Mixed-Mode ADR

Applying Neutral's Skills: Arbitration Cases (I Wish I Had Mediated), and Mediation Cases (I Wish I Had Arbitrated)

BY JUDITH MEYER

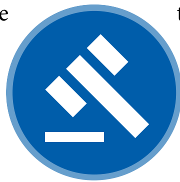
Justice may be blind, but it is not always just.

An order in a child custody battle may not serve the interests of the children and likely does not promote harmony between warring parents who must negotiate lifelong relationships with each other because of those children. An order in a will contest will settle the distribution of the estate, but will likely harm the willingness of children of the deceased to have anything to do with each other—a loss to those children and to their children who will never enjoy the closeness of cousins. An order distributing partnership assets is both the death knell for the partnership and the death knell for any chance of a continuing relationship between business partners who may have spent years pursuing mutually inspired dreams and goals.

If you start as an attorney and segue into service as a mediator or an arbitrator, you experience fluid borders. When you serve as an advocate, you may well see avenues for settlement that risk analysis dictates your client should travel. When you sit as an arbitrator, it may pain you to render an award that is far less perfect than a mediated settlement would produce. And when you serve as a mediator, you may ponder the wisdom of a settlement when you know a party could have done much better in arbitration.

When you channel one of your skills, you do not shutter the perspectives your other skill sets provide. The challenge is to use these skill sets to complement each other and not allow them to conflict.

When you sit as an arbitrator, you cannot relate to the parties as if you were their mediator. An arbitrator fills a judicial function—a decider of facts and law. The arbitrator does not go behind the scenes of the dispute and explore the parties' interests or needs.



The arbitrator who foresees the outcome of arbitration as Armageddon may suggest that the parties consider mediation, but the arbitrator is not the parties' mediator. If wise, the parties will take the heartfelt suggestion of the arbitrator and try mediation. An example follows.

The Arbitration (that Should Have Been a Mediation)

THE LONG SCENARIO: Three partners in an architecture firm involved in the restoration of historic buildings had a many decades' long and happy business relationship. The oldest partner—also the founding partner—experienced a series of business bumps in the road. He completed a job that cost the firm money and lost a major client. He seemed depressed and began to spend more time away from the firm.

His partners began to discuss asking him to retire, but were hesitant to do so. Finally, they broached the subject and were relieved to learn that their partner was amenable. Then the senior partner proposed his retirement terms—a payout of $1.95 million.

The terms were unacceptable. The junior partners rejected them, and the senior partner refused to retire. The junior partners then fired him, and all hell broke loose. Accusatory and vituperative letters flew back and forth. The senior partner filed a demand for arbitration.

The facts of the arbitration: Although the junior partners had terminated the senior partner's employment in November 2019, they only got around to giving him the formal notice required by the partnership agreement in May 2020. The agreement pegged buy-out to the value of the firm at the end of year *prior* to termination. The junior partners argued that because they terminated the senior partner in 2019, the value of his units was pegged at the value of the partnership on December 31, 2018. The senior partner argued that because the *legally effective* date of his termination was in 2020, he was owed his percentage of partnership valuation—the value of his units—as of Dec. 31, 2019.

The partnership had had a bumper crop year in 2019, all generated by the two younger partners. The difference between the firm's value at the end of 2018 and 2019 was $9 million. Stated differently, the firm's value had more than doubled to $15 million from $7 million.

The senior partner owned one-third of the total value. If valued as of Dec. 31, 2018, his equity interest would be $2.31 million; if valued as of Dec. 31, 2019, it would be $5 million. And he would be entitled to interest at 6% and attorneys' fees of $500,000.

An award in his favor at the 2019 price tag plus interest and fees would effectively shut down the firm he helped found. Given that his first demand was $1.95 million, and given that an arbitration award would all but destroy the firm, this case should have been mediated. To the parties' credit—and to the arbitrators' great relief—just before the third week of hearings commenced, the case settled.

OBJECT LESSON: Even with a win in sight, parties with longstanding relationships are not always out for blood. There was also the possibility that the firm could declare bankruptcy to avoid the buy-out obligation.

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A SHORT SCENARIO: A decamillionaire head of a foundation and his principal strategist—who became his lover and then had a lovers' argument—further quarreled over intellectual

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Information on the veteran attorney-neutral/author's Haverford, Pa.-based ADR firm can be found at www.judithmeyer.com. This article is updated and expanded from a College of Commercial Arbitrators blog post and a Pennsylvania Bar Association article which can be found at https://bit.ly/3HYXrbN.

Mixed-Mode ADR

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property rights to a web strategy she had created to raise money.

She filed for arbitration and in the course of discovery and depositions, the decamillionaire's wife became aware of the affair. The strategist lost the arbitration. At the insistence of the wife, she also lost her job. And in a further act of vituperation, the decamillionaire's wife forced her husband to oust the former employee from the condominium he had bought her.

Neither the decamillionaire nor the former employee were out for scorched earth. Mediation might have tamped the anger, kept the wife out of the picture, and produced an accord. The strategist might not have kept her job. But she likely would have kept her condo.

The Mediation (that Should Have Been an Arbitration)

The Long Scenario: A graduate student working on a Ph.D. in chemistry, faced with being terminated from her program for failing to complete her degree in the allotted five-year period, accused her professor of stalking her and making unwanted sexual suggestions.

She also alleged that her professor had "hit on" other female students and suggested that he attempted to rape a student. She identified 12 witnesses to various events she described. The university immediately placed the accused professor on administrative leave, launched a Title IX investigation and interviewed the 12 named witnesses.

None of the witnesses corroborated the graduate student's allegations. The graduate student sent the university a draft complaint for sexual harassment. The university requested mediation.

In mediation, it was disclosed that the student suffered from schizophrenia and multiple-personality disorder. The burden of proof in a civil action is the preponderance of the evidence. Applying this evidentiary standard, the student would not prevail in an arbitration. But the university chose to mediate and settled for more than nuisance value.

Why? asked the mediator. The university feared the negative publicity an even frivolous suit would generate and the possibility that negative publicity would result in loss of federal grant money that might exceed the settlement cost. The mediator could not fault the university's option for mediation, even though he believed there was no realistic likelihood that it could lose the case.

> ## Combining Processes
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> **The ADR problem:** Sometimes, the better-than-litigation choice is mis-chosen.
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> **The ADR advantage:** Arbitration and mediation have bled into one another over the years to the benefit of the parties using them. Read on about mixed mode.
>
> **Putting the neutral on notice:** '…[T]ailor the process to a perfect fit. Toggle between arbitral and mediated solutions, applying each to different elements of the same problem.'

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In another mediation, an employee had a viable and significant case against his employer. He had been encouraged by his employer to be truthful about race relations in the manufacturing plant … and was then fired for being so.

The employer offered a pittance in mediation. The employee accepted. The mediator suggested that the employee's case had much greater value. The employee didn't disagree. He simply said he could not take the stress of being a litigant. The employee's need for resolution trumped the mediator's advocacy instinct.

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A Short Scenario: A family business that spanned three generations fell into a family feud—fueled by the great success of the business in the second and third generations—and the youngest brother filed for arbitration against his two older brothers. The two defending brothers requested mediation.

Trying to save family relationships, if not the family business, the younger brother acceded to the request. The two older brothers, however, had no interest in family relationships. Convincing their elderly mother that the youngest brother had contributed no time or talent to the family business, but took out far more in expenses and salary than he deserved, they brought their mother to the mediation to guilt the youngest brother into settlement.

While the older brothers' charges would not have held up in arbitration, the mother's presence unhinged the youngest son, and he settled cheaply.

Applying Arbitral Skills In Mediation

Retired-judges-turned-mediators often simply tell mediation parties what they should settle for. Facilitative mediators take deep dives into interests and needs, and move methodically toward settlement. The best mediation melds the knowledge of an experienced judge/arbitrator with the negotiation skills of a mediator.

Parties in mediation do not want to be told what their case is worth—unless, of course, they hire a retired judge for that very purpose. Nor do mediation parties wish to have their mediator endlessly convey back-and-forth settlement numbers ad nauseum until the case settles or reaches impasse. There is no reason to hire a mediator as a butler.

The best mediator starts in a facilitative, open inquiry way to color the dispute and the parties' various stakes in it. It is an open-ended, fact-finding inquiry, informed by the parties' interpretations of those facts.

With guidance, the parties and counsel adjust their perceptions and understandings along the way. They can then engage in risk analysis, and the mediator can coach them into a more evaluative phase of the process. The risk analysis turns in part on what will happen at trial, and the experienced mediator uses her advocacy experience to assess risk and make predictions.

Occasionally mediation arrives at impasse because a decision on a point of law is required, and whichever way that decision goes materially influences risk—e.g., is the exclusion of consequential damages in a contract enforceable? "Yes" or "no" materially alters the cost of settlement.

May the mediator opine? Might the mediator send the parties to an arbitrator for the decision on this single issue, then to return to mediation with modified risk outlines? Whether mediator or arbitrator, advocacy skills trump mediation skills when a point of law is an obstacle creating impasse.

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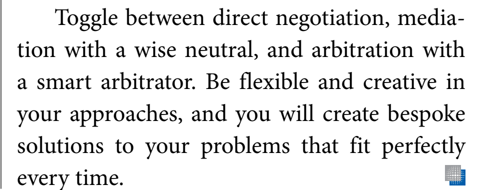
Mediation informs arbitration. Arbitration or litigation might produce a better outcome than mediation. What does a best practice path ahead look like?

Chicago-based Schiff Hardin retired partner Paul M. Lurie, and Tom Stipanowich, an ADR professor at Pepperdine University's Caruso School of Law in Malibu, Calif. (and former publisher of *Alternatives*), have written widely on the subject of "Guided Choice," or "Mixed Mode" practice. The underlying notions of Guided Choice and Mixed Mode are those of flexibility and creativity. Why be constrained by the straitjacket of arbitration if mediation is a better choice? Why flounder in the boundary-less space of mediation if a bounded choice will create focus and a path forward?

If one size does not fit, try several and tailor the process to a perfect fit. Toggle between arbitral and mediated solutions, applying each to different elements of the same problem. The better, indeed best, path might be to start with mediation and test what can be solved by brainstorming and risk analysis.

Engage in informal but informative discovery. If you reach impasse on legal issues and risk-analysis fails because the issue is hotly contested or innovative, brief that issue for arbitral final decision. With that issue locked in place, move back to problem solving and consensus.

Toggle between direct negotiation, mediation with a wise neutral, and arbitration with a smart arbitrator. Be flexible and creative in your approaches, and you will create bespoke solutions to your problems that fit perfectly every time.



ADR Training

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appointed officials regarding climate adaptation priorities. See the New English Climate Adaptation Project at https://bit.ly/3cqT36I.

NECAP was a two-year participatory action research project intended to help New England communities at risk of sea level rise, increased storm intensity, shoreline erosion, and other extreme temperature events. The project placed more than 500 diverse stakeholders in community-based role-play simulations and collected data through questionnaires, follow-up interviews, and observation.

NECAP results showed that participation in the role-play simulations was correlated with a statistically significant increase in participants' concerns about local climate change risks, support for local government action, and increased confidence in the prospects of effective local adaptation efforts.

These results were largely consistent across demographic groups. Based on these findings, we were able to show that role-play simulations can lead to transformative learning in a civic engagement context.

Variety of Games

There are almost 60 simulations mentioned in the 11 short course outlines mentioned above that appear on and can be ordered from PON's website, and many of them are new. See the link above; for more details, see "Harvard's PON Provides Free Curriculum Outlines and Teaching Materials for Better Negotiation Training," 39 *Alternatives* 165 (November 2021) (available at https://bit.ly/3Ct6UEm).

For topics like water resource management, environmental dispute resolution, urban development, employment disputes, and health care, I tried to incorporate newer games that people might not know about. Each outline suggests a sequence of four to six role plays and recommended readings. Even someone who has never taught the material before will have everything they need to help students or learners acquire the skills and knowledge they need.

> ## Simulating Success
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> **The technique:** The founder of the Consensus Building Institute outlines a new ADR training option.
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> **The practice aide:** There are nearly 60 simulations based on real-world events that can be deployed in any educational or work setting to improve the skills needed to resolve major conflicts.
>
> **Does practice help?** You will "learn more from trying to do something rather than reading about it."

For a training or course that extends over several weeks, the sequence of role plays and readings is important. Repetition of key learning points can be helpful, but sequencing or nesting of concepts that feed into each other is even more important. It is possible to introduce a set of negotiation or dispute resolution problems in one session (of several hours), but it takes multiple learning sessions (with time in between to reflect) for someone to move from novice practitioner of a new method to an intermediate level.

Within the short outline for a mini course on environmental dispute resolution, I included a new role play called "Ethical Dilemmas Surrounding Water Shutoffs in Older American Cities" that tackles the worrisome problem of water affordability in many cities.

In older U.S. cities, mostly in old neighborhoods with a large population of color, water bills are so high that low-income homeowners cannot pay their water bills (which are increasing at an alarming rate). Some of these residents have had their water shut off or have even lost their homes because they were unable to pay their water bills.

First, liens have been put on their property, then water authorities have sold those liens to make money, and finally the private purchasers of those liens have forced people from their homes for nonpayment of their original bills plus substantial interest.

Some water authorities have defended these actions, claiming that they only have the money from water rates to pay for operations,

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