

Development of the Mediation Associate: A Case Study

By John J. Upchurch

After 13 years of offering mediation services under Florida's groundbreaking mediation statute and procedures, we have seen two distinct trends emerge. First, a select few mediators have become industry leaders. Because most attorneys insist on having an experienced, reputable mediator for significant cases, these highly skilled mediators are fully booked. Fees for this elite group range from \$275 to \$450 per hour and higher.

Conversely, there is a large pool of trained, certified mediators who have been unsuccessful in developing a reasonable demand for their services. Even at entry-level fees of \$125 an hour, these mediators have failed to attract many cases.

Why the imbalance, and why is the market so resistant to adjustment?

A combination of factors comes into play. First, the elite group is made up of pioneers who cast their lot early into the mediation game. Everyone - lawyers and mediators - were novices in the beginning and developed together.

Compare this to the challenging market today's novice mediator faces. Major competitors have thousands of mediations under their belts. Just as important, attorneys have become experts in mediation advocacy over the years and have worked extensively with veteran mediators. It is difficult for a novice to impart a favorable impression because he or she must demonstrate skills relatively comparable to the veteran group.

It also is a challenge to develop those skills. Most mediators are sole practitioners, and those who practice in partnerships still perform solo in individual mediations. As a result, the only exposure the novice receives after the standard 40-hour mediation training is the opportunity to observe four mediations conducted by a certified mediator, participating as "second chair" in two of those. Few seek additional opportunities to shadow the experienced mediator before entering the market, and the market has resisted accepting these relatively inexperienced entrants.

Upchurch Watson & White has not been immune to this trend. Despite the firm's strong marketing efforts, new mediators almost always are disappointed in how slowly the market accepts them. We saw this as a challenge to develop our entry-level mediators to a competitive level and convince the market that they are ready for prime time.

About a year ago, we adopted a strategy to develop the skills of a novice mediator under the supervision of a veteran without compromising the quality of our services. At the same time, we sought to expose this mediator to clients over time in a manner that would instill confidence in her skills and lead clients to trust her with individual mediation assignments. So we created the position of "mediation associate."

The program begins with assigning the associate the responsibility of interviewing the attorneys about the case before each of the senior mediator's mediations. After the interviews, the associate prepares a memorandum outlining the issues, the parties' arguments and insights gathered during the discussions. These memorandums are then reviewed by the senior mediator in conjunction with the premediation summaries provided by counsel. In the course of preparing them, the associate gains invaluable experience and direct exposure to the attorney/clients.

Next, the associate attends a select number of mediations with the senior mediator -- usually about two per week. This exposes the associate to a variety of situations and builds his or her frame of reference from direct experience, albeit primarily as an observer. The associate is encouraged to participate, and we often "whisper in the hallway" about the case between caucus sessions. This activity builds upon the relationships the associate has initiated in earlier telephone interviews, and introduces him or her to key client representatives and claims professionals.

After several months, the associate begins to develop the skills, self-confidence and client relationships necessary to be entrusted with follow-up telephone calls in select cases that were not concluded in the initial mediation session.

This has been a significant development. Busy mediators are always in a time crunch - fully engaged in the next day's mediation, with yesterday's clients clamoring for a telephone conference to seal the deal. Timing is everything. What a powerful tool to have in those circumstances: an associate who has met the participants, observed the mediation and is ready, willing and able to work on it immediately even if the principal mediator is consumed with the next case.

Additionally, some assignments are so complex and vast in scope that additional help is a must. The associate has worked effectively performing important independent tasks in several multifaceted cases. It is comforting to have this resource available to offer clients when the occasion demands.

After about eight months of shadowing a senior and providing the pre- and post-mediation services described, the firm introduces the associate to the geographic market as a mediator prepared to accept direct engagements. In response, he or she begins to land a number of bookings. Our idea is to continue the associate mediator role as long as necessary, but the goal is to see the associate's time increasingly taken up by his or her own mediations. At that point, a new associate will be recruited and the cycle will begin again.

This process has helped us identify the steps needed to train and develop a mediator for today's market. The sponsoring mediator gains invaluable assistance in preparation and follow-up, and special assistance in the complex, multiparty case. The clients benefit from the associate's contributions in assisting the principal mediator. In mediation, we teach that "win-win" is the goal, and with this program, early returns show three winners: the associate, the veteran, and most importantly, the clients.

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