

Including an expert in mediation

An expert in a complex matter can be helpful in resolving a matter in mediation more quickly

By Nancy Neal Yeend

When the topic of including an expert in a mediation is broached, attorneys will typically respond with one of two comments: *"We have never used an expert in mediation"* or *"It will cost too much."* Now wait, before you turn the page, stop and think about two things:
1) clients want to spend less and yet get the "right results" and 2) they do not want cases that seem to go on forever. Well, experts may just be the answer, and your incorporating them earlier in the litigation process may bring you more satisfied clients.

Benefits

As a mediator, I have observed firsthand how early inclusion of an independent expert enables the design of settlements that are "perfect fit" solutions to their unique problems. Attorneys who look at experts with a wider lens often see how the expert's experiences with similar cases can provide information that is useful beyond merely subject-matter testimony.

Some examples include:
- insight on strategic planning for negotiations;
- familiarity with proposed mediators;
- objectivity during case analysis;
- emotional stability, especially when working with stressed clients; and, of course,
- subject-matter expertise.

Experts are invaluable resources, since they can provide insight and information about many aspects of a case and about specific individuals. As a result of his/her experience with different lawyers, an expert may provide insight on how some attorneys prepare for a case or their negotiation strategies. This information



could be of value when you are not familiar with opposing counsel.

Experts may have served in other mediations and observed the qualities of different neutrals. Again, this information may be of value when selecting a mediator for your next case.

Courts presume that experts are neutral, and for this reason, an expert may be a viable resource when assessing a case. In a recent report, Dr. Michael Hammes, PricewaterhouseCoopers' director, stated that *" Where the factual context is often not fully known, experts can assist in finding the crucial facts, which may support the strengths of a case and also identify its weaknesses."* When conducting a 360-degree case analysis, experts can provide not only objectivity, but also provide insight as to how opposing counsel may evaluate the case.

Clients are often emotionally involved with their case, thus producing selective hearing. You may have stated that the case possibly will settle within a certain range, but the client only hears the highest number. Experts may be of value during these conversations and help with client understanding.

Naturally, in complex cases an expert provides added value by being able to suggest possible solutions developed in other cases, or can just help untangle confusing technical jargon.

Impediments

Clearly experts are not needed in every case. They are most beneficial when included in construction, intellectual property, contentious divorce, multiparty, or cases that present complex, highly technical or significant tax issues.

Typically, the argument against including an expert early in the process is cost. Yet, early resolution through direct negotiations or during mediation saves time, money and other valuable resources – not to mention stress on the client. When both sides agree on one impartial expert, the cost is further reduced.

It is understandable that an attorney does not want someone kibitzing from the sidelines; so early involvement of an expert is often dismissed. Consider for a moment the benefit of an extra pair of eyes to strengthen your case or prevent a costly mistake. Would it be worth the risk?

Timing

Due to pressure exerted by clients, attorneys are caught between the proverbial "rock and a hard place" with the client saying, *"Get me what I want, and do not spend much money doing it!"* Of course there are those clients who say, *"spare no expense!"* and yet these are often the ones who yell the loudest when they open the final bill. For this reason, if for no other,

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it is important to consider an expert sooner rather than later.

Even if involving an expert during the initial stages of the case were unpalatable, then certainly prior to mediation would be advisable. Discuss the involvement of an expert with opposing counsel early in the process to further reduce expenses. When both sides agree to use a single, independent expert as an information resource, and not an advocate who reiterates the client's position, overall expenses are reduced.

Requisite qualities

Although the term "expert" may be attached to a person's name, determining the legitimacy of the label is important. Granted an expert must have industry knowledge, but how did they acquire it, how long ago – in short what are his/her credentials? An independent, objective assessment by an expert is extremely important, especially if each side is hiring their own expert.

Possessing the ability to explain complex issues, not only to the parties, but also to counsel is desirable. Experts who possess sound analytical skills and integrity, coupled with clear communication abilities, hold a winning combination.

Experts in mediation

For more effective involvement of experts in mediation, it is wise to consider the following and avoid being bitten by the proverbial asp: assessment, selection and preparation.

• ***Assessment:*** During the initial case assessment, explore involving an expert. Is the case complex; does it involve highly technical issues; are there extensive variables influencing damage calculations; or are tax issues significant? These are just a few of the factors that indicate consideration of an expert early in the process.

Assessing whether an expert would be useful in assisting with selecting a mediator, understanding the other side's case, or evaluating your case can be beneficial. If there is a possibility that an expert may help with resolution of a case, then a discussion with opposing counsel and the mediator is warranted.

• ***Selection:*** The ideal is for everyone to agree on one neutral expert. This reduces costs and frees the expert to truly remain impartial when assessing the facts. As one mediator said, *"The expert's role is as an honest broker rather than an advocate."*

Basic characteristics of an expert, especially useful in mediation, include subject-matter expertise; understanding of and experience with the mediation process; and effective communication skills.

• ***Preparation:*** In addition to being certain that the expert is familiar with the mediation process, it is critical that the expert understands confidentiality. The wise attorney will include specific language in the mediation confidentiality agreement that cites California Evidence Code section 1119, which references statements and admissions, and writings prepared for or developed in the course of the mediation. Some attorneys require that experts mark all mediation materials as *"For Settlement Purposes Only."*

Discussion with the mediator and opposing counsel often includes the time and manner of the expert's involvement. Consider whether the expert will attend the entire mediation or be conferenced in when needed. Developing an outline of factors to be considered or questions to be answered by the expert can be done during these early joint discussions.

Conclusion

Experts may be a useful resource when settlement is the goal. Benefits are numerous, especially in cases involving highly technical, substantial liability and damages, or complex tax issues. Although experts are not needed for every case, selection of an impartial expert often produces cost-effective settlements. If each side uses their own expert, keeping the focus on finding a solution rather than dwelling on minute differences benefits everyone.


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