



AMERICAN ARBITRATION ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

April 4, 2019
11:15-12:30

Not Your Average ADR – New (and Not So New) Techniques for Resolving Disputes on the Job

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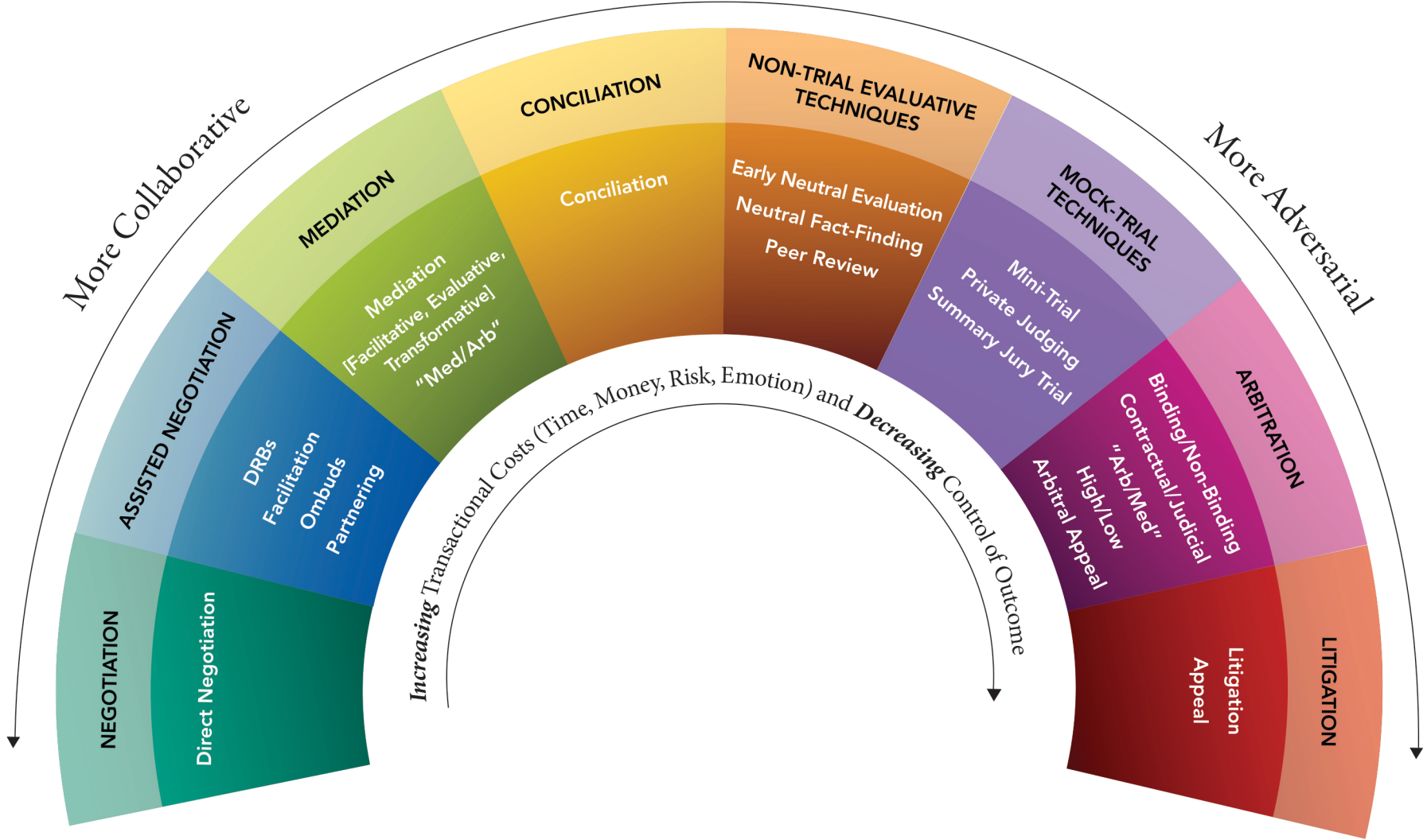
SCOPE

An Interactive Panel Dialogue:

- Dispute Review Board (DRB)
- Customized Hybrid Mediation
- Early Neutral Evaluation (ENE)



Dispute Resolution Continuum



Dispute Review Board (DRB)



DRB



Features/Benefits:

- Skilled, impartial industry professionals selected mutually by parties
- Mitigate impact of unplanned events, resolve disputes before claims arise... *in real time*
- Obtain non-binding board recommendations, “decisions”
- Preserve relationships, maintain privacy, impart confidentiality
- Often cheaper, quicker, more effective than other ADR methods
- EARLY INTERVENTION ADDS VALUE!!

DRB



Selection Criteria:

- Experience appropriate for project (e.g., engineers, contractors, construction lawyers)
- Ethical bent – recognition of importance for meaningful affiliation/relationship disclosures
- Neutrality, impartiality, objectivity
- Training in DRB practice, mediation/arbitration skills
- Willingness, availability, genuine interest
- Resourcefulness, insight
- Decisiveness



DRB

Proceedings

- Regular, periodic conference meetings
- Informal guidance reports
- Formal hearing by party referral, after discussion at regular meeting

Mechanics

- Select experienced, ethical panel members
- Secure buy-in from all parties
- Initiate conference meetings, site visits early, without preconditions
- Continuity, constancy: refrain from postponing, canceling project meetings or site visits



Proceedings

- Reasoned, non-binding recommendation to persuade parties
- Parties may opt for binding decision
- Recommendations either admissible or inadmissible in later proceedings, per DRB agreement

Mechanics

- *Initiative*: Don't wait for disputes to arise
- *Pro-activity*: Stay ahead of game
- *Value add*: Early intervention a definite value



Customized Hybrid Mediation Course of Construction



CUSTOMIZED HYBRID MEDIATION

Resources required:

Universal Needs

- Positive attitudes
- Commitment to process
- Innovation, trust, resourcefulness
- Experience, expertise, “energy”

Recognized Benefits

- Avert project delays, disruption
- Avoid extraordinary legal expense
- Mitigate loss to benefit of all
- Safeguard proprietary interest



CUSTOMIZED HYBRID MEDIATION

Resources required:

Universal Needs

- Cooperation, compromise
- Safety, civility
- Candor, fairness
- Confidentiality, respect
- Documented agreement (scope, extent)

Recognized Benefits

- Maintain privacy, confidentiality
- Promote culture of joint problem
- Solving, early dispute resolution
- Foster future relationships





Mediating ground rules as you go; remaining flexible and open:

Illustration

- Parties requested AAA mediation of project dispute, per AIA Contract
- Project stopped to attempt early dispute resolution
- No full resolution at mediation
- Mediator empowered to hear parties' positions on abbreviated basis
- Mediator empowered to render "decision" on short time fuse
- Decision binding until project's final completion, per AIA contract
- Arbitration of decision available on either party's demand
- Progress payments, work to continue for timely project completion

Early Neutral Evaluation (ENE)



Features

- Either non-trial evaluation or “mini-trial”
- Each side presents case, proffers evidence
- Generally no live testimony (but witness declarations possible)
- Opportunity for side-bar discussions with Evaluator, during/after hearing

Issues/Mechanics

- Mediation success rate – up or down?
- Evaluator selection: expertise in subject matter? arbitral experience?
- Scope/extent of ENE agreement?
- Pre-hearing prep of Evaluator – critical materials?

Features

- Evaluator issues reasoned evaluation (“Preliminary Decision”)
- Notice and joint opportunity to respond
- Final non-binding decision of Evaluator

Issues/Mechanics

- Evidentiary submissions, ‘mini-version’ of case?
- Ex parte communications? reasons?
- Discovery needs pending evaluation hearing?
- Timing of preliminary, final evaluations?

Advantages

- Potential for earlier settlement, lower cost than formal hearing
- Obtain “early view” of strengths, weaknesses, potential costs, risks
- Provide client with informed preliminary look at case by neutral third party

Disadvantages

- Showing of hand to others
- Could potentially fortify opposing party’s position, causing entrenchment

Advantages

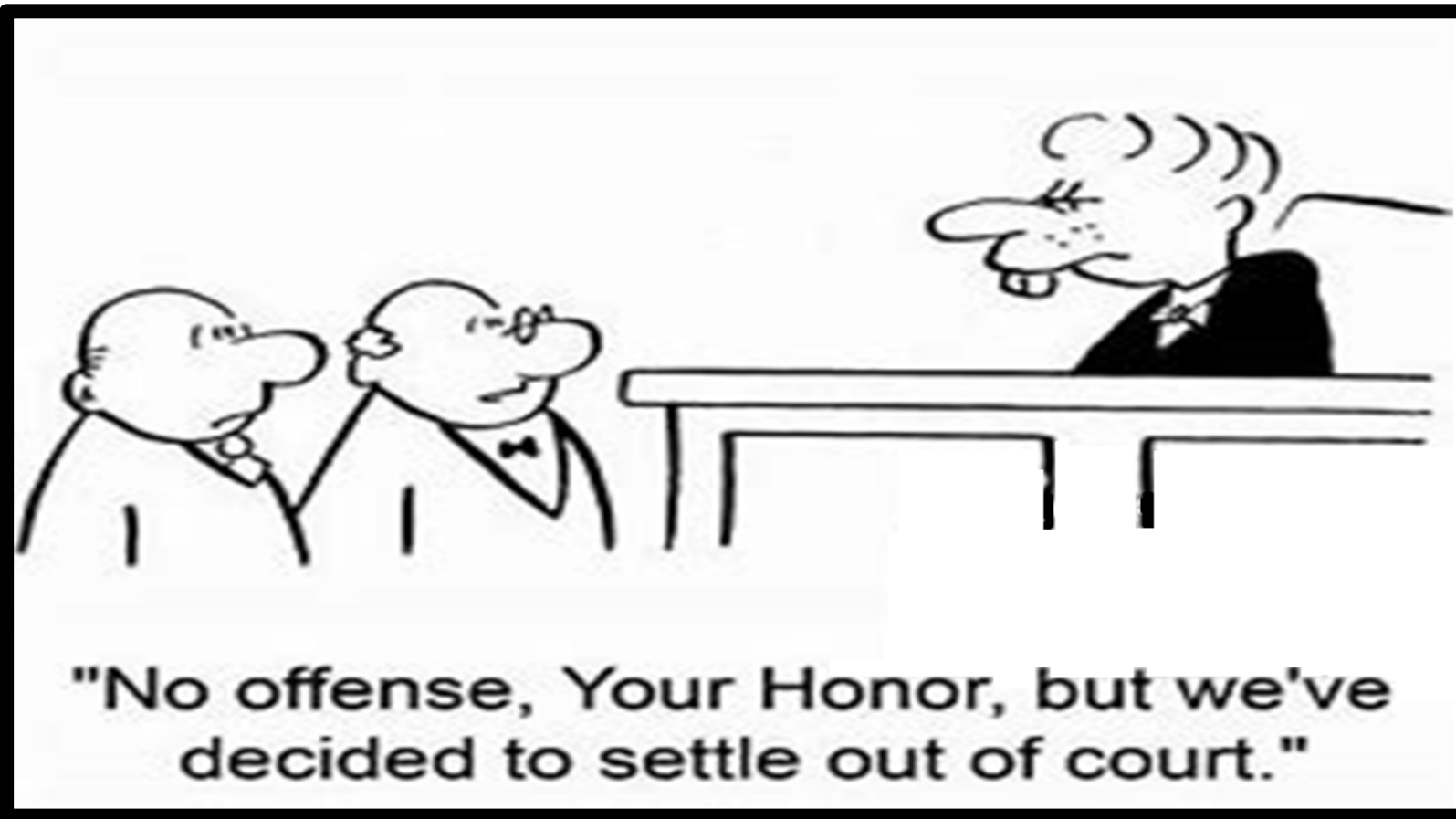
- Potential fee-shifting opportunity (optional), providing ENE “teeth”
- Sample ENE agreement in materials

Disadvantages

- Considerable time, effort, cost...with no guarantee of settlement
- Might ultimately pay process costs via fee-shifting arrangement

SUCCESS!!







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