



ACR Commercial Section Newsletter

A quarterly publication of the ACR Commercial Section

April 2009

Dear Commercial Section Members:

Your Co-Chairs, Michele Riley and Kurt Dettman, welcome you to an exciting year ahead for the Commercial Section of the Association for Conflict Resolution (ACR). We want our members to know that we appreciate that you have joined our section and that our top priority is to give value back to you. We also want to ask you to join us in our initiatives so that your commitment to the section is focused on things that are valuable to you - and it's a great way to network within the commercial sector in which you work.

The following are some of the initiatives that we plan for 2009:

Web Site - The web site will be brought up to date and we will post information that is relevant and interesting to our members.

Teleseminars - Interesting and informative speakers will lead our Teleseminars approximately every two months. These are offered complimentary to you, our members, except for any telephone fees you may incur.

Advanced Commercial Mediation Institute - The Advanced Commercial Mediation Institute, offered in conjunction with the American Arbitration Association, will continue to present experienced speakers addressing cutting edge topics in the field of commercial mediation. ACMI will be offered again in conjunction with the ACR Annual Conference in October 2009.

Newsletter - The Newsletter resumes publication on a quarterly basis starting with this issue, and will feature articles from speakers at the ACMI and the Teleseminars.

International Section Initiatives - We plan to work on joint initiatives with the International Section as the commercial world is becoming more globally based.

Committees - We welcome section members to join committees of interest to them. We have openings on the following committees: International, Ethics, Diversity-Equity, Strategic Planning, Program, Newsletter, and Membership. Contact either of your co-chairs for details.

We look forward to working with all of you in the coming year. If you have any questions or suggestions for us feel free to send us an email to kdettman@c-adr.com (Kurt) and rileyadr@yahoo.com (Michele).

Sincerely,

Michele Riley and Kurt Dettman, Co-Chairs

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UPCOMING EVENTS

ACR Teleseminars: each is scheduled for 12 noon EDT:

May 4 - Beyond [The Negotiator's Fieldbook](#): The "Negotiation Teaching 2.9" Initiative

May 28 - Using Game Theory to Understand, Manage, and Resolve Legal Conflict

June 17 - Dialogue Marketing: Leading Edge Marketing Strategies for Today's Commercial ADR Practice

July 16 - Leveraging the Internet to Market Commercial ADR

Click [here](#) to learn more about the Teleseminar presentation topics and presenters.

ACMI 09: October 7-8, 2009
Hilton in Atlanta, Georgia

Conflict Resolution Day: October 15, 2009

VISIT US ONLINE

For the latest articles and information, visit the ACR Commercial Section [website!](#)

Checklist to Assist in the Prevention of Mediator Malpractice by Melvin A. Rubin, Esquire

Mediators often see malpractice during the course of the mediations they perform. Unfortunately, we often do not see or recognize that we ourselves may be doing something wrong that could be interpreted as negligence or malpractice or at least the basis of a grievance. Although malpractice actions against mediators are few, they still exist. Typically we think of breaches of confidentiality and conflicts of interest as the basis for these possible claims. However there is more than that. For example, "marathon" mediations and perceptions of "coercion" by the mediator have also given rise to legal actions, as well as pre-suit claims. This article is an attempt to make us all aware of the problem and perhaps be a bit more circumspect in how we properly perform our role as a mediator.

No checklist, however, can compare with one's own "gut feeling." While this article is presented as a guide, it can and will not substitute for each mediator's own analysis and intuition as to ethical problems that are confronted periodically. When in doubt, when not sure, when it is necessary to ask, then something is amiss. That is the time to step back and question what has been done or what should be done. With this preface, perhaps more of a warning and disclaimer, the following checklist is offered solely as a guide and not an answer to the ever present question of "WHAT SHOULD I DO?!"

As you begin your mediation, please review the following.

In cases involving attorneys and parties:

1. Is there an engagement letter?
2. Has the engagement letter spelled out:

- the fees that will be charged, including preparation and travel times
- disclosed, in writing, any conflicts and established waivers with the parties' signatures
- disclosed any other possible information that could cause later conflict problems
- disclosed the right to counsel if either or both parties intend to appear without counsel (see pro se comments below)
- any other information, the failure of which to disclose or discuss, may cause issues to arise at the mediation or later, such as any misrepresentations of expertise or personal biases
- any language relevant to multi-jurisdictional, multi-party or multi-session mediations (see comments below)
- attached any rules, laws, immunities, or forms you believe will help the parties and protect yourself
- asked for any special needs of the parties or attorneys, such as those that would fall under ADA compliance

3. Have you delivered the appropriate opening statement? Here are some very limited suggestions, which should not inhibit your own style:

- Clarified your role as a facilitator, being neutral and impartial and not as a judge
- Advised that the process is consensual
- Advised that you must honor each party's right to self-determination
- Covered confidentiality, both for the entire session and any caucus
- Given a description of the process as it unfolds
- Allowed the parties to voice any concerns that they have before the process begins, and invited them to raise those other concerns at any time during the mediation

4. Have any misrepresentations been made in your advertising upon which a claim could be made, e.g., resolution rate, knowledge or expertise, training etc.?

5. Have you complied with all ADA requirements and is your physical facility, or the one you are using, secure in all regards, including physical safety, sound proofing, etc.?

6. Has confidentiality been explained sufficiently (both as to the entire session, private sessions and pre, post and interim discussions) so as to both reassure and yet make clear those exceptions which the failure of discussing could be the basis for a party to claim breach, misrepresentation or similar arguments?

7. In reference to caucusing, have you created so much CP (caucus paranoia) that you have given fertile ground for the accusation of bias or some conflict of interest, e.g., so much time with the other side; appearing biased by too much reality testing or too much of the devil's advocate role?

8. Are you engaging in a marathon mediation, which will give rise to motions set aside using arguments such as "I had no idea what I was doing" or "I signed anything just to get out of there."

9. Have there been any communications or information, or lack thereof, that should put you on notice that there is a question of someone's ability to make an informed and voluntary decision?

10. Have you given any information or expressed an opinion, even within your expertise that could be misconstrued as legal, psychological, accounting or business advice?

11. If this is a multi-session mediation, have any communications between the sessions created problems and have they been protected by the confidentiality as in the more formal sessions? During the course of the mediation have you inadvertently disclosed information received that should not be shared, e.g., your opening statement made reference to information in a pre-mediation statement that should not have been disclosed (this is especially dangerous in multi-party cases where reading several pre-mediation statements could allow confusion as to who gave you what information).

12. Have you created any perceptions that could be the basis of a grievance or manipulated yourself into a malpractice case?

13. Have you witnessed malpractice or any other disclosure during the mediation or the caucus which might trigger reporting requirements per your obligations as a professional in your field (lawyer, psychologist, social worker, etc.), as an officer of the court, or worse as a person with knowledge of a criminal act?

14. Have you participated in any fraud, overreaching or other acts with one side (perhaps in caucus), that would make you susceptible to a claim of participation in the fraud or failure to disclose?

15. Have you participated in the drafting of the settlement agreement sufficiently to make you liable for giving legal advice, inserting or omitting material provisions, or drafting errors in that agreement?

16. Has there been any disproportionate or discrimination in your billing practices, including cancellations, which could give rise to the appearance of bias or prejudice in favor of one client over the other?

17. Have you complied with all court requirements in the reporting of the outcome of the mediation to the court, and no more?

18. At the time of the signing of the agreement have you asked questions (see question 9 below) of each of the signers in the presence of all the parties or enough parties so as to create witnesses that there was no coercion?

19. Have you unnecessarily signed the agreement or kept original documents?

20. Have you periodically checked your malpractice coverage?

In cases involving parties not represented by counsel:

1. In addition to the above, confirm, in writing, in your retainer letter these additional issues:

- Have you very clearly explained your role and the limitations you are bound to as a mediator?
- Have you explained the role, duties and responsibilities that the parties have to you, including immediate attention to any claims of bias or conflict of interest and their obligation to make full and complete disclosure of any issues that might affect your neutrality or the appearance of bias?
- Have you made clear, in writing, your fee arrangement and payments?
- Have you covered yourself in reference to full discovery, financial disclosure, etc.?
- Have you attached any important rules, statutes or other information that helps the clients understand the process, as well as protecting yourself?

2. Have you explored why one or both do not wish to use legal counsel?

3. If you use private sessions, have you explained the purpose and that it should not create caucus paranoia (CP)? Have you explained all applicable rules, including confidentiality, and their purpose so that it does not give rise to CP?

4. If you assist or write up the agreement, have you done so without crossing the line of providing legal services and advice and advised them to seek independent counsel first, as well as in reviewing the document? Have you made clear the right to counsel or any other resource, including experts, tax issues, etc. (this should be in writing as well)?

5. Has anyone raised any issues of competency or capacity of either party or anything else that could later be used against you, e.g., medications, addictions, etc.?

6. Have you continually debriefed your clients from the opening to before they leave each session?

7. Have you used multiple sessions and limited the maximum time per session, thus avoiding marathon (and potentially coercive) mediations?

8. When the parties execute an agreement during the mediation session, have you asked the following questions, preferably in joint session?

- Have you read and do you understand the agreement?
- Have you asked your attorney any questions you might have and has she answered those satisfactorily?
- Are you signing this agreement voluntarily?
- Do you understand by signing this agreement you are entering into a fully enforceable contract?
- Is there anything physical, psychological or emotional that would have prevented you from understanding what we did here today?

9. Have you sufficiently documented the file or in the alternative shredded it?

Again, this checklist is not comprehensive and additions can always be made. Never take any case for granted or lose the necessary formality. Also the checklist refers to malpractice and negligence and does not address the possibility of the filing of a grievance if your jurisdiction has such a process established.

In all events, good luck is wished upon all who practice this noble endeavor.

Melvin A. Rubin is a professional in dispute resolution with over 20 years of experience. His dispute resolution services range from civil mediation to family mediation to collaborative law. Mr. Rubin conducts state-certified and tailor-made mediation training, speaks to audiences ranging from several dozen to over a thousand on cutting-edge dispute resolution topics, and provides consulting services on dispute resolution to corporations and professionals.

Ethics: Resources & New Column

Resources:

The ACR Commercial Section website maintains a database of ethics articles on a wide variety of issues; click [here](#) to access the database. In addition, the American Bar Association maintains a database of ethics opinions that is free for ABA members or for purchase by non-members. Visit the [ABA website](#) to learn more and access this resource.



New Column:

ACR member Melvin A. Rubin, author of the preceding article, has agreed to write a column for the Commercial Section Newsletter in which he will answer your questions on mediator ethics and insurance issues. If you would like to submit a question, please send it him by email: mrubin@melrubin.com. Note that you should avoid using specific names or circumstances to protect the confidentiality of the process.

International Committee Initiatives

The Section's International Committee is in the process of developing new opportunities for members of the section to network and exchange ideas, information and contacts about all aspects of international commercial ADR. We are initiating several new programs this year in response to the interests identified in the Section's 2008 member survey results.

These new activities will be available on the Section's website starting in July this year and include the following:

1. Short articles (2000 words or less) on significant current issues, developments and events of particular importance to practitioners and educators in the field. They will be written or recommended by members. Readers will be able to post comments on the articles and exchange views.
2. Networking section of news about future events and activities, business opportunities, requests for and offers of information and assistance, recommended books, seminars, reports, etc.
3. International news items submitted by our members about events and projects of special importance and interest.
4. International Committee news on what we are doing and areas of collaboration with ACR's International Section.

We want to make this program interesting, timely and valuable for our members. To achieve these goals, we need your help. Please suggest issues and topics you want to read about. Send your ideas, questions and comments to Frances I. Mossman, ACR Commercial Section International Committee Chair, at Hawaii.IDR.group@earthlink.net.

Contributions of news items and articles are encouraged. In the next newsletter, we will list the individuals and their e-mails, who will be responsible for coordinating the content and submissions for each of the activity categories above. Instructions on themes, format, time schedule and process for submitting materials will also be described.

ACMI Conference

The Advanced Commercial Mediation Institute (ACMI) is an educational forum designed to further develop advanced skills of professionals experienced in mediating commercial and business disputes. ACMI features an interactive environment facilitated by leading practitioners and educators in the dispute resolution and related fields. Past programs have focused on innovative approaches for resolving business disputes such as the use of decision tree analyses and game theory.

The **ACMI 09 Conference** will be held on **October 7-8, 2009 in Atlanta, Georgia**. This two day program is limited to 60 participants experienced in mediating complex commercial and business disputes so as to facilitate extensive interaction among participants and faculty.

ACMI is co-sponsored by the American Arbitration Association (AAA) and the ACR Commercial Section and is held annually in conjunction with the ACR Annual Conference. Members of the AAA's National Roster of Neutrals attending this program receive A.C.E. credit. M

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.