

Chicago Daily Law Bulletin

Volume 158, No. 125

Parties should choose their best mediator

One of the most inviting features of mediation is the ability to handpick the trained professional who will conduct your mediation. All too often, parties select their mediators casually, without careful strategic consideration. The personality, style and techniques used by your mediator may very well be central to your ability to reach a sensible and pragmatic resolution to your dispute.

1. Effective mediators are well versed in the creative processes of bringing people who are financially and emotionally split by serious conflict, together in ways that result in resolution of their disputes. What you are looking for is a mediator able to find paths to resolution, rather than a mediator who is most likely to side with your positions in the dispute.

2. Prospective mediators bring along their background to the mediation process. A former, effective trial lawyer or judge will understand court processes and the genuine hardships and risks of litigation and may be the most understanding proponent of resolving litigation early.

3. There is a growing recognition that the resolution of business disputes often involves complex business and interpersonal issues that are best addressed by proactive, facilitative mediators with extensive understanding of complex commercial matters. The necessary skills to support dispute resolution are found in a variety of mediator backgrounds, including the creative and trained skills of many former trial lawyers, judges and business attorneys. Examine the effect that the mediator's background may have on the mediation process.

4. Request and call references from potential mediators and get

their biographical information. The opinions of others who have mediated before your prospective mediator are especially insightful. Seek their views of how the mediator conducted their process and how that mediator interacted with the parties and their counsel.

5. Remember that just because a mediator did well on one case, they may not be the best match for this case. Identify all the obstacles preventing the settlement of the case and then choose a mediator who is well-suited to removing these obstacles.

6. The Internet is simply too powerful a tool for researching public people to be overlooked. Go online and stay online. You will find a wealth of information including articles, affiliations, blog posts and other potentially helpful knowledge about a prospective mediator.

7. An often overlooked technique to assess your prospective mediator is to simply call up the mediator to obtain a sense of their approaches to mediation, your rapport with them and specifics about how they structure their mediations. This conversation may be *ex parte*, but may even be more useful when conducted jointly with the other side. A joint conference informs both sides and begins the process of building trust and rapport between counsel and the mediator.

8. Put a strong premium on mediators who are highly energetic and committed to dispute resolution. When, as often happens, the parties reach a difficult impasse in their negotiations, it is the strong, committed mediator who may lead the parties through that impasse.

9. Determine whether and what premediation submissions the mediator requests. Also



Irving Levinson is a mediator and arbitrator exclusively with ADR Systems of America and the executive director of business mediation of the DePaul's Center for Dispute Resolution. For at least three decades, he has tried cases throughout the United States and is now focusing his efforts on mediating and arbitrating commercial disputes. He is also of counsel for K&L Gates LLP. Each month, he will share his tips for engaging in effective mediation.

determine the mediator's willingness to meet with counsel, and perhaps the parties as well, prior to the day of mediation. Mediators who want premediation submissions and who encourage premediation hearings are demonstrating their energetic and engaged commitment to a successful mediation. The litigation you are trying to resolve will likely go on for months and years if you are unsuccessful in mediating a settlement. Therefore, the incremental extra time and maximum effort of a rigorous mediation process is well worthwhile.

10. When your case is viewed as extremely difficult to settle, consider a "higher risk" choice for mediator. For instance, I have seen a party consent to a mediator known to be "close" to the other side. The mediator who is well-accepted or friendly to the other side cannot force a settlement on you, but can persuade a stubborn and resistant adversary of the benefits to settling their dispute.

11. In some highly technical cases, the mediator's substantive knowledge may be helpful in resolving the case. Someone who is well-informed about the industry, process or other relevant substantive matter could be more credible and effective. In the end, though, it is usually the mediator's skills and talents in forging settlements, rather than substantive technical knowledge, that produces results. The best mediators are often distinguished by their "people skills."

12. A growing use of mediation is to resolve difficult discovery and electronic discovery disputes. These disputes have become very technical, complex and burdensome. Unresolved electronic discovery disputes may derail your litigation and have a high probability of creating disturbing issues of party and/or attorney sanctions. A mediator with a strong hands-on, e-discovery background can assist the parties in overcoming the onerous burdens of contemporary complex discovery issues, thereby moving your litigation along to a much quicker and less painful resolution.

13. It is imperative that the parties not allow differences over the choice of a mediator to result in failure to mediate. In litigation you are basically "stuck" with whatever judge is assigned to your case. In mediation you are able to substantially impact who mediates since the parties choose the mediator. If you cannot agree on a mediator, you are better off agreeing to a third party process for determining who will mediate your dispute.

14. In this day of international business and diverse workplaces, it is increasingly vital to consider a mediator's skills and sensitivity in dealing with different nationality, cultural, ethnic and gender issues.