

DEVELOPING A MEDIATION PRACTICE

I. INTRODUCTION

Former Chief Justice Warren E. Burger of the United States Supreme Court, once opined, that “for many [civil] claims, trial by adversarial contest must go the way of ancient trial by battle and blood. . . .”¹ Indeed, his forecast has become a reality in the Twenty-First Century.

United States Chief Magistrate Paul Zoss, stated that

Civil trials in the federal courts in Iowa are disappearing. That is a statistical fact. Most cases that previously were tried are now settled with the aid of mediation.²

United States district Judge, John A. Jarvey observed:

Mediation took Iowa by storm for several reasons. First, while courts were loath to sponsor settlement conferences until the eve of trial, mediation is now conducted earlier and often prior to filing. Second, the process typically takes from four to six hours and facilitates more rapid exchange of proposals. Third, people are naturally attracted to a process that gives them more control over the outcome of the dispute. Finally, compared to the jury trial, mediation is extremely inexpensive.

With this augmenting trend, the need for trained mediators is ever-increasing. The question is how can one get into the practice of mediation and build a livelihood?³

¹ Warren E. Burger, 70 A.B.A.J. 62, 66 (1984).

² In Iowa, jury trials decreased 38 percent from 1993 to 2002, and at an ever-increasing pace since. Letter to the editors, Des Moines Register, August 15, 2003. Civil cases across the country actually decided by jury verdict constitute less than one percent of the cases filed. The statistics for bench trials is similar. Peter L. Murray, *The Privatization of Civil Justice*, 91 JUDICATURE 272 (2008).

³ In becoming a mediator, one is entering a noble profession – the highest calling in the practice of law. The person is no longer advocating, but peacemaking, bringing not only resolution, but conciliation, peace and healing.

Abraham Lincoln stated:

The lawyer as peacemaker has the superior opportunity of being a good man.

It is a noble calling because it brings a profound change in our dealings with others and within ourselves.

A. Where to Begin

1. Find a niche or specialty.

The first step is to inquire whether the candidate has a niche or specialty where he or she is known and respected. This might be in family law if the person's practice has concentrated in that area. Or, it might be personal injury or patent or commercial dealings, whatever. A long and distinguished career in a particular area of law gives the person a better opportunity to exchange his or her coat of advocacy for a mediator's cloak. The person is already familiar with the law, is acquainted with those also practicing in the area, and is presumably respected by his or her peers.⁴ It is therefore natural to concentrate in a specialty area, at least initially until the person can build the practice which will facilitate expansion.

2. Adequate training.

The second step is to get adequate training. There are a number of training courses for mediators offered around the country. Generally, they are 40 hours, which in many jurisdictions is required for state certification. Courses are geared for certain specialty areas. For example, if the individual seeks to become a family law mediator, there are courses which cover all aspects of this area, and in Polk County, for example, are required for certification to mediate family law disputes. Generally, the family law courses teach conference mediation, that is, the parties remain together throughout the mediation with the mediator seeking to open better communication between the parties because of the ongoing contact in which they must engage. Three instructors that might be considered are Steve Sovern (Cedar Rapids, IA), Zena Zumeta (Ann Arbor, MI), and Kim Stamatelos (West Des Moines, IA).

⁴ This is not to suggest that one can only mediate in an area for which they have some expertise. On the contrary, an experienced mediator can mediate in any area of law so long as the person is able to grasp the legal concepts without too much difficulty.

For most other areas of the law, caucus mediation is the preferred format. Dick Calkins of Des Moines offers such a training class at Drake Law School.

In receiving training, the candidate should be certain there is some form of certification. All established training courses will provide such along with CLE credit of 40 hours and 2 hours of ethics.

3. Identifying top mediators in the state.

After completing training, the third step is to inventory the top ten mediators in the state, particularly those with whom the person has participated with as an advocate. Ask, (a) what format did each use – caucus or conference? (b) Were they evaluative, facilitative, or a messenger? (c) Did they play devil’s advocate and confront the parties and counsel? (d) What format did you like best? (e) What role do you feel is best for you? (f) Which mediators did you feel were least effective and what was it you did not like?

Once you have completed your inventory, seek to pattern your mediation approach after those mediators with whom you feel most comfortable. You might even inquire whether you could shadow one or two in a mediation. Some mediators are willing to do this with the consent of the parties and counsel.

4. Pro bono mediations.

The fourth step is to engage in pro bono mediations to get experience and build your resume. If you can represent you have successfully completed 25 mediations, for example, no one will ask whether they were pro bono or you were paid. Such organizations as the Iowa Civil Rights Commission (Beth Townsend), Legal Aid (Carol Burdette), Iowa Mediation Services, Inc. (Mike Thompson), Polk County (Joe Harrison) can provide pro bono opportunities – small claims, divorce, employment discrimination, neighborhood disputes, etc.

5. Administrative considerations.

Step five is to resolve administrative matters such as fees, contract of engagement, the form of the letter to be sent to counsel and the parties, insurance coverage, etc.

a. Fees

Most mediators charge an hourly rate, although some may charge a flat fee per case or per diem. Family law cases generally generate lower fees - \$100 to \$150 per hour, while personal injury, commercial, employment, and other non-family matters generate \$200 to \$300 per hour in Iowa. An administrative fee may also be charged - \$150, \$300. Call around and find out what is being charged in your area.

If you travel, you can charge the same expenses as a lawyer – mileage, travel time, hotel, motel, parking, tolls and airfare. Some mediators, however, will absorb those costs in order to be competitive with mediators in the area. Additionally, you can ask for a retainer and cancellation fee.

The fee must be set before the mediation begins and cannot be dependent upon outcome – there can be no contingency fee, bonus for success, a percentage of the settlement. Such would be unethical because your fee depends on the outcome.

b. Contract of engagement

Before you commence a mediation, you must require the parties to sign a contract of engagement. This should include your name as mediator, your compensation (which is the same regardless of outcome), a request that counsel be present and participate, the format you use (conference of caucus), and the confidential nature of the process.⁵

⁵ A sample agreement to mediate might include the following:

c. Letter to counsel

Once engaged, the mediator should send a letter to counsel setting forth the date, place, and time of the mediation. It should invite counsel to submit material to prepare the mediator for the session. The letter should stress the importance of the decision-makers being present and participating with sufficient authority to settle. Finally, the letter should request that the parties allow four hours or more to conduct the mediation.⁶

AGREEMENT TO MEDIATE

We, _____, the undersigned parties, hereby agree to use mediation for a dispute concerning _____ in accordance with the following terms:

Mediator: The parties agree that _____ will be the mediator.

Fees: Fees for the mediation services will be charged at the rate of \$ _____ per hour with a \$ _____ Administrative fee. The parties agree to pay the mediator's fee as follows: _____

Consulting With Attorneys: It is recommended that attorneys be present and participating in the mediation. If attorneys are not going to be present, parties should, during or between mediation sessions, and before finalizing an agreement, consult with counsel regarding legal rights and obligations. The parties recognize that the mediator is not giving legal advice or counsel, nor analyzing the legal rights of any of the parties. Nor is the mediator serving as an expert as to factual and legal issues.

Private caucuses: The mediator may conduct private caucuses or meetings with each party and counsel to assist the mediator to better understand each party's position. Information obtained in private caucus is confidential and may not be disclosed to the other side unless specifically authorized by the party participating in the caucus.

Confidentiality: The parties agree that mediation sessions are settlement conferences and matters discussed therein may not be disclosed and are inadmissible in any future trial or arbitration should the case not settle. The parties agree they will not subpoena or otherwise require the mediator to testify or produce records, notes or work product in any subsequent proceedings.

Dated: _____

Mediator

Parties

⁶ A letter to counsel might include the following:

Dear _____:

RE: _____ vs. _____

Please send any material you would like me to review. Because my function is that of mediator rather than arbitrator or judge, such material cannot prejudice either side. It is only intended to assist me to become better acquainted with the case so that I can assist all parties participating. Please do not feel obligated to draft a lengthy

d. Insurance

Your regular errors and omissions policy covers your activities as a mediator. However, if you are no longer practicing law as such and engaged in the full-time practice of mediation, insurance rates are very low, as low as \$680 per year.

e. Business cards

You should have business cards made up which include your designation as mediator and possibly arbitrator. It should also include a tag line such as, “finding peaceful resolution,” or “resolution through mediation,” or “mediation: resolution through peacemaking.”

f. Brochure

You might wish to develop a brochure which identifies you and your services. It also suggests that you are serious about being a mediator. It should (1) identify you and your biographical background; (2) training and experience in the practice of law; (3) experience as a mediator – pro bono; (4) expertise and niche you wish to serve; and (5) favorable comments from those who support you. And it should be instructive: (1) describing what mediation is; (2) how to prepare for mediation; (3) what type of format you use – conference, caucus; and (4) benefits of mediation to the parties.

case statement, or to send other original documents for me to review. If you wish, you may send me a brief position paper and/or documents already prepared during the course of pretrial discovery.

It is important the parties attend the mediation. If a party is represented by an insurance company, an insurance company representative with authority must be present. If a party cannot make the scheduled mediation, please let me know as soon as possible.

Please come with authority for movement at the mediation session. You are encouraged to continue your direct communications with each other in an effort to settle before mediation.

I cannot tell you how long the mediation will last, so please allow at least four hours. More time may be needed, so try to remain flexible. If you have any questions as to the mediation process, please feel free to call me at any time.

B. How to Introduce Yourself As A Mediator

1. Books on marketing. There are a number of books on how to market yourself as a mediator. One, C.J. Hayden, Get Clients Now is particularly good. It lists the various ways you might introduce yourself to the profession and the market. Unquestionably, your primary market is lawyers and the legal profession. The following lists the most effective ways to reach your market, beginning with the most effective to the least effective:

- Direct contact and follow-up
- Networking and referral building
- Public speaking
- Writing and publicity
- Promotional events
- Advertising

Interestingly, the least effective way to introduce yourself is to advertise – presumably in the Iowa Lawyer and the Yellow Pages.

2. Website. Setting up a website can be an effective way to introduce yourself, because if someone is interested they will normally check your website first. The website should include the following: first, a biography about yourself listing your education, background, past legal experience, articles and books you have published, honors you have received, positions in various organizations you have held, military background, etc.; second, it should list the mediation and arbitration services you have available; third, it might list your specialty areas if you seek to reach a certain clientele; fourth, it might include testimonials of your past work if you have such; fifth, you need to include contact information; and sixth, it is effective to have photographs of yourself, for example, conducting a mediation.

If there is access, you might connect your website up with other websites as a type of referral, such as the American Academy of ADR Attorneys. Your website might include tips on mediation and how to select a mediator. You might even have a question and answer section to your website listing questions commonly asked and your answers, such as:

Q. What is the difference between mediation and arbitration?

Q. How successful is mediation in resolving disputes?

Q. Is it ever beneficial to have co-mediators?

Q. Is mediation good for the attorney as well as the party?

Q. When can you mediate – before the case is filed?

Q. Where should a mediation be conducted?

Q. How long does a mediation take?

3. Blog.

A blog can provide you with a means of keeping your name before interested parties. By regularly providing articles on mediation or tips on how to resolve differences outside the courts, it will suggest that you are on the cutting edge of mediation.

4. Contact lawyers.

Contacting lawyers who you know and respect you is perhaps the most effective way to begin your practice. Concentrate on just a few to start – take them to lunch and explain why you will be an effective mediator. Frankly, ask them to help you get started and give you a chance to show your wares. Given a chance and a successful mediation, the word will spread. Each mediation generally includes a new lawyer or two and the network grows.

5. Contact insurance carriers.

Because insurance companies are heavily involved in mediation, they are an excellent source of business. There is always a concern about soliciting; however, letting a carrier with whom you have dealt in the past know that you have mediation services available should not create a problem.

You might offer to provide training sessions for new adjusters or do a demonstration mediation. Most insurance companies have annual meetings and are looking for speakers. You can offer to speak on mediation.

6. Send out letters.

Although not as effective as direct oral contact, sending out letters to the profession and insurance companies announcing your services as a mediator is another way to get started. Letters to people you know with a personal note so that they will know it is not just a mass mailing, will help identify you.

7. Speaking engagements.

It is helpful if you can be a speaker at a bar association meetings. This is a good forum to announce your new undertaking. Likewise, speaking at trade association meetings can draw attention to your new endeavor.

Although as not as fruitful, you might contact Chamber of Commerce groups, Kiwanis, Lions, Rotary, etc. and ask to speak at a meeting. They are always looking for speakers.

8. Actively network.

Networking will help get the word out. Join such groups as the ADR committee of the Iowa Bar Association, AAAA, ABA ADR Committee, etc.

You can also network by setting up a consortium of new mediators and provide mediations, in which you are counsel, in exchange for their providing you with mediations.

9. Contact judges.

Contact judges you know with whom you have good rapport and ask them to consider referring mediations to you. If you feel uncomfortable doing this, suggest that they set up a court mediation program for the county that you will help run. Initially, mediation could be done on a pro bono basis until the program is accepted. There has been interest throughout the state particularly in the family law area.

10. Local newspaper.

Get an article printed about your new activity in your local newspaper. This is not an ad but a story about you and the meaning of mediation and the impact it can have in a community.

11. Write articles.

See if you can get a column in your local newspaper, which you will author on mediation. Each week you can discuss a different aspect of the process and the impact it is having on the resolution of disputes.

Write law review articles, articles for trade journals and newsletters. You might even write your own newsletter to send out to a definitive audience that might be able to use your services.

12. Participate in mediation competitions.

There are two major mediation competitions, one at the college level and the other at the law school level, which would welcome your participating. This would include, first, contacting your college and/or law school and assist them in setting up a program; and, second, participate

by judging at the competitions. One always learns by watching students participate in these programs.

13. If all else fails.

If you have taken all these steps and still have not gotten a response, you might try the following: Contact a few of your closest lawyer friends and ask them candidly, first, why are you not getting mediations from the profession; second, what do you need to do to improve your acceptability; and third, what do they suggest you do to get your mediation practice started.

If you have mediated a few cases, but they are declining, ask your friends what the “book” is on you as a mediator. They will have to be blunt, but hopefully it will give you some ideas how to make your work more acceptable.

C. Ongoing Activities to Further Business

1. Establish network groups.

Set up network groups with lawyers having a common interest. For example, a woman might join other women lawyers and meet periodically for lunch or otherwise, to discuss common concerns and how to develop mediation prospects.

A network group might be set up through your college or law school, anything that binds a group together. You would be the mediator rep.

2. Make a bid to join the panel of mediator organizations.

There are a number of mediator organizations that add mediators to their panels such as Resolute Systems, Inc. (Milwaukee), ADR Systems, Inc. (Chicago), JAMS/Endisputes (national). If you can get on one of these panels, it is a source of business. The best way to do so is send them mediations from your law firm. Then, they are inclined to reciprocate.

3. Send out holiday cards.

One way to keep your name before those for whom you wish to mediate, is to send a holiday card at the end of the year. However, in doing so, it is important to personalize the card with a note which the receiver will know is a personal reference. The card will convey the message you are still around and you are mediating.