



ACR Commercial Section Newsletter

A quarterly publication of the ACR Commercial Section

November 2010

Update from Section Co-Chairs

To All Commercial Section Members:

We are pleased to report most of our Advisory Council members will continue to serve the ACR Commercial Section in the coming year, and we also have four new members:

- Ruth Franklin
- Robert C. Gross
- Lisa Renee Pomerantz
- Kendall Reed

Information about the Advisory Council members can be found on Leadership page of the ACR Commercial Section website. We welcome our newest members and look forward to working with them!

Sincerely,

Kurt Dettman kdettman@c-adr.com

Frances Mossman fmossmanmediate@earthlink.net

Co-Chairs

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UPCOMING EVENTS

[Advanced Commercial Mediation Institute VI:](#) 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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In Praise of Joint Sessions by Geoff Sharp

The working premise for this paper is that over the last 3 to 5 years we have seen a move away from mediators doing their work in joint session with all the mediation parties together at the table towards the process becoming dominated by private or caucus sessions where the mediator meets privately with individual parties only.

This is an especially topical debate amongst mediators with some advocating that a purely caucus model saves time and is what the market now requires. This compares with other mediators resisting the demise of the joint session, saying it is at the heart of what we do and of what mediation is.



Dialogue Based Mediation -v- Separation Based Mediation - the Debate

The engine room of the mediation is, I was always taught, the joint session where issues are explored and where parties drill down into key matters identified in the opening statements as needing debate and dialogue - usually with the mediator facilitating an exchange of party perspectives or sometimes the parties simply staying in a legal frame and claiming the merits of their own position against the demerits of the other. In the mediation of legal disputes we have come to know this as 'valuing the case'.

While it would be a mistake to claim that there is one right way of mediating and while the debate between the different 'schools of mediation' is subsiding, one commentator has suggested that the bright line that historically divided our field is no longer along the facilitative versus evaluative fault line, but now more about a "dialogue based" versus "separation based" rift. [\[i\]](#)

One hears that the "market", with its' invisible hand, *requires* a separation based model with some of the repeat players (often lawyers) claiming "I never do joint session", "I never let my client talk in a joint session", "We don't need a joint session... we all know the issues" or "If we do a joint session, the whole thing will blow up". [\[ii\]](#)

Indeed, my own experience observing mediations in 'mature jurisdictions' suggests there is far more work carried out by the mediator with individual parties in private than with parties collectively in joint session and engaged in party-to-party dialogue. Talking to one practitioner in California, she described joint sessions as 'nearly a dead letter here in Los Angeles'. In one case I observed, the parties did not meet for the entire mediation - not to introduce themselves at the start of their working day, nor when they settled and, in fact, the lawyers for the parties only met by accident in the photocopy room as the already signed agreement was being copied. [\(Click here to read the full article\)](#)

[\[i\]](#) Moving mediation back towards its historic roots - suggested changes Joseph P McMahon, Jr <http://tiny.cc/MemyL>

[\[ii\]](#) The Joint Session: What's In It For You, Tracy Allen and Eric Galton, International Academy of Mediators, 2008

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

Your Biggest Competition Isn't The Mediator Next Door

Your biggest competition isn't who you think it is.

It's not the mediator down the street who's been in business for a decade and whose name is synonymous with mediation in your region. It isn't the legal firm one building over. It isn't the newly minted mediator across town who's known well from a prior career. And it isn't the ADR star from out of town, called in on his white horse for high profile cases that make the news.

Long the traditional task of good business planning, analysis of the competition has inadvertently lead too many mediators astray. It's focused you too much on what others are doing, on what you believe is working for them and should therefore emulate, and on trying to figure out how to be distinctive in a crowded market.

Like the marathon runner so focused on the runners near her that she fails to notice the runner steadily gaining ground from two blocks back, mediators who focus primarily on other professional competition waste time, energy, and opportunity.

I've talked to mediators so overshadowed by the professional competition around them that they're paralyzed by it. I've taught business development to groups of mediators so worried about someone else in the room stealing their thunder that they fail to capitalize fully on the workshop. It's time to do something else entirely.

Your Real Competition

Think of your two biggest competitors as the following and you'll not only focus your services and marketing more effectively, but also save yourself the frustration of playing keep-up.

Clients themselves. Most prospective consumers of dispute resolution services are not choosing between you and another provider. They're choosing between doing nothing, continuing to try something on their own, and hiring someone to help them. The last option is a distant third to the first two - only a small percentage of business, workplace, community, public and family disputes result in the hiring of a professional for assistance.

Conflict itself. Think of aligning yourself with your prospective and current clients against destructive or entrenched conflict. When you consider "conflict" your competition, it changes the marketing game considerably. It forces you to address the questions your market is inevitably asking: How do I prevail over this mess? How do I know a conflict this messy is even resolvable? How do I know that hiring someone to help is a better option than severing the relationship and moving on? How do I know staying in conflict for the time being won't serve me better?

How to Compete

Marketing guru Seth Godin says, "Stop worrying so much about comparing yourself to every other possible competitor you can imagine and start comparing yourself to [doing] nothing. Are you really worth the hassle, the risk, the time, the money? Or can't the prospect just wait until tomorrow?"

If doing nothing is the status quo, then the most effective mediation marketing helps the prospective client understand why the hassle, risk, and cost are better than no action at all. It helps them understand why the pain of mediation and similar services is better than the pain of things as they are. It helps them understand whether you're really worth it.

To compete against conflict and against consumers' "do nothing" apathy, you must answer these questions, both for yourself and in your marketing:

- When is hiring me better than taking no action?
- Why is hiring me better than taking action on your own?
- Why am I worth the hassle and cost?
- What will I do to eliminate every ounce of hassle I can? How will I make hiring and working with me easier?
- How will I ensure that hiring me doesn't increase the hassle of this conflict?
- What are the risks of hiring me instead of doing nothing and what will I do to minimize or eliminate them?
- If they think I'm not worth it, what can I change about what I do to make what I offer compelling?

There's a side benefit to focusing your energy on the real competition instead of on beating out your fellow provider. Right now, the field is fractured by mediators so worried about losing an inch to a "competitor" that they hold close to their vest the approaches and strategies that have real impact on the bottom line. Imagine the leaps this fledgling field could take forward if we pooled our insights and success strategies instead of hid them.

I've said it before and I still believe it: More good work for any good mediator means more work for all mediators. When you focus on the real competition, you help build not only your own business, but the field as well.

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 Mediation Ethics Coach by Melvin A. Rubin, Esquire

Fourteen Tips to Avoid Mediator Ethics Violations, or How to Stay Out of Trouble

Mediators often are so focused on getting to the mediation where they can "do good" by helping people try to resolve difficult disputes that they do not step back and think about some of the potential trouble spots for the mediator in the mediation process. Set out below are some tips that mediators can add to their "mediation checklist" to avoid or mitigate against some of these trouble spots.

1. CONFLICT OF INTEREST-Upon the first notice of mediating a case, ask the parties for a list of the parties and key stakeholders/participants and any reason they may be aware of that would give rise to a conflict for you do an immediate conflict search, just as you would if you did it as an attorney. The initial burden is on the mediator to disclose any existing or potential conflicts of interest. In complex cases, where parties may consist of many individuals, such as class actions, be prepared to make the search broader than you might first anticipate.

2. AVOID ANY APPEARANCE OF BIAS, LACK OF OBJECTIVITY OR NEUTRALITY-Bias or partiality is clearly in the eyes of the beholder. Therefore, if any mediation participant even raises the issue, address it immediately and attempt to resolve it as early as possible. A continuing claim of bias should result in the withdrawal of the mediator from that mediation.

3. NOTICE OF FEES AND EXPENSES-It is the responsibility of the mediator to give all participants advance notice in writing of any and all fees and expenses associated with the mediator. Travel expenses, review of documents and pre-mediation statements, telephone calls and the like should all be referred to in your initial retainer letter with a clear explanation of all charges and especially how they are to be apportioned between the parties.

4. AFFIRMATION OF THE MEDIATOR'S ROLE-At all times, confirmation of the role of the mediator should be made to the exclusion of any appearance of practicing law, giving legal advice or giving any professional advice other than within the scope of the mediator's role. Confirmation can be made in the initial retainer letter as well as reaffirmed in the final settlement agreement itself.

5. CONFIDENTIALITY OF THE MEDIATION-Strict adherence should be given to all statutes and rules governing confidentiality in mediation. Be particularly aware of the applicable statutes and rules when mediating in multi-jurisdictional cases or outside your home state. Confirm in writing the applicable confidentiality statute and, if necessary, allow counsel to explain to their client the implications of such confidentiality. Be wary and understand the exceptions to the confidentiality in mediation within your particular jurisdiction, including any criminal acts, reporting obligations, federal violations, or other exceptions that may apply.

6. CAUCUS CONFIDENTIALITY-Be thoroughly familiar with any statutes or rules that govern confidentiality in caucus or private session. Be sure to explain such confidentiality, both in your opening statement, and renewed at the time of each caucus. Should any questions be raised that call upon a legal explanation, be sure to defer to counsel for an explanation so as to avoid any appearance of giving legal advice.

7. PUT IT IN WRITING-Any issue that arises that causes you even the briefest pause, should cause you to re-think taking the matter. Even with the consent of all parties and their counsel, be sure to put the waiver in writing far in advance of the mediation and reaffirm the waiver at the time that the mediation session actually occurs.

8. MARKETING AND ADVERTISING PRACTICES-Be aware of any marketing or advertising restrictions or requirements within your jurisdiction. Be truthful and honest in all your marketing and advertising efforts and comply with any professional regulatory obligations.

9. CONCURRENT OBLIGATIONS-If you maintain a professional status other than as a mediator, be fully aware of any obligations under that profession that may conflict with your mediator obligations. If you practice law as well as mediation, determine whether there are any conflicts in reference to mediator confidentiality versus required attorney disclosures. The same would be relevant for other professionals, including mental health professionals and financial professionals. Utilize hotlines or other resources to determine which professional standard may trump another.

10. UNAUTHORIZED PRACTICE OF LAW---At all times, refrain from any appearance of giving legal advice, especially if not a lawyer. Various states have prosecuted mediators who have allegedly crossed the line and were giving legal advice. Attorneys and non-attorneys acting as mediators should be thoroughly familiar with the rules and regulations in this area.

11. BE AWARE OF ALL IMMUNITIES AND OTHER PROTECTIONS-Review and use any and all immunity statutes and rules that provide protection to the mediator. Determine whether your professional malpractice insurance carrier also provides coverage for your mediator role. Keep current in all cases and rulings that relate to mediators and their obligations to the process and to the parties.

12. MEDIATOR'S RESPONSIBILITY TO THE COURTS-When acting pursuant to a court order or under the auspices of any court, be fully candid and responsive to the court concerning your own competency and being accurate in your reports to the court, if applicable.

13. OBLIGATIONS TO THE PARTIES AND PROCESS-At all times, maintain the self-determination of the parties and do nothing that could be interpreted as impinging or limiting that right. Refrain from any appearance of coercion and respond promptly to any claims or accusations of coercion or pressure that might later give rise to a motion to set aside or other relief.

14. WHEN IN DOUBT-DON'T-Ethical advice is generally a luxury since ethical problems often do not permit substantial time for contemplation. If your "gut" gives you pause, there is usually a reason. While transparency and disclosure may often resolve the problem, there will be others that are not so easily solved. It is better to forego a mediation than to spend time defending grievances or worse.

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.

Ethics Committee: Statement of Purpose

The Ethics Committee has published the following Statement of Purpose:

The Ethics Committee will take action to bring ethical issues to the attention of Section members, provide them with relevant, timely information regarding ethical concerns relevant to commercial ADR activities, and otherwise support the ACR Ethics Committee in developing policies, reviewing complaints against Commercial Section members or providing appropriate dispute resolution processes to resolve such complaints

In 2011, the Commercial Section Ethics Committee will focus on developing protocol for responding to any formal complaints which may be referred by the ACR Ethics Committee against any Commercial Section member.

Anyone wishing to contribute to the efforts of the Commercial Section's Ethics Committee contact Will Miller by email at adrwill@comcast.net.

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.