

Building Your Mediation Practice: October 2008

By Lee Jay Berman

Question:

I'm having trouble getting my mediation practice off the ground. I don't really want to mediate litigated cases, so how else can I make a living as a mediator?

Answer:

Just like there are many opportunities for those holding Juris Doctor degrees outside of the practice of law, there are more ways than can be counted to have a viable career in mediation outside of the litigated arena. Additionally, as we are beginning to see in more seasoned mediation markets, as litigators see that the magic of mediation can be learned by taking a couple of classes, more litigated cases are being settled without the need of private mediators. Together, this means it may be time for the profession to begin considering "Life After Mediating Litigated Cases."

The problem may be that we have defined the profession too narrowly. Because mediation's popularity was turbo-charged by its implementation in the courts, mediators have traditionally left their basic mediation training courses and fled to the courts like ants to a picnic. Not that this is a bad thing, after all, our litigation system was and is in need of mediators to help parties resolve conflict more efficiently, more cost effectively, more creatively, with more voice to the disputants, and with more choices. While the courts and the litigators may seem to be the gatekeepers of seasoned disputes, they are also the most obvious place to look, drawing the largest numbers of mediators, until the demand is met or exceeded, leaving more mediators than litigated cases, and not enough food at the picnic for mediators to put food on the table.

While I built my career in the litigated case arena, I have watched those who entered our profession in recent years struggle to gain enough traction for mediation (in communities where mediation is newer), or struggle to get themselves cases (in more mature, competitive mediation markets). I also believe that the surest way to make money in our society is to do the things that other people do not want to do. In the world of mediation, I believe that means considering turning your back to the court house and looking for the road less traveled. While these opportunities will not present themselves as readily as litigated cases, the upside is higher and the competition is almost non-existent when you create a new opportunity, rather than following others where the opportunity already exists.

The first step is to figure out where your education and career background intersects with your passion. Mediators with backgrounds in aerospace will likely have different career paths than those with backgrounds in teaching, the law or in real estate. Figure out which field interests you and seek out or create a way to marry your conflict resolution expertise with that field.

Notice that because the mediation profession is relatively new, the field has been populated by people moving laterally from other professions, and as such, mediators' resumes and educational paths are often made up of fields that are different than mediation and conflict resolution. The next generation of mediators will more likely have degrees in mediation or conflict resolution, and will then endeavor to find applications of those skills in other professions, where most of us practicing today come from these other fields and are using those prior skills to define our specialty within the mediation profession.

For those who don't want to mediate litigated cases, think about your passion, and about your qualifications. The following is a list of some ideas to research. This list is by no means exhaustive, and is intended to start your juices flowing and wheels turning. Research thoroughly, take additional training and course work as may be required, and have fun being a pioneer:

Government. Many federal, state and local governmental agencies have laws or ordinances mandating or encouraging the use of mediation. Many also hire mediators into salaried positions.

Ombudspeople. Many college campuses, hospitals and large corporations hire ombudspeople to handle conflict that arises within their organization. These positions are essentially mediators who, in the end, are employed by the company to settle disputes. Opportunities here may arise in job postings, but the idea might also be pitched to a large entity in your area who has not yet considered such a position.

Business. Corporations have tremendous need for mediators, but in most cases, they don't know it yet. While some of our colleagues are doing this work, the door is wide open for people to help big business see the value added by having a mediator assist in situations such as mergers and acquisitions, management and culture change programs, retention programs, and facilitating management and board level meetings.

Education. Parents fight with teachers, who are under siege from administration (or vice versa), contract disputes arise, and somewhere in the mix students have troubles with each other and with the grade their teacher gave them. Not to mention special needs children, where mediation is already gaining a strong foothold. Education is a field with multiple stakeholders and high emotions. This is a great arena for the future growth of mediation.

Healthcare. Healthcare suffers from the same built-in stakeholder issues as the educational system, with nurses leaving from burnout, insurance coverage disputes, patient and family relations strained with the hospital, internal disputes between doctors and nurses, and administration and employees, the health care world is ripe for the plucking for mediators. If your local hospital does not have a mediator on staff, maybe they should. Kaiser Permanente, the large California

HMO, is a model example. Health insurance companies would be smart to consider adding staff mediators to their claims department, too, if policyholder and provider retention is important to them.

Academics. Just as we say, - There is always room for one more peacemaker, "there is also always room for one more teacher of peacemaking skills." Whatever the grade level, teachers and trainers who can deliver mediation training and inspire today's youth to be tomorrow's peacemakers will always have a home. Some do it as consultants, marketing their training to public and private schools and universities, others become full-time faculty, adjunct professors and full tenured professors. If this is your passion, the number of dispute resolution programs is expanding exponentially - find one or create one!

Law Enforcement. While these positions are often filled by officers who have been trained in mediation skills, law enforcement departments are increasingly hiring mediators to help resolve issues between officers, "the brass", and constituents.

Community Mediation. If working hands-on with real people is your passion, then opportunities in community mediation may be right for you. Often, governmental funding, grant funding, and even funding from the courts can be available to fund community mediation programs. While some funding only covers program administrators and staff, occasionally staff mediators may be funded as well. Bringing peace to a community two neighbors at a time may be its own reward.

Faith-Based. Because religions generally teach non-violence and peaceful dispute resolution, those involved in conflicts that arise in these arenas usually do all they can to avoid litigation. This is a place where skillful mediation, especially with a mediator who is well schooled in the religion's beliefs and in the skills required to mediate effectively in this setting, can thrive. Discussions in this arena generally consist of very different subjects than what a jury would do with their dispute. Mediators interested in reconciliation and forgiveness, rather than just settlement, will enjoy working in this setting.

Group Facilitation. While group disputes often turn to mediation after litigation has been filed, these are very different mediations than the typical litigated cases. With multiple and diverse stakeholders and complex and intertwined issues, these are generally long-term projects built around collaboration, rather than compromise, and problem solving rather than settlement. With increasing pressure for public policy change in areas of the environmental resources and green living, future opportunities for group facilitation will be plentiful. While work in this area requires specific training, including a deeper understanding of group dynamics, cross cultural issues, and possibly environmental issues, training is available at places such as www.ConcurInc.com. This work can be a nice niche for mediators who want to do more than "move insurance money around the

table," as I have heard some mediators say. Public agencies, non-profit organizations, environmental groups and NGO's often engage in this kind of process.

Settlement Counsel. Law firms are increasingly setting up ADR departments and looking for an attorney to lead them in their pursuit of being ADR leaders in their local community. Litigators are also increasingly hiring settlement counsel to assist with mediation advocacy in larger cases, advising trial counsel and clients on settlement strategy throughout the course of a mediation. This is every mediator's chance to be on one side of the negotiation and actually pick up the hand of cards and play it, for a change. For every mediator who has always wanted to say, "you're offering too much!" or "don't drop that fast!" this may be the job for you.

Courts. Many courts are now hiring ADR people, both as staff mediators, like Bob Rack at the U.S. 6th District Court of Appeals in Cincinnati, and as ADR administrators, like Julie Bronson, who oversees 25,000 mediations per year at the Los Angeles Superior Court's ADR Office. If it is the sole practice nature of operating a mediation practice, and trying to get enough cases to feed your family that makes you shy away from the competitive world of mediating litigated cases, these are opportunities to put your training and experience to good use and have a steady paycheck.

System Design. In addition to delivering mediation services, some mediators choose to specialize in ADR system design, helping companies, agencies, courts and other organizations design dispute resolution systems that move through a variety of processes until the dispute is resolved. A working knowledge in dispute resolution systems and design is usually required, but those with advanced degrees in dispute resolution can often find gainful work consulting to organizations in designing efficient and effective dispute resolution procedures.

To learn more about additional opportunities, investigate conferences and job listings related to mediation. Lipscomb University's Institute for Conflict Management believes so strongly in "Life After Mediating Litigated Cases" that they have created an entire conference around it. Their first annual Southeastern Mediators' Summit is entitled "In the Shadow and Out of the Box: Realizing Mediation's Future" (<http://icm.lipscomb.edu/page.asp?SID=168&Page=6150>), scheduled for December 1-3, 2008 in Nashville, Tennessee is focused entirely on the applications of mediation skills outside of the litigated arena.

Mediate.com also lists, for their members, job opportunities in the field of mediation at www.mediate.com/careers. The National Association for Community Mediation posts jobs at <http://www.nafcm.org/pg29.cfm> and Fresno Pacific University lists mediation jobs at <http://peace.fresno.edu/rjobs.php>. Finally, the Conflict Resolution Information Source provides job listings at <http://www.crimfo.org>.

And finally, be sure to question how important it is to you to call what you are doing "mediation." The skill set in which you are trained and have been practicing, can be practiced under many names, such as ombudsperson, employee relations, union negotiator, facilitator, manager, client relations, customer service, project manager, committee chair, claims manager, human resources, peacemaker, transactional attorney, business affairs, collaborative lawyer, broker, intermediary, department head, administrator, moderator, diplomat, politician, and yes, community organizer. So think about whether you are passionate about the mediator title or about practicing the skills, as they may not necessarily be inseparable.

In any event, go forth, spread the word, multiply, practice the skills, do good work, make money, and above all, enjoy yourself!

Lee Jay Berman is a commercial mediator based in Los Angeles. He has been on and off of the Los Angeles Superior Court's mediation program since 1996, and from 1999-2000 served as the inaugural director of the Santa Barbara Superior Court's Court Annexed Dispute Resolution (CADRe) Program. He has successfully mediated over 1,300 cases and is Director of Pepperdine Law School's Mediating the Litigated Case program in Malibu.