



Is mediation your exit strategy?

More and more attorneys see mediation as the final act in their legal career, but it's not for everyone

BY ALAN BRUTMAN

Starting in the early '80s, when judges retired from the bench, establishing an ADR practice and offering arbitration, settlement conference and private judging services was a natural progression. With the explosion of mediation over the last twenty years, lawyers increasingly are leveraging ADR as their exit strategy or second career act. I have been an ADR professional for the past 28 years and based on my experiences, the following insight is offered to those contemplating a career as a neutral, especially for attorneys who are considering giving up lucrative practices.

Do you have the skillset, or more importantly, the "it" factor?

The first step is self-reflection. Be sure to assess your temperament. Ask yourself why you think this career move is right for you. It's important to understand and acknowledge how challenging and competitive this industry truly is as well as how challenging the transition is likely to be. Just because you're a great negotiator or problem solver as an advocate doesn't mean it will translate to your role as a neutral. Despite how obvious a solution may seem to you, the parties need to come to their own conclusions in their own way, at their own pace. If you do not feel that resolving conflicts is a calling, a passion, or something you find



yourself practicing in your head when you are a participant in a mediation or when you come across conflict at home, work or about town, chances are you are not a good candidate, at least not at this time.

Many don't understand just how hard successful mediators work. Whether it is obtaining business, continually honing skills or managing a busy practice, there rarely is much downtime, if ever. Mediation is driven by momentum – you often may be working late into the evenings or early mornings, but tomorrow's case still needs to be prepared for. Challenging cases tend to force mediators to work around the clock, even when not in session or preparing for an upcoming matter. They constantly must think about all matters still in need of closure to find creative ways to help parties navigate paths toward resolution while overcoming multiple obstacles including parties' and attorneys' emotional interests, varying motivations and hardball tactics.

Reflect upon your skills. Among other qualities, good mediators should be natural problem solvers, great communicators and empathetic listeners. They are persistent, highly focused, organized, detail oriented, and they must display high emotional intelligence. Ask yourself if others believe you have these qualities. This is only a start, as there are many other required skillsets and attributes a person must possess to really have what it takes.

There is however, only one quality that absolutely assures a person's success as a mediator: the mysterious "it" factor. The small percentage of people who have "it" are "can't miss" mediators, but it is a rare, possibly innate quality that is not easily identified and is not likely to be taught or developed over time. The most successful mediators all seem to have it, and industry professionals with countless years in the business know it when they see it.

How do you know if you possess the "it" factor? Look at your past and present life trials and tribulations, and recount how you handled them. If you typically

persevered and emerged victorious without making others feel like losers, while making friends and gaining respect by all, it should serve as a key indicator that perhaps you do have "it." Additionally, being a worldly and knowledgeable person with great positivity and energy increases your odds of having "it," as does having an insatiable fire in the belly and great work ethic. Other key ingredients in those with the "it" factor include a love for and interest in people from all walks of life, and an immense love of the mediation process.

Aside from the required intangible skills, it is important to get some formal mediation training from a respected institution. You will need 30 to 40 hours of mediation training to get on court-sponsored panels, which is a great way to get opportunities to mediate, even if pro bono, to develop your skills and gain valuable experience. Most importantly, do it to learn about mediation and the process in great detail and how to really become a neutral. It will go a long way in determining whether you should proceed down this path.

Getting your business off the ground

To enter this saturated field, you must be fully committed. You need to plan how you will wind down your law practice and prepare to start a new business. You'll need cash flow (at least, most of us do). On average, it takes two to five years to get your business off the ground, so you must plan ahead and be able to survive without your current income and with minimal cash flow. This will likely be the case even if you join an ADR provider. As an independent contractor, you must realize and operate with the mindset that you are essentially starting your own business despite the fact that you will receive assignments and administrative support from the provider you join. It is still your responsibility to build a network of prospects and make it happen for yourself. However, if you choose the provider that is

truly the right fit, they should take great pride in partnering with you in every aspect of developing your practice.

Setting goals

Once you have launched your business as a professional mediator, start setting goals, including what success looks like for you in this new career. Everyone has a different definition of "success," but you'll want to find one that reasonably fits within your expectations. It's easy to create a business card and claim that you are a mediator, but clients and cases that regularly come to you will be the true determining factors of success. Good goals will keep you on track and focused on achieving your definition of success. Your goals should include the usual start-up business items, including financing and planning strategies. Be sure to conduct extensive diligence and research to decide on a business strategy and initial price point. When transitioning, mediators are best served by reflecting humility in their fees. Later in your career and after you've established yourself as a reputable mediator that can close even the most difficult cases, you can command higher rates, and they may even be advantageous.

After the visionary work and smaller, inward-facing tasks are complete, you can focus on the big-ticket items, such as choosing your business entity (incorporated or LLC); obtaining errors and omissions (E&O) insurance; developing a website, establishing a logo and/or tagline for marketing your services (e.g., website, advertising, letterhead and business cards); and securing a facility with a minimum of four conference or private meeting rooms.

Your case manager

Another area that cannot be underestimated is the need for a quality assistant to manage cases. A trained case manager who can convene your cases is invaluable, and it is crucial to have a live person always answer the phone. The majority of calls you receive early



in your new career are from clients who caught wind of your new endeavor and are just shopping for dates and information from a list of neutrals. Often at this stage, the parties have not yet all agreed on a mediator. Other factors aside, these cases have the highest probability of going to the neutral with the most talented case manager. A talented case manager is an industry professional who knows the firms involved, is familiar with the nuances of different case types, can discern personalities and adeptly handle questions clients may have about the mediator's experience, style and success rate. Contrary to what you may believe, good case managers are not easy to come by.

Marketing your practice will require a significant investment, and you must plan for continuous evolution and an ongoing campaign – regardless of how you feel about constantly promoting yourself or the demands of your current caseload. Ads, articles, outreach, advertorials, seminars, conventions, public speaking and relentless networking at all types of legal-related events are necessary in this career. For example, while email has become the norm, it has become less effective and is often construed as less personal and may be treated as spam. Therefore, taking the time to create handwritten letters may seem like an antiquated approach, but is an important tool to consider. You will also want to build a comprehensive and interactive website to provide around-the-clock marketing. Clients and potential clients expect neutrals' websites to be dynamic and up-to-date; you may consider bringing on a content marketing specialist to help your website get the best results. Your website is not likely to bring you business, but it can certainly cost you business.

Have a specialty

It is increasingly difficult to establish yourself as a generalist who mediates every type of case. At first, it is best to narrow your focus to the areas you know

best. If you are fortunate enough to have experience in a specific substantive area that lends itself to a popular niche in the ADR market, you may be able to gain some traction in your first year as a full-time neutral.

As you are getting your business off the ground, one strategy you may consider is to create your practice to make yourself attractive to an ADR provider with an established platform to help you accomplish your goals. The most desirable providers are highly selective when it comes to prospective mediators. Providers are often inundated with interested prospects and typically only select a small number of mediators per year, since partnering with a new neutral requires a significant investment of time, planning and resources for the duration of their careers – and this is especially true during the initial practice development and growth years. Unless you've made inroads with an established provider that has a proven track record for developing successful practices for others with similar experience and you are a solid fit for their business model, culture, and goals, you will need to consider – at least initially – to start operating as an independent neutral. If there is a particular provider that you feel is the best place for you, but the feeling isn't currently mutual, don't be shy about asking them to map out a plan for you that, when executed, will likely land you on their roster.

Competing in the crowded marketplace

Once you've established your business, it's time to prepare for some cases. You will need to draft an engagement letter, confidentiality and settlement documents, and most importantly, you should obtain software to track potential conflicts. You should also keep records of your case history as your practice grows. The reality is that eventually, and likely sooner than later, California will adopt disclosure standards for mediators similar

to what arbitrators are currently required to disclose.

The competition for cases is fierce. Now more than ever, judges are leaving federal and state benches earlier in life and have already put in the work required to become "go-to" mediators, rather than focusing on arbitration or private judging work that typically seeks them out from having a good bench reputation. And for the most part, when judges announce their availability as private neutrals, they tend to create the most buzz in the ADR/legal community.

Just names on the roster

There are also new ADR providers, so the top talent is spread around even more. As a result, some providers may be devaluing what it really takes to succeed in this industry, and rather than taking the time necessary to carefully vet candidates and focus on quality, they are focusing on adding as many neutrals as they can to their rosters regardless of experience and the likelihood that they'll succeed. Statistically, from all the candidates who train to become mediators, few actually achieve a full-time career of working at least 30 hours per week as a commercial mediator or making the kind of money a successful lawyer makes.

The ADR industry can also be a lonely and cruel business. It thrives off client experiences and word of mouth. Mediators can be judged and criticized for their every move, even before engagement on a matter. You only have one chance to make a good first impression. Unfortunately, rookie mistakes you make at the beginning of your mediation career can linger in the memory of clients for years to come and follow you for your entire career. Today, criticisms are magnified by the large network easily reached through the electronic world we now operate in. Your reputation for delivering results and the impression you leave with others will have a great impact on where your career goes.



For the lucky few who become stars and are in great demand, there is a risk that the perception of you can change quickly. Clients who always tried to get your work and who were your biggest fans may jump off the bandwagon and become your loudest critics. It is a great benefit to have incredibly thick skin to avoid getting caught up in either the chatter you will hear, or on your “press clippings,” whether public or private, good or bad.

The other harsh reality is that while you may have been a rock-star lawyer or celebrity judge in your former career, in this industry, you will be just another rookie mediator hustling to develop business with a limited track record in the field. Your trial prowess and former career results may catch the eye of a provider, but those factors are unlikely to translate to business as you might expect. Therefore, your ego must be able to handle this challenge for at least your first year. If you are unable to begin with a provider, or don’t at least have a colleague or mentor mediator on speed dial, you may struggle to navigate critical situations and risk second-guessing yourself, along with this new career choice. Even veteran mediators experience similar challenges, and it is extremely helpful to have colleagues who can talk you through these inevitable periods and serve as a resource at this critical time in your new career. Failure to have someone, or a quality

group of mediators, in place to support you can really hinder how quickly your practice can grow.

Should you consider arbitration?

A question often asked is whether you should also serve in the capacity of arbitrator or private judge. Although often lucrative, many view these roles as detrimental to building a successful mediation career. The popular thought is that you risk making a friend for a minute but an enemy for life; experience shows that as long as you are able to provide an intellectually honest, well-reasoned opinion, that will not be the case. Not everyone will always be pleased with your rulings, but they will gain respect for you and eventually come to see you as a true neutral who knows how to evaluate challenging issues and make a tough call. At the very least, this, along with mastering the art of mediation and having endless passion for the process, should ensure mediation opportunities from arbitration clients still come your way. One potential downside of which you should be mindful is that serving as an arbitrator and private judge can complicate networking opportunities, as you cannot solicit arbitrator work.

What now?

At this point, you may be wondering if there is room for you in this industry. There is always room for those who

possess the “it” factor, as well as renowned members of the bench and bar with the drive to build a successful practice as a neutral by implementing much of what was previously discussed. If you succeed in setting up your practice, secure some mediation opportunities on your own and earn repeat business, you will likely be in the enviable position of staying the course for the next two to five years – or longer. On the other hand, you may be introduced to a provider who believes in you enough that they will offer you a turnkey opportunity to bankroll and expedite the growth of your practice. While a career in mediation seems to be the natural and enviable goal for many attorneys looking to their next chapter, carefully consider all the factors and options before diving in.



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