

How To Get The Most Out Of Your Roster Mediator

Jonathan T. Cooper - Cooper Mediation Inc.

This topic assumes something that may or may not be obvious. If you hire a private mediator, presumably you are paying more than \$600 for a half-day mediation. If you are paying premium prices, you have every right to expect a premium service. You may be selecting a private mediator based on their knowledge of substantive law, their knowledge of mediation procedure, protocols and tactics, their past experience either as a lawyer, judge or otherwise, or their problem-solving skills to name but a few of the primary attributes of a private mediator.

When you hire a roster mediator or have a roster mediator appointed, there is significant variability in relation to the mediator's knowledge, experience and training. Counsel and their clients do not share the same optimistic view about mediation when the word "roster" is used in the same sentence as mediation. Without a doubt, there is a difference between private and roster mediators. I believe that if a roster mediator was successful [by that, I mean in high demand], they would not continue to offer their services at roster rates. Roster mediators may be new to the market [such that demand has yet to materialize] or they may be veterans in the marketplace [in which case the lack of demand may be telling].

I had trouble starting to write this paper because my initial thought was, "Isn't the goal of both roster and private mediators the same? Settle the case." Even if your mediator is the nicest person in the world, it comes down to what they bring to the mediation process. Can the mediator get the job done and close the deal? Sometimes, one or the other or both of the parties are not there with the intention of settlement. You can only lead a horse to water; you cannot force it to drink. Ultimately, my thought process brings me to the point where you have either selected a roster mediator, had a roster mediator appointed or you have been told by your client that you must hire a roster mediator. What do you do? How does your approach to mediation change?

1. Do Your Homework

Not all roster mediators are created equally. Speak to your colleagues, either within your firm, in your practice area or through professional associations [OTLA and CDL come to mind in the area of personal injury and insurance]. Review the mediator's website. Find out if the mediator has written any articles and review them. There are undoubtedly more and less capable roster mediators. While you, your client or both may wish to control the cost

of the mediation, it is irresponsible not to put some effort and thought into the selection of the roster mediator.

If you are having difficulty gathering information and reconnaissance on a prospective mediator, call them. Generally speaking, people love to talk about themselves. Ask the mediator about their background and experiences which bring them to mediation. Ask the mediator about their experiences before becoming a mediator. Perhaps I have a greater interest than most in making the following observation. Simply because the mediator is not a lawyer does not prevent him or her from being an effective neutral. I suggest, that a neutral who has not spent a significant portion of their professional life working as a lawyer or as an institutional client may bring a certain freshness of perspective to the process.

Do your best to match the prospective mediator to the matter in dispute. Is the mediator known as directive, facilitative, evaluative, etc.? What are the communication skills of the mediator? If you ask a few pointed questions of the mediator as part of your due diligence and listen carefully for the answers, you will undoubtedly gain an appreciation for their communication skills, personality and the like.

When you meet with your client to prepare for the mediation, do what you can to realistically set or control their expectations. Mediators generally are not miracle workers or magicians though, every now and again, a skilled mediator can pull a rabbit out of a hat. This is probably less likely with a roster mediator but it doesn't mean they shouldn't try.

When you hire the mediator or when you meet the mediator at the beginning of the mediation session, do what you can to realistically explain your expectations for the mediation and of the mediator specifically.

2. Design Your Mediation Memorandum with the Roster Mediator in Mind

Generally speaking, your memorandum should be designed for the target audience which should normally be the decision-maker on the other side of the table. While the mediator is less critical, he or she needs a sufficient briefing of the facts, evidence and law to assist the parties in going about their negotiations. A roster mediator, depending upon his or her background, training, education and experience, may need more. You may have to provide the mediator with a description of the law, copies of statutes, regulations or key judicial decisions. You may have to provide the mediator with a more detailed factual discussion so as to equip the mediator with the tools so that he or she can be part of the solution rather than part of the problem.

3. Limit the Size of the Mediation Memorandum

One should bear in mind that a mandatory mediation with a roster mediator involves one hour of preparation and three hours of negotiations. If you provide the mediator with 20-30 pages of text or dozens of tabs, you put the roster mediator in a challenging position. Will they limit their preparation to one hour and ignore what may be important information or documentation? Will they devote extra time to preparation and expect to be paid for their effort? Will your client be prepared to pay for additional preparation time? I can well imagine the additional frustration on your part and that of your client as you field phone calls or emails in this regard in the days leading up to the mediation.

Best practices would be to keep the narrative portion of the memorandum fairly brief and focused. Identify points of agreement, which will constitute the beginnings of a settlement agreement, and identify points of serious disagreement. Suggest ways and means to go about bridging those points of serious disagreement. Generally speaking, less is more.

If your instructions are to proceed through mediation because it is mandatory and if your instructions are not to settle the matter short of a capitulation, from the perspective of one side or the other, you may want to make this clear to all concerned in the memorandum or in a without prejudice communication in advance of the mediation. That said, there are always possible resolutions; never say never.

4. Limit the Length of the Mediator's Opening Remarks

While I have heard some wonderful opening remarks from some very skilled mediators, I suggest it is a poor use of time to have the mediator explain the history of mediation or all of their skills and abilities and experiences which make them suitable as a mediator, consuming 20 to 30 minutes in the process. Counsel should perform the mediator's function and educate their client in advance of the mediation as to the process generally and what they can expect to hear and to happen at mediation. Consider asking the mediator to attend a few minutes in advance of the official start time of the mediation so that they can explain whatever they feel compelled to explain to your client before the opening session begins.

Roster mediations are typically restricted to three hours of negotiations. If your matter is capable of resolution, it is imperative that you and your mediator get on the same page as soon as possible with a view toward getting opposing counsel and their client onto the same page soon thereafter. I try to start my caucus discussions before the opening session and kick off the conversation with a broad question such as, "What are you here to do today", "What do you want to get out of our time together" or "What do I need to know

that is not reduced to writing". It is surprising how forthcoming some people, be that counsel or their clients, will be. It helps me identify interests or issues to focus on.

5. Limit the Length of Opening Statements by Counsel

Focus on matters or issues where there is agreement [building bridges] and focus on matters where there is disagreement which will realistically hamper your ability to settle the matter. Offer constructive suggestions about how areas of disagreement can be addressed. A simple example may assist in this regard. The matter involves a two car collision at an intersection controlled by automatic traffic signals which are operational. There are no independent witnesses. Each driver insists that they entered the intersection on green and the other driver failed to observe a red traffic signal. It probably does little good to review the evidence of each witness in detail. It probably does little good to take the cheerleading approach and suggest that your client is credible and likeable and the other side is not. Shockingly, opposing counsel will tell you that their client is credible and likeable and your client is not. It would be refreshing for one of those lawyers to incorporate in their opening remarks a willingness to resolve the matter on a 50/50 basis, having regard for the uncertainty of the trial process.

6. Don't Read or Regurgitate your Brief as an Opening Statement

If at all possible, you should say something new in your opening that is not in the brief. Give a new perspective, slant or angle to something you have already addressed in your brief. Use your opening to achieve clarity in relation to the content of your message and points of emphasis. Use your opening to humanize the process. If you are addressing an unsophisticated decision-maker, tailor your message for your audience. Be sincere, whether you mean it or not. Avoid sticking your fingers in the eyes of the opposing party or their counsel. The decision-maker will have greater challenges making an informed and sensible decision if you elicit a negative emotional response from them. You should appreciate that there is an expectation on the part of the decision-maker on the other side of the table that everything you say must be good for your client and bad for them. As a result, they start the process with a tendency or propensity to disbelieve anything and everything you say. If you start your remarks with comments that the decision-maker on the other side of the table is likely to agree with, you may find that person to be more inclined to listen to the things you have to say regarding the points of disagreement.

7. Give the Mediator What They Need to Understand Your / Other Client's Position

Tom Cruise, in Jerry Maguire, said, "Help me, help you". If there is a critical case on point, give it to the mediator or give him or her a summary of the case law. Identify the important moving parts of the case which will drive the negotiations. Educate the mediator. Your

objective should not be to convince the mediator, as the mediator has no decision-making power; rather, your objective should be to arm the mediator with the tools, ammunition or arguments so that the mediator can be effective in the other room. Understand that the other side will be doing exactly this from their perspective. Don't be surprised when the mediator returns to your room with "pushback". Don't shoot the messenger. Work with the mediator to respond to the pushback in a productive fashion.

The roster mediator, given their background or experience [or lack of experience in a particular practice area], may not be able to assist you and your client to get to the "right number". However, a roster mediator should be able to assist you in the pace of your negotiation moves and may be able to offer some insight gathered from time spent in the other room.

The roster mediator should be expected to do more than simply courier numbers or messages from one room to the other. Subject to confidentiality considerations, the roster mediator may be able to offer some insight as to who seems to be controlling the other room, the temperament or temperature in the other room, etc. The roster mediator may be able to offer insight into other factors impacting settlement negotiations in the other room.

Be prepared to acknowledge areas of weakness in your client's case in caucus. This can lead to points of agreement with the other side and potentially lead to a snowball effect in terms of an overall compromise and settlement agreement. Search for ways to say "yes".

8. Consider Bringing the Roster Mediator into the "Inner Circle"

This issue is really one of trust and confidence. Can you trust the mediator to respect the confidentiality of what you have told him or her? Do you have confidence that the mediator can use this information to facilitate ongoing negotiations and an ultimate resolution? For example, you may want to inform the mediator as to your monetary target or range. The mediator may be able to assist you in planning out several moves or steps ahead. Monetary movement is one of the clearest and most transparent forms of communication at mediation. Another example may arise where your client, private or institutional, is not listening to you or taking your advice. Some mediators can be very helpful in gently probing this area and determining whether they can help you bring your client on side.

Despite the foregoing, there is no question that many people at mediation "play" the mediator and the mediator may be "playing" those people as well. Mediation is not an under oath process. For example, if you tell the mediator that this is your final demand or final offer, don't be surprised or offended if the mediator challenges this statement later in the mediation. Some use the word "final" as definitive - it should elicit a yes or no reply but no counter offer; others seem prepared to use the word "final" as part of the negotiation process.

9. Good Ideas are Not Within the Exclusive Jurisdiction of the Roster Mediator

The roster mediator may be the custodian of the process for the day. However, they do not hold an exclusive license over good ideas. Don't hesitate to offer your thoughts and suggestions. Subject to your views on the extent to which your client should have communications with the mediator, encourage the client to offer their thoughts and suggestions. Everyone comes to the mediation with different experiences. Some of those experiences may lead to insights on a particular issue or problem and, ultimately, to problem solving ideas and potential for resolution.

10. Don't Let the Roster Mediator Get in the Way

If you find yourself at mediation with a roster mediator who is not up to the task, use the mediator for what they can do rather than focusing on what they cannot do. If they are simply working as a courier pigeon, conveying offers from one room to the other, let the "money talk". If necessary, give the roster mediator explicit instructions on the message to be delivered and the wording to be used. Rehearse the message and ask the mediator what they plan to say in the other room. Give consideration to a resumption of the general session. Another option would be ask the mediator to bring you into the caucus room of opposing counsel so that your message can be delivered in a clear and unfiltered fashion. A further option is to suggest a meeting of just counsel and the mediator. This does raise some concerns and sensitivity amongst clients. Unsophisticated clients may be concerned about the lawyers conspiring against them. Sophisticated clients may feel insulted.

11. Don't Let the Roster Mediator Off the Hook Easily

On some days, the matter cannot be settled on the day of the mediation. This can be due to a number of factors including missing information and documentation, lack of authority and overvaluation or undervaluation to name but a few. Use the roster mediator to understand what may be lacking in your room or the other room and what can be done to address this deficiency going forward. Use the roster mediator to follow up with you or opposing counsel or both in the coming days, weeks and months. Some roster mediators may be prepared to stick with the matter at no additional cost. If necessary, make a commitment to pay the roster mediator for their additional time in this regard. If the roster mediator can help you resolve your matter, it is money well spent.

12. Don't "Mail It In"

There are many occasions when there are no realistic prospects to resolve the matter at mediation. However, mediation does provide an opportunity for you to have the ear of the opposing decision-maker. You may want to explain your perception of the weaknesses in their case or the strengths of your case. You may want to explain why you cannot resolve the matter. You may want to ask questions of the opposing party, whether to gain information to help you resolve the matter going forward or to gain a better appreciation for the opposing party as a potential witness. You may want to ask for documentation to address gaps in your understanding of the matter which may lead to settlement down the road. You can certainly use the opportunity to better gauge the likability of the opposing party and the competence of their counsel. You should leave the mediation with more information and a better understanding of the matter and the impediments to resolution.

13. Roster Mediation Economics

Many clients, institutional or otherwise, wish to engage roster mediators as a cost-saving measure. This is a legitimate concern and a modern-day reality. Some roster mediators will view their compensation as a step backwards; other roster mediators will view this compensation as very rewarding. Like most things, it is a matter of perspective. That said, no mediator, roster or private, should talk the talk unless they are prepared to walk the walk. You have every right to expect your roster mediator to be engaged, energetic and committed to the process. The roster mediator cannot compel anyone to do anything and, as a result, should not be held responsible for the fact that the matter does not settle. Similarly, the roster mediator may get too much credit for matters which do settle. The roster mediator can and should be judged on their commitment to the process, the creativity of their problem-solving, their tenacity and resolve, their communication skills, their empathy and their understanding of the issues and problems in a given matter.

Conclusion

Despite there being many obvious differences between roster mediators and private mediators, many of the expectations of counsel and their clients can and should be the same: commitment to the process, last person to give up on the potential for resolution and clear communication skills come to mind among other qualities. Any mediation is an opportunity for settlement. Every mediation is an opportunity to discuss the matter and to learn something new about the matter, the other counsel and the other party that you did not know or appreciate going into the mediation. Every mediation is an opportunity to listen. My late great-grandfather, Jack Cooper, used to say, "You have two ears and one mouth; use them in those proportions". Listen for cues and clues which may give you insight into resolution of the matter, either at the mediation that day or at some later time. Any decent mediator, private or roster, knows that just because the matter did not settle at

the conclusion of the mediation does not mean that the matter cannot be settled down the road. I submit that you can and should expect your mediator to follow up after the mediation concludes.

Mediation is not a sporting event. Batting averages may be the measurement tool which allows batters to enter the Hall of Fame. Settlement percentages for mediators may be illusory. Evaluate your mediator based on their commitment to keep people working away at issues and to keep people engaged in the discussion. The mediator should be the last person to throw in the towel.