

A Consumer Guide to

SELECTING A MEDIATOR

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Note to The Reader

To make an informed choice of a mediator, the consumer must have information and the ability to evaluate that information. This guide begins the educational process by presenting a framework for understanding mediator competence. The information is based on research presented at the 1993 National Symposium on Court-Connected Dispute Resolution Research sponsored by the State Justice Institute and the National Center for State Courts, the work of the Test Design Project, the work of alternate dispute resolution policy makers, including the SPIDR Commission on Qualifications and the experience of mediators and mediation program directors nationwide. We anticipate that the guide will need to be updated as our knowledge grows.

How to Use This Guide

Mark the guide up. Use the checklists as you go. Don't feel that you must use all the information or go through all the suggested steps; use only what seems most helpful. Refer to the Resources section at the back for more information.

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I. Purpose of This Brochure

This guide is for anyone looking for a mediator. It will be especially useful to lawyers or other professionals advising their clients, court systems and mediation programs that provide information to consumers, judges who refer litigants to mediation, and people who have been referred by the court to mediation and who must choose their own mediator.

Mediation is a conflict resolution process in which one or more impartial persons intervene in a conflict with the disputants' consent and help them negotiate a mutually acceptable agreement. The mediator does not take sides or decide how the dispute should be resolved.

This guide does not explain mediation or alternative dispute resolution (ADR) in detail, although a consumer needs at least a basic understanding of mediation to profit fully from this guide. To learn about mediation, consult books, articles and pamphlets at your local library, community mediation center, courthouse, bookstore, mediator's office, or mediation association. The Alaska Judicial Council publishes a free pamphlet that gives some basic information about mediation.

II. What Qualifications Does a Mediator Need?

Qualifications refer to the amount and type of training, education and experience possessed by a mediator. In some states, courts or legislatures impose training or experience standards on mediators who practice in state- or court-funded mediation programs. In most states, including Alaska, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. As of 1999, no entity in Alaska licensed, certified or otherwise regulated mediation practice. In reality, however, many private mediators, and most

What does it mean if someone tells you they are a "certified" mediator? Sometimes, a person has a certificate of training completed. Such a certificate is a confirmation that the person has successfully completed training, but does not confirm that the person has attained any level of competence. In other cases, the person has been granted certification by a public or private entity to indicate that the person has attained a certain level of competence in accordance with experience, training and other standards. Consumers may use this type of certificate to determine the qualifications of the practitioner. A smart consumer always asks what the particular certificate means.

of those who work for or are associated with mediation organizations and programs, have training or experience, or both.

Most independent mediation programs impose their own training or experience standards on mediators. For example, the Resolution Center, a community mediation center in Anchorage, requires its volunteers to complete a certain amount of mediation training and an apprenticeship. Many mediation referral services also impose training, experience or other requirements on mediators who wish to be included on their rosters.

Some national and local mediation membership organizations set training and experience requirements and ethical standards for their practicing members (refer to the resources section at the end of this brochure for more information). One national non-profit mediator organization, the Academy of Family Mediators, is working to develop a voluntary, performance-based certification program.

III. What Makes a Competent Mediator?

There is no universal answer to this question. No particular type or amount of education or job experience has been shown to predict success as a mediator. Successful mediators come from many different backgrounds.

Competence depends partly on the context of the dispute and the parties' expectations. It also depends on whether the mediator has the right mix of acquired skills, training, education, experience and natural abilities to help resolve the specific dispute. Important skills and abilities include neutrality, ability to communicate, ability to listen and understand, and ability to define and clarify issues.

IV. Five Steps to Choosing a Qualified Mediator

Because no easy formula can predict mediator competence, the consumer must do some groundwork before selecting a mediator. First, you must understand the mediation process. After you understand the

✓ Checklist: Five Steps to Choosing a Mediator

1. Decide what you want from mediation
2. Get a list of mediators
3. Look over mediator's written qualifications
4. Interview mediators
5. Evaluate information and make decision

basics, you can use the following process to choose a mediator: These steps are described on the next pages. Remember during your search that a mediator should remain neutral and treat both parties with equal fairness and respect.

1. Decide What You Want from Mediation

Think about your goals for the session. Do you want a mediator who suggests options in order to help move the parties towards agreement? Or, do you want a mediator who resists offering opinions so the parties feel responsible for their agreement? Think about past attempts at negotiation and problems with those attempts. What are your choices if mediation does not work?

Think about your abilities. What are your strengths and weaknesses as a negotiator? What are the other party's strengths and weaknesses? What are your emotional limitations? Do you expect the mediator to help you stand your ground if the other person negotiates better than you or has more "power?" Thinking about these issues is especially important if there is a power imbalance between you and the other party. If there has been abuse and or violence between you and the other party, please read the Domestic Abuse section on page 10.

Think about the dispute and the context in which you must resolve it. What is the time frame? Is this a commercial dispute between experienced insurance company representatives, or is it a divorce involving an emotional child custody decision? The approach or model that commercial disputants might prefer may differ greatly from the one preferred by a mother and father.

Consider your budget. How much you can spend might limit your choice of mediator or mediation program.

Many mediators and dispute resolution firms or services can help you understand what services would be best for your dispute. Some will contact the other party to the dispute to introduce the concept of mediation.

2. Compile a List of Names

You can get a list of mediators from several sources.

Word of Mouth. Ask a friend, your attorney, your therapist, or another professional. Describe your case to a mediator and ask, "Other than yourself, who are the most skilled mediators in this kind of case?" Talk to people who have been in a mediation with the mediator (you can ask the mediator for names of clients). What was their case about and

what were their impressions of the mediator?

Written Lists. Check local listings in the Yellow Pages. The Alaska Court System publishes a directory of mediators in Alaska that is available on the court's web page (www.courts.state.ak.us) and at the Alaska state law library. Rural consumers can consult the Alaska Judicial Council's directory of organizations that resolve disputes in rural areas (many of these are tribal courts or councils). Many local mediation organizations maintain directories of member–mediators.

Referral Services. Many national mediator membership organizations and trade organizations keep lists of practitioner members and offer referral services (some of these organizations are listed at the end of this pamphlet). Some may charge for the referral services.

✓ Checklist: Get Names

1. Ask people and professionals whom you know
2. Look at directories
3. Call referral services (ask whether they charge to refer you to a mediator)

3. Evaluate Written Materials

Call or write several mediators on your list and ask them to send you their promotional materials, resume, references and a sample of their written work. These materials should cover most of the following topics.

Mediation Training. How was the mediator trained? Some mediators receive formal classroom–style training. Some participate in apprenticeships or in mentoring programs. While training alone does not guarantee a competent mediator, most professional mediators have had some type of formal training. Was the training geared towards this type of dispute? How many hours of training has this mediator had? How recent was the training?

Experience. Evaluate the mediator's type and amount of experience (number of years of mediation, number of mediations conducted, types of mediations conducted). How many cases similar to yours has the mediator handled? A mediator's experience is particularly important if he or she has limited formal training.

Written Work. Some mediators will write up notes about agreements or even draft agreements for the parties. Other mediators do not prepare written agreements or contracts. If your mediator will prepare

written work, you may want to review a sample. Samples could include letters, articles or promotional materials. Any sample of the mediator's written work should be clear, well organized, and use neutral language. Agreements or contracts should have detailed information about all items upon which the parties have agreed.

Orientation Session. Some mediators offer an introductory or orientation session after which the parties decide whether they wish to continue. Is it offered at no cost, reduced cost, or otherwise?

Cost. Understand the provider's fee structure. Does the mediator charge by the hour or the day? How much per hour/day? What about other expenses?

Other Considerations. Find out whether the mediator carries professional liability insurance which specifically covers mediation. Is the mediator certified, and if so by whom? Certification may show the mediator has completed a specific amount of training or education but training and education do not guarantee competence.

Does the mediator belong to a national or local mediation organization, and is the mediator a practicing or general member? Cost may prevent some competent mediators from joining organizations, becoming certified, or carrying liability insurance.

✓ Checklist: Evaluate Written Materials

1. Fees: Hourly? Daily? How much?
2. Education: How much? What? How recent?
3. Experience: What kinds of disputes? How many mediations? Areas of specialization?
4. Written (if available): Understandable?
Complete? Concise?
5. Insurance: Yes? What kind?
6. Professional memberships, certifications, adherence to ethical standards?

4. Interview the Mediators

Talk to the mediators in person or by phone. During the interview, observe the mediator's interpersonal and professional skills. Qualities often found in effective mediators include neutrality, emotional stability and maturity, integrity, and sensitivity. Look also for good interviewing skills, verbal and nonverbal communication, ability to listen, ability to define and clarify issues, problem-solving ability, and organization.

During the conversation, you also may want to ask questions about matters covered in the written materials and other topics. Some topics to discuss in the interview include:

Training, Knowledge and Experience.

Ask the mediator, “How has your education and experience prepared you to help us work out this specific dispute?” If the mediator had formal training, did it include role play and observations of skilled mediators? While training and education do not guarantee competence, training is most effective when it includes practice-oriented segments such as role play and observation.

Ask “Do you participate in continuing education, ongoing supervision, or consultation?” Many professional mediation organizations encourage or require their members to participate in ongoing education or other professional development.

People often ask whether a mediator should be an expert in the subject of the dispute. For example, should the mediator in a commercial mediation be an expert on industry standards and practices? The answer depends on the type of dispute, the mediation program (for example, court-referred or administrative agency), and the parties’ expectations and needs. Ask the mediator if he or she thinks subject-matter expertise is necessary for this dispute, and why or why not.

In some cases, the parties may prefer a mediator with no special knowledge of the subject. Benefits of this approach include avoiding a mediator’s preconceived notions of what a settlement should look like and letting the parties come up with unique or creative alternatives.

In other cases, for example where the subject of the dispute is highly technical or complex, a mediator who comes to the table with some substantive knowledge could help the parties focus on the key issues in the dispute. Or, parties may want someone who understands a cultural issue or other context of the dispute.

Style. Ask “What values and goals do you emphasize in your practice?” For example, does the mediator encourage the parties to communicate directly with each other, or does he or she control the interchanges? The mediator should be able to describe his or her style of mediation and his or her role in the mediation process. Different mediators may practice their craft in different ways, and some mediators can change their style to suit the parties’ specific needs.

Another stylistic difference is the use of caucus. A caucus is a meeting between one of the parties and the mediator without the other party present. Some mediators caucus frequently during the mediation,

while others seldom or never use this procedure. Ask the mediator whether he or she uses caucuses, and if so, why?

If the mediator works for or is associated with a mediation program or organization, ask what values and goals the program emphasizes. For example, the style or requirements of a mediator who practices in a court program designed to reduce court caseloads may differ from the style of someone whose practice does not involve the same time pressure.

Standards of conduct (Ethics).

Standards of conduct do not regulate who may practice, but rather create a general framework for the practice of mediation. National mediator organizations have adopted voluntary standards of conduct. The resources section at the end of this brochure lists some of the national organizations that have adopted or are considering adopting standards of conduct for their practitioner members.

Ethics. Ask "Which ethical standards will you follow?" (You may ask for a copy of the standards). All mediators should be able to show or explain their ethical standards (sometimes called a code of conduct) to you. If the mediator is a lawyer or other professional, ask what parts of the professional code of ethics will apply to the mediator's services. Ask the mediator, "Do you have a prior relationship with any of the parties or their attorneys?" The mediator should reveal any prior relationship or personal bias which would affect his or her performance, and any financial interest that may affect the case. Finally, ask the mediator whether any professional organization has taken disciplinary action against him or her.

Confidentiality. The mediator should explain the degree of confidentiality of the process. The mediator should have a written confidentiality agreement for you and the other party to read and sign. If the mediation has been ordered by the court, ask the mediator

✓ Checklist: Talk to the Mediator

1. What ethical standards apply?
2. Confidentiality?
3. What approach to mediation?
4. More about training and experience?
5. Logistics (meetings, written agreements)?
6. How much will this cost?
7. Special concerns?

whether he or she will report back to the court at the conclusion of the mediation. How much will the mediator say about what happened during mediation? How much of what you say will the mediator report to the other parties? Does the confidentiality agreement affect what the parties can reveal about what was said? If the parties' attorneys are not present during the mediation, will the mediator report back to them, and if so, what will the mediator say? The mediator should be able to explain these things to you.

Logistics. Who will arrange meeting times and locations, prepare agendas, etc.? Will the mediator prepare a written agreement or memorandum if the parties reach a resolution? What role do the parties' lawyers or therapists play in the mediation? Does the mediator work in teams or alone?

Cost. Ask, "How would you estimate costs for this case?; How can we keep costs down?" Are there any other charges associated with the mediation? Does the mediator perform any pro bono (free) services or work on a sliding fee scale? If more than one mediator attends the session, must the parties pay for both? Does the mediator charge separately for mediation preparation time and the actual mediation?

Special Considerations if There has Been Domestic Abuse Between You and the Other Party. If there has been domestic abuse or violence between you and the other party, you should understand how it can affect the safety and fairness of the mediation process. Talk to your lawyer, a domestic violence counselor, women's advocate, or other professional who works with victims of domestic abuse before making the decision to mediate. A law passed in 1996 in Alaska says that a judge cannot order divorcing parties to mediation if a domestic violence restraining order is in effect. The law also says that a judge cannot order mediation if there has been domestic violence and the victim does not want to mediate.

All family mediators should be knowledgeable and skilled in the screening and referral of cases involving abusive relationships. They should be able to explain the potential risks and benefits of mediation when control, abuse, and violence issues exist. Any mediator who handles such cases should have special training in domestic violence issues and should offer special techniques and procedures to minimize risk and maximize safety of all participants.

If you decide to try mediation, it is important to let the mediator know about the abuse or violence. Some ways you can tell the mediator include asking your lawyer to tell the mediator, or telling the mediator

yourself. You can tell the mediator yourself in the initial telephone call, or when filling out any written questionnaires. If there is an active restraining order, make sure the mediator knows about it.

Ask what domestic violence training the mediator has had and if the mediator has worked with similar cases. Ask whether or not the mediator believes your case is suitable for mediation and why. Ask how the mediation process can be modified to make it safer and more fair. Can the mediation be done by telephone or in separate sessions (“shuttle mediation”)? Can a support person (domestic violence advocate or your attorney) be present during the mediation? If your case is not suitable for mediation, what are your alternatives? Ask for referrals to other resources, such as a local domestic violence counselor.

5. Evaluate Information and Make Decision

During the interviews, you probably observed the mediators’ skills and abilities at several important tasks. These tasks, which mediators perform in almost all mediations, include:

- gathering background information,
- communicating with the parties and helping the parties communicate,
- referring the parties to other people or programs where appropriate,
- analyzing information,
- helping the parties agree,
- managing cases, and documenting information.

Ask yourself which of the mediators best demonstrated these skills. Did the mediator understand your problem? Understand your questions and answer them clearly? If the other party was present, did the mediator constructively manage any expressions of anger or tension? Did the mediator convey respect and neutrality? Did you trust the mediator? Did the mediator refer you to other helpful sources of information? Understand what was important to you? Pick up on an aspect of the conflict that you were not completely aware of yourself? Did the mediator ask questions to find out whether mediation is preferable or appropriate? Understand the scope and intensity of the case? Of course, not every orientation interview permits the mediator to demonstrate all these skills, and every mediator has relative strengths and weaknesses. But you should be satisfied that the mediator can perform these tasks for you before beginning.

Review the other questions on this checklist. Make sure that

✓ Checklist: Evaluate

1. Check the mediator's experience skills and abilities against the tasks listed above.
2. Does the mediator have the qualifications you want?
3. Can you afford the services?
4. Can the mediator work with your time frame?
5. Will the other parties agree to the mediator?

the mediator's cost and availability coincide with your resources and timeframe. The other parties to the mediation must agree to work with this person, too. You may want to suggest two or three acceptable mediators so that all parties can agree on at least one.

Finally, consider evaluations of others who have used this mediator or your own previous experience with this mediator. If applicable, consider the goals and procedures of any organization with which the mediator is associated.

V. Conclusion

The increasing use of mediation has outpaced knowledge about how to measure mediator competence. You can choose a qualified mediator by thinking about what you expect, gathering information about mediators, and evaluating that information using the information in this guide.

NOTES

More Information/Resources:

Many mediation organizations exist. This is not a definitive list, but merely a sample of some that offer consumer services.

Local Organizations:

Alaska Dispute Settlement Association (ADSA): A non-profit professional association of Alaskans working for resolution of conflict in non-judicial settings by providing mediation, arbitration and facilitation services. Membership costs \$40 per year and is open to everyone with an interest in alternative dispute resolution. The ADSA web page is located at www.alaska.net/~adsa. Members are eligible to participate in dialogue on ADSA's free listserv.

The Resolution Center: A non-profit community mediation center offering juvenile victim offender mediation, parent adolescent mediation. Trains community volunteers to be mediators. Call (907) 274-1542 for more information, or visit the website at cdrc@alaska.net

Alaska Bar Association Alternative Dispute Resolution Section: Membership in this section of the Alaska Bar Association is open to lawyers and non-lawyers with an interest in alternative dispute resolution. Among its many activities, the section holds monthly meetings and presents continuing education programs on dispute resolution topics. Call (907) 272-7469 for more information.

National Organizations:

American Arbitration Association (AAA): Maintains panels of arbitrators and some mediators with wide range of subject matter expertise and supplies complete administrative services. A not-for-profit organization in operation since 1926, AAA has a network of regional offices throughout the United States. Cases processed in Alaska are administered from the AAA office in Seattle. Call 1-800-559-3222 or write to: 1020 One Union Square, 600 University Street, Seattle, WA 98101. Web: www.adr.org/offices/seattle/seattle.html.

American Bar Association Section of Dispute Resolution: Offers books, pamphlets and videos about alternative dispute resolution and mediation;

publishes quarterly magazine. Call (202) 662-1680 or write to: 740 15th St. NW, Washington, D.C. 20005.

Web: www.abanet.org/dispute/home.html.

Academy of Family Mediators: A mediator membership organization. Practitioner membership entitles the mediator to listing in the Academy's National Referral Roster. To qualify for practitioner member status, the applicant must complete 30 hours of the Academy's integrated family mediation training or 40 hours of integrated divorce mediation training, have at least 250 hours of face-to-face mediation experience in at least 25 family mediation cases; and submit sample memoranda, case reports or other documentation from the required mediation cases. Call (781) 674-2663 or write to: 5 Militia Drive, Lexington, MA 02421.

Web: www.mediators.org

Association of Family and Conciliation Courts: An interdisciplinary association of judges, lawyers, mediators and mental health professionals dedicated to the development and improvement of the practices and procedures of court-connected services as a complement to the judicial process. Members must subscribe to the purposes of the Association. Call (608) 251-4001 or write to: 329 W. Wilson St; Madison, WI 53703.

Web: www.afccnet.org

CPR Institute for Dispute Resolution: A membership-based nonprofit corporation with a variety of educational and information functions. Offers neutrals for public policy disputes. Also offers many publications. Call (212) 949-6490 or write to: 366 Madison, New York, NY 10017.

Web: www.cpradr.org

National Association for Community Mediation: An organization of community mediation programs and volunteer mediators which supports and promotes community-based mediation programs. Call (202) 667-9700 or write to: 1527 New Hampshire Ave. N.W., 3rd Floor Washington, D.C. 20036.

Web: www.nafcm.org/nafcmm/

San Diego Mediation Center: A non-profit, public service organization which provides mediation and other dispute resolution services and training. It was established in 1982 by the San Diego Law Center, a program of the University of San Diego Law School and the San Diego

County Bar Association. The Center, in conjunction with representatives of the ADR community of San Diego, has developed a performance-based mediator credentialing program. The instrument used to assess performance is designed as a generic evaluation of specific behaviors, measuring both the ability to facilitate a process, and specific skills and techniques. Call (619)238-2400 or write to: 625 Broadway, Suite 1221, San Diego, CA 92101.

The Society of Professionals in Dispute Resolution (SPIDR): A non-profit, professional membership organization promoting the use of alternative dispute resolution throughout the United States and other countries. SPIDR has issued two reports on mediator qualifications. Both draw on the observations of practitioners and consumers, the policy and personal goals of the SPIDR membership, and research attempting to quantify the combination of skills, training, education, experience and other attributes in a good mediator.

Call (202) 667-9700 or write to 1527 New Hampshire Ave. N.W., 3rd Floor, Washington, D.C. 20036.

Web: www.spidr.org

Standards of Practice

LOCAL:

(None adopted in Alaska).

NATIONAL:

American Bar Association (ABA): Standards of Practice for Lawyer Mediators in Family Disputes (adopted 1984).

AAA, ABA & SPIDR: Standards of Practice for Mediators.

SPIDR: Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution (adopted June 1986, readopted June 1991).

Academy of Family Mediators: Standards of Practice for Divorce and Family Mediation (also subscribed to by the Association of Family and Conciliation Courts).

INFORMATION ABOUT NEGOTIATION STRATEGIES: Many books exist. Try *Getting to Yes* by Roger Fisher and William Ury and *GETTING PAST No* by William Ury.

RESEARCH AND ACADEMIC WRITING ON MEDIATOR

QUALIFICATION AND COMPETENCE: See the list of references cited in the Test Design Project's paper on performance-based assessment of mediators. The Test Design Project's work is published by NIDR (address above).

Quick Reference: Select a Mediator

✓ Checklist 1: What Do You Want?

1. What are your goals?
2. What mediation approach do you prefer?
3. Assess your abilities: strengths, weaknesses
4. What is your timeframe?
5. What is your budget?

✓ Checklist 2: Get Names

1. Ask people and professionals whom you know
2. Look at directories
3. Call referral services (ask whether they charge to refer you to a mediator)

✓ Checklist 3: Evaluate Written Materials

1. Fees: Hourly? Daily? How much?
2. Education: How much? What? How recent?
3. Experience: What kinds of disputes? How many mediations? Areas of specialization?
4. Written (if available): Understandable? Complete? Concise?
5. Insurance: Yes? What kind?
6. Professional memberships, certifications, adherence to ethical standards?

✓ Checklist 4: Interview Mediator

1. What ethical standards apply?
2. Confidentiality?
3. What approach to mediation?
4. More about training and experience?
5. Logistics (meetings, written agreements)?
6. How much will this cost?
7. Domestic abuse concerns?

✓ Checklist: Evaluate

1. Evaluate the mediator's skills and abilities against the tasks listed above.
2. Did the mediator understand you, listen well, act neutral, understand the problem, convey respect, analyze well?
3. Can you afford the services?
4. Can the mediator work with your time frame?
5. Will the other parties agree to the mediator?



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