



Do You Want to Have a Successful Mediation?

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**E**xamining best practices that will help you choose a mediator who will ensure a meaningful process and increase the likelihood of settlement.

# Selecting the Right Mediator

Mediation can be an efficient and cost-effective way to resolve litigation and reduce the uncertainties and legal risks that are inherent in trying a case. The most important step to ensuring mediation success is selecting the

right mediator for the job. To do so, you need to know the characteristics to look for in a mediator, and the specific type of mediator most likely to help the parties reach a settlement given a client's goals and the particular facts of a case. A mediation certainly stands a greater chance of success if the parties take the time to investigate and select the right mediator. This article will examine the different mediator styles and outline best practices for choosing the right mediator to put you, and more importantly, your client, on a path to achieve a successful mediation.

## Different Types of Mediators— Evaluative, Facilitative, Transformative, Hybrid

Different types of mediators exhibit and employ very different styles, which are important to understand when assessing the right mediator for your case. Knowing which style is particularly suited for

your case not only narrows the search for the right mediator, but it also allows you to assess potential mediators adequately in light of your client's goals and objectives. Generally, the various mediator styles fall into four buckets: (1) evaluative, (2) facilitative, (3) transformative, and (4) hybrid.

### The Evaluative Mediator—"The Hammer"

An evaluative mediator considers the arguments and evidence presented by each side and uses that information to evaluate the strengths and weaknesses of the parties' positions. An evaluative mediator will then offer an opinion regarding the relative strength of each side's legal arguments and generally will predict the likely outcome if the parties tried a case. Robert Psaropoulos, Litigation Counsel at Eaton Corporation, typically uses evaluative mediators who "voice their own opinions" and have a propensity to "directly address the parties' chances of winning at trial." A mediator's



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own assessment of a case, therefore, largely drives this type of mediation.

Depending on the relative strengths of the parties' positions, an evaluative mediator will then encourage one or both parties to move from their original position toward a compromise with the other party. The goal of the assessment is to offer the parties a "dose of reality" and to foster

## A facilitative mediator

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concessions ultimately to reach an agreement. Of course, the party that a mediator deems as less likely to prevail in a court may have more motivation to make concessions to reach an agreement and avoid an adverse trial result than the other party. A mediator often can persuade the party that is more likely to prevail in a trial to reach an agreement because even a party with a strong case may not succeed or succeed entirely. When a case has some weaknesses or would cost a lot to litigate, reaching an agreement through mediation can provide certainty and eliminate litigation risks and expenses.

An evaluative mediator is often the most effective in resolving business disputes, product liability claims, and matters involving the interpretation of contracts. The evaluative method is typically used by mediators who are former judges as it largely mirrors the process that they undertook in weighing evidence and rendering decisions during trials during their careers on the bench. According to Mark Freeman, Associate General Counsel of KeyCorp, using a former judge is effective because "the parties get a better sense through the mediation process of just where a judge is likely to go in the litigation." Similarly, this approach is often the most attractive one to litigators since it is based on the familiar practice of assessing the strengths and

weaknesses of a case and formulating a settlement position accordingly.

### The Facilitative Mediator— "The Hand Holder"

A facilitative mediator encourages the parties to consider the interests that form the basis for their respective positions in a case and helps to encourage a mutually beneficial agreement that might transcend merely finding a "middle ground." By focusing on the parties' underlying interests, a facilitative mediator encourages the parties to come up with possible solutions that they might not have considered otherwise.

The hallmark characteristic of this style is the use of "shuttle diplomacy" or "caucuses," which typically encourages a bidding process. Here, a mediator shuttles messages back and forth between the parties in a progressive effort to encourage them to consider more alternatives. As a result, in contrast to the evaluative style, the parties' opinions drive the process more than a mediator's own assessment of the case when a mediator adopts a facilitative style.

A facilitative mediator may also suggest creative approaches to satisfy a party's underlying interests. In this way, the dispute is viewed as more than just a zero-sum game, and the mediator helps the parties to find a resolution that often does more than merely divide a fixed pie. While a facilitative mediator might help clarify the issues or the parties' positions on particular points, generally he or she does not offer his or her own assessment of a case.

A facilitative mediator typically is effective in employment cases and matters involving business parties that have an existing relationship that will continue after they resolve the dispute. Joe Spagnola, an in-house employee relations director who has worked for two national retailers, principally uses facilitative mediators in employment cases. He believes that the best facilitative mediators will "set the table to have the claimant tell his or her story." This is a cathartic experience for employees and former employees who believe that their employers have treated them unfairly. By allowing the party with the grievance to be heard, a facilitative mediator can help that party overcome the emotional aspects of the case and focus on his or her overall goals.

### The Transformative Mediator— "The Marriage Counselor"

A transformative mediator focuses on the underlying relationship between the parties to a dispute. This approach emphasizes the parties' interpersonal relationships rather than focusing on their legal rights or individual interests. A transformative mediator serves to empower the parties or to affect their overall perception of themselves or each other, rather than attempting to resolve a particular dispute by applying the law to the facts of the case.

Given this focus, transformative mediation is often disregarded as an option in commercial disputes. Lawyers often overlook the emotional components of such cases and focus strictly on the legal issues. This form of mediation can be useful, however, when the parties are emotionally invested in a dispute, such as in the dissolution of a family business or a fight over intellectual property.

Because this form of mediation focuses on the relationship between the parties, more than the other styles the parties themselves drive it. A mediator's role is to ask questions to help the parties recognize the importance of repairing and continuing the underlying relationship between them. The solution will often involve more than a monetary settlement and may include things such as an exchange of apologies or an agreement that the parties will work together on a particular future endeavor.

### The Hybrid Approach— "The Shape-Shifter"

All mediations, of course, do not fit neatly into one particular box, and it is often useful to find a mediator who has the flexibility to invoke different styles depending on the unique facts and circumstances of a case. For example, a mediator might help the parties acknowledge their mutual interest in repairing their relationship and encourage them to accomplish this by fashioning a creative solution that goes beyond simply addressing the dispute at hand. Similarly, a mediator might help evaluate the relative strength of each party's legal claim, and then encourage them to find new and creative solutions, particularly when neither party is completely satisfied with the potential outcome it could face with a trial. Ultimately, the best mediators are able to

vary their approaches and apply the most effective style under the circumstances rather than taking a rigid “one-size-fits-all” approach to the mediation process.

As discussed in the following sections, you should consider the different tools presented by these various approaches and assess how they might best serve your client’s particular scenario and dispute.

### Evaluating the Needs of Your Client

Any one of the mediator styles may be appropriate depending on the needs and goals of your client. Before assessing which type of mediator will fit, you must understand your client’s interests and expectations for the mediation process. For example, if your client wants a fair settlement reflective of the probable result from full litigation, then you probably will want to seek an evaluative mediator who will assess the case and predict how a trial probably would resolve the case. Similarly, if your client wants an early and quick resolution of the issue at hand, to achieve that end you might want to find an evaluative mediator who will offer the parties a candid assessment of their chances with a trial and urge them to compromise accordingly. On the other hand, if your client seeks a continuing relationship with the adversary, selecting a facilitative or transformative mediator who will focus on creative solutions and safeguarding the interpersonal relationships involved in the dispute might best accomplish that goal.

It is also important to assess the strength of your client’s case. If a client has a strong case and a mediator or a court likely will view it that way, then the evaluative style is an attractive option because the mediator generally will attempt to convince the other side to settle on terms favorable to your client. At the same time, if the mediator does not believe your client has a strong case, the mediator can assist you to effectively control client expectations. If, however, you believe that you have the weaker of the two legal arguments, a facilitative mediator may have less inclination to force you and your client into making concessions.

In addition to a genuine, good-faith commitment to attempt to resolve the dispute, often a client will view the mediation process as an opportunity to assess the strengths and weaknesses of the cli-

ent’s overall case and positions on specific issues. Rebecca Ruppert McMahon, General Counsel of Cuyahoga Community College, sees additional benefits to the mediation process, such as assessing witness credibility and the opposing counsel’s performance, as well as potentially gathering new facts that may be useful in valuing the case or in litigation if the mediation does not succeed. In this sense, mediation can become an “educational experience” for you and your client.

Understanding your client’s goals from the very beginning of the process will not only help you select a mediator that can best resolve a dispute, but it also will increase overall client satisfaction with the mediation process.

### Assessing Other Factors

In addition to understanding your client’s goals, it is important for you to recognize other factors in a case that will affect the mediation. If a case involves heavy emotions or personality conflicts, for example, those issues may interfere with the parties’ ability to reach a mutually acceptable settlement. In such a circumstance, you should consider using a facilitative mediator who will assist the parties by clarifying or interpreting their positions to eliminate distracting criticism or personal attacks.

Another important task is to assess the opposing counsel. If you have a difficult opposing counsel to deal with or someone who does not appear to have control over his or her client, an evaluative mediator may be the right choice because that approach can cut through an opposing party’s unrealistically high expectations by quickly framing an assessment of the case as a reality check. In addition, an evaluative mediator can eliminate filters put in place by opposing counsel so that accurate and complete information reaches the other party.

In assessing these issues, you should also consider events that have occurred before the mediation to inform your point of view. Have the parties previously discussed settling? Do the parties have a relationship extending beyond that which led to the current dispute as family members, old friends, or long-standing business partners? Considering these questions can provide you with helpful insights regarding how the parties

likely will interact and which type of mediator will be the most likely to broker an agreement between them.

### Outlining a Process with the Opposing Counsel

Once you understand your client’s goals and which mediation style will most likely accomplish them, you can outline the

## The best mediators

are able to vary their approaches and apply the most effective style under the circumstances rather than taking a rigid “one-size-fits-all” approach.

process for selecting a mediator with the opposing counsel. Of course, the particular circumstances of a case will largely inform this process. You will want to consider some critical questions. In what sort of time frame do the parties want to complete the mediation? How much are the parties willing to spend mediating? Where will you hold the mediation? Putting yourself and your opposing counsel on the same page regarding these basic logistical issues early in the process can avoid potential conflicts down the road.

It also can help to discuss the different types of mediators and to find out if the parties can agree on the type of mediator that they will seek to employ. Ultimately, both parties should share the same mediation goal: to reach a settlement. You and your opponent should, therefore, discuss why a particular type of mediator seems more or less likely to accomplish that result.

If the parties do not immediately agree on who will serve as their mediator, which happens often, the attorneys must develop a process for exchanging lists of names from which the parties ultimately will select the mediator. Once the parties reach a consensus on the mediator selection pro-



cess, they should formalize their understanding in a mediation agreement. In addition to preventing confusion as the process progresses, a written agreement will provide the parties with a road map to allow them to proceed efficiently.

### Finding the Right Mediator

The next step is to find the individual medi-

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ator. As detailed above, first you should determine which mediation style will most effectively serve your client's goals and the case circumstances. Once you identify a particular stylistic approach, important considerations remain regarding a mediator's experience and approach.

The first consideration is a mediator's experience. A skilled and seasoned mediator has the ability to cut through the magnitude of a case while bringing credibility and sense of "peace with honor" to the parties, which often enhances the chance of achieving a settlement. The ability of a mediator to relate effectively to the parties and their lawyers and to bring about an agreed resolution is not innate or gained through training but is an art that comes only through experience. An experienced mediator knows when best to play his or her cards instead of simply cutting to the chase to complete a deal. As a rule of thumb, as the magnitude of a case increases, so should the experience level of the mediator. And a mediator's fee is not necessarily a good indication of his or her experience, effectiveness, or competence; a neutral is not always the best mediator just because he or she is expensive.

Another consideration is the complexity and subject matter of the dispute. Often it can help to have a mediator who understands the subject matter of the dispute—particularly if it is complex or highly technical—since you will have an easier

time bringing the mediator up to speed on the dispute, and the attorneys and clients will find it easier to communicate with him or her, both of which, in turn, can save expenses. Sometimes, however, you might desire to have a mediator without knowledge of the subject matter so he or she does not bring to the mediation a preconceived idea of what a settlement ought to look like.

Most mediators also have particular intangible qualities that you can deduce through a personal interview or by talking to references. For example, it is often beneficial to have a mediator who can bond with the clients, get past the lawyers, and develop rapport because this establishes credibility and allows the parties to engage meaningfully in the process of reaching a compromise. In some circumstances, however, a no-nonsense mediator might work better, particularly if the clients customarily deal in such a manner, have thick skin, or need a dispute resolved as quickly and efficiently as possible.

Perhaps most importantly, a good mediator has a proven track record of taking the time to prepare for a mediation. Mr. Freeman prefers to select a mediator who will take as much time preparing for the mediation as the mediation will last: "a mediator that does their homework." Ms. Ruppert McMahon echoes this sentiment. For her, the best mediators fully prepare for a mediation by carefully analyzing the mediation statements, reviewing all the pleadings, and having a list of critical questions for the parties to answer.

### Conducting Due Diligence on Potential Mediators

Once you identify potential mediators, you always should investigate their backgrounds. A good place to start is to ask colleagues or other trusted contacts in the legal field questions because you usually can count on them to appraise the mediators' performances candidly. Tapping external references also can help. A mediator will probably have a reference list, which will obviously consist of individuals who will offer a positive opinion. You can dig up a more candid appraisal, however, by requesting a list of the last five parties who retained the mediator.

The most important question that you

can ask these references is whether a mediator ultimately reached a settlement. While each case is unique, the collective responses to this question can still indicate whether a mediator has the tenacity to see a case through to a resolution. "You want a mediator that wants to get a settlement done and is dedicated to seeing it through to the end," says Mr. Spagnola. Likewise, Mr. Psaropoulos looks for mediators with "a reputation for closure" and "a seasoned track record" of obtaining settlements.

Conducting interviews with potential mediators, either individually or with opposing counsel, may also serve a useful purpose. This will provide valuable insight into the mediators' demeanor and style, which can have a significant impact on the mediation process. You also have another imperative task: you need to review a mediator's written work to try to sense his or her customs and habits in resolving disputes and to determine whether the mediator has any predilections about the particular legal or factual issues involved in your case.

In addition to scrutinizing a mediator's background, you should assess the process that the mediator employs to make sure both parties find it acceptable. You need to determine whether a mediator insists on a specific and regimented process, or if he or she seems willing to be flexible to suit the interests and goals of the parties participating in a mediation. Moreover, you should take into account the specific procedures used by a mediator. Does the mediator require briefs or other written statements? Does the mediator prefer *ex parte* briefs or mutual exchanges? Does he or she limit the length of written submissions? Do the parties present opening statements in a joint session to begin the mediation, or does he or she consider it too disruptive? Does the mediator keep the parties separate for the entire process while the mediator engages in separate caucuses? The answers to these questions are not necessarily good or bad in and of themselves, but they can substantially impact how the mediation progresses. You will want to consider how the answers to these questions will affect the mediation process and your client's overall goals.

Lastly, you definitely should confirm that a mediator does not have a conflict of interest and that the mediator maintains a

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confidentiality policy that your client finds acceptable.

### Selecting a Mediator

After careful attention to the matters discussed above, you will have the information that you need to select the right mediator for your client's case. Remember that your ultimate goal is not to "win" your preferred mediator but rather your goal is to reach a mutual agreement that both parties find acceptable. As noted above, you should have already agreed on a process for exchanging names to choose a mediator. Ideally, both parties will have at least one common mediator on their respective short lists, but sometimes the first round of exchanging names will not lead to an agreement, so you will need to plan for that possibility. In such a circumstance, you should set up a call or meet in person with your opponent to discuss the poten-

tial candidates. You should ask your opponent to articulate the reasons for rejecting your proposed mediators. You should also emphasize the shared goal of selecting a mediator who can broker a resolution to the dispute and explain why your candidates are aimed at reaching that result rather than at gaining an advantage.

Similarly, you should be willing to accept a mediator proposed by the other side. While you should always seek to determine which mediator will best serve your client's needs, you should not reflexively assume that in suggesting a particular type of mediator or a particular individual your opponent seeks a strategic advantage. You should, however, press your opponent on the specific reasons why he or she thinks that a particular mediator is a good choice and evaluate those responses to decide whether the choice is both fair and likely to achieve a settlement. If the other side

truly understands the goal of the mediation process, it will propose candidates who stand the best chance of leading the parties to an agreement. Further, agreeing to a mediator proposed by the other side will demonstrate a good-faith commitment to reaching a settlement through the mediation process.

### Conclusion

"It is the exception that mediation is a waste of time. The process is, more often than not, beneficial in moving the case forward even if you do not settle the matter," says Mr. Freeman. Ultimately, selecting the right mediator is the best way to ensure mediation success. Through careful attention to the issues addressed in this article, you will duly serve your client's interests and ensure that the mediation process is meaningful and likely to result in a settlement. 