

# Med-Arb and the Legalization of Alternative Dispute Resolution

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## ABSTRACT

*Med-Arb is a dispute resolution process that combines mediation and arbitration. Interest is increasing in Med-Arb because of a growing similarity between arbitration and litigation. As attorneys legalize and formalize mediation into a more evaluative and adversarial process, Med-Arb practitioners offer a process that guarantees a final resolution but incorporates informal opportunities for settlement. Thus, as both mediation and arbitration become increasingly formalized, Med-Arb is perceived as one way to correct the adversarial disadvantages of each by providing for both “finality” and “flexibility.” However, the key principles of both mediation and arbitration are compromised by Med-Arb. The core values of mediator neutrality, party self-determination, and confidentiality cannot be satisfied by Med-Arb. In arbitration, the promise of arbitrator impartiality, the due process right to equal treatment and confrontation, and the enforceability of the arbitral award are weakened. Separating the processes and utilizing different neutrals is the ideal way to gain the benefits of flexibility and finality without compromising either process’s core values.*

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I. INTRODUCTION

Med-Arb is a dispute resolution process that combines mediation and arbitration.<sup>1</sup> The most common variety of Med-Arb is ‘same-neutral,’<sup>2</sup> where parties utilize a combined mediator/arbitrator and only proceed to arbitration if they do not reach a settlement in mediation. This Article discusses the same-neutral Med-Arb model where the same neutral mediates and then, if unsuccessful, arbitrates.

Interest in Med-Arb is rising among neutrals who provide both mediation and arbitration services because ADR is becoming increasingly legalized. Mediation is becoming more evaluative and adversarial, arbitration and litigation are increasingly similar, and arbitration is viewed as too costly, too inefficient, and effectively, the “new litigation.”<sup>3</sup> Med-Arb practitioners see an opportunity to offer a process that combines the best of both mediation and arbitration by guaranteeing a final resolution (“finality”) but incorporates informal opportunities for settlement (“flexibility”). The “finality” of arbitration is utilized as the stick to promote good behavior in mediation, while the “flexibility” of informal mediated discussions promotes efficiency and cost-savings over the use of arbitration. Instead of a creative solution to the legalization of ADR, Med-Arb, as it is practiced, Med-Arb is contributing to the legalization of both processes, and as a result is actually part of the problem.

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1. See Martin C. Weisman, *Med-Arb: The Best of Both Worlds*, 19 DISP. RESOL. MAG. 40, 40 (2013) (explaining benefits of hybrid method); David J. McLean & Sean-Patrick Wilson, *Compelling Mediation in the Context of Med-Arb Agreements*, 63 DISP. RESOL. J. 28, 30 (2008) (reporting increasing use of Med-Arb); Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, 2 N.Y. DISP. RESOL. LAW. 71, 71 (2009) (describing increased attention to hybrid processes).

2. See generally John T. Blankenship, *Developing Your ADR Attitude: Med-Arb, a Template for Adaptive ADR*, 42 TENN. B. J. 28 (2006).

3. See generally Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1 (2010).

This Article demonstrates that despite efforts to provide flexibility and choice to prospective arbitrants, the key principles of both mediation and arbitration are compromised by Med-Arb. As presently practiced, Med-Arb cannot satisfy the core values of mediator neutrality, party self-determination, and confidentiality. Nor in arbitration are the promise of arbitrator impartiality, due process right to equal treatment and confrontation, and enforceability of the arbitral award likely to be achieved. Though Med-Arb promises to combine the best of both mediation and arbitration it does not remain faithful to the core values of their respective processes.<sup>4</sup> Abandoning the Med-Arb format as an integrated unit and utilizing different neutrals is the ideal way to gain the benefits of flexibility and finality, and to counteract the negative impact of legalization all without compromising on the core values essential to the integrity and successful implementation of each process.

In Part II, this Article describes the legalization of arbitration and mediation and the rise of mediation as the primary ADR process. It argues recent interest in Med-Arb stems from the growing similarity between the practice of litigation and arbitration. It explains that Med-Arb is an effort to counter the increasing perception that arbitration is too costly, too inefficient, and is effectively, the “new litigation.”<sup>5</sup> Med-Arb proponents argue that the blended process accomplishes this by utilizing both the efficiency and informality of mediation to avoid prolonged arbitration discovery and hearings, and the finality of arbitration to support the weaknesses of the “evaluative” or “legalized” style of mediation.<sup>6</sup> Part II concludes by arguing that these inherent weaknesses in each process that Med-Arb seeks to counteract are actually due to the negative effects of legalization on each process model. The “solution” offered by Med-Arb is built on a false premise that further legalization can correct legalization. Part III describes the ways in which Med-Arb is detrimental to the fundamental tenets of both mediation and arbitration and how, despite efforts to the contrary, Med-Arb will only further legalize both processes.

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4. Brian A. Pappas, *Med-Arb: The Best of Both Worlds May Be Too Good to Be True: A Response to Weisman*, 19 DISP. RESOL. MAG. 42, 42 (2013).

5. See generally Stipanowich, *supra* note 3.

6. See Jacqueline Nolan-Haley, *Mediation: The “New Arbitration,”* 17 HARV. NEGOT. L. REV. 61, 66, 87–88 (2012) (describing the adversarial tactics common to “legal” mediation).

## II. THE LEGALIZATION OF ADR AND THE MED-ARB “SOLUTION”

Legalization of informal processes like mediation and arbitration exemplify the tension between the problem solving goals of mediation and the adversarial system’s twin aims of finality and justice.<sup>7</sup> This Article argues rising interest in Med-Arb is a result of the legalization of arbitration and mediation. The following Section examines ways in which arbitrators are combining mediation with arbitration for the purposes of countering the negative effects of the legalization of both processes.

Jerold Auerbach first noted the tendency of alternative dispute mechanisms to mimic formal processes over time.<sup>8</sup> He describes how non-law dispute resolution systems, particularly small claims courts, commercial arbitration, and labor arbitration, among others, over time become significant parts of the legal system.<sup>9</sup> Within the ADR community, neutrals and other practitioners view legalization as the process of co-optation of ADR, and mediation in particular, by the legal field.<sup>10</sup> Legalization of ADR processes is also often the result of greater reliance on the legal system by participants, who will often frame their demands and grievances in informal processes in a “rights conscious” way.<sup>11</sup>

### A. *The Legalization of Arbitration*

Consequently, the increasing interest in Med-Arb is primarily due to the legalization of arbitration and its resulting similarity with litigation. Despite litigation’s downward trend, discontent with arbitration has never been more widespread due to: (1) arbitration’s increasing similarity to litigation, (2) the rise of mediation, and (3) the enforcement of binding arbitration clauses in standardized adhesion contracts.<sup>12</sup> Arbitration now includes many of the features of a trial court<sup>13</sup> including prehearing motion practice, prolonged discovery, extensive hearings to avoid claims of procedural injustice, and the

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7. *Id.* at 83.

8. Jerold Auerbach, *JUSTICE WITHOUT LAW?* 15 (1983).

9. *Id.* at 15.

10. *See, e.g.*, Menkel-Meadow, *infra* note 85.

11. Mary E. Gallagher, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, 40 *LAW & SOC’Y REV.* 783, 784–85 (2006) (describing China’s transition from a reliance on the informal to a more formalistic, rights-based legal consciousness).

12. Stipanowich, *supra* note 3, at 5–7.

13. *Id.* at 6–7.

erosion of the finality of arbitration awards.<sup>14</sup> Contrary to the initial expectation that arbitration was way to provide greater finality and efficiency at less cost than litigation,<sup>15</sup> today, U.S. business arbitration is a formal, costly, and time-consuming mechanism.<sup>16</sup> For example, seventy-five percent of experienced arbitrators surveyed in 2002 believe “arbitration is becoming too much like court litigation and thereby losing its promise of providing an expedited and cost-efficient means of resolving commercial disputes.”<sup>17</sup> Similar to litigation, arbitration is a formalized adversarial process designed to adjudicate rights with lawyers driving the process.<sup>18</sup> The next Section describes the preference for mediation, and why it is leading many arbitrators to promote Med-Arb.

### B. *The Rise and Legalization of mediation*

Due to arbitration’s trend toward litigiousness, mediation is quickly becoming the ADR “process of choice.”<sup>19</sup> First, mediation provides parties with a high degree of control over both the process and the agreement.<sup>20</sup> Second, the process is customizable and the scope of the discussion may extend beyond the dispute into communications and relationship issues.<sup>21</sup> The solutions crafted can transcend the

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14. See *id.* at 6, 16 (citing Lawrence R. Mills et al., *Vacating Arbitration Awards*, DISP. RESOL. MAG., Summer 2005, at 23, 25 fig.5).

15. Stipanowich, *supra* note 3, at 8.

16. See e.g., Benjamin J. C. Wolf, *On-line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT’L & COMP. L. 281, 281 (2006) (describing arbitration as similar to litigation in cost and length of discovery); Nicolas C. Ulmer, *A Comment on “The ‘Americanization’ of International Arbitration?”*, 16 MEALEY’S INT’L ARB. REP. 24, 24 (2001) (describing the use of hardball tactics in arbitration).

17. Gerald F. Phillips, *Is Creeping Legalism Infecting Arbitration?*, 58 DISP. RESOL. J. 37, 38 (2003).

18. Stipanowich, *supra* note 3, at 28 (stating “[arbitration and litigation] are both formalized adversary processes aimed at adjudicating rights and obligations . . .”).

19. Bush, *infra* note 71, at 111.

20. Debra L. Shapiro & Jeanne M. Brett, *Comparing Three Processes Underlying Judgments of Procedural Justice: A Field Study of Mediation & Arbitration*, 65 PERSONALITY & SOC. PSYCHOL. 1167, 1170 (1993) (describing the opportunity to control, negotiate and develop the outcome as reasons parties may value mediation over arbitration).

21. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT*, 23–24 (2005).

typical forms of adjudicated relief into more creative, durable solutions.<sup>22</sup> As a result, unlike arbitration, mediation is viewed more favorably by attorneys on issues of cost,<sup>23</sup> speed,<sup>24</sup> confidentiality, satisfaction, and maintaining relationships.

For example, businesses are increasingly turning to mediation as an alternative to arbitration to resolve disputes.<sup>25</sup> The International Chamber of Commerce (“ICC”), a major arbitration provider, prefers mediation in the absence of a specified settlement technique.<sup>26</sup> This is a departure from multi-step ADR clauses in contracts, which first required mediation, followed by arbitration and then litigation if necessary.<sup>27</sup> In 2007, American Institute of Architects in 2007 deleted the default arbitration provision from the AIA contract but retained mediation as a precondition to going to court.<sup>28</sup> As arbitration’s popularity wanes, mediation is becoming the ADR process of choice for both disputes and pre-dispute contracts.

As mediation becomes a primary forum for dispute settlement, legalization of mediation occurs as lawyers over time default to utilizing litigation skills in informal dispute processes.<sup>29</sup> Professor Jacqueline Nolan-Haley joins a chorus of scholars<sup>30</sup> who argue that

22. Howard J. Aibel, *Mediation Works: Opting for Interest-Based Solutions to a Range of Business Needs*, DISP. RESOL. J. 24, 26 (1996) (stating that compliance with agreements is likely to be higher when it is not imposed by a third party).

23. See Fulbright & Jaworski LLP, *infra* note 28, at 10–11.

24. Rhys Clift, *Introduction to Alternative Dispute Resolution: A Comparison Between Arbitration and Mediation* 7–9, 2006, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1647627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1647627), ¶¶ 4.18–4.22, at 8 (confidentiality), 7–9 (satisfaction), ¶¶ 7.13–.14, at 14 (maintaining relationships).

25. Nolan-Haley, *supra* note 6, at 71 (citing Fulbright & Jaworski LLP, 2004 U.S. Corporate Counsel Litigation Trends Survey Findings, 1 (2004), available at <http://www.fulbright.com/mediaroom/files/fj0536-uk-v13.pdf>, indicating more respondents reported using mediation than arbitration); see also, Russ Bleemer, *CPR Meeting Survey Finds Mediation Is Top ADR Choice*, 25 ALTERNATIVES TO THE HIGH COST OF LITIGATION (CPR, New York, N.Y.) Jun. 2007, at 110; Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 849–51 (2001).

26. *Arbitration and ADR Rules*, INT’L CHAMBER OF COM. art. 5(2) (2011) (requiring the neutral to act as a mediator in instances where the parties lack agreement to use a specific settlement mechanism).

27. Robert N. Dobbins, *The Layered Dispute Resolution Clause: From Boilerplate to Business Opportunity*, 1 HASTINGS BUS. L.J. 159, 162–77 (2005) (described by Dobbins as “layered” dispute resolution clauses).

28. AM. INST. OF ARCHITECTS, AIA DOCUMENT A201-2007 GENERAL CONDITIONS OF THE CONTRACT FOR CONSTRUCTION art. 15.3.1.

29. *Id.*

30. See Bush, *infra* note 71, at 122 (describing evaluative mediation’s similarity to arbitration); Kimberlee K. Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ruminations on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 60–61 (2005) (predicting mediation’s growing similarity to arbitration due to the vanishing trial phenomenon). Kimberlee

mediation is becoming the “New Arbitration” because “legal mediation has taken on many of the features traditionally associated with arbitration: adversarial posturing by attorneys in the name of zealous advocacy, adjudication by third party neutrals, and the practice of mediator evaluation.”<sup>31</sup> Professor Robert Baruch Bush argues that this evaluative style of mediation is so similar to mediation that it is nothing more than “an arbitration substitute.”<sup>32</sup>

Not all mediation is legal or evaluative. Evaluative, or legalized, mediation can be distinguished from facilitative and transformative styles of mediation. Evaluation in mediation lacks a singular definition but operates on a continuum. On one end of the evaluative continuum, mediators predict court outcomes, provide case analysis with assessments of strengths and weaknesses, and recommend specific proposals.<sup>33</sup> On the other, mediators use questions or statements that implicitly suggest to the parties the mediator’s opinion.<sup>34</sup> Evaluative mediators tend to have more influence over the outcome, with the most evaluative directly impacting any settlements reached.<sup>35</sup> Additionally, evaluative mediations tend to more closely resemble a court-based process, with a neutral firmly in control of the topics and the direction of the conversation. Facilitative mediators, on the other hand, refrain from providing their opinions, views, and suggestions regarding the issues being discussed. Facilitative mediators work to clarify and enhance communication between the parties, and demonstrate process control. For example, a facilitative mediator decides when or if to meet separately with the parties. A third style, in direct opposition to both facilitative and evaluative mediation, is transformative mediation. Transformative mediators believe neither facilitative nor evaluative mediation provides for true party empowerment and seeks to place parties in direct, sole control over both process and outcome.<sup>36</sup> Despite the facilitative and transformative mediation

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K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 HARV. NEGOT. L. REV. 71 (1998) (arguing that arbitration’s criticism are applicable to evaluative mediation).

31. Nolan-Haley, *supra* note 6, at 61 (describing legal mediation as a mediation where lawyers are involved as advocates for parties).

32. Bush, *infra* note 71, at 125.

33. Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL’Y & L. 211, 224 (2004)

34. A.B.A. Sec. Disp. Resol. Rep., *Task Force on Improving Mediation Quality Final Report*, 34 (2008).

35. LEONARD L. RISKIN, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

36. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* (rev. ed. 2004).

styles which ensure greater mediator impartiality and party self-determination to parties than evaluative mediation, the legalized version of mediation persists where attorneys are involved.

Lawyers acting as mediators are highly likely to evaluate even if they are trained in the facilitative method of mediation.<sup>37</sup> Lawyers tend to highly prefer evaluative mediators for their mediations,<sup>38</sup> and they prepare accordingly for this style of mediation.<sup>39</sup> In order to gain advantage with an evaluative mediator, attorneys often appear inflexible and present arguments intended to influence the mediator.<sup>40</sup> Through this mediator “spinning,” the advocate tries to persuade the mediator in the hope of gaining the mediator’s support for a settlement that will favor their client.<sup>41</sup> Spinning provides the opportunity for lawyers to operate as though in private judicial settlement conferences<sup>42</sup> and engage in adversarial behavior<sup>43</sup> considered unethical in arbitration.

Adversarial behavior by attorneys in mediation is a growing problem. A 2010 survey of mediators in the New York region asked about their behavior in mediation.<sup>44</sup> The survey indicated lawyers

37. Bobbi McAdoo & Art Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473, 524 (2002); Kovach & Love, *supra* note 33, at 92–93 (noting that lawyers “revert to their default adversarial mode, analyzing the legal merits of the case in order to move towards settlement”).

38. Nancy Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 805 (2001).

39. HAROLD ABRAMSON, *MEDIATION REPRESENTATION*, at 203 (National Institute for Trial Advocacy 2010). (“If you know in advance that your mediator will evaluate, you should develop a plan for securing a favorable evaluation.”).

40. *Id.* at 203–04.

41. John T. Blankenship, *The Vitality of the Opening Statement in Mediation: A Jumping-Off Point To Consider*, 9 APPALACHIAN J.L. 165, 178 (2010) (noting that caucus and the separation of the parties may make it easier to spin the mediator); Joseph P. McMahon Jr., *Moving Mediation Back Towards Its Historic Roots — Suggested Changes*, 37 COLO. LAW. 23, 23–24 (2008) (arguing that it is easier to manipulate a mediator during caucus than in joint session); Joan Stearns Johnsen, *Mediator — Friend or Foe? Using Mediator to Your Best Advantage*, SF16 A.L.L., A.B.A. Continuing Legal Education 415 (2000) (criticizing spinning as detrimental to mediation).

42. *See, e.g.*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 23, 25–27, 57–58 (2001) (noting mediation’s growing adversarialisms and similarity to judicial settlement conferences); Louise Phipps Senft & Cynthia A. Savage, *ADR in the Courts: Progress, Problems and Possibilities*, 108 PENN ST. L. REV. 327, 335 (2003) (noting that mediation increasingly looks “more like the traditional pretrial settlement conference, and less like the alternative process originally intended by its proponents”).

43. Kovach & Love, *supra* note 30, at 96 (“[Lawyers] attempt to draw mediation back into their adversarial paradigm”).

44. Nolan-Haley, *supra* note 6, at 93–94.

use adversarial behaviors in mediation, including arguing positions and contesting the other side's positions, presenting legal facts and arguments to the mediator as though they were a fact finder, or arguing as if participating in a trial.<sup>45</sup> Bad faith tactics persist in mediation,<sup>46</sup> including attorneys that lie,<sup>47</sup> mislead, and delay<sup>48</sup> to increase litigation costs, or claim limited authority to negotiate.<sup>49</sup> Attorneys also use mediation as an opportunity for free discovery,<sup>50</sup> and they often intentionally misuse confidential communications as the courts sometimes ignore and do not regularly sanction abuses of confidentiality.<sup>51</sup>

The growth of the use of mediation has primarily been in this legalized, evaluative form of the process.<sup>52</sup> John Lande predicted this pattern in 1997, commenting that “[w]here mediation becomes routinely integrated into litigation practice, we can expect that this will significantly alter both lawyers’ practices in legal representation and mediators’ practices in offering and providing mediation services.”<sup>53</sup> Thus it is the increase in legally trained mediators, in addition to the increase in advocates within mediation that is responsible for the increasing legalization of mediation. Med-Arb is promoted as a solution to arbitration’s lack of flexibility and the increasingly legalized version of mediation.

### C. *The Med-Arb “Solution”*

Med-Arb proponents allege the process resolves mediation and arbitration’s problems by providing (1) finality, (2) efficiency, and

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45. *Id.* at 79.

46. *Id.* at 81.

47. See generally Peter Reilly, *Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help*, 24 OHIO ST. J. ON DISP. RESOL. 481 (2009); Don Peters, *When Lawyers Move Their Lips: Attorney Truthfulness in Mediation and a Modest Proposal*, 2007 J. DISP. RESOL. 119 (2007).

48. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 267 (2002).

49. See, e.g., Don Peters, *Just Say No: Minimizing Limited Authority Negotiating in Court-Mandated Mediation*, 8 PEPP. DISP. RESOL. L. J. 273, 273 (2008).

50. Macfarlane, *supra* note 48, at 309.

51. Nolan-Haley, *supra* note 6, at 82–83 (Citing Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419, 1424–25 (2006) (“The constant misuse of mediation communications seems surprising in light of the importance parties, mediators, attorneys, courts, and legislatures place on protecting mediation confidentiality.”)).

52. Bush, *infra* note 71, at 115.

53. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 841 (1997) (describing the impact of mediation’s integration into litigation practice).

(3) flexibility<sup>54</sup> for a variety of types of disputes.<sup>55</sup> The Med-Arb “solution” is to combine arbitration’s finality with mediation’s flexibility in order to gain efficiency and the best of both processes. In reality, the problems facing the two processes are not inherent and are being utilized by neutrals seeking to gain by taking advantage of mediation’s growing popularity. This Section now reviews the Med-Arb’s proposed advantages of finality, efficiency, and flexibility.

Med-Arb is promoted as a process to fix the mediator’s lack of formal authority to create a final and binding settlement.<sup>56</sup> Specifically, Med-Arb guarantees a binding arbitration award if settlement does not occur in mediation.<sup>57</sup> Finality also promotes another Med-Arb advantage: efficiency. Early neutrals argued for arbitrators mediating as a first step as parties are more efficient in identifying problems and potential solutions when the next step is a binding decision.<sup>58</sup> Med-Arb proponents promote Med-Arb as a corrective strategy to combat procrastination,<sup>59</sup> and the adversarial nature of legalized mediation<sup>60</sup> by placing the decision-maker in the room to

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54. *E.g.*, Kristen M. Blankley, *Keeping a Secret from Yourself? Confidentiality When Same Neutral Serves Both as Mediator and as Arbitrator in the Same Case*, 63 BAYLOR L. REV. 317, 326 (2011); Thomas J. Brewer & Lawrence R. Mills, *Med-Arb: Combining Mediation and Arbitration*, 54 DISP. RESOL. J. 32, 34 (1999); Gerald F. Phillips, *Same-Neutral Med-Arb: What Does the Future Hold?*, 60 DISP. RESOL. J. 24, 28–32 (2005).

55. *See, e.g.*, Pau Caprara, *Surf’s Up: The Implications of Tort Liability in the Unregulated Sport of Surfing*, 44 CAL. W. L. REV. 557, 583 (2008) (surfing disputes); Candi Henry, *Spam v. Ms. Piggy: An Entertainment Law Cautionary Tale*, 8 VAND. J. ENT. & TECH. L. 573, 582–84 (2006) (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) (medical malpractice disputes); for a more complete list, *See* Blankley, *supra* note 54, at 329, fn. 37.

56. Karen L. Henry, *Med-Arb: An Alternative to Interest Arbitration in the Resolution of Contract Negotiation Disputes*, 3 OH. ST. J. ON DISP. RESOL. 385, 390 (1998)

57. *E.g.*, Brewer & Mills, *supra* note 54; Sussman, *supra* note 1, at 71–73; McLean & Wilson, *supra* note 1, at 30.

58. C. W. AHNER, *Arbitration: A Management Viewpoint*, in THE ARBITRATOR AND THE PARTIES: PROC. OF THE ELEVENTH NAT’L ACAD. OF ARB. 76, 78–82 (Jean McKelvey ed., 1958).

59. JAMES HAYES, *Grievance Mediation: Why Some Use It and Others Don’t*, in ARBITRATION 2009: DUE PROCESS IN THE WORKPLACE: PROCEEDINGS OF THE SIXTY-SECOND ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 224, 230 (Paul D. Staudohar ed., 2010).

60. DEAN G. PRUIT ET AL., *Process of Mediation in Dispute Settlement Centers*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 368, 389–90 (D. Pruitt & Assoc. K. Kressel ed., 1989) (finding parties made fewer hostile comments and proposed more solutions under same-neutral Med-Arb than different-neutral Med-Arb or standard mediation).

provide the “stick”<sup>61</sup> that guarantees good behavior.<sup>62</sup> Specifically, Med-Arb proponents argue the finality of arbitration assists the process of mediation by providing the incentive to avoid posturing and bargain in good faith during mediation.<sup>63</sup> Proponents argue efficiency is achieved because the legalized, evaluative form of mediation is neutralized, leading to faster settlements and cost savings.<sup>64</sup> Further, using the same neutral saves time and cost by eliminating the need for parties to identify, appoint, and educate an additional neutral.<sup>65</sup> Finally, flexibility is promoted as a Med-Arb benefit that will improve arbitration. Med-Arb advocates promote the use of a hybrid process as a means of infusing arbitration with many of the informal benefits of mediation. For example, in mediation parties can have a less structured and less formal conversation about the case and possibilities for resolution. Mediation allows for solutions to underlying issues as opposed to arbitration awards only addressing issues formally presented as evidence.<sup>66</sup>

The Med-Arb solution provides arbitration with flexibility by adding mediation and mediation gains finality by adding arbitration and placing the decision-maker in the room to provide the “stick”<sup>67</sup> that promotes settlement.<sup>68</sup> As a result both processes gain efficiency by utilizing each other’s natural advantages. However, the Med-Arb “solution” is not a solution at all because it relies on a false premise that mediation and arbitration as independent processes have inherent problems that need to be corrected. A more likely reason for promoting Med-Arb is that arbitration increasingly resembles litigation, and mediation’s popularity is a threat to the financial viability of private arbitration practice. For example, in a 2013 Strauss Institute survey of 200 experienced College of Commercial Arbitrators (“CCA”), a majority indicated a higher proportion of their caseloads settled both pre-hearing and pre-award during the last five years than before

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61. Hayes, *supra* note 59.

62. Phillips, *supra* note 54, 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.”).

63. Weisman, *supra* note 1, at 40; Blankenship, *supra* note 2, at 31; Phillips, *supra* note 54, at 28–29.

64. *Id.*

65. Phillips, *supra* note 54, at 28.

66. Barry C. Bartel, *Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential*, 27 WILLAMETTE L. REV. 661, 665 (1991).

67. Hayes, *supra* note 59.

68. Phillips, *supra* note 54, at 30 (“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.”).

that time.<sup>69</sup> To the author's knowledge (and research efforts) there are no neutrals who primarily serve as mediators who have publications advocating for the use of Med-Arb. Instead, Med-Arb is a process promoted by arbitrators to maintain and enhance the market viability of arbitration by adding a mediation component and selling the two processes as one package.

#### D. *The Med-Arb "Solution" Is Built on a False Premise*

Med-Arb appears to be a creative and effective means of accessing the benefits of both informal and formal dispute mechanisms. In reality, the increasing interest in Med-Arb is a result of the legalization of ADR and efforts to use arbitration to fix mediation and mediation to fix arbitration. Med-Arb is promoted "to cure some of the problems inherent in both mediation and arbitration."<sup>70</sup> These problems are not, however, "inherent" to both processes, and instead are due to the legalization and formalization of informal processes.

For example, mediation does not have an "inherent" problem with finality. Finality is only a problem in mediation due to the legalized, evaluative form of mediation. By definition, mediation is a consensual process that is not designed to impose finality.<sup>71</sup> Nor does the lack of finality does not impact mediation settlement rates. Studies of general civil and divorce mediations in Michigan in 2008 show that nearly 70% of all cases sent to mediation immediately resulted in settlement, with a substantial number settling shortly after.<sup>72</sup> Surveys of these participants indicated that over 90% of mediation participants were satisfied with mediation, even if the case did not settle at mediation.<sup>73</sup> Further, a 2001 study of small claims cases in 1999 showed a voluntary compliance rate of 90% for mediated agreements

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69. Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 Y.B. ARB. & MEDIATION 1, 16–17 (2014).

70. Blankenship, *supra* note 2, at 28 (citing Henry, *supra* note 56, at 389).

71. See Robert Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L. J. 111, 115 (2002) (stating that mediation's main draw was its consensual alternative to binding, mandatory processes like arbitration and litigation).

72. STATE BAR OF MICHIGAN ADR SECTION, LETTING LITIGANTS KNOW THAT MEDIATION REALLY WORKS!, available at <http://www.michbar.org/adr/pdfs/guide.pdf>.

73. *Id.*

versus 53% for non-mediated judgments.<sup>74</sup> These rates remain consistent in Georgia, where 69% of all mediated cases resulted in settlement between 2005 and 2008.<sup>75</sup> In 2008, the U.S. Equal Employment Opportunity Commission's mediation program reported a 72.1% settlement rate.<sup>76</sup> In the family realm, parents mediating custody disputes reached settlement in mediation at a 77% rate.<sup>77</sup> In a comprehensive review of mediation studies, Professor Roselle Wissler found settlement rates as high as 63%,<sup>78</sup> compliance with mediated agreements at 90% or greater,<sup>79</sup> and highly favorable views of mediation among litigants.<sup>80</sup> These studies tend to demonstrate mediation's effectiveness without finality. Mediation inherently does not suffer due to the lack of a guaranteed, final, and binding settlement.

Instead of resolving the legalization of these processes at their root causes, legalization, Med-Arb combines the two processes. Med-Arb formalizes and provides a mechanism of finality to a form of mediation that already looks in practice like non-binding arbitration.<sup>81</sup> In effect, Med-Arb is Arb-Arb, where the first phase is non-binding arbitration followed by a binding form of arbitration if no agreement is reached. Ironically, the "new arbitration" style of mediation is more akin to the form of arbitration that existed before legalization transformed it into a process that closely resembles litigation.<sup>82</sup> Legalization is mediation's problem. Evaluative mediators and adversarial advocates violate the core values of the process. The solution is not to provide the mediator with binding settlement authority, which only makes it even more impossible to fulfill the core principles central to the process.

In order to actualize mediation's core values of impartiality, self-determination, and confidentiality, lawyers and law students must be trained to effectively advocate in collaborative processes and

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74. *Id.*

75. Naman L. J. Wood, *Can Judges Increase Mediation Settlement Rates? Of "Coase" They Can*, 26 OHIO ST. J. ON DISP. RESOL. 683, 691 (2011).

76. *Questions and Answers About Mediation*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited May 13, 2015).

77. Robert E. Emery, Sheila G. Matthews & Melissa M. Wyer, *Child Custody Mediation and Litigation: Further Evidence on the Differing Views of Mothers and Fathers*, 59 J. CONSULTING & CLINICAL PSYCHOL. 410, 412 (1991).

78. Roselle Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 CONFLICT RESOL. Q. 55, 65 (2004).

79. *Id.* at 68.

80. *Id.* at 65.

81. Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265, 277 (2002) (stating that some forms of evaluative mediation may be similar to non-binding arbitration).

82. *Id.* at 122.

mediators must be trained to facilitate instead of evaluate. Mandatory mediation itself needs to be reassessed because it furthers the legalization of the process given the dichotomy of mandating parties into a voluntary process.<sup>83</sup> With a truly voluntary mediation process, fewer instances of “bad faith” or adversarial conduct will take place, as no one will be forced to initiate mediation against their will. In order to fulfill arbitration’s core values of due process and efficient justice, arbitrators’ must limit extended discovery and advocates must create carefully crafted and tailored pre-dispute arbitration clauses that will guarantee efficiency. In A 2009 survey of 180 arbitrators, corporate counsel and attorneys representing clients in arbitration, 65% identified mismanaged motion practice as moderately and very much a reason why arbitration fails to meet business users desire for speed, efficiency, and economy.<sup>84</sup> Instead of arbitration’s lack of informality or mediation’s lack of finality, both mediation and arbitration are impacted by legalization and attorneys’ use of both processes as alternative forums within which they may litigate. The solution is to address the legalization itself.

The Med-Arb “solution” assumes that the initial problems of informality or lack of finality observed with mediation and arbitration are inherent to the processes, and can be resolved by combining them. However, legalization of arbitration and mediation cannot be fixed by further legalization. As the next Part describes, Med-Arb will be unable to “save” either process because harms the central tenants of each and will only further the legalization of both mediation and arbitration.

### III. MED-ARB WILL FURTHER ADR’S LEGALIZATION

The process of Med-Arb harms the core principles of each procedure and will accelerate the legalization of mediation by limiting informality and accelerating arbitration’s legalization by increasing the likelihood of judicial review. Though Med-Arb may encourage parties to mediate, it limits the core principles of mediation — impartiality, self-determination, and confidentiality — and strips mediation of its informal character. Med-Arb also places stress on the core principles of arbitration — due process, confidentiality, and arbitral neutrality — by making the arbitral award increasingly susceptible to court-review.

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83. See Thompson, *infra* note 160, at 422–24.

84. Stipanowich & Ulrich, *supra* note 69, at 23.

A. *Med-Arb Is Detrimental to Candor and Confidentiality*

Med-Arb harms candor and confidentiality and further legalizes both mediation and arbitration by making one neutral both mediator and arbitrator. Mediation is legalized because putting the decision-maker in the room formalizes the process and makes candid conversation, crucial to a voluntary process, unlikely. Arbitration is legalized because arbitral awards are exposed to increased judicial review through the use of confidential mediation conversations while rendering those awards. As a result, Med-Arb severely limits mediation's effectiveness while endangering the enforceability of any resulting arbitral award by making it more susceptible to judicial review.

Mediation's confidentiality encourages candor by promoting the free expression of needs, interests, and options for resolution.<sup>85</sup> Mediation is unique amongst the alternative dispute resolution practices because its informality allows parties to speak freely without fear that they might be harmed for their candor.<sup>86</sup> Mediators rely on free information exchange to identify interests, assist in correcting information asymmetries, reality-test assumptions, and build trust between the parties.<sup>87</sup> Placing the prospective decision-maker in the room as a neutral negatively impacts the candor of the parties in the "Med" phase and reduces the effectiveness of the process. When parties know that the mediator may later assume the role of arbitrator, both advocates and parties will not be as candid with the mediator about weaknesses in their arguments or offer information that may be detrimental to their positions.<sup>88</sup> For example, a 2008 survey (described subsequently as the "Wissler Survey") asked Ohio lawyers about their experiences with mediation and settlement conferences in federal court.<sup>89</sup> When the judge assigned to the case oversaw a settlement conference, 71% of lawyers strongly or somewhat disagreed with the statement that parties can be candid with the neutral about interests and difficulties in the case without concerns of negative consequences.<sup>90</sup> Comparatively, lawyers strongly or somewhat disagreed

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85. *Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 822-23 (1984) (discussing the importance of information exchange for resolving disputes).

86. *See id.*

87. Pappas, *supra* note 4, at 42.

88. Brewer & Mills, *supra* note 54, at 35; Phillips, *supra* note 54, at 27.

89. Roselle Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271.

90. *Id.*

with the statement that parties can be candid with a judge not assigned to the case (26%), court staff mediator (7%), volunteer mediator (6%), or private mediator (2%).<sup>91</sup> Placing the decision maker in the room is detrimental to candor, and parties in same-neutral processes will carefully guard their statements in the mediation phase.<sup>92</sup> As a result, the information needed to craft lasting, reasonable settlement will not be available as parties begin to adopt, in practice, a more legalistic and formal process.<sup>93</sup>

Med-Arb promoters advance the hybrid process as a way of countering advocates' adversarial behavior by providing the mediator with decision-making authority if settlement does not occur. In reality, Med-Arb only furthers the perceived problems with mediation it intends to remedy. First, Med-Arb may increase the use of advocates in mediation as advocates are not always present in mediation but are typically utilized in arbitration. Second, Med-Arb's attempt to limit adversarial behavior of advocates by placing the judge in the session will create a more formal environment in which (1) the mediator/arbitrator is the focus of the session; and (2) candor is eliminated out of a concern of showing weakness to the prospective decision maker. In effect, without candor and confidentiality, the mediation stage of a Med-Arb becomes an informal arbitration hearing. This is especially problematic for arbitration in avoiding challenges to the enforceability of the arbitral award.

The "biggest and most obvious concern with the same-neutral [M]ed-[A]rb procedure" is the use of confidential mediation communications in determining an arbitration award.<sup>94</sup> The arbitral award's enforceability of the arbitral award is open to challenge in Med-Arb due to the lack of confidentiality of mediation communications in the arbitration phase. In the role of the neutral, the future "judge" may learn information during mediation not normally introduced in arbitration<sup>95</sup> such as points of flexibility in demands, potential offers, weaknesses, or prejudicial information.<sup>96</sup>

Professor Kristin Blankley<sup>97</sup> provides examples of awards vacated for confidentiality issues, specifically on the basis of: (1) being

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91. *Id.*

92. See Phillips, *supra* note 54, at 27.

93. Pappas, *supra* note 4, at 42.

94. Blankley, *supra* note 54, at 332.

95. Ellen E. Deason, *Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review*, 5 Y.B. ARB. & MEDIATION 1, 225 (2013).

96. *Id.*

97. Blankley, *supra* note 54, at 346–58.

explicitly based on mediation communications;<sup>98</sup> (2) the simple use of Med-Arb not creating an implicit waiver of mediation communications;<sup>99</sup> (3) one party not consenting to the appointed arbitrator who earlier mediated another aspect of the case;<sup>100</sup> and (4) using mediation communications not also introduced in the arbitration as the basis for an arbitration award.<sup>101</sup> Further lawsuits involve claims that the arbitrator based the award on ex parte evidence received during the mediation.<sup>102</sup>

Professor Ellen Deason provides the context as to why the legal challenges to combined process occur. First, there is an inherent conflict created when a neutral obtains information while serving as both mediator and arbitrator.<sup>103</sup> Second, challenges occur because the neutral improperly used information while acting as an arbitrator (including rejected settlement proposals) obtained while mediating.<sup>104</sup> Often the mediator/arbitrator's retainer agreement requires information shared during the mediation phase to constitute the arbitral record in lieu of a hearing for the purposes of rendering the arbitration award. As a result, the mediation and the arbitral evidentiary hearing are one and the same. This results in claims of adjudicative process violations, including claims that the arbitrator did not conduct a hearing and failed to take additional evidence.<sup>105</sup>

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98. *Bowden v. Weickert*, No. S-02-017, 2003 WL 29419175, (Ohio Ct. App. June 20, 2003).

99. *Town of Clinton v. Geological Servs. Corp.*, No. 04-0462A 2006 WL 3246464, (Mass. Super. Nov. 8, 2006).

100. *In re Cartwright*, 104 S.W.3d at 708.

101. *Twp. of Aberdeen v. Patrolmen's Benevolent Ass'n Local 163*, 669 A.2d 291, 94, (N.J. Super. Ct. App. Div. 1996).

102. *Id.* (citing *U.S. Steel Mining Co., LLC v. Wilson Downhole Servs.*, No. 02:00CV1758, 2006 WL 2869535, at \*5 (W.D. Pa. Oct. 5, 2006) (confirming award where parties agreed arbitrator could utilize ex parte evidence from mediation); *Estate of McDonald*, No. BP072816, 2007 WL 259872, at \*4 (Cal. Ct. App. Jan. 31, 2007) (rejecting challenge to binding mediation decision over objection that neutral considered ex parte communications); *Rodriguez v. Harding*, No. 04-0200093CV, 2002 WL 31863766, at \*4 (Tex. Ct. App. Dec. 24, 2002) (rejecting challenge to Med-Arb award of incorrect pre-arbitration ex parte communications with parties).

103. DEASON, *supra* note 96, at 229 (citing *In re Cartwright*, 104 S.W.3d 706, 710 (Tex. Ct. App. 2003) (vacating the appointment of the same individual to arbitrate property issues in a divorce proceeding who had previously mediated child custody issues); *Gaskin v. Gaskin*, No. 2-06-039-CV, 2006 WL 2507319, at \*2-3 (Tex. Ct. App. Sept. 21, 2006) (highlighting neutral conflicts resolveable with party consent); *Isaacson v. Isaacson*, 792 A.2d 525 (N.J. Super. Ct. 2001), (finding a categorical prohibition on the dual role of mediator and fact-finding guardian ad litem).

104. *Id.* at 20.

105. DEASON, *supra* note 95, at 240 (citing *Bowers v. Raymond J. Lucia Co., Inc.*, 142 Cal. Rptr. 3d 64, 70 (Cal. Ct. App. 2012) (enforcing a binding mediation award even without an arbitral hearing); *Wright v. Brockett*, 571 N.Y.S.2d 660 (N.Y. Sup.

These challenges occur despite the fact that both processes contemplate and address issues of candor and confidentiality in order to avoid judicial involvement in ostensibly private dispute resolution processes. Mediation and arbitration separately prohibit breaches of confidentiality that routinely occur during Med-Arb. Arbitration's right of equal treatment prevents an arbitrator from caucusing separately with the parties.<sup>106</sup> Ethical codes for arbitrators, including the ABA and Arbitration Association ("AAA") Code of Ethics for Commercial Arbitrators and the International Bar Association ("IBA") Rules of Ethics for International Arbitrators, discourage *ex parte* communications with parties.<sup>107</sup> Because parties cannot rebut arguments they were not aware of, i.e. those made by the other side during a confidential mediation caucus, mediation's core principle of confidentiality is in direct conflict with a fundamental tenet of arbitration and due process: the ability to know of and confront the other side's arguments. Without knowing what was said in the other side's caucus, it is impossible to provide countering evidence or cross-examine witnesses about the information. Additionally, the IBA rules state that while an arbitrator may make settlement proposals with the parties' consent, he must inform the parties that discussing settlement terms in the absence of a party will normally lead to disqualification of the arbitrator.<sup>108</sup>

Mediation's confidentiality rules prevent an adjudicator from learning of, and thus being influenced by, mediation communications. For example, the Uniform mediation Act restricts the admissibility of mediation communications in both court and arbitration proceedings.<sup>109</sup> Mediation communications are confidential, with exceptions for abuse, neglect, or criminal activity. Most importantly, mediation

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Ct. 1991) (finding that arbitrator violated the statute in refusing to hear evidence or conduct an arbitration hearing).

106. Berger, *infra* note 151, at 392.

107. MODEL CODE OF ETHICS FOR COMMERCIAL ARBITRATORS Canon 3 (Rev. 2004), available at [www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p123778.pdf](http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbtors/documents/arbmed/p123778.pdf) (prohibiting discussions of proceedings without all parties present; requiring all parties be sent written communications); IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS R. 5.3 (1964) (requiring arbitrators to avoid unilateral communications with any party and to inform the other party about the substance of the communication if they occur).

108. IBA RULES OF ETHICS FOR INTERNATIONAL ARBITRATORS R. 8 (1986).

109. See National Conference of Commissioners on Uniform Laws, Uniform Mediation Act (Aug. 2001) § 2(7)(A) (A proceeding is defined as "a judicial, administrative arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery.").

communications are not subject to disclosure in any formal proceeding as the UMA prohibits the mediator from making a report about the mediation to the deciding judge or arbitrator.<sup>110</sup> The UMA further requires that decision-makers obtaining information about mediation communications may not consider it in making arbitral awards.<sup>111</sup> Foreign arbitration statutes echo this general prohibition against the admission of mediation communications in an arbitration.<sup>112</sup> Confidentiality statutes do not make exceptions for arbitration<sup>113</sup> and courts examining mediation confidentiality in combined processes uniformly find confidentiality rules apply.<sup>114</sup> Rules governing mediation and arbitration advocate for sharply drawn lines in order to protect the confidentiality and thus the sanctity of the two processes.

Med-Arb eliminates the confidentiality between facilitators and decision-makers intended to protect the integrity of both processes.<sup>115</sup> Med-Arbs structure communication so that the judge, and not just the mediator, participates with the parties — indeed, the judge and mediator are one and the same. This is as if a judge were to

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110. Uniform Mediation Act, *infra* note 109, § 7 (*stating* “[p]rohibited Mediator Reports (a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation. (b) A mediator may disclose: (1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; (2) a mediation communication as permitted under Section 6 [providing for exceptions to the privilege]; or (3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment. (c) A communication made in violation of subsection (a) may not be considered by a court, administrative agency, or arbitrator.”).

111. *Id.* at § 7(C).

112. Deason, *supra* note 95, at 227 n.47 (listing multiple international arbitration statutes, including Belarus International Arbitration Court Law art. 18 (1990)); Bermuda International Conciliation and Arbitration Act § 10 (1993), *available at* <http://www.ciarb.bm/arbitration-act-1993/>; Costa Rica Law on Alternative Dispute Resolution of Disputes and Promotion of Freedom from Social Unrest art. 14 (2000); Croatia Law on Conciliation art. 13 (2003), in INT’L HANDBOOK ON COMM. ARB. SUPP. 57, Croatia, Annex II, *available at* [http://alanuzelac.from.hr/pubs/B27\\_ICCA%20HB%20Suppl.%2057%20Offprint%20Croatia.pdf](http://alanuzelac.from.hr/pubs/B27_ICCA%20HB%20Suppl.%2057%20Offprint%20Croatia.pdf); India Arbitration and Conciliation Act § 81 (1996), *available at* <http://www.indiankanoon.org/doc/1306164/>; Uganda Arbitration and Conciliation Act § 66 (2000), *available at* [http://www.wipo.int/wipolex/en/text.jsp?file\\_id170036](http://www.wipo.int/wipolex/en/text.jsp?file_id170036).

113. Blankley, *supra* note 54, at 342–46 (describing multiple states with mediation rules that broadly apply to Med-Arb).

114. DEASON, *supra* note 95, at 238 n.111.

115. Cynthia F. Cohen & Murray E. Cohen, *Relative Satisfaction with ADR: Some Empirical Evidence*, 57 DISP. RESOL. J. 37, 40 (2002).

oversee a settlement conference for their own case. Research indicates many judges in that exact situation lack understanding or concern for confidentiality. In a 2009 survey, only 54% of settlement conference judges in general civil cases reported discussing confidentiality of settlement discussions with the participants usually, often, or regularly.<sup>116</sup>

Med-Arb inhibits candor in mediation, severely limiting the process' effectiveness. Med-Arb eliminates the confidentiality of mediation communications in arbitration, unnecessarily exposing any resulting arbitral awards to judicial review. Med-Arb proponents advance four solutions to the confidentiality problems raised by Med-Arb. First, prior to utilizing Med-Arb parties consent to the structure, the resulting confidentiality issues, and waive any resulting causes of action. As described in Part III, informed consent is difficult to achieve and does not adequately resolve the confidentiality, impartiality, and self-determination issues. By utilizing a complex contract involving waivers of liability, informed consent to Med-Arb in itself further formalizes the process.

Second, the confidentiality issue can be lessened, but not completely resolved, by the mediation all occurring in joint session without separate, private, caucuses. This does not lessen the candor concern but it does ensure that parties are able to know of, and thus confront, any statements made privately to the mediator. This solution is largely not viable as most neutrals able to serve as an arbitrator are unaccustomed to facilitating conversation between parties and rely largely on caucus.

A third solution to Med-Arb's confidentiality problem is the neutral disregarding information learned during mediation when determining the arbitral award.<sup>117</sup> Judges and juries regularly ignore information deemed to be improper,<sup>118</sup> and the "concept that a trier of fact can ignore improper evidence enjoys broad acceptance in American Jurisprudence."<sup>119</sup> However, any claim that neutrals may be able "to keep secrets from themselves" should be regarded with suspicion.<sup>120</sup> The weight of psychological evidence suggests people have

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116. Peter Robinson, *Settlement Conference Judge — Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and Techniques*, 33 AM. J. TRIAL ADVOC. 113, 139 (2009) (Usually in the survey was defined as greater than 90% of the time, Often as 61–90% of the time, and Regularly as 41–60% of the time).

117. Weisman, *supra* note 1, at 41.

118. Blankenship, *supra* note 2, at 35.

119. *Id.* at 36.

120. Blankley, *supra* note 54, at 366–67.

great difficulty deliberately disregarding information.<sup>121</sup> Evidence indicates judges do not disregard inadmissible information when making substantive decisions<sup>122</sup> and even if a judge can ignore information, what was learned will still affect judgments indirectly.<sup>123</sup> Furthermore, judges are less able to ignore inadmissible evidence when making determinations that they consider at low risk of review.<sup>124</sup> Consequently, arbitrators facing little risk of review are probably even less able not to consider mediation communications during the arbitration phase.<sup>125</sup>

A fourth solution and an alternative to ignoring information learned in mediation, Med-Arb proponents suggest reversing the two processes. In Arb-Med, the neutral mediating the case renders and seals the arbitral award and can be confident that information learned in mediation will not contaminate the arbitration process.<sup>126</sup> Arb-Med may relieve Med-Arb's confidentiality problem, but, as discussed in the next Section, it does not resolve Med-Arb's impartiality problem.

#### B. *Med-Arb Compromises the Neutral's Impartiality*

Med-Arb's confidentiality and candor problems lead to three major impartiality problems. First, acting as a mediator/arbitrator in Med-Arb harms the mediator's impartiality by making it more difficult for the neutral to mediate. Second, acting as the mediator harms the arbitrator's impartiality as information learned during the mediation may negatively implicate the neutral's impartiality in rendering the arbitral award. The third impartiality problem is created when parties attempt to avoid these problems, because the structure incentivizes the neutral to pressure settlement prior to arbitration. The resulting Med is more formal and more akin to a judicial settlement conference and the resulting Arb is more susceptible to judicial review. The 2008 Wissler Survey of Ohio lawyers illustrate the impartiality problem: 31% strongly or somewhat agreed with the statement that the judge assigned to the case handling the settlement conference is biased, falling to 7% for judges not assigned to the case, 4% for court staff mediators, 6% for volunteer mediators, and 7% for

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121. Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L.REV. 1251, 1323 (2005).

122. *Id.*

123. *Id.* at 1269–70.

124. *Id.* at 1324.

125. Pappas, *supra* note 4, at 42.

126. Richard Fullerton, *Med-Arb and Its Variants: Ethical Issues for Parties and Neutrals*, 65 DISP. RESOL. J. 52, 59 (2010).

private mediators.<sup>127</sup> With this in mind, the following Section describes how Med-Arb's effort to counter the legalization of mediation and arbitration actually does the opposite as it exacerbates the impartiality problem.

1. *Impartiality of Med-Arbiter Acting as a Mediator*

In Med-Arb, the neutral is incentivized to impose solutions and essentially turn the mediation into a faux judicial settlement conference. This is because the neutral wields significant influence over possible alternatives to a negotiated agreement. The parties will closely examine the mediator's statements as the mediator may eventually become the arbitrator and thus informally controls the Best Alternative to a Negotiated Agreement ("BATNA").<sup>128</sup> In 'normal' mediation, parties examine and analyze their BATNAs, often as the mediator elucidates and assists the parties in thinking through likely outcomes. Med-Arb changes the BATNA analysis of the parties who seek to determine from the neutral's clues, what the likely award might occur if the matter proceeds to arbitration. The mediation turns away from the issues and the parties' options and focuses on the neutral. For example, because the same neutral will hear the dispute in arbitration if mediation is unsuccessful, the frequent BATNA question of "what might happen if this dispute goes to court?" becomes an exercise without a purpose. It is no longer relevant how "a" judge may see the evidence, but instead how "the" very mediator asking the question will decide the matter.<sup>129</sup> In Med-Arb, the mediation is formalized into a judicial settlement conference as the mediator will become the arbitrator if settlement does not occur.

The neutral's impartiality is also under pressure in the mediation phase because the parties have an opportunity to both influence the prospective award and to determine what that award might be, and to test whether settlement is preferred.<sup>130</sup> The parties and their advocates will utilize the private caucus sessions to convince the neutral of their case, attempting to "spin" the mediator. At the same time the parties will naturally examine any clues as to the neutral's preferences. Impaired perceived and actual impartiality of the neutral negatively impacts candor in the mediation because no thoughtful mediation participant would share the weaknesses in their case with a mediator who may become an arbitrator.

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127. Wissler, *supra* note 89, at 287.

128. Pappas, *supra* note 4, at 43.

129. *Id.*

130. *See id.*

## 2. *Impartiality of the Med-Arbiter Acting as an Arbitrator*

The second impartiality issue occurs after the mediation phase when information learned during the mediation phase not normally introduced in arbitration, will likely “cast doubt on the judge’s decision-making neutrality.”<sup>131</sup> The suspicion of parties involved is that arbitrators may make biased awards based on information learned during the mediation phase alone.<sup>132</sup> For example, mediators tend to learn the potential settlement ranges. While the arbitrator is charged with determining the arbitral award according to the evidence<sup>133</sup>, all parties know that the arbitrator is aware of the boundaries of desired settlement. Even if the arbitrator is acting impartially in determining the award, it will not appear this way to at least one of the parties because the parties will assume the neutral came to their conclusion with the known settlement ranges in mind. These issues are illustrated in the 2008 Wissler Survey of Ohio lawyers, where 60% strongly or somewhat disagreed with the statement that the judge assigned to the case is “able to explore settlement without prejudice to ongoing litigation if the case is not settled.”<sup>134</sup> In comparison, lawyers strongly or somewhat disagreed with the same statement relating to judges not assigned to the case (16%), court staff mediators (5%), volunteer mediators (3%), or private mediators (1%).<sup>135</sup> Despite fulfilling the obligations of the role, judges no longer appeared “impartial,” even though the parties consented to the process. The survey provides evidence that neutrals with subsequent settlement authority will be widely viewed as partial as compared to neutrals without such authority.

### C. *Impartiality of the Med-Arbiter Generally*

Med-Arb’s third impartiality problem is that it incentivizes the neutral to avoid the above arbitral impartiality issue by achieving a

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131. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 MARQ. L. REV. 79, 83 (2001).

132. Bartel, *supra* note 66, at 686.

133. James M. Gaitis, et.al., COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 238 (JurisNet LLC 2014) (“Reasoned awards should contain a concise analysis of the critical evidence and applicable law and a discussion of how the arbitrators’ view of the evidence and law relates to the arbitrators’ decision”); *see also*, ARBITRATION FORUMS, INC., GUIDE FOR ARBITRATORS 4 (Arbitration Forums, Inc. 2013), [https://www.arbfile.org/af-static/res/ArbitratorResources/arbitrator\\_guide.pdf](https://www.arbfile.org/af-static/res/ArbitratorResources/arbitrator_guide.pdf) (“All decisions must be based solely on the arguments made in the contentions and the evidence submitted by the parties to avoid any perception of bias”).

134. Wissler, *supra* note 127, at 284.

135. *Id.*

mediated resolution. Neutrals pressuring settlement compromise their impartiality by abusing the “shadow” of an impending arbitration to put pressure on settlement. The self-determination issues created by such tactics are reviewed in Part III. Med-Arb’s structure is similar to a judicial settlement conference, and research indicates that settlement conference judges are partial towards settlement. For example, only 25% of general civil settlement conference judges surveyed in 2009 reported usually, often, or regularly being indifferent as to whether a settlement is accomplished.<sup>136</sup> No judges in settlement conferences for complex civil cases reported usually, often, or regularly being indifferent as to whether settlement is accomplished.<sup>137</sup> Neutrals in a Med-Arb are similar to judges in a settlement conference, only the Med-Arb structure incentivizes the neutral to pressure settlement, and in doing so, harms the neutral’s impartiality.

Not every party knows whether they want to settle when they enter the process. Consequently, neutrals pressuring settlement are not impartial and in effect become someone with whom the parties must negotiate in order to achieve their goals. For example, if a party shares their ‘true’ bottom line with the mediator, they will likely be pressured towards it, incentivizing the party to hide information. In reality, parties need help thinking through their options and without complete information the neutral is less likely to be able to assist. This is not a phenomenon created by Med-Arb, but is a result of the legalized form of mediation in which settlement is assumed and the mediator is there to evaluate, pressure, and cajole. Med-Arb further legalizes the situation by incentivizing the neutral to avoid confidentiality and impartiality issues in the arbitration by using their decision-making authority to pressure settlement in the mediation phase.

#### D. *A Med-Arb Is Not a Judicial Settlement Conference*

Med-Arb proponents make three main arguments to rebut the impartiality problem. First, advocates argue that a process of informed consent, often accompanied by a waiver of liability for any perceived or actual partiality, resolves the issue. Second, advocates argue there is no conflict in using the same neutral for both the Med and the Arb because this blended process is analogous to a judicial settlement conference. Finally, advocates point to Arb-Med as a

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136. Robinson, *supra* note 116 at 143 (Usually in the survey was defined as greater than 90% of the time, Often as 61–90% of the time, and Regularly as 41–60% of the time).

137. *Id.*

means of resolving impartiality concerns. Informed consent is further discussed in Part III.e. The remainder of this Part describes the second and third arguments.

### 1. *Judicial Settlement Conferences Face Impartiality Issues*

Med-Arb proponents point to ostensibly ‘impartial’ judges in civil cases routinely acting as mediators in settlement conferences. If settlement does not occur, the case continues into the trial or “arbitration” phase. Bolstering this argument, Peter Robinson’s research found 80% of the techniques used by a judge in a “mediation” are the same as those used by a judge in a “settlement conference.”<sup>138</sup> Recent studies indicate that judicial settlement conferences are very similar to evaluative mediations, and that both face impartiality problems. A 2009 survey of settlement conferences judges indicated 75% of civil judges in general and complex cases request concessions from one or both parties in negotiation usually, often, or regularly.<sup>139</sup> Sixty percent of civil judges in general and complex cases indicated they meet exclusively in caucus usually, often, or regularly.<sup>140</sup> Only 11% of judges in general and complex cases encouraged the clients to discuss the case directly with the other side usually, often or regularly.<sup>141</sup> These statistics demonstrate that judicial settlement conferences and evaluative mediation are today one and the same. The impartiality issues facing Med-Arb, including *ex parte* communications and the propriety of pressuring settlement, exist in judicial settlement conferences. The argument that Med-Arb’s impartiality is satisfied because the hybrid simply replicates a judicial settlement conference instead proves the point: A judicial settlement conference is not an impartiality model for Med-Arb to replicate.

Research from the early 1980s bolsters this conclusion and demonstrates the discomfort expressed by both lawyers and judges regarding judicial settlement techniques viewed as biased. Lawyers surveyed on judicial settlement by Wall and Schiller in 1982 found the most used techniques included: Asking both lawyers to compromise (80%), analyzing the case for a lawyer (79%), suggesting they split the difference (72%), pressuring the ill-prepared attorney (72%), evaluating one or both cases for the attorneys (69%), calling a certain

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138. PETER ROBINSON, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 375 (2006).

139. Robinson, *supra* note 136 at 119.

140. *Id.* at 134.

141. *Id.* at 136.

figure reasonable (69%), suggesting settlement figures after asking for lawyers' inputs (67%), and informing the attorneys as to how similar cases have been settled (66%).<sup>142</sup> Lawyers viewed (1) coercing lawyers to settle (2) suggesting settlement figures without asking for lawyers' inputs, (3) pointing out the case's strengths and weaknesses to the client (4) commenting on the credibility of testimony; and (5) offering advice to a lawyer to be unethical practices.<sup>143</sup> Lawyers viewed judicial settlement techniques to be lacking impartiality and biased towards settlement.

Judges themselves raised concerns about conducting judicial settlement conferences in a 1984 survey by Wall, Schiller, and Ebert.<sup>144</sup> Reasons against participating in settlement conferences highlighted the impartiality concerns and included opinions that it was ethically improper, outside their role, represented illegal and impeachable offenses, or that they themselves resented judicial pressure when practicing as attorneys.<sup>145</sup> A significant number of judges also declined to become involved in settlement negotiations because they felt it prejudiced them if the negotiations were unsuccessful.<sup>146</sup> Others felt that judicial-led settlement resulted in parties' routinely expecting such involvement and thus doing very little settlement work prior to court involvement.<sup>147</sup> Early evidence suggests both attorneys and judges were uncomfortable with impartiality issues raised by judicial settlement conferences. There are impartiality issues with settlement conferences as judges serving as "informal mediators" are more powerful than either of the parties compared to other neutrals.<sup>148</sup> By using the specter of an unfavorable judgment as a sword, a judge can yield significant power in shaping specific settlements. There are also impartiality issues with using judicial settlement conferences as a model for Med-Arb to emulate.

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142. James A. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge Is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 43 (table 2) (1982).

143. *Id.* at 44 (table 3).

144. James A. Wall, et al., *Should Judges Grease the Slow Wheel of Justice? A Survey on the Effectiveness of Judicial Mediation Techniques*, 8, 83 (1984).

145. *Id.* at 110–11.

146. *Id.* at 111.

147. *Id.*

148. James A. Wall & Dale E. Rude, *The Judge as a Mediator*, 76 J. OF APPL. PSYCHOL. 54, 54–59 (1991).

2. *Elevating Med-Arbiters to Judge-like Status Exacerbates the Impartiality Problem and Creates a Due Process Problem*

Following mediation with arbitration and using the same neutral for both processes elevates the neutral to judge-like status. Just as parties and their advocates carefully watch judges during settlement conference for signs of signaling preferences or views about the case, the parties in a Med-Arb do the same, elevating the already sensitive issue of impartiality. Due to the similarity between evaluative mediation and judicial settlement conferences, Med-Arb should not be considered a hybrid of mediation and arbitration, but instead a judicial settlement conference conducted prior to an arbitration. There is one notable difference that constitutes a key reason why the judicial settlement conference analogy fails: The arbitration in a Med-Arb lacks the due process protections provided by either trial or a traditional arbitration. The fact that many judges are involved in settlement discussions prior to litigation does not mean it is proper for a neutral to do so under private dispute resolution procedures. For example, often the neutral seeks to use the mediation as the arbitral hearing if the mediation ends in impasse instead of conducting two distinct sessions and an opportunity for presenting proofs. This makes it impossible for an appeal given the unavailability of an evidentiary record, and presents issues in terms of the right to confront all arguments. Clearly defined procedures governing litigation protect the parties from the dangers of partial settlement conference judges. Med-Arb lacks due process protections.

Blending mediation and arbitration without a clear delineation raises process concerns, including the arbitrator asking a party in arbitration what it would offer and entering this amount as an award.<sup>149</sup> Problematic transitions from mediation to arbitration can also occur, notably when parties reach an incomplete agreement in mediation and are unclear as to the extent to which process is underway.<sup>150</sup> The result is a Med-Arb hybrid process vulnerable to legal review — endangering the enforceability, and thus the finality, of the arbitral award.

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149. *Id.* at 241 (citing *Trimble v. Graves*, 947 N.E.2d 885, 889 (Ill. Ct. App. 2011) (vacating award and labeling the inquiry as acceptable in mediation but no arbitration. The evidence was prejudicial and presented an impermissible delegation of the arbitrators' duty to adjudicate.).

150. *Id.* (citing *Weddington Prods., Inc. v. Flick*, 71 Cal. Rptr. 265, 267–68 (Cal. Ct. App. 1998) (refusing to enforce binding mediation award arising out of a lack of consensus by the parties and the mediator about whether it was binding).

The settlement conference comparison also fails to satisfy impartiality due to the rules governing arbitration and mediation. Arbitration requires an opportunity for parties to be heard and to be treated equally.<sup>151</sup> Equal treatment is significantly conditioned on a neutral's impartiality. The Texas Ethical Guidelines for Mediators provides that a neutral serving as a mediator should not subsequently serve in any other judicial or quasi-judicial capacity in matters that are the subject of the mediation.<sup>152</sup> The Ontario Arbitration Act prohibits any process that "might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially."<sup>153</sup> The China International Economic and Trade Arbitration ("CIETAC") rules were changed to accommodate western concerns and now enable parties to have their conciliation conducted by person(s) other than the arbitration tribunal.<sup>154</sup> Existing ethical rules operate to create distinctions between formal and informal processes in order to ensure confidentiality, candor, and impartiality.

### 3. *Research Indicates a Preference for Separating the Informal and Formal Resolution Functions*

Studies indicate a clear preference for separating the informal and formal resolution functions. A 2009 Wissler Survey of Ohio lawyers examining mediation versus settlement conferences, indicates lower satisfaction with settlement conferences overseen by judges assigned to the case. Ohio lawyers preferred mediation with staff mediators first, followed by settlement conferences with judges not assigned to the case, and then mediation with private mediators

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151. Deason, *supra* note 95, at 226; Klaus Peter Berger, *Intergration of Mediation Elements into Arbitration: "Hybrid" Procedures and "Intuitive" Mediation by International Arbitrators*, 19 *ARB. INT'L* 387, 391 (2003); Michael Collins, *Do International Arbitral Tribunals Have any Obligation to Encourage Settlement of the Disputes Before Them?*, 19 *ARB. INT'L* 333, 334 (2003); UNCITRAL Model Law on International Commercial Arbitration; United Nations Commission on International Trade Law (2006), available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_Arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_Arbitration_status.html) (explaining that "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case").

152. Approval of Ethical Guidelines for Mediators, Misc. Docket No. 05-9107 (Tex. Ct. App. June 13, 2005), available at <http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf>; see also *Supreme Court Approves Ethical Guidelines for Mediators*, 68 *TEX. B.J.* 856, 857-58 (2005).

153. Ontario Arbitration Act, R.S.O. 1991, P 35 (Can.), available at [http://www.elaws.gov.on.ca/html/statutes/english/elaws\\_statutes\\_91a17\\_e.htm#BK42](http://www.elaws.gov.on.ca/html/statutes/english/elaws_statutes_91a17_e.htm#BK42).

154. CIETAC Arbitration Rules, China Int'l Econ & Trade Arbitration Comm'n (May 1, 2012), available at <http://www.cietac.org/index.cms>; EDNA SUSSMAN, *International Mediation*, 47 *INT'L LAW.* 179, 181 (2013).

ahead of settlement conferences with judges assigned to the case.<sup>155</sup> Only mediation with volunteer mediators was ranked lower.<sup>156</sup>

Recent research also indicates clients are better served by court mediators, private mediators, and even judges who are not assigned to the case than they are by judges assigned by the case. When asked about client satisfaction regardless of outcome, 53% of lawyers agreed or strongly agreed with the statement that judges assigned to the case who overseeing settlement discussions left clients feeling well served.<sup>157</sup> Only volunteer mediators received a lower rating (33%) with non-assigned judges (60%), court mediators (70%) and private mediators (59%) all viewed as better able to help clients feel better served.<sup>158</sup> Separating the informal and formal aspects of resolution help to ensure the neutral's impartiality.

#### 4. *Arb-Med Does Not Resolve Med-Arb's Impartiality Problem*

Finally, Med-Arb advocates advance the use of Arb-Med to rebut the impartiality problem. Arb-Med may lessen the candor and confidentiality concerns, but it does not address the impartiality problem. In Arb-Med, the neutral first conducts the arbitration, seals the award, and then mediates the dispute. The parties will still carefully watch the neutral's subsequent statements in order to glean information about the award. This makes it very difficult for the mediator in an Arb-Med to reality test the BATNA and to avoid signaling their views. Not only do the arguments advanced by Med-Arb proponents correct Med-Arb's impartiality problem, they do not address Med-Arb's fundamental flaw: The impartiality issue encourages adversarial behavior. The next Section addresses adversarial behavior in mediation.

#### E. *Med-Arb Incentivizes Adversarial Behavior*

The Med-Arb "solution" is to correct the adversarial behavior that typifies legalized mediation by placing the "judge" in the room. Med-Arb is an effort to deal with parties who refuse to bargain in good faith in mediation. The pro-good faith argument is that courts compelling mediation have a responsibility to protect parties from adversarial abuse and to provide guidance about what is expected from the parties and the mediators.<sup>159</sup> While not uniformly definable, good

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155. Wissler, *supra* 89, at 298.

156. *Id.*

157. *Id.* at 296.

158. *Id.*

159. *Id.* at 366.

faith is described as “leaving behind adversarial instincts and tactics and cooperating, or at least playing along, with the demands of the mediator.”<sup>160</sup> Arguments against good faith include the inability to define or the subjective nature of good faith;<sup>161</sup> the creation of additional litigation over mediation misconduct;<sup>162</sup> and the impact on confidentiality and mediator impartiality by pressuring good faith behavior and being the best evidence of party misconduct.<sup>163</sup> On one hand is “distaste for the rule-based adversary system” and preference for limiting judicial review to objective issues (e.g., party attendance) to minimize the court’s role.<sup>164</sup> On the other is the argument that a good faith requirement is necessary in order to ensure a fair process without adversarial abuse.<sup>165</sup> Therefore tension exists between efforts to maintain confidential, informal, and voluntary alternatives, and mandatory means of requiring mediation to ensure efficient and effective resolution of disputes.

Med-Arb proponents argue the hybrid process resolves this tension and effectively eliminates the need for the mediator to ensure or monitor “good faith” in mediation, as he or she will assume the role of arbitrator and have decision-control if the dispute does not settle in mediation. The finality of the Med-Arb process provides an incentive to bargain with the purpose of reaching an agreement.<sup>166</sup> Negotiating in good faith is ensured in Med-Arb by placing the decision-maker in the room as the mediator and subsequent arbitrator, and guards against adversarial abuses.<sup>167</sup>

Recent research questions whether Med-Arb is the best means of managing difficult parties and indicate that there is little difference

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160. Peter N. Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363 (2011).

161. *Id.* at 374.

162. David S. Winston, *Participation Standards in Mandatory Mediation Statutes: “You Can Lead a Horse to Water . . .”*, 11 OHIO ST. J. ON DISP. RESOL. 187, 198 (1996) (noting that this can lead to “exhaustive investigations” that run counter to the interest of efficiency).

163. Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 AM. ACAD. MATRIM. LAW. 69, 94–97 (2001); James J. Alfini and Catherine G. McGabe, *Mediation in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 182–95 (2001)

164. Thompson, *supra* note 160, at 376.

165. Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L. J. 591, 643 (2001) (arguing that good faith mediation requirements are necessary in order to achieve mediation’s efficiency, effectiveness, party satisfaction, and fairness objectives).

166. *See supra* notes 58–67 and accompanying text.

167. *Id.*

between mediators and judges in ensuring good behavior. The 2008 Wissler Survey of Ohio lawyers examining judicial settlement conferences indicated that 76% strongly or somewhat agreed with the statement that when overseeing judicial settlement conferences the judge assigned to case can help counsel manage difficult parties.<sup>168</sup> Lawyers strongly or somewhat agreed with the statement relating to judges not assigned to the case (76%), court staff mediators (70%), volunteer mediators (36%), and private mediators (62%).<sup>169</sup> Examining the other end of the spectrum, Lawyers strongly or somewhat disagreed with the statement for judges assigned (9%), for judges not assigned (5%), for Court staff mediators (7%), for volunteer mediators (26%), and for private mediators (5%).<sup>170</sup> Aside from the views regarding volunteer mediators, these statistics do not indicate a large divide between judges and mediators in their ability to help counsel manage difficult parties.

Instead of ensuring good behavior, adding arbitration and the finality it provides to ensure “good faith” in mediation only legalizes the process. In Pruitt, et al.’s 1989 study examining mediation, different-neutral Med-Arb, and same-neutral Med-Arb, the authors found that threats and strong advocacy of a solution, described as heavy pressure tactics, were significantly greater in same-neutral Med-Arb than in mediation.<sup>171</sup> Knowing the neutral has decision-making authority, advocates will seek to both determine and influence the views of the neutral who will eventually become the decision-maker.<sup>172</sup> With impartiality under a microscope and candor inhibited as the parties attempt to “spin” the mediator, the prospects of reaching agreement are severely curtailed.

Confidential mediation caucus sessions provide Med-Arb parties to have ex parte conversations with their future arbitrator — an ideal opportunity for advocates to poison the well.<sup>173</sup> Advocates may utilize these separate caucus sessions to reveal unfavorable information about the other side, knowing that the other side will not know of these communications and be able to rebut them. The potential exists

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168. Wissler, *supra* note 89 at 295.

169. *Id.*

170. *Id.*

171. Pruitt, *infra* note 189, at 372–74.

172. Stipanowich & Kaskell, *infra* note 233, at 21–22 (describing parties’ performance as an attempt to influence the mediator’s decision as arbitrator).

173. Jeff Kichaven, *Med-Arb Should Be Dead*, N.Y. DISP. RESOL. 80 2009.

for advocates to use the mediation, and the caucus sessions in particular, offensively in anticipation of arbitration. Utilizing this information either during the mediation to pressure settlement or afterwards while determining the arbitral award harms the mediator's impartiality. Neutral accustomed to evaluating may struggle to assist the parties in interacting productively<sup>174</sup> without compromising their impartiality.

The impending arbitration phase provides a carrot to "behave" that leads to settlement, but it also creates a competing incentive for the "Arb" to leak into the "Med." Placing the prospective decision-maker in the room changes the dynamics and encourages advocates to operate as though in the arbitration. These incentives to "arbitrate" the mediation make the session far more formal and adversarial than it might be otherwise and may limit the mediator's effectiveness and the prospects of reaching an agreement. In order to counter these tactics, the neutral must act more as a judge and less as a mediator, evaluating the legal merits, and pressuring the parties towards settlement by implicating, directly or indirectly, their authority over settlement. The impartiality and confidentiality issues described increase the formality and the adversarial nature of the process and result in a process that is increasingly legal.

#### F. *Informed Consent to Use Med-Arb Does Not Protect Party Self-Determination*

Med-Arb proponents describe self-determination and party choice as the solution to both the confidentiality and impartiality problems. Med-Arb advocates point to the importance of providing parties with a full understanding of the risk and benefits, and only undertaking Med-Arb "with the parties' full, voluntary consent."<sup>175</sup> The benefits, though, are not worth the risks. Implicitly, efforts seeking to protect and fully inform prospective parties to Med-Arb require that the process be made increasingly formal and legalistic. The next Section reviews these arguments and describes how Med-Arb limits self-determination and choice.

##### 1. *Informed Consent Corrects Med-Arb's Flaws*

Proponents of Med-Arb believe that Med-Arb's detriments can be avoided through an informed and thorough mechanism of consent

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174. See Deason, *supra* note 95, at 224.

175. See, e.g., Weisman, *supra* note 1, at 40 (noting "it is imperative that the mediator-arbitrator describe both the benefits and criticisms of the process.").

prior to agreeing to Med-Arb. Indeed, this is the “silver bullet” argument that flexibility<sup>176</sup> and choice are the hallmarks of ADR and restricting the exercise of choice is overly rigid and paternalistic. Med-Arb, where sophisticated parties contract for the dispute resolution option of their choice is, they argue, the epitome of flexibility and disputant control. Med-Arb proponent John Blankenship argues “the process should be fashioned to fit the dispute, rather than the dispute to the process.”<sup>177</sup> Instead of viewing ADR processes as “unalterable process boxes” into which disputes must fit, ADR procedures should be “adaptable and combinable in order to best meet the needs of a particular dispute.”<sup>178</sup> Blankenship argues the “alternative” in ADR often means that only certain “alternatives” are available and that this harms flexibility and creativity.<sup>179</sup> Blind devotion to certain mechanisms is harmful to the field as a whole.<sup>180</sup> John Lande echoes these concerns when he noted that “[p]rocedures are inanimate phenomena that should be means to ends, not ends in themselves . . . [so] [i]nstead of investing so much of our cultural resources in myths about our most (or least) favorite procedures, we should invest more in realistic stories honoring people who work together to make good choices in using procedures to satisfy people’s interest . . . .”<sup>181</sup> Instead of arguing over the “correctness” of certain procedures, Lande and Blankenship frame the argument as one of individual preferences to tailor dispute mechanisms in ways that meet party interests. The notions that “one size does not fit all” and “flexibility and choice” are the hallmarks of ADR ignore the reality that ADR processes are now the primary mechanisms for resolving legal disputes and as a result they require careful examination.

## 2. *Informed Consent Does Not Provide True Self-Determination*

Med-Arb, even when selected through a process of informed consent, does not provide for party self-determination due to five main reasons. First, lawyers and the increased legalization of mediation

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176. See, e.g., Blankenship, *supra* note 2, at 33–34; Phillips, *supra* note 54, at 28 (arguing that Med-Arb is the most flexible ADR process).

177. *Id.* at 29.

178. *Id.*

179. *Id.* at 38.

180. *Id.*

181. John Lande, *Shifting the Focus from the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter*, 6 CARDOZO J. CONFLICT RESOL. 191, 210–11 (2005).

curtail party self-determination. Second, increasing the legality of mediation by making the mediator also the arbitrator further curtails party self-determination. Third, informed consent to formal processes is not the same as informed consent to informal processes. Fourth, barriers to educating clients and their advocates about the dangers of Med-Arb make achieving truly informed consent difficult. Finally, even assuming self-determination to use Med-Arb, issues with educated party choice exist beyond the initial agreement. The resulting picture is one in which self-determination is not protected throughout Med-Arb by often complicated initial consent forms that in and of themselves further legalize the process.

a. *Lawyers and the Increased Legalization of Mediation  
Curtail Party Self-Determination*

Med-Arb advocates argue that sophisticated, represented parties should not be restricted in their ability to make such choices. These arguments can be countered by evidence indicating that procedural choice may relate more to the attorney's inclinations than the client's preferences.<sup>182</sup> The weight of research highlights participant preference for non-adjudicative resolution procedures. In a 2004 study, Shestowsky found in two experiments that participants prefer dispute resolution options that provide them the most control.<sup>183</sup> Notably, parties preferred to present their own information without the assistance or filter of a representative.<sup>184</sup> Participants want "a neutral third party to do no more than help them arrive at their own decision."<sup>185</sup> Aspects of control that matter to disputants include "the level of formality or conversationality of the discussion, and who has the authority to determine when it is appropriate for the disputants to speak."<sup>186</sup> Studies also indicate disputants prefer non-adjudicative procedures to adjudicative ones.<sup>187</sup> The legality of the subject matter does not necessarily influence the participants' dispute mechanism preferences.<sup>188</sup> Simply put, disputants prefer processes that provide greater voice and participation, and these processes tend to be less

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182. See *supra* notes 177–83 and accompanying text.

183. Lande, *supra* note 181, at 233.

184. *Id.* at 243.

185. *Id.* at 243.

186. Donna Shestowsky & Jeanne Brett, *Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study*, 41 CONN. L. REV. 63, 95 (2008).

187. Shestowsky, *supra* note 33, at 220.

188. *Id.* at 246.

formal and less legalistic. Further, an important benefit of disputants' preferences guiding procedural choices and direct participation in the resolution process is voluntary compliance with agreements.<sup>189</sup> As a result, self-determination within the process leads to self-determined compliance after resolution.

Despite party preferences for non-adjudicative procedures, self-determination, and control, evidence suggests attorneys are the gatekeepers to ADR.<sup>190</sup> Clients look to their lawyers for guidance on how to approach the dispute,<sup>191</sup> and clients are significantly influenced by their lawyer's preferences and tendencies regarding dispute resolution.<sup>192</sup> Research indicates party self-determination to utilize informal dispute mechanisms is heavily mediated by attorney preferences. Brett and Shestowsky's research indicates that disputants' initial

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189. Shestowsky & Brett, *supra* note 186, at 100 (citing Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Consensual Processes and Outcomes*, in *MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD PARTY MEDIATION* 53, 59, (Kenneth Kressel & Dean G. Pruitt eds., 1989) (finding that disputants are more likely to comply with the agreement's terms if they think the agreement was fair and they felt good about the mediation); Dean G. Pruitt, et al., *Long-Term Success in Mediation*, 17 *LAW & HUM. BEHAV.* 313, 327 (1993) (finding that parties believing a mediation was fair were more likely to comply with the agreement and to view an improvement in the relationship with the other party)).

190. JEFFREY H. GOLDFIEN & JENNIFER K. ROBBENNOLT, *What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 *OHIO ST. J. ON DISP. RESOL.* 277, 287 (2007).

191. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 *OHIO ST. J. ON DISP. RESOL.* 269, 318 (1999) (arguing that clients are largely dependent on attorneys for an analysis of their case and the pros and cons of a proposed settlement); *cf.*, e.g., Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative mediation and Lawyering*, 6 *HARV. NEGOT. L. REV.* 145, 166 (2001) (stating that lawyers are perceived as professionals with experience "to whom parties should defer");

192. See, e.g., AUSTIN SARAT & WILLIAM L. F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 20–21 (Oxford University Press, 1997) (describing research indicating that clients are relegated to secondary roles in litigation as lawyers view their involvement as hostile and seek to limit it); Goldfiel & Robbennolt, *supra* note 190, at 305–09 (finding that disputants are influenced by their lawyers' mediator preferences and conflict styles); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 *TEX. L. REV.* 77, 82 (1997) (indicating support for the belief that lawyers have the ability to persuade litigants to approach the decision to settle or go to trial "from the lawyer's preferred analytical perspective."); Roselle L. Wissler, *When Does Familiarity Breed Content?: A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 *PEPP. DISP. RESOL. L.J.* 199, 205 (2002) (observing the recommendation and encouragement of attorneys as a key factor in litigants' willingness to use ADR); see also, Shestowsky & Brett, *supra* note 186, 98–99 and accompanying footnotes (providing further citations in support of how lawyers influence disputants' choices).

procedural preferences do not predict which settlement mechanism they later select.<sup>193</sup> They posit three possible explanations for this behavior: (1) issues of time or cost may impact the procedural choice; (2) the opposing party preferred a different mechanism; or (3) attorneys were directing their clients' procedural choices.<sup>194</sup> In analyzing the data, Shestowsky and Brett believe attorneys were not guiding their clients to the newly available mediation program and were also not inclined to negotiate.<sup>195</sup> As the gatekeepers to ADR attorney preferences guide client choices, curtailing client self-determination and leading to the use of more legalized alternatives like Med-Arb or evaluative mediation.

Once in mediation, party self-determination is limited due to attorneys' preferences for evaluative processes that emphasize the law over the interests and the needs of the parties. The Model Standards of Conduct for Mediators defines the extent of self-determination. The Standards state, that "parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes."<sup>196</sup> Under this definition, evaluative mediation offers parties a more limited version of self-determination. As described above, attorneys prefer evaluative mediation and seek mediators who have the legitimacy to mediate through their substantive expertise honed over years of litigating similar issues. Evaluative mediators legalize the process by often focusing exclusively on the legal issues in the case, by pressuring settlement, and by using mediation retainer agreements that may include waivers of liability, including an expressed agreement that the mediator will be evaluating the legal merits of the dispute and providing settlement options.

Ironically, when parties are dissatisfied with informal processes it is often because attorneys are primarily in control of negotiation.<sup>197</sup> This explanation is confirmed by Shestowsky and Brett's who found that 39.3% of negotiation participants were unable to identify the rules or basis for resolving their dispute.<sup>198</sup> This suggests that adjudicative procedures may involve the participation of disputants in

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193. Shestowsky & Brett, *supra* note 186, at 97.

194. *Id.* at 97–98.

195. *Id.* at 98.

196. MODEL STANDARDS OF CONDUCT FOR MEDIATORS *supra* note 121, at § I(A)

197. Shestowsky & Brett, *supra* note 186, at 101.

198. *Id.* at 102.

ways that non-adjudicative procedures may not.<sup>199</sup> The formal mechanisms whereby disputants are included (attending the proceeding, acting as a witness) may provide for more participation than informal mechanisms handled exclusively by their attorneys. Ironically, with attorneys controlling informal processes, the parties' participation is limited at best. The procedural formality of adjudicative procedures may thus enhance disputants' perceptions of fairness.<sup>200</sup>

b. *Increasing the Legality of Mediation by Making the Mediator also the Arbitrator Further Curtails Party Self-Determination.*

Evidence of party perception of greater participation in more formal adjudicative processes suggests that Med-Arb may provide greater self-determination than evaluative mediation. As neutrals in Med-Arb tend to be evaluative, Med-Arb must be viewed in light of the limited self-determination provided when selecting evaluative mediation. Med-Arb "choice" looks remarkably similar, and in fact may be a natural progression from this more legalized and adjudicative form of mediation. In both instances "choice" occurs at the beginning-stage decision of whether to utilize these processes and who to utilize as the neutral. These choices often impact the types of conversations that take place in the mediation. In arbitration only legal norms will be enforced<sup>201</sup> whereas in mediation, parties can agree to non-legal solutions. By pairing mediation with arbitration and placing the arbitrator in the mediation, it ensures that the mediation takes a decidedly legal tone and thus inherently legalizes the mediation, reducing party self-determination in favor of more legal arguments.

c. *Informed Consent to Formal Processes is Not the Same as Informed Consent to Informal Processes*

As the risks of Med-Arb are difficult for most parties to understand without experiencing, legal definitions of informed consent are insufficient for ensuring self-determination to utilize the a hybrid process. Determining informed consent to mediate is not easy, complicating the process of determining informed consent to utilize Med-

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199. Deborah R. Hensler, *Suppose It's Not True: Challenging Mediation Ideology*, 2002 J. DISP. RESOL. 81, 90-91 (2002).

200. E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 982 (1990).

201. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105, 116-17 (1995).

Arb.<sup>202</sup> Generally legal informed consent is defined as “[a] person’s agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives.”<sup>203</sup> The Model Standards of Conduct for Mediators does not utilize the term informed consent,<sup>204</sup> but Professor Nolan-Haley defines informed consent in mediation as “requir[ing] that parties be educated about mediation before they consent to participate in it.”<sup>205</sup> Further, informed consent “guards against coercion, ignorance, and incapacity that can impede the consensual underpinnings of the mediation process.”<sup>206</sup> Informed consent in formal processes like litigation or arbitration can thus be contrasted with informed consent to utilize informal processes like mediation.

Informed consent in mediation is something that must be maintained throughout the process, and not simply achieved at the outset. Informed consent includes both “participation consent” and “outcome consent” and participation consent is not meaningful without a full understanding of the process.<sup>207</sup> If “outcome consent” rests on mediator evaluation, the basis for the evaluation should be clear and include the mediator’s expertise and, if applicable, highlight ways in which the evaluation is different than what a judge would recommend.<sup>208</sup> Underlying informed consent are the values of individual autonomy and self-determination.<sup>209</sup>

Determining the degree of information needed to make decisions “informed” is difficult due to the potential complexity of the subject matter and the sophistication level of the parties.<sup>210</sup> Five key elements must be addressed to achieve informed consent: disclosure, comprehension, voluntariness, competence, and consent.<sup>211</sup> One “of

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202. See *id.* at 49.

203. BLACK’S LAW DICTIONARY 346 (9th ed. 2009).

204. *Id.*

205. Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 812 (1999).

206. *Id.* at 812.

207. See *id.* at 819–20.

208. LELA P. LOVE & JOHN W. COOLEY, *Collision of Two Ideals: Legal Ethics and the World of Alternative Dispute Resolution*, 21 OHIO ST. J. ON DISP. RESOL. 45, 54 (2005).

209. Ben Sones, *A Tale of Two Countries: Parallel Visions for Informed Consent in the United States and United Kingdom*, 39 VAND. J. TRANSNAT’L L. 253, 257 (2006) (Sones specifically describes these values in the U.S. healthcare context).

210. Kimberlee K. Kovach, *The Duty to Disclose Litigation Risks and Opportunities for Settlement: The Essence of Informed Decision-Making*, 33 U. LA VERNE L. REV. 71, 76 (2011).

211. *Id.* at 77 (citing RUTH R. FADEN AND TIM L. BEAUCHAMP, *A HISTORY AND THEORY OF INFORMED CONSENT*, 274 (1986)).

the key elements of clients having autonomy [and] decision-making. . . is the information the lawyer provides to the client.”<sup>212</sup> Informed consent to utilize Med-Arb is very similar to informed consent when utilizing an evaluative mediation process. Both require a greater understanding of the hidden risks to a process combining formal and informal processes. For example, the International Bar Association’s Working Group, formulating Guidelines on Conflicts of Interest in International arbitration,<sup>213</sup> stated:

Considering the sensitive position of the arbitrator as potential settlement facilitator. . . the taskforce and the Working Group determined that the parties must give their express agreement prior to the commencement of such a process. This express agreement will be considered an effective waiver of any potential conflict of interest that might arise from the arbitrator’s participation in settlement or from any information that the arbitrator may learn in the process.<sup>214</sup>

Understanding the limitations and risks associated with confidentiality and impartiality make informed consent to utilize Med-Arb more complicated than informed consent to utilize mediation or arbitration alone. In order to effectuate informed consent requires a discussion of the limitations and risks of Med-Arb and this in itself increases the legality of both the discussions and the result consent agreement itself.

d. *Barriers to Educating Clients and Their Advocates About the Dangers of Med-Arb Make Achieving Truly Informed Consent Difficult*

Entering into Med-Arb requires parties to be educated about the weaknesses inherent in the process. Love and Cooley argue that, similar to entering into a Med-Arb process, party consent to engage in evaluative mediation should be “based on a clear understanding of the benefits, limitations, and risks associated with the process.”<sup>215</sup> Love and Cooley argue that “relying on parties to study mediator retainer agreements (when clients may rely on their lawyers for that service) would be a mistake,” just as it might be a mistake to assume “that attorneys understand the difference between mediation and an

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212. KOVACH, *supra* note 210, at 83.

213. INT’L BAR ASS’N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2004).

214. Otto L O de Witt Wijnen et al., *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, 5 BUS. L. INT’L 433, 452 (2004).

215. Love & Cooley, *supra* note 208, at 56.

evaluative process.”<sup>216</sup> It may be difficult for clients to understand these issues without experiencing them first hand. With informed consent overseen difficult to guarantee or even monitor, and attorney preferences weighing heavily on party choices to utilize ADR,<sup>217</sup> party self-determination is uncertain at best.

As an example of the challenges of educating parties about the dangers of combining formal and informal processes, Love and Cooley describe mediators who agree to offer an evaluation as a last resort in order to break impasse given the difficulty of determining what is a final impasse. Parties want an evaluation often because they believe it will be favorable. Their attorneys may want an evaluation because they believe it will benefit their clients or will make their clients more flexible. Love and Cooley thus caution that evaluations “are likely to disappoint one (or sometimes all) of the players.”<sup>218</sup> Therefore, mixing informal and formal processes is something that inherently pressures the impartiality and confidentiality of the informal process and makes self-determination difficult to achieve without understanding the complicated dynamics involved.

Often Med-Arb is considered at the neutral’s suggestion, and in such situations it is questionable as to whether true self-determination is taking place because parties may be agreeing to the process to avoid appearing disagreeable to the neutral. Arbitrator John Kagel argued that arbitrator-suggested mediation creates a difficult tactical problem for parties not wanting to offend their potential arbitrator and that the parties “will be subject to the same kind of subtle coercion to settle in mediation as they were to getting there.”<sup>219</sup> Med-Arb proponent Gerald Phillips argues the risk-benefit analysis of Med-Arb should be “made by the parties and their counsel, not by the neutral.”<sup>220</sup> Weisman also cautions that it is imperative for the mediator-arbitrator to describe both the process’s benefits and criticism and that the scope of Med-Arb should always be in the hands of the parties.<sup>221</sup> Despite Weisman’s best efforts to encourage self-determination, a detailed explanation of the benefits and criticisms of Med-Arb

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216. *Id.* at 65.

217. *See supra* notes 177–83 and accompanying text.

218. *Id.* at 69.

219. JOHN KAGEL, *Mediating Grievances*, in *ARBITRATION 1993 — ARBITRATION AND THE CHANGING WORLD OF WORK: PROC. OF THE SIXTH ANN. MEETING OF THE NAT’L ACAD. OF ARB.* 76, 78 (Gladys W. Gruenberg ed., 1994).

220. Gerald F. Phillips, *The Survey Says: Practitioners Cautiously Move Toward Accepting Same-Neutral Med-Arb, but Party Sophistication Is Mandatory*, 26 *ALTERNATIVES TO THE HIGH COST OF LITIG.* 101, 101 (2008).

221. Weisman, *supra* note 1, at 40.

requires understanding the legal risks of weakened impartiality and confidentiality. Such discussions will be inevitably legal, and clients will defer to their attorney's preferences, making true self-determination elusive. The initial self-determination to agree to the process is often uninformed and insufficient because attorneys themselves do not understand the risks and the neutral suggesting the process may not effectively detail all the limitations of Med-Arb.

In sum, the difficulties of determining self-determination and informed consent to use an evaluative mediation process are not corrected or improved by adding an arbitration component. Neither evaluative mediation nor Med-Arb provides for true informed consent about the risks of the process, and neither provides for adequate self-determination. Executing truly informed consent will increase the legality of Med-Arb. As Professor Kristin Blankley indicates, courts are hesitant to uphold arbitration awards in Med-Arb when the parties have not expressly consented to the use of mediation communications in the arbitration.<sup>222</sup> Blankley argues that parties using Med-Arb must adequately provide in advance for confidentiality and informed consent.<sup>223</sup> Such planning and careful drafting increases the formality and thus the legality of the process, because without such legalization, the resulting arbitration agreement arising from a Med-Arb is vulnerable to being vacated under the Federal Arbitration Act.<sup>224</sup> There also may be issues about what specifically may be waiveable. While the Massachusetts Court of Appeals, for example, held parties agreeing to Med-Arb "waive[s] any due process rights attendant on the mediation and arbitration,"<sup>225</sup> a party agreeing to arbitration does not surrender due process rights or mediation confidentiality rights.<sup>226</sup>

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222. Blankley, *supra* note 54, at 346–58.

223. *Id.* at 358.

224. *Id.* at 360.

225. Peterson v. Peterson, No. 99-P-366 2002 WL 518481, at \*1, (Mass. Ct. App. Apr. 5, 2002).

226. DEASON, *supra* note 95, at 24 (also noting at 26 that a party agreeing to Med-Arb does not surrender "the fundamental process rights of equal treatment and an opportunity to be heard that are associated with arbitration as well as litigation." Nor does the party "surrender the confidentiality rights associated with mediation." A party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

- e. *Even Assuming Self-Determination to Use Med-Arb, Issues with Educated Party Choice Exist Beyond the Initial Agreement*

Assuming the actualization of party self-determination to utilize Med-Arb still may limit self-determination only to the decision point of entering into the process. The choice to settle in the mediation phase is certainly incentivized,<sup>227</sup> but it is not a decision that can be made unilaterally without the other side's agreement. Thus the default, agreement notwithstanding, is an agreement to arbitrate that is complete and binding upon agreeing to the combined process.

The parties have an incentive to retain self-determination by reaching a mediated settlement. But what if one or both sides no longer see the neutral as impartial? Self-determination in mediation occurs throughout the process, not simply at the initial agreement stage. Parties in some respect are always negotiating for the third party neutral's perception, but Med-Arb elevates this to a greater degree. Knowing that your mediator will become your arbitrator requires that you attempt to persuade the neutral to see the issues from your point of view. If a mediation party shares information detrimental to their situation to the mediator, or if the mediator indicates favoritism towards one party's position, a party may regret their decision to enter Med-Arb. Self-determination would be greater in Med-Arb if the parties could each opt out and select an alternative arbitrator.<sup>228</sup> Touting finality and cost-savings as overriding values, Med-Arb agreements typically require parties to use the same neutral for both phases and leave no recourse if either party is unhappy with the neutral's performance in mediation.

Self-determination beyond the initial agreement also becomes an issue in deciding when the shift from mediation to arbitration will occur. If parties must jointly agree to transition to arbitration, it could indefinitely delay arbitration, but the same is true if one party refuses to participate in the arbitration phase.<sup>229</sup> Bartel argues the transition ideally will not take place until both parties agree, but without that consent the only real solution is to vest the Med-Arbiter with the power to determine when the transition occurs.<sup>230</sup> Such power could be used to stimulate compromise during the mediation, but might pre-maturely conclude the mediation because of slower-

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227. Weisman, *supra* note 1, at 40.

228. Deason, *supra* note 95, at 221.

229. Bartel, *supra* note 66, at 683.

230. *Id.*

than-desired progress.<sup>231</sup> A lack of party control or certainty over when the process proceeds to arbitration harms the self-determination of the parties over the process.

Further, the finality of arbitration impacts self-determination. While the parties are aware the neutral makes the final decision if they cannot reach an agreement, providing one neutral with the ability to mediate and render a binding decision can result in coercion by the neutral during the mediation.<sup>232</sup> Neutrals may unknowingly signal their opinions on the dispute and influence the outcome of the mediation.<sup>233</sup> Though the resolution may appear negotiated, the parties may feel that it was imposed, which will diminish their satisfaction and commitment to the result.<sup>234</sup> Efforts to ensure self-determination and informed consent will result in increasingly technical and legal agreements to Med-Arb, and increasingly legalistic Med-Arb “mediation” sessions as the neutral pressures the parties to settle prior to the “arbitration” session. Correcting mediation’s legalization problem with arbitration raises a host of issues relating to confidentiality, and impartiality. Informed consent does not provide self-determination due to the barriers to understanding and making informed choices. Without the ability to make truly informed consent, Med-Arb encourages legalized forms of both component processes and consequently limits the most essential aspect of mediation: party self-determination and freedom of choice. The resulting story is one in which mediation’s informality is severely curtailed and arbitration’s finality is endangered.

#### IV. CONCLUSION

The rise of “legal” and more adversarial forms of mediation, and arbitration’s increasing similarity to litigation makes Med-Arb attractive as a means of “correcting” for the legalization of these ADR processes. Parties struggling to settle in mediation need arbitration’s finality, and parties unhappy with arbitration’s similarity with trial need to add mediation’s flexibility. Same neutral Med-Arb appears to

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231. *Id.*

232. *See id.* at 683–84.

233. THOMAS J. STIPANOWICH & PETER H. KASKELL, CPR COMM’N ON THE FUTURE OF ARB., CPR INST. FOR DISPUTE RESOL., COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 21 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001); BARTEL, *supra* note 66, at 679–85.

234. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, GETTING DISPUTES RESOLVED 57 (1988).

be a viable solution. But by requiring increasingly proscribed agreements to achieve informed consent and opening the door to increased judicial scrutiny, same-neutral Med-Arb, in addition to violating fundamental tenets, will accelerate the legalization of both mediation and arbitration. The result of arbitration resembling litigation and mediation resembling arbitration is that our alternative processes are beginning to look more and more like the formal system itself. Professor Nolan-Haley argues that the blurring of mediation and arbitration will leave disputing parties with little more than variations of adjudication.<sup>235</sup>

Parties are free to select same-neutral Med-Arb,<sup>236</sup> but mediation and arbitration are available as subsequent but separate processes and can be utilized with a different neutral. Utilizing different neutrals may save money and time, given the risks posed by combing the two processes. For example, in an effort to save expense, many neutrals and parties skip the arbitral hearing as being duplicative of the mediation.<sup>237</sup> Such a step places additional pressure on issues of candor (mediating while knowing that an informal arbitral record is being compiled), confidentiality (the ability to confront all arguments), impartiality (the arbitrator attempting to disregard certain information), procedural fairness (of having a record for purposes of appeal), and informed consent (to waive key features of both processes).

Despite speculation to the contrary,<sup>238</sup> Med-Arb will not save time or expense for participants as it will be difficult to locate neutrals who can adequately perform both functions. An ideal Med-Arb neutral is equally skilled in both facilitative mediation and arbitration, but these are vastly different skills and mindsets. To conduct same-neutral Med-Arb correctly requires an individual with the substantive expertise to serve as the arbitrator and the exceptional facilitative skills to remain impartial during the mediation. Few legal mediators practice in this way limiting the pool of neutrals qualified to serve as a mediator and an arbitrator.<sup>239</sup> The skills of each role are very different. A decision-maker overseeing an adversary evidentiary

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235. Nolan-Haley, *supra* note 6, at 1, 65.

236. Deason, *supra* note 95, at 224 (“Parties are free to elect a combined process despite these practical and functional limitations.”).

237. Phillips, *supra* note 54, at 28.

238. *Id.* at 28 (Because selecting a new arbitrator is time-consuming, considerable time is saved by having the mediator become the arbitrator. Further, there is no need to catch up a new arbitrator on the details of the dispute if the same-neutral is used for both processes.).

239. Bartel, *supra* note 66, at 688.

hearing may not be able to facilitate discussions of parties crafting their own agreements and vice versa.<sup>240</sup> Many regard these diametrically opposed roles as fundamentally “incompatible.”<sup>241</sup>

In fact, same-neutral Med-Arb may actually require more time and money than different-neutral Med-Arb. Time and cost savings gained by settling a dispute in mediation are lessened considerably if attorneys must also prepare for and treat the mediation as an arbitral hearing. In the 2008 Wissler Survey of Ohio lawyers examining settlement conferences versus mediations, lawyers surveyed agreed or strongly agreed at a rate of 63% that judges assigned to the case made good use of parties’ resources.<sup>242</sup> Only volunteer mediators received a lower rating (57%) with non-assigned judges (67%), court mediators (80%) and private mediators (71%) all viewed as a better use of party resources.<sup>243</sup> This evidence suggests that mediators are a more effective use of resources than judges and suggests that a neutral’s binding authority does not necessarily equate with time and cost savings.

To remedy the cost of Med-Arb, Professor Blankley proposes creating “a financial disincentive for the mediator to arbitrate,” ensuring costs savings by ‘pay[ing] the neutral a premium if the case settles in mediation.’<sup>244</sup> This proposal would save the parties money, but would put an extraordinary amount of pressure on settlement and potentially damage the neutral’s impartiality and the parties’ self-determination. With these risks, different-neutral Med-Arb is the better option as it avoids the confidentiality, impartiality, and other issues of utilizing the same neutral.

Further analysis is required to answer underlying questions regarding whether the careful combination of formal and informal permutations can provide access to justice at greater speed and lower cost. Arguments that these are solely private processes and it is paternalistic to proscribe limitations on dispute system choices are shortsighted as they do not examine or address systematic access to justice issues and the proper role of formal and informal dispute mechanisms. As Professor Sternlight’s cautions, “it would be a real mistake . . . to simply allow our procedural system of justice to evolve

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240. Sussman, *supra* note 1, at 73.

241. STIPANOWICH & KASKELL, *supra* note 233, at 20.

242. Wissler, *supra* note 89, at 297.

243. *Id.*

244. Blankley, *supra* note 54, at 328 (also noting that discounted rates can be agreed to for providing both mediation and arbitration services in order to adequately protect both the parties).

on its own.”<sup>245</sup> The use of same neutral Med-Arb has evolved on its own, and the risks clearly outweigh the rewards.

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245. Jean R. Sternlight, *ADR Is Here: Preliminary Reflections on Where It Fits in a System of Justice*, 3 NEV. L. J. 289, 303 (2002–2003).

