

Keynote Address – FIMC/IMI (Florence, Italy)

The following Keynote Address was delivered by Bennett G. Picker at a conference in Florence, Italy organized by the newly launched Florence International Mediation Chamber and the International Mediation Institute.

I have a passion for many things in life, including a passion for family, for travel and for mediation. So, to be here with my wife in Florence, one of my favorite cities in the world, together with a community of mediators, is an absolute pleasure.

The theme of today's conference is "Succeeding in Mediation." The simplest definition of mediation is "facilitated negotiations by a trusted individual." If I had to define mediation in only one word, my word would be "opportunity." The process offers the parties an opportunity to telescope issues in hours that might take years in litigation, to forge solutions based upon underlying interests, to preserve relationships and, quite obviously, to avoid the time, expenses and distractions of litigation. Opportunity will be the focus of my comments today – the one that exists for disputants and for each of you in the audience who aspires to a career as a mediator.

More specifically, Mike McIlwrath has asked me to speak on the topic "How To Become A Successful Mediator." Implicit in this topic are two questions. The first question: "What are the keys to becoming a highly skilled mediator?" As many of you know, mediation work flows to mediators with the best reputations for skill and experience. This is very much unlike law practice where work typically flows to attorneys based upon relationships. It is quite acceptable for an attorney to refer work to colleagues within the firm. In contrast, mediators are members of a solitary profession and need to continue to perform on their own at the highest levels to assure a continuing flow of work. The second question: "What are the keys to building a successful mediation practice?" Even the best mediators spend a great amount of their time developing new business opportunities.

I. The Changing Landscape Of Mediation

Before exploring these questions, however, I think we need to take a look at the competitive environment – the ever changing landscape of mediation. And I think this is why Mike asked me to speak today – because I am old enough – to have been around at the dawning of the creation of commercial mediation.

I started practicing law in the late 1960's as a trial lawyer in business disputes. At that time, the world of dispute resolution, at least in the Anglo-Saxon world, looked about the same as it had 700 years earlier when the jury trial replaced trial by ordeal and trial by combat.

In the late 70's and early 80's the world of dispute resolution changed dramatically. You have all heard of the phrase a "perfect storm." I like to describe what happened in the late 70's and early 80's as a "perfect rainbow." In a period of not much more than five years, we saw the convening of the Pound Conference in 1976 which Michael Leathes, the founder, and Deborah Masucci, current Chair of the International Mediation Institute, have called the "Big Bang of ADR." Leading scholars and judges met at the time in America to discuss increasing dissatisfaction with judicial system and insufficient access to the courts.

In this period, we also saw beginnings of tort reform. Not in a political sense. But corporate counsel were beginning to assume far more responsible roles within their companies and they began to look for faster, better and cheaper solutions to business problems.

In this period Fisher & Ury wrote "Getting to Yes," popularizing interest-based, "win-win" solutions. Especially in business disputes, many began to see the potential for business solutions in mediation that are unavailable in litigation and arbitration.

We also saw the founding of the International Institute for Conflict Prevention & Resolution (CPR) formed by America's leading corporations, banks and insurance companies for the purpose of institutionalizing ADR in corporate and law firm settings. To the extent that within only decades it was commonplace to see mediation provisions in contracts, as a part of court-annexed mediation programs, in government programs mandating ADR and to see the use of mediation on an ad hoc basis, much of this growth was due to the initiatives of CPR.

Fast-forwarding twenty years to the mid-90's, the rhetoric about mediation far exceeded its actual use in commercial disputes. By then, my problem-solving approach to life and law led me to become a reformed trial lawyer – a mediator. During this timeframe, I spent a fair amount of time educating others who wished to become mediators. While many were beginning to understand the benefits of mediation, many others could not intelligently describe the difference between mediation and arbitration. I continually was asked “how do we know that mediation won't result in a binding result.” Some could not even explain the difference between mediation and meditation. On one occasion I gave a lecture on “ADR” and several individuals walked out of the room within the first few minutes. I later saw one of them in a hallway and asked why he left. The response: “I thought I was attending a lecture on “American Depository Receipts.” At the time, ADR was still mostly unexplored terrain.

Fast-forwarding through the next twenty years to today, we have seen a substantial rise in the use of mediation. In America, in jurisdictions such as Texas, California and Florida, almost every case is mediated. Florida alone has over 8,500 state court certified mediators. Yet, there is still resistance to mediation in many parts of America and the full promise of the process has not been realized. Some of the resistance comes from law firms which see mediation as a threat to the all-important litigation profit center within the firm. Within corporations there is a great deal of lack of awareness and inertia. And while some companies have champions for ADR and mediation, when she or he leaves the company, that company is often left without any culture of appreciation for ADR.

With the advent of the Woolf Reforms in the late 1990's, we have seen the rise of mediation in countries such as England and New Zealand and today we are seeing progress from Singapore to the Netherlands and from Australia to Argentina. Yet, with EU Directive and even the recent Reboot, mediation remains stalled in most of Europe. Giuseppe de Paolo, well known to most of you, has talked about the “European Union Paradox” – the existence of a highly acclaimed, efficient and effective process that very few people use. The good news: With the IMI and others participating in today's conference including Florence, Singapore, the AAA, CEDR, JAMS and the ICC, and with the upcoming Global Pound Conference in 2016, we can begin to see a greater promise for mediation worldwide.

What does all this mean for any of you who want to be mediators? In one word – “opportunity.” And that's my story. I started over 25 years ago, as one of 10 or 15 individuals in my region seeking work as a mediator. Today, in a

community of almost 20,000 lawyers, there are probably close to 300 or 400 individuals looking for work as a mediator. Regrettably, as my jurisdiction is one that does not yet fully embrace mediation, the median number of cases for each of these individuals is zero – meaning more than half of those looking for mediation work get no cases in a given year.

I was fortunate to be asked to write one of the American Bar Association's first books on mediation. Today, I continue to enjoy a competitive edge I gained early on from the initial visibility resulting from this publication. This can be your story as well – especially if you are in a market where mediation is just emerging. If you are fortunate to gain recognition for skill and experience mediating in an emerging market you will have an edge that can last a professional lifetime. That opportunity exists for each one of you.

II. The Keys To Becoming A Highly Skilled Mediator

So, let's go back to the first of my two questions. What are the keys to becoming a highly skilled mediator? Let me pause and ask a question. What do you think ranks at the top of virtually every study of users who were asked "What do you look for when selecting an experienced mediator?" What does not appear in almost anyone's list is style – facilitative vs. evaluative vs. transformative. In my mind, style is like flavors of ice cream and consumers of mediation will select their favorite flavor in each next case. Also, what does not appear on the list, somewhat surprisingly, is technique, such as breaking impasse, or the use of joint sessions or one's ability to close. Fortunately, we have credible studies that can answer this question. One outstanding study was performed by Steven Goldberg and Margaret Shaw, both highly respected mediators and educators. In this study, published in CPR's publication "Alternatives," Steven Goldberg and Margaret Shaw interviewed 260 disputants and asked those surveyed what they look for when selecting an experienced mediator. Their results are confirmed by a similar study performed by the Harvard Program on Negotiation.

Here are the top five answers to the question "What do consumers look for when selecting a mediator?"

1. Honesty, Integrity & Trustworthiness

Some comments:

- ❖ “Both sides trusted that the information she relayed was completely accurate”
- ❖ “We had absolute confidence that he would not reveal information we wanted to remain confidential”

2. Relational Skills, Friendliness, Empathy

Some comments:

- ❖ “Because of his sincerity we kept talking and we committed to the process”
- ❖ “She demonstrated compassion for the client, making the client feel she was working hard on its behalf. So we tried even harder.”

Roger Fisher, a few years after co-writing “Getting to Yes,” wrote an outstanding law review article on the sources of negotiating power. Near the top of his list was the power of a good relationship. Understanding this, what I do and what many of the best mediators do, is meet privately with the decision-makers before any joint session. I usually insist that we talk about anything other than the dispute and if I do it right the participants may even show me pictures of their children or grandchildren. By taking this approach, the process of building a relationship and creating trust has begun even before an initial joint session.

3. Preparation

I once gave a lecture at the Advanced Mediation Training Program of the ABA on the “The Three Keys to Success in Mediation.” I began by stating that the three keys to success are “preparation, preparation, and preparation.” We often talk about the importance of preparation. But we don’t talk nearly enough about the various steps mediators can take in advance of a mediation session to prepare themselves, the parties and their lawyers for the most productive session possible. Preparing one’s self and preparing the parties involves exploring the barriers and drivers of resolution, digging deep for the underlying issues and interests and also involves a great deal of teaching and coaching. As preparation is one of the

subjects that will be discussed this morning in one of our Panel Sessions, I will leave this topic for the Panel.

4. Nuanced Understanding Of Process

Skilled and experienced mediators understand that mediations are not only about the parties' positions, but also the problem and the people in the room. They recognize the need to uncover the cognitive barriers that may distort rational assessments such as selective perception, advocacy bias, and assimilation bias, among others. They understand the relational barriers to settlement. Among these barriers are the differences between various representatives of the parties attending a mediation session such the CEO, the CFO, the General Counsel, and the line manager most involved in dealings giving rise to the dispute. As just one example, in many of my mediations, one side with a reasonably strong position will ask "Don't they understand our position?" or "Don't they understand their weakness?" Of course, in many cases they do understand but have difficulty getting on the same page. In these situations experienced mediators often will conduct intramural mediations to obtain consensus among the various representatives of one party. Experienced mediators also understand the critical importance of exploring differences between parties and their counsel. Barriers to resolution can be created by attorneys initially creating overreaching expectations or by the unwillingness to deliver bad news to the client. Many times counsel have said to me "thank you for telling my client what I could not say. I started down that road and my client said if you don't believe in my case, I may need to find another lawyer." Other examples include lack of good communication or an interest in the fee. Professor Gerry Williams, a noted scholar and student of negotiations, studied the settlement behavior of twenty-two lawyers for seven years and concluded that the top reason cases failed to resolve by settlement was a disconnect between the lawyer and the client.

5. Tenacity: The Best Mediators Never-Give-Up

Too many mediators see impasse too early and may quickly jump to a mediator proposal or simply give up. In fact, "impasse" often is not real. It is postured. Even if an impasse is real, skilled mediators understand that this is simply a reason for another conversation or for another road to be traveled. Even if dispute does not resolve in a mediation session, the best mediators persist – they never give up.

III. The Keys To Building A Successful Mediation Practice

The second question, of course, is “What are keys to building a successful mediation practice” – the business equation. Most importantly there is no one way – one needs to be authentic. And unlike mediation skills, there is no survey of which I am aware. So, I conducted my own informal survey contacting highly skilled and experienced (“successful”) mediators from the United States, England, Scotland, France and New Zealand. Here is our consensus opinion of the best ways to build a mediation practice.

1. Training

At the top of almost all of our lists was the need for training which is essential to mediation skills development. Many engage in mediation without training and, while much of the process is intuitive, that in our view would be a mistake. Equally important, consumers of mediation who select mediators make the assumption that those who have had training are more likely to have greater skill.

2. Especially If You are Beginning a Practice, Look for Every Opportunity to Become Involved in Mediation

Look at opportunities to become engaged in the activities of community mediation clinics, pro bono programs and court programs. Or shadow an experienced mediator.

3. Tell People What You are Doing – Put Yourself Out There

Send emails to colleagues. Take the time to create a good mediator bio – go on the website and look at the bios of other successful mediators to see how they describe their experience and background. Create a website and consider placing on your website videos where you talk about your approach and style. Finally, consider the use of social media including possibilities such as LinkedIn and even Twitter.

4. Participate in ADR Organizations with No Barriers to Entry

Networking is one of the keys to success. It’s important to engage with others whether it be in bar associations, trade associations, ADR associations or Chambers of Commerce.

5. Find a Niche

This one is somewhat controversial. When I started as a mediator, the conventional wisdom was that process expertise was most important. In my view, that view is still correct. However, consumers of mediation today are looking for subject matter expertise, especially in disputes involving issues of intellectual property, construction, and employment. Also, from a marketing perspective, you are most likely to obtain initial work in the field where you have your expertise. So, for example, if you are an IP lawyer, after you have had training and some experience, and contact your colleagues who are IP transactional and litigation lawyers, let them know of this experience and your interest in mediating IP disputes. This is where you are most likely to get work – in your own field – and of course, in time, you can expand to other fields.

6. Consider Writing a Pop Article

By pop article I mean 1500 or so words without footnotes. There are so many places today where publications is not difficult including, for example, “mediate.com” which publishes several short articles each week. The importance of writing an article is not so much that people will read the article. The power of an article is more in the reprints you can send to those who might consider using you as a mediator. While after writing an article you may not have any greater expertise in your field, the perception – which is the reality – is that you are an expert. This was true for me. It was when I started writing about mediation that my practice began to take off.

7. Commit

Too many see mediation as a part-time career or a career compatible with retirement. However, in order to be successful one needs to commit to a sustained effort which may take years. If you have a passion for the process and persevere, while it may take years, you will have your best chance of success.

8. Take a Risk – And This May Be Difficult

Once you begin to get some flow of work, there may come a time when you will want to consider taking a risk and crossing the bridge from law practice to full-time mediation. For me, it was when I crossed the bridge to full-time mediation that my practice began to take off. However, as work usually develops slowly, one needs to consider the risk carefully.

For those of you who would like to follow up with additional marketing suggestions, I recommend a book written by one of my colleagues in the IAM, Jeff Krivis, who wrote a book entitled “How to Make Money as a Mediator (30 Top Mediators Share Secrets to Building a Successful Practice).” Full disclosure: I am one of the 30 mediators; however, I receive no royalties from the book. The book answers questions such as:

“Can I be a neutral in a law firm?”

“Should I join a Panel?”

“Can I be successful if I’m not a lawyer?”

“How should I charge?”

Also, I commend to you the most recent edition of the *ABA Dispute Resolution Magazine* which contains several articles for those who are beginning to plan for a future in the field of mediation.

IV. The Future Of Mediation Internationally

What does the future hold for mediation internationally? First, a caveat. Predications for the future are precarious. I am reminded of Harry Warner, the co-founder of Warner Brothers, who in the late 1920’s said “No one will ever want to hear actors talk.” Also, Thomas Watson, one of the founders of IBM, who once said “I think there’s a world market for, maybe, five computers.”

With this caveat, I strongly believe the future offers great promise for mediation internationally. With the internet and in an increasingly global marketplace, I believe we will see a dramatic rise in the mediation of disputes internationally. There will be a greater opportunity for those who want to enter the field, especially for those with strong language skills and those who are trained in managing cross-cultural disputes. I suggest you take a look at the IMI’s Inter-Cultural Qualifying Assessment Programs.

Cross border disputes involve significant cultural issues. As just a few examples, in some cultures it is important to save face; various cultures have different assumptions about good faith, and in some cultures the impact of religious beliefs play an important role on decisions.

I believe the future also offers great promise for non-traditional jobs such as ombuds, settlement counsel, in diagnostics, systems design (I would note the newly conceived process of “Guided Choice”), corporate coaching and consensus building, just to name a few.

The future is also likely to allow for individuals to enter the field at a much earlier stage in one’s career. I believe California is a good example of this phenomenon as many of the best mediators in California are, in contrast to the East Coast, in their 40’s, many having entered in their 30’s. Choosing an ADR career at a young age is an option today’s more senior lawyers never had. Those of you looking to work full-time in mediation early in your legal career may want to consider working as a case manager, an outreach coordinator, an administrator or a full-time mediator in a court program or with a governmental agency.

I believe that certification of mediators will become more the rule and less the exception. Here, the IMI should take great pride in being THE world leader on this issue.

I envision technology playing an ever-increasing role in what we do – with new opportunities ensuing as a result. Here are just a few startling facts. EBAY and PayPal are resolving 60 million disputes a year through quick online resolution – where algorithms and crowd sourcing matter more than issues of jurisdiction or law. For mediation, platforms allow for custom intake, online negotiation, file sharing and video conferencing. Just last week, I spoke with Colin Rule who is truly the guru of online ODR (Online Dispute Resolution). Colin predicts that this year over 700 million disputes will be resolved online and that number will increase to in excess of 1 billion by 2017. And he says there will definitely be a meaningful role for mediators.

Regardless of what changes may be in the wind, we need to embrace change to survive as a profession or, to paraphrase Professor Frank Sander of Harvard, our profession may be killed by the status quo.

V. In Conclusion

I would like to conclude with three thoughts.

First, developing a mediation practice is not a sprint, it's a long distance run. But those who have a passion for the process and who persevere will have the best chance of success.

Second, Stephen Hawking, the brilliant physicist and author, once wrote "For millions of years, mankind lived just like animals on the planet. Then something happened which unleashed the power of imagination. We learned to talk. We learned to listen. Speech has allowed the communication of ideas – enabling humans to work together to build the impossible."

Hawking's words are lofty. But for mediators . . . facilitating communication, bringing people together, and helping them to learn from each other is the very core of what we do. And most of us are convinced that the growth of mediation worldwide is not "impossible," it is inevitable.

I, for one, am encouraged by the collaboration we can see right here in Florence, by the MOU's signed yesterday, and by the promise of the IMI's Global Pound Conference. Given this unprecedented collaboration, I believe we will see a dramatic growth of mediation internationally in the not-too-distant future.

Third, and finally, if you are fortunate and you do succeed, you will find that helping to resolve conflict will give you enormous personal satisfaction which, according to the poet, Maya Angelou, is the true definition of success.

Thank you. Grazie mille.

BENNETT G. PICKER

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In 2010, Mr. Picker received the American Bar Association's "Lawyer as Problem Solver Award." The award is presented annually to an individual or institution that demonstrates "profound creativity in problem solving."

Mr. Picker is a member of the National Panel of Distinguished Neutrals of the International Institute for Conflict Prevention & Resolution (CPR); a member of the Commercial Mediation, Arbitration, International and National Class Action Panels of the American Arbitration Association; a fellow of both the American College of Civil Trial Mediators and the International Academy of Mediators and is certified by the International Mediation Institute. He is the author of Mediation Practice Guide – A Handbook for Resolving Business Disputes (Second Edition) published by the American Bar Association Section on Dispute Resolution, and has written numerous book chapters and articles on mediation and arbitration. Mr. Picker has lectured widely on ADR related topics at law schools, business schools, and organizations such as the American Bar Association, the American Arbitration Association, CEDR and CPR.