

ALTERNATIVE DISPUTE RESOLUTION:
FINDING THE RIGHT NEUTRAL

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As mediation and arbitration become more widespread in the resolution of disputes, lawyers find themselves representing clients in what may be unfamiliar territory. This article explores issues and factors to consider in selecting an arbitrator or mediator for the Alternative Dispute Resolution ("ADR") process.

In both mediation and arbitration the disputants usually have the right to select the neutral who will resolve their dispute. This ability to select the neutral is a tremendous advantage of ADR over litigation where judges may be assigned randomly. This article explains where to find neutrals, describes the different qualities that make a good mediator and those that make a good arbitrator, and provides some advice in selecting the particular neutral that is right for your case.

WHERE TO FIND NEUTRALS

As the attorney representing a client in ADR, you should first review any prior contract under which your client is required to submit the dispute to mediation or arbitration. In many instances, the "arbitration or mediation clause" may also set forth the ADR provider that the parties must use. It is not unusual, for instance, to find that the parties are required to submit any disputes to the American Arbitration Association which is a leading, national non-profit provider of ADR services. Upon submitting the dispute to the AAA, the case administrator assigned to the case will provide lists of mediators and arbitrators from whom to choose. Regardless of whether the case is to be submitted to a mediator, two mediators, a single arbitrator or a panel of three arbitrators, the parties

must first agree on the selection of the neutral(s). The tenor of this selection process, incidentally, can also serve as an indicator of the contentiousness or cooperation that will ensue during the actual mediation or arbitration.

If the mediation or arbitration clause does not specify an ADR provider, the matter may still be submitted to the AAA or to any of the other ADR for-profit providers - many advertise in Lawyer's Weekly. In addition, the Boston Bar Association publishes a Directory of Massachusetts Alternative Dispute Resolution Providers. This publication, available for \$20 from the BBA, lists both individuals and organizations that provide ADR services. The providers are cross-indexed alphabetically, by county, and by subject matter. The information available for each neutral includes how to contact them, the counties in which they practice, the types of services they provide, their training in ADR, their ADR experience, the number of cases they've handled, any approvals and/or court affiliations they have, their professional background, their fees and any other additional information they wish to offer.

The BBA Directory also lists all of the Massachusetts Court-Annexed ADR Programs. Many of these court-annexed providers (such as the Middlesex Mutli-Door Courthouse) offer mediation and arbitration services, as well as other useful ADR processes such as case conferencing, case evaluation, complex case management, summary jury trials, fact-finding, minitrials, conciliation, facilitation and ombudsman services. Some court-annexed services are provided to the disputants at no cost and others offer services on a sliding fee scale.

It is also important to note that a case does not have to be filed with the court to which the ADR program is annexed in order to use that program. Typically, simple cases that are filed with that court may be mediated through its court-annexed ADR program at no cost to the parties; more complex cases involving multiple parties and requiring multiple mediation sessions may be available on a fee for services basis. Regardless, one

may contact a court-annexed ADR program and inquire about available programs and neutrals.

Finally, you can let your fingers do the walking. Both Mediation Services and Arbitration Services are listed in the Yellow Pages.

WHAT TO LOOK FOR IN A NEUTRAL

So, now that you have figured out where to find neutrals, how do you go about determining the good ones? What are the qualities to seek in a mediator or arbitrator?

QUALITIES OF A GOOD MEDIATOR

The mediation and arbitration processes are very different. Likewise, the roles of mediator and arbitrator are different, and, therefore, the qualities to look for in a mediator or arbitrator also differ.

Effectiveness in Bringing the Parties to Yes

Perhaps the single most important quality to look for in a mediator is effectiveness. In mediation, the parties retain control of the outcome by fashioning their own resolution. The mediator serves a facilitative function. Resolution is not certain - the parties may or may not develop and agree on their own resolution. It is essential, therefore, that the mediator be effective at bringing the parties to an agreement. Although a wide variety of skills and techniques go into the making of an effective mediator, a mediator's general effectiveness can be assessed by obtaining information about the mediator's settlement rate and history of mediations that have led to settlement. (Many mediators claim that it is unfair to judge them on their settlement rate, because the parties, not they, control the outcome. Nonetheless, a mediator's past settlement rate may be a good indicator of that mediator's chances of settling your case.)

Fairness

All parties were not created equal. Often there are differences in the parties' resources, experiences, educational levels, psychological fortitude and tolerance for conflict. Advocates should look for a mediator who recognizes these imbalances and

has the necessary skills to level the playing field so that both parties - particularly the weaker party - will feel safe in agreeing to settle. At first blush it may appear that the stronger party would not want the neutral to be fair. After all, why not take advantage of your strengths at the expense of your opponent's weaknesses? This does not work in mediation, because the less secure the weaker party feels in the process, the less likely that party may be to agree to settle. It is, therefore, in the interests of both parties to seek a mediator who is fair.

Mediation Experience

Of all forms of alternative dispute resolution, mediation involves the highest degree of active party participation. Unless the parties are involved and working towards a resolution, no resolution will occur. A mediator must be experienced in order to manage, control and facilitate the plethora of situations that arise during the mediation process. Mediation experience is necessary to know how to rein in recalcitrant parties, broker highly contentious or emotional issues, and keep the parties on track towards resolution.

Knowledge of Subject Matter

A mediator's negotiation and facilitation skills are transferable to all types of disputes. That said, there are some mediations that require subject matter expertise. This is the case, for instance, in construction mediation where the mediator must understand the industry terminology, the relationship of subcontractors to each other and to the general contractor, the intricacies of liability issues involving multiple parties, and the interrelationship of the parties and the unions. Similarly, divorce mediation is an art unto itself. Because the Probate and Family Court judge will take a second look at the mediated Separation Agreement, mediators must be familiar with domestic relations law, both so that the mediated agreement conforms to current law and so that it covers all of the points which must be settled for a divorce decree to enter. Moreover, emotions can

run particularly high in divorce mediation and special skills are needed to work effectively with the divorcing couple.

QUALITIES OF A GOOD ARBITRATOR

Arbitration, unlike mediation, is an adjudicative process in which the neutral controls the process and determines the outcome. There are several qualities to look for in a good arbitrator.

Neutrality

It always surprises me when lawyers say that what they want in a neutral is neutrality. I don't believe this to be true. What advocates and parties really want is a neutral who is biased towards their position and will decide the case in their favor. So, when representing a giant corporation in an arbitration, the corporation and its attorney may wish for an arbitrator who is pro big business. Unfortunately for the party and advocate, biased arbitrators are rarely going to be agreed to by both parties. It is clear that the bias one side wants, the other side fears. So, while disputants really hope for an arbitrator with a natural predilection to find in their favor, they must usually agree on a neutral who has no known predisposition and who will serve with neutrality.

Judicial Temperament

Advocates and parties should look for an arbitrator who is known to have a judicial temperament. The arbitrator decides the case and, therefore, should have the qualities of a well-respected judge. Judicial temperament includes, open-mindedness, attentiveness, fairness, patience, a willingness to listen to advocates and parties wishing to be heard, thoughtfulness, and intelligence. Think of the type of judge you most admire and most enjoy appearing before - that judge possesses the qualities you want in your arbitrator.

Arbitration Experience

While the arbitrator controls the outcome, the arbitrator must also be able to control the process. A good arbitrator has experience with the arbitration process and

will be able to maintain decorum, control the parties, and organize the proceedings to whatever extent necessary to move the arbitration along. Seasoned arbitrators are also skilled at helping the attorneys - perhaps during a prehearing joint conference - to narrow the issues and streamline the arbitration down to its essential elements. Efficient management of the proceedings is a benefit to all.

Knowledge of Subject Matter

It is the job of the advocates to educate the arbitrator about the relevant facts and the relevant law. But, depending on the case, an arbitrator's subject matter knowledge may be somewhat important. It is far easier to arbitrate a securities case before an arbitrator familiar with Securities Law than before one who isn't.

SELECTING THE RIGHT NEUTRAL FOR YOUR CASE

In addition to the general qualities to look for in an arbitrator or mediator, there is a final step to the analysis: finding the particular neutral who is right for your case.

In making this determination, you must consider both the case and the parties: the case, in terms of its subject matter, size, complexity of issues, and amount in controversy; the parties, in terms of their psychological make-up, geographic location, financial resources, stamina, and sophistication. A careful analysis of the case and parties will lead you to a conclusion as to the best neutral from the universe of good neutrals to select for your client.

To find the best neutral for you, you will want to do all the information-gathering possible. Solicit the opinions of colleagues and friends with knowledge about the neutrals you are considering. Review each neutral's bio to ascertain the neutral's legal background, ADR experience, subject matter expertise, ADR training, types and number of disputes handled in the past, mediation settlement rate, fees, and availability. Ask to be provided with - and check out - the neutral's references. You may want to talk with attorneys and parties who have appeared before the neutral. If you do speak to parties and attorneys who have appeared before an arbitrator, make sure to speak to the losing

side as well as the winners. This will insure a balanced assessment of the arbitrator's skills and fairness.

After you have done this homework, review your suggestions with your client for final selection of the neutral. This client conference can also be a useful tool for exploring your client's sensitivities, strengths, weaknesses and vulnerabilities. In discussing the type of neutral that you and your client think you need for the case, you will be examining and solidifying your views and theories of the case.

CONCLUSION

The ability to select the neutral may be a key element to a successful outcome using ADR. You don't want to squander this opportunity by giving short shrift to your selection of a neutral. If you follow the steps outlined above, you will have gone a long way towards providing your client with effective advocacy in the ADR process.

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