

Neutral Selection: Some Guidance from a Neutral

By Peter L. Michaelson

The use of ADR is growing substantially, particularly for IP disputes. Undoubtedly, ADR's crucial advantage over litigation, also the most important decision parties will make in an ADR proceeding, is their ability to select their own neutral. Parties have complete autonomy to select whomever they want as their neutral. But, they must be sharply cognizant of a fundamental tenet: the quality of an ADR process is only as good as the neutral conducting it.

There is no "one size fits all" approach for selecting the neutral.¹ The task can be difficult, tedious, and even frustrating. Selecting the right neutral may yield substantial cost and time efficiencies and other benefits throughout the entire process meeting, if not exceeding, the parties' own expectations—thus well worth all the time and effort expended in selecting that person. Selecting the wrong neutral may well lead to a disaster. Through the prism of my experience as an active arbitrator and mediator since 1991, I now offer my own perspectives on the task of neutral selection.

The task has two basic components: one performed by neutrals, the other performed by the parties.

A. Getting the Word Out – the Neutrals' Responsibility

Those who hire neutrals need current, accurate, reliable, and comprehensive information about neutrals: who they are, their experience and expertise, education, training, language ability, their location, cost, availability, etc.

Once provided, the information can be disseminated to parties through differing pathways: by ADR institutions for panelists on their own lists; and by neutrals themselves and/or their firms through, e.g.: professional reputation, neutral attendance and presentations at conferences and meetings; publications; legitimate law firm/neutral marketing websites; directories; advertisements; and other appropriate vehicles. Any neutral must ultimately provide sufficient trustworthy information that reaches the hands of those people who will hire him/her. In nearly all situations, the information flows indirectly, through successive paths, from the neutral to that decision-maker – and that often takes considerable time.

B. Selection – the Parties' Responsibility

Essentially, a preliminary list of potentially qualified candidate neutrals is first assembled; sufficient information is then obtained on each of them; thereafter, clearly unqualified neutrals are eliminated from the list; the resulting candidates are rank ordered, based on defined selection criteria; and finally a small number of these candidates (to provide alternates) are selected, from the list and in order of preference, to appoint. Far easier said than done.

Each dispute has its own unique characteristics. Even within a common substantive area, two facially similar disputes can have widely divergent characteristics.

Carefully think about, formulate, and then follow a selection process that takes into account the primary characteristics of your dispute and matches your neutrals to that dispute. Avoid selecting anyone without adequate forethought. If the results are not what you need, modify the process accordingly and iterate it as often as necessary to yield the desired neutrals.

Specifically, to start the selection process, decide what neutral qualifications you want. Decide if you want a neutral with substantive/legal expertise in the field of the dispute. If you are advocating a position contrary to conventional wisdom in the area or prefer to have someone with no preconceived notions whatsoever based on prior experience, you might want someone who has no knowledge of the field/technology in question. Doing so allows the parties an opportunity to educate the neutral. However, if your position comports with conventional wisdom and you want your neutral to quickly and credibly cut through misconceptions put forth by the other side, then find an expert in your field/technology.

The ADR clause in the governing contract may specify the necessary qualifications. However, those clauses may be too narrowly drawn such that a qualified neutral may be very difficult to find or, worse yet, not exist at all. Be realistic in what you seek. If the ADR clause does not specify qualifications, then decide what qualifications you absolutely need (not want). For a case filed with an institution, ask your case manager to screen potential candidate neutrals on its roster. This often occurs in collaboration with the parties through carefully and mutually selected keyword searches on the institution's neutral database, sometimes followed with additional screening through specialized queries posed directly by the case manager to those neutrals.² Keywords are initially chosen to pull a reasonable number of potential candidates from the database. If that does not happen, appropriately change the keywords accordingly until it does. If your case is non-administered, compile a list, from all available sources, of neutrals having those qualifications. Work with your adversary, if need be. The result, however obtained, is a preliminary list of potential candidate neutrals.

Once you assembled that list, perform due diligence on each listed potential candidate. This includes collecting useful information from multiple sources, such as websites (with the caveat that some information on third party sites may be wrong, misleading, or incomplete), listings, and directories (traditionally in print but now increasingly online). While doing so, remember that such sources, while useful, tend to be somewhat self-serving, as they base their own information on CVs and bios from neutrals or questionnaires completed by neutrals. No numeric third-party mechanism currently exists to rate neutrals in terms of their proven ability. If you do not have enough information from an institution on a potential candidate neutral's background, ask the institution to query the neutral for you, or, if the ADR process is ad hoc, then directly ask the neutral.³ Find out if the potential candidate has any prior writings of interest and has previously taken any position on any issue involved in your dispute. Ask your colleagues at law firms for their thoughts on the potential candidates. Most law firms maintain lists of neutrals with whom they have had dealings. As many IP disputes tend to be sent these days to large law firms or IP boutiques, if your own firm does not have information for any candidate on the list, the odds are that another such law firm will. Get referred to it and others, if need be. As

there are relatively few neutrals serving the IP area, you should be able to quickly reach a firm that has useful information.

Ask each of your potential candidate neutrals for any conflicts: substantive, relational (affinities including with parties, counsel, witnesses, and the institution involved), financial, and temporal (availability). Inquire about their current caseloads. Be conscious of a marked tendency among rather busy neutrals to take on too many cases which, when arranging hearings, can cause extended schedule conflicts and often necessitate multiple hearing sessions separated by weeks, if not months, which leads to inefficiencies and increased cost.

If you are considering using an ADR institution which is not well-known or with which you have no experience, undertake due diligence of the institution itself. You need to gain comfort and repose trust in the institution, not just its neutrals. Find out about the institution's quality and selection of its neutrals, how its neutrals are compensated, if it has any relationships that may cause inherent biases or conflicts of interest with disputants of one side or another in your dispute, its industry reputation, governing ethics rules, organizational longevity, members, support (filing fees, member contributions, etc.) and other factors of interest.⁴

Eliminate clearly unqualified neutrals from the list based on qualifications, conflicts, and availability. Further, ask what type of demeanor/temperament/perspective you want in your neutral and further narrow the list. Perhaps you need an experienced practicing attorney who has substantial subject matter/industry expertise. Alternatively, choose an ex-judge if you need someone who can command authority and possibly "twist some arms." However, such a person may exhibit dictatorial conduct and lack sufficient subject matter/industry experience. For an arbitrator, you might also want someone who remains closely "involved" throughout the proceeding, exercises proper "muscular" control, including the ability to make hard decisions throughout so the arbitration doesn't explode or follow a tangential path, and can reset it back on its proper track when and if necessary, is sensitive to cost/autonomy issues, and is certainly not just a "go along, get along" person. The remaining neutrals are your candidates.

Define further selection criteria (e.g., inter-candidate conflicts) and interview the candidates whether in person or by telephone (or video web connection) to ferret out and then compile data relevant to these criteria. Interviews are best done *inter partes* and, if an institution is involved, with the case manager present. A very limited scope of inquiry, not touching on the merits of the dispute, is permitted under applicable standards of ethics.⁵ If need be, particularly in an ad hoc process, interviews can be conducted *ex parte* though the scope of inquiry, particularly for arbitrators, is even more restricted under those standards. On an *ex parte* basis, you can discuss the general nature of the case, the candidate's suitability to hear the case, including availability, conflicts, language proficiency (if applicable), references, and, for a tripartite panel where the chair is selected by the co-panelists, your party's preference for the chair. For an *inter partes* interview, you can also inquire about a candidate's preferred practice on awards if given full discretion (i.e. fully reasoned, abbreviated reasoning, bald, providing a draft award to the parties for review, etc.) and his/her views on attaining cost-effectiveness and process efficiencies. For high-stakes arbitrations and/or those with multiple hearing sessions where the arbitrators will need to work together over an extended period of time, consider testing and evaluating your

candidates for inter-personal compatibility with each other and taking the results into account when selecting tripartite panels from amongst your candidates.⁶

Do not merely acquiesce in your adversary's selection of a neutral, particularly if you are selecting a sole arbitrator or mediator. While many parties will simply abdicate their responsibility for the sake of signaling goodwill and cooperation to their adversary, if you have strong preferences for your neutral, then make them known to the other side and, to the extent reasonable, insist on them – else you may be stuck with a neutral you do not want.⁷

For mediation, try to identify the underlying driving causes of the dispute (e.g. relational, psychological, substantive, financial, etc.) and an appropriate skill set to deal with them. Choose mediators from amongst your candidates who possess most, if not all, of those skills.⁸

When assessing neutrals, trust your instincts. If, after doing all your due diligence, you just do not have a good feeling about a particular candidate but cannot articulate the reason, then just strike that candidate from your list and move on to the next person.

Using your interview data and criteria, compare your candidates and rank order them in terms of your preference. Then, select the top ranked candidates in order of preference as those you want appointed. If you do not get useful results, modify the process, including your neutral requirements and interview selection criteria, as needed, and repeat the process, or appropriate parts of it, as often as necessary until you get the neutrals you want.

No selection process can guarantee good results. Nevertheless, if you follow this guidance, you are more likely than not to find the right neutral(s) that will run a high-quality ADR process to the benefit of all concerned.

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¹ D. Rothman et al., *Litigators' Views and Goals Vary on Selecting their Arbitrators*, 22 ALTERNATIVES 13 (2004).

² American Arbitration Association, Fact Sheet: Enhance Neutral Selection Process for Large Complex Cases (2011).

³ For suitable questions, see International Institute for Conflict Prevention and Resolution, Due Diligence Evaluation Tool for Selecting Arbitrators and Mediators (2010), available at <http://www.cpradr.org/Resources/ADRTools/NeutralEvaluationSelectionTool.aspx>.

⁴ H. N. Mazadoorian, *Disclosure Questions for ADR counsel to Ask When Choosing Neutrals or Provider Groups*, 14 ALTERNATIVES. 95 (1996).

⁵ PRACTICE GUIDELINE 16: THE INTERVIEWING OF PROSPECTIVE ARBITRATORS, CHARTERED INSTITUTE OF ARBITRATORS (2006); H. R. Dundas, *Guidelines for Interviewing Prospective Arbitrators*, N.Y. DISP. RESOL. LAW., Spring 2009, at 33-35; D. Bishop et al., *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395 (1998).

⁶ P. L. Michaelson, *Enhanced Tribunals: Why It's Time to Use Personality Screening to Supplement Selection Criteria*, 28 ALTERNATIVES 189, 194-99 (2010) (part 1 of 2-part article); and P. L. Michaelson, *Can Conflicting*

Styles Be Detected? How Personality Screens Make Tribunal 'Matches' for More Effective Arbitration, 28 ALTERNATIVES 205, 209-13 (2010) (part 2 of 2-part article).

⁷ J. Kichaven, *You're Letting 'em Choose the Mediator? Your Case Isn't That Good! Getting to Settlement Demands Mutual Participation in Selection*, 25 ALTERNATIVES 115, 116 (2007).

⁸ M. Young, *Rethinking Mediation: A New and Better Path to Neutral Selection*, 30 ALTERNATIVES 111 (2012).