

Abrams Mediation & Negotiation, Inc.



COMBINED PROCESSES

By: Jeff Abrams

INTRODUCTION

The various tools and techniques of ADR may be combined to create any powerful impetus for dispute resolution. The complexities of a given situation may require a different analysis or approach than would customarily be offered by a single ADR process. Combining ADR techniques such as mediation, arbitration, mini-trial, summary jury trial, and moderated settlement conference, when done appropriately, often leads to the resolution of a dispute. The techniques resulting from combining processes are sometimes referred to as “hybrid” processes.¹

MEDIATION COMBINED WITH OTHER PROCESSES

The common denominator of a combined process often is mediation.² As defined by statute, “mediation is a forum in which an impartial person, the mediator, facilitates communication between parties to promote reconciliation, settlement, or understanding among them.”³ The mediator has no authority to make a binding decision.

The requirement that *parties* participate in the settlement discussions is an important catalyst in the mediation process. Client involvement is essential.⁴ The party is called upon to make a settlement decision in view of the alternative (*i.e.*, continued litigation with all the attendant risks and costs). In the process, the parties may test confidential settlement positions while analyzing strengths and weaknesses of the case. Mediation is the cornerstone of nonbinding ADR processes and it can be used, standing alone or in conjunction with other

¹ See S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 245 (1985).

² For further discussion of mediation generally, see Chapter 3, *supra*.

³ TEX. CIV. PRAC. & REM. CODE ANN. § 154.023(a) (Vernon Supp. 1990).

⁴ Abrams & Abrams, *Mediation and How It Will Make Your Practice More Profitable*, 23 TEX. TRIAL LAW. F. 17 (1989).

techniques, for constructive negotiation and dispute resolution.⁵

A. MED-ARB

Med-arb is a blend of the mediation and arbitration processes.⁶ The parties typically agree that a mediator with the authority to arbitrate any unresolved issues will hear the dispute.⁷ The presence of the med-arbiter provides additional incentive for the parties to achieve their own agreement, since they know that if they fail to do so, the med-arbiter will issue a binding decision.⁸ Med-arb combines the hospitable environment of mediation with the finality of a binding agreement.⁹

The clear advantage to the med-arb process is that the parties are assured of a resolution, either through agreement or by enforced decision. The med-arbiter has the power to arbitrate any issues not successfully resolved through mediation. For that reason, med-arb has been called “mediation with muscle.”¹⁰

The principal disadvantage of the typical med-arb process lies in the fact that the parties are permitted to engage in ex parte communications with the third-party neutral and are encouraged, in confidential settings, to expose weaknesses in analysis of the dispute. In a situation where the third-party neutral has the authority to impose a binding decision, the parties may be less than candid in admitting weaknesses for fear that the med-arbiter will rule against them. The parties may feel compelled to influence the outcome of the procedure by assuming the end game to be arbitration. The adversarial atmosphere of an arbitration proceeding may interfere with the mediation process.

Many would argue that the very “changing of the hat” from mediator to arbitrator violates the cardinal principles of mediation. The Model Standards of Conduct for Mediators characterizes the process as one “based on the principle of self-determination of the parties.”¹¹ The committee that created the Model Rules rejected mediation as an evaluative process (in direct opposition to the goals and purposes of arbitration).¹² It is clear, however, that real world mediators skate on a facilitative-evaluative continuum. Therefore, a med-arb process requires, at the very least, a careful contractual understanding of the role of the neutral, the nature of communications to the neutral at various phases in the process, and a clear delineation as to when the mediation ends and the arbitration begins. Anything

⁵ *Id.*

⁶ For further discussion of arbitration generally, see Chapter 4, *supra*.

⁷ Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OHIO ST. J. DISPUTE RESOLUTION 385 (1988).

⁸ Kagel, *Combining Mediation and Arbitration*, 96 MONTHLY LAB. REV. 62 (Sept. 1973).

⁹ Henry, *supra*, note 4, at 390.

¹⁰ Kagel & Kagel, *Using Two New Arbitration Techniques*, 95 MONTHLY LAB. REV. 62 (Sept. 1973).

¹¹ Model Standards of Conduct for Mediators, Standard I (Am. Arb. Ass’n et al. 1995)

¹² John Feerick et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. Disp. Resol. 95 app. at 103 (1995).

less would impair the integrity of the process and confuse the role of the neutral as he or she relates to the applicable code of ethics (mediation, arbitration, or both).

Every participant needs to understand the hybrid process.

B. MEDIATION FOLLOWED BY BINDING ARBITRATION

Unlike the med-arb process described above, the technique of mediation followed by binding arbitration preserves the distinctive features of each process. Mediation is first employed to attempt settlement of the dispute. Even if unsuccessful, the mediator may help the parties agree upon subsidiary issues and streamline the presentation of the case for arbitration. As distinguished from the typical med-arb process, the arbitration proceeding follows the mediation with a *different* third-party neutral. The arbitrator has been insulated from private and confidential communications with the parties and he or she is free to decide the case as presented. Note that some commentators describe this type of combination of mediation and arbitration as “med-arb” as well.

Creative parties can also prescribe upper and lower limits to an arbitration award, thereby reducing their risk. In a “high-low” arbitration, the parties reach an agreement (through mediation or direct negotiation) that the final award will be no less than a certain floor and no higher than a certain ceiling. Customarily the arbitrator is not informed of these parameters. The arbitration award is increased to the minimum (if the award is less) or decreased to the maximum (if the award is more) *after* the proceeding and final award. Again, careful drafting of the terms is necessary.

C. MINI-TRIAL FOLLOWED BY MEDIATION

Mini-trial is a process whereby each counsel presents the position of his or her client, either before selected representatives for each party or before an impartial third party, to define the issues and develop a basis for realistic settlement negotiation.¹³ Following the presentations, the impartial third party may issue an advisory opinion regarding the merits of the case. The parties then meet, either with or without their attorneys, and negotiate. Thus, the focus is on reaching business solutions rather than on settling the legal issues in dispute.

Whether the moderator is a third-party neutral or the parties themselves, it is wise to have a mediator on hand to facilitate the negotiations that follow the mini-trial process. The mediator may be the third-party neutral or an independent mediator who has observed the proceedings. It is generally preferable to allow the neutral third-party moderator to act as mediator since he or she will have moderated the mini-trial process and should be familiar with the issues in dispute.

D. SUMMARY JURY TRIAL FOLLOWED BY MEDIATION

¹³ TEX. CIV. PRAC. & REM. CODE ANN. § 154.024 (Vernon Supp. 1990). For further discussion of mini-trial, *see* Chapter 6, *supra*.

A summary jury trial is a process in which the parties and their counsel present their respective positions before a selected number of jurors.¹⁴ These jurors then deliberate and render an advisory, nonbinding opinion on questions of liability or damages or both.¹⁵ As in the mini-trial, the parties will make abbreviated presentations. This process gives the parties an opportunity to see how a jury might view their case.

The jurors typically are not informed of the advisory nature of the process until after rendition of the verdict. During deliberations, a “hidden camera” may be used to record the thought processes of the jury. After the parties have an opportunity to talk with the jury and discuss the case, settlement negotiations should begin.

A mediation session may be scheduled to follow the advisory opinion of the jury. Since the parties will have the benefit of an advisory ruling, the mediator may then facilitate the negotiations based upon the evidence presented and the objective assessment of impartial jurors.

E. MODERATED SETTLEMENT CONFERENCE FOLLOWED BY MEDIATION

Moderated settlement conference is a forum for case evaluation and realistic settlement negotiations.¹⁶ The parties and their counsel present the parties' positions before a panel of neutral moderators, who generally are three experienced attorneys. After the conference, the panel of moderators gives the parties an evaluation of the strengths and weaknesses of their case. The parties may then use this evaluation in further settlement negotiations.

As with the other processes, mediation may be combined with moderated settlement conference to allow for immediate discussions in the context of the conference. The mediator may be one of the moderators or an independent third party who has observed the proceeding.

ARBITRATION COMBINED WITH OTHER PROCESSES

Sometimes parties to a dispute know that they *need* a resolution but feel that someone else (judge, jury, arbitrator) must decide the outcome. They may still want to negotiate but fear that time may be wasted if the negotiation is not successful. When this occurs, the use of arbitration, in combination with other processes, can help provide the certainty of a final decision while retaining the ability to negotiate a consensual agreement.

A. ARB-MED

The flip side of med-arb is arb-med. Here the parties begin with a traditional

¹⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 154.026 (Vernon Supp. 1990). For further discussion of summary jury trial, *see* Chapter 5, *supra*.

¹⁵ Abrams & Abrams, *supra*, note 4, at 18.

¹⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 154.025 (Vernon Supp. 1990). For further discussion of moderated settlement conference, *see* Chapter 7, *supra*.

arbitration process. Evidence is presented and the arbitrator prepares a written binding award that is not disclosed to the parties. The parties then mediate and if an agreement is reached, the arbitration award is destroyed. On the other hand, if negotiations in mediation are not successful in resolving in dispute, the arbitration award is announced and the parties are bound by that decision. The parties must therefore decide whether they want to control the outcome by reaching a settlement on their own terms or be bound by the unknown solution “in the sealed envelope.”

The arb-med process can be used with the same neutral acting in both capacities, assuming full disclosure, understanding of the roles, and contractual commitment to the process. Alternatively, another person can be asked to mediate in the shadow of the arbitration award. Arb-med is an ideal process in a situation where the parties mutually recognize the necessity for a resolution. There is little risk in trying to settle the dispute in mediation after arbitration but before the award is announced. It is akin to settling the case while the jury is still out.

B. NON-BINDING ARB-MED

In situations where nonbinding arbitration is initially employed and one or more of the parties is dissatisfied with the arbitrator's award, it may be useful to follow with a mediation session. This technique takes into account the fact that parties are more likely to be satisfied with, and abide by, decisions they themselves make. After an award is made in a nonbinding arbitration, the parties may be in a better position to negotiate, and a mediator could assist in and facilitate these negotiations.

NEUTRAL FACT-FINDING COMBINED WITH OTHER PROCESSES

Neutral fact-finding is an informal process in which a neutral third party (generally an expert) investigates the questions at issue and either submits a report or testifies in court.¹⁷ The parties themselves may arrange to have a neutral fact-finder, or the court may order one pursuant to Federal Rule of Evidence 706 or a relevant state statute.¹⁸ The process is especially useful in complex, technical cases.

While the traditional use of neutral fact-finding is in conjunction with litigation, it can be combined with ADR processes as well. For example, in the collective bargaining arena, the fact-finding process is generally followed by mediation.¹⁹ The sequence may also be reversed, and an unsuccessful mediation may be followed by the appointment of a fact-finder, who hears evidence from the parties and makes recommendations for resolving the issues in a dispute.²⁰ In

¹⁷ B. PAULSON, ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMER 3 (ABA Standing Committee on Dispute Resolution 1987); *see* Chapter 2, § 2.3, *supra*.

¹⁸ For a discussion of Rule 706, *see* S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 1, at 293–298 (1985). For a discussion of state statutes, *see* J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 606–607 (1989).

¹⁹ L. KANOWITZ, ALTERNATIVE DISPUTE RESOLUTION 112 (1986).

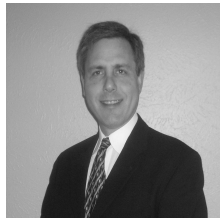
²⁰ MURRAY, RAU & SHERMAN, *supra* note 16, at 607.

some states, both fact-finding and mediation are imposed as preliminary steps before mandatory arbitration.²¹

Neutral fact-finding may also be employed prior to a moderated settlement conference. Although the MSC panel members are to evaluate the case on both a factual and legal basis, frequently time is inadequate to allow such findings, particularly in complex cases. In some such matters, particularly where there is major factual disagreement, the panel has no choice but to give their evaluation couched in terms of “if it is shown . . .” But if the fact-finding is completed in advance of the conference, the moderators are able to be more certain and specific in their evaluation. This could hold true for other ADR processes as well.

NEGOTIATION AND OTHER PROCESSES

Negotiation is at the center of all alternative dispute resolution. The ideal result of an ADR process is a negotiated agreement. “Litogotiation,”²² or the process of negotiation in the shadow of a lawsuit, is how most settlements are reached. Statistically a fraction of civil lawsuits that are filed reach the trial phase; the vast majority of cases are settled. Truth be told, we are negotiators! Negotiation in the context of an ADR device will generally assure a more structured and methodical approach with full client participation. Facilitated negotiation is mediation and part of mini-trial, med-arb, and arb-med. The moderated settlement conference, summary jury trial and nonbinding arbitration are designed to be a prelude to successful bargaining and negotiation between the parties. By using an ADR device to enhance traditional negotiation, the attorney can often achieve a more satisfactory result for the client and the client, having fully participated in the process and the outcome, is likely to have a higher degree of satisfaction.



Jeff Abrams has been an attorney for over twenty-two years, and an active mediator since 1986. Jeff has successfully mediated for thousands of parties and specializes in securities cases, commercial litigation, employment and business matters. He is a NASD arbitrator (chair) and is familiar with the psychology of people and markets. He was a pioneer in the mediation field, serving on the legislative task force that drafted the landmark Texas ADR law. He has been training attorneys, judges and executives in communication and negotiation, conflict management, mediation skills, and dispute systems design since 1986. Before becoming a mediator, he worked as a trial lawyer handling complex business litigation. He served as founding Editor of the ADR Report. Jeff is a frequent and popular speaker on ADR and workplace issues. He is a member of the Oregon and Texas Bars. Jeff was also President and CEO of a national fitness/trucking company. His substantial expertise in both business and law enhances his

²¹ *Id.*

²² Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J. L. & Soc'y 1 (1985).

mediation skill set and enables him to resolve even the most difficult and challenging cases. www.abramsmediation.com

For a complete CV on Jeff Abrams, or general information about Abrams Mediation and Negotiation, Inc., please visit our website at www.abramsmediation.com.