

PATHWAYS TO A MEDIATION PRACTICE

Exploring and expanding opportunities to learn and practice

January 19, 2021 – 5:00—7:00 pm (Zoom Webinar)

**Sponsored by the Alameda County Bar Association and
Contra Costa County Bar Association's ADR and Women's Sections**

PANEL

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OUTLINE

1. Introduction: Purposes of the program
 - a. Add new / diverse individuals to the ADR community
 - b. Understand the broader value of mediation skills training
 - c. Introduce an informal mentoring initiative
 - d. Follow up sessions: Mark your calendar for June 3, 2021
2. Individual paths toward a mediation practice: how and why
 - a. Panelist self-introductions and background
 - b. Multiple paths to mediation work
3. Incorporating ADR skills into your day job: How mediation training and experience impacts other work
4. Qualifications to serve as a mediator: Rules governing mediation practice in California and select local courts (see below)
5. Learning and training opportunities: A few examples:
 - a. Non-profit and for-profit mediation training programs:
 - i. The Congress of Neutrals, Contra Costa County – www.congressofneutrals.com: provides practical mediation experience under the supervision of experienced mediators. Gives trained mediators an opportunity to volunteer for local courthouses mediating small claims, unlawful detainer, and civil harassment cases.
 - ii. Community Boards, San Francisco: communityboards.org: focus on community mediation model
 - iii. SEEDS Community Resolution Center, Berkeley: focus on community mediation model
 - iv. Center for Community Dispute Settlement (CCCDs), Livermore – community mediation model that also supplies mediators in Alameda County courthouses for small claims, civil harassment and unlawful detainer

- v. Center for Understanding in Conflict, Marin County: focus on the understanding-based model of mediation which emphasizes joint sessions
- vi. American Arbitration Association (AAA)
- vii. Pepperdine University, Malibu
- viii. U.C. Hastings
- ix. U.C. Berkeley Extension
- x. Bar Association of San Francisco
- b. Court mediation panels and training
- c. Shadowing
- 6. Mentoring: A grass roots proposal
- 7. Covid-19's impact on mediation and mediation training opportunities
- 8. The best thing I ever did or the best advice I ever received

CALIFORNIA STATE AND LOCAL RULES GOVERNING CIVIL MEDIATION PRACTICE
 SELECT PROVISIONS GOVERNING MEDIATOR QUALIFICATIONS (as of June, 2020)

California Rules of Court (Effective 1/1/2007):

- **Rule 3.850: Purpose and function.**
 - **(a) Standards of conduct.** The rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective, there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence.
 - **(b) Scope and limitations:** These rules are not intended to:
 - Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;
 - Create a basis for challenging a settlement agreement reached in connection with mediation; or
 - Create a basis for a civil cause of action against a mediator.
- ...
- **Rule 3.856 Competence:**
 - **(a) Compliance with court qualifications.** A mediator must comply with experience, training, educational, and other requirements established by the court for appointment and retention.
 - **(b) Truthful representation of background.** A mediator has a continuing obligation to truthfully represent his or her background to the court and

participants. Upon a request by any party, a mediator must provide truthful information regarding his or her experience, training, and education.

- **(c) Informing court of public discipline and other matters.** A mediator must also inform the court if:
 - (1) Public discipline has been imposed on the mediator by any public disciplinary or professional licensing agency;
 - (2) The mediator has resigned his or her membership in the State Bar or another professional licensing agency while disciplinary or criminal charges were pending;
 - (3) A felony charge is pending against the mediator;
 - (4) The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or
 - (5) There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.
- **(d) Assessment of skills; withdrawal.** A mediator has a continuing obligation to assess whether or not his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively.

[Advisory Committee Comment to Subdivision (d)..No particular advanced academic degree or technical or professional experience is a prerequisite for competence as a mediator. Core mediation skills include communicating clearly, listening effectively, facilitating communication among all participants, promoting exploration of mutually acceptable settlement options, and conducting oneself in a neutral manner.]

▪ **Rule 3.858. Marketing**

- **(a) Truthfulness.** A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf by others comply with this rule.
- **(b) Representations concerning court approval.** A mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court.
- **(c) Promises, guarantees, and implications of favoritism.** In marketing his or her mediation services, a mediator must not:
 - (1) Promise or guarantee results; or
 - (2) Make any statement that directly or indirectly implies bias in favor of one party or participant over another.
- **(d) Solicitation of business.** A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending.

- **Rule 3.892. Panels of mediators:** Each court, in consultation with local bar associations, ADR providers, and associations of providers, must identify persons who may be appointed as mediators. The court must consider the criteria in standard 10.72 of the Standards of Judicial Administration and California Code of Regulations, title 16, section 3622, relating to the Dispute Resolution Program Act.
 - **Rule 10.781. Court-related ADR neutrals:**
 - **(a) Qualifications of mediators for general civil cases:** Each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates mediators to mediate any general civil case pending in the court must establish minimum qualifications for the mediators eligible to be included on the court's list or to be recommended, selected, appointed, or compensated by the court. A court that approves the parties' agreement to use a mediator who is selected by the parties and who is not on the court's list of mediators or that memorializes the parties' agreement in a court order has not thereby recommended, selected, or appointed that mediator within the meaning of this rule. In establishing these qualifications, courts are encouraged to consider the Model Qualification Standards for Mediators in Court-Connected Mediation Programs for General Civil Cases issued by the Judicial Council staff.
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Local Rules Governing Mediation Practice and Qualifications (selected portions):

United States District Court, Northern District of California: [per Court's website]

- Attorney applicants must be members of the bar of this Court or faculty of an accredited law school, be admitted to the practice of law for at least seven years and be knowledgeable about civil litigation in federal court. Exceptional non-attorney applicants will be considered but must have professional credentials in another discipline and be knowledgeable about civil litigation in federal court. All applicants must have the temperament to listen well, facilitate communication across party lines, and assist the parties with settlement negotiations. Successful completion of initial and periodic Court-sponsored training is required for service on the panel.
- **Initial Training:** Full participation in the Court's own four-day, two-part Mediation training is required, regardless of whether an applicant has received prior Mediation training.
- **Continuing Training and Education:** Mediators who complete the Mediation training successfully and who are then invited to join the Court's panel of neutrals, will be expected to meet the following requirements to remain on the panel:
 - Either co-mediate or have an experienced District Court Mediation Panel member observe the first one to three mediation sessions. The ADR staff will assist in making appropriate arrangements to meet this qualification.
 - For at least the first year of service, either participate in an Advanced Mediation Practice Group or establish a mentoring relationship with an experienced District

Court Mediation Panel member. Advanced Mediation Practice groups, which are led by ADR legal staff, meet monthly on a regularly scheduled basis for two-hour sessions to discuss cases. Members are expected to attend at least nine sessions per year. Mentoring entails a commitment to debrief mediation sessions with an experienced panel member who can provide guidance and advice as needed.

The ADR staff will assist in matching new mediators with appropriate mentors.

- Participate in three hours of continuing education relevant to mediation each year, including Court “brown bag” sessions or trainings or other mediation, negotiation, or communication trainings. Participation in an Advanced Mediation Practice Group satisfies this requirement
- Spend a minimum of ten hours each year reading books, articles, or reported cases relevant to mediation, negotiation, or communication.

Alameda County Superior Court: COURT MEDIATION PANEL QUALIFICATIONS. [Eff. 8/24/20]

I. TRAINING

- a. Panel mediators must have completed at least 40 hours of mediation training, including a single 40-hour course, **OR**
- b. Qualify as a mediator for the United States District Court for the Northern District of California or any superior court in a neighboring county, **OR**
- c. Be deemed to have sufficient training within the discretion of the court.

II. EXPERIENCE

- a. Panel mediators must have conducted:
 - i. At least five civil mediations of either limited or unlimited jurisdiction of at least two hours in length, **OR**
 - ii. Ten small claims, civil harassment, or unlawful detainers day-of-court mediations referred by the court provided that the applicant also submits a letter of recommendation from the mediation program that supervises the day-of-court mediations, verifying that the applicant has demonstrated excellent mediation skills.

III. PANEL MEMBERS INDICATING AN EXPERTISE IN PROBATE

- a. To qualify as a mediator in probate matters, the applicant must:
 - i. **EITHER:**
 - 1. Be an attorney with five years substantial substantive probate practice (75% of practice dedicated to general probate/ trusts /conservatorship /guardianship /elder law practice), **OR**
 - 2. Have mediated fifteen cases in the previous five years in the areas of probate, trusts, conservatorships or guardianships
 - ii. Complete six hours of specialized probate mediation training.
 - iii. Complete two hours of continuing education in probate mediation every two years (such continuing education may be counted as part of the six hours of the general continuing mediation education).

IV. COMPLIANCE AND CONTINUING EDUCATION

- a. Panel mediators must:

- i. Comply with all applicable ethical standards for neutrals.
 - ii. Comply with all applicable California Rules of Court and the Mediation Guidelines.
 - iii. Comply with minimum qualifications.
- V. **STATEMENT OF COURT DISCRETION:** It is within the discretion of the court to deem the education, experience, and prior training of a mediator sufficient to join the court mediation panel.

Contra Costa County Superior Court [Effective 1/1/18]

- Rule 3.200 et seq.: ADR (excluding Family Law Matters and Probate Matters).
 - Rule 3.201 (c) Mediator qualifications: Mediator panelists:
 - Need not be a practicing attorney
 - (1)(A): Must complete an initial 40-hour comprehensive mediation training program...
 - (1)(B): Must have mediated 5 cases or co-mediated at least 10 cases (2 hours or longer per mediation) ...
 - (1)(C): Must be familiar with ethical standards as adopted by state and federal professional organizations, and with the Uniform Mediation Act.
 - (2): Persons not meeting these criteria may still qualify to mediate for the Court “if he or she provides the ADR Committee or its designee with satisfactory evidence of sufficient alternative education, training, skills and experience...
 - (3)(A): ALL mediation panel members must attend at least 4 hours of continuing education or training related to the practice of mediation every 3 years, including 2 hours addressing “ethics, fairness, and bias issues in the mediation context,” at least 1 hour addressing practice and ethical issues arising when parties are self-represented.
 - (3)(B): All members must certify meeting such requirements every 3 years.
 - (3)(c): All members must abide by ethical principles established by CA Rules of Court 3.850 et seq. and meet the competency standards established by CA Rule of Court 3.856.

Marin County Superior Court: Per the Marin County Bar Association (MCBA) website, Marin County Superior Court judges generally require the use of ADR before assigning a trial date. As required by Cal. Rules of Court, Rule 10.781, all ADR panelists are required to

- Sign a certificate agreeing to comply with all applicable ethical requirements; and
- Serve as an ADR neutral on a pro bono or modest-means basis in at least one case per year, not to exceed eight hours, if requested by the court. The court must establish the eligibility requirements for litigants to receive (and the application process for them to request) ADR services on a pro bono or modest-means basis.
- To qualify, mediators must have completed at least 40 hours of mediation training and within the last two years have completed at least 5 mediations serving as a mediator (of which two may have been as a co-mediator or a member of a court-sponsored

mandatory settlement conference); and commit to earning 10 CLE units on the topic of Alternative Dispute Resolution over the next 3 years.

San Francisco Superior Court: Similar to Marin County practice, cases on the San Francisco Superior Court civil active calendar may be assigned to the Mediation Services of the Bar Association of San Francisco (BASF). BASF's current requirements to serve on its mediation panel include the following:

- Mediators must be members of BASF. Membership is not limited to San Francisco attorneys, however.
- Mediators must have completed at least 40 hours of mediation training.
- Mediators must have participated as the mediator in at least 10 mediations within the last 5 years.
- Mediators must pay the BASF Mediation panel a yearly fee equal to one hour of the Mediator's current mediation rate.
- Mediators must carry Errors and Omissions Insurance for Mediators.