

Is Med/Arb the Process for You?

By Martin C. Weisman and Sheldon J. Stark

Authors' Note: *Of the many alternative dispute resolution processes, mediation/arbitration is worth your consideration. In this article, Marty Weisman, a seasoned med/arb practitioner, describes the process while Shel Stark describes his first experience with it.*

Weisman: Med/arb typically starts with mediation. In the event the dispute isn't resolved voluntarily through mediation, the mediator becomes an arbitrator to make a final and binding decision on the merits. Ordinarily, the two processes are quite separate and distinct. In mediation, the neutral facilitates a negotiation between the parties, helping them face their risks realistically, find common ground, and resolve their differences. Mediation is nonbinding and voluntary. By contrast, in arbitration the neutral serves as a decision-maker, taking proofs, listening to arguments, and deciding the outcome. Med/arb melds the two processes and generally reduces delay, saves money, mitigates disruption, creates efficiencies, and provides the parties with the best of both worlds by guaranteeing closure through one process or the other. Many believe that the prospect of arbitration before the same neutral, with a winner and a loser, is an incentive for the parties to settle during the mediation phase. Med/arb is also more attractive when the parties wish to preserve or repair their relationship.

Stark: I mediated a family conflict related to nonpayment of a loan made when the borrower was in deep trouble, virtually friendless, and broke. The lender expended substantial sums for the respondent's attorney fees, organized a successful rescue effort, and helped the borrower get back on her feet. Hundreds of thousands of dollars were at issue. According to the terms of the written loan document, the loan was repayable with interest if and when the borrower received monies from a list of specific potential financial sources. The dispute arose when the borrower received a substantial sum—more than enough to repay the entire claim—but the money

wasn't from a specifically enumerated source. The borrower didn't deny money was due; she objected to paying from *those* funds.

When the lawyers called, the dispute, not yet in suit, had gone on for years and both parties desired finality. They yearned for a final and binding resolution at the end of mediation. Previous negotiations had failed, and the litigators were skeptical that voluntary resolution was possible. Med/arb seemed an ideal solution. Once understood, both sides embraced the process.

Weisman: While disputants tend to like med/arb, it is not for every alternative dispute resolution provider. The process raises a number of challenging ethical and decisional issues, including management of confidential ex parte communications made during mediation should the case not settle, party perceptions of bias when the neutral plays two distinctly different roles, and concern that parties will pull punches in mediation for fear their remarks will be used against them in arbitration.

The neutral must possess the qualifications necessary for both mediation and arbitration and should probably have subject-matter expertise. The ethical standards applicable to arbitrators govern the med/arb process because they represent a higher, more rigorous standard.

Med/arb providers should be trained in both processes and must engage in hard-eyed self-examination to understand their strengths and weaknesses in each process to determine if they are up to the task.

Stark: I was familiar with med/arb, but had no personal experience with it. I called Marty Weisman for help. Marty was generous with his time, advice, and draft agreement



Fast Facts

- Mediation/arbitration provides efficiencies, reduces delays, and offers the best of both worlds.
- A med/arb provider should be trained in both processes.
- Provider self-confidence in delivery of a fair process is crucial.

language. He explained the importance of self-reflection by the ADR provider: Could I remain neutral throughout the process? Could I limit the basis for an arbitration decision to admitted record evidence and nothing learned *ex parte* in mediation? Could I *deliver* the med/arb process the litigants sought?

My answer was “yes” based on past experience reserving judgment while serving in a variety of decision-making positions including as an arbitrator, a hearing officer for the Michigan Department of Civil Rights, chair of an attorney discipline panel, and a member of blue-ribbon case evaluation panels.

To address some of the challenges of med/arb, the parties’ written agreement provided that the *only* evidence I could consider in arbitration would be contained in affidavits and documents attached to their written submissions. *Nothing* said during the mediation process could be considered.

Weisman: Med/arb is not a one-size-fits-all tool. Sometimes it is not even planned. The parties might begin mediation but request a final and binding decision from the neutral when they are unable to reach agreement. In another variation, the arbitrator may be asked

to suspend the process of taking evidence to see if mediation can resolve their differences. If the mediation proves to be unsuccessful, the parties resume arbitration. Yet another variant is arb/med. In arb/med, the parties start by arbitrating the case. The neutral makes a decision and writes an award but does not disclose it to the parties. The parties then attempt resolution through mediation. If the case can’t be settled, the arbitrator reveals the opinion.

Stark: In my case, the parties chose traditional med/arb. To set out their factual perspectives and present their legal positions in a single round of documents, the lawyers decided their written submissions would be in the form of cross-motions for summary disposition. To reduce the risk of a premature decision—and to save the parties money—I chose *not* to read the cases cited until it became necessary for the arbitration. It helped that the dispute was governed by law in a jurisdiction unfamiliar to me.

While I encouraged the parties to craft their written submissions to persuade each other and not me, the format of cross-motions for summary disposition frustrated that goal. The summaries and supporting affidavits were

antagonistic, aggressive, and provocative. As a result, the participants arrived at the mediation table highly aggravated and hostile.

Weisman: The two processes require the neutral to demonstrate very different aspects of his or her skills, expertise, techniques, knowledge, and temperament in each phase of the process. During mediation, the provider facilitates communication, uses active listening tools, asks neutral-sounding risk questions, identifies common ground, and assists the parties in understanding opposing perspectives. Generally, the mediator doesn't reveal opinions and judgments, if he or she has any. During arbitration, the provider must understand the underlying legal issues, rule on objections, evaluate the evidence presented, and arrive at a final decision based on reasoning the parties can understand. The arbitrator is required to have an opinion and share it with the disputants.

Med/arb is a matter of self-determination. The parties and their counsel can craft the process to ensure finality, shorten time frames, manage evidence, and save costs.

Stark: Two days were set aside for the mediation. The lawyers made opening statements in joint session but quickly moved to a caucus model, with the mediator shuttling back and forth between the rooms. By the middle of the second day, the parties wanted a face-to-face meeting without lawyers present. They wanted me in the room to serve as referee and "honest broker." Before convening the joint session, I worked with the parties individually to craft what they wanted to say to one another in the most productive way, and to ensure that each was willing to listen to the other with an open mind.

The meeting turned out to be profound and powerful. The lender expressed his frustration in personal terms, reminding the borrower of all the many ways he had helped her and wondering why, when she was able, she had not paid him back. Departing from her prepared response, the borrower responded, "I always knew you had my back!" With tears flowing all around, they fell into each other's arms for heartfelt hugs. While much hard bargaining remained, a significant breakthrough had clearly occurred.

Weisman: No matter what we do or how we do it, it still comes down to, "What is the provider capable of?" What are the qualifications and what is needed for an effective process?

Provider self-confidence is very important if the parties and counsel are to have faith in the process. The provider must be flexible and able to operate in different environments. He or she must be able to manage whatever process the parties design to meet their specific needs,

tailored to their individual dispute. Whatever happens, because med/arb is a party-designed process, the neutral is responsible for ensuring the process conforms to the parties' agreement in both the mediation and the arbitration phase. For example, if the parties want help in properly evaluating their claims and defenses, the provider must be able to raise issues designed to ensure realistic assessment of potential risk.



Stark: A major risk factor in many disputes is whether the judge, on motion, will dismiss the claims and grant summary disposition. A common mediator intervention is to test the assessment of that risk with the parties and their counsel: What has been your experience with this judge? What is his or her track record granting summary judgment in cases like this one? What is the likelihood that summary judgment will be granted in *this* case? Has the judge published an opinion that might shed light on the court's views on similar issues?

In a med/arb proceeding, however, we don't explore the risk of what the *judge* might decide; rather, we explore the risk of how *I* might decide! The distinction is significant. As noted, I deliberately chose *not* to become familiar with controlling caselaw. I was determined to maintain an open mind on legal questions. That said, I was familiar with the issues and able to frame cogent risk questions.

The loan document, for example, spelled out five or six specific ways in which the borrower might come into money. If she benefitted in any of the ways listed, she was to pay the lender back immediately. The actual source from which her money came was not listed, nor was the possibility anticipated at the time the note was signed. The defense, of course, argued *ejusdem generis*, i.e., when certain things are specifically enumerated, recovery is limited to those sources only. "I truly have not decided the issue," I told counsel for the lender. "I don't know the law in your state because I did not want to read the cases until decision time. But you know the law. What do *you* think the chances are you'll persuade me that the source of these funds actually fits into one of the categories listed in the note?"

The dynamic is very different when the lawyers contemplate the risk of what *I* might do as compared to predicting what a judge might do. No matter how well known, the judge assigned to the case seems abstract—out there somewhere. By contrast, I'm sitting in front of them looking them square in the eyes.

Weisman: In a recent online poll conducted by the American Arbitration Association, participants were asked whether mediation and arbitration should be used in tandem; in other words, what do ADR practitioners think of med/arb? Fifty-two percent were in favor of the tandem use and 48 percent opposed. Comments were received from a number of well-known ADR providers. Johann Scheepers indicated that in South Africa, med/arb is used to resolve a substantial number of unfair dismissal/unfair labor practice disputes. Ardie Epranian stated:

Not only does the threat of arbitration generally result in settlement that might otherwise not have occurred (the process tends to crystalize position evaluation by each party), but med/arb or the reverse is far more time and cost efficient. In addition, it has been my experience that parties only impart to mediators what they want the other party to know (yes, most parties rarely totally trust any mediator) so the danger of learning confidential information is overstated and often used as a cop-out if things do not go well.

There are numerous objections to the process as well, and you can see from the results of the poll how close the question has become.

In my experience, those who have not experienced med/arb are the most vociferous opponents. Those who have had successful hybrid experiences are more apt to support and use it.

Stark: The case settled by the end of the second day. Not only did the parties agree on a dollar figure, they also agreed to work collaboratively to recover additional monies

believed to be available from other sources. The parties recognized as a result of mediation that "the whole is greater than the sum of its parts." Their chances of recovering additional funds outside their dispute were better if they worked together than if they proceeded separately. Their renewed willingness to cooperate demonstrated conclusively that the dynamics of their dispute had changed.

At no time did it appear the parties were holding back in the mediation process for fear of hurting themselves if the matter did not settle. I believe—as did the litigators—that settlement through mediation was the best option, and it appeared I had their full cooperation. If I am to do another med/arb, however, I will discourage a summary disposition format for written submissions. Written submissions *should* be exchanged, but they should encourage the other side to settle, not crank up hard feelings right before they arrive at the mediation table.

The process worked. I'm a believer. I would gladly do it again.

Weisman: The next time you're retained as a third-party neutral, consider whether the matter is appropriate for a med/arb process. If so, engage in a thorough self-analysis. If you're confident you can deliver a fair, neutral, and professional process, I encourage you to suggest it to the parties as an option. If they're interested, work with them to design a process that best fits their dispute, tailored to their specific needs. Med/arb might offer precisely what they need with a guarantee of finality and closure. ■



Martin C. Weisman has served as a neutral, court, or party-appointed arbitrator and mediator and has written and lectured on numerous alternative dispute resolution and other topics. He is currently the chair of the SBM Alternative Dispute Resolution Section, a member of PREMi, and a member of the AAA Panels of Neutral Arbitrators and Mediators and the National Academy of Distinguished Neutrals. He has been recognized as a Michigan "Super Lawyer" and "dBusiness Top Lawyer."



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