

Alternatives

TO THE HIGH COST OF LITIGATION

The Newsletter of the International Institute For Conflict Prevention & Resolution

VOL. 30 NO. 5 MAY 2012

ADR Skills

Rethinking Mediation: A New and Better Path to Neutral Selection

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Mediator selection used to be so easy. There were a couple of retired federal judges who were not quite all the way over the hill, and they had time on their schedule. Pick one, get told what to do, and maybe that was enough to get the case settled.

But now? There's a mediator standing on every corner with a "Hire Me" arrow spinning in his hands. They all have taken advanced mediation training from one of the hundreds

of quality trainers out there. Some of them are even pretty good.

So how do you choose? By hair color? Lack of hair? Height? Quality of mediation center snacks?

Or do you go the clever route? Since you want to influence your opposing counsel, do you choose whoever the other side proposes on the theory that your opponent will be more persuaded by "his own guy?"

Nice try. But there has got to be a better way.

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CHALLENGING

HOW BUSINESS MEDIATES.

And there is. Using critical analysis, some introspection, and a pinch of due diligence, you can significantly improve your likelihood of a successful mediation process.

But first, a story.

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A SAD TALE

In a design patent case, the parties were looking for a mediator. The plaintiff's attorney subscribed to the apparently clever mediator-selection technique noted above, and agreed to his opponent's first choice, a design patent attorney out of New York who mediated on the side.

The mediator's education checked out—a top-notch pro from an Ivy League law school—as did his mediation training (he had the standard 40 hour course) and references (the mediator's friends seemed to like the guy). All seemed fine.

It wasn't. The mediation was a disaster. The opposing party's attorney presented a fancy Powerpoint explaining why he believed, on the law, he should win. The mediator bought it. Before he even caucused with the plaintiff, the mediator was convinced the defense would win on the merits, and then throughout the day he spared no adjectives in sharing his newfound expert analysis with the plaintiff and his counsel.

The mediator used his one—and only!—trick, evaluation of the law, to try to convince the plaintiff to accept a number that would not even cover the plaintiff's attorney's fees. By 5 p.m., the defense, emboldened by the mediator's views, had not offered a single dollar.

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What went wrong? Simply, the parties—including the defendant—picked the wrong guy. The legal dispute was ostensibly over a design patent, but the *driver* of

the dispute—what was really causing the problems—was the relationship between the parties.

The plaintiff manufactured high-end fashion products; the defendant sold cheap knock-offs through infomercials. The parties were upset with one another. There was a history, and some bad blood.

They also were two businessmen in lines of business that were not necessarily mutually exclusive. And there were some synergies available for exploration.

The plaintiff was a hot-headed Irishman; the defendant a hot-headed Russian. Hence there were cultural and emotional issues underlying the thing.

There also was a practical impasse. The plaintiff had already invested a lot of money in the litigation. He wasn't going to settle without getting something for his investment, regardless of what this attorney/mediator thought of the strength of the case—and even if the mediator's analysis was right.

Unfortunately, for all his expertise in design patents, this mediator was not an expert in any of the factors at play in the dispute. He was a one-trick pony who could look at the legal issues, evaluate them, and then share his analysis like a sledgehammer upside the head.

But deal with emotion? Get creative? Look at business angles? Focus on the real cause of the impasse? Bond with a hot-headed Irishman? Understand the practical realities in front of him?

All well beyond this mediator's limited talents.

It was really both attorneys' fault. The plaintiff's counsel, by uncritically acceding to the opponent's choice of mediator, gave his opponent another platform to practice his opening statement, and subjected his own client to the same type of badgering that created the conflict in the first place.

The defense attorney focused on selecting someone who would understand and buy into the defense's theory of the case, failed to recognize that this dynamic would only serve to further alienate the parties rather than help find the collaboration necessary to end the conflict.

A BETTER WAY

So clearly there has to be a better way to match the mediator to the dispute.

The design patent mediation failed because the attorneys selected a mediator who was really strong at evaluating design patent cases . . . but the dispute before him was not based on a misunderstanding of design patent law. The dispute before him was caused by more personal issues—a history of business conflicts, personal slights, cultural issues, and financial realities.

These two parties could have had 100% agreement on the legal issues and still it would not have settled. The legal issues that were so obvious above the surface were simply irrelevant to what was lurking below. Hence a mediator quick with the law addressed a problem that didn't exist, and ignored the problems that did.

Had the plaintiff's attorney not been locked into the robot mentality of "going with whom-ever *you* want," he could have made a better decision. After all, he knew what was driving this case, having lived it for two years. He knew emotion, as much as logic, was pushing under the surface. He knew the relationship between the two sometime-competitors was at the heart of the dispute. He knew a settlement would require creative thinking—dare we say "outside the box" ingenuity.

He knew all of this. He just didn't connect this knowledge to the mediator selection decision.

Calling the Driver

The problem: Rote practices leading to party disappointment in the mediator.

The task: You gotta find a mediator match.

How? The first step is to get realistic about yourself and your dispute, not scanning piles of neutrals' resumes.

NOT THE SAME

We can learn from this.

Start with the premise that not all disputes are the same. While some disputes may exist as a result of a disagreement by the parties on the law, or even the facts, other disputes are driven by something else altogether.

Even cases that look alike on the surface could be driven by completely different factors. For example, four simple business contract disputes could be filed with identical complaints, and yet one plaintiff may be suing in order to teach the industry a lesson such as, "Don't mess with me."

The second case may simply be a desperate plea for cash in a failing economy. A third may be a company's personal vendetta against a former-employee-turned-competitor, seeking not just to quash the new competitor, but to send a message to other employees who may be contemplating the same thing. A fourth may be driven by a plaintiff's attorney's own

greed. The driver of the conflict—and hence the impasse preventing resolution—will be substantially different in each case.

There may be any number of possible drivers of a conflict, including:

- *Financial:* "The company is broke, and couldn't pay even if it wanted to."
- *Emotional:* "I hate that guy and I'm going to make him pay"; "I'd rather pay my lawyer than pay my competitor a penny."
- *Attorney Ego:* "I'm better than my opposing counsel . . . and I'm going to prove it."
- *Client Inattention:* "The adjuster with authority is on vacation . . . again."
- *Business Realities:* "My cash flow is seasonal—and this ain't the season."
- *Informational:* "They claim our breach resulted in \$1 million of lost profits, but they haven't shared any of their financial records with us."
- *Legal:* "These facts do not give rise to a copyright violation under the fair use doctrine."
- *You or Your Firm:* "I need trial experience"; "I've been too busy to focus on this case."
- *Unrealistic or Stubborn Client:* "I've seen people on TV get millions for having coffee spilled on them"; "I need justice"; "It's the principle of the thing."
- *Your Opposing Attorney:* "He needs to bill this case a little longer."

Second, despite what some people might think, mediation is more art than science, more insight and subtlety than mere message-carrying or sledgehammer-wielding. And hence, shocking as some may believe this sounds and looks, *mediators are not fungible*.

Even outstanding mediators will have different strengths, weaknesses, talents, specialties, styles, and approaches. Some are strong evaluative mediators, like the mediator in the story above. Others are terrific at dealing with emotional issues. Some specialize in cross-cultural disputes. Others really understand numbers. Some are more creative, or are better at setting an atmosphere for creative brainstorming by all the parties. Some know how to manage disputes with scores of parties and innumerable issues. Some are better at forging a personal connection with clients and attorneys and using that connection to help build

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bridges. Others love the negotiation game aspect of the process.

So if disputes are driven by different factors, and mediators have different strengths and weaknesses, wouldn't a more effective and appropriate mediator selection philosophy be one that seeks to match the mediator's strength with the true cause of the underlying conflict?

FIND THE MATCH

In other words, if the driver of a dispute—the impasse that is preventing the parties from finding a way out of their conflict—is emotional, wouldn't a mediator who is strong at dealing with, and ultimately channeling and deflecting emotion, be a better candidate than one who simply evaluates legal strengths?

If the problem is a highly volatile mother in a wrongful death case, which mediator has the calming and patient personality to deal with grief and reach that party?

What if the problem is your own client's intransigence? If your client happens to be a stubborn elderly male, then a mediator who is an elderly male might be the best fit. If your client is an African American female who feels she has been disrespected by an uncaring corporate employer, then an African American mediator might have the best shot at relating to, and really understanding, your client. See, e.g., Vivian Berger, "The Mediator's (Female) Gender: Irrelevant, Important, or In-Between?" 30 *Alternatives* 83 (April 2012).

Or, shocking as this may seem, what if the problem is one of the attorneys who is creating an impasse, either because he is unfamiliar with the law or is simply overbearing and difficult? Then going with a mediator that person chooses might indeed make sense.

On the other hand, if the impasse is actually caused by a fundamental disagreement as to the strength of the legal claims asserted in the matter, then a strong evaluative mediator with experience in that legal field, possibly even a former judge, might be superior to a mediator who is really good at handling emotional parties.

In short, by thinking a little more strategically, and analyzing the conflict a little more

introspectively, one can better identify the type of mediation skills that will best address the driver of the conflict.

HOW DO YOU DO IT?

The first step in selecting an appropriate mediator, thus, is to turn inward—to really analyze the underlying dispute to determine what exactly is creating the parties' impasse.

Sure there are the legal claims, and a disagreement on whether the conduct did or did not violate some law or other. But if that's all there is, then two good lawyers should be able to hash out a fair settlement by themselves. Instead, dig a little deeper. Find that *driver*. Is it financial? Cultural? Informational? Emotional? Legal? Is the cause on your side of the "v." or the other?

Once this is discovered, then make the calls. Call the providers; call friends; check the list serves, and even call the opposing attorney. Do all the things one would normally do to develop a list of quality mediators.

Make sure the candidates have some background in the suit's subject matter—that's always helpful. And of course ensure the candidates are experienced and well trained. That's a must.

Further, include only those mediators who are serious about the profession—ones who are committed not only to continuing their own education and training, but who are making mediation their livelihood. This will increase the likelihood of selecting a mediator who really knows what he or she is doing.

Then—and only then—identify those mediators on the list who have the qualities best suited for addressing the driver of the dispute.

How can one find out? Ask. Ask friends. Ask colleagues. Ask for references and call them, even though this tends to be less valuable than one might think.

But most important, ask the mediator. Call the mediator up, explain the dispute and underlying dynamics, and ask how he or she would handle the mediation. Any mediator worth his or her wages will take the time to walk through the dispute and share thoughts on how the mediator would approach the issues that have been identified.

In other words, do your due diligence . . . but do it with a proper understanding of your goal. Going with "the other guy's guy" only makes sense when "the other guy" is the cause of the

settlement impasse. But in most cases—despite a litigator's penchant for demonizing his or her opposing counsel—the opposing counsel is not the problem. That's too simplistic. The impasse to settlement is generally found a little deeper.

FINAL EXAM

You represent a major manufacturer being sued by a vendor owned by a 62-year-old Armenian-born male.

Your client refused to pay the vendor, and took the vendor off its list of approved suppliers, claiming the vendor falsified quality control records in order to pass off noncompliant goods.

As revealed in his deposition, the plaintiff saw himself as a pillar in his ethnic community—a first generation immigrant who had made it big in America, so big that he now owned his own successful business that was able to employ hundreds, including many of his extended family members. The plaintiff also felt there was racial discrimination underlying your client's decision.

Your client tells you it rejected the goods, and blacklisted the plaintiff, for the simple reason that the goods were noncompliant. One of the plaintiff's former employees provided your client with documentary proof that confirmed the falsification of the plaintiff's quality control records. Your client didn't know the plaintiff personally, and had no idea what his ethnicity was.

The plaintiff filed suit for breach of contract, and alleged in the complaint that the breach was motivated by racial animus—that the breach was a blatant form of discrimination. The plaintiff's attorney is a recent admittee, also of Armenian descent, who knows the plaintiff from church. The court has ordered mediation, and the plaintiff's attorney recommends a young white woman mediator, well-respected in the business law community, whom he had used before with success.

Do you go with the suggestion of the plaintiff's attorney?

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Post your answer at www.mikeyoungmediation.com/ask-a-mediator; or in the Breaking News thread on this article linked at the home page of *Alternatives'* publisher CPR Institute, www.cpradr.org.

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