

Choosing The Best Mediator And Process

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It is neither possible nor helpful to make universal statements about the qualities of “good” mediators. Rather, if you want to hire a mediator you need to know:

- why you want a mediator,
- what kind of dispute you are engaged in,
- and what process suits that type of dispute.

Once you ascertain those elements, you can readily find the right mediator.

First, ask why you think that a mediator would be useful in resolving this dispute. Have the parties engaged in traditional positional bargaining and gotten to an impasse? Or, are the parties floundering around and unable to get any meaningful negotiations started? Have the lawyers painted themselves into a corner by bluffing? Or, is the only reason you are seeking a mediator that some court is not going to let you go any further until you have been through mediation? All are good reasons for seeking a mediator.

Second, you must know the nature of your dispute, since that will determine what characteristics you want in a mediator. Is this a traditional personal injury case, which is a zero sum game in which money will be exchanged in a one time transaction? Is this a workplace dispute (such as sexual harassment) in which money is only one of the issues and the restoration of personal dignity is equally important? Is this a case in which your client, or the other side, is acting out of ignorance of the law, or obstinance in insisting upon a highly unlikely outcome? Is the essence of the case a personal relationship that has become malignant? Each of these different kinds of disputes calls for a different intervention.

Consider some of the types of interventions that are available in mediation. Let’s look at three:

- “settlement conference,”
- “interest based mediation,” and
- “process centered mediation.”

Suppose you were involved in a personal injury case in which all that was at stake was a one time exchange of money. The settlement conference intervention would be a useful tool. In this model a highly knowledgeable neutral provides a credible dollar estimate of the probable outcome. This figure becomes the anchor point for further negotiations, which are

assisted by the neutral. If you want to use this intervention you might do well to look for a retired judge with the appropriate experience. As mediators, many retired judges have proved to be competent settlement judges.

If you had the sexual harassment case, you might well want to use a mediator who could get the parties to engage in "interest based" mediation. This involves careful listening and exploration of the underlying interests of the parties to the dispute. The mediator must bring an understanding of workplace issues, empathy, and an ability to help the parties learn how to discover their interests. A lawyer who had a significant employment background, as well as the necessary personal characteristics, might well be your choice for this mediation. An equally good choice might be a lay person with a background in employment relations, as well as the necessary personal characteristics. Specific legal knowledge is unlikely to be the key to settling this type of dispute.

If you have the "case from hell," in which the disputants have declared *jihad*, and neither you nor opposing counsel are able to exert any rational control, you probably want someone who can engage in process centered mediation. In these cases, specific legal or other expertise is not the most significant characteristic for a mediator. Instead, you need someone who can intervene to create a process which affects the behavior of the litigants. A lay person with community dispute resolution expertise may be an appropriate mediator in this situation. Those folks are used to handling highly volatile individuals and getting them to develop different ways of approaching their differences.

Once you have decided on the type of mediator you need for your case, you have the difficult task of finding the right person. Directories can help, since they will give you some basic information such as whether the mediator is a retired judge, intellectual property lawyer, employment lawyer, or former community dispute resolve. I would ignore any "certification," since it provides no real assurance of competence. It simply says someone was trained by someone else.

The second item to look for is experience. Mediation is an art, and it requires practice. The more experienced the mediator – as a mediator – the more likely she will do a credible job.

Your most basic resource is colleagues. They are likely to have war stories about various mediators, and they can be a rich supply of information – some of it accurate. But don't stop there. Agree with your party opponent to solicit biographical data from possible mediators. Ask for resumes that show the mediation courses taken or taught, the types of mediation done, and lawyer references. Be aware, however, that mediators must preserve confidentiality, and they may not be able to provide you all the information you want.

Finally, try this. Ask your opponent if he would like to have a conference call, the purpose of which is to solicit the potential mediator's views on the nature of the process that she would recommend. The amount you will spend for the mediator's time will be relatively insignificant. Then make that conference call and let the mediator help you design a process for resolving this dispute. You are not obliged to use that particular mediator (after all, you are paying for the advice) but it is an excellent opportunity to achieve two goals. First, you can get a pretty good impression of the competency of the potential mediator. Second, you will have engaged in a cooperative endeavor with opposing counsel. Both of you will be committed to the mediator you select. And both of you will have started down the road to resolving the dispute.