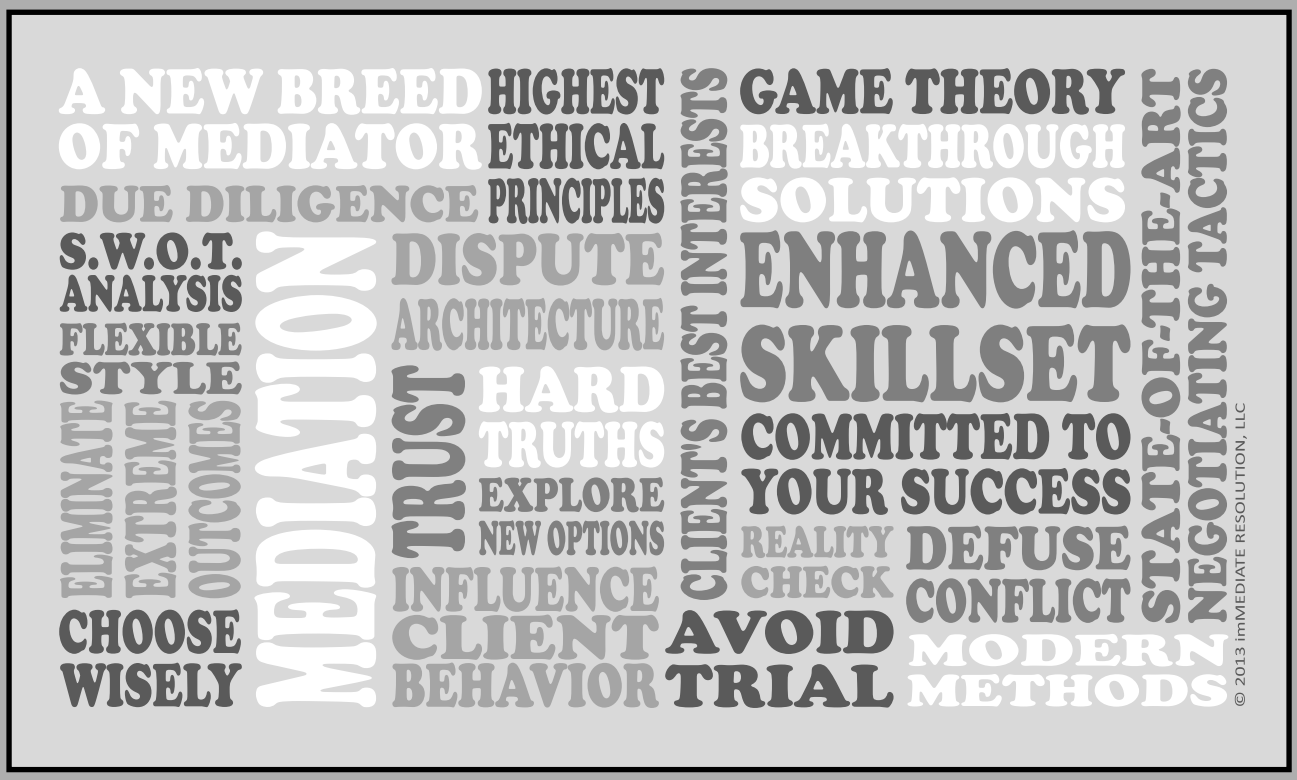
How to Select the Best Mediator



A Guide for Legal Professionals

Second Edition

By

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ACKNOWLEDGEMENT

I would be remiss if I failed to recognize and thank the many lawyers and fellow mediators who generously supported me in creating *How to Select the Best Mediator – A Guide for Legal Professionals*.

Without your 'war stories,' suggestions and advice, this ebook never could have become the resource it is today. Together, we created a tool from which all legal professionals – attorneys and mediators alike – can benefit.

You all left your marks on the final product, making *How to Select the Best Mediator – A Guide for Legal Professionals* a true 'community' endeavor. I cannot thank you enough.

BSP

PROLOGUE

I have an odd confession to make.

For part of my professional career, I held a very dim view of mediation. More than once I began my opening statement by announcing, "We're here because the judge gave us no choice. This is a waste of time." Many colleagues have shared similar views with me. Perhaps you've also had such thoughts at one time or another.

Several years back, I was involved in a mediation conference that proved to be my proverbial 'last straw.'

In one of my largest and most complex cases, an opposing attorney filed a motion requesting mediation far too early in the discovery process. The other litigants were insufficiently educated about the weaknesses of their cases to participate in meaningful negotiations. Naturally, I objected to the motion. The trial judge overruled me.

> ...is there one key element that can make or break a mediation conference?

The case was venued some 250 miles from Orlando, and travel was quite difficult for my client because of her debilitating medical condition. My biggest concern was that she probably wouldn't make it to a second session, so it was likely we'd have only one shot at getting it right. Being unfamiliar with mediators from that remote county, I trusted the judgment of one of the other lawyers and deferred to his selection of a mediator – a retired trial court judge.

The mediator's firm sent a boilerplate confirmation letter with a request for a pre-mediation case summary. Given the complexities of this case, my summary took many hours to assemble. Despite my skepticism about mediation, I took great pains to do everything I possibly could to help ensure a successful mediation. The summary carefully detailed my concerns about the prematurity of the mediation conference and the missing facts our opponents needed to consider if we were going to have productive settlement discussions.

That done, my expectations were very high. So were the stakes.

You know that feeling you get in the pit of your stomach at the beginning of trial when the judge brings in a panel of prospective jurors? That was the feeling I had as the parties convened for opening statements. It didn't take long, however, for that feeling to turn into overwhelming disappointment and frustration.

Almost immediately after we began our initial joint session, it became clear that the mediator was unprepared. He had never even bothered to review my painstakingly-drafted case summary. From there, the situation went from bad to downright awful. We needed a sophisticated strategist to mediate this complex case. Instead, we got a disinterested go-between whose biggest concern was having lunch delivered before noon. Not knowing how to make things right, I felt powerless as negotiations plodded along toward the inevitable impasse.

With this particular mediation, I'd relied on opposing counsel's word when he assured me this mediator was "perfect for the case." Huge mistake! Had I done proper due diligence, I would have discovered that for most attorneys who agreed to use him as a mediator, once was enough. While their reasons were varied, the feelings were mutual: "Never again."

Weeks later, still feeling frustrated about that failed mediation conference and utterly fed up with the institution of mediation as I had

experienced it over the years, I had a career-changing epiphany. I realized that there must be common denominators among failed mediations, and, likewise, common factors in successful mediations. What are they? And is there one key element that can make or break a mediation?

With boundless determination, I set out to find the answers. I dedicated several years to researching and learning all I could about the process of mediation. My efforts included speaking with colleagues about their experiences – both good and bad – soliciting their opinions and advice; studying mediation methodology and best practices; researching the different types of cases being mediated and the most important skills a professional neutral needs to acquire to resolve each of them effectively. I learned a lot about mediation in those years – what works, what doesn't, what's needed and why.

> ...the courts are sending cases to mediation that are so fact-laden that conventional methods for mediating them are no longer adequate.

Increasingly crowded court dockets have raised the importance of mediation as a litigation exit strategy. With the explosion of information technology in recent years, the courts are sending cases to mediation that are so fact-laden that conventional methods for mediating them are no longer adequate. My research has repeatedly shown that, across the country, individual mediators are starting to notice these developments and take responsive action. They write about acquiring new skills – particularly state-of-the-art negotiating, communication and interpersonal skills – and the use of game theory. They relate how their newly-acquired knowledge has helped them tackle even the toughest cases and create satisfying outcomes for all parties involved.

They also write about studying the unique and often complex infrastructure of disagreements and the fact that every constituent part of any controversy must be thoroughly understood before one can approach the delicate task of disassembling that controversy, succinctly articulating the issues, and reframing them to create better understandings in the pursuit of resolution. For lack of a name, I simply refer to this discipline as 'dispute architecture' – an understanding of which is helpful for resolving difficult cases.

Earlier, I described one of my failed mediations as "career changing." It certainly was. That debacle motivated me to study and understand the practice of mediation. I came to realize that it truly is both an art and a science. The deeper I dug, the more intrigued I became, and the more I wanted to learn.

While I have loved my twenty years as a trial lawyer, mediation has become my biggest passion. So much so that I created *im*MEDIATE RESOLUTION – a mediation firm where clients can 'expect success.' Today, I am proud to be a full-time mediator. In the past, I used my knowledge of game theory, negotiation strategy and dispute architecture to my clients' advantage in court; now, I use it to the advantage of parties involved in mediation.

During my research on the art and science of mediation, I discovered that there is no single source of authoritative information on that subject for my colleagues in the legal profession. It simply doesn't exist. Instead, the information we need to learn is in bits and pieces, scattered over myriad websites and published in numerous white papers or books.

Since becoming a full-time mediator, my personal mission has been to practice all that

I have learned and share the wealth of knowledge I have acquired (and am still acquiring) with fellow mediators and attorneys. This is the first of many free ebooks I will be distributing. *How to Select the Best Mediator* covers some basic information about the institution of mediation from the viewpoint of the legal professional; it emphasizes the importance of selecting the best mediators for individual cases. The information I have compiled helps clarify often confusing issues regarding the best mediation approaches and styles for specific types of legal disputes. It also provides insight into some of the personal and professional characteristics our most successful mediators have in common.

I invite all of you to call or email me with any thoughts or questions you may have about the contents of this ebook. I will undoubtedly have questions for you, too. I would like to know about your own experiences and get your advice. Pulling all of this information together and organizing it to write future ebooks or articles is no mean task. I certainly do not have all the answers, but with your input and support, we can find them. Working together, perhaps we will create a *new breed* of mediator; a professional neutral capable of tackling the toughest cases and creating satisfying outcomes for all stakeholders. Now, that's something to which we can all aspire and from which we will all benefit.

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SELECTING THE BEST MEDIATOR

Your success at mediation is directly tied to your choice of mediator.

Choose wisely, achieve a successful resolution and become something of a hero to your client.

Choose poorly and you may not reach a settlement. Worse yet, your case may settle on terms that don't serve your client's interests. Then, having selected or accepted an inadequate mediator, you risk being 'guilty by association' and suffering your client's ill will.

Mere attendance at the basic mediator certification course does not qualify someone as a good mediator. How significant is the problem of under-qualification? One commercial litigator told me that his large, statewide law firm specifically trains its associates how to salvage a mediation conference when the mediator is insufficiently trained to do his job.

Many attorneys have confessed that once they identify an excellent mediator, they are tempted to select the same mediator for all of their cases. However, the overuse of a specific mediator can foster a perception of compromised impartiality — creating a psychological imbalance which taints the mediation process before it begins. Unless all participants start a mediation conference truly believing they are in a neutral forum, the chances of negotiating a lasting solution are significantly diminished.

Before I founded *im*MEDIATE RESOLUTION, I conducted extensive research. When interviewing colleagues about the reasons a particular mediation failed, I frequently heard that the participants needed "more than a messenger," more than someone moving between the mediating parties, relaying

the last best offer. Mediators who operate in that mode have their place, and some lawyers choose them when clients want the lowest cost mediation services or when both parties are amenable to compromising a simple dispute.

Realistically though, how many cases are that easy?

Mediation has emerged as one of the best and most popular tools for resolving legal conflicts. Statistics prove that irrefutably. In recent years, the number of complex disputes referred to mediation has risen sharply with increased case filings.

Moreover, sophisticated litigants are increasingly unwilling to trust the outcomes of their disputes to jurors whose education, training and experience often fail to inspire confidence in our civil justice system. Superior mediation skills are necessary to produce the creative, self-directed, mutually satisfying resolutions clients demand today. I am not referring to the textbook mediator skills with which we are all familiar. I am talking about state-of-the-art communication, interpersonal and negotiating skills, a working knowledge of game theory, and more.

Granted, there are measures a highly-skilled attorney can implement to inoculate a mediation conference against the erosive effects of a mediator whose modest skills are overwhelmed by the challenges some cases present. One attorney explained that he calls opposing counsel in advance of nearly every mediation conference in an attempt to narrow the issues requiring the intervention of a mediator just in case the mediator is not up to the task.

So, how do you deliver superior results to your clients?

S.W.O.T. ANALYSIS

Your very first task in preparing for mediation is to conduct a realistic S.W.O.T. Analysis of your case. Armed with the information your S.W.O.T. Analysis produces, you must then determine the type of mediation approach and style best suited to the subject matter of your case and the needs of your clients. Finally, and most importantly, you have to conduct due diligence to identify the best professional neutral for your case; one with the skills to deal with all the challenges your case presents.

This is your reality check. S.W.O.T. Analysis allows you to see your case for what it is – its strengths, its weaknesses, its options and its truths. These are the bare facts of your case, devoid of emotions, personalities, client demands, your personal thoughts, and other subjective factors that create noise and interfere with solid decision making.

The following is a basic S.W.O.T. Analysis. Since no two cases are identical, no two clients are identical, and no two opponents are identical, you should incorporate additional elements into your S.W.O.T. Analysis that are specific to your case.

S – Strengths of your client's case (your opponent's weaknesses):

- Are your witnesses credible?
- Has there been any pre-trial publicity?
- Do the *Rules of Evidence* allow you to prove each element of every claim or defense?
- Do you have a trial theme that will resonate with the finder of fact?
- Are the relevant facts and applicable law reasonably clear?
- Will the opinions of your expert witnesses survive scrutiny under *Daubert* or *Frye*?
- Is opposing counsel experienced in this type of case?
- Is your case pending in a jurisdiction with a history of predictable trial court outcomes?

W – Weaknesses of your client's case (your opponent's strengths):

- Does your client have the right to a jury trial?
- Are the underlying facts so complex that the average juror is unlikely to understand the evidence?
- Do you represent a business entity that is held in low esteem?
- Do you represent an individual with a felony record?
- Will your client be an offensive witness?
- Does your client have the financial resources to litigate until the final appeal has been decided?
- Is the dispute governed by an arbitration agreement?
- Are venue demographics a concern?

O – Options your client realistically faces:

- What terms are the other parties likely to offer?
- Are there pending dispositive motions?
- Will an evidentiary adjudication produce an 'all or nothing' result?
- Will a loss at trial destroy your client's reputation or finances?
- Is there an earnout formula that will allow the parties to structure a settlement involving payments over time?
- Can a debt be satisfied by providing services or discounts on future transactions?
- Does your client require a confidential outcome?

T – Truths that need to be accepted by your client:

- What are the anticipated costs of litigating the case and the most probable outcomes of litigation?
- Are there any reported appellate court decisions that create uncertainty in the ultimate outcome?
- What did the presiding judge do before ascending to the bench?
- Is the presiding judge both knowledgeable and even-tempered?
- What is the presiding judge's general attitude toward your case?
- How has the presiding judge ruled in similar cases in the past?
- Have orders *in limine* affected your ability to prove your client's case?
- Is one of the parties legitimately concerned about setting a bad precedent?

This is your reality check. S.W.O.T. Analysis allows you to see your case for what it is – its strengths, its weaknesses, its options and its truths.

Conclusion

Once completed, your S.W.O.T. Analysis will equip you realistically to consider the three most important elements of selecting the right mediator for your case:

[1] Approach;
[2] Style; and
[3] Background.

Another advantage of conducting a S.W.O.T. Analysis is its value in helping you create a thorough and easily understood pre-mediation case summary[1] for your mediator.

[1] Upchurch Watson White & Max freely offers comprehensive, time-saving Templates for creating your S.W.O.T. Analysis and preparing a Pre-Mediation Case Summary for your cases. Both are easy to use. You can add your own branding to the generic Case Summary Template. Download both forms by visiting: www.uww-adr.com and clicking CLE>Tool Kit.

APPROACH

Different cases require different approaches to mediation. For example, the settlement of a professional malpractice claim generally consists of a one-time exchange of money between parties to a single-event controversy.

By contrast, the resolution of a complex, multi-party construction dispute often involves parties who are likely to encounter each other on future projects and whose difficulties arise from numerous events which occurred over a period of years. Your mediator should be sensitive to the important distinctions between these two situations and use techniques best-suited to assist the parties and their attorneys during the mediation conference.

Highly-skilled mediators approach their roles with flexibility, recognizing that each mediation conference requires its own methodology. There are many different approaches. The use of a particular approach is driven at least in part by the kind of dispute at issue, the preferences of the attorneys, and the unique needs of the parties.

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Sometimes during a mediation conference, circumstances will change, making a new approach advisable. So, ideally, you want a perceptive and flexible mediator who will alter his approach as needed. To understand what best serves your client in any given case, it helps to have a working familiarity with various types of mediator approaches.

Until 1994, there was no universally accepted vocabulary to describe the different approaches to mediation. That year, Leonard Riskin, a law professor at the University of Missouri, published an article entitled *Mediator Orientations, Strategies and Techniques*, 12 Alternatives to High Cost Litigation 111 (1994).[2] Although Professor Riskin was simply attempting to create common terminology to identify and discuss various mediation activities, his article immediately attracted lots of attention.[3] Although Riskin later suggested an alternative mediation vocabulary, his original terminology is still widely accepted and used by scholars and practitioners today.

In his groundbreaking article, Riskin described the two major approaches to mediation as 'facilitative' and 'evaluative.' While those are by no means the only two mediation approaches, they are the most commonly known. I will review the basic features of both, followed by descriptions of the more recently classified 'transformative' approach and the tongue-in-cheek 'eclectic' approach.

Facilitative Approach

Also known as the 'traditional' approach, facilitative mediation is the most familiar type of mediation in use today. In facilitative mediation, the professional neutral leads the parties in a negotiation of their dispute by

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[2] Today, Professor Riskin is the Chesterfield Smith Professor of Law at the University of Florida Levin College of Law.

[3] For more information about the controversy surrounding Professor Riskin's work, I suggest *Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement* by Kenneth M. Roberts, 39 Loyola University Chicago Law Journal 187 (2007).

emphasizing concepts of empowerment, participation and freedom of choice. While the facilitative mediator subtly educates the parties about applicable rules of law, clarifies available intermediate options, and explores the limitations of litigated outcomes, he is ever-cognizant of relational connections and the importance of enhancing communication between disputants.

The facilitative mediator often begins with a joint session in which each party is given an opportunity to present his views of the dispute and even vent some emotions. Airing grievances publicly has a cathartic effect on mediation participants, which, in turn, reduces the likelihood that any one of them will ruin a mediation conference by declaring *jihad* on the others. The mediator's goal is to make each participant feel validated by knowing his concerns are being heard.

Once a facilitative mediator empowers the parties to defuse overt conflict by displaying their problems openly, he quickly becomes more active in his efforts to guide the participants toward a creative, self-determined solution. Using the applicable law merely as a reference point, a facilitator places a premium on each participant's feelings about fair outcomes. When the issues become too thorny, the facilitative mediator keeps the participants' attention focused on the process by which they exchange information.

The facilitator works to help identify the best interests of the parties and then focuses on satisfying their unique needs. Facilitative mediators never lose sight of the fact that sometimes the best outcomes have little to do with a party's legal rights, financial interests, or the probable results of a trial.

Facilitative mediators insist upon following impartial procedures to achieve balance and equality among the disputants. They ask questions in carefully-crafted and open-ended language. They crystallize the issues in controversy using neutral terms. Many facilitative mediators thoughtfully design a discussion agenda in advance of the mediation conference[4] with the goal of re-orienting the parties and enriching their understanding of one another.

This type of mediation can be very challenging; your choice of mediator can easily make or break the mediation conference. An effective facilitative mediator must possess active listening skills and the ability to discern important, underlying issues. He must also have an appreciation for the unique perspectives of each party and the wherewithal to help the participants realistically identify their best interests.

This type of mediation can be very challenging; your choice of mediator can easily make or break the mediation conference.

Because of these techniques, selecting a facilitative mediator often preordains a slow-moving mediation conference. More than one session may be required before a settlement agreement is obtained. In many cases, that is exactly what is needed. Outside experts may have to be consulted. Additional legal research may be necessary. And while some neutrals stress the importance of getting a signed agreement at the conclusion of the first

[4] A facilitative mediator may refrain from reviewing materials before the mediation conference, believing that too much advance knowledge by the mediator threatens to inject the mediator's own qualitative judgments into the mediation proceedings or overemphasize substantive information to the disadvantage of one or more disputants. These so-called facilitative 'purists' also tend to avoid providing information to the parties that does not originate with the parties themselves. They assume the litigants are intelligent people, capable of understanding their own situations better than any professional neutral.

session, very often the parties would benefit from the ability to 'go home and sleep on it.' Aware of that truth, the facilitative mediator takes his time and builds on partial agreements while he pursues a lasting global resolution.

In disputes where the emotions of the parties are running high or the clients are 'difficult,' facilitative mediation is normally your best choice.

Situations most amenable to this type of mediation include labor and employment controversies, dissolution of business associations, and the repair of established relationships between individuals or groups that will continue to interact long after their dispute is over. Family law matters such as dissolution of marriage and child custody respond well to this approach. These situations can be mediated before the need to initiate litigation arises or after litigation stalls.

In facilitative mediation, the mediator's knowledge of dispute architecture, negotiating strategies and human dynamics are the most important variables. Specific legal expertise or knowledge of the particular subject matter in dispute is not nearly as important.

Put differently, the success of a facilitative mediation conference turns on the mediator's ability to influence the behavior of the parties at the bargaining table. A highly-skilled neutral should be able to guide the parties in examining their primary differences honestly and pivoting their thinking as needed to achieve a self-directed, mutually acceptable resolution.

To strengthen your attorney-client relationships, it is important to understand that clients need to feel as if they have entered into self-determined settlements instead of being coerced into accepting an outcome they believe they had no role in creating.

Sometimes the slow way is the best way. Accept that statement as an article of faith, and you will go a long way in delivering mediation results that keep your clients coming back for years.

> ...the evaluative mediator is focused not so much on the specific interests of each party but rather on their shared interest in identifying the most expeditious ways of avoiding the zero-sum results of trial.

Evaluative Approach

An evaluative mediator provides hands-on guidance to the parties regarding the most appropriate settlement terms within the unique legal, economic and cultural circumstances of each dispute. In contrast to his facilitative counterpart who may prefer not to study case-specific materials before a mediation conference, an evaluative mediator usually will review relevant information in an effort to be prepared.

An evaluative mediator is not shy about sharing his professional opinion on the likeliest range of potential litigation outcomes. That range, which is often expressed in dollars and cents, normally becomes the focus of the negotiations. The parties then rely upon the finesse of the mediator to steer them toward a number somewhere in the middle.

The evaluative mediator will freely inject new information into a settlement discussion even though it did not originate with the parties. Sometimes that information focuses more on damages; other times, on issues of liability and affirmative defenses. Rarely will evaluative mediators engage the parties about *their*

concerns or feelings and will often ignore those issues altogether.

But the participants do not ignore the mediator. An evaluative mediator is aware of that fact and fully cognizant of his ability to influence participant expectations. He depends heavily on techniques which create doubt in the minds of the parties. By downplaying the chances of winning through litigation, it becomes much easier to extract compromises and drive home a settlement.

At the outset of the mediation conference, an evaluative mediator typically asks the parties to present their cases by arguing their respective positions in a joint session. Thereafter, the evaluative approach relies upon private caucuses in which the mediator gains additional insight and shares his views about the relative strengths and weaknesses of the parties' positions and the likely outcomes of litigation.

Contract disputes, complex business torts and other commercial controversies are particularly responsive to evaluative mediation. Irrespective of the type of case involved, evaluative mediation works best when the parties are well-informed about all aspects of their case. That usually occurs after extensive formal discovery.

In general, evaluative mediators have more specialized knowledge than non-evaluative mediators regarding relevant law, applicable industry practices and the cultural conditions bearing on any given dispute. Professional neutrals with significant legal experience – especially as trial lawyers – can be very effective when circumstances call for the evaluative approach. When using it, the mediator is focused not so much on the specific interests of each party but rather on their shared interest in identifying the most expeditious ways of avoiding the zero-sum results of a trial.

Evaluative mediators are sometimes derogatorily referred to as 'muscle mediators' – the 'muscle' being found in their methods of mediation conference oversight, which can be heavy-handed. Some deem their blustery and authoritarian techniques to be more akin to the adjudicative process than to a settlement negotiation.

Even so, many facilitative mediators have been known to switch to the evaluative approach to help breach an impasse.

Evaluative mediators have their place, and resolution can usually be reached in one session. However, evaluative mediation techniques may cause a degree of client angst that attorneys must consider when selecting a mediator.

Transformative mediation first attempts to effect change among disputants on emotional, spiritual and intellectual levels to eliminate obstacles to reconciliation.

Transformative Approach

Some disputes cannot be resolved unless one or more of the parties undergoes a transformation of perspective. Hence, the emergence of a relatively new mediation approach – 'transformative.'

Transformative mediation takes a socio-communicative approach to human conflict. According to this model, a dispute represents an interactive crisis that has a destabilizing effect on each participant. Using this approach, mediators first address the parties' underlying conflict before they turn to the task of attempting to resolve their dispute. Consequently, transformative mediation first attempts to effect change among disputants on emotional, spiritual and intellectual levels to eliminate obstacles to reconciliation.

Advocates of transformative mediation posit that disputants have the capacity to change the quality of their interactions from destructive to constructive, enabling them to resume a healthy relationship. The transformative approach is most effective in cases where there is a fundamental need to understand another party's values, interests or points of view (as in family or church conflicts). Both the process and ground rules are quite different from those used in other approaches.

With an emphasis on empowering each party to resolve the conflict, most of the participants' time is spent in joint sessions rather than caucuses. This maximizes the opportunities for a transformation of perspective. Under the transformative approach, the parties set their own goals, create their own ground rules and control the process of mediation itself. They determine what is discussed and how their time is spent. The transformative mediator's role is to monitor the proceedings closely and assist where needed to facilitate a mutually agreeable outcome. More than one session may be required.

Success with the transformative approach is based on the parties' ability to arrive at an outcome they determine together. Money may not be a factor. A good result could be as simple as each party feeling understood and respected, knowing that future interactions will be both safe and rewarding.

Mediators using the transformative approach tend to have a philosophical orientation based on distinctions between a dispute and a conflict. A dispute is a competition between multiple parties who maintain that only their position is just or true; a conflict is a difference that, if unchecked, will allow one party to impose its will on another. A dispute is intellectual; a conflict is emotional. A dispute is two-dimensional; a conflict is three-dimensional.

Critics argue that transformative mediation is a Pollyannaish attempt to cloak a fundamentally adversarial process with the incongruous garb of peace and harmony. Nevertheless, transformative mediation has proven very effective in certain types of cases, and its acceptance and use are on the rise.

> "Permissible mediation conduct should vary not according to some ironclad formula but should instead reflect the personal style of the mediator as well as the desires of the disputants and the context and nature of the dispute."
>
> --Professor Jeffrey Stempel

Eclectic Approach

To pragmatic legal professionals – lawyers and mediators alike – the most important measure of success is client satisfaction.

In apparent recognition of that fact, Professor Jeffrey Stempel coined a term to denote a mediation approach best described as the willingness to use whatever techniques the mediator finds work best in any given mediation; Stempel called it the 'eclectic' approach.[5]

Stempel states: "Permissible mediation conduct should vary not according to some ironclad formula but should instead reflect the personal style of the mediator as well as the desires of the disputants and the context and nature of the dispute." [5]

Most disputes – especially more complex cases

[5] *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 Journal of Dispute Resolution 247, 250 (2000). Professor Stempel is the Doris S. and Theodore B. Lee Professor of Law at the University of Nevada Las Vegas William S. Boyd School of Law.

– could best be resolved to the satisfaction of all parties by the mediator's nimble use of the eclectic approach. In action, it calls for a mediator adept at switching from facilitative to evaluative to transformative tactics – literally doing whatever it takes – to deal effectively with any obstacle that gets in the way.

■ Conclusion

As I have indicated, your choice of mediator can make or break a negotiation. There are many effective mediators who tend to adhere dogmatically to one approach or another. Choose them for your straightforward cases.

For all of your other cases, it is important to understand the various approaches and the types of controversies each best serves.

This knowledge is particularly useful as you conduct your due diligence. Commonly understood terms will serve as reference points when you discuss methodologies with your peers and prospective mediators.

In the actual 'trenches' of mediation work, labels are meaningless. All that matters is what works best to create the win-win outcomes everyone expects.

STYLE

Each mediator projects some aspect of his personality into a mediation. That is inevitable. Apart from that, the most important element of a mediator's style is his level of involvement in a mediation conference. That level falls somewhere on a spectrum from minimal to very high. Here is what you need to know:

■ The Minimally-Involved Style

Most mediators lead the parties in a joint session at the beginning of their negotiations. Thereafter, the minimally-involved mediator will relinquish control of the negotiation process to the parties and their attorneys. At that point, a mediation conference often transitions into the caucus phase where the parties retire to separate conference rooms; the mediator talks with each group privately and then relays certain, limited information to the other parties. This mediator's style is to serve as a conduit for ever-closer offers, which may work just fine when all parties are amenable to compromising a simple dispute.

If a colleague simply describes a mediator as being a "messenger," he is undoubtedly referring to someone who favors the minimally-involved style.

■ The Moderately-Involved Style

The style of most neutrals is to straddle the middle, being neither minimally- nor highly-involved. Such mediators are effective in cases where emotions are not running high, the legal issues are fairly cut and dry and there is not much about the facts to dispute. Just be sure the moderately-involved mediator you agree to hire is capable of using the most appropriate approach for your case and is flexible enough to shift gears as needed.

■ The Highly-Involved Style

Many attorneys report that they usually achieve more satisfying settlements by selecting a professional neutral with a highly-involved mediation style.

The highly-involved mediator will actively listen as the participants share information and display emotions, following up where necessary to gain a global understanding of the relevant issues in dispute. He is always on the lookout for opportunities to offer helpful thoughts or suggestions and will frequently share his ideas on salient issues without having to be specifically asked.

The highly-involved mediator is sensitive to power imbalances among mediation participants and will take subtle steps to ensure that such dynamics do not get in the way of productive discussions. He never loses sight of the importance of fostering an environment in which each party can exercise its right of self-determination.

This type of neutral will often want to speak with the attorneys about their case before the first day of a mediation conference to clarify facts, discuss applicable legal concepts, and ascertain whether there are any circumstances that will impede progress during settlement negotiations. Should there be an adjournment or an impasse, he will usually follow up with counsel to determine if there has been any movement by the parties and inquire whether additional effort on his part is welcome.

■ Conclusion

Style is an intangible element you can easily ascertain during the due diligence process by speaking with colleagues or with prospective mediators. The importance of matching your case to the mediator with the most effective style is self-evident.

WHAT DEFINES A HIGHLY-SKILLED MEDIATOR?

It is important to understand that mediators come in all skill levels. Given the ever-growing number of cases, there is definitely a need for mediators at each level. Your job is to match a mediator's skill level with what is required to resolve your case. Both your S.W.O.T. Analysis and pre-mediation case summary will go a long way toward helping you determine skill level requirements.

But what about more complex cases? What about cases with recalcitrant parties or highly-charged emotional issues? And what about the cases that make you lose sleep at night? For those, a highly-skilled mediator is an absolute necessity if you expect success.

To find such mediators, you need to know what defines them as being 'highly-skilled.' I am not referring to years of experience. Instead, I am referring to specialized training in specific disciplines and unique skills that have been carefully honed.

Currently, there are not many mediators with such elevated skillsets, but their numbers are growing. Hopefully, over the next few years, they will become the norm. As I mentioned earlier, my research repeatedly showed that across the country, individual mediators have begun to appreciate the significant need for enhanced skills. Those enlightened few have begun to acquire and teach these skills. A new level of proficiency has emerged in our profession; one whose practitioners are substantially better prepared to facilitate win-win outcomes in even the most complicated cases.

The skills that make this kind of mediator so effective include:

- Fluid use of the eclectic approach, moving seamlessly from one technique to another to keep the mediation process going forward;
- Flexible style, ranging between moderately- and highly-involved, as the need arises;
- Highly-refined interpersonal and communication skills;
- Deep understanding of the anatomy of disputes and conflicts (a/k/a dispute architecture), together with the ability to

disassemble a controversy and reframe individual issues to create better understanding among the parties involved;

•Well-honed and creative problem-solving skills;

•Attention to the details of a case with a thoroughness that leaves no possibilities off the table;

•State-of-the-art negotiating skills – a discipline where best practices are ever-changing;

•Game theory – a science that has its origins in complex mathematics yet has proven uniquely successful when applied to mediation. Defined as the study of strategic behavior in humans, game theory rests on two major assumptions: people act rationally, and they choose options with the highest perceived value. Research proves that each party's choices and actions in mediation are influenced by that party's perceptions of every other participant's choices and actions.[6]

Lastly, and perhaps the most telling characteristic of the highly-skilled mediator is:

•The humble recognition that he does not know it all. Such a mediator constantly dedicates himself to enhancing and expanding the scope of his skills to address more effectively the new challenges emerging in our profession.

[6] For more information about game theory, I recommend *Game Theory* by Drew Fudenberg and Jean Tirole (MIT Press 1991). Additionally, within the next few months, I will be publishing an ebook dedicated to the use of game theory in mediation. Look for it on the *im*MEDIATE RESOLUTION website: www.immediateresolution.com.

BACKGROUND

To expect success in mediation, you have one final task. You have already conducted S.W.O.T. Analysis and determined the skill level your case requires in a mediator; now you're ready to assess the mediators and find a match. Here's how to complete your due diligence:

■ Peer Input

Ask colleagues for recommendations. Seek information based on their personal experiences. Make your short list. You may be surprised how many colleagues are willing to take a few minutes to help you avoid their past mistakes.[7]

Your colleagues are your best resource for determining a mediator's 'stature' – an intangible, charisma-like quality that affects the candidate's credibility with the parties and impacts belief in the probability of a successful resolution.

Peer views of a mediator's professionalism encompasses the candidate's integrity, trustworthiness and preparedness.[8]

Colleagues can also help you learn about a candidate's end-of-game performance. Ask about the 'exit process' a mediator uses. Some mediators refuse to let the parties leave a mediation conference until a document embodying their agreement has been reduced to writing and signed by the participants. Depending on the circumstances – and accurately reading the emotions of all parties –

[7] For instance, one attorney told me he no longer uses mediators who place undue emphasis on opening statements or spend too much time allowing the parties to vent their frustrations during joint sessions. In his experience, those practices often lead to posturing and entrenchment, distracting from productive negotiations.

[8] One colleague explained that he calls the mediator before every mediation conference to make sure the mediator has read his pre-mediation case summary. When it is obvious a mediator has not read his summary, he shames the mediator into doing so. No one should have to go to these lengths to receive professional treatment from a mediator.

that may not always be the wisest approach. What has been your colleagues' experience with the candidate in such matters?

What about cases that do not settle? What has been your peers' experience with the candidate regarding follow-up efforts with participating attorneys?

There are many lessons to be learned from the 'war stories' you will undoubtedly hear. Take them to heart.

Internet Research

Peruse the candidates' websites; study their *curriculum vitae* carefully. What is their legal background? Have they had specialized training? What certifications have they earned? What specialized expertise do they possess? Are there client testimonials? Do the candidates have professional experience relevant to your case?

Interview

While peer input and Internet research will certainly provide useful information, there will still be missing details you should know. If practical, make it your practice to speak individually with each candidate – preferably in person.

Do not be shy about asking lots of questions. Make it clear that you are interviewing him as well as several other candidates to serve as the mediator for a specific case and, perhaps, others in the future.

During your conversation, observe the candidate's verbal and non-verbal communication style; pay close attention to how he responds: *what* he says, *how* he says it, and what he *does not* say. When meeting candidates in person, evaluate their body language. Is it in sync with what they are saying about themselves and their work?

Make inquiries to elicit what you need to know. Here is a suggested interview outline to which you will want to add questions specific to your case:

•**Training & Expertise –** Ask questions that fill in the blanks with information your website research failed to turn up regarding legal background, specialized training, certifications, subject matter expertise, and professional experience relevant to your case. Get specifics. Ask candidates for non-confidential information about how they have handled cases similar to yours in the past.

•**Character Traits –** Look for clues about their interpersonal, communication, listening, and rapport-building skills; their sensitivity, insightfulness, emotional maturity, patience, tolerance, and tenacity; and their creativity and problem-solving abilities. You want to determine if they can think outside the box, if they are thorough,[9] if they exhibit common sense, and if they have a sense of humor.

•**The Basics –** This is an obvious but important part of your due diligence which includes:

-- Availability: Is the candidate willing to accommodate your schedule? Does the candidate have a flexible calendar and a willingness to work evenings or weekends?

-- Geographical considerations: Is the candidate willing to travel? If so, what is the cost to your client?

-- Professional liability insurance: Is the candidate sufficiently insured?

-- Costs: Does the candidate make full, up-front disclosures about what and when he is charging clients (hourly rates, advance deposits, travel expenses, etc.)?

Conclusion

Rarely will you find a candidate who is the 'complete package.' Trust your instincts and select the best neutral available.

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[9] Another colleague's biggest pet peeve is a mediator's tendency to quit working once the parties agree on a price term but before pen is put to paper. In certain cases, the preparation of releases, restrictive covenants, confidentiality provisions and anti-disparagement clauses is as important as the money changing hands. You're looking for a mediator who recognizes the significance of such deal structuring logistics.

Committed to Your Success

Your mediator should be dedicated to your success and that of each participant. While maintaining his professional impartiality, there are a number of things a mediator should be able to do to help support your client's cause.

■ Customize each mediation

Cookie-cutter approaches to mediation simply do not work. A good mediator will always contact the attorneys shortly after being appointed to serve. In consultation with you and opposing counsel, a responsible neutral will be willing and able to craft a customized strategic plan in advance of the actual mediation conference. That plan should encompass the best mediation style and approach for the type of dispute and the needs of the parties. If a well-planned mediation conference ends in an impasse, the mediator should always follow up with the attorneys to determine if there is anything else he can do to assist.

■ Solicit mediator's professional opinion

A mediator should have a wealth of knowledge that makes your job easier and allows the mediation conference to run more smoothly. Ask for his insights about your case. Neutral input may help you and your client frame a better settlement proposal. If you trust your mediator, consider confiding your client's 'bottom line' settlement proposal. Tap into the mediator's thoughts about the other party's position based on his considerable knowledge of the issues; adjust your own tactics accordingly.

■ Share your ideas

During caucus sessions, take advantage of your private time with the mediator. Tell him your ideas. If the mediator determines your proposal is fundamentally sound, he can help you refine it. Ask the mediator to propose your idea as his own to your opponents, thereby reducing the likelihood of rejection.

■ A cure for some client 'ailments'

You will have spent considerable time with your client prior to mediation and should have developed a deep understanding of any mindset that might inhibit rational thinking.

You may find yourself trying to deal with a client's unrealistic expectations, emotionally-driven thinking, stubbornness, ignorance, indecisiveness, or any number of other 'ailments' that can seriously impede progress in a mediation.

A professional neutral with whom you feel comfortable confiding client relationship problems like these will prove invaluable. This is one of the many important occasions where your mediator's highly-developed interpersonal skills can contribute to a 'cure.'[10]

Lean on your mediator to deliver unwelcome news and heavy doses of reality. Call upon his skills as a legal 'healer' to address the client who thumps his chest and proclaims that he would rather pay his lawyer to try the case than give one dime to the other side. If history is a good indicator, that is the very client who will protest most loudly when he receives your escalating bills for trial preparation.[11]

Mediation is a powerful procedural tool for the astute legal practitioner. Use it to your full advantage.

--- END ---

[10] Effective mediators realize that one of the most valuable — yet unspoken — services they can provide is the ability to improve understanding and communication between attorneys and their clients.

[11] It is comforting to know that you and the mediator both implored him to at least think about accepting an opponent's reasonable settlement offer during mediation. When your client complains that the results you delivered at trial were disappointing, you can remind him that he rejected the mediator's suggestion to reconsider a better offer during the mediation conference.

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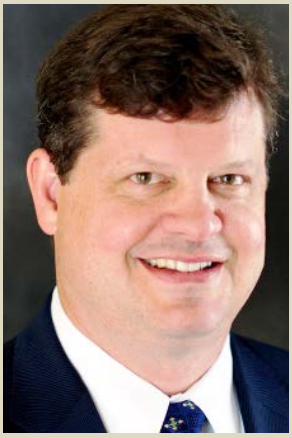
Thank you for reading *How to Select the Best Mediator – A Guide for Legal Professionals.*

Please feel free to forward copies of this ebook to members of your team and colleagues in your firm and beyond. Look for it on our website.

The Upchurch Watson White & Max team and its website are valuable resources legal professionals can depend upon. The firm's online toolkit continues to add exceptional aids and helpful information to make your work on mediated cases significantly easier and more successful.



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ABOUT THE AUTHOR

Brandon S. Peters had dedicated twenty years to the practice of trial law in Florida and Arizona. Perceiving a great need for highly-skilled mediators after several years of intense research and study, Mr. Peters has focused his full-time professional endeavors on mediation and arbitration. In launching his own professional neutral firm, *im*MEDIATE RESOLUTION, Mr. Peters employed his extensive knowledge and proficiencies -- in negotiation strategies, game theory, dispute architecture, flexible mediation approaches, interpersonal skills and creative problem solving -- so parties on all sides of the bargaining table can expect success. Mr. Peters joined the Upchurch Watson White & Max Mediation Group in 2014 and continues to share his broad knowledge with his colleagues to support their success and that of the entire neutrals profession. *How to Select the Best Mediator – A Guide for Legal Professionals* is the first of many such efforts.