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Selecting the Right Mediator

The success of a mediation experience will largely depend on the quality of the mediator selected, especially if the mediation occurs because the court has ordered the parties to engage in mediation (rather than a process in which both parties have voluntarily decided to submit their dispute to assisted negotiations). What should you look for? Where do you find mediators? How much do they cost? Who pays?

1. Where to find ADR professionals.

Courts that require ADR maintain rosters of approved mediators and arbitrators. For example, both the Eastern and Western Districts of Washington publish lists of approved Rule 39.1 mediators called the "Register of Volunteer Attorneys." See CR 39.1(b); LR 39.1(b). These registers have been established by the courts to provide a source of "qualified attorneys who have volunteered to serve as mediators and arbitrators in civil cases." Although the list in the Western District was originally developed on strictly a volunteer basis, the rules now permit the mediators to charge for their services with the consent of the parties. Many of the members of the roster are willing to provide services even if a dispute is not formally subject to Rule 39.1, i.e. even if the court has not specifically ordered that the case be mediated.

Recent years have also seen the development of an ADR industry of sorts in the private sector. Judicial Arbitration & Mediation Service ("JAMS") makes available retired judges for mediation and arbitration. There is both an hourly fee and an administrative fee. Settlement Now, once a source of volunteer mediators, now maintains a roster of trained mediators available at a fixed hourly rate to mediate cases in a variety of subject areas including employment. Settlement Now also provides facilities for mediation and arbitration in its Seattle offices. The American Arbitration Association ("Triple A") likewise maintains a list of qualified independent contractor employment mediators and arbitrators who agree to conduct their mediation practices solely through AAA. A number of highly qualified and effective ADR professionals maintain independent practices and advertise in the monthly Bar Bulletin published by the King County Bar Association, several who limit their practices to labor and employment matters.

In sum, there is no shortage of arbitrators and mediators willing and able to assist parties seeking to resolve labor and employment cases. How do parties choose from among them?

2. Substantive or procedural expertise.

In the ideal world, of course, the mediator would be an expert both in the mechanics of mediation and the substance of the dispute. But in the real world—for example, under Rule 39.1 in the federal district courts—the choice may sometimes be between a mediator who knows something about substantive labor and employment matters or a labor and employment practitioner who knows something about mediation. Very few practitioners have time to maintain high levels of expertise in both disciplines.

If necessary to choose one strength over another, I suggest that substantive expertise is the more important consideration as long as the mediator has sufficient mediation skills to conduct a mediation of medium-level difficulty. The reason is that genuine substantive expertise is often required to shake the parties' faith in their legal positions. A "process" expert may lack the depth of knowledge in the labor field to stand up to the arguments of counsel, and thus may not be able to induce the doubt that is the root of most settlements. A substantive expert also knows the legal parameters within which the parties must agree and the potential hidden pitfalls that can destroy an apparent agreement before it is finalized.

On the other hand, there may be mediations, particularly in a "continuing relationship" situation (such as a sex harassment claim in which the plaintiff is still employed) in which the legal issues are relatively straightforward, but there are difficult personal issues to overcome. In such a situation, a mediator with excellent process skills who knows—or can be quickly taught—the basic legal precepts necessary to a resolution of the dispute may be just as good a choice.

3. Plaintiff or defense oriented?

If the parties cannot find a mutually acceptable neutral mediator, they often face a choice among plaintiff- or employer-oriented mediators (as judged by the bulk of their professional practices). The mediators I know take pride in checking their normal orientation at the door when conducting mediations, and in my experience, fair and conscientious employers' and plaintiffs' lawyers can possess excellent mediation skills in employment cases. But the choice can make a difference.

I think the parties should try to determine who needs the most convincing in order to achieve a reasonable settlement. If it is the plaintiff, a fair plaintiffs' lawyer-mediator may be a good choice because that person may have more influence than someone who could be perceived as being allied with the other side. On the other hand, if the defendant needs relatively more convincing, it may be wise for defense counsel to push the plaintiff's attorney to agree to a management lawyer-mediator. It might be argued in such a case that the success of mediation depends upon having a mediator who will be more persuasive to the defendant's representative. Similar considerations might come into play depending on the precise substance of the case, e.g. is it better to have a female mediator in a case in which a female plaintiff is alleging sexual harassment? A person of color in a case in which plaintiff is African American?

In sum, the right mediator depends very much on the specifics of the case and the personalities involved.

4. "Facilitative" or "Evaluative"

There is a theoretical difference in mediation styles that is the subject of considerable debate within the ADR community. At one end of the spectrum, a mediator may be described as "facilitative." A "facilitative" mediator does not focus on the strengths and weaknesses of the parties' cases (and attempt to assist them in predicting the likely outcome of the case should it proceed through the litigation process), but rather focuses on the interests and goals of the parties without respect to the projected outcome. For example, as distasteful as it may be to employers and their counsel, there is substantial cost associated with the defense of any employment lawsuit, no matter how "frivolous." There are also "hidden costs" such as the distractions of responding to discovery, potential negative publicity, affects on employee morale, etc. Thus, no matter how meritorious the employer's defense seems, there may be substantial reasons for seeking an amicable settlement. A "facilitative" mediator focuses on these and similar considerations that militate in favor of settlement regardless of the likely outcome of the litigation.

At the other end of the spectrum, a mediator may focus entirely on his or her evaluation of how the case will ultimately be decided, playing up the weak points of each side's case (in caucus, of course) in order to introduce elements of uncertainty about the outcome of the case at trial. Because the process of settlement depends upon each party's attempt to determine its best alternative to a negotiated agreement ("BATNA"), increased uncertainty tends to make the concept of an agreed solution more attractive. Thus, "evaluative" mediators tend to focus the parties on the "downsides" of continued litigation in order to emphasize the value of a negotiated agreement.

In practice, most mediators use a combination of these styles, emphasizing a "facilitative" or "evaluative" approach depending on which seems likely to be more effective with a particular party, at a particular stage of the proceedings, or in a particular dispute. Although some mediators may be equally effective with an approach tending toward either end of the spectrum, most will be more comfortable with an individual approach that reflects their training, personality, and experience—and one that probably embodies more of one tendency than the other.

How "facilitative" or "evaluative" should a good mediator be? Let the academics continue to dispute that question. For consumers of mediation services, the more important question is which style is likely to be more effective in your particular dispute? Hardheaded parties (and counsel), convinced of the merit of their legal positions, may need a strong, evaluative mediator to shake their confidence. Others may react negatively to "arm twisting" but find a calm, rational exploration of interests and goals persuasive.

5. Paid or volunteer? And who pays?

At the beginning of the ADR movement, at least insofar as it was seen as a means of reducing court congestion, much of the arbitration and mediation was available pro bono. Some mediators are still willing to provide services for free, but as the demand for skilled mediators has increased—because of the effectiveness of mediation in resolving disputes efficiently—more and more good mediators have begun to charge for their services, even those who appear on the "volunteer registers."

As a full-time arbitrator and mediator, I obviously welcome the willingness of parties to compensate me for my efforts. But even in my former professional life as a consumer of mediation services (representing employers in labor and employment disputes), I found advantages in compensating skilled mediators. First, by and large, the best mediators charge. If I thought it in my client's interest to go through mediation, I thought it worth utilizing the most skilled mediators available, even if they charged for the service. And in fact, the mediation fee is usually relatively small in comparison to the value delivered by a skilled mediator. The cost of a one-day mediation probably approximates the cost of a one-day deposition. Yet a successful mediation can eliminate many days of depositions, hearings, and other litigation expenses.

Secondly, mediation is hard work, not only for the parties, but also for the mediator. Perhaps especially for the mediator. As mediation drags on into mid-afternoon with progress toward settlement that seems infinitesimal, who could blame a volunteer mediator if his or her mind started drifting to the paying work that has been set aside to take on the mediation project? No matter how dedicated the pro bono mediator, it is simply too easy to give up when settlement appears unlikely. A paid mediator, on the other hand, almost always continues the efforts until all chances for settlement have been thoroughly explored—even after the formal mediation process has ended.

If you have access to volunteer mediators, by all means use them, particularly if you have a case that is likely to settle. If you have a difficult case, consider using a paid mediator in order to get the highest level of competence and the highest level of commitment to exhaust all opportunities for settlement.

A corollary question: who pays a compensated mediator? The customary answer—and the one I think is best—is that the parties split the cost. There are important psychological reasons for this approach even when the parties have widely differing economic resources at their disposal (as is usually the case in employment disputes). The most important reason is that sharing of the costs of mediation signals a commitment to the process by both sides. When one side (usually the plaintiff) has no financial stake in the process, mediation is often unsuccessful.

Although my standard mediation agreement provides for equal sharing of my fee by plaintiff and defendant, the precise allocation of the expense is less important in my view than the fact that plaintiff is committed to pay some portion of the cost. And in the end, who ultimately pays the fee is subject to negotiation in any event—i.e., defendants often agree to pay the entire mediation fee as part of an overall settlement.

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