

## What to *Expect* When You're *Expecting* (to mediate)<sup>1</sup>

### I. Getting Your Foot In the Door – How to Get Started

- a. Ask former litigation opponents for a chance to mediate a case. Until you have a fully established practice, your 40 hour-a-week job is to call anyone who can give you a chance and ask for one.
- b. Join a mediation firm if you can.<sup>2</sup> The camaraderie and exchange of ideas in invigorating and will make you a better mediator.
- c. Offer *pro bono* mediations to Legal Aid Society. Get your name out there.
- d. Attend and sponsor civic and bar functions. **Get. Your. Name. Out. There!**

### II. Skillset of a successful circuit civil mediator

- a. People skills
  - i. Behave as if you're on a first date – friendly, respectful, smiling, listening more than talking. Show interest in the parties and their issues. Make the process about them, not yourself.
  - ii. Bias<sup>3</sup> (a strong, preconceived notion based on incomplete or no information) awareness and elimination
    1. Confirmation bias – considering only information that supports a preconceived opinion.
    2. Anchoring bias – relying too heavily on the first piece of information
    3. Cultural/implicit bias – stereotyping
    4. In-group bias – favoring someone within a social group vs an outsider.
    5. Dunning- Kruger Bias- the less a person knows, the more they think they know.
    6. Race and gender Pain bias – a belief that women exaggerate complaints of pain and Black people do not feel pain as much as whites (i.e. studies indicate that half of white medical trainees believe that Blacks have thicker skin or less sensitive nerve endings)<sup>4</sup>. Shockingly, some studies indicate that female clinicians have a higher incidence of gender pain bias.

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<sup>1</sup> Rodney Romano has been a Board-Certified Civil Trial Attorney and has been a Florida Bar member for more than 35 years. He became a full-time circuit civil mediator in 2000 and has conducted more than 24,000 hours of circuit civil mediations over more than 8000 cases. On average, he conducts between 300 and 350 circuit civil mediations each year. He is currently the Chairperson of the Palm Beach County Commission on Ethics and he served for 10 years on the MQDRB. He served four terms as Mayor of Lake Worth. There's more, but that's enough.

<sup>2</sup> This is not the key to success. A firm can get you to some initial tryouts, but only the job you do will determine whether you get more assignments or not. People talk and your reputation will spread quickly-for better or worse. You will not get many second chances.

<sup>3</sup> For example, see [How to Identify Bias: 14 Types of Bias - 2022 - MasterClass](#)

<sup>4</sup> See, e.g. [Gender Biases in Estimation of Others' Pain - PubMed \(nih.gov\)](#); [Gender Disparities in Pain and Pain Care - Southern Pain Society](#); [How we fail black patients in pain | AAMC](#); [Racial bias in pain assessment and treatment recommendations, and false beliefs about biological differences between blacks and whites | PNAS](#)

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- iii. Emotional intelligence - the capacity to be aware of, control, and express one's emotions, and to handle interpersonal relationships judiciously and empathetically<sup>5</sup>
  - iv. Cultural competence – understanding and appreciating cultural differences and customs<sup>6</sup>. A good mediator connects with people on *their* terms, respecting their customs and traditions.
  - v. Think about the case in advance and lay out a design for your approach to each particular case. Take time to try and appreciate each participant's perspective – it's not a flea market. There are no “routine” cases. Every case is a custom job. Each case has several different people, and pieces of evidence which create a vast array of human and negotiating dynamics and variables. Encourage summaries and if you get them, read them. Call counsel in advance when you can to get a sense of the case and the parties. Once mediation begins, you have a short period of time to assess where everyone is at emotionally and intellectually and to design a process contoured to communicate with them in the most effective way. Your job is to help parties solve their problems which have multiple unknown variables.
- b. Legal knowledge
- i. Like it or not, Circuit Civil litigators, at least in my experience, want mediators with an understanding of the legal issues and the Rules of Evidence, *at least to the extent that the mediator can effectively explore the issues.*<sup>7</sup>
  - ii. Being a lawyer or a judge does not assure success as a mediator.
  - iii. There are non-lawyers who have successful circuit civil mediation practices.
- c. Technical skills
- i. Technological competence. At a minimum,
    - 1. Zoom
    - 2. Smartphone
    - 3. Word processing
    - 4. Digital signing
    - 5. E-filing
  - ii. Understanding the life of a claim/Lawsuit and the procedural status at the time of mediation
    - 1. PI, Contracts, 1<sup>st</sup> Party claims

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<sup>5</sup> [\(1\) define emotional intelligence - Search \(bing.com\)](#)

<sup>6</sup> [Country Guides to Culture, Etiquette, Customs & more! \(culturecrossing.net\)](#)

<sup>7</sup> Search Florida Online Sunshine, statutes

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- a. LOR<sup>8</sup>
- b. Exchange of initial facts, medical treatment, and insurance information
- c. Demand letter
- d. Negotiations
- e. Litigation
  - i. Paper discovery
  - ii. Fact witnesses depositions
  - iii. Retention of experts > costs begin to rise dramatically (liability and medical)
  - iv. Medical reports/depositions
  - v. Liability expert reports, depositions
  - vi. CME examinations, reports
  - vii. Motion practice
  - viii. DR<sup>9</sup>
    1. Mediation
    2. Non-Binding Arbitration
    3. Arb/Med hybrid
  - ix. Trial
    1. Jury trial?
    2. Bench trial?
    3. Voluntary trial resolution?
  - x. Post-trial motions
  - xi. Appeal

### **III. Building a Successful Dispute Resolution Practice**

- a. Secrets to Success
  - i. Done right, mediation requires a strong work ethic, energy, focus and strong people skills. It is the lack of these that explains why many mediators fail to achieve their career goals in building a practice.
  - ii. Always, always, always treat your mediation participants as you would treat your boss, because that's who they are. They may have less education or life experience than you, but you have agreed to work for them.
  - iii. Don't be a numbers runner – give sound, neutral negotiating assistance. Challenge assumptions and conclusions by asking questions that help participants more carefully consider their view of the case.

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<sup>8</sup> LOR-letter of representation – the way a plaintiff attorney introduces himself/herself to the defendant and the defendant's insurance carrier and opens communications about the case.

<sup>9</sup> Dispute Resolution – virtually every circuit in Florida now requires mediation, non-binding arbitration, or both.

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- iv. Don't be a quitter – it's your job to find a way over, around or through obstacles. Most mediators throw in the towel too easily.<sup>10</sup>
  - v. Give your clients more than their money's worth. If you became a mediator because you think mediation is an easy way to make money, then you are on the wrong track. If you love helping people, solving problems and want to be an important part of maintaining a smooth running and efficient legal system, then you are on the right track. And yes, if you devote yourself to the Dispute Resolution profession, if you remain in a constant state of learning and helping, then the money will follow.
  - vi. Follow Through – if your case impasses, follow up after a while. There is almost always a way to get the parties to re-engage. Following up is a sure-fire way to distinguish yourself from the pack.
  - vii. Conduct each mediation as if it is the only mediation on which you will be judged.
  - viii. Make sure that everyone is part of the process and do not ignore anyone.
  - ix. Make sure everyone is comfortable and has access to food and hydration.
  - x. Reassure parties that there is no pressure in mediation and take steps to reduce their stress. Stress changes how people weigh risks and rewards and impacts decision making<sup>11</sup>.
- b. Secrets to Failure
- i. Expecting to make lots of money with minimum effort- for most, this is the single biggest kiss of death.
  - ii. Thinking of mediation as a hobby or side hustle instead of a career.
  - iii. Making the mediation about you and not the participants.
  - iv. Faulty pacing – rushing or dragging out the case.
  - v. Being a numbers runner.
  - vi. Giving up too soon.
  - vii. Lack of creativity.
- IV. Getting Your Foot In the Door – How to Get Started
- a. Ask former litigation opponents for a chance to mediate a case. Until you have a fully established practice, your 40 hour-a-week job is to call anyone who can give you a chance and ask for one.
  - b. Join a mediation firm if you can.<sup>12</sup> The camaraderie and exchange of ideas in invigorating and will make you a better mediator.

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<sup>10</sup> **CRUCIALLY IMPORTANT** – while being tenacious, persistent, and offering creative options to keep the negotiations moving forward you must stay in your lane as neutral facilitator and never cross over into rendering opinions or violating self-determination. Fla. R. Cert. & Ct. App. Med. 10.310 and 10.370, especially (c)

<sup>11</sup> see, e.g., Stress Changes How People Make Decisions, 2-27-2012, Association for Psychological Science, [www.psychologicalscience.org/news/releases/stress-changes-how-people-make-decisions.html](http://www.psychologicalscience.org/news/releases/stress-changes-how-people-make-decisions.html)

<sup>12</sup> This is not the key to success. A firm can get you to some initial tryouts, but only the job you do will determine whether you get more assignments. People talk and your reputation will spread quickly-for better or worse. You will not get many second chances.

- c. Get on Florida Department of Insurance rotation lists. Get your name out there.
  - d. Offer *pro bono* mediations to Legal Aid Society. Get your name out there.
  - e. Attend and sponsor civic and bar functions. Get your name out there!
- V. Common Issues You May Encounter and Practical Questions to Explore Them<sup>13</sup>**
- a. Motor vehicle accidents**
    - i. Liability
      - 1. Is there physical evidence or independent witness testimony to break the tie in a “he said, she said” dispute?
      - 2. Sudden stop defense – sudden, unexpected and without any reason<sup>14</sup>
      - 3. Intoxication defense<sup>15</sup>
      - 4. Aggravating circumstances?
    - ii. Causation
      - 1. pre-existing degenerative changes
      - 2. prior claims of the same or similar injuries
      - 3. force of impact
      - 4. mechanism of injury
      - 5. treatment at scene
      - 6. Ambulance?
      - 7. Emergency Department?
      - 8. Is the medical history consistent with deposition testimony?
      - 9. Plaintiff’s credibility an issue?
      - 10. Does the lighting seen by the dash cam accurately depict lighting conditions and field of view that the driver should have seen?
    - iii. Damages
      - 1. Real or exaggerated
      - 2. Medical bills reasonable? (LOP<sup>16</sup> issue)
      - 3. Permanent or temporary
        - a. if jury does not find permanency, then no P&S awardable
        - b. Effect on ADL<sup>17</sup>’s
      - 4. RLE<sup>18</sup>
      - 5. Future medical expense
      - 6. Lost wages
      - 7. Future Loss of Earning Capacity
      - 8. Past Pain and Suffering

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<sup>13</sup> The mediator should not inject issues into a case or ask questions that will have the effect of helping either side; you may only raise explore issues in a neutral fashion.

<sup>14</sup> Tacher v. Asmus, 743 So. 2d 157 (Fla. App. 1999)

<sup>15</sup> 768.36

<sup>16</sup> Letter of Protection – medical provider agrees to accept payment from lawsuit proceeds – a basis for claiming bias

<sup>17</sup> ADL’s – Activities of Daily Living – what is the practical effect of the claimed injuries?

<sup>18</sup> RLE-remaining life expectancy

9. Future Pain and Suffering
10. Facebook, Instagram, Surveillance

**b. Premises negligence claims**

i. Liability

1. Was the condition that injured the plaintiff a dangerous condition?
2. If a transient substance, did the defendant have sufficient Notice to remedy the danger<sup>19</sup>
3. Comparative negligence – shoes, glasses, medications, fatigue, intoxication
4. Lighting a factor?
5. Weather a factor?
6. Aggravating circumstances.
7. Open and Obvious

ii. Causation

1. Preexisting condition(s)
2. Consistency of medical care
3. Consistency of symptoms
4. Mechanism of injury
5. Plaintiff credibility
6. Consistency of testimony, medical records, and ADL's
  - a. Social media, surveillance

iii. Damages – *same as prior section*

**c. 1<sup>st</sup> Party Homeowner's claims**

i. Coverage –

1. Did the carrier deny coverage
  - a. Basis
  - b. exclusions
  - c. untimely report of loss
  - d. fraudulent report of loss<sup>20</sup>

ii. Scope - what is the extent of the covered loss

iii. Pricing \*There is almost always a dispute between the scope of work required and the cost of the work assessed by the Public Adjuster for the homeowner and the adjuster for the insurance carrier. The claims

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<sup>19</sup> **768.0755 Premises liability for transitory foreign substances in a business establishment.**—

(1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:

(a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

(b) The condition occurred with regularity and was therefore foreseeable.

(2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

**History.** —s. 1, ch. 2010-8.

<sup>20</sup> *Schneer v. Allstate Indem. Co.*, 767 So.2<sup>nd</sup> 485 (Fla.App.2000); *Alvarez v. State Farm Fla. Ins. Co.*, 305 So.3d 5 (Fla.App.2019)



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estimating software known as Xactimate is widely used but can vary tremendously depending on how and what information is inputted.

1. Do the parties agree on scope? If not, where are the differences?
2. Do the parties agree on pricing? If not, where are the differences?
3. Ordinance & Law requirements and coverage?
4. Roof
  - a. Replace vs. Repair
  - b. Matching roofing available?
5. 25% rule effective
6. Matching?
7. Continuous flooring
8. ALE?<sup>21</sup>
9. Kitchen cabinets – gotta match!
10. Countertops – replace or repair?
11. Mold – covered? sublimit?
12. Lots of other details – pack out, demolition, and more

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<sup>21</sup> ALE-Additional Living Expense