MED-ARB: A TEMPLATE FOR ADAPTIVE ADR

by John T. Blankenship

I. INTRODUCTION

Med-Arb is an acronym for mediation-arbitration,[1] a hybrid method of dispute resolution which combines both mediation and arbitration.[2] Although there are different variations of med-arb, in its "pure form" it is conducted by a single individual whom the parties have agreed will first mediate their dispute and then arbitrate, should the mediation fail to fully resolve the matter,[3] by issuing a binding decision on all unresolved issues.[4] The process is intended to cure some of the problems inherent in both mediation and arbitration,[5] while allowing the parties to profit from the advantages of both procedures.[6]

But, here lies the rub. Some critics of med-arb, of which there are many, suggest that the disadvantages of med-arb make it a fatally flawed process and that mediation and arbitration are inherently incompatible.[7] The idea of combining what are generally considered two distinct

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[1] *See* Emilia Onyema, *The Use of Med-Arb In International Commercial Dispute Resolution*, 12 Am. Rev. Int'l Arb. 411 (2001).

[2] *See* Barry C. Bartel, *Med-Arb As A Distinct Method Of Dispute Resolution: History, Analysis, And Potential*, 27 Willamette L. Rev. 661, 663 (1991).

[3] *See Id.* at 665.

[4] *See* Karen L. Henry, *Med-Arb: An Alternative To Interest Arbitration In The Resolution Of Contract Negotiation Disputes*, 3 Ohio St. J. on Disp. Resol. 385, 389 (1988).

[5] *See Id.* at 390.

[6] *See* James T. Peter, *Med-Arb In International Arbitration*, 8 Am. Rev. Int'l Arb. 83, 88 (1997).

[7] *See* Sherry Landry, *Med-Arb: Mediation With A Bite And An Effective ADR Model*, 63 Def. Couns. J. 263, 265 (1996) (citing Lon Fuller, *Collective Bargaining and the Arbitrator*, 3 Wis. L. Rev. 23, et seq. (1963)).

dispute resolution processes to form one process[8] is viewed by some Alternative Dispute Resolution ("ADR") professionals as "heretical and even unethical."[9] Interestingly, it is the hybridization itself which has created the disdain for the hybrid. The blending of mediation and arbitration raises serious concern among some as to whether the mediation and arbitration phases can both remain valid.[10] This concern for process validity is a point of analysis for this paper. It is the devotion to process, the zeal to preserve the integrity of individual ADR procedures and the attendant debate, which make med-arb, especially in its "pure form," a perfect template to discuss what will be referred to herein as "Adaptive ADR." This paper is not promoting another ADR process, and most certainly not another name for a process (there are more than enough of those), but simply promoting a way to look at ADR, an "ADR attitude" so to speak.

That attitude is simply this – the process should be fashioned to fit the dispute, rather than the dispute to the process. This paper is about more than med-arb, it is about the way dispute resolution is viewed. How we look at med-arb is a reflection of how we look at dispute resolution. Are the alternative dispute resolution procedures that have developed adaptable and combinable in order to best meet the needs of a particular dispute, or are they distinct and unalterable process "boxes" into one of which every dispute must fit? In this paper's description and analysis of the med-arb process and its various forms and nuances it is intended that a broader consideration emerge, a critical analysis of the reader's dispute resolution philosophy.

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[8] *See* Onyema, *supra* note 1.

[9] *See* Gerald F. Phillips, *Same-Neutral* ***Med-Arb:*** *What Does The Future Hold?*, 60 Disp. Resol. J. 24, 26 (2005).

[10] *See* Carlos de Vera, *Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 Colum. J. Asian L. 149, 157 (2004).

Five additional sections follow this introduction: Section II discusses definitions and forms of med-arb; Section III covers its origins and development; Section IV describes the criticisms and accolades (advantages and disadvantages) ascribed to med-arb; Section V contains the argument and analysis for "Adaptive ADR;" and Section VI is the conclusion which summarizes the argument presented.

II. DEFINITIONS AND FORMS

A. Definitions of Med-Arb.

It is a simple enough exercise to find a definition of med-arb in a legal treatise or encyclopedia:

> "Med-arb:" is designed to bring together the benefits of both mediation and arbitration in one forum. The parties use one neutral person as both mediator and arbitrator. Med-arb is a two-step process, first using mediation and then using formal arbitration to decide any issues not settled at the mediation stage. Because the med-arbitrator has more authority than the traditional mediator, the parties are encouraged to be more honest with each other during the mediation stage, knowing that the neutral person will resolve all remaining unsettled matters. The final result of med-arb is a binding decision which includes the agreements achieved during the mediation phase and the arbitration decisions.[11]

This concise yet descriptive definition borrows from scholarly sources and it accurately presents the type of med-arb process this paper will focus on. Numerous other definitions exist in the scholarly literature. Some of these bear mention because of the qualitative descriptions they provide of the med-arb process. As Peter points out, "There are two ways to describe med-arb. The first is to describe the process known as 'med-arb.' The second is to focus on the goals and the elements of the process."[12] Both of Peter's approaches are used in the following definition:

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[11] 4 Am. Jur. 2d Alternative Dispute Resolution § 17.

[12] Peter, *supra* note 6, at 88.

"Med-arb involves the use of a neutral third party who acts first as a mediator between the parties in an attempt to reach a voluntary agreement and if it doesn't the process switches to arbitration and the third party renders a binding decision on the remaining points of disagreement. Med-arb affords the parties the opportunity to engage in the cooperative aspects of mediation, while providing the parties with the certainty of a final decision."[13]

The literature contains numerous examples of describing med-arb by focusing on the goals and elements of the process. Consider the following for example: "The med-arb method is a technique that fuses the 'consensuality' of mediation with the finality of arbitration."[14] The fact that the parties have agreed in advance to accept any arbitrated decisions as final and binding has led some to call med-arb "mediation with muscle"[15] or "mediation with a bite."[16] This is because it overcomes what some view as one of the major weaknesses of mediation, the mediator's lack of authority to impose a binding decision on the parties,[17] i.e., the mediator's lack of "muscle."

Some have defined med-arb as any ADR procedure combining mediation and arbitration in sequence.[18] At first blush this sounds like a very broad and unrestricted ADR process mentality, but it is the "in sequence" concept which is notable. Under this definition the distinct characteristics of the two processes remain separate and intact and one procedure "ends" before

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[13] Susanna M.. Kim, *The Provisional Director Remedy for Corporate Deadlock: A Proposed Model Statute*, 60 Wash. & Lee L. Rev. 111, 131-132 (2003).

[14] Landry, *supra* note 7, at 264.

[15] Henry, *supra* note 4, at 390.

[16] Landry, *supra* note 7, at 263.

[17] *See* Henry, *supra* note 4, at 387.

[18] *See* Thomas J. Brewer and Lawrence R. Mills, *Combining Mediation and Arbitration*, 54 Disp. Resol. J. 32, 34 (1999).

the other "begins." Mediation and arbitration are not really combined so much as a formal mediation is followed by a formal arbitration in fairly rapid sequential order, and the two processes may or may not be conducted by the same neutral. This is an oft repeated theme, that the mediation stage occurs before the arbitration stage and that both stages are clearly distinct.[19] Again, to some, the inherent differences in mediation and arbitration seriously limit their combination into one process,[20] but I believe the processes can actually be combined and operate effectively free of the "in sequence" mandate.

There are others who view med-arb as more of a "blended mechanism" and believe that the differences between mediation and arbitration are artificial, largely depending on the degree of decision-making power the neutral may exercise during the dispute resolution process.[21] Some proponents not only agree that the process may move back and forth between mediation and arbitration, they consider this flexibility to be one of med-arb's main benefits.[22] To better understand the different philosophies of med-arb it will be helpful to consider the different forms it may take.

B. Different Forms of Med-Arb.

1. Med-Arb Same or Same-Neutral Med-Arb.

As with other forms of med-arb, this is a two-prong process "usually" beginning with mediation followed by arbitration, if it is necessary to resolve unsettled issues. The key feature of the process is that the same person serves as mediator and arbitrator at the request of the

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[19] *See* Peter, *supra* note 6, at 91.

[20] *See* Bartel, *supra* note 2, at 678-679.

[21] *See* de Vera, *supra* note 10, at 155-156.

[22] *See* Phillips, *supra* note 9, at 26, 28.

parties who stipulate in writing their desire and waive any objection to this procedure.[23] This method has also been called the "pure form"[24] of med-arb and the "original med-arb process."[25] There are variations in this form depending on whether the process is invoked by contract or on an ad hoc basis, by who decides when it moves from mediation to arbitration and whether there will be private caucuses in the mediation stage. Also, there is a contingent form of the process in which the parties must agree after the mediation stage if the same person will continue as arbitrator and render the decision.[26] There are conflicting viewpoints on two other aspects of this process: (1) whether the process must always be set up by prior agreement of the parties[27] or if it can be implemented at any time, even where the parties have only agreed to mediate but it fails to resolve all issues;[28] and (2) whether both stages are clearly distinct[29] or if the "process may consist of moving from mediation to arbitration and then back to mediation again."[30] Regardless of the variations in this form of med-arb, it is this method which is most closely identified with the term "med-arb" and this is the form of med-arb on which this paper will focus. Other variations still merit discussion in order to get a fuller picture of the concept of med-arb and of the malleability of the process.

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[23] *Id.* at 26.

[24] Landry, *supra* note 7, at 264 and Bartel, *supra* note 2, at 665.

[25] Peter, *supra* note 6, at 88.

[26] *See* Bartel, *supra* note 2, at 666.

[27] *See Id.* at 665.

[28] *See* Phillips, *supra* note 9, at 30.

[29] *See* Peter, *supra* note 6, at 91.

[30] Phillips, *supra* note 9, at 26.

2. Med-Arb-Diff.

As the name implies, in this model the mediator and arbitrator are different persons. What distinguishes the process from a traditional mediation followed by a traditional arbitration is that both neutrals would be selected before the process begins and the arbitration phase would follow right behind the mediation phase. The mediator would convey to the arbitrator the agreement reached in mediation, but not any confidential information obtained in private caucases. The mediator, in essence, "hands off" the settlement reached to the arbitrator who adopts that part of the award and then proceeds to hear and determine the unresolved issues. Sometimes in this process the arbitrator sits in on the joint opening sessions of the mediation and perhaps even other joint sessions, e.g. the final bringing together of the parties. Advocates of med-arb-diff complain that the med-arbiter has too much power in med-arb-same and may become biased during the mediation phase. Med-arb-diff, however, is more costly and time consuming and it forecloses further attempts to mediate once the process reaches arbitration.[31] Some commentators take issue with even calling this process med-arb. As Bartel says, "calling the process in which different people perform the mediation and arbitration functions med-arb, however, is misleading. Only where the same person performs both functions is the process properly called med-arb. Where different people perform the functions, it is more accurately called mediation and arbitration as distinct processes."[32] Although I follow Bartel's view for purposes of this paper, I believe the parties should be free to fashion the process they prefer and the one best suited to the particular dispute. And, as will be discussed further, there should be

[31] *See* Landry, *supra* note 7, at 267.

[32] Bartel, *supra* note 2, at n.103 (see accompanying text).

less concern on process names and labels and more on the dispute and on the parties' right to self-determination in its resolution.

3. Med-Arb-Diff-Recommendation.

This process is identical to med-arb-diff except that should the participants fail to reach a voluntary agreement during the mediation phase, the mediator submits a recommendation to the arbitrator. It is suggested that the arbitrator usually follows the recommendation.[33]

4. Co-Med-Arb.

In this format the mediator and the arbitrator are different persons who jointly conduct a fact-finding hearing which is followed by mediation without the arbitrator. If the mediation does not resolve all issues, the arbitrator then takes over and ultimately issues a decision.[34] This process is similar to med-arb-diff except the mediator is sitting in on opening hearings and then breaks off to mediate with the parties. The mediator then hands the process back off to the arbitrator to reconvene the hearings in order to resolve the unsettled issues.

5. Med-Arb-Opt-Out.

This is a modification of the "original med-arb" process which provides that once the mediation phase is completed and before the arbitration phase commences, each party is entitled to independently call for a different person to be appointed as arbitrator.[35] This is basically the same as the contingent form of med-arb-same discussed earlier. This concept will be considered again in Section IV as it can blunt some of the criticism or concerns directed towards med-arb.

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[33] *See* Landry, *supra* note 7, at 267.

[34] *See* Peter, *supra* note 6, at 101.

[35] *See Id*. at 98.

And, it can solve a problem for a party who doesn't "hit if off" with the mediator and is concerned about being treated fairly in the arbitration phase.

6. Arb-Med.

Arb-med reverses the sequence of med-arb in that mediation follows arbitration. There are, however, at least two variations this process may take. One accepted view allows the arbitration to conclude, but the award is sealed. The parties then mediate before the same neutral, equally uncertain about the outcome looming in the neutral's envelope.[36] The second variation is similar to the first except the mediator is a different person than the arbitrator. This variation requires an additional process decision to be made in whether the mediator is present throughout the arbitration.[37] At first blush, the logic of this particular process is difficult to comprehend. In med-arb, the parties have the opportunity to avoid the arbitration phase by fully resolving their dispute in the mediation phase or at least limiting the hearing. In arb-med not only are the parties deprived of the opportunity to avoid arbitration, the arbitration phase is almost certain to be more expensive than it would have been in a med-arb process. Since the arbitration occurs first, it must necessarily consist of a full blown adjudicatory hearing of every issue rather than a summary type proceeding or an arbitration of only unresolved issues as is possible in med-arb. To some parties, however, this process may be the most suited for them and/or their dispute. Since the arbitration occurs first, the legal and factual posturing by the parties is over freeing them from the need to posture during mediation. And, the concern that the parties will be reluctant to be candid and open about the weaknesses of their case, fearing

[36] *See* Peter, *supra* note 6, at 99; *See also* Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 Hastings Bus. L. J. 161, 178 (2005).

[37] *See* Dobbins, *supra* note 37, at 178.

negative ramifications in arbitration, is eliminated. Indeed, it would seem that this process would create a unique atmosphere for settlement negotiations. Clearly, the impending finality of the process is undeniable, and the parties know this truly is their last opportunity to control their own destiny by reaching a negotiated settlement.

7. MEDALOA.

MEDALOA stands for Mediation and Last Offer Arbitration. This is a hybrid process very much like original med-arb, the difference being in the arbitration stage. If the parties do not reach a voluntary settlement through mediation, each party then submits a "last offer" to the med-arbiter who must choose between one of the two final offers. This process, by definition, limits the discretion of the arbitrator to decide what he or she believes to be the most appropriate solution, one of the most distinctive features of arbitration, since the award must be limited to one of the two offers.[38]

8. Mediation Windows in Arbitration.

This is an interesting process in which there is an opportunity to conduct a separate mediation during an ongoing arbitration. It is possible for the mediation to occur at any time during the arbitration, i.e., between the hearings, and on more than one occasion. The ability to mediate at different times, on more than one occasion or not at all makes this med-arb format extremely flexible and creative especially if the same neutral is used throughout, though the parties are obviously free to use a separate neutral to mediate by having a mediator "on call" so to speak. The process, however, emphasizes arbitration and, unlike other formats, the parties are not required to mediate but are merely encouraged to do so.[39] Still, there can be a place for this

[38] *See* Landry, *supra* note 7, at 268. *See also* Peter, *supra* note 6, at 100.

[39] *See* Peter, *supra* note 6, at 102.

process and there is much to be said for that mindset that even though arbitration has commenced, it does not have to march inexorably on. I once participated in an unplanned form of this process as will be discussed in Section V.

9. Other Forms of Med-Arb.

There are other procedures that bear the name med-arb in some form, but they will not be discussed herein. While the previously described forms of med-arb do not provide an all-inclusive listing of med-arb methods, they do share the singular point of definition of med-arb, which is finality. It is this author's view that the distinctive characteristic of finality is the essence of med-arb and thus, for purposes of this paper, "med-arb" procedures which lack this characteristic are considered med-arb in name only. (e.g., Non-binding Med-Arb and Med-Arb-Show Cause)

C. "What's in a name?"[40]

Shakespeare may have been telling us that a name is an artificial and meaningless convention, but this does not appear to hold true for med-arb. Not only is the name synonymous with the definition of the process, some commentators believe that the name of the process may be critical to its acceptance as a valid ADR procedure. Some suggest that med-arb be renamed to escape a bad reputation. For example, "transitional arbitration" or "transarb" has been suggested as a name which would make med-arb more acceptable.[41] Some ADR professionals go further, insisting that ADR processes, especially "mixed processes" such as med-arb, must be properly named and called what they are. "Whatever the service being provided, however, it should be

[40] William Shakespeare, *Romeo and Juliet*, Act II, Sc. 2, Line 43.

[41] *See* Gerald F. Phillips, *It's More Than Just "Med-Arb": The Case for "Transitional Arbitration,"* 23 Alternatives to High Cost Litig. 141 (2005); *See also* Phillips, *supra* note 9, at 32.

requested by the parties and accurately labeled. . . . A properly labeled process – or, conversely, a label that has a clear meaning – promotes integrity, disputant satisfaction, and uniform practice."[42]

In my opinion, the necessity to be precise in naming processes smacks of obsession with terminology and the elevation of form over substance. Similarly, the notion that med-arb can escape a bad reputation simply by being renamed seems equally misplaced. If med-arb does, in fact, have a bad reputation, then the answer is not in disguising the process by creating a friendlier label. Med-arb proponents should first determine if the reputation is deserved. If it is not, as advocates of the procedure imply, then efforts should be focused on educating ADR participants of the merits of med-arb and on the importance of focusing on resolution of disputes rather than on the labeling of the methods by which disputes are resolved.

III. Origins and Development of Med-arb.

A complete history of dispute resolution and of the evolution of med-arb is not expedient within the confines of this paper. A review of that history and evolution, however, is helpful and perhaps even necessary in the consideration and development of one's "ADR attitude."

A. Origins.

Med-Arb came about in response to the need for labor disputes to be resolved through compulsory arbitration instead of strikes and lockouts. Sam and John Kagel, the persons credited as the first to develop the process under the name "med-arb," used it initially to settle a 1970 San Francisco nurses' strike. In the Kagel model parties give up the right to strike or lockout, and the

[42] Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937, 948 (1997).

right to ratify the final settlement, because they enter into the med-arb process voluntarily granting the med-arbiter authority to settle if they fail to do so.[43]

The true origins of this concept predate World War II, but it took on a formal structure soon after the December 7, 1941 attack on Pearl Harbor. President Roosevelt, acting on the recommendations of labor leaders, created the National War Labor Board (NWLB). Although the creation of the NWLB was a major step in the development of labor arbitration, the proceedings before the NWLB consisted primarily of mediation and voluntary arbitration with the NWLB arbitrators' seeking equitable rather than legally correct conclusions. "The arbitrator was less the judge between the parties than the friend of both of them, partaking largely of the function of a mediator." The NWLB's arbitration process could have been described as a form of med-arb but it never was. The process was, however, the genesis for a debate that continues to this day, a debate which is a motivation for this paper – whether a neutral can or should serve as both mediator and arbitrator in the same dispute.[44]

B. Industries Where Med-Arb Has Developed.

1. Labor Disputes.

Med-arb developed in the labor arena because of a specific quid pro quo dynamic – management agreeing to provide a grievance procedure culminating in binding arbitration in exchange for the employees losing the right to strike or lockout. Accordingly, using med-arb to settle interest disputes in the public sector helps to equalize the bargaining positions of the

[43] *See* Henry, *supra* note 4, at 389, 390 (citing Kagel & Kagel, *Using Two New Arbitration Techniques*, 95 Monthly Lab. Rev. 11, 12 (1972)). *See also* Peter, *supra* note 6, at 90 (citing Kagel, *Combining Mediation and Arbitration*, 96 Monthly Lab. Rev. 62 (Sept. 1973)).

[44] Bartel, *supra* note 2, at 661, 669-673 (quoting Stein, *Remedies in Labor Arbitration, in challenges to Arbitration: Proc. Of the Thirteenth Ann. Meetingof the Nat'l Acad. Of Arb.*, 39, 41 (J. McKelvey ed. 1961)).

parties, which are lost through provisions prohibiting strikes. In the labor arena, med-arb has apparently found its greatest success in resolving interest disputes (contract negotiation disputes) in fields where a strike is either prohibited or prohibitive. Even proponents of labor med-arb, however, do not believe it should be used to resolve every type of labor dispute and some question whether it is appropriate in private sector labor disputes.[45]

2. International Arbitration.

Med-arb has been used successfully in international arbitration. In an enormously complex copyright dispute between IBM and Fujitsu involving hundreds of millions of dollars, the two party-appointed arbitrators of a three-arbitrator panel engaged in mediation with the parties and later utilized several other innovative ADR methods to successfully resolve the dispute. Despite the success of the IBM/Fujitsu case, it was so unusual in its issues and circumstances that it cannot necessarily be touted as a basis to promote med-arb in all international disputes. It does demonstrate, however, that the third party neutral should be open to possibilities to shape a more effective dispute resolution process. It also demonstrates that med-arb can be an effective tool to identify and isolate disputed facts, thereby allowing the parties to narrow the issues. Then, the parties can dispose of undisputed issues and more efficiently resolve the disputed ones, thus saving time and money.[46] Forms of med-arb exist in Chinese, German, Swiss and other nations' international arbitrations. Brazil, China and Hong Kong have actually enacted arbitration laws that contain med-arb provisions.[47]

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[45] *See* Henry, *supra* note 4, at 392, 396.

[46] *See* Peter, *supra* note 6, at 103-106 (citing American Arbitration Association, Commercial Arbitration Case No. 13T-117-0636-85 (Sept. 15, 1987 award and Nov. 29, 1988 award)).

[47] *See* Onyema, *supra* note1, at 413-415. *See also* de Vera, *supra* note 10, at 175-194.

3. Corporate Disputes - Inside and Out.

Med-arb has proven to be effective in certain types of cases between corporate disputants. This is particularly true in regard to disputes that are less important than, and thus irritants to, a larger relationship. Proponents firmly believe that the parties' business relationship is more likely to continue after med-arb than some other processes.[48] For this reason and others, med-arb has found a foothold in the arena of corporate dispute. In fact, in a 1997 survey of the ADR practices of Fortune 1,000 corporations, forty percent of the respondents had participated in med-arb ADR procedures.[49] Also, disputes within corporations, such as shareholder conflicts and corporate deadlock, can prove well-suited to the med-arb process. Combining the cooperative aspects of mediation and the finality of arbitration can be particularly advantageous for deadlocked corporations. Not only can corporate dissolution and other negative consequences be avoided, but med-arb can create incentives to the parties be less hostile, act in good faith and be more creative.[50]

Clearly, there are other arenas where med-arb can be an effective means of dispute resolution. It is a tool to be used and whether or not it is suitable depends on the circumstances and parties involved in a particular dispute, and not because some categories of industry or dispute are automatically taboo. I believe the med-arb process will find its way into more and more types of disputes as an effective, and perhaps preferred, resolution vehicle.

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[48] *See* Phillips, *supra* note 9, at 29.

[49] *See* Thomas J. Brewer and Lawrence R. Mills, *Combining Mediation & Arbitration*, 54 Disp. Resol. J. 32, 34 (1999).

[50] *See* Kim, *supra* note 13, at 131-134.

IV. Criticisms and Accolades.

Much of the contemporary debate over med-arb focuses on the perceived advantages and disadvantages of the process. Some of the debate is abstract because the degree to which an advantage or disadvantage is real or imagined depends on the point of view of the commentator and the degree to which he or she is an advocate or critic of the process. One must also consider whether the advocate or critic has actual experience in the process. One staunch proponent of the process, and an experienced practitioner as well, describes the disadvantages of med-arb as "theoretical" and believes that they are outweighed by the advantages of the process.[51] Regardless, the med-arb literature is replete with descriptions of perceived advantages and disadvantages, be they real or imagined.

A. Advantages

1. Flexibility.

Gerald Phillips is a full-time neutral in Los Angeles, California who specializes in large complex commercial and entertainment disputes. He has used med-arb to resolve several extremely challenging disputes. He is clearly a leading promoter of the process and has written extensively on the subject. Phillips believes that med-arb is the most flexible of all the ADR processes.[52] This is because the process offers the opportunity to move from mediation to arbitration, back to mediation and so on. Even within the arbitration phase the "arbitrator" can step back into his mediator's role to mediate a discrete part of his "award."

In one example, after failing to mediate a dispute to conclusion, Mr. Phillips, the neutral, commenced the arbitration phase and determined that he would award a permanent injunction to

[51] *See* Phillips, *supra* note 9, at 32.

[52] *See Id.* at 26.

the Claimant. At that point it was clear that the parties desired to work together on the terms of the injunction and the arbitrator mediated the terms of the injunction with counsel. The parties were so satisfied with the result that the Claimant waived its claim for damages, content with the injunctive relief.[53] This kind of flexibility is simply unattainable in mediation or arbitration alone. This example is interesting because the result made the process appear overwhelmingly logical and appropriate; yet, many ADR professionals will insist that it should never have even been contemplated.

Perhaps the logic prevails only because the process resulted in a successful and satisfying conclusion. Arguably, a disastrous result would fuel arguments against the logic of the process. There are critics, however, who would argue that the result is irrelevant because mediation and arbitration have their own lines of "morality" which should not be crossed.[54] Some would also posit that there are only a handful of neutrals as talented, knowledgeable and respected as Gerald Phillips who "can accomplish dispute resolution wonders, even with med-arb" and that the kind of successes he can "pull off are extremely rare."[55] Certainly, the selection of the neutral is critical to any med-arb process. Is it less critical, however, in any other ADR process? While the search for the answer is more fertile ground for debate one can understand how the competence and reputation of the neutral, and particularly the trust the parties and their counsel have in the neutral, are more essential to the success of med-arb than traditional mediation or arbitration. Mr. Phillips himself believes the fact that he is known and trusted by the participants is "the most

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[53] *See* Phillips, *supra* note 42, at 153, 154.

[54] *See* Michael F. Hoellering, *Mediation & Arbitration: A Growing Interaction*, 52 Disp. Resol. J. 23, 26 (1997).

[55] Email from James Groton, a retired partner of Sutherland, Asbill & Brennan, LLP in Atlanta and a neutral, to author (March 20, 2006, 1:24 PM CST) (on file with author).

important thing."[56] Based on conversations with Mr. Phillips and on his reputation among his peers I readily accept that the key to his success and to the success and integrity of the process is his trustworthiness as viewed by the parties and their counsel. I must also agree with Mr. Phillips, that flexibility is a unique and hugely beneficial attribute of med-arb.

2. Efficiency (time and money).

That med-arb possesses superior cost and time efficiency over separate mediation and arbitration proceedings is not fairly debatable.[57] This efficiency is viewed by some as the key advantage of med-arb. If mediation fails, the parties do not have to hire another neutral to render an award. Instead they simply continue with the mediator who likely already knows most of the information necessary to make a decision.[58] This also means that the arbitration phase has the potential to be truncated or presented in a summary fashion not possible in a formal arbitration conducted by a different neutral. And, the parties will often narrow the dispute in the mediation phase so that the arbitration phase of med-arb will only have to deal with unresolved issues.[59]

In terms of time savings, the parties not only save the time necessary to prepare for a formal arbitration before a separate neutral, they can proceed immediately into the arbitration phase. So, the parties achieve significant savings of time and money over separate mediation and

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[56] Telephone interview with Gerald F. Phillips, full-time neutral based in Los Angeles, CA, in Murfreesboro, TN (May 5, 2006). Mr. Phillips points out that a comprehensive and properly worded stipulation for the parties to review and execute is also critical to the success of the process.

[57] *See* David L. Gregory, *The Internationalization of Employment Dispute Mediation*, 17 N.Y. Int'l L. Rev. 2, 28 (2001). *See also* Brewer and Mills, *supra* note 18, at 34.

[58] *Id. See also* Phillips *supra* note 9 at 28; Kathryn L. Hale, *Nonbinding Arbitration: An Oxymoron?* 24 U. Tol. L. Rev. 1003 n.18 (1993) (citing Goldberg et al., *Dispute Resolution: Negotiation, Mediation, and Other Processes* 223 (2d ed. 1992)).

[59] *See* Brewer and Mills *supra* note 18, at 34.

arbitration proceedings, but they are also certain to obtain a resolution of their dispute within a reasonable time.[60]

3. Incentive to settle.

"The primary disadvantage to mediation is the mediator's lack of authority to create a final and binding settlement."[61] While some would disagree that this is a disadvantage, others firmly believe that a med-arbiter's authority to arbitrate those issues unresolved in mediation actually decreases the likelihood that any issues will actually have to be decided in arbitration. The presence of the med-arbiter and the threat of an arbitrated decision create tremendous incentive for the parties to successfully mediate their dispute.[62] Truly, beauty is in the eye of the beholder in terms of this purported attribute of med-arb. Some view this "tremendous incentive" as coercion and that parties to med-arb may feel they have no choice and have to settle less they upset the med-arbiter, the decider of their fate.[63] This divide between different members of the ADR community is ironic. The exact same circumstance can be viewed as appropriate subtle pressure by one and a loss of "free will" by another.[64] What one calls "mediation with muscle"[65] another calls "muscle-mediation."[66] There appears to be some agreement, however, that parties in med-arb are more likely to reach a negotiated settlement than in mediation alone.[67]

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[60] *See Id. See also* Phillips, *supra* note 9, at 28.

[61] Henry, *supra* note 4, at 390.

[62] *Id*.

[63] *See* Peter, *supra* note 6, at 94. *See also* Bartel, *supra* note 2, at 679.

[64] *See* Peter, *supra* note 6, at 94.

[65] Henry, *supra* note 4, at 390.

[66] Peter, *supra* note 6, at 94.

[67] *See* Bartel, *supra* note 2, at 681.

4. Parties' approach to the process.

Besides the incentive to settle, med-arb appears to create an incentive for the parties to participate in the mediation phase in sincerity and good faith. The reason is the knowledge that should they fail to reach an agreement they will immediately lose control over the outcome. The parties, therefore, are more likely to approach the bargaining table with the honest demands. There is research to support the conclusion that disputants are more conciliatory and less hostile in med-arb than mediation alone.[68]

This research has also shown that with a different neutral acting as an arbitrator after the mediation phase, the mediator was less involved and the parties were less creative.[69] It would follow then that parties in med-arb feel they have more control over the process, and certainly more than in "pure arbitration."[70] Logic suggests that a process with more conciliatory, more creative and less hostile parties is going to achieve a better, or at least more satisfying result. In fact, in a study using 27 executive MBA students as the sample population, med-arb emerged as a more satisfying process over either mediation or arbitration alone.[71] Though only a limited study without proof of its external validity, the results are intriguing and suggest the need for similar but more comprehensive studies of actual ADR participants.

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[68] *See* Kim, *supra* note 13, at 132 (citing Neil B. McGillicuddy et al., Third-Party Intervention: A Field Experiment Comparing Three Different Models, 53 J. Personalty & Soc. Psychol. 104, 110 (1987)).

[69] *See Id.*

[70] *See* Brewer and Mills, *supra* note 18, at 34.

[71] *See* Cohen and Cohen, *Relative Satisfaction with ADR: Some Emperical Evidence*, 57 Disp. Resol. J. 37 (2002).

5. Finality.

"Med/Arb's most appealing attribute is that the dispute will be resolved one way or the other."[72] The attribute of finality is, indeed, hard to overstate. Knowing the dispute will be resolved brings tremendous tangible and intangible benefits to the parties and the process. This attribute provides advantages not only over mediation, but arbitration as well. Regardless of whether the final product of a med-arb results entirely from mediation or both mediation and arbitration, it becomes the entire settlement, which is binding and enforceable at law. Accordingly, med-arb overcomes a major weakness of mediation. Also, arbitration is criticized as a slow, expensive, formalistic and unnecessarily adversarial process. Med-arb reduces costs, time and even the adversarial nature of arbitration.[73]

Finality is arguably med-arb's most appealing attribute. Finality is the advantage that is largely responsible for the existence of many of the other advantages. The savings of time and money, and the manner in which the parties approach the process are due in large part to the finality that pervades the med-arb process.

B. Disadvantages.

1. Power of the mediator-arbitrator.

As with other characteristics of med-arb, the neutral's power can be viewed as both an advantage and a disadvantage. The med-arbiter's power has been called "extraordinary" and "enormous," and there is concern by industry leaders that such power too often results in pressure tactics.[74] This power is the "muscle" of the process which, depending on one's point of view, is

[72] Flake, *supra* note 52.

[73] *See* Henry, *supra* note 4, at 390, 391, 393, 394.

[74] *See* Hoellering, *supra* note 94, at 25. *See also* Bartel, *supra* note 2, at 679.

either a source of abuse[75] or the strength of the process.[76] Certainly, it is critical that a neutral be selected who has the skill and experience necessary to exercise this power appropriately and not abuse it.

2. Confidentiality.

Many ADR professionals view confidentiality as the cornerstone of mediation. It is emphasized in virtually every mediation session and most rules governing the conduct of mediations impose stringent limitations on what information divulged in a mediation can be used subsequently outside of the mediation process.[77] Obviously, in med-arb information obtained during the mediation phase may be used by, or influence the neutral in his or her role as an arbitrator. Also, confidential information is often communicated to the neutral in private caucuses. Unless the parties choose a "no-caucus" approach (which they are free to do), the neutral will have received confidential information outside the presence of the other party which could then be used in an arbitration deliberation.[78]

The real premise of this criticism is that the med-arbiter cannot be completely neutral in the decision making phase, having gained some information, perhaps unfavorable, in confidence in the mediation phase.[79] This confidentiality criticism, however, needs to be considered in the proper context. Judges and juries are regularly required to ignore information that has been deemed improper. No one seems to seriously question the concept that a judge presiding over a bench trial is required to, and can, disregard evidence he or she has heard but has subsequently

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[75] *See* Bartel, *supra* note 2 at 680. *See also* Phillips, *supra* note 9, at 27.

[76] *See* Bartel, *supra* note 2, at 682.

[77] *See* Brewer and Mills, *supra* note 18, at 35.

[78] *See* Brewer and Mills, *supra* note 18, at 35.

[79] *See* Bartel, *supra* note 2, at 686.

determined to be inadmissible. To be fair, however, one must concede that a judge will rarely be exposed to evidence on which he or she must not rely which amounts to an admission by a party that they have no case or that they have a frail legal argument. Still, the concept that a trier of fact can ignore improper evidence enjoys broad acceptance in American jurisprudence.

Med-arb should actually reduce the concern associated with another aspect of confidentiality in mediation. This is the concern regarding the use of information obtained during a mediation where a party repeats at trial or arbitration statements made by the other party during the mediation. This situation is obviously not as fraught with peril where the med-arbiter has heard the information directly and understands full well both the context in which the information was conveyed and the dynamics and protocol of the med-arb process. Also, parties to med-arb are free to fashion the process as they see fit and they can implement specific procedures or safeguards to deal with the confidentiality issues. Moreover, this issue ultimately rests with the competence of the neutral and the trust the parties place in him or her. Parties should be aware of the confidentiality issues when considering med-arb, but they should be perfectly free to enter into the process so long as the information sufficient to obtain their informed consent has been disclosed.

3. Due process.

Opponents of med-arb say that arbitrators should only make decisions on the evidence presented in hearings with each side able to challenge the evidence.[80] In med-arb, the arbitrator can use information obtained in mediation which is not only unsworn, it may be from a caucus involving only one party. Critics believe this possibility runs afoul of the most basic due process requirements. Private sessions, which are confidential, violate due process because the other

[80] *See* Phillips, *supra* note 9, at 27.

party is denied the right to challenge what is said to the med-arbiter and which may effectively become "evidence."[81] Also, disputants may feel more free to embellish their presentation in a private caucus than in a hearing where witnesses are sworn. Later consideration of this embellished information by the neutral arguably has the effect of allowing "perjury" to influence an award.[82]

While denial of due process is always a serious concern, this is another criticism that can be overstated. It is easy to "create" alarm when concerns about violations of confidentiality and due process are raised. The philosophy behind rules of evidence and established procedural safeguards is that these protections will aid in achieving a better result. Whether a better result is consistently achieved can certainly be debated as can the meaning of "better." In the case of med-arb the protection is in full disclosure to the parties, informed consent and/or knowing waiver by the parties, proper crafting of the process and a competent, trustworthy neutral. This doesn't mean that there is one hundred percent protection from an infringement on due process. It means that the due process dangers have been minimized and the parties, in exercising their right of self-determination, have elected a process where these dangers are significantly outweighed by its advantages.

4. Coercion.

This criticism has been discussed previously.[83] To be fair to med-arb critics, it bears repeating that coercion in med-arb is viewed by some as a fatal flaw. They believe that

[81] *See* Peter, *supra* note 6, at 94.

[82] *See* Gregory, *supra* note 96, at 29.

[83] *See* Section IV(A)(3).

agreements reached in mediation within a med-arb process are a result of strong-arm tactics. Accordingly, such agreements cannot, by definition, be voluntary.[84]

It is difficult for some commentators to accept med-arb since it lacks what they consider to be a critical attribute of mediation, the ability to "walk away."[85] I believe the coercion issue has been put in the proper perspective by Barry Bartel:

> A degree of coercion within the med-arb process is productive as long as there is not coercion to utilize med-arb. In other words, as long as the parties understand the med-arb process and its characteristics, and choose willingly to give the med-arbitrator the powers associated with that position, the potential disadvantages of the process are no longer limitations but its strengths . . . where there is not coercion into med-arb the disadvantages may essentially disappear.[86]

Furthermore, the coercion complained of in med-arb appears to be focused on the innate and subtle "coercions" which exists because of the nature of med-arb – the awareness by the parties of the looming decision and the power of the neutral. Again, some view this actually as an advantage, but any competent, ethical neutral must be sensitive to the line between appropriate pressure to settle and inappropriate coercion. This line can be crossed in a traditional mediation if the neutral, due to incompetence or overzealousness, allows it to happen.

5. Reluctance by parties to disclose.

This criticism has also been touched on previously and does not require much additional discussion. What is intriguing is the fact that when looking at the same aspects of the process,

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[84] *See* Landry, *supra* note 7, at 265 (quoting Lon Fuller, *Collective Bargaining and the Arbitrator*, 1962 Nat'l Acad. Arb. 8, 255 reprinted in Dispute Resolution 12 (1985)).

[85] *See* Hoellering, *supra* note 94, at 25.

[86] Bartel, *supra* note 2, at 690.

the critic sees parties reluctant to disclose[87] and the proponent sees parties who are more open and forthcoming.[88]

There does not appear to be any empirical research supporting the belief that parties are more reluctant to be open in med-arb. The literature is usually couched in terms of the parties "may be inhibited."[89] On the other hand, there does appear to be research which indicates that the parties are more likely to be honest and open in their disclosures in med-arb.[90] Still, there are experienced, competent neutrals who believe it is virtually impossible for the parties to "share their frank thoughts about the down sides of their case with a mediator if the party knew that if the mediation failed the neutral would then be called on to rule on the merits of the dispute."[91] This criticism, as any criticism voiced by an experienced and competent neutral, merits due consideration. One must recognize, however, that this criticism, like many others, results from viewing med-arb through the lens of traditional mediation. But med-arb is not traditional mediation, it is a different process. And, one must consider the fact that the parties are not always completely open to sharing their frank thoughts about the down sides of their case, or accepting that down sides exist, even in traditional mediation. In discussions with others about med-arb I have found this concern is often to be the first one mentioned. It appears, therefore, that properly conducted surveys of med-arb participants and other scientifically valid research in this area would produce valuable information.

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[87] *See* Hoellering, *supra* note 94, at 25.

[88] *See* Landry, *supra* note 7, at 266.

[89] Brewer and Mills, *supra* note 18, at 35.

[90] *See* Kim, *supra* note 13, at 132 (citing Neil B. McGillicuddy et al., Third-Party Intervention: A Field Experiment Comparing Three Different Models, 53 J. Personalty & Soc. Psychol. 104, 110 (1987)).

[91] Groton, *supra* note 95.

6. Manipulation of the process.

There is no question that a party to med-arb can force the transition from mediation to arbitration to occur by simply refusing to cooperate or negotiate.[92] The same holds true, however, in pure mediation. And, the research available indicates this may be less likely to occur in med-arb than in mediation alone.

7. The "myriad of ethical dilemmas."

Some commentators believe that the mere fact that a mediator may serve as an arbitrator in subsequent proceedings creates a "myriad of ethical dilemmas."[93] This is akin to the views that the process is inherently flawed, is heretical and should never be considered by a neutral. The essence of this mindset is based on other criticisms discussed previously – the chilling effect on participants, the arbitrator being unable to discount unfavorable information learned confidentially, etc. Besides the fact that unfavorable information should perhaps not always be discounted, this entire ethical dilemma appears overstated. A "myriad of ethical dilemmas" implies that a litany of irreconcilable ethical conflicts exist in every med-arb procedure. This is simply not the case, especially where there exists full disclosure, knowledgeable parties and a competent, ethical neutral.

8. Conduct of the neutral.

Some critics of the process posit that the med-arb process irreparably corrupts the neutral. The argument is that the neutral loses his or her neutrality, becomes less vigorous or will be tempted into questionable conduct, i.e. the inability to avoid consideration of unfavorable

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[92] *See* Bartel, *supra* note 2, at 683.

[93] Van A. Anderson, *Alternative dispute Resolution and Professional Responsibility in South Carolina: A Changing Landscape*, 55 S.C. L. Rev. 191, 195, 196 (2003) (citing Karl A. Folkens, *Selecting the "Right" Form of ADR*, 1, 14 (2003) (unpublished manuscript, on file with Folkens)).

confidential information. Although this paper has already touched on these issues, some additional discussion about med-arb's accolades and criticisms in general is called for.

C. Summary of advantages and disadvantages.

Just as in the case of med-arb's advantages, each of its perceived disadvantages are interrelated. One could argue they are all different variations of a fundamental flaw – the same neutral taking off a mediator's hat and putting on an arbitrator's hat. Accordingly, one can envision numerous hypothetical situations in which med-arb could prove to be problematic, at least from a party or party advocate perspective, and prevent some parties from even considering med-arb. Take, for example, the situation where there is concern that a party may clash with a neutral during the mediation phase, prove "unlikable" to the neutral, or otherwise lose all confidence in the neutral. The mere possibility of such situations occurring makes some practitioners extremely hesitant to engage in med-arb.[94] Or, perhaps because of a perceived disparity of power, a party (or the party's advocate) fears that they will reveal too much in the mediation phase.

While such situations most likely would rarely arise and should not be the litmus test for the appropriateness of med-arb, such concerns should not be summarily dismissed. Med-arb, like any the process, belongs to the parties, and any concern or reservation by a participating party is, by definition, legitimate. The solution to such dilemmas, however, lies not in the blanket dismissal of med-arb as a viable process, but in appropriating its innate adaptability and flexibility. The fundamental premise of this paper is that parties should be free to fashion the process to meet their particular needs. It is the parties' right to self-determination, which is sacrosanct, not the particular methods of determination that have evolved. This applies to med-

[94] Interview with Larry McClellan, Des Moines attorney and neutral, in Columbia, MO (April 10, 2006).

arb as much, if not more, than any other process. By creatively looking at the process, the parties may find it worth using despite their initial problematic concerns.

In terms of the specific problematic scenarios discussed above, employing the "med-arb-opt-out" concept discussed previously is one solution. The prohibitive concerns are effectively erased if each party retains the unilateral right to opt out of a same-neutral-med-arb after the mediation phase. Some believe that the "med-arb-opt-out" format ultimately best allows the parties to reach an agreement in that it eliminates issues of coercion, impartiality of the neutral, and the parties' reluctance to be open or feel free to express reservations about the neutral.[95]

It may be that "same neutral" concerns prove unfounded once a party is engaged in the process or, perhaps, the mere existence of a right to "veto" the process could create an atmosphere which eliminates the need to actually do so. Regardless, the right to opt out should blunt not only most criticisms of "same neutral med-arb", but also most of the criticisms attached to med-arb in general. What may be lost, however, is the intangible benefit many see as the key characteristic and advantage of same-neutral-med-arb – the incentive to settle created by the neutral's authority to decide, i.e. the looming finality.

V. "Adaptive ADR"

Once there was an inquisitive young girl who watched her mother prepare a beautiful chuck roast for Sunday dinner. Before placing the roast in the pan for baking, the mother cut off one end and threw it away. Perplexed, the girl asked her mother why she discarded a seemingly perfect piece of meat. Her mother replied, "Oh, that's the way my mother always prepared a roast." Now even more curious, the young girl could hardly wait for her next visit to her grandmother's house to ask her why she threw away one end of a roast. Her grandmother's reply did nothing to abate the girl's curiosity because the answer was the same, "That's the way my

mother always did it." Although more perplexed than ever, the young girl felt fortunate because her great-grandmother was still alive and only a telephone call away. The girl's anticipation was palpable when she called her great-grandmother to ask if she cut off one end of a roast before baking. The great-grandmother confirmed that yes, indeed, she would cut off one end of any roast she baked for the family dinner. "But why great-grandmother, what does that do?" the girl asked anxiously. Great-grandmother replied, "Why it's very simple, I only had the one pan and it just wasn't big enough for a family size chuck roast."

There is more than one moral to this story. One is to be wary of doing something a certain way just because that's the way it has always been done. Another is to find another pan or perhaps use more than one pan (dispute resolution method) instead of fixing the roast (dispute) to fit the only chuck roast pan you have. One can accept this concept in theory, but it often proves difficult in practice. It seems that human beings possess a natural inclination to stick with the familiar and to avoid changes that might tend to "rock the boat." Said another way, most people have a tendency to become devoted to processes and procedures, the means they have created or adopted to achieve certain ends. What can follow, and inevitably does when there is excessive devotion to process, is the means becoming the end.

There is, of course, a reason for the creation of any process. Just as with the young girl's great-grandmother, a problem exists and a logical and legitimate process is created to solve it. The danger comes in applying the process without variation to every similar problem that comes along without any consideration given to whether: 1) the process fits the specific problem; 2) the process should be modified to fit the problem, or 3) an entirely different process should be employed. This paper suggests that this danger exists in the field of ADR just as much as in any other. Although the pejorative term "alternative" is the cornerstone for the now famous initials,

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[95] *See* Peter, *supra* note 6, at 98 and 116.

"ADR", there appears to be a mind-set that there are only certain "alternatives" available and that the "alternatives" are, and should remain, distinct and separate from one another. This means that the distinctiveness of each process must be preserved, almost at all costs, even at the expense of the dispute. The truth is, however, that a dispute should not be fashioned to fit a process, the process should be fashioned to fit the dispute. Said another way, "the fix should be designed to fit the fuss."[96]

Obsessive devotion to process is, by definition, a limiting and inhibiting exercise. Loyalty to a particular process or processes can be carried to an extreme where not only flexibility and creativity suffer, but outright antagonism develops towards other forms of that process or other ADR procedures. For example, some mediators ascribe to one particular form of mediation and ignore all others.[97] Some believe that there is a resistance to any kind of flexibility among so called "professional mediators" and that there exists an undue devotion to process.[98]

In light of the apparent need to "name" ADR methods and processes, I suggest "Adaptive ADR," but not so much as a name for a process as a name for a philosophy or attitude. Perhaps its adoption will begin a trend towards less need to name. Whether the devotion to process is really out of balance or just this author's obsession in the other direction, there seems to be a pervasive mind-set that a dispute must be made to fit the process rather than the reverse. Said another way, we sometimes feel compelled to make the square peg dispute fit the round hole process. Fashioning the process to the dispute is more logical, appropriate and "moral" than the

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[96] Phillips, *supra* note 42, at 152.

[97] *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid For The Perplexed*, 1 Harv. Negot. L. Rev. 7, 12 (1996).

[98] *See* Groton, *supra* note 95.

other way around. Should we not seek the best, fairest, most equitable and truest result possible? If so, then the "best" process should be sought first and fashioned for the particular dispute. And, there should be the ability to "change horses in mid-stream" and adapt, combine or reverse processes when circumstances warrant.

Consider the following scenario. A state's department of education hires a general contractor to build a school. The general contractor hires a subcontractor to install the gymnasium floor. Unfortunately, water seepage into the building damages the floor. The seepage appears due to an error by the state's architect. The state refuses to accept responsibility and arbitrarily reduces the general contractor's contract by $40,000.00, an amount the state determines is necessary to repair the floor. The floor can actually be repaired for $20,000.00. While the matter is on administrative appeal with the state, the general contractor has no choice but to reduce the subcontractor's contract by $40,000.00. The subcontractor's only remedy is to demand arbitration with the general contractor. During the arbitration, it becomes clear to the arbitrator that the general contractor and subcontractor are both victims, that they do not desire to be adversarial with one another but are, in fact, in agreement as to the cause and wish there was another solution.

This scenario was an actual case in which I was the arbitrator. With the permission of the parties and the administering body for the arbitration, I suggested that the parties consider mediation and the exploration of a creative way to resolve their "dispute" with one another. It was clear that the dispute they had was purely technical and that, in reality, they had no real dispute with one another. The parties wholeheartedly agreed and then asked me to do the mediation. After necessary disclosures and consents, I agreed, and we were able to successfully fashion a resolution between these two parties. If someone wanted to name this process, they

could call it another form of "arb-med," or perhaps "mediation windows in arbitration." To do so, however, would be counterproductive and miss the point. If compelled to name it, I choose simply "Adaptive ADR." I am quite sure that more than one ADR practitioner would consider that what I did was wrong and perhaps "heretical or even unethical." I believed, and still do, that continuing with the arbitration without suggesting mediation and creative problem solving to these parties would have been improper.

I am not alone in the belief in adaptive ADR. James Groton says it this way: "Nevertheless, the genius of ADR is is (sic) flexibility and adaptability. I have often said that the A in ADR should stand for Adaptable, not the almost-pejorative term Alternative. Every dispute, with its unique parties and origin and surrounding circumstances, is unique and therefore deserves a process that it best suited to the resolution of that dispute. One size doesn't fit all."[99]

Still, there is some tendency in all of us to be married to process. But what have we accomplished if we preserve process yet obtain a result less satisfactory than could have been accomplished by adapting the process? Legal scholars have noted the possibility of obsessive devotion to process.

> "Procedures are inanimate phenomena that should be means to ends, not ends in themselves. Yet many of us make fetishes of our favorite procedures as if they have some extra measure of goodness. These procedures are incredibly malleable and can yield better or worse effects depending on many things, especially how people use them. . . . Instead of investing so much of our cultural resources in myths about our most (or least) favorite procedures, we should invest more in realistic stories honoring people who work together to make good choices in using procedures to satisfy people's interest. . . ."[100] Our focus should not be on ". . . the myths that canonize or demonize particular procedures . . ."[101]

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[99] Groton, *supra* note 95.

[100] John Lande, *Shifting the Focus From the Myth of "The Vanishing Trial" to Complex Conflict Management Systems, or I Learned almost Everything I Need to Know About Conflict Resolution From Marc Galanter,* Cardozo Journal of Conflict Resolution 27, 28 (forthcoming

ADR is driven in large degree by lawyers, and many, if not most, ADR practitioners are lawyers. Since most law schools now teach ADR, I suggest that ADR curriculums include more than just a study of ADR forms and methods. ADR curriculums could be broadened to include courses which would impact how ADR is viewed, such as, the "Ecology of Conflict Management Systems,"[102] "Creative Problem Solving" and "Therapeutic Jurisprudence."[103]

It has been a long and arduous journey to bring lawyers into the world of ADR. Many litigators were drug kicking and screaming into the ADR fold. Hopefully it will not be as long a journey for lawyers of the future. For this to happen, we need to teach more than the science of ADR and more than ADR procedures. We need to teach about the philosophy of dispute resolution and the different ways a dispute may be approached. Lawyers are trained "to think in categories with criteria."[104] Most people are to some degree. Instruction on how to view, analyze and choose (or create) an ADR procedure based on need rather than category, and on possibilities rather than criteria would be a beneficial addition to any law school curriculum. Otherwise, the mindset that there are only a finite number of specific and unalterable ADR methods available will continue. As the saying goes, "if the only thing you have is a hammer, everything looks like a nail."[105]

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[101] *Id.*

[102] *Id.* at 21.

[103] Edward A. Dauer, *Reflections on Therapeutic Jurisprudence, Creative Problem Solving, and Clinical Education in the Transactional Curriculum*, 17 St. Thomas L. Rev. 483 (2005).

[104] *Id.* at 493.

[105] Abraham Maslow, *The Psychology of Science - A Reconnaissance*, New York Harper and Row (1996).

VI. Conclusion.

Med-arb has become or is becoming a distinct alternative dispute resolution process with its own advantages, disadvantages, proponents and critics. Although not suitable for every situation, med-arb can be an effective tool in the resolution of many types of disputes. Lawyers, new or not so new, need to see more than just a hammer in their dispute resolution toolbox; so does every neutral in the ADR community.

Although the American Arbitration Association does not recommend med-arb, its current president has stated beautifully why I believe med-arb, variations of it and processes not even conceived of yet, will find favor in the ADR world of the future.

> We don't have hidebound rules. Think about the rules we do have today. The rules by and large say it has to be a fair process. In the interest of fairness and justice, the arbitrator or mediator can do X or do Y. Many of the rules are very open-ended. They invite, they absolutely invite creativity. We are going to make the process continually more responsive to the needs of the users. And, again, for individuals, for industries and professionals that means they can help shape a process, they can take a piece of this and a part of that and develop remedies and opportunities that we cannot fathom today.[106]

I suggest we think about how we look at ADR. When viewed from a pure dispute resolution perspective, as opposed to a dispute resolution process perspective, the distinctness and individuality of ADR procedures become subordinate to the dynamics of the dispute and the parties involved. The "best way" to resolve the dispute takes on supreme importance and substance prevails over form. The less important forms (dispute resolution procedures) remain means to the more important end (resolution of the dispute). Accordingly, the forms become adaptable, combinable, reversible and even discardable for the sake of the parties and their

[106] American Arbitration Association, *Managing Change and Innovation: AAA President Slate Focuses ADR Challenges,* 51 Sep. Disp. Resol. J. 29 (1996).

dispute. After all, one of ADR's most appealing features is "the flexibility to create something different that suits the needs of the particular challenges in a case."[107] Certainly, every process must be properly, ethically and appropriately administered, but competent and ethical neutrals working with informed parties should not have difficulty meeting this requirement, even when practicing adaptive ADR.

[107] Robert S. Peckar, *Technical Mediation, A New Tool for Resolving Complex Construction Disputes*, 60 Disp. Resol. J. 34 (2005).