



AMERICAN ARBITRATION ASSOCIATION®

EDUCATION SERVICES

NEUTRAL SELECTION – TIPS FROM THE FRONT LINE

Guidance from Two Neutrals on the Selection of Arbitrators and Mediators



Webinar
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Three Main Topics of Webinar

1. Arbitrator Selection
2. Mediator Selection
3. Selection Approaches and Evaluation of Candidates



Important Qualities

- Case Management Skills - efficient, decisive, organized, capable manager.
- Experience/Background - familiarity with subject matter, experience with types of claims, e.g., multi-party and complex claims.
- Attentiveness/Quick Study.
- Ability to influence others for tribunal service.
- Award writing skill.
- Proper Temperament/Good Judgment.



Rate of Compensation

...and Other Charges

- Such as travel time, expenses, cancellation fees.



Limiting Criteria

- Compliance with qualifications required by parties' arbitration agreement - e.g., nationality, language, place of residence, education/training, field of practice or work position, experience.



Note to contract drafters: Be cautious about constraining the qualifications too narrowly.



Particularize Arbitrator Selection To Dispute At Hand



Important Qualities

- Negotiation skills.
- Ability to influence others.
- High-energy level.
- Perseverance.
- Experience/Background – familiarity with the disputed issues.
- Efficient.



Personality/Style of Mediating



Parties often say they want a mediator who is not afraid to tell a side where they are wrong, will be tough - but those traits are not necessarily productive.



Selecting the Mediator – Personality/Style

- Level of Involvement:
 - Mediators who act like arbitrators.
 - Creativity in fashioning remedies.
 - Tailors process to parties' disputes - e.g., using opening presentations or not, use of offers and counteroffers, joint sessions vs. caucuses.
- Ability to work with parties who have high emotional involvement.
- Facilitative vs. Evaluative.



Particularize Mediator Selection To Dispute At Hand



Formulation of Selection Process

- Where to search.
- Important characteristics of neutral.
- Ranking of criteria.



Formulation of Selection Process

- Neutral's experience in field of the dispute - expertise in the field valuable to the case?
- ADR clause - may specify qualifications of neutral and selection process, such as party-appointed arbitrators and selection of chair.
- Interviews - in person or by telephone, individually or in a group, conducted by one or two persons or a committee or board.





Locating Candidates



Rosters of Arbitral Organizations

- Appointing institutions maintain lists of qualified neutrals.
- Standards of entry vary, and can be high.
- Regional ADR organizations – exist throughout United States and vary by types of disputes handled.
- “Pay to List” Organizations - rosters not vetted or subject to continuing education.



Locating Candidates – Arbitral Organizations

Examples of prominent national and international arbitral organizations:

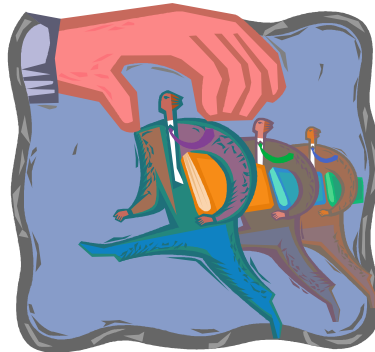
- American Arbitration Association (AAA)
- JAMS
- International Institute for Conflict Prevention & Resolution (CPR)
- CIArb (The Chartered Institute of Arbitrators)
- Arbitral Women
- Foreign Arbitral Organizations e.g., LCIA, SIAC, KLRCA
- International Mediation Institute - mediators only
- International Academy of Mediators - mediators only
- College of Commercial Arbitrators
- National Association of Distinguished Neutrals (NADN)

(Note that their lists of neutrals may not be publicly available, with access limited to their neutrals, their members, or parties using the institution to administer the case.)



Locating Candidates

Screened by arbitral organizations - roster-wide selection involving national search can be done, most commonly in large cases or where specific, even unusual, neutral expertise is required.



Recommendations



- Neutrals known to you or your colleagues.
- Neutrals proposed by opposing counsel.
- Neutrals proposed by other arbitrators and mediators.
- Neutrals identified by neutrals being interviewed.



Potential Questions to Recommenders



Locating Candidates - Potential Questions

- In what circumstances did you observe the arbitrator/mediator's capabilities?
- Describe the types of claims presented, whether there were multiple parties, motions practice, how attorney's fees were handled .
- Characteristics of the arbitration/mediation - for example, international parties, language barriers, cultural issues, time pressures.



Locating Candidates - Potential Questions

- Level of arbitrator/mediator involvement, understanding of issues and interests.
- If arbitration, did the arbitrator dissent from any rulings, orders or awards? Type of dissent? Reasons?
- Disposition of arbitrator/mediator - for example, professionalism, attentiveness, fairness, objectivity, efficiency, managerial skill.



Locating Candidates - Potential Questions

- For mediators: Ask about the mediator's style (facilitative or evaluative, and whether it was effective), creativity in fashioning solutions, control over emotional participants or sensitive topics, perseverance, facility in handling impasse.
- Clarity, completeness and timeliness of written orders, rulings, awards (for mediators - these questions translate into responsiveness, efficient management, and ability to transmit facts and positions accurately).



Locating Candidates - Potential Questions

- Did the arbitrator/mediator require the parties to perform tasks that the parties considered unreasonable or unnecessary?
- Arbitrator's/mediator's understanding and application of relevant law and ADR rules.
- Did the arbitrator/mediator work with the parties to design and tailor the dispute resolution process to the case at hand?



Locating Candidates - Potential Questions

- Sufficiency of administrative support.
- Compensation – were fees and costs reasonable?
- Would you select this arbitrator/mediator in the future, and if so, with any reservations or limitations on the nature of the dispute and parties involved?



Other Resources

- Advertisements by neutrals/their firms in legal publications.
- Web Sites marketing neutrals.
- Publications by neutrals.



Sources of Information About Candidates



Sources of Information About Candidates

- Resume/Website review of candidates.
- Interviews (in-person or by telephone).
 - Interviews are permitted under applicable ethics standards.
 - Interviews can be conducted ex parte. (Note that scope of inquiry is strictly limited by applicable rules of ethics, which include confidentiality; advisable to have case manager present during interviews.)



Sources of Information About Candidates

- Scope of inquiry of arbitrators and mediators:
 - Merits of dispute cannot be addressed with potential arbitrator.
 - Confidentiality obligations of arbitrators and mediators limit their responses.
 - Proper inquiries **in ex-parte interviews** can address general nature of dispute, candidate's suitability to arbitrate or mediate dispute, including availability, conflicts, language proficiency, references, party's preferences for the chair where chair selected by co-arbitrators, candidate's experience and preference on form of awards, **scope can be broadened in inter-party interviews.**



Checklist of Questions to Ask*

***Distinguishing proper questions in ex parte interviews from those for inter-party interviews.**



Questions to Ask

- Potential conflicts with parties, attorneys, potential witnesses, other arbitrators selected or potentially on panel, experience with similar disputes or experience in the industry, financial interests in outcome.
- Time in neutral's schedule for this dispute.
- Description of number/types of cases handled.
Example: For an installation of process piping, questions may concern whether issues involved design and/or installation, scheduling and coordination.



Questions to Ask

- Experience as chair of a panel, experience as sole arbitrator.
- Frequency of representation of certain types of entities. For example, in construction cases neutrals may be asked whether they represent owners or contractors, specialty subcontractors, architects/engineers, and insurers and the breakdown by percentage of practice representing these various entities.
- Specific questions about the kinds of disputes arbitrated or mediated, e.g., multi-party cases, types of claims presented.



Questions to Ask

- For mediators: mediation style, success rate (and how defined), how multi-party cases are managed.
- For arbitrators: views on discovery, pre-hearing motions, attaining cost-effectiveness and process efficiencies.
- Does the neutral still practice in his field as attorney, engineer, architect, accountant? Nature of practice?



Questions to Ask

- Access to awards issued - have the arbitrator's awards been published and if so, where accessible? Are redacted awards available for review?
- For private awards and settlements, identify most recent cases (for example, in the previous 5 years) by describing the parties' claims, identifying the prevailing party, and stating the amount of the award. (Note: Arbitrators and mediators need to be mindful of their duty of confidentiality in providing such information and questioners should frame their inquiries so they can obtain the information they need without violating confidentiality.)



Questions to Ask



- Citations to articles, books, and other published materials within a certain period (for example, in the previous 10 years) regarding the industry in general and pertaining to the arbitration and/or mediation of disputes within the industry.
- Education in field of dispute resolution through training, seminars and programs presented in dispute resolution.



Sources of Information About Candidates

- Answers to written questions.
- Formal disclosures by neutral.
 - Standard disclosure forms of arbitral organizations
 - State law disclosure requirements, e.g., California disclosure standards.
- Recommendations – using party-appointed arbitrators to select chair.
- Affiliations with professional organizations.



Sources of Information About Candidates

- Publications by candidates.
- Psychological screening – more applicable for arbitrators.
 - Considerations: compatibility of panel, ability to lead, decisiveness, judgment, common sense, ability to comprehend situations rapidly.
 - Example: P. Michaelson's experience with psychologists evaluating candidates.



Letting the Other Party Choose

- Most applicable to mediation.
- Pros and cons.



Concluding Remarks



Thank You

Thank you for attending. Please visit our website at www.aaau.org to see additional program offerings.

