



# Pick a winner

*The right mediator makes the process go so much smoother*



Cooper

BY MILES B. COOPER

The lawyer looked over the opposing counsel's list of proposed mediators. A couple retired judges, plaintiffs' lawyers, and one defense lawyer. He thought about the case and pondered the list. All were good but who was best for this case?

## Selection criteria

Most cases settle, and most settle in mediation. That means the mediation day has the same importance, in many ways, as trial. But for some lawyers, the consideration put in is no more detailed than finding someone with an open slot that fits everyone's schedule. Granted, there are cases where simply putting warm bodies in the same building works. But that's often immediately before trial, when one side, the other, or both suddenly realize the case *must* settle. Overall, putting in more selection effort greatly improves the chances for success.

## Past experience

Part of the selection criteria is the potential mediator's experience before becoming a mediator. Former defense lawyers have purchase with adjusters. They understand the layers and how decisions get made. It may seem counterintuitive, but many reformed defense lawyers dislike insurance companies. Years of billing audits and ignored recommendations can do that. But defense lawyers' valuations tend to be conservative.

Plaintiffs' lawyers tend to communicate well with plaintiffs. They can be helpful second opinions with clients who are not properly analyzing risk. They usually have their heart in the right place. But plaintiffs' lawyers' egos ("I subconsciously don't want you doing better than I did on a similar case,") or unintentionally overcompensating in defendant's favor can pose a problem.

Judges, like military officers who become politicians, sometimes fall into robe-wearing, do-it-my-way styles. But the judicial imprimatur ("In my experience, this particular evidentiary issue would favor the plaintiff...") can be useful when procedural uncertainties muddy decision making.

Mediators reading this are likely saying, "That's not me," and feeling slightly insulted. Fair enough – these are broad generalizations, not specifics.

## Personal style

Style means many things. It includes pre- and post-mediation efforts. Some mediators reach out to the parties before the mediation. This is useful. It helps to identify obstacles and make sure the right people will be in the room. Some mediators prod the parties regularly after mediation. Other mediators are "single serving" mediators – there for the day, not before or after. Single serving mediators can do good work. But settlement outcomes improve with those who apply pressure before and after the mediation.

Style also includes personality. At a recent mediation, the mediator was brash (my word) or brusque (another lawyer's). In that case,

though, the forceful personality proved useful, helping settle the case. It would have been explosive with a sensitive client, however.

Finally, style includes mediation method. Does the mediator require joint sessions? Does the mediator process, attempting to grok in fullness, or go straight to Turkish bazaar? Is the mediator rigid or open to input on the method employed? These all factor in to whether a mediator may succeed on a particular case.

## Location, location, location

The mediation facility options should not be overlooked. Mediations at high-end facilities may help communicate exposure perceptions. Physical plant – the space itself – should be considered. Your client is emotional, or cannot hold a poker face? Avoid glass conference rooms without blinds. Is the defense firm hosting the event? Everyone within a block radius (and most assuredly on the elevators) is a potential defense spy.

## Try them and you may, I say

My preferred selection method is to suggest that the opposing side provide five names trusted by the adjuster. The names provided can help one understand how the other side sees the case. The other side is also more likely to listen to the mediator's opinion if they have suggested the mediator.

One risk this presents is the unknown mediator. The time, effort, and cost to mediate tend to favor known quantities. One knows what one is getting when there is a past history. In the last year, however, unknown mediators led two of the best mediations we participated in. We did vet the names with colleagues but were willing to try something new. Change can be good.

## Trust your feelings

Sometimes, the desire to make things work causes us to ignore our inner voice, which whispers, "that's not going to work." Trust the voice. If the choice does not feel right, pick someone else. Getting everyone together and focused is a big deal. Don't waste the opportunity if your instincts are telling you something about it is not going to work.

## Outro

Back to our lawyer and the proposed mediators. The lawyer considered the individuals involved and the client's particular needs in the case. One mediator on the list fit the bill. Fortunately, there was a day in the near future that fit everyone's schedule. Cautiously optimistic, the lawyer continued to prepare for war while hoping for peace.

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