Sotomayor Law
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Med-Arb: A Controversial Dispute Resolution Option

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"Alternative dispute resolution" traditionally has been viewed as any of a variety of dispute resolution methods that are alternative to the default of filing a lawsuit in court. Most people immediately think of arbitration as the main "alternative." Mediation is now more commonly considered as well, at least in the United States.

However, there are many "alternatives," including a hybrid concept that is getting more attention these days, known as "Med-Arb." In this process, the parties agree to begin with mediation, but if they reach an impasse, will proceed to arbitration conducted by *the same neutral who acted as the mediator*. On the surface, this seems like a good idea, at least from the parties' viewpoint. But when you start to think about it, in California at least, the process can be fraught with risk, especially for the mediator/arbitrator hired to do the job.

"Binding mediation" is another term for "mediation-arbitration." For example, the parties can agree that if they reach impasse, then the mediator – who then effectively becomes arbitrator - can decide on a final settlement amount within an agreed-upon range. (There are lots of options here.) If a "binding mediation" provision of an agreement is not sufficiently clear and detailed, then it will not be enforced. *Lindsay v. Lewandowski* (2006) 139 Cal. App. 4th 1618, 1620-1625.

However, if the agreement demonstrates that the parties agreed to a "binding mediation" process that is clearly defined, and a constitutionally and statutorily permissible method of resolving their dispute without trial, it will be enforced. *Bowers v. Raymond J. Lucia Cos., Inc.* (2012) 206 Cal. App. 4th 724, 728-737. The mediation agreement and subsequent mediation award will be enforced as a settlement under Code of Civil Procedure Section 664.6, *not* as an arbitration award.

Normally, we mediators encourage as much creativity as possible in working with parties to find solutions through their own self-determination. The more they "own" the solution to the dispute, the more durable and sustainable it will be.

At its philosophical heart, the concept of "med-arb" seems contradictory, nullifying the voluntary nature of mediation. Essentially, the parties are saying, "We'll do our best, but if we can't agree, then we'll let you, the mediator, decide how we should settle our dispute." It may seem like a rush to give up.

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Mediators must beware the possible pitfalls of being caught in unintended but impermissible consequences of creative settlement procedures such as "med-arb." They are faced with the possibility of violating professional responsibility rules when the process turns into an arbitration. More disclosures are required of arbitrators than of mediators under California law. Has the agreed procedure addressed whether the mediator can consider confidential information discussed in private caucuses in making the final decision? Do the parties intend to offer evidence in a formal manner? What is the scope of the mediator-turned-arbitrator's powers?

Sometimes, in a search for finality and to guarantee an outcome from the ADR proceeding, parties decide to leave the final decision on one or more key issues to the mediator. In one case I know of, the parties were stuck on whether ERISA applied to a case over disability income benefits. If ERISA applied, the damages recoverable in court would be far less than those potentially recoverable in the bad faith suit that would be allowed under state law. The parties decided to have the mediator make the legal determination of whether ERISA applied. They agreed to two different settlement sums based on the mediator's decision on the legal issue. This was a clever way to combine self-determination (the compromise amount) with the need for a third-party neutral's decision on a pivotal legal issue; the result could not have been achieved without that finding.

The last time I was asked to preside over a "binding mediation," I studied the issue intensively, brainstormed with three excellent mediation colleagues, made the parties do the research and develop a suitable agreement, insisted on additional language that clarified that confidential communications could form the basis of the decision, and made the disclosures required of an arbitrator (just in case).

This was not a case that involved an outcome-determinative legal issue, but instead was one in which the parties had a settlement range in mind. I had a plan to avoid taking control over the solution completely out of the parties' hands. What was it? The simple, last-ditch "Mediator's Proposal."

Although mediators differ, I use this technique only when the parties ask, only when the parties are dug in, only when the parties do not want to take additional time to reconsider and return another day, and only when we have reached a point where I have a sense of a number that will "work." The mediator's proposal is not a reflection of the mediator's evaluation of the case. Instead, it reflects the mediator's assessment of the settlement point to which each party will stretch to close the deal, all while saving face when it comes to accountability.

It worked. I know many who wouldn't touch "med-arb" with a 10-foot pole. However, I believe we have much to learn from the stakeholders – including the attorneys – who want to craft a process that works. To each their own. There are many who will make the daring climb, and others who will choose a less risky approach. There are many paths to the summit.

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