

HOW TO SELECT A MEDIATOR

Purpose of This Brochure

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

This brochure does not explain mediation or alternative dispute resolution (ADR) in detail. A consumer needs a basic understanding of mediation to profit fully from this information. 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 Kansas Office of Judicial Administration publishes a free pamphlet that provides some basic information about mediation.

Mediation means the intervention into a dispute by a third party who has no decision making authority, is impartial to the issues being discussed, assists the parties in defining the issues in dispute, facilitates communication between the parties and assists the parties in reaching resolution. The agreement reached by the parties shall be based on the decisions of the parties and not on the decisions of the mediator.

What Qualifications Does a Mediator Need?

Qualifications refer to the amount and type of training, education and experience possessed by a mediator. The Kansas Supreme Court was requested by the Kansas Legislature to establish minimum qualifications for “approved” mediators.

“Approved” mediators are required to meet minimum training requirements and have sat in on at least three mediations. Such approval is a confirmation that the person has successfully completed training, but does not confirm that the person has attained any level of competence. Consumers may use this type of background to determine the qualifications of the practitioner.

Many independent mediation programs impose their own training or experience standards on mediators. For example, the Kansas Departments of Education and Agriculture require the mediators used in their programs meet the approval standards and also take additional training in the area in which they will mediate. Some national and local mediation membership organizations set training and experience requirements and ethical standards for their practicing members.

What Makes a Competent Mediator?

There is no common 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 amount 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.

Five Steps to Choosing a Qualified Mediator

Because no easy formula can predict mediator competence, like with choosing any professional service, the consumer must do some groundwork before selecting a mediator. First, you must understand the mediation process. After you understand the basics, you can use the following process to choose a mediator:

These steps are described on the next pages. During your search remember that a mediator should remain neutral and treat both parties with equal fairness and respect.

Five Steps to Choosing a Mediator
1. Decide what you want from mediation
2. Obtain a list of mediators
3. Review the mediator's written qualifications
4. Interview mediators
5. Evaluate information and make decision

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 does not usually offer opinions and encourages parties to come up with options? Think about past attempts at negotiation and problems with those attempts. You might consider 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.

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 Kansas Office of Judicial Administration can provide you with a list (785-291-3748). A list is attached to the Supreme Court web page, www.kscourts.org. Many local mediation organizations and bar associations maintain directories of member-mediators:

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? Most 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?

4. Interview the Mediators.

Talk to the mediators in person or over the 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, on-going 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, 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 difference in mediation styles 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, when.

Ethics.

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 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 summary 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, womens' advocate, or other professional who works with victims of domestic abuse before making the decision to mediate. Often judges will not order

divorcing parties to mediation if a domestic violence restraining order is in effect.

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. You can tell the mediator 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.

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 mediator's 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.

Did the mediator understand your problem? Understand your questions and answer them clearly? Did the mediator convey respect and neutrality? Did you trust the mediator? Did the mediator refer you to other helpful sources of information? Did they 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? Of course, not every orientation interview permits the mediator to demonstrate all these skills. Every mediator has relative strengths and weaknesses, and 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 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.

Conclusion

You can choose a qualified mediator by knowing what you expect, gathering information about mediators, and evaluating that information using the information in this guide.

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 5: 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?