In An Employment Dispute, Is Med-Arb Worth The Cost?

By Thomas A. Doyle[1]
Wexler Wallace LLP, Chicago, IL
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In our legal system, if the usual form of formal Dispute Resolution is litigation, and if "Alternative" Dispute Resolution is mediation or arbitration, then Med-Arb must be "Alternative-Alternative" Dispute Resolution. Med-Arb is what we get because our profession is attentive enough to notice the limitations in a system, creative enough to ask "What if?" questions, and then bold enough to try a different approach.

Put simply, Med-Arb is a hybrid of mediation and arbitration,[2] and it has been around for decades.[3] Typically, a Med-Arb is a one-day event with a neutral third party proceeding over a two-stage process. In Stage One, the Neutral serves as mediator, trying to help the parties work to a negotiated solution to their dispute. If Stage One does not result in a deal, then Stage Two begins, with the same Neutral hearing

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[1] I am Of Counsel at Wexler Wallace LLP in Chicago. I represent plaintiffs in class action litigation, including employees in workplace disputes. I have also represented employees (and less often, management) in non-class employment disputes. My biography and contact information are available online at https://www.wexlerwallace.com/team_bio/thomas-a-doyle/.

[2] Mark Batson Baril & Donald Dickey, "MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?," at 1, dated August 22, 2014, available online at http://www.mediate.com/pdf/MED-RBTheBestofBothWorldsorJustaLimitedADROption.pdf; Martin C. Weisman, "Med-Arb: The Best of Both Worlds," *Dispute Resolution* (Spring 2013), at 40; *Galantowitcz v. Rhino Room, Inc.*, 2015 U.S. Dist. LEXIS 73911, at *2, n.2 (W.D.N.Y. June 8, 2015); *Wright v. Brockett*, 150 Misc.2d 1031, 1036, 571 N.Y.S.2d 660, 661 (S. Ct. N.Y. 1991).

[3] *Glastonbury Edu. Assn. v. Freedom of Info. Comm'n.*, 234 Conn. 704, 663 A.2d 349 (Conn. 1995); *Wright*, 150 Misc.2d 1031, 571 N.Y.S.2d 660; Edna Sussman, "Developing an Effective Med-Arb/Arb-Med Process," *New York Dispute Resolution Lawyer* (Spring 2009), at 71; Weisman (*supra*, n.2), at 40.

evidence, serving as an arbitrator, and awarding whatever relief makes sense.[4] At the conclusion of the event, the dispute is over. (That setup is not the only possibility, because Med-Arb has room for variation, limited only by the parties' preferences.[5])

In this Essay, I focus on the simplest and most conventional approach to Med-Arb, and I discuss my reservations about the process. I do not favor Med-Arb for employment disputes. My reservations stem from my own bias, because I have found that traditional Mediation can be a valuable tool to resolve employment disputes. I worry that the Med stage of a Med-Arb is pointedly different from a standalone Mediation, and that those differences are costly. In this Essay, I have organized my thoughts about what parties gain and lose in Med-Arb of an employment law dispute. My thoughts cluster around two questions.

1. **Compared a more traditional Mediation of an employment dispute, what do the parties lose when they choose a Med-Arb?**

There are least four advantages of a traditional Mediation -- Confidentiality, Control, Candor and Commitment -- and all of them operate differently in a Med-Arb.

Confidentiality. A Mediation is handled confidentially, and the Mediator does not have an ongoing role in the dispute. That is, everything that the parties say to a Mediator remains confidential, and so does anything that a party "admits" in the

[4] *See, e.g., Town of Clinton v. Geological Servs. Corp.*, 2006 Mass Supr. LEXIS 526, at *1 (Sup. Ct. Mass. Nov. 8, 2016).

[5] Baril & Dickey (*supra*, n.2), at 8.

process.[6] Indeed, many jurisdictions have a statute or rules requiring that all Mediation communications must remain confidential.[7]

Because of that confidentiality, when my client speaks freely at a Mediation, I do not have to worry that my client is coloring her future as a trial witness. If she ends up testifying at a trial, she can make a first impression that is unencumbered by any lasting impact from the negotiations.

But there are other ways that confidentiality is important in a Mediation. For example, during separate caucus sessions in an Employment Mediation, the employee might quickly abandon any demand for reinstatement, if doing so will lead to a deal that day. Walking away from a possible remedy -– and admitting that such a remedy is a lower priority -– does not have long-term consequences if no deal is reached that day.[8]

As another example, an employer might apologize to an employee during a Mediation, and that apology might be a powerful moment in the process.[9] The employer knows that such an apology will never go to the judge. Or, the parties may be willing to tell the Mediator facts during *ex parte* conversations, knowing that those facts

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6 *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply*, 332 F.3d 976, 980 (6th Cir. 2003); *Tower of Clinton v. Geological Servs. Corp.*, 2006 Mass. Sup. LEXIS 526, at *6 (Sup. Ct. Mass. Nov. 8, 2006).

7 Roger Trim & Steven Reid, "State Mediation Privilege Statutes and Mediation Privilege Rules of Selected Federal District Courts and Courts of Appeals: A Summary," *ADR in Employment Law*, 2017 Supplement (Bloomberg BNA, 2017), at AP-3.

8 *Goodyear Tire & Rubber*, 332 F.3d at 980, Steven Moore & Roger Trim, "Mediation in the Employment Context," *ADR in Employment Law*, (Bloomberg BNA, 2015), at 105.

9 Moore & Trim (*supra*, n.8), at 91; Thomas Gilovich and Lee Ross, *The Wisest One In The Room* (Free Press, 2015), at 219.

will not ever be revealed to the other side or to the judge.[10] Communicating confidentially might help nudge the parties closer toward a solution.

Confidentiality does not work the same way in a Med-Arb, because the dynamics of the negotiations from the Med stage will still be in the Neutral's mind when the process enters the Arb stage. Even if the Neutral feels she can forget whatever happened in the Med stage, the parties might worry that the Neutral will remember.[11]

Control. In a traditional Mediation, the parties control their own fate. They alone decide whether the case will end, and on what terms.[12] If they do not reach a deal during the Mediation, they lose that window of complete control, because someone else will then decide the outcome of the case: either a judge will rule on a motion, or a jury will render a verdict.[13] In that sense, Mediation permits the parties to invest in the outcome, unlike any other process, because the Mediation will not impose unacceptable terms on them. That can encourage clients to bargain all the way to their last offer/demand number, because they know at every step of the process they are free to walk away. And, in a Mediation, the parties can fashion any type of relief that they want, which means that a Mediation can settle more or less than the entire dispute, or it

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[10] Moore & Trim (*supra*, n.8), at 105, 127.

[11] Baril & Dickey (*supra*, n.2), at 5.

[12] Hon. Morton J. Denlow (ret.), "Mediation Tips for Trial Lawyers & Their Clients," *ADR Guide* (Law Bulletin Publishing Co., 2013), available online at https://www.jamsadr.com/files/uploads/documents/articles/denlow-mediation-tips-2013-01-01.pdf; Moore & Trim (*supra*, n.8) , at 90.

[13] Denlow (*supra*, n.12).

can fashion a business arrangement that would not be available in a court proceeding.[14] (To use an employment law example, in a Mediation involving a wrongful discharge claim, the parties could agree on a reinstatement that reassigns the worker to a different position in the company, or the parties could agree that the former employee will not reapply for employment at the company.)

That element of control does not work the same in a Med-Arb, because, if the case does not settle in the Med stage, the Arb stage will impose a resolution on the parties. By itself, that possibility might be coercive.[15] For example, in a Med-Arb, a party may feel less able to break off talks, worried that she will suffer adverse treatment (even subtly) in the Arb stage. That means less control for the parties, who may feel less able to walk away from an unacceptable offer in a Med-Arb.

Candor. During a Mediation, the parties can discuss the dispute honestly and candidly, maybe even revealing an otherwise-unspoken motivation.[16] Many Mediators rely on the parties' candor as a key feature of the process.[17] And if a Mediator chooses an evaluative approach, the Mediator may freely tell parties where they face risk.[18]

That candor is not as likely in a Med-Arb, because everyone knows that the

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[14] Moore & Trim (*supra*, n.8), at 91.

[15] Baril & Dickey (*supra*, n.2), at 5.

[16] Brian Pappas, "The Best of Both Worlds May Be Too Good To Be True," *Dispute Resolution* (Spring 2013), at 43.

[17] Sussman (*supra*, n.3), at 71; Denlow (*supra*, n.12).

[18] Moore & Trim (*supra*, n.8), at 95.

process may go to an Arb stage. That might make the parties less willing to talk openly about their own weaknesses or motivations.[19] Lawyers might advise against having the clients talk more in the Med stage, if the lawyers are worried that the clients will make a bad first impression.[20]Also, the parties might be less willing to drop some forms of relief (such as reinstatement) during the Med stage. Even the Neutral might be reluctant to share her own opinions about the merits during the Med stage, if everyone will listen to her evaluation only as a preview of the Arb stage.[21]

Commitment. A standalone Mediation seems to work best when everyone is committed, trying to find a solution. At its best, everyone listens to the other side, tries to understand the other point of view, and tries to re-think their own position based on the discussion.[22] The more the parties are committed to a process, the more likely they will have a positive experience with it.[23] And the best Mediators are skilled at building that commitment, coaxing the parties back to it when the day becomes contentious or argumentative.

Even an unsuccessful Mediation has benefits. If the parties have listened to each

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[19] Sussman (*supra*, n.3), at 71; Pappas (*supra*, n.16), at 42; Katie Shonk, "What Is Med-Arb?," *Program on Negotiation* (Harvard Law School, Jan. 23, 2017), available online at https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/); Baril & Dickey (*supra*, n.2), at 6.

[20] Pappas (*supra*, n.16), at 42.

[21] Pappas (*supra*, n.16), at 43; Baril & Dickey (*supra*, n.2), at 5.

[22] Gilovich and Ross (*supra*, n.9), at 209-10.

[23] Gilovich and Ross (*supra*, n.9), at 115.

other during their Mediation, they might have gained insights into what drives the other side. They might have learned about weaknesses in their own position. They might have honestly seen themselves for the first time, and maybe realized that they will need to present themselves better in front of a jury. But all of those things happen only if everyone in the Mediation commits to listen and think.[24]

In a Med-Arb, no one has committed to the Med stage as whole-heartedly, because everyone knows that an Arb stage has been built into the day. The parties may be less likely to listen with an open mind, instead listening competitively (seeking clues or advantages to be used during the Arb stage).[25] Parties might use any *ex parte* communications (or caucus sessions) in the Med stage opportunistically, disclosing information to sway the Neutral before the Arb stage begins.[26] The parties might be more circumspect during the Med stage, knowing that an Arb stage is just around the corner. And if they hit an impasse, the parties may be too quick to quit negotiating if it is easy to switch the process into the Arb stage.

Just as much, everyone has to prepare for both the Med stage and the Arb stage, so that they are ready to put on witnesses and argue the merits.[27] That preparation might harden people in their own point of view (a phenomenon that behavioral

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[24] Moore & Trim (*supra*, n.8), at 107-109.

[25] Pappas (*supra*, n.16), at 43; Baril & Dickey (*supra*, n.2), at 6.

[26] See, e.g., *Votre v. Maisano-Votre*, 2015 Conn. Super. LEXIS 989, at*6-*9 (Sup. Ct. Conn., May 4, 2015); Sussman (*supra,* n.3), at 71; Pappas (*supra,* n.16), at 43; Baril & Dickey (*supra,* n.2), at 6.

[27] Pappas (*supra*, n.16), at 44.

psychologists call "anchoring").[28] Also, completing their hearing prep might encourage parties to truncate the Med stage: given that they have already invested all the time and money required for a full evidentiary hearing, why keep bargaining?

Thus, the most important part of a Mediation -– the fact that everyone is committed to finding a solution together -- is distorted in the Med stage of a Med-Arb.

2. Compared to a more traditional Mediation of an employment dispute, what do the parties gain when they choose Med-Arb?

Efficiency. Parties gain two important efficiencies when they choose a Med-Arb.

First, the parties know that, at the end of their process, they will be finished. If they do not settle in full during the Med stage, then any remaining dispute will be decided during the Arb stage.[29] Often, a guarantee that the dispute will end is valuable. Compare that certainty with a traditional Mediation, which may not end the dispute.

Second, the parties avoid educating two outsiders about their dispute. In a traditional Mediation, the parties spend time and energy to get the Mediator up to speed, and if there is no settlement, then they spend more time and money to educate the Judge/Jury. In a Med-Arb, the parties use a single Neutral for both stages, saving the need to present the facts multiple times.[30]

But while a Med-Arb may offer these efficiencies once it begins, the process may take longer to get started. It may be harder to find the right Neutral for a Med-Arb,

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[28] Michael Lewis, *The Undoing Project* (W.W. Morton & Co., 2016), at 192.

[29] Baril & Dickey (*supra*, n.2), at 1; Weisman (*supra*, n.2), at 40.

[30] Shonk (*supra*, n.19); Baril & Dickey (*supra*, n.2), at 4.

given that the process requires a unique skillset.[31] And if the pool of Med-Arb Neutrals is small, the best Neutrals will be busy, and the parties will face delays in waiting for an opening on the calendar of a Med-Arb Neutral.[32]

Effectiveness. In some ways, the setup of a Med-Arb gives the Neutral some tools that help make the Neutral more effective.

During the Med stage, the Arb stage is looming, which may keep the parties on their best behavior.[33] There is less likelihood that either side will bargain in bad faith, or refuse to negotiate, or show up without adequate authority to settle, or bluster; any bad behavior could boomerang during the Arb stage. By comparison, a party might not pay as steep of a price for that bad behavior in a traditional Mediation.

Also, when the case gets to an Arb stage, the dispute is somewhat distilled for the Neutral, who has just been through the Med stage.[34] The Neutral may see a way to cut through the makeweight issues and to focus on what really matters to the parties. (Of course, the Neutral's award is likely to be between each side's last offer/demand from the Med stage.[35])

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[31] Sussman (*supra*, n.3), at 73; Pappas (*supra*, n.16), at 44; Baril & Dickey (*supra*, n.2), at 3; Weisman (*supra*, n.2), at 41.

[32] Pappas (*supra*, n.16), at 44.

[33] Pappas (*supra*, n.16), at 44.

[34] Baril & Dickey (*supra*, n.2), at 4; Weisman (*supra*, n.2), at 41.

[35] Pappas (*supra*, n.16), at 43.

Possible Ways to Tailor the Med-Arb Process

These gains and losses are not inevitable, because the parties might be able to customize the Med-Arb process to make it work better.

- The parties could agree that the Med stage will not have caucus sessions with the Neutral, to eliminate any *ex parte* communications with the Neutral.[36]
- The parties could agree that the Neutral will not collect evidence during the Arb stage. Instead, in the Arb stage, the Neutral would issue an Award based solely on whatever happened during the Med stage.[37]
- The parties could reverse the process, and use an Arb-Med. They would work through the Arb stage first, with the Neutral rendering an award that stays in a sealed envelope. Then, the parties could work through the Med stage, trying to negotiate a solution, before they open the envelope.[38]
- The parties could frame very narrow questions for the Arb stage of the process.
- The parties could use separate Neutrals for the Med and Arb stages.[39] Or, the parties could agree that, at the end of the Med stage, either side could elect to

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[36] Sussman (*supra*, n.3), at 71; Baril & Dickey (*supra*, n.2), at 5.

[37] *Bowers v. Raymond J. Lucia Companies Inc.*, 206 Cal. App. 4th 725, 734, 142 Cal. Rptr. 3d 64, 71 (Ct. App. Cal. 2015).

[38] *Society of Lloyds v. Alfred & Betty Moore Revocable Trust*, 2006 U.S. Dist. LEXIS 80963 (S.D. Ohio Nov. 1, 2006); Sussman (*supra*, n.3), at 71.

[39] Pappas (*supra*, n.16), at 44; Shonk (*supra*, n.19); Weisman (*supra*, n.2), at 41.

appoint a new person to serve as Neutral for the Arb stage.[40]

There are many other variations that the parties could use.[41] But no matter how the parties structure their Med-Arb, the parties should execute a detailed agreement to govern their process.[42] A written agreement avoids surprises, and it is strong evidence that everyone consented to a Med-Arb at the outset, which may be important for enforceability of any award.[43] Given the broad deference that courts give to arbitration agreements[44] -- including deference to whatever specific procedures the parties adopt for their private dispute resolution[45] -- a court is likely to enforce almost any Med-Arb agreement as fully consistent with the Federal Arbitration Act.[46]

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[40] Sussman (*supra*, n.3), at 71; Pappas (*supra*, n.16), at 43; Baril & Dickey (*supra*, n.2), at 4.

[41] Baril & Dickey (*supra*, n.2), at 8; Weisman (*supra*, n.2), at 40.

[42] An example of a detailed agreement appears in the Appendix to the court's opinion in *Votre*, 2015 Conn. Super. LEXIS 989, at *28-*46.

[43] *Bowden v. Weickert*, 2003 Ohio App. LEXIS 2871, at *16-*17 (Ct. App. Ohio June 20, 2003); Weisman (*supra*, n.2), at 40; *Wright*, 150 Misc. 2d at 1039-40, 517 N.Y.S.2d at 66; *Bowers*, 206 Cal. App. 4th at 736, 142 Cal. Rptr. at 72-73.

[44] *DirecTV Inc. v. Imbruglia*, 136 S. Ct. 463, 467 (2015); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

[45] *DirecTV*, 136 S. Ct. at 468.

[46] *Vento v. Crithfield*, 2012 U.S. Dist. LEXIS 123761 (D. Virg. Isl. Aug. 29, 2012).

Conclusion

This Essay considers what parties gain and lose when they choose a Med-Arb. I believe that Med-Arb limits the parties ability to negotiate freely, as discussed above in Part 1. Those limitations are not outweighed by the efficiencies that Med-Arb offers (discussed in Part 2, above). As a result, I do not favor Med-Arb for employment disputes. To me, a traditional Mediation seems like a better process for resolving employment disputes.

If I practiced in a different setting, maybe Med-Arb would strike me as a better option.