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## Finding The Best Neutral To Hear Your Case

*The Editor interviews **The Hon. John W. Bissell**, Counsel, Connell Foley LLP; **The Hon. Barry A. Cozier**, Member, Epstein Becker & Green, P.C.; **The Hon. William A. Dreier**, Partner, Norris McLaughlin & Marcus P.A.; **John C. Emmert, Jr.**, Senior Vice President, American Arbitration Association; **Robyn M. Gnudi**, Partner, St. John & Wayne, L.L.C.; **The Hon. H. Curtis Meanor**, Partner, Podvey, Meanor, Catenacci, Hildner, Coccoziello & Chattham; **Margaret L. Shaw**, JAMS Mediator/Arbitrator; and **J. Warren Wood III**, Of Counsel, Greenbaum, Rowe, Smith & Davis LLP.*

### **Editor:** What are the characteristics of a good neutral?

**Bissell:** A good neutral must remain truly neutral throughout any ADR undertaking. This does not mean that a neutral (particularly a mediator) should not criticize a party's position in order to facilitate compromise. Also, searching questions to reveal critical issues or to expose faulty arguments are important tools for a neutral.

A good arbitrator, like a good judge, must be decisive, clear and prompt in making rulings both during and at the conclusion of the proceedings. A good mediator's main strength is a facility for conciliation of what may appear to be irreconcilable positions, employing creative techniques and insights. Also, objectivity, patience, a calm demeanor, determination and courage characterize both the good arbitrator and the good mediator.

The dynamics of certain types of disputes can be dramatically different.

Charges of unfairness or discrimination in employment decisions usually generate highly emotional positions on both sides which can be major barriers to dispute resolution. Commercial disputes usually are not burdened with such issues, but, of course, present their own challenges including the neutral's interpretation of a contractual ADR provision and the need to resolve complex accounting and damages questions. Finally, some disputes arise from a highly technical setting, suggesting the use of a neutral with a specialized background in a particular scientific or engineering discipline.

Just as a judge can and should consider the ramifications of a decision which may extend beyond the particular case (and thereby trigger legitimate public interest), so too may the neutral in crafting either a settlement or decision. In short, public interest should neither dictate the result nor lead to a neutral's exceeding the scope of his/her authority; but it can play a legitimate role in the manner in which the resolution of a dispute in ADR is expressed.

**Cozier:** Good neutrals should have excellent listening and communication skills. A neutral who can digest the positions and discern the nuances in a dispute can more efficiently identify, understand and make use of the parties' shared commonalities and relative goals. The ability to articulate potential solutions and, where appropriate, persuade the parties is also critical.

Neutrals should have the requisite training and experience required to maximize the dispute resolution process. Experience in the law of the case is beneficial, particularly in neutral evaluation, but not an absolute prerequisite. Furthermore, the neutral must necessarily have

the intellect required to understand the nature of the dispute and the goals of the parties.

It is necessary that the neutral command the trust of the parties. The neutral should be viewed as a person of integrity who can and will maintain confidences and manage the process in an impartial manner.

**Dreier:** A neutral must be ethical and open minded. Retired judges make good neutrals, as do lawyers with the appropriate training and experience. Ask colleagues about the neutral's patience, flexibility and creativity. When considering the neutral's fees, remember the adage that you generally get what you pay for.

A mediator needs to be able to bring the parties together so they can understand each other's positions as well as the strengths and weaknesses of their own. An arbitrator has to be able to make a decision and give reasons for it. The parties should not feel that the arbitrator denied them a proper ruling under the law.

Some subject matters require the neutral to have a sophisticated background. For example, some mediators and arbitrators have developed highly specialized expertise for helping to resolve construction disputes. In the matrimonial area, family law expertise is invaluable. I am a commercial mediator.

**Emmert:** At the AAA, we have found that individuals with at least 10 years of experience in their chosen field and a solid knowledge of applicable rules, procedures and law or industry practices are more likely to have the foundation necessary to become an AAA neutral as well as

to meet parties' requirements for a neutral. In addition, neutrals must have a strong and thorough understanding of their role and authority in the arbitration and mediation processes.

Neutrals must also possess naturally balanced thinking, be free from bias and prejudice and possess the ability to evaluate and apply legal, business, and trade principles. Neutrals must approach each case with an open mind, giving full consideration to all evidence and testimony, and possess the willingness and the ability to adhere to the procedures and agreements of parties in a fair, efficient fashion. Finally, neutrals must be held in high regard by their peers in terms of integrity, fairness and good judgment as well as their willingness to make all appropriate disclosures in accordance with applicable ethics standards.

A good arbitrator must have the judicial capacity to manage an arbitration case efficiently and effectively. And, a good mediator must be a superior problem solver who pursues collaborative solutions, generating ideas and proposals that are consistent with case facts as well as being workable for the parties involved.

**Gnudi:** A neutral must have a number of characteristics to be effective:

*Perseverance.* It is too easy for a mediator to throw his or her hands up in the air once the parties indicate that this is the "final offer" or they "won't take a dime under" a certain number. In mediation, it is rarely, if ever, the final offer or demand and a good mediator knows that and will not let it effect their efforts to resolve the case.

*Experience.* The best mediators are those who have litigated on both sides of the "v." An attorney who has represented plaintiffs and defended insureds, will have a much better understanding of what is important in the minds of the parties. A good mediator must take advantage of the insight gained as a litigator to resolve the difficult cases.

*Good listening skills.* The parties can easily take control of the process and let the neutral become merely the conduit for information. Why do parties want to pay for someone to relay information back and forth? A good mediator listens carefully to the spoken and the unspoken

words (e.g. body language) to determine what a party is really looking for and does a lot more than just relay numbers.

*Good people skills.* A mediator who is standoffish and unapproachable will not be successful or sought after. A good neutral must sit back, roll up his sleeves and get in the trenches with the parties.

**Meanor:** The neutral has to have the intellectual curiosity and diligence to do the homework necessary to understand the issues in dispute. In addition, the neutral must be able to communicate with the parties.

As well as being creative, the neutral needs to be practical. For example, if I think that one party does not understand the other side's case, I have each lawyer give a detailed opening statement because people often react more to spoken than written words. In arbitrations, I may ask the parties' attorneys for a list of the relevant cases so that the parties do not have to incur the expenses associated with extensive briefs.

The neutral should know the area of law applicable to dispute. New Jersey has a large pharmaceutical industry, which has given rise to a lot of generic competition. I have experience hearing many of these patent and other pharmaceutical cases.

**Shaw:** A neutral must be trustworthy, highly ethical, and able to quickly grasp the issues in dispute. For mediators, whose task is not to make decisions but rather to help the parties themselves make what are often very tough decisions, the abilities to listen deeply, and to be creative, persuasive and persistent are tantamount. They must quickly gain the parties' confidence, understand what is at stake for each party and go the distance in helping the parties to reach a resolution.

Because arbitrators preside over a process that is adjudicatory, examining evidence and rendering a final decision on liability and damages, expertise in a subject matter can be important, although impartiality and general business, financial and legal experience are often thought to be more so. A common complaint is undue delay in rendering awards, so knowing an arbitrator's track record of issuing fair, well reasoned written awards on a timely basis is a key consideration

Because each case comes with its own particular characteristics and barriers to settlement and each neutral has unique strengths, identifying the appropriate neutral for each case is important. The advantage of ADR, of course, is that the choice of neutral rests with the parties themselves.

**Wood:** A good neutral will possess the following characteristics: Impartiality and independence; practical experience in the arbitration, mediation or other ADR process; willingness and ability to commit sufficient time to see the process through to a timely conclusion; at least general familiarity with the context and subject matter surrounding the dispute; ability to actively, efficiently and flexibly manage the process, including early identification and narrowing of the factual and legal issues; and ability and skill to bring the process to a conclusion and, in the arbitration context, to issue a timely award covering all the issues. In the mediation context particularly, flexibility and creative skills are required to find ways – typically those not thought of by the disputing parties – to accommodate the competing needs of the disputants sufficiently to permit a settlement acceptable to all.

**Editor: How do corporate counsel identify the appropriate neutral needed to help resolve their company's dispute?**

**Cozier:** Corporate counsel should first focus on the relative strengths and weaknesses of their position, what they hope to achieve through the ADR process, and the personalities and goals of the adverse party and their counsel. These considerations will assist counsel in identifying a neutral whose style or approach best suits the matter at hand. For example, does the matter require a neutral who will intervene more or a neutral who will facilitate the parties reaching their own resolution? Do the personalities require that the neutral have a firm hand and set firm deadlines?

Corporate counsel should consider neutrals who have experience working on similar disputes or former related adjudicative experience to help the parties obtain a better understanding of their case

early on.

In addition, counsel should obtain prospective neutrals' resumes and, if possible, speak to other attorneys who have appeared before the neutrals.

**Dreier:** A dozen or so former supreme court justices, federal judges, lower court state judges, top practitioners and I formed the Resolution Group, making it easy for corporate counsel to find the expertise they need in helping to resolve their companies' disputes.

CPR maintains a distinguished neutral list in each state, as well as a national panel. Its list of industry and subject matter experts can be useful for finding a neutral with specialized experience.

The American Arbitration Association also has good lists, as does JAMS. Many courts have lists of certified mediators. The list of America's Best Lawyers includes some excellent ADR specialists.

Overall, corporate counsel should gather information about others' experience with the neutrals. Word of mouth can be invaluable in gauging potential neutrals' reputations. After examining their credentials, a conference with the neutrals can be very helpful in finding the right mediator or arbitrator to help you resolve your company's dispute.

**Emmert:** The American Arbitration Association provides a number of tools to assist parties in selecting appropriate neutrals for their cases including: an administrative conference, AAA Enhanced Neutral Selection Process, and AAWebFile<sup>®</sup>. Parties involved in a case may wish to utilize an administrative conference to discuss the area where the neutral should or must be located as well as his or her expertise, qualifications, and fees. The AAA's Enhanced Neutral Selection Process provides five different screening methods for parties to consider, including

prequalification of neutrals for disclosures and a pre-screening interview processes. AAWebFile enables parties to select their neutrals electronically through a secure and proprietary system located on the AAA's website at [www.adr.org](http://www.adr.org).

**Gnudi:** Most times it is by word of mouth recommendations. Nine out of ten times corporate counsel consult with other attorneys about their experiences with mediators. Success rate is very important. Equally important is the experience and stature of the mediator. The mediator must not only know what they are talking about but be respected by the parties – particularly the corporate representative or officers.

**Meanor:** Having former judges serve as arbitrators can add predictability because of their extensive experience in applying legal principles. In addition, their knowledge of techniques to expedite discovery can make arbitration much cheaper and faster than going to court. Similarly, judges know how to run a hearing, which helps add additional efficiency and speed.

The parties can select a neutral by name or ask an organization, such as AAA, CPR or JAMS, to select the neutral based on qualifications required by the parties, such as former judicial experience.

Resolution of disputes is easier to organize with a sole arbitrator. When chairing an arbitration panel, I ask the parties to agree that all of their discovery disputes should be decided by me alone so it is more expeditious. When three busy people are on a panel, it often is difficult to get together to have a discussion to make a decision.

**Shaw:** The best source of information about neutrals is other counsel who have

used neutral services. Many in-house lawyers and law firms regularly discuss recommended neutrals by department-wide or firm-wide e-mail or through listserves.

Organizations such as the International Institute for Conflict Prevention and Resolution, JAMS, and the American Arbitration Association have rosters of neutrals and personnel who can guide counsel to appropriate individuals.

Many neutrals themselves have websites and welcome the opportunity to discuss their general approach to the dispute resolution process, their style and their experience, and whether they perceive there to be any conflicts in a particular case.

**Wood:** Selection of neutrals can occur in a number of ways depending on the form of ADR to be employed, e.g., arbitration or mediation, the specific contract provisions, if any, mandating the use of ADR, the identity of the other parties involved, the amount and other issues in dispute, and whether or not an ADR administrative institution is utilized. Institutions like the American Arbitration Association and the International Institute for Conflict Prevention & Resolution maintain rosters of neutrals that corporate counsel may use in the selection process. In addition, certain individuals may be known to counsel through prior experience, reputation or recommendation from respected sources. In the international arbitration context in particular, each party ordinarily appoints an arbitrator, and those two appoint the third, who will chair the panel. The selection of a mediator necessitates cooperation of the parties in the selection of the neutral. A recent development in the neutral selection process, especially in larger matters, is the use of questionnaires as well as face-to-face interviews of prospective neutrals.