MED/ARB - A TIME AND COST EFFECTIVE HYBRID FOR DISPUTE RESOLUTION

by Martin C. Weisman

While there are many different forms of alternative dispute resolution, the concept of med/arb is one that is gaining in its use. It involves the combination of private voluntary dispute resolution mediation with a dispute resolution process where the parties agree in writing to submit the dispute for resolution to a neutral third-party arbitrator for, generally, a final and binding decision. The differences between these two ADR processes are quite clear. In mediation, which is private and voluntary, the mediator, who is acceptable to all parties, assists the parties in identifying issues of mutual concern, develops options for resolving those issues, and finding resolutions which are acceptable to the parties. Mediation is non-binding. In arbitration, however, the parties present proofs and arguments to the arbitrator who then determines the facts and decrees an outcome. The parties to arbitration control the process. There is usually one arbitrator or panel of three arbitrators and often the arbitrator or arbitrators have special expertise appropriate for the subject matter of the dispute. The arbitration process only addresses those disputes which the arbitrator has been given the power to resolve and this authority can be given by contract, order of a court of competent jurisdiction or legislative mandate.

Med/Arb combines the mediation and arbitration processes as a means to avoid the increased cost and difficulty of court litigation and, for that matter, even arbitration. This process begins with a neutral third-party facilitating settlement discussions as a mediator. In instances of irresolvable impasse, the neutral third-party then becomes an arbitrator, conducts an arbitration and renders an award.

This process can be efficient, can provide the parties with the best of both types of ADR processes, with a guarantee of closure, while maintaining fairness. Oftentimes, counsel for the parties like this approach because it allows someone else to give "bad news" to their clients. Of course there are also problems with the use of this format. Ethical issues arising out of caucus communications and confidentiality, the parties' perception of impartiality of both the mediator and the arbitrator, and the tendency to have a more restrained mediation process because of inhibitions of the parties to be openly candid are just a few of the issues. The benefits and burdens of med/arb must be weighed by the parties in each situation when determining whether or not to use this process. There are several variations of the process including arb/med which begins with the parties presenting their case to the neutral third-party arbitrator who renders a decision, which is not revealed, and then the parties commence a standard mediation facilitated by the same person. If they are able to resolve their issues, the arbitration award is discarded. If the parties are unable to resolve the issue in mediation, the arbitration award is revealed and generally becomes binding.

No matter which form of this hybrid process is used, the neutral must possess all of the qualifications for both mediation and arbitration and likely will have topic specific expertise in the issues involved. The ethical standards of the arbitration will generally govern the med/arb process, since those represent a higher and tougher standard.

The med/arb starts with a written agreement or court order. It is essential that this agreement or court order is one which is understood by the parties as well as counsel. An arbitrator's authority is only based upon the authority granted to him in the arbitration agreement or order to compel arbitration. Similarly, the arrangement between the mediator/arbitrator and the parties is also based upon the agreement that the mediator/arbitrator has with the parties and

their counsel. This can be accomplished through execution of an engagement agreement, a mediation agreement tailored to the med/arb process, or combining them both. A sample of the language advocates and ADR providers should use include the following:

> "The Client and Counsel have requested MCW act in both the capacity of mediator and arbitrator. During the mediation portion of this engagement, MCW may conduct private sessions/caucuses with one party and exclude the other and receive confidential information and/or information which may not be admissible or relevant in the arbitration. The parties hereby acknowledge that this may occur, and if it did, same would not be used to disqualify MCW from acting as arbitrator nor be grounds for vacatur or challenge to confirmation of any arbitration award. Any and all conflicts created by MCW's dual capacity as arbitrator and mediator are hereby waived. MCW shall have complete authority over the mediation and arbitration subject to the Arbitration Agreement of the parties as well as the American Arbitration Association's Commercial Arbitration Rules and MCR 2.411. MCW shall have the same limited immunity as judges and court employees would have under federal or state law as he is not a necessary party in any judicial or arbitration proceeding relative to the mediation/arbitration contemplated by this engagement.
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> When a party representative meets alone with the mediator, he or she will clearly inform MCW what statements or documents shall remain confidential, and what may be shared with the other party(ies). But in any event, nothing disclosed in these private discussions may be considered in the arbitration unless introduced by either party independently during the arbitration."

At the outset of the engagement, an in-person conference with the parties and their counsel is the best way to ensure that everyone understands the process and executes the documents in a knowing and appropriate manner. During this conference, it is important to discuss all of the benefits and burdens of the process, and to describe how the process will work. You should answer any of the concerns voiced by the parties or their counsel and these answers must be clear, concise and candid, for it is only then that a valid and acceptable executed agreement will result.

This hybrid procedure allows for voluntary settlement opportunities with closure. Since the arbitrator does not have to be educated in the substance of the problems involved in the

dispute, having already learned of the ins and outs of the dispute during the mediation portion of the process, significant economies in both time and expense can result. On occasion, following the mediation portion of a med/arb, the parties will elect to submit the matter to the arbitrator in a "summary" fashion. This may take the form of submitting the matter on briefs, exhibits, and affidavits with no testimony being offered. They may do this because of the knowledge shown by the mediator-arbitrator and their confidence in the mediator/arbitrator to be fair and impartial during the mediation phase. Because the parties know that the mediator will ultimately be a final and binding decision maker, there is also a greater tendency for the mediation process to result in a settlement, and thereby cutting out the expense and time involved in the arbitration process. This process is something for advocates and parties alike to consider. In the current economic environment, given the rise in the use of alternative dispute resolution techniques for problem solving, and given the desire for speed, lower cost, and finality, more and more parties and their counsel are utilizing the med/arb process to resolve their disputes.

For those interested in learning more about med/arb, whether as a provider or advocate, Professional Resolution Experts of Michigan (PREMi) will be sponsoring a med-arb seminar on October 27th , 2011 at Cooley Law School, Auburn Hills, with Martin Weisman as the lead trainer along with many of the PREMi associates . For more information contact William Weber, PREMi's executive director at 248 644 0077 or email execdirector@premi.us

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