



ACR Commercial Section Newsletter

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Update from Section Chair

Dear Commercial Section Colleagues:

In the featured article, "Use of a Mediator in Structuring and Sustaining Business Partnerships and Strategic Alliances," Lisa Renee Pomerantz makes the case for the role of mediators to help parties focus on integrative and process issues, which are often neglected.

In her column, [The Mediation Marketing Coach](#), Tammy Lenski discusses "The Top Three Business-Building Habits of Successful Mediators." We want to express our great appreciation to Tammy for offering her insights in the last several editions of our Section Newsletters. You can reach Tammy by way of her website at www.Lenski.com/ConflictZen. Let her know you are an ACR and Commercial Section member if you do write.

Melvin A. Rubin poses the question, "To Write or Not to Write - That is the Question!" in his column [The Mediation Ethics Coach](#). No, it is not Shakespeare, but it is all about who should write the mediated settlement agreement.

Sincerely,
Frances Mossman fmossmanmediate@earthlink.net
Chair

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UPCOMING EVENTS

[Advanced Commercial Mediation Institute V](#):
Oct. 12-13, 2011 San Diego, California

[ACR Annual Conference](#): Oct. 12-15, 2011
San Diego, California

[Conflict Resolution Day](#): Oct. 20, 2011

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Use of a Mediator in Structuring and Sustaining Business Partnerships and Strategic Alliances by Lisa Renee Pomerantz, Attorney at Law

Introduction

Business partnerships, whether they take the form of closely held corporations, limited liability companies, or strategic alliances, succeed when the value created by the combination of synergistic parties exceeds the transaction costs involved in setting up and managing the arrangement. Mediators can assist the parties to such arrangements maximize value creation and anticipate and resolve essential but potentially troublesome issues.

Left to their own devices, parties in such negotiations tend to focus on distributive issues at the expense of integrative issues, and on substantive issues at the expense of process issues, even though they would be better off in the long run if they could agree to focus on integrative issues and not to ignore process issues. In addition, business (and other) partnerships work best when the benefits and burdens are equitably allocated. (Undercompensated or overburdened partners do not remain reliable, enthusiastic participants). Often, parties do not see it as in their own best interest to advocate for equity. Because attorneys see their function as to zealously represent their clients' interests, their participation can exacerbate this tendency.

The Role of the Mediator in a Transactional Context

Many purists view the role of the mediator as to merely facilitate communication between the parties. In my view, though, to be truly useful in a transactional context, the mediator must see herself as an advocate for a successful combination. She must understand what the essential elements are for such a combination and help the parties recognize and address them.

Identifying the Key Substantive Issues for Discussion

If we look at the kinds of disputes that typically arise in business partnership situations, we can identify some of these key elements:

- Are the parties compatible on critical characteristics such work styles, risk preferences and tolerance for delayed gratification?
- Have their respective roles and responsibilities been clearly defined?
- Have the purpose, strategy, duration and scope of the combination been defined?
- Have incentives been aligned to encourage performance and discourage non-performance?
- Have the parties made their implicit expectations concerning issues such as exclusivity and level of commitment explicit?

Communication, Decision-Making and Dispute Resolution Protocols

Business partnerships also benefit from having agreed-upon processes for communicating, decision-making and dispute resolution. Corporate law actually specifies those procedures in advance, such as by requiring annual meetings and specific board approvals (often by a supermajority vote) for extraordinary transactions. The participants in a business partnership or strategic alliance should have a common understanding of:

- What are the reporting mechanisms for keeping the business partners informed?
- How will decisions be made?
- What are the limits of each party's authority and discretion?
- How will the activities of the parties be coordinated?
- How will disputes be resolved?

Planning for a Successful Transactional Mediation

With this understanding of the needs of a successful business partnership, the mediator can help the parties plan and conduct successful negotiations. In pre-mediation discussions, the mediator can ensure that all necessary parties are involved, that appropriate representatives are designated, and that there are no obvious imbalances, such as one party being represented by counsel.

The mediator also can assist the parties in planning and organizing the negotiations. She can ask that each party provide input on:

- Its own needs, interests and concerns;
- Its understanding and concerns about the other party's needs, interests, concerns, objections and culture; and
- The needs of the relationship.

Using this input, the mediator can assemble a comprehensive agenda of issues for negotiation. Again, while some might view this as a very activist approach for a mediator, my experience has been that the parties welcome the structure and are more accepting of it as having been suggested by the neutral.

Once the session begins, the mediator can effectively facilitate the negotiations by:

- Encouraging the parties to follow the agenda;
- Ensuring the parties understand each other;
- Confirming and documenting agreed-upon terms; and
- Helping the parties break through impasses by eliciting constructive proposals and suggesting workable options.

If the negotiations conclude in a business partnership or strategic alliance agreement, the mediator also can be a valuable resource on an ongoing basis to resolve issues as they arise.

Lisa Renee Pomerantz has more than thirty years of varied legal and dispute resolution experience. After graduating cum laude from Radcliffe College of Harvard University and from Boston University Law School where she was on the Law Review, Lisa spent a year as a law clerk to a federal court judge. Following a stint as a litigation attorney in private practice, she worked for more than fifteen years as a senior level in-house attorney for a major corporation. Since 2003, Lisa has had her own practice in Suffolk County, New York. She works with innovative and creative enterprises to structure and foster successful business relationships and to resolve disputes amicably and cost-effectively. Her dispute resolution activities include membership on the American Arbitration Association's Roster of Neutrals as a Commercial Mediator and Arbitrator. Lisa also develops and presents creative and effective interactive training programs, is a popular keynote speaker at business, association and educational events, and publishes a monthly newsletter entitled "Making the Connection."

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

Newsletter Editor Note: Due to other demands on Mediation Marketing Coach Lenski's time, this will be her last column for the ACR Commercial Section Newsletter. The ACR Commercial Section thanks Tammy for her great tips on how to market your mediation practice.

The Top Three Business-Building Habits of Successful Mediators

I wanted to leave you with the habits that make the difference between a lackluster practice and a vibrant, busy one. So, I'm sharing with you three daily habits I had to develop early on in my ADR career so that I could make mediation my day job. All three habits are part of my daily business life.

1. Don't substitute thinking for doing

When I published my book, *Making Mediation Your Day Job*, in 2008, a colleague said to me, "Why are you just giving away the keys to the palace? Why help your competitors?" The first and still best answer is that more work for any good mediator means more work for all mediators because credibility builds market.

My second answer at the time was cavalier, yet rings sadly true even now: For every 100 mediators who read the book, only five will take serious action as a result. The rest will put it on their bookshelf and, as they did with business and marketing books before and since, fail to take any real action at all.

Don't be one of them. Analysis paralysis will cripple your business. When you stop doing the things that may have been the cornerstone of your practice building but have failed to deliver great results, you'll create space to choose and develop the activities to replace the under-performing ones.

When you read advice that resonates with you, don't just nod and figure you'll put it to work for one day. Instead, answer these questions: How can I use this, right now? What will I do today to begin making it mine?

2. Expand the pie

Michael loves pie, particularly apple pie. He loves it so much he decides to take a course in apple pie making. He locates a master baker and she teaches him how to make a truly fabulous apple pie. She's precise in what she teaches: He needs specific ingredients and he needs to apply them in a certain sequence to bake the best pie.

Michael's smitten and decides to open an apple pie shop. Potential customers stop in. A few buy apple pies. Some ask if Michael makes cherry pie, or pecan. Others are interested in apple turnovers and other apple pastries. Michael's reply to these requests is to list all the reasons apple pie is their best choice.

He could, of course, make these other pastries and pies by adding a new ingredient or changing the amounts and sequencing of the ingredients he already uses. But Michael took an apple pie class and he's sure apple is the best option for everyone. Apple pies are best because that's what he knows.

Several other apple pie shops open in Michael's town. He knows the competition will be a challenge but is convinced that he's good and there are enough potential apple pie lovers out there to succeed.

Of course, Michael doesn't succeed. After all, how many apple pie shops does one town really need? And how many buyers are served only by apple pie? Who does business that way, right?

Don't let mediation be your apple pie. Trade such fixed-pie thinking for the kind of expanded-pie thinking that allows you the freedom to remix your ingredients to serve the desires of your market. They'll still be ingredients you love. They'll still contribute to better conflict resolution. And you won't be hobbled by trying to sell a single type of pie.

To avoid offering just a single type of pie, consider remixing your skills and processes to include other dispute resolution services such as negotiation coaching, consulting, preparing parties for mediation (including when you won't be the mediator), and conciliation (getting parties to the table, sometimes done on behalf of other mediators).

3. Control your monkey mind

"Monkey mind," is the experience of jumping from idea to idea, or unimportant task to unimportant task, like a monkey swinging from branch to branch, lured by another piece of fruit even while the piece in his hand is only partially eaten.

A Buddhist term, monkey mind trades what your true heart wants for a kind of busyness that fills your day without moving you closer to your true goals.

Monkey mind is behind the numbing, confusing chatter you experience each time you think about business-building activities and feel overwhelmed. Monkey mind is behind the tendency to confuse busyness with forward movement.

You control monkey mind by allowing your true heart's desire to guide your choices rigorously. You control it by being

strategic in your choice of activities, instead of saying yes to everything that comes along because "it might lead to some work." And you control it by taking the brave step to halt busyness and allow silence into your day. In that silence, your true heart has the chance to speak up.

I continue writing about conflict, resolution, negotiation and mediation at my blog of almost a decade, Lenski.com/ConflictZen. I hope to see you there.

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 consults from her home base in New Hampshire and writes about conflict resolution at Lenski.com/ConflictZen.

The Mediation Ethics Coach by Melvin A. Rubin, Esquire

To Write or Not to Write - That is the Question!

The question is not whether a mediated settlement agreement should be written, but rather who should write the agreement?

This question should be answered in a context that is fact specific, as opposed to a general conclusion. There are many factors that affect the answer. Some of them are obvious: Are all the parties represented by counsel? Have the parties and the attorneys (if any) come with the expectation and the desire for the mediator (a third party) to write the agreement? Have the parties knowingly and voluntarily agreed upon the mediator being the drafter after adequate explanation about the role of the mediator and the meaning of this additional responsibility? Is it essential that the mediator write the agreement or is the mediator simply acting as a scribe? Can some other method be used to obtain the same desired results?

To many parties and particularly attorneys, the offer of the mediator to write the agreement for them is extremely attractive. Putting aside the possible explanation that the attorneys are just plain lazy and do not want the additional obligation, there are other reasons why this is attractive. Many believe that by the mediator controlling the "pen", the mediation will go that much smoother, quicker and less expensive. This rationale plays extremely well when the mediator is regarded as the "expert" in the field and is therefore in a better position to facilitate and expedite the writing of the agreement.

Moreover, it is not unusual even when the attorneys write the agreement to request the "expert mediator" to review for any possible changes or modifications or items that were left out. The common questions are: "Have I left anything out?" or "Would you look at the agreement and tell me if I've missed anything?" These requests may even be more dangerous for the mediator than drafting the agreement itself. If the request is accepted by the mediator, it now places the mediator as a reviewer and comes closer to, if not qualifying as, legal advice. Moreover, by finding omissions or errors and correcting them in settlement agreements, the mediator runs the risk that one party made the error and the other party was aware of it and did not want to change it for a variety of reasons. The mediator, by inserting his or her review, may disturb the "balance of power", which the mediator may or may not determine is within the scope of the mediator's role.

From another standpoint, the mediator is the person who the parties trusted from the very beginning by their selection of that mediator. During the course of the two-hour or two-day mediation, that mediator has probably further expanded the trust with and understanding of the parties and their lawyers. Therefore, who better to write the agreement than someone that everyone likes, trusts and has confidence in? It is certainly seductive. One must question at that point, with all that going for the mediator, will the mediator in fact draft an agreement that is neutral, objective and free of any bias?

The mediator's entrance into the case may be no more than one day, as compared to weeks, if not months or years, of litigation. Certainly, a simple agreement that provides for payment of money within a certain period of time in exchange for releases with some other simple consideration is one type of agreement. But complicated agreements that may involve employment situations, complex commercial litigation, intellectual property and a variety of other settlements that encompass several pages might be better left with the knowledge and competency of those that have lived with a case for months or years.

And how will that drafting take place, whether the mediator's contribution is partial or more complete? It is not unusual, if not common, for the attorneys and the mediator to retreat into their own separate room (world) and "knock out" the agreement. At that point, it is presented to the parties/clients with the usual comment of "it's okay, just sign it."

With all of the above cautions noted, it is critically important that appropriate steps be taken by the mediator to ensure the neutrality of the agreement, as well as the protection of the mediator, from any later accusations of giving legal

advice, bias, etc.

SOLUTIONS

For those times when the drafting of the memorandum or agreement becomes necessary, the minimum steps that should be taken are as follows:

1. The new role of the mediator as a drafter must be clearly explained to parties and counsel. Whether the mediator identifies this function as within the role of a mediator or identifies it outside that role, this additional function should be explained with the understanding that the parties, with counsel or without, have specifically requested the mediator to undertake this role.
2. In addition to the disclosure and discussion, the mediator should obtain the parties' agreement that the mediator will be drafting the memorandum or the agreement. If in fact the function of the mediator is somewhere between drafter and advisor, it should be within the mediator's discretion as to whether and to what extent such a disclosure and waiver is necessary. If the disclosure and waiver is preferred, it should be in writing and signed by all parties and their counsel, if any.
3. A letter accompanying the drafted document should clearly state that, if the parties were without counsel, the mediator has specifically requested that each party seek independent review by counsel before executing the agreement. In those cases where the parties are unrepresented, the agreement may leave the mediator's office unsigned to allow the parties the time to seek out either independent counsel or to review the document before executing it.
4. From a preventive standpoint and avoiding the very issue of who drafts the agreement, when parties are represented by counsel, it is advisable to request in writing in advance of the mediation that counsel come to the mediation with a prepared document for settlement. Often times, the lawyers will bring the agreement by the appropriate computer technology or possibly e-mail the proposed agreement to the mediator's office in anticipation of the mediation. In fact, where there is a cooperative attitude between counsel, the mediator can further suggest that the attorneys exchange their settlement forms in anticipation of the mediation session itself. This encourages settlement and cooperation, and sets the tone for the actual mediation session itself.
5. To complete this preemptory effort, the attorneys should be encouraged to require their clients to read the proposed agreements in advance of the mediation. This allows the mediation to proceed at a quicker pace and avoids the common problems of last minute misunderstandings, lengthy explanations and impatient outbursts.
6. Each mediator can decide on the appropriate manner of disclosing their participation in the drafting of the agreement. Some mediators will even include, within the final settlement agreement itself, language as to their specific role in the mediation. That is, a mediator may clearly state in the mediation settlement agreement that the mediator provided no legal services, gave no legal advice, and performed solely and exclusively within the scope and duties of a mediator.
7. Be sure that you are aware of any applicable ethical standards, rules or laws that may impact on your decision. For mediators who serve on rosters of different private and public sector institutions, one must also be familiar with their internal procedures. Many federal, state and local governmental agencies that employ mediators, either as employees or as independent contractors, provide guidance in reference to whether or not the mediator should write the settlement agreement. For instance, the Department of Veterans' Affairs provides guidance in writing VA mediation settlement agreements. Suggested settlement agreement provisions with forms are given as well as guidance in reference to the manner in which the agreement should be written, including language and specifics. See <http://www.au.af.mil/au/awc/awcgate/va/mediation/settlement.htm>.
8. Also be aware of different rules about writing agreements in different jurisdiction. Be mindful of the rules and grievance procedures applicable to writing legal agreements.
9. Depending upon the mediator's style, consider a short "voir dire" for execution of the final settlement agreement, which should be conducted in joint session with decision makers and lawyers present:

- A. Have you read the agreement?
- B. Do you understand the agreement?
- C. Have you asked your attorney all your questions and has she answered them satisfactorily?
- D. Are you signing this agreement voluntarily?
- E. Do you understand that you are entering into a fully enforceable contract?
- F. Do you have any physical, emotional or psychological problem that would interfere with your understanding of the mediation process and the agreement you are about to sign?

The writing of the agreement by mediators has occupied considerable discussion and comments amongst the members of our profession (surprisingly not within the legal community!). Because of its ethical implications, a variety of states have issued a variety of ethical opinions in reference to the writing of the agreement. Mediators should carefully consult with their own state's mediation regulatory body to determine if such an ethical opinion has been issued and follow the dictates of that opinion. The Mediator Ethics Advisory Committee opinions issued in Florida have addressed a number of these issues, including whether the mediator may act as a notary public for the signing (MEAC Opinion # 2010-004, as well as the ethical opinions in reference to). The Ethics Committee of the ADR section of the American Bar Association provides the professional with significant resources to be consulted in determining the limits and permissibility of assisting or drafting the settlement agreement (see americanbar.org/dispute/clearinghouse.html).

While the mediator is researching any applicable ethical guidelines in reference to this issue, the mediator who is of another profession may wish to look into the possibility of any standards from that "other" profession also having application. Mediators who are lawyers should not only look at the mediation standards, but any legal standards that also apply. In this regard, the lawyer mediator should also determine whether or not there is a superiority of one ethical standard over another. For instance, the Florida Bar in a committee note indicated that when a lawyer is acting as a "certified" mediator, deference will be given to the individual as a mediator. Mediators in their respective states should determine whether a similar comment has been made by their state bar association. In fact, those mediators who do multi-jurisdictional cases or travel outside their state should determine the applicable ethical standards. The mediator should make it clear prior to the mediation what state's ethical guidelines for mediators will apply to that mediation. That jurisdiction that provides the most protection for a mediator should be applicable.

CONCLUSION

It is up to the individual mediator whether to write the settlement agreement or take a significant role in the drafting of the document. The pros and cons are evident, and each mediation may call for a different analysis and conclusion. For example, a *pro se* case is entirely different from a heavily litigated case with sophisticated counsel. Mediators should determine as early as possible whether they will participate significantly or be entirely responsible in the drafting of the agreement. Once that decision is made, it should be discussed with the parties and counsel, if any, and an agreement reached (and documented) as to the mediator's responsibility in reference to these additional responsibilities.

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.

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