

Choosing the “Expert” Mediator

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When a dispute is truly ripe for mediation, who you choose to mediate is unlikely to affect the outcome. When both parties go into the mediation willing to compromise and expecting to settle, any competent mediator can help them reach agreement. Frequently, however, who you choose to mediate can be critical to making mediation work for your client. To choose the right mediator you must consider the mediator’s skills, expertise, and stature.

Mediators bring different approaches, which emphasize different process skills, to the mediation. Their training, or experience in resolving certain types of disputes, may predict the specific skills they bring to mediation. For example, some family mediators avoid caucuses and may be skilled in mediating with the parties face-to-face. Community mediators may emphasize a transformative approach and be skilled at helping parties see their dispute in a larger context. Labor-management mediators may be skilled in group dynamics, while retired judges may bring persuasive skills they developed in settlement conferences. Knowing the general approach and process skills of different types of mediators is useful in selecting an appropriate mediator for your case.

Process skills differ from the expertise or substantive knowledge you may want in a mediator. One form of expertise often thought to be important is substantive knowledge about specific areas of the law, such as ERISA, Title VII, or intellectual property. Legal expertise can also involve knowledge about current verdicts, settlements, and jury trial results in a specific trial court venue, for a specific type of case. Most sophisticated users of ADR already consider whether their case requires a mediator with specific legal expertise. But they should also consider other kinds of expertise, such as industry, scientific, or technical expertise, which can make a difference in the outcome of a mediation.

The mediator’s stature – the respect and confidence the parties place in the mediator – can go a long way towards ensuring that the parties will resolve their dispute. When Jimmy Carter offered to mediate a peace agreement between Egypt and Israel, he was highly likely to succeed. A mediator’s stature can be based on success in resolving similar disputes, or the impartiality of a mediator who is a religious leader, or the mediator’s high achievement in the professional field in which the dispute arises. The mediator’s stature increases the parties’ belief in the likelihood of settlement, which increases the possibility of success.

In order to discuss mediator choice cogently, it is helpful to examine mediator skills, expertise, and stature separately, and examine an example of how these elements were involved in choosing the mediator for a specific high profile case.

Skills

Knowledge about the process of mediation, and the ability to use that knowledge to affect behavior, are the mediator's "skills." All mediators know that an aggrieved plaintiff must be permitted to tell his story, and many are able to listen actively. If the mediator demonstrates the process skill of "active listening," the client will be satisfied that he has been fully and fairly heard.

Different approaches to mediation emphasize different skills. For instance, some psychological approaches to mediation emphasize the primacy of improving communication between the parties. Conciliators and family mediators use this approach to help parties to a divorce involving children. While resolving some of the child custody issues, they attempt to open the lines of communication between the parties. A mediator demonstrates skill in this setting when the parties can effectively resolve the day-to-day problems that arise in implementing their child custody agreement.

Since the parties will have to deal with each other about their children for many years, improving communications is an approach that is well suited to this type of dispute. The skills used in family mediation, however, would not necessarily be useful in an automobile accident mediation. In most cases, the parties to the accident are strangers who hope to have as brief a relationship as possible. Moreover, the issue in dispute is strictly financial. The plaintiff wants as much money as possible; the defendant's insurer wants to pay the smallest amount possible. There are rarely other issues or opportunities for mutual gain. A skilled mediator knows this is a zero-sum game and will frame the dispute so that both parties can begin to appreciate the value of their time and the transaction costs that can be avoided by settling the dispute out of court. The mediator demonstrates skill, in this setting by getting both parties to focus on a number that is within the range of possible settlement for each of them. If the mediator can focus them on that number, the parties will almost inevitably settle.

Expertise

Experienced lawyers generally know the advantages of having a mediator with legal expertise. When this expertise is in a specific area of law – such as employment law—you can reasonably expect the mediator to quickly grasp the legal nuances of each side's position. For instance, the mediator will know if there is a substantial chance of summary judgment, and may privately convey that information to each party. This legal expertise allows the mediator to make an independent legal judgment that both parties respect. The mediator's judgment may enable the parties to adjust their demands to reflect a more realistic estimate of the legal outcome, and thereby resolve the dispute.

Similarly, a mediator's familiarity with jury trials and jury verdicts in the pertinent area of law and venue, may help create an anchor point for settlement. The parties may rely on the mediator to evaluate their case and ask the mediator for an opinion on what the case is worth. This opinion represents an expert judgment that is likely to influence the opinions of both parties. If the mediator's assessment of the value of the case is within the current range of settlement for each party, it will become an anchor point around which the parties will bargain to reach an agreement.

Some mediators possess expertise in non-legal areas that can be critical to resolving a dispute. For instance, if the dispute involves the alleged copying of an automated staining

device that employs capillary action or surface tension in a unique fashion, a scientific background would help the mediator quickly grasp the factual nature of the dispute. Many lawyers recognize that simplifying a technical dispute so that a person uncomfortable with science will understand it distorts the dispute in a way that favors their opponent. They can avoid this distortion by choosing a mediator with either specific scientific expertise (as in materials science for a case that involves computer chip manufacturing), or a solid scientific background that makes the mediator easily educable in scientific matters. In some instances, a high level of scientific expertise in an area may be associated with a commitment to a specific school of thought, which can interfere with the mediator's ability to see both sides of the issue. In those cases, scientific educability is more important than scientific credentials.

The expertise desirable in a mediator may be industry specific. For instance, in the computer industry there is often a complex relationship between hardware manufacturers and "other equipment manufacturers" (OEM). An OEM may make a product (such as a medical imaging device) that could become a market leader if it incorporates a new, more powerful chip the hardware manufacturer is developing. Suppose the OEM wants to beat its competitors to the marketplace and makes promises based on both its development schedule and that of the hardware manufacturer. When product development or manufacturing milestones are not met, there may be fertile ground for disputes. A mediator with industry expertise brings an intellectual framework for understanding whether the reliance that is alleged in a complaint comports with industry reality. As a result of this expertise, the mediator may be able to help the parties develop a creative solution that works because of industry-specific considerations.

Industry expertise is not limited to the private sector. A mediator may have expertise in public education, public safety, or government that can be useful to resolving a particular dispute. For instance, if the case involves allegations that a police officer used excessive force, it may be desirable to have a mediator with expertise in police matters, gained through work as a neutral or on a public board. Since the case will often turn on how judgment was exercised, it can be extremely useful to have a mediator who is familiar with the borderline between reasonable police judgment and brutality. How close the specific facts of the case are to that border affects the range of settlement.

In a case involving public entities, another kind of expertise may be important in the mediator: political sophistication. The plaintiff may use the media to promote a particular point of view and motivate public officials to settle. That can be a successful strategy. A mediator with political expertise can evaluate the potential damage that might motivate a settlement and bring a keen sense of what is politically feasible. There may be potential settlements that are in the range of litigation outcomes but outside the range of political outcomes. For example, an otherwise reasonable settlement may put public officials in so bad a light that they will be compelled to reject it. The political reality is that they would rather have a court or arbitrator impose the settlement (perhaps after they have moved on to other office), than be thought to agree with it. And if a vote on a settlement is necessary, taking a position against known opponents may have too high a political cost for a public official to support a specific settlement.

The mediator's expertise in political matters is important for another reason. In many highly charged public – as opposed to private – disputes, mediation is chosen simply to take the heat off the parties. The parties want a politically savvy mediator to propose a settlement (informed by what the parties have said they can live with) that is identified as the mediator's settlement. Both sides can publicly disclaim the settlement while begrudgingly

accepting it as the alternative to a long and difficult fight. The mediator becomes the "lightning rod," – the person that attracts the criticism of people who are unhappy with the settlement (including politicians who tacitly agreed to it). A recent example of this type of high profile mediation is discussed below.

Stature

Stature, like charisma, is intangible. It is a quality the mediator brings which affects his or her ability to move the parties to a settlement. It is made up of the parties' and the public's perception of the mediator. It is difficult to quantify, but it is significant, and consequently worth analysis.

When parties choose a mediator, personally or through their lawyers, they confer stature on the mediator by their choice. Their choice expresses confidence that this mediator has the ability to successfully resolve their dispute. Although they may not have any experience with this mediator, they want to believe that this person can and will bring them to agreement. Consequently, they are willing to engage in a settlement process directed by this mediator.

High achievement and professional respect are often the basis for an individual's stature within a particular professional and social community. Parties may choose a religious figure – a priest, rabbi, or minister – as mediator because they are themselves religious and look up to a spiritual leader and trust this individual to be neutral. Parties who belong to the same profession may choose someone with high status within that profession as their mediator. For instance, feuding doctors may choose a medical college dean to mediate their conflict. They choose the dean because of his stature in their profession and their understanding that to be successful the dean must possess a high degree of skill at dealing with fractious doctors. Lawyers involved in the dissolution of law firm partnerships often call upon colleagues with stature to help them avoid litigation.

Stature is what leads some lawyers to choose retired judges to mediate a dispute, regardless of the judge's specific dispute resolution skills or legal expertise. Lawyers sometimes say they want the gray hair and robes for their effect on the client. Some believe their client needs to hear the judge say: "This is not a ten million dollar case," before agreeing to settle. While retired judges may not have gray hair or conduct mediations wearing judicial robes, they have the stature that most lay persons accord the judiciary. This stature may make the client willing to believe the mediator's view of the dispute is meritorious, and to adjust his or her view accordingly.

Some mediators have the stature to actually focus public attention on the mediation before it begins. In New York City during the 1960s, when Ted Kheel was called in to resolve an impasse in negotiations between the city and a union, his stature generated media attention, which focused public awareness on the dispute. Because he was widely respected as a neutral, his statements affected the public's perception of the dispute. If he were to characterize either side as being inflexible or unreasonable, it could generate a loss of public support that would make it difficult for that side to prevail through a strike. His stature with the public enabled him to move the parties from extreme positions to agreement.

Choosing a Mediator: An Example

Here is an example of how a mediator was selected in a politically sensitive public dispute. The facts come from articles that appeared in the *Los Angeles Times*. While this type of case differs considerably from private mediation, it nonetheless illustrates a great deal about choosing a mediator with the proper expertise and stature for the dispute.

This dispute arose out of the decision by the Los Angeles Police Commission not to reappoint the police chief, whose contract was to expire in six months. The chief threatened suit, alleging racial discrimination. The City Council, which had to approve any monetary settlement, was divided among those who were unwilling to pay anything to the chief and wanted him to serve out his term, those who were willing to make a small additional payment after he served out his term, and those who wanted to give him a large amount of money regardless of whether he served out his term. The mayor, who appointed all of the members of the Police Commission, played a public role in the decision not to reappoint the chief. What skills, expertise, and stature would the lawyers for the Police Commission and the chief look for in a mediator?

The mayor's first choice was former Secretary of State Warren Christopher, who chaired the commission that created the plan for civilian control of the police under which the chief was appointed. The chief's lawyers, however, would not accept Christopher as mediator. The mayor reportedly rejected the mediators suggested by the chief's lawyers because "they were insisting on a private-style mediation." The mayor described the mediator's task as figuring out "what is fair," so that the settlement could be recommended to the City Council. The parties ultimately agreed on a retired Superior Court judge who reportedly belonged "to a California judicial dynasty." Why this choice of mediator?

Warren Christopher has high level mediation skills and expertise in both police matters and politics. Nonetheless, the chief's lawyers probably made a sensible decision in rejecting him as mediator. While his skills are significant, from the chief's point of view he may have too much substantive expertise. Christopher could make an independent judgment about whether the stated reason for not reappointing the chief – that he failed to improve the Police Department – was real or a pretext for discrimination. Christopher also has the stature to orchestrate a public campaign in support of his "finding," which might undercut the chief's position. His notion of what was "fair" could be decisive in any public debate.

The retired judge was likely chosen because of his expertise in Los Angeles politics and his public stature. His skills as a mediator were probably irrelevant. The mayor's public statements indicated that he would "accept" the mediator's recommendation and propose it to the City Council. This took responsibility for the settlement off of the mayor, created pressure on the City Council to accept it, and made the mediator a lightning rod for any public anger. For the chief's lawyers this was an opportunity to deal with a mediator whose political expertise could ensure that the mayor would propose the agreed-upon figure. They may well have determined there was a better chance for an acceptable compromise figure through this type of mediation, than through other political means. Once the mediator's recommendation was announced, the chief could further affect the Council's deliberations by saying he wanted to end divisiveness by accepting the settlement – if the Council approved it.

Not surprisingly, the parties agreed to the figure proposed by the mediator and the City Council approved it. The choice of a mediator with the proper skills, expertise, and stature was probably decisive in enabling the parties to resolve this highly-charged public dispute.

Conclusion

The skills, expertise, and stature of the mediator can all be critical to resolving your dispute. It is possible, however, to overemphasize specific expertise, since it is often the easiest attribute to discern from a resume or professional listing. It is worth remembering that professional mediators sell curable ignorance. They ask questions that engage the parties in teaching them about the facts and business setting of the dispute. This questioning creates a cooperative endeavor in which the parties can agree on many points, which can signal the beginning of settlement momentum. By quickly comprehending the dispute, the mediator gains in stature with the parties, making settlement more likely. Thus, a professional mediator who is a quick study, and has well-developed process skills and the stature that comes from successfully resolving many disputes, may provide all the expertise you need.

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