ADR Professionals as Both Mediators and Arbitrators in the Same Matter

by Linda Michler

January 2021

Before determining any processes in a two-step mediation and arbitration (med-arb), start with contemplating whether it is a good idea for you as the ADR professional to assume the role of mediator and then as arbitrator. The objectives of the parties and perhaps even the ADR professional are to save time and the costs of educating another neutral. The next time you or counsel proffers the idea of a med-arb, think carefully about the inherent drawbacks. Then make a decision. I almost always decline.

Private caucusing in a mediation is usually the norm, with the mediator adjusting his or her approach to what the parties need at a specific time. In other words, first developing trust with the mediation participants, particularly the clients, diagnosing what is impeding progress, and determining how that impediment might be overcome in order to progress. This approach helps the mediator impartial and honest – someone confidences can be shared with -- and also provides private and valuable information that can provide

settlement alternatives. Mediators use the private caucuses to learn the parties' case strengths and weaknesses in greater detail than might be provided in pre-session submissions or conferences with counsel. They also allow the mediator to play devil's advocate to conduct reality testing and to challenge factual and legal positions, sometimes aggressively.

Arbitration is an adjudicative process that relies upon neutrality and objective procedural fairness. The procedural rules may be more relaxed than court; the principle of searching for the truth is not relaxed. It remains the foundation of the process and procedure. *Ex parte* contact is prohibited. Any communication that may happen must be conducted in front of the other party. No one wants untested and unchallenged evidence to potentially influence the arbitrator.

If the mediator has had private conversations with a party, there is simply no way to protect the disclosing parties' confidences and the integrity of the arbitral process. The mediator inevitably has learned information, without opposition, that likely colors the impression of the case. Mediators are human. Even worse, if a party has decided beforehand that it will not settle and wants to arbitrate no matter what, the opportunity for mischief is great. Private sessions can be used by a disingenuous party to influence the mediator/future arbitrator, knowing that the other side cannot challenge unless the disingenuous party has permitted dissemination of the private information. As neutral and fair as one might want to be, these *ex parte* communications necessarily risk preconceived bias in the subsequent arbitration.

The mediation process is inimical to a fair arbitration. Many mediators decline as a general rule. However, there are a few exceptions to this general rule. Before any part of a mediation begins, discuss whether the parties might want to do a step-up process. Full disclosure of the risks, in writing and in detail, likely are required under ethical rules and as a matter of prudence. Explain the reluctance to mediate first and then arbitrate. Suggest the alternative of arbitrating first and then mediating after the evidence is presented but before an award is issued. This form of a stepped-up process can guarantee the certainty of a resolution while maintaining the integrity of both processes.

The process would work as follows: the arbitration proceeds to a conclusion in as streamlined a process as the parties feel comfortable using. At the conclusion of the presentation of the evidence and any

closing arguments, the arbitrator would write a simple Award. The mediation would take place within a few days, no more than that. This gives the parties an opportunity to digest what happened in the arbitration. Next step, the mediation commences. Knowing that the outcome of the arbitration has already been determined but not revealed seems to give the parties an added incentive to reach a negotiated solution. Plus, the integrity of the arbitral process has been protected since the award was drafted before the mediation and its *ex parte* contact began.

The advantages of this step-up process are that the parties are only hiring one neutral. The presentation of the evidence and argument in the arbitration has allowed for the ADR professional's education about the legal issues and strengths and weaknesses of each side's case, saving time that would otherwise be expended if mediation were conducted first. Most importantly, the parties have been ensured of a fair process that has not been corrupted by accidental or intentional contamination from disingenuous statements made by a party in a prior mediation. Of course, during the arbitration and the mediation process, the neutral must be careful not to reveal, by body language or word, the decision set forth in the final award.

Another exception to mediator's general disinclination to mediate and then arbitrate would be in those instances in which the parties included in their settlement term sheet or agreement that the mediator be engaged again if an unexpected dispute arises, such as sometimes happens when the final version of the settlement agreement is being negotiated. Accepting a mediation engagement when the matter is intended to re-settle a case that everyone thought was settled simply does not create the ethical dilemmas that a mediation-arbitration does.

Whether online or in-person, the combined process of an arb-med can be beneficial in certain matters. Just make sure the process is structured properly and in advance. Think carefully the next time the idea of a mediation-arbitration is discussed. The cost savings may not be worth it.

Linda A. Michler is an arbitrator and mediator and may be reached at 412.854.4315/ 412. 480.1731 or on-line at www.nadn.org/linda-michler She is a member of the National Academy of Distinguished Neutrals and is on the roster of the American Health Law

Association's Dispute Resolution Service, CPR's Employment Disputes, Mass Claims, Franchise, Banking, Accounting and Financial Services Panels, FINRA's Neutral rosters, and the American Arbitration Association's neutrals for mediation and arbitration including bankruptcy, landlord-tenant/real estate, and disaster panels. She is the Publications Chair for the American Bar Association's Dispute Resolution Section's Arbitration Committee.

Linda A. Michler is an attorney licensed in New York, North Carolina and Pennsylvania, with over 25 years' experience on ADR matters, providing dispute resolution services including arbitration, mediation, early neutral evaluation and consulting of domestic and international commercial and consumer disputes for claims involving business and financial matters including real estate, personal property, employment, lending, shareholder, franchise, and healthcare disputes.

In her alternative dispute resolution work, Linda has arbitrated and mediated cases of all complexities including those involving multiple parties, multiple issues and substantial damages. Linda has served as sole arbitrator, co-arbitrator, chairperson, mediator, and co-mediator. Matters have included airport construction disputes between several subcontractor parties and respective insurers, mortgage lending (predatory and regulatory issues) disputes between businesses and lender, between multi-parties including realtors and mortgage / deed recording fraud, disputes between shareholders in professional and business operating entities, employer and employee disputes including EEOC ad PHRC issues, collection matter between a music association and a bar/restaurant involving copyright infringement issues, a business bankruptcy where the divorce of the principal and his wife was causing financial issues in successfully completing the bankruptcy. Insurance litigation between the general contractor, airport authority, subcontractors and several insurance carriers concerning construction issues. Parties had agreed to construction

liability issues and had bifurcated the damages issues. The matter was successfully concluded. Other representative matters have included homeowners, title company, and lender disputes concerning lender and title issues along with mortgage default and, in some cases, deed recording and mortgage fraud. (multiple cases).

Linda also has experience with government contracts, franchise disputes, product liability, professional malpractice, commercial/business matters, and bankruptcy disputes. In addition to once maintaining an active private law practice, representing primarily financial institutions and small businesses, she has served as Assistant District Counsel, Special Assistant United States Attorney with the US Small Business Administration (SBA), taught legal courses at Robert Morris University, Duquesne University, Community College of Allegheny County and has been a presenter for several CLE providers including the American Bar Association, National Business Institute, and the Allegheny County and Washington County Bar Associations. She has been in-house counsel for a global data and risk management software company. Ms. Michler is currently admitted to practice in all Pennsylvania, North Carolina and New York Courts, US District Courts for Western, Middle and Eastern Districts of Pennsylvania, US District Court for the Eastern District of North Carolina, US Court of Appeals for the Third Circuit, and US Supreme Court.

While working in the government sector she was responsible for the legal review of the small business loans, 8(a) programs, disaster program, Freedom of Information Act Requests, and employee issues. In addition to drafting court pleadings, she researched and wrote memoranda and legal opinions on a variety of the SBA's programs. As Assistant District Counsel, Linda handled negotiations with labor and government management, unemployment compensation, and reduction in force issues.

Successfully owning and managing her own law firm, she ran the diverse activities of managing attorneys and administrative personnel. Linda's firm represented creditors, secured and unsecured, in commercial and consumer credit ranging from mortgages, UCC, auto, boat, and mobile home collateral. She practiced in administrative courts such as the Pennsylvania Human Relations Commission, and all levels of state and federal courts,

including the federal bankruptcy court and state court receiverships. She assisted a Chapter 7 Trustee in his work administering the Estate of a multi-national business and its divisions where the principals eventually served sentences for fraud and incomplete reporting. Linda was an approved title attorney by a title company. She has been lead counsel in litigation at the trial and all appellate stages, with several reported decisions. Matters ranged from basic financing disputes to complex financial transactions, involving alleged false claims and statements, fraud, conflicts of interest, and other misconduct. She has represented her law firm clients and the government agency in mediations involving financing and employment issues.

Linda has been a long-standing leader in professional organizations and an advisor in alternative dispute resolution, as a teacher, presenter and author.

Website: https://www.nadn.org/linda-michler

Additional articles by Linda Michler