THE PROMISE AND PERILS OF "MED-ARB"

By Maria C. Walsh

When disputing parties tire of mediation (because it is too "weak") or fear arbitration (because it is too "controlling"), they seek an Alternative Dispute Resolution solution that is "just right." Recently, I've heard a number of highly talented negotiators, and one famous law school, endorse med-arb as the best of all ADR worlds. The advantages, however, come with caveats.

Through mediation, parties in conflict negotiate a dispute settlement with the assistance of a neutral mediator. The materials, design, and strength of the deal all belong to the disputants. If they can't agree, the deal collapses. Each party's attraction to controlling the settlement terms through negotiation is tempered by the frustration that each lacks power to unilaterally impose a solution. Sometimes mediation doesn't feel sufficiently "muscular."

In contrast, arbitration delivers closure because the parties give an impartial arbitrator authority to impose a decision. The arbitrator decides the facts, judges the parties' legal rights, and dictates the result. Med-arb, as the name indicates, is a hybrid, sometimes proposed as a cure for a failed mediation. Frustrated, tired of spending money, time, and effort in negotiation, parties want closure and may ask the mediator to provide a binding decision. The neutral mediator who has weighed all the accusations and defenses, debated the various proposed solutions, and earned the trust of all parties during the mediation process, seems the perfect candidate to adjudicate the remaining irreconcilable differences between the parties. Med-arb may be the perfect solution; but counsel considering med-arb should think about the following:

- Candor and the Effort to Compromise: Mediators persistently probe each party's priorities and willingness to compromise. Candid discussions with each side can identify intersecting interests that lead to settlement opportunities. Mediators consider each party's understanding of the strengths and weaknesses of the case when assessing the likelihood that a party can achieve its objectives. If parties fear such candid revelations in mediation later may influence the mediator-turned-arbitrator to award them a less beneficial arbitration decision, they may limit their candor during mediation.

  Parties tend to advocate polarized positions in arbitration, expecting that the arbitrator, like Solomon, will compromise between extreme proposals. When mediating parties withhold from the mediator information about objectives, priorities, settlement ideas, and a candid discussion about their case, the mediation is more likely to fail. As a consequence, counsel should alert clients to the possibility that a guaranteed arbitration following a failed mediation may increase the likelihood that mediation fails.

- Risk Assessment: Most litigants expect to win their case. As a result, they are reluctant to negotiate significant compromises in mediation. As many clients opine, why compromise if they will "win" at trial? Successful mediators push each party to carefully weigh the risk of an adverse adjudicatory decision. Whether the adverse outcome results from poor performance by a witness, juror misunderstanding or inattentiveness, adverse legal precedent, or adjudicatory error, the risk of a loss always exists in litigation. Mediators ask each party to compare the risk of a poor trial outcome with the opportunity to negotiate favorable settlement terms. When the mediator transforms into the med-arb adjudicator, however, the parties may no longer fear an adverse adjudication, instead imagining that the mediator who has been so understanding, empathetic and insightful is unlikely to make a mistake! The chance for a negotiated settlement may be lost if clients believe the mediator shares their perspective and is likely to deliver a beneficial arbitration award. Counsel should remind clients that the mediator-turned-arbitrator is appointed by the parties to be im-

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partial. As such, clients cannot expect that the empathy expressed during mediation will guarantee a win at arbitration.

- *Ex Parte* Evidence: Mediators usually "caucus" with each party separately to encourage candid, full-ranging discussions. Some of the "facts" presented in such *ex parte* discussions may never be shared with, or subject to challenge by, the other side. When considering med-arb, counsel should address whether and how the mediator will separate factual statements and other impressions formed during the mediation from evidence presented in arbitration. Most mediators require the parties to acknowledge (and waive any objection) that a med-arb award may be influenced by *ex parte* communications presented during the mediation.

  To avoid the problem of *ex parte* evidence, some parties reverse the order and use "arb-med." In the arb-med process, an impartial arbitrator conducts a hearing and prepares an arbitration award based on evidence presented at hearing. Rather than announce the decision, however, the arbitrator applies the knowledge gained during the arbitration to mediate the dispute. Only if the mediation negotiations fail, will the binding arbitral award be announced. Any party choosing arb-med should discuss fully with the selected arbitrator-mediator expectations about the procedure.

ADR is, by design, a product of the parties' creativity. Counsel can create the "just right" ADR process for each dispute by evaluating the benefits and limitations of each procedure, educating the client, and initiating a preliminary, all-party discussion with the mediator to customize the process and maximize the likelihood of resolution. ■

Maria C. Walsh *is a full-time mediator and arbitrator with JAMS and has vast experience resolving employment discrimination claims. She can be reached atmwalsh@jamsadr.com.*