

How to Choose a Good Mediator

Most lawyers want someone from their background, but picking from ‘the other side’ can be smarter

By Scott Delius



Scott Delius is a mediator with Miles Mediation in Atlanta. He has more than 16 years of experience litigating both sides of personal injury and workers’ compensation cases, which leads to a very high mediation success rate. He is a solo practitioner, an Afghanistan veteran and a major in the Georgia Army National Guard.

How do litigating parties pick a mediator? Everyone has ideas about mediation strategy, but how does the selection of a mediator affect the outcome of the negotiations? The answer may surprise you.

Litigating parties often have a preconceived notion of who their mediator should be. The defense lawyer usually wants a mediator with a defense background, whereas the plaintiff’s attorney generally wants a mediator with experience representing plaintiffs. Opposing counsel sometimes refuse to use a particular mediator because of the kind of work that the mediator does in private practice. The implication, and it’s not really implied at all, is that the mediator is incapable of being neutral because of his or her practice area.

This has always seemed counterintuitive to me, even before I became a mediator. I suppose that there are indeed “neutrals” out there who in fact are not. Thankfully, I don’t know any of them. My favorite saying as a mediator is that I have but one allegiance, one party to whom I am faithful, and that is to “the

settlement” itself. A mediator should not be concerned with impressing one side or another. That will come naturally if the case settles.

In any event, and for whatever reason, the conventional wisdom says that each side should strive to hire a mediator who does their kind of work. Supposedly having a fellow insurance defense lawyer as a mediator is going to help the defense negotiate a better deal and the assumption is that the mediator who represents plaintiffs will do the same for that side.

After successfully settling hundreds upon hundreds of cases as a mediator, I have a different perspective. I believe that lawyers should re-think the impulse to have “one of their own” act as mediator in every case. A closer look at the dynamics of a particular case may call for a completely different approach.

In my other life as a litigator, I often employ the “plaintiff’s expert” in my defense cases and vice versa in my plaintiff’s cases. I do that because I want a different perspective. I want my expert to identify both positive and negative issues, not just what they think I want to hear. I usually know what my strengths are, but I need my expert to also help me identify my weaknesses. An expert who only works for one “side” or the other may be lacking in that ability. That same philosophy may also be applied to mediators.

It doesn’t do a litigating party much good to have a mediator tell them what they want to hear. Praise isn’t always necessarily what’s best for our clients. Do you really want your mediator to tell you and your client that your case is rock solid, that you can’t lose and that you shouldn’t budge an inch? Maybe your client will appreciate it, but that probably isn’t going to help you settle your case.

Indeed, a good mediator asks the tough questions and points out the biggest risks to both parties. After all, that’s why you’ve come to the mediation table in the first place, to minimize your risk. How are you going to accomplish that if you don’t know what your risks are? I will submit that it’s a little too late once a jury lets you in on the secret.

If you’re the defense lawyer, there are some instances where you should strongly consider hiring a mediator who has the experience of litigating plaintiff’s cases. If

the plaintiff has unreasonable expectations, there's nothing more valuable than having a mediator who has the ability to look the plaintiff in the eye and tell him why his case is not worth what he thinks it is.

Mediators acquire that skill by having had the same heart-to-heart conversations with their own plaintiffs: clients. Credibility is everything to a plaintiff unversed in the law. It can be quite difficult to settle a case if the mediator is unable to make a "connection" with the plaintiff, especially where valuation is a sticking point.

Plaintiff's attorneys should also consider hiring a mediator "from the other side." If the plaintiff's attorney believes the other side is undervaluing their case, an experienced insurance defense lawyer working as a mediator can be extremely effective when it comes to persuading an adjuster to offer more money.

Insurance defense lawyers are skilled at advising adjusters on how to do their jobs. Plaintiff's attorneys may have experience negotiating with adjusters, but that's not what a good mediator does. An effective mediator speaks directly to the adjuster to help them do their job, which is to minimize the risk to their insureds.

It has happened to me countless times. I listen to each side's presentation at mediation and I think of a question or see an issue that neither side has considered before. That's because the parties often have tunnel vision. Litigators view and present the facts in the most favorite light for their client.

As someone who is new to the table, and who has represented both plaintiffs and insurance companies, I can see the entire case from all sides. I'm also able to have credible discussions with the plaintiff and the insurance adjuster because I've stood in their lawyers' shoes many times before.

It is very important to choose the right mediator for the job. Litigating parties should take the time to step away from the case and objectively evaluate the obstacles to settlement.

Resist the instinct to insist on a mediator from "your side." It may be that given the dynamics of your case, the opposite may in fact be needed, and hiring a

mediator from “the other side” might actually be the key to getting your case settled.