



ACR Commercial Section Newsletter

A quarterly publication of the ACR Commercial Section

December 2009

Update from Section Co-Chairs

Welcome to an exciting year ahead for the Commercial Section of the Association for Conflict Resolution (ACR). We want our members to know how much we appreciate your continued membership in our Section. Our top priority is to give value back to you. We ask you to join us in our initiatives to ensure that the Section is focused on issues that are valuable to you-and, because they also are great ways to network within the commercial sector in which you work.

The following are some of the activities we have planned for 2009--2010:

Web Site-Our [web site](#) provides up-to-date information and current events of the Commercial Section. We have expanded information, adding a newsletter archive and recent articles about topics that are relevant and interesting to our members.

Teleseminars-Teleseminars will continue to be offered approximately every two months, and the next one is Jan. 21, 2010 on "Predictable Irrationality." CDs of past teleseminars are available for purchase at a nominal cost, details can be found [here](#).

Advanced Commercial Mediation Institute (ACMI)-Offered each year with the cooperation of the American Arbitration Association, ACMI will continue to present experienced speakers addressing cutting-edge topics in the field of commercial mediation. Mark your calendar for September 1-2, 2010, when ACMI will be held in conjunction with the ACR Annual Conference in Chicago.

Newsletter-The newsletter will continue to be published on a quarterly basis, featuring regular columns by Mel Rubin on mediator ethics issues and Tammy Lenski on marketing issues. We always welcome suggestions for articles from Commercial Section members.

International-The International Committee launched a special feature on the Section's web site this year, [International Focus](#), to provide news, articles, events and networking opportunities for our members on a global basis. We will expand our geographic coverage in the next year. You are encouraged to visit International Focus frequently and submit materials and comments. We are planning several joint initiatives with ACR's International Section. This international emphasis will add options for extending your commercial practice into an increasingly globally based arena.

Committees-We welcome Section members to join [Committees](#) of interest to them-we have openings on the following committees: Membership, Newsletter, Programs and International.

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.

Sincerely,
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UPCOMING EVENTS

"Predictable Irrationality" Teleseminar: January 21, 2010 [Learn more](#)

International Committee Meeting: January 26, 2010 by Teleconference
[Learn more](#)

ACMI V: September 1-2, 2010
Chicago, Illinois

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

Conflict Resolution Day: October 21, 2010

VISIT US ONLINE

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

Getting Mediation Widely Adopted in the Marketplace: The Five Characteristics of "Innovation Diffusion" by Tammy Lenski, Ed.D.

What will it take for ADR to reach a real tipping point in broad adoption by the public? While tempting to place the answer to this question squarely on the shoulders of national and regional professional associations, the more effective answer instead places the responsibility on the collective shoulders of all individual mediators.

There are five critical characteristics that affect the rate at which a new idea gets adopted broadly in the marketplace. Know the five - and how to address them in your marketing efforts - and you have a powerful key not only for your own success, but also for helping professional conflict management and resolution gain traction broadly. More work for any good mediator means, ultimately, more work for all mediators.

Alan AtKisson, environmental sustainability expert, the powerhouse behind the Sustainable Seattle project, and writer on the "diffusion of innovation," says this about spreading innovation:

"Researchers have discovered that the adoption of an innovation in any given population follows a fairly predictable pattern. An innovation starts with an innovator, often a single individual with a new idea. ("New" here means unknown to the culture, even if the idea is very old.) After its conception, an innovation spreads slowly at first - usually through the work of change agents, who actively promote it - then picks up speed as more and more people adopt it. Eventually it reaches a saturation level, where virtually everyone who is going to adopt the innovation has done so."

AtKisson identifies five critical characteristics for increasing the rate at which a "new" idea - like professional mediation - gets adopted by the mainstream. I've described each and how it's relevant to your mediation marketing.

Characteristic 1: Relative Advantage

An innovation will spread more quickly if it's perceived as better than the status quo - that is, its advantage relative to the status quo is quite clear in the potential adopter's mind.

For mediation to gain market traction, the market needs to see it as better in some way than these other common options:

- Doing nothing or handling it yourself. This remains the most widely adopted option in conflict situations in virtually every market.
- Intervention by someone with authority. In commercial and business settings, this might include human resources or senior leadership.
- Litigation. While mediation marketing commonly makes the case for mediation by contrasting it to litigation and the accompanying financial and emotional tolls, only a very small number of business disputes escalate to litigation. The status quo isn't litigation for most conflict and disputes, including those in the business arena.

Until mediators collectively do a better job of contrasting mediation's relative advantage over the above "big three" options, adoption rate will rise slowly.

Characteristic 2: Compatibility

To spread, an innovation needs to fit well with people's existing values, past experiences and present needs.

If you want to increase your ADR marketing success, you need to figure out what your target market values, what problem-solving approaches they already know and use, and explicitly connect your value offer to those.

For instance, if your market values direct dialogue for resolving disputes and preserving the business relationship, they're apt to be more attracted to a style of mediation that doesn't rely solely on caucus to negotiate a resolution. If your market distrusts neutrality, then they may be more attracted to working with a negotiation coach who'll figuratively "step to their side" and advise them, rather than a professional mediator.

Characteristic 3: Complexity

The easier it is for people to understand and use the innovation, the faster the adoption rate.

This is a particular challenge for mediators. The public still doesn't really know what mediation is because the term is often used interchangeably with negotiation and arbitration in the media, and because mediation conducted by one mediator can look quite different than mediation conducted by another. The public doesn't yet know how to find the kind of mediator who will be a good fit for their particular situation and values, and too often assumes that one size fits all, sometimes leading to disillusionment with all of mediation. And court-associated mediation carries some of the same procedural and systemic complexity that litigation carries - hardly a way to make mediation simpler to adopt than litigation.

Mediators who de-complexify the process of getting to the mediation table will help diffuse mediation faster. This translates into re-thinking the procedural maze associated with some court-associated ADR. And for mediation outside of the legal arena, it translates into minimizing the hoops mediators require parties to jump through to get to the table.

Characteristic 4: Trialability

If people can try out an innovation in some form, without first having to commit to it all at once, the adoption rate will increase.

Trialability is not an unfamiliar idea if you've ever walked by the product sample lady in the supermarket.

The challenge for mediation, of course, is that its confidential nature makes sampling difficult. Videos of roleplays (even unscripted ones), while informative, don't achieve trialability in the true sense because the viewer knows what they're watching isn't fully real. They're not really sampling; they're watching someone else sampling.

The answer to this challenge may well be in the time-tested process of networking. Networking, online and in person, allows your market to sample who you are instead of what you do. The most effective networking builds trust and gives your market the opportunity to experience how you think, what you're like, and how credible you are. It's a shorter leap to buy your services for a market that already knows and trusts you as a person and as a professional in your field.

Characteristic 5: Observability

If people use an innovation and the good results are visible by others, the innovation will spread more rapidly.

Observability is tricky stuff for people whose product is invisible. Self-promotion by talking about your successes at networking events, on blogs, and via social networking sites doesn't rise to the level of observability. Credible observability comes from others talking about your work and the good results they achieved because of you.

Add to this challenge the real possibility that consumers of mediation may not really observe that the mediator is helping the dispute or conflict get sorted out. In Daniel Bowling and David Hoffman's "Bringing Peace into the Room," Peter Adler describes this small research project:

"Several years ago, Kem Lowry of the University of Hawaii Department of Urban and Regional Planning did an analysis of some thirty successfully mediated cases that had been in a program I directed. First Lowry asked the mediators in our cases to explain what they did to bring about success. Then he asked the parties in those same cases what they actually observed the mediators doing. The mediators - myself included - gave elaborate explanations of strategies, timing, and tactics. We identified how we went about conducting our conflict analyses and circumscribing issues to be worked on. We deciphered the breakdowns, breakthroughs, and the windows of opportunity both lost and found. The participants in our cases had a very different view. What they recalled us doing was opening the room, making coffee, and getting everyone introduced."

So how to build credible observability for both the ADR field and for individual mediators? Some ways include:

- Testimonials. Not just any testimonial, but ones in which the writer or speaker explicitly describes what you did that helped.
- Tapping people with courage. Some folks who've used mediation won't discuss it with others, even when they're happy with the results. It's the dirty-laundry thing. But the blogging, cell phone generation may have fewer inhibitions. You need to find the people with courage to talk - again, very specifically - about what you did that helped.
- Tapping people affected positively when the parties work things out. If successful observability is about making the good results visible to others, you may have more success getting people who weren't directly involved in the mediation to talk about the successes. People like HR directors, managers, CEOs, and legal counsel.

To integrate these ideas into your mediation marketing, answer each of these questions for your own practice and use your answers to design your approach:

1. What is the conflict status quo for my particular market and how can I demonstrate to them that my services are a vastly preferable alternative?
2. How do my services speak explicitly to the values, past experiences and present needs of my market, and how will I convey that to my market?
3. How can I make the adoption and use of my services as straightforward and simple as possible and how can I best alert my market about that?
4. What will I do to give members of my market the opportunity to sample me and/or my services?
5. How can I make the good results I've had with my clients observable by my prospective clients?

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.

Ethics Column by Melvin A. Rubin, Esquire

Question : I recently called one of the lawyers in a complicated case to get a little more information after receiving his pre-mediation written statement. One of the other attorneys learned of this and expressed concern. How can I avoid this even though it was quite helpful?

PRE-MEDIATION CAUCUSING: ASSET OR LIABILITY?

The theme of this message is a warning, both practical and ethical, as to the use of this growing procedure. As experienced mediators, we have the challenge of mediating complex commercial cases with sophisticated parties represented by their attorney(s). Gaining more and more interest and acceptance is the concept of "pre-mediation caucusing". An increasing number of mediators are using this procedure, especially in those cases where getting a "heads up" on the case and the parties will assist and expedite the mediation session or sessions ahead. To many experienced litigators, and even parties, this procedure is not only being accepted, but in some cases is expected and requested.

The benefits and advantages are obvious. The mediator gains a familiarity and understanding of the issues and the parties. The parties' attorneys get a feel for the mediator and have an opportunity to present to the mediator in even a more private setting than a caucus at the mediation session their take on the case.

1. GIVE NOTICE IF USING PRE-MEDIATION CAUCUSING

All mediators have been trained to at all times maintain neutrality, objectivity and freedom from bias. Pre-mediation contact with counsel is capable of misperception. On the other hand, notification that the mediator, in an attempt to assist the parties in expediting the case, will talk with all counsel, should be open and transparent. In fact, announcing it clearly in the initial correspondence will not only diffuse any misconception, but probably enhance the credibility of the mediator with the lawyers and the parties.

2. OBTAIN PERMISSION AFTER PROVIDING NOTICE

Since mediation is consensual and self-determination is a fundamental principle of the mediation process, it is vital that the mediator obtain the consent and permission of the lawyers in using the "pre-mediation caucusing" procedure. Again, this should be done in writing and in your initial correspondence. It may or may not require a formal document execution, but also can be communicated as a simple request that if objection is made to such a process, that the objection be voiced immediately, either in writing or by telephoning the mediator.

Equally important is the ethical requirement that all charges be made clear to the parties prior to the mediation. Therefore, any mediator using pre-mediation caucusing as a tool, should make clear that charges will also be made for these services. In fact, this process may inure to the benefit of all in terms of time and money to the parties.

3. BE SURE TO TALK WITH ALL COUNSEL PRIOR TO THE MEDIATION

Always be sure that you speak, or attempt to speak, with all counsel. Repeat the warnings of your letter as to confidentiality and having spoken to the other attorneys and the reason why you are doing this. Needless to say, this procedure may also be implemented in multi-session mediations, and the same warnings apply.

4. MAKE SURE THAT CONFIDENTIALITY APPLIES TO THE PRE-MEDIATION CAUCUSING COMMUNICATIONS

Certain states already have statutes that provide that confidentiality attaches immediately upon the initiation of the mediation, even before the physical session commences. However, most states do not have either such statutes or such detailed statutes that actually define when the mediation begins. The mediator should craft additional language that provides protection to the lawyers and the parties in their communications with the mediator and equally protects the mediator in receiving such ex-parte communications before the session. If such statute already exists, then reference to it is

sufficient. If no such statute exists, then it is incumbent upon the mediator to make clear that such discussions are confidential, unless, in fact, they are not. If not, then use a private confidentiality agreement form or such a procedure or pre-mediation caucusing may not be as beneficial or have limited use.

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.

International Focus - October/November Issue Available Online

In the latest edition of *International Focus*, you will find an article about the International Chamber of Commerce's International Court of Arbitration, written by Josefa Sicard-Mirabal, Director of Arbitration and ADR for North America. This is one of five regional offices; the others are Latin America, United Kingdom, Asia and Eastern Mediterranean, Middle East and Africa. The Secretariat is located in Paris, France. We plan to have other articles next year about the important work of the Court of Arbitration.

Prathamesh D Popat, Counsel, Arbitrator, Mediator and Founder of Prachi in Mumbai, India, has given us an insider's view of [ADR in India - 2009](#). He describes recent history and the impact of the 1999 amendments to India's Code of Civil Procedure 1908. He is optimistic about the promise ADR has for relieving the backlog of cases in India's courts, which in the Bombay High Court stretches back to the 1980s and 1990s.

We are looking for new members to join the Commercial Section's International Committee. Please [click here](#) to see a summary of the ambitious plans for the committee's activities in 2010 described in the International Committee section on the website.

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.