

Mediator: Not to Be Confused With a Burned Out Litigator

by Len Levy

All too often, attorneys who represent clients in matters in which I have been the mediator remark that they are tired of all the (expletive deleted) they have had to put up with as litigators, and figure, with all the litigation experience they have, and with all the mediations they have appeared in, they may just become a mediator. Among the implications of such a statement are:

1. Litigation experience (including appearances at mediation) bears relationship to the development of mediation skills;
2. The desire to leave something which has become less than satisfying is a basis for moving into the mediation field;
3. Exposure to others litigators provides sufficient contacts for developing a mediation practice.

This article is being written, not to scold those whose desires have changed, and who might, indeed be “burned out” as litigators, to pursue the goal of becoming a professional mediator. In order to develop as human beings, we are constantly reexamining our goals and desires. That is a good thing. If, after deep insight and a realistic evaluation of one’s goals, the conclusion is reached that mediating cases is what you really want to do, even if you are tired of being a litigator, by all means pursue the goal. But don’t do so simply because you are tired of doing what you are doing. Do so because you really want to mediate matters.

If you pursue the development of a mediation practice purely from a desire to “make the big bucks,” you will be disappointed. By this, I do not mean to say that mediators cannot make a very good living. Of course, many mediators do. But, on the other hand, many very skilled mediators do not earn a good living, and even those that do, have had to “pay their dues” much in the same way that struggling actors do. It is the very rare individual who can simply give up his or her law practice, or psychology practice, or other profession, and immediately earn a living as a mediator. It happens, but that is the exception, not the rule.

It is not very likely that a person can count on closing one’s law practice, and having people utilize that person as a mediator, such that within a matter of months, a drop off in income is hardly noticed. The more usual scenario is that after a number of years of actively “getting the word out” (i.e. “marketing”), you finally reach a stage where two people will agree to utilize your services over those who have already established themselves, and gained a reputation as an effective, skilled mediator.

The more usual scenario is the development of mediation skills through courses, seminars, and conducting mediations as a volunteer. While it is certainly not right that mediators

“work for free” through the court panels over an extended period of time, the opportunity to develop skills, and to make contact by the handing out of the “free samples” of those skills you provide, the value of the experience gained, and the contact list developed, cannot be overlooked. It is important for the mediator to be ready to make such a commitment, and, I submit, that “being burned out” as a litigator does not provide the proper basis for making such a commitment. Rather, it is a commitment *to* professional development which is an essential ingredient. Indeed, it defies logic to conclude that a commitment to *leave* anything, by itself can form a sufficient basis for doing that which must be done to develop *into* a committed professional.

Woody Mosten, in his *Mediation Career Guide*, helps put this into perspective:

“Many beginning mediators are frustrated at the time, expense, and hard work that it takes to make a living in a new profession. This frustration translates to many mediators’ jumping into, but then crawling out of, this profession. It is remarkable to see the number of new faces at the Southern California Mediation Association’s Annual Conference each November. This influx of fresh blood is heartening. But where did all the familiar faces go?”

So, what does it take? The answer is different for everyone. But one thing is clear, as Woody Mosten states, “If you want to enter this profession and it is a distinct profession from your current day job, it will require major investment and time commitment.”

It will also require something else: A desire to develop those skills which will make you the best you can be at mediating disputes. A commitment *to* excel in a very difficult profession, and not simply to make money is required. The reason for this is that the frustrations of developing a mediation practice mandates such a commitment to see you through very lean financial times. For those who have had the experience of building a law practice, and think that it is the same process as developing a mediation practice, you are flat out wrong.

A lawyer can hang out a shingle, work for another attorney, perhaps get a client or two to utilize his or her services, and develop necessary experience in this way. Generally, a lawyer is getting paid for this work. Getting clients requires simply that, in any given situation, one person is willing to give you a chance to represent him or her. If you do a good job for the client, that client, hopefully will utilize your services again. Some clients have the means of keeping an individual lawyer extremely busy, and working on one matter can be extremely lucrative. Usually, one individual can decide to utilize a lawyer’s services without having to obtain the agreement of another person.

Contrast the above with what is necessary to build a mediation practice. You can call yourself a mediator, but who will know you in that capacity until you have conducted a number of mediations, usually for free, as part of a volunteer panel. This is work for which you are not being paid. To be retained for any particular mediation, at least *two* parties have to agree to utilize your services. If one of those parties hasn’t heard of you, someone else is likely to be

hired, no matter how well you performed as a mediator in a prior matter, for the one who submitted your name. Once a mediation has been concluded, your services are no longer needed, and those services will (except in major litigation matters, which you are unlikely to see in the beginning stages of your mediation practice), generally not consume more than 10 to 12 hours (although more usually three to four hours). Hopefully, though, as you conduct a few hundred mediations, and utilize the contacts you have made through those mediations and your prior career, you begin to see repeat business, on both sides of the table.

What sustains you to the degree necessary to go through this process? I would submit, that you must have a commitment to the work, a real enjoyment of the process, a desire to continue to educate yourself, and to continue to constantly develop new mediation skills and approaches, in order to succeed as a professional mediator. A desire to earn as much money as one can is simply not enough.

A number of years ago, I began to write screenplays, and received positive feedback about my writing from screenwriter friends of mine, and others. As with so many budding screenwriters, I had some pie in the sky ideas of where my writing would take me, and the money I would earn. After some time in attempting to market some scripts, I expressed frustration to one of those friends about the slow process of having at least one of my masterpieces turned into a film. His response to me was, "It's called 'writing,' not 'selling.' If you don't enjoy the process of creating the screenplay, don't do it."

I still haven't sold a screenplay, but I still write.

The lesson is applicable to development as a professional mediator. If you don't enjoy the mediation process, and continuing to grow as a mediator, don't do it. However, give yourself the opportunity to develop your skills to a point where you can accurately assess where your desires lie, and whether you are willing to make the necessary commitment to developing a mediation practice.