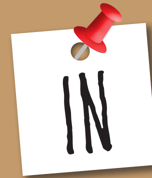
BECOMING A MEDIATOR

by MICHAEL G. BALMAGES



I first mediated a case long before I had any of the qualifications or training I discuss below. In the late 1980s or early 1990s, I got a phone call from attorney William M. Crosby. Bill was then, and still is, one of the leading, if not *the* leading, lawyer representing employees. He asked if I would mediate a case of his. I did. I do not remember much about the mediation other than we did it in an office in Irvine and I really liked the feeling that came from trying to get lawyers and litigants to see the benefits of settling their case. A thousand-plus MSCs and 600-plus mediations later, I still feel the same about the process.

At the beginning of every mediation and MSC, I introduce the process and myself. As to myself, I talk about my business, real estate and employment litigation experience, and my five years as the General Counsel of Ocean Pacific Sunwear, "Op," the world's leading surfwear brand. As to my mediation experience, I tell a story that goes something like this: "There are rules of professional conduct which govern what lawyers must do and cannot do. There is a rule which clearly does not apply to your lawyer, Mr. So-and-So, and that is that when a lawyer gets old he or she must become a mediator. I got old about twenty years ago, so I became a mediator." The lawyers always chuckle at this long with their litigation-sophisticated clients such as insurance adjusters. Lay clients, not as much.

It's not true that all old lawyers become mediators; it only seems that way. It's also not true that you have to be old to be a mediator. What do you have to be to become a mediator? Before we get to that, let's talk about what you do not have to be. You do not have to be a lawyer, at least not in California and in most other states. Some courts, in some states, require law degrees for their court-panel mediators, but it seems that most states do not. (A list of state-by-state requirements can be found at https://onlinemasteroflegalstudies.com/career-guides/become-a-mediator/court-certified-mediation-requirements-by-state/.) For California, that list says:

> The Supreme Court of California provides a directory of information for each superior court's ADR programs. The Administrative Office of the Courts provides model standards for mediator qualifications . . . . Model standards include forty hours of basic mediation training, at least two mediations of at least two hours in length that are co-mediated with or observed by a mentor mediator, and legal education in the form of a course on the court system and civil litigation . . . .

That's not a lot of requirements. Newly adopted Business & Professions Code section 6173 confirms that mediators do not have to be attorneys. It requires the State Bar to create a (voluntary) ADR provider certification program and specifically states that the program "shall not require a firm, provider, or practitioner to be a licensee of the State Bar in order to be certified . . . ."

For private (non-court panel mediations) in California the mediator does not have to be a lawyer or, for that matter, have any mediation training. He or she just has to have customers—people willing to use him or her as a mediator.

To be a mediator, you also do not have to be a subject matter specialist. To mediate construction defect cases you do not have to be a general contractor or have any construction knowledge. You do not have to be a coverage lawyer to successfully mediate insurance coverage cases. And, so on. Mediators with subject matter expertise will tell you the opposite, that such expertise is essential for a mediator, but that just isn't true.

A retired judge is another thing you do not have to be to mediate. Some of the litigating public and even a few attorneys prefer retired judges as mediators. There is, however, a substantial portion of lawyers who specifically do not want retired judges as mediators. I have encountered both sides of the equation. I have been told by lawyers who have used me as a mediator that their suggesting me as a mediator on a new case was rejected because the other side was insisting that the mediator must be a retired judge. I have also been told just the opposite, that I was selected as the mediator because I am not a retired judge. I prefer the latter approach. I recently spoke with a soon-to-retire Orange County Superior Court judge and asked if she planned on mediating. She assured me that she did not, that she was going to spend more time on her hobbies, travel, and be with her grandkids even though her former judicial colleagues told her "you make twice the money and work half as hard." You do the math.

There are no prerequisites to becoming a mediator in California. Instead you can just hang up the proverbial "shingle" and be in the mediation business. There are, however, things that might be helpful to becoming a successful mediator.

It helps to have some mediation training. There are formal and extensive and expensive programs like those offered at the Straus Institute for Dispute Resolution at Pepperdine University, and the Harvard Program on Negotiation. In California, there are 24-40 hour courses under the Dispute Resolution Programs Act (DRPA) (see Business and Professions Code sections 465-471.5). In Orange County, two groups offering DRPA training are Waymakers (https://waymakersoc.org/) and Groundswell (https://wearegroundswell.org/training/). There are also private training groups

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that offer DRPA compliant training, like Phoenix Dispute Solutions (https://phoenixdisputesolutions.com/usa/news/how-become-mediator-california). Twenty years ago, when I got old enough to become a mediator, I enrolled in a program at UCI called "Conflict Resolution and Alternative Dispute Resolution." It was comprised of six long weekend classes covering all aspects of dispute resolution, with a lot of role playing. In addition to getting my certificate of completion, I also got a certificate acknowledging that I had completed DRPA training. Mostly that led me into being a volunteer mediator for small claims cases in the OC Superior Court. As "low-powered" as that sounds, it was great. Trying to reconcile differences between small claims litigants sharpened skills that I did not know I had. I did more than 200 of those (volunteer) mediations before I started mediating cases with lawyers and big stakes.

Other significant training I got was as a temporary judge handling MSCs in the OCSC. Before I mediated my first "private" case (other than the Bill Crosby case mentioned above), I had conducted hundreds of MSCs. The skill sets are very similar even though as an MSC judge you have some "powers" that you do not have as a mediator, like making sure all the necessary parties are present.

When I started my mediation practice (alongside my litigation practice), I wanted to do as many mediations as I could to hone my skills and get my name out there. Since I did not have a large customer list then, I joined various mediation panels, most notably the Central District's and the OC Superior Court's, doing essentially free mediations. It all grew from there into a steady paying mediation practice.

Many would-be mediators believe that they are qualified to mediate because they have been at many mediations as counsel; they know how mediations work and how to make them work. It probably does not hurt to have that experience, but the view of a mediation from counsel's chair is far different than the view from the mediator's chair. As counsel you view mediation as a way to "win" the case. As mediator you view it as a way to end the case in a manner that makes everyone feel that they made a smart decision. Those views are often radically different and it takes time and experience to shift your mindset. I had a highly experienced trial lawyer "shadow" me on several MSCs as she was interested in joining the MSC panel as a step toward becoming a mediator. After three MSCs, she said that mediating was not for her as she could not put up with the "crap" coming from counsel and would feel compelled to tell them that. Sometimes that approach is not the best!

The two keys to getting cases settled are rapport and persistence. You must have rapport with counsel, rapport with the litigants, and rapport with the adjusters. Developing rapport is personality driven and takes time. A large portion of my mediations involve me talking to and listening to all the participants about their lives and my experiences that mirror or confirm them. We talk about where they live, their children, their sports teams, their vacations, their everything. We digress. And, we often validate the six degrees of separation rule; we almost always find people we know in common or who share a mutual connection.

To be a successful mediator, hope has to spring eternal and you need to relentlessly pursue that hope. Mediation is a process that works, but only if you persist at it. Plaintiff is demanding $2.6 million. Defendant's offer is $2,500. Eight hours from now the case is going to settle at $235,000. If right at the outset you told defendant that she was going to pay $235,000 to settle, the mediation would be over and you'd be accused of not being neutral, of favoring the plaintiff: *How could you even think that? There is no liability, and even if there is, you're forgetting about comparative; and, even if there is liability, there is no causation; these damages were not caused by this incident; and, plaintiff is NOT entitled to emotional distress damages for this kind of claim; and they are not entitled to attorney's fees and the amount they are claiming is way overstated because they have been running up the fees; this is not a six-figure case; we might pay low to mild-five figures, but that's it.* Eight hours later, the defendant realizes that it does have some risk and that winning is going to cost a lot of money and there is no way it will ever collect its winning attorney's fees and section 998 costs from this plaintiff.

Same thing with the plaintiff. If, at the outset, you told plaintiff that he would accept $235,000, he would leave and you'd be accused of being on the defendant's side: *This is a seven-figure case; no way we're going to settle for five figures, maybe high six figures, like $950,00 but nothing lower; and, we will get our attorney's fees, so it's really worth more than that; and, so on.* Eight hours later, the plaintiff realizes that he could lose and that in any event he is not going to see any money for a year or two, and that the defendant might not have any money beyond the $300,000 policy.

All of this requires patience by the mediator and the ability to convince counsel to also be patient and let the process work. Patience was not in my skill set as a lawyer. It now is, but it took practice. Sometimes, though, it fails me. I mediated a case where the plaintiffs were brother and sister in their early twenties suing their uncle who was the trustee of their dad's testamentary trust. The plaintiffs thought their uncle was cheating them as he was also a beneficiary of the trust. Brother and sister felt that they were each entitled to a payout of $2,000,000 each and that their uncle had to give up his claim to part of the $4,000,000 trust corpus. After a full day of mediation, a tentative deal was cut where the uncle would get $500,000 and brother and sister would get $1,750,000 each. A settlement agreement was drawn up but then brother refused to sign. He reverted back to the beginning of the mediation where he said that his uncle was a crook and not entitled to anything. He reiterated all the points we had just spent a full day smoothing over. His lawyer was frustrated. His sister was frustrated; she wanted her money and she wanted the family feud over. I exploded. "You are not going to eff this up for your sister. You're not going to eff this up for yourself. This is a great deal. It is better than you will do at trial. If you don't sign this, you are an eff-ing idiot." He walked out. He returned in about fifteen minutes and signed the settlement agreement. Afterward, his lawyer thanked me and said that someone needed to tell him that. His lawyer has since used me in six or seven more mediations.

You want to become a mediator? Get some training. Get some experience. Have a lot of patience. Personally, I love it. I love the thrill of the deal; dealing with the attorneys; dealing with the litigants, all of it. On the other hand, I don't play golf. If I did, I might not be mediating!

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