



# ACR Commercial Section Newsletter

A quarterly publication of the ACR Commercial Section

September 2009

## International Committee Initiatives

The 1st edition of the Commercial Section's **International Focus** webpages was launched this month. You can view it now by going to our website at [www.mediate.com/acrcommercial/](http://www.mediate.com/acrcommercial/).

The initial theme for the next several months is: "The Most Effective Ways to Use Mediation in International Business." You are invited to send in your examples of situations where mediation proved particularly effective and even may have "saved the day." All types of disputes and circumstances are encouraged and will show the flexibility and diversity of mediation.

One of the primary objectives of International Focus is to give our members a virtual venue to meet and find out about each other. We particularly urge you to send us bits of information for the Member Networking section about your activities, events, trainings, projects and areas of expertise and interest.

There is also an easy way for you to comment on and add to the articles and information presented in each edition. We hope you will make frequent and lively use of this feature.

Watch for and take advantage of special benefits offered by our members for our members. These are listed in the Member Networking section.

Are you planning to attend the ACR Annual Conference in Atlanta this year? Let us know if you will be at the Commercial Section's meeting and would be interested in contributing your ideas on future subjects for International Focus.

### Frances I. Mossman

Chair, International Committee, ACR Commercial Section

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## UPCOMING EVENTS

**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!](#)

## Death of the Cookie-Cutter Mediator is Nigh by Tammy Lenski, Ed.D.

Prospective clients are checking up on you. They're Googling your name and your business name. They're scanning only the first one or two pages of results. If you've got a website, they're visiting it and looking around. If you don't, they're relying on what others are writing or saying about you.

These are the questions they're asking themselves as they rummage about on the 'net:

- Does she know her stuff?
- Can I trust him to get it done right?
- Why should I hire her instead of the mediator down the street?
- How can he help my clients and/or me?
- What would working with her be like?
- Does he offer something that I believe is a compelling solution to my problem?

For many mediators, these are the answers you're providing online and off:

- Images of suits at boardroom tables, the scales of justice, handshakes, doves.
- FAQs about mediation, with the same answers as many other mediator websites.
- A photo of yourself in front of your legal library's bookshelves, perhaps with your attorney colleagues around you.
- A boardroom like all others.
- An introductory session like all others.
- Print materials that are professional but generally boring and indistinguishable from the ADR provider next door.

Collectively, these answers are ineffective in a world where "cookie cutter" just doesn't cut it anymore.

### Why Differentiation Matters

If you're already established and bringing in all the clients you want, you're not reading this article. You already had a toehold before competition got tough or you had such an entree into your market that you could be mediating from the moon and people would still seek you out. I'm not writing this for you.

I'm writing it for the other 95% of mediators out there.

To stand out to your prospective clients, you need to be remarkable, not average. You need to convey your fit with their specific needs, not be interchangeable with other commercial providers. You need to convey that your practice is vibrant and in demand, not boring or tired.

What does it take to stand out, to be remarkable, to be unique in what you do and/or how you do it?

Here are five actions you can take in the next 60 days to build a differentiated platform for your practice. Some are concrete actions, and some are reflective work. You'll need to do both, because each feeds the other.

You'll notice none of them involve building or re-building your website. That comes later because the outcomes of the exercises will guide website design, function and content.

### **1. Stop Running From Your Current Job**

To market effectively, you need to be running toward your dream, not just away from your nightmare. Running from your present situation supplies only the desire to get away - to almost anything that will give you some relief. That's not a great foundation for marketing, which benefits greatly from genuine passion.

When mediators tell me they want to build a private practice or prove the mettle of a mediation division within a firm, I always ask: Why ADR? With painful frequency the answer is some version of, I'm disillusioned/unhappy/tired of what I'm doing now.

I live for the days mediators say to me, I'm so excited about the potential that ADR offers that I can't stand waiting another day for my market to see that too.

**Action 1:** Figure whether you're running primarily away or toward. Be nakedly honest with yourself. If you're running away, all is not lost. Your task is to get very clear on what you would love to run toward - paint a picture in detail, figuratively or literally. Maybe it is commercial ADR. Maybe it's piloting commercial jets.

### **2. Take Off the Mask**

Differentiation is, in no small part, about risk. The risk to be who you really are and show that face to your market. It's the risk to set yourself apart in a remarkable way, instead of blending in with the crowd. And in the mediation world, it sure is a growing crowd.

When it comes time to write marketing copy, build or re-build your website, and put yourself in front of your market, you want no cognitive dissonance between who you really are and who they see, or between who they see and what your marketing says about you. You want consonance and differentiation, in tandem.

**Action 2:** Who are you, really? If you could relax and let your good quirks shine through, what would people see? If you took off the professional mask you think you have to wear and let your market see you in your glory, what would they see? When you're most happy, who are you and how do you act?

### **3. Pick Up the Paintbrush**

This is about getting very clear on your market. Your market is not everyone, even though everyone has disputes. Repeat after me: My market is not everyone. When you market to everyone, the old saying goes, you market to no one.

Your market is looking for glimpses of themselves in your marketing. They'll look 'til they find the person who'll give it to them, or they'll walk away and find another way to resolve their dispute.

Be the commercial mediator for the construction trade. Or NASCAR fans who own mid-sized businesses. Or tech startups in Silicon Valley. You can add more markets later if you wish, but understand this: narrowing your market usually means more business, not less, because your reputation as the go-to person in that market creates word-of-mouth momentum.

**Action 3:** Paint a picture of the people in your market, using words or images. What do they do? Where do they live and/or work? What do they spend money on? How do they dress? Where do they hang out? What do they do in their spare time? What kinds of values do they hold deeply? What causes do they support? Do you like them as humans (please say yes or pick a different market - it'll show)?

### **4. Write a Classified Ad**

You've heard of the elevator pitch. This is like that but you get fewer words. Your market is busy, overwhelmed by information, and wants you to cut to the chase.

If you were to write a classified ad for your market, telling them who you're seeking and conveying a few important tidbits about the real you, what would you write? Here's an example to get you started:

Conflict makeover artist seeks high-achieving mediators who want to transform their reactions to conflict. Whiners need not apply; this is strictly for internal-locus-of-control ADR providers who want to boost their own and their clients' success. Are you a conflict junkie or conflict doormat? Tammy will teach you how to transform your reactions in conflict and be the mediator you know you can be.

**Action 4:** You have 75 words max. Write the ad. It's not about using it; it's about the clarity you'll get from the act of writing and limiting your verbiage.

### **5. Take Your Market to Lunch**

Market research matters, and I suspect very few ADR providers actually do it. Market research helps you answer necessary questions like:

1. How many people are there in my chosen market?
2. Who is my competition and how do I stand apart from them?
3. How do they solve problems now?

4. Would my market buy what I'm selling? If not, why not, and how would that change the services I offer?

The Internet, the Yellow Pages, your local library, and your local Small Business Development Center (sponsored by the SBA) can help with the first two questions. But there's no substitute for talking to people in your market if you want to answer the last two.

Those last are two of the most important answers you need. And the questions most of you will skip. Too much trouble? Afraid of the answers and the implications for your dream? Too vague about your target market to know how to find them? Too uncomfortable approaching them?

All legitimate fears and discomforts. But here's the rub: If you don't do your research, you're building a business based on a hunch. That's a pretty expensive hunch, and one that hasn't paid handsomely for most mediators.

**Action 5:** Invite five people in your target market to lunch together. If you know your market really well, you'll know the kind of place they'll enjoy eating. The trade is this: They get a fabulous, fun, extended lunch with no obligations beyond that, and you get to be a sponge with lots of questions. Be sure you get answers to numbers 3 and 4 above. After the first lunch, rinse and repeat.

### **The Return on Your Investment**

When I look at mediators who make it in the current business and ADR environment and those who don't, the differentiation is clear.

- Those with clarity about their market shine.
- Those with clarity about what differentiates them are remarkable - and their markets notice, too.
- Those who set aside their fears and reach out to their market for the unvarnished truth learn what will work and not work. Then they translate that information into practice.
- Those who set a solid foundation by working through the hard questions have the best marketing materials, websites, and advertising.

If you take all five of the actions I'm recommending, you'll spend eight hours over 60 days. That's one hour per week. If you're running toward your passion instead of away from your disillusionment, you can find that one hour and it will pay satisfying dividends.

*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](http://MakingMediationYourDayJob.com).*

**Dr. Lenski will be writing a regular column for the Commercial Section Newsletter, "The ADR Marketing Coach." 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](mailto:Tammy@Lenski.com).**

## **Ethics Column by Melvin A. Rubin, Esquire**

***The question asked by an ACR Commercial Section member is whether there are any special or unique ethical problems associated with mediating mortgage foreclosure cases, or associating with programs that administer large numbers of mortgage foreclosure mediations.***

The answer is "yes." The problems involve the same ethical issues, but on a much broader scale. Several seem obvious, although upon further analysis they may reveal more ethical intrigue than was first contemplated.

For instance, obviously confidentiality is the cornerstone to all mediations. Mortgage foreclosures are no different. However, financial information relevant to the mortgage foreclosure may present certain aspects, possibly even criminal, that make enforcement of confidentiality more difficult if not impossible. For instance, what happens if financial documents and information relied upon during the mediation, turn out to be less than truthful, or even false? This problem is not unique to the experienced mediator. But it does become more real, and perhaps more common, in mortgage foreclosures with the stringent requirements for qualifying, restructuring of loans and the major involvement of the federal government. That governmental involvement alone may cause serious concerns as to the priority given to a state confidentiality statute, rule or standard. Examples may include the documenting of cash income that may have not otherwise been disclosed or reported; not disclosing other debts or credit cards, and a host of other situations that may arise in the mortgage mediation. Inquiries by federal regulatory agencies, such as FBI, SEC, IRS and others may supersede state laws. However, even state level regulatory regimes can present the same challenges. The savvy mediator should have at least a working knowledge and understanding of the regulatory overlay and reporting requirements.

Another major area would be conflicts of interest. This may also have serious implications in reference to confidentiality. Has the mediator represented lenders or borrowers previously which require disclosure? Does that disclosure itself create another breach of confidentiality issue? It is anticipated that many of the mediators who will be working in the mortgage foreclosure field, aside from lawyers, will come from the mortgage industry, including former mortgage brokers, appraisers, real estate brokers and many others participating as mediators. Every mediator must examine their own professional history, experience and credentials to make sure that there is no appearance of bias or favoritism.

Lawyer mediators from major law firms need to be extremely circumspect as the conflict may boomerang and affect their clients. Faulty conflict checks could result in the loss of a major client.

The number of mediations already occurring involves a very large percentage of pro se defendants. How mediators who have only dealt with represented clients handle this will be challenging. Advice of the right to counsel should be affirmed. How and when is another question. Hopefully, the pro bono services being offered by various bar associations and others will help in this regard. Beyond that, the mediator must be extraordinarily careful in maintaining a balanced process and avoiding any appearance of favoring one side over the other, especially when one side is not represented by counsel.

Other issues that may arise include keeping current with all the federal programs; making full disclosure, especially when mediating large numbers of these cases; and reviewing billing and collection practices that may be impacted.

Aside from the ethical issues of conflicts of interest, neutrality and confidentiality, there are interesting dynamics between the mediator and the participants. Just the presence of someone with possible related authority, e.g., a member of a large law firm or mortgage brokerage house, may alone change the power balance in the mediation. A manager in a lending institution may feel that his or her decision or actions at the mediation may reach another partner of the mediator with the ability to influence that participant's employment or position.

Another issue might be the question of confidentiality. Information can be revealed during the mediation that has relevancy to that mediator's firm, even if not relevant to that particular case. Issues of representation by other firms, proprietary information relating to the calling of the loan, or what restructuring that plaintiff might entertain that would be of interest to a competing lending institution. Likewise, work out formulae and even personnel information could be extremely important, if disclosed to competitive lending or regulatory institutions.

It is a safe assumption that as the foreclosure mediations increase more issues will appear, hopefully solvable by common sense and respect for the process, the people, and the profession.

The second question that has been asked is a more general question which is 'when I am in an ethical quandary, where should I go?' The first answer is that all ethical problems must be solved by the individual mediator. Collecting as much information, opinions and thoughts are crucial, but the ultimate decision rests with you, the mediator. For mediators, the very first place we should start is examining any ethical rules, standards, or other published procedures promulgated by the jurisdiction within which that mediator practices. It may also be voluntary guidelines that are simply put forth by various organizations. It should also be determined whether the state or any professional mediation organization provides a "hotline" or other opinion producing forums.

Another source of information for ethical quandaries is looking to other states that may maintain some sort of ethics' advisory opinions, such as exist in the state of Florida. MEAC (Mediator Ethics Advisory Committee) issues opinions in reference to the standards as established in Florida. Those opinions can be found at [http://www.flcourts.org/gen\\_public/adr/MEAC%20Opinions/index%20of%20opinions.shtml](http://www.flcourts.org/gen_public/adr/MEAC%20Opinions/index%20of%20opinions.shtml). In addition, Hamline University has undertaken an incredible effort to report the case law as it relates to mediation; see <http://law.hamline.edu/adr/mediation-case-law-project.html>.

If one is unable to obtain guidance from those sources, then one should look to those mentors and senior mediators with whom one has had experience or training. Former trainers are an excellent source of guidance, as are those practitioners who have been mediating for many years. Other sources would include standards and ethical guidelines from national organizations such as ACR, the ABA, the Model Rules, state organizations and other related entities.

Standards have been promulgated by not only states, but organizations, ABA, ACR, JAMS, CPR and now international organizations, such as IMI and IAM. In the early part of 2009, the ABA Section of Dispute Resolution Ethics Committee created a national clearinghouse for mediator ethics opinions and decisions; see <http://www.abanet.org/dispute/clearinghouse.html>.

There are many other resources but the more sources you consult on ethical issues, the more likely you are to receive conflicting or confusing answers. The best advice is to try to reconcile them, but when confronted with differences where the overarching guidance is not clear, go with your "gut."

Documentation is an issue connected to ethics. The advice can be very split on this issue. Some, including many malpractice defense attorneys, would counsel detailed notes and records. The other side advises a good case of amnesia. Again the ultimate decision is that of the mediator.

Most important ethical issues have been the subject of magazine articles, journals and law reviews. A quick internet search will reveal a plethora of such resources.

Guidance could also be found in parallel professional journals and opinions. For instance, the prevalence and importance of mediation has become the topic of many comments and opinions in other professional publications and organizations. The ABA has issued opinions, most recently the issue of truthfulness in caucus and mediation. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-439, Model Rule 4.1.

As new fields open and new disciplines provide mediation services, it should not be unusual to find opinions issued relevant to those from that regulate mediation practice in a particular industry. For instance, it will be interesting to see if the mortgage industry issues position papers or opinions. Even more interesting will be whether those opinions affirm or take different positions from those issued by mediator organizations.

It is somewhat amazing that in such a short time, mediation has developed so many of the attributes of a profession with a much longer life experience. The attention given to the ethical practice of mediation is an attestation to its value, use and involvement with our lives and conflicts.

Note: THIS ARTICLE PROVIDES INFORMATION ABOUT MEDIATION AND ETHICS AND IS DESIGNED TO HELP READERS. ALTHOUGH THE AUTHOR HAS GONE TO GREAT LENGTHS TO MAKE SURE THE INFORMATION IS ACCURATE AND USEFUL, THE READER SHOULD CONSULT WITH HIS/HER OWN ATTORNEY TO OBTAIN PROFESSIONAL ASSURANCE THAT THE INFORMATION, AND YOUR INTERPRETATION OF IT, IS APPROPRIATE TO YOUR PARTICULAR SITUATION.

*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](mailto:mrubin@melrubin.com). Note that you should avoid using specific names or circumstances to protect the confidentiality of the process.**

## Advanced Commercial Mediation Institute

### This is Your Brain on Mediation - The Use of Neuroscience and Neurolinguistics in Resolving Disputes

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. Visit the [ACMI section of the Annual Conference website](#) for agenda and registration information.

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.

**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.**