

Mediation Strategies

Choose Carefully

All Mediators Are Not Created Equal

By Lee Jay Berman

If a mediation is going to have a chance at success, perhaps the most important decision is who will sit in the neutral chair at the head of the table. From case to case, that decision will vary. Attorneys owe it to their clients to invest the time in investigating, strategizing and selecting the right mediator for each case. In a time where we have retired judges, litigators, transactional attorneys, so called “recovering litigators”, and professional mediators available, and when more mediators are specializing in particular areas of practice, here are 13 tips on the best ways to select a mediator effectively.

- The old days of each side picking three and scratching two from the other’s list, a process that comes from the adversarial arbitration process is out. Even more so than arbitrators, mediators must be selected on a consensus basis, rather than a least objectionable basis. The mediation has a greater chance of settling the case if all parties buy into the mediator’s reputation, personality and qualifications for a successful mediation.

- Just because the “other side” proposed a mediator they have worked with before, that is no reason to “ding” that mediator. Consider three things. First, the mediator has no ability to coerce or pressure you or your client, or to make you agree to anything you don’t want to. Second, if the other attorney is proposing a mediator they are probably doing so because they feel the mediator has the ability to settle the case which means that mutually agreeable terms have been reached. Third, if you are concerned that the mediator and opposing counsel’s working relationship may be too close for comfort, ask the mediator some questions. Perhaps it is important in reaching a resolution that your opposing counsel feel that he or she can trust the mediator, and that the mediator has the ability to reach that attorney (or client) in a way that can be more persuasive than another mediator that they do not know or that is not familiar.

- Consider the mediator’s training in resolving conflict. While mediation is an art form more than a science, there are many levels of tangible skills that mediators can study and learn to make them better negotiators and facilitators. Some mediators on court panels have merely completed a single 25-hour mediation course, while others make mediation their full-time career and study for hundreds of hours with the best instructors in the world. Mediators often refer to their mediation skills as tools in their tool box or the bullets in their gun. My website says, “If the only tool you have is a hammer, you tend to treat most problems as nails.” The difference in the level of training your mediator has in actual mediation skills (or how many tools they have to pull out of their tool box and use) may be just the difference you need to get your particular case settled. After all, if settling the case was easy to do, you wouldn’t need a mediator at all!

- Consider the mediator’s tenacity. Lately I have been asked to do a lot of second mediations for cases that went first to an ineffective mediator. All too often the attorneys tell me that the mediator heard the initial dollar amounts that each side was looking to settle for and gave up too easily, or didn’t have the skills or tenacity to see the case through to resolution. A mediator can only keep going if they have the skills to keep trying different things, and if they have what some have called “an iron rear end” and are willing to sit for as long as it takes to get

it resolved. That tenacity, or resolve to resolve a case, is one of the most important features to look for in evaluating a mediator, or in interviewing other counsel who have worked with that mediator in the past.

- Consider the other attorney(s) in the case and their clients and either ask them or size up the type of mediator to which they would best respond. Some cases (and some opposing counsel) require an authoritative voice of a retired judge or litigator with multiple decades of experience, others may respond better to a persuasive, personable mediator who reaches people well and can see the big picture. Some cases require a macho authority figure, while others may do better with a feminine touch. It is important to consider variables such as these in each case. No case will be like any other, since the personalities at the table will be different and will respond to different types of mediators.

- Consider *your* client's state of mind regarding the litigation. If they are highly emotional about the case, they will benefit (as will you) from a mediator who can handle emotional parties and gently guide the case to a smooth settlement. If they are stubborn and intransigent, they may need logic and tenacious persuading. If they are weak decision-makers or are unsure about the fair value of their case, they may need the authority of a retired judge or seasoned litigator.

- Consider your own strengths and weaknesses. This may be the hardest part, but it's critical to know yourself with clarity. For example, if you have a strong, authoritative presence, you may benefit from a mediator who has a softer touch to complement you. If you tend to be more left-brained, or a more logical or linear thinker, you may want a mediator who is more right-brained, or more emotionally attuned, and perhaps creative. If you have a client control problem, you may want a mediator whose style is more directive. You will also need to consider your relationship with opposing counsel and whether you want more of a facilitated negotiation or an evaluative appraisal of the case.

- Consider the timing of the case. If for some reason outside your control your case is ordered to mediation before a particular date, and that date is too early in the case, you will want to select a tenacious mediator who is dedicated to following the case through the litigation process. Experienced mediators know that sometimes, the first day of mediation is the start of the mediation process, but that additional key discovery may be required before a final settlement can be reached. In these cases, a mediator who will take the lead in facilitating the discovery process will be an asset. For this, you will want a mediator who is a real believer in peaceful resolutions, and not letting litigation get out of control before trying to settle a case. This could range from a no-nonsense retired judge to a former general counsel to a non-attorney mediator with business and economic sense. This may be important in cases where you have general counsel involved in a case.

- Consider the subject matter. It is not imperative, but it is helpful to have a mediator who understands the nature of the dispute. If the dispute is a dissolution of a family business, it is helpful to have a mediator who understands partnership and corporate law, business law and contract law. It will be beneficial to have a mediator who is familiar with the workings of the particular industry in which the family operates their business. It may be even more beneficial to have a mediator who specializes in or grew up in a family business and understands the dynamics involved in these unique situations. The important thing to consider in selecting the mediator is that they are familiar with what it takes to discuss the issues and to reach a resolution. It is not enough for the mediator to understand the legal issues, they must understand

how to relate enough to the parties and their counsel to bring the parties to a resolution they are willing to go along with.

- Because such a large volume of cases going into mediation are doing so as a result of a court order, you must examine the court program rules and the ability to select a mediator of your choosing within the court's program. Just because a case may be court-ordered, you may still have the right to pick your mediator. Most courts allow the parties to select their mediators from a list of available mediators. Many courts have followed Santa Barbara Superior Court's successful Court Administered Dispute Resolution (CADRe) Program by listing the mediators and making their resumes available on the court's web site. Take the time to review these resumes and comb for the qualities described above.

- If the court doesn't assign the mediator to a case, you should request resume information on the potential mediators if it is not made readily available to you. Allowing the court to select the mediator for you when you have the ability to participate in that decision is doing your client a disservice. Furthermore, even when the court offers a list of "approved" mediators, that should not limit your ability to select and hire a mediator of your choosing if you do not see one on the court panel that has the qualifications that you want. What should be more important is actually settling the case. That is, after all, the only reason to begin the mediation process.

- Ask colleagues. But ask questions that will give you useful information such as what has been outlined above. Ask specific questions about each of these points, rather than simply asking if your colleague liked the mediator or thought he or she was competent. Even less informative is asking whether the case settled, since there are so many variables involved in whether a case settles or not that the mediator may have been unable to overcome all of them.

- Finally, there is the list of things *not* to do. The dartboard approach is out. So is the "pick an address label from this random list offered by the court" method. Coin flipping is shameless. And picking the one with the biggest ads in the legal periodicals may not tell you enough, either. Often times, name recognition simply means a mediator markets well, but does not necessarily imply competence or appropriateness for your case. Letting opposing counsel select without asking any questions of them is paramount to telling them you are not planning on taking the mediation process seriously and do not care to put the effort into it.

The mediator you select may be the most important decision you make regarding the mediation. Regardless of whether the mediation is ordered or voluntary, take the time to pour through resumes, ask colleagues, and do the appropriate research. Make the decision wisely and settle your case!



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