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EDITOR'S NOTE

Mediation as a process of dispute resolution is undergoing various changes. It has evolved more than a tool for dispute resolution or management. Apart from the dispute resolution properties, the mode and method used in mediation is also undergoing changes. In this edition, the property and method of mediation is being discussed. We would like to know the views of mediators on this aspect. Should we allow mediation to develop as a culture or confine its conservative nature?

Looking forward!

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Dispute Resolution Mules

Preventing the process from being part of the problem

: MICHAEL LEATHES

Packaging non-contentious mediation in the same box as adversarial arbitration has had an important unintended upside - it encourages the development and use of hybrid forms that drive synergy from the best features of both processes to generate holistic benefits. Many creative professionals in the dispute resolution field have come up with some imaginative and useful options. Process should be configured to fit the substance of an issue and all the parties engaged in it. Never the other way around. The author analyses the various hybrid forms.

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

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

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

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

* I am grateful to mediators and arbitrators Alan Limbury of Strategic Resolution in Sydney, Jeremy Lack, a JAMS International panelist in Geneva and Peter Phillips of Business Conflict Management in Montclair NJ and to Irena Vanenkova, of IMI and Ute Joas Quinn of Shell International, for reviewing this article and offering valuable practical insights, experience, wisdom and support.

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

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

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

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

Arb-Med

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

The advantage is that the parties know they will reach an outcome, but the uncertainty of what the envelope contains motivates them to find a negotiated outcome rather than risk opening Pandora's Box. Arb-Med can be used to break deadlocks in mediations and even in negotiations (for example, where parties cannot agree on an amount of money to change hands[1]).

(Footnotes)

[1] see: Einstein's Lessons in Mediationhttp://imimediation.org/index.php?cID=129&cType=document

Med-Arb

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

Non-Binding Arb-Med and Med-Arb

Instead of the arbitration resulting in a binding decision, the parties could agree that they would not be bound by the outcome of the arbitration phase. Some might argue that such a process would be impotent and pointless, and indistinguishable from conciliation (a form of evaluative mediation), but others see advantage in the greater degree of structure and formality to the process as well as its capacity to forge a range within which a settlement could be reached[2], and the positive impact that can have on the negotiating dynamics between the parties.

Conciliation/Evaluative Mediation/Early Neutral Evaluation

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

Mini-Trial

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

Party Hat-Swapping

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

The American mediator, David Shapiro famously said, shortly before he died in October 2009: "*People come to me in love with their case. I tell them - I'm going to break up your romance.*" Getting each party to swap hats and present the other side's case as an acting performance is a clever way to break up the blind passion they may have for their case. Of course the parties all have to agree to do it, but the exercise has several

(Footnotes)

[2] Known to many dispute resolvers as ZOPA - Zone of Potential Agreement.

benefits. First, in most cases, the parties really have not considered the other side's position or interests in the depth they should. Secondly, it is an effective reality testing exercise. Thirdly, it gets the main positional issues on the table up front and in Technicolor. And finally, it is fun - it breaks the layer of ice covering a frozen relationship. A lot of laughing and pulled faces goes on. A great platform for effective mediation.

Non-binding Arbitration

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

Baseball Arbitration (also called Mediation and Last Offer Arbitration)

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

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

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

The Lighter Side

On reaching his plane seat a man is surprised to see a parrot strapped in next to him. He asks the stewardess for a coffee where upon the parrot squawks “And get me a whisky you cow!” The stewardess, flustered, brings back a whisky for the parrot and forgets the coffee.

The parrot drains its glass and bawls “And get me another whisky you idiot.” Quite upset, the girl comes back shaking with another whisky but still no coffee.

Unaccustomed to such slackness the man tries the parrot’s approach “I’ve asked you twice for a coffee, go and get it now or I’ll kick you.”

The next moment, both he and the parrot have been wrenched up and thrown out of the emergency exit by two burly stewards.

Plunging downwards the parrot turns to him and says,

“For someone who can’t fly, you complain too much!”

Collaborative Lawyering

Collaborative law is a US born and bred dispute resolution platform based on cooperative strategies pioneered by David Hoffman and Boston Law Collaborative[3] over 20 years, and is now underpinned by the Uniform Collaborative Law Act 2009. The parties agree up-front to use problem-solving advisers to try and achieve a settlement, and to disclose whatever information is needed. They also agree not to threaten court action. However, if the dispute ends up in court, the parties' advisers must withdraw and the parties must find new representatives for the litigation. The psychological effect, and the focus less on people and content rather than process, combined with the support of advisers with no incentive to go to court, makes for a high settlement rate. Collaborative consultants (non-lawyers) are increasingly being enlisted by parties who want counsel with a wider focus to solve the issues. As Ute Joas Quinn of Shell International puts it: "*We lawyers are selling ourselves short at the same time as being sold out*"[4].

An application of collaborative lawyering is where the parties jointly fund the fees of a counsel whose client is not the parties, but the outcome itself. Conceived by Professor Jeswald Salacuse[5] at Tufts University, the "*counsel to the deal*" concept can be particularly effective where the parties are not in dispute, have envisaged a deal but want to make it as sustainable as possible.

Combined Neutrals

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

CONFIGURING PROCESS TO CIRCUMSTANCES

Some mediators at the leading edge of thinking and practice have written extensively about hybrids. Three recent articles[6] cover the hybrid options in more detail.

David Plant[7] wisely observed: "*We have to start by defining the process as part of the problem*". Parties, their representatives and dispute resolution professionals need to think not only about which neutral to select to help their resolve disputes, but also what process to use for each set of circumstances. There are many hybrids to choose from, many of them tried and tested, and now, despite mules being unable to reproduce, hybrids of hybrids are developing in dispute resolution.

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

(Footnotes)

[3] http://www.bostonlawcollaborative.com/

[4] Lawyers as a Catalyst for Change in Early Issue Business Conflict Management [add link]

[5] http://imimediation.org/jeswald-salacuse-article

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

[7] Seasoned arbitrator, mediator and general dispute resolver. Author of We Must Talk Because We Can.

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Article

Tug of War: Evaluative Versus Facilitative Mediator

: DIKSHA MUNJAL

Looking at mediation from the historical perspective, mediation was confined to the facilitative role of a neutral third party. Gradually, however, there came a sharp divide amongst the existing mediators as regards the scope of intervention by a mediator in the mediation proceedings. The author attempts to portray the distinction between mediators and decision makers and sketches out the differences between the approaches taken by the facilitative and the evaluative mediators and tries to bring out the dangers posed when mediators strive to put on the evaluative cloak.

I. INTRODUCTION

Mediation can be defined as a process where a neutral third party seeks to facilitate communication between the disputing parties to help them arrive to an amicable solution of their disputes culminating in a win-win situation for the parties. Though "…there is no single limiting definition of mediation, in part because mediators function in accordance with different philosophies and in statistically different ways"[1], the most commonly accepted definitions of mediation[2] incorporate two essential elements: "(1) third-party facilitation of dispute settlement, and (2) lack of third-party power to determine the resolution of the dispute".[3] The central focus of mediation is based on the principle of parties' self-determination. To further this basic principle, the role of a mediator must be well defined.

Looking at mediation from the historical perspective, mediation was confined to the facilitative role of a neutral third party. Gradually, however, there came a sharp divide amongst the existing mediators as regards the scope of intervention by a mediator in the mediation proceedings. At one end of the broad spectrum of a mediator's role, lies his or her active role as an evaluator and at the other, that as a facilitator of communication between the parties. These two positions are, however, in contrast with each other and hence, the debate as to the most suitable role of a mediator's intervention in the process.[4]

(Footnotes)

[1] Murray S. Levin, 'The Propriety of Evaluative Mediation: Concerns About the Nature And Quality of an Evaluative Opinion' (2001) 16 Ohio State Journal on Dispute Resolution 267

[2] See, e.g., Council Directive (EC) 2008/52 on certain aspects of mediation in civil and commercial matters [2008] OJ L136/3 (hereinafter referred as 'EC Directive') Article 3(a) [http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF]

[3] Donald T. Weckstein, 'In Praise of Party Empowerment – And of Mediator Activism', (1997) 33 Willamette Law Review 501, 508

[4] E.g. Lela P. Love, 'Top Ten Reasons Why Mediators Should Not Evaluate' (1997) 24 Florida State University Law Review 937; James J. Alfini, 'Evaluative Versus Facilitative Mediation: A Discussion' (1997) 24 Florida State University Law Review 919;

Part II (a) of the present paper attempts to portray the distinction between mediators and decision makers. Because of the emergence of evaluative forms in mediation, part II (b) sketches out the differences between the approaches taken by the facilitative and the evaluative mediators. Part III tries to bring out the dangers posed when mediators strive to put on the evaluative cloak and finally, Part IV sums up the paper with an appropriate conclusion.

I. Drawing the lines

a. Distinguishing Mediators from Decision-makers

Mediation is unique as compared to other forms of dispute resolution mechanisms. It is resorted to as an 'alternative' to the usual adversarial method of dispute resolution[5] and is intended to be a practice free from such a feature.

"Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves."[6] Evaluators include judges, arbitrators, neutral experts, and advisors.[7] A comparison of arbitration and mediation would show that though an arbitrator and a mediator are similar in terms of being a neutral third-party chosen by the parties themselves, they have different functional roles. The role of an arbitrator is to go through the pleadings, examine the evidence, hear both the parties, look into the merits of the case, and thereafter pass an award. The arbitrator cannot have private sessions with the parties to the dispute. The disputants expressly ask the evaluator i.e. the arbitrator to preside over their case or resolve the conflict.[8] In contrast, the role of the mediator is to assist the parties to make them understand each other's points of view by facilitating better communication between them, and thereby empowering them to reach a harmonious, consensual solution. For this in the process the mediator also goes through private sessions and maintains confidentiality. The task of the mediator does not go beyond the abovementioned role. On the conclusion of mediation, the mediator either rewards the settlement/ compromise or in case no settlement/compromise is arrived at by the parties, the mediator is not supposed to give any reasons for failure. He only reports that the process of mediation is complete but no settlement is arrived at.

The EC Directive, though not expressly, hints at this distinction between mediation and processes of adjudicatory nature. This is reflected in its Preamble Para (11) which provides that the Directive should not be applicable "… to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute". By incorporating such a provision, the Directive recognizes the two analytically different processes and seeks to put them on two different platforms.

The essence of mediation lies in the fact that "decision-making is the province of the parties"[9]. If this core feature is eroded, mediation ceases to perform its true function.

b. Distinguishing Facilitative from Evaluative Mediator

Riskin in his formulation of the mediators' orientations grid[10] states that the role of mediator can be either facilitative or evaluative. There are certain analytical differences[11] between the two which may now be dealt with.

(Footnotes)

[5] This includes litigation in courts, arbitration, and neutral-evaluation by a neutral third-party where disputing parties act in an adversarial manner try to put their best case forward to incline the evaluator towards their respective sides.

[6] Love, n.4 above, p.938

[7] Love, n.4 above, p.938

[8] Love, n.4 above, p.938

[9] Lela P. Love, 'Mediation: The Romantics Days Continue' (1997) 38 South Texas Law Review 735, 738

[10] See generally Riskin, n.4 above

[11] Simon Roberts & Michael Palmer, Dispute Processes: ADR and the Primary Forms of Decision Making (New York : Cambridge University Press, 2005), p.155 (Roberts & Palmer observed that "two analytically distinct forms of intervention, with quite different processual shapes, become concealed beneath the conventional label of mediation.")

The fundamental role of a mediator is to act as a facilitator of communication between the parties. A facilitative mediator helps the parties understand their underlying interests, emphasises the need for the parties to educate themselves and each other more than the mediator, helps them develop and propose broad, interest based options for settlement, and to evaluate proposals.[12]

An evaluative mediator on the other hand gives advice, assesses the strengths and weaknesses of each side's cases, predicts outcomes of court or other processes, proposes fairly directive agreements and, urges or pushes the parties to settle or to accept a particular settlement proposal or range.[13] Therefore, the decision-making process passes from the hands of the parties into those of the evaluator.

"Widespread as these activities have become, they are inconsistent with the role of a mediator"[14] and in fact, change the whole perspective of mediation. As both the so-called 'categories' of mediation require their own unique competencies, skills and techniques, they are at two very different positions from one other, and can never be put or compared on the same plane.[15] Whenever any evaluation is done by the mediator three elements get intricately juxtaposed viz., principle of self-determination, fairness and mediator's neutrality and impartiality.

II. Dangers posed when boundaries are Crossed-over

a. Change of nature of Mediation

Mediation should be a "pure play"[16]. "It should connote facilitation."[17] If the evaluative ink taints mediation, the process will be affected and it will assume adversarial hues. Evaluative mediators hinder prospects of an environment conducive for settlement. The moment mediation is portrayed as a process wherein the mediator has the power to provide evaluation of the case, the parties get "in a competitive mind-set seeking to capture the evaluator's favour and win the case"[18]. They compete with each other to put before the mediator their best case and use different tactics, just as in litigation, to get the attention of the mediator to decide in their favour.[19] The disputants view the mediator equivalent to a person with adjudicatory functions and "…rely on [this] outside authority like a judge to decide [the] [case] for [] [them]…".[20]. The foundation of mediation which is based upon the principle of parties' self-determination is completely lost is such a process. As a result, the process echoes the adversarial traits.

(Footnotes)

[12] Riskin, n.4 above, p.32-34 (Riskin describing the techniques put to use by facilitative mediators)

[13] Riskin, n.4 above, p.27, 28 (Riskin describing the techniques put to use by evaluative mediators)

[14] Kimberlee K. Kovach & Lela P. Love, 'Evaluative Mediation Is an Oxymoron' (1996) 14 *Alternatives To The High Cost of Litigation* 31

[15] Love, n.4 above, p.939; Kovach & Love, n.14 above, p.32

[16] Kovach & Love, n.14 above, p.32

[17] Kovach & Love, n.14 above, p.32

[18] Love, n.4 above, p.940; Kovach & Love, n.14 above, p.31 ("…mediator evaluation tends to perpetuate or create an adversarial climate. Parties try to persuade the neutral of their positions, using confrontational and argumentative approaches.")

[19] A party is likely to exercise caution with the information he or she gives out during an evaluative mediation so that it does not adversely affect such evaluation and rather orients the mediator's decision in his/her favour.

[20] Kovach & Love, n.14 above, p.32

Parties' participation in the process is a key feature of mediation and is implicit in the parties' right to self determination. If the mediator takes over the process and the decision-making task, not only does it endanger the parties' right but also changes the very nature of mediation. Hence, the true nature of mediation undergoes drastic transformation if evaluation is permitted to be a part and parcel of it.

a. Encroachment upon Parties right to Self-determination

The principle of parties' right to self-determination is "paramount"[21] and constitutes the crux of mediation. Bush has very rightly observed that the central value echoed in the majority of literature on mediation is self-determination.[22] The most commonly accepted definitions of mediation as well as the regulatory standards[23] also embody this salient feature. This principle implies that it is the parties who shall be the decision-makers and not the neutral third-party. The mediator is required to enrich the information base and promote better understanding between the parties[24] by encouraging them to reflect on the issues involved, reduce friction, explore their true underlying interests and find mutual points of accord to help them reach an agreement but not formulate any decision for them. "In so doing, [mediator] [facilitates] evaluation by the parties"[25] Party autonomy abets greater party participation, feeling of empowerment, satisfaction and greater compliance with the outcome.

Evaluation undermines party autonomy. Once the evaluative mediator steps in to do his 'task', parties lose control over the outcome. When a mediator ardently tries to evaluate the issue, the scope of negotiation between the parties ultimately narrows down[26] and because the parties give importance to what the mediator says and rely on it, it may go on to shape their so-called 'independent' decision.[27] Though it has been contended that for the true realization of self-determination, mediation must provide knowledge of law and the parties' legal rights[28], it nevertheless hinders creative problem-solving by the parties and rather adversely affects the self-determination principle. There is a barrier erected to the level to which parties are involved in the problem-solving processes and generating an array of alternatives for settlement. As a result, in an evaluative mediation not only does the level of parties' participation in the process fall[29] leaving the parties feeling dissatisfied[30], there may also be lesser compliance with the outcome drawn-up by the mediator[31]. Accordingly, the parties may not perceive mediation to be a process any different from the adversarial processes.

(Footnotes)

[21] Weckstein, n.3 above, p.508

[22] Robert A. Baruch Bush, 'Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field' (2003) 3 *Pepperdine Dispute Resolution Law Journal* 111, 115.

[23] Annex-A CPFM, n.2 above, Sec. 5.1, 5.5; Annex-B CPCCM, n.2 above, Sec. 5.1,5.5

[24] Kimberlee K. Kovach & Lela P. Love, 'Mapping Mediation: The Risks of Riskin's Grid', (1998) 3 *Harvard Negotiation Law Review* 71,101; John D. Feerick, 'Toward Uniform Standards of Conduct for Mediators' (1997) 38 *South Texas Law Review* 455,458

[25] Love, n.4 above, p.939

[26] Kovach & Love, n.24 above, p.100

[27] Alfini, n.4 above, p.930 (quoting Ms. Donna Gebhart); Carrie Menkel-Meadow, 'Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities' (1997) 38 *South Texas Law Review* 407,424; Ellen A. Waldman, 'The Evaluative-Facilitative Debate In Mediation: Applying The Lens of Therapeutic Jurisprudence' (1999) 82 *Marquette Law Review* 155,164; Levin, n.1 above, p.271; Carrie Menkel-Meadow, 'Is Mediation the Practice of Law' (1996) 14 *Alternatives to the High Cost of Litigation* 57,61

[28] *See* Jacqueline M. Nolan-Haley, 'Court Mediation and the Search for Justice Through Law' (1996) 74 *Washington University Law Quarterly* 47, 49-52,91

[29] Kovach & Love, n. 24 above, p.99,100; E. Allan Lind et al, 'Voice, Control, and Procedural Justice: Instrumental and Non-instrumental Concerns in Fairness Judgments' (1990) 59 *Journal of Personality & Social Psychology* 952, 953 ("…people actively reject procedures that appear to offer process control but that do not provide any real input into the decision-making process."); Riskin, n.4 above, p.45

[30] Alfini, n.4 above, p.930 (quoting Ms. Donna Gebhart); Riskin, n.4 above, p.45

[31] EC Directive, n.2 above, Article 3(a), Preamble Para (6) (It recognizes mediation as a process wherein "…parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of the dispute…" and expressly notes in its Preamble Para (6) that "agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties.")

c. Impugned Neutrality & Impartiality

In conjunction with principle of self-determination, the mediator's neutrality and impartiality are fundamental principles of mediation.[32] The mediator must not only be neutral and act in a fair and even-handed manner throughout the process,[33] but must also be perceived by the parties as such.[34] Mediation must be conducted in an impartial way and the mediator must not try to impose any preferred outcome on the parties,[35] "whether by attempting to predict the outcome of court or formal proceedings or otherwise".[36] The mediator must not give advice to the parties, individually or collectively.[37] If such a conduct is not maintained, it may impair not only the mediator's position but also parties' right to self-determination. Riskin has observed that the higher the degree of evaluation, the greater is the need for impartiality.[38] Likewise the lower the degree of intervention by the mediator the lesser the challenge posed to the mediator's position.

Roberts & Palmer[39] in their summarization of Simmel[40] on the idea of a non-aligned third-party intermediary observed that "…a defining characteristic of the mediator is that he or she is not a partisan". An activistic mediator is likely to be a partisan as evaluation invariably ends up favouring one party at the expense of the other.[41] When any opinion is given on the merits of the case, or any part of a statute is put forth or the attention of the parties is brought to a particular article chosen by the mediator, it can never be said to be completely objective.[42] This is so because the mediator may have certain notions of either the outcome in court proceedings "in the shadow of the law"[43] or some predisposed stance towards the party. Such a behaviour in addition to distorting the mediator's image as a neutral and impartial figure may also cause the parties to flee from mediation.[44]

(Footnotes)

[32] Annex-A CPFM, n.2 above, Sec. 3.1; Annex-B CPCCM, n.2 above, Sec.3.1; CMCPM, n.2 above, Para 4.2, 4.3; *European Code of Conduct for Mediators*, (hereinafter referred as 'ECCM') Para 2.2 [http://www.ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf] last accessed on November 14, 2011; EC Directive, n.2 above, Article 4(2), 3(b) (The definition of a mediator provided by the EC Directive also reiterates it.)

[33] Annex-A CPFM, n.2 above, Sec. 3.2.3; Annex-B CPCCM, n.2 above, Sec.3.2.2; CMCPM, n.2 above, Para 4.3.1

[34] ECCM, n.32 above, Para 2.2; Levin, above n.1, p.294; Riskin, above n.4, p.47

[35] Annex-A CPFM, n.2 above, Sec. 5.5; Annex-B CPCCM, n.2 above, Sec. 5.5

[36] CMCPM, n.2 above, Para 4.2, 6.9

[37] Annex-A CPFM, n.2 above, Introduction; Annex-B CPCCM, n.2 above, Introduction

[38] Riskin, above n.4, p.47

[39] Roberts & Palmer, n.11 above, p.154

[40] G. Simmel, *The Sociology of Georg Simmel* (Free Press, Glencoe, 1950) p.149-150

[41] Kovach & Love, n.14 above, p.31

[42] Alfini, n.4 above, p.927,928 (quoting Prof. McDonald); Stark, n.4 above, p.785 (discussing how student mediators would make a choice as regards the information they would provide as mediators); Levin, n.1 above, p.294; Menkel-Meadow, above n.27, p.61

[43] *See generally* Robert H. Mnookin & Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1989) 88 *The Yale Law Journal* 950

[44] Love, n.4 above, p.938 (If a party believes that the mediator has sided the other party, it may retreat from the process)

The proponents of evaluative mediation bring up the issue of fairness and informed consent where there may be an imbalance of powers between the parties. The process of mediation does not call in for the mediator to try to level the playing-field. In situations where such circumstances arise, the mediator must encourage the parties to seek independent legal advice.[45]

d. Competency of Mediators Questioned

Mediation in England is open to all. The league of mediators comprises of people of "different rank and ambition"[46]. This open-market policy approach is put to risk if the evaluative-mediator approach is promoted and adopted. When mediators evaluate a case applying the relevant law to the specific facts, they engage in the practice of law.[47] These activities require a high degree of professional competence[48] and are put in the spotlight particularly when the mediator-pool consists of people varied in knowledge and skills. In a situation where, for instance, a non-expert mediator (e.g. a neighbour) evaluates, he/she may not be well versed with the legal position on the subject-matter. In such a scenario, it inevitably implies that the mediator must be one who is well versed with legal principles or even better, a practitioner of law. Mediators may not be qualified to serve as case evaluators or even if they are, they may not be able to carry out their task bearing in mind their neutral and impartial position in the process. Thus, in a case where there may be an imbalance of power between the parties and there is a lawyer-mediator, restriction is nevertheless placed on the mediator on the grounds of his/her neutrality and impartiality.

The facilitative approach deals well with the above set of conditions. With this approach in hand, a mediator need not be an expert. If there arises any situation where the mediator is faced with legal questions such as informed decision-making by the parties or dealing with power-imbalances, he/she may direct the parties to seek independent legal or other professional advice.[49] This also ensures congruence with principle of self-determination and the neutral and impartial position of the mediator.

Evaluative mediation also tends to diminish the quality of mediation. Given that the mediator can be almost anyone and that mediators do not receive decision-making training[50], the prediction of case outcomes by such mediators is debatable. The parties may look up to the mediator as a person with expertise in the subject-area but in reality, he/she may not have information any more than the parties and may be in a poor position to render an evaluation.[51]

e. Clogging Market-growth

If it is acceptable for mediators to render opinions on the merits of the case or predict likely outcome in courts, then only lawyers and other experts will be fit to be mediators.[52] Mediation, as noted above, is open to all. This helps in the formation of a rich heterogeneous mediator-pool with talents, calibers, and perspectives of people based in different disciplines.[53] Mediation in its pure form does not involve law but communication along with other skills.[54] These include human relations, interpersonal dynamics, communication skills, negotiation and bargaining skills, gender and generational dynamics, organizational and managerial skills,

(Footnotes)

[45] Annex-A CPFM, n.2 above, Sec. 5.10, 5.11; Annex-B CPCCM, n.2 above, Sec. 5.4, 6.3; Solicitors' Code of Conduct (July 2007, amended on March 31, 2009), Rule 3.06 [http://www.sra.org.uk/solicitors/change-tracker/code-of-conduct/rule3.page?20090331#rule-3] last accessed on November 14, 2011; Quality Mark Standard for Mediation, F1.3 [http://www.legalservices.gov.uk/docs/fains_and_mediation/mediation_qual_mark.pdf] last accessed on November 16, 2011.

[46] Roberts & Palmer, n.11 above, p.153

[47] Menkel-Meadow, n.27 above, p.424; Menkel-Meadow, n.27 above, p.61; Riskin, n.4 above, p.46 (Riskin notes that increase in the need for subject-matter expertise is directly proportional to the parties' need for the mediator's evaluations.)

[48] Alfini, n.4 above, p.933 (quoting Prof. Love)

[49] Alfini, n.4 above, p.933, 934 (quoting Prof. Love); CMCPM, n.2 above, Para 6.10, 6.17; Annex-A CPFM, n.2 above, Sec. 5.10, 5.11; Annex-B CPCCM, n.2 above, Sec. 5.4, 6.3

[50] Kovach & Love, n.24 above, p.104; Kovach & Love, n.14 above, p.31

[51] Levin, n.1 above, p.287

[52] Love, n.4 above, p.941

[53] Love, n.4 above, p.942; Love, n.9 above, p.741

[54] Menkel-Meadow, n.27 above, p.61

rich information base regarding particular industry or disputes among others.[55] No single profession fits the bill with respect to each of these requirements.[56] At times, parties may not even desire lawyers or experts to act as mediators. They may have the apprehension of such a person having a pre-disposed position with respect to the subject matter on account of his/her experience in the field.[57]

If fetters are imposed on the entry into the market, there would be a substantial loss in the mediator-pool resource[58] which would in turn obstruct creative problem-solving by the parties and full realisation of their right to self-determination. Mediation must not be "[legal-ized]" and made the private domain of lawyers.[59] If this is allowed it may end up in an unhappy two-faceted result for mediation. Firstly, it may drain out the mediator-pool resources, as noted above. Secondly, as lawyers would never shed their evaluative habits, mediation would be pulled back into the adversarial framework.[60]

(Footnotes)

[55] Love, n.9 above, p.741
[56] Love, n.9 above, p.741; Feerick, n.24 above, p.468
[57] Feerick, n.24 above, p.467
[58] Love, n.4 above, p.942
[59] Schuwerk, n.4 above, p.761
[60] Kovach & Love, n.14 above, p.32; Kovach & Love, n.24 above, p.105; Love, n.4 above, p.942

Think ... C-130 Versus F-16

The older C-130 cargo airplane was lumbering along when a F-16 fighter jet flashed by. The jet jockey decided to show off.

The fighter jock told the C-130 pilot, "Watch this!" and promptly went into a barrel roll followed by a steep climb. He then finished with a sonic boom as he broke the sound barrier.

The F-16 pilot asked the C-130 pilot what he thought of that.

The C-130 pilot said, "That was impressive, but watch this!"

The C-130 droned along for about five minutes and then the C-130 pilot came back on and said, "What did you think of that?"

Puzzled, the F-16 pilot asked, "What did you do?"

The C-130 pilot chuckled. "I stood up, stretched my legs, went to the bathroom, then got a cup of coffee and a cinnamon bun."

When you are young, speed and flash may be great. When you get older and smarter, comfortable and dull are not so bad!

Death is more universal than life;
everyone dies but not everyone lives.
~A. Sachs~

f. Parties left without any Remedy

Mediators have a duty to conduct mediation in a confidential way.[61] This means that the sessions are conducted in a private and legally privileged manner subject to certain exceptions provided in the regulatory standards.[62] Unlike litigation and arbitration where there are provisions for the parties to appeal against the decision of the evaluator, there is little or virtually no safeguard against a mediator's inadequately informed opinion.[63] Confidentiality shields the careless and erroneous mediator opinions from public scrutiny and results in a failure of professional liability on the part of the mediators.[64] The confidentiality aspect here seeks to protect the mediator from any accountability but on the other hand, damages the parties' position who may end up feeling even worse than before they started mediating. Also, evaluation by the third-party neutral "…based in some part on information obtained in caucuses (without the opportunity for rebuttal by other side) rests on inferior evidence than the evidence that an arbitrator, judge or jury would have."[65] For instance where a mediator is a layman with respect to the subject matter involved, an evaluation made by him/her based on incomplete or limited information, on substandard evidence or in the absence of specialist opinions can be highly speculative.[66] As noted above, the parties may inevitably rely on the mediator's opinion. In such circumstances, it means that the parties have virtually no remedy against the mediator when they bank on the information by the mediator that may be unjust, unfair or plain wrong.[67] The problem is essentially two fold – firstly, if there is no remedy against the incorrect evaluation, it would leave the parties without any form of redressal against the action of the mediator and secondly, if there is a remedy provided to the parties' to institute proceedings against the mediator, it would pull mediation back in the adversarial framework.

III. Conclusion

Mediator activism is wholly inconsistent with the core founding principles of mediation. The regulatory standards neither expressly endorse evaluation nor do they expressly bar it. However there requires a degree of refinement and uniformity in the definition of mediation. This is crucial for the growth and development of mediation.[68] Public should understand the essential nature of each dispute resolution process[69] and be able to distinguish it from others.[70] Uniform understanding of mediation would help prevent the weakening of mediation's unique advantages.[71] Lessons must be learnt from the growth of arbitration which originated as a true 'alternative' to litigation but eventually ended up getting aligned with the adversarial processes.[72] Over a span of time, it lost its many attributes that made it appealing initially.[73] Similarly, if evaluation in mediation is permitted, it can have parallel adverse implications. To ensure high quality of mediation and minimal unfairness or mistake, the best and safest practice with respect to both – the parties as well as the mediators is that the process be left in its original facilitative form. Therefore, it may be concluded that mediation must be conserved in its pristine form so that it does not fall into the pit falls of adversarial system.

(Footnotes)

[61] EC Directive, n.2 above, Article 7; ECCM, n.32 above, Para.4 ; CMCPM, n.2 above, Para.4.5, 4.6; Annex-A CPFM, n.2 above, Sec.7; Annex-B CPCCM, n.2 above, Sec.7

[62] EC Directive, n.2 above, Article 7; ECCM, n.32 above, Para 4; CMCPM, n.2 above, Para 4.6; Annex-B CPCCM, n.2 above, Sec. 7; Annex-A CPFM, n.2 above, Sec. 7

[63] Love, n.4 above, p.942

[64] Kovach & Love, n.24 above, p.104

[65] Lela P. Love & John W. Cooley, 'The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary' (2006) 21 *Ohio State Journal on Dispute Resolution* 45, 58; Kovach & Love, n.14 above, p.31 (They noted that the conventional decision makers operate within a framework of ethical norms and legal standards which direct their evaluation. This is however not the case with mediators.)

[66] Love & Cooley, n.65 above, p.58; Riskin, n.4 above, p.111 (He notes that the facilitative mediator may not know enough about the relevant law, practices or technology to render an informed opinion.)

[67] Menkel-Meadow, n.27 above, p.61

[68] Love, n.4 above, p.946

[69] Kovach & Love, n.14 above, p.32

[70] Love, n.4 above, p.948 (She states that process different from mediation must be "labeled" as such and not be mixed with the understanding of mediation in any way)

[71] Kovach & Love, n.24 above, p.87

[72] Kovach & Love, n.24 above, p.90

[73] Kovach & Love, n.24 above, p.90

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Vodafone threatens India with international arbitration.

Vodafone has threatened to take India to international arbitration over proposed retroactive tax legislation that could cost the British mobile phone giant over $2 billion. Vodafone, stepping up its battle against the tax plan which it called a violation of foreign investors' rights, said it had served the Indian government with a "notice of dispute" in a first step toward international arbitration.

Gulf islands dispute could go to arbitration.

The United Arab Emirates has urged Iran to agree to resolve a long-standing dispute over three islands in the Persian Gulf, warning that otherwise it will resort to arbitration of the International Court of Justice.

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The Singapore Judiciary, the Law Society of Singapore, the Singapore Mediation Centre, the Singapore Academy of Law and the Community Mediation Centre of the Ministry of Law will be hosting the Alternative Dispute Resolution Conference: The 5Cs of ADR (Collaboration, Communication, Consensus, Co-operation and Conclusion) in Singapore from 4 – 5 October 2012.

The organisers welcome academics, scholars, researchers, practitioners and other interested individuals and organisations to present papers at the conference. The papers should cover ADR-related ideas, theories, practice or experience in your country that may be useful to developing ADR in other countries. Attendance at the conference is not a prerequisite to making a submission in response to this call for papers. Submission of abstract by: 27 April 2012 | submission of full paper and materials for printing by: 5 September 2012 | Submission of presentation slides by: 1 October 2012

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