

Dispute Resolution Mules

Preventing the process from being part of the problem

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Mermaids, like Sphinxes, are hybrids. Each combines distinct elements of another species to create something that is supposed to function better. I am a hybrid myself, a cocktail of Polish, Indian and English bloodlines, though opinion is sharply divided on whether the result is a functional improvement. A mule, derived from the union of a female horse and a male donkey, is more patient, sure-footed, hardy and longer-lived than the horse, and less obstinate, faster, and considerably more intelligent than the donkey. The ancient Egyptians, Romans and Greeks much preferred mules to other forms of transport.

Toyota has coined “*Hybrid Synergy Drive*” for its 21st Century mule, the Prius, a marriage of the environmental and economic benefits of a nickel-metal hydride electric motor and the power of a modern internal combustion engine, while minimizing the negatives of each. They work in tandem. It's an inspiring concept. Does it have longer legs, into the world of dispute resolution?

Alternative Dispute Resolution or "ADR" is a strange term that could mean very different things - mediation, or arbitration. Packaging non-contentious mediation in the same box as adversarial arbitration has had an important unintended upside - it encourages the development and use of hybrid forms that drive synergy from the best features of both processes to generate holistic benefits. Over the years, the many creative professionals in the dispute resolution field have come up with some imaginative and useful options.

To understand the nature of a mule it is first necessary to understand the horse and the donkey. To value hybrid forms of ADR requires an appreciation of mediation and arbitration.

Mediation can be described succinctly. Mediation is a non-binding voluntary negotiation facilitated by a trusted neutral person. Mediation may result in a contractually-binding settlement, but only if the parties so wish. In its classic form, the mediator does not express an opinion on merits or law, and is entirely facilitative.

Arbitration is private judging. It involves the parties voluntarily submitting their dispute to a neutral person who hears the parties' arguments and makes an award that will fully and finally bind the parties. Invariably, arbitrations are conducted in accordance with rules published by an arbitral body. Under the New York Convention of 1958, arbitral awards made in one country can be enforced in other countries.

An important difference between the two relates to the degree of compulsion. Once begun, the parties cannot escape an arbitration and must live with the consequences. Mediation, being an entirely voluntary attempt by the parties to resolve the matters at hand, means they can walk away from the process at any time with no adverse results.

With that description of the horse and the donkey, here are my personal top 10 dispute resolution mules that are in practical use today:

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Arb-Med

The process starts as an arbitration, often on an accelerated basis. The neutral makes the award, but instead of immediately announcing it to the parties, seals it in an envelope and keeps it secret. Then the neutral (who could be the same or a different person) becomes a mediator, facilitating the parties to come to a negotiated settlement. The parties agree beforehand that if they are unable to settle (say by a certain time, or if they stop the mediation phase) then the envelope is opened and the parties are bound by that outcome.

The advantage is that the parties know they will reach an outcome, but the uncertainty of what the envelope contains motivates them to find a negotiated outcome rather than risk opening Pandora's Box. Arb-Med can be used to break deadlocks in mediations and even in negotiations (for example, where parties cannot agree on an amount of money to change hands²).

Med-Arb

Also known as Binding Mediation, the process is the reverse of Arb-Med. The neutral begins as a mediator. If the parties cannot settle all issues as a result of the mediation, the neutral becomes an arbitrator and renders an enforceable decision on those issues. There are a few main drawbacks to Med-Arb. The first is the effect it has on the integrity of the mediation - not only are parties unlikely to be as honest and truthful with a mediator who may later impose an outcome as an arbitrator. Second, for an arbitration award to be enforceable, any significant confidential information disclosed during the mediation phase must be disclosed to all parties before the arbitration proceeds. To counteract the first, parties often agree that if a settlement is not reached in the mediation phase, a different neutral will be engaged to act as arbitrator. But the confidentiality issue is a serious problem. Med-Arb lacks the psychological incentive to settle that is inherent in Arb-Med.

Non-Binding Arb-Med and Med-Arb

Instead of the arbitration resulting in a binding decision, the parties could agree that they would not be bound by the outcome of the arbitration phase. Some might argue that such a process would be impotent and pointless, and indistinguishable from conciliation (a form of evaluative mediation), but others see advantage in the greater degree of structure and formality to the process as well as its capacity to forge a range within which a settlement could be reached³, and the positive impact that can have on the negotiating dynamics between the parties.

Conciliation/Evaluative Mediation/Early Neutral Evaluation

There are many definitions of "conciliation" but the most common describes a process involving a neutral with an active but advisory and evaluative - but non-binding - role. Conciliators are likely to make suggestions for how to resolve a dispute as well as the settlement terms and may robustly encourage the parties to settle, even engaging in arm-twisting. So a conciliator is an evaluative mediator, though not all evaluative mediators would go so far as to call themselves conciliators. There are variations on this hybrid, such as Early Neutral Evaluation (ENE) where the neutral offers an opinion on the merits up front, or early on, but then applies a lighter touch.

² see: **Einstein's Lessons in Mediation** <http://imimmediation.org/index.php?cID=129&cType=document>

³ Known to many dispute resolvers as ZOPA - Zone of Potential Agreement.

Mini-Trial

It's like being in a court or tribunal, except that instead of presenting the case to a judge or arbitrator, it is presented to senior representatives of each side who have the full authority to settle the case, often in the presence of a mediator. Usually, those representatives are not involved in the day-to-day running of the case. They may be chief executives of a corporation or Government ministers, for example. It may be the first time they have heard the other side's case expressed by the other side. Once the cases are presented, the mediator takes the representatives aside, with or without the parties' advisers, to try and help resolve the case. Mini-Trial can be handled without a mediator, but it helps to have one present to keep the settlement talks on track.

Party Hat-Swapping

Some mediators suggest that, at the start of the process, the parties behave like litigators but assume the role of the other side for a brief period as an acting exercise and make their opening statements as if they were their opponent.

The American mediator, David Shapiro famously said, shortly before he died in October 2009: *"People come to me in love with their case. I tell them - I'm going to break up your romance."* Getting each party to swap hats and present the other side's case as an acting performance is a clever way to break up the blind passion they may have for their case. Of course the parties all have to agree to do it, but the exercise has several benefits. First, in most cases, the parties really have not considered the other side's position or interests in the depth they should. Secondly, it is an effective reality testing exercise. Thirdly, it gets the main positional issues on the table up front and in Technicolor. And finally, it is fun - it breaks the layer of ice covering a frozen relationship. A lot of laughing and pulled faces goes on. A great platform for effective mediation.

Non-binding Arbitration

In some ways similar to ENE, conciliation and evaluative mediation, non-binding arbitration is where the parties enter into arbitration but do not agree to be bound by the award rendered. It helps the parties test the strength of their arguments, and can therefore break deadlocks.

Baseball Arbitration (also called Mediation and Last Offer Arbitration)

Major league baseball players often have their remuneration fixed this way. It is typically a binding process where each party makes a final offer to settle at a stated figure. The role of the neutral is to select one of these figures and may not propose another figure. The idea is that this encourages the parties to make reasonable submissions in order to maximize the chance their figure will be chosen. The process can be linked to mediation or conciliation as a deadlock-breaker before the neutral selects the figure, involving the neutral to morph into mediation before re-assuming the role of arbitrator if the mediation does not reach a settlement.

There are several variations on Baseball Arbitration. In Hi-Lo Baseball, the parties agree a range within which the demands must fall, and usually give the neutral flexibility to set a figure that is different from those proposed by the parties provided it falls within the agreed range.

In Night Baseball, the parties establish their figures but keep them sealed in envelopes so that they are unknown to the neutral. The parties then argue their positions to the neutral, and the neutral makes an award. The envelopes are then opened, and the party whose figure is closest to the neutral's figure becomes binding.

Collaborative Lawyering

Collaborative law is a US born and bred dispute resolution platform based on cooperative strategies pioneered by David Hoffman and Boston Law Collaborative⁴ over 20 years, and is now underpinned by the Uniform Collaborative Law Act 2009. The parties agree up-front to use problem-solving advisers to try and achieve a settlement, and to disclose whatever information is needed. They also agree not to threaten court action. However, if the dispute ends up in court, the parties' advisers must withdraw and the parties must find new representatives for the litigation. The psychological effect, and the focus less on people and content rather than process, combined with the support of advisers with no incentive to go to court, makes for a high settlement rate. Collaborative consultants (non-lawyers) are increasingly being enlisted by parties who want counsel with a wider focus to solve the issues. As Ute Joas Quinn of Shell International puts it: "*We lawyers are selling ourselves short at the same time as being sold out*"⁵.

An application of collaborative lawyering is where the parties jointly fund the fees of a counsel whose client is not the parties, but the outcome itself. Conceived by Professor Jeswald Salacuse⁶ at Tufts University, the "*counsel to the deal*" concept can be particularly effective where the parties are not in dispute, have envisaged a deal but want to make it as sustainable as possible.

Combined Neutrals

Combined Neutrals is a co-mediation hybrid using a mediator and conciliator working as a team. It is useful where there is a need for evaluative and facilitative skills. It is hard for a neutral to be, and to be perceived as, purely facilitative if they have given views of the case earlier. A facilitative neutral may not feel comfortable making a specific proposal where the parties or the neutral may not think this appropriate. By using a combination of neutrals not sequentially or separately but together as a team, the parties can have the benefits of both. It allows the parties to understand their alternatives while seeking a deal that maximizes value for everyone.

Configuring Process to Circumstances

Some mediators at the leading edge of thinking and practice have written extensively about hybrids. Three recent articles⁷ cover the hybrid options in more detail.

David Plant⁸ wisely observed: "*We have to start by defining the process as part of the problem*". Parties, their representatives and dispute resolution professionals need to think not only about which neutral to select to help their resolve disputes, but also what process to use for each set of circumstances. There are many hybrids to choose from, many of them tried and tested, and now, despite mules being unable to reproduce, hybrids of hybrids are developing in dispute resolution.

Process should be configured to fit the substance of an issue and all the parties engaged in it. Never the other way around. Harnessing up the right dispute resolution mule is often the ideal conveyance to get to the outcome.

⁴ <http://www.bostonlawcollaborative.com/>

⁵ **Lawyers as a Catalyst for Change in Early Issue Business Conflict Management**
<http://imimmediation.org/index.php?cID=385&cType=document>

⁶ <http://imimmediation.org/jeswald-salacuse-article>

⁷ **Hybrid Dispute Resolution Processes - Getting the Best While Avoiding the Worst of Both Worlds (2009)**, and **Med-Arb: Getting the best of both worlds (2010)** by Alan Limbury. **ADR - The Spectrum of Hybrid Techniques Available to the Parties** by Jeremy Lack. All three articles available at: <http://imimmediation.org/hybrids>

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