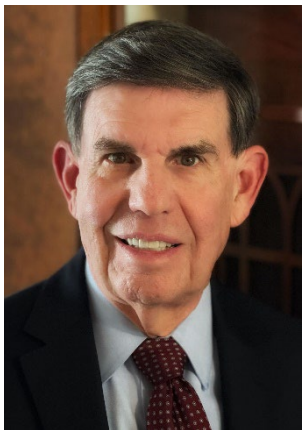




Choosing a Mediator vs. Choosing an Arbitrator

Dale Larrimore, Esq.



While articles on Alternative Dispute Resolution often conflate mediation and arbitration, these are actually significantly different methods of resolving cases outside of the court system. While both are effective at efficiently resolving disputes, as the lines between these ADR methods are blurred, there is often confusion in the process of selecting the best person to assist the parties in reaching the goal. Give some thought to the skills necessary in each role.

Without question, a mediator or arbitrator should be someone whom both sides trust will provide a fair and honest view of the facts and law involved. Both roles require a person with experience in the type of case presented, knowledge of the elements of the cause of action, and the ability to recognize the key facts and legal issues.

Arbitrations will most frequently involve a hybrid mix of live or deposition testimony, combined with documentary evidence admitted into evidence under the predetermined rules for the arbitration. An obvious benefit of arbitrations over an actual trial is that the parties can agree in advance what rules of procedure and evidence will be applicable and arbitrations almost always include a relaxation of the evidentiary rules governing the admissibility of documents. Medical records, employment records, and even expert reports are usually admitted by agreement.

Your arbitrator should be someone who will read all of the documentary evidence presented and listen carefully to the testimony and arguments made at the hearing. Like any juror, the arbitrator will bring his or her background and general knowledge to the case and no one, not even a retired judge, can totally eliminate his or her prior life experiences from how the evidence is viewed. But an arbitrator is acting as both a judge and jury for your case, and he or she will arrive at an opinion based on reading the documents and listening to the evidence. You have to trust that the person selected will

render an award based on his or her honest assessment of the facts and reports presented.

Mediation is so different. While an arbitrator can sit back, listen, and ultimately render a binding award, a mediator has to work hard to get all parties to come to an agreement to resolve the matter. You should submit substantive materials to the mediator well in advance of the mediation. Give the mediator the best possible opportunity to read, review, study, and fully understand the issues in the case. This means submitting not only a mediation memorandum but also key evidence and reports, including expert reports, on both liability and damages.

To be effective as a mediator, I have found that I must spend many hours preparing in advance prior to the day of the mediation in order to gain an understanding of the facts, the law, and the issues that have prevented the parties from settling on their own. Comprehensive mediation submissions allow the mediator to appreciate both the strengths *and the weaknesses* of each side's position.

By tradition, many mediation memoranda are submitted confidentially to the mediator, but I usually suggest that each side shares their memos, or at least a portion thereof, with the other side. Keep in mind that your goal is not to persuade the mediator; rather the plaintiff's objective is to convince the defendant, defense counsel, and insurance adjuster that the case has a value greater than the current offer—and potentially might result in a jury verdict that far exceeds it. Conversely, the defendant's goal is to persuade the plaintiff and counsel that the case is worth far less than the current demand—or that a jury might even return a defense verdict.

In advance of the mediation, I have found that I often challenge the attorneys on each side to provide facts or law to support the positions they take in their memoranda. In *ex parte* emails with each counsel prior to the day of the mediation, I have used my 50 years of civil litigation experience to “poke holes” in the positions taken, and I have found that by the day of the mediation the fixed positions of each side have weakened somewhat, enabling me to nudge them to the middle ground necessary for settlement. This advance preparation often makes meaningful movements on the day of mediation far more likely.

On the day of the mediation, the hard work begins. A good mediator must be willing to shuttle back and forth between or among the parties, encouraging movement away from their fixed settlement positions. This takes time and, on occasion, more than one day. But the parties agree on mediation because they want to resolve the case and an effective mediator should be willing to put in the time and effort to encourage the respective parties to reach their ultimate goal.

Because a mediator does not decide the case, I suggest that the prior experience of the person selected to be a mediator is less important. Whether he or she has had a career

as a plaintiffs' attorney or as a defense attorney is not really important. What is important is selecting someone who is willing to spend the time in advance to learn the nuances of the case so that he or she can effectively talk to each side in the various break-out sessions that lead to resolution of the case.

When I first started practicing law, the senior partner in my firm told me that a good settlement is one that no one really likes – it is invariably less money than the plaintiff wanted, and more than the defendant wanted to pay. But a good settlement is one that everyone can accept. An effective mediator must be respected enough by the attorneys on each side to be able to obtain movement to that uncomfortable position that is necessary for resolution of the case. Helping all parties to recognize the strengths of the opponent's evidence and the potential weaknesses in their own is often the key to moving the needle toward a settlement value that everyone can accept.

Dale G. Larrimore is an attorney and mediator with ADR Options in Philadelphia. He has been a civil litigation attorney in Pennsylvania since 1976, was senior partner of Larrimore & Farnish since 1994, and is now of counsel to the firm of Haggerty, Goldberg, Schleifer & Kupersmith.