

Mediator's Corner



[Charles McClain](#)

Mediation Musings

by [Charles McClain](#)

The ability to listen is, of course, essential to success in all areas of legal practice. The trial lawyer must have a sharp ear indeed if he or she is to detect weaknesses and inconsistencies in a witness's testimony. The transactional lawyer must be alert to the bearing of the law upon the transaction being proposed by the client. The judge or arbitrator must listen carefully to determine how well the applicable law bears on the evidence presented by the two sides. The mind is prey to constant distraction, especially under the stress that is the ever-present partner of law practice.

But these are not the types of listening skills we new mediators were being encouraged to cultivate by the workshop leaders. We were being asked to listen in a very different way. "Listening to hear", is the way former Magistrate Judge Wayne Brazil put it in an article published some years ago. Listening not to adjudge the legal rights and wrongs but to reach a level of empathy with the parties, an understanding of the deep interests driving the litigation, with a view to helping the parties find common ground. We were being asked, I think, not to put the law completely aside (the law after all will, of necessity, have a bearing on realizable outcomes), but to let it drift out of the foreground and into the background, so to speak. But, as Brazil cautions, this is a hard task because of the "relentless instinct to judge", an instinct all humans have but which we in the law feel more intensely than others.

Experienced mediators say that one of the fringe benefits of serving as a mediator is that it makes one a better listener in general. One finds oneself listening more attentively to what others are saying. Am I beginning to reap these benefits? I think a little. I at least find myself consciously trying more to be a truly attentive listener. But beginning is the right word. Learning to listen with openness and empathy, whether as a mediator or generally, is a lifelong task.

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