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Selecting the “Right” Mediator

Choosing a mediator can be a little like choosing a dog at the shelter. Most of them are good, but you have to live with one for a while to really know. Likewise, judging a mediator based on his or her performance in one mediation is like picking a dog based on a quick walk past the cage. You may be overlooking a fantastic dog—or mediator—because of a first impression that was not great.

As a litigator, I almost always defer to opposing counsel’s choice of mediator regardless of what side I am on. My settlement evaluation and advice to the client will not likely be influenced by my relationship with the mediator, but opposing counsel and his client might be influenced by a face that appears friendly to them. If I insist upon a mediator whom the other side distrusts for any reason, the intellectual underpinning of the process is compromised. The mediator must be perceived as neutral or favorable by both sides to be the best communicator of each party’s messages.

If you expect the other side will be bringing difficult personalities, consider whether you need a mediator able to absorb abuse or someone adept at dealing with difficult people. You might need a mediator who “commands” the room and can deal with rancor. Best practices suggest you think about the cultural and psychological dynamics of the process before selecting a mediator.

Attorneys often ask whether subject matter competence is important in choosing a mediator. The answer is yes, but with a caveat. Trying to mediate a high-profile product liability case with a nationally known defendant facing huge exposure is hard. A mediator who understands the issues in such national litigation would be helpful, even if they are not expert in the particular product. In trademark claims involving famous marks, branding changes or licensing, some brainstorming with a mediator with IP experience can be helpful. Most would also agree that subject

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matter expertise is valuable in IP, insurance coverage, homeowners' association disputes, construction defects and statutory torts, such as Title VII or other civil rights claims. Understanding the nature of the business in commercial disputes is more important than understanding the law governing the claim.

The benefit of subject matter competence is not entirely evident at the beginning. Yes, the ramp-up time is less. Subject matter competence creates a level of confidence and trust in the mediator which makes it easier for the lawyer and client to believe the deal being offered is just and fair.

When in doubt about the selection of a mediator, ask them if they believe they are the right fit for the matter at hand. A good mediator will not be offended, and most will appreciate the opportunity and be candid about their experience. Trying different mediators from time to time is helpful to litigators. It allows you to compare skill sets, hear useful or different language and learn end-game strategies you can recycle in future cases. Finally, be sure to give the mediator a fair look—ample time to demonstrate his or her skills—don't judge a mediator by one impasse. The case may have been hard to settle, and truth be told, the skill of the mediator is only as useful as the desire of the parties to achieve finality. In some cases, the parties are not emotionally committed to resolution. Some cases fit the eye of a mediator better than others.

Attorneys need to spend more time considering the experience, skill set and attributes of the mediator that might be needed. Choose wisely, my friends.

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