

The Practice

Advice for the busy lawyer

Four factors for lawyers seeking the right mediator

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The amount of time and effort that lawyers put into finding the right mediator to resolve an important legal dispute should come as no surprise. Litigation is expensive and time-consuming, often taking years to get to final judgment.

In many cases, by the time a matter is ripe for effective mediation, the parties have been through a considerable amount of discovery, including extensive document reviews and productions and several rounds of lengthy depositions.

The parties also may have had significant motion practice over thorny discovery disputes and other pre-trial issues.

Depending on the dispute, the litigants may have hired experts to offer testimony in support of their claims or defenses, and perhaps engaged in extensive expert discovery.

At this point, each side has likely had the opportunity to test its affirmative claims and defenses and probe the possible weakness of the opponent's case — and in the process has spent appreciable amounts of time and money. If the case is going to go to mediation, the participants want to make every effort to find a mediator who can help them, to the extent possible, resolve the matter, put it behind them, and move on to more productive things.

While the parties are wrestling with the expense and distraction of litigation, however, they still do not want to “give away the store” to resolve the dispute. Sunk costs and bruised egos associated with protracted discovery and motion practice may cause parties to become more reticent to resolve their disputes through compromise. The instinct to continue to throw good money after bad — especially when tempers and attorneys' fees may be boiling over — can stand in the way of finding a settlement that is in the best interests of the client.

Convincing a party that a resolution is fair after spending significant energy

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and resources is often a serious challenge in effective mediation. The bad blood that can arise during litigation, when combined with the legal dispute giving rise to the case in the first place, can leave parties unwilling to hear the other side or to bend from their position, even when court battles continue to put a strain on their schedules and resources.

Consequently, the difference between a successful and unsuccessful mediation in an important case often comes down to having the right mediator. Some lawyers think that the “right” mediator is someone whom they know very well, or who they think will be on their side, or who they trust will be sympathetic to their client's position. They believe these are the best qualities even though the mediator does not decide the case, make any findings of fact or rulings of law, or issue any rewards.

More often than not, however, finding the right mediator means finding a neutral who is knowledgeable about the law and case, is a trustworthy and patient listener, and is relentlessly persistent.

First, a great mediator must be knowledgeable about the law and the case. The mediator has to be willing to develop a detailed understanding about the particular facts of the case and the evidence to support such facts.

He has to be steeped in the case law and elements of the claims and defenses to be able to point out to both sides the strengths and weaknesses of their arguments, and identify the issues that may lead them to be unsuccessful at trial or on summary judgment.

He must force the parties to put aside their emotional attachment to their side of the story and face the harsh reality of proving their claims to a disinterested judge or a jury of their peers.

A great mediator has to find a way to have the parties and lawyers see the case from the vantage point of a neutral fact-finder concerned only about what elements can be proved for each

claim or defense.

Second, a great mediator must engender trust from both sides. The mediator must be perceived by the parties as approaching the matter from a truly neutral vantage point and analyzing in a balanced manner each and every point made in support of

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their position.

In this regard, knowing the mediator too well may work against a participant, as the other side may perceive this relationship and, even if it does not technically cause a conflict of interest for the mediator, conclude that the mediator cannot be trusted to look at the case fairly.

It is also helpful to have a mediator who is not perceived as harboring a preexisting sympathy for one side or the other — whether plaintiff or defendant — as this will decrease the likelihood that the other side will believe it is getting a fair shake.

A mediator who is not trusted by both parties will be unsuccessful in convincing the warring factions that compromise is in both of their best interests. Trust earned from all participants assists a great mediator in getting the parties moving toward compromise.

Third, a great mediator must listen patiently and carefully to each side's arguments. While a mediator must ultimately focus on the holes in the claims and defenses of each side, he cannot brush aside the points that the plaintiff and defendant believe are important.

A successful mediation requires both sides to believe that the mediator

is truly listening and hearing what matters most to them about the case, and why they feel aggrieved by the opposing party.

If a party concludes that the mediator fails to understand what is critical, then the party will not find convincing the mediator's efforts to see beyond these points that, though important to the party, do not guarantee or perhaps may prevent success at trial or on summary judgment. The parties will not start listening to the mediator until they believe they have been heard by the mediator.

Finally, a great mediator must be persistent. After enduring painstaking litigation, possibly for years, it is understandable that parties may be unwilling to budge from their positions. The parties' lawyers also may have become true believers in their cases, no longer as open to seeing the weaknesses and challenges. The underlying dis-

putes and the pains of discovery may cause both sides to harbor anger and resentment at the other.

In order to overcome this potential hostility and close-mindedness, the mediator must be indefatigable and relentless in trying to get past these prejudices in order to get the parties to agree to a resolution.

This effort often means tirelessly pressing reluctant parties to confront the challenges and deficiencies in their own case and preventing them from glossing over these weaknesses in favor of their perceived strengths.

Even when equipped with these qualities, no mediator can credibly tell participants that a settlement is guaranteed. The right mediator, however, can ultimately convince both sides that he understands the dispute, knows the law, hears the arguments, and will work hard to find a resolution.

While success at mediation is never assured, one thing is certain: If the case does settle, neither party will wake up the next morning and say, “Gee, I really wish I could go back to litigating.” **MLW**