Selecting a Mediator

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What things might counsel consider in deciding whether and how a mediator will be selected? What things might a client consider in deciding whether and how a mediator will be selected? These might be different considerations. Which considerations are most important? Some considerations can include the mediator's background, experience and reputation as well as the mediator's mediation philosophy...evaluative, facilitative or the newer transformative, which emphasizes the quality of the discussions and negotiations. In a future article I will discuss and compare these different approaches.

On-line lists of mediators are being developed; however, the Circuit Courts in every county have lists of approved mediators from whom the court will select when ordering mediation pursuant to the Maryland Rules. It is not uncommon for counsel to contact a proposed mediator and ask them to furnish their background and mediation experience. Mediators might also be asked to identify some attorneys for whom they have done mediations who can be contacted as references. A simple approach can be to just call some attorney friends and ask for recommendations.

A preliminary discussion with a proposed mediator as to what the mediator sees as the role of the attorney and the parties in the process might be helpful. A mediation should be comfortable, and all persons present should be reading from the same page and understand where each is coming from and what their respective roles should be. This is often discussed as part of the opening of a mediation session itself, although this can also be discussed in advance as part of the mediator selection process.

The mediator's subject matter knowledge in the area to be mediated, or lack thereof, is a matter of some controversy. The mediator is not supposed to decide the case, give legal advice or even recommend the terms of an agreement. See Md. Rule 17.102(d). There is a saying "a little knowledge is a dangerous thing". In mediation, it well may be that "A lot of knowledge is a dangerous thing" in that too much subject matter experience may lead the mediator to attempt to structure the terms of a settlement. Not only does that run contrary to the Maryland Rule (noted above), but it also may not be what is most satisfying to the parties and their counsel. The mediator's proper role is not to be the body of knowledge, but to help the parties and counsel have a productive exchange and negotiation exercise. Subject matter knowledge by the mediator is not always necessary for this. However, it is certainly helpful for the mediator to have <u>some</u> familiarity with the subject matter and terminology. Failure to have this may result in the parties losing respect and confidence for the mediator and, in the process, for the mediation itself. Therefore a mediator might be well advised to gain at least some familiarity with the subject matter and terminology ahead of time.

As mentioned, I will go into the different mediation models in a future article. But one thing might be mentioned here. A mediation should be a safe opportunity for an attorney to "showcase" the client to the other side, or for the client to showcase what is most important in, or has been most troubling about, the dispute. It is a much wider forum since the rules of evidence are not in play and what is possibly irrelevant to one

party but very important to another can be discussed freely. And it is safer than a deposition because the confidentiality rule prohibits any statement or misstatement in mediation to be later used in court if the matter does not settle. And lawyers do observe (and later report to or discuss with their client) the kind of impression the other party makes at the mediation. This can be quite helpful in a case getting resolved especially when the party comes across as appearing truthful or reliable. Of the three mediation models, the transformative model most allows counsel as well as the parties to speak fully and otherwise participate in the mediation. Indeed, each party is invited to do so. It thus offers the greatest "show case" opportunity. This can be a side benefit of having a mediation.

While I am not advocating one way or the other whether counsel should use the court appointed mediator or personally select another mediator, I am suggesting some thoughts that might be considered preliminarily.

Obviously where mediation is voluntarily chosen by the parties and their counsel, there can be mutual agreement on who should serve as mediator. Although not the norm, there might be cases where the parties feel more comfortable with co-mediators, with one chosen by each side as is often done in arbitration. I am not here suggesting a "his" and a "her" mediator. All mediators must be and remain neutral. But anything that might help parties feel more comfortable with the mediation process can be helpful, and this is something that can be considered. Even in Circuit Court ordered mediation where a mediator is designated by the Court, the parties have the right to select someone else as mediator. Many attorneys are not aware of this, and not all mediators are the same or of the same caliber or approach. Thus, counsel, and parties, may choose to select someone else. To do so, they simply notify the court within thirty (30) days of the original scheduling order. See Md Rule 17.103 (c) (4).