Beware the "Hallelujah!" mediator

Accepting a mediator without understanding their training, experience, style and methodolgy can cause you to lose control of your case

By Nancy Neal Yeend

Hallelujah mediators are individuals who wake up one morning with a *"special"* vision. Like moths drawn to a flame, or like zealots, they have *"seen the light."* Mystically, they pronounce themselves "*mediators*" and begin their new careers with little or no training in the art of mediation.

Through deception, sheer luck or (rarely) innate ability, some function reasonably in the role of mediator while the vast majority do not. They are doing something – it's just not mediation. This is where the problem arises for the attorney who has planned and prepared for mediation. Attorneys who unwittingly participate in a process run by a Hallelujah mediator often unexpectedly find themselves in a settlement conference, arbitration, or private judging process.

If an attorney does not care what the process is, or is called, or how it works and just wants someone to dictate terms, then Hallelujah mediation could work. On the other hand, if an attorney wants to retain control over the outcome by actively negotiating a solution that is in a client's best interest, then the following should be considered when selecting a mediator:

Verify the extent of the individual's training as a mediator.

Discover whether the mediator has experience with similar cases.

Assess the mediator's approach to his or her role in the process.

Determine the mediator's concept of confidentiality.

Consider the mediator's style and methodology.

Training

Researching the prospective mediator in advance allows an attorney to determine if, and to what extent, the individual received formal training in the mediation process. Studies have proven that no degree or previous profession qualifies a person to serve as a mediator. At a minimum, the individual should have taken a mediation course that included 40 hours of instruction and incorporated role-play practice.

There are also subtle clues that will provide evidence of an individual's grasp of mediation basics. For example, if a mediator states that in his/her last case the "*owner prevailed,*" or otherwise indicates the concept of a winner and a loser, then consider a different mediator. Winning and losing are concepts associated with settlement conference, arbitration, and private judging – not mediation.

Experience

Direct, hands-on experience mediating cases involving the same subject matter is critical. As part of due diligence, an attorney should interview the prospective mediator. When asking the mediator about similar cases, a hedged response may be a sign it is time to consider other alternatives. While a mediator does not need to be a subject-matter expert, an understanding of the fundamentals and familiarity with industry customs is a definite plus.

Role

Ask the mediator to describe how s/he intends to manage the mediation process. Does the description comport with the statutory definition? California Evidence Code section 1115(a) defines mediation as "*... a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement.*" An attorney should run if a prospective mediator says, "*I've mediated 100 cases and I settled 99!*" A mediator with such strong ego involvement can be overbearing and controlling, rather than facilitative, and will soon sideline an attorney.

The statute defines a mediator as a neutral. This means that they cannot become advocates for either side. Hallelujah mediators frequently profess to be clairvoyant and have the ability to predict what a court or particular judge will do. These characteristics are indications that they are more likely to slide into settlement conference or private judging mode. Making sure that a mediator's understanding of the process matches what the participants expect may prevent attorney frustration and client disappointment.

Confidentiality

Determining if a mediator understands confidentiality, and can articulate statutory exceptions, is another important discussion. California has few exceptions to confidentiality – basically reporting abuse and criminal activity.[1] At present, even evidence of attorney malpractice is protected.[2] Should an attorney be concerned about mediator malpractice? Ask to review a mediator's confidentiality agreement. Attorneys often forget that these agreements can be re-written and specific exceptions to confidentiality may be delineated. Making sure that the client

understands the parameters of the confidentiality privilege is very important.

Style and methodology

If the responses to the other inquires are acceptable, do not forget to ask a mediator to describe his/her style, methodology and procedures. Will the mediation be conducted in a facilitative, evaluative or directive manner? Does a mediator have pre-mediation conversations with counsel to get a better understanding of the case and issues to be resolved?[3] Are those conversations *ex-parte* or will counsel meet together with the mediator in a pre-mediation phone conference? Does the mediator help identify who needs to attend the mediation, determine who has settlement authority, or clarify just what "*settlement authority*" means? If these basics are missing, the potential for settlement is diminished. Hallelujah mediators often do not recognize or appreciate that anticipating problems before the session saves time and prevents impasse later.

Asking if a mediator gives assignments or requests briefs is prudent. Mediators who fail to encourage counsel to prepare, diminish the odds of settlement. The mediator who gives assignments in advance is actually helping counsel prepare. Attorney preparation is the primary formula for a successful outcome.

The importance of joint sessions

Does a mediator give an opening statement? Even if the attorneys have heard a particular mediator's opening, the parties typically have not. Do the participants have an opportunity to outline the issues they would like resolved? Hallelujah mediators are either afraid of dealing with parties' emotions or are just unskilled; so do not permit participant opening remarks. When counsel has a chance to state, so everyone hears, what is important, it opens the channels of communication.

Does the mediator have the parties start in a joint session, or does the mediator keep everyone separated for the entire process? After not seeing the other party at the beginning of the mediation, it can be extremely irritating to learn later that they only spoke to the mediator by phone – especially when you and your client traveled a great distance to appear in person.

Keeping everyone separated is a common Hallelujah mediator tactic, and one that disadvantages an attorney. Remember, words comprise only 7 percent of a communicated message. The balance of the message is made up of voice inflection and body language. Good negotiators demand to see and hear for themselves what is being offered. Without 100 percent of the message, an attorney cannot negotiate effectively.

This last point could signal problems with the process if the Hallelujah mediator proposes what is euphemistically called "*shuttle diplomacy,*" and conducts the entire mediation in caucus. With this scheme, the mediator is more likely to dictate settlement terms, thus diminishing attorney/client control over the outcome. Mediation, if conducted appropriately is the "*participants' last opportunity to control the outcome.*" More importantly, how does the attorney know whether a mediator is conveying the information accurately or, even worse, revealing confidential information?

Hallelujah mediators, who are uncomfortable dealing with parties' emotions, typically lack substantive training in interpersonal and communication techniques, so do not permit participant opening remarks. If Hallelujah mediators no longer have dictatorial power or a gavel to bring order, they control by separation. Running the entire mediation in caucus reminds one of the cliché, *"When the only tool in a toolbox is a hammer, then everything looks like a nail."* Perhaps it is time for attorneys to find mediators with more tools.

Separation prevents the insurance company from fully appreciating the impact of the event on the plaintiff or prevents assessing how strong a witness the client will make if mediation fails. Separation prevents hearing an acknowledgement that someone did something wrong, or hearing a heartfelt apology. Hearing someone admit that they made a mistake will often settle a case faster, because the listener finally hears that they were right! Ego validation is a very important settlement criterion. Research confirms that unprompted, heartfelt apologies go a long way toward resolving a case. These admissions can settle cases faster than having a mediator go back and forth between caucus rooms slowly closing the gap between demand and offer. Hallelujah mediators rarely recognize that there are "*currencies*" other than money.

Avoiding Hallelujah mediators helps attorneys to retain control over mediation outcomes, which results in higher probability of producing settlements that meet clients' individual needs. There is nothing like satisfied clients for generating future referrals — Hallelujah!


Yeend

Nancy Neal Yeend is an experienced, nationally recognized dispute management strategist and mediator. As a strategist, she has designed court-connect mediation programs, including Maryland's first appellate mediation program; and she evaluates existing court ADR programs. As a mediator Nancy handles real estate, employment, partnership and related business cases. She serves on California's First and Third District Courts of Appeal Mediation Panels. She co-founded Silicon Valley Mediation Group in Los Altos. Nancy has served as a faculty member at the National Judicial College for 19 years, and has helped train over 5000 mediators. Her publishing credits include what some consider the seminal study of appellate ADR in state courts.

Endnotes

[1] Evid. Code section 1119, subds. (a), (b).
[2] See *Cassel v. Superior Court*, 51 Cal.4th 113, 244 P.3d 1080, 119 Cal.Rptr.3d 437.
[3] See *The Quid Pro Quo of Mediation*, Jerry Spolter, Plaintiff Magazine, July 2011.