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Selecting Arbitrators and Mediators: A Guide for Small Firm Litigators

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For small firms, each of our cases carries great financial and reputational weight. Choosing the right arbitrator or mediator is a strategic choice, not an administrative one. When a case moves into arbitration or mediation, the choice of neutral can have as much influence on the outcome as the facts and the applicable law.

Although arbitrators and mediators are often thought of as a single group of neutrals, the traits that make someone effective in one role do not always translate to the other. There are important commonalities to consider, but also critical differences that should guide your selection process.

Commonalities Between Arbitrators and Mediators

Both arbitrators and mediators must be trusted by counsel, by parties, and by courts that later may be asked to enforce or review their result. Whether you are choosing an arbitrator or a mediator, the chosen neutral must understand the legal and factual background at issue. Employment law, construction disputes, shareholder conflicts, and commercial contracts each have their own nuances. A neutral who “gets it” will conduct the chosen process efficiently and command respect from both sides.

For both mediators and arbitrators, appropriate judgment and temperament are non-negotiable. As a small firm lawyer, I do not have the time or money to afford a neutral who is erratic, impatient, or performative. Look for people who are prepared, respectful of time, and capable of managing strong personalities without escalating conflict. Reputation matters here. I talk to other lawyers, especially those who've been on the losing side before the neutral, to get an unvarnished sense of how they operate. I have been in front of mediators who are former judges, and their attitude toward a party (i.e., whether or not they "like" them) has significantly weighed the outcome, unrelated to the facts of the case. This type of unpredictability must be avoided. Discussions with your peers will quickly out who these mediators are.

When you have the option to select a neutral, you want one who is engaged, prepares ahead of time, and has the reputation of being thoughtful and informed. I work hard, and I expect my neutral to as well. No neutral, regardless of experience, can effectively perform the role for which they have been retained without preparation. Nothing is more deflating and less productive than starting a mediation you have spent countless hours preparing for, only to realize that you are informing the mediator or arbitrator about the facts in detail for the first time. It is also an impediment to getting a quick and fair outcome. For a firm billing by the hour and litigating against larger teams, inefficiency is not just annoying, it's leverage-shifting.

Before we separate arbitrator from mediator, there's a baseline I won't compromise on. Whether the neutral is going to decide a case or facilitate its settlement, I need four things.

1. Credibility for Both Sides

I want someone the other side will respect and listen to, someone a court will take seriously if enforcement is needed, and someone my client will trust even when the message is tough. I don't just ask, "Who likes this neutral?" I ask, "Who lost in front of them and still thinks they were fair?" Those are the recommendations that matter.

2. Subject-Matter Familiarity

A neutral doesn't need to be the world's leading authority on indemnity clauses or the Americans with Disabilities Act to be effective on cases with that subject matter, but they do need enough foundation to spot the issues and move efficiently. For arbitrators, subject-matter competence must be deeper because they will render findings and conclusions. For mediators, it's more about practical fluency. Can they reality-test positions credibly and quickly understand the levers that drive value? If the case turns on industry practice (construction scheduling, financial services compliance, health care billing), I prioritize a neutral who has worked or regularly adjudicates in that space.

3. Temperament and Process Discipline

I cannot afford a neutral who is impatient or checked out. I also need someone who reads the record and doesn't let disputes sprawl. In small firm practice, every unnecessary hour is leverage transferred to the better-resourced side. A neutral who tolerates endless motion practice or leaves discovery disputes to "work themselves out" should be avoided.

4. Commitment to Preparation

Do they read briefs? Do they know the facts, or are they winging it as things go along? I take my role seriously, and they should, too.

Despite these shared considerations, selecting an arbitrator is ultimately about choosing a private decision-maker, while selecting a mediator is about choosing a facilitator of resolution. As explored below, this distinction drives selection.

Choosing an Arbitrator: Approach It as Picking a Judge

When selecting an arbitrator, approach it as if it were a judicial assignment. In arbitration, there is typically no right to appeal, and outcomes are binding. This means the arbitrator's approach to contract interpretation, credibility, and damages may effectively end the case. Alignment with your theory of the case matters.

The first strategic consideration when selecting an arbitrator is how they decide cases. Some arbitrators are equity-forward and resolution-oriented. Others are text-driven and evidentiary formalists. Some are cautious with fee-shifting even when authorized; others treat fee provisions as part of the bargain and enforce them robustly. If my case is contract-heavy with clean text on my side, I want a neutral known for honoring language and resisting “equitable rewrites.” If my case turns on credibility and commercial reasonableness, I’ll consider an arbitrator who has tried a lot of bench cases and is comfortable weighing witness demeanor and practical context.

The second strategic consideration is the arbitrator’s case management style. Does the arbitrator allow broad discovery? Do they frequently intervene at hearings? Do they actively question witnesses or remain largely passive? Discovery scope, motion practice, and hearing scheduling are where small firms can gain or lose ground. A hands-on case manager who sets guardrails and keeps to them levels the playing field against big firms. A hands-off arbitrator can make arbitration look like federal court without the rules or appellate check. Things that I look for as a small firm litigator are (1) willingness to hold short, prompt conferences to resolve discovery fights; (2) clear expectations for discovery and expert scope; (3) commitment to enforcing deadlines; and (4) willingness to encourage or discourage dispositive motion practice where appropriate.

A third consideration is the arbitrator’s reputation for being engaged and prepared. I’ve had arbitrators who barely looked up from their laptops. That’s not neutrality; that’s laziness. I want a neutral who reads the exhibits, asks clarifying questions meaningfully, and manages time across witnesses. Prehearing orders that clarify stipulations, page limits that fit the issues, and hearing days that don’t go over time are good signs and parameters to ask peers about. For solo and small firm litigators, case management style can materially affect cost. An arbitrator who reins in discovery and sticks to schedules can level the playing field. One who allows endless motion practice may inadvertently favor the party with more resources.

Finally, for client management, it is important to find an arbitrator who provides reasoned awards in writing. Look for arbitrators who write clearly, address the material issues, and explain their reasoning. This is important for client satisfaction but also for enforceability and settlement leverage in future disputes.

Provider institutions (e.g., [AAA](#), [JAMS](#), [CPR](#)) offer structured rules, administrator support, and panels with documented qualifications. Ad hoc appointments can work well for very sophisticated counterparties or niche cases but demand more front-end coordination on rules, selection, and logistics. As a small firm lawyer, I like the administrative predictability of a reputable provider. Most small firm practitioners cannot absorb or excel at the administrative burdens of an ad hoc appointment while successfully preparing for arbitration. Additionally, panels (three arbitrators) can mitigate outlier risk and add subject-matter coverage. They also triple the scheduling friction and increase cost substantially. As a small firm practitioner, I default to a single arbitrator unless the stakes, industry complexity, or optics point strongly to a panel.

Choosing a Mediator: Approach It as Choosing a Partner

Mediation is not about being “right.” It is about moving people emotionally, practically, and financially toward resolution. Because of this, different factors have more weight when selecting a mediator as opposed to an arbitrator.

In my view, the first and most important strategic question when choosing a mediator is whether both parties agree that the neutral is a good choice. One of the most overlooked factors is whether the mediator will be *heard* by the opposing party. A retired judge or seasoned trial lawyer might command attention from corporate defendants. In other cases, a mediator with industry experience or cultural fluency may be more persuasive.

My practice is to ask opposing counsel for a list of three to five mediators. This guarantees that we will work with someone they believe to be competent and fair to their client. From that list, I consider factors important to my case and narrow down the options to one or two. For the case to resolve effectively, both parties must believe in the mediator as a partner. This process is a simple way to ensure that result.

Second, the style of a mediator is of critical importance. Some mediators will tell parties—sometimes forcefully—what they think will happen if the case goes to trial. Others are more facilitative. They help parties find common ground without expressing views on the merits. For a small firm practitioner, this choice should be strategic. A mediator willing to reality-check an overconfident opposing party can be invaluable. On the other hand, in cases with sensitive non-monetary dynamics, a heavy-handed evaluator can derail progress. What do you need for your case? Is it a highly emotional case where feeling heard is imperative to a resolution for your client? Is it more important to have a straight shooter former judge who will tell your client that a courtroom verdict for the plaintiff is going to be much higher than what is being put on the table in mediation? You must consider the emotions, facts, and law applicable to your case and match the mediator's style with what you need. If you always go for the same mediator no matter what the case, based solely on familiarity, you are doing it wrong.

Third, choose a mediator who grinds, one with a reputation for knowing the facts of the case and the issues before mediation starts. They stay engaged through long days. They move back and forth effectively between rooms. They help craft solutions that go beyond a single number. The best ones stay engaged after a mediation ends without success to provide a mediator's proposal or other opportunities to resolve. Settlement often requires creative structuring—timing of payments, confidentiality terms, or future business arrangements. In my experience, a mediator who is willing to stay engaged and think outside the box has been the difference in resolving cases and providing solutions in cases early, before costs and emotions run higher. Look for persistence, post-session follow-ups, willingness to float proposals after silence, and comfort with award bracketing, mediator's numbers, and contingent moves.

Settlement value isn't always a single number. Payment timing, non-disparagement, training commitments, references, transition plans, cooperation clauses, and royalties can unlock deals when cash alone won't. Try to pick a mediator who enjoys crafting these structures and can paper them precisely enough to avoid disputes later.

A fourth consideration that can be strategic for solos and small firms is cost. Some neutrals require full-day minimums. Ask about halves, cancellation policies, and premium rates for late nights. Clarify how much pre-reading the neutral will do and whether it is included. Remote sessions cut travel costs and can reduce posturing; in-person sessions can help with rapport. Confirm provider rules and whether mediation communications remain confidential. Align your mediation brief and client counseling accordingly.

Mediators often enter at critical case stages, such as after discovery or before summary judgment. Because of that, I sometimes choose a mediator based on where the scales need to be tipped. If the other side needs an authoritative voice, I want a mediator who projects authority. If my client needs reassurance, I want someone who can patiently explain risk without causing panic.

A Strategic Decision

Large firms can absorb a bad neutral choice; small firms often cannot. For us, neutral selection is part advocacy, part risk management, and part client counseling. The most important lesson I've learned is not to rely solely on résumés. Talk to colleagues. Ask pointed questions. Match the neutral not only to the case, but to the moment the case is in. Arbitrators decide outcomes. Mediators shape possibilities. Understanding that difference and choosing accordingly is one of the most important strategic skills a solo or small firm litigator can develop.

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