

THE MED/ARB PROCESS:  
A VIEW FROM THE NEUTRAL'S PERSPECTIVE

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Published:

ADR Currents  
The Newsletter of Dispute Resolution Law and Practice: June 1998 Edition  
American Arbitration Association  
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## **THE MED/ARB PROCESS: A VIEW FROM THE NEUTRAL-S PERSPECTIVE**

**by Richard P. Flake  
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Arbitration as an alternative dispute resolution mechanism has existed for centuries. Within the last several hundred years, arbitration has ingrained itself into the dispute resolution conscience of several industries such as labor and construction, and significant growth is being experienced in new areas, including the securities and employment sectors, among others. The continued growth of arbitration proves both its need and its popularity among users of all types.

Mediation on the other hand, while also having a long history of existence, has exploded in the last several decades. In certain areas of this country a litigated matter cannot be set for trial without first having undergone the mediation process. It can fairly be said that mediation has changed the face of alternative dispute resolution in the United States.

Individually, the success of arbitration and mediation cannot be disputed. Given this undeniable success, can there be a successful combination of these individual processes into one alternative dispute resolution mechanism? Can such a combined method be successful and, perhaps more importantly, desirable by intended users?

Based on my experience, the Mediation/Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.

Mediation/Arbitration or AMed/Arb® as it is more commonly known, can take several different forms; however, its singular point of definition is the same neutral acts as both the mediator and the arbitrator. Other forms of this hybrid process include Arb-Med, Shadow Mediation, and Concilio-Arbitration. While each of these processes have their own distinctive characteristics, this article focuses on standard Med/Arb techniques.

At first blush it seems logical to have the same person act as both mediator and arbitrator. In fact the concept is a radical departure from Atrue® arbitration philosophy. The typical

arbitration process, other than in certain *party-appointed* arbitrations, prohibits the neutral from discussing or interacting in any way with the contestants, except in an administered conference in which both parties and counsel are in attendance. In fact, arbitrator eligibility and the Canon of Ethics for arbitrators require disclosure of any prior knowledge, discussion of the case, or contact with parties or counsel in an effort to maintain the purity of the arbitration process. This attention to prior knowledge and disclosure is the hallmark of neutral arbitration.

Med/Arb, where the neutral as mediator will interact with each side independently in private sessions and specifically out of the presence of the other party, flies in the face of this philosophy. The mere thought of a decision making neutral discussing the facts of a dispute privately with one contestant is a major reason why the process has received less than universal support.

Properly performed, however, the Med/Arb process can absolutely be an effective alternative dispute resolution technique. In fact, some would say it combines the best of both mediation and arbitration in allowing the parties to fashion their own resolution on their own terms in the mediation process, while providing an avenue for immediate decision by a person who, far from being a stranger, should now have intimate knowledge of factors surrounding the dispute.

American Arbitration Association (AAA) studies have shown that while the ultimate outcome of the process is important to users, almost equal in importance is the ability to bring final resolution to the situation in a relatively inexpensive and time-efficient manner. The Med/Arb process without question favorably satisfies the desires of timely resolution and, if properly done, cost efficiency.

## THE PROCESS

As with most forms of alternative dispute resolution, the parties generally work from a blank page in creating the actual methodology of the Med/Arb process. As an example, the mediation portion of the Med/Arb may be prescheduled for a definitive time period. A complete mediation can be held, be it one-half day, one day, or longer, and a separate arbitration hearing can be scheduled for a later time. The arbitration hearing may be a standard arbitration, with the full presentation of evidence including witness testimony.

More commonly, however, a Med/Arb is scheduled to run consecutively, either in a half-day mediation/half-day arbitration scenario, or a 2-day schedule with the first day devoted solely to mediation and the second solely to arbitration.

The parties should determine in advance whether a full evidentiary hearing at the arbitration stage will take place. Typically, after the mediation session runs its course (assuming no resolution was reached), the parties, having fairly presented their case to the neutral in the mediation process, are content with either a summary presentation of the case or simply closing arguments for the arbitration portion of the process. Again, both the parties and the neutral are working with a blank page relative to the methodology. However, it is very important to reach agreement on that methodology and to memorialize that agreement prior to the commencement of the Med/Arb.

## PROS AND CONS

Current literature on the Med/Arb process is largely anecdotal. Similarly, this article is based largely on my own experience with the process as the neutral.

Med/Arb's most appealing attribute is that the dispute will be resolved, one way or the other. Ideally, the parties will resolve their own dispute through the mediation process, resulting

in a mutually satisfactory agreement. However, if the matter does not resolve in the mediation process, the neutral will put on the arbitrator's hat and depending on the methodology used (hearing or no hearing, as decided by the parties), complete the arbitration process, culminating in the rendering of an award. The dispute will effectively be resolved and the parties may move on to bigger and better things.

The speed and decisiveness of the Med/Arb process is not without sacrifices, however. Confidentiality is the cornerstone of mediation. In the mediation process, any disclosure to a third-party neutral mediator is absolutely confidential unless authorization to disclose the information is given by the party. Further, in most jurisdictions, the entire mediation process is cloaked with confidentiality, such that the neutral cannot be subpoenaed to testify to what he has heard or discussed with either party in the mediation. In fact, confidentiality is so ingrained into the mediation process that some jurisdictions are in the process of creating ethical rules for mediators, most of which center around the confidentiality process, and which, if violated, can lead to penalties being inflicted on the neutral.

How is confidentiality affected in the Med/Arb process? Essentially, the neutral's responsibilities relative to confidentiality do not change. If the neutral is told something in confidence by one party, he is bound to maintain that confidentiality throughout the entirety of the process, including a subsequent arbitration.

The difficulty arises of course when the neutral dons the arbitrator's hat and decides the issue, being privy to confidential information. If the information is not brought forth during the arbitration (and hence, not subject to challenge or cross-examination), can the neutral still consider the confidential information in the deliberation of the merits of the case? What weight does the arbitrator give to the confidential information?

While the answers may differ based on philosophical grounds, as a practical matter, once a fact is put into the universe, the law of human nature will ultimately dictate the neutral's

consideration of the fact on some level. Such is the nature of the Med/Arb process. Because the ultimate decision maker conducts private caucusing, a complete discovery of facts between the parties, sometimes critical facts, may be sacrificed.

It cannot be stressed enough that use of the Med/Arb process may result in the ultimate decision by the arbitrator being based on information not known or gleaned by one party. Therefore, good neutral procedures should include a full discussion of the confidentiality issues with the parties in order to allow an informed decision to be made on what is potentially being compromised. A well-drafted Med/Arb agreement covering these issues is highly recommended.

Experience has shown, despite potential negatives, most parties believe they are familiar enough with their own case, and with their opponent's case, such that they do not consider this down-side possibility as material. In any event, parties seem content to compromise this issue for the sake of speed and the ultimate decisiveness of the Med/Arb process.

## NUANCES

### The Parties.

The Med/Arb process has characteristics all its own which differentiate it from pure mediation and pure arbitration. In a pure mediation scenario, where the neutral will not subsequently act as the arbitrator, the parties feel more comfortable in discussing the weakness of their case, given the confidential nature of the process. However, in Med/Arb, where the neutral may be the ultimate decision maker, the parties are loathe to discuss any weaknesses in their case, and will never admit to any such weaknesses.

The parties' inability to thoroughly, and more importantly, realistically discuss and understand the weaknesses of their case can hamper the mediation part of the process. It is simply human nature not to want to discuss any weakness with a potential ultimate decision maker.

Experience has shown, parties spend most of the mediation time discussing the merits of the case and the reasons why they should prevail.

One of the main components in mediation is an honest and candid give and take regarding the strengths and weaknesses of the case in a confidential setting with the mediator. The mediator's ability to perform reality testing with the parties is a key element in successful mediation techniques. This element is somewhat compromised in the Med/Arb process, and as a result the mediation part of the Med/Arb process can be more difficult and, perhaps ultimately, less successful.

### The Neutral

The Med/Arb process also creates nuances in the typical behavior of the neutral. At its basic level, the neutral will act as not only a mediator, conversing privately with each party about the merits of the case, but also as the arbitrator who can act in a more formal and decisive manner.

The real change in the neutral's methodology occurs in the mediation process. Every trained mediator has his own style. While these styles differ from mediator to mediator, sometimes dramatically so, it is generally acknowledged that the process belongs to the parties, and that the opinions of the parties, not the mediators, should carry the day.

However, successful mediation technique includes the ability of the mediator to point out, and discuss potential weaknesses of the parties' case, in effect, to test reality. The mediator's ability in this area, after having gained the confidence of the parties, can be critical to achieving a resolution at mediation.

In the Med/Arb process, should the potential decision maker conduct in-depth discussions with a party regarding the weaknesses of that party's case? Will the neutral's opinions about the

merits of the case improperly influence the party-s decision making in a mediation process where they, effectively, have control?

While there may not be definitive answers to these questions, after performing numerous Med/Arbs as the neutral, these issues have caused me to be less probative and less opinionated in the Med/Arb process. Given that the parties have selected me as the neutral, with ultimate decision making power, I do not feel it is appropriate to give my thoughts or opinions regarding a particular issue during the mediation process. While giving my opinions or suggestions may actually hasten a mediated settlement, I would rather the parties mediate the case to a resolution based on their own feelings and understandings about the dispute, rather than mine.

It is for this reason that extreme caution should be used by the neutral in a pure mediation process when, during the process, the parties request the mediator to become an arbitrator and decide their case. As discussed above, in the course of the mediation process the neutral very likely has indicated his thoughts and opinions on certain facts. Without an up-front agreement where everyone (especially the mediator) understands that the mediator may ultimately become the arbitrator, either the parties or the neutral may have acted in such a way as to taint the ultimate process.

Additionally, an important mediation technique is not available to the neutral in Med/Arb. No longer in the arsenal is the inability to raise the specter of significant costs, fees, and time ahead of the parties should a mediated settlement not be reached. In the Med/Arb process, a decision will almost immediately be reached. Additionally, it is typical for the arbitration process to proceed in summary fashion. The parties will no longer be worried about substantial attorney-s fees going forward, or the potential of many months and perhaps years before the matter can be reached for trial. The inability of the mediator to use this technique makes it all the more difficult for an agreed resolution to be reached.

Practice has shown a lower success rate for parties resolving their dispute in the mediation portion of a Med/Arb. The parties' natural tendency not to disclose weaknesses in their case to the neutral, and the neutral's own reticence to opine candidly on certain aspects of the dispute creates a chilling effect not present in pure mediation.

However, despite potential criticism, the Med/Arb process should be looked upon as what it is: a singular alternative dispute resolution service. The service is not unsuccessful simply because the parties were unable to resolve their dispute in the mediation process. The ultimate goal of any alternative dispute resolution mechanism is resolution of the dispute. Med/Arb, one way or the other, will mete out a resolution, which is a primary goal of most parties.

## SUGGESTIONS

In summary, Med/Arb can be a successful alternative dispute resolution mechanism which can efficiently resolve a dispute with potential for saving significant preparation costs. It allows the parties the chance to resolve the dispute on their own terms. Failing that, a fairly immediate decision by a third party knowledgeable of the dispute will be made.

If Med/Arb is to be undertaken successfully, it is critical that a full discussion of the process be discussed, and that a clearly worded Med/Arb agreement addressing the potential confidentiality issues be understood and executed by all parties prior to submission. In summary, Med/Arb combines some of the best of the different attributes of mediation and arbitration. However, it should only be undertaken after a thorough understanding of the nuances of the process by both parties and the neutral.

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