

“Making Mediation-Arbitration Work”

Final Paper

Family Law Dispute Resolution

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Mediation-arbitration (“med-arb”) is increasingly being used in Ontario to resolve family law disputes due to its relative efficiency. When applied correctly, considerable time and money is saved.¹ Unfortunately, med-arb’s unique hybrid dispute resolution approach presents additional impartiality concerns for mediators.² In light of these challenges, this paper will show that “successful” med-arb is best facilitated by a mediator/arbitrator who remains strictly neutral during the mediation phase. A mediation approach along the strict-neutrality end of the neutrality continuum better ensures the trust and openness of parties entering negotiation. Part I of this paper defines strict neutrality and “successful” mediation. Part II provides four ways that strict neutrality is beneficial in med-arb. Finally, Part III lists some of the challenges engendered by the recommended approach and underlines the corresponding importance of a comprehensive screening process.

PART I: “Strict-Neutrality and “Successful” Mediation-Arbitration defined

Parties enter med-arb with the understanding that they will attend mediation, failing which, they will submit unresolved issues to arbitration.³ Its legitimacy as a dispute resolution process stems from *Marchese v. Marchese*,⁴ a Court of Appeal decision confirming that parties can opt out of the *Arbitration Act*’s prohibition⁵ on the intermingling of mediation with arbitration.

¹ Barry Leon & Alexandra Peterson, “Med-arb: Ontario’s Appeal Court brings more effective dispute resolution one step closer” (2007) IBA Legal Practice Division: Mediation Committee Newsletter 29.

² This paper will illustrate why there are greater impartiality concerns in med-arb in comparison to the impartiality concerns in pure mediation.

³ *Supra* note 1.

⁴ 2007 ONCA 34, [2007] O.J. No. 191.

⁵ *Arbitration Act*, S.O. 1991, c.17, s. 35.

Med-arb is appealing to parties because it allows one individual to take on the dual role of mediator and arbitrator. Because of that dual role, mediator/arbitrators should strive for a more neutral, less interventionist approach during the mediation phase. Defined simply, neutrality means “doing exactly equal to and for each disputant” and remaining above suspicion of favoritism.⁶ In practice, the term “neutrality” lends itself to a variety of approaches. Understandably, mediation counselor Alison Taylor notes that the ethical practice of mediation falls upon a continuum of neutrality with strict neutrality at one end and expanded neutrality at the other.⁷

i) Strict-neutrality

Strict neutrality is the less interventionist approach to mediation that restricts the application of “therapeutic” and “normative-evaluative” modes of mediation and limits the use of caucusing.⁸ Embracing the strict neutrality concept would entail offering “neutral information” to parties and undertaking a “rational, cognitive approach” to mediation.⁹ While the pursuit of strict neutrality has its drawbacks,¹⁰ it is preferable to the alternative, more directive “expanded neutrality” approach. This paper aims to show that strict neutrality should be adopted by mediator/arbitrators as it facilitates greater “success” in med-arb.

⁶ Alison Taylor, “Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process” (1997) 14 *Mediation Quarterly* 215 at 218.

⁷ *Ibid.* at 226. While Taylor is referring to pure mediation, this categorical classification of mediation practices is applicable to the mediation phase in med-arb.

⁸ *Supra* note 6 at 226.

⁹ *Ibid.* at 225.

¹⁰ See Part III re: dealing with power imbalances.

ii) “Successful” Mediation-arbitration

For purposes of this paper, “successful” med-arb is a dispute resolution process that is a) *efficient* and b) *satisfactory* to the parties involved.

Efficiency is measured in terms of time needed to settle the dispute. A process where the mediator/arbitrator prolongs (although unintentionally) a dispute into the arbitration phase when the parties could have realistically resolved the dispute during the mediation phase will be considered “inefficient.” Furthermore, a situation where one party decides to remove a mediator/arbitrator mid-process will be considered “inefficient” since potential cost and time efficiencies are lost.

A *satisfactory* process is achieved when both parties believe the outcome rendered was free from bias. Med-arb will be considered “unsatisfactory” if one of the parties feels that the process was tainted by a partial mediator/arbitrator.

PART II: The Necessity of Strict Neutrality

1. Strict Neutrality builds the trust needed to facilitate discussion

In order to generate meaningful dialogue, parties must be convinced of the mediator/arbitrator’s commitment to professionalism. Since the mediator/arbitrator may eventually impose a binding solution, revealing one’s true interests and intentions during the mediation stage could be perceived to be disadvantageous.¹¹ At least initially, parties may be reluctant to share information. Professor Lela P. Love notes that “when disputing

¹¹ Stephen B. Goldberg *et al.*, *Dispute Resolution: Negotiation, Mediation, and other Processes*, 5th ed. (Frederick, MD: Aspen publishers, 2007) at 308.

parties are in the presence of an evaluator...they do not make offers of compromise or reveal their hand for fear that it weakens the evaluator's perception of the strength of their case."¹²

Unfortunately when a mediator/arbitrator expresses a personal opinion or evaluation during the mediation phase, impartiality concerns are triggered and parties are reminded to "put up their guards" and conceal information. Love cautions that certain comments may unintentionally create a "winner" and a "loser":

"...evaluative tasks...can compromise the mediator's neutrality – both in actuality and in the eyes of the parties – because the mediator will be favoring one side in his or her judgment."¹³

When this occurs, the "losing"¹⁴ party may begin to lose trust in the mediator/arbitrator and in the med-arb process. An urge to "level the playing field" and persuade the mediator/arbitrator that one has the stronger legal case may become the dominant priority. Parties may subsequently engage in "value claiming" whereby personal concessions are exaggerated and interests are concealed.¹⁵ An adversarial mindset could end "integrative bargaining"¹⁶ and thwart further progress at mediation.

¹² Lela P. Love, "The Top Ten Reasons why Mediators should Not Evaluate" (1996-1997) 24 Fla. St. U. L. Rev. 937 at 940.

¹³ *Ibid.* at 939.

¹⁴ Although there is no real "winner" or "loser," one party may have a more favourable opinion of the mediator/arbitrator's opinion/evaluation and thus, be considered the "winner." Conversely, the other party may consider himself/herself to be the "loser."

¹⁵ See discussion of "value claiming": D. Lax & J. Sebenius, *The Negotiator's Dilemma: Creating and Claiming Value* (New York: Free Press, 1986) at 103.

¹⁶ See discussion of "integrative bargaining": Colleen M. Hanycz, "Introduction to the Negotiation Process Model" in C. Hanycz, T. Farrow & F. Zemans, eds., *The Theory and Practice of Representative Negotiation* (Emond Montgomery, 2008) 41 at 45.

When a settlement is not reached at the mediation phase, the process could extend to arbitration, costing parties additional time and money. Going to arbitration also imposes a longer term disadvantage. Parties are generally happier when they come to an agreement on their own.¹⁷ Any decision imposed at arbitration may not be as diligently followed in the future.

Communication barriers during the mediation phase can be more effectively avoided if parties feel it is safe and beneficial to reveal their true interests. Establishing an atmosphere where parties can collaborate freely is best facilitated during the mediation phase by a strictly-neutral mediator/arbitrator. With this approach, a “normative-evaluative” mode of mediation, a mediation style that directly attempts to influence the outcome of mediation through the mediator’s active participation, is discouraged.¹⁸

Strict neutrality signals that the mediator/arbitrator is not open to persuasion and is sincerely committed to fulfilling his or her professional obligation to remain impartial. This approach should keep parties focused on working together and could produce “win-win” outcomes as parties may be more willing to share information. By not extending the process into arbitration, “successful” med-arb is achieved.

The dual role of mediator/arbitrators is analogous to the dual role of teachers. A teacher will initially assist students in learning the course material and then evaluate them based upon their level of comprehension. During the term, a student may only reveal his lack

¹⁷ J. Pearson, N. Thoeness, “Divorce Mediation: An American Picture” in R. Dingwall and J. Eekelaar, eds., *Divorce Mediation and the Legal Process* (Oxford: Clarendon Press, 1988) at 27-28. See also: Milka Vujnovic, *The Benefits of Mediation – What do the research studies tell us?* online: Milka Vujnovic Family Law and Mediation Services <<http://www.mvfamily.ca/benefits-of-mediation.php>>.

¹⁸ *Supra* note 6 at 223.

of understanding to the teacher if there is trust that this revelation may not negatively impact one's grade. A teacher that remarks "your lack of understanding this late in the course suggests you should not get an A" or "you obviously don't understand the material as well as student X" will discourage future questions and the future exchange of information. On the other hand, teachers that resist prematurely evaluating students may create a safer environment and encourage greater communication. In a similar way that a student is more likely to learn the course material by revealing his or her lack of understanding, parties in a family law dispute are more likely to reach a settlement by revealing their true interests.

2. Strict Neutrality lowers suspicions of the "losing" party

Caucusing, the act of pulling parties aside to discuss matters in private, is a form of intervention often used by mediators in pure mediation.¹⁹ Unfortunately, caucusing in med-arb can raise impartiality concerns:

"there is a danger that in the adjudicative stage of the proceedings, the mediator-arbitrator may consider and weigh information, obtained from one party during private caucusing in the mediation phase, to which the other party has not had a chance to respond. This information might be incomplete or even false, and prejudicial to the opposite party."²⁰

In addition to actual impartiality concerns, frequent caucusing also makes it more likely that a party will be suspicious of an impartial decision, suspecting that the decision rendered was biased. Whenever a binding decision is rendered, parties may inevitably

¹⁹ *Supra* note 1 at 30. The use of the term "pure" mediation refers to the dispute resolution process of mediation, without the commitment that unresolved issues would be submitted to arbitration.

²⁰ *Ibid.*

feel there is a “winner” and a “loser.”²¹ The problem with the frequent use of caucusing during mediation is that the “losing” party may attribute an unfavourable decision to prejudicial information obtained by the mediator/arbitrator during private caucus sessions. Even if an impartial decision is rendered, the “losing” party may not feel that the decision was based solely on merit. Once again, “successful” med-arb is not achieved because one of the parties is not satisfied that the decision rendered was the product of a fair process. The following example highlights this dilemma:

Example #2

Mediation: The mediator/arbitrator frequently caucuses with both parties.

Arbitration: An impartial decision is rendered by the mediator/arbitrator. Party B, nonetheless, feels that he should have received a greater amount of spousal support²² and attributes his loss to unchallenged/prejudicial information given to the mediator/arbitrator (by Party A) during caucusing. Party B fears that Party A fabricated a story with respect to undeclared income – a claim that B has not had the opportunity to rebut.

Strict neutrality during the mediation phase creates openness and objectivity because it reduces the use of caucusing. With greater openness, Party B is more likely to feel that the process was fair and transparent. A perceived “loss” can be explained away by a disagreement over the merits of the case and may not be attributed to an unfair process.

²¹ Although there is no real “winner” or “loser,” one party may have a more favourable opinion of the decision and thus, be considered the “winner.” Conversely, the other party may consider himself/herself to be the “loser.”

²² This would appear to be a natural response by a party whose perception of the merits of his/her case may have been tainted by his/her own interest.

Since Party B is more likely to feel satisfied upon completion of arbitration, “successful” med-arb is achieved.

It must not be forgotten, however, that caucusing can be a valuable tool for mediator/arbitrators. As such, caucus sessions should merely be reduced (not eliminated) in frequency and limited to specific, agreed-upon issues. For instance, prior to caucusing in regards to settlement options for the sale of a matrimonial home, a strictly-neutral mediator/arbitrator could warn parties that the discussion will focus solely on potential settlement offers. Discussions during caucusing could be limited to that one issue and information gathered unrelated to settlement options should be shared with the opposing party. Confidence in the mediator/arbitrator’s impartiality is at least partially - if not entirely - maintained.

3. Strict Neutrality prevents parties from altering their negotiation strategy

The recent *Marchese* decision confirms that dissatisfaction at the mediation phase does not provide one party the right to unilaterally refuse to proceed to the arbitration phase.²³ *Marchese* could significantly impact the power dynamics in negotiation since a party feeling disadvantaged upon completion of the mediation phase no longer has the alternative option (safeguard) of refusing to proceed to arbitration.²⁴ For this reason, the mediator/arbitrator must avoid providing any indication about how the dispute may be resolved at arbitration. Failing to do so may result in one party gaining an unfair advantage during negotiations. A careful balance must be taken between helping parties

²³ *Supra* note 4.

²⁴ Provided the parties have not stipulated an option in the med-arb agreement allowing a party to unilaterally change the mediator/arbitrator at the completion of the mediation phase.

reach a settlement while at the same time, ensuring parties are not forced into agreeing to a settlement based solely upon a suspicion of what a mediator/arbitrator might do at arbitration.

A strict-neutrality approach helps mediator/arbitrators achieve the appropriate balance. On the other hand, a mediator/arbitrator who adopts an expanded view of neutrality may speculate about a potential resolution to the dispute in an attempt to encourage parties to settle. Lawyer Nancy Illman Meyers rightfully points out the downside with this form of intervention: “what a mediator intends as benign intervention, the dominant party may reasonably interpret as favoring his spouse, even if the aim was merely to level the playing field.”²⁵

Further, Love warns that an “arbitrator’s questions and suggestions while acting as a mediator can create improper pressure to settle” and adds “a party advantaged by a favorable opinion may get locked into an unacceptable claim or position.”²⁶ The dangers highlighted by Love are prominent in med-arb because both parties are aware that the chosen mediator/arbitrator has the power to impose a binding settlement if there is no agreement at mediation. The threat of an unfavourable outcome at arbitration may pressure one of the parties into making concessions that would not otherwise have been made. While a quick resolution to the dispute is obtained, “successful” med-arb is not achieved. The party making the concession will likely be unsatisfied with the process, feeling he or she was forced into settlement. As cautioned:

²⁵ Nancy Illman Meyers, “Alternative Dispute Resolution Symposium: Power Imbalance and the Failure of Impartiality in Attorney-Mediated Divorce” (1996) 27 U. Tol. L. Rev. 853 at 864.

²⁶ *Supra* note 12 at 941 and 945.

“An agreed-upon solution may be more likely...but it is often agreed upon in form only, accepted by the parties (or at least one of them) because the neutral stated that if it were not accepted in mediation, it would be imposed in arbitration.”²⁷

The following example highlights the unnatural shift in negotiation power that can occur when a mediator/arbitrator does not remain strictly neutral:

Example #3

During mediation, Party A and Party B are negotiating the purchase price in the range of \$200K - \$250K for the other spouse's equity in the matrimonial home.

To encourage party B to make an offer, the mediator/arbitrator speculates that the house is worth at least \$250K. (Unbeknownst to everyone, Party A would have taken \$225K.)

The mediator/arbitrator's speculation has anchored the negotiations in favour of Party A. Party A now resists making any concessions. Party A is aware that if the dispute were to proceed to arbitration, the worst possible outcome is likely a buyout very close to \$250K. In contrast, Party B is now most willing to make concessions. It is in Party B's best interests to agree to an amount much closer to \$250K instead of prolonging the dispute and “leaving it to chance” at arbitration. It may be said that the settlement was obtained as a result of mediator/arbitrator imposed pressure to make a concession. “Successful” med-arb is not achieved because Party B will not be satisfied that the outcome was generated by a fair process.

²⁷ *Supra* note 11.

In *Hercus v. Hercus*,²⁸ the court set aside a pair of arbitration decisions and removed the mediator/arbitrator for violating his obligation to treat both parties fairly. Some of the complaints advanced were the mediator/arbitrator's favourable disposition towards the other side and his withholding of key information gained in private discussions.²⁹ If the mediator/arbitrator would have adopted a strictly-neutral approach, there may not have been the same motivation by one of the parties to remove him from arbitrating. "Successful" med-arb was not achieved in *Hercus* because of the inefficiency in beginning anew with another process.

4. Strict Neutrality reduces the likelihood that parties will switch the mediator-arbitrator

Med-arb provides efficiency benefits because the same person may act as both mediator and arbitrator. As explained by Leon and Peterson: "Using the same neutral party also provides considerable savings in cost and time, because he or she will already be familiar with the case and will therefore not need to be briefed on the issues in dispute at the second stage."³⁰ These efficiency benefits, however, are lost if the mediator is forced to step down or the parties choose to switch mediator/arbitrators prior to entering the arbitration phase.

Too direct of an indication about how an arbitrator/mediator might make an award during the arbitration phase could result in an award being set aside. Mediator and arbitrator,

²⁸ [2001] O.J. No. 534 (Ont. S.C.J.).

²⁹ See commentary of *Hercus* decision: Malcolm C. Kronby, *Canadian Family Law*, 8th ed. (Toronto: Stoddart Publishing Co., 2001) at 163-166.

³⁰ *Supra* note 1.

Richard W. Shields, notes that an overt indication to a potential outcome could “impugn the integrity of the process and the award will be set aside on the ground there was a reasonable apprehension of bias on the part of the arbitrator.”³¹ For less obvious displays of favoritism, parties may rely upon a provision in the mediation-arbitration agreement providing for a change of arbitrator upon completion of the mediation stage.³²

Depending upon the agreement drafted, a change in mediator/arbitrator may be unilaterally invoked.

If there is a change in mediator/arbitrator, time and financial resources are spent ensuring that the new mediator/arbitrator is familiar with the facts of the case and the positions of the parties involved. Med-arb’s potential for greater efficiency is squandered.

An expanded-neutrality approach to mediation increases the likelihood that this inefficiency will occur. In emotion-driven disputes, a mediator/arbitrator with an expanded-neutrality approach to mediation may outwardly sympathize and interact with “one client about his or her emotional responses.”³³ The adoption of this “therapeutic” mode of mediation is problematic. By openly consoling one client, the opposing party may feel disadvantaged. Specifically, the opposing party may feel as though the mediator/arbitrator’s judgment may be affected by the highly-charged emotional context.

These feelings may encourage that party to trigger the change of mediator/arbitrator

³¹ Richard W. Shields, *Family Law Dispute Resolution Course Reserve Article: Family Arbitration in Ontario* (Faculty of Law, University of Western Ontario, January 2009) at 19.

³² Thomas Galbraith Bastedo, *Family Law Dispute Resolution Materials for Class on Arbitration and Mediation-Arbitration: Mediation paper revised with draft watermark* (Faculty of Law, University of Western Ontario, January 2009).

³³ *Supra* note 6 at 221.

clause. The triggering party may feel that the benefits of a new mediator/arbitrator exceed the cost and time consequences of familiarizing this new person with the facts of the case.

Strict neutrality drastically reduces the incentive for either party to change the mediator/arbitrator prior to entering arbitration. Under this approach, the mediator/arbitrator would withhold expressing sympathy, preferring instead to refer emotional parties to outside parties or professionals. Given the efficiency benefits of having one person serve as both mediator and arbitrator, there is little incentive to remove a person who has remained objectively neutral throughout the mediation phase.

“Successful” med-arb is achieved.

PART III: Tradeoffs/Challenges with Strict-Neutrality approach in Mediation-Arbitration

The recommended approach has certain tradeoffs making the med-arb process vulnerable to abuse if used by the wrong parties. Fortunately, a thorough screening beforehand could help ensure only the appropriate parties access this process.³⁴ Since a mediator/arbitrator can personally conduct the screening process,³⁵ he or she may be in a good position to assess whether parties are best suited for another process.³⁶

³⁴ Unfortunately, even with a careful screening by the presiding mediator/arbitrator, parties may still provide “false information” to portray their position in a more favourable light. The screener should be familiar with the risks inherent in the screening process. See discussion on screener training: *Infra* at 71.

³⁵ Hilary Linton, “Top Ten Questions about Screening for Power Imbalances and Domestic Violence in Mediation and Arbitration” (2008) *Riverdale Mediation* 69 at 70.

³⁶ Presumably, the mediator could also assist the parties in pure mediation. As such, the mediator/arbitrator may be in a good position to decide whether the parties would be better candidates for pure mediation.

Strict neutrality depends upon a reasonable balance in negotiation strength and for this reason, is not recommended when there is a substantial power imbalance between parties. Mediator/arbitrators have an overriding goal to do no harm.³⁷ Nancy Illman Meyers cautions that “mediation by its nature assumes relative bargaining equality...yet, while some disputants may be relatively equal, many are not.”³⁸ Unfortunately, a strictly-neutral mediator/arbitrator can do little to prevent a much stronger party from taking advantage of a weaker party.³⁹ A mediator/arbitrator’s lack of intervention, while beneficial in projecting neutrality, could lead to grossly unfair results.

If there is a substantial power imbalance, parties may benefit from some other dispute resolution process, such as formal adjudication in the courts. Pure mediation followed by pure arbitration (or some form of hybrid process where the duties of mediator and arbitrator are separated) can also help guard against more minor power imbalances.⁴⁰

When the duties of mediator and arbitrator are separated, there is no longer the concern that that same person may impose a binding decision in the event of disagreement. While maintaining the appearance of impartiality is still important in pure mediation, it does not have the same elevated importance as it does in med-arb. As such, a mediator may adopt a more interventionist role.

³⁷ Hilary Linton, *Family Law Dispute Resolution Lecture Notes* (Faculty of Law, University of Western Ontario, 13 January 2009). See also discussion: Alison Taylor, “Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process” (1997) 14 *Mediation Quarterly* 215 at 222.

³⁸ *Supra* note 25 at 859.

³⁹ *Supra* note 6 at 222.

⁴⁰ A more interventionist approach, nonetheless, has its drawbacks. Parties separating the mediation and arbitration duties sacrifice the cost and time benefits of the med-arb process.

Family law lawyer, Alfred Mamo, notes that family law disputes can invoke various levels of emotional states.⁴¹ Since a strictly-neutral mediator/arbitrator should avoid using a “therapeutic” mode of mediation, the initial screening must be thorough. The mediator/arbitrator must be able to recognize different stages of emotions. Depending on the emotional state of parties, it may be appropriate to recommend waiting before entering med-arb or simply recommend another process such as pure mediation where the dangers of using a “therapeutic” mode of mediation are not as great.

Another challenge to the recommended approach is its application. Strict neutrality would theoretically discourage the use “directive” behaviour according to Leonard Riskin’s “New Old Grid” of mediator orientations and encourage more “elicitive” behaviour.⁴² Riskin, however, notes the difficulty in maintaining a distinction between “directive” and “elicitive” mediator behaviour since a particular intervention can have both “directive and elicitive motives and effects.”⁴³

Fortunately, the occasional mixture of “directive” and “elicitive” behaviour may not be too problematic, provided the mediator/arbitrator is diligent in coming across as impartial and at least strives for strict neutrality. Parties are unlikely to view this minor form of intervention as favouring the opposing party. An efficient and satisfactory process can still be maintained.

⁴¹ Alfred Mamo, *Family Law Dispute Resolution Lecture Notes* (Faculty of Law, University of Western Ontario, 14 January 2009).

⁴² Leonard L. Riskin, “Decisionmaking in mediation: The New Old Grid and the New New Grid System” (2003-2004) 79 *Notre Dame L. Rev.* 1 at 32.

⁴³ *Ibid.* at 33.

Conclusion

Med-arb is a unique process that should not be overlooked by parties seeking an efficient resolution to family law disputes. This paper has illustrated why a strict-neutrality approach should be used by mediator/arbitrators in order to maximize potential time and cost efficiencies.

While there are certain tradeoffs with a strictly-neutral approach, these disadvantages can be minimized with a thorough screening process. On the whole, the recommended approach will best facilitate “successful” med-arb since it builds trust needed to facilitate discussion, lowers the suspicions of “losing” parties and prevents parties from altering their negotiation strategy and switching the mediator/arbitrator. As such, parties are more likely to come to an agreement during mediation, as oppose to extending the process into the arbitration phase. As an additional benefit, parties are more likely to come away from the dispute satisfied.