



Choosing the Best Mediator: An Examination of Necessary Core Traits

By Joe Epstein, Esq. & Hon. Kenneth Plotz

When selecting a mediator, most parties scout the field and choose based on the mediator's experience in the courtroom, approach to the process, and depth of experience. These are sound selection criteria, but given that mediation is as much an art as it is a science, we propose a more effective approach, one that includes the four traits of legal intelligence, mindfulness, emotional intelligence and courage. This article examines these core traits and suggests a new selection paradigm for counsel to observe when choosing a mediator.

Legal Acumen

Most experienced mediators have the legal skill to efficiently process the case law, jury instructions, expert reports and relevant facts typically provided by counsel. But mediation also requires an open and inquiring mind with the ability to separate the irrelevant from the pertinent, to assess the merits of the case, to absorb and react to arguments, and to provide clear, candid and concise feedback to all parties efficiently. In sum, a mediator with legal acumen has the ability to study cases on short notice, sift new information insightfully and skillfully, and provide wisdom in addition to knowledge.

Mindfulness

Jon Kabat-Zinn has defined mindfulness "as paying attention in a particular way: on purpose, in the present moment and non-judgmentally."¹ Victor Frankl speaks of the space between stimulus and response, while Thich Nhat Hanh refers to "keeping one's consciousness alive to the present reality."²

From the perspective of a mediator, mindfulness is a multi-dimensional zone of listening, hearing and feeling during the period of mediation. Mindfulness means understanding one another in the context of conflict, hearing what is said and left unsaid and sharing insight based on what the mediator has absorbed and understood. Mindfulness allows a mediator to understand the parties before him in a deeper sense and this

better enables the mediator to meet these goals. A mindful mediator stays calmly present and "clear seeing," as Kabat-Zinn advises in *Mindfulness for Beginners*, as well as attentive, discerning, compassionate and empathic.³ He is calm in the midst of the sea of conflict.

Emotional Intelligence

Peter Salovey and John D. Mayer define emotional intelligence as "the ability to monitor one's own and other's feelings and emotions, to discriminate among them and to use this information to guide one's thinking and actions."⁴ In *Emotional Intelligence*, Daniel Goleman expands upon this definition by noting five main domains of emotional intelligence: 1) knowing one's own emotions, 2) managing emotions, 3) motivating oneself, 4) recognizing emotions in others and 5) handling relationships.⁵

People in conflict are in the midst of change, turmoil, grief, anger and fear. The best mediators understand the emotional context of the parties and create a calm and safe space for the parties to work through their emotions and differences. Unlike mediators who rush to resolve a case, mediators with the trait of emotional intelligence understand that parties may need resolution on a deeper level and guide the mediation process accordingly. They understand that unless they address the parties' emotions and associated feelings, settlements can feel "crammed" and parties will be left with a sense of injustice. The conflict, if resolved at all, will feel like resolution by fiat and control will feel to be in another's hand. One can assume that when mediators are aware of the emotions of the different parties they can make everyone feel a sense of justice.

Courage

In his exploration of the courage trait, Mark Nepo defines courage as "going into the unknown in spite of all the fears."⁶ The coward, he writes, "listens to his fears and follows them, and the courageous person puts them aside and goes ahead."⁷

As Nepo explains, “It takes courage to find one’s way to an inner core, and to face the lion of fear.” In her seminal work on fearlessness, Pema Chödrön urges us to be spirit warriors in the face of fear.⁸

Before helping parties, mediators must face their fears in a logical and cogent manner; they first need the courage to take their own measure. In order to allow the parties to express their emotions of grief, anger, and fear, mediators need the courage to listen mindfully. Empathic and compassionate dialogue may require the courage of appropriate self-disclosure. People open up and connect with the other who “gets” it.

When necessary, mediators need to have courage to be a reality check for an opposing party. Mediators are the only neutral individuals in the entire process that have the courage to tell parties what their attorneys will not tell them. In some cases, mediators may need courage to find the creative solution necessary for closure. Self-awareness, self-esteem and self-actualization are the hallmarks of a courageous mediator prepared to mediate parties to a place they may fear to go: closure of the conflict.⁹

Conclusion

In short, when selecting a mediator for a case, do your homework. Start with courtroom experience, approach to the

process and depth of experience, but then extend your inquiry to include legal acumen, mindfulness, emotional intelligence and courage. Chances are the mediator with the right balance of traits for your case will be more likely to help you and your client achieve a satisfactory result and truly end the conflict. ▲▲▲

Joe Epstein, Esq. – is an international recognized commercial mediator (International Who’s Who of Commercial Mediators), and recognized nationally as an employment mediator by the National Law Journal. He has published numerous articles and has been recognized by Best Lawyers, Super Lawyers, Colorado Law Week (Mediator of the Year 2011), National Academy of Distinguished Neutrals, and The International Academy of Mediators (Past Vice-President). Joe concentrates his practice in the Rocky Mountain/Southwest region of the United States. He focuses his mediation practice on emotionally intense cases that include bad faith, catastrophic injury, employment, medical malpractice, nursing home, probate and wrongful death cases. A member of Conflict Resolution Services, Inc. (CRS), he can be reached at 303-355-2314 or joe@crs-adr.com. For a complete bio visit www.crs-adr.com.

Hon. Ken Plotz – The Honorable Ken Plotz is a former Chief Judge of the 11th Judicial District. He now sits as a Senior Judge sitting throughout Colorado. For the past 10 years, Ken has served as a

mediator, arbiter and private judge. Ken handles personal injury, commercial, construction and domestic relations matters. He can be reached at Conflict Resolution Services, Inc. (CRS) at 303-355-2314 or ken@crs-adr.com. For a complete bio visit www.crs-adr.com.

©Joe Epstein, Esq. and Hon. Ken Plotz, 11/15/14, all rights reserved.

Endnotes:

- ¹ JON KABAT-ZINN, WHEREVER YOU GO, THERE YOU ARE 4 (1994).
- ² CHADE-MENG TAN, SEARCH INSIDE YOURSELF 20 (2012).
- ³ KABAT-ZINN, MINDFULNESS FOR BEGINNERS 53 (2012).
- ⁴ Peter Salovey and John D. Mayer, 9 *Emotional Intelligence, Imagination, Cognition, and Personality* 185, 190, cited in CHADE-MENG TAN, SEARCH INSIDE YOURSELF 20 (2012).
- ⁵ DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 43-44 (2006).
- ⁶ OSHO, COURAGE: THE JOY OF LIVING DANGEROUSLY 1 (1999).
- ⁷ MARK NEPO, FINDING INNER COURAGE (2007).
- ⁸ PEMA CHÖDRÖN, THE PLACES THAT SCARE YOU: A GUIDE TO FEARLESSNESS IN DIFFICULT TIMES (2002).
- ⁹ KENNETH CLOKE, MEDIATING DANGEROUSLY (2001).



Cheryl Stafford
(303) 668-3482

Lee Groom
(720) 421-5237

www.tenantsagent.com



SERVICE OF PROCESS SINCE 1987

LIGHTNING FAST SERVICE OF PROCESS FOR THE ENTIRE FRONT RANGE

LEGAL INDUSTRY SPECIALISTS
FAST AND EASY ORDERING
ONLINE WWW.DBCOURIERS.COM
OR BY PHONE 303.571.5719

303.571.5719