



Acting as a neutral is a unique job/responsibility, and is unlike any other professional services job for several reasons: 1. You don't have a boss or client. 2. You perform services for all parties in the dispute *and* their counsel. 3. You are responsible not so much for the outcome as you are for shepherding the process, controlling the experience, managing expectations, directing the conversation, interjecting reality, brokering a settlement, etc. While neutral services are a different kind of professional service, starting and building a neutral practice is very similar to starting and building a law practice.

For the past 5 or 6 years, I've been presenting programs on the subject of starting/building an ADR practice. Those programs have usually run 2 or 3 hours, but today we have only one short hour! So, in preparing for

today's program, I decided to create a written summary of my discussion points and PowerPoint slides from other programs because I'm pretty sure we won't be able to everything there is to discuss on this subject.

This handout was written from my current perspective, after years of practice, study and my own practice building efforts, and is really just a "perspective piece." There are many points of view in this rapidly changing/developing area, so I do not mean to suggest by any means that what is set forth on the following pages is dogma. I think as you read through the attached handout materials you'll find that the attached materials are more a collection of questions and things to think about before you set out in pursuit of a career as a neutral than they are a template or outline of what to do.

I hope you enjoy reading the following materials as much as I enjoyed writing them. I would love your feedback (pro and con). Please email me at [Rebecca@callahanADR.com](mailto:Rebecca@callahanADR.com).

**GOOD LUCK!**

## 1. Preliminary Questions

The following are some questions you might want to ask and answer before getting started or making decisions about any aspect of setting up shop as a neutral:

- Who am I in the community I hope to serve? Does that community know me in any way? Do I have a reputation in terms of who I am as a person? as an attorney? As a neutral?
- What do I have to offer that is better / different / more economical / etc. as compared to who and what is already in the marketplace?
- Who is my *immediate* market in terms of people who might send work to me on Day 1?
- Who is my *target* market and is that market aware of my existence?
- How much work will I have when I open the door to my neutral practice?
- Is there a need for mediator services in the subject areas where I am qualified to serve?
- Looking forward 5 years, what are the types of disputes or clientele I want to have on my calendar? E.g., similar recurring fact patterns vs. different fact scenarios; particular subject matter vs. diverse subject matters; particular types of disputes vs. eclectic assortment of dispute types.
- How much time can I devote to starting up? E.g., full-time, half-time, part-time?
- Do I want to be a full-time neutral and “retire” from my day job as an attorney? Now? Ever?
- Am I going to start as a solo or be part of a group?
- What is it that I want / expect from a career as a neutral in terms of monthly/annual revenue, busy-ness, time demands, etc.? Year 1? Year 3? Year 5+?

- What do I have in the way of money to fund my start-up? [Note: This is a *reality check* moment.] Am I going to use savings? Am I going to borrow? Am I going to use earnings from my “day job?”
- What kind of physical assets am I going to need to operate?
  - Conference rooms
  - Phone lines
  - Internet connection / WIFI
  - Computer(s) and printer(s)
  - Software
  - Online legal research accounts
  - WebPacer / court access account
  - Copy machine
  - Office
  - File cabinets
  - Kitchen
  - Etc.

## 2. Practicalities

No matter how you answer the questions in Section 2, there are some practicalities to getting started:

**First.** It is *essential* that you have a business card that identifies you as a neutral (e.g., mediator, mediator-arbitrator, peacemaker, facilitator, etc.). Before you have that business card printed, you will need to have made some decisions about your start-up logistics in terms of an address, phone number, email address, etc.

**Second.** It's a good idea to have a one-page bio statement, and a detailed CV.<sup>1</sup> Both should have a *current* photo, and both should be updated at least once per year. In terms of detail, many consumers of mediation and arbitration services care about the nature and extent of a neutral's initial training and continuing education. So, you might want to think about including those items in your detailed CV. Many consumers are also interested in a neutral's leadership experience. So you might want to think about including a brief mention of your leadership roles in community and professional groups, as well as any speaking or writing you have done on ADR topics.

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<sup>1</sup> My bio statement and detailed CV are attached for reference, but they by no means represent the template. You are encouraged to browse the internet and take a look at what some of your favorite neutrals have done to describe their backgrounds, education and experience.

**Third.** It's a good idea to do some type of announcement to your community / target market about your availability to serve as a neutral. There are a variety of ways these announcements can be made. E.g., ad in the OC Lawyer, hard copy mailing, email blast, etc. Whatever you do, make sure it reflects positively on you and is appropriate for your intended audience. The old adage "less is more" is definitely applicable here.

**Fourth.** It's important to have a web presence and to note it on your business card so that people you meet can check you out later. As a solo, your website can be simple. The important things to cover are contact info, printable CV, vcard link, practice areas and rates.

**Fifth.** Whenever you are out in public – attending a section meeting or networking event – it's important to present yourself professionally. You don't have to be in a suit, but you need to be somewhat dressed up and aware of your image in terms of grooming. As a neutral – whether as a mediator or arbitrator – you take the "power" seat at the table and you want to look like you can handle it.

### 3. Growing a Practice

#### *Overview Comment*

At the outset, you should recognize that it's up to you to find and cut your own path as an ADR neutral. Some suggestions:

- A large part of what we do as mediators requires some level of trust being placed in the our hands. In order for people to trust you, they need to know you to some extent – if not by personal association or experience, then by reputation. Bottom Line: You need to be an active member of the community you hope to serve.
- Set simple goals each year that you can realistically hope to achieve, *and* do an annual review/assessment. What goals did you set and achieve? What goals were not attained and why? What did you try that worked? What did you try that didn't work? What did you do that was good? What did you do that needs improvement? What new goals do you have?
- Identify and promote your strengths

- Recognize and respect your limitations. Work on your weakness and set goals to improve in these areas.
- Don't get distracted by what others are or are not doing. If you look at the neutral market, you will find that neutrals come in a wide variety of shapes, sizes and prices. The fact is that we neutrals are all unique and thus may take different paths and employ different means to promote and develop our respective practices to a different clientele.
- Be prepared for rejection as you offer your services or attempt to make an introduction. Southern California is flooded with neutrals, so you are not the only one looking / pitching for work. That being said, it helps me to keep Chief Justice Tani Canti-Sakauye's words in mind: "When I hear the word 'No,' that means find another way." Gracefully accept no for an answer, but don't give up, continue to search for ways to make yourself relevant in your legal community, and don't be afraid to try again.
- Enter this professional with eyes wide open – recognizing from the outset that starting and ADR practice has a lot of moving parts and requires a lot of nurturing. It does not happen over night.

### *Live Marketing*

As a neutral trying to build a practice, the number one thing you need to do is get yourself out into the community you hope to serve. Live marketing. This takes a lot of time, but it does not cost a lot of money. Some suggestions:

- Join groups that will bring you into contact with people who consume or greenlight ADR services – e.g., lawyers, accountants, general counsel, etc. Attend meetings regularly and be an active participant by taking on a leadership role or presenting on whatever ADR subject is of interest to the group.
- Join as many court-annexed ADR panels as you have time for. This is for experience, to meet other attorneys and neutrals, and to develop your personal style.

- Do follow-up calls on your cases. Follow-up calls are an opportunity for you to get to know attorneys who utilize ADR in their practices and for them to get to know you. Chit chat might lead to a referral down the line.
- Stay in touch with your friends and referral sources. Share with them about what and how you're doing. Look for new opportunities to meet and work with new people. Take time to go to lunch and meet for a quick cup of coffee.

### *Capitalize on Opportunities*

Challenge yourself to do new things, to meet new people, to get involved with new groups, to read new authors, to try new things, etc. If you're going to help people think outside the box, then you need to live outside the box. Some suggestions:

- When you get a chance to mediate or arbitrate a case, make sure you prepare and are ready to guide the process from beginning to end. Focus 100% on the matter at hand from the moment you walk into the room. Start positive and stay positive. Work to avoid "judging" (or pre-judging) what you think the ultimate outcome might be with respect to the legal merits or demerits of the dispute. Keep an open mind. Listen and try to capture the total messages of the parties.
- Accept all invitations to speak or write on ADR. It will help you find your voice and develop your unique style or perspective. It will make you relevant to your community. It will build your image as an ADR expert. It will keep your skills fresh and up-to-date and will keep you energized about ADR.
- Take your business cards to events and *hand them out*. More importantly, make sure you collect business cards from the people you meet and 1. Add them to your contacts, 2. Add them to your mailing list, and 3. Send a quick email note to them that has your contact information in the signature section.
- One of my favorite phrases to keep in mind when trying something new or venturing into a new area: "What would you attempt to do if you knew you could not fail?"

#### 4. Social Media

As mentioned above, it is quite important to have a website presence and to periodically update the website so that your CV, bio and rates are current. Beyond that, there are other, numerous ways to connect and thus market using the internet – Facebook, Twitter, LinkedIn, forums and listserves, to name just a few. These internet vehicles are popular because they're inexpensive and easily accessible by you and your audience. That being said, there are some things to think about before using social media as a neutral:

- When we “link”, “friend,” “like,” join a forum discussion group, etc., we might create a relationship with that person or group of persons and that might, in turn, later result in a party or counsel objecting to our engagement because of the existence of the social media connection. The fact of the connection – even if remote in time – might prompt a reasonable person to believe that you might be biased for or against one of the parties. It's not just the fact of the connection. It extends to the subject matter of the discourse and the content of the internet dialogue in which you participated – no matter how minimal your involvement might have been.
- It's hard to control content. Something you may not perceive or intend as offensive or inappropriate might nevertheless be perceived/received by a reader as exactly that. And once you push “send” or “post” on the internet, it's impossible to take it back.
- Internet communications are one dimensional – no tone, no visual and no non-verbal clues (which comprise 80% of how we humans communicate) – so for many messages it's an ineffective communication tool for anything but the simplest and most generalized of messages.
- Once a message is posted, you lose control over how others might further disseminate, use or editorialize some or all of what you said.

- It takes time to sit at a machine posting and responding. Social media outlets basically invite a conversation about a topic or topics. If you initiate or step into the dialogue, you then need to actively participate or risk insulting the other party (parties).
- If the purpose for conversing through social media is to market yourself as a neutral, you need to make sure that the other participants are people who might send business your way. If you're conversing with a group of neutrals or people located in places far, far away from Southern California, the question probably needs to be asked whether there might be a more productive way to market yourself besides sitting at a computer terminal/laptop/I-pad, etc.
- Social media conversations are impersonal because they are conducted through a machine. Acting as a neutral is a "people business." In terms of developing and improving one's "people skills," there is no substitute for spending time with people.

## 5. **Managing a Neutral Practice**

### *Time Management*

If you don't plan for it, *it* won't happen. Some thoughts on items to be included in your weekly/monthly planning:

- Scheduling activities (intake phone calls, letters, invoices, file set up, room reservations, etc.)
- Study time
- Hearing time
- Business lunches / marketing activities
- Pre-mediation conference calls
- Personal time (e.g., workout, get your hair done, buy new shoes, update your wardrobe, manicures, etc.)

The above items all tie together. To book a mediation and schedule a day for hearing time, you need to be out in the community having lunch, attending events, working on community projects. Those marketing/business development commitments are as important as the mediation bookings. You must make time in your schedule for these things! Once you get the job, you need to spend time sending out scheduling letters, invoices, setting up the file, calendaring – all the stuff we hate to do. To do a good job, you need to reserve time to study in advance of the mediation and do your pre-mediation calls to counsel. To stay healthy, attractive and mentally alert, you need to take care of yourself. Truth be told, even though life as a neutral appears to the outside world to be “relaxed,” it’s still requires a balancing act to reserve time in your schedule to do all of the things you need to do to be successful as a neutral.

### *Scheduling, Calendaring and Case Management*

In addition to booking the mediation date on our calendar, there are other things we need to do to in advance of convening the mediation. Here are a few:

- Send out scheduling letter with an agreement to mediate and an invoice for an advance deposit. Keep in mind that this is when/where you start “the process” on several levels – e.g., rapport building, giving information about the process/you, getting information about the dispute and the parties, setting expectations about the process in terms of time commitment, cost, your role, party roles, etc.
- Calendar due dates for briefs and deposits. Block out time for study, closing and follow-up.
- If this is a litigated matter, download the electronic docket and, if available, the operative pleadings and any court orders re scheduling and dispositive motions
- Confirm contact information for all attorneys – input into Outlook
- Create an email distribution list for the matter
- Reserve conference rooms
- Plan for food

- Add matter to conflicts data base
- Set up mediator notebook

Many of the above tasks are “back stage” work that others can help you with. The areas where I think the mediator needs to be involved are invoicing and collection, scheduling letters and calendaring.

### *Creating a Conflicts Data Base*

You don’t need a data base to know and recall who your friends, family, prior employers, and business partners are. And you probably have a pretty good recall of the names of clients you have represented over the years. But in a neutral practice, if you book just two mediations per week, you will touch 100 cases per year. If all 100 matters were just a two-party cases where both sides were represented by a single attorney, that would be 200 parties and 200 attorneys *per year*. That’s a lot of potential conflicts, especially when multiplied over 2 years, 5 years, 10 years and more.

If you are a mediator that intends to also offer neutral services as a private arbitrator, you are required to maintain a conflicts data base that includes the names of all parties and attorneys involved in any matter where you served in a neutral capacity (e.g., mediator, arbitrator, early neutral evaluator, temporary judge, court-appointed referee, etc.). If you intend to limit your practice to mediation, there is no requirement that you maintain a conflicts data base or make required disclosures, but the better practice is to do so. You might ask why the potential for bias matters in mediation where the mediator has no power to make any decisions that are binding upon the parties. The answer is simple: While arbitrators have authority, mediators have *influence* – which is a powerful tool, especially in caucus mediation.

If you are inclined to develop a conflicts data base, you should start that data base on day one that you start accepting neutral assignments (or as soon thereafter as practicable). The following are some thoughts with respect to the types of fields of information you might want to include in your conflicts data base:

### For Cases

- Case name
- Tribunal
- Case number
- Full names of plaintiffs/claimants
- Full names of defendants/respondents
- Full names of attorneys and their law firms – e.g., Joe Brown and Susie Smith, of Jones Bell & Lee LLP – and who they represent
- For corporate parties, the full names of their representatives/principals and their titles
- For insured claims, the name of the insurance company and the attending adjuster
- Nature of the dispute
- Date of mediation
- Outcome – e.g., settlement, no settlement, partial settlement

### For Social/Community Involvement

*(This information generally kept in the Notes section of the Outlook business card)*

- Date
- Event
- Role

Example 1:

April 2010, ABA Dispute Resolution Annual Conference – SF; sat next to each other; he does primarily construction arbitration

June 2012, AAA Skills Course on Award Writing; he was one of 20 attendees; I was the course facilitator

February 2014, met again at ADR Study Group hosted by Bill McDonald

Example 2:

OCBA Board 2014  
Co-Member

OCWL Gala Event 2014  
She was event chair  
CDR was a sponsor

OCBA Board 2014  
Task Force re XYZ Project with \_\_\_\_\_ and  
\_\_\_\_\_

Example 3:

Commercial Law & Bankruptcy 2008  
Section Meeting where \_\_\_\_\_ was speaker; sat next to each other; have \_\_\_\_\_ in common

AAA Essential Skills for Mediators 2012  
Student

When you maintain a data base of people you meet and work with as a member of professional or community groups, there is a difference in degrees of relationship and that becomes more obvious when you look at the number and type of activities you have shared. When the list is simply tangential overlap – you both attended the same event – that is pretty remote. When the list involves working together on projects and there is more than one project you’ve shared, that starts to look like a relationship that

should be disclosed even if in your eyes the relationship is not significant to you because you are not otherwise friends or social acquaintances with the person.

### *Case Management and Protecting Internal Confidentiality*

Irrespective of the rules or laws that may govern internal confidentiality between the parties or external confidentiality between the parties and the outside world, we as mediators promise to keep confidential that which is said and done internally during or in connection with the mediation. The question is, what are *you* going to do with all that paper and ESI that finds its way to your office in advance of the mediation and that you create in connection with scheduling, conducting or closing the mediation? Here are some things to think about:

Between the Time of Intake and the Day of the Mediation. If you work outside your home in an office that has foot traffic – other attorneys, other neutrals, parties, attorneys, other visitors – you may want to take care with how you label and store your mediation case files. The following are some of my practices and procedures:

- Store letters, briefs, emails, reference documents, etc. electronically as PDF documents. Organize files by case “Open” and “Closed” and then by case name.
- Organize all hard copy paperwork into a binder labeled “Confidential Mediator Notes & Working Papers” and store the binder in a redwell labeled with only the date of the mediation.
- Store binders/redwells in a file cabinet labeled “Pending Mediations” organized by date of the mediation.
- Drop file in the redwell any paperwork related to the matter. Do not leave mediation paperwork sitting on your desk or in a filing bin. Make it a habit to put all mediation binders and redwells away when you are finished working with them so they are not inadvertently laying around for visitors to see.
- Have your bookkeeper maintain a separate file – electronic and hard copy – for the financial aspects of any engagement (billing, collection and payment).

During the Mediation. If the ground rules of the mediation include private caucus where the parties can share information with the mediator that is not to be share with the other side or if the parties have provided you with “mediator’s eyes only” briefs and/or documents, then some thought needs to be given to how to handle those documents and any mediator notes you might create during private caucus. My method is to put everything into a binder with separate sections for the following:

- pre-mediation study notes
- joint session notes
- private caucus notes – party 1
- private caucus notes – party 2
- party 1 brief
- party 2 brief
- reference documents

My binder goes with me in and out of every room. What I like about keeping segregated notes in a binder is that the binder closes when you leave one room and when it gets opened in the next room it is to the *that* party’s section and that party cannot see the notes that I took while I was visiting with the other side.

Post Mediation. There are no hard and fast rules on this, but my practice is that when a mediation is closed (versus recessed or continued for a further session), the entire contents of the binder are shredded, with the exception of the following:

- intake information sheet
- agreement to mediate / confidentiality agreement
- sign-in sheet
- any memorandum of understanding signed re the settlement
- closing bill

With respect to the above items, I staple and three-hole punch them and then file them alphabetically in a set of three-ring binders. I also make sure to make a PDF of any memorandum of understanding that is signed by the parties at the mediation.

## 6. Rates, Billing and Getting Paid

### *Setting Your Initial Rate*

The justification and explanation for the billing rate of mediators is just as elusive as that for attorneys and other professionals. Why is one neutral's time worth \$300 per hour and another neutral's time is billed at \$800 per hour? This is a questions to which there are a least a dozen different answers. In final analysis, you will have to decide what makes sense for you, and that decision will probably be driven by one or more of the following factors:

- Your overhead and how much you need to make each month to break even and put something in your pocket. Obviously, you need to charge enough to pay the bills!
- How quickly you can fill your calendar. The greater the demand for your time, the more you might be able to charge.
- How much you can make if you were to spend your time on other endeavors or engagements.
- The range of rates for mediators in the community or market you are targeting. *Note: Most mediators agree that in the majority of cases, their hourly rate is not the tipping point in terms of whether they are engaged or not; that in a litigated dispute where the parties are spending tens of thousands (maybe even hundreds of thousands) of dollars per month, the different between paying a mediator \$5,000 or \$8,000 or \$10,000 is simply not that great.* That being said, you need to understand and appreciate where you are in terms of what your community of potential consumers expects to pay.

## *Billing*

Most mediators bill in advance and request that a deposit for the estimated session time be funded before or at the start for the mediation session. Some mediators are so adamant that their fee be paid in advance that they have made arrangements for credit card processing so that counsel is not off the hook because they forgot to bring a check.

Many neutrals have a cancellation fee policy, meaning that if the mediation is cancelled within a certain number of days of the reserved date, the mediator keeps all or some portion of the advance fee deposit. However, that policy needs to be stated up front.

If a mediation extends beyond the time reserved, you have two choices: send a bill for the additional time and hope that both sides pay or bring out the credit card swiping machine if you're set up to take credit cards.

## *Getting Paid*

Collections are the bane of any business's existence, and the practice of mediation is no different. Getting paid after the fact is sometimes risky, especially if the mediation does not conclude with a settlement (no matter that it later settles along the lines discussed or recommended at mediation). So, do your best to collection an advance fee deposit. If you can, have someone other than yourself collect checks on the day of the mediation and do the collection calls before and after the mediation. This will help you keep your focus on the mediation and helping the parties resolve their dispute.