

## **MEDIATION EXCELLENCE – TIME FOR THE NEXT LEVEL**

*Depending on skill and effort, mediation can range in usefulness from an utter waste of time to the single most valuable litigation event*

**By Rodney Romano<sup>1</sup>**

Some of the brightest former Florida judges and trial lawyers are now mediators. The Florida Dispute Resolution Center (DRC) is recognized in America as a premier state ADR program. With that kind of leadership and resources, mediators can and must be better and more consistent. The goal of this essay is to continue the dialogue necessary to improve the value of the ADR process to litigants and the job satisfaction of ADR professionals. It is intended to be frank, not offensive or arrogant.

Arguably, a lawyer's goal is to serve his/her clients' best interests and earn a decent living doing so. A great verdict may not provide as good a benefit as a less dramatic but more efficient mediated settlement. Certainly some - but not most - cases must be tried when there is no possible way to reach common ground. However, great mediator can be a catalyst in helping the lawyer achieve his/her goals, and thus become an indispensable litigation support tool, and not just a court obligation.

How can one predict their potential success as an ADR professional? What defines a good mediator? Is it:

- 1) Results?
- 2) Popularity and the number of cases handled per year?
- 3) The value or complexity of the cases handled?
- 4) The percentage of cases settled?

- a. As compared to his/her market?
  - b. As compared to the world?
  - c. As compared to other mediators handling the same genre of cases?
- 5) Experience as a judge or a trial lawyer?
  - 6) Earnings?
  - 7) Pro bono work?
  - 8) The hourly rate commanded?
  - 9) Advance bookings?
  - 10) Involvement in professional development?
  - 11) Articles published ?
  - 12) Willingness to follow up at no charge?
  - 13) Willingness to mentor others?
  - 14) Skill at the business of mediation?
  - 15) Understanding of human dynamics?
  - 16) Issue and obstacle spotting skills?
  - 17) Ability to make participants comfortable and trustful in the process?
  - 18) The ability to add value to every case even if it does not settle?

The answer is “all of the above.” But the essence of a good mediator can arguably be distilled into a single word: “passionate.” A great mediator has the passion to be focused *and diligent and studious and patient and inquisitive and insightful and compassionate and tenacious* and importantly, has the innate ability to connect with people on a visceral level.

For the first 25 years of its existence, at least in Florida, ADR has, for the most part, been a second career for retired lawyers and judges.<sup>ii</sup> Essential elements of a great mediator are life experience, “people skills<sup>iii</sup>” and litigation understanding. While most mediators come from a judicial or legal career, it is not their training but their attitude that makes all the difference; the successful ones approach ADR with gusto and an enthusiasm to keep contributing to the legal profession. In contrast, the common thread among those who fail seems to be apathy and a lack of “people skills” – they just kind of aimlessly leak into ADR. Such mediators are almost cliché and just about every trial lawyer has a negative story to tell in this regard. In the past, few mediators depended on ADR for their livelihood, but that is now changing and an increasing number of lawyers seem to be looking to ADR as their primary, if not their only, source of income - and at an earlier age. As the cost of prosecuting and defending even the simplest cases skyrockets, quality mediation becomes an increasingly valuable tool in the litigator’s arsenal. Consistent with this, *pro forma* mediations are becoming less and less tolerable to the professionals we serve and to their clients. A mediocre mediator not only wastes everyone’s time and money, but makes the lawyer who chose the mediator look foolish to his or her client client. Making a lawyer look bad to the client is very bad karma.

Trial lawyers and litigation professionals have uniformly and universally complained about the wasted time and money spent with mediators who had no real passion for assisting the parties but rather were going through the motions using the same tired techniques and overlong introductions. Those mediators have little regard for the outcome and the positive effects that quality mediation could have on all the parties. Yet paradoxically, even in the face of such widespread mediator mediocrity, the results were

positive and very impressive. Throughout Florida, court dockets shrunk from years to months and the entire litigation process became dramatically more manageable as scores of cases settled through mediation. It appears that other states which instituted required mediation before trial have experienced similar results. Yet evidence suggests that despite the enormous success of mediation in reducing court docket backups, that most litigators would not mediate – or at least not to the same extent – if they were not required by the courts to do so.<sup>iv</sup> This research suggests that the legal profession is not yet convinced that they will get their money's worth on a consistent basis. In contrast, litigation professionals routinely rave about mediators who are consistently effective.

As a second career, ADR can be immensely satisfying, both professionally and financially. That fact creates extraordinary opportunity for a metamorphosis of ADR into its own recognized specialty and to raise the bar of excellence by an order of magnitude in this generation, the central theme that this essay advocates. ADR professionals today have it within their grasp to usher in an era of unprecedented excellence and pride in our craft and to keep pace with the changing demands and needs of litigation professionals and their clients. But rather than choosing ADR as an exciting and challenging career in which they can make profound contributions, many people who become mediators are merely trying to *escape* unsatisfactory law practices or other careers because they perceive ADR to be a stress free way to make easy money.<sup>v</sup>

As the number of certified mediators explodes in Florida, more and more people are realizing that true success and career satisfaction in ADR requires more than certification; it requires great positive emotional energy and the passion and skill for

helping others reconcile their differences in creative ways that make sense to them. Just like virtually every other trade or profession, some of the necessary skills can be taught; others cannot. Every year, hundreds of lawyers take the certification course, do their mentoring, get their certificates and strike out with high hopes only to be disappointed when clients don't line up. Certification courses fail to disclose the harsh reality about the market demands and the likelihood of success nor do they provide tools so that a student can better evaluate ADR as a career choice. That harsh reality is that the vast majority of mediators are unable to earn a living as mediators<sup>vi</sup> In fairness to those certification providers, without the ability to assess "people skills" there is no accurate formula (at least not that I have found) for predicting who will do well. There are certain hallmarks for potential success, but the only way to know with certainty is to take a shot and see if ADR users like the mediator.

This new reality seems to cry out for a sea change in the way we train mediators and the way we view their role in our legal system. ADR is a wonderful, challenging and very satisfying vocation for those whose skills and personalities are suited for ADR. Imagine the value that could be brought to the litigation process by mediators who are passionate about what they do! Imagine if every mediator considered the profound and positive impact they can have in every single mediation and for all the participants in the following ways: 1) alleviating the cost, stress and uncertainty of pending litigation on the parties; 2) easing the burden of case management on adjusters and risk managers; 3) dramatically improving trial lawyers' ability to manage their time and money so that they can settle cases that ought to be settled and re-direct their resources to cases that must go to trial and by doing so maximize their clients' benefit and by doing that improve their

entire business model. Not only does ADR provide a way to manage litigation risk, but also a way to manage *business* risk.

ADR in general and mediation in particular are essential litigation management resources that greatly improve the effectiveness and efficiency of any litigation practice – but only when it's high quality mediation. So why then is mediation still considered a fringe profession rather than an essential resource? Mediocrity. Inconsistency. Complacency. As a former Board Certified trial attorney, I have been the victim of numerous impatient mediators who were too lazy or apathetic to “work” the case and only wanted to bill their 2 hours and move on to the next case. Ask any group of trial lawyers if they've had a similar experience and it's easy to get a resounding “Amen! Brother!.”

Over the years, numerous attorneys have told me that they are tired, that they are burned out, that they do not want to work anymore and so they are going to become mediators! Who would hire someone with that kind of attitude? UNBELIEVABLE! The ADR profession needs to increase excellence and consistency in its ranks if it hopes to move to the next professional level. It seems comparable to the real estate business: just about anyone can get a license but only a small percentage enjoy most of the success because they are dedicated professionals and not dabblers. There is an abundance of mediators, but an extreme shortage of *excellent* mediators as reflected by market forces. In Florida, if you are a certified mediator, then you are bound by standards of professional conduct in addition to whatever other standards may apply to your particular profession. But there is currently no law that requires mediators to be certified or even licensed in Florida. There is no current track toward Board Certification. In any case,

legal requirements cannot impose or inspire a sense of purpose, a sense of dedication...in short, a professional attitude, on mediators. We must do that for ourselves and for each other. We owe it to ourselves and to those who follow to take our profession to the next level, to make it a specialty and in so doing, to make it invaluable.

The good news is that we in ADR have all the ingredients among us to take our profession to the next level. Our ranks include immense talent from the Bench and Bar representing extraordinary education and decades of valuable experience. I am confident that if asked through a survey, litigation professionals would be happy to give us constructive input as to how lawyer and non-lawyer mediators can improve. In Florida, we have one of the best organized ADR infrastructures – the Dispute Resolution Center (DRC) created by and directly responsible to the Supreme Court.

However, since there does not seem to be any current political interest in mandating certification or licensure to govern our profession, I propose that we develop the following:

- 1) a survey of Florida Bar members to get a better idea of what the users of ADR want to get out of the process;
- 2) a Board Certification process either through State Bars or National organizations such as the ABA or The National Academy of Distinguished Neutrals (NADN);
- 3) some method by which mediators can discreetly and in a non-threatening way assess their strengths and weaknesses and evaluate their success potential before investing time and money in becoming certified, and thereafter evaluate their growth as an ADR professional.

These are my observations based upon more than ten years as a full time ADR professional and more than 4000 circuit civil mediations. It would be nice to know how other ADR professionals and legal practitioners feel and I hope this essay will spark further discussion and input so that the ADR process can become even more valuable to litigation professionals, the court system, other institutions and the people we serve.<sup>vii</sup>

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<sup>i</sup> Rodney Romano is the founder of Matrix Mediation, LLC a full service ADR firm headquartered in Palm Beach County, consisting of full time certified mediators who are also members of the Florida Bar. He is a member of NADN, FAPM and a Fellow of the ACCTM. He serves as a member of the Mediator Qualifications Board through the Florida Supreme Court. Previously, he was a board certified civil trial attorney practicing throughout South Florida. *See*, [www.matrixmediation.com](http://www.matrixmediation.com)

<sup>ii</sup> For example, the Circuit Civil Mediation program that was established in 1989 for Florida's 15<sup>th</sup> Judicial Circuit (Palm Beach County) mandated that only the court's retired judges were eligible to conduct court referred mediations absent the agreement of the parties. But by 2008, the court program was eliminated because the private sector was filling the need effectively and users preferred private sector mediators. *See*, Administrative Order 2.804 – 9/08, in re: Circuit Court Civil Mediation, <http://15thcircuit.co.palm-beach.fl.us/web/guest/courtprograms/adr>

<sup>iii</sup> Khozaima Motiwala, *How Good Are Your People Skills?*, May 6, 2004, [http://www.3smartcubes.com/pages/articles/articles\\_040506.asp](http://www.3smartcubes.com/pages/articles/articles_040506.asp)

<sup>iv</sup> *Id*

<sup>v</sup> The undersigned has interviewed well over 100 lawyers who are interested in moving into ADR; a surprising majority state they want to become mediators because they are “burned out” and “don’t want to work any more” and “just don’t have any energy left.” ADR requires certain skills just like any other trade or profession. While very rewarding, it is not as easy as it may seem.

<sup>vi</sup> Urska Velikonja. 2008. "Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice" ExpressO Available at: [http://works.bepress.com/urska\\_velikonja/1](http://works.bepress.com/urska_velikonja/1)