

ADR Techniques and Procedures Flowing Through Porous Boundaries: Flooding the ADR Landscape and Confusing the Public

(Revised, January 27, 2012)

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This article addresses a growing trend in ADR -- the blurring of boundaries between various ADR processes. This blurring of boundaries raises crucial issues to the further development of the field, particularly regarding fundamental distinctions between ADR processes that encourage cooperative behavior versus those that encourage competitive behavior. The loss of these distinctions is having the collateral consequence of increasing litigation regarding ADR. The intention of this article is to raise questions designed to clarify more principled boundaries between various ADR processes in order to assist the public and the practitioner to understand truly

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what the profession is offering and to protect consumer choice. The authors set forth what they believe are principled boundary distinctions between more cooperative/problem solving ADR processes and more competitive/adjudicative ADR processes to enable parties to understand the fundamental principles guiding each approach and to make better choices about which approach will better meet their goals in particular cases.

Historically, the three main dispute resolution methods used in the United States have been violence, avoidance, and litigation. In the early 1900s, labor management disputes began to be resolved through mediation and arbitration, and a few decades later many states enacted statutes requiring teachers, police and other public service personnel to mediate and arbitrate their conflicts. Today, there are a variety of additional processes that can be used to foster the resolution of disputes. Many of these processes began gaining popularity in the early 1970s as a result of frustration with the various human and financial costs associated with litigation. These processes were described as alternatives to litigation — hence the term Alternative Dispute Resolution or ADR.

To gain a clearer understanding of ADR, it is helpful to define the term as a continuum of dispute resolution processes used to resolve conflicts in a variety of contexts.¹ There are many ADR processes on the continuum that are competitive and many that are cooperative in nature (See Figure 1). Each process has its own advantages and disadvantages. In certain situations, one process may be more appropriate than another in resolving a dispute (e.g. to maintain a relationship, to establish a precedent, to save face, to provide political cover or to be vindicated).² Accordingly, the users of ADR processes (the public) must understand the continuum in order to make informed choices when selecting the appropriate ADR process to resolve their disputes. However, because the characteristics associated with competitive processes have seeped into the cooperative settlement approaches on the continuum, mediation and other collaborative processes have been transformed into something other than cooperative, self-determined interventions. It is not only important for the public to understand the distinctions between the various processes, it is imperative that the public and the novice ADR professional understand how the seepage of competitive characteristics into cooperative processes has affected mediation.

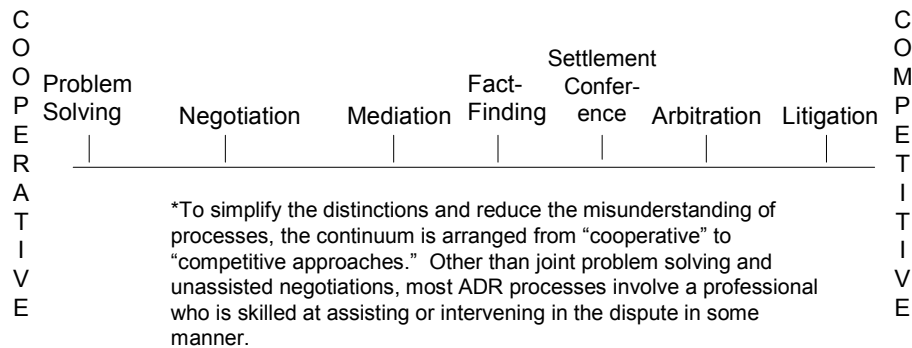
The interventions on the continuum, all of which are constructive dispute resolution mechanisms, range from cooperative processes where the disputants work together to resolve their own issues to adversarial processes in which disputants argue their positions to a third party who determines the outcome of the dispute by validating the position of the prevailing party. On the cooperative side of the continuum, the interventions are such that the interveners attempt to create an informal/flexible environment in which the parties are involved in process

¹ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflicts* (Jossey-Bassy 3rd ed 2003).

² Frank E.A. Sander and Stephen Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, *10 Negotiation Journal*, 49 (1994).

FIGURE 1

Continuum of Some Basic Conflict Management Mechanisms*



development and collaboratively determining the agenda, the standard of fairness to be applied, and the outcome of the dispute. The energies of those involved in interventions on the cooperative side of the continuum are directed at increasing the likelihood of integrative outcomes – in other words, “win-win” outcomes that make both sides better off than they would be absent an agreement. On the competitive end of the continuum, the interventions, for the most part, have more of a formal, linear approach where the interveners decide the process used, the agenda, and the fairness principles to be applied, and whether to evaluate, predict or decide the outcome of the dispute. The energies of those involved on the competitive end of the continuum are directed at determining which party will prevail over the other. This adversarial approach increases the likelihood of competitive behavior and outcomes where one party wins and the other loses.

Since all of the processes on the continuum are structured to resolve disputes and because many of them have common terminology, the uninformed have difficulty understanding the distinctions between the processes on the continuum (See Chart 1). Of particular note, the differences between arbitration and mediation are routinely misunderstood. As some predicted, the failure to educate the public about these process distinctions has contributed to confusion and to the public’s misunderstanding of ADR.³ For example, recently, a business owner who was a fellow airplane passenger of one of the authors commented to him, after learning that he was a mediator, that he liked mediation because the mediator could give a decision faster and less expensively than going to court. To

³ Kimberlee K. Kovach and Lela P. Love, Mapping Mediation: The Risks of Riskin’s Grid, 3 *Harvard Negotiation Law Review* 71, 97 (1998).

remedy this situation, the American Bar Association and the Association for Conflict Resolution began a national effort on how to educate the public about the dispute resolution field and its ADR processes.⁴

One way to help the public understand the difference between a competitive approach and a cooperative approach to resolving disputes is to use Professor Morton Deutsch's observation about "linkages." Linkages create either cooperative or competitive behaviors. The linkages associated with each process will either increase the likelihood of competitive, win-lose behaviors and lessen the chances of collaborative outcomes, or conversely increase the likelihood of collaborative, win-win behaviors and lessen the chances of competitive outcomes. More specifically, over 35 years ago Deutsch observed:

In a cooperative situation when a participant behaves in such a way as to increase his chances of goal attainment, he increases the chances that the others, with whom he is [collaboratively] linked, will also attain their goals. In contrast, in a competitive situation when a participant behaves in such a way as to increase his own chances of goal attainment, he decreases the chances of the others.⁵

It can be helpful to think of linkages as the perspective of the parties about the dispute and their actions in attempting to resolve the dispute. By viewing the linkages of various processes on the continuum, it becomes clear that the intentional and the unintentional behavior of the parties will be more competitive in a process where the outcome of the dispute is determined by a third party who decides who is right and who is wrong. The linkages in competitive processes allow only one side to achieve their goal, thus decreasing or eliminating the possibility that the other side will attain their goal. This occurs in third party decision-making processes such as litigation and arbitration where the parties view each other as opponents and act in an adversarial manner. The linkages in the cooperative processes on the continuum increase the likelihood of a collaborative interaction between the parties where the parties communicate with each other and work together to reach an outcome that meets their needs and, at a minimum, a solution all can live with. In sum, the rights-based processes (win/lose; right/wrong) land on the competitive end of the ADR continuum, and interest-based processes occupy the cooperative end.

Principles of Cooperative and Competitive Processes

The public's lack of basic knowledge about cooperative and competitive linkages and other characteristics associated with the various ADR processes not only has precluded a deeper understanding of the distinctions between the various dispute resolution processes, it has contributed to a blurring of functions **within** some dispute resolution processes. To help

⁴ November 11, 2009 Letter of Invitation, signed by the President and Past President of the Association for Conflict Resolution (ACR) and the Chair of ABA Section of Dispute Resolution, to a small group of ADR organizations for the purpose of exploring the feasibility of initiating a focused and sustained effort to address the public's awareness of ADR processes.

⁵ Morton Deutsch, *The Resolution of Conflict, Constructive and Destructive Processes* (Yale University Press 1973).

CHART 1

Alternative Dispute Resolution Processes – Definitions and Descriptions

Adopted from *Join the Resolution*, The Maryland ADR Commission's Practical Action Plan, December 1999.

TERM	DEFINITION	DESCRIPTION
Alternative Dispute Resolution (ADR)	A process or collection of processes for resolving disputes without going through a trial or committing violence.	Generally refers to a broad category of "ADR processes" that include settlement conferences, arbitration, mediation, consensus building, which are defined below as well as other alternative disputes without using violence or having a court decide.
Problem Solving*	A process in which people work cooperatively to identify the problem and its causes and then propose potential solutions from which a solution is selected.	The parties work together to reframe their differences into a joint problem that they attempt to solve in a way that maximizes the outcome for all parties.
Negotiation*	A process in which people communicate with one another in an attempt to resolve their differences in a manner most favorable to their particular perspective.	Negotiation is something everyone does everyday. It consists of unassisted communication of information between parties for the purpose of reaching an agreement influenced by the information exchange.
Mediation	A process in which a trained neutral person, a "mediator," helps people in a dispute to communicate with one another, understand each other, and, if possible, reach agreements that satisfy the participants' needs.	A mediator does not provide legal advice or recommend the terms of any agreements. Instead, the mediator helps people reach their own agreements, rebuild their relationships, and if possible, find lasting solutions to their disputes. Mediation is a process that lets people speak for themselves and make their own decisions.
Arbitration	A process in which people in a dispute present their views to a knowledgeable neutral person, an "arbitrator," who decides how the dispute will be resolved.	Arbitrators review evidence and arguments from people in the dispute and make a decision or "arbitration award." Arbitration is generally "binding" which means that the participants must abide by the arbitrator's decision.
Settlement Conference	A process in which people in a dispute in court present their views to a knowledgeable neutral person who evaluates the case and suggests ways to settle the dispute without a trial.	The settlement conference facilitator is usually a judge or experienced lawyer who can give informed opinions about how the court might decide the case, discuss how similar cases have been settled, provide advice, and suggest agreements.

*Excerpted from the Center for Alternative Dispute Resolution's training manual (2009).

focus our view on the blurring of the ADR process functions, below we summarize some of the basic principles of cooperative/problem solving approaches to resolving disputes — a focus that was noted by the Erickson Mediation Institute in the 1990's, and described in detail in the book *The Practitioner's Guide to Mediation, A Client Centered Approach*.⁶ As a comparison, we then set forth some of the principles associated with competitive/adjudicative dispute resolution processes before looking at the permeation of boundaries.

Principles of Cooperative/Problem Solving Processes

Cooperative/problem solving processes are non-coercive and non-judgmental. They require the intervener to have an unconditional positive regard for the parties in creating an environment in which the depths of the parties' issues, concerns, beliefs, attitudes and feelings can emerge as a part of the process and be considered as part of the resolution.

The basic characteristics of problem solving processes have the following three main principles:

1. Views people in conflict, whatever the type and however complex, as inherently capable of making decisions on their own.
2. Views people in conflict as capable of determining fairness based on their own unique history.
3. Respects the parties' self-determination and the neutral's impartiality and requires that the intervener has the skills to integrate these principles into a non-coercive process that encourages creative thinking, respectful interactions and constructive communication.

Principles of Competitive/Adjudicative Processes

Litigation and other adversarial processes are based on an understanding that the best resolution to a dispute is through a formal hearing in which the parties present arguments in support of their disputed positions to a third party who will determine which party's position is valid and which is not. This approach assumes a contested process governed by procedural rules through which a third party evaluates the parties' arguments and determines the outcome of the dispute. As an adversarial process, adjudicative forums require the intervener to focus primarily on procedural rules, evaluate the merits of the conflicting arguments, and decide the outcome of the dispute.

The characteristics of adjudicative processes have similar assumptions and generally follow three main principles:

1. Views people in conflict as not competent to make their own decisions in an adjudicative forum and assumes they must hire advocates to speak for them and make decisions for them.
2. Views people in conflict as unable to understand what is fair, and therefore assumes they must be told what the principles of fairness are and what the standards of fairness (law, regulation) would do for them if the outcome of the dispute were decided by an adjudicative forum.

⁶ Stephen K. Erickson and Marilyn L. McKnight, *The Practitioner's Guide to Mediation: A Client Centered Approach* (John Wiley 2001).

3. Views adjudicative tribunals as the ultimate font of fairness and only those professionals who are skilled in managing evaluative or adjudicative processes are capable of directing people towards resolution.

Blurring the Lines

As noted above, the ADR continuum depicts a range of dispute resolution processes from the formal, inflexible, rule-driven, third party directive process to the informal, flexible, party-driven collaborative process. Just before ADR came to be popular thirty years ago, there were not as many alternative dispute resolution options as there are today. Accordingly, one can argue that there were clearer boundaries between the various ADR processes. An understanding of the boundaries between the ADR processes on the continuum is necessary to understand how each process functions and to have an awareness and appreciation of the distinctions between the process procedures, the participant behaviors and the process outcomes.

As ADR gained popularity in the 80's, the functions endemic to the traditional litigation process began to permeate the boundaries of various other processes. Some attributed the seepage to the courts' adoption of ADR processes which brought large numbers of lawyers and other advocates with adversarial skills and litigation expertise into the ADR field.⁷ Although the effusion may have been inadvertent, the resulting spillover continued and has not gone unrecognized by the clients and the observers of arbitration and mediation processes. In this regard, one arbitration commentator noted that "criticism of American arbitration is at a crescendo. Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation — extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost."⁸

Another arbitration observer stated "[l]awyers are increasing in their concern that arbitration has lost its luster for being fast, efficient and economical. Most [lawyers] will tell you that arbitration has become the mirror image of the 'scorched earth' methods too commonly associated with traditional litigation."⁹ Two other observers stated that "[a]rbitration has become so cumbersome that many lawyers find it easier and less risky to go to trial."¹⁰

Similarly, observers of the more cooperative processes have noticed the seepage of adversarial functions into the mediation process.¹¹ For example, after noting the negative impact that traditional litigation tactics have had on arbitration, one mediation observer noted that those same traditional litigation tactics are "beginning to have an equally negative impact

⁷ S. R. Peppet and A. S. Rau, *Mediation and Other Non-Binding ADR Processes* (Foundation Press 2nd ed. 2002); John Lande, Lawyers' Routine Participation Directs Shape of "Lit-Mediation," 16 *Alternatives to High Cost Litigation* 53 (1998).

⁸ Thomas J. Stipanowich, Arbitration and Choice: Taking Charge of the "New Litigation" (Symposium Keynote Presentation), June 30, 2009.

⁹ Kent Scott, Arbitration - In Trouble Again?, 20 *Utah Bar Journal* 34 (2007).

¹⁰ See Kovach and Love, *supra* note 3, at 91.

¹¹ See generally *Id.* at 71; John Lande, Lawyers' Routine Participation Directs Shape of "Lit-Mediation," 16 *Alternatives to High Cost Litigation* 53 (1998).

on the mediation process” and have “created unfortunate unintended consequences, including less client satisfaction and lower settlement rates.”¹²

The following excerpt taken from experienced mediator statements about the legal system’s impact on mediation exemplifies the influence of the overflow of litigation tactics onto the mediation landscape. “[Lawyers] play the mediator, use the mediator, turn the mediator to their advantage [like] in an adversarial proceeding. That to me is a relatively new phenomenon,”¹³ In this regard, another observer stated “to gain a competitive edge in mediation,” litigators would deceive the mediator as to their client’s bottom line and “[o]ccasionally would ask the mediator to outright lie to opposing counsel for the purpose of gaining an advantage.” Some attorney and retired-judge mediators “engaged in over-the-top conduct, such as publishing articles that outlined methods by which an attorney could ‘manipulate’ the other side in mediation.”¹⁴

Early on, some commentators said “that the ADR movement may” have been “in the process of being ‘captured’ or ‘co-opted’ by the very legal system to which it was supposed to be an alternative.”¹⁵ Others said that “the growing institutionalization of ADR programs has inevitably led to their being ‘legalized’— with the danger of being ‘just another battleground for adversarial fighting’ on the part of attorneys.”¹⁶

The continued seepage of traditional litigation functions, and its associated behavior, into other ADR processes that are less adversarial has caused the distinctions between processes to become blurred and has contributed to the public’s misunderstanding of ADR processes.¹⁷ Today, because of the spillover, the range of behaviors associated with **all** of the various interventions on the ADR continuum can be recognized **within** the mediation process—making it a reservoir, of sorts, for the overflow of adversarial characteristics notwithstanding its location on the cooperative end of the continuum. Specifically, the array of approaches used by some interveners in the mediation process range from the collaborative/problem solving techniques to the evaluative/adjudicative techniques (See Figure 2). The flooding of the continuum with adversarial functions distorts the continuum and makes it more difficult for the public to understand.¹⁸ One does not have to look any further than the Riskin Grid of Mediation Techniques to observe the overflow and confusion.¹⁹ The Riskin Grid, which includes a Problem Definition Continuum²⁰ demonstrates that the orientation of the mediator and the context within which a dispute is conceived and

¹² Deborah Rothman, Who Took the Me Out of Mediation, *Daily Journal*. January 15, 2010, retrieved May 2010 from <http://www.dailyjournal.com>.

¹³ Stephen B. Goldberg, and Margaret L. Shaw, The Past, Present, and Future of Mediation as Seen Through the Eyes of Some of Its Founders, *26 Negotiation Journal* 237, 243 (2010).

¹⁴ See Rothman, *supra* note 12.

¹⁵ J. S. Murray, A. S. Rau, and E. F. Sherman, *Mediation and Other Non-Binding ADR Processes* (Foundation Press 1996).

¹⁶ *Id.*

¹⁷ Report of the Task Force on Education of the Public to the ACR Board of Directors, submitted by James A. Rosenstein and Peter Maida, Co-Chairs, August 23, 2005.

¹⁸ *Id.* See Kovach and Love, *supra* note 11.

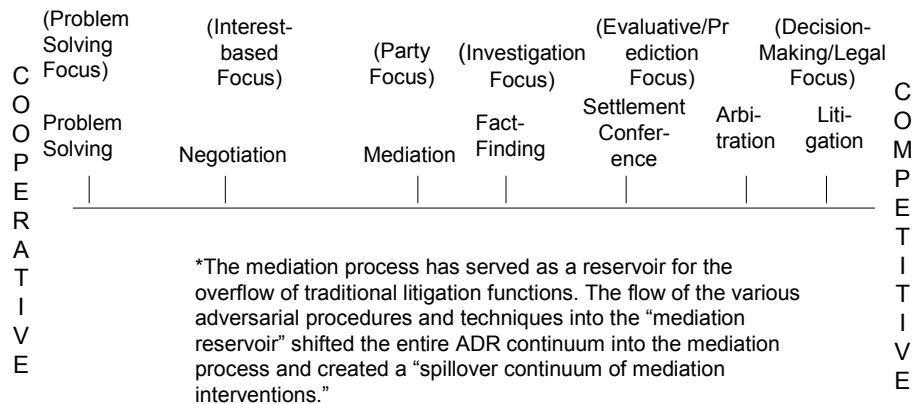
¹⁹ Leonard L. Riskin, Mediator Orientations, Strategies and Techniques, *12 Alternatives to High Cost Litigation* 111(1994); Leonard L. Riskin, Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed, *1 Harvard Negotiation Law Review* 7 (1996); see Kovach and Love, *supra* note 11.

²⁰ The Problem-Definition Continuum was recently modified in Leonard L. Riskin and Nancy Welsh, Is That All There Is? The ‘Problem’ in Court-Oriented Mediation, *15 George Mason Law Review* 863 (2008).

processed influence the participants' behavior, decision making and the outcome of the dispute (See Figure 3). When the Problem Definition Continuum is superimposed over the mediation reservoir (Spillover Continuum of Mediation Interventions), the overflow is even more noticeable (See Figure 4).

FIGURE 2

Mediation Reservoir* (Spillover Continuum of Mediation Interventions)



In 1998, two observers proposed an alternative to the Riskin Grid to stop the flow of adversarial activities into the mediation process.²¹ In 1999, another attempt to clarify the distinctions between the ADR processes and help the public understand the differences was made by the Maryland Mediation and Conflict Resolution Office (MACRO), which published definitions of the various ADR processes (See Chart 1). The authors have heard others attempt to clarify the distinctions by classifying the adjudicative approach to mediation as legal mediation, judicial mediation or court-annexed mediation. In addition to classifying the adjudicative approach, some would like to have independent entities certifying, licensing and monitoring those who engage in cooperative approaches to resolve disputes, others would like to establish the same oversight for those who engage in adjudicative settlement approaches.

²¹ See Kovach and Love, *supra* note 3.

FIGURE 3

Problem-Definition Continuum

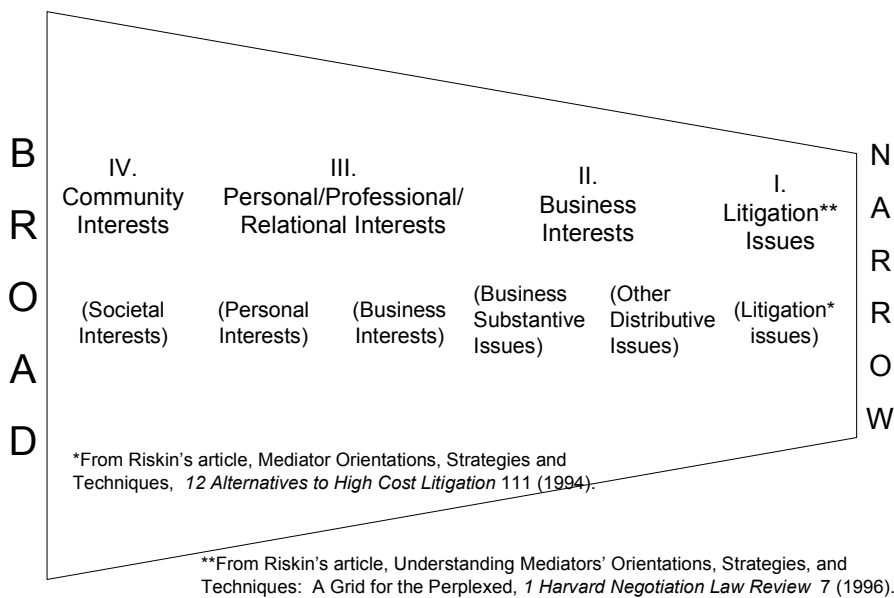
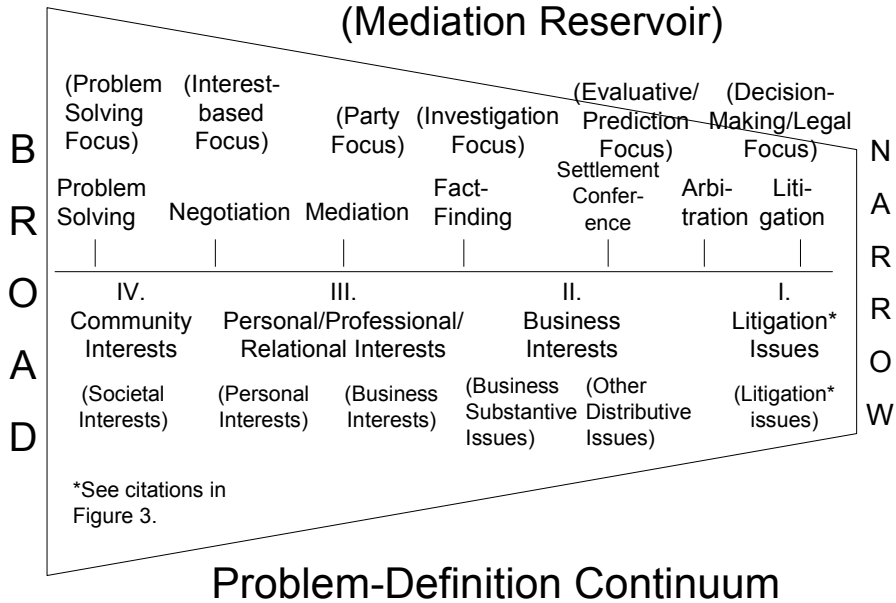


FIGURE 4

Spillover Continuum of Mediation Interventions (Mediation Reservoir)



Problem Solving and Adjudicative Approaches

Before utilizing a cooperative/competitive focus to examine and compare the linkages, i.e., the characteristics, behaviors and conditions created in an adjudicative settlement approach and in a problem solving approach to mediation, additional core principles endemic to each approach are summarized below.

Problem Solving Approach

In order to create an environment that fosters collaboration, mediators must have a skill set that would, among other things, enable them to move the process forward by viewing conflict as an opportunity rather than a barrier, by understanding and raising underlying concerns without judgment, by allowing the parties to be the primary focus in all aspects of the process, and by recognizing the importance of using the expertise of other professionals to provide information that would help the parties to make informed decisions in resolving their dispute. Therefore, the following core cooperative principles must be added to the aforementioned cooperative/problem solving process principles when focusing on mediation:

Mediation is a separate and distinct conflict resolution process that does not overlap with other disciplines such as therapy, law, accounting, etc. This important distinction requires the utilization of professionals from other disciplines when it is necessary to provide information that will assist the process and help the parties. For example, a neutral would not predict the outcome of the dispute in litigation only to pressure the parties towards a more realistic settlement, but would rather ask the parties to caucus separately with their attorneys or obtain the advice of someone who might consent to making such a prediction.

Adjudicative Settlement Approach

Because a contested environment is the foundation for adjudicative processes, practitioners with an adversarial focus utilize a settlement conferencing approach when settling disputes. Such an approach focuses on the evaluation and judgment of whose case is stronger and a prediction of who will be the prevailing party in an adjudicative forum. In order to make predictions as to which party would prevail in an adversarial process, one must be knowledgeable about the specific law, regulation and adjudicative procedure. Accordingly, in order to reach a settlement that closely resembles a predicted adjudicated outcome, interveners must be experts in the law and in the subject matter of the dispute. In addition, the complexity of the law and the legal process requires the parties to be represented by subject matter experts and reduces the parties' participation in the process.

A Comparison of Problem Solving and Adjudicative Interventions

What follows is an ADR process guide that compares the characteristics of problem solving interventions with the characteristics of adjudicative settlement interventions. The guide is designed to identify the linkages – the behaviors, and functions that are mainly associated with each approach. Note that these linkages can be changed by the way the problem is defined (or reframed). They can also be changed by the way fairness is measured or obtained and, most importantly, these linkages can be changed by the bargaining process approach that is used during the negotiations.

Even though the dispute resolution field has a place for a variety of alternative dispute processes, some parties and practitioners value adjudicative approaches more than cooperative approaches, and vice versa. As we hope you will see, by comparing them, both approaches are distinct, effective, co-equal conflict resolution processes.²² Although many favor the blending of the approaches discussed above, an understanding of the fundamental principles guiding each approach would improve the parties' decision making in determining which approach would better meet their needs and goals. The following comparative guide to ADR approaches can serve as a map when comparing processes. We believe *A Comprehensive Guide to Cooperative/Problem Solving and Competitive/Adjudicative Processes* will help the public better understand ADR processes and make informed choices when selecting a mediator and a mediation process to resolve their disputes.

**A COMPREHENSIVE GUIDE TO COOPERATIVE/PROBLEM SOLVING AND
COMPETITIVE/ADJUDICATIVE ADR PROCESSES**

ISSUES EXAMINED	PROBLEM SOLVING PROCESSES	ADJUDICATIVE PROCESSES
Definitions	Problem solving processes have, as a core principle, the self-determination of the parties in the process. These approaches center on the standard of practice that self-determination is a fundamental principle prohibiting the direct or indirect use of provocation or coercion to influence a participant or a particular outcome during the process.	These approaches have in common an evaluative settlement conferencing approach that can violate the self-determination of the parties in the room. These processes tend to focus on evaluations of whose case is stronger or weaker and have other characteristics that resemble moderated settlement negotiations within a legal or court framework.

ROLE OF LAW

What Principle of Fairness is Applied in the Discussions?	Education and full disclosure provide foundation for clients to expand their knowledge of the issues and develop options that serve their needs. Through the process, the clients create a different understanding of the situation which may or may not be supported by a strict black and white construction of the prevailing laws, regulations and policies regarding the particular subject being addressed.	State statute, case law, regulation, policy or a prediction of an adjudicative outcome is the prevailing principle.
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²² For an alternative view of the processes, See, David A. Hoffman, Exploring the Boundaries and Terrain of ADR Practice - Mediation, Arbitration, and Collaborative Law, *14 Dispute Resolution Magazine* 6 (2007).

ISSUES EXAMINED	PROBLEM SOLVING PROCESSES	ADJUDICATIVE PROCESSES
Who Can Serve as a Neutral?	Process experts manage the process using intervention skills to move the process towards settlement. They do not rely on predictions of the adjudicatory outcomes. Subject matter expertise is secondary.	This type of process is managed exclusively by subject matter experts. Process experts who are not considered to be subject matter experts are excluded. Because these models often require predictions about whether or not one side's case would prevail in an adjudicatory tribunal, only subject matter experts can serve as the process dispute settler.
Is Legal "Advice" Given in the Process?	Providing legal advice is inconsistent with the role of the neutral who may provide information about laws, regulations and policies and how they may affect parties. The process expert does not use predicted adjudicatory outcomes as a method of moving the parties toward settlement.	Legal advice is often integrated in the predictions about the weaknesses of each side's case. The subject matter expert focuses the settlement on likely adjudicatory outcomes.

ROLE OF NEUTRAL

Selection of Neutral	Usually selected by clients. Can be selected by advocates or an adjudicative tribunal.	Usually selected by advocates or an adjudicative tribunal.
Parties View of Neutral	Collaborative, facilitative, integrative, encourages full participation (self-determination), non-judgmental	Authoritative, directive, evaluative, advisory and judgmental
Parties Involvement in the Process	The clients are expected to be primary speakers. Advocates may or may not be present during the session. Clients assist in controlling of the process.	Advocates generally speak for their clients. The advocates are almost always present during the session to control process. If the neutral is required to make a prediction about an adjudicatory outcome, the parties and their advocates play to the neutral rather than to each other.
Neutral's View of Clients	Views clients as competent, and able to make their own decisions once they understand their choices.	Views the clients as unable to make decisions, as likely to be taken advantage of, and in need of protection.

ISSUES EXAMINED	PROBLEM SOLVING PROCESSES	ADJUDICATIVE PROCESSES
Preparation by the Neutral	Neutral receives information during the mediation. Specific information, limited by agreement, may be provided by clients prior to first session.	The neutral must interview the advocates and sometimes the disputing parties and review all available factual information before first meeting.
Advocate's Role in the Process	Presence of advocates not required. May be helpful in avoiding impasse. They take on an advisory role and help implement the parties' joint decisions (such as drafting documents or providing advice when requested).	Always present. Advocates take on an important decision-maker role. Neutral attempts to mediate decisions between competing advocates who will advise the parties whether or not to take the deal.

OTHER CHARACTERISTICS

Factual Information and Timing of First Session	The facts and the legal situation may be revealed and discussed at the beginning of the first session. Full disclosure is inherent in the process and may be included in the agreement the parties sign to participate in the process. Emphasis is on the discussion and the parties' view of the information provided.	Factual and legal information exchanged before the first session--with emphasis on preparation for an adversarial forum. Independent gathering of facts and law must be completed by the advocates before any attempt at settlement is made because it is important to compare potential settlement outcomes with adjudicatory outcomes. Usually the first session is held after the advocates' settlement efforts have failed.
Purpose of the Process	To reach a settlement that is owned by the parties and possibly heals a torn relationship. Not necessarily an adjudicative outcome. Can be more creative and may deviate from adjudicatory norms.	To reach a settlement that most closely resembles predicted adjudicative outcomes.
Caucusing	Caucus is used strategically. The parties or the neutral may decide to caucus for specific reasons during the process. Having the parties in the same room provides opportunities to resolve underlying conflicts that may be key to settlement.	Caucusing is used extensively by some neutrals and exclusively by others. Since adjudicative processes emphasize the parties' differences, the processes tend to keep people in separate rooms without meeting jointly.
Bargaining Methods	Are interest based, assumes that discussing and understanding underlying interests and needs are vital to a comprehensive settlement.	Tend to be distributive and positional, assumes that clients are adversarial.

ISSUES EXAMINED	PROBLEM SOLVING PROCESSES	ADJUDICATIVE PROCESSES
Client Discussion Outside of the Session	Encouraged if both feel it is emotionally safe to do so.	Not encouraged
Initial Stages	Opens with listening and information gathering. Helps clients to understand and evaluate information and have a better understanding of the situation. Assists them to think creatively and to begin to see settlement more holistically.	Opens with positional statements in which the parties' advocates set forth their legal positions.
View of Feelings, Beliefs and Interests	Feelings, interests and beliefs are just as important as the facts and the law.	Less important than the facts, policy, regulation and the law.
Domestic Violence	Allows clients to decide whether or not to enter into a settlement process, and sets protocols for clients to better assure successful and safe process.	If present, such cases are not seen as appropriate for a settlement process.
High Conflict	Welcomes conflict as opportunity to resolve underlying issues.	Generally suppresses or avoids conflict in favor of establishing the facts of the case as relating to the law.
Focus of the Process	Focuses more on needs and interests. Looks at each person's perspective/understanding of the issues and options.	Focuses more on right-wrong, win-lose. Who will prevail on the legal claim.
Use of Neutral Experts	Uses an agreed upon authority when clients need an expert opinion on a disputed issue.	Uses experts from each party and then attempts to compromise between the experts' information.
Option Development	Creative, brain storming, discussing as many options as possible and comparing consequences.	Within the confines of the law as understood by the advocates and the neutral.
Includes Support People or Children	As agreed by clients	As agreed by the advocates
Agenda	Set by clients and neutral	Set by neutral or neutral and advocates