

PICKING THE RIGHT STUFF

When it comes time to choose a mediator, parties should select a professional who not only is competent and experienced, but has a style that fits the case and counsel.

BY JOHN BICKERMAN

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As clients look for faster and more efficient ways to resolve disputes and as the courts attempt to reduce their civil dockets, more attorneys will find themselves in search of qualified mediators. Selecting the right mediator may make the difference between a satisfied client whose case has been amicably resolved and an unhappy client who has paid for a failed attempt at settlement. While not every case that is mediated can be settled, attorneys can take several simple and common-sense steps to ensure the greatest chance of mediation success.

• **Court-appointed or private mediator?** Litigants in the D.C. courts have the good fortune of being able to take advantage of several excellent court-administered programs in alternative dispute resolution. Volunteer mediators include leaders of the D.C. bar. In return for mediating two to three cases a year, volunteers receive free mediation training. With few exceptions, however, mediation is not the primary practice area of volunteer mediators. In many cases, selection of a private mediator whose sole or primary practice is ADR may be advantageous.

Parties who use a professional mediator do not need to wait until suit is actually filed. They may elect to mediate a dispute before the sides have "dug in," before costs have mounted, and before the case has taken on a life of its own. If suit has been filed, the parties are free to control the timing of mediation, contacting a mediator either before discovery has begun or only after necessary discovery has been completed.

By agreeing to select a professional mediator, the parties retain the authority to choose the individual who will serve as mediator. Clients and their counsel may decide to consider whether a mediator possesses adequate subject-matter expertise, has a perceived conflict of interest, or has sufficient references, training, and experience. Availability may also be critical, as even the best-intentioned court-appointed volunteer mediators must balance their pri-

vate practice with their commitment to mediate and can rarely devote the time necessary to mediate cases that require multiple meetings over several days, weeks, and, occasionally, months.

These factors may be especially important in complex or "high stakes" cases, where the cost of multiple counsel engaged in protracted mediation would necessitate employing the most effective mediator available. In most commercial cases, the cost of mediation (usually split between the parties) represents a small fraction of the expense of attorneys preparing for and attending mediation sessions.

• **Experience/competency.** In selecting a mediator, competency and experience should guide the litigant. The field of mediation is relatively new. Partly out of concern

mediators for the District Court), among other groups, offers a variety of training opportunities for mediators. Increasingly, new mediators gain additional training through co-mediating cases with experienced mediators. Many full-time mediators also teach mediation. A professional mediator who conducts training on a regular basis may benefit from the most rigorous training experience of all—the constant challenge presented by students learning this new discipline.

CHECKING REFERENCES

In assessing competency, no one criterion is determinative. One can probably compile a long list of bad attorneys who have had excellent training and a longtime practice. Just as you would not hire a plumber or contractor without checking references,

mediator that can get parties to the table and settle their dispute may be preferable to one who wrote the treatise. Most disputes can be distilled to their essence and made comprehensible to persons who lack familiarity with the specific discipline of law at issue. Good mediators are quick studies who can rapidly grasp the crux of a dispute. Moreover, a mediator who is an expert in the law of the dispute may not always work to the advocate's advantage in a mediation. An opinionated neutral who comes to the mediation with strong views that differ from the advocate and lacks good process skills can do more to undermine the party's position than help it.

• **Strategic considerations.** Selecting a mediator can and should involve a significant amount of strategy. Mediation is a wonderfully flexible process that can be tailored to the needs of litigants. It is but one more tool in the lawyer's arsenal to serve the client. Choose the mediator that best fits the case and the personalities of the attorneys and the parties. Mediator styles vary. If your case is especially strong on the legal merits, you may prefer a mediator who will be more evaluative of the legal issues and convey those evaluations to the other side. Conversely, if your case is strong on the equities, but not great on the law, a neutral that is more facilitative of the process and less evaluative may be more effective at advancing your case. Similarly, in those cases where millions of dollars are at stake and money is the only issue in dispute, the plaintiff may opt for the big name, such as a former presidential contender or attorney general. The theory of such a choice is that the status and respect commanded by the big name will soften the resolve of the defendant. The defendant, in turn, may resist the big name mediator, preferring instead a less flashy but experienced neutral.

Unlike arbitration, an advocate does not have to abide by his mistakes after selecting a neutral. Mediation is a voluntary process from which either side may withdraw. If the mediator is performing badly, you and your client can halt the process. Before taking this step, talk directly to the other side and the mediator and explain your reasons.

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not to inhibit entry into the field, neither the American Bar Association nor the Society of Professionals in Dispute Resolution (a professional association of mediators and arbitrators) has established programs to certify or license mediators. Consequently, anybody can call himself or herself a mediator. Mediation "flight time" can be a useful tool to assess the experience of the prospective neutral. How many hours of actual mediation experience does the mediator possess? What types of cases has he or she mediated? Has the mediator been paid for his services or has he volunteered?

Training may also help predict competency, so investigate the prospective neutral's mediation training. The Center for Dispute Settlement in Washington, D.C. (the non-profit organization that trains

checking a mediator's references is enormously important. Ask the mediator for the names of parties for whom he or she has mediated. Check both defendants and plaintiffs. Ask the mediator to provide references both for cases that have not settled as well as for those that have been resolved. If the prospective neutral has co-mediated cases, talk to the mediator with whom he or she has worked. There is no substitute for diligent investigation.

Many attorneys experienced in ADR prefer mediators who know how to manage the mediation process over lawyers with impressive substantive credentials or nationally recognized reputations. Inexperienced ADR advocates often believe that a neutral unfamiliar with the specific area of relevant law cannot be effective. In fact, a

Style and Substance Count for Mediator

Even when mediation appears initially to fail, the groundwork has been laid to settle through renewed mediation later or direct negotiations.

- **Mediation advocacy.** Once you have selected your mediator, there is no substitute for adequate preparation for the mediation session. Hopefully, when interviewing your mediator, you will learn enough about his or her philosophy, style, and requirements to prepare both counsel and the clients participating in the mediation.

Mediation differs dramatically from the depositions, hearings, or settlement conferences with which clients and counsel may be more familiar. If resolution of the dispute is your goal, adequate preparation is a must. Toward this end, many providers of mediation services now offer courses in mediation advocacy.

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Selecting a mediator requires the same preparation and diligence as other aspects of litigation. In the same way that choosing the right expert can critically affect the outcome of a case, the right mediator can make the difference in whether a case settles. Because the ADR field is expanding so rapidly, special care should be given to making the right choice.

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