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Trial Preparation Includes ADR Process Design: What Type of Mediator Fits Best?

BY DONALD R. PHILBIN JR.

[Preparation] is the be-all of good trial work. Everything else—felicity of expression, improvisational brilliance—is a satellite around the sun. Thorough preparation is that sun.
—Louis Nizer[1]

If 98.4 percent of filed legal claims settle pretrial,[2] tailoring dispute resolution to the particulars of each case and casting the right players in key roles are as central to trial preparation as developing case themes.

Trial lawyers are typically cast in the role of generals preparing for battle. Among their options is the location at which to engage opponents. The default location is often a jury trial. And there is no more effective way to uncover truth and to test witness veracity than with the liberal discovery and live jury trials that are uniquely American.

Having said that, trials are not any more of a one-size-fits-all solution than conventional warfare. For some battles, there is no substitute for trial. For others, there are several. Hard-fought trials make friends and business partners like heat-seeking missiles. The cost of the battle also may exceed the prize. But, even under threat of war, peace often becomes the preferred alternative after analyzing the expected financial and other costs associated with other potential outcomes. Diplomatic activity reaches fever pitch in the run-up to war, but those conversations are rarely conducted directly between the generals conducting the war. Other countries or world organizations are often called in to help avert a costly fight.

And, there are psychological reasons why such third-parties boost settlement prospects—there are things we just do not

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FOR THE YOUNG LAWER

Avoiding the ADR from Hell

BY P. JEAN BAKER, ESQ.

Some form of alternative dispute resolution (negotiation, mediation, arbitration) currently permeates the practice of law, regardless of the legal specialty. Yet successful completion of an ADR course isn't a typical requirement for graduation from law school. And rarely is ADR included as an essential component of the programs offered to bridge the gap between graduation from law school and admission to the practice. Far too many attorneys gain their knowledge of ADR the hard way—by making mistakes that cost their client's time and money.

To Settle or Not To Settle

The defendants (three landlords) had over a period of time rented apartments with walls covered in lead-based paint. Prior to moving into the third landlord's apartment, the family asked and was assured that the unit was lead-free. A daughter suffered a severe reaction to the lead and serious brain damage resulted. The plaintiffs (the mother and her daughter) sued all three landlords although service

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utilizing their staff effectively to help better maintain the interests of their clients.

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1. *Why go to court when you can settle cheaply, quickly and fairly elsewhere?*, from "Knocking Heads Together," THE ECONOMIST (Feb. 2007).
2. *Id.*
3. *Id.*
4. American Arbitration Association, *Alternate Dispute Resolution Basic FAQ's*, AAA Library Online (2007).
5. Debbie Lech, *Paralegals and Alternate Dispute Resolution: Other Career Options*, Legal Assistants of State Bar of Michigan, Vol. 1 (2007), *available at* www.michiganbar.org.
6. SUSAN R. PATTERSON, ESQ. & GRANT SEABOLT, ESSENTIALS OF ALTERNATIVE DISPUTE RESOLUTION (2d ed. 2001).
7. J.R. Schwartz, *Layman Cannot Lawyer, But Is Mediation the Practice of Law?*, CARDOZO L. REV. 1715 (May/July 1999).
8. Jonathan Beyer, *Practing Law at the Margins: Surveying Ethics Rules for Legal Assistants and Lawyers Who Mediate*, GEO. J. LEGAL ETHICS (Winter 1998).
9. Peggy Lowden, *Legal Assistant Division: Legal Assistant Utilization May Optimize Client Services in Litigation Practice*, 16 UTAH BAR J. 44 (June/July 2003).
10. If one wants to be part of the AAA National Roster of Mediators and Arbitrations, he or she should review the qualifications necessary to be considered, on their website.
11. Lowden, *supra* note 9.

Trial Preparation Includes ADR Process Design

(Continued from page 1)

want to hear from our opponents, even if it is a reasonable proposal. A cold war experiment quantified the magnitude of this reactive devaluation bias. Soviet leader Gorbachev made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time.[3] Researchers attributed the proposal to President Reagan, to a group of unknown strategists, and to Gorbachev himself. The surprise was not that the group reacted differently to the same proposal depending on its source, but the wide range of difference between those reactions. When attributed to the U.S. President, 90 percent of U.S. subjects reacted favorably to Gorbachev's proposal. That high level of support dropped only marginally when attributed to the third-party unknown strategists (80 percent), but to half of that (44 percent) when attributed to the Soviet leader.[4] Accordingly, the same proposal was received dramatically differently by the same audience depending only on the speaker. Furthermore, the third-party unknown strategists carried more weight with both sides.

Parties to litigation react similarly. The receipt of even a reasonable suggestion or creative settlement offer will be colored by the fact that it comes from the other side. As a result, our litigation planning necessarily includes developing alternative dispute resolution process alternatives that cast neutrals in a variety of roles. Those scenarios may range from facilitating direct or mediated negotiations that maintain the parties' control over the outcome to arbitrations and trials that necessarily turn that control over to others to resolve the dispute. Even under the "mediation" rubric, there are a number of flavors to choose from, depending on the dispute.

In 1994, Professors Frank E.A. Sander and Stephen B. Goldberg wrote the classic article "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure."[5] The article methodically analyzes different forms of alternative dispute resolution, focusing on the disputants' goals in making a forum choice and the obstacles that each choice entails and might overcome.[6] In 1994, Professor Leonard Riskin also published a "grid" describing mediators' approaches to mediation.[7] Riskin's article recognized that not all mediation styles are the same, and it graphed mediator styles along a two-dimensional "grid." Ironically, the "grid" itself has kept practitioners of dispute resolution busy with their own "debate" for a decade.[8] A helpful "style index" followed.[9] Later articles and Riskin's revisions to his own thesis acknowledged the fact that effective mediators roam from one stylistic quadrant of the grid to another, depending on the circumstances of each case.[10] That is to say, mediators do not camp in just one quadrant of the "grid."[11]

The Rule of Presumptive Mediation

Sander and Goldberg focus on process design. Specifically, emphasizing the realization of client goals and the minimization of obstacles to resolution, they ask, "How can I design a procedure that provides that kind of help?"[12] Detailing many options, they favor a rule of presumptive mediation: "Mediation is the only procedure to receive maximum scores on each of these dimensions—cost, speed, and maintain or improve the relationship—as well as assuring party privacy, another interest which is present in many business disputes."[13] Using mediation to satisfy the goals of the parties while reducing obstacles to efficient resolution of disputes, a mediator would gain a clearer sense of the parties' goals and the obstacles to settlement using "customary mediation techniques"; and if mediation were not initially successful, "the mediator could then make an informed recommendation for a different procedure" that could be utilized to narrow the disputed issues before "looping-back" to mediation with more perfect information in an effort to break the impasse.[14] Having developed a

well-rounded view of the case from listening to both parties' respective positions, the mediator might perceive that the issues have been narrowed to a legitimate difference of opinion regarding the probability of a particular trial outcome. If the parties agree on the range of potential verdicts (the brackets a particular legal remedy might provide), but are hung up on the probability of certain results, the mediator might suggest a quick mock trial as part of the mediation. Feedback from sample groups may help the parties refine their positions. With that "more perfect information," the parties then might return to mediation in an effort to further narrow their negotiating positions. Furthermore, by allowing room for such a loop back to mediation, the mediator helps the parties maintain settlement momentum even as they also refine their strategy for trial and other alternatives.

Mediators elicit potential payoffs and probabilities from the parties in an effort to build and test potential outcomes interactively.

"Mediation" Means Different Things to Different People

If you wish to make a man your enemy, tell him simply, "You are wrong." This method works every time.
—Henry Link[15]

Even if mediators "roam the style grid" in an adaptive way on a case-by-case basis, Riskin's original observation that mediators employ different styles holds true. Those styles range from facilitating dispute-focused conversations to offering conclusory case evaluations. Indeed, some scholars caution mediators against making evaluations,[16] and many parties are sorry they asked for one after they get it.[17] But parties will not settle lawsuits unless they believe prospective settlement terms are preferable to trial.[18] "Absent an analytical structure for understanding a complex case, the parties have no mechanism with which to consider how the mediator's feedback on individual issues, if accepted, will affect their case's value."[19] The irony is that the party who most needs an evaluation may be the least receptive to it. Mediators elicit potential payoffs and probabilities from the parties in an effort to build and test potential outcomes interactively "before their very eyes."[20] That process certainly includes hard-headed legal analysis, but testing assumptions in a developing model seems preferable to a bottom-line conclusion. Using the parties' own data and testing the granular assumptions used to build the models often leads to the same endpoint through entirely different paths. Notice the difference between the following:

- If this suit gets tried 100 times, how many times do you think the outcome will be $72,000 [gesturing to the right side of a drawn bell-shaped curve]? What about $24,000? $7,000? And $0?
- You will never get $72,000 for this claim.

Both methods test the asserted claims.[21] Without thoughtful analysis and reasoning, however, a party may be left wondering if the mediator "just tells both sides that their case is lousy." "A mediator addresses this suspicion head-on by testing positions with analytical tools in an effort to find efficient outcomes."[22] Parties reasonably assume that the mediator is conducting similar discussions with the other parties.

Whether the question of dispute resolution comes up after a dispute arises, or whether we have the luxury of thinking them through before the euphoria of the new deal we are drafting rubs off, parties have options. Decision trees help us visualize these strategic decisions.

At one extreme, parties can simply ignore the problem and see what happens. It may get worse, but it also may go away. Moving on to other choices, parties may decide to resolve the dispute the same way they got into the initial deal—through direct party-to-party negotiations. That is "[t]he most common form of dispute resolution."[23] In direct negotiation, parties retain complete control of the process and the solution. Additionally, either or both parties may decide to use settlement counsel. This is an increasingly popular means of formally assigning the dispute resolution task to settlement counsel while keeping the trial team focused on the march to war if that alternative becomes necessary.[24] Both are complimentary. Trial counsel's efforts may make peace a more acceptable and appealing outcome. Furthermore, routinely assigning settlement counsel reduces any perceived weakness that may be telegraphed by trial counsel opening settlement discussions. Both are simply playing their assigned role while closely coordinating each move.

If the parties do not want to hire independent settlement counsel, they could agree to hire a neutral mediator early in the case that would confidentially work through analyses with both sides in caucus and potentially recommend additional processes to reduce uncertainty through improved information. By retaining control over the ultimate outcomes, parties have more say in how the process evolves than if they turned it over to others through a binding decision process. Sophisticated former business partners may want to decide their own destiny but may need some outside help to do so. That help may range from keeping them focused on outcomes and improving the lines of communication, to testing hypothetical outcomes and gauging their realistic probabilities. Ignoring a problem is almost entirely within our control—legislation rarely is. Even near the middle of the chart (non-binding arbitration), parties surrender some control over specific deal terms while retaining the ultimate right to agree or disagree with the result. (See Figure 1.) In fact, some would argue that one has less control in arbitration than in court

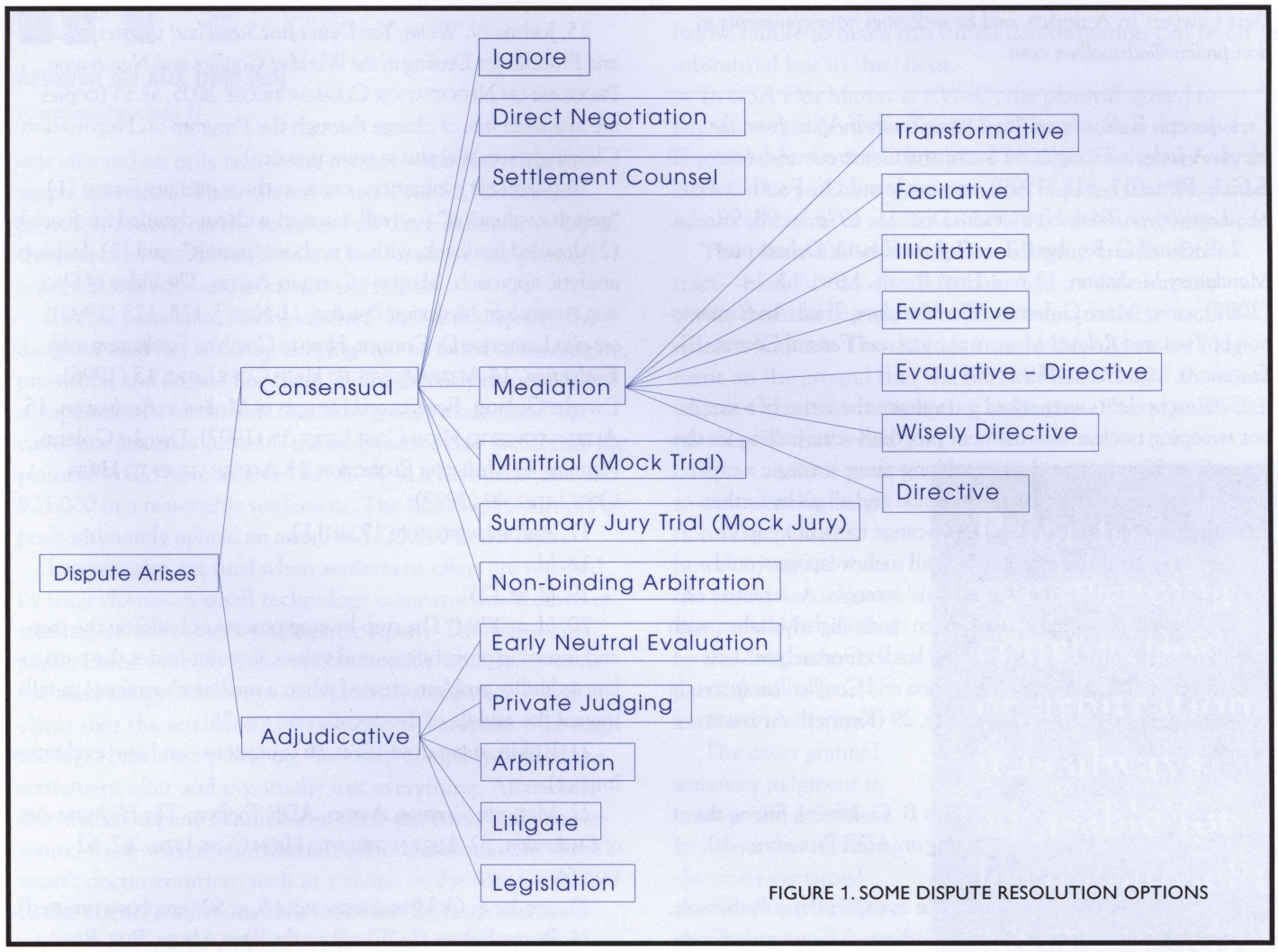

FIGURE 1. SOME DISPUTE RESOLUTION OPTIONS

due to the very limited appellate review to which such arbitral awards are subject. The scope of contractual review of arbitration awards is currently before the Supreme Court.[25]

If the parties cannot or do not agree to a consensual process, the law and the parties' contracts will provide the default procedures. Those can range from early evaluation and private judging to precedent-setting litigation, or even trying to adjust the alternatives for entire groups through legislation.

The "Goal" Is a Tailored Process Through Information

Information is a negotiator's greatest weapon.
—Victor Kiam[26]

Lawyers are used to fitting specific facts within the parameters of general rules. Sander and Goldberg analyze several fact patterns in formulating the relative weightings they assign to different dispute-resolution processes. While helpful, the end product depends on client goals and objectives. And, while mediation is the statistical favorite because it has the highest probability of both satisfying party goals and reducing barriers to a negotiated outcome, it certainly is more difficult to resolve law-changing cases like *Brown v. Board of Education* in mediation. Riskin's "grid" is also a helpful starting point for mediation process decisions. Casting the right players in the right process roles offers opportunities to marry case nuances to party expectations. If the parties want an evaluation, that is what they should get. If they need to be drawn to uncomfortable places, however, a quick evaluation may instinctively force them into a defensive position that increases the likelihood of an impasse. A neutral mediator may elicit "best" and "worst" outcomes while leading parties through NEV calculations, psychological debiasing, and other analyses to reach a similar result with lower barriers.

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1. Joseph F. Anderson Jr., *Setting Yourself Apart from the Herd: A Judge's Thoughts on Successful Courtroom Advocacy*, 50 S.C. L. REV. 617, 618 (1999), *quoting* Jerrold K. Footlick ET AL., *Lawyers on Trial*, NEWSWEEK, Dec. 11, 1978, at 98, 99.

2. Richard C. Reuben, *Tort Reform Renews Debate over Mandatory Mediation*, 13 n. 2 DISP. RESOL. MAG. 13, 14 (2007), *citing* Marc Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in State and Federal Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004).

3. "Respondents were asked to evaluate the terms of a simple but sweeping nuclear disarmament proposal—one calling for the immediate 50 percent reduction of long-range strategic weapons, to be followed over the next decade and a half by further reduction in both strategic and short-range tactical weapons until, very early in the next century, all such weapons would have disappeared from the two nations' arsenals. As a matter of history, this proposal had actually been made slightly earlier, with little fanfare or impact, by the Soviet leader Gorbachev." Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26, 29 (Kenneth Arrow ET AL. eds., 1995).

4. *Id.*

5. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 67 n.7 (1994).

6. Sander & Goldberg, *supra* note 5, at 66; Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L.R. 963, 964 (1998) ("Mediation is facilitated negotiation.").

7. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

8. *See, e.g.*, Kimberlee Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).

9. Jeffery Krivis & Barbara McAdoo, *A Style Index for Mediators*, 15 ALTERNATIVES TO HIGH COST LITIG. 157 (1997).

10. Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 14 (2003) ("Mediators often evaluate on some issues and facilitate on others, all within the same time block, and they typically decide on their moves at least partially in response to the personalities and conduct of the other participants.").

11. Cris M. Currie, *Mediating off the Grid*, 59 JUL DISP. RESOL. J. 9, 11 (2004) ("Most mediators resist defining themselves in terms of Riskin's four styles. The best mediators will draw from all available mediation techniques, depending on the situation.").

12. Sander & Goldberg, *supra* note 5, at 66.

13. *Id.* at 52.

14. *Id.* at 59.

15. Joshua N. Weiss, *You Didn't Just Say That! Quotes, Quips, and Proverbs for Dealing in the World of Conflict and Negotiation*, PROGRAM ON NEGOTIATION CLEARINGHOUSE 2005, at 35 (copies are available free of charge through the Program on Negotiation Clearinghouse Website at www.pon.org).

16. Mediator evaluations come in three primary forms: (1) "gestalt evaluation" (overall reaction without detailed feedback); (2) detailed feedback, with or without "gestalt"; and (3) decision analytic approach. Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 NEG. J. 123, 123 (1995); *see also* Laurence D. Connor, *How to Combine Facilitation with Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 15 (1996); Dwight Golann, *Benefits and Dangers of Mediation Evaluation*, 15 ALTERNATIVES TO HIGH COST LITIG. 35 (1997); Dwight Golann, *Planning for Mediation Evaluation*, 15 ALTERNATIVES TO HIGH COST LITIG. 49 (1997).

17. Aaron, *supra* note 17, at 123.

18. *Id.*

19. *Id.* at 125.

20. *Id.* at 129 ("The step-by-step process of building the tree and inserting probabilities and values also eliminates the particular credibility problem created when a mediator's evaluation falls toward the middle of the negotiation gap.").

21. Riskin, *supra* note 10, at 16 (questions can have evaluative impact).

22. Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 62 ALTERNATIVES TO HIGH COST LITIG. 62, 62 (1996).

23. Sander & Goldberg, *supra* note 5, at 50 (emphasis omitted).

24. Roger Fisher, *He Who Pays the Piper*, HARV. BUS. REV. Mar.–Apr. 1985, at 150, 156 ("Perhaps we, as a corporation, would reach a wiser decision if we had one lawyer develop the case for litigation and a different lawyer press on us the case for settlement."); Kevin R. Casey, *Law Firm ADR Departments Can Respond to Market Challenges*, 25 ALTERNATIVES TO HIGH COST LITIG. 1, 1 (2007) ("When police bargain for a suspect's confession, they often separate the 'good cop' role from the 'bad cop' role. The analogous separation of roles between specialized settlement counsel and the litigation counsel often plays well in resolving major suits."); *Id.* at 10–11; William F. Coyne Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 367 (1999) (comparing the United Kingdom's division of tasks between solicitors and barristers); Donald Lee Rome, *Resolving Business Disputes: Fact-Finding and Impasse*, 55-JAN DISP. RESOL. J. 8, 15 (2001) ("Some companies have employed settlement counsel as well as trial counsel, each performing their respective functions, in order to separate the mediation effort from the necessary pre-trial activity.").

25. Hall Street Assoc. v. Mattel, Inc., No. 06-989 (argued Nov. 7, 2007).

26. Weiss, *supra* note 16, at 26.