

So ... You're Thinking of Becoming a Mediator

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I get a lot of people who call me up and say, "Rob, I'd like to take you out for lunch to pick your brain about becoming a mediator ...". Fortunately (for me) I am too busy mediating nearly every day and am unable to break away to "do lunch." Because I like to try to help people as much as I can, one weekend (a la Jerry Maguire) I wrote this "mini-manifesto" which contains just about everything I would tell you if we sat down for a several-hour lunch. I hope you find it helpful.

Let me set the stage: You are a lawyer—probably practicing about 20-30 years or so. The odds are that you are a litigator—in which case, you've had your fill of adversaries who are let's just say, not nice to be around; and, clients who are either ungrateful, feel you charge too much, and/or who would unhesitatingly sue you if they think, for a second, that you may have committed malpractice. You have been before one too many judges who have forgotten what it's like to be in the trenches and you have most likely often thought of writing a book entitled *My Life Is a Deadline*. If you are a litigator, you probably feel that a little piece of life is sucked out of you every time you get to the final throes before trial; and a not-so-little piece when you actually go through a trial.

As the years have rolled by, you have been saying to yourself (with more and more frequency) "there's gotta be a better way ...". You may already be at the point of jumping off a cliff (hopefully not!); or you may simply be at the point of realizing that you need a five-year (plus or minus) exit strategy.

You take inventory of your strengths and weaknesses. Assuming you are not compellingly drawn to doing something or reinventing yourself totally outside the legal arena (which is the subject of a separate book, in and of itself)—your most realistic viable options are: 1) try to get on the bench, 2) teach, 3) roll the dice on going in-house with an exciting—yet very risky—startup; 4) change your area of practice; or, 5) become a mediator.

You quickly strike numbers 2 and 3. As far as number 1 is concerned, either becoming a judge doesn't appeal to you, or, if it does, you realize that you don't have the right background or connections to nab a seat on the bench. As for number 4 you're an "old dog," and not likely to learn any new tricks. The one thing that you've always loved in your practice is going to mediation. You know what mediators do and you feel (or better yet—you know) you have what it takes to be a good mediator. Voila! The answer is "door number 5".

Reality Check

As you know, the field of mediation has become enormously competitive over the last decade. Nearly every judge hangs up a mediator shingle immediately after stepping off the bench. That alone creates an extremely high barrier to entry for those who have never donned a black robe.

Should that stop you? Of course not! Competition shouldn't scare you off, but, a dear friend of mine recently summed up the competition in the mediation arena when he said (separate and apart from all of the judges becoming mediators), "There are so many lawyers becoming mediators, pretty soon there will be more mediators than lawyers!"

When I was doing my due diligence before I decided to GO FOR IT!, I had heart-to-heart talks with several mediators I have the utmost respect for. I received lots of advice; however, I believe that the following "jewels" that I gleaned from those discussions are the proverbial starting point for anyone who is seriously considering becoming a mediator:

Although there is the rare exception, in today's market you must be either fish or fowl. This poses an almost insurmountable hurdle for most lawyers. It means that you must have the financial means to walk away from your law practice (whether by having built up a big enough cushion over the years, mortgaging your home or having a spouse who brings home enough bacon to carry you through the ramp-up phase.) There are several attorney-mediators who have been able to transition over the years (and who are able to wear both a litigator hat and mediator hat); however, today's market is dramatically different. I believe the only way one can maintain parallel tracks today, is if you bring something truly unique to the mediation world (and even then, I think there are irreconcilable conflicts.)

Speaking of the ramp-up phase, everyone I talked to told me that I had better plan on it taking a minimum of three to five years before things really start to happen. I have been able to beat the prevailing wisdom and gained traction after two full years; however, I can see why I was told, "You better count on a bare minimum of three years."

The third jewel that I took away from those discussions was presented to me as follows: "Rob, no matter how good you are (or think you may be) as a mediator—if you are really serious about making mediation your vocation—you should, at the very least, take the "Mediating the Litigated Case" course (which is six full days) at the Straus Institute for Dispute Resolution at Pepperdine Law School. It's 'a must.'"

OK. You are either at, "Ready, Set, Stop" or you are so committed to becoming a mediator that you are willing to take a second mortgage out on your house. Read on.

Ready, Set, GO

First, a preliminary comment. I can tell you right now, if you're thinking "I'll throw it up against the wall (put the word out on the street, take out a few ads ...) and if it sticks, great; if it doesn't, no biggie"—do not even bother! In fact, unless you are 100 percent committed to doing everything that is involved in starting a new business—don't bother. The bottom line is that if you REALLY want to have a successful mediation practice, what you are really saying is, "I am about to start a NEW BUSINESS; and, I'm going to do everything in my power to succeed."

As you presumably know, 90+ percent of ALL new businesses fail. If you don't treat starting your mediation practice as starting a new business, I believe that your odds of failing will be pushing 99 percent.

So, how do you improve those odds? First, I think the best advice I can give you is to take the time and put the energy into drafting a business plan (something that most lawyers have never done).

That advice falls into the category of, as my father would say, "Do as I say; not as I do." Although I didn't draft a detailed plan, the one thing I had was a laser-beam focus on the type of cases I wanted to mediate and the type I didn't. The following is a verbatim copy of my rather cursory initial "to do" list:

RJK's Mediation To Do List October 20, 2002

- Decide on location and procure office;
- Get E and O insurance;
- Create "Standard Disclosure" form and any other necessary documents;
- Decide on fee schedule and draft appropriate agreements, etc.;
- Review California Evidence Code sections 1115-1128, etc.;
- Create logo and tagline and have business cards and letterhead made;
- Perfect "Elevator Blurb" re what I'm doing ...;
- Create website and brochure;
- Develop "International Mediation" concept;
- Develop "Mega-Case Specialists" concept;
- Create "new ideas" notebook;

Location

Although I touched upon location in my initial plan, after doing some preliminary leg work, it quickly became apparent that I had only one viable option as to where to set up shop. It had to be downtown. Downtown is still the main hub of the San Diego legal market. It is the place to see and be seen by other lawyers (your potential clients) and judges. I had moved to Paris with my wife and kids and had been out of sight and out of mind for several year, so, getting and going to a downtown office every day was the first concrete step I took in launching my new mediation practice.

Be very careful about taking space in a firm. You run the significant risk of being perceived as “defense oriented” if it is a defense firm; or, “plaintiff oriented” if it is a plaintiff firm. A business firm is about the only safe harbor and, not all business firms will be safe.

Define Your Niche

You **MUST** come up with a niche that separates you from the pack. Doing so does not ensure success; however, failing to do so, will almost certainly ensure that you will not succeed.

Given my background, contacts, etc., in the insurance arena, focusing on mediating insurance disputes was my natural launching pad and the initial focus of my marketing efforts. I believed (and was quickly able to confirm) that I had a talent for being “a closer” irrespective of the type of case I was presented with, and my ultimate goal was to be known as a mediator who is called upon in the toughest cases (i.e., ALL cases, not just insurance), ranging from “extremely challenging” to those believed to be “unsettle-able.”

Make Sure “The Price is Right”

Do not underestimate how important your fee structure is. It is a particularly sensitive issue in the San Diego market. You don’t want to go too high; and, you don’t want to go too low. When deciding on what you are going to charge, the most important factor is what your niche is. However, no matter what, you must be cognizant of what your “competitors” (working predominantly in the same niche) are charging. Also, if you decide that part of your marketing plan is to go outside of San Diego (as I had decided to do from the get-go), you have to be totally tuned in to what the market is in the other areas that you are targeting.

The ADR provider (and I have a whole section devoted to ADR providers below) who I decided to affiliate with (Judicate West) has been highly instrumental in guiding me insofar as this critically important decision is concerned.

Creating and Implementing a Marketing Plan

Once you identify your niche, you must develop and implement your marketing plan. This is really where the rubber hits the road. Creating a marketing plan is one thing, implementing it is another. Be aware, that any plan that does not contemplate continual, always-expanding, never-ending marketing efforts is not a plan at all.

If the sum and substance of your marketing plan is that you are simply planning on calling your lawyer friends, judge friends, and business associates, and to then sit back and wait for the mediations to come rolling in, you better get ready for a lot of open days on your calendar.

Don't Lose Hope!

My first three months in my “new mediation practice” was spent handwriting letters to approximately 350 people who I had culled out of the attorney directory and my Rolodex. (It took me nearly a full week just to create that list!) I handwrote each and every letter because I felt that a handwritten letter has a lot better chance of being read in today's world than a typewritten letter. I also tried to personalize each one. I literally developed a callous on my writing finger. (Which brought back memories of being in elementary school!)

In addition to writing letters, I compiled my “Top 100” list—people who I wanted to take out to lunch, dinner, or have coffee with; and, I started scheduling and doing those get-togethers.

Here's a snapshot of how my typical day went. Write letters until my hand hurt. Meet someone for coffee, lunch and/or dinner and do something to further my marketing efforts (e.g., work on my website, work on getting on different panels, etc.). Come back to my office after “doing lunch” and look to see if the little red message light on my phone was lit (and most days, it wasn't). Look to see if there were any faxes in my fax machine (and most days there weren't). Go to check my mailbox to see if I received any “Congratulation” cards or letters (and, you guessed it—the mailbox was almost always empty). And, last but not least, checking my e-mail (and most days, there were no new e-mail messages—not even spam!).

When my wife, kids, and close friends asked, “How did it go today?,” my answer was always the same, “I am a farmer; I'm just planting seeds ...” Even in some pretty down and discouraging times (and there were more than just a few), I always felt 100 percent confident that once I get a crack at mediating the really tough cases, I WILL pull rabbits out of the hat and sooner or later the word will get out and I would have messages on my phone, faxes on my machine, mail in my box, and e-mails on my computer. (My current reality falls into the category of be careful what you wish for!)

A Word on ADR Providers

In my research I recognized that although San Diego is still a “small town” where a relative handful of local Independents are still monopolizing the ADR business, it is not a question of “if,” but “when” this will change. Sooner or later (and I predict much sooner than later) San Diego will follow in the footsteps of Orange County, L.A., and San Francisco, where most top mediators affiliate with one of the ADR providers (such as JAMS, Judicate West, triple A and the like), and lawyers run all of their mediations through an ADR provider.

The three major functions that an ADR provider does (or should be doing!) are:

1. Putting out the word about you (i.e., creating a buzz!);
2. Convening cases. Convening (i.e., getting all involved to agree to use you as the mediator) is the key to the kingdom. Before the word really gets out, you often see cases where one attorney wants to use you but the other side doesn't know you at all. This is where a good ADR provider can make all the difference. I have seen that it is literally an art to finesse the convening of cases;
3. Lastly, the ADR provider handles all of the paperwork confirming the session, all other administrative matters pertaining to your cases, and maintains your calendar (which becomes a huge juggling act and a much bigger task than you ever imagined once the phone starts ringing).

Just like with law firms, there are significant differences (personalities) between the major ADR providers. The key is finding the one that you believe you would be most comfortable with; and most importantly, be ready to persuade them that they should bring you on board. Retired judges pretty much have their pick. It's an entirely different story for an attorney-mediator who does not [yet] have a following (i.e., book of business.) I also know that Judicate West will only entertain taking on attorney-mediators if they are no longer practicing.

Unfortunately, I have no concrete advice on how to get your foot in the door of the various ADR providers other than to say that you should start your networking and start making whatever inroads you can in this arena as soon as possible.

Do NOT Count on Your Friends and Business Associates

Be prepared to be DISAPPOINTED! People who you have known for 20+ years (those who you have helped get to where they are, who you have referred cases to, who you consider to be your friend) will look you in the eye and tell you, “I will absolutely use you. You can count on it.” All I can say is: **DON'T HOLD YOUR BREATH!!!!**

I am not alone in having experienced this. I know you think that it'll be different with you; but, trust me, it won't!!!!

And as for the few that do try to get cases to you—you will likely run into the problem that if the other side doesn't know you (and there is no ADR provider involved who can hopefully finesse the convening) they will usually reject you based on the school of thought, "If the other lawyer wants you, we don't."

The good news is that if you approach your mediation business as something in which you are always planting seeds, then (assuming you are REALLY GOOD) sooner or later (and most likely it will be MUCH LATER) the people who said (when you had lunch, dinner, or coffee with them) that they will "definitely come to you" eventually will come. However, it will be after you have earned your stripes from having mediated cases with attorneys you've never met before, AND only after they know that you are not going to be one of the many aspiring mediators who are here today and gone tomorrow.

The bottom line is that IF you are counting on your friends and business associates to "launch" your new mediation practice, you will, more likely than not, be sorely disappointed; and, your Mediation practice will, in all likelihood, fail.

A Barometer

In terms of having some sort of a gauge, here are some hard facts pertaining to my mediation practice. Although I started talking to lawyers in the early fall of 2002 and telling them that I was going to become a full-time mediator, I officially launched (started leasing my office) on January 1, 2003. I went into the office every day, Monday through Friday. My very first mediation was on March 27, 2003 (i.e., it took almost three months after I opened my office, and nearly six months after I started spreading the word to do my first mediation!). My second mediation was on June 25. Things started to VERY SLOWLY happen in the last quarter of 2003 and I ended up doing about a dozen more mediations by year end.

In early 2004 the seeds that I was diligently planting started to sprout. My continuing marketing efforts, coupled with my decision to affiliate with Judicate West (and most importantly, "putting up the stats" on some of the toughest cases imaginable) resulted in my doing 71 mediations in 2004, with a number of them being multi-day sessions and nearly all of them being the kind of cases I have been focused, since Day 1, on going after—big, complex, highly challenging cases, including all kinds of insurance disputes, catastrophic injury/death/products liability cases, prevailing wage, legal mal, med mal, business disputes, real estate, franchise, trade secret, law firm dissolution, battles over attorney fees (ouch!), probate, defamation and many others. About 45 percent of those cases were in

San Diego, 33 percent were in Orange County, 20 percent were in L.A., and the remaining 2 percent or so were elsewhere (one out of state and one in San Francisco).

It is now the beginning of February 2005 and this year is already off to a bang. I had 12 mediations in January (nearly what I did in my entire first year); and, it looks like I will most likely have about 15 this month. Has it been easy getting to this point? Of course not. Has it been worth it? I've never been happier.

Some Words of Encouragement

IF, notwithstanding all the above, you STILL want to become a mediator, DO NOT FORGET that mediation is a very broad field. Obviously, the "big bucks" lies in mediating litigated cases (especially the biggees/"most challenging" cases). However, if living a balanced, fulfilling and wonderful life is your goal, you do not necessarily have to mediate litigated cases. Mediation is a very horizontal vocation. You can specialize in mediating pre-litigation disputes in a business in which you have tons of experience, contacts, etc.; or you can become the "go-to" mediator in your church or synagogue. The world is your oyster.

Decide what you want to do; figure out how to do it; and don't let anyone or anything stand in your way. It would give me tremendous satisfaction to one day, receive a call, an e-mail, or a letter letting me know that I was, in some way, helpful to you attaining what we are all looking for.

If there is anything that you would like to discuss in more detail, please don't hesitate to give me a call or send me an e-mail. I will do my best to help in any way that I can.

Rob

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Postscript (May 2014)

It's hard to believe that at the beginning of this year, I began my 12th year as a full-time mediator (and that it's been nearly a decade since I wrote this mini-treatise!)

Having just re-read it for the first time in years, it is remarkable how what I would share with someone aspiring to become a mediator today is virtually identical to what I shared when I wrote this in 2005.

It was super-competitive when I first entered the field on January 1, 2003. It is now uber-competitive.

On a personal note, I must say that it is immensely rewarding to be able to add this postscript.

I have worked harder building my mediation practice than is imaginable. I never wavered. I knew that I had the drive, motivation, desire, and the myriad of diverse skillsets that are necessary to becoming a successful mediator.

I approached building my mediation practice in the same manner that I approach every case I mediate—never, ever, ever, giving up!

I've heard it said that it only takes about a decade to become an overnight success. After all these years of extremely hard work (with 75-plus-hour weeks being the norm) and with the extraordinary help and support of Judicate West, I have built the mediation practice that I envisioned (and had the deep confidence that I knew I could achieve) back when I first made the decision to go down this path.

If you have that same vision, that same type of confidence and are willing to work your you-know-what off, I urge you to GO FOR IT!

Sincerely,

Rob Kaplan