

Selecting the “Right” Mediator for Your Case

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I. Introduction

You and opposing counsel have finally agreed (perhaps with some judicial nudging) to have your case mediated. Now you need to find, and agree on, a mediator. How do you do that? Selecting the “right” mediator involves two steps:

- 1) knowing available mediators, their strengths, their styles.
- 2) knowing your case, including your client.

Knowing your case will help you decide what type of mediator to look for. Knowing the basic difference between mediator styles will help you evaluate your case from a mediation perspective.

II. Mediator Styles

Mediators comes in all shapes and sizes, with a variety of strengths and weaknesses. At the risk of over-simplification, and with a huge debt of gratitude to Prof. Leonard Riskin for his article, “Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed,” 1 Harvard Negotiation L. Rev. 6 (Spring 1996), one way to understand mediator styles is to distinguish between “evaluative” and “facilitative” mediators. This distinction may be especially appropriate for Michigan right now because there seems to be a clear difference – and some healthy competition -- between these two styles (even if the terms themselves may only add to Michigan’s current nomenclature confusion regarding mediation).

A. Evaluative Mediator

The evaluative mediator sees himself as the expert. The parties have hired him because they are at impasse and, without him, they will never settle. The evaluative mediator sees his role as learning each side’s position, and then “evaluating” the strengths and weaknesses of their respective positions, offering his opinion as to how the case might go in court, and suggesting possible resolutions. The evaluative mediator therefore spends much of his time in separate caucuses with each party, and directs most of his attention to the attorneys. In addition, the stereotypical evaluative mediator defines the issues substantively, so that only legal issues are on the table, and the only outcome discussed is some kind of monetary payment from the defendant to the plaintiff.

B. Facilitative Mediator

The facilitative mediator sees the parties as the experts. The parties have hired a mediator because communication has broken down and they need someone to get them talking to each other. The facilitative mediator sees her role as bringing the parties together and “facilitating” their communication with one another, helping them sort out issues and explore underlying interests, encouraging them to develop, exchange and evaluate options for resolution, never revealing her personal opinions about the case. The facilitative mediator therefore keeps the parties together throughout much of the mediation, and encourages the clients to play active, even major, roles, in the discussions. The stereotypical facilitative mediator defines the issues broadly to include not only legal but also relational issues, and encourages parties to consider creative, non-monetary resolutions that will restore the parties’ fractured relationship.

While Prof. Riskin maintains that a good mediator should be able to utilize both styles of mediation, depending on the case, in fact most mediators are much more comfortable in one style than the other. However, unless a mediator is familiar with Prof. Riskin’s article, the mediator may not describe him/herself using these terms. So a basic step in selecting the “right” mediator is understanding the difference between the two styles, then evaluating your case to determine which style of mediator will best suit your needs, and formulating interview questions of prospective mediators to help discern which style of mediation they are more likely to practice.

III. 10 Factors to Use in Evaluating Your Case

Determining the characteristics of your case from a mediation perspective will help you narrow the search for the “right” mediator. Factors to consider in evaluating your case include:

A. Selecting Mediator Style

1. Future relationship between the parties

Is there any chance of an ongoing relationship, if this case settles? Will the parties continue to work together, do business with each other, or otherwise relate to one another, regardless of how this dispute is resolved? Or is their only “relationship” that their two autos happened to be in the same intersection at the same time?

If a future relationship is possible, look for a facilitative mediator who is comfortable discussing relational issues. The stereotypical evaluative mediator will not recognize relational issues, or will not know how to address them.

If there’s no relationship between the parties, the mediator’s sensitivity to relational issues does not matter.

Sample interview question of a prospective mediator:

“There’s a possibility of a continuing relationship between the parties, if this case settles. Would you address that in the mediation? If so, how?”

2. Impediments to settlement thus far

What is the real reason that this case has not yet settled? Of course there are disagreements as to the facts and the law, but are they the fundamental impediment to settlement? Or is this essentially a personality clash, or a communication breakdown, or is there possibly some underlying issue that has not yet come out?

If this is a fundamental difference as to law or facts, an evaluative mediator may be able to provide the credible objectivity to move parties beyond those disagreements. Does the other party—or your client—just need some sense knocked into their head, some heavy-duty reality-testing? If so, evaluative mediators can usually do that quite effectively.

If (as is more often true in cases where there is an ongoing relationship, Factor #1), the fundamental impediment is a personality clash or communication failure, a facilitative mediator may be able to unearth the relational problems and other underlying interests, and improve parties' communication. Indeed, if there is an especially difficult personality among the parties, or any party has mental or emotional challenges, consider choosing a mediator who is a therapist or social worker, skilled in dealing with these types of people.

Example: On the verge of breaking up with his business partner over differences in running the business, a man consulted an attorney, who, recognizing that the issues were more relational than legal, recommended mediation. The partners selected a mediator who is a family therapist; the mediator asked them to bring their wives to the mediation. There it was disclosed, not only that the business problems were harming their marriages, but also that one of the partners was having an extra-marital affair, that the other partner didn't know about, but which helped explain the work performance issues. The happy ending is that the philanderer stopped the affair, went into marriage counseling (not with the mediator!), reconciled with his wife and then with his partner, and the business once again began to prosper. A non-therapist mediator, who focused solely on legal or factual or communication issues, might never have unearthed the root causes to this conflict.

Sample interview questions:

“The real reason we cannot settle is that we cannot agree on whether the company's new regulations apply retro-actively; how would you handle that?”

“My client is very angry at the other side and is liable to blow up in the mediation. What might you do if that happened?”

3. Timing of resolution

Do you need to settle as soon as possible, no matter what it takes? Or is it sufficient if the mediation results simply in the parties being able to resume negotiations on their own?

If you want settlement at all costs, choose a mediator who will do whatever it takes, including exerting pressure to take the last offer, and threatening to quit if you don't, to ensure that the parties leave with a settlement. Because evaluative mediators see themselves as the experts in the case, they feel more freedom to use pressure to reach settlement than do facilitative mediators.

If you do not want a mediator who uses such tactics, then be prepared for the possibility that not all issues will get resolved in one session. If “settlement today” is not your highest goal, then seek a mediator who will terminate the mediation rather than resort to pressure tactics.

Sample interview question: “What will you do at 5:00 pm if we still haven’t settled?”

4. Technical subject matter

Does this case involve technical terminology or specialized areas of the law, requiring a mediator with some subject-matter expertise? Or is the average attorney – or non-attorney – likely to be able to grasp the issues in this case?

Most attorneys will instinctively demand a mediator who is well-versed in the subject matter of the dispute. But beware that there are trade-offs. There actually may be an inverse relationship between subject-matter expertise and process expertise. The ideal mediator may be someone who is both knowledgeable about the law and standards of practice in this field, as well as skilled in the mediation process. But unless the mediator works only in a specialty area like labor, securities, or domestic relations, they are not likely to excel in both process and substance. (See Factor # 10) A lawyer renowned in his field may not have the mediation skills your case requires—just as an experienced mediator, who deals with a variety of cases, is not likely to be current in a particular area of the law.

Indeed, sometimes the mediator’s expertise makes it difficult for the mediator to maintain neutrality, because the mediator will more quickly recognize legal incompetence, for example.

If your case involves technical terminology, or jargon unintelligible to an outsider, it will be helpful to seek a mediator conversant with the parties’ language, though not necessarily an expert in that field.

Subject-matter expertise should be sought if, referring back to Factor #2, legal or factual issues are the main impediment to settlement, or if your legal case turns on intricate points of law not easily grasped by the general practitioner, or where you want the mediator to draw on her background and expertise to influence the other side. In any of these cases you will want an evaluative mediator who feels free to express personal opinions on substance.

But if the conflicts between the parties have more to do with communication, or inter-personal relations, than with the law, consider a mediator who is more expert in process than substance. Facilitative mediators maintain that they can mediate just about any case, regardless of their lack of knowledge about its substance, because their role is to manage the process, not offer substantive guidance. Evaluative mediators will be reluctant to mediate anything outside their field of expertise, even if the legal or factual issues are not the most significant impediments to settlement (See Factor #2).

Sample interview questions:

“How familiar are you with computer programming terminology?”

“This dispute concerns the legalities of creative accounting techniques; can you mediate that?”

5. Client participation in the process

Does your client want to participate in the mediation? Are they able to speak for themselves? Even if your client can, and wants to, should they? Or would it be better for their case if their participation is minimal?

Decide to what extent your client should be involved in the process, then find out how much the potential mediator intends to involve them. Evaluative mediators tend to minimize the client's role, and will be more interested in the party with settlement authority than the individual who contributed to the problem. Facilitative mediators generally want full client participation, especially from the individuals responsible for the initial dispute, and will tend to minimize the attorneys' participation in the joint discussions.

Sample interview question: "How much do you involve the clients in the mediation?"

6. Possible outcomes

Is this only about money, or is there any possibility for non-monetary resolutions?

This is related to Factor #1; if there is a possibility of an ongoing relationship, there is a good chance that there is a possibility of non-monetary resolutions, such as an apology, changes in policy, collaborative repairs, etc. Facilitative mediators typically enjoy the challenge of seeking and fashioning unique, creative resolutions, so much that they are disappointed if the only resolution the parties want to discuss is money, and facilitative mediators may be stymied by divergent dollar offers. Evaluative mediators tend to miss opportunities for non-monetary resolutions, but will have a variety of creative strategies for helping parties agree on a specific dollar figure.

7. Cost

What kind of mediation fees does this case justify?

Mediators charge anywhere from nothing to \$1,000/hour. Typically the parties split the mediator's fee, but it can still add up, especially if the mediator charges for pre- and post-mediation work. If any party is pro se, this factor is especially significant. Low- or no-cost mediation is available through Michigan's Community Dispute Resolution Program (CDRP), which has 24 centers around the state, serving all counties. You will not be sacrificing quality: community mediators include attorneys and other professionals, and many are skilled and experienced mediators. If the case is not that complex, if the relational issues are more significant than the legal, if one side is not represented, or if the negotiations could be completed in a couple hours, consider referring the case to your local CDRP.

B. Selecting Co-mediators

The above factors should help you zero in on the *type* of mediator you need. To help you determine *how many* mediators you need, consider these factors:

8. Number of parties

Will there be multiple parties, or a large number of individuals, at the mediation?

Especially where there are more than two opposing positions, as where there are cross-claims, consider co-mediators (typically just two, occasionally three) to help manage the process and be sensitive to the additional dynamics created by multiple parties. Since it is essential that the co-mediators work well together, select the first mediator and ask that mediator to recommend a co-mediator with whom they'd like to work. This factor is related to Factor #7—co-mediators may be a luxury the parties cannot afford.

9. Demographics

Is there an obvious divergence in the demographics of the parties, such as age, race, gender, geographical origin? Is that an issue in the case?

If “yes” to either question, consider having a co-mediation team that reflects the diversity among the parties. For example, if one side is older white males and the other side is young women of color, the co-mediators could be a male and female, or an older male and a younger female, or some other combination that will help all parties trust the process when they walk into the mediation room.

10. Substance vs. process

Does your case seem to need expertise in both substance and process?

If you can't find the “ideal mediator” who is expert in both the substance of the case and the mediation process (see Factor # 4), consider having one co-mediator who is experienced with the mediation process but unfamiliar with the subject matter, and another co-mediator who is conversant with the terminology and industry practices but has less mediation experience.

IV. Conclusion

Selecting the “right” mediator for your case is a combination of knowing the unique mediation requirements of your case, as well as being familiar with various mediator styles and which type of mediator—and how many—will best serve your client's needs. Deciding whether you need an “evaluative” or a “facilitative” mediator significantly narrows your search for the “right” mediator, as does determining how conversant the mediator needs to be in the subject-matter of your case, and considering whether co-mediation will be more effective than a solo mediator. Then you can interview potential mediators to be assured that they are “right” for your case.

MEDIATOR STYLES

-- adapted from Leonard Riskin

Evaluative

Mediator is the expert

Role: learn parties' positions
then "evaluate"
strengths/weaknesses of
their respective positions

Offers opinion re: court
outcomes

Recommends possible
resolutions

Separate caucuses

Focuses on the attorneys

Defines issues legally

Outcome: monetary
payment

"facilitate" communication,
explore interests,
enable parties to negotiate

Asks questions re: court
outcomes

Carefully suggests
possible resolutions

Joint session

Focuses on the parties

Defines issues broadly

Outcome: creative, more
than just money

Facilitative

Parties are the experts

Role: bring parties together,

