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Hats for Sale: Efficiency, Economics, and Process Integrity

Elayne E. Greenberg

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Introduction

What are the ethical considerations for a mediator when a neutral is asked to be both the mediator and arbitrator on the same case? Some parties and their lawyers opt to select one neutral to serve as both the mediator and arbitrator on the same case, believing it will be a more efficient and cost-effective way to resolve their dispute. After all, the mediator already knows the facts of the case. Why waste time and money getting another neutral up to speed? This design choice, however, may collide with the mediator ethical mandates of party self-determination,[1] neutral impartiality,[2] confidentiality,[3] and process integrity,[4] and compromise the benefits of mediation. What makes this neutral selection even more challenging is that there is no consensus about the best way to ethically proceed.[5] This column highlights these issues.

Contexts

This ethical conundrum arises in multiple contexts where the neutral is asked to be the arbitrator and mediator in the same matter. This column will focus on two domestic contexts in which the neutral serves as the mediator first and then is asked to serve as the arbitrator on the same matter if a mediated agreement is not reached.[6]

Context one: there is no multi-step dispute resolution clause, and a dispute arises between the parties. Rather than litigate, the parties voluntarily opt to mediate their dispute. After working with the mediator, the parties conclude that they are unable to resolve the dispute in mediation. They decide to resolve the dispute in arbitration. Rather than selecting a different neutral to arbitrate the dispute, the parties would like the mediator on this dispute to now change hats and serve as the arbitrator. After all, the mediator is already up to speed on the issues.

Context two: the parties have reached a deal and are now drafting a multi-step dispute resolution clause to help resolve any disputes that may arise out of the agreement. The parties prioritize the cost and efficiency of achieving a resolution and select the same neutral to be both the mediator and the arbitrator to resolve each dispute.

Context one raises the procedural issues that should be observed when parties in mediation then decide they want the mediator to switch hats and arbitrate the dispute. AAA, CPR, and Jams acknowledge the ethical challenge this presents. Jeffrey T. Zaino Esq., Vice President of the American Arbitration Association contributes, "AAA is not 100% comfortable with having the mediator then become the arbitrator of the same dispute.[7] However, if the parties and the mediator agree to this, put it in a signed writing, then it's party self-determination."

Allen Waxman, president and CEO of the International Institute for Conflict Prevention & Resolution, opined, "It is challenging but not impossible. It's doable if certain guardrails and procedures are followed such as party consent and awareness of the other ethical issues."

Kim Taylor, JAMS president, concurs:

> While JAMS does not encourage the practice of a single neutral serving as both the mediator and the arbitrator in a 'Med-Arb' process, we recognize that parties sometimes include this process in their arbitration agreements, or mutually desire that the mediator change roles and issue a binding arbitration award in the absence of a mediated settlement. Our arbitration rules provide for such a process, with agreement by the parties.

The following real-life example of context raises two questions whether the appointment of the same neutral as both the mediator and arbitrator pursuant to a dispute resolution clause compromises the benefits of mediation as a party-directed dispute resolution process. When St. John's Law School Vice Dean Emeritus Andrew Simons was in private practice, he was appointed, pursuant to a multi-step dispute resolution clause, to serve as both the mediator and arbitrator to help resolve any disputes that might arise between the two compa-

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nies who were implementing the transfer terms of property ownership. In accordance with the multi-step dispute resolution clause, the parties first attempted to negotiate a resolution themselves before they were contractually obligated to mediate. In those instances where there the parties were unable to negotiate an agreement, they were contractually obligated to proceed to mediation. However, most of the presenting disputes were resolved in arbitration, not mediation. An unanswered question is whether the parties themselves were participating in mediation differently, merely checking mediation off as a contractual obligation, knowing that Vice Dean Emeritus Simons would be the ultimate decision maker in arbitration. Vice Dean Emeritus Simons opined, "It might have been more beneficial for the companies if they had a separate mediator."

Beyond Cost and Efficiency—Ethical Consideration

As indicated by the contexts above, the practical and ethical considerations may differ depending on how the issue of changing hats arises. Mediators who are considering serving as both the mediator and the arbitrator on the same matter should consider how their ethical obligations as mediators might impact their decision. One consideration, how might wearing two hats affects a mediator's ethical mandate to conduct a quality mediation process? Proponents of having a neutral assume two hats on the same matter defend that this is just party self-determination. However, the Model Standards clarify that party self-determination is not an unfettered right. It has limitations. Standard I Self-Determination A(1) provides:

> Although party self-determination for process design is a fundamental principle of mediation practice, *a mediator may need to balance such party self-determination with a mediator's duty to conduct a quality process in accordance with these standards.*[8]

There is no consensus on what is a quality mediation process,[9] adding to the complexity of the issue.

Depending on your understanding of what constitutes a quality mediation process, might a mediator's impartiality may be compromised if the mediator opts to wear two hats: one as the mediator and one as the arbitrator? Model Standard II B(1) Impartiality provides:

> A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality
>
> 1. A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or **performance at a mediation,** or for any other reason.[10]

The unconscious influence on the mediation has to be recognized independent of the parties' knowledge and desires. If the neutral knows that they will serve as both mediator and arbitrator pursuant to a multi-step dispute resolution clause, I question if that neutral can maintain their impartiality. Might the mediator also observe the mediation behavior of the parties through the selective perception lens of an arbitrator, assessing which party violated the law? Even if the mediator does not agree to serve as the arbitrator on the same case until the conclusion of the mediation, might the mediator have formed opinions about the performance of the disputing parties that carries over into the arbitration? Adding to this conundrum, skilled advocates have boasted how they "spin the mediator" so that the mediator views their side more favorably whether their case will be resolved in mediation or in arbitration.[11] Experience supported by behavioral research has shown us that impartiality is an aspirational goal that ethical mediators strive to maintain throughout their mediations However, when neutrals take on the roles of both mediator and arbitrator, mediator impartiality is likely to be seriously challenged.

Another ethical challenge presented when a neutral is wearing two hats, is the risk that the mediator might violate their ethical mandate of confidentiality, a foundational principle of candid discourse in mediation. Might the confidential information that parties share with the mediator during mediation caucuses or mediation written submissions challenge mediator impartiality, violate mediation confidentiality, and shape the mediator turned arbitrator's decision making? If caucuses have been held, how will confidential exchanges be handled—will the parties agree that full disclosures must be made? Is the neutral capable of keeping track of all potential disclosures?

Some mediators have declined to take on the role of arbitrator for the same case, while others have agreed to assume the additional role. In those cases where the mediator has also agreed to arbitrate the same matter, the Model Standards Standard VI Quality of the Process instruct how the mediator should ethically proceed if the take on an additional dispute resolution role such as that of arbitrator.

Standard VI Quality of the Process provides:

> A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes

> such role assumes different duties and responsibilities that may be governed by other standards.[12]

As presented earlier in this column, AAA, CPR, and JAMS reinforce the importance of obtaining parties' consent if a mediator is going to switch to an arbitrator's hat. Yet, even sophisticated parties may not fully appreciate the full import of what they are consenting to if they agree to a mediator switching to an arbitrator's hat.

. . . Parties, you don't have to abandon your desire for cost-effective and efficient processes

Yes, parties and their lawyers want cost-effective and efficient dispute resolution processes.

And, dispute resolution providers such as AAA offer variations of concurrent dispute resolution processes in which the parties participate concurrently in both arbitration and mediation with separate neutrals.[13]

Beyond cost-effectiveness and efficiency, let's not forget that parties also value a dispute resolution process like mediation, irrespective of the outcome, where the neutral is impartial and provides the parties an opportunity to be heard.[14] Yes, even sophisticated business people are human beings who universally want to have the emotional issues that are part of the impasses to settlement finally addressed.[15] And, mediation provides that opportunity.

So . . .

I can't help but wonder if this mediator "two hats issue" is actually a continuation of the quantitative-efficiency versus qualitative-justice debate that began in the 1970's, challenging whether mediation is even a valued process choice.[16] I question if those that support the mediator "two hats" approach, base their support on misinterpretations of mediator ethics mandates of party self-determination, quality of process, confidential and mediator impartiality. Moreover, I question the faulty assumption that neutrals can be skilled at both mediation and arbitration, ignoring the distinct philosophical maps and skills each professional role requires.

From the mediator's perspective, sequentially wearing two different hats increases the likelihood that a mediator might compromise their ethical mandates and diminish the benefits of mediation. As a party-directed process, mediation offers parties an unparalleled dispute resolution process choice. It is here that the parties, with the support of the mediator, can have candid conversations with each other, take control of how their dispute is resolved, and collaborate with their counterparts to resolve their dispute in ways that make economic and emotional sense to the parties.

I agree that parties are looking for cost-effective and efficient dispute resolution processes.[17] However, I don't believe that the "two hat" option is the solution. In fact, Professor Jacqueline Nolan Haley and Professor Thomas Stipanowich have opined how some attorneys, more accustomed to advocating in a litigation model, are misusing mediation and arbitration, so that neither process has become efficient or cost-effective.[18]

Dispute resolution processes such as mediation, a party-directed process, and arbitration, a third-party directed process, expand parties' justice options. Each process offers parties and their attorneys distinct benefits and remedies. As influencers of our justice options, ADR providers, neutrals, and advocates need to diligently preserve the ethics and process integrity that are fundamental to each process. The "two hat" option challenges neutrals' ethics and process integrity. Your thoughts?

Endnotes

1. Model Standards of Conduct for Mediators (2005), Standard I Self-Determination at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf
2. Model Standards of Conduct for Mediators (2005) Standard II Impartiality at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
3. Model Standards of Conduct for Mediators (2005), Standard V Confidentiality at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
4. Model Standards of Conduct for Mediators (2005), Standard VI Quality of the Process at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.
5. *See, e.g.* Thomas Stipanowich & Mordehai Mironi, "*Switching Hats": Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med- Arb* (May 2021) at https://imimediation.org/2021/05/04/switching-hats-developing-international-practice-guidance-for-single-neutral-med-arb-arb-med-and-arb-med-arb/; Yijia Lu, *Med-Arb and Arb-Med: A Law and Economic Analysis*, 27 Harv. Negot. L Rev. 253 (Spring 2022).
6. There may be instances where the arbitrator on a matter is asked to then serve as the mediator on the matter before the arbitrator issues their award. That context also implicates arbitrator ethics issues. That discussion is beyond the scope of this column.
7. *See* https://go.adr.org/910mediationrule.html. (Both R. 9 and R. 10 "Unless agreed to by all parties and the mediator, the mediator shall not be appointed as the arbitrator on the case.")
8. Model Standards of Conduct for Mediators (2005), Standard I Self-Determination at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf

9. *See e.g* Elayne E. Greenberg, *What They Really Want . . . Bringing Objective Evaluation into Mediation*, chapter in Bankruptcy Mediation (ABI 2016)

10. Model Standards of Conduct for Mediators (2005) Standard II Impartiality at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.

11. *See e.g.* Thomas J. Brewer, Richard R. Mainland, Gerald F. Phillips, Edna Sussman, Hybrid Arbitration Processes, Commercial Arbitrators Guide to Commercial Arbitration—3rd Edition (2014) "Some neutrals are neither trained nor experienced in both processes. "The parties, knowing that their mediator may arbitrate the dispute, may be reluctant to be candid in the mediation or may try to spin the mediator to gain an advantage in the arbitration."

12. Model Standards of Conduct for Mediators (2005), Standard VI Quality of the Process at https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf.

13. *See* AAA, https://go.adr.org/910mediationrule (Both R. 9 and R. 10 "Unless agreed to by all parties and the mediator, the mediator shall not be appointed as the arbitrator on the case.").

14. Tom R. Tyler, *Procedu ral Justice and the Courts,* Ct. Rev.: 44 J. Am. Judges Ass'n. 26, 30 (2007); *see also* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution,* 2011 J. Disp. Resol. 1 (2011)

15. Roger Fisher & Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate, Viking Adult, 2005.

16. *See, e.g.* Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR",* 19 Florida State L. Rev. 1 (1991); Elayne E. Greenberg, *ADR's Place at the Justice Table* in *Discussion in Dispute Resolution,* Edited by Art Hinshaw, Andrea Kupfer Schneider, and Sarah Rudolph Cole, Oxford Univ. Pr., 2021.

17. *See e.g.* The Global Pound Conference held in 28 locations around the world and interrogating 4000 respondents including neutrals, counsel, and parties with the same 20 questions isolated 4 key global themes—two were relevant to this discussion: Efficiency—meaning, bringing appropriate resolution in acceptable timeframes and at realistic costs, and near universal recognition that the parties should be encouraged to consider mediation before adjudication and that processes like mediation or conciliation can work effectively in combination with litigation or arbitration. https://www.pwc.com/gx/en/forensics/gpc-2018-pwc.pdf.

18. Jacqueline Nolan-Haley, *Mediation: The 'New Arbitration,'* 16 Harv. Negot. L. Rev. 61, (2010); Thomas Stipanowich, *Arbitration: The 'New Litigation',* 2010 U. of Illinois L. Rev. 1 (2010).