possible for the settlement to turn out to be superficial, which means that the mediator's job has not been completed. In such a case, the mediator should be able to ask the correct questions to

15 Jonathan Rothfield, 'What (I think) I do as a Mediator' (2001) 240 *Australasian Dispute Resolution Journal* 246.
16 Project Sentinel, 2006.
17 Boule above n 3, 183.
18 Nathan, above n 6, 57.
19 James Zack, 'Are you prepared for mediation'? AACE International Transactions (2000) C.D.R. 13.

ascertain the real feelings of the parties involved in the process. Moreover, asking proper questions could also help the parties, reach that safe place where trust prevails and they feel comfortable enough to open up, and this will make the mediation process much more successful.

The Place of Questioning in the Mediation Process

(i) Introductory Stage:

The first stage is where the parties meet face to face for the first time. In this stage the mediator must take a relatively active role in establishing the tone of the session, the ground rules to be followed, and the antecedent facts. During this stage, there is also an 'evaluation and selection of options like, the discussion forum and argumentation system'²⁰ and there can possibly be a multi-criterion decision support system created.²¹

The mediator's task is to become acquainted with the parties and the parties ought to be less uncooperative to each other because of the fact that they have all met the mediator individually. The mediator would have been able to ascertain the personalities and ambitions of the parties. Hence the opening statement of the mediator based on the acquired knowledge rather than questions will set the stage where progress is achievable. Thus, the primary concern of the mediator at this juncture is to make the parties comfortable by establishing a positive environment that is favorable to discussion and possible settlement arrangements.

(ii) Fact-Finding Questions:

The first questions a mediator should consider in the early stages is making sure that the parties are getting to know each other in the mediation setting as distinct from their previous conflict positions. The issue is that the parties have entered a new phase in their attempt to resolve the dispute. The mediator as noted above has met and had discussions with each of the parties individually. Thus meeting them jointly, the mediator should pose carefully crafted questions and ask the parties for a targeted introduction at the beginning. The aim of the mediator is to make sure that the expected answer should be of a positive nature and not aggravate an already tense situation. Simply put a question such as 'would you introduce yourself, or what is the purpose of you coming to this mediation' should be avoided.

A targeted question – tailor-made to the situation at hand – allows the parties to relax since they are not immediately faced by stressful questions regarding the controversy or are allowed to be controversial. Their focus is not readily directed towards the issue at hand; rather, they are led to a safe place where their persons are important. Thus, by asking specific questions, the mediator can succeed in achieving one of his or her primary goals, which is to make the parties comfortable in the setting and to make them speak freely about their positions. If required the mediator should use interventions at this stage

20 See Borries Ludwig, *Computerunterstützung der Argumentation in Gruppen: Aufarbeitung einer Sprechaktsequenz nach Habermas und Vorstellung eines Prototypen* (Springer 1997) Wiesbaden.

21 Matthias Jarke, Tawfik Jelassi and Melvin Shakun, 'MEDIATOR: Towards a negotiation support system' (1987) 31 *European Journal of Operational Research* 314-333.

such as ‘rephrasing, paraphrasing and summarising to improve the communication process and render the negotiations productive’.²²

This stage of the mediation process is also where the parties and the mediator agree on the rules to be followed throughout the session. Thus, it is the mediator’s duty to ask at this point about the preferences of the parties. For example, the mediator should ask if the parties want a caucus with the mediator so that they could each have their turn in sharing some issues or concerns with the mediator, to the exclusion of the other party.²³

(iii) Private Sessions:

A distinction must be drawn between a separate meeting and shuttle mediation. Each of two processes are useful in order to work with each party separately. Such meetings would give the parties the opportunity to tell the story from their own point of view, without fear of interruption or contradiction.²⁴

Separate meetings with the mediator will allow him or her to explore the controversy from ‘three perspectives: 1) the past, 2) the present and 3) the future’.²⁵ Such meetings should be focused towards identifying the concerns and feelings of each party. The existence of this kind of mechanism should be maximised by the mediator and the parties, because it allows the mediator to ask questions which might be found offensive or unfair by the opposing party. The confidentiality and exclusivity of these separate meetings can lead to a break-through. However, importantly – the mediator needs to be aware when the separate meetings have served their purpose.²⁶

(iv) Discussion Stage:

In stage two of the mediation process, which is the discussion stage, the mediator’s task of asking correct and proper questions again takes centre stage. At this stage, the disputing parties face each other and present their grievances, not only to the mediator, but more importantly, to the opposing party. This is the time when each party gets the chance to convince the other of the genuineness of his interests, and the fairness of his position, while at the same time opening his or her mind to the concerns of the other party’s position on the conflict.

The participation of the mediator at this stage is crucial, because it is his or her duty to ensure that both parties are given equal opportunity to present their respective positions. The mediator should achieve a balanced view of the controversy, and his or her questions should guide the parties when they are telling their respective versions of the dispute.

22 Boule above n 3, 189.

23 JAMS, 2003) <<http://www.jamsadr.com/mann/Securities/>> and FINRA, 2007 <<https://law.lexisnexis.com/info/zimmermans/disp.aspx?z=1180>>.

24 Oliver Ramsbotham, Hugh Miall, and Tom Woodhouse *Contemporary Conflict Resolution* (Polity Press, 2011) <http://books.google.com.sa/books?hl=ar&lr=&id=71b9UMgPgbwC&oi=fnd&pg=PR1&dq=Total+Conflict+Management,+2007&ots=aB4KxG1L7G&sig=CjY_vk4GApNaT1PqF8R4LRzxOYQ&safe=on&redir_esc=y#v=onepage&q&f=false>.

25 Ibid.

26 For a more detailed treatment see Boule, above n 3, 189-193.

The discussion stage is also the phase where the mediator should ask the parties regarding matters that are yet unclear to all. Thus, he or she shall endeavour to ask questions that clarify facts or positions that are vague or capable of several interpretations. In doing so, the mediator summarises the points already covered, and asks each party to confirm whether he or she agrees or ask them to clarify or modify the points that are not in conformity with the positions taken.

In addition, the mediator should – at this stage – assist the parties in exploring possible settlement arrangements and alternative solutions. This can be done by asking the parties how they feel about a particular arrangement and if such arrangement would be acceptable to them.

Final Stage: Closure

The final stage means that the parties have reached an agreement that is acceptable to both. Although, there may be still some questions to be resolved, despite the fact that this is already the final stage of the mediation process. The mediator must determine who among the parties would be tasked with the implementation of the agreement. The mediator can now ask whether the parties would prefer a third party to implement the same. The mediator should also ask the parties what their expectations are from the other and what actions they commit to perform.

Even at this point, there could be disagreements on other matters. In such cases, the mediator should again ask questions to elicit the best acceptable arrangement for both parties.

At each point where a proposed solution is put on the table, the mediator should ask the parties whether such a proposal is acceptable to both. In the negative, the mediator shall ask each party what kind of modifications the parties want in order to make the proposal acceptable.

When it appears that the parties have finally reached an agreement, the mediator should summarise the agreement before them and put it in writing. It is advisable – when possible – that the mediator read it in the presence of the parties and seeks their conformity to the written agreement as the true settlement of their issues. A mediator must be aware that the process starting with the setting of the ground rules, establishing antecedent facts of the controversy up to the time when a tentative agreement is in sight is dependent on correctly phrasing the relevant questions which lead the parties towards a conclusion.

Types of Mediator's Questions:

The discussion above illustrates the proper stages wherein the mediator should ask certain types of questions. However it is also useful to classify questions pursuant to the intended purpose as different stages of the mediation process require different types of questions. Knowledge of this classification of questions would lead to a better understanding of the mediator's role and tasks, and would also allow him or her to fully utilise these questions towards reaching his or her goal.²⁷

27 Margaret Herrman, *The Blackwell Handbook of Mediation: Bridging Theory, Research and Practice* (Blackwell, 2006) <http://books.google.com.sa/books?id=OWtf-NMz6BwC&pg=PA388&dq=Katz+mediation&hl=ar&sa=X&ei=ffs_U-OFOMSm0AWT4YGYAQ&ved=0CC0Q6AEwAA#v=onepage&q=Katz%20mediation&f=false>.

(i) Clarifying Questions:

In the early stages of the mediation process, the parties are arguably not totally familiar as to the degree of their disagreement and the actual claims of each party as distinct to the ambit claims. Thus, the mediator's questions at this point are directed at getting a clearer understanding of the issue and gathering relevant pieces of information.²⁸

Katz provides the following examples of clarifying questions:

'Khun _____, can you explain in greater detail the defect in the air conditioner that caused the fire?'

or

'Khun _____, how would you like for that payment to be made and where?'

It is noticeable that in the first example, the mediator is simply asking for more details as to a fact already admitted. Such questions show that the mediator's role is a facilitator rather than a judge or an advocate.

The same is true in the second example, because the mediator in this example merely elicits suggestions from a party. Such suggestions help both parties to understand and appreciate the interests and ambitions each party has in order to resolve the conflict. Having a suggestion on the table will facilitate a reaction, whether favourable or not and as such would pave the way towards opening possibilities and compromises not thought of by the parties.

The reactions of the parties to proposed solutions should serve as a cue to mediators to keep pressing for answers. The mediator may ask the parties for the reason behind their reactions, and ask why the suggestion is favourable or unfavourable to the cause.

(ii) Open Questions:

Another type of question used in the preliminary stage of the mediation process is the open question.²⁹ It also has a similar function as the qualifying question namely to elicit information.³⁰

Katz provides the following examples of open questions:

'Can you please elaborate on that statement?'

'How do you see the situation being resolved?'

The goal of open questions is to make the parties talk and share their thoughts and experiences to the group.³¹ Despite the perceived simplicity these questions are useful because they are broad, and have a larger focus than a specific question which is capable of being answered by a 'no' or 'yes'. The parties

28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.

are thereby given more freedom in answering the questions, which is an encouraging tool to engage them into a dialogue.³²

It is apparent that open questions may be the most useful type of questions in the arsenal of the mediator. Open questions allow relative freedom on the parties to discuss whatever answers they feel are responsive to the questions.

Two caveats are applicable. First the mediator – in using these types of questions – should make sure that parties are given equal opportunities to explain their position. In doing so, the mediator, through questioning, will be able to encourage active participation, which is the only way for the parties to arrive at a mutually agreeable settlement. The second point is that the mediator ought to anticipate the answer as being conducive to the situation at hand and will not be driving the mediation ‘backward’.

(iii) Closed Questions:

When there is already useful information at hand, and it is time to limit the discussion towards reaching a settlement closed questions are the best option. These types of questions are useful in order for the mediator to narrow down the issues. The questions should no longer be exploratory, but limiting.³³

This type of question merely elicits either a ‘yes’ or ‘no’ response.³⁴ Katz recommends that mediators should use this type of question sparingly or with discretion because of the limited response it elicits. This type of question is best used to minimise the domination by one party of the entire discussion.

The following are examples of closed questions:

‘I have noted that you are concerned about the rent and the dog. Are there other concerns you would like to raise now?’

‘Does this written agreement completely satisfy your original claim?’³⁵

This type of question is useful to mediators, despite the warning by Katz as to the dangers that could result from its use. It is unique in a sense that it also serves another purpose than merely eliciting a response or information namely a sense of finality of an issue.

Closed questions can be a powerful tool to the mediator when he or she needs to regain control of the mediation process. As pointed out above, mediators serve as facilitators of communication. Thus, it is important that the mediator is empowered to limit the input of only one party, in order to allow the opposite side to fully explain its case as well. Thus, closed questions are very useful in cutting short the aggressive presentation by one party. Since the answers to this type of questions would only be either a ‘yes’ or a ‘no’ the answering party cannot dominate the discussion to the prejudice of the less assertive party.

32 Ibid.

33 Ibid.

Another useful purpose of closed questions refers to its power to limit the discussion to more pressing issues that need resolution. Closed questions prevent parties from fixing their attention towards unimportant issues or facts, and allow the mediator to steer the conversation towards the discussion of relevant issues.

(iv) Justification Questions:

Another type of question that is useful to mediators is the justification question, which generally calls upon the party to validate or rationalize his position.³⁶ Justification question often begins with ‘why’, and an example is as follows:

‘Why do you think you deserve payment?’

Thus, the question asks the party to provide reasons for a position. Reasons put forward by the party should be evaluated by the other party and the mediator. The mediator must make sure that answers are directed to the opposing party in order to facilitate a response. The task of the mediator is – where necessary – to probe further in order to facilitate an acceptable solution.

Though Katz believes that this should be avoided because it places the party in a defensive mode, but still this type of question can be useful for the other party and the mediator to understand what the ambitions of the defending party are. It is possible that one party may have adequate justification for his or her actions, and this should be taken into account when formulating the settlement arrangement.

Justification questions may reveal that a party’s actions are not intentional, in which case his liability may be reduced. Justification questions may also show that, a certain action is made necessary by the circumstances, in which case the liability of one party may actually be negated.

(v) Compound Questions:

Finally, there is the compound question, which is composed of several questions rolled into one. An example of this question is:

‘Did you go out that night and was the door locked when you left?’

These questions are complex and dangerous to use because they tend to confuse the person to whom they are directed.³⁷

34 Ibid.

35 Ibid.

36 Eshanda James and Sharmon Monagan, *Problem Solving Mediation Training: Participant’s Guide* James and Monagan, (2009)
<<http://books.google.com.sa/books?id=1r0hAgAAQBAJ&pg=PA53&dq=Katz+questions+in+mediation&hl=ar&sa=X&ei=dgJAU72BLcrm7Ab6mICwDg&ved=0CC0Q6AEwAA#v=onepage&q=Katz%20questions%20in%20mediation&f=false>>

37 Ibid.

These types of questions however are an indispensable tool for a good mediator. Used correctly, the mediator would be able to facilitate clear responses that would enable both parties to see reason and possibly agree on a mutually acceptable solution.

However, Katz has a point in warning against the mediator's use of this type of questions. If in doubt it is better to use simple questions to elicit answers or suggestions so that the mediator and the other party are sure that the process is moving in the right direction. It is not useful in any mediation proceeding to confuse a party into answering in a certain manner, because in the end the solution which offers itself would not be a satisfactory one.

It is also not advisable to hasten the mediation process through the use of complex questions because it arguably could delay the resolution of the controversy. Thus, it is always better to break down the components of a complex question and ask them separately, in order to elicit a proper response.

Conclusion

Mediation as a form of ADR is undeniably useful and practical, especially when compared with the litigation process. Mediation can only be successful if the parties cooperate and the mediator is skilled enough to engage the parties in an honest and sincere discussion.

The use of questioning technique is indispensable for a good mediator. Different types of questions, when used in the appropriate stages of the mediation process, can make each party understand the justification and position of the other party.

In every stage of the mediation process, the acts of the mediator when asking questions and eliciting answers should remain confined within the limits of his role as a facilitator of communication, rather than an advocate or a judge.

