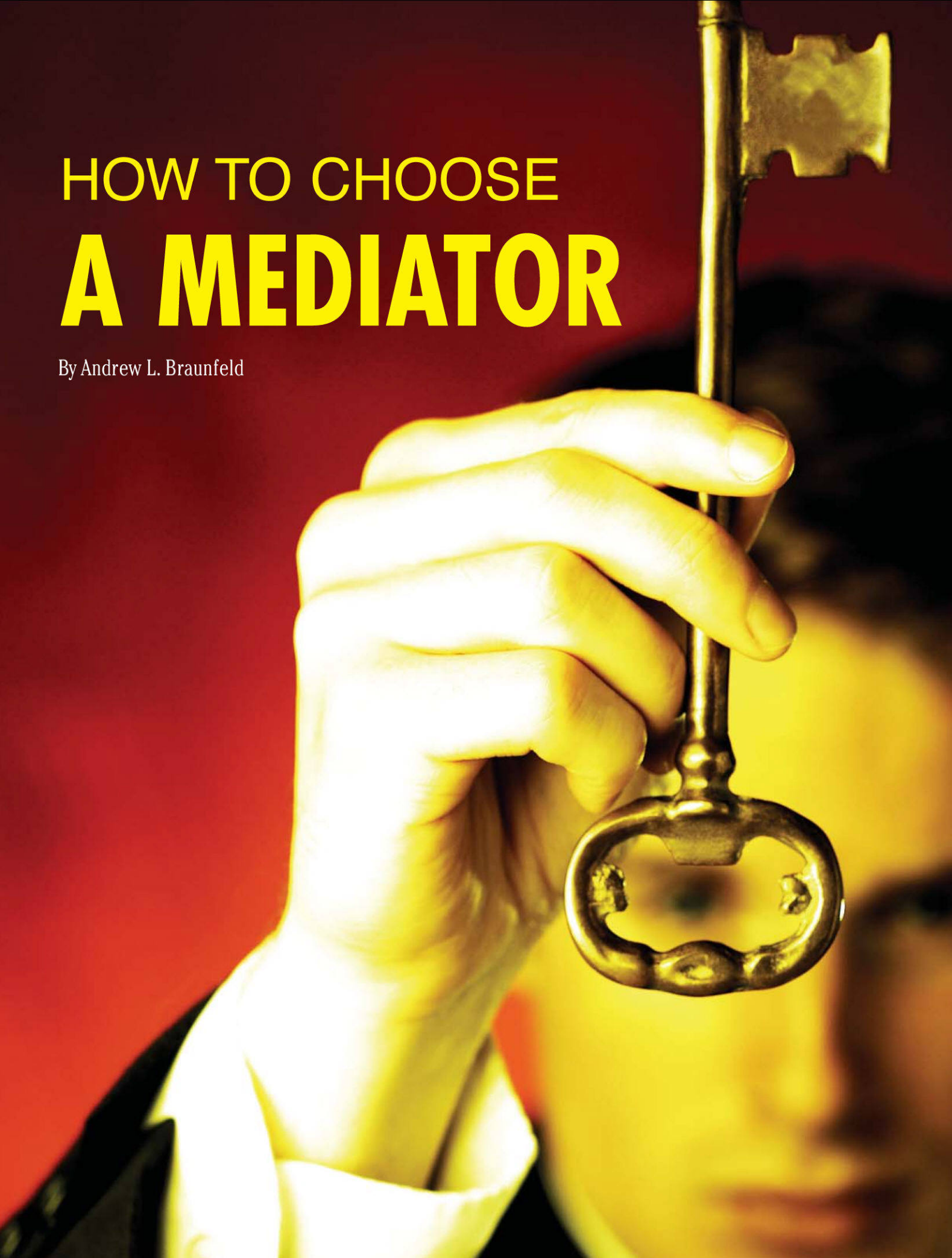
HOW TO CHOOSE
A MEDIATOR

By Andrew L. Braunfeld



Most of the cases I mediate for others are in active litigation and are in advanced stages of development when I first see them. A few are on my desk early in the dispute, where the parties do not want to spend more time and money and/or expend against the risk of what they perceive to be an adverse outcome. For the most part, the parties to these types of cases want a desired result, and they don't particularly care what method the mediator employs to get them to it. Whether the goal is to facilitate agreement among the parties themselves or to evaluate the case for counsel and the parties, i.e., a fresh pair of eyes, the goal is the same: Resolve the case!

Once the decision has been made by counsel, clients and insurance carriers that a given case is appropriate for mediation — i.e., the parties and their representatives agree that resolution is desirable, but, at least at the moment, the parties cannot achieve resolution on their own — there are many factors that counsel need to consider with regard to how best to get to the end point of resolution. Not unexpectedly, a successful end is best assured by the most important decision to be made at the very beginning of the mediation process — the choice of the mediator. Choosing a mediator with the proper blend of experience, people skills and judgment, with the latter being the single most important component of the skill set, is paramount.

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If anything is clear to an experienced trial lawyer, it is that when it comes to settling cases, some judges (lawyers too, for that matter) "get it" and some do not. Some care about settling cases and others do not. Of those who care, some do so for the right reasons; others want only to clear dockets and caseloads. While those who "get it" are often helpful in achieving resolution, the ones who don't can often irreparably damage the chances of settlement and actually force cases to trial.

So the question I keep asking, and not so rhetorically at that, is: What exactly is it about a judge's retirement that all of a sudden converts him or her from someone who never "got it" while on the bench, to someone who gets it now?

I have never viewed mediation as a pasture in which to graze post-retirement. In fact, too many years post-active-service on the bench or in a law practice can prove to be an impediment to the mediation process. The law, the insurance industry, public perception of the legal system and the system itself, not to mention the business of law, all evolve.

On the other hand, I should not and do not argue that former judges or lawyers who have achieved "senior status" cannot be effective mediators. The argument is only that neither the judicial credential nor the accumulation of years of trial experience, by themselves, confers the talent required to serve this much different process.

I make these points because many alternative dispute resolution (ADR) services feature rosters headlined by former or retired judges. Unlike arbitration, where the nexus between service as a judge and a neutral chosen to decide a dispute is clearer, mediation requires a different mindset and skillful ability to avoid that eventual decision in a manner tolerable to all concerned. The operative word here is "tolerable." In order to discern what is tolerable, a mediator must be able to figure out what the various agendas around the table are. Often these agendas are unspoken and/or cannot be articulated even under the confidentiality of the mediation process. Disagreements between counsel and client, differences of opinion between defense counsel and insurance representatives, unrealistic financial expectations of parties and, perhaps most important of all, the

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inevitable clashes of ego are all factors that the mediator must identify, segregate and deal with. Given the business relationships of today's legal practice, this is no easy task. Your plaintiff, even if he or she thinks it, is not likely to tell a mediator that his or her lawyer is an idiot who undervalues his or her suffering. A defense lawyer won't say he or she is adhering to the insurance company line only to protect the future pipeline of business. An adjuster will not say that he has no influence on supervisors who refuse to authorize more money even when the adjuster knows it is needed. Mr. or Mrs. Plaintiff has been carefully coached not to reveal that he or she would sooner die than take the case to a public courtroom.

Everybody in the room, lawyer and client, has an unstated agenda. Unless this is revealed to or implicitly understood by the mediator, the case is unlikely to settle, because a settlement must have something in it for everybody. Often that process involves two or more agendas for the same party (client, lawyer, insurance company). Ascertaining these singular interests and then dealing effectively with them is the most challenging and crucial task for the litigation mediator.

One thing I can tell you for certain about the process is that, for a lawyer-mediator, it is both difficult and stressful, and in complex cases it creates as much stress as does the courtroom. Each party to a trial has a position to worry about, but the mediator has to know (or learn) and then balance the whole show. I mention this here because the reason most often given to me by those seeking to become mediators is that they want to reduce the stress of legal practice or the bench. That objective is noble enough, but, in my opinion,

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it is not attainable. While it is true that the cases we mediate are those for which we do not bear ultimate responsibility, it is also true that if we cannot consistently help the parties achieve their objectives, whatever they are, there is no way to build future business. Like anything else, being a mediator is hard work, and pressure and stress are unavoidable if you do it right.

In short, I advocate choosing a mediator based on factors particular to the matter to be mediated, none of which should ordinarily include whether or not the neutral has a judicial background or is a retired anything.

My own rules, in no particular order, include:

- Choose someone currently in active legal practice or at least someone who at some time in his or her career represented private clients to earn a fee. In my opinion, such a mediator is more likely to be appropriately sensitive to lawyer-client relationships than those without such experience.

- Obviously, pick someone with credibility to and the respect of both plaintiffs' and defendants' bars.

■ Experience within the field of the subject matter to be mediated, while not essential, is preferable. Expertise in medical malpractice does not match the mindset needed for a construction dispute or an employment controversy. Numerous of my colleagues will not agree with this suggestion, but it leads to my next point.

■ The mediator needs to be able to identify with and talk to the clients as well as the lawyers. For example, a mediator who understands construction issues can, with the right word or two, convince a contractor party that he's one of them. Moreover, it is one thing to understand fully the concept of leverage, i.e., a Smith & Wesson beats four aces. It is quite another thing to know instinctively who has the gun and who has the cards.

■ Check the organizational e-mail listservs, bar association lists and your own contacts for the current buzz on the street about specialized mediators.

■ Where applicable, find someone who understands how the liability insurance industry functions and how primary and excess insurance layers work both with and against each other. A working knowledge of coverage issues is often helpful as well.

■ Most important, find someone with a creative mind who has the ability to think differently. Most of the time, the parties have already argued their positions to each other, as have their lawyers, before the mediation session. Repeating the same arguments will not likely be effective in changing any positions previously taken. Since the mediator is not there to make a decision or to validate either side's position, the best way to advance the ball is to offer new considerations to each party.

■ Make sure your mediator has both the time and inclination to follow up if the case does not resolve at the first session. This is a field where persistence pays off.

Note that I have not mentioned fees (expense), as it might be considered inappropriate for present purposes. Within reason, however, this should not be a significant issue, as the fees are usually split among several parties anyway. Some mediators charge a flat fee or calculate fees by the day or half day, others by the hour and some with an add-on for the number of parties involved. It has been my experience that, all things considered, there is not too much difference in the bottom line cost of mediation, at least any that can be attributed to the manner of calculation. The goal, of course, is to get the right mediator for your case. In the end, the cost of a successful mediation will be less than the expert video you would have needed for trial, not to mention the time and work to be saved. ✪

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