

# The Rising Utilization of Hybrid Dispute Resolution Procedures and Potential Ethical Concerns

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**A**s commercial litigators face mounting pressure to resolve disputes efficiently and expeditiously, hybrid dispute resolution mechanisms have become increasingly prevalent. Many commercial contracts now contain what are commonly referred to as “step clauses,” requiring parties to first attempt mediation and then proceed to arbitration if mediation proves unsuccessful. Among the various hybrid procedures available is the option to engage in processes commonly referred to as *arb-med* or *med-arb*. In these structures, the parties may begin in arbitration and later pivot to mediation, or vice versa.

At first glance, these arrangements may appear uncontroversial. However, depending upon the order in which the process is structured, significant ethical concerns and challenges may arise, particularly when the same individual is tasked with serving as the neutral in both roles. This hybrid model, particularly in its “pure” form where the same neutral mediates and later arbitrates, rests on a structural flaw. Once a neutral mediates a dispute, that neutral cannot later serve as arbitrator without compromising confidentiality, impartiality, and due process. No amount of advance waiver cures that defect.

To fully understand the issue, one must first examine the distinguishing features of each process. In mediation, parties are encouraged to “bare all” to the mediator in order to maximize the effectiveness



**An illustration of a hybrid worker at home and in the office.**

of the process. This may include sharing litigation strategy, settlement positions, assessments of the strengths and weaknesses of the case, business or reputational concerns, and other confidential information that would never be presented openly in court.

The disclosure of this type of information enables the mediator to function in part as a case evaluator, assisting the parties in exploring their BATNA (best alternative to a negotiated agreement) and WATNA (worst alternative to a negotiated agreement). The core of the mediation process depends upon the

confidentiality of information shared with the mediator and the mediator's candor with the parties.

During mediation, the neutral engages in private *ex parte* communications with all parties, including both clients and counsel. The mediator becomes the repository of information, sharing only what the parties expressly authorize. At no point does the mediator decide the dispute. Even when a mediator's proposal is offered, it is not necessarily a formal case evaluation, though evaluative components may be present.

Arbitration, by contrast, functions much more like a judicial proceeding. While the arbitrator is neutral in the sense of having no affiliation with either side, the arbitrator is ultimately charged with making a determination. At some point, the arbitrator must assess the evidence, apply the governing law, and render a decision.

Just as in court, the arbitrator must remain insulated from confidential communications, private party strategies, or any information not formally presented as evidence. Arbitrators cannot engage in *ex parte* communications with the parties, the very practice that forms the cornerstone of mediation, and they do not engage in private interactions with clients outside the formal proceedings.

This raises a fundamental question: how can the same neutral perform both roles without compromising the integrity of the process? Can the neutral begin as a mediator and later become an arbitrator, or can an arbitrator transition into the role of mediator for the same dispute?

Although some practitioners believe this is possible, the answer largely depends on the sequence of the process. Otherwise, the parties risk entering a slippery and ethically fraught terrain.

If the parties begin in arbitration and then decide to attempt mediation using the same neutral, the arrangement may initially appear unobjectionable. At the outset, the arbitrator is shielded from confidential strategies and private disclosures. In essence, the neutral has not yet "seen behind the curtain." If the parties subsequently decide to attempt mediation and voluntarily share confidential information, the neutral will then gain insight into those matters.

The problem arises if the mediation fails and the parties attempt to return to arbitration with the same

neutral. The same concern exists when the process begins with mediation and then transitions to arbitration with the same individual. In either scenario, the neutral is no longer truly neutral. Having served as mediator, the neutral possesses information not in evidence, not subject to cross-examination, and potentially not equally disclosed to both parties. The neutral can no longer serve as a true fact-finder without compromising the adjudicative role.

Parties would never present to an arbitrator the same information they freely disclose to a mediator. When the mediator becomes the arbitrator, the neutral now possesses confidential information unavailable to one side in the formal proceeding. This may include settlement flexibility, perceived weaknesses in a party's case, emotional or reputational pressures, and strategic considerations. Such information cannot simply be "unlearned."

In arbitration, the neutral evaluates evidence solely for purposes of rendering a decision; the arbitrator does not share views of the case to assist parties in reaching a settlement figure. Arbitration requires the decision-maker to remain fully impartial and disengaged from private negotiations. Decisions must be based exclusively on the evidentiary record. An arbitrator typically renders a decision unaware of rejected settlement proposals, party bottom lines, or confidential admissions regarding weaknesses in a case. Even the most conscientious decision-makers cannot reliably compartmentalize knowledge of this nature and then neutrally assess the evidence.

Some commentators have suggested that parties may waive any perceived conflict through advance agreement. However, such waivers provide limited protection. If the arbitration proceeds with the same neutral after an unsuccessful mediation and one side ultimately loses, as inevitably happens, there is a substantial risk that the losing party will suspect that the decision was influenced by confidential disclosures. Under New York law, evident partiality remains grounds for vacatur. That risk cannot be fully eliminated through contractual drafting. Indeed, the process itself may become vulnerable to challenge, thereby undermining the adjudicative role of the neutral.

Moreover, the concept of informed consent is often illusory. Parties frequently fail to appreciate

the psychological impact that confidential disclosures may have on subsequent decision-making.

Even experienced lawyers may underestimate how knowledge of settlement ranges or strategic weaknesses can shape a final award. Consent to a structural conflict does not eliminate the conflict itself.

Due process concerns also remain, even with waiver language. A party cannot meaningfully rebut information privately disclosed by the opposing side during mediation. The evidentiary boundaries of the arbitration effectively dissolve, creating a record that cannot be properly tested. The resulting award may therefore be vulnerable to challenge based on evident partiality or procedural unfairness. The confidentiality rules governing mediation and arbitration exist precisely to preserve the integrity of each process.

One might ask why this is even a concern when the solution appears simple: change the neutral. While that solution seems straightforward, there remains pressure in some cases to maintain the same neutral throughout the process. In part, this stems from economic considerations. A neutral who is already familiar with the facts and nuances of the case may reduce costs and increase efficiency. The parties may also become comfortable with the neutral and confident in his or her understanding of the dispute.

More cynically, some parties may believe they have influenced the neutral's perception of their case and therefore expect a favorable outcome. For that very reason, however, the practice is fraught with risk. Any resulting award may be vulnerable to challenge based on claims of evident partiality or procedural unfairness.

Courts generally view adjudicative processes that blur the line between *ex parte* communications and decision-making authority with skepticism. Ethical codes typically discourage *ex parte* communications in arbitration, while mediation rules often prohibit mediators from reporting to decision-makers. Med-arb and arb-med constructs risk collapsing these distinctions. Attempting to contract around such fundamental procedural protections through waiver provisions is simply poor risk management.

Some proponents argue that this hybrid process is no different from situations in which a judge conducts a settlement conference and then presides over the trial. However, the analogy is imperfect. Judicial settlement conferences have themselves been criticized for creating concerns about impartiality. Lawyers often report discomfort with judges who both encourage settlement and later adjudicate the dispute.

Additionally, not all courts employ this model, and even when they do, judges rarely obtain the same depth of confidential information that mediators receive. Court proceedings also operate within well-defined procedural frameworks, including discovery rules, evidentiary standards, appellate review, and public accountability. These safeguards mitigate many of the risks inherent in private dispute resolution. By contrast, private med-arb proceedings often compress mediation and arbitration into a single continuum, sometimes without a clearly defined evidentiary hearing. This increases, not reduces, the risk of *vacatur*.

Does this mean that hybrid processes should be rejected entirely? Not necessarily. A more balanced approach can preserve the benefits of efficiency while protecting the integrity of the process.

One viable structure is to begin with arbitration and then attempt mediation with the same neutral, provided that the parties do not revert to arbitration before that neutral if mediation fails. If the dispute must return to arbitration, a different arbitrator should be appointed. This approach allows the parties to benefit from a neutral who understands the case history and dynamics while preserving the impartiality required for adjudication.

By employing separate neutrals at the adjudicative stage, parties can still achieve the efficiency associated with hybrid dispute resolution while avoiding the structural conflicts that arise when mediation and arbitration roles become intertwined.

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