

DAILY REPORT

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Mediation Tips for Rising Stars

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Mediator Selection

Today, counsel frequently consider mediating even before filing pleadings. So, the issue is not whether to mediate, it has become when and how to mediate. Often, this involves the consideration of the use of a provider, as well as the selection of a mediator.

Cost is certainly a factor; inexpensive court-sponsored programs are an alternative for extremely cost conscious counsel and their clients. However, for most cases worth filing, the value of an effective mediator, who produces a resolution long before litigation could, results in a substantial saving of time and money and an increase in client satisfaction.

The process for the selection of the mediator has changed

over the years. At first, the Lions of the plaintiffs' trial bar espoused the theory "he who held the checkbook should select the mediator;" apparently based on the assumption that if defense counsel and his claim representative approved of the mediator, they would be more likely to follow that mediator's recommendations and the chance of settlement would be increased. This was particularly true in insured liability cases. Now, both sides recognize that mediator selection is often critical to settlement of the case and that selection is carefully negotiated.

Today, experienced advocates in **mediation** prefer mediators with a body of successful process experience. They want mediators who have mediated and settled a substantial number of cases. Of course, knowledge



of the substantive law involved, especially in cases in an unusual or arcane nature, sometimes can be important. Most of the time, a knowledgeable advocate can teach an experienced mediator the controlling law on the narrow issues involved, during the pre-mediation telephone conference or in the written mediation statement. But, even the best advocate cannot teach the mediator how to mediate!

Ask the proposed mediators about themselves, their experiences with opposing counsel, their familiarity with the substantive area and their general methods used in the mediation process. Do they use opening statements? Will they use early bracketing? Will they see the mediation through until resolution? Do they know how to effectively use a “mediator’s number?”

Look them up on the Internet, especially on their own or their providers’ websites. Try LinkedIn, Georgia Academy of Mediators & Arbitrators (georgiamediators.com), the National Academy of Distinguished Neutrals, and other organizations. Look for membership in local, state and national associations and their ADR Sections. Ask your mediator friends who are not under consideration for the case to suggest other potential mediators.

Make sure you have an experienced mediator, with a reputation for resolving cases, who is competent to mediate your area of law and who will be respected by

the other side, as well as by your own client. You need a mediator that everyone will listen to and respect.

Mediation Advocacy

Too many lawyers confuse litigation advocacy with **mediation** advocacy. In a court room, there is a triangle of communication between you, the judge or jury, and the opposing side. You must entertain and persuade, while you establish credibility with the jury. You can describe the other side’s terrible misdeeds and exaggerate for emphasis, with a plethora of descriptive adjectives and adverbs. But, when sitting across the mediation table there is no jury, no triangle. If you call your opponent names and vilify him when he is sitting right in front of you, you will aggravate and offend him past the point of any reconciliation. Good mediation advocacy consists of teaching and explaining to your opponent why a jury will decide that your position prevails over his.

Utilize the opening session with your opponent to make a low-key,

but persuasive, presentation that helps the other side to understand your case and why you predict it will prevail. Discussing this issue in advance of the mediation with the mediator is critical. It may be worth discussing with opposing counsel, too.

As the art of mediation continues to develop, stay informed about those developments. Your provider may even make seminars available to you for no charge to help you stay current. Again, just ask.

Terrence Lee Croft, Esq. is a JAMS neutral based in Atlanta. He has successfully resolved more than 3,000 disputes as a mediator and arbitrator in a wide array of matters including business, employment, health care, insurance, personal injury, professional liability and probate disputes. He can be reached at tcroft@jamsadr.com.

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