

MED-ARB: Is There Such a Thing?

By Amy Lieberman

What is Med-Arb?

Med-Arb is the short-hand description of a hybrid procedure, where the same neutral “switches hats.” This occurs when the mediator is asked to serve as arbitrator by the parties, or the arbitrator is asked to mediate the dispute before her.

Mediation and Arbitration are distinct ADR processes.

Arbitration is a formal process, governed by the reasoned application of the law as presented by the parties to the facts as proven by witness testimony and documentary evidence. From an ethical perspective, past relationships that are viewed as too close between the neutral and counsel can serve to disqualify an arbitrator, due to a perceived conflict of interest. And, ex-parte contact is

prohibited. There is little room for the display of strong emotion. In arbitration, the outcome is a win-lose proposition: one side wins, and one side loses. The arbitrator acts in an evaluative role, making a binding decision. The arbitrator determines the outcome.

Mediation is, by contrast, an informal process. Past close professional relationships can help make the process flow more smoothly, as there is likely to be less gamesmanship during negotiations. Ex-parte contact is not only permitted, it is the hallmark of the process, as the mediator meets with each party separately and engages in “shuttle diplomacy,” working with each side until resolution is reached. While the mediator’s legal evaluation is relevant, it is

but one factor in the process. Mediation requires the neutral to act in a facilitative role, to discover and address underlying needs and interests, and to constructively and compassionately deal with strong emotion. The outcome is not win-lose, but is “can live with – can live with.” In contrast to arbitration, the parties determine the outcome.

How does Med-Arb work?

Med-arb can work in several ways.

1. The **parties agree, in advance** of the mediation, that if some or all of the issues cannot be resolved at mediation, the mediator will act as arbitrator.
2. The **parties request, during** the mediation, that the mediator act as arbitrator for some or all of the issues that are not resolved.
3. The **arbitrator suggests, before or during** an arbitration, that he first try to mediate the dispute.

The Benefits

The primary benefits are two:

1. Efficient use of ADR resources and time. Parties and counsel have already committed the time, and selected a neutral they trust. Shouldn’t that increase the odds of a successful process?
2. If switching to mediation, the parties will likely achieve an end result they have agreed to. If

A wealth of legal salary data at your fingertips.

Download your FREE 2012 Salary Guide today at roberthalflegal.com/salarycenter.

Phoenix • 602.977.0505
2375 E. Camelback Rd., Suite 290

2012 Salary Guide
Your Resource for Compensation in the Legal Field

Robert Half Legal



switching to arbitration, they will know that they have exercised due diligence in working towards an agreement with a respected neutral, and an award was necessary.

The Risks

There are three main risks:

1. Loss of neutrality.
If the mediation fails, the arbitrator will have learned confidential and/or attorney-client privileged information that may color his analysis in the arbitration process. This can jeopardize the integrity of the final award, subjecting it to later challenge. For this reason, the American Arbitration Association has traditionally discouraged the same neutral from serving in the dual “med-arb” role.
2. Less-than-optimal assistance.
As noted by Patrick Westerkamp, in his Spring 2011 Rutgers Conflict Resolution Law Journal article, *Dilemmas Facing Advocates and Arbitrators Who Mediate Grievances*, there is some overlap between the competencies required of neutrals in the professions, but they are far from identical, and it is “rare that the competencies to be a stellar mediator

and a distinguished arbitrator reside in the same neutral.” The arbitrator’s strength is in intellectual analysis and evaluation, while the mediator’s strength is in balancing the legal evaluation with the creative work necessary to meet the parties’ underlying business, personal and emotional interests.

3. Delay.

Should the mediation fail, it will take some time to get the arbitration back on track, especially if a party decides a different neutral is needed to serve as the arbitrator.

How often is Med-Arb used?

In a recent polling of over 100 arbitrators and mediators, most stated they have only on rare occasion served in the dual role of mediator and arbitrator. Most neutrals said they prefer not to wear both hats. They questioned the feasibility of blending the two roles, and wondered whether it is possible to get a true, knowing waiver of all perceived conflicts. As one neutral stated, “I sleep better by not trying to carry water on both shoulders.”

The exception is that neutrals frequently agree to arbitrate any issues that may arise with respect to interpretation or enforcement of a Mediated Settlement Agreement. Most of the

time, this ADR function is never needed.

Best Practices for the use of Med-Arb

Let the parties request the change. If the mediator suggests arbitration, the parties may feel he has given up. If the arbitrator suggests mediation, the parties may feel pressured to accept, to appease the mediator, and may not be fully candid in the process.

Get it in writing. If the parties are insistent, be sure to get a clear statement of a knowing and voluntary waiver of any conflicts of interest and objections of any kind, and an agreement not to use the process as a basis to challenge the award.

Use a different neutral. The clearest way to avoid the risk of contamination of the arbitration is to break for the parties to mediate with another neutral.



Amy Lieberman is the executive director of Insight Employment Mediation LLC and Insight Mediation Group LLC. She has been listed in "Best Lawyers in America" for alternative dispute resolution since 2004. She can also be reached at (480) 246-3366, or by email at amy@insightemployment.com

Personal Touch Transportation
executive town car limousine service

Where Can We Take You Today?

480-559-7135

11:42 PM

Your brief is due in less than 12 hours when the building transformer blows.

Isn't it a comfort to know you'll be talking directly with your IT Provider by 11:43 PM?

Our experience in legal IT is unmatched.

We've been serving the technology needs of law firms for 25 years, and we're here for you, 24/7/365.

We know legal software like nobody's business:

iManage, eDOCS, Omega, ProLaw, Time Matters, Amicus, Equitrac, Abacus, Sanction, Elite, PC Law, TABS, and many others.

No surprises, no excuses.

We keep your computers running, instead of waiting for something to break, and then charging double to fix it. We routinely meet with you to maintain a 36-month technology plan.

**If you're ready
for Legal IT done right,
it's time to call us.**



Total Networks
Legal IT Done Right

Phoenix, AZ | 602.412.5025 | totalnetworks.com