

THE IMPORTANCE OF A MEDIATOR WHO KNOWS HOW TO MEDIATE (OR THE MYTH OF “HON.”)

By Ben Hamburg

Many of us, in our role as mediators, often interact with attorneys and litigants who tell us they feel they “need” a retired judge to act as the mediator in their cases because a judicial officer will have more “persuasive power.” It becomes incumbent on those of us who are not retired judicial officers to point out that “power” is not necessarily helpful to reaching a negotiated settlement, and that while many judges make excellent mediators, being a former judicial officer does not mean that a person has developed skills that are essential to mediation.



BEN HAMBURG

An effective mediator will:

- Quickly analyze the key issues;
- Build rapport and credibility with attorneys and parties;
- Listen;
- Continue to listen;
- Be willing to learn from the parties;
- Assist in crafting creative solutions; and
- Convincingly discuss, on the basis of experience, why there might be problems with proceeding to trial.

An effective mediator does not:

- Exclude the parties from the mediation process;
- Rush the process;
- Prevent a party from feeling like his or her position has been fully heard and considered;
- Ignore the emotions or sensitivities of parties;
- Make proclamations of outcome or pronounce to a party that they would be a “fool” to go to trial; or
- Try to use “power of position” instead of “power of persuasion” to convince parties to settle.

Judicial officers with crowded dockets, multiple concurrent settlement conferences, and limited time are often forced to rush parties to reach a settlement, and more often than not meet only with the attorneys and not with the parties. Also, many judicial officers have not had a client for years and are used to controlling a courtroom and being listened to. Thus, much of a judicial officer's training and experience in handling settlement conferences can be the antithesis of the active listening and power of persuasion that makes for a successful mediation of hotly contested matters.

The next time an attorney or litigant tells you that he or she believes that a case requires a retired judge in order to convince their client to settle, you can point out to them the above differences between a good mediation and a judicial settlement conference, and explain to them the benefits of utilizing a skilled mediator who is practiced in listening and has been trained to help parties reach a negotiated settlement. Like any professional, mediators should be chosen by checking their references and results, not by a title.

Mr. Hamburg is the principal of Hamburg Mediation. After graduating from Boalt in 1979 and serving as a law clerk to the Hon. Ira Brown and Hon. Robert Dossee, Mr. Hamburg became a commercial litigator in San Francisco, and also served as General Counsel for a public real estate investment trust. Since 1993, after training through the United States District Court Mediation Training Program, Mr. Hamburg has served as both a private mediator and arbitrator.

* Ben Hamburg, who recently joined The Mediation Society, is a 1979 graduate of Boalt Hall, and mediates business, real estate and employment cases.