Med-Arb

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Med-Arb! The worst nickname ever … or maybe the best nickname ever because it quickly informs the reader of the basic concept. Never fear, I have completed numerous med-arbs (one of the few mediators who actually has) and there are good reasons to use med-arb.

So, what is this strange creature? Med-Arb uses the same Alternative Dispute Resolution (ADR) professional to act as both mediator, and if mediation is unsuccessful, to serve as an arbitrator. Clients love this concept, especially its efficiency. Time is money and med-arb takes advantage of saved time in educating only one ADR professional about the dispute. I remember in a mediation, watching the client's surprise when he learned that his option, if mediation failed, was to start all over again with a new person acting as an arbitrator. He commented on this terrible waste of time and wanted to hire me on the spot to arbitrate the case. (The mediation was successful so we never went down this path)

The big difference in med-arb is that the parties know in advance that both ADR tools will be used. Typically, in a one-day med-arb we start the day with parties in separate rooms. I inquire into prior settlement discussions and about general demands and offers to begin. Knowing we will do openings in arbitration, we do not hold a mediation opening (however, you could.) I ask about any corollary issues and then move quickly between rooms delivering demands and offers. If I discern, with input from the attorneys and clients, that mediation will be fruitful, we go forward. If I conclude, again with input from the attorneys and clients, that we are spinning our wheels and unlikely to reach a settlement, we close the mediation and move to arbitration. I set aside the settlement demands and offers, and transition to the evidence presented in arbitration. Trained and experienced attorneys compartmentalize information all the time. What I know to be true, but cannot use in trial, is a common dilemma in law. Moreover, a trained arbitrator, much like a judge, compartmentalizes information. Case in point, evidence is presented, objected to and ruled inadmissible. The decision-maker heard the inadmissible evidence but now must ignore it. Isn't this the same thing we ask an ADR professional to do in med-arb?

Think of med-arb as a symphony and different instruments are coming in and out of the music. The ADR professional is the conductor and creating a melody rather than a cacophony. We move seamlessly from one movement to another. The audience knows we are moving and wants to see the dispute to its conclusion—be it through mediation or arbitration. This dichotomy can work with a seasoned professional and lots of good communication.

I have heard criticism of med-arb that an attorney will tell the mediator secrets that she would never share with the arbitrator. My experience does not bear this out. Mediations begin with each side pushing out the most favorable facts to their position. Guess what? This is exactly the same strategy used in arbitration. When secrets are handed out to the mediator but not to be shared with the other side, the mediator has to hold those secrets in abeyance and the chance of settlement is lessened. But I am going to share a surprise with you; there are fewer secrets than you think. So often, I will hear a party say that other side has no idea of a certain fact (let's call it XYZ) only to learn that the other side knows of XYZ and has already dealt with it, strategized around it and moved on.