

Using a Guiding Mediator To Help the Parties Design Bespoke Dispute Resolution Processes

By Laura A. Kaster and Jeremy Lack

This article summarizes the work done by Working Group 2 of the task force set up by the International Mediation Institute (IMI), the Straus Institute at Pepperdine University (SI), and the College of Commercial Arbitrators (CCA). It starts by explaining the benefits of appointing a process facilitator/mediator early in disputes, and then discusses a range of practical tools, including a model clause, checklist and diagnostic metrics.

The Benefits of a Process Design Facilitator/Mediator

The core principle of the IMI/SI/CCA Task Force is the need for multiple lanes on a “highway to dispute resolution” to maximize speed, minimize costs, and take into consideration relationships and other factors important to the disputants. Flexibility of process choices, combinations, and sequences are key to the ultimate goal. And parties who are interested in changing lanes, going off-track, traveling through a new medium (e.g., negotiation, arbitration or mediation when they start off on a different path) or doing issue selection for different processes are likely to need guidance, particularly when they are already in dispute.

Who can provide such assistance? Who can help identify the specific issues to address, how to do so, and in what sequence or combination? Working Group 2 of the Mixed Mode Task Force focused on the use of a process facilitator, working as a mediator (to benefit from confidentiality), to help the disputants focus on, discuss, and choose procedural options as early as possible.

This “Guiding Mediator” helps the parties to determine their procedural needs and interests (e.g., budgets, time constraints, access to information, importance of preserving certain relationships, etc.) to help them design a bespoke process that can include adjudicative or evaluative elements as well as non-evaluative elements. Because of the privilege usually accorded to mediators, the Guiding Mediator’s communications and work product can remain confidential or immune from discovery to encourage early and frank exchange of the disputants’ needs and interests. The Guiding Mediator, as an architect of process design, can adapt to the disputants’ expressed preferences and suggest procedural options or stages that can better align with their needs and concerns.

By focusing on issues of process first, the parties can consider less tangible issues early on, such as personalities, cultures, loyalties and emotional reactions as well

as concrete calculations such as fees, deadlines, the relief sought, and how to best implement a final outcome. No assumptions are made and there is less gamesmanship. The parties have greater scope to think about their procedural needs having been freed of their immediate focus on possible substantive outcomes and such concepts as “winning” or “losing.” Considering procedural needs and interests first and brainstorming procedural options together with the Guiding Mediator helps the disputants to “go to the balcony” earlier and build better “in-group” dynamics. Relationships between counsel and/or the parties can be improved by creating a partnership in terms of process design and helping to think collaboratively as a team, before focusing on substantive issues that could otherwise trigger a more competitive or “out-of-group” dynamic without such a prior partnership step. This collective early process focus helps to create and maintain a more amicable and cooperative mindset, even if adjudicative elements will be required. Simply considering whether there may be key issues that are likely to drive results, or obstacles that may impede solutions, and how to deal with them earlier, can help avoid premature positional arguments. Does a disputant have an unfulfilled need for more information? Have they considered one-another’s procedural needs (e.g., efficiency of time and costs, or maintaining good relationships or reputations with certain stakeholders)? The Guiding Mediator can help the disputants focus on these topics upfront and explore and generate a range of issue-specific procedural options, which may include sequencing or combining issues and processes. Focusing the disputants’ attentions on such key topics early is one of the major contributions of a “mixed mode” approach to dispute resolution. A better journey can lead to a better destination. It is important to

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plan accordingly early on, not only in terms of time and costs, but also quality.

Another benefit of early joint process design with a facilitator is that it can help de-escalate a dispute or prevent it from escalating further. The Guiding Mediator can help the parties establish better communications and a better exchange of information. What is needed for constructive discussions or to maintain cordial relations between key protagonists? What behaviors would the participants prefer to encourage or avoid? What are perceived as key issues needing expert input or the applications of norms, such as applicable laws or industry standards? What is the sequence in which these topics could best be addressed? For example, it may be helpful in an adjudicative or evaluative process to discuss causality or liability separately from damages or valuation issues, but would it be helpful to look at the latter before the former, e.g., to set a zone of possible agreement and remove certain risks earlier in the process? How might

A Guiding Mediator may simply help the parties facilitate consideration and discussion of the procedural design. Or, with the parties' consent, she or he may be more directive, making recommendations regarding procedural options and the timing of different parts of the process, such as what topics to focus on first, who to consider involving, why and when. The Guiding Mediator can build into the process a role for remaining involved throughout the process, to consistently help the parties to review, update and reconsider their procedural choices iteratively, as the matter evolves or new issues emerge. Their role as a process designer coach enables all of the participants to take stock of a broader range of dynamics (e.g., likely reactions to evaluative feedback on dispositive issues and their impact on relationships), especially if evaluative or adjudicative neutrals need to remain involved for further deliberations. This can keep the process "on track." Their role could also encompass assisting the parties at the end of the process to determine whether there are any clos-

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different participants (e.g., businesspeople, advisors, witnesses, experts and/or stakeholders) be involved?

A Guiding Mediator can help the parties and their counsel step back and evaluate the potential that a mixed mode process might offer, combining an adjudicative or evaluative approach (e.g., arbitration or conciliation) with a non-adjudicative approach (e.g., mediation). Sequential, parallel and even combined process can be assessed, possibly with different teams of participants at different stages. The design process can consider using one neutral to provide expert evaluations (whether binding or non-binding) working together with another neutral who can facilitate broader discussions, taking subjective needs and interests into consideration, looking to the future. Such a combination has reportedly been helpful in many situations, leading to higher settlement rates and higher satisfaction ratings both from clients and their counsel. Engaging with guided process design earlier in disputes may help generate considerable savings in costs and time not only for the parties, but for justice systems in general, providing faster, cheaper better access to justice.

ing, implementation, compliance or enforcement issues to address.

Overall, a Guiding Mediator is about having an optimal dispute resolution process, while also saving time, money, energy, and relationships. This can be at any stage of the dispute. In the initial process design phase, for example, a Guiding Mediator can help the parties identify dispositive elements of the dispute that may benefit from adjudicative or evaluative input. Knowing that dispositive elements may exist (e.g., whether a statute of limitations period has expired, or if a limitation of liability clause in a contract will be binding) may help the parties in their facilitated negotiations. The investigation and diagnosis steps can thus be used by the Guiding Mediator to sequence process steps likely to result in an earlier and cheaper resolution of the dispute.

As the proceedings evolve, the parties' procedural needs or preferences may evolve. A skilled Guiding Mediator should be able to assist the participants to diagnose when and how to bring in adjudicative neutrals, possibly appointing and instructing these neutrals on behalf of the parties, and requesting a range of options or a zone

of possible outcomes, which can help narrow the range of the negotiations. The Guiding Mediator can thus seek to establish an ongoing cooperative relationship with and between the parties that can result in greater trust in the process itself, rather than focusing only on possible outcomes and how to gain them. Such a process is more likely to succeed if it is discussed and put into place before the parties have completed discovery or commenced negotiations on substantive issues, which often harden positions and make amicable agreements more difficult to reach.

By generating a collaborative working relationship with the parties on an ongoing basis, the Guiding Mediator can help spot and deal with any surprises in the process. This can also avoid moving prematurely to settlement discussions before the design of the process has been finalized and more opportunities have been considered. It can avoid disappointments and hostility by discussing what the parties and their counsel wish to avoid upfront.

A Guiding Mediator can also help at the end of a dispute resolution process, before a final agreement has been reached. She or he can help the disputants to consider the various ways in which the final outcomes can be obtained, such as a settlement agreement or a consent award, and any other formalities or rituals that may have meaning to the disputants or simplify recognition and enforcement abroad. Should the matter not settle fully, the Guiding Mediator can help to identify and discuss what impediments remained and how they could possibly be resolved using more procedural elements. If the Guiding Mediator was able to observe all parts of the process, he or she may be able to help the parties reflect on alternative ways of handling those topics that the facilitative or adjudicative neutrals who handled substantive issues were not able to resolve.

Practical Tools and Documents: A Model Clause, Checklist and Diagnostic Metrics

While the value proposition of a Guiding Mediator may be clear, Working Group 2 found that the use of such a process guide has never been considered as a possibly standard process. Its members realized there are no generally accepted metrics or diagnostic tools to help design such processes. All the tools they developed and considered are working drafts subject to input and revision.

A Draft Model Clause

Working Group 2 started off by developing a draft model clause for the appointment of a Guiding Mediator. The current draft reads as follows:

Any disagreement or dispute between the parties arising out of or relating to this agreement, including its formation, related documents and any non-contrac-

tual claims, shall be resolved as quickly and efficiently as possible by mutual consent using the most appropriate form of dispute resolution available for that disagreement or dispute (e.g., negotiation, mediation, conciliation, litigation or arbitration) or a combination of such processes as agreed to by the parties. The parties [shall/may] jointly retain a neutral, independent and impartial mediator to focus initially on process issues (the “Guiding Mediator”). The Guiding Mediator will help the parties to design an optimal process for achieving an early and mutually acceptable resolution. The optimal process should be efficient and cost-effective, taking into consideration relationships and commercial interests, as well as other important factors identified by the parties (e.g., enforceability, remedies, deadlines, etc.) The Guiding Mediator shall maintain strict confidentiality regarding all aspects of the process, including any private conferences with parties and/or their attorneys. The Guiding Mediator may provide non-binding recommendations on process issues. The parties agree that any information they or their attorneys exchange or provide to the Guiding Mediator and/or other parties or stakeholders as part of this appropriate dispute resolution process will be treated as confidential and immune from discovery or disclosure. The Guiding Mediator shall be granted mediation privilege and professional secrecy status as a mediator to ensure that all information exchanged or provided pursuant to this process shall be legally privileged and immune from disclosure or discovery to the extent possible under applicable laws. Once appointed, the Guiding Mediator may act as a mediator and/or arbitrator in any subsequent proceedings with the prior written consent of all the parties involved in those proceedings. If a Guiding Mediator was not retained within [thirty (30)] days from the date of first request for the appointment of a Guiding Mediator by a party, or if no other process or ADR neutral has been agreed to or appointed by that date by mutual consent of all the parties involved in the dispute, the substantive matters in dispute shall be settled by mediation [in accordance with the rules of the [NAME OF INSTITUTION] in effect at that date].

[The full draft clause then provides for arbitration if the matter is not resolved by mediation within 90 days of the appointment of the Guided Mediator.]¹

A Checklist of Issues

Working Group 2 also generated a checklist of issues that may help in assessing what factors might favor certain procedural choices, and when and how to suggest them. This checklist and other documents are available on the Task Force's website at <https://imimmediation.org/about/who-are-imi/mixed-mode-task-force/#documents>.²

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Diagnostics Tools

Certain diagnostic tools are already being used by some ADR practitioners to initiate conversations with disputants and to develop a methodology for designing mixed mode processes. Many are inspired by the “guided choice” movement and its six or seven steps.³ An example of a set of exercises used by one of the authors can be found here: <http://lawtech.ch/wp-content/uploads/2016/03/SIX-PREPARATION-EXERCISES-PRIOR-TO-A-FACILITATED-DISCUSSION-OR-ADR-PROCESS-2-parties-English-J.-Lack-2017.pdf>.

A Mind Map

The Working Group also started working on a mind map to illustrate what possible links might exist between certain factors in its checklist and their possible impact on process design choices. See: <https://mm.tt/927123035?t=L9Jqfdv52>.

The above documents are works in progress that are not intended to contain recommendations or a summary of “best practices.” They are being provided to stimulate reactions, discussion and exchanges of information on what is being done, and to encourage ADR neutrals, disputants and/or their advisors to consider possible ways of combining evaluative or adjudicative elements early with non-evaluative elements early on, based on the parties' procedural needs and preferences.

These tools can help to generate a broader discussion on the benefits of possible combinations and permutations early in dispute resolution processes. These materials may also be used at any stage of traditional dispute resolution proceedings (including litigation) as aids to consider faster, cheaper and/or better outcomes. In either situation, early consideration of ways of combining mediation together with arbitration, or conciliation and negotiation can and should be considered more often. Process design at the earliest stage can also ensure the attendance of the right stakeholders, witnesses or experts at the right time, and involve key participants earlier.

The Guiding Mediator will need to be flexible regarding when and how to arbitrate or mediate, how to initiate such proceedings, and whether, when or how they can be combined. The success of this approach will also depend on the willingness of the parties and their advisors to hire a procedural facilitator in the first place. Indeed, some clients and/or their lawyers may be reluctant to discuss what dispositive issues can be identified, triaged and handled earlier in the process. Initiating such a process may also face resistance from lawyers or other advisors who are unfamiliar with such processes and might perceive them as being risky compared to the past traditional approaches they are familiar with. They may also prefer to get adjudicative input early on, to assess the strengths and weaknesses of the case, although this can lead to early anchoring and overconfidence bias, making amicable discussions on process design more complex to raise. These variables may all require identifying the personalities and cultural contexts in which a mixed mode process is being discussed and skill in managing the design process itself.

Conclusion

The idea of bringing in a process facilitator in the form of a Guiding Mediator is not new. While the benefits are clear, the ways in which to establish a Guiding Mediator and the practices to follow are not. The approach seems to hold great promise, providing disputants with greater autonomy and informed choices, and access to faster, cheaper and better access to justice. More work is needed, and more experiences need to be shared. Please join us by providing us with your feedback and sending your thoughts and comments to the authors at laura.kaster@kasteradr.com and jlack@lawtech.ch.

Endnotes

1. For the full draft model clause, see: <https://imimmediation.org/download/184/mixed-mode-task-force-documents/34267/proposed-adr-clause-for-the-appointment-of-a-guiding-mediator-for-commercial-agreements.docx>.
2. For the checklist, see: <https://imimmediation.org/download/184/mixed-mode-task-force-documents/34268/checklist-of-criteria-for-mixed-modes-process-design.docx>.
3. For information about this movement, see: <https://gcdisputeresolution.com/>.