

Exploring the Boundaries and Terrain of ADR Practice

Mediation, Arbitration, and Collaborative Law

By David A. Hoffman

The Appalachian Trail, as it passes through the Smoky Mountains, straddles the North Carolina-Tennessee border for about 200 miles, and hikers are often literally walking with one foot in each state. There is no line or other physical feature indicating where one state ends and the other begins. In other places along the trail, in contrast, the boundaries are distinct: there is no mistaking, for example, Vermont for New Hampshire because moving from one to the other requires crossing the Connecticut River.¹

What does any of this have to do with dispute resolution? I offer these features of the trail as a metaphor of those portions of the ADR terrain where the distinctions between one process and another are clear, and others where they are not. The boundaries between some forms of ADR are, like the Connecticut River, hard to miss. One can readily discern, for instance, the differences between a hard-fought

construction arbitration in which the parties despise each other and an amicable mediation of a prenuptial agreement in which the parties are sitting side-by-side holding hands.

Because the ADR equivalent of the North Carolina-Tennessee border may be harder to envision, the purpose of this article is to describe cases in which the boundaries are indistinct. Before describing these cases, however, it might be helpful to state one obvious premise: The various forms of practice within the ADR spectrum—and I would include within that spectrum the practice of collaborative law (CL)—lend themselves to a wide variety of styles. For example, mediation can range from transformative to facilitative to more directive styles.

Collaborative Law

CL is a form of negotiation in which lawyers participate but agree in writing that they will not litigate the matter, and that if



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a negotiation impasse is reached, the parties will hire new counsel to take the matter to court. Among the hallmarks of CL are interest-based, problem-solving styles of negotiation; confidentiality; voluntary exchange of information; joint retention of experts; and respectful communications. Although CL does not always involve the use of neutral third parties, it is an ADR process inasmuch as it provides an alternative to determination of disputes in court.

Like other forms of ADR, CL cases vary widely. In the paradigmatic CL negotiation, the parties and attorneys negotiate in four-way meetings, in a nonadversarial manner. In some CL cases, however, despite the parties' and counsel's best intentions, the negotiations can become so protracted, positional, and adversarial that they are virtually indistinguishable from ordinary negotiation in a high-conflict case. Those types of cases—arguably “collaborative” in name only—can often generate the same escalating costs, delays, and antagonisms that the CL movement sought to avoid when this form of practice was first developed by Stuart Webb in Minnesota in 1990.

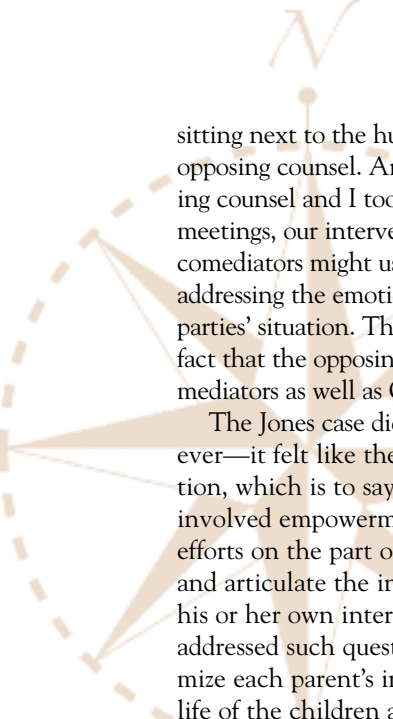
At the other end of the CL spectrum, however, are cases in which the negotiations are so cordial and so collaborative that they resemble transformative mediation. In one such divorce case in which I served as CL counsel for the husband (let's call it the “Smith” case), my opposing counsel and I were astonished at how smoothly the negotiations proceeded. (In the CL movement, one's opposing counsel is usually referred to as one's “collaborative colleague” or a similar nonadversarial term; for purposes of the ABA Model Rules of Professional Conduct, however, this colleague is serving as “opposing counsel”—see, e.g., Rule 3.4—and therefore I am using that more familiar term in this article.) From the

clients' standpoint, the amicable nature of our discussions seemed natural; they did not see their interests as adverse. They were both computer professionals, with roughly equal incomes, and they quickly agreed to share equally their time with the children and to equalize their assets. Their lawyers' roles consisted primarily of helping to set an agenda of issues to be resolved, jointly documenting the parties' agreements, and congratulating them on their successful collaboration.

In another such divorce case in which I served as counsel for the wife (let's call it the “Jones” case), my opposing counsel and I were instructed emphatically by our clients that their goal was to remain loving friends, successful coparents, and business colleagues at the conclusion of their divorce. They needed each other emotionally and financially—they simply could not remain married.

Although this case was not formally a CL case—we used a cooperative process agreement, which contains all the elements of a CL participation agreement except disqualification of counsel from litigation²—it had all the hallmarks of a CL case and then some. The discussions were cordial, and the parties were solicitous about each other's interests. During the four-way meetings, we noticed that the seating arrangement changed each time we gathered around the table. This is a bit unusual; in most four-way meetings, regardless of whether they occur in a CL case or a non-CL case, it is customary for lawyer and client to sit side-by-side on one side of the table, with the opposing party and his or her lawyer across the table.

In our case, however, I sometimes found myself



sitting next to the husband and other times next to my opposing counsel. And in terms of the steps that my opposing counsel and I took during these very amicable four-way meetings, our interventions were similar to those that comediators might use: helping to generate options and addressing the emotional and practical dimensions of the parties' situation. This was not entirely surprising given the fact that the opposing lawyer and I are both experienced mediators as well as CL attorneys.

The Jones case did not simply feel like mediation, however—it felt like the most transformative type of mediation, which is to say that the focus of our interactions involved empowerment, recognition, and substantial efforts on the part of each party to identify, understand, and articulate the interests of the other party as well as his or her own interests. Our negotiating sessions addressed such questions as how to maximize each parent's involvement in the life of the children and how to prevent the husband, who was employed on a part-time basis by the wife's father, from losing his job. At the end of our negotiations, which resulted in a practical settlement that was readily approved by the court, the wife asked a staff member at my office to *take a picture* of the four of us because she had found the entire negotiation experience to be so constructive. The other attorney and I were astonished—and pleased—by the request, which neither of us had ever heard in any case in which we were involved as lawyer or mediator.

From 30,000 feet, both the Smith and Jones cases looked a lot like co-mediation, and if you traced the specific steps that the parties, opposing counsel, and I took on the path to settlement in those cases, it would not have been clear whether we were in North Carolina or Tennessee. One might say that this is dangerous territory, but it did not feel that way at all, and the outcome of the cases speaks for itself. These cases suggested to me that mediation and CL, at their boundaries, can look a lot like each other.

Adversarial Mediation

At the opposite end of the mediation “spectrum” are those cases in which the parties have no prior relationship and few joint interests other than reducing transaction costs, such as a wrongful-death auto-accident case. In many such cases, if the parties are at an impasse, they look to the mediator to be

more like a judge or arbitrator and evaluate the likely outcome of the case if it went to trial.

In fact, in some adversarial mediation cases, an impasse in the negotiation leads the parties and counsel to ask the mediator to “switch hats” and serve as an arbitrator. It has been my experience that the parties and counsel in such cases are more likely to feel comfortable with the mediator as arbitrator than to hire a new person to serve as arbitrator for two reasons: (1) the mediator is already familiar with the case and does not have to be educated about it, thus making the arbitration a more cost-effective process than it would be with a new arbitrator; and (2) the parties and counsel feel that they can trust in the mediator's even-handedness because they have seen his or her reactions to the legal and factual issues that have been addressed during the mediation.

In other cases, the parties and counsel agree in advance—even before the mediation has begun—that the mediator will serve as arbitrator if the negotiations fail.

As numerous commentators have pointed out, such arrangements may rob the mediation phase of its full potential. But if the parties are making an informed choice, processes in which the mediator also serves as an arbitrator can be useful and demonstrate the extent to which mediation can “blend” with arbitration.

In one such case, the parties and counsel had intended to resolve their dispute—a breach of contract claim between two taxi companies—by mediation. However, after more than a day of mediation, both sides became convinced that a definitive interpretation of their contract was needed, and they asked me to switch hats and arbitrate the dispute. Strongly held views on both sides, as well as intense anger between the principals of the two companies, made it difficult for either party to consider settlement, but they did see the value, from a business standpoint, of having the dispute resolved privately.

In the family law arena, a widely used form of dispute resolution—parenting coordination—brings to mind the Tennessee-North Carolina border inasmuch as the parenting coordinator straddles the line between arbitration and mediation. A parenting coordinator is used by the parties, usually in a postdivorce setting, to resolve any child-related conflict by first helping the parents to reach an agreement and then, absent an agreement, making a recommendation that is immediately binding on the parties. In a typical parenting coordinator arrangement,

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either parent may go to court to challenge the parenting coordinator's decision but must pay the other side's legal fees if the challenge is unsuccessful. This latter part of the arrangement makes parenting coordination similar to nonbinding arbitration.³

Another process situated on the Tennessee-North Carolina line is the "mediator with clout" proposed in a recent article by Arthur Ciampi, who describes a mediation process for law firm disputes.⁴ In this process, the mediator is empowered to issue orders with respect to such procedural and substantive aspects of the mediation as ordering discovery and imposing sanctions for the failure to provide timely discovery; setting the schedule for the mediation and the duration of each mediation session; ordering attendance of specific individuals in the firm; and imposing sanctions ranging from attorneys' fees to "liquidated damages in a sum certain which approximate potential expected damages" if a party does not, in the opinion of the mediator, "participate in good faith in the mediation process."

Whatever one may think of such procedures—and I would argue that they have their place in appropriate cases—they clearly straddle the line between two ADR territories

Mediative Arbitration

I have also experienced arbitrations that felt more like mediations. In a series of 180 Dalkon Shield cases⁵ in which I served as an arbitrator, the relaxation of the rules of evidence—a characteristic, generally speaking, of arbitrations to one degree or another—was often, by agreement of the parties, so complete that some of the testimony presented in the case was not even relevant to the issues to be decided.

The testimony in these cases by the claimants often involved wrenching accounts of miscarriages, uncontrolled vaginal bleeding, raging pelvic infections leading to hysterectomies and infertility, and the impact of these conditions on the claimants' lives. In most of these cases there was a \$20,000 cap on damages, and therefore my task as arbitrator was primarily to decide whether the claimant had established causation by Dalkon Shield use in connection with her injuries because it was clear that compensation for the damages, if causally related to the Dalkon Shield, would reach the cap. It was not unusual in these proceedings for the claimants to cry, and occasionally even the Trust advocates and arbitrators were moved to tears.

In these hearings, the Dalkon Shield Claimants Trust was not represented by counsel. Instead, to economize on

transaction costs, non-lawyer advocates (most of them recent college graduates, but with on-the-job training in epidemiology, women's reproductive health, statistics, and other scientific issues related to Dalkon Shield use) represented the trust and performed very competently, even though they had no formal training in examining witnesses. On the other side of these cases, the claimants sometimes appeared without counsel and therefore presented their highly personal evidence without the structure of legal advocacy. Even when the claimants were represented by counsel, however, the representatives of the trust often permitted highly personal accounts to be presented without making arguments about the relevance of particular portions of the testimony.

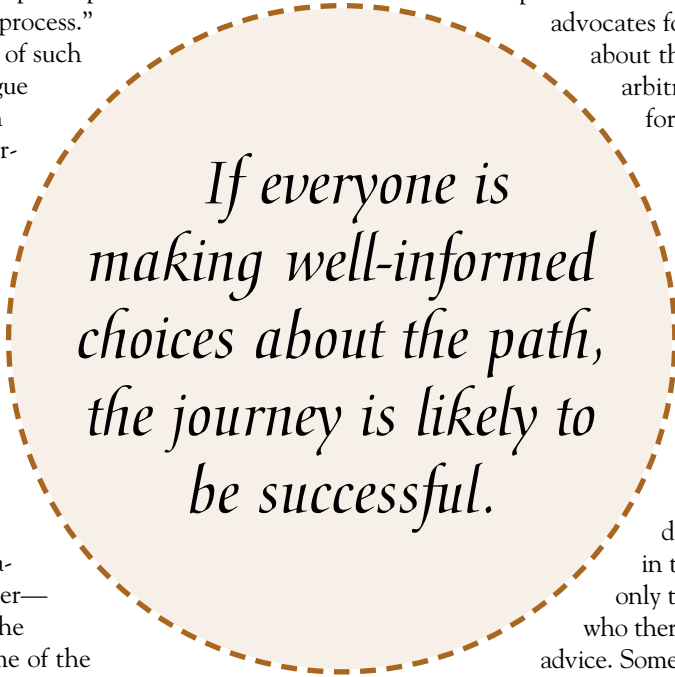
The process described above was clearly adjudicative but borrowed heavily on elements from mediation insofar as the openness to emotional expression, empowerment, and recognition is concerned. Many of the claimants expressed their appreciation to the trust advocates for their openness to hearing about their suffering, and even the arbitrators were sometimes transformed by the experience.

Tensions at the Border

There is a disturbing tendency for ADR providers in one territory to fear, and question the value of, the procedures used on the other side of the border. For example, some CL attorneys criticize mediation as leaving divorcing parties vulnerable, because divorce mediation often occurs in three-way meetings involving only the mediator and the parties, who therefore lack real-time legal advice. Some divorce mediators consider

CL an oxymoron because, in their view, lawyers of any stripe add contention to the negotiation as a result of their ethical duty to advocate zealously on behalf of their clients. Even within each territory there is a tendency to demonize those who stray too close to the border, as can be seen in the criticism leveled at evaluative mediators, who are not considered "true mediators" by some who practice transformative mediation.

These tensions disserve the public by failing to give due respect to the varieties of dispute resolution processes that are appropriate for differing situations.⁶ There is also a large percentage of disputes that are suitable, for example, for either CL or mediation—the former is often preferred for those issues where real-time legal advice is needed, and the latter is often preferred for parties who need to work on communication issues or child-related problems. I have been involved in numerous cases in which both mediation



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and CL are used, and in Michigan, some CL attorneys involve mediators in their cases as case managers. I have proposed in several cases that the parties include a mediation clause in their CL participation agreement, so that, in the event of an impasse, the parties mediate before going to court. As the discussion in this article suggests, dispute resolvers have only begun to explore the terrain in which hybrid processes, and combinations of processes, are helping people find their way to the resolution of conflict.

Looking Ahead

The ADR landscape is dotted with multiple headquarters where a particular form of dispute resolution is taught and practiced in its purest forms. At the same time, those practitioners who, like me, attempt to adapt the process in each case to the unique needs, interests, and circumstances of the parties often find themselves in the land between those outposts.

To be sure, boundaries are important, and the cartographers of the ADR movement can help us pinpoint our location on the ADR map when it matters, as it often does. There are distinct sets of ethical rules that constrain the actions of CL attorneys, mediators, case evaluators, and arbitrators, and there are times (particularly when the going gets rough) when the successful completion of a case might depend on knowing whether one is in Tennessee, North Carolina—or Vermont. But in those parts of the terrain where the ethical rules are complementary or coextensive, or simply not relevant to the

direction that a practitioner takes, the boundaries can become indistinct and it may no longer matter whether the boundary between one part of the terrain and another can be seen. If everyone is making well-informed choices about the path, the journey is likely to be successful. ♦

Endnotes

1. For a brief description of hiking the Appalachian Trail, see David Hoffman, *A Sabbatical Journey on the Appalachian Trail*, ACRESOLUTION (Spring 2002) (available at www.bostonlawcollaborative.com/documents/2005-07-sabbatical.pdf).
2. The cooperative process agreement was identical to a CL agreement except that in place of a withdrawal/disqualification provision, the agreement required the parties to mediate in the event of an impasse, and established a 60-day cooling-off period before any dispute, other than an emergency, could be taken to court. For a discussion of cooperative process agreements, see David Hoffman, *Cooperative Negotiation Agreements: Using Contracts to Make a Safe Place for a Difficult Conversation*, in *INNOVATIONS IN FAMILY LAW PRACTICE* (K.B. Olson & N. VerSteegh, eds., 2007, available at www.bostonlawcollaborative.com/documents/Cooperative_Negotiation_Agreements.doc).
3. For an example of a typical parenting coordinator provision, see www.BostonLawCollaborative.com/what-we-do/dispute-resolution/parenting-coordinator.html.
4. *Mandatory Dispute Mediation: Empowering Mediators*, 237 N.Y.L.J. 3 (May 31, 2007).
5. The Dalkon Shield is an intrauterine contraceptive device (IUD) that was pulled from the market because of serious defects in its design; the arbitration awards were paid by the Dalkon Shield Claimants Trust, which held \$2.4 billion in funds from the bankruptcy of the Dalkon Shield's manufacturer, A.H. Robins Company.
6. For the seminal article on this point, see Frank Sander & S. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).



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