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Choosing a mediator: Why different skill sets matter

Judges and attorneys bring different but invaluable strengths as neutrals, helping parties understand litigation risks and settlement benefits, while navigating the emotional and financial complexities of dispute resolution.

By Craig A. Schloss

When I left my private law practice to begin working as a mediator, I was confident I had the experience, skills and personality to excel in my new role. However, I had some concern about joining a field dominated by retired judges. I had been a highly rated and successful attorney, but this didn't allay some initial apprehensions about my place in the ADR pecking order. Most of the panelists at my new firm were retired judges. They had sat in pristine robes on the bench administering the law, while I was getting dirty in the trenches representing clients. Would I be able to achieve the level of respect and reverence as a neutral that judges are inherently afforded?

As I began looking closely at the mediation process, I realized that I needed to rethink my assumptions. Former litigators, such as myself, bring a unique and often critical perspective to the resolution of disputes. They can provide insights and experience that have been gleaned from working on the front lines. Former judges bring an understanding of the justice system into mediation and often become superb deal makers, but attorneys have a unique perspective on how deals get done.

Lawyers vs. judges

It's not a competition: Practicing attorneys and sitting judges are both valuable pieces of the litigation picture. Litigants need representation; they deserve strong advocates who will put their interests first. Parties



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involved in legal disputes need to have their stories heard; they deserve fair and impartial justice. Attorneys and judges fulfill these two critical functions – both help bring about resolution of often complex and difficult legal matters.

But when litigants seek to resolve their issues outside the courtroom, other functions may be even more important. A litigator who vociferously argues his client's case in court without giving any edge to the other side is to be praised. A former litigator who approaches mediation with the same level of contentiousness will not serve his clients' interests well.

A judge who evaluates and makes thoughtful and firm judgments about the parties' positions will render intelligent decisions from the bench. A former judge who harshly judges

the parties' positions in a mediation stands little chance of facilitating resolution. The very skills that can make judges and lawyers exceptional in the courtroom may undo their efforts to achieve closure in the mediation context.

Mediation skills

These fundamental differences are why aspiring neutrals, both judges and practitioners, undergo special training before taking on these new roles. They must unlearn some skills that helped them achieve success in their former positions and learn new skills that will help them succeed as mediators.

Former litigators must unlearn confrontation; former judges must unlearn judgment. Successful mediation calls for open communication, lack of judgment, and a willingness

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to work toward a mutually satisfactory result. It requires mediators who understand both the law and the dynamics of back-and-forth negotiations.

Judges know the law and the trial process. As neutrals, they can help parties in a mediation understand how their cases might play out in a courtroom before a jury. Practicing attorneys generally represent either plaintiffs or defendants. As neutrals, they have unique insight into that side's litigation experience and their settlement drivers. They have intimate awareness of the challenges of preparing and trying a case and the benefits of achieving a settlement, and they know the financial and emotional costs associated with a drawn-out lawsuit. Neutrals can use this insight to educate and persuade both sides to stop litigating.

Strategy may be key

A neutral must be open-minded and nonjudgmental. But in the real world,

there are many angles to consider when trying to resolve a dispute. A former judge may approach mediation with the same evaluative mindset that powered his or her judicial decision-making. This mediator can help parties understand how the evidence will be interpreted and what juries will do, which can be a huge benefit for parties who are vacillating between settling or going to trial.

Former attorneys, in contrast, may find it easier to be a facilitator rather than overly evaluative. If they represented just one side over the course of their careers, they are likely to make a concerted effort to be deliberately unbiased. They might also have more substantive knowledge of applicable law, especially if they specialized in the practice area that is the subject matter of the mediation.

In addition to having substantive expertise, a mediator who was a practicing attorney may be more

sensitive to how each side in a dispute is evaluating their case and the risks/rewards of continuing a lawsuit versus settling. He or she may know about hot-button issues in particular types of cases and may be able to help each side understand what might motivate the other side to change its position.

Retired attorneys are, at heart, dealmakers. They have a keen understanding of the settlement landscape. Judges may understand jury verdicts, but settlements are the work of litigators. They know the dollar amounts for similar cases that have settled and can advise parties in mediation based on this knowledge.

Conclusion

When choosing a mediator, there are many factors to consider. The type of case, the personalities of the parties, and evidentiary complexities may require the skills and knowledge of a retired judge.

But for many cases, an attorney's tool kit can provide a strong foundation for resolving disputes. Attorneys who litigated for clients were laser-focused on obtaining favorable pre-trial resolutions. As mediators, they can use that experience to bring parties together. Although many former judges also have settlement expertise derived from cases that required judicial approval of settlement, retired attorneys understand how those settlements were achieved - from start to finish.

Former litigators may have dirt under their fingernails from duking matters out for their clients, but most have seen and learned strategies and skills that can make a difference for parties struggling to reach agreement during mediation. They understand legal and practical issues facing litigants on both sides of the fence and can often bring a valuable perspective to seemingly intractable settlement negotiations.