Arb-med/med-arb: how to make it work

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Lawyers and their clients come into arbitration or mediation wanting a result. They want to win, but they also want expeditious and cost-effective dispute resolution. This article will explore how to use a mixture of mediation and arbitration in the same case with the same neutral, combining settlement-focused mediation and arbitrator adjudication, where the parties agree that the mediator can shift to the role of arbitrator, or vice versa.

Having a single neutral serve in both roles — i.e., having an arbitrator engage in settlement discussions — eliminates the need to educate two neutrals, which results in a savings of both time and cost.

Known as med-arb, arb-med or arb-med-arb, these multimode processes have resulted, in my experience, in a very high rate of settlement.

The basic questions

Med-arb: You're in a mediation but not reaching settlement. Would it be useful if the mediator switched to the role of arbitrator and gave a ruling on some issues within the case or even the entire case? This is **med-arb**, a dispute resolution process in which the parties agree that the mediator first attempts to mediate the dispute and, if mediation is unsuccessful in fully resolving the dispute, switches to the role of arbitrator.

Arb-med and arb-med-arb: You're in an arbitration, but you think now is a good time to mediate. Should you ask your arbitrator to shift to the role of mediator, or directly engage with the parties with respect to settlement? And, if you don't reach settlement (at this time), are you prepared to return to the arbitration with your former arbitrator who was your mediator? This is **arb-med** and **arb-med-arb**, dispute resolution processes in which the parties agree that an arbitrator takes on the role of mediator at some point during the arbitration process.

If mediation resolves the dispute, the settlement agreement may be converted into a consent arbitration award. If, on the other hand, mediation is unsuccessful in fully resolving the dispute, the arbitrator-turned-mediator will return to being an arbitrator, and the arbitration will continue.

When and how

Arb-med or arb-med-arb

During the preliminary arbitration conference, an arbitrator who is also an experienced mediator and who has experience in the mixed-mode arb-med process may raise the idea of using mediation. Alternately, it may arise during arbitration proceedings, or at the conclusion of testimony, or even after the arbitrator has written an award but before it is issued.

Whenever it happens, it is likely the result of the parties concluding that a negotiated resolution via mediation by the arbitrator, who is already familiar with the case, is more beneficial in terms of cost savings and familiarity with the case than reaching out to another mediator. At this point, one needs a med-arb or arb-med-arb agreement that describes the process and confirms the parties' understanding that the neutral will be functioning in both roles.

The neutral will be in caucus with each party and may learn confidential information that the mediator is not authorized to share with the other party. The parties will agree that the mediator may have these confidential caucuses with each party and that they are willing to waive the right to object to those *ex parte* communications.

Additionally, if the matter returns to arbitration, the parties agree not to move to vacate any arbitral award or later disqualify the neutral solely on the grounds that the arbitrator also served as a mediator. This enables the neutral to conduct a mediation using caucuses with each party while still being able to return to the role of arbitrator if the mediation is not successful in resolving the entire case.

Med-arb

The opportunity to combine mediation and arbitration may arise during a pre-mediation call with the mediator when a party identifies an issue that is an obstacle to settlement on which they would like the mediator to hear some evidence and make a ruling.

More often, it arises during the mediation when the mediator and the parties recognize that the matter simply won't settle until there is a ruling on a particular issue. At this point, the mediator can become an arbitrator, issue an enforceable order on the issue and then return to the role of mediator.

Assuming the parties are in agreement, they will need to sign a med-arb agreement, which is similar in purpose and scope to the arb-med-arb agreement discussed above.

The why

Now that you know how to combine mediation and arbitration in the same case with the same neutral, why would you do it?

Having a single neutral serve in both roles — i.e., having an arbitrator engage in settlement discussions — eliminates the need to educate two neutrals, which results in a savings of both time and cost. It may lead to a more creative business solution than could be ordered in an arbitration, and it may be appropriate given the parties' ongoing business relationship. There may be times when the parties wish to get a final resolution immediately, whether for financial reasons or because of a business situation that needs resolution.

When one person is wearing both hats, counsel and the parties are inclined to listen to and take more seriously the mediator's efforts and evaluations.

In such situations, having their arbitrator transition to a mediator role, or vice versa, may be the simplest and best solution and one that can be accomplished with one conference call. This is especially the case when an arbitrator has heard evidence or is otherwise well acquainted with the issues in dispute through prior motions, and may be able to shift to a mediator role immediately.

Likewise, if the parties have been engaged in mediating and they have a rapport with and trust in the mediator, the mediator may be an ideal candidate to adjudicate the dispute if the parties are unable to reach a negotiated settlement.

Furthermore, when one person is wearing both hats, counsel and the parties are inclined to listen to and take more seriously the mediator's efforts and evaluations. That makes sense: When the mediator looks the lawyer in the eye and discusses a potentially weak point in the case, a typical response from an aggressive counsel in the usual mediation is to brush it aside. Usually, it is something that counsel in fact recognizes as a problem but has determined to try to push past the mediator, arguing that the arbitrator may never focus on that point or won't agree that it is an issue, even though counsel knows it is a weak point. This is a form of "spinning" the mediator, which may or may not work, but does interfere with reaching a settlement.

When the mediator is also the arbitrator, one cannot so easily spin the mediator by arguing that the arbitrator will see things differently. Truth telling in mediation increases when counsel know that misrepresentations will come back to haunt them if the case proceeds to arbitration in front of the same neutral.

What about the concern that the mediator may learn information in *ex parte* caucuses that would affect the arbitration process, should the parties return to arbitration? How can a mediator-turned-arbitrator purge his or her mind from what was heard in caucus, and how can the other side respond to confidential communications to which they were not privy?

In general, if the facts are relevant, they are either already known by the other party or will be by the time of the arbitration. If they are irrelevant, the neutral knows how to disregard them.

What *is* shared in mediation that does not come out at arbitration are the parties' interests in settlement that are unrelated to the merits or their belief in the strength of their case but that have to do with their risk tolerance, their desire to control the resolution, and the need for a quick settlement and to avoid the cost, time and expense of further arbitration.

Med-arb, arb-med and active involvement by arbitrators in settlement discussions are not process options that have been widely embraced by parties, counsel or dispute resolution professionals. However, they have been effective. Try them; you might like them.

The opinions expressed in this article are those of the author. They do not purport to be the opinions or views of JAMS.

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