

Choosing A Mediator
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Prologues Always put yourself in the other person's shoes .
Understand the deal from the other side of the table.
Solve the other sides' problems as the means of solving your own.
Do not undervalue other side's case, or become entrapped by biased perceptions.¹

I. When, Why, Who and How

A. When –

Any time

Before dispute

During dispute

After apparent resolution

E.g.: settlement contract

court ruling

arbitration award

Avoid pre-dispute designation of specific person

B. Why, Who and How: After preparation, etc., as set out below

¹ From James K. Sebenius, "Six Habits of Merely Effective Negotiators", Harvard Business Review, April 2001.

II. Preparation, Preparation, Preparation

- A. Identify the Players
 - Yours
 - Theirs
 - Others

- B. Identify the Problems
 - Yours
 - Theirs
 - Others

- C. Identify “Material” Facts
 - As you see them
 - As they see them
 - As others see them

- D. Identify Business Interests and Needs
 - Yours
 - Theirs
 - Others

- E. Identify Emotional Interests and Needs
 - Yours
 - Theirs
 - Others

- F. Identify BATNAs
 - Yours
 - Theirs
 - Others

- G. Identify Further Information You Need
 - From your team
 - From them
 - From other sources

- H. Identify Objectives
 - Yours
 - Theirs
 - Others

- I. Explore Options
 - Substantive
 - Procedural

- J. Stand in the Other Person's Shoes
 - Physically stand in the other person's shoes
 - Examine the situation thoroughly from the other side's perspective
 - Examine both side's perspectives
 - Consider applicable options as if you owned both sides of the problem

- K. Determine How You Expect To –
 - Gather information
 - Share information
 - Express your views
 - React to their views

III. Determine Why –

A. In light of –

- The problems
- The players
- The “material” facts
- Business interests and needs
- Emotional interests and needs
- BATNAs
- Objectives
- Potential options

- Consequences of failing to resolve
 - To you
 - To them
 - To others

- Consequences of resolving
 - For you
 - For them
 - For others

- Compelling circumstance
 - Pre-dispute agreement
 - Court order
 - Court’s suggestion
 - Arbitrator’s suggestion
 - Institutional pledge
 - Institutional culture
 - Third person “good offices” intervention

- Change in other conditions
 - Between the parties
 - External to the parties

B. Can the players negotiate their own resolution, or do they need help?

IV. Who: Determine² –

A. The Mediator's Role

Ascertain what is appropriate re this situation

What does each party need?

What does the mediator need?

What do others need?

What is happening in the market place?

Are the parties ready?

Are the parties committed?

Assist the parties in –

Getting to the table

Remaining at the table

Agreeing on procedures and ground rules

Confidentiality

Settlement privilege

Written submissions

Ex parte communications

Joint meetings

Private caucuses

Proper participants

Attend

Participate

Schedule

Venue

Commitment

² I.e., undertake human due diligence. See Harding and Rouse, "Human Due Diligence," Harvard Business Review, April 2007, page 124.

Assist the participants in –
Understanding the process
Understanding the problem(s)
Understanding each other's real interests and needs
Understanding each other's emotional issues
Understanding each other's BATNAs
Assuring that every one has communicated clearly each intended message
Assuring that every one has understood what has been said
Exploring options (i.e. brainstorming)
Getting unstuck (i.e. avoiding and breaking impasse)
Finding a mutually acceptable and beneficial solution to their problem(s)
Sealing the deal

Assure that adequate time, is available

Assist the business people in participating, in lieu of lawyers

Be prepared to move to and from facilitative, evaluative, and directive roles, as appropriate

Earn trust

Serve as an arbitrator under agreed conditions³

Co-mediate

Assure that a durable agreement is endorsed by each side

Substantive
Procedure re future activities
Written
Signed by all
Binding
Enforceable

³ Suggested rules under which a mediator may serve as an arbitrator appear in the Annex.

B. The Mediator's Characteristics

Three Classic Categories –

Facilitative

Evaluative

Directive

Committed

Patient

Persistent

Creative

Empathetic listener

Willing to speak candidly –

When instructed by one side to demand something from another side

When faced with emotion

When a party has brought the wrong people

When a party is not participating in a committed, candid manner

Aware of his/her own strengths and weaknesses, especially –

Emotional buttons

Biases

Fears

Sensitive to and able to work with –

Different personalities

Different cultures

Personal

Institutional

Power imbalances

Personal

Institutional

Sophistication imbalances

Personal

Institutional

C. The mediator's experience

Training

Actual mediations

V. Professional Responsibility And The Mediator

- A. Independent
 - No financial or other interest in the outcome.
 - Is this possible?
- B. Impartial
 - Neutral with respect to the parties and their interests, needs and objectives
 - Is this possible?
- C. Disclose all relationships with any party or its lawyers
 - Before the mediation
 - During the mediation
 - After the mediation – for a reasonable period of time
 - When in doubt, disclose
- D. Preserve the integrity of the process
- E. Fees –
 - Must be independent of the value of a settlement or other outcome of the mediation⁴
 - Cancellation or lost opportunity fees
 - Who is liable?
 - One side.
 - All parties jointly and severally liable
 - All parties and all counsel jointly and severally liable
 - Retainer
- F. Expenses
 - Reasonable
- G. Openly deal with potential abuse of the process

⁴ Compare Article 4 ICC ADR Rules (and Appendix C.) and Article 22(b) WIPO Mediation Rules. The latter take into account the “amount in dispute” in setting a mediator’s fees.

VI. How: Determine –

- Who should approach the other side(s)
- How the approach should be made
- When the approach should be made
- What should be communicated
- How to avoid appearing weak
- How to persuade the other party it is in the other party's interest to try mediation
- How a mediator may assist the parties
- How to find an appropriate mediator

VII. Where To Look?

- ADR providers' lists
- Inquire of colleagues
 - Business
 - Legal
- Accept the other side's suggestion, if the mediator is otherwise qualified

VIII. Remember –

The biggest problem with communication is the illusion it has occurred.
(G. B. Shaw)

Annex

- I. Suggested Rules under which a Mediator may Serve as an Arbitrator
- A. Typically applicable in situations where parties have resolved all but one or two issues, e.g. money, configuration of a product, capacity of a machine, territory, ownership. Useful in resolving impasse. The Mediator and the parties expressly agree in writing to the procedure set out in Paragraphs B. - F. below.
 - B. All parties shall agree on all language in a written settlement agreement, except for the disputed number or language.
 - C. The places in the written settlement agreement where the disputed number or language would appear but for the dispute shall be left blank.
 - D. The written settlement agreement with the blanks shall be executed by an authorized representative of each party.
 - E. The written settlement agreement with the blanks shall provide expressly that the agreement shall be binding and enforceable with respect to each party immediately upon execution by all parties.
 - F. The written settlement agreement shall provide expressly that –
 - 1. The parties have intentionally left blank [described number, language.]
 - 2. The parties expressly authorize the Mediator to insert a number/language selected by the Mediator in the appropriate blanks. A procedure for providing the Mediator further information may be specified.

[The Mediator may, for example, base the Mediator's choice of number on a high/low or baseball arbitration procedure, with or without formal submissions, or on the Mediator's sense of what is fair.]
 - 3. After completion of any agreed procedure (as set out in Paragraph F.2. above) and appropriate consideration by the Mediator, the Mediator shall insert the selected number/language in the appropriate blanks.
 - 4. The settlement agreement with the inserted number/language shall continue to be binding on all parties after the Mediator inserts the selected number/language in the appropriate blanks.

5. After the Mediator has inserted the selected number/language in the appropriate blanks, an authorized representative of each party shall initial the margin of the agreement opposite the place(s) where the Mediator has added a number/language – to ratify each party’s acceptance of the inserted number or language.

II. Arbitrator as Settlement Facilitator

A discussion of this possibility appears in D. W. Plant, Resolving International Intellectual Property Disputes, ICC 1999, at pages 105-114.

This is the inverse of a mediator-as-arbitrator scheme such as described in Section I. above.

Under appropriate circumstances, a sitting arbitrator may serve as a settlement facilitator (i.e. mediator).