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## What do Clients of Mediators “Want”?

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This title reflects a familiar marketing and ethical question for all service providers – what do clients of plumbers/doctors/psychologists/builders/lawyers etc want?

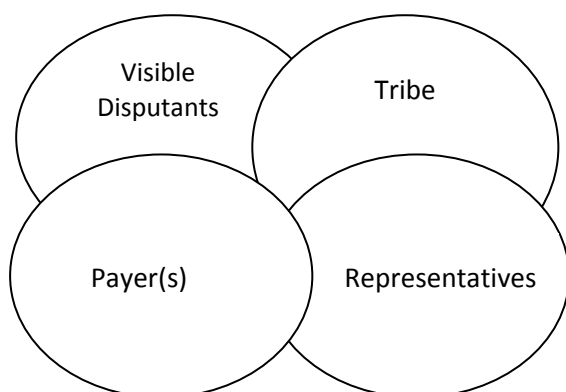
Predictably, the answers given by anecdote, “theory” and more systematic research are complicated and conflicting. There is a simple answer to every complex question, and it is wrong.

There are three elements in the question – what do the (1) clients of (2) mediators (3) want?

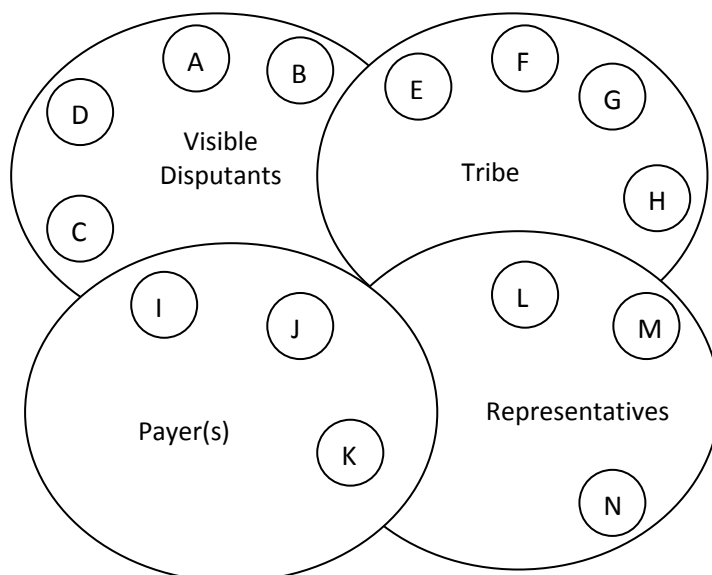
First, who are “clients”? There are four possible types of clients:

- Immediately visible *disputants* or “parties”.
- The “*tribe*” behind the visible disputants – eg relatives, shareholders, cheer squads, the hawks, doves and moderates.
- The person *paying* the mediator – the insurer, taxpayer, corporation, court administrator.
- The “expert” *representative* (often a lawyer) acting on behalf of the “party”.

These four categories of “clients” have different though usually some overlapping goals or “wants”.



Any apparent unity in each of these four teams obviously masks the reality that different members within each team have different “goals” or “wants”!



Goals of the fourfold “clients” multiply into a maze of spoken and unspoken conflicting hopes and expectations – no wonder mediators, negotiators and politicians age prematurely.

An important addition to the jangling and shifting fourfold “client” goals, are the sometimes conflicting goals of the mediator – to be paid, to be respected, to be hired again, to follow a tried process, to avoid deception etc – a possible fifth wheel on the already four-wheeled bus.

The second element of the question is the word “mediators”? Like physicians, there are many types, hybrids and chameleons under the umbrella of “mediators”. Much has been written about mediator typologies plus personalities.

Clients have a variety of different expectations/goals/wants from different “types” of routine or customised mediations – an opinion, or not; shuttle or not; lock-the-door or not; explore emotions, or not; long preparation, or not; clients talk-a-lot, or not; go till midnight, or not; structure or not; with all the abacus of variables in between.

The third key word in the question is “want”. “What do clients of mediators *want*?” All service providers face this tension – what clients subjectively “want” at the moment, may not be what they “need”, on some other objective criteria, in either the short or long term.

Moreover, a major part of a mediator’s task is to assist the fourfold “parties” to *change* their wants and goals to a new version of goals and needs. Therefore *Initial* wants (procedural, emotional or substantive) are important *starting* points, though not finishing points which they will “need” to reach, for a settlement of some kind to occur.

For example:

<b>“Client” initial “wants” or “initial goals”:</b>	→	<b>However, ultimately clients’ “need”:</b>
1. To tell my version of history	→	1. To listen to other versions of history
2. To vent publicly	→	2. To vent privately
3. To show how “strong” my arguments are	→	3. To understand the risks of ongoing conflict
4. To assign blame for the past	→	4. To organise my future priorities
5. To “settle” quickly	→	5. To discover and address the hurdles which exist to a quick settlement
6. To get to the “bottom line” quickly	→	6. To get to the likely settlement ranges slowly
7. To get “justice”	→	7. To stop talking about “justice” and get a result which is within the “market range”
8. Etc	→	8. Etc

In typical mediator and problem-solving fashion, having made the initial “question” far more complicated, here are a few possible answers from story, systematisation and statistics.

**Story**

My own experience as a mediator is that what the fourfold “clients” often want from me is:

**Lawyers:**

1. “John”, just weave your magic”.
2. To “get rid of” a troublesome client who is not listening to advice and/or paying bills.
3. To manage a “troublesome” lawyer or tribal member on the other side eg who is giving (in their opinion) crazy advice.
4. To impose a deadline upon disorganised “opponents” by which time the mediator will require and assist with written summaries of data, evidence, rules, risks and ranges.

5. To establish via preparation meetings a calm environment where posturing pontificator or silent stonewaller will suffer some embarrassment/before a respected authority figure, and hopefully modify his/her behaviour.
6. To satisfy a statutory requirement for mandatory mediation just in case the dispute needs to proceed to a full tribunal or judicial hearing.
7. To use a process with which I am familiar and comfortable and over which I have some control.

#### *Payers want to:*

1. Settle this dispute anyway possible, quickly and quietly because the disputants are causing serious damage to our organisation.
2. Make sure the settlement sticks.
3. Set up a quick response reaction system if the dispute breaks out again.
4. Be told confidentially which party is to blame, so that we can sack him/her if this happens again(!!!).

#### *Visible disputants want:*

1. To settle this somehow – the conflict is escalating and having many side-effects on health, reputation, diversion from work, litigation trauma etc.
2. My version of “justice”.
3. A comfortable and structured meeting where some politeness and clarity may emerge from the fog of war, and legal babble.
4. To be listened to.
5. A meeting where some control is exercised over an angry, violent, stupid, mentally-ill, alcoholic, drug addicted or dominating person; or vice versa (a meeting where I can try to dominate a “weaker” person).

#### *Tribal groups in the background want:*

1. Our preferred solutions.
2. To express outrage, and righteous indignation when our representatives or relatives are weak, compromising wimps. (“principle without the pain”).

### **Systematised preparation lists of goals**

Apart from the anecdotes above, the possible goals/wants of visible partners and lawyers can be systematised into ubiquitous lists to assist these people prepare for negotiation or mediation.

For example:

## **Client Information Sheet – How Will You Measure “Success”? And What Are Your Goals At The Proposed Mediation/Negotiation?<sup>1</sup>**

<b>Very Important</b>	<b>= 5</b>
<b>Important</b>	<b>= 4</b>
<b>Marginal Importance</b>	<b>= 3</b>
<b>Not Relevant</b>	<b>= 2</b>
<b>Unsure</b>	<b>= 1</b>

GOALS AT THE MEDIATION/NEGOTIATION	RANK
1. To clarify what this dispute is about	
2. To be listened to	
3. To regain some control over a confused situation	
4. To meet in a comfortable situation	
5. To make speeches and presentations about the strength and reasonableness of my position	
6. To have my difficulties acknowledged by the other side	
7. To give an apology of some kind	
8. To receive an apology of some kind	
9. To communicate directly, rather than through lawyers or other people	
10. To understand why these claims are being made	
11. To understand the other disputants better	
12. To clarify alleged facts and evidence	
13. To have the mediator express opinions on the reasonableness of our respective claims	
14. To reach at least partial agreement	
15. To reach agreement at the <b>low</b> end of possible range of outcomes	
16. To reach agreement at the <b>mid-range</b> of possible range of outcomes	
17. To reach agreement at the <b>high</b> end (in my favour) of the possible range of outcomes	
18. To avoid the delay, cost and uncertainty of further conflict	
19. To create at least some doubt in the minds of the other disputants about the reasonableness of their claims	
20. To “beat” the other disputant	

<sup>1</sup> J H Wade, *Advanced Mediation Workbook* (Bond University; 2008) p 64-65.

21. To have an opportunity to express my feelings	
22. To have a mediator who controls procedure, air-time and politeness fairly	
23. To have any agreements expressed quickly in a legally binding document	
24. To reach an agreement that all parties can live with	
25. To reach an agreement that is likely to be observed	
26. To lay foundations of politeness and clear communication for a later agreement	
27. Other ??	
28.	
29.	
30.	
31.	

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

## Joint Client and Representative Goals<sup>2</sup>

As a client identifies **risks** if the conflict continues, this will also identify client **goals**.

From your experience as a representative or mediator, what joint client and representative goals or measures of success do you see at the mediations (and negotiations) which you attend?

Seen Often = 3

Seen Occasionally = 2

Seen Rarely or Never = 1

JOINT CLIENT AND REPRESENTATIVE GOALS?	RANK
1. To be compliant with a legal requirement to attend	
2. To make a presentation about the merits of a case or solution	
3. To listen; to understand the motivations and interests of the "opposition"	
4. To be listened to	
5. To regain client control from professionals or inertia	
6. To give an appearance to outsiders (eg. bosses, courts, relatives) of behaving reasonably	
7. To gain insights into alleged facts, evidence and interpretation of rules from the "opposition"	
8. To sow seeds of doubt with the opposition	
9. To create a deadline for a meeting for a disorganised "opposition"	
10. To meet in a comfortable environment	
11. To have unruly opposition under some constraint by the mediator	
12. To create doubt by having the mediator express an opinion about the reasonableness of <b>opposition's</b> claims	
13. To clarify whether <b>our</b> claims are reasonable by having the mediator express an opinion	
14. To wear down the opposition with another time-consuming and expensive meeting	
15. To evaluate the skill and credibility of opposition witnesses	
16. To reach a settlement within the predicted range of outcomes	
17. Other?	
18.	
19.	
20.	
21.	

<sup>2</sup> Wade, *ibid* at 61.

## Surveys and statistics

Apart from stories and systems, there are of course more structured research and statistics which give another window (not necessarily more “accurate”) into the question of “what do clients of mediators want?”

For example:

### *Bond University survey of mediators*

In 1999, Bond University Dispute Resolution Centre assembled fifty of the most frequently employed mediators in Australia (mainly lawyers) in “commercial” disputes. Over two days this group completed a number of exercises including the following survey.

What do mediators themselves want when they have a mediator?

From the list set out below attempt to rank the desirable skills and traits you look for in a mediator. (You can only give the top ranking to five of these traits and skills.)<sup>3</sup>

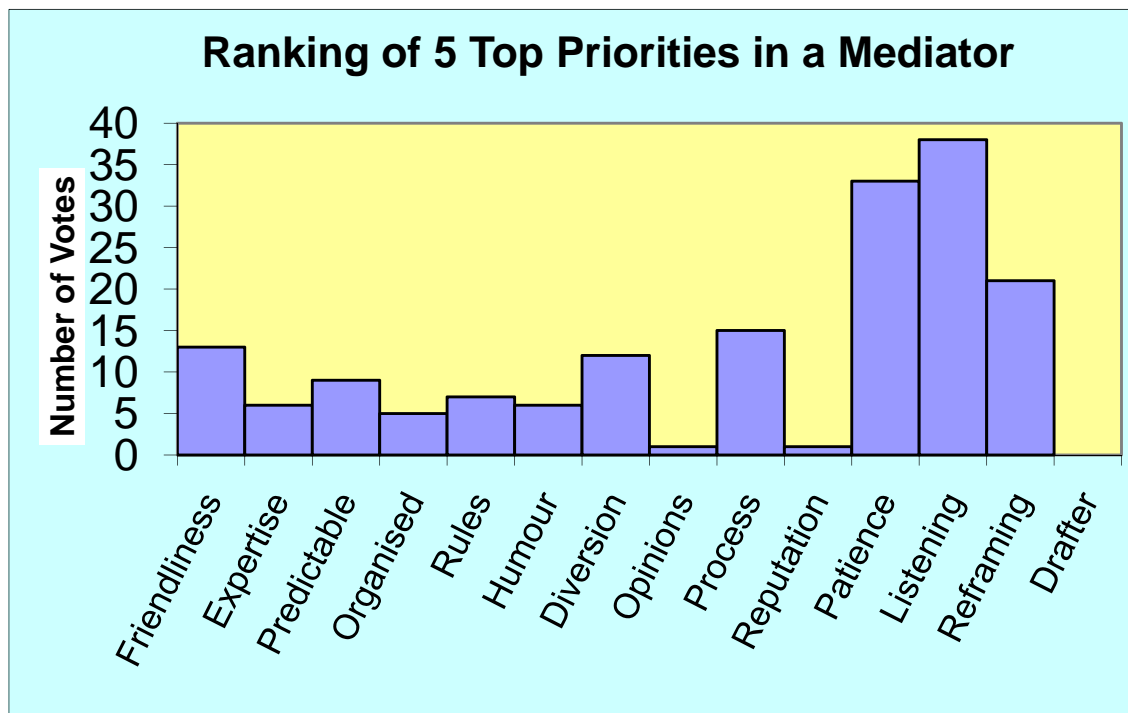
	Essential	Preferable	Not Necessary	Ranked as one of 5 top priorities
1. Warmth and friendliness				
2. Substantive expertise in the area of dispute – eg. law, accounting, engineering				
3. Follows a predictable mediation process				
4. Highly organised				
5. Stickler on process rules, good behaviour, speaking in turn				
6. Good sense of humour				
7. Excellent diversion strategies				
8. Ready to express strong opinions; give strong advice				
9. Strong opinions on process; but reluctant to give opinions on judicial outcomes				
10. Protects the reputations of lawyers				
11. Persistence and patience				
12. Excellent communication skills – listening				
13. Reframing, summarising skills				
14. Good drafter of documents				

Now compare your ranking with the self-perceptions of fifty leading commercial mediators from Australia.

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<sup>3</sup> Wade, *ibid*, 86-7.





### ABA Survey - 2008

In 2008, the ABA Section of Dispute Resolution published the *Task Force on Improving Mediation Quality*.

Ironically, this report was a result of a decision “that a national credentialing program was not feasible for the current mediation marketplace”. (p2). Instead, the task force switched to investigating “the factors that define high quality mediation practice” in private practice civil cases only and *not* in domestic, family law, or community disputes (p2).

The information was gathered from such civil dispute mediators, and the repeat user clients and legal representatives.

The Task Force systematised its findings into four conclusions. What do these repeat clients (lawyers and business people) **want** from their chosen mediators? Set out below is an (over-)simplified four point summary.

#### Preparation

These repeat clients want *inter alia* pre-mediation meetings with the mediator; especially pre-mediation meetings between the mediator and any lawyers; confirmation of beginning and end times of the mediation meeting; to strategise on what is not helpful procedure; express brainstorming on type of “opening statements” are possible/desirable; and of course, settlement!

Conversely, the repeat clients did **not** want the absence of these services from the mediator, or to be “ambushed” by unexpected events.

The Task Force repetitively identified an apparent mismatch between the stated goals of even highly respected mediators and their repeat clients and their representatives. For example, mediators emphasised their own prominent goals of listening, having emotions expressed, promoting communication and preserving relationships. Repeat clients ranked all these “classic” mediator goals as less important to them. This mismatch needs further hypotheses and study. Why do **you** think this

occurred? Do mediators attempt to give politically correct answers in surveys? Do mediators perceive building block goals underneath client goals? etc.

### *Customisation*

Repeat “commercial” clients want the preparation meetings to design each mediation, and **not** to use a cookie-cutter approach.

They want “design discussions” around who should/should not be present; type of documents and summaries sent or swapped; types of “speeches”; and many other customised variables.

### *Analysis and Advice-Giving*

Repeat commercial clients want the mediator to engage in a range of “active inputs” including – asking pointed questions about facts, perceptions, goals, risks and rules; giving advice indirectly by asking questions; giving advice directly at the right time, place, in the correct “tone”, with the right words, to the right parties – that is, advice giving is a subtle and sophisticated exercise; - suggesting a range of procedural and substantive options.

Again, in this study, there is a clear mismatch in client, mediator and lawyer perceptions about sophisticated advice giving. Clients want this “often”; mediators want to give this service much less often (or at least **perceive** they give this advice-giving service less often?).

### *Persistence*

Clients want mediators to be active and exert pressure on all parties to continue considering options and/or change the style of the meeting. There is clearly uncertainty on how to do this task well, and when it is “too much” pressure.

Surprisingly, clients expect follow-up and mediator contact **after** the formal mediation is “over”. That is, clients want structure for future contact, not to be left in the wilderness of a “failed mediation”.

The ABA study offers a challenge to common mediation orthodox “beliefs” and practices (eg no advice, no follow up, few preparation meetings), and to mediation training; and by suggesting some uncomfortable truths about what certain mediation clients want.

## **Conclusion**

The catalogues of “wants” and “goals” of the four client groups who use mediation differ dramatically and also overlap. How to predict what a particular client subjectively **wants**, and then go on to persuade him/her what to try what is objectively **needed**?

Mediation industries are fragile in reputation and marketability. Supply of eager mediators far exceeds demand. Therefore it is important for mediators to include extensive, and expensive, preparation meetings with the four client groups:

- To tease out what is/might be wanted by members of each group
- To lower expectations by advice and stories
- To share humble hypotheses on what clients might objectively need
- To encourage regular feedback during meetings on whether the service is meeting expectations.