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PERSPECTIVE

Picking a peacemaker: Is there a secret formula to picking the right mediator?

By Christopher Keele

In my many years as a litigation and trial lawyer, I recommended and helped select a lot of mediators. I also participated in numerous mediations as a client representative. These experiences offered me valuable insight into what qualities a client and its attorney should look for in selecting a mediator.

The following list is not exhaustive. Nor do I have all-knowing insight into what makes a good peacemaker. But in my experience as both a lawyer and a neutral, effective mediators consistently possess these characteristics.

Honesty, integrity, civility, respect and professionalism. No need to dwell on these attributes. It's a given that they are essential.

Mediators must be trustworthy. Parties trust neutrals to, among other things, hear and comprehend their positions as well as keep their confidences. Parties must be able to rely on mediators to communicate arguments, demands, offers, etc., accurately. Plus, mediators should strive to build trust among the participants. Trust between mediator and parties, as well as a healthy level of trust among the parties, is crucial to a successful mediation.

No bias. This is a tricky one, as we all come to the table with biases. Some are obvious and overt; others are not. Mediators who practice real neutrality genuinely believe they have a duty, not to a person, party or position (unlike lawyers, who are fiduciaries and hence advocates for clients), but to a fair and objective process. Good neutrals work relentlessly to walk the walk of impartiality.

Commitment to fairness. Effective mediators make sure the playing field starts level and stays level. They keep an open mind. They make certain everyone gets their say and give due

weight to positions and arguments based on their merits. Good neutrals give no advantage to one side over another. They show no favoritism toward any person, party or position.

Knowledge about the subject matter of the dispute. This doesn't mean the mediator must have deep expertise in a particular field. But a strong working familiarity with the subject matter and applicable law is essential.

Persistence. It is imperative that mediators persevere, both during the mediation and afterward. They cannot throw up their arms when encountering difficult positions or intransigent parties. They cannot walk away when negotiations hit the wall. They must be persistent and keep the parties and process moving forward, even if the initial session ends without a settlement. Follow-up is key. Being relentless is vital.

Patience. This is the sister of persistence. There is no quick fix or magical solution when trying to settle a dispute. Reaching a resolution can take many hours, days or even weeks. The mediator should strive to be like Job.

Preparation. In addition to inviting pre-session briefs, mediators should lay a foundation with ample and meaningful pre-session calls (or virtual meetings) with counsel (and, in appropriate circumstances, party representatives). Good neutrals take considerable time to learn about the dispute, the parties and their positions before the actual mediation.

A "let's roll up our sleeves" work ethic. Reaching a settlement is not easy. If it were, most litigants would do it themselves quickly and painlessly. The mediator must be ready, willing and committed to put in the hard work, and encourage (if not insist) that the participants do the same.

Positive energy and an optimistic outlook, at least as it pertains to the mediation. Effective mediators know that a posi-

tive disposition and good energy are essential. They aim high and target a successful outcome. They abhor defeatist attitudes. (Corny as it may sound, good mediators have demonstrable "we can do this!" mindsets.)

Devotion. In my experience, effective mediators focus exclusively and intently on the matter before them. They devote their energy and faculties solely to the mediation session and participants.

Listening and follow-up. Much of what good mediators do is listen, learn, listen some more and ask questions. This is why former trial lawyers make some of the best mediators: They know how to really listen and to follow up on what they've heard and ask the right questions at the right time — all skills honed in cross-examination.

Flexibility. Good mediators are creative, not only about possible solutions, but also about the road to get there. They should have the confidence and willingness to think outside the box and suggest the parties do the same. And they should be cognizant of what I call the "arc" of a mediation and steer and shape the session in accordance with the flow and dynamics of negotiations.

Teamwork. This one may seem odd, but resolution takes collaboration and a willingness by everyone to work together toward a common purpose. One party need not ask the other side to marry it; it simply should extend a hand and invite the other side to dance (perhaps without stepping on toes or kicking shins).

Mediators should be **facilitative and evaluative.** They must have empathy but be prepared and willing to share their views on the merits of a party's position, arguments, case, etc. They should be willing and able to be more than just a messenger of demands and offers.

Calm and steady. Mediations can turn turbulent, sometimes

quickly. Effective mediators are like the captain of a ship on rough seas: cool, calm and deliberate.

Mediators welcome and embrace **problem-solving.** Disputes between and among parties can be complex and convoluted. Mediators should not fear these, but instead dive in and tackle them with vigor and ingenuity.

Be genuine and seek truth. Mediators should not provide, provoke or tolerate false pretenses or untruths (which are vastly different from information shared by a party in confidence). Good neutrals are skilled at sniffing out B.S. and separating the wheat from the chaff. They seek truth and are thoughtful, truthful and direct.

No mediator is perfect. We all have our shortcomings and imperfections. If you can check many of the above boxes when selecting a peacemaker, you will be well served. ■

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