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A Fresh Look at Med-Arb for Business Disputes.

Although Med-Arb is a powerful ADR technique, it is often overlooked as the preferred approach for resolving business disputes. This article reviews Med-Arb in the context of a Case Study that will hopefully provide a framework to demystify the complexity of Med-Arb, identify some of the pitfalls that can be avoided during the preliminary decision-making stages and suggest strategies that lead to the adoption of a Med-Arb as an efficient and effective process for the resolution of business disputes.

Simplify stated, Med-Arb is a formal combination of the two well understood ADR processes each with its own well accepted parameters and ethical standards. From the beginning, the parties agree that any matters not mutually agreed upon through Mediation will be resolved as a binding decision in Arbitration.

In Mediation, the parties are encouraged to be open and candid with the Neutral, often sharing confidential information or settlement positions, while recognizing that mutual agreement is required for a binding settlement. Depending on the use of joint or separate caucus sessions with the parties, the Neutral may have discussions with one side that are intentionally not shared with the other. The parties can continue in Mediation as long as they are productive, or either party may unilaterally withdraw or cease discussions at any time and return to other options such as litigation. The Model Standards of Conduct for Mediators recognizes the voluntary nature of Mediation and the necessity of self-determination by each party during all aspects or phases of the process, including satisfaction with the continued neutrality of the Mediator. By definition, Mediation is voluntary, and a settlement must be agreed upon by the parties without coercion.

At the other end of the continuum, Arbitration is compulsory (after the parties agree to arbitrate), the outcome is determined by a third party, and the resulting award is legally binding. During a typical Arbitration engagement, a strict code of conduct applies restricting any ex parte communications between the Neutral and any party. This restriction is a matter of due process and equal protection, assuring each party that they are aware of all information or evidence conveyed to the Arbitrator, and have an opportunity to cross examine or challenge the information during the Arbitration phase. This restriction also exists to reinforce the impartiality of the Neutral as Arbitrator. In Arbitration, several important procedural choices also have become accepted as standard components of commercial Arbitration proceedings, such as choosing the rules to be followed, the amount, or limits on discovery and the form of the award. These are all typical issues that would be addressed if the matter started as an Arbitration case.

There are fundamental conflicts between the two approaches. Recognizing this tangle of conflicts often ends further consideration of Med-Arb. So how can these conflicts be reconciled, and can they be combined into a fair and effective ADR process?

The Michigan Standards of Conduct for Mediators (the Standards) provide some guidelines, specifically under Standard VII, Quality of the Process:

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B. 5. Where appropriate, a Mediator may recommend that parties consider other dispute resolution processes.

6. A Mediator may undertake an additional dispute resolution role in the same matter, if the Mediator:

- a. informs the parties of the implications of the change in process;
- b. receives the informed consent of the parties; and
- c. can do so consistent with these Standards.

At the risk of oversimplification, these conflicts can be addressed with disclosures, informed consents, and timely waivers at key decision points. But framing the decisions in ways that are easily understood and demystify the process, which lead to acceptance, is a significant challenge. One approach is a step-by-step process to guide both attorneys and their clients, something I call the Med-Arb Roadmap.

The Roadmap highlights eight decision points where conflicts are systematically identified, choices are presented and decisions are made to acknowledge or waive each of the respective principles set forth in the Standards. Some of the choices or alternatives must be addressed at the inception of the process, which form initial basic commitments of the parties to the binding nature of the Arbitration phase of the Med-Arb process. Some decisions ~~that~~ can only be made during the transition from the Mediation to the Arbitration phase of the Med-Arb process. These choices recognize the importance of party self-determination, yet provide the structure needed to finalize the Arbitration phase that produces the binding award.

The Med-Arb Roadmap Decision Points:

- Decision Point 1. Commitment that binding Arbitration will follow unsuccessful Mediation. This Decision Point deals with waiver of Standard I-Self Determination. This principle respects that Mediation is the act of a voluntary, uncoerced decision. The commitment to commit to a binding Arbitration acknowledges and waives this principle.
- Decision Point 2. Agreement on exclusive joint sessions or joint and caucus sessions during Mediation phase. This Decision Point deals with Standards II-Impartiality, Standard IV- Mediator Competence, as well as Standard V- Confidentiality. These principles deal directly with the participants' expectation of confidentiality and the actions permitted by the Mediator. The expectation of an Arbitration phase may impact the desirability of ex parte communications during the Mediation phase, a waiver and consent that is required before the first Mediation session.
- Decision Points 3 & 4. Procedures for selecting the Neutral in the Arbitration phase. This Decision Point deals with Standard III-Conflicts of Interest. A Mediator should avoid a conflict of interest or the appearance of a conflict of interest both during and after Mediation. Standard II-Impartiality. A Mediator shall conduct Mediation in an impartial manner and avoid conduct that gives the appearance of partiality. A Mediator should withdraw from Mediation if the Mediator cannot conduct it in an impartial manner. Standard I-Self-Determination. Self-Determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome including Mediator selection, process design and participating in or terminating the process. These principles cannot be addressed until the start of the Arbitration phase,

at which point the Roadmap provides the guidelines for accepting the same Neutral to act as Arbitrator going forward or selecting a new Neutral.

- Decision Points 5 & 6. Agreement for additional discovery, evidence, etc. at time of transition to Arbitration phase from Mediation. This Decision Point deals with the fundamental due process of participants in an Arbitration. Decisions about further discovery or other administrative issues cannot be made until the conclusion of the Mediation Phase. This Decision Point acknowledges these rights inherent in Arbitration.
- Decision Points 7 & 8. Agreements on form of the Arbitration Award, and agreed upon limits on award, such as Hi-Lo or Last Offer. This is another administrative decision that is best made at the conclusion of the Mediation phase.

A Case Study illustrates some of the key steps that lead to a full understanding and adoption of the Med-Arb process. These key steps will be referred to as Practice Pointers.

The Case Study involves a dispute between an owner and general contractor arising from the construction of an industrial building. Some of the 20 issues were minor punch list related topics, with a mix of more challenging and costly defects which required expert engineering evaluation. This is a typical problem where some of the issues are ripe for compromise and agreement, and others more complicated but needing finality. From experience, Med-Arb would be a practical approach, but would require commitment and cooperation on a much more sophisticated level than conventional Mediation. The owner filed a Request for Mediation with the American Arbitration Association as provided in the construction agreement (no agreement to Arbitrate). The Case Manager arranged the Preliminary Mediation conference call. In advance of the call, I sent the attorneys my disclosures and standard Mediation Agreement.

Practice Pointer 1. My Mediation Agreement emphasized the importance of customizing the ADR process and encouraged an early discussion of hybrid processes without a singular focus on Med-Arb. I also routinely include a link to my website where there is a section on Med-Arb and my experience with the process. For those familiar with the concept of “Pre-Suasion”, as presented by the social psychologist Robert Cialdini in the book Pre-Suasion: A Revolutionary Way to Influence and Persuade, you will recognize the importance of presenting this information in a timely fashion. The objective is to prepare the parties to be receptive to the message, in this case, the opportunity to customize the ADR process, perhaps using Med-Arb. The purpose is not to change the parties’ attitude about Med-Arb at this point, an admittedly complicated process with inherent ethical conflicts, but to create a focus of attention before the relevant upcoming discussion on ways to customize the ADR process. The Med-Arb process may be a useful way to accomplish this objective.

During the Preliminary Mediation conference call, the attorneys described the factual basis for the claims, and suggested a site visit as a first step to familiarize me with the complexity of the case. I asked if either attorney had considered how the upcoming Mediation process could be customized and inferred from the conversation that they were receptive to suggestions. I accepted the responsibility as Process Leader and this situation appeared suitable for further discussion of the hybrid Med-Arb process. I suggested that the site visit would also be an appropriate time to discuss the details of our upcoming Mediation. Confirming the arrangements, I forwarded the Med-Arb roadmap.

The site visit was productive, full of necessary detail. The parties were cooperative but cautious, each still firmly entrenched in their respective confirmation biases. The follow-on conference room discussion to finalize arrangements for information and document exchange easily lead to a discussion on Med-Arb as a possible structure for the upcoming Mediation. Each side had reviewed the Med-Arb roadmap.

Practice Pointer 2. Be careful with ex parte communications during the early stages, while the ADR Process is still forming. I participate in Mediation site visits as if it's a roving joint session; I treat it like I'm an Arbitrator. In advance, I tell the attorneys to always stay by my side because I do not want any ex parte communications for the entire visit. If I hear something, or I say something, I want both attorneys to know what's been said or heard. If there is a follow-on discussion on Med-Arb, ex parte communications will be a topic. Having a productive sidebar conversation with one side during the site visit may be sufficient to preclude discussion of Med-Arb.

Practice Pointer 3. Continue operating in Joint Session (and thus avoiding ex parte communications) until the final decision has been made on whether to adopt Med-Arb as the selected process, with special focus on the following discussion of Decision Points 1 and 2.

Decision Point 1. Commitment to Arbitration. This is a substantial commitment, and fundamentally alters a party's option to withdraw from the process, as would be the case in a standard Mediation. Both parties need to acknowledge that this dispute, if not resolved in Mediation, will be decided by an Arbitrator (you or someone else). You want the parties to view your demeanor in joint sessions as Arbitrator like.

In some situations, this commitment to final binding Arbitration has already been made. Consider the common situation where the parties have a contract with staged obligations, mediate first, followed by mandatory Arbitration if Mediation is unsuccessful. Or the case where one party has already filed a Demand for Arbitration, but the parties decide to first attempt Mediation (a very common situation). When the decision to arbitrate has already been made, suggesting Med-Arb as an efficient path to avoid the expense and delay of the two separate and independent processes should be obvious and more straightforward. Unless the Neutral, again as Process Leader, presents the hybrid option early in the Mediation process, the parties are likely to start down a road where two independent procedures will be the norm.

Decision Point 2. Mediation in Joint Session or Mediation with private Caucus with the Neutral. This Decision Point suggests another reason to remain in Joint Session. Do the parties desire that all Mediation communications remain in Joint Session (no ex parte communications unless agreed) or are the parties willing to engage the Neutral in private conversations or caucuses as in conventional Mediation practice? Their choice, not yours. It is therefore important to have avoided extensive ex parte communications up to this point.

In the Case Study, the Mediation phase resulted in the settlement of all but one of the claims. The parties had jointly retained a geotechnical engineer but were unable to agree on the cost of remediation, leaving cost as the final issue for Arbitration. The parties agreed to remain with me

as the Arbitrator. The parties agreed to time schedules, additional discovery, and form of award to complete the Arbitration.

The Med-Arb Roadmap explained here is but one way to provide the information necessary to manage the confusion that can so easily lead to the reluctant to adopt the ADR process of Med-Arb. The case study illustrates the importance of Pre-Suasion by first channeling attention to the obvious benefits of customizing the ADR process, making supporting information available in a timely fashion with the objective of exploiting the window of opportunity for the parties to evaluate the merits of Med-Arb and follow through by adopting the process as a wise way to resolve their dispute.

The Med-Arb Roadmap and Mr. Rock's Med-Arb Agreement are available on-line at <http://www.JeromeRockLaw.com>.

Jerome F. Rock is an attorney, engineer, and former business executive who maintains a full-time practice as a Mediator and Arbitrator for business, technology, automotive supplier, and construction industry disputes. He is on the panel of Arbitrators for the American Arbitration Association for commercial, construction, and large complex cases. Mr. Rock has been a licensed residential builder, a LEED accredited professional with the US Green Building Council, and a former adjunct lecturer in engineering and construction law. He is a member of the Engineering Society of Detroit and serves on the board of directors of the Michigan chapter of the Design-Build Institute of America. Mr. Rock is also a member of the Professional Resolution Experts of Michigan (PREMi) and is the Chapter Author for Settlement & Negotiation for ICLE's Michigan Civil Procedure. Mr. Rock has earned the Martindale Hubbell Peer Review Rating of Preeminent, is rated as a SuperLawyer by Thompson Reuters, and Top Lawyer by Detroit Business and Hour Detroit. He has served as a Director and Secretary Board of Directors of the Detroit Athletic Club and is an advanced SCUBA instructor. His website is www.JeromeRockLaw.com.