

Assessing Your Needs: What Do You Want from a Mediator?

Once you begin looking for a mediator, you'll find out that not only do we come in all shapes and sizes, our professional backgrounds differ as well. Virtually all other individuals within the same profession have similar backgrounds. For example, all lawyers have graduated from law school; all doctors have graduated from medical school; all accountants have graduated with a degree in accounting. The story is different with mediators; there is no common background. Many mediators do take a forty-hour divorce mediation course, but certainly not all do, and most likely not even a majority. Some mediators did attend law school, others studied social work, and still others attended business school; however, a significant number have no graduate degree, and some never went to college at all. However, rather than focusing first on the qualifications of the mediator, look at yourself. What are *your* needs in a divorce mediator?

In the pages that follow, I list the characteristics that a good mediator should possess and that a divorcing man or woman may need. Read through it and get a general feel for the types of issues. Then do a second review, this time arranging your priorities. On the third review, focus on your specific needs—generally, the top three requirement! for your situation. If your

circumstances are complicated, you might look for a mediator who meets four or five of your needs. Do not assume that you must focus on every need—that would be both daunting and unnecessary. Instead, prioritize.

<i>Your Situation</i>	<i>Qualifications of the Mediator</i>
1. Have children:	Background in child development Knowledge of latest research on parenting arrangements Familiar with local court practices regarding custody plans that a court will approve Familiar with legal definition of custody
a. Financial concerns/support guidelines:	Understanding of your state child custody laws Expertise in: <ul style="list-style-type: none"> • Child dependency tax rules • Head of household tax rules • Household budgeting • Rules for custodial accounts
b. Insurance:	Applicable state and federal laws pertaining to medical and/or dental insurance coverage for children
2. Own a house:	Expertise in:
a. May want joint ownership:	<ul style="list-style-type: none"> • Real estate transactions
b. May want to sell:	<ul style="list-style-type: none"> • Federal and state capital gains taxes
c. May want a buy-out:	<ul style="list-style-type: none"> • Title and deed transfers • Mortgage qualifications and refinancing

Your Situation

Qualifications of the Mediator

- Buy-out tax consequences, including the IRS tax code, Incident to Divorce Rule
- d. Mortgage greater than house value:
- Expertise in:
- Mortgage financing
 - Sale in lieu of foreclosure
 - Liability exposure
- e. May want to buy:
- Expertise in:
- Mortgage qualifications and financing
 - Real estate market
 - Fanny Mae requirements
3. Pensions and retirement plans:
- Expertise in:
- Pension plans
 - Retirement plans
 - Transfers of pensions and retirement plans
 - Employee Retirement Income Security Act (ERISA)
 - Qualified Domestic Relations Orders
 - Federal and state tax consequences
 - Withdrawal rules and penalties
 - Incident to Divorce Rule
4. An apartment:
- a. Live in an apartment:
- b. Will move into an apartment:
- Expertise in:
- State laws regarding rental deductions

<i>Your Situation</i>	<i>Qualifications of the Mediator</i>
5. Medical and dental insurance coverage:	<p>Expertise in:</p> <ul style="list-style-type: none"> • Applicable laws concerning coverage of an ex-spouse • State health and dental insurance statutes • Federal COBRA laws (Consolidated Omnibus Budget Reduction Act) • QUAMCSO (Qualified Medical Child Support Orders) • ERISA
6. Investment accounts, stocks, bonds, and mutual funds:	<p>Understanding of:</p> <ul style="list-style-type: none"> • Types of financial investments • Taxable capital gains and losses • Federal and state taxes • Investment “basis” and computations
7. Credit card debt:	<p>Understanding of:</p> <ul style="list-style-type: none"> ▪ Credit laws • Credit card account transfers • Joint and individual liability
8. Future college payments:	<p>Understanding of:</p> <ul style="list-style-type: none"> • Financial Aid Forms (FAF) • Children’s custodial accounts • Estimated college expenses • Parental needs/ contributions

Your Situation

Qualifications of the Mediator

9. Self-employed:

a. Sole-proprietor:

Understanding of:

- Schedule C of federal 1040 tax return
- Ordinary/unusual business expenses
- Business valuation

b. If incorporated:

- C Corporation rules
- Subchapter S rules
- Articles of Incorporation
- Bylaws
- Financial statements
- Business valuation

10. Professional license:

Understanding of:

- Applicable state laws
- Local court practices
- Valuations

11. Realty trusts and other trusts:

Understanding of:

- Interest under a trust document
- Asset interpretation (for divorce purposes)
- General understanding of trusts

12. Over age 55:

Expertise in:

- Primary residence
- Tax exclusion for capital gains tax
- Pension and retirement accounts
- Withdrawal rules and penalties
- Social Security rules

<i>Your Situation</i>	<i>Qualifications of the Mediator</i>
13. Lack of communication between spouses:	Psychological skills, such as reframing Couples counseling techniques
14. Not enough money to go around:	Understanding of: <ul style="list-style-type: none">• Budgeting issues• Expense/income spreadsheets• Power dynamics• Underlying issues behind many arguments
15. Support payments (alimony):	Understanding of: <ul style="list-style-type: none">• Alimony advantages/disadvantages• Spousal support vs. alimony• Federal and state tax consequences of alimony for payer and recipient
16. Alcohol/drug abuse:	Expertise in: <ul style="list-style-type: none">• Substance abuse theory• Experience with this population• Drug/alcohol history taking• Psychological techniques in dealing with abuser
17. Domestic violence:	Understanding of: <ul style="list-style-type: none">• Cycle of violence• Safety measures for clients and mediator• Local support references and network• Legal action available, especially restraining orders

Your Situation

Qualifications of the Mediator

18. Refusal to pay child support:

Knowledge of:

- Applicable state law concerning child support payments
- Court practices in your area
- Wage assignments
- Referral attorney network

19. Unusual parenting arrangements/division of assets:

Knowledge of:

- Specific divorce court judges and decisions
- Court practices in your area

20. Minimal funds (little or no assets to pay for mediation services):

Mediator offers:

- Sliding scale based on financial situation
- Negotiated payments for services
- No retainer (money upfront)
- Payment plan

21. A high-conflict couple/very argumentative

Primary profession as a mediator

Experienced; five years **full-time** experience.

There is a considerable amount of information in these twenty-one situations. Let's look at each of these needs in more detail.

1. HAVE CHILDREN

Every state requires that a divorcing couple make custody arrangements for the children. A mediator will help you arrange a good parenting plan and can assist you with several

aspects of custody decisions, from legal custody, which concerns who makes the major decisions concerning a child, and physical custody, which is the location where the child lives from day to day. The two basic physical custody arrangements involve a child living at one primary residence and spending time at another home (which courts often refer to as visitation), or joint physical custody, in which each parent has the child residing with him or her a good deal of time. Note that joint physical custody does not necessarily mean 50 percent of the time. A mediator can help parents look at the child's best interests, rather than at an arbitrary mathematical division of time.

There are many highly regarded studies concerning good parenting arrangements, and a mediator who is up on the latest research should prove invaluable. Even if they are not arguing over custody, many couples have questions concerning age-appropriate behavior, and a background in child development is helpful. For example, my clients Alan and Julie were considering whether it made sense to alternate one week on and one week off with their three-year-old son. Alan asked if there was any information I could provide regarding their child. I pointed out that it might be a good arrangement for the parents, which was important, but that a three-year-old will most likely have a hard time developmentally if he has a parent drop out of sight for an entire week. Some contact during that week with the non-residential parent would be beneficial for that toddler. The parents read two books I recommended, found another on their own, and talked to friends who had joint physical custody, and we later had further discussions on the matter. They jointly decided on a slightly different schedule, which called for the non-custodial parent to spend every Wednesday after school to an hour before bedtime with the boy. They also wanted to build in a review after three months to see if they needed to see their son more than once a week. A lot of factors figure into parenting arrangements, the ability of the child to handle transition not being the least. Many of the best custody schedules are not com-

monly known, even for the best of parents, which is why it is helpful to find a mediator who has a strong understanding of good parenting arrangements. Two uncommon schedules are (1) three overnights with one parent and four with the other, (2) primary residence with one parent and three out of four weekends with the other.

With children come a host of financial considerations. In response to federal mandates, every state has developed guidelines that decree the amount of child support that must be paid. Your mediator should be able to work out the guidelines with you and to provide you with that figure. You'll also need someone who can walk you through the likely issues that Face ex-spouses in the future, so that the mediator can alert you to make those agreements now. For example, will child support change in the future? Will there be support when a child goes to college? If so, will support end or be adjusted? If one party makes a lot more money, will it affect the amount of child support? What if one loses a job? If you have no provision for these events, you will end up in a courtroom, with each of you paying thousands of dollars to a lawyer to confront these issues. I've seen hundreds of nonmediated cases where a man lost his job, and each parent was forced to go out and hire a lawyer (during a time when there was no money coming in) in order to adjust their child support payments. In mediation, couples will either write a renegotiation clause or actually decide what will happen. Since studies show that negotiations between ex-spouses become more difficult as time goes on, it makes sense for clients to make actual decisions or formulate guidelines concerning future adjustments. I think the reason this works best is because there's actually a strong bond between the couple at the time of divorce; the bond lessens over time, and ex-spouses become less attached.

Along with the financial child support issues, your mediator should be able to explain your tax choices concerning the child dependency exemption and the federal head-of-household fil-

ing status. It helps if your mediator is a good teacher, one who can talk to you in a language you understand, as you will be the ones making the decisions.

Many parents deposit money into an account for a child, called a custodial account. This area is definitely not as complex as many of the divorce topics; however, there are rules concerning such accounts, and mediators are apt to know these rules.

2. OWN A HOUSE

Remember the movie *War of the Roses*? There is a scene where the husband shouts at his wife, “You’ll never get the house!” after which the divorcing couple spend the rest of the film arguing over who will get the marital residence. At the end of the movie, the fighting has so escalated that it ends in the bizarre deaths of both husband and wife, finally putting to rest the infamous question, Who gets the house?

Of all the complicated areas of divorce, this one is the most divisive. Therefore, the more expertise your mediator has in both the area of real estate and the emotional stages of divorce, the better served you will be. In the same vein, if your mediator understands the area of capital gains taxes upon the sale or buy-out of the marital residence, you both will be better off. The issue of the home is especially complex on two levels: the strong emotional ties to the house, and the questions concerning complex financial areas, such as the mortgage, equity, lien, title and deed transfer, buy-out, taxable transfers, and basis. You will need experts in every field if your mediator does not have a good understanding of each of these areas. An accountant can provide some of this information, particularly on taxes.

The psychological issues regarding the house are even more daunting. Both spouses often want the house, not only for financial reasons but for strong emotional reasons as well. I often hear responses ranging from, “It was my first house,” “It was our

first house,” “It was mine before I met you,” or “I did all of the decorating and made it beautiful,” to “I deserve it” or “I can’t live without it.” A mediator I know introduces the topic of the marital house by describing the Chinese character for “security”—a woman with a roof over her head.

3. PENSIONS AND RETIREMENT PLANS

Though this area doesn’t have the same conflict-ridden reputation as the marital residence, it is a complex area in which clients also have emotional ties. As often as women are depicted as psychologically attached to the house, men are as often psychologically attached to their pension plan. In order for a mediator to begin to help, he will need to have a basic knowledge of ERISA, the federal act that applies to pension and retirement plans. Such plans are further complicated because of the wide range and variety of the plans. Some are relatively simple, like an Individual Retirement Account (IRA), while others, called defined benefit plans, are much more complicated. These latter plans generally require an appraisal in order to provide the present value of the pension plan. If you have a pension that you want to divide or transfer, your mediator should know the rules concerning transfer and division. This topic is rife with complicated tax and other rules.

4. AN APARTMENT

Most likely, your mediator will be familiar with whether or not there are any local and/or state tax advantages for apartment occupants. The marital apartment is also a frequent area of conflict, as typically both clients want to remain in the residence and have the other go through the hassle of moving out. Important concerns here, in addition to moving out, are the secu-

rity deposit and the last month's rent. Who will get these accounts? If one or both plan to move into another apartment, how will the security deposit and the first and last months' rents be handled? What about the apartment contents?

5. MEDICAL AND DENTAL INSURANCE COVERAGE

For many workers, being employees means that they have affordable medical coverage. When a divorce occurs, it is often the case that one spouse may have to obtain his or her own medical insurance coverage. The cost of such individual coverage is often prohibitive or totally beyond reach. Medical coverage has become an important issue in divorce, ranking right up there with child support and division of assets. Federal rules, known as COBRA, kick in at the time of divorce, and these rules require that the ex-spouse be allowed to purchase thirty-six months of health insurance coverage at the cost of an individual plan plus an administration fee. For many of the formerly married, it is crucial to maintain existing coverage and, in many states, this is possible.

Alongside federal laws, many states also have laws concerning medical and dental insurance coverage for an ex-spouse. Couples in these states may be able to continue such coverage for an ex-spouse at the same premium cost of a family plan, even upon divorce. A few states, such as Massachusetts, actually allow for an ex-spouse and a current spouse to continue under the same insurance provider. Such benefits are extremely valuable for an ex-spouse. Though most mediators should be more than familiar with the area of medical health insurance, don't take it for granted. Be sure to check if your mediator is familiar with both medical and dental insurance coverage upon divorce.

6. INVESTMENT ACCOUNTS, STOCKS, BONDS, AND MUTUAL FUNDS

In order to assist with division of assets, your mediator should be able to understand the written documents you provide, to look at an investment account or a mutual fund statement and explain it to you. This is especially necessary if one of the spouses does not have financial expertise. That individual will rely on the mediator to explain financial matters, so that each spouse has enough understanding to make an informed decision.

It will help if the mediator is knowledgeable about subsequent investor topics such as tax basis, nontaxability, and taxability of transfers between spouses. Mediators are more likely to have a basic understanding of the financial investment itself, rather than these tax consequences. If the mediator does not have this kind of tax expertise, an independent tax consultant can help.

7. CREDIT CARD DEBT

Dividing debt is more difficult than dividing assets and, however unfortunate, most people have a significant amount of debt. In fact, professionals in the field of divorce note that the divorcing individual generally has a higher rate of debt than the average consumer. The important issues here are the mediator's understanding of the availability of credit for each spouse, the implication of joint versus individual credit card debt and other debts, joint versus individual liability, and the removal of a name from an account. A good number of mediators will be familiar with these issues.

Good psychological skills in dealing with conflict are important here as well. Neither person wants to walk away with all or most of the debt. The debt brings up their past life together, and lifestyle is an all-too-frequent point of argument. The

skilled mediator will be able to help sort out even the most complicated of debt situations.

8. FUTURE COLLEGE PAYMENTS

This is a “maybe” for a lot of parents. Though it’s important for a significant number, it’s also a matter of financial ability and the ages of your children. If your child is a teenager who knows college is in her future, then a mediator knowledgeable in this area can be a tremendous resource as you can tackle the finances of college without the cost and time of additional experts. Furthermore, if you think that you or your child may require financial aid in order to attend college, a mediator who understands the federal Financial Aid Form (FAF) is worth her weight in gold, though this is also information you can obtain elsewhere — from professional FAF consultants, for example.

9. SELF-EMPLOYED

A self-employed person may work in a vast range of occupational settings. On the one hand, a self-employed music teacher may give lessons two times a week at \$10 a lesson; on the other, a self-employed dentist may take in \$300,000 per year. Both may file an individual federal tax form called a Schedule C. The mediator should have a basic working knowledge of Schedule C terms and practices: gross income, expenses, deductions, net profit, cost of goods, depreciation, auto and truck expenses, and office in the home. The mediator should be able to understand and explain these expenses. If, however, the spouse has incorporated her business, it becomes a very complex area. Included in this category are single individuals, who incorporate for any number of reasons, to large corporations with complicated asset holdings. Be familiar with the kind of self-employment tax form you or your spouse files; it will allow you

to ask the mediator if he is comfortable helping you make an informed decision concerning a business.

10. PROFESSIONAL LICENSE

In some states, a professional license is a marital asset. Once again, you want a mediator who is familiar with the laws in your state. Remember, you cannot divorce yourself. You need a judge to approve your Divorce Agreement and grant you a divorce, and you must file a settlement that is in line with the law in your state.

11. REALTY TRUSTS AND OTHER TRUSTS

The world of trusts is a world unto itself. Trust lawyers are a breed apart, and your mediator will most likely not be an expert in this area, which is acceptable. She needs only to have a basic understanding of trusts in order to draft any provisions of the divorce agreement concerning this issue.

12. OVER AGE 55

Two categories of divorcing couples, in which one or both spouses are over age 55, need specific information from their mediator. The first group are those couples who have a marital residence which, upon a sale, will incur a capital gains tax. Having a mediator who is intimately familiar with the age-55 exclusion could save you thousands of dollars in taxes. The second group will appreciate a mediator who is familiar with benefits for those who are, or will shortly be, concerned with federal Social Security benefits. In the area of Social Security, an important rule allows a woman to receive her own monthly benefit or the equivalent of one-half of her ex-spouse's benefit, whichever

is greater, providing she was married to that individual for a minimum of ten years. There is important information in this area, and it may not be every mediator's cup of tea, so ask. The information also can be obtained from your local Social Security office.

13. LACK OF COMMUNICATION BETWEEN SPOUSES

At least several times a day, whether from callers or during a session, I hear from a client that "we can't communicate." It's often true and may be a characteristic of all divorcing couples. During one session, a client Tom turned to his wife and asked, "You said there was mail for me?" His wife responded, "Joyce said you'd be late," to which he replied, "I can't go that night." She answered, "The mail is still there." I had no idea what they were talking about and asked if they wanted my help. Both looked at me as if to say, "See, we don't communicate." When people say this, they are invariably right. A good mediator, one with psychological skills, can make the difference in helping couples to communicate with each other.

14. NOT ENOUGH MONEY TO GO AROUND

If there is one factor that mediators must possess, it is familiarity with the budget. All mediators use a budget as their basic tool, and it is the most important one for reaching agreement concerning financial matters. The more financial expertise a mediator has, the more helpful he will be. A budget is actually a record, typically on a spreadsheet, that lists each person's monthly expenses and income. The budget allows mediators to help clients allocate their often limited amount of money in a manner that each person will deem fair.

15. SUPPORT PAYMENTS (ALIMONY)

Some people call all of their support payments child support, others designate some or all as alimony. For many, the difference is the tax deductibility of alimony for the person who is making these support payments. What does it mean to the recipient, and is it a good idea? Mediators in this area can probably save you significant tax dollars. Ask your mediator if she is familiar with federal and state consequences of support. If she does not have the tax expertise to make the calculation of after-tax income, an accountant can provide you with the appropriate recommendations.

16. ALCOHOL/DRUG ABUSE

People who abuse alcohol or drugs are often unpredictable as clients, as they engage in behavior that is affected by their addiction. If your spouse abuses alcohol or drugs and your mediator does not have a working understanding of the behavior of such individuals, your spouse may very well undermine the mediation. Mediators cannot cure drug or alcohol abuse, but in order to reach a fair settlement they need to understand the dynamics of alcohol and drug abuse. At a minimum, for example, the mediator should know that denial is the primary defense mechanism of most alcoholics.

As mentioned earlier, untreated and severe alcoholics and drug addicts are not appropriate for mediation. If your spouse's alcohol or drug problem is not severe, you will do well to choose a mediator who has not only counseling under his belt, but real-life experience in interacting with that population.

17. DOMESTIC VIOLENCE

Not all mediators are trained in domestic violence. Those mediation organizations that do mandate domestic violence training for their members may require only a one- or two-hour educational workshop. For someone unfamiliar with the dangers posed by domestic violence, this may not be adequate. The best choice for a mediator in such cases is one who has had substantial experience in this field, perhaps, for example, one who has worked on a hotline for battered women or as a therapist with men who batter, and who has taken several educational training seminars. It is most important that your mediator know about safety issues for victims of domestic violence, have support references (the ability to provide the name of the nearest support person, as well as a group for perpetrators), and is clear on the legal issues surrounding such violence. Most important, the mediator must understand power differences, though this ability may be difficult for you to discern even when you're sitting in the room with them. If there is an existing restraining order, make sure that the mediator is aware of it, so that special arrangements can be made for the sessions.

18. REFUSAL TO PAY CHILD SUPPORT

If one of you is already stating that the other is refusing to pay child support, you'll need a mediator who is very familiar with two areas: your state's statute concerning child support, and the specific practices in the divorce court where your hearing will be held. This is common information known by divorce lawyers, but a good nonlawyer mediator will also be aware of it. The information also may be obtained by independent, consulting attorneys.

19. UNUSUAL PARENTING ARRANGEMENTS/ DIVISION OF ASSETS

In order to be granted a divorce a judge must approve your agreement. The more your agreement falls within the parameters of “usual,” the more likely the judge will be to approve it. To know what is typical for your case, your mediator should be able to offer guidelines, but if you want a judge to approve an arrangement that differs from the norm, it is helpful to know in advance how the judge tends to rule in such cases. The mediator should be able to help with this, though she may refer you to a divorce lawyer if your agreement, is outside the range of a usual divorce settlement.

20. MINIMAL FUNDS

If the payment of mediation fees is a problem, you may be well served by a mediator who will do at least one of the following: make available a sliding-fee scale (mediation fees based on the client’s ability to pay), negotiate the mediation fees, accept your case on a pro bono basis (which means free), or offer a payment plan. Discuss fees and payment plans during your first call and/or during the introductory session. It’s never too soon to discuss money.

21. A HIGH-CONFLICT COUPLE/VERY ARGUMENTATIVE

Your mediator can also help if you and your spouse are arguing, or if one or both is hostile or withdrawn. Mediation skills are designed to reduce anger and hostility, engage the withdrawn client, and allow you to communicate with each other. People often think that aggressive clients are the most difficult to deal with during a mediation session. That’s not true for me and for

many of the mediators I know. Instead, it is the passive or withdrawn individual who is the most difficult. With this type of personality, one needs a mediator who not only has good mediation skills but who can engage an individual.

Even if you have already started to disagree with each other, don't despair. A mediator's classic expertise is in helping you to resolve your dispute. The best evidence here is your own gut reaction to a potential mediator. Inevitably, couples will disagree over some issue during their introductory session. It's difficult, but while you are arguing during or after the session, remember how the mediation went. Did you feel helped? Did you think she was neutral? Did you get a chance to talk? Did you feel that he listened to you? The last factor is extremely important, perhaps more than anything else. You need a mediator who is not biased. Follow your feelings—they are a good sign.

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This list is not a road map—you do not need to, nor could you, fulfill every point. It would be unlikely to find all of those qualifications in one person. Instead, choose the mediator characteristics that will most help you with your top priority issues.