



Sun Tzu wrote that all warfare is based on deception, and then, in a line far less quoted, that supreme excellence is to subdue the enemy without fighting. Alternative dispute resolution (ADR) was built on the second sentence. This editorial argues that the peace is real only in the sense that the noise has stopped. The deception has not left the room. It has simply changed its clothes.

In the courtroom, strategic concealment works through paper, document dumps, privilege logs, selective deletion. In ADR, it works through information itself, who knows what, who may say it, and who is ever allowed to find out. Negotiation at bottom, is the management of what the other side is permitted to believe. And the question to start asking is, what rules, if any, should govern it?

The Gentle Myth of ADR

Fisher and Ury's *Getting to Yes* taught to look past stated positions to underlying interests, to invent options for mutual gain, and to bargain on principle. Mediation grew from that optimism, a neutral helps two people talk, and the truth of what they really need emerges in the conversation.

The theory is sound as far as it goes. But notice what it leaves out, nobody in a negotiation is obliged to reveal their true walk-away point, often called the BATNA, best alternative to a negotiated agreement. Nobody has to disclose how desperate they are for cash, how much they fear a hearing date, or how little their threatened counterclaim is actually worth.

The space in which a deal is possible, which negotiators call the zone of possible agreement, is precisely the thing both sides are trained to hide. Every skilled negotiator knows that the whole game lies in estimating the other side's hidden limit while concealing their own. That is not a flaw in the method. It is the method.

Manoeuvres Behind the Closed Door

None of the tactics below is unlawful, and most are taught openly in negotiation courses. Deception in war does not require falsehood; it requires an opponent who draws the wrong conclusion from true-seeming signals.

Manoeuvre	Details	Official Purpose	Tactical Use
The anchor	Behavioural research on anchoring suggests that the first number on the table pulls the final outcome toward it, even when everyone knows the number is arbitrary. The wise negotiator therefore opens high, not because the figure is true, but because it is useful. Nobody calls this lying. It is a statement calibrated to mislead about what one expects to receive.	Open the conversation with a starting position.	Set an extreme first number so every later 'concession' looks generous.
Bluffed walk-away	'My client will never settle below this figure.' The sentence may be a prediction, a hope or an invention. ABA Model Rule 4.1 forbids knowingly making a false statement of material fact to a third person, but its commentary takes a realistic line: estimates of price or value, and a party's intentions as to an acceptable settlement, are ordinarily not treated as statements of material fact. The profession's own rulebook thus carves out a protected space for exactly the statements most likely to deceive.	Show the limit of one's flexibility.	Overstate the alternative to a deal, since the other side cannot audit it.
Caucus filter	In mediation, the neutral often meets each side privately and carries messages between them. The mediator knows things neither party knows about the other. The mediator decides which to convey, in what framing, and with what urgency. Good mediators do this with skill and integrity, but the structure is, a single person, trusted by both sides, controls the flow of information between them and is rarely challenged on the account. Most parties would not tolerate that arrangement from a lawyer on the other side. But, they accept it from a neutral because neutrality is presumed.	Let a neutral carry messages safely between parties.	Shape what the other side hears, and when, without ever being contradicted.
Confidentiality as cloak	Confidentiality is ADR's most prized feature. It lets parties speak frankly, and it is supported by statute in many places. But the same confidentiality conceals	Encourage candid, frank discussion.	Keep patterns of conduct, and the settlements they produced, out of sight.

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	patterns. If a company is accused by many people of the same conduct and settles each claim quietly, each claimant sees only their own dispute. While a court judgment would create a public record and, perhaps, a legal precedent, a confidential settlement creates neither. The private bargain is fair to the parties and, at the same time, invisible to everyone who might have learned from it.		
Thin record	International arbitration commonly narrows document production to specific, justified requests, often tracked in a Redfern schedule and guided by the IBA Rules on the Taking of Evidence in International Arbitration. That restraint is a virtue, it avoids the litigation dump. Yet the same narrowness means a party who does not know what to ask for will never find it. The IBA Rules allow a tribunal to draw adverse inferences against a party that fails without good reason to produce requested material, but an inference requires a request, and a request requires knowledge. The party holding the secret is, once again, the one best placed to keep it.	Speed and economy.	Narrow document exchange so the decisive page is never requested.

ADR did not abolish the paper war. It privatised the intelligence service.

The Defence, Taken Seriously

Fairness demands the other side's best argument. Negotiation is a voluntary exchange between consenting parties, each of whom knows that the other is bargaining. Both expect puffery, exaggeration and silence. If everyone were required to disclose their true limits at the outset, bargaining would collapse, since the side that revealed its position first would simply be taken to it. Some concealment is what makes a bargain possible.

Confidentiality too, earns its keep. A company that knows every statement will be quoted in a later lawsuit will say nothing useful. Mediation works in large part because people can test ideas they would never commit to in public. And ADR's speed and cost advantages are real for people

who cannot afford three years of litigation. For them, a hidden walk-away point is a small price for getting a resolution at all.

All of this is true, and none of it answers the harder question. The defence justifies deception between equals who have chosen the game. Much of modern ADR is neither. Pre-dispute arbitration clauses now sit in consumer, employment and platform contracts, where they are accepted by clicking a box, and courts have enforced them robustly. In *AT&T Mobility v. Concepcion* 563 U.S. 333 (2011), the U.S. Supreme Court held that the Federal Arbitration Act preempted a state rule against class-action waivers in consumer arbitration agreements.

Judicial review of the resulting awards is narrow. In *Hall Street Associates v. Mattel* 552 U.S. 576 (2008), the Court held that the statutory grounds for vacating an award are exclusive. The choice to be in the room was, for many, never a choice. The deception that is acceptable between equals becomes something different when one side wrote the rules, chose the forum and appears in it every week.

The repeat player problem deserves emphasis because it is the least comfortable. A one-time claimant meets the system once. A corporation that arbitrates hundreds of disputes a year meets it constantly, and knows which providers, procedures and arbitrators tend to produce which results. Empirical work on employment arbitration has suggested that repeat users of arbitration fare better than one-time users, although researchers disagree about how much of that gap is bias and how much reflects the cases repeat players choose to fight. Whatever the explanation, the structure is an asymmetry of information that no single hearing can repair.

The law has long recognised the danger in a narrower form. In *Commonwealth Coatings v. Continental Casualty* 393 U.S. 145 (1968), the Supreme Court set aside an award because an arbitrator had failed to disclose a business relationship with one of the parties. The principle, that the neutral must disclose what might make the other side doubt their neutrality, is exactly right. The difficulty is that disclosure rules still depend on the neutral's own judgment of what is material, and on a party's ability to detect what has not been said.

An Honest ADR Regime Would Require

If the diagnosis holds, exhortation will not cure it. The reforms below are offered as proposals for debate.

1. A floor of disclosure in mediation: Before any session, require an exchange of the small set of documents on which each side's case actually rests. This leaves bluffing about intentions intact, but removes the most corrosive form of deception, hiding facts that would be disclosed in any court.
2. Publish the neutral's track record: Institutions should disclose, in standardised form, how often each arbitrator or mediator has been appointed by the same party or law firm, and with what outcomes. Sunlight costs little, and it targets the repeat-player problem where it lives.

3. Aggregate without exposing: Confidentiality should protect the content of a settlement, not the existence of a pattern. Providers could publish anonymised statistics on claim types, respondent categories and outcomes, letting regulators and claimants see what no single file reveals.
4. Make a question answerable: In arbitration, tribunals should be encouraged to use their power to draw adverse inferences, and to allow narrowly framed requests about categories of material, so that a party who cannot name a document can still ask whether a kind of document exists.
5. Protect the unequal: Where one party is an individual without counsel, require a short, plain-language explanation of what is being given up, and a genuine cooling-off period before a settlement binds. Consent should not have to be both mandatory and uninformed.

Critics will say these reforms would wreck the very features that make ADR attractive, and that a mediator who must disclose every pattern is no longer a safe place to talk. Transparency is not free, and poorly designed rules would push candid conversations into the corridor, off the record, where oversight is weaker still. The profession is right to be wary of solutions that resemble litigation, since the flight from litigation is how ADR began.

But the burden of proof has shifted. For decades, ADR advocates asked sceptics to show that informality harms people. A field that now resolves an enormous share of disputes, including disputes between organisations and the individuals who depend on them, should be expected to show that informality does not. The question is no longer whether ADR is faster or cheaper. It is whether it is fairer, and the evidence we would need to answer is, by design, the evidence we have agreed not to keep.

Winning Without Fighting

Sun Tzu's ideal was victory without battle. ADR's ideal is resolution without combat. They are cousins, and they share a risk, a peace that rests on concealment is only an armistice. The test of a dispute system is not whether the parties shook hands, but whether the handshake was informed. Until that test is applied, every mediator, arbitrator, counsel and client in the room should hold two ideas at once. The first is that negotiation is the most human way yet invented for ending a quarrel. The second is that negotiation is, by its nature, a structured management of belief. Reading a negotiation well means asking not only what is being offered? but what am I being encouraged to think, by whom, and what is being kept out of the room? That is not cynicism. It is the only literacy that makes peace last.