

## "Getting Traction for Mediation"

"Building Your Mediation Practice: July 2008"

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**Question:** I'm a mediator in a county where mediation hasn't been accepted or supported by our local court, and the lawyers don't seem interested in mediating cases. What can we do, perhaps through our local Bar ADR section, to help mediation gain some traction?

**Answer:** Get ready to go to work! There are many things you can do, and frankly, the faster you and your local community of mediators implement them, the faster mediation will take hold. There is not a place where mediation is the norm, that didn't start the way you are, so here is what has worked elsewhere.

**Consider partnering with the courts.** While there are good sides to court-annexed mediation programs (they expose litigators and litigants to mediation at a much more rapid rate and make mediation more of an accepted process of dispute resolution), there are dangers, as well (mandated mediation is often a poor representation of the process, and courts often think that mediators should volunteer their time). But if your county doesn't have a bench-bar ADR committee, you can approach the courts about forming one, where you can partner with them to think about how mediation and other forms of ADR might be of service to the courts. There is a lot of good thinking around best practices (and landmines) for court referrals to mediation. In short, the higher the level of voluntary choice the parties have (choice to mediate, choice of neutral, choice of timing), and the greater the level of buy-in (voluntary opt-in and paying for the process tends to make lawyers and clients prepare better), the greater the statistical success of court programs.

**Educate the Judges.** Judges are generally in favor of anything that helps parties to find mutually satisfactory resolutions to conflicts. In many jurisdictions, they will also support anything that will ease their dockets. However, they have an antenna up for anyone who seems to be trying to make a profit off of people in litigation, and of anything that costs parties money, remembering that the court is a public service of the government that anyone is entitled to utilize. Judges often have considerable exposure to settlement conferences and little first-hand experience with mediation, so they can often assume that the two are one in the same. When I was Director of the Santa Barbara Superior Courts' ADR program, I was lucky to be invited to speak to our county-wide judges' meeting. After seeing short demonstrations of a settlement conference followed by a mediation that demonstrated integrative bargaining, their eyes were forever opened to the benefits that mediation can provide.

**Educate the Bar.** Lawyers are the gate keepers of disputes that are in litigation, or headed that way soon. But you can't tell them about the virtues of mediation, you have to show them. It's like test-driving a car. They have to experience it before they're sold on it. If your section can hold public demonstrations of mock mediations or some other informational experience for the lawyers who represent clients in litigation, they will see it faster. Several of the following methods will help in this regard, but there are two additional ways to educate the lawyers. The first is by getting them into a mediation room and showing them some skills that they will remember. The second is by greeting them at every bar function and cocktail party by standing

proudly and introducing yourself to them as a mediator. If mediation is to be considered a profession unto itself, then we, as mediators, must present the profession and ourselves in a way that supports that.

**Write Articles.** Write for the local and state bar journal. There should be an article in there every month on mediation approaches or negotiation strategy or case law updates. The other articles that are persuasive are success stories (leaving out names and identifying facts, of course), but demonstrating creative solutions that are not possible in litigation or even settlement conferences. Write for business journals, write for other professional journals (health care, accounting, Realtors, etc.), write for homeowner associations and for insurance publications. Look on your desk and see what you read. Then write for that! But write to their interests. Write to their level of intellect. Remember to give them the "what's in it for me?" hook. Tell some eye-opening stories. And be aware that when we say mediation, we all have slightly differing ideas of what that looks like; imagine how different their concepts of mediation are, given that it is not what they do for a living. So, when you use the word, be certain to define the process as you envision it.

**Hold Seminars.** Your ADR section can sponsor presentations on mediation where the attendees - house counsel or private practice lawyers or business leaders or insurance adjusters or psychologists - are invited to attend and get continuing education credits and see the individual mediators in your community answer the same "what would you do in this situation" question in as many different ways as there are mediators. Let them see the individuality among mediators, the different styles, different approaches and different personalities of the various mediators. This will help to prevent them from thinking mediators are all interchangeable commodities. This will make them work harder to pick the right mediator for a particular case, resulting in a better experience for all. At the same time, they will learn from you about the mediation process, effective representation techniques (aka mediation advocacy), how to use caucus and joint session most effectively, and best practices for drafting a mediated settlement agreement. And be sure to invite the judges! It is also helpful to invite a key speaker from out of your area (since we all know one definition of an expert is someone from at least 100 miles away!).

**Form a Speakers' Bureau.** Many years ago, when the Southern California Mediation Association was brand new, we formed a speakers' bureau. We trained those who were interested in speaking skills, offered them outlines for talks on mediation, and even gave them form letters they could send out to law firms, corporate law departments and organizations (service organizations, chambers of commerce, non-profits, etc.) asking if the recipient group would be interested in a free presentation on mediation. Your speakers' bureau can organize brown bag lunch presentations at law firms or at the bar association, it can offer CLE credits, and it can reach users on a more personal level in small groups, which can be more impactful to some than articles or larger seminars.

**Teach the Young Ones.** Today's law students are tomorrow's attorneys. While they aren't selecting mediators yet, and may not be for some time, you have an opportunity to plant the seed with them about mediation in a way that wasn't done 20 years ago. You can normalize mediation as an accepted method of dispute resolution in which lawyers engage. The same goes for speaking at college courses, high schools and on down to grade school. While a terrible analogy,

the tobacco companies get the marketing angle: win them over when they're young, and you will own them for life. To affect change, or introduce a new social concept, we must work at all levels.

Clearly, there are many, many things that a local mediator group can do to speed the "conversion" of a community to utilizing mediation. The best advice might be to organize, mobilize and execute a plan of action that creates momentum on all of these fronts, and that shares the work load among all of the local mediator community. Some ADR sections, even smaller ones, have appointed sub-committees to divide and conquer, making the ADR section meetings one where committees report on progress or express needs they have, rather than the place where the brainstorming and work gets done. This can allow the overall section meeting to be more about strategic planning.

In actuality, achieving the goal of embedding mediation is not unlike a mediation itself. Some people think that the world of mediation opportunities is a fixed pie to be divided among those competing in the market for slices. Others seek to combine the synergy of the talented local mediation community and work together to grow exponentially the existing pie and create more opportunities than the existing mediators can handle. Please choose wisely!