Seven traits of highly effective mediators

Finding the right mix of specialized knowledge, involvement and creativity is how to stay out of court

Deborah Howden

Not all mediators are created equal. Like many lawyers, I have been to mediations where settlement was a longshot and where agreement between litigants was only achieved through the sheer skill and effort of the mediator. On the flip side, I have also participated in mediations which had a solid opportunity for settlement, but which nonetheless failed because the mediator was simply not up to the task. A good mediator can quickly identify the parties’ interests, narrow the contentious issues and bring the parties to a mutual agreement in circumstances where no such common ground existed theretofore.

A good mediator can quickly identify the parties’ interests, narrow the contentious issues and bring the parties to a mutual agreement in circumstances where no such common ground existed theretofore.

Deborah Howden
Shibley Righton LLP

Knowledge

Parties typically attend mediation either because they have not bothered to broach settlement directly, or because they are at a settlement impasse. In either case, if the mediator is not indomitable, the opportunity for settlement will be lost. In personal injury cases, mediation can work like highly-paid messengers. An effective mediator will become actively engaged in the settlement negotiations, the mediator openly admitted that he did not know the applicable law relating to the extent of the employer’s mitigation obligations. We did settle the case, but it was in spite of the mediator, not because of him. A highly effective mediator is well versed in the pertinent law and will be in a position to point out the weaknesses in a party’s legal position.

Credibility

Closer to this extensive knowledge of the law is the ability to make meaningful, important contributions to the issues in dispute between the parties. These mediator “weigh-ins” must be useful and persuasive, neither of which can occur if the mediator’s opinions are not considered trustworthy in the eyes of all of the parties. Practically speaking, this means the mediator should have some relevant experience under his or her belt to establish some “street cred.”

Tenacity

Parties typically attend mediation either because they have not bothered to broach settlement directly, or because they are at a settlement impasse. In either case, if the mediator is not indomitable, the opportunity for settlement will be lost. In personal injury cases, mediation can work like highly-paid messengers. An effective mediator will become actively engaged in the settlement negotiations, the mediator openly admitted that he did not know the applicable law relating to the extent of the employer’s mitigation obligations. We did settle the case, but it was in spite of the mediator, not because of him. A highly effective mediator is well versed in the pertinent law and will be in a position to point out the weaknesses in a party’s legal position.

Persuasion

Let’s face it—some mediators work like highly-paid messengers, merely delivering offers to and fro between the warring factions. You could save your client a whole lot of money by simply holding a settlement meeting or engaging the services of a FedEx delivery person. An effective mediator will become actively involved in the negotiations and lean on the parties to effect a settlement, leaving the pure messaging services to the men and women in the brown uniforms.

Discretion

Nothing can derail settlement negotiations like a mediator providing his or her view of the case—or even certain elements of the case—to the parties at the outset of the mediation. As a neutral intermediary, the mediator must refrain from commentary that will drive a wedge between the parties and cause them to become more entrenched in their positions and less willing to negotiate. Some aggressive mediators will attempt to strong-arm parties by openly showing their disagreement for a certain position that has been taken by one side or another. Polarizing commentary should almost always be shared privately, and not during any open sessions.

Intuition

A good mediator will wade through legal positioning and focus on a party’s true interests. I defended a civil sexual assault claim against an institutional client many years back, and settlement seemed almost impossible. Near the end of the mediation session, the mediator invited the parties into a joint session where the mediator was allowed to express to the

defendants (in very loud fashion) his anger, hurt and frustration. An apology was offered. With the assistance of the mediator, the parties finally began real dialogue and less than an hour later, the plaintiff accepted a reasonable settlement offer. The plaintiff’s claim was never really about the money—he just wanted to be heard and believed, which the mediator picked up on.

Creativity

Used with intuition, it can be the secret to achieving settlement. Effective mediators will propose creative solutions to keep the parties at the settlement table. These solutions come as unique proposals having regard to the parties’ true interests.

Settlement is never inevitable. The converse, however, is also true—settlement is never unachievable. Choosing the right mediator can make the difference between retreating a claim at earlier stages and having to go to the courtroom steps—or further.

Deborah Howden is a partner at Shibley Righton LLP and is a senior member of the firm’s Labour, Employment and Condominium Law Groups.

Bulldozer used to tidy up the house

Most men don’t make home renovation decisions without their wife’s OK, but a Middletown, N.Y., man is in legal hot water for doing just that. MSN.com reports that 48-year-old James Rhein became so frustrated with the dilapidated condition of the 900-square-foot home he shares with his wife that he rented a bulldozer and demolished it. Trouble is, his wife was not only absent at the time but the house is in her name. The police arrived to find Rhein filling dumpsters with debris, including furniture, clothes and appliances. In his defence, he said he tried to call her but she didn’t pick up. He also tried to get a demolition permit but the office was closed for Martin Luther King, Jr. Day — he did have the water and gas turned off. Rhein was charged with felony criminal mischief and released on bail, but doesn’t see what all the fuss is about. “We’re married,” he explained. “It’s a community asset.” Rhein’s wife was upset at first but has calmed down he said, adding, “we’re good.” — STAFF