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Characteristics To Consider When Selecting “The Right” ADR Neutrals

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Editor: What criteria should be considered when selecting an ADR neutral?

Meanor: That depends on the subject matter. If there are to be three arbitrators, then it would be a good idea, if the subject is complex, to have at least one who is familiar with the turf and can communicate with the others. If there is to be only one arbitrator, then he or she should be at least familiar with the subject. The lawyer will be able to write in understandable language which is the language that any reviewer will be familiar with.

Emmert: When selecting an ADR neutral several factors should be considered.

A good neutral should have at least 10 years of experience in his chosen field, solid knowledge of applicable rules, procedures, and law or industry practices, and a thorough understanding of his or her role and authority.

An arbitrator must have the judicial capacity to manage arbitrations efficiently and effectively. A mediator must be a good problem solver; pursuing collaborative solutions and generating ideas and proposals that are consistent with case facts and workable for opposing parties.

Other factors to consider are the neutrals' compensation rate and availability. Choosing a higher profile neutral with a full schedule may be more costly as delays may result in getting on their calendar. An equally qualified neutral with a more flexible schedule may help in getting the dispute heard.

Finally, a good neutral is held in the highest regard by peers for integrity, fairness and good judgment, and willing to make appropriate disclosures in accordance with applicable ethics standards.

When selecting a neutral it is also important for the parties to determine what they wish to achieve through the ADR process. Finding a neutral who can apply the rules and procedures while allowing the parties the flexibility to design their proceedings as will best suit their needs, will serve to provide the parties with the most impartial, efficient and expeditious resolution of their dispute.

Levie: Because disputes and the parties are unique, every selection process should be tailored to them. The obvious criteria include: process expertise; subject-matter expertise, judicial or litigation background; mediation style/temperament; approach to arbitration process; intelligence; ability to learn quickly and thoroughly; geographic location; and rates and fees.

The more subtle criteria include: ability to work with people who are under stress or feel wronged; ability to diffuse volatile situations; thinking and acting creatively in a mediation; common-sense; ability as an arbitrator to make a decision and move a case fairly, efficiently and cost-effectively; and flexible enough to adapt to different situations.

If a case involves highly technical or specialized matters consider whether it makes sense to use a neutral who has

considerable experience resolving those types of disputes or who possesses the capability to learn quickly and work competently with counsel. There are many former judges and litigators who possess these talents and skills.

Dreier: There is a distinct difference between the neutral you pick for an arbitration and one that you pick for a mediation. For either, you want to know up front whether the neutral can show proven results. With mediations, indicia are a high success rate of settlements, repetitive work from counsel, a general reputation for legal ability, fairness, thoroughness and speedy disposition of the matter. For arbitrations, you can add the traits of decisiveness and efficient case management.

Another difference between the two types of neutrals is the background of the person you would choose. Look for an arbitrator who might favor your cause, within the bounds of impartiality and fairness. For mediation, where you want the mediator to aid in driving a settlement on favorable terms, pick one of your adversary's favorite mediators, provided you trust the mediator's fairness and impartiality.

Additionally, you want to look at the neutral's personality, style of proceedings and general amenability to work within scheduling needs. Your neutral should also have some experience with the law and procedure applicable to the arbitration or mediation matter. Where the matter involves a specialized field, look for a neutral with a background relevant to the case's complexity.

Downplay the neutral's location and price. It is helpful if the neutral can supply a forum in which the matter can be heard, as the process works better on neutral ground. Yet, unless the distance to be

travelled by the neutral, the parties or attorneys is unreasonably long, distance should not keep you from a superior arbitrator or mediator. As to price, this should be a minor factor, especially if the matter in difference is sizeable. An additional few hundred dollars in fees that result in time saved is money well spent.

Osborn: Our practice focuses on the litigation of complex construction, environmental and real estate matters. Because the outcome of these cases is often determined by the interpretation and analysis of engineering, scientific and technological information, many attorneys in our field would choose an ADR neutral principally based upon his or her technical background. In our experience, the neutral's technical background should very seldom be the primary criterion. We believe that technical background is secondary because, when it comes down to it, the most effective neutral is one who has extraordinary listening skills, in depth ADR experience and training, and well developed coping and problem solving abilities.

Rauer: This is actually a more complex question than it would seem at first blush. There are certain nearly universal qualities sought for any neutral: impartiality/neutrality often tops the list. Beyond that, the answer is dependent upon myriad factors. The Better Business Bureau has maintained an advantage in this area, in that it already maintains a longstanding reputation as a neutral/impartial dispute resolution provider; its neutrals may thus be accorded a level of inherent trust at the outset so crucial for effective resolution. Not every forum and/or neutral has that benefit.

There is a school of thought that subject matter expertise is crucial for the effective resolution of certain highly technical matters, while others proffer that an effective neutral is *always* effective at guiding the process, regardless of such specific expertise. From my perspective, the debate centers more upon the inherent trust of the parties in the neutral and thereby the process itself. If the parties to a technical dispute spend more time educating the neutral than resolving their issues and the *result* is a lack of trust in the competence and effectiveness of that neutral, under such circumstances, a neutral with subject matter expertise may inspire more confidence in the process

and expedite potential resolution. Moreover, in certain venues, the parties may take issue with paying a heightened fee for the time expended to educate a paid neutral.

Experience in handling the matter at issue is also a key factor for consideration. For example, a skilled divorce mediator with forty hours of formal training and ten years of experience resolving hundreds of similar matters may have gained a better understanding as to effective techniques of emotive management, venting, issue spotting and the essential dynamic between the parties. A novice in that area may prove equally effective and adept, although the chances are less likely that he will fully appreciate the process in quite the same fashion nor understand the party dynamic as thoroughly as the far more experienced neutral. Is this a universal tenet? Absolutely not; however, for particularly challenging and emotionally driven cases, the ability to draw upon such experience may prove highly beneficial.

The bottom line? There must be full "buy-in" from both parties for any effective dispute resolution process - i.e., they both must appreciate the impartial nature of the selection process, trust in the competence of the neutral, and believe that they are starting on an even playing field with a legitimate chance for mutually acceptable resolution. Dispute resolution and the selection of an effective neutral is far from an exact science - nor can it be; indeed, when you are dealing with a party dominated process, the focus is necessarily upon them and their comfort level. That often translates to a belief in the process itself and thereby bolsters potential resolution.

Kreb: I recommend clients focus on: (1) prior neutral experience, (2) functional or subject matter expertise, and (3) industry experience. Prior neutral experience is important because it is beneficial to have a neutral that is comfortable being in the position - setting the agenda, presiding over discovery issues, procedural matters, and ultimately making a decision that will likely have a significant impact upon both of the parties to the dispute. We all know that comfort comes from not only being prepared, but also having lived the experience before. Prior experience is also important because the candidate may have a reputation that is either commonly known in certain circles, or

can be assessed through minimal research.

Functional or subject matter expertise is also of great benefit. If the dispute involves accounting or tax matters, the parties should consider using a Certified Public Accountant or tax specialist in the neutral role. This subject matter expertise should be bolstered with industry experience. Industry experience may be critical in evaluating the behaviors of the parties and the expectations based upon industry standards. In any event, having industry experience will shorten the learning curve for the neutral who is already familiar with the industry. The combination of these three factors serves to increase both the efficiency and the effectiveness of the ADR proceeding.

Editor: How can the quality of an ADR neutral be verified?

Levie: In performing "due diligence" about a neutral, counsel should start with the neutral's background. An organization like JAMS makes it easy to navigate its website to find detailed information about a neutral's background and experience. Performing a search on Westlaw, Lexis or Google may also provide information about the neutral's background.

Asking colleagues and other attorneys provides extremely valuable information about a neutrals' past experience and credentials. Performing a "reference" check supplies "real time" information about how a neutral conducts a mediation or arbitration.

Additionally, counsel can interview prospective neutrals. For a mediation, such calls can be done *ex parte*. However, counsel for both sides must be present for an arbitration. In either situation, the calls provide information about a prospective mediator's style and techniques and should not be seen as an attempt to lobby the neutral.

Another area to be explored is whether the neutral has had specialized training in mediation and arbitration. Prior work as a mediator or arbitrator or as a judge does not necessarily mean that the individual possesses the requisite skills, training and experience. Training in arbitration and mediations is provided by various institutional providers such as CPR and the ABA Dispute Resolution Section.

JAMS has the JAMS Institute where neutrals are trained and afforded the opportunity to "shadow" more experi-

enced neutrals in actual mediations and arbitrations. In addition JAMS provides continuing training and education to its neutrals in topics ranging from conducting mediations and arbitrations to specialized training in specific substantive areas.

Dreier: If you can, ask for references. Speak to the references and read between the lines. As to mediators, mediation proceedings are confidential so most ethical mediators will not give you the names of cases or parties. They may however refer you to attorneys for whom they have mediated, with the understanding that neither you nor the attorneys will refer to specific cases. See if the neutral has lectured or written in the field. There also is nothing amiss if you telephone the neutral or even arrange for an appointment to sit and talk about the issue. Your case is important, and this is an opportunity to retain a "private judge." You should feel comfortable with your choice.

Kreb: While it is challenging to assess the "quality" of an ADR neutral, there are prudent steps one should take. In a 2006 study conducted by PricewaterhouseCoopers and the School of International Arbitration, Queen Mary, University of London, the most important attributes parties evaluated in selecting neutrals were reputation, expertise, common sense and the knowledge of applicable law. Further, 50% of respondents stated that they selected neutrals based upon the advice of external counsel and 33% relied upon their own personal knowledge.

When evaluating neutral candidates, it is common for us to reach out to others in our firm who may have interacted with the candidates. We canvas others to

understand the individual's reputation, technical knowledge, ability to manage an ADR process and general business knowledge. Assessing a neutral's reputation in this manner is limited, at best. As such, it is beneficial to undertake additional steps which include conducting a literature and Internet search regarding individuals. Publications written, or speeches given by neutral candidates contribute to their reputation and can also demonstrate their level of expertise. Expertise can also be vetted through a review of the curriculum vitae and by conducting brief interviews. In the resolution of accounting related disputes through arbitration or expert determination, neutrals are often interviewed prior to being retained. This may be unique when compared to some ADR organizations in which arbitrators are selected out of a pool, when a party may only have access to the resumes of those in the pool.

Emmert: The neutrals resume is simply a "snapshot" of the neutral's experience and qualifications and is not meant to be a complete history of ADR qualifications. Oftentimes neutrals will provide an "enhanced" biography with references. The Internet is another source of information. Some neutrals have their own website where they provide more details on their professional and ADR background. The American Arbitration Association provides a number of other tools to assist parties in their neutral selection process. AAA's Enhanced Neutral Selection Process provides parties with a number of options for neutral selection assistance including prequalification for disclosures and availability and pre-screening interview processes. Another tool that is used, especially in larger law firms, is the

inquiry of colleagues for any experience with a potential neutral. Careful review of the information on a neutral, as provided by various resources, will help the parties to select the most qualified neutral for their case.

Osborn: It is very difficult to verify the quality of an ADR neutral, in the same manner in which it is extremely difficult to verify the quality of an attorney you are considering retaining. In either instance, the criteria for verifying that the neutral or attorney is of high quality is very subjective and "in the eye of the beholder". This being said, in verifying ADR neutral quality, my primary source of information is speaking to an experienced attorney colleague who has worked with the ADR neutral being considered. Reading CV's and even initial interviews of potential neutrals is of little help as it provides little verification of the neutral's listening, coping and problem solving abilities.

Although it takes a lot of work and it does not take the place of candid and "off the record" views of experienced colleagues, the approach and philosophy of a neutral may be accurately verified from researching the substance of the neutral's publications and speeches within the industry. With the advent of the internet, this type of background information is readily found.

Meanor: The AAA and CPR have resumes on line. They can be reviewed. www.cpradr.org; www.adr.org.

Any of the arbitration services will send you resumes on request. If you want more, call several attorneys in the areas where the neutral practices.