

Selecting the right mediator for your particular dispute should be considered as carefully as exercising a peremptory challenge to a judge or arbitrator. In certain cases, choosing the right mediator will literally make the difference between reaching a settlement or not. And while settling the case is not necessarily the only benefit to be obtained by mediation, it clearly is the primary objective for most mediation participants.

Where Do I Start?

Word of mouth is still the best method of finding a good mediator. Ask other attorneys or people who have been around the block a time or two. Lists can be obtained from industry associations as well as professional ADR providers. Either way, the list is merely the first step if you don't have benefit of a recommendation.

Checking Up on the Mediator's Background and References

Step 1: Determine What Type of Background or Experience is Important to Your Dispute. The mediator's background, experience and training may be critical to you in the context of the particular case you are seeking to mediate. In some cases, the simplicity of the issues or the lack of legal complexity may make the case suitable for any trained mediator. In other cases, however, the subtleties and nuances of your claim may compel the selection of a mediator conversant with the law of the particular case, and/or an individual with substantial knowledge of the specific subject matter.

In a statutorily based sex harassment case, for instance, it might well be wasteful of everyone's time to hire a mediator who has little or no background with the subject matter. That blank look on the mediator's face when you referred to FEHA was not a good sign. Similarly, you probably wouldn't hire a mediator with limited securities experience for a securities limited partnership dispute. If you want the mediator to be able to roll up his sleeves and dig into the meat of the case, that person needs to be able to quickly understand

the issues, find the seams in each side's arguments, and speak with sufficient credibility that the parties demonstrate willingness to move from their initial positions.

Step 2: Obtain the Mediator's CV.

The starting place in selecting the right mediator for your case is by obtaining the mediator's Curriculum Vitae (CV), or resumé. If the mediator is a member of any industry panels, that is a good place to start, but is in no way determinative of the individual's credentials. However, the association will be able to provide a CV. Alternatively, simply contact the mediator and ask for a copy. Mediators are accustomed to this request and will gladly forward it to you, along with a list of references.

If an association approaches you regarding mediation, feel free to ask questions about the mediators on the panel, including who are the most requested mediators, which ones have been receiving the best feedback, etc. You may also request that certain individuals be included on the list of potential mediators for your case.

Step 3: Check Up on the Mediator's References.

Make sure the mediator provides you with a list of references which include participants in cases which failed to settle as well as those which did. Call some of the participants and ask the relevant questions: Was the mediator effective? Were you happy with his services? Why or why not? Was the mediator knowledgeable in the subject matter? How was his demeanor? Was he prepared? Did he sink his teeth into the case and proactively help the parties move toward resolution? Did he allow the parties to control the outcome? Did he

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Choosing the Right Mediator for the Job

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Why Picking the Right Mediator Can Make or Break a Settlement

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appear neutral and unbiased? Was he ever called upon to break an impasse, and if so, how did he approach it?

Selecting a Mediator Whose Style Fits Yours and That of Your Client

Mediators have many different approaches and styles. Some fall into established categories with descriptions such as "facilitative" or "evaluative." Some are known as "split the baby" mediators (which can be a good thing if you have a weak case). Still others defy categorization.

Is the mediator proactive or passive? Having a passive mediator in a case requiring mediator involvement and assertiveness can be frustrating and unproductive. This is not to say the mediator needs to be overly assertive or unpleasant (a characteristic not unique to retired judges). An effective mediator can play "Devil's Advocate" to both sides without alienating either.

Do you want to retain control of the negotiations, or relinquish control to a strong-arm "bully" mediator? If you are confident of your abilities as a negotiator and feel comfortable with your evaluation of the claim, you will probably want to determine your own negotiation strategy. If and when you reach an impasse, only then might you ask for suggestions from the mediator on how to break the stalemate.

Does your case require that the mediator put a substantial amount of time into reviewing briefs and analyzing a number of complex issues and facts? If so, you want to make sure you choose someone who will indeed commit the time and energy to figure out your problem and how to solve it. If the mediator is either too lazy or too busy to do so, he may not be right for this particular job.

Does your case involve strong personalities? Does the mediator have the ability to deal with these personalities and maintain control over the proceedings? Will the strong personalities be able to manipulate the mediator? Whether this is a positive or negative for your case again depends on your

claim and the strengths or weaknesses of your position.

Do you have client control problems? Is it important to select a mediator who will help you to obtain control over your client? Will the mediator assist in this regard or attempt to work around counsel to settle the case? Can you trust the mediator to work with you rather than against you?

Does the mediator "add value" to the settlement process? Is he sufficiently knowledgeable that he can provide meaningful input and assist in strategizing on how best to achieve a settlement? Does he suggest ideas and creative solutions which help to move the negotiations forward? When the mediator asks you to move off of your position, can he explain why?

Do Your Homework: It Pays Off in the End

While doing the investigative work to choose a mediator may sound like a lot of work, it really is not, when you consider the fact that you need only do it once if you make the right choice. From that point forward, you become one of the references others call.