

So, You Want to Be a Mediator? (Don't give up your day job, yet!)



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I LIKE BEING A PEACEMAKER.

These days I spend more than 90% of my time and effort as a mediator and arbitrator. An even greater percentage of my revenues are derived from my mediation and arbitration work. I am pleased to report that I now earn more as an arbitrator and mediator than I did as a civil trial lawyer; but that wasn't always true. Even though I have mediated and arbitrated over 2,000 cases in the last 25 years, my ADR practice started slowly and developed gradually. Only in the last decade has it become nearly "full-time."

PEACEMAKING IS IN MY FAMILY HISTORY.

Mediation is now so prevalent that Georgia lawyers are supposed to discuss it with their clients (see Specific Aspirational Ideals, (b)(1), State Bar Handbook at H-151). However, many years ago, I learned about being a mediator from my father, Thomas L. Croft, Esq. (1913-1980), a lifelong Missouri trial lawyer. My father was often selected by his colleagues at the bar to help resolve disputes among themselves, such as division of fees, partnership disputes and the like. He did this with patience and wisdom and without charge to his lawyer colleagues. When I asked him why he provided this service, my father told me that he believed that he owed it to his friends, to the profession, and to the community at large to resolve disputes among lawyers in private, rather than on the front page of the daily newspapers where cases among lawyers were always reported. Thus, I was predisposed to view private dispute resolution as a true "calling," rather than merely a job. When the Atlanta Bar Association instituted a mass "mini-mediation" program called Settlement Week in the Fulton County Courthouse in the mid-1980s, I was enthralled. We resolved nearly 400 cases in a single week! From then on, mediation took off in Atlanta. Even though the Fulton County ADR program took a nearly 20-year detour through evaluative, non-binding arbitration by three-member panels before it embraced mediation and binding arbitration, the official use of ADR in Georgia paved the way for private individuals, mostly lawyers, to begin serving as mediators. Today we have 3,775 neutrals who have registered with the Georgia Office of Dispute Resolution, and many more who serve privately, but not on court-annexed panels.

WHY BECOME A MEDIATOR?

Today, we are overwhelmed with surveys showing that many lawyers are dissatisfied with the practice of law. Some don't like the level of chronic incivility and contentiousness; some don't like the very long hours of tedious preparation for fewer and fewer trials; some are ready to move on or quit or retire; some are forced to do so. Some lawyers simply aren't doing very well in their law practice. Their health and energy levels aren't what they once were. They are simply bored doing the same old things, day-after-day. Some lawyers think they would be more successful as a

peacemaker than a warrior. Some relish the idea of working with no staff and little overhead. They have visions of financial sugarplums dancing in their heads. They believe they are experienced (or is that just "old"?). They think they know what cases are "worth" or what they were worth back when they used to try their cases. They have many acquaintances at the bar whom they think would jump at the opportunity to use them as a mediator. Sometimes they forget that those whom they know, also know them. They think mediation looks easy. It appears to involve short hours. They don't see the mediator doing homework or other detailed preparation. They think sitting at the head of the table involves less stress than sitting on one side or the other. They perceive that there are no collection problems involved in being a mediator. And visions of financial sugarplums dance in their heads.

THE REALITY OF BUILDING AND MAINTAINING A MEDIATION PRACTICE.

Conducting a mediation is hard work. The parties are often impatient while the mediator is caucusing with the other side. They only see the mediator working part of the time. In fact, the mediator is working all the time. A real mediation session takes a long time. Mediations usually start at 9 or 10 in the morning and often last all day. Sometimes they go late into the evening hours. Then, if you are fortunate to have a case scheduled for the next day, you get up early and start the process all over again. In some respects, it is like being on trial, day after day after day.

Although it looks like peace work, it isn't piece work. It is hourly work for most mediators. If you don't work enough hours, you won't make a living at it. It is not for the faint of heart or mind or body. It requires a high energy level without many opportunities to take a real break. There is a lot of homework and other preparation for each mediation. This includes pre-mediation caucuses, review of mediation statements and sometimes review of other pleadings, deposition transcripts and documents. Some mediators send the parties a post-mediation report in cases that were not settled at mediation, in an effort to provide direction toward a potential settlement. Diligent mediators remain available after the mediation, to assist in subsequent communications and even negotiations when necessary. A good mediator can help resolve drafting disputes that arise during the course of preparing settlement documents.

Unless you are paid in advance, you should also expect some collection problems. Lawyers who are on contingent fees will want to pay you when, and if, they get paid in the case. Defense lawyers will pass the bill on to their client or its insurance carrier, at attenuated intervals, and those clients and insurance companies will often "ride the float" for a long time.

LAWYERS HIRE MEDIATORS WHO GET CASES SETTLED.

There is a great deal of pressure on a mediator to succeed or risk the loss of future mediation business from the lawyers who use them and from their firms and colleagues as well. This is very stressful! Additionally, the parties at a mediation, particularly those who are inexperienced, are under a great deal of stress due to their adversarial positions and their financial interests in the matter. Each side believes that their opponent is the problem; and they each expect the mediator to "work a miracle" to bring the unreasonable opponent to a favorable resolution of the matter. A mediator is often abused from all sides. Each side may want to shoot the messenger. In the face of these stressful circumstances,

a good mediator must remain upbeat and encouraging. It helps to be a “professional optimist,” but it is not easy to do.

EARNING A LIVING AS A MEDIATOR.

Mediator compensation can be substantial when, and if, you are able to develop a full calendar of mediations paying you at, or above, your regular hourly or realization rates as a practicing lawyer. Until then, do not give up your day job! If your services are provided through a private mediation company, it may be entitled to a portion of the fee for its overhead and profit. This is appropriate, particularly when the company is providing scheduling services, marketing, insurance, facilities for the mediation, refreshments, food, telephones, staff, billing and collecting. A good mediation company supports a website, provides a newsletter and sends you your check on the first of each month, along with a detailed accounting. If you undertake to provide all this for yourself, or with an assistant, set aside sufficient time and financial resources to provide first rate services to the customers (the lawyers and clients who hire you) and support for a comfortable mediation. In the beginning, you may work for little or no compensation, simply to develop the necessary experience and reputation among potential users of your services. Some court annexed programs and panels have low or controlled rates or require certain pro bono mediation efforts from their members. Just as in building a law practice, building a mediation practice is a gradual process.

MARKETING TIPS.

Never forget that lawyers, particularly frequent litigators, are your most likely potential clients. Spend time with them. It makes more sense to attend litigation meetings than ADR meetings, at least for marketing your mediation practice. Most lawyers want a mediator who knows the area of law involved in the dispute, who has a good track record as a mediator (no one wants to pay you to learn how to mediate on their case), and who can persuade the other side to move. Unlike arbitration, in which each side wants a neutral predisposed in its favor, advocates in mediation want the mediator to persuade opposing counsel and parties to change their positions. Thus, the perception that you will be effective in causing the other side to change its position may be more important than the perception that you, personally, are favorable towards the side that hires you. Some advocates in mediation have yet to grasp this counter-intuitive proposition, but they are learning it through experience. Successful handling of a mediation will increase your mediation practice. When you help both sides reach a settlement, each will be more inclined to call upon you again. Your practice can grow geometrically if you are perceived as a mediator who produces settlements.

WHAT ARE THE REQUIREMENTS TO BECOME A MEDIATOR IN GEORGIA?

None, not even a law degree! However, all court annexed programs and panels require that you be registered with the Georgia Supreme Court’s Commission On Dispute Resolution, www.gadr.org (404-463-3788). At present, the rules, which are available on the website, require a 28-hour training course for a general mediator and a 42-hour training course for domestic law mediation, plus five observations of a mediation or an equivalent practicum. The website identifies several approved training courses. A course with excellent materials and teaching is available at Henning Mediation & Arbitration Services, Inc. in Atlanta (770-955-2252). Short and long term courses are available at many educational institutions. Among the best known are Pepperdine University’s

Strauss Institute, University of Missouri-Kansas City, Harvard University, and Kennesaw State University. I urge you to attend the annual ADR Institute sponsored by ICLE. You would be well advised to join the Atlanta Dispute Resolution Lawyers Section of the State Bar of Georgia and the Dispute Resolution Section of the American Bar Association. Attending meetings with other experienced mediators will provide invaluable tips on becoming a better mediator and growing a mediation practice.

THE BOTTOM LINE.

An experienced lawyer, with plenty of litigation experience, some gray hair, and good “people skills”, who can listen and show interest and empathy, has the tools to become a successful mediator. It helps to be a quick study and know something about a large number of different areas of the law. It helps to be old and experienced enough to seem wise, and young and healthy enough to keep up the pace of vigorous negotiations for hours on end. It really helps to be well known and respected by a large number of lawyers. It could be that years of participation in bar association programs and activities could actually pay off!

I enjoy conducting mediations. It is psychologically rewarding (feels good) to be a successful peacemaker. It is gratifying to see adversaries shaking hands, and to see opposing parties occasionally hug one another, once a compromise is reached. I have never seen that happen in a courtroom after a trial!

I enjoy having a new case every day. This fast pace is challenging, intellectually and emotionally. Figuring out how to help these adversaries reach a mutual compromise, without having any real authority or power, except your force of personality and your wits, is energizing. It can be a grueling and exhausting experience to work straight through an entire day with one case, and then spend portions of that evening and the next morning preparing for another case. Too many mediations in a row, without sufficient time off, can numb your mind and reduce your effectiveness.

Attending bar meetings is a refreshing change of pace. It’s an opportunity to market your practice, too. An unwelcome break in the schedule of a full-time mediator is the last minute cancellation. These are impossible to avoid, and usually deprive the mediator of the fee he would have earned if the mediation had not cancelled. No good solution exists, until you become so popular that your clients will pay for reserving your time, whether they use it or not. But don’t hold your breath waiting for that to happen! Once your mediation practice reaches a critical mass, you may find that you can’t do justice to a part-time law practice, especially a litigation-oriented one. At that point, you may want to consider becoming a full-time mediator. But don’t ever forget your marketing. This is a rapidly developing profession, with many changes likely to occur. The number of lawyers offering their services as mediators has doubled and re-doubled in the last few years. For the entrepreneurial peacemaker, it’s a great opportunity. For the timid, conservative, halt or lame, don’t give up your day job!

Terrence Lee Croft served as chair of the Litigation Section in 1986-1987; as president of the Atlanta Bar Association in 1993-1994; as president of the Atlanta Dispute Resolutions Lawyers in 1996-1997, and as president of the Atlanta Bar Foundation from 1998-2003.