



Center for  
Alternative  
Dispute  
Resolution

*Mediation. It Works!*

# SELECTING A MEDIATOR

A Guide for the Public Prepared  
by the Hawai'i State Judiciary  
Center for Alternative Dispute Resolution

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## **Acknowledgments**

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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 ongoing work of the Test Design Project, the work of alternate dispute resolution policy makers, and the experience of mediators and mediation program directors nationwide.

## **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.

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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 and help the parties 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. (There is a brief description in Appendix A.) To learn more about mediation, consult books, articles and pamphlets at local libraries, bookstores, the Center for Alternative Dispute Resolution and the following community mediation centers: Kaua'i Economic Opportunity, Inc.; Ku'ikahi Mediation Center; Mediation Center of Moloka'i; Mediation Services of Maui; The Mediation Center of the Pacific, Inc.; and West Hawai'i Mediation Center.

## **II. What Qualifications Does a Mediator Need?**

Qualifications refer to the amount and type of training, education and experience possessed by a mediator. In most states, including Hawai'i, a person can offer private mediation services without taking a class, passing a test or having a special license or certification. In reality, however, many private mediators, and most of those who work for or are associated with mediation organizations and programs, have some training or experience. Most independent mediation programs impose their own training or experience standards on mediators. For example, community mediation centers often require their volunteers to complete a certain amount of mediation training before handling cases.

Some national and local mediation membership organizations set training and experience requirements and ethical standards for their practicing members. Many mediation referral services impose training, experience or other requirements on mediators who wish to be included on their rosters. For example, local non-profit community mediation centers require mediators to complete a basic mediation training course, as well as continuing education modules in specialized areas.

When you select a private or community-based mediation center, they may or may not supply you with a list of mediators. They still should be able to answer the questions about training, experience, and fees raised in this guide.



### 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 prior to 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. Remember during your search that a mediator should remain neutral and treat both parties with equal fairness and respect.

#### ✓ Checklist: Five Steps to Choosing a Mediator

- ☐ Decide what you want from mediation
- ☐ Get a list of mediators
- ☐ Look over mediators' written qualifications
- ☐ Interview mediators
- ☐ 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 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 do 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.

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

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

Many mediators and mediation centers 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 town in this kind of case?" Talk to people who have worked with the mediator (you can ask the mediator for names of clients). What were their cases about and what were their impressions of the mediator?

**Written Lists.** Check local listings in the Yellow Pages under "Mediation Services." Martindale-Hubbell, available in the Hawai'i State Supreme Court law library, publishes a national Dispute Resolution Directory containing the names of service providers. Many national mediator membership organizations keep lists of practitioner members and offer referral services. Some may charge for their referral services.

### ✓ Checklist: Get Names

- ☐ Ask people and professionals whom you know
- ☐ Look at directories



### 3. Evaluate Written Materials ☐

Call or write several mediators or mediation centers on your list and ask them to send you their promotional materials, resumes, 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. 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 had 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 for your case, 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.

**Orientation Sessions.** 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, session or day? How much per hour, session or day?

#### ✓ Checklist: Evaluate Written Materials

- ☐ Training: How much? What? How recent?
- ☐ Experience: What kinds of disputes? How many? Specialties?
- ☐ Writing (if necessary): Understandable? Complete? Concise?
- ☐ Orientation sessions?
- ☐ Fees: Hourly? Sessions? Daily? How much?



#### 4. Interview the Mediators

Talk to the mediators in person or by phone. Or, if you have chosen a mediation center, speak with the Director or person in charge of mediators. Explain your situation briefly. 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 skills, 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 have your education and experience prepared you to help us resolve this specific dispute?”

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 matter of the dispute. For example, should a 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. When 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 key issues in the dispute. Ask the mediator if he or she thinks subject-matter expertise is necessary for this dispute, and why or why not. If the mediator believes such knowledge is important, how will the mediator obtain that knowledge?

In some cases, the parties may prefer a mediator with no special knowledge of the subject. The benefit of this approach comes from avoiding a mediator's preconceived notions of what form a settlement should take and letting the parties come up with unique or creative solutions of their own.

**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. Remember that different mediators may practice their craft in different ways, although some mediators can change their style to suit the parties' specific needs.



Another stylistic difference is the use of caucuses. A caucus is a meeting between one of the parties and the mediator without the other party or parties 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, “Which ethical standards do you follow?” All mediators should be able to show or explain their ethical standards (sometimes called a code of conduct). Ethical standards in Hawai‘i include the Hawai‘i Supreme Court’s “Guidelines for Hawai‘i Mediators.” If the mediator is a lawyer, ask what parts of the lawyers’ professional code of ethics will apply to his or her 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.

**Privacy.** The mediator should explain the degree of privacy of the process. The mediator may have a written privacy 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 disputants? Does the privacy agreement affect what the disputants can reveal about what was said? The mediator should be able to explain these things to you.

**Logistics.** Who will arrange meeting times and locations and prepare agendas? Will the mediator always be available? Will the mediator prepare a written agreement or a memorandum if the parties reach a resolution? What role do the parties’ lawyers or therapists play in the mediation, if any? 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? Does the mediator charge separately for mediation preparation time and the actual mediation?



**Special Consideration 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.

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 the 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. If there is an active restraining order, make sure the mediator knows about it before the first session. 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 safe and fair. Can the mediation be done by telephone or in separate sessions ("shuttle mediation")? Discuss having a support person (domestic violence advocate or your attorney) present during the mediation. If your case is not suitable for mediation, ask about your alternatives.

**✓ Checklist: Talk to the Mediator**

- ☐ More about training and experience?
- ☐ What approach to mediation style?
- ☐ What ethical standards apply?
- ☐ Privacy?
- ☐ Logistics: Meetings? Written agreements?
- ☐ How much will this cost?
- ☐ Domestic abuse or violence consideration?



## 5. Evaluate Information and Make a Decision ☐

During the interviews, you probably observed the mediators' skills and abilities at several important tasks. These tasks include:

- gathering background information
- listening and understanding the parties' concerns
- communicating with the parties and helping the parties communicate
- referring the parties to other people or programs where appropriate
- earning trust and maintaining a sense of humor
- analyzing complex information
- helping the parties reach agreements
- managing cases
- documenting information

Ask yourself which of the mediators best demonstrated these skills. Consider the evaluations of others who have used this mediator. Review the other questions on this checklist. Make sure that the mediator's cost and availability coincide with your resources and time frame. Then ask yourself the following questions:

- 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 anger or tension?
- Did the mediator convey respect and neutrality?
- Did the mediator refer you to other useful sources of information?
- Did the mediator understand what was important to you?
- Did the mediator ask questions to find out whether mediation is preferable or appropriate?
- Did the mediator understand the scope and intensity of the case?
- Did the mediator appear comfortable with the subject matter of the case?
- Did you trust the mediator?



### ✓ Checklist: Evaluate

- ☐ Check the mediator's experience and skills against the tasks listed above.
- ☐ Does the mediator have the qualifications you want?
- ☐ Can you afford the services?
- ☐ Can the mediator work within your time frame?
- ☐ Will the other parties agree to this mediator?

## V. Conclusion

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



## Appendix A: What is Mediation?

In mediation, a neutral third party helps parties find a resolution to a dispute. A mediator focuses on the process while the parties control the outcome. A mediator does not impose decisions on the parties.

A mediator, the parties, and attorneys (if the parties wish) usually meet face to face. The mediator usually opens the session by explaining how the session will run, and approximately how long the session will last. Parties may be asked to agree that everything said in the session be kept private and, therefore, inadmissible at court proceedings. Parties then take turns stating their perspectives of the dispute with the mediator asking occasional questions. The mediator may choose to meet with each party separately in a caucus session or sessions, during which time the mediator will help the party to assess positions, identify interests, generate possible solutions and consider possible alternatives to assist in reaching agreement. Several mediation sessions may be necessary before parties reach agreement.

Benefits of mediation include:

- Party control over disputes and their outcomes
- Potential for amicable solution
- Ability to devise creative solutions
- Consideration of a broad range of issues, including the underlying causes of the dispute
- Informal proceedings with no rules of evidence or courtroom appearances
- Legal precedents don't control the outcome
- Venting of concerns and diffusion of conflict
- Open lines of communication
- Maintenance of relationships
- Preservation of privacy