III. Mediation During Arbitration: An Argument Against Donning Two Hats

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Grievance mediation and labor arbitration are two well-recognized and utilized dispute resolution processes. However, it is never appropriate to "don the hat" of a mediator in the midst of the arbitration process.

Labor arbitration is well-established and is, with rare exception, expressly provided for in parties' collective bargaining agreements. Arbitration, typically the fourth step in the grievance process, usually sets out the manner in which an arbitrator will be selected by the parties, the arbitrator's jurisdiction, time frames for scheduling and holding the hearing, when closing briefs are due, and when an opinion and award is due. On rare occasion, agreements address hearing procedures. With increasing frequency, collective agreements also provide for, or suggest, mediation as an alternative means of resolving grievances. However, there usually is no provision for selection of a mediator or when and how mediation will occur. Because mediation is not one of the steps in the grievance process, the parties are not required to engage in mediation. And although mediation skills may be useful in resolving the issue before the arbitrator, to so insert mediation into the arbitration process raises serious ethical and practical issues. The result, at the least, may be compromised service as a neutral and consumer confusion concerning the processes and, at the worst, ethical sanctions or vacating of an arbitration award.

As professional labor arbitrators, our work is governed by one or more codes of ethics. For those arbitrators who are also lawyers, an additional code applies, and when serving pursuant to the rules and procedures of an alternative dispute resolution (ADR) service provider, there is likely another set of standards or ethics with which we must comply.

As members of the National Academy of Arbitrators (NAA), we have pledged to comport with the provisions of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, which was approved in 1951 by a Committee of the NAA,

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the American Arbitration Association (AAA), and the Federal Mediation and Conciliation Service (FMCS), and officially revised by the three organizations in 1972. The most recent amendments were approved in 2007. In addition, many labor arbitrators are lawyers who are no longer advocates but who maintain a license to practice law and, therefore, are governed by a code of ethics or professional rules of conduct. With the evolution and utilization of ADR processes in court systems, beginning in the early 1980s, applicable general rules of practice have been promulgated followed by adoption of a code of ethics.

Each of these various codes and sets of rules recognize both arbitration and mediation processes. Most of them acknowledge and embrace the Model Standards of Conduct for Mediators, developed and first adopted in 1994, by the Society of Professionals for Dispute Resolution (SPIDR), now the Association for Conflict Resolution (ACR); the AAA; and the Dispute Resolution Section of the American Bar Association (ABA). The Model Standards were revised in 2005, following lengthy committee review, and study and input from representatives throughout the national dispute resolution community. The ABA, ACR, and AAA are signatories to the revised Standards.[12]

In addressing the question of whether mediation is appropriate to employ during arbitration, a review of the code, rule, and standards provisions that apply to our work as neutrals is important and informative. Whether they are aspirational in nature or absolute rules with which strict compliance is required, each provision thoughtfully sets out a best practice guideline. In addition, users of ADR are both educated and protected by them. Both providers and consumers are served well by a high-quality process with unfailing integrity.

NAA Code of Ethics

The NAA Code of Professional Responsibility for Arbitrators of Labor-Management Disputes[13] distinguishes labor-management disputes and sets out the scope and application of its provisions in a lengthy Preamble. The Code expressly excepts mediation

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[12] *See* American Arbitration Association, American Bar Association, & Association for Conflict Resolution, Model Standards of Conduct for Mediators (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf.

[13] *Available at* http://www.naarb.org/code.html.

and conciliation from its application at the same time recognizing mediation by an arbitrator.[14] Some consideration of the seemingly conflicting language is needed. If the Code does not apply to mediation, then what portions of the Code do apply to an arbitrator who accepts an assignment that calls for both mediation and arbitration or who, apropos the topic of this paper, agrees to provide mediation services during the course of an arbitration? A close reading of the two provisions supports a conclusion that an arbitrator who provides mediation services during an arbitration is required to faithfully adhere to the Code as basic to professional responsibility.[15] The principles embraced in Sections 1–3 of the Code (which address an arbitrator's qualifications and responsibilities to the profession, to the parties, and to administrative agencies) largely apply to an arbitrator who agrees to serve in a mediator's role. Nonetheless, the Code does not distinguish the two processes so as to guide either arbitrators or the parties in a manner necessary to avoid ethical pitfalls.

Most states have adopted the ABA Model Rules of Professional Conduct,[16] including Rule 2.4, Lawyer Serving as Third-Party Neutral. Many states have also adopted the ABA comments to the Model Rules. Comments [1] and [2] to Model Rule 2.4 acknowledge that ADR has become a substantial part of the civil justice system and recognize other codes of ethics and standards that may

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[14]The Scope of Code provides: "The Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is *not authorized in advance to make decisions or recommendations*." (emphasis added). NATIONAL ACADEMY OF ARBITRATORS, AMERICAN ARBITRATION ASSOCIATION, & FEDERAL MEDIATION & CONCILIATION SERVICE, CODE OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES 6 (as amended and in effect Sept. 2007) (emphasis added), *available at* http://www.naarb.org/code.html.

[15] *See* Application of Code at 7; and Section 2.F.2a.–c:

> When a request to mediate is first made after appointment, the arbitrator may either accept or decline a mediation role.
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> a. *Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision.*
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> b. *If one party requests that the arbitrator mediate and the other party objects, the arbitrator should decline the request.*
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> c. *An arbitrator is not precluded from suggesting mediation. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.*

Id. at 17–18.

[16] *Available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

apply to lawyer-neutrals and others, including the Model Standards of Conduct for Mediators.

Model Standards of Conduct for Mediators

The Model Standards of Conduct for Mediators[17] have been adopted and followed by public and private sector dispute resolution providers including court systems, community programs, and mediation systems established pursuant to federal and state law mandate.[18] The Preamble and Note on Construction, which precede the nine Standards, describe the mediation process, the purpose for which the Standards were developed, and the nature of their authority:

Preamble

> Mediation is used to resolve a broad range of conflicts within a variety of settings. These Standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.
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> Mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute.
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> Mediation serves various purposes, including providing the opportunity for parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.

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[17] *See* American Arbitration Association, American Bar Association, & Association for Conflict Resolution, Model Standards of Conduct for Mediators (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf.

[18] A Google search of the Model Standards reveals the widespread adoption of them. Some significant Minnesota examples follow: The Lawyers Board of Professional Responsibility has adopted the ABA Model Rules of Professional Conduct, including Rule 2.4, citing the Model Standards in the comments to the Rule; Rule 114, Alternative Dispute Resolution, of the General Rules of Practice for the District Courts was promulgated by the Minnesota Supreme Court in 1993. In 1997, the Minnesota Supreme Court adopted a Code of Ethics, Appendix to Rule 114, which substantially follows the Model Standards in form and substance, and applies to all neutrals included on the Supreme Court Rosters of Neutrals. Several Minnesota community mediation programs have adopted the Standards and require their volunteer mediators comply with them. The Minnesota Special Education Mediation System, within the State Department of Education, has adopted the Model Standards, which apply to its Roster of Mediators and Facilitators, established pursuant to federal and state law, which require that the state offer a mediation system to help resolve special education disputes.

Note on Construction

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Various aspects of a mediation, including some matters covered by these Standards, may also be affected by applicable law, court rules, regulations, other applicable professional rules, mediation rules to which the parties have agreed and other agreements of the parties. These sources may create conflicts with, and may take precedence over, these Standards. However, a mediator should make every effort to comply with the spirit and intent of these Standards in resolving such conflicts. This effort should include honoring all remaining Standards not in conflict with these other sources.

These Standards, unless and until adopted by a court or other regulatory authority do not have the force of law. Nonetheless, the fact that these Standards have been adopted by the respective sponsoring entities, should alert mediators to the fact that the Standards might be viewed as establishing a standard of care for mediators.

Mediation, as prescribed by the Model Standards, is grounded upon principles of self-determination of the parties, impartiality of the neutral, and confidentiality of the process. Those principles, and the Standards that support them, guard against coercive conduct by the mediator; set out broad, *on-going* disclosure requirements to reveal actual and potential conflicts of interest; and encourage open and candid discussion to explore all options for resolution without fear of adverse impact in the event there is no resolution in mediation. Additional Standards address the competence and qualifications of the mediator to meet the expectations of the parties in mediation, including training, experience, cultural understanding, and continuing education to enhance knowledge and skills; and to ensure the quality of the process, setting out maxims that address circumstances that may jeopardize the mediation process.[19]

The Standards are commended for complete and thorough reading. The Reporter's Notes[20] provide interesting and helpful illumination of each Standard. The following select excerpts from the Standards are particularly relevant to this discussion:

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[19]The Model Standards include nine Standards: I. Self-Determination, II. Impartiality, III. Conflicts of Interest, IV. Competence, V. Confidentiality, VI. Quality of the Process, VII. Advertising and Solicitation, VIII. Fees and Other Charges, and IX. Advancement of Mediation Practice.

[20]*Available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/mscm_reporternotes.authcheckdam.pdf (Sept. 9, 2005).

STANDARD I. SELF-DETERMINATION

A. … 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.

…

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

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STANDARD II. IMPARTIALITY

A. A mediator shall decline a mediation if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.

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STANDARD III. CONFLICTS OF INTEREST

A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality.

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STANDARD V. CONFIDENTIALITY

A. A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.

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D. Depending on the circumstance of a mediation, the parties may have varying expectations

regarding confidentiality that a mediator should address. The parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations.

STANDARD VI. QUALITY OF THE PROCESS

A. A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

…

4. A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation.
5. The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles. A mediator may provide information that the mediator is qualified by training or experience to provide, only if the mediator can do so consistent with these Standards.

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8. A mediator shall not undertake an additional dispute resolution role in the same matter without the consent of the parties. Before providing such service, a mediator shall inform the parties of the implications of the change in process and obtain their consent to the change. A mediator who undertakes such role assumes different duties and responsibilities that may be governed by other standards.

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10. If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a media-

> tion, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.
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> …
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> C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.
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> …

The NAA is in the process of developing a code of ethics specifically applicable to arbitration of employment cases. Particularly because of the frequent use of mediation in employment cases, a new or expanded code may deal with the topic of mediation during arbitration more fully. Although the focus of this discussion is mediation in the context of labor arbitration, the same issues arise in employment arbitration cases. Nonetheless, labor arbitration is distinct in a number of ways that may more strongly support the thesis here that mediation, within the arbitration process, is replete with reasons why it should not occur.

Those neutrals who regularly wear different "hats" as they deliver ADR services may have the benefit of experience, which provides greater sensitivity to the ethical, moral, and practical pitfalls that confront them as they change their roles. Experience sometimes is the greatest teacher. Although changing processes midstream is not strictly prohibited by the various codes, it clearly is ill-advised. It does not necessarily make a difference whether parties are represented by counsel or by individuals with experience in both mediation and arbitration. The dynamics in each case are unique and often not easily or fully detected without spending some time together. The burden of properly managing the arbitration process together with an intervening mediation session is high and fraught with risk. The issues raised by the circumstances vis-à-vis best practice are many. The following are some of them:

- The processes are distinct and more likely not to be familiar to the parties to labor arbitration, resulting in a need to provide certain education concerning mediation before beginning.

An understanding of mediation in the context of labor arbitration may be founded upon experiences in contract mediation, which is distinct from grievance mediation, whether or not interest-based bargaining has been employed.

- Labor arbitrators must be certain they are properly trained to provide the mediation service the parties expect. The skill set is quite different and special training is needed. Are you able to assure the parties that you are competent and qualified to provide the service they expect? Are you completely prepared to discuss the differences in your role when you switch from arbitrator to mediator and help the parties to assess whether they wish to participate in mediation having come prepared for arbitration?
- It is likely that all those who would best participate in mediation are not present at arbitration. Mediation discussions are not confined to the four corners of the parties' contract or the narrow issues set out in a grievance. Resolution of the matter may best be assured with participation of an individual who would not be called to testify at a hearing. Will you take the time to describe and distinguish the process and determine who should participate?
- Party representatives may not be properly prepared to assist the parties in mediation. Or, parties may desire different representation in mediation.
- The duty to disclose known *and* potential conflicts of interest is broader and likely is different in mediation from disclosure in the context of labor arbitration. Arbitrators and party representatives frequently know each other from the ongoing relationships that labor-management work fosters. Their relationships are often known and largely accepted without disclosure or objection. When their roles change with the process, there may be objections that did not exist in arbitration.
- How does an arbitrator genuinely and accurately test his or her ability to ensure impartiality in the context of mediation? What about in arbitration following mediation, having learned information likely not to be learned through testimony but that may impact the outcome? What are the tests and the challenges? Is there not significantly more risk of an appearance of bias in mediation than in the more formal arbitration hearing setting? Will you be able to parse out that which you hear in mediation from evidence and testimony at

hearing in support of an award in the event mediation does not resolve the dispute?

- How will you create an environment for open and candid conversation in mediation with the distinct possibility that the parties will be testifying at hearing? Is it appropriate to begin if candor will be limited at best? Will the parties and their representatives be prepared to make the shifts?
- How can you ensure self-determination, free from pressure to settle a case, following disclosure by the parties of information, even admissions, needed to resolve a matter in mediation? What is the likelihood that the parties will feel there is no choice but to settle the case once engaged in the mediation process, which is understood best through experiencing it? Will they have buyer's remorse and complain?
- Will you be able to separate what has been declared to be confidential and that which the parties declare is not? How will this impact decision making in the event of arbitration following mediation that does not resolve the issues?
- Can you ensure an efficient process under the circumstances?

It is not necessary to be dismissive of either process in resolving a grievance. Both have merit, and combining them is not strictly forbidden. However, it is necessary to be fully informed and to fully inform others with regard to the deep and murky water being entered when you consider doing it. No one is served well by a process that may be undone or that is less than the highest of quality. Perhaps a good motto is "mediate first" and, in all cases, with a neutral different from the arbitrator who may hear and decide the case.