

ISO The Perfect Mediator; Other Characteristics Considered

By Arthur L. Pressman, Nixon Peabody LLP

Before social media, the personals column found at the back of New York Magazine was where readers sought potential mates or more, often beginning their ads, as they were called back then, with the three letter acronym “ISO,” meaning “in search of.” As readers of the ABA Forum on Franchising ListServ know, today’s posters often ask for help in finding potential mediators, albeit rarely with the ISO introduction. While geography sometimes prompts their questions (“Does anyone know a mediator in Dubuque?”), other times members identify the chief characteristics they seek in a mediator. For example, recently there’s been a spate of emails on the ListServ looking for a “strong” mediator.

The subject of this short piece is what this inquiry (“ISO Strong Mediator”) means. To answer this question, and pose others, I spoke with some long-time Forum members from both sides of the proverbial aisles—older and younger, dedicated and occasional litigators and lawyers recognized as franchisor or franchisee practitioners. I reviewed the same questions with each: what background or experience you look for in a mediator, what you dislike, whether it matters which side you are on, what clients look for in a mediator and what your preference among mediator styles is.

As I approached this article, I expected that how our members describe what qualities they want in a mediator would depend upon the case, the side the lawyer is on, the opponent, one’s own client, and mostly how the lawyer sees the mediator’s role. Contrary to my expectation, my sample of franchise lawyers has lead me to conclude that what a lawyer wants in a mediator is stamina, flexibility, dedication to the process, deference to the parties’ interests, and is frequently informed by past unsuccessful mediation experiences, rather than the needs of the next case. That is, the answer to the question of what a lawyer or client wants in a mediator, “strong” or otherwise, often reflects what they don’t want, based on lessons learned painfully.



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So, what are the qualities or behaviors our colleagues identified that they did or didn’t like in a mediator?

WHAT WE LIKE:	WHAT WE DISLIKE:
Attentiveness	Poor listener
Persistence	Too quick to throw in the towel
Ability to influence	Message carrier
Respectfulness	Self-centeredness
Creativity	Linear thinking
Neutrality	Alignment with either side
Honest talk at right time	Quick to evaluate
Pre-mediation discussions with counsel	Unprepared, shows up and trusts instincts

Some of the best insights came from non-litigators who have found themselves in mediation and were surprised by the shortcomings of the experience.

- “Mediation is not about the mediator . . . it’s about engaging through authentic and humble behavior.”
- “Show me, don’t tell me.”
- “Don’t give me your view without me asking for it.”

Each of these comments from a Forum member who asked not to be quoted for attribution describes her dissatisfaction with a mediator who did not listen and who was intent on pressing his own view of the dispute on the parties, whether they asked for it or not. For this lawyer, listening was the *sine qua non* for

service as a mediator. Without it, you've literally got one hand clapping.

Similar observations from Bethany Appleby describe an encounter with a mediator who "was so intent on 'growing the pie' that she fell in love with her own proposed resolution because she hadn't listened to what the parties wanted." As a result of this mediator's poor handling of the parties, the mediation failed. The quality that Bethany values in a mediator is flexibility and the ability to respond to what the parties want from the process, rather than a mediator who is intent on imposing on the parties the mediator's "format." As an example of how to learn what the parties want, Bethany points with approval to the practice of those mediators who schedule in depth *ex parte* pre-mediation calls with counsel (and sometimes clients) to learn what they can about the dispute before the mediation begins in person.

The mediator's ability to be an active listener is a key requirement, says Bethany. As a lawyer representing a defendant, "you want the plaintiff to be heard at mediation." Shutting down the plaintiff with a mediator who is quick to point out a claim's shortcomings before earning the plaintiff's trust does not help produce a successful resolution. If seeking a so-called strong mediator is code for "I want a mediator who will tell the other side that they will lose," Bethany's comment reinforces the short-sightedness of that view. Disputes don't get resolved if one side stops listening, and a mediator's early and heavy-handed evaluation, even if accurate, can doom the mediation. Bethany's preference is for a mediator who can move from listening and trust building mode to evaluative, with a touch of tough love, if necessary.

Former Governing Committee Chair Ron Gardner looks for a mediator who has, or can build significant rapport with the other side and will demonstrate the risks involved in going forward to the client. "In these two traits," Ron advises, he is

"essentially looking for the same thing—someone who will talk business sense to both sides, and to whom both sides will listen. I have found that for the most part, my clients will listen to what the mediator has to say. Therefore, if the mediator will speak openly, and honestly, about both the strengths and weaknesses of our case to my client, my client is more likely to make the right decision about whether or not to settle. Additionally, unless

the mediator can build rapport with the other side, it is not likely that the other side is going to listen to what the mediator has to say either.

John Dienelt, another former Forum Chair, told me that he wants a mediator who is "patient and persistent [because] clients, and their advocates, are usually resistant to giving appropriate weight to the other side's strong points." An impatient mediator who is not willing to "keep at it" is, in John's view, much less likely to achieve a successful settlement than a mediator who "never gives up" and makes it clear that (s)he has the commitment and stamina to work long and hard. Gardner makes the same point, albeit slightly differently:

More than once I have been disappointed in "reputable mediators" who throw up their hands long before I do, declaring that there is nothing more that they can do because the other side is not willing to do anything. In my view, it is the job of the mediator to get both sides to do something—even if that something does not ultimately lead to settlement. I do not need a mediator to be a water carrier—I need them to be an influencer.

In my own experience as a litigator going into mediation, I found that former judges were, to put it kindly, a mixed bag. Some are so skilled as mediators that they are booked for months in advance at retainer rates that would choke even the most aggressive litigant. Unfortunately, others are literally so quick to judge or so slow to offer much beyond "water carrying" that they do little to influence or assist a successful resolution. Dienelt also is "very wary of former judges, who often have a different skillset, appropriate for making decisions themselves, not facilitating the decisions of the parties, and seem unable to remember that they no longer are wearing a black robe."

Neutrality and the appearance of neutrality are key factors in Dienelt's mediator selection matrix. If presented with a potential mediator who has a high profile as either franchisor or franchisee lawyer, Dienelt thinks hard about whether he wants this mediator candidate, rather than someone who meets his other criteria, but does not have an established identity with one side. Conversely, Dienelt acknowledges that when representing one side, having as a mediator someone whose reputation as an advocate was made on the other side may prove to be very helpful in persuading that side of the strength of his side's position.

How clients look at mediators is less-nuanced—they want and expect a mediator to champion their views, or to show them a direction out of their dispute. As Dienelt recounts,

[N]o matter how many times, in how many different ways, I try to convince clients that mediators are supposed to be, and are, neutrals that have no decision-making power, I believe that clients instinctively view mediators as decision-makers and invariably look for someone who will favor their side, and not be truly neutral. No matter what clients say, I believe that what they truly want is a mediator who will browbeat the other side into agreeing essentially to their view of the case and their terms. Sometimes, I suppose, with strong-willed mediators (often former judges), this approach works. It doesn't with me, and it never should.

Dienelt's view supports the proposition that it is clients who often are ISO strong mediators notwithstanding their lawyers' experiences that brow-beating is not usually the road to resolution.

Rudnick Award winner Michael Garner (who represents franchisees and dealers) prefers a mediator who is an activist, extremely well prepared, somewhat evaluative and creative. An "activist" mediator, Garner says, will build credibility with the parties, and apprise them, privately, of his or her view of the strengths and weaknesses of the merits and the procedural hurdles of getting to a favorable result in litigation or arbitration (this sounds very much like Bethany Appleby's "some evaluation with a touch of tough love.").

High on Garner's list of mediator approaches are pre-mediation calls with the parties' attorneys to clarify issues and begin shaping settlement discussions. These calls help the best mediators build momentum in the bargaining process by eliciting offers for settlement from each side at an early stage and then working to narrow the gap. These mediators seek to build momentum in the bargaining process by eliciting offers from each side at an early stage and then working to narrow the gap. Good mediators identify the points of dispute and further build momentum by fostering agreement on "easy" issues first; this gives both sides a stake in a mediated outcome and encourages agreement on more difficult issues.

Both Dienelt and Garner approve of a mediator who, when the hour is late and resolution is close

but not yet reached, offers a "mediator's proposal" in an effort to break through to settlement. Usually, a "mediator's proposal" involves the mediator privately giving each side his or her view of a settlement and asking for a confidential "yes" or "no" from each side. If both sides say "yes," the case is resolved; if either says no, the case is not resolved and a party who rejected the "mediator's proposal" is left to consider whether the other side did so as well. An unaccepted mediator's proposal does not, however, necessarily spell the end of the mediator's efforts. Although some lawyers are not receptive to a mediator's efforts to push toward settlement after the conclusion of a formal mediation (they may think it designed to "pad" a mediator's bill), Garner values a mediator who takes the lead in post-session discussions, pushing—sometimes over a period of months—for a final resolution.

Although none of the Forum members I spoke with used the adjective "strong" to describe their mediator preferences, all emphasized "persistence," "dedication" and "creativity" as among the qualities they value. Among mediators, the list of what they see as effective mediator attributes is long and does not include the word "strong," unless referring to stamina.

At a mediation conference in Vienna that I attended in July, more than thirty mediators from around the world, including me, brainstormed and identified what for us are the essential attributes for high-quality mediator performance. The list was long—attentiveness, flexibility, empathy, curiosity, mindfulness, discipline, tenacity, stamina, respectfulness, intelligence, creativity, assertiveness, patience, calmness and confidence were at the top of everyone's list, and no one's list included "strong."

In my humble opinion, it is the confluence of all these attributes that makes a mediator "strong" and leads to successful resolution. The likelihood of resolving a dispute is not improved by a mediator who strong-arms one side or the other, or presses his view upon the parties; in fact, the prospects of resolution are diminished when the mediator's primary activity is pressing her own, or anyone else's, agenda for settlement. Openness to all sides, with attentiveness, persistence, patience, and help with sometimes difficult conversations among the parties, is the more likely road to resolution, and what truly makes a mediator "strong." ■