

Chapter 1

Achieving Success as a Mediator

In This Chapter

- ▶ Deciding whether you have the skills and personality to be a mediator
- ▶ Finding career opportunities in mediation
- ▶ Acquiring essential mediation skills, training, and education
- ▶ Launching and marketing your mediation business

Ask a dozen people what *success* means, and you're likely to get a dozen different definitions. For some, success means lots of money. Others define it in terms of happiness or freedom from worry. For others, success means spending quality time with loved ones. When focusing on success as a mediator, however, the word means two things:

- ✔ You're good at facilitating dispute resolution.
- ✔ You earn enough money to make mediation your career or, at a minimum, a significant source of new income.

To be a great mediator, you need to master the skills, techniques, and strategies required to assist parties in resolving their disputes. To earn enough money to make mediation a worthwhile career, you need to market yourself and network in ways that attract clients who can pay what your services are worth.

This book is dedicated to empowering you to achieve success as a mediator in both areas. This chapter serves as the *CliffsNotes* version, getting you up to speed in a hurry.

Do You Have What It Takes?

Not everyone has the makeup to be a mediator. Some people lack patience, are uncomfortable with conflict, or are unable to remain impartial. Others lack essential abilities, including critical thinking, problem-solving, and communication skills. Sure, you can develop some of what you may lack through education, training, and experience, but much of what's required to be a mediator is born and bred — it has to do with personality and attitude. In the following sections, you take a personality and skills inventory to see whether you have what it takes to be a master mediator.

Assessing your personality

Some people prefer to work in relative isolation, never having to deal with the messiness of human interaction and relationships. They focus on the task at hand and accomplish a great deal. The world needs people like that, but mediation doesn't. To be a great mediator, you need to be good with people, and that means having the following personality traits:

- Ability to inspire
- Curiosity
- Dogged determination
- Emotional stability/maturity
- Empathy/sympathy
- Impartiality
- Integrity
- Open-mindedness
- Optimism
- Patience
- Persistence
- Sensitivity

In short, you need to genuinely like people and enjoy helping them solve their problems and get along with one another.

Taking inventory of your skills

In an emergency, people with relevant skills tend to be more helpful than the average Joe. Doctors, nurses, emergency medical technicians (EMTs), police, and firefighters have the skills, equipment, and experience necessary to respond to disaster and help the victims. Those without the skills required for the task tend to just get in the way. Similarly, you need a few fundamental skills to help parties in dispute, which is a crisis in human interaction, including the following:

- ✓ **Interviewing:** You should possess the ability to ask open-ended, curiosity-driven questions and to follow up those questions with more inquiries to elicit detailed narratives along with the emotions and subjective perceptions driving the conflict story. If you're naturally curious about people and what motivates their behavior, you're probably good at interviewing people.

- ✔ **Critical thinking:** You must have the ability to figure out what's really bothering each party by breaking down problems into discrete issues and helping the parties problem-solve those issues in light of their conflicting or overlapping interests.
- ✔ **Creative problem-solving:** Mediation is often more than just figuring out how much of the pie each party is entitled to. It's about identifying each party's interests or needs and matching them up with the available resources.
- ✔ **Communication skills:** You need to be able to communicate orally, in writing, and in nonverbal ways. *Nonverbal* means without words, through body language. You must be able to pick up on what certain postures and facial expressions mean and to communicate confidence and optimism through your own body language.

Choosing Your Path

The paths that lead someone to a career in mediation are too varied and numerous to describe. Attorneys weary of litigation often pursue mediation as a more attractive alternative. Educators may go into mediation to help parents and school systems resolve their disputes. Healthcare providers may enter the field to help patients and doctors resolve malpractice claims outside the courtroom.

Generally speaking, however, two paths lead to a career in mediation, and the path you take requires that you learn or unlearn what you already know:

- ✔ **From attorney to mediator:** As an attorney, you need to unlearn what you already know about dispute resolution and embrace a collaborative rather than adversarial approach. In mediation, disputes are no longer about rights and remedies or who's wrong and who's right. Disputes are opportunities to locate and allocate available resources to provide the parties with as much of what they want as possible and, in some cases, to mend the relationships damaged by the dispute.
- ✔ **From non-attorney to mediator:** If you're not an attorney, you need to get up to speed on the basics of the law and legal process whether or not the dispute is being litigated, because the parties' right to sue each other is often the better (or worse) alternative to a negotiated resolution. You also need to learn what you may and may not legally do or say as a mediator working with parties whose dispute is, or may be, the subject of a lawsuit.

In either situation, Chapter 5 eases the transition.

Checking Out Mediation Opportunities

As a mediator, you can choose to ply your trade in a variety of ways. You may want to specialize in litigated or nonlitigated cases, pursue an opportunity in a court-annexed panel, seek out prospects in the public sector, or even go global with international diplomacy. Here's a short list of the many possibilities:

- ✓ **Litigated cases:** These are the meat and potatoes for many mediation practitioners because this is where most of the money is. Depending on the nature of the dispute and the parties involved, you can often save the parties a considerable amount of money in legal fees while earning a handsome income.
- ✓ **Nonlitigated cases:** Not all mediation originates inside the courtroom or even within the legal system. Plenty of opportunities exist in mediating agreements, contracts, and disputes in a wide variety of venues. Mediators are often needed for employer-employee disputes, in congregation-clergy contract negotiations, in prenuptial negotiations for couples planning to get married, to assist in no-fault divorce proceedings and public policy and environmental mediations, and much more.



Some mediators practice a form of mediation known as *deal mediation*, in which they help people build better deals upfront instead of resolving disputes that result from bad deals. It's the legal industry's version of preventive medicine.

- ✓ **Court-annexed practices:** Courts often order the parties involved in lawsuits to mediate their dispute at some point in the litigation. Some businesses require their customers or clients to mediate before they're permitted to pursue litigation. Some market sectors, such as the California real estate industry, have written mediation clauses into their recommended forms, including real estate sales and leasing contracts.

When you join a court-annexed panel, your name and qualifications are listed on its roster, which is provided to the attorneys. In most instances, you're required to provide free services for a limited number of hours but can then charge the parties if the dispute continues beyond that time.

- ✓ **Public sector opportunities:** Government-sponsored programs — such as family courts, the Equal Employment Opportunity Commission (EEOC), and even the United Nations — require mediators. Some of these opportunities are provided as contract work, while others are employment opportunities.
- ✓ **Ombuds work:** An *ombuds* works for an organization, such as a hospital or university, to investigate and resolve complaints lodged against the organization. The ombuds may be an internal position or an external consultant hired by the organization.

- ✔ **Restorative justice and victim-offender programs:** Unlike the criminal justice system, which punishes or tries to rehabilitate offenders, restorative justice and victim-offender programs attempt to help the offender right the wrong of the crime he has committed, mend the broken relationship between the offender and the community, and restore to the offender and the community the sense of safety that everyone needs to thrive in collaborative ventures.
- ✔ **International diplomacy:** If you've always dreamed of playing an active role in achieving world peace, international diplomacy may be the field for you. Track I diplomats represent states or nations, and Track II diplomats work at the grassroots level to improve relationships among states and countries. They're often referred to as *citizen diplomats*.
- ✔ **Consulting, speaking, training, and publishing:** After gaining some experience in mediation, you can share your expertise with other mediators, members of the public, and people in the market niche you serve through consulting, speaking, training, and publishing opportunities — like writing this book!

For additional details about these and other opportunities in the mediation field, check out Chapter 2.



Consider looking for opportunities in your *natural market* — the field you're in right now. For example, if you're a real estate agent and you want to become a mediator, look for opportunities in resolving real estate disputes. If you're a human resources manager, you may want to look into resolving disputes between employers and employees.

Mastering Essential Skills and Strategies

To conduct effective mediation sessions efficiently, certain skills, techniques, and strategies come in very handy. Mediation has been around a long time, and mediators have discovered through trial and error what works and what doesn't. You need to become familiar with the tools of the trade to save yourself a lot of trial and error. The following sections give you a glimpse of what you need to do in the thick of many mediation scenarios and what's covered in the bulk of this book.

Recognizing different approaches to mediation

You can take several different approaches to mediation based on your philosophy, what you believe to be most effective, and what your market prefers:

- ✓ **Facilitative:** Through the use of trust-building techniques, diagnostic questions, concessions, reciprocity, and other negotiation strategies and tactics, you help facilitate the negotiated resolution of a dispute.
- ✓ **Transformative:** You preside over a process in which the parties use the dispute to reach a deeper understanding and appreciation of each other's issues, positions, and interests and develop communication and problem-solving skills to resolve the dispute, strengthen the relationship, and be better prepared to resolve other disputes with other people in the future.
- ✓ **Evaluative:** You analyze, or help the parties analyze, the strengths and weaknesses of each side's case to help them calculate the risks and benefits of proceeding on the course they're already on or bringing the dispute to a close by resolving it. This method requires the parties to conduct a risk/benefit analysis.

Although many mediators hold strong opinions about which approach is best or constitutes *real* mediation, each approach has its place. For example, transformative mediation may be best in family or community mediation, where the parties probably want or need to maintain a relationship long after they've resolved their current dispute. In other situations, parties may want the mediator to help them objectively evaluate the pros and cons of mediation versus litigation. For more on different mediation styles, flip to Chapter 6.

Knowing the essential skills and techniques

The goals of mediation are to resolve the dispute and to help the parties use the resolution process as a way of deepening their understanding of themselves in relation to others with competing interests. You have many tools at your disposal to accomplish these goals. The following list describes the most essential skills, techniques, and strategies you may employ during a mediation:

- ✓ **Asking diagnostic questions:** Disputes, especially those in litigation, tend to shut down communication and restrict the flow of information. To resolve the dispute, you need to find out what's driving it. To uncover the underlying reasons the parties have fallen into conflict, you need to ask open-ended questions, which always begin with *Who? What? When? Where? Why? How?* or *Tell me more about that*. The narrative responses you elicit lead to further questions seeking clarity and completeness. Answers to these questions expose issues, interests, and potential solutions that you, the mediator, couldn't possibly have guessed at.
- ✓ **Anchoring:** An *anchor* is any relevant number (or idea) that enters the negotiation environment and ultimately influences the outcome. You don't drop the anchors — the parties do — but you can encourage the parties to get the ball rolling by explaining that the party who puts the

first number on the table or suggests the first solution sets the bargaining range that will influence the course of the negotiation until the parties reach agreement.

- ✔ **Framing:** This is a technique to help the parties take a look at the problem from a different perspective. The mediator often accentuates the positive and encourages the parties to engage in a collaborative effort to resolve their differences. Mediators often reframe the parties' dispute from an adversarial contest to a problem-solving exercise and from trying to find out who's right to searching for solutions that serve everyone's best interests.
- ✔ **Logrolling:** This concessions-and-reciprocity problem-solving technique enables the parties to gain a lot while giving up little. Each party trades something that's low-cost to him but of high value to the other party in exchange for something that's of high value to him but low-cost for the other party.
- ✔ **Bracketing:** This strategy enables a party to make an offer or demand conditional upon the other party's offer or demand in order to narrow the gap that separates them. For example, if Party A's offer of \$175,000 in response to Party B's demand for \$350,000 leads to impasse, you can ask Party A whether he'd be willing to increase his offer to \$225,000 if Party B would drop her demand to \$275,000. This can get the parties talking hypothetically without committing to a certain offer or demand.
- ✔ **Interest-based negotiation:** Through interest-based negotiation, you attempt to help the parties expand the thing being valued (the "fixed pie" being negotiated) beyond the money value that's so often the focus of disputes. The parties identify each other's interests — needs, desires, preferences, priorities, fears, and appetite for risk — and look for mutually beneficial exchanges that serve as many of those interests as possible. For example, if a disgruntled former employee is demanding a certain amount of money that her former employer is unwilling to pay, you can ask questions about what nonmonetary relief may satisfy the employee's needs, such as job training or a referral to another employer.
- ✔ **Distributive bargaining:** Through distributive bargaining, you help the parties figure out an equitable division of the fixed pie of benefits. Even in an interest-based negotiation where the parties expand the pie of available benefits, they ultimately create a fixed pie that needs to be distributed.
- ✔ **Forming contingent agreements:** Contingent agreements make the deal conditional upon certain events occurring. Such agreements often help alleviate a party's concern over a possible future event that could harm the party's interests. These agreements can also call a party's bluff. For example, if a party refuses to accept \$500,000 as a buyout for his share of a mutual business venture because he claims that the business will earn a profit of \$1 million in the next three years alone, the parties can agree to protect against future uncertainty by deferring part of the seller's payment until a date certain in the future while at the same time making the sum of the payment contingent upon the business reaching a certain level of profitability.

- ✔ **Appealing to higher values:** You can use shared beliefs or principles to reach agreement, such as both parents' desire to do what's best for the children.

Getting the required education and experience

You can start mediating with little more than a desire, people skills, and perhaps a certification from a 28-hour, court-required, alternative dispute resolution (ADR) course. To be a master mediator, however, you should constantly be learning more about your trade and mediation-related topics. Here are some opportunities you may want to consider:

- ✔ **Bachelor's degree in conflict resolution or a related field:** Colleges and universities are beginning to offer degrees in conflict resolution, conflict analysis, negotiation, and peace building.
- ✔ **Bachelor's degree or informal study in humanities:** Any formal or informal education that increases your understanding of human nature is beneficial, including courses in psychology, philosophy, literature, criminal justice, law, sociology, social work, and anthropology.
- ✔ **Bachelor's degree in any field of study:** A bachelor's degree in any field of study, especially in a field in which you want to mediate, such as business or agriculture, is useful.
- ✔ **MDR degrees:** Many universities now offer a master's degree in dispute resolution (an MDR degree). Anyone with a bachelor's degree, for example, can apply to the Straus MDR program — a 32-unit course of study with several required and many elective courses.
- ✔ **LL.M and doctoral degrees:** The Master of Laws (LL.M) in dispute resolution is a recent addition to curricula at many law schools. In addition, some law schools offer doctoral programs in various areas of dispute resolution study.
- ✔ **Basic course in law:** Courts that permit non-lawyers to mediate litigated disputes usually require them to take a short course that covers the legal process and general substantive law. Such a course covers contracts, *torts* (wrongful acts that result in injury to others), real property, and civil procedure.
- ✔ **Dispute resolution certification:** Some courts may require certification for acceptance on court-annexed panels. Certification may require a minimum number of hours in mediation training that covers confidentiality, ethics, convening, negotiating, caucus strategies, effective communication techniques, cross-cultural challenges, and methods for breaking impasse and closing the session.

Private sector certification is also available through any number of mediation training firms. Some certifications are meaningless, while others carry a lot of weight.

- ✔ **Law school courses for specific types of cases:** If you plan on mediating certain types of disputes — malpractice lawsuits, for instance — take a course or seek out continuing education programs related to the law that governs that type of dispute.
- ✔ **Trade-specific courses, experience, or training:** If you've been working in a field and plan on conducting mediations in that same field, you probably already have plenty of trade-specific experience and training. If you're in an industry that changes rapidly, however, you need continuing education. Read trade journals, attend conferences, and talk shop with people in the field.

For more on mediation education, turn to Chapter 3.

Obtaining additional training

Additional, less formal training is always available, and you should actively pursue that training to stay on top of your game. Following are some suggestions on where to look for continuing education opportunities:

- ✔ **Mentor or sponsor:** Learn from the best by asking a seasoned mediator whom you respect and admire to serve as your mentor. This person may eventually become your sponsor and introduce you to her contacts, expose you to potentially profitable networking opportunities, recommend you for speaking engagements or writing assignments, and vouch for the quality of your work.
- ✔ **Local mediation associations:** A mediation association is a great way to get to know your market, talk shop with other mediators, and establish yourself in the field, especially if you choose to serve in the organization. For a long list of mediation associations, visit www.mediate.com/organizations.
- ✔ **Observations:** Ask other mediators in your area of specialization if you can sit in on a mediation. You can often pick up new techniques and strategies from your colleagues.
- ✔ **Mediation conferences and seminars:** All good mediators attend (and often speak at) mediation conferences and seminars held by mediation and bar association organizations. By attending these seminars and speaking at them you expand your network of mediators, improve your practice, and make yourself known in the industry. The more geographically distant the mediators you meet, the more likely you are to receive referrals from them because people rarely agree to fly mediators from their home state to the state in which the disputing parties live or work.

For more on mediation training, check out Chapter 3.

Building a Successful Mediation Business

Most mediators are also small-business owners — freelancers who set their own rates and fees, buy their own office equipment and supplies, do their own marketing and advertising, and often manage their own finances and taxes. To be successful on the business end of mediation, you need to be part business manager and part marketing maven. The following sections give you a taste of what's involved.

Launching your business

Launching a successful business requires the right timing and having the necessary resources in place to operate the business through the initial lean months that every start-up encounters. The following steps guide you through the process (for additional details, check out Chapter 15):

1. Know when you're ready.

You're ready to make the move from part- to full-time mediation when you have clients lined up and you're earning at least half as much as you've been earning from your day job and at least ten times the amount you need to run the business.

2. Draft a business plan.

Your *business plan* is a summary of how you intend to launch your practice and stay in business. It should include a vision/mission statement, market and competition analyses, short- and long-term goals, a list of income sources and projected expenditures, your location, and some ideas on how to market your services.

3. Draw up a budget.

Your budget should include your projected income along with an itemized list of expenses, including living expenses, office space, professional services (such as a bookkeeper), Internet and communications (phone), office equipment and supplies, marketing costs, membership dues and fees, liability insurance, and taxes.

4. Choose a name and location.

In most cases, your name is your business name and you run your business out of a home office. If you're planning to join a mediation panel, however, or rent office space, you should have a business address in mind.

5. Prepare the necessary paperwork.

You need a few forms to get started, including a scheduling letter, a contract that each client signs, a settlement agreement that the parties flesh out with details of what they agreed to, and a follow-up letter.

6. Purchase liability and property insurance.

Though mediators are rarely the target of lawsuits, you should have liability insurance in place just in case. Don't worry — it's very affordable. In addition, consider purchasing property insurance to cover damage to or theft of equipment or furniture and any personal injury claims by clients who slip and fall during office visits.

7. Set your rates and fees.

Mediation rates and fees may vary from free for pro-bono work to upward of \$20,000 a day for commercial litigation. Call around to mediators in your market to find out what they charge.

8. Market and network to attract clients.

Being a master mediator isn't enough. People in your market need to know about you, so you need to market yourself online and off, as I explain in the following section, to increase demand for your services.



Mediation is a low-overhead business venture. If you run your practice out of a home office, your biggest expenses are income tax, payroll tax (FICA), and liability insurance.

Marketing yourself and your services

Mediators tend to be fairly humble people who are uncomfortable singing their own praises. Fortunately, marketing isn't about selling yourself. It's more about establishing yourself as a trusted expert and giving your clients something of value — typically information that saves them money or makes their lives easier or better. With that goal in mind, here are some of the marketing and networking activities you need to engage in to achieve that goal:

- ✓ **Identify your market.** Where are you likely to find new clients? Through law firms, corporate lawyers, or individual attorneys? From other mediators who have an overabundance of clients? From businesses in a specific industry? In school systems?
- ✓ **Immerse yourself in your market.** Before you can give your market something of value to remember you by, you must know its needs and the most significant issues and problems its members face. Engage in an ongoing conversation with your market and perform relevant research — read what your market reads.
- ✓ **Build a marketing database.** Collect names and contact information and enter into some sort of contact management program. Also, record details about each person you meet, including when and where you met, what you discussed, the kind of work the person does, details about the person's family, and more.

- ✔ **Launch a website, blog, or combination website/blog.** A website or blog gives you a permanent presence on the web, enables potential clients to find you via search engines like Google and Bing, and simplifies the process of branching out to social networking communities, including those on Facebook and Twitter.
- ✔ **Establish a presence on Facebook, Twitter, and LinkedIn.** These are the three major social networking venues. Though people don't want to be sold to on these venues, they do expect to find businesses there. In addition, being present in these venues makes it easier for people in the community to talk about you and generate buzz.
- ✔ **Claim your online business listings.** People often search Google Places, Yelp, and other online directories when they need a product or service. If you don't have a listing, add it. If you're already listed, claim the listing, so you can populate it with additional information, including your website or blog address.
- ✔ **Post press releases.** Whenever something important occurs, such as when you open your business or are planning to speak at a mediation conference, post a press release and be sure to link back to your website or blog.
- ✔ **Distribute newsletters.** Compose a monthly newsletter with articles relevant to your market and distribute it via e-mail or postal mail according to each recipient's preference. Be sure to have a system in place that allows recipients to opt out of future mailings.
- ✔ **Build a brand presence.** Design business cards, brochures, letterhead, and your website or blog so they all have a consistent look and feel. As people view your marketing materials, they begin to recognize your brand.
- ✔ **Network.** Join organizations where you're likely to mingle with people who need your services, and then take a leadership role in those organizations. Engage everyone you meet in conversation to really get to know people and what they do. In the process, distribute and collect business cards to add to your marketing database.
- ✔ **Contribute to online discussions.** Join mediation discussion forums online and contribute your insight. LinkedIn has several discussion forums dedicated to a wide range of mediation topics. Be sure to research the discussion group and get a feel for the community before posting anything.

For more on marketing yourself and your business, see Chapter 16.