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Switching Hats in Med-Arb: The Ethical Choices Required to Protect Process Integrity

Nancy A. Welsh
Texas A&M University School of Law, nwelsh@law.tamu.edu

Chapter 10

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Nancy A. Welsh

10.1. Introduction

Many have written about mediation and arbitration, but there is another alternative that combines these two processes. It goes by the rather inelegant name of "med-arb." As the name implies, this process generally begins as mediation. If the parties resolve their dispute in this phase, there will be a mediated settlement agreement and no need for arbitration.[1] If the mediation phase does not produce a settlement, however, the

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1. In some instances, the neutral in a med-arb may adopt the parties' mediated settlement terms as his arbitral award. The resulting "consent decree" or "consent award" may then be entitled to expedited recognition and enforcement just like an arbitral award that resulted from a hearing. *See* Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F.L. Rev. 169 (1991) (citing *Arbitration and Med-Arb*, 23 PERB News 4, 7, col. 2 (Apr. 1990)) (describing a med-arb program that produced, inter alia, consent awards). The use of arbitration to render a mediated agreement into an arbitral award has been controversial. *See* Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. on Arb. & Mediation 219 (2013); Edna Sussman, *The New York Convention through a Mediation Prism*, 15 Disp. Resol. Mag. 10 (2009);

process transforms into an arbitration. In the most common variation—"classic same-neutral med-arb"—the same individual serves as both mediator and arbitrator and, in the mediation phase, uses both facilitative and evaluative interventions and meets with all of the parties in joint (or plenary) sessions as well as one-on-one private meetings (or caucuses). The arbitration phase—if it occurs—will be conducted as a hearing, with the parties presenting evidence to the arbitrator entirely in joint session. The neutral will issue an arbitral award that can be recognized and enforced by a court.[2]

It is worth noting here that classic same-neutral med-arb resembles the situation in which a presiding judge in a lawsuit—who will hear the case and adjudicate its outcome—also facilitates the parties' pretrial settlement negotiations. If the parties settle with the pretrial assistance of the judge, there will be no need for trial. If the parties do not settle, the case will proceed to trial with the same judge presiding. In the United States, many state court judges "switch hats" in this way, which has the potential to assist the parties in achieving a more expeditious resolution guided by the judge's perception of the strengths and weaknesses of their cases.[3] However, judges, lawyers, and academics have also raised serious concerns regarding this practice[4] due to its potentially negative effects in

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Minkowitz v. Israeli, 77 A.3d 1189 (N.J. Super. Ct. 2013) (arbitration awards based on agreements reached during mediation were deemed in excess of the mediator-arbitrator's power as arbitrator and therefore vacated). Now, under the Singapore Convention on Cross-Border Mediated Settlements, there is no need for the conversion of mediated agreements into arbitral awards in international commercial disputes. *See* Hal Abramson, *New Singapore Convention on Cross-Border Mediated Settlements: Key Choices*, *in* Mediation in International Commercial and Investment Disputes (Catharine Titi & Katia Fach Gomez eds., 2019).

2. This chapter does not include consideration of a process called "binding mediation," which involves a single neutral who serves only as mediator (using both plenary sessions and caucuses) and never holds an arbitration hearing but nonetheless has the authority to issue a "binding mediation award" if the parties fail to reach their own agreement. *See* Congsi Wu, *Binding Mediation: Not an Oxymoron Anymore?*, 30 Alts. to High Cost Litig. 165 (2012).

3. *See* Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 Harv. Negot. L. Rev. 97 (2012); Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Practices and Techniques*, 33 Am. J. Trial Advoc. 113 (2009); Edward Brunet, *Judicial Mediation and Signaling*, 3 Nev. L.J. 232, 252–54 (2003).

4. *See* Nancy A. Welsh, *Magistrate Judges, Settlement, and Procedural Justice*, 16 Nev. L.J. 983 (2016) (citing John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 Ohio St. J. on Disp. Resol. 569

terms of the parties' perceptions of procedural fairness,[5] violations of due process,[6] coercion of settlement,[7] conflicts of interest, and lack of impartiality. These same concerns exist when a neutral switches hats in classic same-neutral med-arb.

Besides classic same-neutral med-arb, there are many other practice variations. Parties may choose to modify the number of neutrals, the sequencing of the mediation and arbitration phases, the use of caucusing during the mediation phase, the timing of the parties' election to proceed from mediation to arbitration, and the neutral's use and disclosure of confidential information. Med-arb variations include the following:

- *Sequential med-arb*[8]—involving two neutrals rather than one, with one neutral serving as mediator and, if the parties do not reach a mediated settlement, the other neutral stepping in to serve as arbitrator.
- *Overlapping med-arb*[9]—again involving two neutrals, with one neutral serving as mediator and the other, who will serve as arbitrator, attending and observing the joint sessions of the mediation phase.
- *Standby mediator*[10]—involving two neutrals, but beginning with arbitration rather than mediation, and with the mediator reading the arbitration briefs, observing the arbitration hearing, and available to serve as mediator at any time.
- *Braided arbitration*[11]—involving a single neutral, beginning as arbitrator but pausing at various points to serve as mediator.

(2006); Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 Ohio St. J. on Disp. Resol. 271 (2011)).

5. *See id*.

6. *Id.*; Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St. L.J. 73 (2017).

7. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1 (2001).

8. *See* David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63 Disp. Resol. J. 28, 30 (2008) (describing one variation of med-arb as involving "separate sequential processes"); Joshua M. Javits, *Better Process, Better Results: Integrating Mediation and Arbitration to Resolve Collective Bargaining Disputes*, 32 ABA J. Lab. & Emp. L. 167 (Winter 2017).

9. *See* Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, 65 Disp. Resol. J. 52, 57 (2010).

10. *See* Deason, *supra* note 1.

11. *See* Fullerton, *supra* note 9, at 53, 58.

- *Plenary med-arb*[12]—involving a single neutral, but in the mediation phase, using only joint sessions to ensure that all parties are aware of everything that the arbitrator has heard.
- *Opt-in med-arb*[13]—involving a single neutral, but with the parties deciding whether to opt in to arbitration only after completion of the mediation phase.
- *Opt-out med-arb*[14]—involving a single neutral, but with the parties deciding whether to opt out of arbitration after they have completed the mediation phase.
- *Med-arb not incorporating confidential information learned during caucuses*[15]—involving a single neutral using both joint sessions and caucuses during the mediation phase and then, if serving as arbitrator, not disclosing confidential mediation communications and avoiding consideration of confidential information in determining the arbitral award.
- *Med-arb incorporating confidential information learned during caucuses*[16]—involving a single neutral using both joint sessions and caucuses during the mediation phase and then, if serving as arbitrator, not disclosing confidential mediation communications but considering such confidential information in determining the arbitral award.

12. *See id.* at 58; Deason, *supra* note 1, at 246 (noting that this approach has been recommended by the CEDR Commission on Settlement in International Arbitration); *Med-Arbitration Rules of Procedure*, Colo. Mediators & Arb. (Nov. 1, 2013), https://coma.com/rules/med-arbitration (Rule MA-9, which provides: "The initial step in Med-Arbitration is a mediation session in which all parties and the med-arbitrator are present together. No ex-parte (private) sessions with the med-arbitrator shall be held.").

13. See the process at issue described in the text accompanying *Spruce Environmental Technologies, Inc. v. Festa Radon Technologies Co.*, 370 F. Supp. 3d 275 (D. Mass. 2019), *infra* page 219.

14. *See* Fullerton, *supra* note 9, at 58. Australia, for example, has a Commercial Arbitration Act that permits med-arb with an opt-out provision. *See Commercial Arbitration Act 2010 No 61 (NSW)*, s. 27D(3), N.S.W. Gov't, https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2010-061#sec.27D (last visited Mar. 15, 2021); *Commercial Arbitration Act 2017*, Austl. Cap. Terr. (effective July 2, 2019), https://www.legislation.act.gov.au/View/a/2017-7/current/PDF/2017-7.PDF.

15. *See* Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Negot. L. Rev. 157, 177 (2015); Javits, *supra* note 8, at 173.

16. *See* Javits, *supra* note 8, at 173 (citing John Kagel, *Med-Arb after 40: More Viable Than Ever*, *in* Nat'l Acad. of Arb., A Tale of Two Countries, Proceedings of the Sixty-Sixth Ann. Meeting 241, 244 (Matthew M. Franckiewicz et al. eds., 2013)).

- *Med-last offer arbitration (MEDLOA)*[17]—involving a single neutral, using both joint sessions and caucuses during the mediation phase and issuing an arbitral award based on what was learned during both the mediation and arbitration phases, but limited to choosing between the parties' last best offers.
- *Med-arb not promising confidentiality*[18]—involving a single neutral using both joint sessions and caucuses during the mediation phase and then, if serving as arbitrator, disclosing confidences shared by the parties while in caucus if such information may inform the neutral's arbitral award.

Obviously, there are many variations of med-arb, and this list is not exhaustive. Some variations are more problematic ethically than others.

10.2. Contexts in Which Med-Arb Is Used and Legal Questions That Can Arise

It has been reported that in the United States, Sam Kagel first combined mediation and arbitration into one process in the labor-management context in the 1970s when he settled a controversial nurses' strike in a San Francisco hospital.[19] The nurses apparently waived their right to strike, and both parties committed to accept the final settlement.[20] Commentators indicate that med-arb continues to be used to resolve labor-management disputes, but it is also used now in corporate disputes (including disputes between shareholders) and in international commercial arbitration.[21] Use of med-arb—or at least interest in its use—is also growing in

17. *See* Joseph B. Stulberg, *Keeping Commercial Arbitration True to Its Core Values*, 20 Disp. Resol. Mag. 18 (2014) (book review).

18. *See* Deason, *supra* note 1, at 247 (describing the Hong Kong Arbitration Ordinance, which provides that if a neutral learns confidential information during the mediation phase and the case does not settle, "before resuming arbitration he must disclose to all the parties 'as much of that information as the arbitrator considers is material to the arbitral proceedings'").

19. *See* Fullerton, *supra* note 9, at 53–54; *see also* Dafna Lavi, *Divorce Involving Domestic Violence: Is Med-Arb Likely to Be the Solution?*, 14 Pepp. Disp. Resol. L.J. 91, 130–33 (2014) (reporting that med-arb was first used by John and Sam Kagel).

20. *See* Lavi, *supra* note 19, at 131.

21. *See id.* (also reporting that China, Germany, and Switzerland use various forms of med-arb in international disputes).

the context of family[22] and estate disputes[23] as well as online business-to-consumer (B2C) disputes.[24] In the United States, some state statutes and court rules authorize the use of med-arb in, for example, the labor-management[25] and court-connected[26] contexts. In general, however, the process is used in the United States only on an ad hoc basis or due to its incorporation into dispute resolution clauses in contracts. In other parts of the world, in contrast, there is substantially more cultural acceptance of[27] and interest in med-arb, as evidenced by legislation authorizing its use, sometimes accompanied by safeguards.[28]

Unfortunately, there is no definitive information available regarding how frequently med-arb is used in any of the contexts just identified. Focusing particularly on the incidence of med-arb in the corporate

22. *See id.*; Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 Baylor L. Rev. 317, 320 (2011) (drawing a parallel between neutrals providing med-arb and parent coordinators); Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: Arbitration and Med/Arb in Family Law Cases*, 58 Fam. Ct. Rev. 26, 34 (2020).

23. *See* Yolanda Vorys, *The Best of Both Worlds: The Use of Med-Arb for Resolving Will Disputes*, 22 Ohio St. J. on Disp. Resol. 871 (2007).

24. *See* Dafna Lavi, *Three Is Not a Crowd: Online Mediation-Arbitration in Business to Consumer Internet Disputes*, 37 U. Pa. J. Int'l L. 871, 930–32 (2016).

25. *See* Karen L. Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 Ohio St. J. on Disp. Resol. 385, 395 (1988); *but see* Gerawan Farming, Inc. v. Agric. Labor Relations Bd., 234 Cal. Rptr. 3d 88 (5th Dist. 2015) (holding that a labor med-arb process mandated by California statute in agricultural workers' collective bargaining was unconstitutional).

26. *See e.g.*, 3A Minn. Practice Series, Gen. Rules of Practice Annotated R. 114.02(9) (2020 ed.) (defining med-arb and categorizing it as a hybrid ADR process); N.D. Ala. Local R. 16.1(c) (providing that parties using the med-arb track to settle disputes will switch from mediation to arbitration upon the neutral's determination that "further efforts [in mediation] would not be useful"); N.D. Ala. Alt. Disp. Resol. Plan § IV.C.9.e (2006).

27. *See, e.g.*, Carlos de Vera, *Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 Colum. J. Asian L. 149 (2004); Gu Weixia, *The Delicate Art of Med-Arb and Its Future Institutionalisation in China*, 31 UCLA Pac. Basin L.J. 97 (2014); Shahla F. Ali, *The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities*, 10 Disp. Resol. Int'l 119 (2016).

28. *See, e.g.*, *Commercial Arbitration Act 2010* (NSW), *supra* note 14, at s 27D (Power of arbitrator to act as mediator); Hong Kong Arbitration Ordinance (2011) Cap. 609 § 33 (both permitting med-arb with certain safeguards). *See also* Lavi, *supra* note 19, at 131 (reporting that Brazil and China have arbitration legislation that includes med-arb provisions).

arena, Tom Stipanowich and J. Ryan Lamare conducted a survey of Fortune 1000 corporations in 2011 regarding their use of various dispute-resolution processes—including "mediation-arbitration." A hefty percentage of respondents—51 percent—indicated that they had experience with the process within the previous three years. Professors Stipanowich and Lamare warn, however, that this percentage likely overstates the use of classic same-neutral med-arb and that it is more likely that these corporations are using med-arb variations that involve two neutrals, such as sequential med-arb or standby mediation.[29]

The use of med-arb—as well as the legal and ethical challenges it presents—is evidenced by court cases challenging the enforcement of arbitral awards. In *Lindsay v. Lewandowski*,[30] a California Court of Appeal refused to enter judgment on a stipulated settlement agreement, finding that there had not been a meeting of the minds between the parties regarding the consequences of a med-arb process (described by the parties as "binding mediation"). In *Bowden v. Weickert*,[31] the Ohio Court of Appeals vacated an arbitral award after similarly finding insufficient evidence that the parties had agreed to classic same-neutral med-arb and, further, that the neutral had exceeded his powers by using a failed settlement proposal made during the mediation as the basis for his arbitral award. Several cases have dealt with both the sufficiency of parties' consent to classic same-neutral med-arb and the sufficiency of their waiver of the mediation privilege when the neutrals considered mediation communications in determining their arbitral awards.[32] Quite recently, for example, a corporate party unhappy with an arbitral award objected to med-arb in *Spruce Environmental Technologies, Inc. v. Festa Radon Technologies Co.*,[33] arguing that med-arb violated public policy, specifically the protection of confidential mediation communications as provided by Massachusetts's mediation privilege, because the neutral used what she had learned in mediation to inform her arbitral award. Citing the "exceedingly deferential" standard of review provided by the Federal Arbitration Act, the federal district court concluded that the parties

29. Thomas J. Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 Harv. Negot. L. Rev. 1, 42 (2014).

30. Lindsay v. Lewandowski, 43 Cal. Rptr. 3d 846, 850 (App. Ct. 2006).

31. Bowden v. Weickert, 2003-Ohio-3223, 2003 WL 21419175 (App. Ct. June 20, 2003).

32. *See* Blankley, *supra* note 22, at 345–60.

33. Spruce Envt'l Techs., Inc. v. Festa Radon Techs. Co., 370 F. Supp. 3d 275 (D. Mass. 2019).

had knowingly waived the mediation privilege and the neutral did not exceed her authority. Therefore, the court confirmed the arbitral award and denied the vacatur motion. Similarly, in *U.S. Steel Mining Company v. Wilson Downhole Services*,[34] the court refused to vacate an arbitral award arising out of a med-arb after finding that the parties had expressly authorized the neutral to rely on confidential information he learned in the mediation phase and had anticipated that ex parte communications would occur.[35] Particularly for same-neutral variations of med-arb, these cases highlight the challenges that can arise when a case proceeds to arbitration after a mediation phase that included parties' disclosure of confidential information while in caucus. These cases also counsel the importance of ensuring parties' informed consent regarding the mechanics and consequences of agreeing to med-arb.

Cases from other parts of the world also attest to the use of med-arb and the legal challenges it can pose. For example, in the 2011 Hong Kong case of *Gao Haiyan v. Keeneye Holdings Ltd.*,[36] one member of a Chinese arbitral panel and the general secretary of the arbitration commission conducted an informal and unsuccessful mediation during the pendency of the arbitration proceeding. After the arbitration resumed, the panel issued an award that was much lower than the settlement amount that had been proposed during the mediation. The challenge to Hong Kong's enforcement of the arbitral award alleged that the arbitrators had acted with bias and had penalized the party who refused to cooperate with the earlier settlement efforts. On appeal, the Hong Kong Court of Appeal found that apparent bias had not been sufficiently established and also took into consideration the cultural norms of Chinese arbitration in determining to allow enforcement of the arbitral award.[37]

10.3. Organizational Rules and Cautions

Major dispute-resolution service providers offer med-arb.[38] JAMS, for example, has neutrals who list examples of providing med-arb services

34. U.S. Steel Mining Co. v. Wilson Downhole Servs., 2006 WL 2869535 (W.D. Pa. Oct. 5, 2006).

35. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. Disp. Resol. Law. 71, 72 (2009).

36. Haiyan v. Keeneye Holdings, Ltd., [2011] 1 HKLRD 627 (C.A.).

37. *See* Edna Sussman, *International Mediation*, 47 Int'l Law. 179 (2013).

38. The American Arbitration Association offers AAA Med-Arb. *See AAA Statement of Ethical Principles*, Am. Arb. Ass'n, https://adr.org/StatementofEthicalPrinciples (last visited Mar. 15, 2021). JAMS offers Med-Arb as one of its binding adjudicative processes. *See JAMS Case Submission Form*, Jud. Arb. & Mediation, Inc., https://www.jamsadr.com/about/submitacase (last visited Mar. 5, 2021).

in disputes over health care-related contracts, national security, environmental/construction issues, antitrust claims, insurance disputes, and landlord-tenant matters,[39] and the American Arbitration Association (AAA) includes "AAA Med-Arb" among the services it offers. However, the AAA acknowledges the controversies that the process can cause.[40] Its Commercial Arbitration Rules provide that "[u]nless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case"[41] and "[a]bsent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding."[42] Even more pointed is the cautionary advice that the AAA provides in its *Drafting Dispute Resolution Clauses: A Practical Guide*:

> Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process and/or it could convey evidence, legal points or settlement positions *ex parte*, improperly influencing the arbitrator.[43]

10.4. Overview of Ethical Difficulties Associated with Med-Arb

As suggested by the med-arb procedures that have been challenged in court, as well as the cautionary words of a leading dispute-resolution provider, there are several ethical difficulties associated with the practice of med-arb. They are listed here and will be referenced in the discussion of relevant ethics provisions:

- Whether the neutral is competent to conduct both mediation and arbitration.
- Whether the parties have made a self-determined, informed decision regarding their participation in a med-arb process.

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39. *See Search*, Jud. Arb. & Mediation, Inc., https://www.jamsadr.com/search?q=med-arb (last visited Mar. 5, 2021).

40. Organizations' candor in this area would appear consistent with the Principles for ADR Provider Organizations developed by the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR. *See* CPR-Georgetown Comm'n on Ethics & Standards of Prac. in ADR, Principles for ADR Provider Orgs (May 1, 2002).

41. Com. Arb. Rules & Mediation Procedures R-9 (Am. Arb. Ass'n amended 2013).

42. *Id.* at L-2(c).

43. Am. Arb. Ass'n, Drafting Dispute Resolution Clauses: A Practical Guide 33 (amended 2013).

- Whether the transition of the neutral's role is consistent with the parties' exercise of self-determination in making voluntary and uncoerced substantive decisions in mediation.
- Whether the transition of the neutral's role is consistent with maintaining the quality and integrity of both mediation and arbitration.
- Whether the transition of the neutral's role is consistent with the neutral's maintenance of impartiality and integrity in conducting both processes.
- Whether the transition of the neutral's role is consistent with mediation confidentiality obligations.
- Whether the transition of the neutral's role, particularly when the neutral has caucused privately with the parties during the mediation phase, is consistent with the neutral's provision of a fair arbitration hearing.
- Whether the neutral has sufficiently disclosed potential conflicts of interest associated with the transition of roles.

10.5. Relevant Ethics Provisions

There are no rules of ethics that apply specifically to neutrals providing med-arb services. Because the process combines mediation and arbitration, however, the ethics provisions that apply to each of those two processes are relevant here. This chapter will begin with generally applicable and context-specific mediation ethics provisions and then move on to generally applicable and context-specific arbitration ethics provisions.

10.5.1. Relevant Mediation Ethics Provisions

10.5.1.1. Model Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators (Model Standards),[44] which were developed and approved in 2005 by the American Arbitration Association, American Bar Association, and Association for Conflict Resolution, have been used as the basis for mediator ethics codes in a variety of contexts. The Model Standards' provisions regarding self-determination, quality of process, confidentiality, impartiality, and conflicts of interest are applicable to med-arb.

44. Model Standards of Conduct for Mediators (Am. Arb. Ass'n, Am. Bar Ass'n & Ass'n for Conflict Resol. 2005).

Self-determination and quality of process. Standard I of the Model Standards—Self-Determination—establishes the central ethical importance of protecting parties' self-determination in mediation. It provides that "[a] mediator shall conduct a mediation based on the principle of party self-determination" and defines self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." In classic same-neutral med-arb, neutrals use both facilitative and evaluative interventions during the mediation phase. Evaluative interventions can include the neutrals' assessments of the strengths and weaknesses of the parties' cases and even settlement recommendations. It is quite likely that a party's decision whether to accept the mediator's assessment or recommendation will be influenced by the knowledge that if the case does not settle, the mediator will transform into an arbitrator. Thus, while the party's choice in deciding whether to settle certainly is "informed" by the neutral's advice, this choice is unlikely to be entirely "free," "voluntary," or "uncoerced."[45]

Importantly, however, Standard I also recognizes party self-determination in making "free and informed choices as to process." The standard notes that "[p]arties may exercise self-determination at any stage of a mediation, including . . . process design . . . ." This language suggests that it can be ethical for a mediator to accept the additional role of arbitrator as long as the parties have exercised self-determination in choosing or designing their med-arb process. However, the standard also limits the effect of parties' self-determination:

> Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these Standards.

This of course begs the question: What is a quality process according to these Standards? Would med-arb be considered a quality process?

Standard VI—Quality of Process—is meant to answer this question and includes the language that most obviously applies to a mediator who assumes the role of arbitrator: "A mediator shall not undertake an

45. *See* Welsh, *supra* note 7 (extensive discussion of evaluative interventions' effect on parties' exercise of self-determination); *see also* Omer Shapira, A Theory of Mediators' Ethics: Foundations, Rationale, and Application 140–42, 146–48 (2016) (discussing the meaning of voluntariness and the duties of the mediator regarding self-determination).

additional dispute resolution role in the same matter without the consent of the parties." This is again consistent with self-determination. But there is more: "Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards." Standard VI thus indicates that a mediator may ethically take on the role of arbitrator, but *only if the mediator ensures the parties' informed consent and recognizes the other duties—and ethics—that may apply to the neutral's second role.*

In two advisory ethics opinions dealing with med-arb, the Florida Supreme Court's Mediator Ethics Advisory Committee (MEAC) acknowledged that parties may exercise self-determination in choosing to have a mediator assume the changed role of arbitrator. However, the MEAC made it clear that a mediator may not ethically change roles unless he is responding to an explicit request from the parties and ensures that (1) the parties' agreement to such changed role is voluntary; (2) the parties "understand[] their alternatives and the legal implications of their decisions";[46] and (3) the parties consent to the resulting changes in the neutral's role and the dispute-resolution process.[47] Later, this chapter will examine the particular disclosures that a mediator should make to ensure the parties' informed consent.

Even for the mediator who takes all of the precautions just described, the MEAC had these cautionary words: "In summary, while it is not expressly prohibited for a mediator to serve as an arbitrator . . . the MEAC believes that doing so is inherently laden with hazards and suggests great caution for any mediator that accepts this change in roles."[48]

Confidentiality. Standard V—Confidentiality—also has the potential to be relevant to med-arb, particularly because a neutral may intentionally or unintentionally disclose some of what she learned in mediation. This may occur as the neutral interacts with the parties or asks questions during the arbitration hearing or discloses the reasoning underlying her

46. Fla. Sup. Ct. MEAC Op. No. 2009-002 (Oct. 23, 2009).

47. Fla. Sup. Ct. MEAC Op. No. 2015-003 (Feb. 4, 2016); *see also* Fla. Rules for Certified & Ct.-Appointed Mediators R. 10.310 Committee Note ("Before providing decision-making services, therefore, the mediator shall ensure that all parties understand and consent to those changes.").

48. Op. No. 2015-003, *supra* note 47.

arbitral award.[49] Standard V provides that "[a] mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law." Specifically regarding the confidentiality of what the mediator learned in caucus, the standard provides: "A mediator who meets with any persons in private session during a mediation shall not convey directly or indirectly to any other person, any information that was obtained during that private session without the consent of the disclosing person." Thus, as with assuming an additional dispute-resolution role, the parties' consent will determine the ethicality of violating this otherwise-applicable ethics rule. Indeed, as Standard V later provides: "The parties may make their own rules with respect to confidentiality . . . ."

Impartiality and conflicts of interest/integrity. Two more ethical obligations borne by mediators under the Model Standards that are relevant to med-arb are the mediator's obligations to maintain impartiality (Standard II—Impartiality) and avoid a conflict of interest that "might reasonably be viewed as undermining the integrity of the mediation" (Standard III—Conflicts of Interest). Standard II provides that "[i]mpartiality means freedom from favoritism, bias or prejudice." A mediator is required to "conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality" and "should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason." Meanwhile, according to Standard III, "[a] mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation."

As referenced briefly in the discussion of self-determination, the mediator—or a party—could reasonably worry that playing the role of arbitrator will cause at least the appearance of partiality and conflict of interest. The mediator might prefer his recommended solution over the solution that seems to be favored by one of the parties. Thus, the mediator's anticipated power as arbitrator may tempt him to push the resisting party toward the solution that the mediator prefers rather than the one the party favors. Is this mediator truly impartial? The mediator also might benefit financially from serving as arbitrator—that is, holding a series of evidentiary hearings that may take days or even weeks, reviewing the

49. This neutral also may use some of what she learned during the mediation phase as she determines her arbitral award. Such use may violate a mediation privilege, but it would not, in and of itself, violate an *ethical* standard for mediation.

parties' briefs, and drafting his award and opinion, rather than helping the parties reach settlement in a half-day mediation. Could this represent a conflict of interest?

If a mediator has these or other concerns arising out of her dual role, Standard III provides that she "shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality." According to Standard III: "After disclosure [of the actual or potential conflict of interest], if all parties agree, the mediator may proceed with the mediation." This sounds very much like Standards V's and VI's handling of concerns regarding confidentiality and quality of process—relying upon disclosure and the consent of the parties. However, in this instance, even the parties' informed consent will not always be sufficient: "If a mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, a mediator shall withdraw from or decline to proceed with the mediation regardless of the expressed desire or agreement of the parties to the contrary." A mediator's obligation to avoid undermining the integrity of the mediation supersedes the parties' informed consent to the potential perils of med-arb.

Ethics advisory opinions issued in Florida and North Carolina underscore this point. Regardless of the parties' consent, a mediator may not serve as an arbitrator if it would "compromise the mediator's integrity or impartiality."[50] In one advisory opinion, the North Carolina Dispute Resolution Commission focused on impartiality and helpfully recommended that a mediator should

> engage in appropriate self-reflection before agreeing to serve. S/He may have spent several hours with the parties during mediation. In that time, did s/he develop any strong positive or negative feelings toward any of the individuals involved that might cloud his judgment or compromise her/his neutrality? Did s/he learn any confidential information during a caucus session that s/he may not be able to exclude from his[/her] thought process and that may inappropriately affect his/her decision? If the mediator has any concerns about his[/her] ability to be fully neutral, s/he should not serve.[51]

50. Op. No. 2009-002, *supra* note 46 (citing Fla. Rules for Certified & Ct.-Appointed Mediators R. 10.620).

51. N.C. Disp. Resol. Comm'n Op. No. 17 (Sept. 28, 2010).

In another advisory opinion, the North Carolina Dispute Resolution Commission actually concluded that a mediator's acceptance of the decision-making role of parenting coordinator in a family matter would represent a conflict of interest and thus would be unethical.[52] The Commission noted that the confidential information that the neutral learned while serving as mediator could influence his decision making as parenting coordinator and thus affect his ability to remain neutral. Two aspects of this case, though, distinguish the situation from med-arb. First, the Commission cited to a bright-line rule in the Association of Family and Conciliation Courts' *Guidelines for Parenting Coordination* (2019) barring a parenting coordinator from providing services if he has already served the parties as a confidential mediator. Second, the Commission perceived the financial conflict of interest to be much more significant for a parenting coordinator, who might have an extended role with the parties, than for an arbitrator whose service would be short-term and "supportive of the resolution of the dispute being mediated . . . ."[53]

The Model Standards and these advisory ethics opinions help us understand how and when med-arb could threaten a neutral's impartiality or create at least the appearance of a conflict of interest. Unfortunately, however, neither the Model Standards nor any of the advisory ethical opinions specify what could threaten the *integrity* of mediation—that is, what is so core, so essential to mediation that its absence or violation would eviscerate the process. Professor Omer Shapira has been the first to observe that the Model Standards lack an independent standard that clearly expresses mediators' duty to "conduct mediation with professional integrity," which he defines as "in a state of true commitment to the role of a mediator and to the wholeness of the mediation process."[54] Professor Shapira helpfully asserts that mediators' ethical duties should be understood to extend beyond the parties, to the mediation profession and the public, and to include a responsibility "to preserve the institution of mediation and public trust in it."[55] Thus, and regardless of the parties' consent, will the public's confidence in mediators and the mediation process be jeopardized by a neutral's use of confidential information, never disclosed and learned only while in caucus, as the basis for her arbitral award? Similarly, and again regardless of the parties' consent, will the

52. N.C. Disp. Resol. Comm'n Op. No. 40 (Mar. 24, 2020).

53. *Id.*

54. Shapira, *supra* note 45, at 233.

55. Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 Marq. L. Rev. 81, 113 (2016).

public's confidence in the voluntariness of mediated settlement agreements be threatened by the knowledge that a mediator in a same-neutral med-arb process will have the authority to impose the settlement that he is now merely suggesting?

As Professor Shapira urges, the obligations under Standard III to avoid conflicts of interest and subsequent relationships that "might reasonably be viewed as undermining the integrity of mediation" should compel a mediator to make the ethical choice to "decline to serve the parties in another professional capacity where accepting a different role after the mediation would reasonably raise a question about the propriety of the mediator's actions at the time of the mediation, to the effect that a reasonable concern might arise that the process had been faulty and that public trust in the process and profession of mediation could be undermined."[56] This may mean that a neutral should decline to serve in a same-neutral med-arb process or withdraw from such a process.

10.5.1.2. Context-Specific Mediator Ethics Codes

In addition to the generally applicable Model Standards, there are various context-specific mediator ethics codes. Mediators in the U.S. Federal Mediation and Conciliation Service and other public and private labor mediators, for example, practice subject to the Code of Professional Conduct for Labor Mediators,[57] adopted in 1966. The International Mediation Institute Code of Professional Conduct,[58] which was adopted much more recently, applies to those serving as international mediators (largely but not exclusively in commercial matters). The Model Standards of Practice for Family and Divorce Mediation[59] were adopted by the Association of Family and Conciliation Courts, Association for Conflict Resolution, and Mediate.com and generally apply to the mediation of family and divorce disputes.

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56. Shapira, *supra* note 45, at 240 (including consideration of Standard III.F.—"Subsequent to a mediation, a mediator shall not establish another relationship with any of the participants in any matter that would raise questions about the integrity of the mediation.").

57. 29 C.F.R. § 14000.735-20 (2011).

58. Code of Prof'l Conduct, Int'l Mediation Inst., https://imimediation.org/practitioners/code-professional-conduct/#:~:text=The%20IMI%20Code%20of%20Professional,IMI%20Professional%20Conduct%20Assessment%20Process (last visited Mar. 5, 2021).

59. Model Standards of Practice for Family & Divorce Mediation (Ass'n of Family and Conciliation Cts., Ass'n for Conflict Resol. & Mediate.com 2001).

Overwhelmingly, these context-specific mediator ethics codes are consistent with the Model Standards. There are, however, a few notable omissions. None of the context-specific codes identifies the potential for parties to exercise self-determination in making process decisions, such as the decision to hire a single neutral to serve as both mediator and arbitrator. None addresses directly the potential that a mediator may change roles and become an arbitrator in a med-arb. Finally, none suggests a mediator's ethical obligation to protect the integrity of mediation.[60]

10.5.2. Relevant Arbitration Ethics Provisions

10.5.2.1. Code of Ethics for Arbitrators in Commercial Disputes

The Code of Ethics for Arbitrators in Commercial Disputes (Commercial Arbitrators Code)[61] was approved and recommended by the American Arbitration Association and the American Bar Association in 2004. Although it provides ethical guidance for arbitration in many contexts, it explicitly does not apply to labor arbitration.

Integrity, fairness, and impartiality. The Commercial Arbitrators Code gives priority to the neutral's obligations of integrity, process fairness, and impartiality. Unlike the Model Standards, the Commercial Arbitrators Code explicitly recognizes duties owed to the public. Canon I provides that "[a]n arbitrator should uphold the integrity and fairness of the arbitration process." More specifically:

> An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding.

Further, "[o]ne should accept appointment as an arbitrator only if fully satisfied: (1) that he or she can serve impartially. . . ." There is no provision for parties' consent to overcome the arbitrator's obligation to serve impartially and uphold the integrity and fairness of the arbitration process.

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60. *But see* Shapira, *supra* note 55, at 113 (observing that two states' mediator ethics codes—the Georgia Ethical Standards for Mediators and the California Dispute Resolution Council Standards of Practice for California Mediators—explicitly reference a duty of integrity).

61. Code of Ethics for Arb. in Com. Disputes (Am. Arb. Ass'n & Am. Bar. Ass'n 2004).

Fairness and diligence. Perhaps the most basic ethical obligation of the arbitrator is contained in Canon IV of the Commercial Arbitrators Code: "An arbitrator should conduct the proceedings fairly and diligently." As in the Model Standards, Canon IV explicitly recognizes that neutrals may be asked to play dual roles—that is, that an arbitrator may be asked to play the role of mediator:

> Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation, or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as a mediator unless requested to do so by all parties.

Thus, the ethics of serving as both a mediator and arbitrator depends upon the will of the parties. There is no requirement that the arbitrator ensure the parties' informed consent.

However, one of the comments to Canon IV speaks to the potentially negative consequences of an arbitrator's engagement in mediation, particularly if it includes caucusing. Specifically, this comment provides that "[t]he arbitrator should afford to all parties the right to be heard and . . . should allow each party a fair opportunity to present its evidence and arguments." Assume that the neutral in a med-arb learned something during a mediation caucus and knows she has been influenced by what she learned but cannot disclose what she learned to the other party. The other party then *cannot* present evidence and arguments—or even ask questions—to address this point. That party is not being given a fair opportunity to present his evidence and arguments. Thus, the neutral is not providing and cannot provide a procedurally fair process and is not protecting and cannot protect either the integrity or fairness of arbitration. Under these circumstances, the arbitrator must be aware that she cannot uphold her obligations to the parties, the process, or the public as required by Canon I.[62] A very substantial body of research, primarily involving judges, also indicates that the neutral who has learned particularly vivid information while in a mediation caucus—even information that is not legally relevant—will not be able to ignore what he learned,

62. Interestingly, Canon V.D. also acknowledges that arbitral awards sometimes represent consent decrees but makes the arbitrator responsible for assessing the propriety of the settlement terms reached by the parties.

even if he thinks he can.[63] Regardless of whether this information is particularly negative or particularly positive, it will keep the neutral from being able to provide a procedurally fair arbitration and preserve the integrity of the process.

Confidentiality and ex parte communication. The Commercial Arbitrators Code requires a neutral in med-arb to consider further ethical issues, especially if the mediation phase included caucusing and the neutral learned information that she is obligated to keep confidential from the other party. Canon III provides that "an arbitrator should avoid impropriety or the appearance of impropriety in communicating with parties" and more specifically provides that "an arbitrator or prospective arbitrator should not discuss a proceeding with any party in the absence of any other party, except" for a list of specified circumstances. A caucus necessarily involves discussing a proceeding with one party in the absence of the other party. Service as the neutral in a med-arb is not on the list of exceptions to the bar on such ex parte communications. It is possible that disclosure and the parties' consent may overcome this ethical issue,[64] but that is not explicitly provided in Canon III, and as noted previously, neither Canon I nor Canon IV provides for parties' consent or waiver.

Conflicts of interest. Canon II provides that "[a]n arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality." Among these, an arbitrator should disclose any known professional relationship "which might reasonably affect impartiality or lack of independence in the eyes of any of the parties" as well as "[t]he nature and extent of any prior knowledge they may have of the dispute." If an arbitrator has previously served as mediator, he certainly will have "past knowledge of the dispute"—and if he has had ex parte meetings with the parties, he will have knowledge about both parties that *neither may have regarding the other.* He also may have developed a particular bias for or against a party.

Canon II by itself suggests that disclosure and the parties' consent provide the cure: "When parties, with knowledge of a person's interests and relationships, nevertheless desire that person to serve as an arbitrator, that person may properly serve." According to Canon I, however, the arbitrator retains the independent obligation to determine whether she

63. *See* Welsh, *supra* note 4, at 1029–30; Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 28 (2007); Deason, *supra* note 6, at 121–27.

64. *See* Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885 (D. Conn. 1991) (failure to disclose ex parte activities by a party-appointed arbitrator violated his ethical disclosure obligations).

can serve impartially and uphold the integrity and fairness of the arbitration process. Further, in making this determination, she must take into account her responsibility to the public, not only the parties. If she cannot meet all of her obligations to all of these stakeholders, she should decline the appointment or recuse herself.

10.5.2.2. Context-Specific Arbitrator Ethics Codes

Beginning with the labor-management context, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (Labor Arbitration Code)[65] was adopted by the American Arbitration Association, Federal Mediation and Conciliation Service, and National Academy of Arbitrators in 1974, with occasional amendments over the years. In the international arbitration arena, there are no ethics provisions that are binding on all arbitrators. However, in the late 1980s, the International Bar Association promulgated Rules of Ethics for International Arbitrators (IBA Rules)[66] to reflect "internationally accepted guidelines developed by practicing lawyers from all continents."[67] There are no rules of ethics for family and divorce arbitrators.

The Labor Arbitration Code and the IBA Rules mirror the Commercial Arbitrators Code in their ethics provisions requiring arbitrators to conduct fair hearings, maintain impartiality, and disclose conflicts of interest. However, these context-specific ethics codes vary from the Commercial Arbitrators Code in their treatment of neutrals' dual role in med-arb. The Labor Arbitration Code is strikingly matter-of-fact in discussing the potential for a neutral to engage in med-arb. Standard 2 provides that if the parties request med-arb before the arbitrator's appointment and the arbitrator then accepts the appointment, "the arbitrator must perform a mediation role consistent with the circumstances of the case." On the other hand, if a party requests mediation after the arbitration appointment has been made, the arbitrator may only accept the appointment if all the parties agree; otherwise, the arbitration must be continued to decision. Standard 2 also anticipates that the arbitrator may suggest mediation to the parties. This is "not precluded." However:

> To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties

65. Code of Prof'l Responsibility for Arb. of Lab.-Mgmt. Disputes (Nat'l Acad. of Arb., Am. Arb. Ass'n & Fed. Mediation & Conciliation Serv. 1974, amended Sept. 2007).

66. Rules of Ethics for Int'l Arb. (Int'l Bar Ass'n 1987).

67. *Id.* intro.

> are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.

Clearly, in the labor-management context, med-arb is not outside the norm.

The IBA Rules take a quite different approach, specifically addressing in Rule 8 the ethics and consequences of an arbitrator's provision of settlement assistance in meetings that fail to include all of the parties:

> Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since *this will normally have the result that any arbitrator involved in such discussions will become disqualified from any future participation in the arbitration*.[68]

This sentence is particularly noteworthy. If the mediation phase in a med-arb involves caucuses and the discussion of settlement terms—a pairing that is almost inevitable—there "normally" cannot be a med-arb. Proceeding to arbitration will be barred. Of course, we must also note the introductory language that "any procedure is possible with the agreement of the parties."

10.6. Managing the Ethics Issues Raised by Med-Arb

As should be apparent, some med-arb variations are more likely than others to avoid or substantially mitigate the ethics problems identified thus far. Ensuring the parties' informed consent also will be key to neutrals' ability to meet their ethical obligations.

10.6.1. Med-Arb Variations That Are More Likely to Avoid or Mitigate Ethics Issues

Sequential med-arb and standby mediator. These two processes are most effective in avoiding the ethics problems identified thus far. This is because they involve two neutrals—one to serve as the mediator, the other to serve as the arbitrator—and thus avoid all of the ethics issues that could be problematic. The parties' self-determination will not be threatened by the neutral's potential adverse arbitral award. The confidentiality of the parties' mediation communications, both in plenary sessions and caucuses, can be fully protected. The mediator does not have to deal with

68. *Id.* R. 8 (emphasis added).

any threats to her impartiality. If the case proceeds to an arbitral award, such award will be based entirely on the evidence presented at the hearing. The integrity of mediation and arbitration are thus fully protected. Of course, because these processes involve two neutrals, they are likely to be more expensive and may require more time than a process involving just one neutral. In addition, during the mediation, the parties will not get the benefit of the neutral's "signaling" regarding his likely decision, nor will they feel any pressure to settle—except to avoid the additional time and cost involved in arbitration. But these last issues are practical and do not raise ethical concerns.

Overlapping med-arb and plenary med-arb. While overlapping med-arb involves two neutrals and plenary med-arb involves just one neutral, these two med-arb variations share the primary ethical benefit of ensuring that the parties will know exactly what the neutral serving as arbitrator heard during the mediation. In overlapping med-arb, caucuses may occur and secrets thus may be disclosed—but only to the neutral who will serve solely as mediator. The arbitral award will be based on the information presented in everyone's presence, during the joint mediation sessions and the arbitration hearing, thus ensuring a fair arbitration process. As with sequential med-arb and standby mediator, the primary disadvantage of this process is practical—the additional cost involved in using a second neutral.

In plenary med-arb, there will be no caucuses and thus no confidential information disclosed to the single neutral serving as mediator and arbitrator. The prohibition on caucusing is likely to be viewed as a significant practical disadvantage because many parties value the opportunity to speak privately with a mediator. In addition, this variation has the ethical disadvantages that if the single neutral shares her assessments or recommendations during the mediation phase, she may experience more difficulty in maintaining her impartiality, and her power as potential arbitrator may interfere with the parties' self-determination in choosing whether to settle.

Med-arb not promising confidentiality. This med-arb variation uses a single neutral and requires the parties' waiver of mediation confidentiality before they enter into the process. Then, if the neutral learns confidential information during the mediation phase and the case does not settle, the neutral is required—before the arbitration begins—to disclose to all the parties "as much of that information as the arbitrator considers material to the arbitral proceedings."[69] The intent of this provi-

69. Permitted by the Hong Kong Arbitration Ordinance, *supra* note 28.

sion is to ensure that all of the parties are aware of the information that could serve as the basis for an award. This gives them the opportunity to present responsive evidence or ask questions at the arbitration hearing. Obviously, this variation allows for an arbitration that is fairer than one that produces an award based in whole or in part on information communicated ex parte and never disclosed to the parties. In other words, it mitigates the potentially negative effects of a med-arb that includes caucusing during the mediation phase. However, this variation fails to acknowledge that an arbitrator may not recognize or be willing to admit (even to himself) that his judgment or impartiality has been or will be influenced by what he learned during a caucus. In a sense, it fails to acknowledge that arbitrators are human too. It also fails to address the ethical challenge to parties' self-determination during the mediation phase when they may feel subject to undue pressure or coercion to accept the neutral's assessment or settlement recommendation.

Opt-in med-arb, opt-out med-arb, MEDLOA. These three options involve a single neutral serving as mediator and then arbitrator, but each introduces an opportunity for the parties to exercise self-determination regarding the process—for example, deciding, at the conclusion of the mediation phase, whether to opt in or opt out of the arbitration phase or, in MEDLOA, placing limits on the arbitrator's discretion in issuing her award. These represent important safeguards of the parties' self-determination in mediation because the parties need not be concerned (or, in the case of MEDLOA, need not be *as* concerned) about the potential for an adverse arbitral award. Despite this benefit, none of these processes explicitly deals with another ethical issue—the potential for the neutral to learn confidential information during caucuses, with such potential then affecting the neutral's impartiality and her ability to provide a fair arbitration hearing for all parties. This remains a significant ethical problem because, ultimately, the parties may not possess the authority to waive the neutral's ethical obligations.

10.7. The Most Problematic Med-Arb Variations and Practices

Four med-arb variations are extraordinarily likely to yield ethical problems, including violation of the obligations of ensuring impartiality, avoiding conflicts of interest and protecting the integrity of both mediation and arbitration, and ensuring self-determination in mediation and fairness in arbitration. These problematic variations are classic same-neutral med-arb, braided arbitration, med-arb not incorporating confidential information learned during caucuses, and med-arb incorporating confidential information learned during caucuses.

In all four of these variations of med-arb, a single neutral conducts the med-arb and may learn something during the mediation phase, especially in caucus, that will then bias him toward or against one of the parties to such a degree that he will not be able to meet his ethical obligations to remain impartial, protect the integrity of either the mediation or arbitration phase, and provide a fair hearing during the arbitration phase. Also, in all of these variations, particularly if the neutral uses caucuses, he is more likely to engage in behavior—or be perceived as engaging in behavior—during the mediation phase that is coercive, simply because he and the parties are aware that he will transform into an arbitrator and thus have the power to impose a decision upon the parties. Finally, none of these variations incorporates any mitigating safeguards such as opt-in, opt-out, or limitations on the neutral's obligation of confidentiality or discretion in fashioning an arbitral award.

A few examples illustrate this point. Regarding threats to the integrity of the arbitration process, the neutral in one of these same-neutral variations may learn something in caucus that she is quite aware will influence her arbitration award but that she is not permitted to disclose to the other party. To nonetheless proceed to arbitration will violate the fairness and integrity of the arbitration process. One of the parties will not know that he should introduce or contest evidence on this particular issue. The neutral may try to persuade the disclosing party to permit her to share the confidential information with the other party. If she is not successful in these efforts, however, the neutral's only ethical course of action must be to withdraw. In another example, the neutral may learn something in caucus that is extremely provocative or coincides with a stereotype that is likely to bias him or influence his arbitration award. Here, the neutral may be unaware or unwilling to admit that he will be biased or influenced and is therefore unlikely to seek the parties' consent for any mitigating disclosures or avoid considering the information as he determines his award. In many ways, this presents an even worse ethical dilemma.

Turning to examples that threaten the integrity of the mediation process, the single neutral involved in classic same-neutral med-arb, braided arbitration, or med-arb incorporating (or not incorporating) confidential information may realize that as a result of his power to serve as arbitrator, he has used behaviors or threatened consequences that have had the effect of coercing one of the parties to enter into a mediated settlement agreement. In this case, the neutral may use a caucus at the end of the mediation phase to remind the party that she is not required to reach agreement and that she may instead proceed to arbitration. But the

intimidated party is likely to continue to fear the consequences that she will suffer if she goes to arbitration. Her mediated settlement agreement is unlikely to represent an act of self-determination. Even worse is the example of the less self-reflective neutral who uses behaviors or threatens consequences that have the effect of coercing a party to enter into a mediated settlement agreement but is unaware or unwilling to admit that he has behaved in this way and with these coercive effects. This neutral will have violated both the party's self-determination and the integrity of the mediation process—but will do nothing about it.

All of these problematic examples involve med-arb variations characterized by the presence of a single neutral, the use of caucuses during mediation, the potential influence of confidential information upon the neutral and her arbitral award, and the neutral's inability or unwillingness to breach confidentiality. These med-arb variations are thus particularly susceptible to ethical problems. Although this chapter will soon turn to what should be disclosed to gain parties' informed consent to med-arb, such consent cannot be sufficient to overcome every ethical issue. Rather, under both the Model Standards and the Commercial Arbitrators Code, neutrals remain responsible for making independent judgments regarding whether they can fulfill their ethical obligations—to be impartial, avoid conflicts of interest, protect the integrity of both the mediation and arbitration phases, and conduct a fair arbitration hearing. In making such judgments, it is up to neutrals—not the parties—to protect public trust in the mediation and arbitration professions and processes.

10.8. Ensuring the Parties' Informed Consent to Med-Arb

As discussed throughout this chapter, many—but not all—ethics obligations can be waived or met through parties' informed consent. Indeed, most of the commentary regarding med-arb involves this topic—that is, what a neutral must disclose in order to ensure the parties' informed consent to the mechanics and consequences of the process. Thus, ensuring the parties' informed consent to med-arb is essential. But as this chapter has revealed, such consent will not be sufficient to overcome certain violations of neutrals' ethical obligations to protect the integrity of the mediation and arbitration processes. Gaining the parties' informed consent to dual service is a precondition, but it is not sufficient in and of itself.

With that warning as preface, to be effective, neutrals' disclosures to ensure the parties' informed consent to med-arb should include all of the following:

(1) An initial agreement of the parties to use med-arb and the services of the neutral (or neutrals) chosen to serve as mediator and then arbitrator.
(2) Confirmation of the impartiality of the neutral(s), absence of conflicts of interest, independence of all the parties, and obligation to act in good faith.
(3) Explanation of the processes and roles of the neutral(s) in each phase of the process, with special emphasis on the neutral's role in the mediation phase to assist the parties to reach their own resolution and not to impose an outcome, as contrasted with the neutral's role during the arbitration phase, when he will adjudicate and impose an outcome that will be binding upon the parties.
(4) Explanation of the specifics of the med-arb variation being used. For example, in opt-out mediation, that at the conclusion of the mediation phase, if a mediated settlement agreement has not been reached, parties are entitled to opt out and not proceed to the arbitration phase, etc.
(5) Confirmation of the parties' understanding of the risks involved in the use of med-arb. For example, in the med-arb variations involving a single neutral and the use of caucuses, these will include the risks that
    (a) the neutral and his arbitral award may be influenced (consciously or subconsciously) by confidential information learned during the mediation phase;
    (b) information learned by the neutral during ex parte meetings (caucuses) in the mediation phase may influence him and his award and will not be disclosed to the other side;
    (c) the process will likely cause the neutral to receive information that might not otherwise have been received as evidence in arbitration;
    (d) the parties might not know of the information the mediator learned in caucus and thus will not know to contest it at the arbitration hearing; and
    (e) the neutral may share his assessments or settlement recommendations during the mediation phase, and parties may feel pressured to accept such assessments or recommendations due to the neutral's dual role and his authority as arbitrator to impose an outcome.[70]

70. *See* Lavi, *supra* note 19, at 140–42 (advising additional disclosures to avoid legal, rather than ethical, issues); Lavi, *supra* note 24, at 931–32; Deason, *supra* note

10.9. Conclusion

Increasingly, there is interest in the use of mixed-mode dispute resolution, including med-arb. Med-arb provides the opportunity for parties to reach their own agreements, while also guaranteeing a binding decision. As this chapter has revealed, however, med-arb presents a variety of ethical challenges. Some of these challenges can be met through the use of two neutrals rather than one, providing for the parties' opt-out or opt-in before the commencement of the arbitration phase, the avoidance of caucuses during mediation, and establishing exceptions to the confidentiality of mediation communications. Also essential is careful and thorough assurance of parties' informed consent. But some med-arb variations, including the one that is discussed most often—classic same-neutral med-arb—do not incorporate any meaningful mitigating procedural elements and present ethical dangers that cannot be guaranteed to be overcome by neutrals' self-awareness or the parties' informed consent. This chapter urges the avoidance of these med-arb variations—thus prioritizing the protection of parties' self-determination, neutrals' impartiality, and the fairness and integrity of both mediation and arbitration.

1, at 247–49; Gerald Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, 60 Disp. Resol. J. 24, 30 (2005).