ADDITIONAL ARTICLES

"MED-ARB": BEHIND THE CLOSED DOORS OF A HYBRID PROCESS

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Med-arb is a hybrid conflict resolution process that attempts to blend the collaborative, client-empowering approach of mediation with the efficiency and finality of decision making from arbitration. This article explores the benefits and risks of med-arb in the context of separation-divorce cases. The conclusions offer suggestions for maximizing the benefits and managing the risks.

Keypoints for the Family Court Community

- Many conflict resolution practitioners are blending the roles and skills of different conflict resolution processes in order to better serve the needs of different clients.
- Although blending roles and skills may provide certain advantages, practitioners and program developers need to be cognizant of unintended consequences.
- This article highlights the risks of blending mediation and arbitration in relation to client self-determination, informed consent, fairness, neutrality, power, and other issues.

Keywords: *Arbitration*; *Hybrid Conflict Resolution*; *Informed Consent*; *Med-Arb*; *Mediation*; *and Neutrality.*

INTRODUCTION

In the quest for more effective methods of resolving family disputes arising out of separation and divorce, legal and mental health professionals have tried a broad range of processes, including mediation, lawyer-led negotiation, litigation, arbitration, custody evaluation, and family group conferencing (Folberg, Milne, & Salem, 2004). Some processes seek to empower the parties to make decisions for themselves, whereas other processes turn decision-making power over to a third party. The purpose of this article is to explore the potential benefits and risks of blending these approaches in a process called med-arb (or mediation-arbitration).

This article begins with an overview of med-arb as a hybrid conflict resolution process. The following sections illustrate the process of med-arb using a divorce scenario. Although the particular case example is fictional, it draws from issues raised in actual cases. The case analysis is intended to highlight potential benefits and risks of med-arb from the perspectives of the med-arbiter and each of the parties. The final section provides suggestions for policy makers, practitioners, researchers, and professional associations who may be interested in the development of med-arb and related processes.

WHAT IS MED-ARB?

Med-arb is a two-stage conflict resolution process. In the first stage, the med-arbiter strives to facilitate agreement between the parties. If the parties do not resolve their concerns, the med-arbiter switches roles from mediator to arbitrator, conducting an adjudicative hearing to determine the

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outstanding issues. During the arbitration phase, the parties relinquish control over decision making to the arbitrator (Loschelder & Trötschel, 2010). The parties can agree in advance whether the arbitrated decisions will be binding or nonbinding (sometimes called "recommendatory"). Most arbitrators and theorists favor binding arbitration so the process necessarily results in a definite outcome (Limbury, 2005). If the med-arbiter's decision is nonbinding, either party may ignore the med-arbiter's advice and the parties will require another process to deal with the ongoing conflict. When arbitration relates to parenting issues (e.g., child custody, visitation, and child support), courts generally retain the right to review arbitrated decisions. In other words, even if parents agree to binding arbitration, the court may review the decision and substitute its own decision in order to protect the best interests of the child (Fawzy v. Fawzy, 2009; *Tuetken v. Tuetken*, 2010).[1] For alimony and division of family property, courts will generally enforce arbitrated agreements unless there is proof of either arbitrator bias or the arbitrator made decisions outside the scope of the agreement to arbitrate. Still, courts may decline to enforce arbitration awards that affect children such as when an award of alimony may affect the calculation of child support (Toiberman v. Tisera, 2008). Whereas court processes are typically open to the public, both phases of the med-arb process are closed. Med-arb offers confidentiality for families working through separation-divorce issues, but this veil of privacy makes it difficult for researchers and the public to know what goes on behind the closed doors of med-arb.

The specific models of mediation and arbitration used depend on the training and preferred approaches of the med-arbiters. In an interest-based approach, the med-arbiter uses mediation to help the parties focus on their underlying interests and work toward win-win solutions (Barsky, 2007). The mediator can move back and forth between mediation and arbitration. In a rights-based approach, the med-arbiter uses mediation to encourage the parties to reach settlement based on their legal rights and responsibilities. A rights-based med-arbiter typically tries mediation once; if no agreement is reached, then the med-arbiter conducts a formal arbitration hearing (Telford, 2000). Sometimes, the arbitration is based on final offers, where the med-arbiter selects between the final positions of the two parties. Some med-arbiters purport to use a transformative approach to the mediation stage of med-arb (Limbury, 2005); however, the use of transformative mediation within med-arb seems somewhat antithetical. Whereas transformative mediation seeks to empower parties to make their own decisions and promote mutual understanding (Folger, Bush, & Della Noce, 2010), med-arb has a built-in mechanism of arbitration that removes the parties' decision-making power. Med-arb may fit better with rights-based or interest-based approaches that view reaching a decision as a primary goal of the process. Although some med-arbiters clearly articulate their models of intervention, others do not provide a clear statement of their approaches. Ideally, the specifics of the med-arb process are tailored to the needs of the parties and their situation (Blankenship, 2006).

Some additional family conflict resolution processes have elements of mediation and arbitration within them, but should be distinguished from med-arb. The role of a parenting coordinator, for instance, has been described as a professional who uses a combination of conflict resolution methods including assessment, parenting education, mediation, evaluation, case management, arbitration, child custody consulting, co-parent counseling, monitoring, and enforcement (American Psychological Association, 2012; Barsky, 2012; Hayes, Grady, & Brantley, 2012). Although a parenting coordinator may use methods akin to mediation and arbitration, this role can be distinguished from a med-arbiter because of the breadth of additional methods that the parenting coordinator may use. Further, the mediation and arbitration processes used within parenting coordination tend to be informal. In contrast, med-arbiters may use a more formal mediation process, followed by a more formal arbitration process. Lawyers are more likely to be present during med-arb, particularly during the arbitration stage when each party is expected to provide evidence in a manner more similar to a court-based hearing.[2] A parenting coordinator may rule (or arbitrate) on certain issues without having the parties present evidence in a formal manner. The parenting coordinator continuously gathers and assesses information with family members and collateral contacts, rather than conducting a court-like hearing for each issue to be decided. Finally, a PC is often used after a court has ruled on custody and access, and the PC's role is to help the parties implement the order. Med-arb is typically used before any court

order is made, and ideally to avoid the need for court. Med-arb is not typically used for implementing orders that have already been made.

Another conflict resolution role to be distinguished from med-arb is an early neutral evaluator. An early neutral evaluator meets with the parties and gathers evidence from each. The evaluator assesses the evidence and arguments of each side, and presents an evaluation report that may be used by the parties to facilitate settlement of the case (Santeramo, 2004). Like a med-arbiter, an early neutral evaluator may use methods related to both mediation and arbitration. Unlike a med-arbiter, the early neutral evaluator gathers information and presents recommendations first. The evaluator may help facilitate settlement between the parties, but only after providing the evaluation. Further, the decision of a med-arbiter may be binding, whereas the evaluation of an early neutral evaluator is never binding.

Most research on med-arb comes from non-family contexts, such as commercial disputes, community disputes, intergroup conflict, and collective bargaining between employers and unions (Loschelder & Trötschel, 2010; Pruitt, 1995; Sones, 2009). Although med-arb has been used with separating and divorcing couples (Jacobs, 2006; Shienvold, 2004), there has been little empirical research on actual med-arb cases in this context.[3] This article draws from med-arb literature in other contexts and illustrates how the general benefits and risks of med-arb may be experienced by parties in a divorce situation. By gaining insight into the potential benefits and risks of med-arb, practitioners may be able to construct their processes in a manner that maximizes the benefits and minimizes the risks of med-arb.

POTENTIAL BENEFITS OF MED-ARB

When assessing the potential benefits of med-arb, it is important to consider these benefits from several vantage points, including the views of clients (parents going through separation or divorce), their children, lawyers, the court system, and society. Practitioners, policy makers, and researchers often consider the following factors as criteria for success for conflict resolution processes: high settlement rates, self-determined solutions, enduring solutions, client satisfaction, lower levels of conflict, lower rates of litigation, and saving time and costs (Beck, Sales & Emery, 2004). Different clients, however, may want to pursue different goals as they deal with lawyers, mediators, judges, arbitrators, and other family law professionals. Some may be seeking the best parenting arrangements for their children. Others may be seeking arrangements that best fulfill self-centered interests. Self-centered interests could include maximizing their time with the children, controlling or hurting the other parent, or getting their own way in order to prove that they are right and the other parent is wrong. Some may want to repair or redefine their relationships with their former partners. Others may want to sever all ties. Some may simply want the quickest and least costly conflict resolution process. As these disparate motivations indicate, a definition of the key benefits of med-arb lies in the eye of the beholder.

To demonstrate the potential benefits of med-arb, consider the following scenario:

> Mary-Ann is a med-arbiter who has been hired to help Vanessa and Clarence resolve parenting and property division issues stemming from their recent separation. Upon referring the case to Mary-Ann, the parties' lawyers provide Mary-Ann with the following information. Vanessa and Clarence have a 9-year-old daughter, Dolly. Vanessa alleges that Clarence has sexually abused Dolly, stating that Dolly is acting out sexually. Vanessa says she has never seen Clarence actually abuse Dolly and Dolly has never said anything about being abused. Vanessa called child protective services to investigate the case. After meeting with each party, protective services concluded there was no abuse. Clarence alleges that Vanessa has schizophrenia and that her allegations are due to paranoia and delusions related to her mental illness. Vanessa's mother had schizophrenia, but Vanessa has never been diagnosed with a mental illness. Clarence wants equal time-sharing with Dolly. Mary-Ann wants Clarence to have no contact with Dolly.
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> Based on the lawyers' information, Mary-Ann asks Clarence to obtain a psychological assessment to establish whether or not he poses a risk of sexually abusing Dolly. Clarence complies, concerned that he

will be denied parenting time with Dolly unless he submits to the assessment. The psychologist concludes that Clarence does not pose a risk. Although Vanessa continues to insist that Clarence is a pedophile, Mary-Ann concludes that mediation may proceed on the basis that Clarence has been cleared of the child protection concerns. During the first three mediation sessions, the parties cannot agree to anything. If Clarence says "black," Vanessa says "white." Mary-Ann realizes that agreement with these clients is impossible if she uses a purely facilitative approach. Accordingly, she switches to an evaluative model of mediation, offering suggestions and informing the parties how she would resolve issues if they had to go to arbitration. Using this approach, Mary-Ann brings the parties to the following agreements:

- Dolly will reside with Vanessa.
- Dolly will initially spend 5 days per month with her father (as agreed upon by the parents) but this schedule will be reviewed in 6 months to see how well it is working out.
- Vanessa and Clarence will sell the family home to Mary-Ann's cousin (who offered a good price and saved them the costs of a real estate agent).

The following discussion deconstructs Mary-Ann's case, highlighting the primary benefits of med-arb in bold lettering. Note that these benefits are described from Mary-Ann's perspective.

Mary-Ann feels good about her performance. By referring Clarence for a psychological assessment, she addressed concerns raised about **the child's safety**. By using an evaluative approach, she believes she helped the parties resolve the conflicts by agreement, saving the costs of either litigation or arbitration (Blankenship, 2006). The parties agreed to her recommendations, making it more likely that they would be **satisfied with the arrangements** and follow through on them.

The primary advantage of med-arb is that while it allows parties to collaborate and produce their own agreement, it also **provides a mechanism for making a decision** when the parties cannot agree on their own (Shienvold, 2004). In pure mediation,[4] if the parties do not reach agreement, they will incur the expense of an entirely new process (e.g., arbitration or litigation) in order for a decision to be made. Med-arb may also reduce the time required to make decisions. The parties know that if they do not reach agreement, the med-arbiter is ready to make decisions for them (Blankenship, 2006). The med-arbiter already knows the issues and background information. If the case requires the arbitration stage, the med-arbiter may not need as much time to arbitrate, as compared to an independent judge or arbitrator. Thus, med-arb may be **more efficient** than having a separate mediator and arbitrator (Jacobs, 2006; Sones, 2009).

In med-arb, the desire to maintain control over making their own decisions creates an incentive for parties to **resolve issues more expeditiously** (Conlon, Moon, & Ng, 2002; Telford, 2000). Reaching decisions earlier rather than later is helpful because it diffuses conflict between parents and provides children with certainty about where they will live and how they will spend time with both parents. Med-arb may be particularly useful in high-conflict situations, such as the case example, where one or both parties have difficulty being reasonable during the mediation stage. A parent who is angry and just wants to hurt the other parent is incentivized to act reasonably because that parent does not want the med-arbiter to see the parent as unreasonable if and when it is time to arbitrate a decision. Research in commercial uses of med-arb suggests that clients tend to be **more conciliatory** and less hostile in med-arb as compared to pure mediation (Blankenship, 2006). Clients know that they mediate in the shadow of arbitration; accordingly, they may be more likely to reach a decision (Shienvold, 2004). This was the case with Vanessa and Clarence.

A final benefit of med-arb is that it allows for **client self-determination**, including the ability of the parties to choose which type of process (or processes) they want for their particular conflict (Sones, 2009). Med-arb may not be helpful or appropriate for every situation. However, that does not mean that med-arb should be dropped from the range of conflict resolution services made available to families going through divorce. Clarence and Vanessa should be allowed to make their own assessment of which process is best. Yes, they need to be properly informed about the risks and benefits of med-arb. The concept of self-determination suggests that the clients are experts in their own lives, including the ability to determine which interventions are best for them (Barsky, 2010; Blankenship, 2006; Fullerton, 2009).

RISKS OF MED-ARB

Although med-arb offers parties many potential benefits, it is also important to consider the risks of this hybrid process. The primary risks relate to pressure and self-determination, due process and procedural fairness, posturing, professional competence, erroneous judgments during the mediation stage, relational and emotional issues, role confusion, termination, and effectiveness. By gaining a better understanding of these risks, proponents of med-arb may be in a better position to address them. If the risks cannot be addressed in an adequate manner, then the viability of med-arb as an ethical and effective process will be called into question.

PRESSURE AND SELF-DETERMINATION

While clients are supposed to retain decision-making power in the mediation phase of med-arb, their right to self-determination may be limited by the knowledge that the med-arbiter will make decisions if they do not come to agreement. The med-arbiter may intentionally or unintentionally make use of this pressure to bring the parties to agreement (Blankenship, 2006; McGillicuddy, Welton, & Pruitt, 1987). For instance, when Mary-Ann advised the parties to accept the "5 days per month" parenting time plan, she explained that this is what she would probably order if the case went to arbitration. Because the result of arbitration was a foregone conclusion, both parties acquiesced, but not happily. Mary-Ann's intentions may have been good. However, she may have been in too much of a rush to reach a conclusion (perhaps to save the parties time and money) and may not have afforded them with sufficient time and structure to generate with a more creative win-win solution.

In studies comparing med-arb to mediation, researchers have found that some med-arbiters pushed for a particular solution after just a few minutes of mediation and disputants appeared anxious to follow the med-artiber's suggestions (Telford, 2000). This was true for Clarence who already felt defensive when Mary-Ann insisted he go for a psychological evaluation. To avoid any implication that he was violent or deviant, Clarence felt obliged to agree with Mary-Ann's suggestion, even though he felt it was not in Dolly's best interests.

Some ethical codes discourage arbitrators from participating in settlement conferences unless the parties invite them. The rationale is that the arbitrator may impede discussions by just being there and may create improper pressure to settle by asking questions or making suggestions (Love, 1997). Although these provisions do not relate specifically to med-arb, the risks are similar.

DUE PROCESS AND PROCEDURAL FAIRNESS

One of the greatest concerns about med-arb is that a med-arbiter will formulate a decision in the mediation stage and will be unable to be impartial during the arbitration stage. Even if the med-arbiter is able to remain impartial, the parties may not believe that he or she can. Perception of bias means that one or both parties will feel the process is unfair. From a legal perspective, the concepts of due process and procedural fairness suggest that a judge or arbitrator must be able to hear a case without being biased by prior knowledge or beliefs about the case (Ross, Brantmeier, & Ciriacks, 2002; Semple, 2012). In med-arb, the information shared by parties in the mediation stage is intended to be used by the med-arbiter during the arbitration stage. While hearing information during mediation does not necessarily present a problem, due process is challenged if the med-arbiter formulates an opinion during the mediation stage. By using evaluative mediation, Mary-Ann felt it was appropriate to assess the best parenting time plan for Dolly and recommend it to the parties. If the parties did not agree to the plan, then the issue would go to arbitration. How could Mary-Ann arbitrate in an impartial manner if she had already disclosed her opinion before all the arbitration evidence was presented? Even if Clarence was able to present evidence that the 5-day plan was not in Dolly's best interests, Mary-Ann might feel too embarrassed to change her mind, fearing the parties might interpret this change as capitulation, weakness, or incompetence.

In pure mediation, parties may reveal information that they would not feel safe revealing in arbitration. For instance, mediators encourage parties to disclose feelings, underlying interests, and other personal information that might not have a direct bearing on how a case should be decided by an arbitrator who is mandated to apply the law to the relevant facts of the case (Stulberg, 2002). In med-arb, the arbitrator is supposed to disregard irrelevant information learned in the mediation process (Fuller, 1962). Even a professional with a high degree of self-awareness might find this difficult. Further, the med-arbiter may have received some facts about the case from each party in private caucuses (Sones, 2009). This concern is particularly significant since research indicates that there is a higher rate of accusations and character assassinations in caucuses than in joint sessions (McGillicuddy, Welton, & Pruitt, 1987).

Some med-arb critics suggest that arb-med is preferable. In arb-med, the arb-mediator[5] conducts an arbitration hearing first. The arbitration decision is placed in a sealed envelop until after mediation is attempted (Ross & Conlon, 2000). If the parties resolve the case in mediation, then the case is determined by their agreement. If the parties do not reach agreement, the arbitrated decision becomes binding. Because the arb-mediator makes an arbitration decision prior to mediation, the parties may feel more open to sharing delicate information (such as weaknesses in their plans or arguments) during the mediation phase (Shienvold, 2004). In terms of procedural fairness, the arbitrated decision is based solely on evidence provided during the arbitration stage. Accordingly, the arb-mediator cannot be accused of bias from information divulged during mediation (Limbury, 2005). One of the primary arguments against arb-med is the cost: parties incur the temporal and monetary costs of arbitration, regardless of whether the case is resolved in mediation (Sones, 2009).

POSTURING

Given the fact that a med-arbiter has decision-making power, parties are likely to posture during the mediation stage, hoping to influence any arbitrated decisions. Rather than sharing potentially embarrassing information or underlying issues, each party may focus on proving how good he or she is, and how horrible the other person is. Whereas pure mediation encourages parties to be collaborative and share information without fear of how it could be used in an arbitration or litigation process, med-arb may encourage parties to be positional, competitive, and strategic about their disclosures (Blankenship, 2006; McGillicuddy, Welton, & Pruitt, 1987). In Mary-Ann's case, Vanessa had no intention of agreeing to anything in mediation. In fact, her lawyer instructed her not to agree to anything, knowing that delaying decisions would extend the time that Clarence would be denied contact with Dolly. Vanessa knew in her heart that Clarence posed no risk to Dolly, but she also knew how embarrassing it might be for Clarence to have to go through psychological testing—can you imagine having a mercury strain gauge placed on your penis while being shown sexually explicit photos, or having a psychologist contact each of your prior intimate partners in order to check up on your history of sexual relationships? Mary-Ann unintentionally played into Dolly's hands, ordering psychological testing when none was needed and allowing mediation to be dragged on, without the parties making significant progress.

Clarence also postured, but in a manner that sometimes worked to his detriment. Wanting to look cooperative to Mary-Ann, he often agreed quickly to her suggestions. Unfortunately, this meant that his true concerns and interests were never addressed. The exacerbation of conflict also hurt Dolly, who was estranged from a father she deeply loved and longed to see. Although research comparing pure mediation with med-arb suggests that clients demonstrate less hostility in med-arb (McGillicuddy, Welton, & Pruitt, 1987), this could be a limitation of med-arb if it means that underlying issues and emotions are not being resolved.

PROFESSIONAL COMPETENCE

Different approaches to conflict resolution require different competencies (Della Noce, 2009). Because med-arb is a hybrid process, the med-arbiter also requires different temperaments,

knowledge, skills, and techniques for different parts of the process. During mediation, for instance, the med-arbiter should be able to facilitate communication, demonstrate active listening, and use techniques that help parties move from positions to interests or from concern about self to concern about others (Taylor, 2002). During arbitration, the med-arbiter should be able to direct a formal inquiry into the issues at stake. He or she also requires substantive knowledge of the issues in dispute (e.g., knowledge of how divorce impacts children and issues that need to be taken into account when there is high conflict, an alienated child, allegations of sexual abuse, or other special needs). Not all professionals have the required combination of knowledge, skills, and techniques to assume these hybrid roles. Mary-Ann, for instance, was most comfortable in a directive or authoritative role. She may have switched to evaluative mediation because she lacked certain skills and knowledge required to help the parties deal with underlying issues and emotions. Vanessa and Clarence might have been better served by two separate professionals, one who was strong at mediating and one who was strong at arbitrating. Even if they did not reach agreement in mediation, the mediator may have been able to help them deal with emotional and relational issues, for instance, improving their modes of communication. While mediation and arbitration knowledge, skills, and techniques can be taught, one challenge relates to the nature of training for med-arbiters. Most med-arbiters receive separate training for mediation and arbitration. Unfortunately, there are few in-depth training programs to help professionals become competent in the hybrid med-arbiter's role.

ERRONEOUS JUDGMENTS IN MEDIATION STAGE

While the med-arbiter gathers *some* information in the mediation stage, the purpose of mediation is to facilitate discussion and agreement between the parties. Providing opinions or suggestions in the mediation phase can be risky because the med-arbiter may not have sufficient information upon which to base them. The consequences for providing an incorrect evaluation can be dramatic (Lowry, 2004). When Mary-Ann suggested that Clarence should have 5 days of parenting time per month, she believed this would give the parties flexibility to determine which 5 days worked best for them, particularly given their rotating work schedules. She also believed this would give them an opportunity to practice cooperating and resolving conflicts on their own. In fact, the flexible schedule set up Clarence and Vanessa for much greater conflict. Both parents knew that a simple and fixed plan would have been easier to implement, but both acceded to Mary-Ann's plan, wanting to please her. The six-month trial period for this plan turned into a series of fights, missed and mixed-up visits, and extreme frustration for Dolly. If this were pure mediation, the parties might have been more assertive about their concerns.

RELATIONAL AND EMOTIONAL ISSUES

People who arbitrate family cases require a sound knowledge of legal issues and process. Accordingly, the mindset of a med-arbiter may be to focus on legal issues, even during the mediation stage. This might mean that med-arbiters tend to focus on resolving issues rather than helping the parties to process feelings, manage relational issues, deal with underlying interests, communicate more effectively, or transform their conflict into a more positive experience (cf. Lowry, 2004). While Mary-Ann was pleased that she had kept the parties out of court and out of arbitration, Vanessa and Clarence still maintained remarkable hate and frustration with each other. They did not learn new communication or conflict resolution skills, and they felt disempowered by the process. Further, the arbitration phase of med-arb tended to exacerbate the conflict and make their relationship more adversarial.

ROLE CONFUSION

Parties may become confused when the professional switches roles from mediator to arbitrator: who is responsible for making decisions, how will decisions be made, and what am I supposed to do

in order to make a good impression on the med-arbiter (McGillicuddy, Welton, & Pruitt, 1987; Barsky, 2012). Even if the med-arbiter has provided clear written and oral descriptions of med-arb, clients are not sure how to behave unless they have experienced this hybrid process before. Clients may be at particular risk of role confusion if the med-arbiter switches back and forth between roles more than once. Mary-Ann, for instance, began her process by telling Clarence to go for a psychological evaluation. This was an arbitrated decision without the benefit of a full hearing. Mary-Ann relied on the information from Vanessa and her lawyer and determined that Dolly's safety required this evaluation. Clarence felt betrayed because he thought they would mediate first, but he had no say in the first decision that was made.

From the clients' perspective, Mary-Ann made several arbitrated decisions. When she offered suggestions, they sometimes took these as decisions. Although Mary-Ann thought she was careful to ask them if they agreed, they did not realize that they had a choice. Often, this was a case of the message intended being different from the message received. For instance, when Mary-Ann said:

> "Let me try to mediate a solution rather than impose one. It is better for everyone if you can agree to a solution."

the clients heard:

> You had better agree, or I may make a decision that will be even worse for you than the one I am suggesting now.

Or:

> Don't anger me. I have decision-making power.

When the parties reached impasse on some issues, Mary-Ann said they would have to go to a full arbitration hearing and this would be costly. The parties could not understand why Mary-Ann said some issues had to go to a full hearing and why Mary-Ann made some judgments summarily. They were afraid to raise these concerns with her, not wanting to put her on the defensive. Unfortunately, this meant that Mary-Ann was unaware of the confusion experienced by the parties.

The blurring of roles may also occur in terms of legal rules and ethical standards. If a practitioner calls herself a med-arbiter, is she bound by all the legal and ethical obligations of a mediator, by those of an arbitrator, or by those of both professions? Some statutes and codes of ethics, for instance, require mediation to be confidential, which would seem to prohibit med-arb. Alternatively, if the jurisdiction has mandatory mediation, does attending a mediation hybrid satisfy this requirement? If not, then clients who use a mediation hybrid might be surprised that they still have to try mediation before they have access to court.

TERMINATION

Some risks in med-arb stem from the fact that the parties cannot simply terminate the process if they are unhappy. They have agreed that the med-arbiter can impose a decision on them if they do not reach their own agreement. In pure mediation, the ability to terminate without prejudice to any further process acts as a safety valve. If parties feel that the mediator is biased, incompetent, or unprofessional, they can simply end mediation. In med-arbitration, the parties might need to file a grievance or sue for malpractice in order to terminate med-arb. Given the costs of these actions and the indeterminate results, clients may be concerned that raising issues is more risky than keeping quiet. If they allege bias but cannot prove it, they might feel the med-arbiter will become more angry or biased towards them.

When Mary-Ann ordered Clarence to go for psychological testing without even seeing him, Clarence wanted to terminate med-arb then and there. Why would Mary-Ann accept Vanessa's allegation that he was a pedophile, and at the same time, ignore Clarence's claim that Vanessa had schizophrenia? Clarence felt Mary-Ann showed bias from the start and he could not trust her. Clarence's lawyer advised him that he had agreed to med-arb with binding arbitration, so there was no way out of this process. Clarence became further infuriated when Mary-Ann suggested that her cousin buy their house. Although Clarence felt that the price received for the house was fair, he thought that selling the house to Mary-Ann's relative was a conflict of interest. Once again, Clarence's lawyer suggested that it was in Clarence's best interests not to raise the issue, given that there was more to lose than there was to gain by complaining. Clarence agreed to put up with Mary-Ann, thinking that his cooperation would mean that med-arb would end more quickly. When Mary-Ann suggested that they try a parenting time plan for six months and then return to med-arb, Clarence felt trapped. If he said, "no," he believed the case would have gone to arbitration and Mary-Ann would have imposed the same temporary plan. He reluctantly acquiesced to the plan, hoping that Mary-Ann would not keep extending med-arb. Because the med-arb agreement had no ending date, Clarence wondered whether he and Vanessa would have to keep seeing Mary-Anne until Dolly graduated college and was living on her own.

EFFECTIVENESS

As with most hybrids, there is little published research on the effectiveness of med-arb in separation-divorce cases. Research on med-arb tends to come from business and labor contexts (Telford, 2000). Med-arbiters need to know more about med-arb's benefits and risks in separation-divorce contexts. Practitioners, referral sources, and clients also need to know when med-arb is appropriate and what types of mediation and arbitration provide the greatest benefits and the lowest risks within this hybrid process.

CONCLUSION

Although some conflict resolution experts believe mediators should never have authority to make evaluations or decisions (Love, 1998), others believe that blending the roles of mediation and arbitration may entail special advantages (Blankenship, 2006; Shienvold, 2004). This article does not portend to determine whether med-arb is an effective and ethical process; rather, it highlights the possible risks and benefits of this process. As practitioners, program developers, and policymakers consider the future of med-arb, they will need further research to determine the extent to which the risks and benefits described in Vanessa and Clarence's case are borne out in practice. For those who wish to advance the use of med-arb in separation-divorce cases, the following suggestions are offered to enhance the potential benefits and manage the risks more effectively:

PROFESSIONAL STANDARDS

Currently, there are no med-arb associations and no nationally recognized standards of practice for med-arbiters—in family law or otherwise (Roth, 2009). Med-arb is a relatively new method of conflict resolution, dating back to the early 1970s (Kagel, 1973). Although a med-arbiter may adhere to mediation standards and ethics when mediating, and to arbitration standards and ethics when arbitrating, many conflicts may arise when blending roles. For instance, if a med-arbiter purports to adhere to the Association of Family and Conciliation Court's (2000) Model Standards of Practice for Family and Divorce Mediation, Standard IV prohibits the mediator from mediating when there is a conflict of interest or when the mediator may be biased. The med-arbiter role may offend Standard IV because the practitioner is engaging in a dual relationship with the parties. As a mediator, the med-arbiter may

have a disincentive to resolve matters in mediation, so the parties will have to pay for arbitration services. Even if the med-arbiter is acting with good intentions, parties may distrust the med-arbiter's motivations. Further, if the med-arbiter suggests solutions during mediation, one or both parties may perceive the med-arbiter disclosing a bias that might extend to the arbitration phase. If the med-arbiter purports to abide by the American Arbitration Association's (2004) Code of Ethics for Arbitrators, Canon III suggests that the arbitrator should not meet with one party in the absence of the other party. This would mean that a med-arbiter should not caucus with the parties during the mediation phase, as information could be shared that might be used in the arbitration phase (Fullerton, 2009). Yes, parties are free to negotiate their own procedures, including ones outside the parameters of their profession's usual standards of practice. Still, the emerging profession of med-arb would benefit from its own guidelines, standards of practice, or codes of ethics to elucidate preferred practices on how to handle issues such as informed consent, coercion, confidentiality, caucusing, due process, dual relationships, and conflict of interest.[6] Practice guidelines should provide clarification of med-arb as a hybrid process, including how med-arb is different from simply mediating with one professional and then arbitrating with a second professional. Practice guidelines for med-arb could certainly build on existing guidelines for mediation and arbitration; however, med-arb practice guidelines also need to take the special characteristics of this hybrid process into account. As a first step toward establishing practice guidelines, it may be useful for researchers to solicit and review the "agreements to med-arb"[7] from experienced med-arbiters. Although these agreements may not demonstrate how med-arbiters actually manage ethical concerns, they will indicate what med-arbiters consider to be preferred ways of handling them. Practice guidelines will also facilitate training for med-arbiters, as the trainers can ensure that new med-arbiters are familiar with the ethical provisions guiding their profession.

LAW REFORM

Many laws governing divorce, mediation, and arbitration make no mention of med-arb. If med-arb is to take root as a legitimate conflict resolution process for family matters, then references to med-arb may be required in various pieces of legislation. For instance, if arbitration legislation prohibits dual-relationships, then it should make special provisions for med-arbiters who act as both mediators and arbitrators for the same clients. Laws that require mediation to be confidential should be amended to allow parties to agree to use information from the mediation phase of med-arb in the arbitration phase. Conversely, laws that require an arbitrator to rely only upon information presented in arbitration should be amended to allow parties to agree that information learned in the mediation phase may also be used by the med-arbiter.

MED-ARB COMPETENCIES

Med-arbiters require the combined knowledge and skills of mediators and arbitrators, as well as the knowledge and skills concerning how to blend the processes in an effective and ethical manner (e.g., the ability to ignore certain information learned in mediation that should not be used to influence decision making during the arbitration stage). Given the complexity of med-arb, it may be best for practitioners to first gain training and experience in mediation and arbitration as separate processes. Once they have achieved competence in each process, they could then participate in advanced med-arb trainings and supervised internships to develop competence as med-arbiters.

INFORMING PARTIES

The process of med-arb is not well known among the general public. Med-arbiters must be able to explain the nature of their process, including its potential benefits and risks. Since med-arb may be implemented in different ways, med-arbiters need to clarify their specific models of mediation and arbitration, if and how they blend the two processes, and how the parties' roles may shift when the

process moves from mediation to arbitration. Although some med-arbiters shift back and forth between mediation and arbitration roles[8] (Blankenship, 2006; Fullerton, 2009), the changing roles may be particularly confusing for the parties. The clearest way to conduct med-arb is to give the parties *one* opportunity to mediate; if they do not reach full agreement on the issues, then the outstanding issues are sent to a formal arbitration hearing. In this manner, the shift in roles occurs just one time. Further, the med-arbiter is not able to extend the med-arb process indefinitely by continuously shifting back and forth between mediation and arbitration. As part of the informed consent process, parties need to understand all of these aspects of the med-arb process. The parties also need to know whether they may terminate med-arb once is has begun, should they have concerns about mediator partiality, competence, or other process issues.

CHECKS AND BALANCES

In separation-divorce cases, med-arbiters have broad authority to influence or make decisions over child custody, visitation, child support, spousal support, and division of property. Given the gravity of these decisions, parties need legitimate mechanisms to raise and resolve grievances concerning bias, coercion, incompetence, or other concerns about the med-arbiter. Currently, if a party has a concern about the med-arb process, the party may sue the med-arbiter for malpractice or request judicial review of an arbitrated decision (Moses, 2004). Unfortunately, there are many barriers to court, including legal costs and time commitments. Further, courts may be reluctant to overturn the findings of a med-arbiter as the parties have agreed to be bound by the decisions of the med-arbiter. A party should not be permitted to overturn a med-arbiter's decision simply because it goes against the party's wishes. If the med-arbiter is a member of a professional association (for mediators, arbitrators, mental health professionals, or attorneys), the parties may have access to professional review processes through the relevant association or licensing body. Because these associations do not specialize in med-arb, they may not be equipped to deal with grievances toward a professional who is acting as a med-arbiter. They may also be reluctant to review a med-arbiter who is acting in a quasi-judicial role (National Association of Social Workers, 2012). Given the lack of statewide or national associations specific to med-arb, the most effective form of recourse for grievances may be within the agency. If clients have concerns about their med-arbiter, they may take their grievance to an agency supervisor or ombudsperson designated to review such concerns. Some clients may question the ability of a supervisor or ombudsperson to provide an impartial review. Although agency-based reviews are not perfect, they do provide a system of accountability that is readily accessible to clients. When clients hire a med-arbiter who operates in private practice, they should be aware that opportunities to pursue concerns about the med-arbiter may be very limited. Many criticisms of med-arb are related to concerns about possible abuses by the med-arbiter (Limbury, 2005). Accordingly, an effective system of accountability is vital to addressing these concerns.

PROCEDURAL RIGHTS

Med-arbiters should clearly define the procedural rights of the parties in the initial agreement to med-arb. With respect to arbitration of any issue, how will med-arbiter ensure the parties have a right to notice and an opportunity to be heard? How will the med-arbiter ensure impartiality? Will the parties have representation by attorneys? Will the parties be allowed to call witnesses? Will they be permitted to cross-examine the other's witnesses? Will the parties be restricted to submitting documentary evidence? Will the parties be required to submit to a custody evaluation by an independent mental health professional? Will the med-arbiter be allowed to rely on information learned during individual caucuses with the parties? Will the med-arbiter provide a written decision with reasons based on relevant family law and the evidence introduced? Will the parties have access to a transcript of the proceeding? (Strauss, n.d.) Will the parties have an opportunity to appeal the med-arbiter's decisions? How will the costs of the arbitrator, the attorneys, and a custody evaluator be shared?

Parties may opt for procedures that limit procedural rights in order to have a faster and less expensive process (e.g., permitting the med-arbiter to make summary decisions without providing written reasons, or restricting evidence to written affidavits by each party). However, the parties need to be aware of the risks of waiving certain procedural safeguards. Before signing any agreement to med-arb, each party should have access to independent legal advice. Informed consent is a critical safeguard for the parties (Fullerton, 2009).

ALLEGATIONS OF CHILD PROTECTION CONCERNS OR DOMESTIC VIOLENCE

When one party alleges child abuse or domestic violence, the med-arbiter is placed in a difficult situation. The med-arbiter cannot simply ignore the allegations, as the children or one of the parties may be put at risk. On the other hand, if the med-arbiter contacts child protective services, orders a risk evaluation, or takes other steps to validate the allegations, the med-arbiter may be playing into the hands of a client who is trying to manipulate the process and make life difficult for the other party. Med-arbiters should make it clear from the early stages of intake (as well as in their agreements to med-arb) that allegations of child abuse or domestic violence fall outside the scope of the med-arb process. The parties should take such concerns to child protection services, police, domestic violence agencies, or other appropriate authorities. If allegations arise during the med-arb process, the med-arb should suspend med-arb until the authorities have made appropriate determinations.

Perhaps the most important question about med-arb for cases involving parenting issues is whether med-arb is good for the children. At its best, the mediation phase of med-arb may be able to promote better decisions for children, as well as more amicable relations and lower conflict between their parents. The prospect of an arbitration phase may provide parents with incentives to resolve their conflicts in a child-centered and collaborative manner. Further, if they do not come to agreement, then arbitration may offer finality—a decision by the arbitrator that provides the children and family with a clear determination of custody and visitation issues. Unfortunately, there is little published research on the effectiveness of med-arb, particularly in the context of parenting issues and med-arb's impact on children. Med-arb may not offer finality, as a dissatisfied parent may go to court to have the arbitrated decision reviewed. As noted earlier, some jurisdictions specifically prohibit binding arbitration of parenting issues; other jurisdictions allow for review even when parties have agreed to binding arbitration. Still, we need further research to study how often parties go to court after med-arb, and how often courts overturn arbitrated decisions. Further, we need further research to evaluate whether med-arb leads to better, more timely, or more enduring decisions than mediation, arbitration, or other conflict resolution processes. Without further research, it is hard to assess the impact of med-arb on children. If med-arb is vulnerable to problems such as professional bias, abuse of power, or role confusion, then these problems may filter down and have a negative impact on the wellbeing of the children.

Although med-arbiters can take certain steps to pre-empt or address risks in the med-arb process, they also need to be aware that some challenges are virtually impossible to avoid. During the mediation phase, for instance, parties may posture to win favor with the med-arbiter, hoping to influence any decisions made in arbitration. The med-arbiter may address posturing by stressing the importance of each party being open and honest during the mediation phase. "During mediation, both of you are responsible for making the decisions. Rather than trying to convince me of the right decision, both of you can work together to develop solutions that meet both of your needs and interests." Ideally, the med-arbiter builds trust with the parties and they make the best use of mediation, without trying to posture. If one or both parties continue to posture, the med-arbiter needs to make the best of an imperfect process. Med-arbiters can also take solace in the notion that no conflict resolution process—even pure mediation—is perfect (Blankenship, 2006).

As med-arb continues to develop, further research should focus not only on the outcomes of med-arb, but also the process. How do the skills and strategies of a med-arbiter conducting mediation differ from those of a pure mediator? How do med-arbiters make decisions regarding when to switch

from the mediation to arbitration? How do the skills and strategies of a med-arbiter conducting arbitration differ from those of an independent arbitrator? As with many emerging methods of conflict resolution, there are many more questions than answers about the processes, risks, and benefits of med-arb.

NOTES

1. In the *Tuetken* case, the Tennessee Supreme Court found that the entire agreement to arbitrate was invalid because state law prohibited binding arbitration of parenting issues. In jurisdictions that prohibit binding arbitration for parenting issues, nonbinding arbitration may be used. However, in the *Fawzy* case, the New Jersey Supreme Court held that arbitration awards could be enforced unless a court determined that the arbitrator's award *threatens harm to the child*.

2. During the mediation phase of med-arb, lawyers often play an advisory role to their clients. They are not necessarily present during the mediation, depending on the model used by the med-arbiter and the types of issues being discussed. During the arbitration stage, lawyers lead the evidence for their parties and cross-examine witnesses for the other side.

3. Some research has been conducted on judicial settlement conferences in family law (Semple, 2012). Med-arb is similar to judicial settlement conferencing, particularly when the same judge facilitates the settlement conference and the trial of the issues.

4. For the purposes of this article, "pure mediation" refers to a mediation process that is not combined with arbitration or any other method conflict resolution. In this usage, "pure" does not connote that the process is better, untainted, or more natural.

5. Sometimes called an arbiter-mediator or arbitrator-mediator.

6. The parameters of confidentiality should be stated in the agreement to med-arb. For instance, if a family law statute says that mediation is confidential, then the med-arb agreement would need to explain that information from the mediation stage could be used in the arbitration stage. Parties are allowed to waive all or part of their right to confidentiality. They just need to be informed of their rights, and limits on those rights, at the outset of the med-arb process.

7. An "agreement to med-arb" is the med-arbiter's contract with the parties for med-arb services. This contract should include provisions related to the med-arbiter's role and how it is different from that of a pure mediator or pure arbitration, the nature and limits of confidentiality, the risks and benefits of the process, how the arbitrator will ensure due process, and the specific methods that the med-arbiter will use for the mediation and arbitration phases. The agreement should explain the extent to which any arbitrated orders are enforceable, and each party's rights should either one have concerns about the med-arbiter's actions or processes.

8. This process is sometimes called "braided med-arb."

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