



How Does the Mediator Selection Process Work?

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(Part 2 of a 4-part series on gearing up for a mediation.)

Once the parties in a dispute have cleared the first hurdle of agreeing to go to mediation, the next step is to select a mediator.

First of all, who gets to choose the mediator? Well, both sides have to agree, so each party should have input. When I was a practicing attorney, it was common for the defense to defer to the Plaintiff in suggesting the first round of names of potential mediators. The thinking from the defense perspective is that the Plaintiff and his or her attorney should be comfortable working with the mediator in order to be in the best mindset for settlement discussions. That said, if the defense is not comfortable with the names suggested by opposing counsel, then it may be appropriate to propose a few mediators for the Plaintiff to consider.

Either way, there is no one-size-fits-all when it comes to mediators. Mediators come in all shapes, sizes and styles, and what might be the right fit for one case may not be a good fit for another. Some mediators take an aggressive, tough-love approach. Others have a softer touch. Some are retired judges, while others are subject-matter experts in a given practice area. A mediator's gender or ethnic background also may be a factor that resonates with the parties in a positive (or negative) way. Accordingly, in order to maximize the chances of success at mediation, the parties should give careful thought to

finding a mediator who is the right fit for the case at hand and not just give in to habit or the path of least resistance.

Next, who pays for the mediator? Do the parties split the mediator fees equally? Does one side pay the entire amount? Using the dreaded lawyer-speak, it depends. The thinking behind the 50/50 split is that it gives each side an equal investment in the mediation, or what they call, “skin in the game.” Where the investment is not equal, the concern is that the side with less invested in the mediation has less incentive to settle.

On the other hand, sometimes one of the parties – usually the Plaintiff in employment dispute – lacks the financial resources to invest in a mediator. In that case, one option is for the Defendant to front the entire mediation fee, with an agreement that the Plaintiff will reimburse the other side for a 50% share of the mediation fees if the case does not settle. This option would address the financial issue while serving the goal of incentivizing both sides to negotiate in good faith.

Lastly, settlements can be structured so that one party agrees to pay the other side’s share of the mediation fees along with the settlement proceeds. Sometimes this type of incentive can serve as the final push toward reaching a settlement agreement after a long day of negotiations.

Next: How to Maximize the Probability of Success at Mediation: Effective Preparation



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