Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes

I. INTRODUCTION

The National Labor Relations Act[1] was promulgated to encourage stability in the field of industrial labor relations. To aid in accomplishing this goal, the Supreme Court, in a series of cases collectively known as the *Steelworkers Trilogy*,[2] outlined a policy favoring settlement of labor disputes with grievance procedures established through collective bargaining agreements.[3] The collective bargaining agreement has since become the most powerful means through which management and labor determine their rights and duties with respect to their employment relationship.

The primary focus of the collective bargaining agreement is to establish a method by which disputes arising out of the employment relationship are settled. "Grievance handling mechanisms have been described as the heart of union-management contracts because their effectiveness largely determines how well parties adhere to the labor agreement."[4] Consequently, a variety of grievance procedures have been developed as management and labor representatives strive to create workable, effective solutions to the problem of dispute settlement in labor relations.

There are five traditional methods of dispute resolution in the labor law arena: negotiation,[5] mediation,[6] arbitration,[7] strike,[8] and lockout.[9]

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1. 29 U.S.C. §§ 151-69 (1982).

2. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

3. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

4. J. MARTIN, T. KEAVENY & R. ALLEN, READINGS AND CASES IN LABOR RELATIONS AND COLLECTIVE BARGAINING 245 (1985).

5. "[C]ommunication for the purpose of persuasion." S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 19 (1985) [hereinafter DISPUTE RESOLUTION].

6. "The act of a third person in intermediating between two contending parties with a view to persuading them to adjust or settle their dispute." BLACK'S LAW DICTIONARY 885 (5th ed. 1979).

7. "The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard." *Id.* at 96.

8. "The act of quitting work by a body of workers for the purpose of coercing their employer to accede to some demand they have made upon him and which he has refused." *Id.* at 1275.

9. "Cessation of furnishing of work to employees or withholding work from them in effort to get for employer more desirable terms." *Id.* at 848.

However, the faults of each of these methods have led labor relations experts to promote various alternatives to these procedures.[10] Mediation-arbitration (hereinafter: med-arb) is one such alternative. Med-arb is a hybrid process of dispute resolution combining elements of both mediation and arbitration in an effort to maximize the positive effects of both. Briefly, the parties to a dispute agree that the dispute will be heard by a mediator having the authority to arbitrate any unresolved issues.[11] The med-arbiter thus has the power to determine a binding settlement. This element alone increases the parties' incentive to determine their own agreement through mediation.

This Note will explore the feasibility of med-arb in the labor dispute context. An initial description of traditional methods of dispute resolution in the labor field, including a discussion of the pros and cons of each method, is necessary to illustrate the flaws which med-arb seeks to cure. Next, med-arb, as it has been used to date, will be discussed and analyzed in the context of its effectiveness in the labor arena. Finally, this Note will examine critics' questions of the feasibility and constitutionality of med-arb. This Note concludes that despite these challenges, med-arb is a highly effective and desireable method of resolving certain types of labor disputes.

II. TRADITIONAL METHODS OF LABOR DISPUTE RESOLUTION

As noted, there are five traditional methods through which parties to a labor dispute seek to resolve their differences.[12] While negotiation, mediation, and arbitration are discussed independently below, strikes and lockouts are discussed where appropriate in those sections.

A. *Negotiation*

Negotiation is the most widely used method of dispute resolution,[13] and is typically the first step taken in resolving labor disputes. Parties generally find negotiation initially advantageous as it involves only the disputing parties. No third party is brought in to coerce an agreement. The parties are free to propose settlements and "exchange promises [and make binding] commitments"[14] to reach a mutually satisfactory resolution. If the parties reach an agreement, the agreement is enforce-

10. *See generally* DISPUTE RESOLUTION, *supra* note 5, at 245-309.

11. M. CARRELL & C. HEAVRIN, COLLECTIVE BARGAINING AND LABOR RELATIONS 149 (1985).

12. *See supra* notes 5-9 and accompanying text.

13. DISPUTE RESOLUTION, *supra* note 5, at 7.

14. T. COLOSI & A. BERKELEY, COLLECTIVE BARGAINING: HOW IT WORKS AND WHY 3 (1986).

able as a contract. The key to negotiation, however, is compromise, and because labor relations has a built-in tension between management and labor, the parties to a dispute may find it difficult to reach an adequate settlement through negotiation.

Negotiations fail when the parties bargain to impasse. At this point, strikes or lockouts are traditionally used as economic weapons to force the other party to change its position.[15] The destructive force of these weapons, however, leads parties to seek the assistance of a neutral third party, familiar with the industry and knowledgeable in the settlement of labor disputes.

B. *Mediation*

The least intrusive of third-party neutrals is the mediator.[16] The mediator's primary function is to help the parties negotiate their own settlement. While the mediator has no power to impose a binding agreement, mediation has been found to assist in resolving disputes by, "establishing a constructive ambience for negotiation, . . . collecting and judiciously communicating selected confidential material, . . . seeking joint gains, . . . keeping negotiations going, . . . [and] articulating the rationale for agreement."[17] Furthermore, settlements reached through mediation are typically well suited to meet the parties' needs because the parties themselves have established the terms of the agreement. By attempting to guide the parties, the mediator, unlike a typical adjudicator, is privy to any and all information which the parties wish to disclose. Additionally, the mediator is free to confer privately with the parties, and may use the information discovered through such a conference to formulate a solution acceptable to both parties.

The strength of mediation, therefore, lies in its flexibility. For this reason, it has been the most successful method of solving labor disputes.[18] Consequently, only after mediation has failed should other methods be considered.

There are, however, several major disadvantages to mediation. First, the mediator has no power to impose a binding agreement on the parties. If a settlement is reached, it is enforceable only as a contract. While a contract is binding, it does not have the force of a judicial decree. Consequently, the parties may feel less compelled to adhere to the terms of the agreement than they would were a judge or arbitrator to issue a binding agreement. A second problem with mediation is that the

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15. *See supra* notes 8-9 and accompanying text.
16. DISPUTE RESOLUTION, *supra* note 5, at 91.
17. *Id.* (quoting H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982)).
18. H. EDWARDS, R. CLARK & C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 647 (3d ed. 1985) [hereinafter LABOR RELATIONS LAW].

mediator has no power to prevent a strike should mediation fail. A strike in any industry can have far-reaching, detrimental effects on an entire community—effects which the mediation process is powerless to prevent. Thus, while mediation is widely and successfully used in labor relations, its effectiveness does not extend beyond its ability to create an atmosphere amenable to successful negotiations between management and labor.

C. *Arbitration*

Arbitration is a second method of dispute resolution falling under the third-party intervention category. Arbitration, like mediation, is used in resolving labor disputes after internal grievance procedures fail (namely, negotiation). Unlike mediation, however, arbitration is an adjudicatory process "in which disputants present proofs and arguments to a neutral third party who has the power to hand down a binding decision, generally based on objective standards."[19] Labor arbitration can be divided into two distinct categories: grievance arbitration and interest or impasse arbitration.[20]

Grievance arbitration, or arbitration of rights, involves an arbitrator's interpretation of the parties' rights under an existing collective bargaining agreement. To determine the parties' rights under the employment contract, the arbitrator must determine the intent of the parties as it existed when they entered into the contract.[21] It is for this reason that grievance arbitration tends to resemble the typical adjudicatory process. The arbitration hearing is conducted much like a trial, and as such is the most formal of the procedures available for settling labor disputes, without resorting to formal litigation.

Impasse or interest arbitration is arbitration entered into upon the failure of the parties to negotiate the terms of a new collective bargaining agreement. It is, therefore, used as an alternative to the threat of strikes and lockouts in determining the contract rights of the parties.[22] While interest arbitration is also an adjudicatory process, negotiating is more central to the peaceful resolution of an interest dispute than are the procedural requirements of grievance arbitration. This is because interest arbitration is the negotiating of the terms of the contract/collective bargaining agreement and grievance arbitration is a process for determining the rights of the parties under a previously established contract.[23]

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19. DISPUTE RESOLUTION, *supra* note 5, at 149.
20. *See* LABOR RELATIONS LAW, *supra* note 18, at 633.
21. J. MARTIN, T. KEAVENY & R. ALLEN, *supra* note 4, at 247-48.
22. *See* LABOR RELATIONS LAW, *supra* note 18, at 633.
23. For purposes of this Note, interest arbitration will be the basis of comparison in discussing the effectiveness of med-arb in labor dispute resolution.

While arbitration is a somewhat formal method of dispute resolution, it is not as rigid as traditional courtroom adjudication. Although rules of procedure and evidence are germane, strict adherence to these rules is not required unless the parties so stipulate in a pre-arbitration agreement.[24] Therefore, although arbitration is formal because the parties submit evidence and arguments in a judicial-like proceeding, it is less formal than traditional adjudication because the procedural rules and substantive law may be set by the parties.[25]

The major advantage of arbitration over mediation is that an arbitrator's decision is binding on the parties and enforceable at law. The decision, therefore, is subject to review only on limited grounds.[26] Labor arbitration has, however, been widely criticized as being slow, expensive, and formalistic.[27] The dual functions of arbitration—to avoid strikes and to provide a satisfactory alternative to litigation[28]—are, therefore, overshadowed by the realities at hand.

In sum, mediation and arbitration are effective, widely employed methods of solving labor disputes through third party intervention. Their respective disadvantages have, however, led commentators and practitioners to promote and utilize new methods of resolving labor disputes.[29]

III. MED-ARB

Med-arb, as stated above, is a dispute resolution process in which the parties agree that the dispute will be heard by a mediator with the authority to arbitrate any unresolved issues.[30] Med-arb was developed in response to the demand that major labor disputes be resolved through "compulsory arbitration,"[31] rather than through the use of strikes and lockouts as disruptive and expensive economic measures. Hence, med-

24. D. ROTHSCHILD, L. MERRIFIELD & H. EDWARDS, COLLECTIVE BARGAINING AND LABOR ARBITRATION 213 (2d ed. 1979).

25. DISPUTE RESOLUTION, *supra* note 5, at 8.

26. The *Steelworkers Trilogy* cases established that interpretation of the collective bargaining agreement is a question for the arbitrator, not for the courts (United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)), and that judicial review of arbitral awards should be reserved for cases where the arbitrator has exceeded his powers. *See generally* Yedwab, *The "Essence" of the Labor Arbitration Process: A New Focus*, 39 ARB. J. 28 (Dec. 1984). The enforceability of a decision reached through mediation is subject to the general principles of contract law and is thus open to attack through such doctrines as fraud, or misunderstanding.

27. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U.L. REV. 270 (1982).

28. *Id.* at 272.

29. *See generally* DISPUTE RESOLUTION, *supra* note 5.

30. *See supra* note 11 and accompanying text.

31. Kagel & Kagel, *Using Two New Arbitration Techniques*, 95 MONTHLY LAB. REV. 11, 12 (Nov. 1972).

arb focuses on negotiations entered into voluntarily by parties who have forfeited their right to strike or lock-out.[32] Furthermore, in agreeing to participate in med-arb, the parties give up the right to ratify the final settlement. According to the Kagel model,[33] because med-arb is entered into voluntarily by the parties,

> it pays strict adherence to the axiom that the best agreement is an agreement which the parties themselves reach . . . . The presence of the med-arbiter provides the incentive to the parties to achieve their own agreement, since they know that if they fail to do so, the med-arbiter will through his decision [sic] make the agreement.[34]

Med-arb thus cures some of the problems inherent in both mediation and arbitration by combining the hospitable environment of mediation with the finality of a binding agreement.

A. *Advantages Over Mediation*

As noted *supra*, the primary disadvantage of mediation is the mediator's lack of authority to create a final and binding settlement. During mediation, the mediator may suggest a settlement proposal, but any final agreement is the product of compromise between the parties. The mediator helps each party evaluate its options against the proposals of the other party, but the mediator has no "muscle"[35] in the role as a third-party facilitator. The med-arbiter, however, has the power to arbitrate any issues not successfully resolved through mediation. Ironically, it is this fact—the med-arbiter's authority to arbitrate those issues which cannot be mediated—that decreases the probability that any issues will actually be decided by the med-arbiter in the role as an arbitrator. The med-arbiter's presence, and the threat of an arbitrated decision create tremendous incentive for the parties to successfully mediate their dispute.[36] Furthermore, because the parties agree in advance to accept any arbitrated decisions as binding (as in traditional arbitration), med-arb has been called "mediation with muscle."[37] The final product of med-arb, whether resulting entirely from mediation, or both mediation and arbitration, becomes the entire settlement which is binding, nonratifiable,

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32. *Id.*

33. Sam Kagel, a San Francisco attorney/arbitrator, is credited as the first to develop med-arb. He employed it initially to settle a 1970 San Francisco nurses' strike. *See generally* Kagel, *Combining Mediation and Arbitration*, 96 MONTHLY LAB. REV. 62 (Sept. 1973).

34. DISPUTE RESOLUTION, *supra* note 5, at 265.

35. Kagel & Kagel, *supra* note 31, at 11.

36. Kagel, *supra* note 33, at 62.

37. DISPUTE RESOLUTION, *supra* note 5, at 265.

and enforceable at law.[38] Med-arb thus effectively eliminates a major weakness of mediation.

A second disadvantage of mediation, which med-arb eliminates, is the mediator's inability to prevent a strike upon the failure of mediation. A critical prerequisite to a med-arb is an advance agreement under which the parties agree to arbitrate any issues which cannot be successfully mediated. Such advance agreements have been entered into as late in the process as after a strike has already begun[39] and as early as before any dispute has been anticipated.[40] This agreement, therefore, gives the med-arbiter the power to determine a binding agreement and forces the parties to forfeit the right to strike or lockout. If the strike has already begun, the advance agreement forces the striking employees to return to work before the med-arb can begin.[41] Under the National Labor Relations Act (NLRA),[42] employees have the right to engage in concerted activity "for the purpose of collective bargaining or other mutual aid or protection."[43] Inherent in this provision is the right to strike for greater benefits or improved working conditions.[44] Furthermore, the right of an employer to use a lockout to promote its bargaining position is also protected by the Act. Hence, strikes and lockouts have traditionally been the most effective albeit drastic means of promoting each parties' bargaining position. It may be questioned whether the forfeiture of these rights is desirable, particularly in light of the Act's intent to give employees a statutory right to strike. However, the inherently destructive nature of both the strike and the lockout must be kept in mind. These tactics injure not only employees and their employers, but often have a devasting effect on the community.[45] It is therefore to the benefit of both labor and management, when agreeing to med-arb, to forfeit these rights and concentrate on the resolution of the issues in dispute.

Med-arb is particularly well-suited to resolving contract-negotiation disputes (where interest arbitration has traditionally been used) in the

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38. *See supra* note 25.

39. *See generally* Kagel & Kagel, *supra* note 31, at 12 (med-arb used to settle 1970 San Francisco nurses' strike).

40. *Id.*

41. *Id.* at 13.

42. 29 U.S.C. §§ 151-69 (1982).

43. *Id.* at § 157.

44. NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962).

45. This problem was evidenced by the 1986-87 COTA bus drivers strike in Columbus, Ohio. The inability of citizens to use public transportation affected those citizens' ability to work, and decreased the volume of business of local merchants. In any other city in which the population relies more heavily on public transportation (e.g. New York City), such a strike could virtually paralyze the city.

public sector where strikes are often statutorily proscribed.[46] The traditional justification for this prohibition is summed up in a statement made by Franklin D. Roosevelt in 1937: "A strike of public employees manifests nothing less than an attempt . . . to prevent or obstruct the operations of government until their demands are satisfied. Such actions toward the paralysis of government by those who have sworn to support it is [sic] unthinkable and intolerable."[47] Thus, under the NLRA, federal, state, and local governments are not considered employers;[48] government employees are not considered employees;[49] and the rights and duties granted by the NLRA do not apply to government employees. Consequently, any and all rights which government employees submit for collective bargaining are determined by federal, state, and local employment relations acts. These acts often include provisions forbidding government employees to strike. Using med-arb to settle interest disputes in the public sector would thus help to equalize the bargaining positions of the parties, which are lost through provisions forbidding strikes.

An excellent example of med-arb's effectiveness in settling contract negotiation disputes in the public sector is its role in settling a 1981 bargaining dispute between the Social Security Administration (SSA) and the American Federation of Government Employees (AFGE).[50] Under the Civil Service Reform Act of 1978,[51] an impasse in contract negotiations may, upon the request of either party, be referred to the Federal Service Impasses Panel (FSIP) which may "take whatever action is necessary"[52] to resolve the impasse. The SSA-AFGE impasse marked the first instance in which the FSIP used med-arb to resolve a contract dispute.

The successful resolution of this dispute through med-arb was the result of several factors.[53] First, federal employees did not have the option to strike.[54] They were, therefore, more open and accepting of alternative forms of dispute resolution and were undoubtably looking for the method which would give them the strongest voice. Second, the med-arb was voluntarily adopted by both labor and management, although initially it was requested by management and rejected by the

46. The following states give public employees a limited right to strike: Alaska, Hawaii, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin.

47. R. WOODWORTH & R. PETERSON, COLLECTIVE NEGOTIATION FOR PUBLIC AND PROFESSIONAL EMPLOYEES 32 (1969).

48. National Labor Relations Act, 29 U.S.C. § 152(2) (1982).

49. *Id.* at § 152(3).

50. *See generally* Allred, *Med-Arb and the Resolution of the SSA-AFGE Bargaining Impasse: A Case Study*, 39 ARB. J. 46 (June 1984).

51. 5 U.S.C. §§ 552-8913 (1982).

52. *Id.* at § 7119(c)(5)(B).

53. *See generally* Allred, *supra* note 50, at 46.

54. 5 U.S.C. § 7116(b)(7)(A) (1982).

union. This criterion of voluntary acceptance is the cornerstone of any successful med-arb, and cannot be overemphasized. A third factor was the lack of formal ground rules. In this med-arb, the med-arbiter "made it clear to both parties that he was going to call the shots as he felt they should be called at the time the call was necessary."[55]
Fourth, "criteria to be applied in evaluating proposals, was quickly established and understood by the parties."[56] That criteria in this particular med-arb was "that managemant had to be able to control the work force, while recognizing certain institutional rights of the union."[57] A fifth factor was the requirement that the parties view med-arb "as an extention of negotiations with arbitration as a matter of last resort."[58] Because the issues of this med-arb were resolved at the mediation stage, clearly the parties feared future arbitration and were more willing to compromise.

The success of the SSA-AFGE med-arb demonstrates that med-arb can be a very effective alternative to the resolution of interest disputes in the public sector. However, the presence of the controlling factors, which made this med-arb a success, narrows the applicability of med-arb.

B. *Advantages Over Arbitration*

Med-arb has also been found to effectively eliminate disadvantages commonly associated with arbitration. As noted previously, arbitration is typically criticized as being slow,[59] expensive,[60] and formalistic. By eliminating the judicial nature of arbitration, med-arb effectively reduces costs and resolves grievances in one to seven days, depending on the number of issues to be resolved.[61] Procedurally, med-arb is much less formal than arbitration. No records or transcripts are taken, and any issues which the parties deem relevant are open for discussion and if

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55. Allred, *supra* note 50, at 52.
56. *Id.*
57. *Id., quoting* Jerry Ross, the med-arbiter in this med-arb.
58. *Id.*
59. The cost of a one day arbitration hearing can be as high as $1000 per party. Expenses associated with most arbitration hearings today include: The arbitrator's daily fee, which normally varies between $150 and $225; the arbitrator's travel time and study time, normally paid at the daily rate; the fees for the parties' attorneys. . .; wage payments to plant personnel who take part in the proceedings; rental of a hearing room; payment to the American Arbitration Association for furnishing the parties a panel of arbitrators if the association is used; and stenographic transcription costs, if a record of the hearing is desired.

Usery, *Some Attempts to Reduce Arbitration Costs and Delays*, 95 MONTHLY LAB. REV. 3 (Nov. 1972). Note that these figures are from 1972 and are likely to be higher today.

60. *Id.* The average time from grievance date to receipt of an arbitration award is over 200 days.
61. Kagel, *supra* note 33, at 63.

necessary, decision.[62] Typically, during med-arb negotiations, the parties' are brought closer together through offers and counteroffers, so that if an issue does proceed to arbitration, the differences between the positions are often minimal.

Finally, under med-arb, the adversarial nature of arbitration is said to be substantially decreased[63] and the hearings are more akin to traditional negotiations. According to Sam Kagel,

> [i]n carrying out the functions of med-arb, you have in effect negotiating meetings. We don't have records, we don't take a transcript, and we take up each issue whatever it might be . . . . Most interest problems are settled by direct negotiations and since both parties approach the problem with complete honesty, they come within the area of settlement.[64]

Furthermore, because all issues resolved through mediation become part of the final, binding agreement enforceable at law, the parties have a tremendous incentive to keep their demands honest. The med-arbiter may pull a party aside to examine its evidence ("which it has prepared in the event they will go to arbitration")[65] and evaluate the correctness of its position. If the med-arbiter finds that a party falsely represented its position, the med-arbiter has the power to arbitrate the issue at hand, and is likely to hold for the other party. Consequently, med-arb "really does keep [the parties] honest."[66] The result of this honesty is that, typically, during the med-arb negotiations, the parties' positions are brought closer together.[67] This, in turn, allows the med-arbiter, in the role as an arbitrator, to formulate a decision that is likely to accomodate the needs of both parties.

C. *Disadvantages*

Med-arb is not a panacea for the resolution of all labor disputes. As with any other method of dispute resolution, med-arb is effective only in the presence of certain conditions. Various commentators have discussed the factors necessary for an effective med-arb,[68] and there is some consensus to those requirements.

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62. *Id.* at 62.
63. *Id.*
64. *Id.*
65. Stern, *The Mediation of Interest Disputes by Arbitrators Under the Wisconsin Med-Arb Law for Local Government Employees*, 39 ARB. J. 41, 45 (June 1984).
66. Kagel, *supra* note 33, at 62.
67. *Id.*
68. *See generally* Allred, *supra* note 50, (factors critical to effect med-arb: the no strike option; voluntary adoption; ground rules; established criteria for discussions; med-arb as an extension of bargaining; education of constituencies; and constraints on the mediator). *See also* J. FOLBERG & A. TAYLOR, A COMPREHENSIVE GUIDE TO RESOLVING

Of key importance is voluntariness. If parties do not enter a med-arb voluntarily, chances of a successful mediation of all issues are greatly diminished. Thus, where med-arb is statutorily mandated, the results have not been as promising. This situation is illustrated by Wisconsin's Municipal Employment Relations Act,[69] which specifically provided for med-arb of municipal employee disputes involving teachers and "a wide variety of blue and white-collar employees of cities and counties."[70] Under the Wisconsin law, the Wisconsin Employment Relations Commission (WERC) had the authority to appoint a mediator-arbitrator upon the failure of the parties to modify their final offers. Once the mediator-arbitrator determined that mediation had failed, a choice between the two positions was necessary in making a final determination.[71] Therefore, under the Wisconsin law unless the parties agreed otherwise, the mediator-arbitrator was not free to fashion a settlement, but had to choose between the parties' final offers. In this context, the Wisconsin provision mandating med-arb was different from the process used in the Kagel model.

The Wisconsin system for solving interest disputes in the public sector had varied success. Between 1978 and July 31, 1983, 703 cases were settled through the use of med-arb. Of those, only about fifty percent were resolved at the mediation stage.[72] The remainder went into final offer arbitration. Some of the reasons for the failure of med-arb to resolve issues at mediation are as follows: "one side was supremely confident that it had a winner; [t]he issue involved something that [was] regarded as a basic philosophical point [under which] one party would prefer to lose rather than make the compromise; [and] bargainers [had] no flexibility or authority to move."[73] However, it was also clear from the statute that the requisite voluntariness, necessary for any successful med-arb, was absent, thus contributing to failure in these instances. Consequently, the Wisconsin med-arb statute was amended in 1985 to provide for the settlement of such disputes through traditional interest arbitration.

CONFLICTS WITHOUT LITIGATION 278 (1984) ("This med-arb approach may work best when the participants are of relatively equal bargaining experience and the efficiency of a combined procedure outweighs the inhibiting or strategic effect of the mediator's anticipated role change"); Polland, *Mediation-Arbitration: A Trade Union View*, 96 MONTHLY LAB. REV. 63 (Sept. 1973) (med-arb "should be undertaken primarily in situations where the issues truly are difficult or complex. . . [and] should be used where an impasse in negotiations could result in a strike that would have a serious impact upon the community or on the economy.").

69. WIS. STAT. ANN. § 111.70, 111.71 (West 1978).

70. Stern, *supra* note 65, at 41.

71. In this respect, the Wisconsin model is more akin to final offer arbitration than to the Kagel model.

72. Stern, *supra* note 65, at 43.

73. *Id.* at 43, 44.

Other factors of key importance to a successful use of med-arb in the resolution of labor interest disputes include the need for the med-arbiter to have the authority to fashion a result which seems most appropriate for the situation at hand. This element was also missing in the Wisconsin system, for the med-arbiter could only choose between the final offers of the two parties. Additionally, the parties must agree beforehand to forgo the use of a strike or lockout should the mediation fail. This element forces the parties to remain at the bargaining table or risk having their dispute arbitrated by the med-arbiter.

Consequently, med-arb cannot be used to resolve every type of labor dispute. While the Kagel model has been used in a variety of arenas such as nursing, journalism, shipping, public utilities, saloons, teamsters, and education,[74] its greatest success has been in resolving interest disputes (contract negotiation disputes) in fields where a strike is either statutorily proscribed (as in the public sector), or where the parties cannot risk the cost of a strike and are hence quite willing to try med-arb. In sum, the greatest disadvantage of med-arb is its limited application.

IV. CRITICAL ISSUES

Using med-arb in both private and public sector labor disputes raises two issues: first, whether the use of med-arb compromises the integrity of the adjudicative role, and second, whether med-arb provisions in governmental employment statutes are likely to withstand judicial scrutiny if challenged as violative of due process.

A. *Integrity of the Adjudicative Role*

Under med-arb, the med-arbiter plays a dual role. As mediator, the med-arbiter may call private conferences with either party and may view any and all evidence the parties are willing to produce. As arbitrator, however, the med-arbiter must be a neutral adjudicator viewing only that evidence which is determined to be admissible under the standards established for that arbitration. Med-arb has thus been challenged as compromising the adjudicative role because the roles of the mediator and arbitrator cannot be successfully combined.[75] In sum,

> [m]ediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement . . . . The morality of arbitration lies in a decision according to the law of the contract. The procedures appropriate for mediation are those most likely to uncover

74. DISPUTE RESOLUTION, *supra* note 5, at 265.

75. *Id.* at 248 (quoting L. FULLER, COLLECTIVE BARGAINING AND THE ARBITRATOR (1962)).

> that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favor. Thus, private consultations with the parties, generally wholly improper on the part of an arbitrator, are an indispensable tool of mediation.[76]

It has been argued that the med-arbiter cannot successfully block out information learned through mediation when determining an award as an arbitrator.[77] Others argue that the parties will not freely divulge information to the med-arbiter in the fear that such information will be used against them if mediation fails.[78] In response to these arguments attacking med-arb as compromising the integrity of the adjudicative role, one must keep in mind that med-arb, in the labor dispute arena, is best reserved for the resolution of interest disputes only—that is, reserved for those disputes in which the parties are attempting to determine the terms of a new collective bargaining agreement. Negotiation, not adjudication, is the cornerstone of med-arb when used as a substitute for interest arbitration. There are no previously established contract rights, and the third party is not called upon to determine the rights of the parties under an existing collective bargaining agreement. The med-arbiter's presence during contract negotiations keeps the parties moving toward settlement. Consequently, the information the med-arbiter learns from opposing parties during the negotiations typically helps to bring the parties' views on a particular issue closer together, so that any arbitrated decision is more likely to be mutually satisfactory to the parties. Furthermore, judges are often called upon to rule on the admissibility of evidence, and then must use only that admissible evidence in determining a holding. It is presumed that judges are able to render decisions based only upon such admissible evidence, and that they have learned to block out extraneous, yet potentially prejudicial, matters. Through proper training, there is no reason why med-arbiters could not be afforded the same presumption. Arguments challenging med-arb as compromising the adjudicative role are, therefore, defeated by an understanding of the true nature of med-arb.

B. *Due Process Challenges*

A second issue raised by med-arb is whether the parties to a statutorily mandated med-arb are assured their constitutional rights to due process.

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76. *Id.* at 248.
77. *Id.*
78. C. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION ALTERNATIVES TO COURT 126 (1985) (quoting F. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111).

Again, the answer to this challenge has its basis in the nature of med-arb. Although a mandated med-arb lacks the voluntariness which can be critical to success, the parties remain free to agree to restrictions and rules insuring procedural fairness of the proceedings. The Wisconsin med-arb statute was challenged in *Milwaukee County v. Milwaukee District Council*,[79] on equal protection and due process grounds as an unconstitutional delegation of authority.[80] The Wisconsin Court of Appeals determined that "the appointed arbitrator performs an administrative, . . . rather than a legislative function, . . . [and] merely carries out a legislatively-outlined administrative function."[81] Because of the "strong presumption of constitutionality [of] all legislative acts,"[82] only those challenges which are proved beyond a reasonable doubt work to find a statute unconstitutional. In this case, the argument against the statute was that it made no provision for meaningful judicial review. In rejecting this claim, the court pointed to the specific procedural safeguards in the Wisconsin Municipal Employment Relations Act and held that Milwaukee County (plaintiff) had not proven beyond a reasonable doubt that these safeguards were inadequate. Consequently, the argument for the constitutionality of med-arb is synonymous with the argument for the constitutionality of arbitration. Thus, in the only case to date in which a med-arb statute has been challenged on constitutional grounds, the statute withstood judicial scrutiny.

V. CONCLUSION

Med-arb has been shown to be an effective method of resolving particular types of labor disputes in both the private and public sector. While this Note does not suggest that med-arb be employed to resolve all types of labor grievances, med-arb does effectively combine the useful elements of both mediation and arbitration to create a workable alternative to interest arbitration. Furthermore, its voluntary nature weakens arguments claiming med-arb is a threat to fair adjudication of disputes, thus creating potential for its use in the resolution of disputes outside the labor arena. Finally, statutorily-mandated med-arb has withstood constitutional challenges and it is likely to withstand similar scrutiny in the future.

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79. 109 Wis. 2d 14, 325 N.W.2d 350 (1982).
80. *Id.* at 34-35, 325 N.W.2d 359-60.
81. *Id.* at 35-36, 325 N.W.2d at 360.
82. *Id.* at 24, 325 N.W.2d at 354-55.