

EXECUTIVE SUMMARY

This is a three-page Executive Summary of “ADR Techniques and Procedures Flowing Through Porous Boundaries: Flooding the ADR Landscape and Confusing the Public,” a fifteen-page article published in *Practical Dispute Resolution*, Volume 5, No. 1. It does not include the footnotes, charts and tables that are in the complete article, which can be obtained by contacting the Center for ADR at (301) 313-0800 or visiting www.natlctr4adr.org.

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

By Stephen K. Erickson and Marvin E. Johnson***

This article addresses a growing trend in ADR -- the blurring of boundaries between various ADR processes. This blurring of boundaries raises crucial issues to the further development of the field, particularly regarding fundamental distinctions between ADR processes that encourage cooperative behavior versus those that encourage competitive behavior. The loss of these distinctions is having the collateral consequence of increasing litigation regarding ADR. The intention of this article is to raise questions designed to clarify more principled boundaries between various ADR processes in order to assist the public and the practitioner to understand truly what the profession is offering and to protect consumer choice. The authors set forth what they believe are principled boundary distinctions between more client centered, cooperative ADR processes and more legally-focused, adjudicative, competitive ADR processes to enable parties to understand the fundamental principles guiding each approach and to make better choices about which approach will better meet their goals in particular cases.

Today, there are a variety of processes that can be used to foster the resolution of disputes. Many of these processes began gaining popularity in the early 1970s as a result of frustration with the various human and financial costs associated with litigation. These processes were described as alternatives to litigation — hence the term Alternative Dispute Resolution or ADR.

There are many ADR processes that are competitive and many that are cooperative in nature. Each process has its own advantages and disadvantages. In certain situations, one process may be more appropriate than another in resolving a dispute (e.g., to maintain a relationship, to establish a precedent, to save face, to provide political cover or to be vindicated).

Over time, the characteristics associated with competitive processes have seeped into the cooperative settlement approaches transforming mediation and other collaborative processes into something other than cooperative, self-determined interventions. If the public is to make informed choices when selecting the appropriate ADR process to resolve their disputes, they must understand the distinctions between the various processes. In addition, it is imperative that the public and the

novice ADR professional understand the affect of the seepage of competitive characteristics into cooperative processes.

Understanding the linkages*— the perspective and behavior of the parties and the neutral— associated with competitive and cooperative approaches helps to clarify the distinctions between the approaches and the blurring of functions between and within some dispute resolution processes. The linkages create either competitive or cooperative behaviors and reveal whether the intentional and the unintentional behavior of the parties, and or the intervener, will be more competitive or more cooperative.

The cooperative approaches tend to involve more client centered processes which are non-coercive and non-judgmental, and require the intervener to view the disputing parties as capable of making decisions on their own and crafting their own resolution. The intervener must respect the parties' self-determination and have the skills to integrate these principles into a non-coercive process that encourages creative thinking, respectful interactions and constructive communication. In contrast, the competitive processes tend to be adjudicative where the intervener determines which party's position is valid and which is not. This approach often assumes the presence of represented parties in a contested process that is governed by procedural rules through which the intervener evaluates the parties' arguments and determines the outcome of the dispute.

As ADR gained popularity in the 80s, many functions ascribed to the litigation process began to permeate the boundaries of non-adversarial and lesser adversarial ADR processes. Some attributed the seepage to the courts' adoption of ADR processes, which brought large numbers of lawyers with adversarial skills and litigation expertise into the ADR field. The continued seepage of traditional litigation functions and associated behaviors into ADR processes that are less adversarial has caused the distinctions between processes to become blurred, and has contributed to the public's misunderstanding of ADR processes. The blurring of the lines and the misunderstanding of the processes are most pronounced in the fields of mediation and arbitration. Some observers have noticed that arbitration has also taken on the trappings of litigation, particularly in terms of extensive discovery and motion practice, contentious advocacy, long cycle time and high cost.* Similarly, mediation observers have noticed the seepage of adversarial functions into the mediation process, noting, for example, the negative impact that traditional litigation tactics are having on the mediation process.* Because of the spillover of litigation tactics and techniques, the range of competitive behaviors associated with adjudicative interventions can be recognized within the mediation process—making it a reservoir, of sorts, for the overflow of adversarial characteristics. As a result, the array of approaches used by some interveners in the mediation process range from the collaborative/problem solving techniques to the evaluative/adjudicative techniques. This flooding of ADR processes with adversarial functions (and techniques) has distorted the process distinctions and made it more difficult for the public to discern the differences.

Even though the dispute resolution field has a place for a variety of ADR processes, some parties and practitioners value adjudicative approaches more than client centered approaches, and vice versa. Both approaches are distinct, effective, co-equal conflict resolution processes. We believe our "Comprehensive Guide to Client Centered and Adjudicative Processes" can serve as a map when comparing processes and will help the public make informed choices when selecting a neutral and an ADR process to resolve their disputes.

Excerpt from The Comprehensive Guide to Client Centered and Adjudicative Processes**

ISSUES EXAMINED	CLIENT CENTERED PROCESSES	ADJUDICATIVE PROCESSES
Definitions	Client centered processes have, as a core principle, the self-determination of the parties in the process. These approaches center on the standard of practice that self-determination is a fundamental principle prohibiting the direct or indirect use of provocation or coercion to influence a participant or a particular outcome during the process.	These approaches have in common an evaluative settlement conferencing approach that can violate the self-determination of the parties in the room. These processes tend to focus on evaluations of whose case is stronger or weaker and have other characteristics that resemble moderated settlement negotiations within a legal or court framework.
Purpose of the Process	To reach a settlement that is owned by the parties and possibly heals a torn relationship. Not necessarily an adjudicative outcome. Can be more creative and may deviate from adjudicatory norms.	To reach a settlement that most closely resembles predicted adjudicative outcomes.

*All footnotes are cited in the complete article, “ADR Techniques and Procedures Flowing Though Porous Boundaries: Flooding the ADR Landscape and Confusing the Public,” published in *Practical Dispute Resolution*, Volume 5, No. 1.

**The Comprehensive Guide to Client Centered and Adjudicative Processes is in the complete article, “ADR Techniques and Procedures Flowing Though Porous Boundaries: Flooding the ADR Landscape and Confusing the Public,” published in *Practical Dispute Resolution*, Volume 5, No. 1.

***Both authors are nationally known mediators who began mediating disputes in the mid 70s. They have watched the dispute resolution field grow and change over the past 35 years. They have been active in the dispute resolution field and served in leadership roles in national dispute resolution organizations and received numerous awards for their contributions to the field. They wrote this article in an attempt to encourage a discussion about public education regarding ADR and to help the public and the inexperienced practitioner to better understand ADR processes and to make informed decisions when selecting an ADR process to resolve disputes.

Stephen K. Erickson, J.D. received the Bush Leadership Fellowship Award for the study of mediation in 1979 and is a founder and the second president of the Academy of Family Mediators and served on the Board of the Association for Conflict Resolution in 2005 where he also chaired the Taskforce on Mediator Certification. He and his partner, Marilyn McKnight, co-authored a number of highly successful books on mediation including *Mediating Divorce: A Client's Workbook* (1998), *Mediating Divorce: A Trainer's Manual* (1998), and *The Practitioner's Guide to Mediation: A Client Centered Approach* (2001).

Marvin E. Johnson, J.D. serves on the JAMS panel of resolution experts, is a former board member of the Society of Professionals in Dispute Resolution (SPIDR) and the Association for Conflict Resolution (ACR), the International Academy of Mediators and is a former council member of the American Bar Association Section of Dispute Resolution. He is the founder and executive director of the Center for Alternative Dispute Resolution, one of the longest standing not-for-profit ADR institutions in the country devoted to the promotion of ADR and to the diversity of the field. He has authored and co-authored many articles including “Emotionally Intelligent Mediation” (2003, 2005).