

SELECTING AND PREPARING YOUR MEDIATOR
January 18, 2013

**Joint Meeting of the Litigation Section and the Dispute Resolution Section
of the Atlanta Bar Association**

BY: TERRENCE LEE CROFT, ESQ.

Mediator and Arbitrator, exclusively affiliated with JAMS, the Resolution Experts, 404-588-0900, www.jamsadr.com ; ADR Advocate, Co-Counsel, Consultant and Coach through Croft ADR, 404-577-8400, tlc@croftadr.com; Past President of the Atlanta Bar Association, Past Chair of its Litigation Section and its Dispute Resolution Section; Past Chair of the Dispute Resolution Section of the State Bar of Georgia and a Member of the Board of the Governors of the State Bar of Georgia; Selected a Georgia Super Lawyer since 2005, and twice selected as One of the Top 100 Lawyers in Georgia, selected as One of the Best Lawyers in America in ADR; AV rated for more than 32 years; selected by Who's Who Legal as one of the world's leading commercial mediators since 2011; has resolved more than 3,000 dispute in the fields of business, commercial, contract, construction, employment, health care, insurance, personal injury, professional liability and trust and estates.

CONTENTS

- I. Deciding to Use Mediation
 - A. When to consider using mediation.
 - 1. Mediate as soon as each party has sufficient information to evaluate its case. Consider providing additional information to the opposing side in advance of the mediation;
 - 2. Before filing suit;
 - 3. After filing suit: before answer, before discovery, before motions, before pre-trial order, before trial, before post-trial motions, before appeal.
 - B. Which ADR procedures to use

1. Mediation: In almost every case, sometimes more than once;
2. Arbitration: Binding (private, usually held sooner and complete more quickly, but not always cheaper) and non-binding (not as good as an evaluative mediation);
3. Med/Arb: The “hammer”; if you use the same neutral, you substantially empower the mediator and often avoid the necessity of a subsequent arbitration;
4. Neutral Evaluation: Do you really want to know? Will the evaluation affect disclosures that may be required to third-parties?

C. How to Persuade Your Opponent to Mediate.

1. Simply ask. This is not a weakness, but represents a show of strength and confidence in your case. It is wise to do and a proper procedure to utilize, and you could be criticized for not doing so.
2. Request mediation orally and also in writing. This could become important if the issue of attorney’s fees arises, later.
3. Request the Court, the calendar clerk, the scheduling officer or other staff person to direct the case to mediation. If the Court has an ADR office, contact that office for assistance.
4. File a motion requesting mediation or other ADR procedure.
5. Call a professional provider and request the provider to assist you in persuading your opponent to utilize the services of the provider and one of its neutrals.

II. Selecting a Neutral

- A. Ask your colleagues at the bar and members of your listserves who they recommend for the case that you are handling. Contact the professional providers: in mediation, as in life, you get what you pay for!
 - 1. JAMS, the Resolution Experts, 404-588-0900, www.jamsadr.com.
 - 2. American Arbitration Association, 888-320-3490, www.adr.org.
 - 3. Bay Mediation & Arbitration Services. 678-430-8077, www.bayadr.com.
 - 4. Henning Mediation & Arbitration Services, 800 843-6050, www.henningmediation.com.
 - 5. Miles Mediation, 678-320-9118, www.milesmediation.com.
 - 6. South Georgia ADR Service, LLC, 800-863-9873, <http://southgeorgiaadr.com>.

III. Rosters of ADR Neutrals, Some Screened, Some Not

- A. Georgia Academy of Mediators and Arbitrators, www.GeorgiaMediators.com.
- B. National Academy of Distinguished Neutrals, www.NADN.org
- C. Bar Rosters of ADR Neutrals and members of their dispute resolution sections.
- D. List of neutrals registered with the Georgia Office of Dispute Resolution (which includes many non-lawyer neutrals)
- E. Considerations in selecting a mediator
 - 1. Find someone the other side respects and will listen to. Find someone you respect and to whom your client will listen, as well. Find someone with a proven track record rather than someone who

is learning to mediate. In most legal disputes, you need a lawyer with good legal skills in general and a working knowledge of the subject matter of your dispute, in particular, who has professional credibility and strong interpersonal skills. This is why your successful experiences with prior mediators and those experiences of your colleagues, are so important to the selection process, which is an art not a science. Most of all you need a mediator who can persuade the other side to move.

2. Before making your selection, do not hesitate to call a potential mediator and candidly discuss issues involving their experience, background, and possible relationships with opposing parties and counsel.

IV. Preparing the Mediator

- A. In addition to the usual mediation statements, significant briefs and orders entered in the case and other documents which might be useful in bringing your mediator up to speed, you should be sure to have a private meeting or caucus, in person or by telephone, with your mediator. Depending on the complexity of your case and the detail involved, you may need more than one such meeting. It should be done close enough in time to the scheduled mediation so that the mediator will retain the information that you communicate. Any mediator who is unwilling, unable, or simply too busy, to spend this time with you is one you should avoid. Discussing this depth of preparation and procedure before you have selected the mediator is a good idea. If the mediator doesn't contact

you, then you should contact the mediator within the week before the mediator. This caucus should include you, but in most cases should not include your client, at least initially. This will give you and the mediator an opportunity to have a candid discussion about things you need your mediator to know, even such things as help that you may need with your own client.

- B. On the day of the mediation, if you or your client need additional time with the mediator before a preliminary session begins, do not hesitate to request such a private caucus. A good mediator will be sensitive to your concerns and should be willing to make time for the caucus, so long as it does not impede the overall schedule of the mediation.
- C. Trust your mediator and do not routinely exclude the mediator from each private caucus, except when it is necessary for purposes of confidential communications between you and your client. The more you can include your mediator in side of the mediation, the more likely you are to get the case resolved.