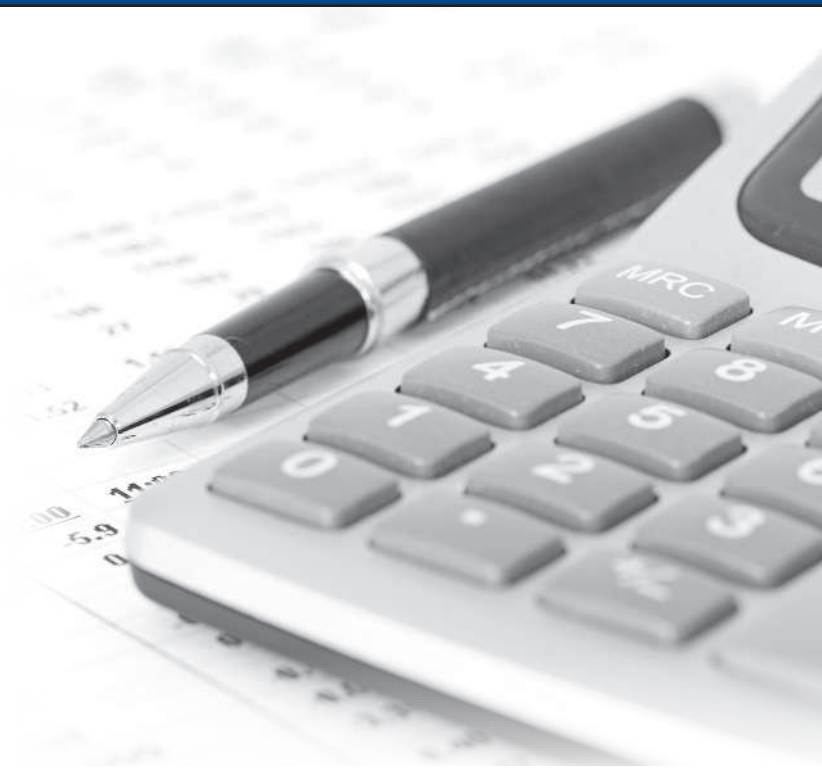
How to Succeed in Business

With a lot of careful planning and attention

By John Bickerman



In my more than 25 years of practice as a neutral, I've been approached by dozens of would-be mediators and arbitrators, some young, some not so young. Some have been counsel or parties in my mediations. Others have had distinguished legal or judicial careers. I can usually predict who will be successful — and who will not. Those who will succeed have an understanding of the business of mediation and arbitration, which is different from possessing the skills needed to be a good neutral. They have a good sense of where their work will come from, how they are going to reach their future clients, and the economics of running a business. Most important, they have an intangible quality or instinct about how to make it happen. Whether that's drive, personality, or self-confidence, they have an air that they can and will succeed.

Even with those intangibles, however, the sad, hard truth is that just as it is in any small, undercapitalized business, without careful planning, failure is much more likely than success. The median income of mediators — the amount of income that divides the profession, with half earning more and half earning less — is believed to be $0. Stated differently, more than one-half of the professionals who call themselves mediators do not make any money in their chosen profession.

Deciding to Become a Neutral

Becoming a mediator or arbitrator requires forethought and planning. Among the questions I field often are: Should I jump into the deep end and become a full-time practitioner, or dip in my toe and try it out part-time? If I'm with a law firm, should I cut my ties — or try to maintain my affiliation and perhaps some of my legal practice? Where will my cases come from? Should I affiliate with a national or local alternative dispute resolution provider or should I be independent?"

While these are all important questions, they should be addressed only after careful construction of a business and marketing plan. Well-conceived plans may help drive many of these practical decisions.

Working as a neutral is a business, and you should treat it as one from the moment you decide that's what you want to do. Imagine going to a bank to seek a line of credit. The bank officer will want to see a business plan showing your anticipated sources of income and projected expenses as well as some consideration about how you will find your clients and meet your income projections. He or she will want to know how quickly you think you can turn a profit and some assurance that your assumptions are realistic. The Internet has many good examples of business and marketing plans; completing one is a good way to get a sense of the many challenges of starting a mediation/arbitration practice.

Expecting the money you make in your new practice to equal what you earned before is usually unreasonable, which prompts an important question. Do you have the resources to survive on limited income until your practice catches fire? After deducting your living expenses, chart out your practice expenses. Initially, you may be able to keep those costs down, but they are never inconsequential. You will need a good website, a cell phone, and access to office and/or conference space. You will also need to finance your receivables — the fees you've earned but haven't yet collected. Most important, you need to set aside money to market your practice. It helps to have a reasonably comprehensive marketing plan.

Finding a Niche and Selling Yourself

First, what's your target audience? Neutrals who have a specific practice area are much more likely to develop a clientele. Do you have special expertise or contacts that would lead to your being hired to resolve disputes? Are you especially well-respected or known in a particular area of the law or community? Once you have identified your target audience, how do you plan to reach it? Marketing plans need not be overly complicated. Start with whom you know and who might know you. Let all of them know you're going into a new area of practice. Asking for advice is often much more welcome than trying to "sell" yourself or your services, so meet with potential clients to find out what they need and get their guidance.

Several years ago, a friend of mine saw that the health-care industry was likely to become a hotbed of disputes and fertile ground for dispute resolution. He identified this niche market, learned the issues that might be relevant, marketed himself to potential consumers of his service, and carved out a thriving health-care dispute resolution practice. Many other niche practice areas are waiting to be discovered.

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I subscribe to the pinball theory of marketing. The more times you bounce off a bumper — get your name in front of a potential client — the more likely people are to give you a try. Write articles, give speeches, and use social media such as LinkedIn and Facebook to get your name out to potential clients. Even sending change-of-address notices, with mention of your new practice, to all your contacts and friends can help. Be systematic about marketing. Set up a calendar with tasks and deadlines and treat starting your new practice as a full-time job — because it can be and usually is.

Being professional from the moment you launch your practice is also crucial. You are probably going to ask clients to pay you hundreds of dollars an hour for your services, so everything about your presentation should reflect a high degree of professionalism. Be thoughtful about where to economize and where to spend to create the kind of appearance that you want for your business.

Staying or Leaving the Firm

I often meet accomplished lawyers who see mediation as a suitable steppingstone to retirement and want to remain with their law firm as they transition to a neutral practice. I also see successful attorneys with substantial financial needs who can't forgo the income of their practice while they try to launch a new career. The question of whether to stay with a firm or go it alone has no one answer, but here are some broad generalizations from personal experience.

For lawyers in firms contemplating starting a practice, the advantages of maintaining affiliation are obvious. The firm has office space, secretarial support, phones, conference space, a reception area — in short, all the creature comforts of a highly professional setting. But there are both obvious and hidden costs of remaining with a firm. The economics of a mediator's or arbitrator's practice are vastly different from those of a successful partner. With some rare exceptions, the billing expectations and income generation at a firm will not change just because your practice has. Because being a neutral does not generate leverage from employing other attorneys in your work, the income you generate for the firm will almost always decline as your practice shifts toward dispute resolution. The flip side is that most of the firm's

overhead for which you are paying isn't necessary for a dispute resolution practice. You won't need lots of support staff or dawn-to-dusk reception services. While the importance of mailrooms has declined as more communications have become electronic, you will have even less need for these services. In short, the economics of a large or even a medium-sized firm just don't fit the practice of a neutral.

In addition to the economics, there is a more important drawback to firm affiliation: conflicts. As most firm lawyers know, under your state's rules of professional conduct, the clients of one partner and the ethical conflicts connected to them are imputed to all partners. In theory, with client consent, it may be possible to screen your neutral practice for these potential conflicts, but the reality is different. First, clients may not be willing to grant consent. Second, there are many potential retentions that you will never even learn about for which you were rejected because a party was uncomfortable with your firm affiliation. After I left my firm, I learned that I'd been proposed for and rejected for many matters solely because of my firm affiliation. In addition to the known conflicts, your fellow partners may resist your taking certain matters because of the future downstream conflicts such a retention would create for them. Once someone from the firm has been hired as a neutral by a major corporate client in a particular line of business, the firm may be precluded from taking on work from that client in the future. I experienced the problem of a putative downstream conflict firsthand I was being considered to mediate a billion-dollar, nationwide class-action matter. My law firm did not allow me to serve as the mediator in the case because the firm did not want to be precluded from future opportunities to represent one of the parties in the dispute. This experience convinced me that it was time to move on.

Affiliating with Private ADR Providers

The few national and many local providers of dispute resolution services generally follow the same model. These providers affiliate with neutrals as independent contractors. The full-service firms provide name recognition (of the firm), marketing, and, most important, office and support staff for a neutral. While you may not get your own office, you will have a place to hang your hat and access to phones, a receptionist, conference rooms, catering services, billing services, and all the support services a neutral could need. These firms will also provide varying degrees of marketing services to help promote your practice, but these come with a substantial cost, often starting out at 50% of your fees. (As your fees increase, the firm's share may decline.)

Even if you decide to affiliate with a provider, the ability to be successful will still rest with you and your ability to market yourself as a neutral, especially when you're starting out. Before a firm will be willing to welcome you into its fold, the business people there will assess the likelihood that you will be successful. That assessment may be based on your prior legal experience. In some states, bench experience will be an excellent credential. However, often the firm will want to see how you've done on your own generating clients and income. The admonitions about finding a niche and developing a plan apply with equal force to joining a dispute resolution firm. Of course, the obvious advantages of affiliating with a full-service firm are that you don't have to worry about running the business or collecting your fees. The firm will do all that work for you, and your association with the firm may help you generate business. The downside is that you pay a substantial price and give up some control over your practice. Especially for accomplished lawyers and jurists, provider affiliation may be a very attractive and profitable alternative.

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Going Solo

Many of the most successful mediators in the United States are solo practitioners. Being independent has many rewards but substantial challenges. Without the support of a firm, you will have to set up your business from scratch, and at first you may not be able to afford an assistant to help with scheduling, billing, marketing and other support tasks. Until then, you're on your own performing all those tasks, but you won't have to share your fees, and you will have complete control over your practice. You will need fewer assignments to become "profitable."

For many neutrals, having this kind of control from the initial call to the final bill is important. As you become successful and can afford your own support system, the payoff will be considerably higher than if you affiliate with a firm. Successful solo practitioners are usually able to keep 75 percent or more of their fees. Also, the transition to part-time work is easier because the reduction in hours is cushioned by the higher percentage of fees retained.

Solo practice does require great attention to many details, particularly setting and collecting adequate retainers and fees. In the last several years, some clients, especially insurers, have been very slow to pay.

Mediation is a Process — Not an Event

As most good mediators know, mediation is a process, not an event. As you start your practice, you should realize that how you present yourself and your business from the moment someone encounters you or your name — whether he or she is looking at your website, calling your office, or seeing your marketing material — affects that person's perception of you and your work. If every contact that a client has with you and your office is crisp and professional, this will be to your benefit. However, the opposite is equally true: if you meet a client in a messy office, your communications or your bills contain mistakes, or you are late, you risk harming your business. Make sure that when you go live, you're ready to provide the type of service that you would want to receive. If you're affiliated, make sure that the organization is providing the level of efficiency and professionalism you want for your practice.

Working Full or Part-Time?

Some lawyers nearing retirement view a dispute resolution practice as the perfect part-time practice to make the transition from their firms. While a fortunate few can make that transition, for most attorneys the start of a dispute resolution practice requires intense effort to develop a demand for services. For the latter group, after the proper groundwork has been laid, a part-time practice is a worthy goal.

Because it draws on your intellectual and creative abilities and helps clients achieve resolutions efficiently, creatively, and constructively, a dispute resolution practice can be very rewarding. While the competition is fierce, if a mediation practitioner has strong skills, passion, and a deep understanding of how the business works and exactly what's needed to start up a business, success is possible. ■

John Bickerman *is an internationally recognized neutral, specializing in complex, multi-party insurance coverage and general commercial disputes who left his firm 20 years ago to form a solo practice and has never looked back. He teaches negotiation and mediation courses at Cornell University and is a past Chair of the ABA Section of Dispute Resolution. He can be reached at jbickerman@bickerman.com.*