

## ADR Innovation

# The Benefits of MED-CON, a Mixed-Mode Process Combining Mediation and Conciliation

BY JEREMY LACK

In the field of appropriate dispute resolution—ADR—understanding and using the distinct methodologies and benefits of mediation and conciliation can significantly enhance the resolution of commercial disputes. This article delves into the concept of a mixed mode process, referred to here as MED-CON, which integrates mediation and conciliation into a cohesive approach.

By leveraging insights from the International Mediation Institute’s Mixed Mode Task Force, as well as recent findings in neuroscience and social plasticity, this article will explore the differences between mediation and conciliation, the reasons for hiring two neutrals instead of one, the benefits of MED-CON, and the considerations necessary for successful implementation. (Information on the IMI task force is available at <https://bit.ly/4hUb9if>).

Additionally, this article analyzes the Glas conflict escalation model and the Riskin Grid to explain the benefits of combining different forms of mediation and conciliation. It will also highlight how mixed mode processes can address various ADR challenges.

## Social Plasticity and Its ADR Impact

Recent advances in social neuroscience have highlighted the importance of social plasticity in shaping our interactions, especially

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when disputes exist. Social emotions such as empathy and compassion play crucial roles in determining how individuals perceive and react to conflict. According to Klimecki (2015) [see Resources box at end for all references in this article], two fundamental neural systems influence our social behavior: one linked to distress and social disconnection, and the other to reward and social connection.

- *In-Group Behavior:* When individuals perceive themselves as part of a cohesive group (in-group), they exhibit prosocial behaviors such as helping and empathy. This is because the reward and social connection system is activated, leading to positive emotions and cooperative behavior.
- *Out-Group Behavior:* Conversely, when individuals perceive themselves as part of competing groups (out-group), they are more likely to exhibit competitive and aggressive behaviors. This activation of the distress and social disconnection system can hinder constructive dialogue and resolution.

This understanding of social plasticity—the ability to adapt behavior based on past experience—is crucial for optimizing ADR processes, as it highlights the unconscious and rapid nature of these changes, occurring in mere hundreds of milliseconds. Moreover, thinking about the future for just one minute has been shown to increase prosocial behavior, emphasizing the importance of mediators focusing on future-oriented solutions (Cernadas Curutto et al. (2022)).

## Distinguishing Mediation From Conciliation

Mediation and conciliation aren’t synonymous, as many ADR professionals believe. They can

have deeply different impacts on group behaviors. Here is the explanation:

**MEDIATION AND CONCILIATION DEFINITIONS.** Mediation and conciliation are both facilitated negotiation processes but with distinct roles and objectives. In mediation, the focus is on helping the parties reach their own solutions based on their subjective needs and interests.

In contrast, conciliation aims to help the parties reach a mutually acceptable compromise within a Zone of Possible Agreement (ZOPA), established by applying norms (such as laws) and findings of fact. The conciliator, being an expert, works within a Zone of Permitted Evaluation (ZOPE).

**CONCILIATION: AN EVALUATIVE PROCESS MANAGED BY AN EXPERT.**

*The Purpose:* The role of a conciliator is to be neutral, impartial, and evaluative. Conciliation may be considered a form of non-binding arbitration or an expert opinion process, designed to help the parties reach a mutually acceptable compromise. The classic conciliator is usually a learned expert with relevant industry experience and knowledge of the subject matter involved in the dispute, who understands what norms may or should apply in litigation. This process can entail meeting the parties separately, in caucuses, and doing reality testing: challenging the parties’ assumptions about the strengths of their respective cases and helping them understand the weaknesses of their positions.

*The Process:* Conciliation is a form of “objective justice” that is based on the legal syllogism “facts + law = outcome.” The conciliator helps the disputants understand the variables in this equation and what is relevant versus irrelevant with respect to the outcome. It is primarily a retrospective approach, seeking to analyze and understand past facts, determining responsibility or liability for a breach or

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tort, and deciding on appropriate damages or remedies.

**MEDIATION: A FACILITATIVE PROCESS FOCUSED ON SUBJECTIVE NEEDS AND INTERESTS.**

**The Purpose:** The mediator's role is to be neutral, impartial (or equally multi-partial), and non-evaluative. Unlike a conciliator, the mediator does not express an opinion regarding the dispute's outcome. Instead, the mediator helps the disputants look to the future and facilitate an interest-based negotiation rather than finding a zone of compromise between different positions. The mediator is primarily there to help the parties exchange meaningful information as part of a joint problem-solving process, treating the disputants as partners seeking mutually acceptable solutions based on subjective considerations.

**The Process:** Mediation is a form of "subjective justice." The mediator's role is to help the parties assess and define their need for a Zone of Permitted Evaluation (ZOPE) and to help the disputants generate their own norms or exchange information about their subjective needs, interests, concerns, and motives, looking to the future rather than the past. Mediation allows the disputants to explore broader procedural questions, considering a wider range of options that are not constrained by objective norms such as legal precedents or what a court would do.

**WHY HIRE TWO NEUTRALS INSTEAD OF ONE?**

Hiring two neutrals—one mediator and one conciliator—leverages their distinct skills and perspectives, enhancing the resolution process.

**Complementary Roles:** The mediator focuses on facilitating dialogue and understanding the parties' interests, while the conciliator provides legal evaluations and reality checks. This combination ensures that both the relational and substantive aspects of the dispute are addressed comprehensively.

**Enhanced Expertise:** Two neutrals bring a wider range of expertise to the table. The mediator's skills in negotiation and conflict resolution complement the conciliator's legal knowledge and evaluative capabilities.

**Balanced Process:** Having two distinct roles ensures a balanced process where neither facilitation nor evaluation is overlooked. This balance is crucial for addressing the multifaceted nature of complex commercial disputes.

**How Should They Work Together?** For MED-CON to be effective, the mediator and conciliator must work together throughout the process, coordinating their efforts to ensure a seamless and cohesive approach.

**Initial Assessment:** Both neutrals work together to understand the context of the dis-

## Mixing It Up

**The technique:** Broadening conflict resolution options and effectiveness by integrating concepts.

**The science:** Mixed-mode ADR has been a hot topic. The author brings a distinct European methodology in combining mediation and conciliation.

**The path:** This involves two neutrals, but it's not as complicated as that might seem. It's a powerful, likely faster, and more efficient way of tackling tough commercial issues.

pute and the needs of the parties. This involves gathering information and setting expectations for the process.

**Collaborative Sessions:** Throughout the process, the mediator and conciliator work together in all sessions. The mediator facilitates discussions focused on interests and future relationships, helping parties find common ground. Meanwhile, the conciliator provides evaluations, reality checks, and non-binding proposals based on agreed ZOPEs. This collaborative approach ensures that both evaluative and facilitative techniques are effective.

**Role Coordination:** The mediator can consult the conciliator as an expert to help explain different Zones of Possible Agreement based on Zones of Permitted Evaluation that the parties agree to, providing greater self-determination and minimizing the impact of unfavorable

views expressed by the conciliator. Conversely, the conciliator can work with the mediator to raise and address concerns about how they provide input constructively, without coming across as biased. This collaboration ensures that the strengths and weaknesses of the parties' cases are understood, enabling a constructive conversation focused on the quality of dialogue and working relationships.

**Analysis of the Glasl Conflict Escalation Model:** The Glasl conflict escalation model named after its inventor, Friedrich Glasl, provides a particularly useful way of visualizing how mediation and conciliation may differ. The model outlines nine conflict stages, each escalating in severity and complexity. Understanding this model is crucial for ADR neutrals, as it helps them identify the level of conflict and apply appropriate interventions. The nine stages are:

1. **Disagreement:** A problem is identified, and the parties realize they disagree.
2. **Debate and Polemic:** People start debating the issues, seeking to convince one another.
3. **Actions, Not Words:** Words seem to be futile and are not having any impact. Actions speak louder than words. Dialogue ceases and the parties cease speaking to one another.
4. **Images and Coalitions:** Formation of coalitions and negative stereotyping. The parties usually seek reassurance from friends, colleagues or experts (e.g., lawyers) that they are "right" and that the others are "wrong."
5. **Loss of Face:** Coalition building leads to perceptions that the other party is seeking to damage their opponent's reputation. The problem is now the other party.
6. **Threats:** The opponent is now viewed as a threat that needs to be managed. Ultimatums are given and threats are made.
7. **Limited Destructive Blows:** Limited attacks are made to cause minimal/proportional harm. The desire is to coerce the other party into more reasonable behavior.
8. **Fragmentation of the Enemy:** Destructive blows escalate in reaction to each party's perceived attacks. Parties adjust systematically to conquer their opponent.
9. **Together into the Abyss:** Destroying the other party becomes a goal in itself. There is pleasure in punishing one's opponent. This

can be to such an extent that so long as the other party suffers or loses more, each party is willing to risk self-destruction.

Glas's conflict escalation theory is depicted visually at <https://bit.ly/4hmtfs7>.

**Impact of Conciliation on Conflict Escalation:** During conciliation, the evaluative nature of the process can inadvertently lead to coalition-building and competitive behavior, particularly in stages four--Images and Coalitions--and beyond. As the conciliator provides evaluations and proposals, parties may become defensive, forming coalitions to strengthen their positions, which can escalate the conflict further. They may start to use the conciliator competitively, seeking to influence the proposals they are likely to make.

**Coalition-Building Tendencies:** Coalition-building occurs when parties perceive the conciliator's evaluations as a threat to their interests. This can lead to entrenched positions, making it difficult to reach a consensus.

**Conflict Escalation:** Without proper management, conciliation can exacerbate conflict, especially if parties feel unfairly evaluated or misunderstood. The presence of a mediator can help mitigate these tendencies by fostering communication and collaboration.

**Role of the Mediator in Addressing Escalation:** The mediator's role is crucial in addressing coalition-building tendencies and preventing conflict escalation. By facilitating

open dialogue and focusing on interests rather than positions, the mediator can help de-escalate tensions and guide parties back toward a collaborative resolution.

**Preventing Coalitions:** The mediator encourages parties to view each other as partners rather than adversaries, fostering a sense of cooperation and mutual respect.

**De-Escalating Tensions:** Through active listening and empathetic communication, the mediator helps parties express their concerns and interests, reducing the likelihood of defensive reactions and conflict escalation.

**The Riskin Grid and Process Design:** The modified Riskin Grid (named after its inventor, Harris H. Agnew Visiting Professor of Dispute Resolution at Chicago's Northwestern Pritzker School of Law Leonard Riskin) provided in the chart below helps to explain four variations in mediation approaches. It classifies them based on the degree of control the disputants are willing to give to the ADR neutrals or wish to keep for themselves on procedural as opposed to substantive issues.

When viewed this way, mediation can typically be viewed as occurring in all four quadrants, focusing on the parties' underlying interests and relationships, while conciliation is restricted to the two right-hand quadrants C and D (being evaluative), focusing on legal issues and norms.

MED-CON's approach allows all four quadrants to be integrated as part of a more inclusive

process, permitting different quadrants to be used for discussing various topics. The use of two neutrals provides the benefits of being able to work in all four quadrants at any time while keeping distinct roles regarding the ZOPEs of each neutral, and maintaining a constant desire to balance patterns of thinking that will retain both in-group and out-of-group heuristics.

**Process Design:** The diagram below left shows how process design can impact party autonomy and self-determination. The diagram is structured into four quadrants:

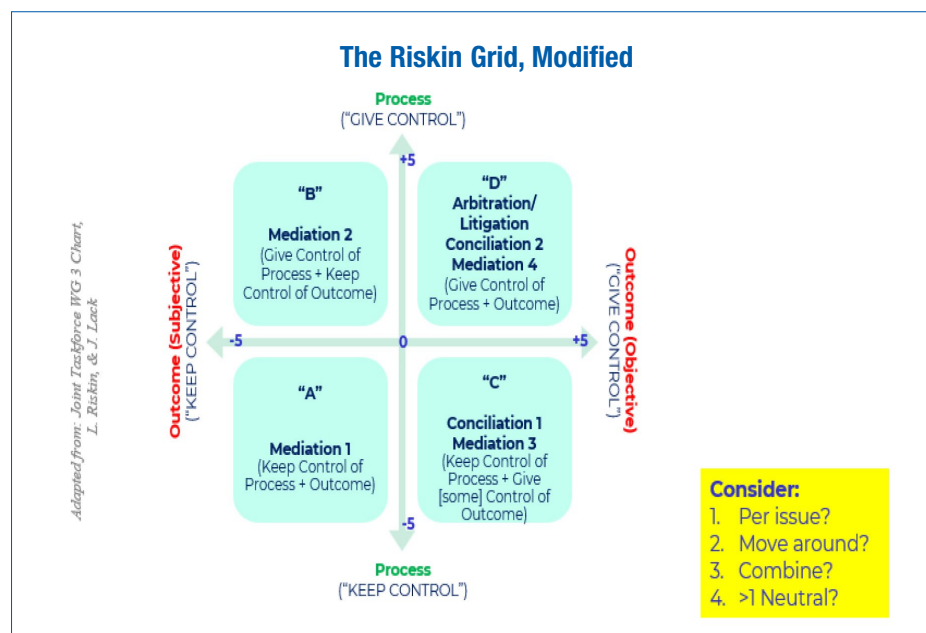
- **Quadrant A (bottom left):** Mediation 1 with full party control over process and outcome.
- **Quadrant B (top left):** Mediation 2 with party control over outcome but some third-party guidance on process.
- **Quadrant C (bottom right):** Mediation 3 or Conciliation 1 with third-party guidance on outcome but party control over process.
- **Quadrant D (top right):** Mediation 4, Conciliation 2, Mediation 4 or Arbitration/Litigation, with third-party control over both process and outcome.

The difference between Mediation 3 and 4 as compared to Conciliation 1 and Conciliation 2 is that in conciliation, the neutral is a person of high status who is expected to make a proposal whenever they deem it appropriate to do so, and who is expected to do robust reality testing, challenging positions taken by each party, and exposing weaknesses in their arguments.

In mediation, however, while the Mediator 3 or 4 in quadrants C and D may opine and provide their own views if asked to do so, they may only do so at the request of each party and have a narrow ZOPE in which to do so. And even if they do express a view, it does not carry any particular weight or authority as it is understood to be how one person understands it (the mediator), which could be incorrect.

By combining mediation and conciliation, parties can move fluidly between these modes of thinking and quadrants, benefiting from both facilitative and evaluative techniques as needed, without the risk of triggering out-of-group patterns of behavior or the conflict escalating further.

For a convenient self-evaluation, on the *(continued on next page)*



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author's business website (more below), there is a recent simple, visual, two-part diagnostic test. See <https://innovadr.com/innovadr-diagnostic-exercise>. It will help identify the most appropriate dispute resolution process for a matter. It is based on Leonard L. Riskin, "Decisionmaking in Mediation: The New Old Grid and the New New Grid System," 79 *Notre Dame L. Rev.* 1 (2003) (available at: <https://bit.ly/4h4zsZu>).

### Benefits of MED-CON ADR

Integrating mediation and conciliation into a MED-CON process thus offers several key benefits, especially when two different ADR neutrals are appointed, one as a conciliator and the other as a mediator:

*Enhanced Understanding and Flexibility:* MED-CON provides a comprehensive approach that combines the evaluative guidance of conciliation with the facilitative negotiation of mediation. This dual perspective ensures a thorough understanding of both the legal and relational aspects of a dispute.

*Higher Settlement Rates:* Combining mediation and conciliation can lead to settlement rates near 100%. The conciliator provides reality checks and legal assessments, while the mediator facilitates interest-based discussions, leading to more robust and acceptable solutions.

*Efficiency and Cost Savings:* MED-CON is generally faster and more cost-effective than litigation or standalone ADR methods. The combined process can resolve disputes more quickly by addressing both procedural and substantive issues simultaneously, reducing the need for prolonged negotiations or multiple sessions.

*Preservation and Improvement of Relationships:* Mediation's focus on future relations and mutual interests, coupled with the clear legal guidance from conciliation, helps preserve and even improve business relationships. This is particularly beneficial in commercial contexts where continuing interactions are crucial.

*Increased Satisfaction and Compliance:*

MED-CON's holistic approach leads to higher satisfaction among disputing parties, as both their emotional and practical needs are addressed. This satisfaction often results in better compliance with the settlement terms, as parties feel more involved and understood in the resolution process.

*Practical Implementation:* InnovADR ([www.innovadr.com](http://www.innovadr.com)), an ADR funder (which this author founded) that finances mediation proceedings on a "no settlement, no fee" basis, often suggests using mediation and conciliation as part of its mixed mode solutions to ensure that evaluative/expert opinions and proposals can be provided by the conciliator, while the mediator can address social plasticity issues and keep the parties focused on mutual goals. This approach helps prevent coalitions from forming and compensates for any recommendations or proposals made by the conciliator that may be unpopular, without compromising the neutrality, impartiality, and independence of the neutrals.

### MED-CON Preparations

Implementing MED-CON requires careful preparation and consideration to ensure its effectiveness.

*Training and Expertise:* Both neutrals should ideally be well-trained in both mediation and conciliation techniques. This requires continuing education and practical experience in handling complex disputes.

*Clear Communication:* Effective coordination between the mediator and conciliator is crucial. They should maintain clear communication and make sure the parties consistently understand each other's roles to avoid conflicting guidance. Regular check-ins and discussions about the process are recommended.

*Party Perception:* Parties should understand the distinct roles of the mediator and conciliator at all times. Misunderstandings can lead to confusion and reduced trust in the process. Clear explanations and setting expectations from the outset as well as throughout the process mitigate these risks.

*Cost Considerations:* While MED-CON can be cost-effective overall, it may initially seem more expensive due to the involvement of two neutrals. Parties should be made aware of the long-term savings and benefits, including faster resolutions and improved working

relationships to resolve the conflict in a better manner.

*Checklist for Co-Mediating:* The checklist provided by Toolkit Co., authored by Manon Schonewille, is an effective way to prepare for co-mediating (available at <https://bit.ly/40qT18G>). This checklist ensures that both neutrals understand their roles, the flow of the process, and how they will communicate with each other and the parties.

### Case Studies

*CASE STUDY 1: SOFTWARE DISPUTE.* In a software dispute involving disagreements on reasonable royalty provisions, the conciliator had extensive industry experience and provided empirical data to help better understand the range of numbers available that would be fair, reasonable and non-discriminatory (FRAND).

With the mediator's assistance, the parties were able to appreciate the range of differences, their possible consequences on their needs and interests, and seek a mutually acceptable alternative royalty structure and solution. This preserved good relationships throughout the discussions and enabled better cooperation between counsel as well, who initially had robustly defended the original valuations and proposals from each party, leading to out-of-group heuristics and conflict escalation.

*CASE STUDY 2: REAL ESTATE AND INHERITANCE DISPUTE.* A real estate and inheritance dispute involving significant assets and three generations of a large family was resolved using MED-CON.

Family members disagreed regarding the value and fair market rental of several buildings and residential apartments, some of which were occupied by family members. Working with a retired judge as a conciliator and a real estate evaluator as an expert (two evaluative neutrals in this case, in addition to a mediator), the parties were able to change the debate from original positions to considering a much broader range of options at different valuations using different structures.

The mediator played a key role in taking feedback from the conciliator and the valuation expert to help bring the parties and their counsel back to the advice and recommendations they were receiving, enabling them to find solutions that better considered the interests of different family members, and

preserve better relationships for the younger generation.

**CASE STUDY 3: TRADEMARK INFRINGEMENT DISPUTE.** In a trademark infringement dispute with disagreements on the valuation of certain brands and their validity, as well as fair use in making comparative statements about them, the conciliator provided expertise on trademark case law and permitted comparative uses of other owners' brands in different jurisdictions.

The mediator worked with the parties and their counsel to understand the possible consequences of the ranges of different interpretations in various countries on the parties' future needs and interests in these markets. This helped overcome the legal issues initially dominating the case and explore more holistic and interest-based solutions looking to the future, understanding that consumers were likely to compare these branded products closely in any event. The question became how to do so in ways that would minimize possible confusion regarding the source of goods and brands.

## Challenges and Considerations

While MED-CON offers significant benefits, it also presents certain challenges that need careful consideration:

1. *Coordination Between Neutrals:* Effective coordination between the mediator and conciliator is crucial. They must maintain clear communication and understand each other's roles to avoid conflicting guidance.
2. *Party Perception:* Parties must clearly understand the distinct roles of the mediator and conciliator. Misunderstandings can lead to confusion and reduced trust in the process.
3. *Training and Expertise:* Neutrals must be well-trained in both mediation and conciliation techniques. This requires continuing education and practical experience in handling complex disputes.
4. *Cost Considerations:* While MED-CON can be cost-effective overall, it may initially seem more expensive due to the involvement of two neutrals. Parties should be made aware of the long-term savings and benefits.
5. *Complexity of Process:* The complexity of coordinating two ADR processes can be challenging. Clear guidelines and

structured processes must be established to ensure that both mediation and conciliation phases are effectively managed.

6. *Cultural Sensitivity:* In international disputes, cultural differences can affect how parties perceive and engage with mediation and conciliation. Neutrals must be culturally competent and sensitive to these differences to facilitate a successful resolution.


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MED-CON ADR, as a mixed mode process, offers a powerful tool for resolving commercial disputes by integrating the strengths of both mediation and conciliation.

By treating these processes as separate yet complementary, and using skilled neutrals, parties can achieve faster, cheaper, and more satisfactory outcomes while preserving valuable business relationships. Heated conflicts can be de-escalated, and experts can be brought in without coalition-building. Effective

coordination and communication between the mediator and conciliator are essential to ensure the success of this combined approach.

Ultimately, the question for the parties becomes to what extent the disputants really need to: (1) improve relationships and dialogue; (2) exchange information on specific items; and/or (3) negotiate and reach a compromise (e.g., on numbers). It can be a combination of all there, but with differing degrees of importance allocated to each topic, which can also greatly affect the balance between when mediation is needed as opposed to conciliation, or how and when to combine them.

Balancing mediation with conciliation optimizes emotional, social, and rational heuristics, allowing disputants to benefit from pro-social in-group behavior while considering their legal positions and the advice received, without escalating the conflict further. Even more interestingly, they tend to lead to almost 100% settlement rates. 

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