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MED-ARB AND ITS VARIANTS:

for *and* **Ethical Issues Parties Neutrals**

A look at the ethical problems raised by this hybrid dispute resolution process and its variants.

BY RICHARD FULLERTON

In the realm of alternative dispute resolution methods, mediation and arbitration are the most popular.¹ Despite their popularity, each process has detractors—mediation for its lack of a binding decision,² and arbitration for its limited right of judicial review³ and the lack of party control.⁴ These perceived shortcomings have caused parties to seek additional dispute resolution options with the hope of finding a conclusive, fair alternative that also is efficient.

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One possible alternative to individual processes is a combination of mediation and arbitration known as med-arb. Sam Kagel has been credited as the first to combine the two methods into one when settling a controversial nurses' strike in the 1970s.⁵

The hybrid med-arb differs from using mediation and arbitration sequentially in that if the mediation phase of med-arb is unsuccessful in resolving the entire dispute, the mediator becomes the arbitrator, holds an arbitration hearing and issues a binding award. Med-arb eliminates the need to start over with a new arbitrator who is wholly unfamiliar with the dispute. Despite the efficiency of med-arb, it has serious limitations that derive from having the same neutral conduct the mediation and the arbitration. The danger is that the core principles of each process may be compromised.⁶

This article takes a closer look at med-arb to determine whether complaints of ethical compromise are justified.

Definitions

Despite the prevalence of mediation and arbitration, few parties or their counsel are familiar with the ethical foundations. Fewer still understand the particulars or the ethics of the med-arb process. Before discussing the ethical underpinnings, however, a review of the definitions of the processes as used here may be helpful.

The following definitions are drawn from the Colorado Bar Association Web site:⁷

Mediation is a process whereby:

- a neutral and impartial third party (the mediator)
- facilitates communication between negotiating parties which
- may enable the parties to reach settlement.

Arbitration is a process whereby:

- one or more neutral and impartial expert third parties
- hear and consider the evidence and testimony provided by the disputants and
- issue a binding or non-binding decision.

Med-arb is a process whereby:

- a neutral and impartial third party
- facilitates communication between negotiating parties and
- failing settlement, receives evidence and testimony provided by the parties and

- issues a binding decision.

Other definitions of these terms abound, but most are similar to these.

Ethical Foundations of Mediation and Arbitration

Principles supporting mediation and arbitration include collective personal values, which “get their authority from something outside the individual—a higher being or higher authority (e.g., society)”⁸—in this case several recognized associations representing dispute resolution professionals.

Mediation Principles

The Model Standards of Conduct for Mediators⁹ provide guidance in evaluating the ethical basis of mediation. Three of its nine standards are of interest here: Standard I, Self-determination; Standard II, Impartiality; and Standard V, Confidentiality.

Standard I. Self-determination

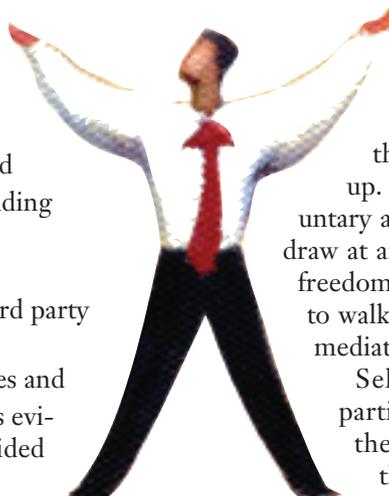
Standard I, Paragraph A, provides in relevant part:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Paragraph B further states: “A mediator shall not undermine party self-determination by any party....”

Self-determination recognizes the right of parties to make independent decisions, beginning with voluntary participation in mediation. An adage common among mediators allows that although parties may be obliged to attend mediation, they fulfill that obligation merely by showing up. Their ensuing participation is voluntary and they have the freedom to withdraw at any point. It has been said that “the freedom to engage in the process but also to walk away from it is critical to effective mediation.”¹⁰

Self-determination also allows the parties joint authority in determining the format, content and conduct of the mediation, and particularly the



terms of any agreement, without undue influence by the mediator.

As we will see later, med-arb violates the self-determination principle by eliminating the right to withdraw voluntarily.

The degree of mediator interaction with the parties during mediation depends on the mediator's personal style. A transformative style restricts a mediator from exerting influence, instead empowering parties to chart their own course regardless of outcome. In the more common facilitative mediation, a mediator has the latitude to clarify party perspectives that could lead to agreement. An evaluative mediator expresses personal opinions on the merits of party positions in encouraging settlement. Regardless of style, parties maintain the right to reject any influence of the neutral. However, if the neutral is ultimately to be the decider in a subsequent arbitration, mediator-party interaction may be undermined.

By having a single neutral conduct both the mediation and arbitration, several core principles guiding the conduct of arbitrators and mediators may be compromised.

Standard II. Impartiality.

Paragraph A of Standard II of the Mediator Standards provides: "A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice."

Mediation promises a balanced process. Paragraph B instructs mediators to "avoid conduct that gives the appearance of partiality."

Mediators often meet separately with each party to explore facts and beliefs that could affect the outcome of mediation, even though *ex parte* communication presents an increased risk of bias or the appearance of bias.

Because of the very nature of mediation, however, an "appearance of impartiality" does not have the same pivotal consequence in mediation that it has in arbitration. Arbitrators are not supposed to have any *ex parte* communication. However, the private communication from the mediation phase of med-arb necessarily is known by the neutral in the arbitration phase because the mediator is also the arbitrator.

Standard V. Confidentiality

Paragraph A of Standard V of the Mediator Standards provides, "A mediator shall maintain the confidentiality of all information obtained by

the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law."

Mediators often rely on confidential information to encourage parties to rethink the perspectives they bring to a dispute. Particularly in facilitative or evaluative mediation, the "task of the mediator is to attempt to persuade each party to focus on its real interests, rather than on what it conceives to be its contractual or legal entitlement."¹¹

This technique can result in greater party satisfaction and, consequently, higher rates of agreement. In encouraging parties to share confidential information, the mediator pledges confidentiality so that the information disclosed will not be used against them. The critical commitments to self-determination, impartiality, and confidentiality are so important to mediation practice that any effort that does not uphold them would not be considered mediation.

In med-arb, confidentiality of private information is not shielded from the neutral when acting as arbitrator; even if the other side does not have the information, the decider in the dispute does. Private information that could be helpful in finding a resolution in mediation could be used against a party in the looming arbitration phase.

Arbitrator Standards

The Code of Ethics for Arbitrators in Commercial Disputes (Arbitrator Code)¹² provides guidance in examining ethical considerations in the arbitration process. The Arbitrator Code is organized into ten canons. It was originally prepared in 1977 by a joint committee of representatives from the American Arbitration Association (AAA) and the American Bar Association. It was revised in 2004 by an ABA Task Force and special committee of the AAA. Both the original 1977 code and the 2004 revision were approved and recommended by both organizations.

Four Canons are pertinent to evaluating med-arb ethics.

Canon III. Appearance of Impropriety

Canon III states: "An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties." This canon takes

aim at the “impropriety” created by the arbitrator having *ex parte* communication with a party involving the content of a case. Paragraph B provides, with a few exceptions, that “[a]n arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party....” As discussed above, this canon attempts to shield the arbitrator from influence that could bias the award.

Canon IV. Fair Proceedings

Canon IV states, “An arbitrator should conduct the proceedings fairly and diligently.” This canon reinforces the due process right of parties to present evidence, to be represented by counsel, and to a timely process. It allows the arbitrator to continue the arbitration if one party fails to attend, and generally provides guidance for the conduct of the arbitration process. For example, it allows the arbitrator to ask questions at the hearing.

Paragraph H of Canon IV also permits the arbitrator to suggest to the parties that they settle, but it does not give arbitrators the right to pressure them to do so. Arbitrators do not have the same leeway in communicating with the parties that mediators have.

Canon V. Independence

Canon V states, “An arbitrator should make decisions in a just, independent and deliberate manner.” It instructs the arbitrator to decide all issues independently and “not permit outside pressure to affect the decision,” thereby isolating the neutral beyond the even-handed exchange of the arbitration hearing. The arbitrator also is limited to deciding the issues before him or her, whereas in mediation, the mediator is free to urge the parties to consider ways to “expand the pie” or otherwise resolve the dispute outside the confines of the controversy.

Canon VI. Trust and Confidence

Canon VI states, “An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office.” This canon addresses respect for confidentiality, which is an important aspect of both arbitration and mediation. However, in mediation, the mediator is allowed—even encouraged—to hear confidential information in private caucus to assist in resolving the dispute. The Arbitrator Code does not allow any *ex parte* communication.

Thus, this code and the Mediator Standards are formulated on different and sometimes opposing principles. The Mediator Standards allow private communication between mediator and the parties, relying on self-determination and confidentiality to ensure the parties’ right to make important decisions without influence. The Arbitrator Code, by contrast, protects arbitrators from confidential information by allowing only plenary exchanges.

These opposing principles cannot both be observed in med-arb.

Med-Arb and Ethical Concerns

The med-arb process has no governing ethical code of its own. For ethical guidance one must look to the Mediator Standards and the Arbitrator Code.

As a hybrid process, med-arb does not have universally accepted procedures. This article assumes that med-arb includes the following procedures:

1. First the parties agree on a protocol detailing both the mediation and arbitration phases. The protocol is incorporated into a med-arb agreement. By signing this agreement, the parties commit to participate in each process until a mediated resolution is reached and executed or, if a full settlement is not reached, a binding arbitration award is issued.
2. The process begins with mediation. If mediation results in a complete agreement, the med-arb is terminated without the need for arbitration. Lacking full agreement, the mediator closes the mediation and commences the arbitration phase.
3. During the mediation phase, the mediator may engage in *ex parte* conversation with each side, but may not do so during arbitration.

Parties unfamiliar with med-arb may not realize that it differs in significant ways from traditional mediation and arbitration. However, as soon as the parties sign the med-arb agreement, changes occur. First, by committing to engage in med-arb, the parties relinquish the right to voluntary participation and voluntary withdrawal, both of which are protected by Mediator Standard I (self-determination).

Second, instead of negotiating freely, they may feel pressured to accept an offer before an arbitration award is imposed.

Med-arb raises concern about the parties’ right to self-determination and possible arbitrator bias.

If the parties proceed to arbitration, an ethical problem arises because the neutral engaged in *ex parte* communication during mediation. In this scenario, it is possible—even likely (even though some dispute resolution professionals disagree)—that this communication will influence the neutral’s view of the evidence and ultimately the arbitration award. Thus, *ex parte* communication, although not a danger during the mediation phase, becomes one in the arbitration phase in light of Arbitrator Code Canon III, which does not permit “impropriety or the appearance of impropriety in communicating with the parties.”

One commentator has written that information disclosed during a private caucus in the mediation phase “might tempt the neutral into questionable conduct during the arbitration phase. Could a mediator-turned-arbitrator properly conduct questioning during the arbitration phase of a Med-Arb proceeding directed at information disclosed during earlier private sessions of the mediation?”

Another commentator questioned, “Why would it be permissible for such information to be possessed by a Med-Arb arbitrator but not by any other arbitrator or by a court?”¹³

Some neutrals in med-arb cases claim to be able to disregard confidential information acquired during the mediation phase and say that the risk of such information tainting the arbitration phase is limited. One commentator wrote, “Concerns about the possible contamination of the neutral by receiving information or arguments in private meetings are overstated. Judges regularly rule on the admissibility of evidence and if that evidence is rejected the judge disregards the information that has been tendered.”¹⁴

In addition, Canon VI of the Arbitrator Code, which cautions arbitrators not to “gain personal advantage or advantage for others, or to affect adversely the interest of another,” can be used as a shield from accusations of bias.

But the problem remains that med-arb has no procedural safeguards against the effects of confidential information and the practice of allowing such communication makes them susceptible to bias. Knowing this, a party could “take advantage of this process” by trying to persuade the mediator—even by introducing misleading information—in order to later influence the final award.¹⁵ And even worse, that information would be protected by confidentiality and not subject to challenge in court.

To recap, the self-determination principle is severely compromised in med-arb by the elimination of voluntary participation and the absence of a withdrawal option. Also, the impartiality princi-

ple is violated by the ability of the neutral to engage in *ex parte* communication. Both concerns would be recognized by users of med-arb only with a thorough understanding of the differences between med-arb and the principles of accepted mediation and arbitration practice. Except during preparation by counsel or the neutral, users may not notice any procedural difference signaling these changes.



Med-Arb Is a Unique Process

Support for med-arb may be based on the fundamental misconception that med-arb provides all the benefits of traditional mediation and arbitration in a single process.¹⁶ The idea that med-arb provides the best of both procedures is simply inaccurate. Med-arb offers what appears to be mediation, but parties are subjected to unique pressures in avoiding an imposed decision. If they go to arbitration, the award they want to rely on for finality may be tainted by arbitrator bias. Med-arb can be described more accurately as a unique process differing in important ways from mediation and arbitration.

Med-Arb Practice Variations

To reduce the ethical concerns of the combined practices, practitioners have come up with some variations in order to offer parties greater protection and reduce the potential for bias. Several variations are considered below.

Overlapping Neutrals

One med-arb variation involves using two neutrals, a mediator and an arbitrator. Instead of isolating the arbitrator from the mediation, the arbitrator attends joint mediation sessions as an observer and receives all documents exchanged by the parties during the mediation. The arbitrator is only prevented from having access to private communication between the mediator and each party.

If an agreement is reached, the arbitration phase is abandoned. If not, the mediator is excused and the arbitrator holds an arbitration hearing to receive evidence.

Overlapping neutrals is efficient because, if there is a need to hold the arbitration, the arbitrator is already familiar with much of the case when arbitration starts. It also offers legitimate separation to avoid arbitrator bias.

But it is more expensive to engage two neutrals. In addition, the concern remains that the parties are still required to forego voluntary withdrawal from the mediation portion of the

process. This is no small matter. As Michael Hoellering once wrote: “A large part of this openness to mediation and the 85% settlement rate can be attributed to the voluntary nature of the process, and a party’s right to end its participation at any time without fear of repercussions.”¹⁷

Overlapping neutrals place the parties during mediated joint sessions under the attentive eye of the arbitrator. It is difficult to anticipate how this will affect the parties’ behavior. Will they seek to attract the favor of the arbitrator or otherwise try to influence the award? Will they be as candid as they need to be to make the mediation work? The use of overlapping neutrals, each with separate interests, has some advantages but at an unknown cost to the mediation.

Plenary Med-Arb

In the plenary med-arb variation there is a single neutral (following the med-arb procedures assumed in this article) who is not allowed to have any *ex parte* communication with any party. All communication, both oral and written, is in joint (plenary) meetings. This eliminates concerns of bias, but it may hinder the effectiveness of the mediation, making it more challenging for the parties to reach a settlement. Facilitative and evaluative mediators feel that the practice of mediation without private caucuses is not a legitimate process because “candid and honest private communications with the mediator are generally considered essential to successful mediation....”¹⁸ Also, as another commentator has noted, “an impairment of private communications and caucuses will prejudice the prospects of achieving settlement to the satisfaction of the parties.”¹⁹

Braided Med-Arb

The braided med-arb variation involves a single neutral. What makes it different is that the arbitration phase can be interrupted for further mediation efforts so that the parties have additional opportunities to pursue voluntary agreement. Proponents see an expanded opportunity for self-determination as the parties seek agreement periodically during the arbitration phase.

However, this variation may violate Paragraph F of Canon IV of the Arbitrator Code, which specifically discourages an arbitrator from pressuring parties to settle or to mediate. Paragraph F states: “Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of media-

tion, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle.”

In the arbitration phase, the neutral gains complete authority over the outcome and consequently has substantial power in the eyes of the parties. They could construe a settlement proposal from the neutral (whether during the mediation or the arbitration phase) not as a mere suggestion, but as a strong recommendation or a veiled directive. Thus, with braided med-arb, proposals by the neutral may appear coercive and jeopardize the principle of party self-determination.

Although braided med-arb may improve the chances for a cooperative agreement, it places the neutral in a compromised position when encouraging settlement, especially after confidential information has been shared.

Med-Arb with Optional Withdrawal

A significant concern with med-arb is the elimination of the parties’ right to voluntarily withdraw due to the commitment to arbitrate. This concern could be eliminated by allowing parties to decide whether to proceed to arbitration at the termination of the mediation phase, rather than at the beginning. An opt-out provision would protect voluntary participation.

However, optional withdrawal med-arb could undermine a practical benefit of med-arb—that is, finality. Withdrawal would force the parties to engage in a new dispute resolution effort to secure a final outcome. In addition, the option to withdraw may give a party an incentive to manipulate the situation by offering finality but withdrawing at the last minute. As a result of this risk, one commentator opined, “If a party believes that an opt-out clause is required, med-arb should probably be rejected.”²⁰

Furthermore, parties who continue to arbitration still face the concern that a neutral was privy to *ex parte* communication and therefore could be biased.

Arb-Med

The reverse of med-arb, “arb-med,” has gained credibility in a few specialized arenas, although it is not well known or broadly used. It has support for both its results and its ethics in eliminating arbitrator bias.²¹ Arb-med is a process in which:

- a neutral and impartial third party receives evidence and testimony provided by disputants in an arbitration, then



writes an award that is withheld from the parties, after which

- the neutral facilitates communication between the parties in the mediation to enable them to reach an agreement, and
- failing agreement, the arbitration award is issued and becomes binding on them.

The structure of arb-med allows each party to evaluate its arbitration case after hearing the opponent's case, when it is easier to recognize strengths or weakness that could help the parties find common ground during mediation. After the close of the arbitration phase and the writing of the award, the neutral is free to hold private caucuses with each party during the mediation phase. Because the award has already been written, it cannot be tainted by *ex parte* communication.

Although this variation eliminates the ethical problem of award contamination, it introduces two new concerns. First, parties might feel greater pressure to reach agreement during the mediation phase of the arb-med process because they are aware of the relative strength of their cases and have a binding award hanging over the mediation. Their only alternative to accepting the arbitration award would be to reach a mediated agreement.²² So it is not surprising that arb-med is credited with a greater rate of voluntary agreement.²³

The other concern is that after the arbitration award has been written, the neutral cannot change it, regardless of insight gained during the subsequent mediation. Were new information revealed that would have altered the award, the neutral might be tempted to encourage a mediated agreement so that the award would not become known.

Ethical Considerations

In med-arb and some variants, parties may not be aware of ethical compromises that exist compared to traditional mediation and arbitration. For example, conceding their withdrawal right may cause them to feel greater pressure to settle and affect the way they interact during mediation.

Optional withdrawal med-arb circumvents this concern, and braided med-arb increases the opportunity for voluntary agreement, but each

introduces ethical or procedural problems of its own.

Variations that attempt to eliminate *ex parte* communication face similar problems. They may shield neutrals from confidential information but create concerns that cloud their effectiveness. Consequently, although med-arb and its variations may have satisfactory and/or practical outcomes, none offers simultaneous protection of the ethical standards for both mediation and arbitration.

The Med-Arb Dilemma to Parties

Despite its limitations, some parties prefer the greater efficiency of med-arb to traditional mediation followed by a separate arbitration using a different neutral. The strongest argument for med-arb is that parties have the right to contract for a less-than-perfectly-ethical process to resolve dispute if they choose. Some commentators have explained it as follows: “[W]hen consenting adults make such judgments with an informed understanding of the advantages and possible disadvantages of the Med-Arb process, they should be free to contract for the dispute resolution process that seems best to them.”²⁴

Further, there are few legal restrictions on parties in choosing any dispute resolution method they desire. The Alternative Dispute Resolution (ADR) Act, which authorizes district courts to promulgate local rules that authorize the use of “alternative dispute resolution processes in all civil actions,” broadly defines “alternative dispute resolution processes.” Section 651(a) provides, in relevant part: “Definition: For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy....”²⁰

John W. Cooley, a strong supporter of self-determination in ADR, wrote in the *Dispute Resolution Journal*, “ADR profession leaders and designers must ... emphasize the importance of practitioners preserving and guaranteeing to all parties who use ADR services the parties’ rights to self-determination and informed consent.” He explained that “[s]elf-determination is important because it preserves the parties’ right to freely and jointly choose the neutral (lawyer and non-

Despite its limitations, some parties prefer the greater efficiency of med-arb to traditional mediation followed by a separate arbitration using a different neutral.

Med-Arb Practice Variations

| Method | Procedure | Benefits | Ethical Concerns | Procedural Concerns |
|---|--|--|---|---|
| Med-Arb Hybrid | <ul style="list-style-type: none"> • 1st mediation, 2nd arbitration • one neutral • <i>ex parte</i> communication allowed in mediation phase | <ul style="list-style-type: none"> • efficient | <ul style="list-style-type: none"> • no voluntary withdrawal • risk of arbitrator bias from access to <i>ex parte</i> communication | |
| Overlapping Neutrals | <ul style="list-style-type: none"> • 1st mediation, 2nd arbitration • two neutrals • <i>ex parte</i> communication allowed in mediation phase • arbitrator hears only shared info in mediation | <ul style="list-style-type: none"> • efficient • no risk of arbitrator bias | <ul style="list-style-type: none"> • no voluntary withdrawal | <ul style="list-style-type: none"> • arbitrator's sitting in on mediation can alter interpersonal dynamics • more expensive |
| Plenary Med-Arb | <ul style="list-style-type: none"> • 1st mediation, 2nd arbitration • single neutral • no <i>ex parte</i> communication allowed in either phase | <ul style="list-style-type: none"> • efficient • no risk of arbitrator bias | <ul style="list-style-type: none"> • no voluntary withdrawal | <ul style="list-style-type: none"> • mediation weakened without confidential info |
| Braided Med-Arb | <ul style="list-style-type: none"> • 1st mediation, 2nd arbitration • single neutral • <i>ex parte</i> communication allowed in mediation phase • mediation allowed during breaks in arbitration phase | <ul style="list-style-type: none"> • efficient • more opportunity for voluntary agreement | <ul style="list-style-type: none"> • no voluntary withdrawal • risk of arbitrator bias • parties may feel pressure to settle | |
| Med-Arb with Optional Withdrawal | <ul style="list-style-type: none"> • 1st mediation, 2nd arbitration • single neutral • <i>ex parte</i> communication allowed in mediation phase • parties can forgo arbitration by withdrawing after mediation | <ul style="list-style-type: none"> • efficient • withdrawal option allows greater self-determination | <ul style="list-style-type: none"> • risk of arbitrator bias | <ul style="list-style-type: none"> • no guarantee of finality • possible manipulation by parties |
| Arb-Med | <ul style="list-style-type: none"> • 1st arbitration, 2nd mediation • single neutral • <i>ex parte</i> communication allowed in mediation phase • award disclosed after mediation if no settlement | <ul style="list-style-type: none"> • efficient • no risk of arbitrator bias | <ul style="list-style-type: none"> • no voluntary withdrawal • parties may feel pressure to settle in mediation | <ul style="list-style-type: none"> • arbitrator cannot alter award based on mediation |

lawyer) and the ADR process that best suits their specific needs.”³⁰

With informed consent, those who freely choose med-arb for its expediency over principle, assume the risk of demonstrated flaws that may affect their specific case.

The Med-Arb Dilemma for Neutrals

Many neutrals do not accept appointment in med-arb cases, even with the parties’ informed consent, because of the ethical issues. Others do. An important question is whether those practitioners can provide med-arb services in good conscience. Guidance provided by the Mediator Standards and the Arbitrator Code suggest that the answer is arguably yes, if informed consent is obtained from the parties.

Mediator Standard VI, governing the quality of the process, states in Paragraph 8:

A mediator shall not undertake an additional dispute resolution role in the same matter

without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.³¹

Canon IV of the Arbitrator Code similarly states, “An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.”³²

Neutrals who provide med-arb services do stress the necessity of securing informed consent of the parties. For example, Gerald Phillips, a California neutral, has written, “[T]he parties ... can be fully informed of any ethical problems and decide to waive any objections they may have to the Med-Arb process. That is why the parties’ informed consent to same-neutral Med-Arb is so critical.”³³

However, serving as a neutral in a med-arb may require working outside a strict interpretation of the Mediator Standards and Arbitrator Code because, as the earlier sections of this article have shown, they may have been or could be compromised by med-arb at some point. But there is one principle that the neutral may not depart from: the obligation to uphold the parties' essential right to a fair process. Thus, for example, each neutral must determine the effect of private information acquired during an *ex parte* communication and its influence on the award. Finding the appropriate balance would be left to the discretion of each neutral.

This is a heavy responsibility but one that sophisticated neutrals are capable of performing. Nevertheless, there is greater uncertainty for the parties and neutrals in med-arb than in traditional arbitration and mediation. That may explain why many neutrals decline to offer med-arb services.

To clarify the details of the med-arb process, it is recommended that the parties "spell out in detail in a written protocol exactly what process they wish to follow before the proceedings begin."³⁴

These suggestions recognize ethical pitfalls in med-arb and steer the participants toward full knowledge of the inherent risks, the parties' expectations and the procedures they would like to follow. However, informed consent does not establish an ethical foundation for med-arb. It is only an acknowledgement of, and an assumption of, risk from defects in the process.

Professional Support for Med-Arb

Several interested organizations have taken a cautious position on med-arb. For example, the AAA does not recommend same-neutral med-arb "except in unusual circumstances because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions *ex parte* improperly influencing the arbitrator." However, the AAA says it will administer a case using same-neutral med-arb if that is what the parties want. JAMS³⁵ also does not recommend same-neutral med-arb, but will administer such a process if the parties expressly agree to it.³⁶

The International Institute for Conflict Pre-

vention and Resolution (CPR), on the other hand, promotes having two neutrals. "[T]o ensure the integrity of the arbitration process, Med/Arb agreements should provide that the arbitrator shall not be the same person who served as mediator in the matter."³⁷ Deborah Katz of the Expanded Conflict Management Processes Committee of the Dispute Resolution Section of the ABA has said:

After completing the mediation session, it is not unusual for the parties to agree to have the mediator continue on as the arbitrator as long as the parties do not feel that they have shared any private or confidential information with the mediator that might adversely affect the decision of the mediator/arbitrator.³⁸

No professional dispute organization has been found that recommends the practice of med-arb without conditions.

No professional dispute organization has been found that recommends the practice of med-arb without conditions. CPR rejects same-neutral med-arb, and the ADR Section of the ABA seems to have no objection to it if no confidential information was shared. Both the AAA and JAMS discourage the process by publicly withholding their recommendations. But they recognize party autonomy to choose the process and by saying they will administer the process if the parties agree in writing.

Thus, med-arb has little backing from dispute resolution organizations.

Conclusion

Traditional mediation and arbitration processes, each with its proven history and ethical standards, are well accepted. However, there are ethical issues that arise when these processes are combined, challenging the integrity of each process in different ways, and creating several risks to both parties and neutrals.

Although variations of med-arb may allow greater ethical protection, none does so completely or without ethical or procedural obstacles. Nevertheless, some parties are willing to engage in med-arb anyway, because it offers greater efficiency and finality. An understanding of the complications may allow an experienced neutral to offer med-arb as a useful—if imperfect—dispute resolution alternative. ■

(Endnotes are on page 154)

supra n. 14, at ¶ 88.

¹⁹ UNCITRAL Secretariat, Note, Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules (Dec. 6 2006) ¶ 24, UN Doc A/CN.9/WGII/WP.145/Add.1.

²⁰ Report of WGII on the work of its 47th session (Sept. 10-14, 2007) ¶ 30, UN Doc A/CN.9/641.

²¹ See art. 4.2 of the 1999 and 2010 IBA Rules.

²² See art. 6.2 of the 1999 IBA Rules (requiring statement of independence before expert's appointment) and art. 6.2 of the 2010 IBA Rules (requiring description of qualifications and statement of independence before expert's appointment).

²³ Report of WGII on the work of its 51st session (Sept. 14-18, 2009) ¶ 94, UN Doc A/CN.9/684.

²⁴ Compare *id.*, ¶ 91 with Report of WGII on the work of its 47th session, *supra* n. 20, at ¶ 110.

²⁵ Report of WGII on the work of its 48th session (Feb. 4-8, 2008) ¶ 20, UN Doc A/CN.9/646.

²⁶ Report of WGII on the work of its 45th session, *supra* n. 10, at ¶ 57.

²⁷ Report of WGII on the work of its 46th session (5-9 Feb. 5-9, 2007) ¶ 63, UN Doc A/CN.9/619.

²⁸ UNCITRAL Secretariat, Note, *supra* n. 19, at ¶ 41.

²⁹ Report of WGII on the work of its 45th session, *supra* n. 10, at ¶ 67 ("in

practice, arbitral proceedings had been adversely affected by *mala fide* or tactical resignations by arbitrators"); *id.* at ¶ 71 (noting that loss of the right to reappoint an arbitrator "could only be based on the faulty behavior of a party to the arbitration").

³⁰ *Id.* at ¶ 76.

³¹ See, e.g., Baker & Davis, *supra* n. 12, at 107.

³² See, e.g., *Glamis Gold v United States* (Procedural Order No 2, 31 May 2005; NAFTA Chapter 11 proceeding) ¶ 12(c) (tribunal 'may decline to [bifurcate jurisdictional issues] when doing so is unlikely to bring about increased efficiency'), available at http://ita.law.uvic.ca/documents/16Order2_000.pdf.

Med-Arb and its Variants: Ethical Issues for Parties and Neutrals

(Continued from page 61)

¹ David Lipsky & Ronald Seeber, "The Appropriate Resolution of Corporate Dispute: A Report on the Growing Use of ADR by U.S. Corporations," available at www.marquette.edu/disputeres/downloads/patterns.pdf.

² Claude Thompson, "Med-Arb: A Fresh Look" (Nov. 12, 2008), available at www.claudethomson.com/docs/Med-Arb_A_Fresh_Look.pdf.

³ The ADR Committee of the Colorado Bar Association (CBA), Manual on Alternative Dispute Resolution, available at www.cobar.org/index.cfm/ID/211/subID/1244/Manual-on-Alternative-Dispute-Resolution.

⁴ Steven Menack, "Mediation/Arbitration: The Hybrid ADR Theory," *N.J.L.J.* (Aug. 14, 1995), available at www.divorcelawandmediation.com/images/mediationarticle2.pdf.

⁵ Megan Elizabeth Telford, "Med-Arb: A Viable Dispute Resolution Alternative," available at irc.queensu.ca/gallery/1/cis-med-arb-a-viable-dispute-resolution-alternative.pdf.

Med-arb achieved broad acceptance in the 1980s, particularly in public sector labor conflicts where the mediation phase offered the possibility of resolving the dispute through a cooperative exchange, which, if unsuccessful, is followed by arbitration as the ultimate hammer to bring about resolution while preventing labor disruptions.

⁶ See Gerald Phillips, "Same-Neutral Med-Arb: What Does the Future Hold?" 60(2) *Disp. Resol. J.* 26 (May/July 2005) (stating: "Some arbitrators and mediators believe that mixing mediation and arbitration is heretical and even unethical....").

⁷ Colorado Bar Association, "Alternative Dispute Resolution Process De-

finitions," available at www.cobar.org/adrdirectory/description.cfm.

⁸ Frank J. Navran, "Defining Values, Morals, and Ethics," available at www.navran.com/article-values-morals-ethics.shtml.

⁹ Model Standards of Conduct for Mediators (Aug. 2005), available at www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf.

¹⁰ Michael Hoellering, "Mediation & Arbitration: A Growing Interaction," 52(2) *Disp. Resol. J.* 23-25 (Spring 1997). Michael Hoellering was the corporate counsel of the American Arbitration Association for many years.

¹¹ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 1999).

¹² Code of Ethics for Arbitrators in Commercial Disputes (Feb. 9, 2004), available at www.abanet.org/dispute/commercial_disputes.pdf.

¹³ Thomas J. Brewer & Lawrence R. Mills, "Med-Arb: Combining Mediation & Arbitration," 54(4) *Disp. Resol. J.* 32-39 (Nov. 1999).

¹⁴ Thomson, *supra* n. 2.

¹⁵ *Id.*

¹⁶ Examples can be found in professional journals. "[The] med/arb process provides the disputants with the best that mediation and arbitration have to offer. It furnishes them with a clean incentive to resolve the disputed issues promptly, affordably, amicably and to their mutual satisfaction through mediation, by holding open the prospect of an adverse, nonappealable determination by the arbitrator if a mediated settlement is not reached." Menack, *supra* n. 4

¹⁷ Hoellering, *supra* n. 10.

¹⁸ Brewer & Mills, *supra* n. 13

¹⁹ Thompson, *supra* n. 2.

²⁰ *Id.*

²¹ Arnold Zack, "The Quest for Finality in Airline Disputes: A Case for Arb-Med," 58(4) *Disp. Resol. J.* 34-38 (Nov. 2003/Jan. 2004).

²² William H. Ross & Donald E. Conlon, "Hybrid Forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration," 25 *Acad. of Mgmt. Rev.* 416-27 (2000) (it "may cause disputants to actively consider the possibility of losing ... because a ruling already has been rendered...."). As another author noted, "the deal sealer is the power of the envelope." Rita Drummond, "A Case for Arb-Med: Why Consider It and How to Draft an Arb-Med Clause," available at papers.ssrn.com/sol3/papers.cfm?abstract_id=951194, 12/2/2008.

²³ Brewer & Mills, *supra* n. 13.

²⁴ 28 U.S.C. § 651.

²⁵ John W. Cooley, "Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR," 55(3) *Disp. Resol. J.* 72-79 (Aug./Oct. 2000).

³⁰ Model Standards, *supra* n. 9.

³¹ Code of Ethics, *supra* n. 12.

³² Phillips, *supra* n. 6.

³³ Brewer & Mills, *supra* n. 13.

³⁴ See www.jamsadr.com.

³⁵ Phillips, *supra* n. 6.

³⁶ International Institute for Conflict Prevention & Resolution, "An ADR Primer" (Dec. 2, 2008), available at www.cpradr.org/ClausesRules/ADRPrimer/tabid/340/Default.aspx.

³⁷ ABA Section of Dispute Resolution, "Expanded Conflict Management Processes," available at www.abanet.org/dch/committee.cfm?com=DR088888.

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