

WHO CHOOSES YOUR MEDIATOR **(and Does It Make Any Difference)?**

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During the 18 or so years I have been conducting mediations and arbitrations (ADR), I have seen a phenomenon that consistently puzzles me. I hope this short article will dispel some of the suspicion and superstition that prevails in the marketplace and will help the consumer when shopping for a mediator or arbitrator.

So, Whose Side Are You On?

Mediators and Arbitrators (“ADR Professionals”) find that when one party or one side (Plaintiff or Defense) contacts us, the opposite side will immediately eliminate the ADR Professional contacted fearing that a “deal” has been made or that the Professional will be biased because of the contact. Such a “knee-jerk” reaction not only impugns the integrity of one’s opponent, but it presupposes that the recommended ADR Professional also lacks integrity. It may also suggest that the person rejecting the proposed ADR Professional would try to convince her opposition to agree to a “ringer.” I am certain this is not how any of us would prefer to be perceived. There are no guarantees for the ethics of human beings, but from someone who has been around this profession for a long time, most ADR Professionals acutely know that performing under the shroud of bias or favoritism will quickly destroy one’s business. I practice in a (relatively) small community. I am familiar with many of my attorney colleagues within the community and have the pleasure of viewing the majority as at least friendly colleagues. I appreciate it when one of them calls me to mediate or arbitrate a case and I always disclose whatever relationship I have with that professional. ADR Professionals are recalled by “regulars” because of the service we provide and NOT because of the outcome of a case. I estimate that the quality of the outcomes perceived by my regular clients do not differ significantly from those of first timers. I do my job as I was engaged to do without regard to who “wins or loses.” That perception is never the ADR Professionals’ except, perhaps, in Arbitration.

We Are On The “Side” Of Resolution

In spite of what may be perceived, ADR Professionals are human beings with all of the inclinations and weaknesses of the rest of humanity. However, like our cousins, Judicial Officers, we are trained and conditioned to acknowledge our biases and work toward neutrality. Whether judges or non-judicial dispute resolution professionals, some fail in that endeavor. We regularly see in the news how this judge or that has tripped on her robes and failed to live up to her oath. But also, few years ago in California, a well-known mediator made the legal news because of an appearance of impropriety. It happens, and for those of us who pursue this profession, it is embarrassing. I am sure those events might increase the level of suspicion in the consumer, whether a lawyer searching for an ADR professional to help with his case or a self-represented individual

looking for help with her divorce. It all creates confusion in the market and regretful delays.

Mediation Should Be Win-Win

When I mediate cases, I endeavor to reduce or eliminate the risk to counsel and the parties. Yet, as an ADR Professional trying to stay in business, we are at constant risk. The risk discussed in this article is the perception that the ADR Professional is biased. Let me express for myself and my fellow ADR Professionals, I DON'T CARE HOW YOUR CASE RESOLVES (by mediated settlement or arbitration award)! I do not care who contacts me first; I do not care who is paying for my services; I am not concerned that one side is paying too much to the other; I am not concerned that one side is receiving too little from the other; I do not worry myself about lopsided negotiation moves if the process remains fair. At the end of every mediation I conduct a "post-mortem" to figure out what I could have done better, but never lament the terms of the settlement. I realize that because mediation is a voluntary process the parties make the decisions they do in mediation for their own reasons and that, even when the compromise may be painful, they have made a personal decision to resolve a case.

At the end of every Arbitration, I scour my mind and my notes to make certain I did the very best job I could do. (No matter how an arbitrator decides, the losing party always insists that the arbitrator did something wrong or missed something; and it is not unusual for the winning party to be upset that not enough was awarded.)

THE ANSWER?

For counsel, I recommend when you are in search of an ADR Professional outside of your geographic area you consider a few options. Foremost, do not assume that one of the big ADR providers is the best choice particularly if expense is a real concern. In most jurisdictions, outstanding local services provide the same or better quality and efficient services as the big guys. Second, if the attorney is familiar with someone who practices in the area of law for which the Mediator is being sought, call that colleague and ask. Why not take advantage of his familiarity with the area?

Next, check with the website of the Court in the venue of your case. Many courts have ADR panels members of which have been vetted by the courts. Those panelists are expressly not endorsed by the courts, but given the routinely rigorous application procedures of the courts, training and experience requirements, it is a good place to begin. Just as above, once you see a few you might select, call local counsel for advice. I suggest that when out of area lawyers make "cold-calls" on local counsel for references, they are willingly provided. County Bar Associations often have their own ADR services manned by pre-qualified panelists and their fees are competitive in most cases. Choosing such a service may also solve location issues since they may provide ADR facilities at no additional charge. As a final "group" of sources, one may inquire of certain organizations such as the Association for Conflict Resolution, Southern

California Mediation Association, American Arbitration Association (which has a mediation panel) and on-line organizations such as Mediate.com.

Avoiding Your Perception of Bias

After one has found a few names of potential ADR Professionals, a simple safety check on Google® or similar search engines to see if the choices have information in the Web World. Whether it is an attorney or a self-represented individual doing the search, I recommend neither side make individual phone call or contact if the relationship between opponents is suspicious or strained. I recommend getting the email address(es) of the professional(s) being recommended and emailing “cc”ing copies to you and your opposition asking the professional to send information to you by email, or requesting a conference call.

For those who are self-represented I particularly recommend a joint effort. Most ADR Professionals have their own websites on which one can locate biographies, backgrounds, fee schedules, etc. for download. A joint email contact will usually result in a response to both of you, particularly if it is requested.

Care in Research

One of the biggest drawbacks to some of the quickie referral sites such as Yelp, Thumbtack, etc., is that the inquiries are sent out as a shotgun blast to randomly selected professionals who are asked to provide a quote with a short squib about himself without an opportunity to speak with the potential client unless that person makes contact. Basically, it is a “Black Friday” rush to respond on a first come, first served, basis. A quote and short note tells the contact almost nothing about the services provided. If one is not serious about hiring an ADR Professional, since every response to your inquiry costs the professional money, I urge you not to send a request. Also, non-lawyers should understand that ADR services are not free. ADR Professionals are in business to make a living. We possess years of experience and, usually, years of education. One would not take out her own appendix, so why would one try to muddle through resolving a legal dispute without the help of a qualified professional? You will find that the cost is the least of your concerns in the long run and that choosing the ADR (mediation and/or arbitration) course of action will be most beneficial to you in the long run.

So, What Does This All Mean?

The response is that if the parties considering ADR do their research well, it should make absolutely no difference who makes first contact. Outcomes of cases mediated or arbitrated by different ADR Professionals will vary depending upon the style of the Professional. Rather than concerning one’s self about who recommended or selects the ADR Professional, one should be concerned about the ADR Professional’s background, training, experience and reputation.

We at ***California Arbitration and Mediation Services (C.A.M.S.)*** are dedicated to providing everyone, lawyer or consumer, who engages our service with and the most neutral, efficient, cost effective and effective dispute resolution services available at any price.