

The Ethics of Mediation-Arbitration

by Richard Fullerton

Mediation and arbitration are respected methods of dispute resolution, but their combination into the hybrid practice of mediation-arbitration (med-arb) has been accused of compromising ethical principles. This article examines med-arb against accepted standards, to determine whether it can be offered as a legitimate dispute practice.

In the realm of alternative methods for resolving legal disputes, mediation and arbitration are the most popular,¹ largely for their effectiveness and efficiency. Often, the two are used sequentially in the same dispute, not because of procedural compatibilities but for the different processes they offer. Mediation, the first resort, provides for negotiation in a conversational, facilitated exchange between the parties, without the guarantee of a final resolution; arbitration follows the mediation if all issues are not resolved and provides an exchange in the setting of an adversarial hearing, which results in a binding award.

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

One possible alternative to individual processes is a combination of the mediation and arbitration processes. Sam Kagel was the first to hybridize the two methods into one when settling a controversial nurses' strike in the 1970s.⁵ Known as mediation-arbitration (med-arb), the process includes a mediation phase and, if mediation is unsuccessful in resolving the dispute, the same neutral proceeds to an arbitration hearing and issues a binding award. The combined process eliminates the need to start over with a new arbitrator wholly uneducated in the nature of the dispute. 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.

Despite the efficiencies of the med-arb process, it also has limitations. By conducting both the mediation and arbitration under

one neutral, the core principles of each may be compromised: "Some arbitrators and mediators believe that mixing mediation and arbitration is heretical and even unethical. . . ." ⁶ Today, dispute resolution professionals are divided in their support for med-arb.

This article takes a closer look at med-arb to determine whether complaints of ethical compromise are justified. First, med-arb and its components are defined and described, then the ethical principles on which each relies are explored. The article also reviews several procedural variations of med-arb to determine whether the practice, in any form, can function as a legitimate dispute resolution tool from an ethical perspective.

Definitions

Despite the prevalence of mediation and arbitration, few parties or their counsel are familiar with their 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 (CBA) website: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 nonbinding decision.
- Med-arb is a process whereby:
 - a neutral and impartial third party

Coordinating Editor

O. Russel Murray, Englewood, of ADR
Source—(303) 893-1667, orm@adrsource.com



About the Author

Richard Fullerton teaches ADR ethics in the University College program and provides dispute resolution services for construction, real estate, homeowners association, and common interest community cases—(303) 229-8668, adr@richardfullerton.com, www.richardfullerton.com.

ADR articles are sponsored by the CBA Alternative Dispute Resolution Section. The articles printed describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

- facilitates communication between negotiating parties and
- failing settlement, receives evidence and testimony provided by the parties and
- issues a binding decision.⁸

Other definitions of these terms abound, but most are similar to these with only a few changes in the wording.

The Ethical Foundations of Mediation and Arbitration

In reviewing the principles supporting mediation and arbitration, it is important to differentiate collective from personal values. Collective values “get their authority from something outside the individual—a higher being or higher authority (e.g. society)”⁹—in this case several recognized associations representing dispute resolution professionals.

Mediation

The Model Standards of Conduct for Mediators (Mediator Standards)¹⁰ provide guidance in evaluating the ethical basis of mediation. Of its nine standards, three are of interest here: Standard I, Self-determination; Standard II, Impartiality; and Standard V, Confidentiality.

Standard I, Self-determination. Self-determination recognizes the right of parties to make independent decisions, beginning with voluntary participation in the process even when they have been ordered by a court to participate 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. “[T]he freedom to engage in the process but also to walk away from it is critical to effective mediation.”¹¹ By eliminating the right to withdraw voluntarily, med-arb raises concern about the parties’ right to self-determination.

The self-determination standard also allows the parties joint authority in determining the format, content, and conduct of the mediation, and particularly the terms of any resolution agreement, without undue influence by the mediator. The eventuality of arbitration in the med-arb scenario cuts short this determination.

The degree of mediator interaction with the parties during the mediation depends on the mediation style. The 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, mediators have the latitude to clarify party perspectives that could lead to agreement. With evaluative mediation, mediators express personal opinion on the merits of party positions in encouraging settlement. Regardless of style, however, parties maintain the right to reject any influence of the neutral. When the neutral is ultimately to be the decider in a subsequent arbitration, mediator-party interaction may be undermined.

Standard II, Impartiality. In promising a balanced process, mediators are watchful of any behavioral or emotional inequity on their part that could allow even an appearance of partiality. This commitment causes professionals to debate which adjective best describes the important responsibility—impartial, balanced, unbiased, neutral, equidistant, unprejudiced, even omni-partial—the intention of each being analogous. In spite of an increased risk of bias by communicating privately with parties, mediators often meet

separately with each party to explore facts and beliefs that could affect the outcome of mediation. They are careful to balance that privilege with procedural steps, meeting equitably with all parties, for example, or allowing equivalent exchanges during plenary meetings.

Because of the very nature of mediation, however, “appearance of impartiality” does not have the pivotal role in mediation that is required in arbitration. Arbitrators typically do not even permit the *ex parte* communications that are *de rigueur* in mediation. However, the private communications from the mediation portion of the med-arb process necessarily seep into the arbitration portion.

Standard III, Confidentiality. Mediators often rely on private information to support parties in rethinking 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.¹²

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

In med-arb, such confidentiality of private information goes by the wayside; even if the other side does not have the information, the decider in the dispute does. Private information that can be used against a party thus will remain private in a med-arb process where it could be helpful in finding a resolution in mediation without the looming arbitration.

Arbitration

The Code of Ethics for Arbitrators in Commercial Disputes (Arbitrator Code)¹³ provides guidance in examining ethical considerations in the arbitration process. The Arbitrator Code is organized into ten Canons. Some are less relevant to this review because of their focus on the personal behavior of the arbitrator in addressing conflicts, fees, promotion, and party-appointed arbitration.

Pertinent to this review, however, are: Canon III, An arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties; Canon IV, An arbitrator should conduct the proceedings fairly and diligently; Canon V, An arbitrator should make decisions in a just, independent and deliberate manner; and Canon VI, An arbitrator should be faithful to the relationship of trust and confidentiality inherent in that office. These Canons are critical in the evaluation of med-arb ethics.

Canon III. Canon III takes particular aim at the “impropriety” created by *ex parte* communications involving case content. “An arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party.”¹⁴ As discussed above, contrary to the Mediator Standards allowing *ex parte* communications, this Canon attempts to protect the arbitrator in issuing an impartial and binding decision by shielding the neutral from influence that could bias the award.

Canon IV. This Canon reinforces the 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, provides the arbitrator the right to ask questions, and generally provides guidance for the conduct of the arbitration process. Canon IV also permits the arbitrator to suggest to the parties that they settle, but not to pressure them to do so. It does not, however, give the same leeway to the arbitrator in communicating with the parties that the Mediator Standards provide.

Canon V. Canon V 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. This Canon addresses confidentiality in the arbitration setting. Confidentiality is a cornerstone of the mediation process. In mediation, the mediator is allowed—even encouraged—to hear but not to share private information and to use the information to assist in resolving the dispute. The Arbitrator Code disallows *ex parte* communications entirely. Thus, the Mediator Standards and the Arbitrator Code 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 assure the right of the parties to make important decisions without influence. The Arbitrator Code, by contrast, shields arbitrators from confidential in-

formation by only allowing plenary exchanges. These different approaches conflict in med-arb.

Med-Arb and its Ethical Concerns

The med-arb process has no governing ethical code of its own. Because claims of ethical violations are based on the standards for its component practices, the Mediator Standards and Arbitrator Code act as controls. Med-arb also does not have universally accepted procedures; instead, it relies on common practices that can be modified by the parties.

To provide a consistent comparison, this article will consider med-arb to include the following:

1. Before committing to med-arb, parties agree on a protocol detailing both the mediation and arbitration phases. The resultant procedures are detailed in a med-arb agreement. By signing this document, parties commit to the process until either a mediated resolution is executed or a binding arbitration award is issued.
2. The sequential process begins with the mediation phase to address all mutually recognized issues. If mediation results in full agreement, the med-arb is terminated without the need for an arbitration phase. Lacking full agreement, the same neutral closes the mediation and commences the arbitration phase that will result in a binding award.
3. During both phases, the neutral is allowed to communicate with parties the same as in the traditional practices, engaging

in *ex parte* conversation during mediation but not during arbitration.

The conduct of both phases of med-arb can appear identical to the independent practices, and parties unfamiliar with their standards may be unaware of any difference. However, a significant shift occurs as soon as the parties sign the med-arb agreement. By committing to engage until the process concludes, parties relinquish voluntary participation protected by Mediator Standard I regarding self-determination. Instead of negotiating freely, they may feel pressured to accept an offer during mediation and before an arbitration award is imposed. By waiving the withdrawal option, med-arb eliminates a key mediation principle.

An additional concern develops if parties proceed to arbitration. Assuming that the neutral engages in private communication during mediation, it is possible—indeed likely—that confidential information already shared will influence the neutral and ultimately the arbitration award. Although *ex parte* communication is not a danger during the mediation phase, it becomes a concern in the arbitration phase in light of Arbitrator Canon III disallowing *ex parte* communications:

Information disclosed during the mediation phase of the process might tempt the neutral into questionable conduct during the arbitration phase. For example, 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? 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?¹⁵

Neutrals are expected to disregard such confidential information and rely solely on Canon VI as a shield from bias, which cautions them not to “gain personal advantage or advantage for others, or to affect adversely the interest of another.”¹⁶ Some proponents of med-arb argue that the risk is limited:

Concerns about the possible contamination of the neutral by receiving information or arguments in private meetings are over-

stated. Judges regularly rule on the admissibility of evidence and if that evidence is rejected the judge disregards the information that has been tendered.¹⁷

Although some dispute resolution professionals are comfortable that the neutral can successfully disregard private information acquired in mediation, med-arb has no procedural safeguard against *ex parte* communication. The practice is susceptible to bias, whether from inadvertent or candid disclosure, and is particularly susceptible if a party were to “take advantage of this process by focusing on persuading the mediator with a view to influencing a final award,”¹⁸ conceivably introducing misleading information during the mediation caucus that would be protected by confidentiality and not subject to challenge as in court.

Thus, at least two ethical principles are compromised in med-arb: the elimination of voluntary participation without a withdrawal option, and the ability of the neutral to engage in *ex parte* communication. Both concerns would be recognized only with a thorough understanding of the principles of accepted practice. Except during preparation by counsel or the neutral, parties may notice no procedural difference signaling these changes.

Med-Arb as a Unique Process

Support for med-arb may be based on a fundamental misconception. Some participants, including practitioners, believe that med-arb provides all the benefits of traditional mediation and arbitration in a single process. 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.¹⁹

The idea that med-arb provides the best of procedures is refuted by the limitations addressed earlier. It offers what appears to be mediation, but parties are subjected to unique pressures in avoiding an imposed decision. The arbitration award they rely on for finality may be tainted. 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 attempted to rearrange some of the procedures to offer greater protection of underlying standards. Several variations are considered below to see whether the variants achieve that goal.

Overlapping Neutrals

One med-arb variation involves using separate neutrals, each responsible for one phase of the process. Instead of complete separation, however, the arbitrator attends

the mediation as observer during all plenary exchanges, where only the mediator engages privately with the parties. The arbitrator hears joint exchanges and reviews shared documents throughout the mediation phase but without access to private communication. If a mediated agreement is reached, the arbitration phase is abandoned. If not, the mediator is excused, and the arbitration commences with the arbitrator already familiar with much of the case. Such overlap offers some efficiency and legitimate separation to avoid arbitrator bias.

The concern remains, however, that the parties still are required to forego voluntary withdrawal from the mediation portion of the process. This is no small matter:

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.²⁰

Overlapping neutrals introduces a practical concern, because participants interact under the attentive eye of the arbitrator throughout mediation. It is difficult to anticipate the interpersonal dynamics they will experience and whether parties can participate with the same candor knowing their behavior may affect the award or play to the favor of the arbitrator at the expense of the mediation. Dynamics could be altered by simultaneously including two neutrals, each with separate interests. The concern of arbitrator bias may have been eliminated, but at an unknown cost to the mediation.

Plenary Med-Arb

The plenary med-arb variation engages a single neutral following accepted med-arb procedures and allows no private communication with any party, instead relying exclusively on plenary communication and document exchange. This format of disallowing *ex parte* communications effectively eliminates concerns of contamination.

However, plenary med-arb attracts concern for the possible affect on the mediation. Facilitative and evaluative mediators in particular feel that the practice no longer offers a legitimate process, because "candid and honest private communications with the mediator are generally considered essential to successful mediation. . . ."²¹ Also, "an impairment of private communications and caucuses will prejudice the prospects of achieving settlement to the satisfaction of the parties."²²

Braided Med-Arb

The braided med-arb variation involves using a single neutral following accepted mediation and arbitration procedures, with the additional latitude of interrupting the arbitration phase with subsequent mediation efforts, asking or allowing parties to pursue voluntary agreement. Proponents see an expanded opportunity for

self-determination as parties seek agreement periodically during the arbitration phase. However, Arbitrator Canon IV specifically discourages an arbitrator from pressuring parties to settle or to mediate, which the arbitrator risks violating:

Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle.²³

In moving to the arbitration phase, the neutral gains complete authority over the outcome and consequently has substantial power in the eyes of the parties. Parties could construe a settlement proposal from the neutral as a suggestion, a recommendation, or a veiled directive. Braided med-arb provides no procedural measures to offset such interpretation beyond the conveyance of the neutral. Should a proposal appear coercive, it would jeopardize the self-determination it proposes to enhance. 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.

Optional Withdrawal Med-Arb

A significant concern with med-arb is the elimination of voluntary withdrawal. 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. This idea reinforces Mediator Standard I for voluntary participation by allowing parties to attempt an agreement before deciding to put their

fate in the hands of the arbitrator. Allowing an opt-out provision would protect voluntary participation.

However, optional withdrawal med-arb also could undermine a practical benefit of med-arb—that is, finality. Withdrawal would force disputants to engage some new resolution effort to secure a final outcome. The withdrawal option also may provide an incentive for a party to manipulate the situation by offering finality but withdrawing at the last minute. “If a party believes that an opt-out clause is required, Med-arb should probably be rejected.”²⁴ Parties continuing to arbitration still face the concern that *ex parte* communications will bias the neutral.

Arbitration-Mediation

The reverse of med-arb, arbitration-mediation or “arb-med,” has gained credibility in a few specialized arenas, although it is not well-known or broadly practiced. It has support both for its results and its ethics in eliminating arbitrator bias.²⁵

- Arb-med is a process whereby:
 - a neutral and impartial third party receives evidence and testimony provided by disputants in an arbitration, writing a decision that is withheld from the parties, after which
 - the neutral facilitates communication between the parties in mediation to enable the parties to reach agreement, and
 - failing agreement, the arbitration decision is issued as binding resolution.

Arb-med begins in an arbitration phase. The neutral writes a binding award, but instead of revealing the award, he or she keeps

it confidential and the parties proceed to the mediation phase with the same neutral. If the parties reach voluntary agreement in mediation, the neutral never discloses the arbitral award. If parties are unable to agree, the award is revealed and becomes binding.

The structure of arb-med allows a party to evaluate its arbitration case compared to that presented by the opponents, possibly recognizing strengths or weakness that could allow common ground during mediation. After the close of the arbitration phase, the neutral is free to explore private communication during mediation, thereby protecting the already-written award from taint by *ex parte* communications.

Although this variation eliminates the ethical problem of award contamination, it introduces two new concerns. Parties might feel greater pressure to reach agreement during the mediation phase of the arb-med process. They are aware of the relative strength of their cases and now have a binding award hanging over the mediation. Their only alternative to accepting the arbitration award would be to reach a mediated agreement. Arb-med is credited with greater rates of voluntary agreement, because it “may cause disputants to actively consider the possibility of losing . . . because a ruling already has been rendered. . . .”²⁶ As one author notes, “the deal sealer is the power of the envelope.”²⁷

Arb-med also leads to another question after the arbitration award has been written. The neutral cannot change the award regardless of insight gained during the subsequent mediation. Arb-med offers no procedure for changing the award based on new information discovered during the mediation process.

Med-Arb Practice Variations				
Method	Procedure	Benefits	Ethical Concerns	Procedural Concerns
Med-Arb (compared to separate processes)	<ul style="list-style-type: none"> • parties commit to both mediation and arbitration • arbitrator allowed <i>ex parte</i> communication 	<ul style="list-style-type: none"> • greater economy and brevity • finality 	<ul style="list-style-type: none"> • elimination of voluntary withdrawal • award contamination 	
Overlapping Med-Arb	<ul style="list-style-type: none"> • arbitrator oversees mediation 	<ul style="list-style-type: none"> • elimination of award bias 	<ul style="list-style-type: none"> • elimination of voluntary withdrawal 	<ul style="list-style-type: none"> • altered interpersonal dynamics
Plenary Med-Arb	<ul style="list-style-type: none"> • disallows <i>ex parte</i> communication 	<ul style="list-style-type: none"> • elimination of award bias 	<ul style="list-style-type: none"> • elimination of voluntary withdrawal 	<ul style="list-style-type: none"> • weakened mediation
Braided Med-Arb	<ul style="list-style-type: none"> • mediation allowed throughout arbitration 	<ul style="list-style-type: none"> • more opportunity for agreement 	<ul style="list-style-type: none"> • perception of settlement pressure • award contamination 	
Optional Withdrawal Med-Arb	<ul style="list-style-type: none"> • parties can withdraw after mediation 	<ul style="list-style-type: none"> • protection of self-determination 	<ul style="list-style-type: none"> • award contamination 	<ul style="list-style-type: none"> • no guarantee of finality • possible manipulation by parties
Arb-Med	<ul style="list-style-type: none"> • arbitration precedes mediation 	<ul style="list-style-type: none"> • elimination of award bias 	<ul style="list-style-type: none"> • elimination of voluntary withdrawal • greater pressure for agreement • arbitration award cannot be altered 	

Ethical Considerations

In med-arb and its variants, parties may not be aware of ethical compromises they encounter. Conceding their withdrawal right may affect the way they interact during mediation, because they may face greater pressure than in the traditional mediation practice. Optional withdrawal med-arb circumvents this concern, and braided med-arb increases the opportunity for voluntary agreement, but each introduces procedural or ethical problems of its own. Procedural variations that attempt to eliminate *ex parte* communications face similar problems. They may shield the neutral from confidential information but create concerns that cloud their effectiveness. Although med-arb and its variations are supported for their 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 the voluntary withdrawal or impartiality provided by its component practices. Med-arb supporters have expressed that the strongest argument for its acceptance originates with the parties—that party interests overrule ethical principles covered in the codes.

[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.²⁸

Further, there are few legal restrictions on parties in choosing any dispute resolution method they desire. The Alternative Dis-

pute Resolution (ADR) Act appears to allow the parties considerable latitude:

Sec. 651. Authorization of alternative dispute resolution

(a) 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. . . .²⁹

John W. Cooley, a strong supporter of self-determination in ADR, proposes:

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. Self-determination is important because it preserves the parties' right to freely and jointly choose the neutral (lawyer and non-lawyer) and the ADR process that best suits their specific needs.³⁰

Parties freely choosing med-arb will encounter a method with demonstrated flaws that may or may not affect their specific case. As long as there is informed consent, the only question is one of values in selecting expediency over principle. The parties may encounter greater pressure to compromise and their neutral may no longer be neutral, but they assume such risk in selecting med-arb.

The Med-Arb Dilemma for Neutrals

Mediators, arbitrators, and other dispute professionals line up on either side of the med-arb debate, some in support and many against because of its recognized problems. An important question

is whether the neutral can provide med-arb services in good conscience knowing its ethical limitations. The Mediator Standards offer guidance:

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

The Arbitrator Code has a similar provision: “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

It may be reassuring to neutrals that methods such as med-arb are acknowledged, and arguably allowable, under current standards. Perhaps the only prerequisite is party consent. However, engaging in med-arb may require working outside a strict interpretation of the Mediator Standards and Arbitrator Code. Neutrals conducting med-arb must assume that recognized standards have been or could be compromised at some point. The neutral is not released from upholding essential rights to a fair process, even though that process is uncharted and promises uncertainty. With opposing principles at stake in med-arb, the neutral could encounter or create further ethical compromise. Finding the right balance in *ex parte* communications may be an example. It is left to the discretion of each neutral to determine the point where private information might influence the award.

Without consistency in a well-defined procedure, it seems impractical—perhaps impossible—to outline an optimal approach to provide the greatest protection to the parties. It is left to the neutral to help formulate the process and to proceed as ethically as possible. This complex responsibility involves greater uncertainty than do the traditional practices, and may explain why many neutrals do not offer med-arb services. There is one point, however, on which all resources agree when considering med-arb services—the necessity of securing the informed consent of the parties:

[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

Further,

[P]arties who wish to employ a “Med-Arb” dispute resolution process should 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 and steer the participants toward full communication of the inherent risks, written procedures, and a waiver of responsibility. Informed consent should not be interpreted as establishing its own ethical foundation but as a transfer of responsibility from the neutral to the parties.

Professional Support for Med-Arb

Several interested organizations have expressed support for med-arb, with limitations. For example, the American Arbitration Association (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, 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 Prevention and Resolution (CPR), on the other hand, suggests that “to 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 offered the following on med-arb:

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

These positions on med-arb offer no clear endorsement for the process, allowing qualified acceptance at best. CPR rejects same-neutral med-arb, and the ABA endorses it only if no confidential information was shared. Both the AAA and JAMS withhold recommendation but will support the process if parties agree in writing. No professional dispute organization was found that recommended the practice of med-arb without conditions, leaving med-arb with little backing from the professional community.

Conclusion

Traditional mediation and arbitration processes, each with its proven history and ethical standards, have long been accepted. The risks of combining these practices into mediation-arbitration, however, are several, both to the parties and to the neutrals. Med-arb sometimes has been misunderstood to offer the best of both practices with little downside, but their combination challenges the integrity of each in ways that are mutually exclusive. Although practice variations may allow greater ethical protection, none does so without ethical or procedural obstacles.

Despite its limitations, some parties prefer the greater efficiency and finality of med-arb to the protections offered in traditional practice. Some compromise can be predicted, but an understanding of the complications may allow an experienced neutral to offer med-arb as a useful—if imperfect—dispute alternative.

Notes

1. Lipsky and 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. Thompson, "Med-Arb: A Fresh Look" (Nov. 12, 2008), available at www.claudethomson.com/docs/Med-Arb_A_Fresh_Look.pdf.
3. The Alternative Dispute Resolution 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. Menack, "Mediation/Arbitration: The Hybrid ADR Theory," *New Jersey L.J.* (Aug. 14, 1995), available at www.divorcelawandmediation.com/images/mediationarticle2.pdf.
5. Telford, "Med-Arb: A Viable Dispute Resolution Alternative," available at irc.queensu.ca/gallery/1/cis-med-arb-a-viable-dispute-resolution-alternative.pdf.
6. Phillips, "Same-Neutral Med-Arb: What Does the Future Hold?" *Dispute Resolution J.* (May/July 2005).
7. CBA, "Alternative Dispute Resolution Process Definitions," available at www.cobar.org/adrdirectory/description.cfm.

8. This article addresses only binding arbitration.
9. Navran, "Defining Values, Morals, and Ethics," available at www.navran.com/article-values-morals-ethics.shtml.
10. American Bar Association (ABA), "Model Standards of Conduct for Mediators" (Aug. 2005), available at www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf.
11. Hoellering, "Mediation & Arbitration: A Growing Interaction," *Dispute Review J.* (Spring 1997).
12. Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 1999).
13. ABA, "The Code of Ethics for Arbitrators in Commercial Disputes" (Feb. 9, 2004), available at www.abanet.org/dispute/commercial_disputes.pdf.
14. *Id.*
15. Brewer and Mills, "Med-Arb: Combining Mediation & Arbitration," *Dispute Review J.* (Nov. 1999).
16. ABA, *supra* note 13.
17. Thompson, *supra* note 2.
18. *Id.*
19. Menack, "Mediation/Arbitration: The Hybrid ADR Theory," *New Jersey L.J.* (Aug. 14, 1995), available at www.divorcelawandmediation.com/images/mediationarticle2.pdf.
20. Hoellering, *supra* note 11.
21. Brewer and Mills, *supra* note 15.
22. Thompson, *supra* note 2.
23. ABA, *supra* note 13 at Canon IV-F.
24. Thompson, *supra* note 2.
25. Zack, "The Quest for Finality in Airline Disputes: A Case for Arb-Med," *Dispute Resolution J.* (Nov. 2003/Jan. 2004).
26. Ross and Conlon, "Hybrid forms of Third-Party Dispute Resolution: Theoretical Implications of Combining Mediation and Arbitration," *25 Academy of Management Rev.* 416-27 (2000).
27. 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.
28. Brewer and Mills, *supra* note 15.
29. 28 U.S.C. § 651.
30. Cooley, "Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of ADR," *Dispute Resolution J.* (Aug./Oct. 2000).
31. ABA, *supra* note 10.
32. ABA, *supra* note 13.
33. Phillips, "Same-Neutral Med-Arb: What Does the Future Hold?" *Dispute Resolution J.* (May/July 2005).
34. Brewer and Mills, *supra* note 15.
35. See www.jamsadr.com.
36. Phillips, *supra* note 33.
37. International Institute for Conflict Prevention & Resolution, "An ADR Primer" (Dec. 2, 2008), available at www.cpradr.org/ClausesRules/ADRPrimer/tabid/340/Default.aspx.
38. ABA Section of Dispute Resolution, "Expanded Conflict Management Processes," available at www.abanet.org/dch/committee.cfm?com=DR088888. ■