

CONSUMER'S GUIDE TO MEDIATION

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I. Purpose of This Guide

This guide is for anyone looking for a mediator. This Guide begins the educational process of making an informed choice of mediator, by presenting a framework for understanding mediator competence. This Guide will be especially useful to people who have been referred to mediation and must choose a mediator, mediation programs and court systems that provide information to consumers, and to lawyers or other professionals advising their clients and judges who refer litigants to mediation.

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.

II. Mediation: What It Is and What It Is Not

A consumer needs at least a basic understanding of mediation to profit fully from this Guide. To learn more about mediation, consult books, articles and pamphlets at your local library, community mediation center, courthouse, bookstore, or mediator's office. The information contained here is necessarily brief, but does give an overview of the essential points which should be kept in mind when choosing and working with a mediator.

What Mediation Is

Mediation is a consensual process in which an impartial third person assists two or more parties to reach a voluntary agreement which resolves a dispute or provides options for the future. The mediator helps the parties identify their individual needs and interests, clarify their differences, and find common ground. A few points to keep in mind:

- The parties are the decision makers; the mediator has no authority to render a decision.
- The parties determine the issues that need to be addressed; the mediator guides the process and maintains a safe environment.
- The mediator models and facilitates active listening skills.

- The mediator does not give advice to the parties, legal or otherwise. However, the mediator may help the parties generate options for the parties to evaluate, possibly with the advice and assistance of another professional.
- The process is usually confidential, with any exceptions disclosed and discussed prior to beginning a mediation.
- The success of mediation rests largely on the willingness of the parties to work at understanding each other and to seek solutions that meet each other's needs.

What Mediation Is Not

Mediation is not litigation. Litigation is the formal legal process in which parties use the court process to resolve their disputes. The judge or jury determines the outcome of this process, unless a negotiated settlement is reached first.

Mediation is not arbitration. Arbitration is a form of private adjudication, where parties present evidence and argument to an impartial third person (the arbitrator). The arbitrator then reviews the evidence and renders a decision which may be imposed on the parties. The arbitrator determines the outcome, much as a judge determines the outcome of a trial and the arbitrator's decision may or may not be binding on the parties.

Mediation is not counseling or therapy. Although the process is often therapeutic for the parties, the primary goal of mediation is to reach an agreement, not to resolve the feelings associated with the dispute.

What is the difference between a mediator and an attorney? In many instances a mediator may be an attorney, but mediators and attorneys have different roles. Traditionally, attorneys represent the interests of their clients, advise them of their rights, responsibilities and obligations, discuss their legal options, and advocate on behalf of their client. Mediators, however, do not represent either side of a dispute, even if the mediator is also an attorney. Mediators assist people in dispute to communicate with each other in an effort to resolve their conflict.

What Sets Mediation Apart

- Mediation approaches disputes from a fresh perspective. Instead of looking backward to decide who is at fault, it looks forward to what agreements the parties can reach to resolve their disputes or govern their future interactions.
- The mediator uses his or her skills to help parties understand each other's needs and interests to find common ground. From these, the parties begin to generate options.
- The options are not based on "giving in" or compromise of any principle. Instead, they are based on a search for creative ways to resolve differences and meet identified needs.
- Agreements are reached only when the parties all agree. Because mediated agreements are voluntary, they are more likely to be followed by all parties.

What Are the Steps to Mediation?

Different mediators describe the process differently. However, there are several common stages that the parties move through with the assistance of the mediator.

1. **The Introduction.** The mediator sets the stage, discusses the ground rules and describes the process.
2. **Information Sharing.** The parties have an opportunity to share information and describe their desired outcomes.
3. **Defining the Issues and Understanding Interests.** The parties discuss the issues that need attention and the underlying needs and interests they hope to satisfy.
4. **Generating Options Toward a Solution.** The parties generate and evaluate options that will best satisfy their needs and interests.
5. **Writing the Agreement.** If agreement is reached and the parties desire a written record, the mediator may write or help the parties write their agreement as an outline for agreed upon future action.

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. Having a particular background does not guarantee a skillful mediator.

Some mediators specialize in particular types of disputes, for example divorce or child custody disputes. Others, particularly those at community mediation centers, have extensive experience in neighbor-to-neighbor issues. There are mediators who focus on business issues such as contract disputes, and others who have a particular interest in environmental mediation.

How effective a mediator will be depends partly on the context and content of the dispute, on what expertise or knowledge the parties expect and on their own personalities and working style. 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, and ability to define and clarify issues.

IV. What Qualifications Does a Mediator Need?

Qualifications refer to the amount and type of training, education and experience possessed by a mediator. There is currently no clear consensus on what qualifications mediators need in order to perform competently in the many and varied contexts in which mediation is practiced or how to assess and evaluate competence in mediators. In Oregon, as in most states, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. In reality, many private mediators and those who work for or are associated with mediation organizations and programs, have some training and experience.

Mediators in programs that receive state funds to provide dispute resolution services in Oregon must meet the minimum qualification and training requirements established by the Oregon Office of Community Dispute Resolution and set out in Oregon Administrative Rule Chapter 571. Court connected mediation programs have similar training and experience requirements for mediators

operating under those programs. Individual programs often have additional requirements for training and practice under the supervision of an experienced mediator.

Mediation referral services may 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 as well as ethical standards for their practicing members. In 2010 OMA adopted training and experience guidelines for private practitioners in order to support that portion of Oregon's mediator population.

V. Five Steps to Choosing a Qualified Mediator

No easy formula can predict mediator competence, so the consumer must do some groundwork before selecting a mediator. First, you must understand how mediation works. After understanding the basics, you can use the following process to choose a mediator:

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

These steps are described below. 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 mediation and the best way to get there. How do you want the mediator to participate? 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.

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?

Do your goals match 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.

Are your goals realistic in your time frame? 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.

What about budget? Consider your budget. How much you can spend might limit your choice of mediator or mediation program. Many private mediators publish their fee schedule and are willing to discuss arrangements that would keep the process affordable.

2. Compile a List of Names.

You can gather 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. Many courthouses maintain a list of mediators available locally. OMA also maintains an online directory of member-mediators and their fee structures.

Referral Services. Many national mediator membership organizations and trade organizations keep lists of practitioner members and offer referral services. Some may charge for the referral services.

Community Mediation Centers. Neighborhood mediation or dispute resolution centers offer services in many Oregon counties. Volunteer mediators receive training and supervision before handling cases independently. Most programs do not charge the public for their services. The Oregon Office of Community Dispute Resolution maintains a list of all such community mediation programs.

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. While training alone does not guarantee a competent mediator, most professional mediators have had some type of formal training. How was the mediator trained? Some mediators receive formal classroom-style training. Some participate in apprenticeships or in mentoring programs. Was the training geared toward 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? If you think it is important that the mediator knows the subject matter of your dispute, how much experience has the mediator had in that field? 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. Does the mediator belong to a national or local mediation organization, and is the mediator a practicing or general member? Some competent mediators may choose, for reasons of cost or otherwise, not to join professional organizations or carry liability insurance. If this is a concern, ask the mediator about it.

If you are using mediators from a community mediation center, you may want information about the center. How long has it been operating? How does the center select volunteer mediators? How does it train the mediators? How are the mediators supervised? What types of cases does the center handle?

4. Interview the Mediators.

Mediation can help you resolve conflicts and can be custom designed to serve all participants' needs. While mediation is very useful to help you resolve your disputes, not all mediators are the same. Regardless of the mediator or mediation program you use, you may wish to interview the mediator first by telephone, and ask several questions described below. 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.

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.

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

Specialty/Subject Matter Expertise. Some mediators specialize in particular kinds of disputes. Some mediators, for example, primarily mediate divorce cases or child custody disputes. Others, particularly those at community mediation centers, have extensive experience in mediating neighbor-to-neighbor issues. There are mediators who focus on business issues, such as contract disputes, and others who have a particular interest in environmental mediation. You may want to ask the mediator about his/her experience mediating cases like yours.

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.

Training. Most mediators have taken at least 30-40 hours of basic mediation training. Many have taken more than that, and others will have taken additional training in advanced techniques or concentrated subject areas. You may want to ask the mediator if he or she has taken any specialized training that fits the type of dispute in which you are involved.

Please note: In Oregon, no statewide organization or government agency certifies or licenses mediators, nor is there a test to take or any required course work. Although some mediators may be certified in a specific area by a particular organization, the State has no certification program of its own. Some state agencies do require experience and training before they will hire or assign a mediator to a state sponsored or ordered mediation.

Experience. Asking about a mediator's experience may also help you determine if you are hiring a skilled mediator. You may want to ask the mediator how many mediations he or she has mediated, the kinds of cases they were, and the average length of those mediations. You can also ask if the mediator or mediation program has handled disputes similar to yours, and if so, how often were the disputes settled?

Other Background/Expertise. Mediators may have very diverse backgrounds, and having a certain background does not guarantee a skilled mediator. Some might have backgrounds as attorneys, social workers, teachers, or mental health professionals. Others might not have a specific professional background. You might choose a mediator because they have a specific background or because they do NOT have a specific background.

Approach to Mediation/Mediation Philosophy. You can ask mediators about their approach to mediation or their mediation style. Some mediators let the participants guide the process, while others guide the participants through a process. Some mediators help the participants generate all of the options; others may suggest options. You can also ask if they belong to any professional organizations and what, if any, standards of practice they adhere to in their practice or program. You should feel comfortable with the approach your mediator uses.

References. You may want to ask for references—past clients who have used their services. Since mediation is a confidential process, some mediators simply may not be able to provide you with references. Others may have mediation clients who have agreed to serve as references.

Confidentiality. The mediator should explain the degree of confidentiality of the process. The mediator may 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 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?

***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.

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 fairer. 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 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.

VI. 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.