Keeping a Secret from Yourself? Confidentiality When the Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case

by

Kristen M. Blankley*

As the alternative dispute resolution field has grown, parties have designed their own processes from established processes in an attempt to best serve their process needs. One such hybrid process is mediation-arbitration, called "med-arb" for short. Med-arb involves a single neutral who first serves as a mediator, and, if the parties reach impasse in mediation, the neutral then serves as an arbitrator to resolve the dispute. Although the literature has given some attention to the benefits and drawbacks of med-arb, this Article examines the process in light of broad mediation confidentiality and privilege statutes. Because these laws have no exceptions for med-arb, parties who seek to utilize this process must execute careful waivers to avoid the possibility that any resulting arbitration award later be vacated by the courts.

I. Confidentiality in Same-Neutral Mediation-Arbitration: What No One Has Told Neutrals

The combination of mediation and arbitration into a single process, known as "med-arb[1]," has rightfully gained some popularity in recent years. Med-arb is a process that attempts to marry two fundamental, but somewhat opposing, goals of alternative dispute resolution ("ADR").[2]

* Kristen Blankley is an Assistant Professor at the University of Nebraska College of Law. Thanks to Alan Frank, Craig Lawson, Sarah Cole, Ellen Deason, Michael Moffitt, Maureen Westbrook, Josh Stulberg, Chris Fairman, Amy Cohen, Paul Kirgis, Hiro Aragaki, and Chris Haas for their help on earlier versions of this article. Thanks to Desireé Clark for research assistance and valuable insight. Special thanks to my husband, Mike.

[1] The pronunciation of this term is inconsistent across the field, with some pronouncing "med" with a long "e" sound (like in mediation) and others pronouncing "med" with a short "e" sound (like in medical).

[2] Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 161, 162 (2005) (noting hybrid processes, and particularly med-arb, "are growing in popularity" and can be "very effective in the right

Those two goals are finality and collaboration, and these goals are generally not served in the same process.[3] As described in more detail below,[4] med-arb involves a mediation followed immediately by an arbitration if the mediation is unsuccessful. Depending on how the parties structure their process, the same neutral can serve both functions, or different neutrals can serve as the mediator and arbitrator. This Article focuses on the former arrangement, which is known as "same-neutral

---

circumstances and can offer clients another alternative to conventional dispute resolution approaches"). Dobbins' theory of a "layered" dispute resolution clause involves a contract calling for negotiation, followed by mediation, followed by arbitration, followed by court action, if necessary. *See generally id.* With respect to arbitration, Dobbins recommends the use of different neutrals, *see id.* at 171, unless the parties specifically request a hybrid procedure. *See id.* at 177; *see also* Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLIAMETTE L. REV. 661, 665-66 (1991) ("In its pure form, and as a distinct process of dispute-resolution, med-arb is conducted by a single individual whom the parties have agreed will first attempt to mediate their dispute and then will arbitrate if mediation fails."); David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63-OCT DISP. RESOL. J. 28, 30 (2008) ("Med-arb agreements allow parties to combine the benefits of two ADR processes – mediation and arbitration – and, as a result, guarantee that a final and binding award be issued in the event that a settlement is not achieved in mediation. Med-arb eliminates the possibility that impasse in mediation will block and end to the dispute since a binding arbitration decision will follow if the parties are unable to reach a settlement agreement.").

[3] Collaborative processes, such as mediation, negotiation, and collaborative law, are generally not final because the parties can choose whether or not they will agree to settle the case. Final processes, like the various forms of arbitration and litigation, are generally not collaborative because these processes involve making a presentation to a third-party decision-maker. Perhaps the apparent dichotomy is intuitive – disputants who are willing to be collaborative may want an "out" in the event that the collaborative process does not proceed as expected. Similarly, if the disputants know that there is no "out," then they might be more likely to act adversarial. Parties, however, should be aware that the processes of mediation and arbitration have different purposes and different considerations philosophies underlying dispute resolution. Bartel, supra note 1, at 673 ("Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in a decision according to the law of the contract.") (quoting Lou Fuller, Collective Bargaining and the Arbitrator, in PROC. OF THE FIFTEENTH ANN. MEETING OF THE NAT'L ACAD. OF ARB. 8, 29-30 (1962)).

[4] *See* Section II.

med-arb."

Same-neutral med-arb can be valuable in achieving goals such as speed, efficiency, and finality.[5] However, the procedure is not without some drawbacks. One of the biggest drawbacks of med-arb is the potential that the neutral would impermissibly decide the arbitral case in based on confidential information learned during mediation. Improper use of mediation communications is important for at least two reasons. First, parties to mediation expect their proceedings to be confidential,[6] particularly during a private meeting with the mediator, sometimes called a caucus

[5] Presumably because of these benefits, the state of Minnesota incorporated med-arb into its domestic relations law. When a divorced couple have a dispute regarding the division of parenting time, the parties may stipulate or the court may order them to meet with a "parenting time expeditor." Minn. Stat. § 518.1751(1) (2006).

> A "parenting time expeditor" is defined as:
> a neutral person authorized to use a mediation-arbitration process to resolve parenting time disputes. A parenting time expeditor shall attempt to resolve a parenting time dispute by facilitating negotiations between the parties to promote settlement and, if it becomes apparent that the dispute cannot be resolved by an agreement of the parties, the parenting time expeditor shall make a decision resolving the dispute.

Minn. Stat. § 518.1751(1b)(c). The Minnesota statutes have confidentiality provisions, *see* Minn. Stat. § 518.1751 (4a); however, these provisions deal with confidentiality generally, and they do not regulate whether statements made in mediation are confidential, even during the arbitration, or if the mediation confidentiality has been waived in that respect. To date, no opinion expressly deals with confidentiality concerns between these two processes, even if the statute is clear in making all of the statements within the med-arb procedure confidential and inadmissible in any subsequent dealing or proceeding. *See id.* Documents provided to the court within the "normal course of the expiditor's duties," however, are not confidential. Lee v. Herbert, 2004 WL 948385, at *5 (Minn. Ct. App. May 4, 2004) (unpublished table case). These reports, however, must not contain "confidential positions of the parties" but only "affirm the existence and terms of the parties' negotiated agreement." *Id.* Interestingly, in *Lee*, the court found the admission of the expeditor's notes, specifically confidential information under the statute, was admissible to show "whether an agreement was reached." *Id.*

[6] Dobbins, *supra* note 1, at 162 ("Candid, confidential communication is a pillar of mediation.").

session.[7] Second, and perhaps even more importantly, the law may require that the mediation communications remain confidential even during the arbitration session if the parties do not execute waivers of the mediation confidentiality. Awards rendered based on confidential mediation communications – as opposed to arbitration evidence – may be subject to vacatur under the Federal Arbitration Act, or a similar state statute.[8] Although neutrals in med-arb would consider obtaining the proper waivers to be a "best practice," the law in many jurisdictions absolutely requires a proper waiver, as noted in more detail below.

This Article will briefly discuss how med-arb is conducted, the history of med-arb, as well as the benefits and drawbacks to the procedure, focusing primarily on confidentiality concerns. Most scholarship to date focuses solely on these policy issues. This Article goes further and discusses how the Uniform Mediation Act ("UMA") and similar state statutes provide for the absolute confidentiality of mediation communications, even in the arbitration portion of a med-arb

[7] Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, J. Disp. Resol., May/July 2005, at 27 [hereinafter *Same-Neutral Med-Arb*] (noting that ethical issues may arise in med-arb, especially when "the arbitrator's decision could be influenced by confidential information learned during private caucuses").

Med-arb is somewhat similar to judicial settlement conferences in which the same judge hearing the case conducts the settlement conference. In both situations, the neutral acts as a go-between to help the parties reach a consentual settlement, and then later acts as a decision-maker in the event that the parties cannot reach agreement. This Article does not discuss the judicial settlement conference, but it notes that most judges have no qualms about conducting a settlement conference with the parties, even though the judge may later act as the ultimate arbiter of the case. *See East Meets West: An International Dialog on Mediation and Med-Arb in the United States and China*, 9 Pepp. Disp. Resol. L.J. 379, 402 (2009) ("It is interesting because [judicial settlement conferencing] has many of the same concerns that we have as far as med-arb. What we found in the survey is that eighty percent of judges thought this was appropriate, and that in fact they were not concerned about it as long as the parties consented.").

[8] *See* 9 U.S.C. § 10.

procedure. This Article then discusses how court decisions to date echo these concerns. Finally, this Article gives recommendations for med-arb neutrals and parties for drafting mediation confidentiality waivers.[9]

II. Combining Mediation and Arbitration into a Hybrid Process[10]

As noted above, same-neutral med-arb is a process in which the parties agree to first mediate their case, and if the mediation is unsuccessful, the parties then agree to arbitrate the case with the same neutral acting as the arbitrator.[11] This process is voluntary; the parties must agree to

[9] For the purposes of this article, med-arb is assumed to be a process involving the same neutral and a process in which the parties agree at the onset to use both mediation, potentially followed by arbitration. As will be discussed in more detail *infra*, another form of med-arb occurs when the parties agreed to mediation and then requests the mediator to decide the case when the negotiations fail. Yes a third form of med-arb may occur when a person hired as an arbitrator suggests the parties engage in med-arb instead, and the parties agree to such a procedure. Differing concerns exist for these two types of med-arb. Gerald F. Phillips, *It's More Than Just "Med-Arb": The Case for "Transitional Arbitration,"* 23 Alternatives to High Cost Litig. 141, 152 (2005) [hereinafter *Trans-Arb*] (noting in his experience, the "process usually starts with a designated arbitrator–but before any testimony is taken parties agree on trans-arb").

[10] This article treats med-arb as a hybrid process of two different processes, not as a new, singular process that would otherwise be treated under different rules. In other words, this Article assumes that the general mediation rules would apply to the mediation portion of the med-arb procedure. To the extent that courts across the country have dealt with these issues, the courts apply the general mediation rules to the mediation portion of the med-arb procedure, sometimes going as far as to hold that no implicit waiver of general mediation law occurs simply because the procedure is a hybrid procedure. *See infra* notes 25 to 28.

[11] Bartel, *supra* note 2, at 664-65 ("Med-arb is a process combining mediation with the decision-making stage of arbitration. In med-arb, the third party med-arbitrator attempts to mediate the dispute between the parties. At some point, when mediation is no longer likely to succeed, the med-arbitrator, by prior agreement of the parties, switches into the arbitrator's rule and issues a binding decision."); *see also* Di Martino v. Dooley, 2009 WL 27438, at *2 (S.D.N.Y. Jan. 6, 2009) (involving an employment dispute with the following dispute-resolution clause calling for med-arb: "In the event there is any claim or dispute arising out of or relating to this Plan . . . such claim or dispute shall attempt to be settled by mediation through a mediator agreed upon by the parties for nonbinding, confidential mediation. If this is not successful, the dispute will be

engage in med-arb.[12] The process first arose in the public sector, in order to reach a collective bargaining agreement, particularly in important industries in which striking is not a viable option for the public good.[13] This method was chosen because it combined the flexibility of mediation

---

submitted to binding arbitration in New York, New York, in accordance with the Commercial Arbitration Rules of the American Arbitration Association."); Levy v. Seiberlich, 2008 WL 4726456, at 1 (Cal. Ct. App. Oct. 29, 2008) (setting for a different-neutral med-arb provision in an agreement regarding the sale of a tax and accounting practice).

[12] As noted above in note 5, however, Minnesota courts may refer cases involving visitation issues directly to med-arb. Conversely, in the Northern District of Alabama, the ADR Plan in effect since 1993 allows parties to choose on of three types of ADR "Tracks." N.D. Ala. Loc. R. ADR Plan IV (2006). The first tract is a voluntary tract allowing the parties to choose any method of dispute resolution they choose. The second tract is proceeding by mediation, and the third tract is proceeding by med-arb. *Id.* Unlike the med-arb described above, this process results in a non-binding decision meant to give the parties an estimate of the value of the case before the neutral. N.D. Ala. Loc. R. ADR Plan IV.C ("The primary purpose of the Med/Arb Track is to provide the parties with an informed and realistic appraisal of the outcome of the case if presented to binding arbitration or to trial."). In order for the parties to proceed in such a manner, the parties must all consent to the procedure. N.D. Ala. Loc. R. ADR Plan IV.C.2.b ("A case may be selected for the Med/Arb track only with the consent of all parties."). As with the Minnesota statute, there is a general confidentiality provision, but no mention of how to treat communications made during mediation and whether they are protected against disclosure in arbitration. N.D. Ala. Loc. R. ADR Plan IV.C.11. Other states, too, encourage courts to authorize the use of med-arb as well as other dispute resolution processes. *See* Ark. Code Ann. § 16-7-201(1) (2006); Cal. Penal Code § 14151 (West 2006); Colo. Rev. Stat. § 13-22-3132006); Me. Rev. Stat. Ann. tit. 26, § 1282 (West 2006); Minn. Stat. Ann. §162.12(b) (West 2006)

[13] Although now dated, one commentator noted that in 1989, as many as forty-five percent of labor-management arbitrator conducted med-arb procedures. Bartel, *supra* note 2, at 677. Some sectors of the public still use med-arb to resolve these types of disputes. For example, in Maryland, med-arb is used in the collective bargaining context for some of its employees. *See* Md. Code Ann. Art. 28, § 2-112.1(l) (2006) (utilizing a hybrid of mediation and "final offer" arbitration to resolve disputes); Md. Code Ann. Art. 29, § 11.5-108(b) (same); Md. Code Ann. Art. 44A, § 2-106(l) (2006) (same). In South Carolina, the codified grievance procedure for certain actions of state employees is med-arb. *See* S.C. Code Ann. § 8-17-345 (Law. Co-op. 2006). Wisconsin, too, uses a variation of med-arb in resolving disputes governing public employees. *See* Wisc. Stat. Ann. § 111.70, legis. note III (West 2006); *see also Glastonbury Educ. v. Freedom on Information Comm'n*, 234 Conn. 663, 716-17 (Conn. 1995) (describing the dispute resolution procedure in the Teacher's Negotiation Act as a "med-arb" procedure). For a more detailed history of med-arb, see

with the guarantee of a final and binding decision in arbitration in these cases involving important, public employees.[14]

III. Why the Benefits of Same-Neutral Med-Arb Outweigh the Criticisms

Because of the definition of med-arb and the manner in which the proceedings progress, the process offers several advantages and disadvantages. Although these will be explored more carefully below, a brief preview of those issues is helpful.[15] Generally, the advantages of med-arb include increased speed and efficiency of the process as compared to arbitration or litigation. Additionally, the process is more flexible than either mediation or arbitration alone, and the process is structured in such a way as to ensure finality, an aspect missing if the parties simply

---

Bartel, *supra* note 2, at 669-79.

For similar reasons, med-arb is sometimes employed in private-sector collective bargaining arenas, too. *See, e.g.*, Specialized Distribution Management, Inc. v. Brotherhood of Teamsters, Auto Truck Drivers, Linen Drivers, Car Haulers and Helpers, Local #70 of Alameda Cty., IBT, AFL-CIO, 1995 WL 688662, at * (N.D. Cal. Nov. 13, 1995) ("Unable to reach agreement, the parties engaged in a hybrid mediation/arbitration procedure, in which the arbitrator was to assist the parties in mediating the open issues, but, if the mediation was unsuccessful, was to conduct a 'baseball-style arbitration' and select one party's final offer without modification as the CBA. Throughout this proceeding, Local 70 argued for retaining the area practice for permitting drivers to honor picket lines. It described the local procedure to Arbitrator Dorsey and submitted copies of contracts in the industry containing picket line language.")

[14] Bartel, *supra* note 2, at 672 ("Further, the mediator's effectiveness is increased when the parties are aware that the next step is a binding decision that neither party may like.").

[15] Gerald F. Phillips, perhaps the leading scholar and practitioner on med-arb, suggests the name "med-arb" is both "confusing and an oxymoron." Phillips, Trans-Arb, *supra* note 9, at 141. A new name is also being sought because "med-arb" has become synonymous with breaches of mediation confidentiality. Id. Instead, Phillips opted to use the term "same neutral med-arb" to describe the process in which a single neutral undertakes to act as both a mediator and an arbitrator in a single case. Id. Additionally, the term "transitional arbitration" or "trans arb" has been suggested to show the transition of a case between mediation and arbitration. Id.

attempted to mediate.[16] The primary drawback of med-arb discussed in this Article is the potential that confidential information disclosed in the mediation (particularly in caucus) is later used by the neutral in fashioning the arbitration award. In addition, given the neutral's changing roles in the process, parties have a disincentive to participate fully in the mediation process and disclosing and discussing their interests because they fear that this information will later be used against them.[17] However, despite these drawbacks, the benefits of med-arb are significant, and parties who willingly choose to enter the process should be able to do so freely, knowing it may be the best

[16] Given the different focuses of mediation and arbitration, the neutrals engaged in the med-arb proceeding may focus their neutral style on different portions of the process. Elyne E. Greenberg, *ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination? Conclusion: We Can Work It Out: Entertaining a Dispute Resolution System Design for Bankruptcy Court*, 17 AM. BANKR. INST. L. REV. 545, 547 (2009) ("[S]ome judges and trustees opt to focus on their meditative roles, spending time listening to all those involved, culling out interests and encouraging contesting parties to devise their own resolutions. Other judges and neutrals emphasize their decision-making role, believing that their decision-making role will ensure the efficient disposition of cases."); *see also* Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 428 (2007) ("Moreover, as lawyers garner experience with these processes and the ranks of self-described professional neutrals asserting multi-faceted expertise swell, some are experimenting with 'switching hats' to play different neutral roles in connection with a dispute.").

[17] An article discussing the virtues of ADR in the realm of family law discusses the potential place for med-arb among parenting coordinators. Elayne E. Greenberg, *Fine Tuning the Branding of Parenting Coordination: "You May Get What You Need*", 48 FAM. CT. REV. 206, 208 (2010). Greenberg succinctly poses some of the most important questions that participants in any med-arb situation may face: "*How is the mediation opportunity influenced if the parties know what the neutral might ultimately be the decision maker? How does the mediation ideology the neutral relies on impact the entire process? How long do you stay in the mediation step before switching to the arbitration mode? What are the triggering events to signal you switch from one mode to another?*" *Id.* (emphasis in original); *see also* Christine A. Coates, *A Brief Overview of Parenting Coordination*, 38-JUL COLO. LAW. 61, 62 (July 2009) (describing the differences between a neutral engaged in med-arb and a neutral who is a parenting coordinator).

possible manner in which their dispute can be resolved.[18]

A. Same-Neutral Med-Arb as an Efficient, Flexible, and Final Process

The most obvious benefits of same-neutral med-arb compared to different-neutral med-arb, mediation, or arbitration include the process's ability to resolve disputes quickly and efficiency. Because the parties use the same neutral for both mediation and arbitration, if arbitration proves necessary, the parties will presumably save time because they will only have to search for one neutral, rather than two.[19] Additionally, if the process requires arbitration, the neutral is presumably already educated as to the facts and circumstances involved in the case.[20] Although some arbitrators will need to, or would just like to, collect further testimonial or documentary evidence, no hearing may be necessary if the neutral learned sufficient information in the mediation upon which to render an award.[21] Although the arbitrator will need time to render an

[18] Stipanowich, *supra* note 16, at 432 ("Arbitration law is about enforcing consensual arrangements for private dispute resolution, with a central tenet being effectuation of the intent of the parties as expressed in their agreement. Within the ambit of the FAA and the more prescriptive framework of some state arbitration statutes, therefore, parties are afforded considerable flexibility to structure processes as they see fit.").

[19] Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 28 ("There is no need for the parties to review the qualifications of potential arbitrators if no agreement is reached in mediation because the same neutral will arbitrate the dispute. Selecting a new arbitrator is often time-consuming. Considerable time is saved by having the mediator become the arbitrator."). One commentator suggests that med-arb might work best in situations in which the parties "have a working relationship with the third-party neutral." Bartel, *supra* note 1, at 675.

[20] Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 28 ("Very little time is necessary at the end of an unsuccessful (or partially successful) mediation to commence the arbitration phase of same-neutral med-arb."). Phillips suggests the speed gained in med-arb will also benefit the parties by allowing them to resolve their dispute quickly and get back to their working relationship. *See id.* ("The dispute can be resolved faster because the arbitrator is already familiar with the facts of the case. This allows the parties to get back to business more quickly.").

[21] *See* Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 28 (acknowledging some

award, the parties could save considerable time by shortening or eliminating the arbitration hearing.

Med-arb may also be more cost-effective than using different-neutral med-arb, and it should be less expensive than litigating the dispute in court. By contracting with one neutral to perform two services, the parties will most likely pay less than if they would have to contract for a separate mediator and arbitrator.[22] If the case settles during mediation, the cost savings may be dramatic because most of the expenses of med-arb are associated with the arbitration hearing, which could require taking testimony from witnesses and presenting other evidence.[23] Additionally, the expenses for the neutral would increase if the mediator-turned-arbitrator is

---

arbitrators may not need to conduct a hearing; however, if the arbitrator takes this approach, the neutral should first obtain consent from the parties to proceed straight to the award).

[22] *See* Phillips, *Trans-Arb*, *supra* note 9, at 152. Phillips notes the first time he acted as the neutral in med-arb he was originally contacted as an arbitrator. He suggested to the parties that they mediate the case first, but with a different neutral. The parties did not "want to pay for a mediator, and if the case did not settle, then pay a different neutral to act as the arbitrator." *Id.* After explaining the benefits and shortcomings of the med-arb process and after obtaining a written stipulation, the parties proceeded to med-arb. After two days of mediation, the case settled, and Phillips did not need to arbitrate. He noted in this case, "if the dispute had gone to arbitration [only] it would have been far more expensive, and the resolution wouldn't have been amicable." *Id.*

[23] *See id.* at 153. In a second example given, Phillips recounts how a complicated case settled in mediation. He claims the settlement occurred when it did perhaps because the "parties began to appreciate the cost of an arbitration" or perhaps because an arbitrator would have been unable to have crafted the creative settlement reached during the mediation. *See id.* In another example, Phillips explains how a dispute was resolved during the second time the parties mediated the case. Part of the success was due to the fact that "proving damages would be costly and difficult" in arbitration. *Id.* at 154. Of course, this incentive to settle is not unique to med-arb. Parties in mediation often compare a potential settlement against their alternatives (i.e., their BATNAs), which may include expensive litigation. The primary difference between these two situations, however, is the immediacy of the adjudicatory procedure. In med-arb, the costs associated with arbitration will be borne immediately (or nearly immediately) after the mediation concludes in impasse.

required to write an arbitration award.[24] To create a financial disincentive for the mediator to arbitrate, the parties could arrange to pay the neutral a premium if the case settles in mediation. Other financial arrangements could provide a discounted rate for the neutral if the neutral must render both mediation and arbitration services. This type of arrangement could adequately protect both the parties and the neutral depending on how the case proceeds.

Unlike either mediation or arbitration, med-arb can be a flexible process, if the parties allow for such flexibility.[25] Although med-arb is commonly thought of as a mediation followed by an arbitration, nothing prevents the parties from taking breaks from a mediation to negotiate a

[24] Arbitrators are often paid by the hour, and the more work that the arbitrator is asked to do, the more money the neutral's services are going to cost.

[25] The flexibility afforded to the med-arb procedure also makes it an ideal dispute resolution process for multiparty and other types of complex litigation. For example, in *In re Air Cargo Shipping Services Antitrust Litig.*, 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009), the court discussed a med-arb procedure put in place by the court to resolve settlement fund allocation issues in a class action case. Other commentators discuss how the flexibility of med-arb is useful in resolving industry-specific disputes. Paul Caprata, *Surf's Up: The Implication of Tort Liability in the Unregulated Sport of Surfing*, 44 Cal. W. L. Rev. 557, 583 (2008) (discussing the use of med-arb to resolve surfing disputes); *see also* Randall W. Wulff, *Appraising the 9/11 Damages to the World Trade Center*, 62-OCT Disp. Resol. J. 10 (2007) (describing the use of med-arb in the context of insurance payouts following the 9/11 tragedy); Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 345 (2008) (discussing the use of med-arb in the context of online dispute resolution); Candi Henry, *Spam v. Ms. Piggy: An Entertainment Law Cautionary Tale*, 8 Vand. J. Ent. & Tech. L. 573 (2006) (recommending the use of med-arb in the area of entertainment law disputes); Marcy L. McCullough, *Prescribing Arbitration to Cure the Common Crisis: Developing Legislation to Facilitate Arbitration as an Alternative to Litigating Medical Malpractice Disputes in Pennsylvania*, 110 PENN. ST. L. REV. 809, 833 (2006) (concluding that the Pennsylvania legislature should adopt a statute requiring med-arb in the area of medical malpractice disputes); Yolanda Vorys, Note, *The Best of Both Worlds: The Use of Med-Arb For Resolving Will Disputes*, 22 OHIO ST. J. DISP. RESOL. 871 (2007) (advocating the use of med-arb for will disputes in order to preserve relationships while employing a process that guarantees finality).

settlement or even from taking a break from the arbitration to head back to mediation.[26] If the parties agree such flexibility may be helpful in resolving their dispute, they could contract for a procedure such as this, or they could simply agree during the process to employ one dispute-resolution mechanism over another as the situation may dictate.[27]

---

[26] *See* Philips, *Trans-Arb*, *supra* note 9, at 153. Phillips describes a situation in which he did the latter. After an unsuccessful mediation and two days of arbitration, the parties, for whatever reason, decided to return to mediation. Moving from the more adversarial process to the less adversarial process, the parties were able to resolve their dispute prior to the end of the arbitration. *Id.* In his related piece, Phillips noted:

> In my view, same-neutral med-arb is the most flexible of all the ADR processes and hybrids. It allows the parties to move from mediation to arbitration when needed and then interrupt the arbitration to mediate again, if that seems desirable. This process allows the parties to profit from the advantages of both mediation and arbitration and offers benefits that neither process offers alone. I believe it motivates the parties to work harder because they want to avoid having to arbitrate. Furthermore, if arbitration becomes necessary, it ensures that a final and binding award will be issued more quickly.

Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 29; *see also* Edna Sussman, *The New York Convention Through a Mediation Prism*, 15 No. 4 DISP. RESOL. MAG. 10, at *11-12 (Summer 2009) (discussing the use of an "arb-med-arb" procedure in international disputes such that any resolution reached in the procedure could be enforced as an international arbitration award subject to the New York Convention).

[27] *See* Russ Bleemer, *The AIG-Greenberg Neutral on His Settlement Role – Mediation? Or Arbitration? Answer: It's Both*, 28 ALT. TO THE HIGH COST OF LITIG. 8, (2010) ("'Same-neutral' arbitrations after a mediation to settle a case – or in this case, clean up lingering issues – are controversial. Top practitioners say that they are asked frequently to convert in the midst of a case.").

In a decision by a California Court of Appeals, the court determined a neutral who performed a hybrid mediation/arbitration procedure was not afforded arbitral immunity because no final and binding decision had been rendered in the case. Morgan Phillips, Inc. v. JAMS/Endispute, et al., 140 Cal. App. 4th 795, 800 (Cal. Ct. App. 2006). This case, while unique factually, may have farther reaching effects for neutrals who perform med-arb. In *Morgan Phillips*, the parties proceeded to arbitration; however, after all of the evidence had been taken, the neutral began to mediate the case through private caucuses attempting to settle the case without having to render a

Med-arb can also be used to break impasse in mediation. If parties in mediation are near resolution but cannot finally resolve their dispute, they may consensually seek the assistance of the mediator to act as an arbitrator in order to resolve the dispute and move on.[28] The parties can either

---

final and binding award. *Id.* at 798-800. The parties did not necessarily agree with the procedure, but the facts indicate they did work with the neutral to settle the case. For unexplained reasons, the neutral simply gave up trying to resolve the dispute and disqualified himself from rendering an award. *Id.* at 799. Morgan Phillips sued the arbitrator and his provider organization for malpractice. The district court determined arbitral immunity applied, but the court of appeals reversed. The decision is based on the fact that rendering an award is "integral to the arbitration process," and the failure to render one signals a "breakdown of that process." *Id.* at 801. Without an award, the arbitrator is not protected by arbitral immunity, unless the reason for the withdrawal is recognized–such as when the neutral can no longer remain impartial. *Id.* at 801, 803. Alternatively, the neutral argued he was covered by mediation confidentiality and privilege laws. *Id.* at 803-04. The court found these arguments without merit at the demurrer stage because the mediation privileges largely deal with evidentiary privilege rather then complete immunity from suit. *Id.*

Although this case did not explicitly deal with med-arb, and although the parties did not appear to have contracted for med-arb, this decision could impact the law regarding med-arb. Essentially, a med-arb (or arb-med) actually occurred in this case, leaving the arbitrator in a precarious legal position. Because different laws govern the protections for mediators and arbitrators, the neutral may have different protections depending on when the case is ultimately resolved. These types of issues may impact the number of people willing to serve as a neutral in med-arb, especially if the neutral is already concerned about possible malpractice actions due to confidentiality concerns harbored by the parties. *See* Ficklin v. Penguin Grp. (USA), Inc., 2007 WL 560983, at *1 (N.J. Super. Ct. Feb. 26, 2007) (involving a case in which a mediator who was appointed as an arbitrator in disputes regarding the settlement requested to be relieved of such duty, which the court granted). It may also caution neutrals to clarify the difference between the two processes. *See* California Dispute Resolution Counsel, *Ruling Highlights Need for Clear Outline of ADR Process,* June 27, 2006, *at* http://www.cdrc.net/pg1018.cfm (Noting this ruling "serves as a warning to neutrals to be cautions when switching roles . . . and highlights the need to get the parties' agreement in writing about service as a mediator and further service as an arbitrator") (internal quotation marks omitted).

[28] *See* Harold I. Abramson, MEDIATION REPRESENTATION: ACTING AS A PROBLEM-SOLVER IN ANY COUNTRY OR CULTURE 377 (2009) ("During the course of the mediation, parties may want to replace the court option with arbitration, if the parties think the dispute is suitable for arbitration. Then if the mediation reaches an impasse, the more expeditious and less expensive arbitration option will be in place and can be quickly implemented in order to bring closure to the dispute.").

plan in advance to use the med-arb procedure prior to beginning their mediation, or they could decide during the mediation that they would rather conclude the process with an award in arbitration rather than starting over in court.[29] Although the former procedure might be the more advisable process (for the reasons stated below), in practice, the latter occurs more often, presumably by frustrated disputants who prefer the efficiency of same-neutral med-arb to either litigation or an arbitration with a different neutral.[30]

Finally, med-arb will always result in a binding decision, thus ensuring finality. In some instances, the parties are in favor of finality because it ensures they will be back to working together in a timely fashion. In other instances, such finality ensures the shortest possible work stoppage of important functions.[31] Additionally, med-arb has been cited as a good dispute

---

In addition, the parties who are mediating "in the shadow" of arbitration may have an incentive to settle in the mediation portion of the procedure. *See* Bartel, *supra* note __, at 679 ("Part of the success of med-arb is attributed to the "muscle" which the med-arbitrator who mediates under the shadow of arbitration possesses.").

[29] Note that med-arb is a different process with a final award and not simply a "mediator's proposal." A "mediator's proposal" is a technique in which a mediator (usually after being asked to do so by the parties) submits a potential settlement to the parties. The parties are not required to accept the "mediator's proposal," so it is not binding like an arbitration award would be.

[30] *See, e.g.*, Toiberman v. Tisera, 998 So.2d 4, (Fla. Ct. App. 2008) (invalidating an award by a neutral in a med-arb procedure because Florida law prohibited any cases involving child custody from being arbitrated); In re Marriage of Rozzi, 190 P.3d 815, 821 (Colo. Ct. App. 2008) (invalidating a court order allowing a parenting coordinator to make binding decisions (subject to lodged objections) following unsuccessful negotiations and mediations, but recommending to the trial court that the order should allow the parenting coordinator to make *non-binding recommendations* to the parents following unsuccessful attempts to resolve issues involving the parents' minor child).

[31] Indeed, med-arb was first used in the public sector for those working in civil and emergency fields. Presumably, these fields weighed the importance of working and maintaining people in these positions highly, thus taking advantage of med-arb's flexibility and finality. *See supra* note 26 and accompanying text.

resolution mechanism for disputes lacking a "perfect answer."[32] In these situation, med-arb allows the parties to explore mediation and try to resolve their dispute in a conciliatory manner which may allow the parties to preserve their relationships.[33] However, if the mediation does not work, they can always rely upon the arbitration hearing to produce a final and binding decision in their case.

B. Confidentiality – and Other – Concerns Associated with Same-Neutral Med-Arb

The biggest and most obvious concern with the same-neutral med-arb procedure is the actual use of confidential mediation communications used in fashioning an arbitration award –

[32] According to the Michigan Pleading and Practice Database, some disputes lend themselves to med-arb. 8A MICH. PL. & PR. § 62B:32 (2d ed. 2005):

> For an example, in Michigan police and fire fighter interest arbitration, the arbitrator is free to fashion new contract terms over noneconomic issues (for example, drug testing policy) which often lack a perfect answer. Here, the parties often want to share with the arbitrator their needs and interest and to have those needs and interests reflected in the new contractual language. This often may be achieved more genuinely through the joint and private conversations of mediation than through formal testimony of right and wrong.

Id.

[33] *See id.* (noting med-arb might be ideal for a divorcing couple who would like the neutral to understand the relationship and dynamic between the parties). In at least one circumstance, parties chose med-arb (albeit different-neutral med-arb) to resolve employment disputes at a Christian school as a means of preserving relationships and resolving disputes in accordance with Christian ideals. *See* Easterly v. Heritage Christian Schools, Inc., 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009) ("The parties to this agreement [requiring med-arb] are Christians and believe that the Bible commands them to make every effort to live at peace and to resolve disputes with each other in private or within the Christian community in conformity with the biblical injunctions of 1 Corinthians 6:1-8, Matthew 5:23-24, and Matthew 18:15-20."); Prescott v. Northlake Christian School, 2004 WL 2434997, at *1 (E.D. La. Oct. 29, 2004) (involving a "biblically based" med-arb procedure).

especially if such use is in violation of a state statute, court rule, or other source of law.[34] Of equal importance is that the parties may fear illegal or unethical disclosure, and may therefore be less candid during mediation.[35] The American Arbitration Association (AAA) echoes this concern; it

[34] Certainly, other disadvantages exist other than the potential for a breach in confidentiality. Gerald Phillips sets forth an entire list of disadvantages most often used by opponents of med-arb including, but not limited to, the fact that the processes are too different in nature for a mediator to be a successful arbitrator and vice versa. Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 27; *see also* Bartel, *supra* note 2, at 686 ("Criticism of the mediator's access to arguably confidential information cuts both ways. Parties who agree to take their dispute to med-arb are aware that the dispute ultimately may be decided by the med-arbitrator in his arbitral capacity. Therefore, if a party has information or feelings that he does not want the med-arbitrator to know, he may choose to withhold it. But, he must be aware that such withholding ultimately could hurt him in arbitration."); Vorys, *supra* note 25, at 894 ("Some critics even go so far as to say that the same med-arbiter should never be used to perform both processes because during the mediation, participants could become concerned about the 'neutral's integrity and grasp of the issues,' or even his 'intelligence or . . . neutrality,' and for that reason request another neutral to perform the rest of the med-arbitration. These concerns often arise from participants' suspicion that the med-arbiter will not utilize properly the confidential information with which he is armed."). Frank Sander, in his famous "Multi-Door Courthouse" article, commented on some of the potential problems of same neutral med-arb:

> And while the arbitrator can then seek to play a mediation role, as is done by some arbitrators provided the parties give their consent, there is an obvious difficulty if the mediator-arbitrator in unsuccessful in his meditational role and then seeks to assume the role of impartial judge. For effective mediation may require gaining confidential information from the parties which they may be reluctant to give if they know that it may be used against them in the adjudicatory phase. And even if they do give it, it may then jeopardize the arbitrator's sense of objectivity. In addition it will be difficult for him to take a disinterested view of the case-and even more so to *appear* to do so-after he has once expressed his views concerning a reasonable settlement.

Frank Sander, *Varieties of Dispute Processing*, 70 F.R.D.79, 122 (1976).

[35] See Peter Lantka, *The Use of Alternative Dispute Resolution in the Federal Magistrate's Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 U.W.L.A. L. REV. 71, (2005) (noting the benefits of med-arb are "usually tempered by the fact that litigants are tempted to hold back information during mediation for fear that it will be used against them at a later date").

cautions:

> Except in unusual circumstances, a procedure whereby the same individual who has been serving as a mediator becomes an arbitrator when the mediation fails is not recommended, because it could inhibit the candor which should characterize the mediation process/or it could convey evidence, legal points or settlement positions ex parte, improperly influencing the arbitrator.[36]

Yet despite not recommending such procedure, the AAA does recognize that some parties would choose to utilize such a procedure, and it offers a sample med-arb clause that could be used in a contract.[37] As will be discussed in more detail below, if an arbitrator uses confidential mediation communications in fashioning an award, the award may later be subject to vacatur on the basis that the arbitrator relied on information learned outside of the arbitral hearing.[38]

Mediations typically involve two types of settings – joint sessions with all of the parties and

---

[36] American Arbitration Association, Drafting Dispute Resolution Clauses – A Practical Guide 38 (2004); *see also* Gerald F. Phillips, *Back to Med-Arb: Survey Indicates Process Concerns are Decreasing*, 26 ALT. TO THE HIGH COST OF LITIG. 73 (2008) (discussing the AAA comment).

[37] American Arbitration Association, Drafting Dispute Resolution Clauses – A Practical Guide 38 (2004). The sample cause states the parties agree to mediate under AAA rules, and if the mediation fails, the parties agree to arbitrate under AAA rules. Importantly, the sample clause ends: "If all parties to the dispute agree, a mediator involved in the parties' mediation may be asked to serve as the arbitrator." *Id.*

This sample clause, which is intended to be used in a contract as a pre-dispute ADR clause, creates ambiguity as to the timing of the appointment of the arbitrator. As noted in Section IV.B *infra*, the pre-dispute clause could be as specific as requiring a certain neutral to serve as both the mediator and the arbitrator. In contrast, the AAA sample clause allows the parties to choose any arbitrator, including the mediator, but it is unclear whether the appointment of the name neutral should take place before the mediation begins or after the mediation has already failed. If the clause is interpreted to mean the latter, choosing the arbitrator after a failed mediation could add considerable time to the process, especially if the mediation did not proceed to the expectations of one or more parties.

In addition, this sample clause does not address the issue of whether the mediation communication can be used in the

the mediator present, and caucuses, in which the mediator convenes with less than all of the parties. As discussed more fully below, the communications involved in both of these settings may be confidential.[39] Although they may both be confidential, the parties may have different expectations of privacy in a joint session than they do in a caucus. For example, parties who may be comfortable with the neutral relying on joint session communications in fashioning an award may not be comfortable with the arbitrator relying on caucus communications to fashion the award.[40] Information shared in a caucus is meant to be confidential, and it usually cannot be disclosed to the opposing party without the speaking party's consent.[41] This information, which may or may not be admissible in the arbitration portion of the med-arb, in court, or in a subsequent arbitration, could still influence any award rendered in the arbitration portion of the med-arb procedure. This influence may become apparent by reading the award itself,[42] or it may manifest itself in a more subtle bias.[43] Parties who are fearful of the neutral's use of such information may

---

[38] *See infra* notes 95 to 98 and accompanying text.

[39] *See infra* notes 59 to 62 and accompanying text.

[40] Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 27 ("[A] key [ethical] issue is that the arbitrator's decision could be influenced by confidential information learned during private caucuses.").

[41] *Id.*

[42] For instance, the arbitrator may award an amount that one party or another disclosed in confidence to the neutral as a "bottom line."

[43] Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 27. Phillips notes opponents of med-arb have several problems with the process, including the following: "An award might be unfairly influenced by evidence that could not be challenged at the arbitration hearing because it was communicated only to the mediator in a private caucus, but not to the other party." *Id.*; *see also* Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication is Mandatory*, 26 ALT. TO THE HIGH COST OF LITIG. 101 (2008) (noting that one neutral in a survey commented of med-arb: "If mediation doesn't work [it is] difficult to avoid [the] appearance of being favorable to one side or the other.").

elect to not be candid rather than risk the possibility the neutral would use such information to that party's disadvantage at a later point in the proceedings.[44] Alternatively, parties could choose to eliminate the use of the private caucus, but that would also involve eliminating the beneficial aspects of caucusing, too.[45] If a losing party in arbitration can show that the arbitrator based the award on confidential information, that award may be subject to vacatur for the arbitrator having exceeded his or her powers.[46]

Same-neutral med-arb may also have other, less-obvious drawbacks. For instance, during the mediation phase, the parties may seek to ingratiate themselves with the neutral. Perhaps this

[44] Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 27. Additionally, he claims opponents of the med-arb process worry parties "are not as candid or willing to admit weakness in same-neutral med-arb as they are in mediation followed by arbitration with another neutral." *Id.*

Rather than using med-arb, the parties could use a procedure known as arb-med, with the arbitration hearing occurring before the mediation session. Following the arbitration, the arbitrator usually issues an award and puts it in a sealed envelope. Dobbins, *supra* note 2, at 178 ("One accepted view of this process allows the arbitration to conclude but seals the award. The parties then mediate, equally uncertain about the outcome risk looming in the arbitrator's envelope."). Then the parties mediate. If they resolve their dispute in mediation, the award is destroyed. Arnold M. Zack, *The Quest for Finality in Airline Disputes: A Case for Med-Arb*, 58 JAN Disp. Resol. J. 34, 35 (Nov. 2003-Jan. 2004) ("If agreement is reached, the neutral tears up the envelope and the decision is never revealed."); *see also* Society of Lloyd's v. Moore, 2006 WL 3167735, at *1 (S.D. Ohio Nov. 1, 2006) (describing arb-med). If the mediation does not resolve in a settlement, the arbitrator reveals the award. Arb-med, like med-arb results in a final decision. However, arb-med will almost always require the use of both procedures, and it is potentially more expensive than med-arb. Arb-med, however, should alleviate any concerns about confidentiality because the neutral renders the award before the mediation occurs. Dobbins, *supra* note 2, at 179.

[45] *See* Bartel, *supra* note 2, at 687 ("The obvious solution is to eliminate the private caucus during the mediation phase. This, however, may do more harm than good. The private caucus is often an important aspect of the mediation process because it allows the third-party neutral to explore options with each party separately and to provide a reality check for parties with unrealistic expectations.").

[46] This subject is discussed in more detail *infra* at note 93 and accompanying text.

could manifest itself in the parties acting as if they are on their "best behavior,"[47] but it could also involve deception or trying to paint the opposing party in a negative light. Additionally, finding a neutral to serve as a mediator and an arbitrator may be difficult because finding a person with the skills to perform both functions may be a difficult task.[48] Although time may saved because the parties only have to select one neutral, finding a mediator-arbitrator may be more difficult than finding one of each. In some instances, the parties may disagree to such an extent that finding a single mediator-arbitrator could be more difficult and time-consuming than finding both a mediator and an arbitrator.[49] Another disadvantage of the process could be that in a poorly-run med-arb, the parties may not be exactly aware when the mediation process has ended and when the arbitration will begin.[50] Along those lines, it may be unclear who chooses when the mediation has

[47] *See* Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 30 ("Curiously, I found that parties behave better during same-neutral med-arb than in classic mediation. This is probably because they do not want to alienate the potential arbitrator."). One commentator noted that an early research study found that participants in med-arb acted in a more civil manner than their mediation counterparts, citing this study as a benefit of the med-arb process, not a drawback. Bartel, *supra* note 2, at 681-82.

[48] *See* Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 30 (describing the characteristics the parties would like to find in a mediator-arbitrator and noting the ideal candidate should have characteristics amenable to both processes).

[49] When parties select a neutral in med-arb, they should be keenly aware of the qualities that they would like to find in a neutral. Some parties may be inclined to find a neutral who is a more accomplished or skilled mediator while others may be interested in finding a neutral with particular arbitration skills. These additional complexities may increase the amount of time and effort needed to agree on a single neutral.

[50] *See* Cashin v. Cashin, 2003 WL 42269, at *3 (Minn. Ct. App. Jan 7, 2003) (noting the Minnesota parenting time expeditor has the discretion to determine when the mediation has broken down to such a point its continuation would be futile and when arbitration will more likely result in a final and binding resolution to the issue at hand). In Wisconsin, under the med-arb procedure for grievances by public employees, the neutral determines if the mediation failed to generate a settlement after a "reasonable period" of time. Wisc. Stat. Ann. § 111.70 legis. note III.

failed and when the parties should enter the arbitration phase.[51] Finally, the goal of efficiency may not be served if the "settlement facts" crucial to mediation are different from the set of facts pertinent to the arbitration.[52]

C. For Willing Participants, Same-Neutral Med-Arb Provides Benefits Not Available in Other Procedures

The flexibility of med-arb offers disputants a unique opportunity that is largely unavailable in other processes. As noted above,[53] med-arb offers the disputants the opportunity to act in a collaborative way, but they are ensured that their dispute will be resolved in the event that the collaborative process does not yield a mediated dispute. No other process integrates these two qualities in the same manner.[54]

---

[51] Under the court rules for the Northern District of Alabama, parties using the Med/Arb track to settle their disputes will switch from mediation to arbitration upon the neutral's determination that "further efforts [in mediation] would not be useful." N.D. Ala. Loc. R. ADR Plan IV.C.9.e.

[52] Although some of the facts pertinent to the mediation will be in common with the facts pertinent to the arbitration, the neutral may focus on different types of information in the mediation and arbitration phase. Any number of facts might be pertinent to a mediation settlement (i.e., a respondent's ability to pay or a claimant's immediate need for compensation) that have little or nothing to do with the merits of the dispute.

[53] *See supra* notes 3 to 5 and accompanying text.

[54] There exist some similarities between the trial process and the med-arb process. Specifically, one of the legal fictions that trial lawyers encounter every day is the fact that judges and juries will hear information that will later need to be disregarded due to some evidentiary hurdle that has not been met by the proponent of the evidence. As noted by one commentator: "Judges and juries are regularly required to ignore information that has been deemed improper. No one seems to seriously question the concept that a judge presiding over a bench trial is required to, and can, disregard evidence he or she has heard but has subsequently determined to be inadmissible." John T. Blankenship, *Developing Your ADR Attitude*, 42-NOV Tenn. B.J. 28, 35-36 (Nov. 2008). Certainly, if judges and juries can disregard evidence that otherwise might have some effect on the decision-maker, then neutrals picked by the parties to resolve their dispute likewise should be trusted to base arbitration awards on the proper scope of evidence.

However, the criticisms of med-arb are valid and should be addressed – particularly the criticisms relating to confidentiality. The remainder of this Article deals specifically with confidentiality. The next section looks at statutory protections for mediation communications and the effect of confidentiality and/or privilege on the arbitration portion of a med-arb procedure.[55] These statutes generally provide an all-encompassing protection for mediation communications, without exception for med-arb procedures. Case law, described in the following suggestion, supports this view.[56] Accordingly, this Article recommends that parties, with the assistance of the neutral, if necessary, execute specific contracts dealing the treatment of confidential information in the arbitration portion of med-arb.

IV. Mediation Confidentiality Statutes Make No Exceptions for the Med-Arb Procedure[57]

Parties and neutrals involved in med-arb may not realize that the communications made in a mediation session – even in joint session with everyone present – cannot be used in the arbitration portion of the same hearing without an express agreement to use some or all of those communications in the arbitration. Such express agreement is necessary because general mediation confidentiality statutes, court rules, and other laws provide for the confidentiality of mediation communications without exception for med-arb procedures. This section first considers

[55] *See* infra Section IV.

[56] *See* infra Section V.

[57] This Article focuses on mediation-specific statutes and does not consider the effect of Federal Rule of Evidence 408 ("Rule 408"), dealing with the admissibility of offers to compromise, or similar state statutes. Whether Rule 408 and their state counterparts have any application in arbitration is beyond the scope of this Article. Even if Rule 408 applies to the arbitration portion of med-arb, it's applicability is limited because the scope of the Rule is quite limited. *See* FED. R.

confidentiality in the context of states adopting the Uniform Mediation Act and then considers confidentiality in other jurisdictions.

A. Jurisdictions Adopting the Uniform Mediation Act Explicitly Treat Mediation Communications as Privileged in Subsequent Arbitrations

The clearest expression of this general confidentiality is in the Uniform Mediation Act ("UMA"), which has been adopted in eleven jurisdictions and introduced in another three.[58] The UMA provides the parties to a mediation with a general privilege protecting the mediation communications from involuntary disclosure in later proceedings. The privilege afforded to mediation communications is as follows:

> (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
>
> (b) In a proceeding, the following privileges apply:
>
> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
> (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
> (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
>
> (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its

---

EVID. 408 (applying to offers to compromise for the limited purpose of establishing *liability*).

[58] The states that adopted the UMA, to date, are Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington, and the District of Columbia. Additionally, the UMA was submitted for adoption in 2010 in Massachusetts, New York, and Hawaii.

disclosure or use in a mediation.[59]

Pursuant to the statutory definitions, "proceeding" is defined as "a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery."[60] The explicit inclusion of the "arbitral" proceeding means that all mediation communications are privileged in the arbitration portion of the med-arb, absent any waiver of the privilege by the privilege-holders.[61] In addition to creating a privilege, the UMA also affords confidentiality to mediation communications to the extent that state or other applicable confidentiality applies.[62]

---

[59] Uniform Mediation Act § 4; *see also* COLE, ET. AL., MEDIATION: LAW, POLICY & PRACTICE §9.1, at 9-4 (2008) ("Laws of privilege are key determinants of the confidentiality affordedin mediation or other dispute resolution processes."); *see also id.* at §9.3, at 9-10 ("The evidentiary exclusions for compromise discussions differ from privileges, which usually provide protection against any disclosure rather than merely protection against admission into evidence at a court hearing. Thus, most mediation privileges govern use of the mediation information in all forums – not just those judicial hearings governed by rules of evidence, as with evidentiary exclusions."). Section 6 contains exceptions to the privilege, none of which are applicable here. *See* Uniform Mediation Act § 6. Perhaps a litigant could make the argument that med-arb is not mediation at all, based on a theory that the hybrid procedure changes the mediation process in such a fundamental way that the "mediation" occurring in med-arb is not mediation as that term is defined and intended to be.

[60] Uniform Mediation Act § 2(7).

[61] As stated above, the different participants to mediation each hold their own privilege. The parties hold a privilege with respect to all mediation communications. The mediator holds a privilege as to the communications made by the mediator, and non-party participants hold a privilege as to the statements made by the non-parties. For a waiver to occur, all applicable privilege holders must agree to the waiver.

This article treats med-arb as a combination of two procedures – not as a separate procedure. Given the mandatory nature of the UMA and the other statutes discussed below, no practical difference may exist between whether med-arb is a hybrid procedure or a distinct procedure.

[62] Uniform Mediation Act § 8 ("Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent

Although the privilege is absolute, it can be waived. If fewer than all parties waive the privilege, however, the non-waiving party will be able to raise a confidential objection and prevent the use of the mediation communications in the subsequent procedure.[63] The applicable waiver provision reads:

> (a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:
>
> (1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and
>
> (2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.[64]

Thus, the mediation privilege must be expressly waived in order to use the mediation communications in another proceeding. No exception exists for the use of mediation communications in the arbitration portion of a med-arb procedure.

If no exception exists and the parties do not execute a waiver, then a full and complete arbitration hearing is necessary. Because the mediation communications are privileged and confidential, they cannot constitute "evidence" in the arbitration portion of

---

agreed by the parties or provided by other law or rule of this State.").

[63] As noted above, parties to a mediation have the ability to prevent anyone from disclosing any of the mediation communications. The mediator can prevent others from disclosing statements made by the mediator, and non-parties can likewise prevent others from disclosing statements made by the non-party. *See* Cole, *supra* note 59, at §9.4, 9-11 ("The privilege may be raised by or on behalf of anyone who holds it, while the evidentiary objection must usually be made by a party to the litigation."); *see also* Colo. Rev. Stat. § 13-22-307; Haw. R. Evid. 408; Me R. Evid. 408(b); Vt. St. Ev. R. 408; Vt. St. Evid. R. 501(b).

[64] Uniform Mediation Act §5(a). Section (b) provides: "A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure." Uniform Mediation Act § 5(b).

the med-arb without a waiver. This rule applies to information learned in joint session and caucus alike. And without waiver, this rule operates to defeat one of the primary benefits of med-arb – the ability to have a truncated arbitration hearing because the parties had the opportunity to educate the neutral during the mediation stage.[65] Indeed, parties who turn to med-arb as a means of breaking an impasse in mediation[66] must be particularly careful to execute the appropriate waivers because those parties may have little or no arbitration "evidence" upon which the arbitrator can make an award. If a med-arb neutral does not secure the appropriate waivers, then any arbitration award issued may be subject to vacatur for the arbitrator having decided the case without competent evidence.[67]

B. Broad Confidentiality Statutes in non-UMA Jurisdictions Likewise Have No Exemption For Arbitration Procedures

Although the eleven states adopting the UMA have relatively straight forward confidentiality requirements, even those states that have not adopted the UMA may also provide for the confidentiality of mediation communications, prohibiting their use in any other proceeding, including perhaps the arbitration portion of a med-arb procedure.[68] Every state's confidentiality

[65] *See supra* notes 20 to 21 and accompanying text.

[66] Occasionally, parties may be close to settlement but reach impasse for any number of reasons. Those parties may request that the neutral break the mediation impasse by simply issuing an award as an arbitrator. Often, in these types of cases, the parties do not intend on presenting any additional information during the arbitration phase but submitting the mediation information to the neutral for final determination as a decision-maker. *See supra* note __ and accompanying text.

[67] An arbitrator who decides a case on no evidence or on incompetent evidence has likely exceeded the powers afforded to the arbitrator under the Federal Arbitration Act. *See* 9 U.S.C. § 10(a)(4).

[68] Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) ("At the forefront of the inquiry, however, is the fact that every state in the Union,

rules are different, and a practitioner would be wise to consult them before participating in a med-arb procedure – either as an attorney or as a neutral. No matter what the rules, a careful waiver executed by the parties will avoid any of these issues regarding confidentiality.

Some states have comprehensive mediation confidentiality or privileges that would appear to apply to med-arb because the statutes and rules have no exceptions for med-arb procedures.[69] California has a mediation privilege similar to the UMA: "(a) No evidence of anything said *** in the course of *** a mediation *** is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding."[70] Florida has a similarly broad statute: "(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications."[71] Alabama has a mediation rule requiring that all mediation communications be confidential: "All information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this

---

with the exception of Delaware, has adopted a mediation privilege of one type or another. . . . While some states provide only limited protection, a majority of the states go beyond protecting communications in private sessions with the mediator, requiring that the entire process be confidential. Id. A number of states provide explicitly that information disclosed in mediation proceedings is not subject to discovery.") (citations omitted).

[69] Unlike the UMA, often these statutes or rules do not mention arbitration specifically. However, a generally applicable statute with no relevant exceptions arguably applies to the arbitration portion of a med-arb situation. In any event, a "best practice" would be to secure a waiver.

[70] Cal. Evid. Code § 1119(a).

[71] Fl. Stat. Ann. § 44.405. Under the definitions section, a "subsequent proceeding" means "an adjudicative process that follows a mediation, including related discovery." Fl. Stat. Ann.

Rule or by statute."[72] The rule permits disclosure when "the mediator and the parties to the mediation all agree to the disclosure."[73] Otherwise, the information remains confidential. Connecticut has a mediation confidentiality statute explicitly for non-court-connected mediation, that similarly requires a waiver of the confidentiality before those mediation statements can be used in other contexts.[74] Louisiana and Oklahoma have similarly broad confidentiality statutes

---

§44.403.

[72] Ala. Mediation R. 11(a).

[73] Ala. Mediation R. 11(b)(1). This confidentiality is arguably broader than the privilege afforded by the UMA. The UMA allows disclosure if the privilege-holders waive the privilege. Under this rule, all of the mediation participants must waive the confidentiality no matter who made the applicable statement. The exceptions to the rule are not applicable here. Ala. Mediation R. 11(c).

[74] Conn. Gen. Stat. Ann 52-235d provides, in applicable part:

> (a) As used in this section, "mediation" means a process, or any part of a process, which is not court-ordered . . .
>
> (b) Except as provided in this section, by agreement of the parties or in furtherance of settlement discussions, a person not affiliated with either party to a lawsuit, an attorney for one of the parties or any other participant in a mediation shall not voluntarily disclose or, through discovery or compulsory process, be required to disclose any oral or written communication received or obtained during the course of a mediation, unless (1) *each of the parties agrees in writing to such disclosure*, (2) the disclosure is necessary to enforce a written agreement that came out of the mediation, (3) the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation, or (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law.

Conn. Gen. Stat. Ann 52-235d(a) & (b) (emphasis added); *see also* Del. Code Ann. Tit 6 §7716 ("All ADR proceedings shall be confidential and any memoranda submitted to the ADR Specialist, any statements made during the ADR and any notes or other materials made by the ADR Specialist or any party in connection with the ADR shall not be subject to discovery or introduced into evidence in any proceeding and shall not be construed to be a waiver of any otherwise applicable privilege.") Kan. Stat. Ann § 60-452a ("(a) All verbal or written information transmitted between any party to a dispute and a neutral person conducting the proceeding, or the staff of an approved

that apply to all "proceedings," but they are unclear as to whether "proceedings" would include arbitration proceedings.[75] In states with such broad confidentiality rules, the parties and the mediator should be careful to secure written waivers to make clear how the parties want the neutral

---

program under K.S.A. 5-501 et seq. and amendments thereto shall be confidential communications. No admission, representation or statement made in the proceeding shall be admissible as evidence or subject to discovery."); *see also* Tex. Civ. Prac. & Rem. Code §154.053(b) ("(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.").

[75] La. Rev. Stat. §9:4112 provides:

> A. Except as provided in this Section, all oral and written communications and records made during mediation, whether or not conducted under this Chapter and whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding.
>
> ***
>
> E. Confidentiality, in whole or in part, may be waived when all parties and the mediator specifically agree in writing.

Id. The Oklahoma statute provides:

> A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential.
>
> ***
>
> C. No mediator, initiating party, or responding party in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any part of the mediation proceedings.

Okla. Stat. Ann. Tit. 12 §1805:

to treat the mediation communications and whether they can be considered in the arbitration portion of the hearing.

In addition to considering whether a state has a general confidentiality statute, some states deal with mediation communications within a particular subject area. For instance, the mediation provisions within the title on labor in Massachusetts provide that a mediator who "receives information as a mediator relating to the labor dispute shall not be required to reveal such information received by him in the course of mediation in any administrative, civil or arbitration proceeding."[76] As this statute demonstrates, examining a state's general confidentiality statutes may or may not be enough to determine whether the mediation communications are confidential, privileged, or otherwise incompetent evidence in the arbitration portion of a med-arb procedure.

As these statutes and rules demonstrate, any number of sources of law may operate to make mediation communications confidential or privileged. If that is the case, the communications likely cannot constitute competent evidence upon which an arbitrator can render an award absent a waiver. For these reasons, the parties to the procedure should carefully consider which communications they would like to constitute a basis upon which the neutral can render an award.[77]

---

[76] Mass. Ann. Laws ch. 150, §10A.

[77] Note that most of these confidentiality statutes do not clothe the underlying *facts* as privileged. In other words, just because a document is discussed during mediation does not mean that the document is privileged *because* it was discussed during mediation. The document itself is not privileged. Because of these exceptions within the statutes, parties to a med-arb could argue that any type of documentary evidence and/or underlying facts disclosed during the med-arb are not privileged or confidential and therefore constitute competent evidence upon which an

V. Courts Are Hesitant To Uphold Arbitration Agreements In Med-Arb When The Parties Have Not Expressly Consented To The Use Of Mediation Communications In The Arbitration

Although a relatively small number of courts have addressed issues relating to med-arb and the treatment of confidential information within the process, the cases that have are instructive as to the treatment of mediation communications in the arbitration portion without proper consent by the parties. As the discussion below demonstrates, the courts look to whether the parties consented to the med-arb process and whether the parties expressly waived any or all of the mediation communications for use in the arbitration process. This section details the most significant cases dealing with these issues.

A. *Bowden v. Weickert* – Vacating An Award In Med-Arb Explicitly Based On Mediation Communications

One of the cases dealing most comprehensively with the confidentiality issues in med-arb is *Bowden v. Weickert*,[78] from the Ohio Court of Appeals. The case deals with a contract dispute involving the sale of an insurance business.[79] The contract at issue required arbitration, but the neutral suggested – and the parties agreed – that it might be wise for him to first attempt to mediate the case.[80] After two days of mediation, the parties signed a handwritten document purporting to

---

arbitrator may render an award. Although this argument has some attractiveness, the argument is not foolproof, and the easier way to deal with confidentiality is for the parties and the neutral to contract for the treatment of mediation communications and make clear how those statements should be treated by the neutral.

[78] No. S-02-017, 2003 WL 21419175 (Ohio Ct. App. 2003).

[79] *Id.* at *1.

[80] *Id.* The situation in which an arbitrator suggests mediation has the potential to put the parties in a precarious situation. The parties, even if they actually do not want to mediate might feel compelled to participate in mediation or else express a lack of confidence in the neutral who

sell the business for a certain price.[81] The agreement, however, was preliminary, and both parties expected to "flesh out" the details of the settlement in another document. However, the parties were ultimately unable to finalize the contract, and the dispute proceeded to arbitration before the same neutral.[82]

After a hearing, the arbitrator issued an award containing some of the terms of the handwritten mediated settlement, including the price.[83] The award contained some new terms that were considered when the parties drafted the handwritten agreement.[84] The award also addressed issues not part of the proposed mediated agreement, which were apparently decided based on industry norms.[85] The award also included provisions that seemed completely unrelated to original purchase contract and the mediation settlement.[86]

The buyers moved to vacate the arbitration award under Ohio law on the ground the arbitrator exceeded his authority "by attempting to modify the [handwritten mediation] agreement entered into by the parties."[87] After acknowledging the high standard required to vacate an arbitration award, the court considered how the hybrid mediation-arbitration procedure employed

---

may later issue a ruling in the case.

[81] *Id.*

[82] *Id.*

[83] *Bowden*, 2003 WL 214175, at *2-3.

[84] *Id.* at *3. For instance, the arbitration award contained a provision regarding interest due on installment payments–an option discussed in a proposed draft of the mediated settlement agreement.

[85] *Id.*

[86] *Id.* For instance, the award included information regarding the handling of certain documents.

[87] Bowden v. Weickert, 2003 WL 21419175, at *4.

in the case should affect the outcome.[88] The court noted that arbitration procedures are those involving the "hearing and determining of a case between parties in a controversy by a person or persons chosen by the parties . . . instead of by a judicial tribunal" while a mediation is "a procedure by which the parties negotiate a resolution to their dispute with the assistance of a third party mediator."[89] Because the buyer and seller engaged in mediation, Ohio law required the mediation communications to remain confidential.[90] Further, "mediation communications shall not be disclosed in any other proceeding unless all parties and the mediator consent to the disclosure."[91]

The court ultimately vacated the arbitral award because the arbitrator clearly used mediation communications to fashion the award, as evidenced by the price term. The court reasoned that although the mediation failed and the parties utilized arbitration, "the arbitrator had a duty to remain impartial[] and to protect the confidentiality of all mediation communications."[92] Thus, in deciding the case, the arbitrator could rely only upon the original contract and evidence presented at the arbitration hearing without exceeding his powers.[93] The court also noted that the use of med-arb in this instance resulted in the use of multiple proceedings, prolonging resolution

[88] *Id.* at *4-5.

[89] *Id.* at *5 (citing Ohio Council 8, AFSCME v. Ohio Dept. of Mental Health, 459 N.E.2d 220 (Ohio 1984); Oliver Design Grp. v. Westside Deutscher Frauen-Verein, d.b.a. The Altenheim, 8th Dist. App. No. 81120 (Ohio Ct. App. 2002)).

[90] *Id.* (citing Ohio Rev. Code § 2317.023(B)).

[91] *Id.* (citing Ohio Rev. Code § 2317.023(C)(1)).

[92] *Id.*

[93] *Id.* at *6-7 (vacating the arbitral award because the "arbitrator's award was based, at least in part, on the terms of the parties' failed attempt at a mediated settlement, as set forth in the handwritten mediation document").

of the sale dispute "for over three years, resulting in expenditures of time, effort, and money by all concerned, with no final resolution yet in sight."[94] However, the overriding concerns for mediation confidentiality dictated the result in the case.

Bowden v. Weickert clearly demonstrates the problems discussed above regarding the intersection of a broad confidentiality for mediation communications and a med-arb procedure.[95] Under *Bowden*, if a party can prove that – in the absence of a waiver – the arbitrator considered mediation communications in fashioning an award, the award may be subject to vacatur. In *Bowden*, the use of mediation communications was clearly expressed in the award.[96] Despite vacating the award, the Ohio court acknowledged that parties have the right to engage in a procedure such as med-arb, provided they willingly agree to them. The court stated: "Such proceedings, when properly executed, are innovative and creative ways to further the purpose of alternative dispute resolution."[97] However, because of the potential for the disclosure of

[94] *Id.* at *7.

[95] Many states have confidentiality laws prohibiting the use of mediation communications in subsequent litigation. *See, e.g.*, *Marchal v. Craig*, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997) (noting Indiana law prohibits use of mediation communications in subsequent proceedings). However, it is unclear if these laws will be interpreted as simply evidentiary rules governing court proceedings or if they could be utilized to prohibit a mediator-arbitrator from using mediation communications in a subsequent arbitration.

[96] In some circumstances, ADR proceedings are not afforded the benefit of confidentiality. In those situations, mediation communications could be later used in a med-arb arbitration. *See* In re *Berger*, No. A05-267, 2006 WL 224158 (Minn. Ct. App. Jan. 31, 2006) (noting statements made in child-custody med-arb are not confidential under Minnesota law).

[97] *Bowden*, 2003 WL 21419175, at *6. The court continued by noting that despite the benefits of med-arb, because of the "confidential nature of mediation," the parties need to enter the process willingly. *Id.* One of its reasons for informed consent is based on the "high probability that both proceedings [mediation and arbitration] are likely to be employed before [the] disputes are resolved." *Id.* The opinion is unclear as to why the court believes parties who participate in

confidential communication, the court warns "certain ground rules" must be evident "at the outset," making clear the parties' intent to participate in med-arb.[98] The court stated, "At a minimum, the record must include clear evidence that the parties have agreed to engage in a med-arb process."[99] Additionally, the court noted the record must contain: 1) "evidence that the parties are aware that the mediator will function as an arbitrator if the mediation attempt fails"; 2) evidence of a "written stipulation as to the agreed method of submitting their disputed factual issues to an arbitrator if the mediation fails"; and 3) "evidence of whether the parties agree to waive the confidentiality requirements" imposed by Ohio law.[100] The court indicated that it would only uphold an award in med-arb if all of the elements of the above test are met.[101]

B. *Town of Clinton v. Geological Services Corp.*—Ruling That The Use Of Med-Arb Does Not Constitute An Implicit Waiver Of Mediation Confidentiality

A Massachusetts Court of Appeals addressed the confidentiality issues involved in the

---

med-arb are likely to use both procedures. In fact, at least one practitioner has reported that the "dispute usually is settled in the ensuring mediation." Phillips, *Trans-Arb*, *supra* note ___, at 152. In a different article, Phillips also stated a benefit of same-neutral med-arb is the "parties' business relationship is more likely to continue after same-neutral med-arb since the dispute is likely to be settled in whole or in part in mediation." Phillips, *Same-Neutral Med-Arb*, *supra* note 6, at 28.

[98] *Id.*

[99] *Id.*

[100] *Id.*; *see also Med-Arb*, J. DISP. RESOL., Oct. 2003, at 91 (describing these four requirements). An arbitrator's opinion referenced in the California case *Levy v. Seiberlich*, 2008 WL 4726456, at *1 expressed a similar idea that the arbitrator would not consider any mediation communications in a different-neutral med-arb without any evidence that the mediation had been successful. *Id.* ("Levy raised the question of whether there had been a binding settlement reached during an earlier mediation. I did listen to Levy's basis for believing that mediation was admissible as part of the arbitration. There is no record of a settlement agreement being either recorded or reduced to writing and signed by both parties. Pursuant to the holding in *Rojas v. Superior Court* [(2004) 33 Cal.4th 407 (Rojas)], I denied Levy's request.").

med-arb process in the context of a post med-arb motion to compel discovery made by a third party who did not participate in the med-arb.[102] Defendant Garrett Engineering ("Garrett") sought documents associated with a med-arb procedure between the plaintiff Town of Clinton ("Clinton") and third party Methuen Construction Co. ("Methuen").[103] In the med-arb, the arbitrator awarded Methuen $1.2 million, and Clinton brought suit against Garrett, seeking reimbursement or indemnity of the money paid to Methuen.[104] Unsurprisingly, Garrett sought information relating to the med-arb procedures from Clinton and brought a motion to compel the documents.[105] Clinton successfully defended the motion on the basis of the Massachusetts mediation privilege.[106]

Clinton produced arbitration documents to Garrett but withheld its mediation documents on the basis of privilege.[107] Clinton specifically withheld eighteen mediation documents, including the dispute resolution agreement, a position statement, and other documents solicited by

---

[101] *See Bowden*, 2003 WL 21419175, at *6-7.

[102] Town of Clinton v. Geological Services Corp., 21 Mass. L. Rptr. 609 (Mass. Super. Ct. 2006).

[103] *Id.* at *1.

[104] *Id.* ("Clinton has now brought this action to recover the money awarded to Methuen at the arbitration.").

[105] *Id.* Certainly, no one could blame Garrett for seeking to discover this material. Garrett was likely interested in knowing what facts and legal arguments prevailed for Methuen and how Garrett could use that information to its advantage. Additionally, Garrett might have been interested in learning more about the med-arb procedure to determine whether it had any collateral estoppel arguments against Clinton.

[106] *Id.* at *3.

[107] *Id.* at *1. The opinion does not explain why Clinton disclosed the arbitration documents without a greater fight. Presumably, Massachusetts does not have a statutory or common-law privilege protecting arbitration confidentiality, and the opinion does not state whether Clinton had any other confidentiality obligations toward Methuen or any other party.

the neutral during the mediation phase of the case.[108] Garrett conceded that mediation documents are privileged under Massachusetts law,[109] but claimed that the documents' relation to the otherwise non-privileged arbitration procedure brought them outside of the realm of the privilege.[110] The court rejected Garrett's arguments. The court, citing precedent, noted that the Massachusetts mediation privilege does not contain *any* exceptions and is silent as to whether it can be waived at all.[111] Given the policy in favor of confidentiality for mediation statements, the court held that no waiver exception existed under the statute. In particular, the court expressed a concern that the parties would not participate in the mediation openly if they feared that confidential information would be used to their disadvantage during the arbitration phase of the procedure.[112] The *Clinton* court, similar to the *Bowden* court, relied heavily on the fact that the

---

[108] *Id.* at *1 n.2.

[109] The Massachusetts statute dealing with mediation privilege is G.L. c. 233 § 23C ("All memoranda, and other work product prepared by a mediator and a mediator's case files shall be kept confidential and not subject to disclosure in any judicial ... proceedings involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial ... proceeding.").

[110] *Town of Clinton*, 21 Mass. L. Rptr. 609, at *1 ("Presumably, Garrett takes the position that because the mediation process came to an end and was followed by an arbitration process involving the same parties, all documents generated during the mediation now "relate" to the subsequent arbitration and should be available in discovery.").

[111] *Id.* at *2 (citing *Leary v. Geoghan*, 2002 WL 32140255 (Mass. Ct. App. 2002).

[112] *Id.* at *2-3. The court relied heavily on law review articles, including the following quotation:

> The willingness of mediation parties to 'open up' is essential to the success of the process. The mediation process is purposefully informal to encourage a broad ranging discussion of facts, feelings, issues, underlying interests and possible solutions to the parties' conflict. Mediation's private setting invites parties to speak openly, with complete candor. In addition, mediators often hold private

parties to the related mediation did not express any intent to waive their mediation privilege:

> When the parties struck a bargain to enter into an ADR process, they agreed that if mediation failed, they would move to arbitration. However, they made no further agreement to waive the privilege of confidentiality. The mere fact that the mediation portion of the ADR process did not result in an agreement or resolution does not serve as an implicit waiver of the privilege. Under the circumstances of this case, there has been no waiver of the blanket confidentiality privilege conferred by G.L. c. 233 § 23C, and therefore, to the extent that Garrett seeks documents produced during the mediation that were never resubmitted or otherwise independently utilized during the arbitration, Garrett's motion must be DENIED.[113]

Accordingly, any waiver of the mediation privilege must be clear and explicit by the parties holding the privilege, even in the med-arb context. This case is consistent with *Bowden* in

---

> meetings-'caucuses'-with each of the parties. More overt assurances of confidentiality are common. Mediators regularly require all present to promise to keep mediation discussions confidential, and routinely assure participants that the proceedings are confidential (whether or not legal protection is certain). Under such circumstances, mediation parties often reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law. Without adequate legal protection, a party's candor in mediation might well be 'rewarded' by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation. Participation will diminish if perceptions of confidentiality are not matched by reality.

Id. at *2 (quoting A. Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, at 8-10)).

[113] *Id.* at *3; *see also Folb v. Motion Picture Industry Pension & Health* Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998) (establishing a mediation privilege when a party sought discovery of mediation communications); *Confidentiality After Med-Arb*, 62-JUL DISP. RESOL. J. 6, 6-7 (2007). A federal court in Ohio came to a similar conclusion when considering whether a mediation document in an arb-med procedure (another hybrid procedure in which the arbitration portion occurs first) could be considered in the resolution of a motion to vacate an arbitration award. *Society of Lloyd's v. Moore*, 2006 WL 3167735 (S.D. Ohio Nov. 1, 2006). The Ohio court similarly relied on the importance of the mediation privilege and the fact that the parties never intended on waiving their mediation privilege, despite their use of the hybrid procedure. *Id.* at *4-5

that the mediation privilege is preserved unless and until it is waived. In addition, any waiver must be explicit, rather than implicit, and made by the holders of the privilege.

C. *In re Cartright*—Providing Extraordinary Relief to Parties Urged To Use Med-Arb When One Party Does Not Consent To The Procedure

The Texas opinion of *In re Cartright*,[114] dealt with a confidentiality issue in a contract that specifically required med-arb procedure, but the contract did not specify how mediation communications would be treated in the arbitration. The *Cartright* case involved a multi-step dispute resolution mechanism in a divorce decree,[115] naming James Patrick Smith as the neutral for both mediation and arbitration.[116] The parties filed actions against each other regarding the disposition of their marital property and the child custody arrangements, and the husband successfully moved the court to compel mediation/arbitration before Smith, in accordance with their agreement.[117]

When the parties ran into difficulties scheduling with Smith, the court appointed the Honorable Mary Sean O'Reilly to serve as the parties' arbitrator.[118] The husband objected to this

---

(relying on *Bowden*, 2003 WL 21419175, at *6).

[114] 104 S.W.3d 706 (Tex. App. 2003).

[115] *Id.* at 708.

[116] *Id.* The agreement incident to the divorce stated: "Any claim or controversy arising out of the Final Decree of Divorce . . . or the Agreement Incident to Divorce that cannot be resolved by direct negotiation will be mediated [according to Texas law] with JAMES PATRICK SMITH. If the parties cannot resolve the matter through mediation, then JAMES PATRICK SMITH shall be the arbitrator to arbitrate all disputes." *Id.* Unlike the *Bowden* case, the husband and wife in *Cartwrigtht* not only agreed to a med-arb procedure but also agreed to the specific neutral who was to perform the procedure.

[117] *Id.* at 709.

[118] *Id.* at 710. The procedural history of this case is a bit muddled. The parties scheduled and rescheduled mediation with Smith. At one point, one of the parties tried to attend the

appointment because Judge O'Reilly previously served as a mediator when the parties agreed to their original child-custody agreement.[119] The court overruled the husband's objection on the basis that the arbitration dealt solely with property issues, and that any confidential information learned by Judge O'Reilly in the previous mediation would be peripheral to the property issues remaining.[120] The husband, then, sought a writ of mandamus to reverse the ruling,[121] which was granted.

The court initially found that the parties agreed to arbitrate, and that, given the difficulties in scheduling with Smith,[122] the district court did not abuse its discretion in appointing an arbitrator other than Smith.[123] The court next turned to the appropriateness of Judge O'Reilly as an arbitrator,[124] focusing on Texas mediation confidentiality laws.[125] Under Texas law, mediation

---

mediation, only to discover the session had been cancelled. Additionally, one of the two cases was dismissed for lack of prosecution. *Id.* at 709-10. The opinion is unclear whether the parties actually mediated with Smith as the mediator. *Id.* at 710.

[119] *Id.*

[120] *Id.* ("Regarding the objection to Judge O'Reilly, the court said, The arbitrator mediated the child custody issues, nothing dealing with property. As far as the Court is concerned, as far as this Court knows, unless there is some proof otherwise, no property issues have been before this mediator. So this Court's order to mediate with that arbitrator on those days will stand.").

[121] *Id.* at 710-11 (noting the court of appeals reviews this type of motion to determined if the court below abused its discretion in making its rulings).

[122] These circumstances include the delay tactics of all parties and their counsel as well as the unavailability of arbitrator Smith. *See id.* at 712-13.

[123] *Id.* at 713.

[124] *Id.* The husband sought disqualification because Judge O'Reilly may have learned confidential information in their previous mediation years prior to the conflict at issue in the case. The wife, however, was unopposed to the appointment because, *inter alia*, as a former judge, she should be able to separate confidential from other information and she would be working in the exact same capacity as arbitrator Smith would have done were he available. *Id.*

[125] *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 154.073).

communications are strictly confidential.[126] The court noted: "Just as it would be improper for a mediator to disclose any confidential information to another arbitrator of the parties' dispute, it is also improper for the mediator to act as the arbitrator in the same or a related dispute without the express consent of the parties."[127] The court of appeals held that the appointment of Judge O'Reilly was an abuse of discretion.[128] At the time that Judge O'Reilly mediated the case, the parties did not know that she might later serve as their arbitrator,[129] and the parties might have acted differently in the mediation if they knew Judge O'Reilly would wear multiple hats in the dispute-resolution procedure.[130] Thus, without the express consent of both parties, the district court could not appoint Judge O'Reilly to act as arbitrator. Presumably, the court would have conducted a different analysis if the litigation had involved mediator/arbitrator Smith, whom the parties had already agreed would make a suitable neutral for both procedures.[131] Later Texas cases, however, following *Cartwright*, specifically approve of the use of same-neutral med-arb if the parties expressly contracted for the procedure.[132]

D. ***Township of Aberdeen v. Patrolmen's Benev. Ass'n, Local 163—Disapproving***

---

[126] Tex. Civ. Prac. & Rem. Code Ann. § 154.073(c). OTHER STATES HAVE SIMILAR LAWS? IF SO, CITE THEM HERE.

[127] *In re Cartwright*, 104 S.W.3d at 714.

[128] *Id.*

[129] *Id.*

[130] *Id.*; *see also In re E.B.L.G.*, 2009 WL 3126406 (Tex. Ct. App. Sept. 29, 2009) (distinguishing the case from *In re Cartwright* because the court did not order the same neutral to serve as both mediator and arbitrator).

[131] Although the parties specifically agreed to the neutral that they wanted to proceed over later disputes, the decision does not indicate if the divorce decree specifically addressed how mediation communications could be used in later arbitration proceedings.

[132] *See Mann v. Mann*, 2008 WL 577266, at *2 (Tex. Ct. App. Mar. 5, 2008); *Gaskin v. Gaskin*, 2006 WL 2507319, at *3 (Tex. Ct. App. Aug. 31, 2006).

of Mediator Reliance On Arbitration Awards

Similar to the other cases outlined above (and *Bowden* in particular), the Superior Court of New Jersey held that mediation communications cannot form the basis for an arbitration award.[133] The case involved a dispute between the Township of Aberdeen and the union representing police officers over a contract extension when the current collective bargaining agreement was set to expire.[134] The parties were set to begin arbitration, but the arbitrator suggested mediation first, to which the parties agreed.[135] The dispute largely centered on pay for existing officers and the number of hours per week each officer could work. After the mediation reached an impasse, the parties engaged in a substantial and protracted arbitration hearing.[136]

The arbitrator's decision made clear that the neutral had considered mediation statements not also presented during the arbitration. In the award, the arbitrator "made repeated references to information received and statements made during the mediation process. None of these references was grounded in the evidence presented at the arbitration hearings. The arbitrator also described in great detail the Township's shifting positions during the mediation process."[137] The court found

---

[133] *Township of Aberdeen v. Patrolmen's Benev. Ass'n, Local 163,* 669 A.2d 281 (N.J. Super. Ct. 1996).

[134] *Id.* at 291. As noted above, *see supra* note 13 and accompanying text, med-arb has traditionally been utilized in collective bargaining situations for emergency workers to avoid the possibility of impasse and a work stoppage in such an important area of public safety.

[135] *Township of Aberdeen*, 669 A.2d at 191. This is another parallel to the *Bowden* case, in which the arbitrator first suggests that the parties engage in mediation prior to conducting an arbitration. As noted above, *see supra* note 80, parties put in this situation might agree to the procedure primarily out of coercion (such as not wanting to disagree with the potential arbitrator's suggestion) than out of true, informed consent.

[136] *Township of Aberdeen*, 669 A.2d at 192.

[137] *Id.*

that the arbitrator erred in giving weight to mediation evidence that was not part of the arbitration record, thus allowing himself to be biased against the Township based on tactics employed by the Township during the mediation.[138]

As with the cases discussed above, the court primarily relied on the mediation privilege and the public policy favoring the confidentiality of mediation communications. The court held:

> Mediation would be a hollow practice if the parties' negotiating tactics could be used against them by the arbitrator in rendering the final decision. The parties should feel free to negotiate without fear that what they say and do will later be used against them. While perhaps the analogy is imperfect, it would be unthinkable for a trial court to base its decision on information disclosed in pretrial settlement negotiations. Indeed, evidence of settlement negotiations, including offers of compromise, is generally inadmissible to prove a party's liability for a claim. N.J.R.E. 408. Such evidence is excluded because it is not relevant to the question of liability and because its admissibility would discourage parties from attempting to settle claims out of court. *See Wyatt by Caldwell v. Wyatt*, 217 N.J.Super. 580, 586, 526 A.2d 719 (App.Div.1987). Negotiations during the mediation process should be subject to similar protection. To protect the integrity of mediation, N.J.A.C. 19:16-3.4 provides that "[i]nformation disclosed by a party to a mediator ... shall not be divulged by the mediator voluntarily or by compulsion." In a similar vein, N.J.A.C. 19:16-5.7(c) states that "[i]nformation disclosed by a party to an arbitrator while functioning in a mediatory capacity shall not be divulged by the arbitrator voluntarily or by compulsion." While these regulations are not directly on point, they are further evidence of the strong public interest in protecting the confidentiality of negotiations during mediation so as to ensure the parties to the dispute will feel free to adopt and modify their positions as necessary to reach an agreeable settlement. Permitting arbitrators to use such changes in position in the course of rendering a final arbitration award undermines this sense of freedom that the regulations were designed to encourage.[139]

As with the other cases discussed above, policy dictates that mediation communications not be used in the arbitration setting, presumably, unless the parties agree that they may do so.

---

[138] *Id.*at 293-94.
[139] *Id.* at 294.

E. These Cases Demonstrate How Mediation Confidentiality Applies To Med-Arb Procedures

What these cases show is that issues relating to confidentiality in med-arb usually arise in the context of med-arb procedures that do not adequately provide in advance for confidentiality and informed consent. Both *Bowden* and *Cartright* contain procedural irregularities making these cases a bit extraordinary. In *Bowden*, the parties originally agreed to arbitrate, but the arbitrator convinced the parties to try mediating the case with him, instead.[140] They did not explicitly contract for med-arb services, and the only written agreement between the parties contained an arbitration clause.[141] In *Cartwright*, the parties did agree in writing to the med-arb procedure, but the neutral they selected later became unavailable.[142] The court of appeals in the latter case was willing to enforce the parties' agreement to use med-arb, but the problem concerned the selection of the neutral, not the selection of the process.[143] Thus, these cases may not dictate the outcome of future disputes arising in med-arb, especially if the cases had proceeded according to contract.[144] The *Town of Clinton* case involved an agreement to engage in med-arb, but the dispute in court involved parties that were not part of the med-arb procedure. The *Township of Aberdeen* case

[140] *Bowden*, 2006 WL 214919175, at *1. The court does not say exactly how the parties arrived at mediation, rather than arbitration. It does note, however, the "arbitrator, however, instead of proceeding to arbitration, attempted to mediate the dispute." *Id.*

[141] *Id.*; *see also Wright v. Brockett*, 150 Misc. 2d 1031, 1036-40 (N.Y. Super. Ct. 1991) (finding no proof of consent that the parties agreed to an arbitration portion of med-arb and therefore refusing to enforce a settlement as an arbitration award).

[142] *Cartwright*, 104 S.W.3d at 710.

[143] *Id.* at 711, 713-14.

[144] *See Ziarno v. Gardener Carton & Douglas, LLP*, 2004 WL 838131, at *3 (E.D.Pa. Apr. 8, 2004) (dismissing case for lack of jurisdiction because the parties did not "submit [the matter] to private mediation/arbitration prior to bringing suit.").

involved, arguably, the most "classic" med-arb situation, and the court still found that the arbitrator should not have used mediation communications in the subsequent arbitration.

What these cases teach is that courts can rely on state statutes, court rules, and even public policy dealing with mediation confidentiality in order to protect mediation communications from being disclosed later, in the absence of any agreement allowing the use of such information. In *Bowden*, the court determined such disclosure actually occurred,[145] while the *Cartwright* court recognized the possibility of such disclosures and did not require the parties to proceed in med-arb with the court-selected neutral.[146] The *Town of Clinton* case did not allow any discovery of another parties' mediation communications,[147] and the *Township of Aberdeen* court relied on statutes and public policy in its decision.[148]

Although some states have blanket prohibitions against disclosure of statements in mediation,[149] not all states do. Other courts might not have been as willing to look to broader policies, especially if the parties agree to use a med-arb procedure in the first place. Therefore, any of these cases may have turned out differently had the parties lived in a state lacking these protections.

Even if the parties are in a state with a general protection of mediation communications, this does not mean such protection cannot be waived. Indeed, if such confidentiality or privilege were absolute and unable to be waived, the parties would not be able to freely engage in the

[145] *Bowden*, 2003 WL 21419175, at *6-7.
[146] *Cartwright*, 104 S.W.3d at 714-15.
[147] *Town of Clinton*, 21 Mass. L. Rptr. 609.
[148] *Township of Aberdeen*, 669 A.2d 281.

med-arb process. In stressing the need for informed consent, the courts in the decisions cited above recognized the limits of confidentiality and the contracting parties' freedom to choose an appropriate method of dispute resolution to meet the needs of the parties.[150] For instance, the *Bowden* court established a three-part test to determine whether proper informed consent was given.[151] No matter the applicable law in the relevant jurisdiction, if parties are intent on using same-neutral med-arb, they should clearly contract for the procedure, and the contract should explicitly waive confidentiality.[152] Without such careful planning and drafting, the parties may participate in a procedure only to have resulting arbitration agreements vacated under the Federal Arbitration Act.

---

[149] *See supra* note 58 and Section IV.B.

[150] *Bowden*, 2003 WL 21419175, at *6 ("[G]iven the confidential nature of mediation, the high degree of deference enjoyed by an arbitrator, and the high probability that both proceedings are likely to be employed before their disputes are resolved, it is essential that the parties agree to certain ground rules at the outset. At a minimum, the record must include clear evidence the parties have agreed to engage in a med-arb process, by allowing the court-appointed arbitrator to function as the mediator of their dispute."); *Cartwright*, 104 S.W.3d at 714 (partially granting the writ because the parties, when they first mediated a case before Judge O'Reilly did not "make informed decisions" about their disclosures in that mediation such to assume they would consent to her using such knowledge in a subsequent med-arb proceeding).

[151] *See supra* note 100 and accompanying text.

[152] Gerald Phillips recommends the neutral explain the benefits and drawbacks of the med-arb process to the parties, including the difficulties of confidentiality and other ethical problems that may arise. After these issues are explained, Phillips recommends the parties give informed consent in writing. Phillips, *Same-Neutral Med-Arb*, *supra* note 7, at 30-31. As a sample waiver, Phillips suggests using language such as that found in the California ADR Practice Guide: "The parties understand that this process will likely cause the arbitrator to receive information that might not otherwise have been received as evidence in the arbitration and to receive information confidentially from each fo the parties that may not be disclosed to the other side." *Id.* Additionally, the waiver should have the "parties acknowledge that the arbitrator might be influenced by confidential information learned in the mediation and sign a waiver giving up the right to disqualify the arbitrator and vacate the award on account of this." *Id.*

V. In Light Of Comprehensive Confidentiality Laws, Parties' Informed Consent To Participate In Med-Arb Must Be Reflected In Writing

As shown above, med-arb offers participants benefits that are simply unavailable with many other dispute-resolution options.[153] Parties who want to take advantage of these benefits should be able to do so. Although the med-arb procedure has not been specifically endorsed in any one court opinion, the courts appear to be hospitable to the parties' choice of using this procedure, provided that the parties consent not only to the procedure but also to the use of the mediation communications in the later arbitration.

First and foremost, the intent should be the intent of the parties, as opposed to the intention of the neutral or any third-party.[154] The parties' intent should encompass at least two things. First,

---

[153] *See supra* Section III.

[154] The Institute of Christian Conciliation has a med-arb rule that specifically allow the use of the same neutral, provided that both parties agree:

> D. When a transition pursuant to this Rule occurs, an entirely new panel of arbitrators shall be appointed pursuant to Rule 10, unless the parties agree otherwise. By unanimous written agreement, either before or after the mediation stage, the parties may agree to use the same conciliators in both mediation and arbitration. By such unanimous agreement, the parties agree that the arbitrators may consider any information they received during mediation as though it were received during arbitration, in full compliance with the Arbitration Rules.
>
> E. Whenever mediators are authorized to act as arbitrators pursuant to this Rule, the parties, after signing the appropriate documents, may either: (1) summarize the information that was received during mediation, make closing statements, and then rest their cases; or (2) proceed to offer new information pursuant to the Arbitration Rules.
>
> F. Whenever new arbitrators are appointed pursuant to this Rule, the arbitrators may not call the previous mediators as witnesses without the unanimous agreement of the parties and the mediators.

the parties should express their intent, in writing, to participate in the med-arb procedure with the same neutral serving in both capacities.[155] In addition, the parties should also specify in their

---

Rules of Procedure, Institute for Christian Conciliation, Rule 24, *at* http://www.peacemaker.net/site/c.nuIWL7MOJtE/b.5378801/k.D71A/Rules_of_Procedure.htm; Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, But Party Sophistication is Mandatory*, 26 ALT. TO THE HIGH COST OF LITIG. 101 (2008) ("The risk-benefit analysis should be made by the parties and their counsel, not by the neutral. The arbitrators answering this question were not in a position to weigh the parties' determination to resolve the dispute in mediation in order to preserve their business relationship."); Gerald F. Phillips, *A Case Study Demonstrating How the Entertainment Business – And Everyone Else – Can Benefit By Using Hybrid Med-Arb Processes*, 25 ALT. TO THE HIGH COST OF LITIG. 67 (2007) ("The parties urged the neutral to be the mediator and arbitrator. They offered to execute the necessary stipulation to permit the neutral to do both. The dispute was resolved in the mediation part of the med-arb."); Bartel, *supra* note 1, at 689 ("Ensuring that med-arb as a distinct dispute resolution process is voluntarily chosen and agreed to by the parties minimizes its disadvantages."). In Bartel's article, he concluded:

> Recognizing the power of the med-arbitrator and the potential for abuse of that power, the parties should consider carefully whether med-arb is the appropriate choice to resolve their dispute. When the parties are able to choose a med-arbitrator whose style and skill they know and respect, or when the parties are willing to take their chances on a particular dispute with someone they are not as familiar with, med-arb can be the best choice. Without this understanding and voluntary choice, the process may do more harm than good.

Bartel, *supra* note 1, at 691.

[155]Of course, if the parties choose to use different neutrals in the med-arb procedure, they can elect to do so. For parties who believe same-neutral med-arb would inevitably result in a breach of confidential information, they may wish to employ med-arb, but use different neutrals for the mediation and arbitration proceedings. This could also be a viable alternative for parties who would feel too uncomfortable to speak in the mediation because they fear the mediator-turned-arbitrator would later use those statements to that party's disadvantage when crafting an award.

Different-neutral med-arb would maintain the benefit of finality without potentially sacrificing the confidentiality of mediation. The biggest drawback to this procedure is the need to initiate an entirely new arbitration proceeding following a failed mediation. The parties, then, would have to educate the arbitrator as to the merits of the dispute. Arnold M. Zack, *supra* note 40, at 36. Because the arbitrator is not familiar with the case, the parties would be required to spend time and money bringing the new neutral up to speed, essentially arguing their case a second time.

contract how they want mediation communications to be treated if the neutral must render an arbitration award.

Entertainment neutral and med-arb specialist Gerald Phillips recounts a recent contract for med-arb crafted between himself and the parties. The parties originally approached Phillips with a stipulation encompassing that the parties would engage in a med-arb procedure conducted by

---

Individual parties considering med-arb should balance the possibility of breached confidentiality with the speed and efficiency associated with same-neutral med-arb before deciding how to proceed.

Additionally, different-neutral med-arb does not have the same flexibility as same-neutral med-arb. As noted above, *see* supra notes 26 to 28 and accompanying text, a neutral engaged in same-neutral med-arb can switch back and forth between mediation and arbitration depending on the circumstances of the dispute and the needs of the parties. However, if the arbitrator is a person other than the mediator, such transitions are less likely, if not impossible. *See* Bartel, *supra* note 1, at 666; *see also* Blankenship, *supra* note 54, at 31 ("Med-arb-diff, however, is more costly and time consuming and it forecloses further attempts to mediate once the process reaches arbitration."). Because the arbitrator would be unfamiliar with the parties' attempts and progress during mediation, it is unlikely the neutral would be comfortable switching to mediation once the dispute has reached the arbitration stage. Additionally, the arbitrator may not be skilled as a mediator and may not be able to offer those services even if the parties would like to revert back to the mediation process.

Still other variations on the med-arb process could be used by the parties. For instance, one variation involves the outgoing mediator makes a recommendation to the incoming arbitrator as to how the mediator would have resolved the dispute. *See* Blankenship, *supra* note 54, at 31 ("This process is identical to med-arb-diff except that should the participants fail to reach a voluntary agreement during the mediation phase, the mediator submits a recommendation to the arbitrator. It is suggested that the arbitrator usually follows the recommendation."). Another option is known as "co-med-arb" in which the mediator and arbitrator are separate neutrals who jointly oversee a factual presentation by the parties. Following the factual presentation, the parties engage in mediation with the mediator and then arbitration, if necessary, with the arbitrator. This process has the benefit of no potential disclosure of confidential information as well as any potential bias on the part of the neutral, it does have the added expense of an additional neutral and the perhaps needless presentation of a formal fact-gather session if the dispute resolves during the mediation phase. *See id.*

Phillips.[156] Essentially, the original situation only encompassed the parties' intent to conduct a med-arb process. Having received the parties' stipulation, Phillips suggested his own stipulation, including the following language:

> 8. The Parties acknowledge that [Phillips] has advised them that during the mediation process they and their counsel may and most likely will disclose to him, while acting as the Mediator, their respective settlement positions, their theories of the case, the alleged strengths and weaknesses of their respective positions and matters which may not be admissible during the arbitration; and if he is to perform both functions he will, if the case is not settled, hear testimony, and will ultimately rule in the case.
>
> 9. The Parties agree that [Phillips] may undertake the role both of Mediator and Arbitrator, and the Parties, by and through their attorneys forever waive and relinquish any claim or objection to his service in both capacities. The Parties waive any claim they may have of prejudice resulting from Arbitrator undertaking to act in both capacities as a Mediator and as the Arbitrator, and waive any conflict or impropriety in this regard.
>
> 10. The Parties agree that they will not challenge the determination, outcome and decision of the Arbitrator on the basis that they have requested the Arbitrator to act as both the Mediator and Arbitrator in this matter.[157]

Again, this stipulation evidences the parties' intent to engage in the med-arb procedure in front of Phillips, and it even acknowledges that Phillips might hear statements in the mediation that would not be considered "evidence" in the arbitration portion. However, even this stipulation does not discuss whether those mediation communications would remain confidential or if they could be used in the arbitration phase. Immediately prior to the mediation, Phillips asked the parties to sign a stipulation that would allow him to render an arbitration award based on mediation

[156] Phillips, *A Case Study*, *supra* note 154.
[157] *Id.*

communications.[158] In his opening statement, he also advised the parties that information learned in caucus "may influence the arbitrator in the award he will render."[159] Although such stipulation suggests that the arbitration award would be rendered by the neutral based on mediation communications, such waiver is not explicit and might not satisfy the *Bowden* court or other courts who employ a similar test.

A clearer stipulation would have stated whether the confidentiality of mediation communications would or would not be waived in the arbitration portion of med-arb. The stipulation could have done one of two things: 1) expressly stated that the confidentiality afforded mediation communications is waived for the purposes of the arbitration portion of the procedure or 2) expressly retained the confidentiality of mediation communications. For parties who would

---

[158] That stipulation provided:

> It has been agreed by the Parties that [the author] acting as a mediator will endeavor to help the Parties to resolve this dispute during the morning session on June 16. If no agreement is reached during the morning the parties agree that [the author] will then be the Arbitrator. The parties agree that if he believes he received information, during the morning mediation, sufficient for his making a binding award, the parties agree that he may make such an award. If he determines that there should be a hearing to ascertain the facts which he felt he required, a limited arbitration shall be held. The Parties agree that they will not attack any award due to the fact that the arbitration was cut short in order for the arbitrator to render an award based on the mediation and the curtailed arbitration.

Id.

[159] *Id.* ("The parties have agreed that they will in no way challenge the proceedings because the neutral may have used some confidential information in the award or that he held private caucuses where he was a party to ex-parte communications."). Ultimately, Phillips settled the entertainment dispute in the mediation portion of the med-arb. He attributes the settlement, in part, to a position that he took that he would not give the parties an evaluation of the case, which could have been perceived by the parties as a preview of a potential arbitration award. *Id.* He noted that his restraint from giving an evaluation heightened the parties' trust in him, especially when he sought to generate options and help the parties find creative solutions to their dispute.

like the option to have the neutral base an award solely based on the mediation presentations, an express waiver of the confidentiality of the mediation communications should be executed. The best practice is for the parties to enter the waiver at the onset of the med-arb procedure. A waiver at the point at which the procedure changes from a mediation to an arbitration may also evidence the parties intent.[160] In any event, if the parties neglect to execute such a waiver at the beginning, then a belated waiver is better than no waiver at all.

If the parties choose to maintain the confidentiality of the mediation communications, they should execute a contract similarly expressing their intent to maintain the confidentiality. Parties who wish to maintain the confidentiality of the mediation communications will have to rely on the ability of the neutral (whom they presumably chose) to be able to disregard mediation communications, particularly caucus communications, if any, that the parties divulged during the process. In this situation, the mediator would be similar to a judge or jury asked to disregard certain evidence in a trial.[161] Although parties may have legitimate reasons for choosing to maintain the confidentiality of mediation communications, those parties must be aware that the later arbitration would require a full presentation in front of the arbitrator, even if that presentation is largely duplicative of the information discussed during the mediation.[162] Whether the parties choose to waive or maintain the confidentiality of mediation communications is a decision for the

[160] If the parties do not execute the waiver until the middle of the med-arb procedure, the waiver may later be susceptible to a challenge on the basis of duress or a similar defense.

[161] *See supra* note 50.

[162] Perhaps another option would be for the parties to explicitly waive the confidentiality of mediation communications made in joint session while maintaining the confidentiality of mediation communications made in caucus.

parties; this Article suggests that no matter the intent of the parties, such intent be reduced to writing, preferably, prior to the beginning of the med-arb procedure.

V. Conclusion

As demonstrated above, med-arb can be a useful procedure for parties who look to combine the twin benefits of flexibility and finality in an ADR procedure. Parties and neutrals who wish to engage in this procedure, however, should be careful to execute detailed contracts expressing the parties' wish to engage in med-arb and expressing what mediation communications, if any, can be considered for the purpose of the arbitration award. Without this type of explicit disclosure, any award resulting from the med-arb procedure may be subject to vacatur under the Federal Arbitration Act or comparable state statutes. Without such explicit waivers, the med-arb procedure would ironically be subject to post-arbitration litigation, threatening the finality of the process so deliberately chosen.

Although the level of confidentiality afforded to mediation statements should be the choice of the parties, a recommended approach would be for the parties to waive confidentiality with respect to anything said in the joint sessions, at a minimum. If the neutral cannot rely on any statements made in the joint sessions and the parties are required to make a complete presentation of evidence in arbitration, then many of the efficiencies of med-arb have been squandered by the parties. Whether the parties should also waive confidentiality afforded to mediation communications made in caucus is a more difficult decision. If the parties expect the mediation portion of the med-arb to be conducted primarily by caucus, they might want to waive confidentiality with respect to the entire proceeding, or else they will be required to put on an

extensive arbitration hearing. If the parties participate primarily in joint session in mediation, then they likely can present a sufficient "case" if the dispute does not settle and the parties must arbitrate the dispute.

Ultimately, the question may be presented as such: how much confidentiality do the parties need so that they are not required to start anew at the arbitration hearing? An imperfect solution may be to waive all confidentiality in a "shuttle diplomacy" mediation but only the joint session communications in a mediation involving primarily joint sessions. This recommendation is simply an imperfect starting point, and the parties in each individual situation should carefully assess what information they would like to remain confidential and what information would make the arbitration process more streamlined. Giving thoughtful consideration to this question will assist the parties in creating a streamlined procedure that still protects the confidentiality of sensitive information.