



ACR Commercial Section Newsletter

A quarterly publication of the ACR Commercial Section

April 2010

Update from Section Co-Chairs

To All Commercial Section Members:
This newsletter includes the following features:

1. An article by Gary Kaplan that summarizes the content of his recently published book, [Executive Guide To Managing Disputes-Using ADR To Save Time And Expense In Business, Healthcare, And The Workplace](#), published by BeardBooks (2009).
2. A column by marketing expert Tammy Lenski, Ed.D., entitled "The Mediation Marketing Coach."
3. A column by ethics expert Mel Rubin entitled "The Ethics Coach."

We welcome feedback on this newsletter since we want to make sure it adds value to your membership in the Commercial Section. If you would like to become involved in Commercial Section activities please contact us.

Sincerely,
Kurt Dettman kdettman@c-adr.com
Frances Mossman fmossmanmediate@earthlink.net
Co-Chairs

ACMI V Rescheduled

ACMI V has been rescheduled to coincide with ACR's 2011 Annual Conference to be held in San Diego. The American Arbitration Association has been a co-sponsor of ACMI over its past four annual Advanced Commercial Mediation Conferences and has acknowledged the quality of the ACMI Conferences by giving full ACE Credit to any AAA Neutral Roster panelist attending an ACMI Conference. This year AAA has scheduled an advanced commercial mediation training occurring close to the originally scheduled ACMI V 2010 Conference. In acknowledgement of the AAA co-sponsorship of ACMI we have decided to postpone ACMI V so as not to have one conference interfering with another. We will post further information on the content and dates for ACMI V as that information becomes available.

Best Practices for Managing Business Disputes by Gary Kaplan

The Inefficiency of Litigation

There are far better ways to plan for and handle business disputes than to rely on litigation. Indeed, it is difficult to imagine a more inefficient way to resolve business disputes than litigation.

As a structural matter, business litigation involves an extraordinary level of redundancy. Each side must pay for competing teams of costly professionals to review the same facts and legal issues. Because of the long duration of litigation, moreover, each side typically must review the same materials and make the same arguments multiple times.

Further, there are few, if any, economic incentives to limit costs. Everyone understands the implications of hourly fees: attorneys have an incentive to promote longer rather than shorter cases.

Perhaps more importantly, litigation is analogous to the "prisoner's dilemma" of game theory. The prisoner's dilemma illustrates situations where self-interest and the absence of cooperation between the parties lead to worse results than cooperation. In litigation, each side has incentive to make the case as complex and costly as possible for the other side which, of course, leads to spiraling litigation expenses.

If litigation produced better results than other means of resolving disputes, it might be worth the expense. Better results do not mean that a particular side will win, but that the decision will reflect a reasoned assessment by an informed and qualified decision-maker. In complex business cases, though, it is simply unrealistic to expect judges or juries to understand all of the difficult issues parties raise. Jurors, for example, are never allowed to ask questions, and in most jurisdictions are not even allowed to take notes. To expect them to reach a rational conclusion at the end of such a process is like expecting a college student to take a physics exam without being allowed to ask questions or take notes during the course.

Given the inherent wastefulness of litigation, why is it so prevalent? Because once a dispute arises, each side's natural reaction is to attack the other

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UPCOMING EVENTS

ACMI V: TBA

ACR 10th Annual Conference: September 1-4, 2010
Chicago, Illinois

Conflict Resolution Day: October 21, 2010

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side. It is often too late for the parties to reach agreement on a more productive approach, because one side or the other is likely to have incentive to use the inefficiency and costs of litigation as a weapon. Taken together, these considerations make clear that the best (and often only) way to avoid litigation is to reach agreement on a more efficient procedure, such as mediation or arbitration, before a dispute arises, when both sides still have incentives to adopt a fair and cost-effective method to resolve their dispute.

Unfortunately, human nature may prevent people from entering into agreements that plan for disputes and affirmatively adopt better procedures than litigation. Numerous studies have shown that people are inherently over-optimistic and fail to assess and plan for the risks of bad events. In addition, many people unrealistically overstate their ability to control the outcome of litigation or don't appreciate the destructiveness and cost of the litigation process itself.

Relationships Amenable to ADR Agreements

ADR and dispute management programs can be especially beneficial in connection with three broad categories of disputes: Disputes arising in the context of long-term relationships, such as employment, supplier relationships, or joint business ventures; disputes related to high volume transactions, such as customer disputes; and disputes arising in connection with complex and/or long term transactions, such as construction or information technology development and implementation projects. In each case, disputes are inevitable and may follow predictable patterns. Equally important, ADR often allows companies to avoid the destruction of business relationships that often accompanies litigation.

One side-benefit of developing an ADR program for internal disputes (either involving employees or company leadership) is that development of the program itself can help improve trust and internal collaboration. I have found that the key to successful development of a dispute management program is to include influential representatives of key stakeholders so that implementation of the program itself fosters improved communications and trust.

Efficient ADR Requires Forethought

In recent years, many companies have become disenchanted with arbitration, because they believe it has become as expensive as litigation. This is plainly true if the parties don't adopt efficient procedures in advance. A common misconception about arbitration is that the parties need to adopt the rules of the American Arbitration Association, the International Chamber of Commerce, etc. In fact, arbitration is entirely contract-based and, especially in business to business disputes, the parties are free to adopt their own rules or modify standards rules. For example, I have negotiated arbitration agreements that specify the duration of any hearing, that limit discovery or types of discovery, that prohibit costly motions, and so on. Although there is not a one-size-fits-all set of procedures for arbitration that allow for fair and efficient dispute procedures, the critical step is to consider and address these issues at the outset of a business relationship or transaction, when the parties are most likely to share an interest in reaching agreement on cost effective procedures.

Developing an ADR Program

As a starting point, perhaps the most important thing that a business can do to promote efficient management of disputes through mediation or arbitration is to encourage initiatives to explore systemic changes in dispute management--for example, through pilot programs--monitor results, and encourage improvement informed by the company's own experience. Such programs evolve to reflect a company's circumstances and culture. The likelihood of success is much smaller in the absence of board and senior management commitment.

Although litigation is sometime necessary, in many cases it results from how a dispute is handled from the outset rather than from the underlying conflict. An important step in changing this dynamic is to recognize that disputes (both internal and external) are inevitable and to cultivate a culture that actively and productively responds to small disputes before that they grow into large intractable ones.

Companies that have adopted ADR programs have achieved extraordinary savings while improving business relationships. For example, the Toro Company, which makes outdoor maintenance equipment, initiated a mediation program for customer claims in 1992. Before it began the program, it had cases go to trial six to eight times a year, with average litigation costs of more than \$47,000 and average payout of over \$68,000. By comparison, between 1994 and 2000, it neither had a jury trial nor faced document discovery in any case, because of its program to respond rapidly and openly to claims and to use mediation where necessary.

After adoption of its program, Toro resolved 905 claims between 1992 and 2000 for an average of \$20,250, and 95 percent of those cases were settled within four months. Further, the program led to a reduction in insurance premiums of \$1.9 million. Similarly, Georgia-Pacific, a Fortune 500 manufacturer, reported in 2006 that after 10 years its ADR program saved about \$32 million in its nearly 600 cases, or about or about \$54,000 per action.

One measure of the success of ADR programs is simply that experience with ADR is the best predictor of whether or not a company will use ADR in a given dispute. In the absence of positive experiences, this would be an unlikely result.

*Gary Kaplan is an attorney based in Pittsburgh who consults and conducts workshops on the efficient resolution of business disputes. Gary is the author of *The Executive Guide to Managing Disputes* (Beard Books 2009) and he also teaches as adjunct faculty at Carnegie Mellon University. Additional information about Gary can be found on his website <http://managingdisputes.com>.*

The Mediation Marketing Coach by Tammy Lenski, Ed.D.

Question: I'm planning to set up a web site for my new mediation practice-what are the fundamental elements of an effective web site from a marketing standpoint?

Answer: First, let me congratulate you for making sure your mediation business can be found online by prospective clients, because they're surely researching you there. Having a hub on the web conveys credibility and commitment to your business and allows you to help shape what prospective clients find when they search for you.

Most mediators' clients find them in these three ways:

1. Word of mouth
2. Online search
3. Networking

Any content you create online should focus on making sure it addresses those three "findability" fundamentals. Here are some ways to do so.

Word of mouth: People tell others about you when you've done something remarkable or offer information that's particularly relevant to them. It works the same way online. Your online presence should be vibrant, regular and helpful, so that people send links to your site, your articles, your Twitter posts and your Facebook page to their friends, neighbors, colleagues and family members.

Online search: Make sure that your social networking accounts and every page of your website have your telephone and address (remember, most who find your site via search probably don't enter through the home page). As you write content, regularly use phrases that your market is likely to use to find help like yours. "Conflict resolution" and "commercial mediation" are overused and you won't appear near the top of search results - but "Dallas estate mediator" or "NY family business conflict help" can help you stand out. Think like someone in your market, not like a mediator, and don't use insider jargon.

Networking: Mediation is a human business first. And humans buy from humans they like, trust or believe offer something that will serve their interests well. If you sit in your office, disconnected with everyone, you can't build business in the offline world. The online world works the same way, so don't build a site and forget about it. Add content that keeps people interested in coming back. Find a social networking platform that your market hangs out on and start building relationships there. Don't hang out just with colleagues (unless they're your market) - that's like going to a networking event and sitting with your friends; it feels nice but achieves little.

Do you have a question about practice-building or online marketing? I'll be answering readers' questions in future columns and invite your questions so that I can make topics covered here highly relevant to you.

Dr. Tammy Lenski is the author of Making Mediation Your Day Job: How to Market Your ADR Business Using Mediation Principles You Already Know. She mediates, educates and coaches from her home base in New Hampshire and writes about the business of conflict resolution at MakingMediationYourDayJob.com.

Dr. Lenski writes a regular column for the Commercial Section Newsletter. Members of the Commercial Section are encouraged to write with marketing questions, which Dr. Lenski will use to guide content for future columns. Questions can be sent to Tammy@Lenski.com.

The Ethics Coach by Melvin A. Rubin, Esquire

MULTI-PARTY, MULTI-JURISDICTIONAL CASES COMPOUND THE ALREADY COMPLEX MEDIATION

The difficulty associated with multi-party and multi-jurisdictional complex mediation cases is compounded by some very dynamic ethical considerations. Clearly, there are issues of conflicts of interest/ neutrality and confidentiality. The following illustrations of these issues are given simply to spur the reader to even consider more issues than raised here.

Conflicts of Interest/Neutrality

Like attorneys, it is the mediator's responsibility to disclose any conflicts or potential conflicts as soon as possible. Although some standards require disclosure and permit waiver by the parties, the transparency is critical. Even with waiver available, it is still the mediator's obligation to withdraw if the conflict is so abundantly clear and prejudicial. All waivers should be an unambiguous writing and signed off by all, especially the individual clients themselves. Remember clients have the habit of getting new lawyers when dissatisfied with an outcome, as well as selective loss of memory.

Multi-jurisdictional mediations present still other traps for the unwary mediator. Because attorneys, even the best, can overlook the rules of mediation for a particular locale or jurisdiction, it is incumbent upon the mediator to announce under what mediation rules the matter is being mediated. Disclosure requirements, privileges and confidentiality often vary from one jurisdiction to another. The competent trial counsel becomes even more impressive when she demonstrates sophistication in choosing applicable rules by selecting that jurisdiction that most benefits her client's interests. Rules, grievances and enforceability of agreement issues also may be different. Immunity for the mediator may or may not be present. Depending on factors, such as the manner of referral, the right to such immunity may change. Certainly the mediator should avail herself of those most favorable to the mediator.

Confidentiality Considerations

The issue of confidentiality permeates the entire mediation. Instead of the very manageable two party confidentiality of the typical mediation, everything is now geometrically compounded. It starts even before the session begins. Issues such as: who may have hired you, pre-mediation caucusing (discussed in our prior newsletter edition), and care and caution in using information divulged in pre-mediation statements. Where pre-mediation statements are confidential (for the mediator only), how do you segregate and protect the information that you obtain from one pre-mediation statement from another and another and in joint session or in caucus with one of the other 6 or 7 parties?

The safest approach may be to walk-in and announce that even though you have been provided with several sophisticated and complete pre-mediation statements, you will hesitate to say very much for fear of accidentally disclosing confidential information revealed in one of the confidential pre-mediation statements. This gives you the perfect opportunity to not only act, but often times in fact, to be dumb! Rather, you will use only that pre-mediation information in the caucus with that party.

The seriousness and importance of keeping all negotiations between parties confidential becomes critical in a complex multi-party mediation. After running between three, four, five and sometimes six or more rooms, it is difficult to keep everything straight unless the mediator maintains complete clarity, focus and some sort of written record of where offers and demands are coming from and where they are to be delivered. In the opening statement, one should announce the need of this specificity and share the responsibility with the parties. "Because there are several parties, I am asking each of you to specify any offers or demands as to whom they are to be conveyed and whether any disclosure is permitted to any of the other parties." It is also recommended that before leaving any caucus the mediator should repeat the instructions as to whom the offer or demand is intended as well as determining whether that offer or demand can be disclosed to any of the other parties. And write it all down.

All this becomes a compounded problem when the various offers and demands are inter-related and intertwined. I call this the Rubik's Cube Syndrome. When parties indicate confidentiality as between each party, the problem of getting a global settlement is that much more difficult.

The problem continues when a settlement is actually achieved between certain parties. They will want a settlement signed, sealed and delivered at that mediation, without anyone else knowing it. The physical facilities may now become crucial. If you have not maintained sufficient separateness in the facilities or rooms, the parties you wish to not know may see the others congregating together, shaking hands, perhaps laughing and high fiving as

they leave.

The party or parties not participating in the settlement will see or will sooner or later determine that the lack of attention by you is not purely accidental. The common question will be: "What is going on?" "Are they trying to settle without me?" How do you deal with these and what answers do you give without falling into the trap of any sort of misrepresentation? Silence is often overlooked as preferable and honest rather than having that deer in the headlights look.

It becomes best practice for the mediator to obtain the consent and permission or directions of the settling parties as to what you can be disclosed to the party or parties that are not in that settlement. It avoids the ethical dilemma of what do I say without committing a fraud, misrepresentation, or breach of confidentiality.

The conflict continues even to the extent of billing. Are you making any adjustments for greater time spent in reading one party's pre-mediation statement or in your pre-mediation caucusing? Best practice is to make very clear upfront, the terms of your charges in writing. If your multi-party charges differ from your usual two party charging practices, and one or more of the attorneys are common to both, make clear the differential in charging and the reasoning.

In summary, the mediator often works substantially harder and with greater tension with multiple parties and multi-jurisdictional cases than with two parties. It is cases like these that give mediators the challenge and opportunity to excel but always remember to breathe deeply, keep calm, and be sure to charge for that which you deserve!

Mel Rubin is one of the country's premier experts on mediation ethics and malpractice, and in his regular column in the Commercial Section Newsletter will give practical advice on how to deal with these challenges. Mel has over 25 years of ADR experience and has taught mediation to over 6000 professionals.

Mel Rubin writes a regular Ethics column for the Commercial Section Newsletter. Section members are encouraged to write with ethics questions, which may be used for future columns. Questions can be sent to: mrubin@melrubin.com. Note that you should avoid using specific names or circumstances to protect the confidentiality of the process.

The ACR Commercial Section Newsletter is designed to provide accurate and authoritative information in regard to the subject matters covered. It is provided with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the service of a competent professional person should be sought.

Editorial Policy:

The views expressed in this newsletter are those of the various authors for the purpose of encouraging discussion. Unless expressly noted, they do not reflect the formal policy, nor necessarily the views, of the Association for Conflict Resolution.