

THE NEUTRAL IN MULTIPLE ROLES: PRACTICAL AND ETHICAL ISSUES¹

by Irene C. Warshauer²

Introduction

Mediators who are unsuccessful in bringing the parties to a resolution of their conflicts may be asked by the parties to arbitrate the matter. Conversely, an arbitrator during the course of arbitration proceedings may be asked to mediate. What is the impact of these various role changes and are they ethical?

I. The Roles of a Mediator and an Arbitrator Differ

A. A Mediator's Role and the Mediation Process

A mediator is a facilitator who tries to bring the parties together to resolve a dispute themselves and acts to facilitate the resolution of that dispute. In a typical mediation, the parties are seeking someone who is adept at bringing both sides to the table and to a solution that is palatable to both sides. The mediator does not necessarily have any expertise in the area of law involved and may not be particularly knowledgeable about the law at all. Indeed, there is no requirement that a mediator be a lawyer, although there is some controversy as to whether mediation is the practice of law.³

The processes of mediation are informal. There is usually a statement that the process is confidential, a short presentation by each side, an effort by the mediator to allow the

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³ "Whether being a neutral is or is not the practice of law remains a significant, but as yet unresolved, issue." Menkel-Meadow, Carrie, Ancillary Practice and Conflicts of Interests: When Lawyer Ethics Rules Are Not Enough, CPR Winter Meeting Coursebook, January 26-27, 1997 at p. 181.

parties to vent whatever emotions may be present, and then, the mediator usually meets with the parties in separate caucuses to ascertain each side's position in the matter, options for resolution and bottom lines.

At each caucus, the mediator restates the confidential nature of the caucus and the mediation itself. The parties are encouraged to disclose their fundamental and confidential concerns, their positions on a variety of issues and to fully discuss with the mediator various avenues for potentially resolving the dispute. While some lawyers and other parties to the mediation have developed what is called "spinning the mediator" that is, not disclosing the client's full position or the full parameters of that side's position or using the mediator to achieve that party's negotiating results, most parties do disclose matters to a mediator in the caucus, which are confidential and not to be disclosed to the other side, in anticipation that such disclosure will facilitate the resolution of the dispute and enable the mediator in caucusing with the opposing side to be aware of overlapping positions which will enable the parties to reach a resolution within each side's goals and authority.

Client participation is encouraged in mediations and the mediator frequently uses the process to communicate directly with the client, recognizing that the confidentiality of the process will preclude any statements by the client which might prove damaging in a litigation from being disclosed, to the other side or to anyone outside the confines of the party's caucus. Thus, in a mediation, efforts are made to deformatize the process, to have open and full discussion with the business people and to have disclosure by the parties to the mediator of confidential information and positions.

Mediations are frequently designed to encourage continued business relations between the parties with "win/win" results rather than a flat monetary award to be paid by one

side to the other. The parties' submissions in a mediation are usually limited. There is no testimony as such, no swearing of witnesses, no cross examination, etc.

The mediating parties' initial submissions may contain a description of each sides' positions and attach germane exhibits. The position papers are usually not exchanged with the other side. For example, the standard Notice of Selection of Mediator from the U.S. District Court S.D.N.Y. Mandatory Mediation Program, states "Each party should provide to the Mediator ... a memorandum presenting in concise form contentions relative to both liability and damages, and said copies should be served only upon the mediator ..." p. 2, (emphasis added) Mediation does not have the statement and response format that is common in arbitration and traditional litigation. Documents will be provided to the mediator without regard to the rules of evidence or objective relevance and statements made cannot be used in any subsequent litigation. There are ex parte communications between the mediator and each side, indeed, ex parte communications are almost a given for mediation.

B. An Arbitrator's Role and the Arbitration Process

An arbitrator is a private judge who hears testimony and makes a decision based on the law and evidence submitted during the arbitration. Arbitration is a much more formal process than mediation. The parties exchange briefs, the arbitration hearing follows the format of traditional trial with opening statements, sworn testimony, the right of cross examination, closing statements and post hearing submissions. While documents are not always offered pursuant to the rules of evidence, there is more formality in presentation of evidence and the arbitrator can reject evidence as not relevant, material or necessary, although an arbitrator may take evidentiary material, which would be accepted in a bench trial, for "what it is worth." See e.g. AAA, Securities Arbitration Rules Rule 32. An arbitrator does not to have ex parte

communications with either side on substantive issues, indeed, such contact may terminate the arbitration.⁴

The arbitrator is required to make a decision in which one side wins and one side loses. Even the proverbial “cutting the baby in half” award usually results in a monetary resolution or enforcement of a contract, not a party accepted compromise resolution.

The arbitrator’s decision can be overturned on very narrow grounds. For example, the grounds for vacating an award under the New York CPLR § 7511 are:

- i) corruption, fraud or misconduct in procuring the award; or
- ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or
- iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, is virtually identical.

Arbitrators do not have to get the law or the facts right, although the award may be overturned by “manifest disregard” of the law. New York Supreme Court Justice Sklar recently summarized New York law on an arbitrator’s mistake on the law and the facts in Barmad v. Siegel, N.Y.L.J. p. 28, October 27, 1998, (N.Y.Sup.):

An arbitrator’s award will not be vacated for errors of law and fact committed by the arbitrator (Matter of Sprinzen, 46 NY2d 623, 629 ([1979]). An arbitrator’s award will be confirmed “even though the court concludes that his interpretation of the agreement misconstrues or disregards its plain meaning or misapplies substantive rules of law, unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation on his power” (Silverman v. Benmor Coats, 61 NY2d 299, 308 [1984]). The arbitrator’s award

⁴ See IBA Rules of Ethics for International Arbitration, Section 8.

in the present case does not exceed any specifically enumerated limitation on his power, is not totally irrational, and does not violate a strong public policy. The award is therefore confirmed.

In a recent decision, the United States Court of Appeals for the Eleventh Circuit in Montes v. Shearson Leaman Brothers, 128 F.3d 1456 (11th Cir. 1997) held that an arbitration award may be vacated on appeal on the grounds that the arbitrator “manifestly disregarded” the law and did not apply the law to the facts. Id. at 1459. The court stressed that the opinion should be read narrowly and does not mean that the arbitrator has to get the law right. A mere misinterpretation of the law will not lead to reversal, only a “clear disregard of the law,” Id. at 1460, 1464. See also, Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 1998 U.S. App. LEXIS 15193, *19 (2d Cir. 1998) (“In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both. Moreover, the arbitrators did not explain their award.” Id. at 23. (emphasis added))

Thus, although both mediation and arbitration are extra judicial processes for resolving disputes, they are quite different in their constitution, processes, procedures and proprieties.

II. Practical Problems Inherent in the Mediator Becoming the Arbitrator

A. Ex Parte Contact

What happens when the mediation is not leading to a resolution and both sides decide that the mediator should become the arbitrator? While one side could make the request, unless it is agreed upon by both sides, the mediator will not be the arbitrator. The “consent must be reasonable to an objective observer.” When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflicts Issues. Geoffrey C. Hazard Jr., Alternatives p. 147, Vol. 12, No. 12

(December 1994). The agreement of both sides to the switch should be in writing to protect the mediator and keep a track record of consented agreement. International Chamber of Commerce Rules of Conciliation and Arbitration, Article 10 provides:

Unless the parties agree otherwise, a conciliator shall not act in any judicial or arbitration proceeding relating to the dispute which has been the subject of the conciliation process whether as an arbitrator, representative or counsel of a party. A mediator who did not meet privately or caucus with one side would be the exception rather than the rule. Substantive ex parte contact is prohibited in arbitration. How does the change in hats from mediator to arbitrator deal with the fact that several ex parte caucuses have taken place. In recognizing the propriety of ex parte caucuses in mediation, the commentators look to the differences between mediation and adjudication.

But as the various rationales for ex parte communication in ADR suggest, there are arguments that dispute settlement facilitating is different from adjudication. Some ex parte communication may be necessary to ferret out the best information to encourage the most candid sharing of information, to test the waters for possible solutions and to share with a third-party neutral what one really needs to settle a case.

Menkel-Meadow, Carrie, Ex Parte Talks, Alternatives p. 188, Vol. 12, No. 9, September 1994.

Ms. Menkel-Meadow contrasts the impropriety of such ex parte contact in processes closer to arbitration:

When a third-party neutral acts more like an adjudicator, for example in arbitration or early neutral evaluation, or when serving as a special master in the procedural and discovery management of a case, I would recommend that ex parte communications be prohibited. Such a rule is currently built into at least one form of court-sponsored ADR, the Dalkon Shield arbitration program. See Second Amended Rules for ADR in Dalkon Shield Claimants' Trust Litigation. 1993.

Id. at 189.

The arbitrator who met with one side ex parte could jeopardize the results of the arbitration. For example, the American Arbitration Association's check list for arbitrators states:

All communication between any party and a neutral arbitrator, except at oral hearings, must be directed through the AAA. Ex parte contact could be a ground for nullification of the award. If a party contacts you for any reason during the proceedings or after the case has been concluded, please notify the AAA office immediately.

The AAA International Arbitration Rules are even more explicit:

2. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator....No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

Rule 7.

It could be argued under these rules that the prior ex parte contacts in the mediation precludes the mediator from acting as an arbitrator, even with the parties' consent.

B. Information Previously Disclosed in Confidence

1. Is it Possible to Expunge the Confidential Information?

How does a mediator change hats? The mediator already knows what each side's confidential positions are, he or she has promised to keep them confidential and not to use them or disclose them to the other side. The mediator may know the vulnerabilities of each side's case based on disclosures in the caucuses. The mediator knows the bottom line settlement positions from both side and all of a sudden a person with this knowledge is placed in a position of having to decide for one party and against the other. Practically, how does a mediator, now arbitrator, expunge from his or her mind the confidential information received from the mediation? How does he or she determine what is an appropriate resolution?

Can the mediator, now arbitrator, use information that he or she gained from the caucuses in fashioning the result? Should this be done? If the mediator, now arbitrator, uses the

information, is he or she violating the commitment to keep everything said in the mediation confidential and not to be used outside of that process?

Is the mediator, now arbitrator, required to completely erase from his or her memory all information received during the mediation process? Assuming this is possible, is it desirable?

2. Will the Confidential Information Impact on the Award?

The ADR process has taken a one hundred and eighty degree turn so that questions of law have become important, legal precedents will be presented and should have some relationship to the determination, even though the arbitrator does not always have to get the law right.⁵

How do the arguments of the lawyer, who is now fiercely arguing his or her points, as opposed to trying to compromise, sit with the mediator who has heard the lawyer take different positions in the arbitration?

After the arbitration hearings are over and the mediator, now arbitrator, has received post hearing submissions, he or she is faced with the task of making a decision that is correct and appropriate. This is again, contrary to the role of a mediator who is looking to resolve the dispute in a manner that is agreeable to both sides, regardless of what the mediator believes the appropriate outcome should be.

Suppose the mediator has been an evaluative as well as a facilitative mediator, had thought that the appropriate award was within a certain range and had given each side a different monetary amount in order to facilitate the negotiations. Both sides would anticipate

⁵ See discussion above.

that the mediator's, now arbitrator's, determination would be at the approximate number that the mediator had disclosed. Is the mediator becoming an arbitrator under false pretenses? Or, did the sides assume that the mediator told both sides the same number? This may not pose a problem as presumably the mediator told the plaintiff the lower end of the range and the defendant the higher end and an award in the middle would be better than each side anticipated. But suppose the evidence in the arbitration led to a monetary result outside the range disclosed? Do the parties have a right to expect the award to be in the range disclosed in the mediation?

If the mediator, now arbitrator, heard, during the mediation, that more than "x" dollars would bankrupt one side but believes that the law requires such a result, is he or she required as an arbitrator to decide in a manner that the arbitrator knows will result in the bankruptcy of one party and the judgment never being paid? Would the arbitrator have known this, or some other highly confidential matter, which could impact on the award, if he or she had not previously been a mediator? Almost certainly, the answer would be no. How does the mediator, now arbitrator, deal with the additional knowledge? These are some of the practical aspects of the change in hats.

III. Ethical Issues Raised By the Mediator Becoming the Arbitrator

The discussion above has set forth some of the practical difficulties of a mediator becoming an arbitrator. What are the ethics of the matter? For an UNCITRAL mediator or conciliator, the answer is easy. Article 19 of the UNCITRAL Conciliation Rules prohibit a conciliator from becoming an arbitrator or counsel on the dispute.

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation

proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

There are canons of ethics for lawyers as well as model standards of conduct for mediators or conciliators.⁶ The model standards of conduct for mediators put out by the American Arbitration Association, the ABA and SPIDR contain some rules which might apply to the situation under discussion. The discussion of ABA/SPIDR Model Standard VI, Quality of the Process states that:

Where appropriate, a mediator should recommend that parties seek outside professional advice or consider resolving their dispute through arbitration, counseling, neutral evaluation, or other processes. A mediator who undertakes, at the request of the parties, an additional dispute resolution role in this same matter assumes increased responsibilities and obligations that may be governed by the standards of other professions.

What if the rules of mediation and arbitration are in conflict? Can the neutral take on one hat and take off the other hat cleanly? Ethically?

The First Model Standard of Conduct states:

Self-determination; A Mediator Shall Recognize That Mediation Is Based on the Principle of Self-Determination by the Parties.

As the model standards indicate: self-determination is the fundamental principle of mediation.

This voluntary lack of coercion is the antithesis of arbitration which requires a ruling by the arbitrator as to what the result is. The impartiality rules for a mediator and an arbitrator would

⁶ Presumably, if the mediator or arbitrator is a lawyer both sets of rules apply. Rule 5.7 of the ABA Model Rules of Professional Conduct states:

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients;

* * *

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

be the same unless the arbitrator is a party designated arbitrator in which case it would be highly unlikely for both sides to ask that arbitrator to act as a neutral.

ABA/SPIDR Model Standard V states:

Confidentiality: A Mediator Shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality.

Would it be a breach of the standard for the mediator, now arbitrator, to use any of the confidential information disclosed in a caucus and perhaps even information disclosed among the parties in the confidential mediation in evaluating the material presented in the arbitration? Do the parties expect the mediator, now arbitrator, to use the information disclosed in the mediation? The mediator may be in possession of confidential information which is directly contrary to what is presented in the arbitration and if the mediator, now arbitrator, is required to make a decision based solely on what is presented in the arbitration, he or she may either be in the position of making a determination which the arbitrator, knows to be based on false precepts or using the confidential information which is contrary to the model standards. This is almost a question of how do you put the cat back in the bag. Once something which is disclosed, it is very hard to make it undisclosed.

Suppose the mediator, now arbitrator, holds a hearing and takes testimony from the parties and one party under oath swears to something that is diametrically the opposite of what that person told the mediator in the mediation caucus. Was the witness telling the truth in the caucus or is the witness telling the truth now? Is the witness's credibility totally destroyed by the contradictory positions? Can the mediator, now arbitrator, give that testimony the same weight that an arbitrator new to the matter would? Should he or she? If the mediator, now arbitrator, has grounds to believe that perjury has been committed, is he or she under an obligation to follow the appropriate disciplinary procedures ordinarily followed in the case of

perjury? Is there an obligation to report what the arbitrator believes is the attorney's possible subornation of perjury to the authorities or the bar association?⁷ The answer is probably not, in the real world outside the Beltway, particularly since the first statement was not under oath.

What if a document has been provided to the mediator in the mediation and the same party offers it in the arbitration, but has been unable to authenticate it, and the opponent strongly objects to its being considered based on very valid legal arguments. Must the mediator, now arbitrator, disclose that he or she has already read the document or is "taking it for what its worth" a sufficient response?

What is the mediator's, now arbitrator's, further ethical conundrum if the mediator, now arbitrator, has already read a critical document, which was not disclosed in the arbitration. Arbitration requires disclosure of documents used:

All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

Procedures for cases under the UNCITRAL Arbitration Rules, Article 15, ¶3. Is the document being supplied to the arbitral panel? Probably not, but the effect is the same. Again, must the mediator, now arbitrator, disclose that he or she has read the document, require the party who has it to disclose it or even mention that it exists? Certainly in a traditional arbitration, such disclosure would be expected. See *e. g.* UNCITRAL Article 9:

Article 9

⁷ Rule 8.3 of the ABA Model Rules of Professional Conduct states:

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chose, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

How does that square with the assurances of confidentiality during the mediation?

IBA Rules of Ethics for International Arbitration States:

5.3 Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representatives. If such communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance.

Does the mediator, now arbitrator, have to disclose the substance of the caucuses? Such disclosure would be a violation of the confidentiality provisions of the mediation. It is arguable that the caucuses were not “throughout the arbitral proceedings.”

Rule 12 of the AAA Commercial Mediation Rules provides:

12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding:

- a. views expressed or suggestions made by another party with respect to a possible settlement of the dispute;
- b. admissions made by another party in the course of the mediation proceedings;
- c. proposals made or views expressed by the mediator; or
- d. the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

The canons of ethics were not designed for this situation and the ethical rules for arbitrators and mediators conflict as much as the practical considerations conflict. Section 8 of

the IBA Rules of Ethics for International Arbitration provides that unilateral discussion of settlement with a party to an arbitration disqualifies the arbitrator from future participation in the arbitration:

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.

Thus to the extent the canons of ethics or rules of mediation or arbitration are relevant, they appear to severely question if not prohibit the role change.

IV. The Arbitrator Becoming the Mediator

Now reverse the process discussed above. An arbitrator has been hearing the case, received and read submissions from the parties, heard testimony, the parties are in settlement discussions and they indicate they would like the arbitrator to serve as a mediator to try to facilitate the resolution of the dispute. Once again, both sides and the neutral would have to agree and such agreement should be in writing. Many of the problems discussed above now arise in reverse although, at least, both parties here know what has been disclosed to the arbitrator and what they now have the opportunity to disclose. This scenario would appear to be less fraught with ethical considerations as the arbitrator is not sitting with confidential information from one side or the other, which he or she may be required to ignore.

On the other hand, the arbitrator has probably become familiar with the legal issues, either having been selected for his or her expertise in that area, or having learned the issues through the submissions of the parties. The arbitrator may already have decided or be leaning towards a particular resolution of the matter. How does he or she set that aside and try to

work out a resolution which is acceptable to both sides. Is he or she required to disclose the potential resolution? Such disclosure would be expected prior to the selection of a mediator.

AAA Commercial Mediation Rule 5 provides:

Prior to accepting an appointment, the prospective mediator shall disclose any circumstance likely to create presumption of bias ...

If the parties in the new mediation ask for an evaluation, what does the arbitrator do? Does he or she disclose his or her reasoning and then educate the parties, so that, if the matter does not settle in the mediation, they can proceed to arbitrate either with that same arbitrator or a new arbitrator.

Many of the problems discussed above now appear in reverse. What if one or both parties disclose in the caucus matters that are completely the opposite of what they have testified to in the arbitration. The arbitrator, now mediator, concludes that the testimony was false. Does he or she have any ethical responsibilities in connection with that testimony? Is it perjury? Does it need to be reported? What does it do to the parties credibility? What if documents which the arbitrator excluded as lacking proper foundation turn out to be extraordinarily relevant and quite reliable?

Once again, the lawyers for the parties may concede that their legal position is not quite as black and white as they had represented and there is considerable merit to the other sides' case. This is hardly surprising, but it does tend to undercut credibility.

It would appear, due to the absence of confidential caucuses, that it is easier for an arbitrator to become a mediator from a practical and ethical standpoint than it is for a mediator to become an arbitrator. The arbitrator does not have to erase or eliminate from his or her thought processes all the confidential material which has previously been supplied. Some of the ethical ramifications remain and the differences in positions, which may become apparent in the

mediation, may lead the arbitrator to believe that he or she was going a long way down the path of rendering erroneous, if not inappropriate in the circumstances, decision.

V. What Happens If the New Procedure Does Not Work

If a mediator is asked to become an arbitrator, he or she will hear the facts and the law, take the matter under consideration and make a decision. If the parties decide that they would like the arbitrator to once again, become a mediator, the problems which arise are those discussed above in connection with an arbitrator becoming a mediator.

The facts and law learned in the arbitration may color his or her impression of the credibility of the parties and the tactics used in the arbitration may color his or her impression of the lawyers and the clients. Further, the presentation of the facts or law may have given him or her so much information that it is difficult to become a true neutral. More troubling is the prospect of the arbitrator having become a mediator being asked to reassume the arbitrator hat. This is fraught with all of the problems discussed above in connection with the mediator becoming an arbitrator, plus the additional credibility and other problems of the mediator becoming the arbitrator which may have been created by the differing roles they are portraying in either process.

Conclusion

The change in roles from mediator to arbitrator, arbitrator to mediator and back again raises many practical and ethical considerations which are not yet resolved by the current canons or rules of arbitration or mediation.