

**American Arbitration Association
Advanced Mediator Training
November 6, 2009**

**Med-arb, Arb-med, Binding Mediation,
Mediator's Proposal, and other Hybrid Processes¹**

by Bette J. Roth²

Introduction

Mediation and arbitration are the most popular forms of alternative dispute resolution, and both are favored because they can offer parties efficiency and outcomes that are more satisfying than traditional court litigation. Typically, parties agree to mediate the dispute (unless they have a pre-dispute agreement to arbitrate), with the understanding that if the mediation fails to settle the dispute they will then move on to a more adjudicatory process, such as arbitration or court litigation.

In mediation, the parties select their neutral, third party (the mediator), to facilitate their negotiation. It is a confidential, voluntary process, from which the parties can withdraw at any time. If they reach a settlement during mediation, it will be a binding agreement that will include the terms they negotiated. While mediating parties are often satisfied with the outcome (when their case settles), the process lacks certainty, as there is no guarantee that the mediation will be successful. A risk is that the mediation will fail and the parties will return to litigation knowing each other's "cards," and feeling like they wasted time and resources with an unsuccessful process.

Arbitration is a process in which the parties agree to submit their dispute to a neutral, third party (the arbitrator), who renders a final and binding decision based on the evidence presented at hearing. While the arbitration process can provide parties with a certain outcome, the grounds for judicial review of the decision are extremely limited, and the parties run the risk that they will not be satisfied with the decision.

Given these shortcomings (the lack of certainty in mediation and the lack of outcome control in arbitration), parties and neutrals have developed, during the past 35 years, hybrid processes that incorporate what are viewed as the best elements from each: efficiency, fairness, and a conclusive outcome.

¹ Copyright © 2009 Bette J. Roth.

² Bette J. Roth is a mediator and arbitrator, and the primary editor of the two-volume text, [The Alternative Dispute Resolution Practice Guide](#) (Thomson/West copyright ©1993-2009), in which she co-authored the chapter on med-arb with Sam Kagel. She also teaches mediation at Boston University School of Law.

Med-arb

In 1972, Sam Kagel and John Kagel, California neutrals, introduced the hybrid form of dispute resolution “med-arb”, a two-step process in which a single neutral (med-arbitrator) combines mediation with binding arbitration. The process starts with a mediation. If the mediator is unable to fully settle all the claims, then he or she assumes the role of arbitrator for the case and decides the issues not settled during the mediation. The final result is a binding decision that is intended to be as enforceable as an ordinary arbitration award. However, as set forth below, there is considerable debate as to whether, or to what extent, med-arb is effective or ethical.

The med-arb process

The “med” phase v. mediation

At the start of the med-arb process, the med-arbitrator will be acting as mediator and most likely will start with a joint session in order to determine each party's perspective on the issues. The med-arbitrator will then continue with the med phase, using private caucuses as appropriate. Although the mediation phase of med-arb is conducted much like a traditional mediation, it differs in a number of respects. To start, the med-arbitrator has more "muscle" than an ordinary mediator. Since the med-arbitrator has the ultimate power to make a binding decision, some believe that the process will encourage disputants to moderate their tactics and engage in greater problem-solving exercises, making them more likely to reach an agreement than in ordinary mediation. Others argue that this additional power will make the parties reluctant to be candid with the neutral about case weaknesses and their true interests.

The “med” phase further differs from ordinary mediation in that med-arbitrators are typically less likely to be willing to share their opinion or their case evaluation than ordinary mediators, because they may be fearful of reaching a different result based on the evidence that may be later presented. Another difference from traditional mediation is that the parties cannot simply walk away from the med-arb process at any time, as they will be committed to the process until the matter is concluded. Some believe this encourages the parties to "work out" difficult issues with the neutral to a greater extent than in traditional mediation, but others question the ethics of such a process, as discussed below.

The “arb” phase v. arbitration

In traditional arbitration, the parties present their evidence to the arbitrator during a formal or semi-formal hearing. After the hearing and submission of briefs (if any), the arbitrator makes a final, binding decision. Supporters of med-arb argue that the “arb” phase differs from ordinary arbitration in that much of time spent on fact-finding is eliminated, as most facts already will have been uncovered during the mediation phase.

By the same token, opponents of med-arb question whether the form of the information presented (unsworn, possibly confidential, *ex parte* statements by parties) is as reliable as the evidence that would have been presented in an ordinary arbitration.

In addition, it should be considered that during the “med” phase of the med-arb, it is likely that parties will have disclosed to the med-arbitrator confidential information, including changes in their position on a particular issue or their underlying interests in settlement. The issue becomes therefore whether the med-arbitrator would or should consider such “confidential” statements later, during the arbitration step, if the process goes that far. Supporters of med-arb argue that if the process is conducted properly, the med-arbitrator will not rely on the use of such information, and others argue that once the neutral has considered the information it is impossible to erase it.

The med-arb award

Supporters of med-arb argue that the arbitration decision will be as fair and reliable as any other arbitration award because it will be based on reliable evidence obtained during the “arb” phase. Others believe that the med-arbitrator will be rendering an award that is tainted because it necessarily follows confidential negotiations with the parties.

Practical considerations

Among the advantages already discussed, some believe that med-arb, with a single neutral, is more efficient than using two neutrals for two processes. They believe that the time spent in mediation educates the neutral so that the parties do not have to spend additional resources educating a new arbitrator if the mediation fails. Other supporters suggest that med-arb is particularly well-suited to certain types of disputes -- such as those involving family members over their businesses, wills, probate issues, and other types of cases -- where emotions run high and privacy is a priority. Some argue that power imbalances can be addressed in med-arb, because the process allows the neutral to correct any “bullying” that can happen during the mediation phase.

Others believe that med-arb has many shortcomings, starting with the fact that the arbitrator will be making a decision after having confidential, unsworn, *ex parte* communications with each side. The same argument continues that if the award is to be truly reliable (i.e., based on evidence rather than *ex-parte* statements) then it would not be more efficient to use the same neutral for both phases. Finally, as discussed below, the med-arb process presents some potential ethical conflicts by using same neutral to serve first as a mediator, and then later as an arbitrator.

Ethical considerations

There are no ethical guidelines that specifically address the med-arb process. However, there are guidelines that apply separately to mediation and to arbitration. Mediations are subject to the Model Standards of Conduct for Mediators, as articulated by

the ABA, AAA, and ACR (“Model Standards”), which serve as the ethical guidelines for mediators. Among others, the Model Standards provide that the parties have the right to “self determination” (Standard I), i.e., that the mediation is a voluntary process that they control, and from which they can withdraw at any time. As mentioned above, in med-arb, the parties do not have the freedom to withdraw at any time, and the med-arbitrator controls the process as well as the outcome. It can therefore be argued that med-arb compromises the parties’ right to self-determination under the Model Standards.

Standard III of the Model Standards provides for the mediator to protect the confidentiality of private information shared by the parties. As described above, in med-arb, the person deciding the dispute is in possession of confidential information in rendering an award, whether or not he or she actually discloses it to the other side. By converting the mediation process to an arbitration and an award, one can argue that this Model Standard will also be compromised.

Arbitrations are governed separately by the Code of Ethics for Arbitrators in Commercial Disputes, as set forth by the ABA, AAA (the “Code of Ethics”). Among others, the Canons of the Code of Ethics provide: an arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties and not have *ex parte* communications (under Canon III); an arbitrator should conduct the proceedings fairly and diligently, the parties have the right to present evidence, and arbitrator cannot “pressure” the parties to settle (under Canon IV); an arbitrator should make decisions in a just, independent, and deliberate manner and cannot permit outside pressure to affect the decision (under Canon V); and an arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office (under Canon VI).

In med-arb, since the arbitration phase starts with the neutral already having had numerous *ex-parte* communications with the parties, the med-arbitrator may be compromising Canons III and VI of the Code of Ethics. Further, in engaging in the mediation during the first phase, if the neutral leaned on a party to settle, the med-arbitrator could be violating Canon IV of the Code of Ethics. Finally, by negotiating with parties in the mediation phase and exploring with them their interests beyond their claims, the neutral may be compromising Canon V of the Code of Ethics.

Because of these practical and ethical issues, the larger providers, such as AAA and JAMS, as well as many neutrals, do not encourage the use of med-arb, and will only provide it with the appropriate written agreement and party waivers.

The med-arb agreement

Because of the practical and ethical challenges identified above, it is critical that the med-arb agreement identify clearly the process to be used as well as the scope of issues to be decided. It should address issues such as confidentiality, how the phases are to be conducted and concluded, how evidence is to be presented and considered, who is to attend, and in what form the award is to be made. It is also critical that parties waive any claim arising from the same neutral serving in both capacities.

Variations on med-arb

In response to some of these challenges, several variations to the med-arb process have emerged over time. Some involve reversing the processes, others limit the power of the neutral or use different neutrals in the two phases.

Arb-med

In "arb-med," the arb-mediator conducts an arbitration proceeding concerning all issues first and, before releasing the final decision to the parties, conducts the mediation to try to settle the matter. In this variation, the parties and the "arb-mediator" will have heard the complete presentation of each party's position on the issues before the mediation phase.

This process eliminates the risk that the neutral will use inappropriate information in deciding the award. However, arb-med involves a separate set of perceived disadvantages. First, it may be difficult for a party to change or modify its position in the mediation phase, after having presented contrary "evidence" in arbitration. Changing one's position for the negotiation would undermine credibility and weaken one's position. In addition, Arb-med would most likely be more time consuming than med-arb, as it involves the adjudicative, binding process first, which tends to take longer than the mediation phase. Finally, the process makes it awkward for the arb-mediator to lean on parties to settle in a way that is inconsistent with the award that he or she has already decided, which unfortunately makes it more likely to become a position-based negotiation, rather than an interest-based one.

Binding Mediation

In "binding mediation", the parties exhaust the mediation process without reaching settlement, and ask the mediator to render an award for them without the presentation of additional evidence. The parties agree prior to the award that they will abide by whatever the mediator decides. As with med-arb, a written agreement, executed by the parties, identifying the role of the neutral, the issues to be decided, as well as potential appellate issues and party waivers is necessary.

An advantage to this process is finality, but the disadvantages include many of those relating med-arb, as well as how to handle the many elements that tend to be included in a settlement agreement, such as confidentiality, non-disparagement, and the release of claims. Finally, since the need for binding mediation typically does not arise until the parties have impasse in mediation, it might not be easy for them to work well together to draft the binding mediation agreement.

Mediator's proposal

With a mediator's proposal, the mediator makes a settlement recommendation to the parties, but has no authority to issue a final and binding award. Typically, this also occurs at the conclusion of the mediation, when the parties are at or near an impasse, and they ask the mediator for some direction to reach a final resolution. The mediator generally responds by using his or her "last arrow": making the final proposal to each side confidentially, and securing agreement from each side separately before announcing to both sides that the matter is settled. Mediator's proposals are by now fairly common, as there is little downside if it is done properly. Neither side is in a position of having to "tip its hand" to the other side, as either side can reject the proposal privately. At the same time, parties rarely reject the mediator's proposal, as it reflects in part what the mediator believes the parties would be willing to accept, based upon their conduct during the mediation.

Occasionally the parties request that the mediator's proposal be written, and in a form that specifies the mediator's reasoning. This tends to happen where a remote party is involved, such as an insurance carrier or a board of directors.

Med-then-arb

Like med-arb, this process involves mediation followed by arbitration, but it differs in that separate neutrals serve as mediator and arbitrator. While this process eliminates all ethical concerns about using the same neutral for both phases, some would argue that it may be more expensive than med-arb because of the time and costs associated with educating the new arbitrator about the entire case.

This process occurs frequently by default, as many predispute agreements require parties to first mediate, and then arbitrate if the mediation is not entirely successful; and parties typically select different neutrals for the two processes.

Shadow mediation

In "shadow mediation", the parties agree to have a separate mediator "shadow" the arbitration phase of the med-arb. The mediator monitors the pre-hearing activities and joins the med-arbitrator during the arbitration hearings. In this process, the mediator is available if either party would like to stop the proceedings at any time and mediate any particular issue. This allows the arbitrator to stay clear of *ex parte* and confidential communications in the event that the case returns to the arbitration. Because this process is expensive, it generally only is used in multi-party, complex disputes.

Co-med-arb

Partly in an effort to curb the expense associated with the "med-then-arb" procedure, a variation has been developed which combines elements of mediation, shadow mediation, arbitration, and mini-trial into one procedure. In this process, "Co-med-arb," a separate mediator and arbitrator are appointed at the beginning of the process and both are present at the open mediation session when joint presentations are made and documents are exchanged. That phase of the process may proceed as a mini-trial, as senior executives may attend the joint session. When the process moves to the confidential caucus phase, the arbitrator temporarily ends his or her participation, and the mediator is prohibited from disclosing with the arbitrator what occurs during the private sessions.

The arbitrator alone conducts the arbitration phase, although there may be a continuing role for the mediator, either to conduct a later planned mediation, or spontaneously to mediate any specific issues that may arise during the arbitration. Thus, the mediator may attend and monitor the arbitration phase.

Conclusion

Mediation and arbitration are effective and efficient processes, and either can be preferable to traditional court litigation. However, parties and neutrals recognize that neither process is perfect, and in response have developed various hybrid forms, each presenting its own benefits and challenges. Counsel are best advised to carefully consider the possible benefits, weigh the potential shortcomings, and address them in their agreement engaging the neutral(s). By fully understanding the range of risks and benefits, parties selecting a hybrid form of dispute resolution will be able to create their greatest opportunities for success.