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### **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. Attorneys owe it to their clients to invest the time in selecting the right mediator for each case.

When choosing a mediator, ask colleagues questions that will give you useful information. Do not merely inquire whether your colleague liked the mediator or thought she was competent. Even less informative is asking whether the case settled. Since so many variables determine whether a case settles, this may be the worst indicator of a mediator's skill and effectiveness.

In a time when we have retired judged, litigators, transactional attorneys, so called "recovering litigators" and professional mediators available, and when more mediators are specializing in particular areas of practice, choosing one mediator can be a difficult decision. Here are 12 tips on the best ways to select the right mediator for you particular case.

█ The old days of each side picking three and scratching two from the other side's list, a process that comes from the adversarial arbitration process is out. Mediators instead should be selected on a consensus basis, rather than a least-objectionable basis. Mediation has a greater chance of settling the case if all parties believe in the mediator's reputation, personality and qualifications.

█ Just because the other side proposed a mediator that it has worked with is not by itself a reason to reject that mediator. Remember that mediators have no ability to make you agree to anything or to coerce or pressure you or your client. If the other attorney is proposing a mediator, it probably believes that the mediator has the ability to find mutually agreeable terms for settlement. If you are concerned that your opposing counsel has a working relationship with a mediator that seems too close for comfort, try to familiarize yourself with him or her. The fact that this mediator has the ability to influence opposing counsel or client could be a positive for your client.

█ Consider the mediator's conflict resolution training. While mediation is more art form than science, mediators can learn many skills to become expert negotiators, facilitators and closers. Some mediators on court panels have completed merely a single 25-hour mediation course, while others make mediation their full-time career and have studied for many hundreds of hours with

the best instructors. The difference in the levels of mediation training may be the difference between settling and not. If settling a case were easy work, mediators would not be necessary.

■ Appraise the mediator's tenacity. Lately, many experienced mediators are being asked to do a lot of second mediations for cases that went first to ineffective mediators. Some of these lawyers maintained that the mediator gave up too easily on the hearing of each side's initial settlement offers or didn't have the skills or tenacity to see the case through to resolution. A mediator can keep going only if he or she has the skills to keep trying different things and is willing to sit and keep working for as long as it takes to get the case resolved. That tenacity is one of the most important features to look for in a mediator.

■ Consider the personalities of the other attorneys and their clients. Some opposing counsel or their clients require the authoritative voice of a retired judge or a litigator with decades of experience. Others may respond better to a persuasive, personable mediator with a more sensitive touch who reaches people and can see the big picture.

■ Also, evaluate your relationship with opposing counsel and whether you want your mediator to prove a facilitated negotiation or merely an evaluative appraisal of the case.

■ Appraise your client's state of mind. If he is highly emotional about the case, he might benefit from a mediator who can handle emotional parties and help guide them to settlement. If your clients are stubborn and intransigent, they may need logical, 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. If you have a strong, authoritative presence, try using a mediator with a softer touch to complement you. If you tend to be a logical or linear thinker, use a mediator who is more creative. If you have trouble controlling unruly clients, you may want a mediator whose style is firm and direct.

■ Evaluate the timing of the case. If your case is ordered to mediation by a date that is too early in the case, select a tenacious mediator who is dedicated to following the case through the litigation process. Experienced mediators know that the first day of mediation is often only the start of the mediation process and 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 and will work with counsel to schedule a follow-up mediation session will be an asset. This type of situation may require a mediator that can keep the case on a mediation settlement track. Therefore, try to choose a mediator who is committed to a peaceful resolution and to not allowing the litigation to get out of control, such as a no-nonsense retired judge, a former general counsel or a non-attorney mediator with a business or economic background.

■ Consider the subject matter. It is often helpful to have a mediator who understands the nature of the dispute. If the dispute is a dissolution of a family business, it can be helpful to have a mediator who understands partnership, corporate and contract law or who is familiar with business's industry. Or you may choose instead to have a mediator with experience in the unique dynamics of family businesses in general.

█ Appraise the difficulty level of the case. For example, a wrongful death case may include legal, insurance coverage, medical, emotional loss and structured settlement issues and will require a very experienced mediator. Try to match the skill level of the mediator to the difficulty level of the case. Some attorneys with very difficult cases assume that any mediation will fail, so they pay little attention to the selection of mediator. Instead, try hiring a highly skilled mediator to give the mediation process a chance to settle the case.

Because many cases are going into mediation as a result of court orders, you must examine the court program rules and your ability to select a mediator of your choosing within the court's program. Even though a case may be ordered to a mediation program, you have the right to pick your mediator. If the court doesn't assign the mediator to a case, request information on potential mediators.

Many California courts have followed Santa Barbara Superior Court's successful Court Administered Dispute Resolution (CADRe) Program by listing the mediators and making their résumés available on the court's Web site. If so, comb through these résumés looking for the qualities described above. 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.

█ Consider looking beyond the court program. Even when the court offers a list of "approved" mediators, that should not limit your ability to hire a mediator of your choosing. In Los Angeles, for example, lawyers need not select a mediator from the court panel. A second checkbox on the mediator selection form allows the parties to designate a mediator of their choosing. Even if it costs each party a few hundred dollars, that choice may save them many thousands if the mediation is successful.

Finally, there is a list of things not to do. The dartboard approach is out. Coin flipping is shameless. So is the "pick an address label from this random list offered by the court" method. Also, choosing the one with the biggest ad in a legal periodical may not tell you enough. Very often, name recognition simply means a mediator markets well but does not necessarily imply competence or appropriateness for your case. And letting opposing counsel select one without your input merely tells them you are not planning to take the mediation seriously.

The mediator you select may be the most important decision you make regarding the mediation. Regardless of whether the mediation is ordered or stipulated, take the time to read through résumés, ask colleagues and do the necessary research.

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