



On Professional Practice

New Sequences, Techniques, and Approaches for Commercial Mediation

Guided Choice and Mixed Modes Mediation

By Judith Meyer and Ty Holt

In this issue's "On Professional Practice," two of our contributors examine how the early involvement of a mediator creates the most nuanced result for the parties and how mixing the techniques of mediation and arbitration can produce a more satisfactory resolution. Ty Holt and Judith Meyer believe that professional responsibility principles require understanding of these techniques.

"A rose is a rose is a rose" Gertrude Stein famously wrote in 1913, poetically evoking the commonplace notion that a thing is what it is. Mediation is mediation. Arbitration is arbitration. However, mediation often takes place just before the parties start to climb the courthouse steps, after months or years of discovery and numerous depositions, motions to compel, motions for sanctions, and motions for partial or full summary judgment. Every stone has been overturned. Every e-mail has been exhumed and examined. Then the case settles in mediation.

But can professional neutrals use their skills to intervene at other stages of the process and in other ways? Would mediator involvement benefit the parties from the time the issue is joined? When an answer is filed? When the parties have asserted claims and cross-claims?

Advocates of two new approaches, Guided Choice Mediation and Mixed Modes, believe the answer to all these questions is yes. Guided Choice, which was formulated by Paul Lurie, a former contributor to this column, in cooperation with mediation colleagues and corporate clients of mediation, uses the mediator in ways that shape the process of the mediated

dispute, not just its final resolution.¹ Mixed Modes was formulated by the International Task Force on Mixed Mode Dispute Resolution, a joint initiative of the International Mediation Institute, the College of Commercial Arbitrators, and the Straus Institute for Dispute Resolution at Pepperdine Law School. Mixed Modes endorses exactly what its name implies: it toggles among mediation, arbitration, and court intervention, often running simultaneously on three parallel tracks. Both Guided Choice Mediation and Mixed Modes are ways of steering parties efficiently, and with the laser-focus and precision of surgery, to a mutually satisfying end.

Consider, for example, a case in which the parties in mediation came up with a resolution that would work, except that one party insisted that the contractual clause waiving consequential damages was unenforceable and therefore the resolution based on his decision-tree analysis was far too pricey. Rather than opining that the waiver clause was enforceable, the mediator in that case did something different. She suggested that if the mediation did not resolve all matters, the parties could take the single issue of the validity of the damage-waiver clause to the appointed arbitrator waiting in the wings. The parties (to her surprise) agreed and teed up that one legal issue for arbitral resolution. The arbitrator agreed to resolve the issue and after hearing the dispute, ruled the consequential damage-waiver clause enforceable. The case returned to the mediator after the single-issue arbitration and quickly ended with an agreement. The mediator learned, after the fact, that referring an issue or issues to an arbitrator is one of the techniques of Mixed Modes

What is different about the conventional mediator's role in Guided Choice? Mediators play an early and proactive role. They are invited by the parties to involve themselves early in the dispute — at the very beginning of litigation — to hold informal conversations with parties, counsel, and their experts, distilling from those conversations suggestions for the exchange of just enough information so that the parties can make a rational decision about resolution and the terms of settlement. The parties agree, with the direction of the mediator, on what information is essential to a risk analysis and an informed business decision regarding what is at stake. Discovery becomes focused and limited. The mediator, with the parties and counsel, selects the representatives on each side who are best able to evaluate risk, negotiate with each other without hot-button or emotionally invested issues derailing productive conversation, and see the forest without becoming distracted by the number and diversity of the trees. The mediator works to identify issues or people that can lead to impasse or stalemate and suggests work-arounds.

The mediator also works with the parties and counsel to create an agreed-upon menu of essential questions for experts, should experts be identified, and the experts, when they respond to these questions, are able to do so in a confidential, collaborative setting, with the result that the parties and counsel engage in a discourse focusing on practical and workable solutions. In traditional litigation, litigants pay experts to offer opinions on sometimes extreme and party-driven conclusions. In Guided Choice Mediation, experts collaborate and come to a working solution the conflicting parties can endorse. Experts, after all, are usually experts in solving problems, not only in proving that the opinion of another expert is wrong. Guided Choice Mediation can include nonbinding evaluation by the mediator on issues of fact and law, or, if the parties allow, some limited arbitration to determine hotly disputed legal claims such as the above-referenced waiver of consequential damages clause. (Note the crossover with Mixed Modes.) For some experienced mediators, the tools expounded by Guided Choice Mediation may simply seem common sense.

Here are two real-world examples of how some of our most creative mediators have used Guided Choice Mediation:

- A general contractor was in dispute with a large US city, and the case went to mediation. The GC had installed windows in a historic City Hall that were now leaking. The GC, who had a very large outstanding bill, expressed unenthusiastic willingness to do limited repairs. After the city's expert responded that the GC's promises were inadequate, the mediator, strategizing and worrying about impasse, suggested the city and the general contractor hire an expert to weigh in on the scope of needed repairs. The mediator's suggestion foresaw two realities — the political process would not allow the city to accept a negotiated number lower than that suggested by its own expert, but both sides could and probably would consider a neutral expert opinion. The upshot was that the neutral expert persuaded the parties to accept a sound solution to stop the leakages at a lower cost than the city had originally demanded.
- At a well-known university, a young man died of alcohol poisoning during fraternity pledge week. The university attempted to settle the family's wrongful death lawsuit unsuccessfully, and the parties agreed to mediate. Assessing the needs of the family and the desire of the university to settle, the mediator suggested the mediation take place at a location of the family's choosing and that the president of the university — who until that point had not been involved in the negotiations — attend. The mediation took place in the family's home state, far from the university, with the president at the table. The president offered the family a heartfelt apology, a \$1.25 million scholarship in the young man's memory, and \$4.75 million, an amount that could have been awarded by a jury but probably would not have been accepted by the family without the personal involvement of the university president. The mediator's suggestions — holding the mediation in the family's own state and requiring the president to be there — set the stage for settlement. The president's presence, his

apparently sincere distress about a tragedy that never should have happened on his watch, and an offer that acknowledged the pain of the family and the risk the university faced at trial, allowed the family to back away from its anger and begin the difficult process of healing.

(For more examples of Guided Choice Mediation possibilities, check out the webinar sponsored by the American Arbitration Association.²⁾

Practitioners who use Mixed Mode processes explore the interplay among mediation, evaluation, and arbitration in commercial disputes. They look at all the dispute resolution processes available to parties — mediation, nonbinding early neutral evaluation, mediator proposals, mediators becoming arbitrators, arbitrators becoming mediators, arbitrators setting the stage for settlement, and all kinds of other creative interactions. They take all the dispute resolution tools available to parties and counsel and mix and match those most appropriate to the issue that needs to be resolved. Their processes are wholly fluid and flexible, truly “fitting the forum to the fuss.”

Professor Thomas Stipanowich at Pepperdine University School of Law and Veronique Fraser, Pepperdine Scholar in Residence, have imagined various scenarios involving the interplay between mediators and adjudicators, such as mediators not just mediating the substantive dispute but bringing their facilitative skills to process management. When mediation fails to resolve all the issues in a dispute, a mediator may suggest arbitration of unresolved legal issues — the interpretation of a contract clause, the applicability of a consumer fraud statute with triple damages to the facts alleged, or the viability of a punitive damage claim.

Or what about a business-partnership dispute in which arbitration can decide the issues only in a way that leaves both parties with a resolution that works for neither one and results in the crippling of their business venture? Mixed Modes allows the arbitrator to suggest mediation as a better process to: (a) preserve the value of their intellectual property, or (b) keep a business venture alive but prevent legal issues from being decided in arbitration in a business-damaging way.

The London-based mediation institution CEDR, which developed procedures for facilitating settlement in the context of arbitration, has sketched out an arbitration-to-mediation process. In 2009, CEDR rules envisioned, “the Arbitral Tribunal may, if it considers it helpful to do so, where requested by the parties in writing, offer suggested terms of settlement as a basis for further negotiation, or chair settlement meetings attended by party representatives at which terms of settlement may be negotiated.” This would be unorthodox practice in the United States.

Another possibility: arbitrators frequently come to preliminary views on issues in dispute. Should they ever provide a draft or oral version of the tribunal’s award to promote the opportunity of a party-driven settlement? Often arbitrators wish to signal to parties their thinking or the direction in which they are heading, to give the parties an opportunity to craft a resolution that better fits their needs and ultimate goals. This is not the practice in the United States. But might it be considered?

When parties find themselves in litigation, arbitration, or mediation, it’s important to remember that these are default options (or in the case of ADR, pre-selected options) that may not fit their needs at the moment. Consider what happens in the world of medicine. Before a patient suffers an injury or gets sick, no doctor decides whether the best treatment would be medication, physical therapy, surgery, or hospice. Only after the injury, in consultation with the patient, does the physician evaluate, adapt, and try options. Shouldn’t this be our approach to conflicts, too?

Ultimately it is the parties’ needs that ADR is committed to serve. The whole point of ADR is to take commercial and other disputes out of the “what cause of action do these facts fit?” litigation paradigm and move them into the “what do the parties need to do to reach a resolution that serves their interests?” realm.

This is a messy and *ad hoc* process. It does not follow traditional rules. But keep in mind that the traditional rules of litigation were adopted in medieval and renaissance England to keep parties from resorting to private justice, where power trumped right. It is crucial that we acknowledge that the rule of law keeps

civil societies civil. Acceptance of the legitimacy of law prevents chaos.

While acknowledging the rules — and being grateful for them — Mixed Modes invents and deploys processes in unfamiliar ways. Mixed Modes imagines the combining of processes, e.g., start with an early neutral evaluation, and then process the dispute into mediation; begin the arbitration, but with a mediator in the wings; if issues arise in arbitration that the arbitrator senses are better decided by negotiation, send those issues to the mediator, the default being that if the parties cannot settle, the arbitrator will resolve the issues; on construction projects, appoint a Dispute Resolution Board that can settle disputes in real time, subject to a party later contesting the resolution in an arbitration or in court; let a court work with a mediator on an agenda of issues raised by the parties, the default being that if the parties cannot agree on certain issues, the court will rule on each one.

Mixed Modes and Guided Choice are two fairly recently popularized brand names for approaches to dispute resolution that when applied to mediation represent additional tools for use by commercial mediators. While we highly recommend that the reader consider using Mixed Modes and Guided Choice Mediation in appropriate circumstances, we note that experienced and forward-thinking practitioners have been using these kinds of mixed or hybrid techniques,

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and other variations, for many years. Our recognition of colleagues who advocate for the techniques and procedures that characterize Guided Choice Mediation and Mixed Modes is in no way meant to ignore or downplay the work of other colleagues who have applied similar approaches without attaching names to them.

ADR allows the parties to create their own creative, bespoke processes for resolution, and Guided Choice Mediation and Mixed Modes allow even more nuanced choices in ADR. While operating always in the shadow of the law, these cutting-edge philosophies allow parties to landscape their paths to the most mutually beneficial resolution they can reach and to illuminate each area of those paths with the appropriate lighting for the appropriate amount of time. In honoring the individual nature of each dispute, they give that dispute the respect and creativity it deserves.

Endnotes

- 1 For more information, go to www.gcdisputeresolution.com.
- 2 View the examples at <https://www.aaau.org/courses/using-guided-choice-to-increase-satisfaction-with-the-value-of-mediators/15prw042/>.

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