

## FURTHER THOUGHTS ON MEDIATOR SELECTION

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In this, Part II of a look at selecting your mediator, we take you beyond consideration of a particular mediator's style of mediation. Initially, we should reflect on a few foundational questions:

- What key things do you look for when selecting a mediator?
- How do you explain why you consider those things as key?
- Does it matter to you if your mediator has subject matter expertise?
- Do you reject her because opposing counsel suggested her?
- If you always prefer a retired judge, why is that your preference? What is it that you believe the retired judge mediator offers that other mediators may not offer?
- How, if at all, does your mediator's ability to provide you and your client with an effective process impact your selection decision making?
- What do you consider to be an "effective process"?
- What, if anything, can you do when the contract involved in the dispute specifies a dispute resolution provider if you would like to use someone else?



These are some of the issues that you have raised under the subject heading "choosing a mediator". The subject is important to you, your clients and to your mediator. So, let's explore it a bit further with an eye towards

helping you make a well-informed decision and helping me provide you with what you need...

"Choosing your Mediator is more than whether she has substantive expertise."

### Step one: the role of the mediator.

Common threads<sup>1</sup> running through the most accepted definitions of "mediator" (in our context at least) include:

- "neutral and impartial third party";
- there to facilitate discussions and negotiations between disputing parties;
- in a process designed to maximize party self-determination of the outcome (read, "settlement" or "resolution") of their dispute.
- To be effective, the mediator must:
  - establish a rapport with the participants, including quickly developing in them a sense of trust in and comfort with the mediator
  - possess and exhibit a strong understanding of how people respond to conflict, how they negotiate, and good communication skills.

**Subject Matters... or does it?** Many of our litigation/trial colleagues believe that their mediator must have a mastery of the subject matter – the substantive law – underlying their case. Is it truly important that your mediator have substantive expertise? Let's see if we can deconstruct

<sup>1</sup> "Common" but by no means intended to be exhaustive...

the approach, then you can decide for yourself whether subject matters.

- Begin with the Mediator’s role.
  - Fundamentally, your Mediator does not make decisions on the outcome of the dispute; that is the parties’ territory. So, no real need for substantive expertise here.
- Next, do you think your Mediator understands the dispute?
  - You are going to educate your mediator on your view of the “facts” *and* the law – even if the mediator does have significant substantive knowledge.
  - Your Mediator, through summarizing and discussion, can show you that she “gets it”.
  - Certainly, experience with a particular type of dispute makes that education process at least smoother.
  - Looking for a strong evaluative mediator or particularly a directive mediator?
  - The evaluations and directions perhaps carry greater weight by a mediator you feel has a solid grasp of the subject matter.
  - Yet again, you can (perhaps *should*, no doubt *will*) enlighten your mediator. We do read your submissions; some of us read the actual cases you cite; some of us even go further and research the substantive issues. We also listen carefully to the spoken and unspoken at the mediation table and in caucus.
- At some point your Mediator will ask you to put the substantive, positional arguments in the proverbial parking lot because continuing to revisit them impedes us from finding a solution.
  - You have heard it before: if we are going to get to settlement we need to negotiate despite and

recognizing your differing substantive positions...

- And yes, there are disputes where substantive knowledge is very important – take family law for example.
  - Query: to effectively mediate an IP dispute, must your mediator have handled numerous *Markman* hearings, or prosecuted or presided over numerous IP trials?

### An Effective Process – the key to success?

Here’s what it can look like:

- A *safe* place: your client (and yes, you as the lawyer) should have the chance to talk openly, candidly – to thoroughly air out “the facts” and your position. Often, mediation becomes your client’s day in court. Effective process provides a safe place to do so. In the sexual harassment dispute, your client’s sensitive, embarrassing, troubling conversations with the mediator open the opportunity to move forward
- The *reality test*: inevitably and almost invariably, the process gives your client her first opportunity to have a disinterested third party help her (yes, and sometimes you, too) come to grips with the realities of her case – the strengths, the weaknesses, the costs (emotional, time, economic). Sometimes this is your chance to have the mediator explore with your client those difficult moments that keep you up at night
- *Creative exploration*: unrestricted by jury instructions, the process gives us the place to explore, to be creative, to generate alternatives that truly address the conflict and can lead to resolution.
  - In the IP case, it may be developing true business alternatives.
  - The employment case may be as simple as a letter of recommendation

- A further sale and division of equity may be the key to the real estate case
- Perhaps a buy-back of the vehicle and putting the customer in a new one gets us over the lemon law hurdle
- *Trust:* for the process to be effective, everyone needs to have trust and confidence in the Mediator. If she is recommended by the other side, they will listen to her as an impartial voice of reason as she brings reality to them (and of course to you). Perhaps this is at least one good reason not to reject her merely because the other side made the recommendation

**Closing Thoughts:** Unlike the lawsuit where your Judge is chosen for you, you have a direct voice in selecting your Mediator. As you make that choice, consider style and effective process, for it takes more than the moniker “Mediator” to help you build the bridge between your client’s dispute and its resolution...

### CREATIVE SOLUTIONS

Many of you may have seen the report on one Federal Judge’s approach to creative solutions. While not the best technique for mediator selection, it reminds us of the importance of creativity...and it is good for a laugh.

It seems that opposing counsel could not agree on anything over the course of the lawsuit; U.S. District Court Judge Gregory Presnell was displeased (to put it mildly). Counsel’s argument over where to take a sworn statement of a witness pushed Judge Presnell over the edge.

Chastising counsel, the Judge ordered

them to meet at a neutral place to play a round of “rock, paper, scissors” – reminding them that this is the game that kids use to settle disputes. He even went so far as to tell them, if they could not agree on a place to meet they would play the game on the courthouse steps! The winner chooses the location for the taking of the witness’s statement.

Lead plaintiff’s counsel said he would talk with his daughter to brush up on the rules... His preparation apparently helped – he won!

The AP reported that Sotheby’s and Christie’s used this same approach to resolve who would get to sell a \$17.8 million art collection.

Never underestimate the power of creativity in the search for resolution...



APPROPRIATE

## DISPUTE RESOLUTION

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