Mediation Magazine
(https://mediationmagazine.adr.org)

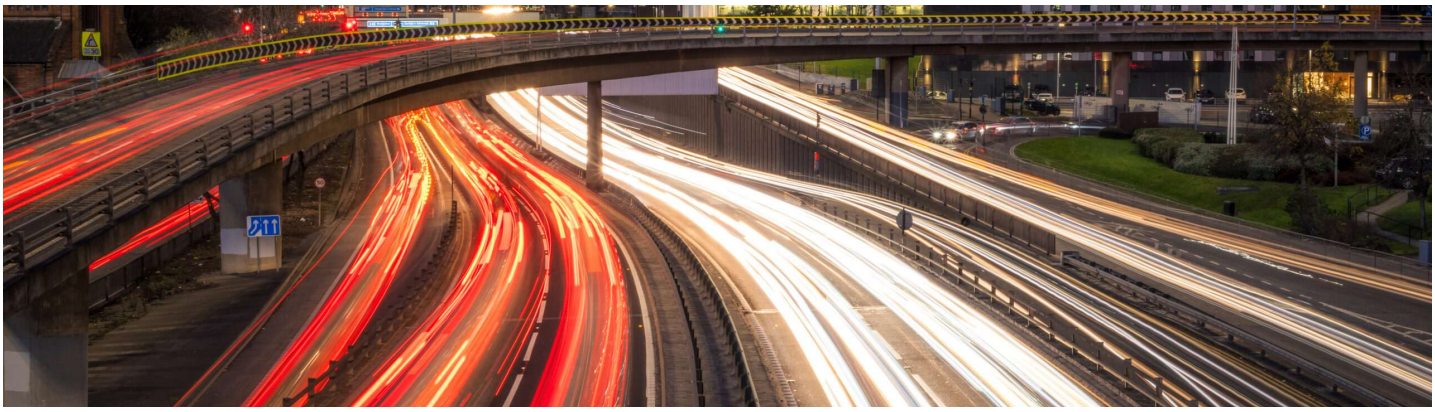
Search

MED+ARB: A Different Concept for Combining Mediation and Arbitration

All (https://mediationmagazine.adr.org/category/all/), Commercial (https://mediationmagazine.adr.org/category/commercial/)

Richard L. Reed, Sr. (https://mediationmagazine.adr.org/author/richard-reed/)
January 19, 2026(https://mediationmagazine.adr.org/2026/01/19/)

Share it :



Imagine the following scenario: The parties approach mediation of their dispute, but if they fail to settle, they will need and want a swift, final resolution to avoid the cost and headaches of protracted litigation. So, they ask their Mediator to also be their Arbitrator, to rule on the dispute if mediation fails. The Mediator declines, not wanting to pick a side. The parties fail to settle and become more extreme in their positions. Litigation proceeds with resolution nowhere in sight. What a shame.

The concept of combining mediation and arbitration has been around for years. The idea was to motivate parties to take mediation more seriously by knowing the same neutral who served as the mediator may ultimately serve as the parties' Arbitrator and determine the merits of the dispute if they fail to settle in

mediation. This hybrid ADR process is called “Med-Arb” or “Arb-Med” depending on which step comes first, the mediation or the arbitration. These ADR processes have received much attention for their various pros and cons.[1]

Med-Arb and Arb-Med can be troubling. If mediation is the first step, the parties may become even more reluctant to candidly discuss shortcomings with the Mediator since his or her ruling as Arbitrator may be influenced by knowledge of the shortcomings. If arbitration is the first step, with the ruling held in confidence until impasse, a party may prematurely give up on the mediation process, believing the Mediator is no longer impartial, having already decided for one side or the other. There is also a risk in Arb-Med that the Mediator, having already decided, may subconsciously (or consciously) push the parties to settle in line with the “sealed” ruling. Or the Mediator may push settlement to avoid revealing the “sealed” ruling because the Mediator failed to consider a fact or theory learned in mediation that makes the ruling questionable.

Arbitrators are also justifiably reluctant to agree to assume the dual role of Mediator.[2] The Mediator’s participation in confidential ex parte caucuses seems to insurmountably conflict with the Arbitrator’s fundamental duty of neutrality. The reluctance of neutrals to combine mediation and arbitration may also be due in part to the view that mediation and arbitration are entirely different, albeit traditional, ADR processes requiring command of significantly different skill sets.

For these and other reasons, Med-Arb or Arb-Med is more the exception than the rule in ADR practice. But there is an alternative process that overcomes the above concerns and still enables the parties to get a decision to promptly resolve their disputes. It is Med plus Arb, or “Med+Arb.”

What is Med+Arb, and When Should It Be Considered?

Med+Arb involves two separate neutrals serving as Mediator and Arbitrator. The Arbitrator remains impartial while serving in conjunction with the Mediator. The Arbitrator bases the ruling(s) on information received prior to or during the mediation.

Med+Arb has received virtually little or no attention, although it was mentioned in passing in the CCA Guide to Best Practices in Commercial Arbitration as a way to avoid “complexities” involved in Med-Arb.[3] Indeed, Med+Arb more fully respects traditional distinctions between arbitration and mediation. As such, it is a more likely enforceable method for achieving confirmable arbitration awards.[4]

For Med+Arb, the parties agree to appoint an Arbitrator to rule globally on all disputed claims or on specific disputed issues, if they fail to settle at mediation. The ruling can be final and binding, or appealable.[5] It can also be non-binding and advisory.[6] If binding and non-appealable, it can be enforced under the Federal Arbitration Act or the Texas Arbitration Act, ending further legal proceedings (other than for award enforcement). If the ruling is to be advisory only, the parties may also want to agree that it will be admissible in any future legal proceeding to further encourage settlement at mediation. Regardless of whether it is binding or advisory, parties can consider returning to mediation to reconsider settlement while awaiting the final ruling.

The Mediator may suggest consideration of Med+Arb to the parties and offer to assist them to reach an agreement for the selection and involvement of an independent Arbitrator as soon as possible, preferably in advance of commencing the mediation, and not at the point of impasse. Alternatively, the Mediator could explore the use of Med+Arb after reviewing the parties’ position papers, or even later, after the mediation has commenced and an impasse appears likely. If the parties want the Mediator to render a Mediator’s Proposal, but the Mediator is disinclined to provide one[7], this too may be an opportune time to consider Med+Arb. It

may be particularly appropriate to encourage the parties to consider (or re-consider) Med+Arb at this late stage if the Mediator does not believe a Mediator's Proposal is likely to be accepted by the parties, but they have expressed a strong mutual desire for a final decision despite impasse.

Even where arbitration proceedings have already commenced under a pre-existing arbitration agreement, Med+Arb can still be considered. An Arbitrator can pose the concept to the parties at the preliminary conference before setting the mediation deadline in a Scheduling Order. The parties can agree to amend their arbitration agreement to proceed with Med+Arb, and have their Med+Arb agreement coincide with, or even be adopted to serve as, the Preliminary Hearing/Scheduling Order. An Arbitrator should be able to encourage the parties to consider Med+Arb and remain appropriately separate from the mediation process. The Arbitrator may even serve as the Arbitrator for the Med+Arb proceedings, as long as the parties agree.[8]

Importantly, by using Med+Arb, parties do not force their Mediator to pick a side as the ultimate decision maker on who wins and who loses. Instead, the Mediator remains strictly neutral and able to facilitate the mediation process to either achieve settlement or transition to arbitration.

Getting Started: The Med+Arb Agreement

- Med+Arb is likely to be of interest to parties and their counsel where:
- The parties need to put the dispute behind them to focus on business, not litigation;
- The need to preserve their business relationship for future dealings;
- Litigation costs will greatly exceed the amount in controversy;
- Judicial resolution will take too long;
- Discrete legal issues or issues of first impression are involved;
- The parties desire to avoid harsh legal acrimony.

Attached at Appendix A is a Basic Outline for Med+Arb Agreement that addresses many of the factors the parties will want to consider for using Med+Arb.[9] The template form provides for signatures by the parties only. It does not provide for signature by the Mediator or Arbitrator, who would need to independently confirm they are comfortable providing their services as neutrals in the matter described in the parties' Med+Arb agreement. The following discussion focuses on the more essential terms for a Med+Arb agreement.

The parties should clearly describe in their Med+Arb agreement the scope of the arbitration and the Arbitrator's authority. The agreement should state whether all claims between them, or just certain discrete issues, will be subject to arbitration if the mediation fails. If the parties desire to make the entire proceeding and rulings subject to confidentiality, they must address this in their Med+Arb agreement.[10] Other issues, such as those identified in the AAA's Alternative Dispute Resolution Clause Builder Tool,[11] can be addressed when drafting the Med+Arb agreement.

The parties must also agree on how to select the Arbitrator(s). Even if the parties agree on who should be appointed, they should have the Arbitrator submit disclosures to the entity or person who will be responsible for administering the arbitration process.[12] While the qualification and selection process might seem to be a relatively simple or even perfunctory one, the AAA's assistance in administering the Med+Arb process can help the parties avoid problems over an arbitrator's qualifications, conflicts[13], compensation, and resolve Arbitrator disqualification claims arising during a Med+Arb proceeding.[14] Thus, paying the AAA to administer the arbitration in Med+Arb is well worthwhile, rather than having the parties' counsel and their Mediator navigate the process for selection and appointment of the Arbitrator and administration of the proceedings, even for smaller disputes.[15] It is highly recommended that someone other than the parties and the counsel

attempt to self-administer the arbitration process for Med+Arb, and for that reason, the Basic Outline for Med+Arb Agreement in Appendix A provides that this will be done by either an arbitration administration service provider or the Mediator.

The Med+Arb agreement should specify how the Arbitrator will be compensated. Customarily, the parties will share the Arbitrator's compensation in the same way they share the Mediator's compensation. Of course, if the parties settle at mediation, deposits would be used to compensate the Arbitrator for the limited time expended to that point, with any remaining balance refunded.

When the dispute will be submitted to the Arbitrator for decision must be addressed. The Mediator can be authorized to submit the dispute to the Arbitrator on the parties' behalf immediately after the Mediator concludes they have reached impasse. Alternatively, the Med+Arb agreement may require the parties to reaffirm their agreement after impasse before the Mediator submits the dispute to the Arbitrator, although this jeopardizes the most cost-effective route to finality.

Using Med+Arb, the parties can promptly obtain a ruling based upon limited information shared with the Arbitrator, foregoing costly discovery and motion practice costs. For example, the parties may agree to give the Arbitrator their live pleadings and mediation position papers.[16] The parties could agree to have the Arbitrator attend opening statements and/or a joint session discussion.[17] In the event of impasse, the parties may also want to consider submitting post-mediation briefs to the Arbitrator to narrow the issues in dispute, focusing only on unresolved factual or legal issues.[18] The parties could also agree to have the Arbitrator conduct a limited evidentiary hearing on just the issues remaining unresolved by mediation. Or the parties can have the Arbitrator decide the dispute strictly on the information provided under their Med+Arb agreement, foregoing the cost of a further hearing. Of course, the Arbitrator may find it necessary to seek additional feedback on certain issues, whereupon the parties should provide the feedback, possibly with their Mediator's assistance.

In addition to specifying whether the Arbitrator's ruling is to be final and binding, or advisory, the parties should also agree on the form of the Arbitrator's ruling, i.e., whether it will be (a) a standard award (stating only the amount of any damages to be awarded on the claims before the Arbitrator, and otherwise denying all other relief), (b) a reasoned award (briefly explaining the logical reasoning for the Arbitrator's award, without specific findings of fact or conclusions of law), or (c) an award that includes specific findings of fact or conclusions of law.[19] The Med+Arb process may also be streamlined if each party agrees to provide the Arbitrator a proposed draft award, as well as attorney fee affidavits, if attorney fee claims are involved.[20]

The Med+Arb agreement should state the timing for the Arbitrator to render a decision, running from when the matter is referred to the Arbitrator. This can occur automatically upon the Mediator's declaration of impasse, or after any post-mediation submissions or proceedings. The Arbitrator will need to agree to the time for rendering a decision. Depending on the nature of the dispute and the process for submitting it to the Arbitrator, it may be possible to obtain the Arbitrator's agreement to render a decision within a relatively short time, perhaps less than two weeks after the mediation has ended in impasse.[21]

To most who are familiar with arbitration practice and procedure, it should be apparent from the foregoing discussions that a Med+Arb agreement may serve as an agreed scheduling order for both mediation and arbitration. In short, the Med+Arb agreement should enable coordination of the Mediator's and Arbitrator's services within ethical standards generally applicable to neutrals.[22]

How May a Mediator Assist Parties to Adopt Med+Arb?

Before helping the parties consider Med+Arb agreement, the Mediator should ascertain whether the parties are already subject to an existing arbitration agreement that would need to be amended. If an existing arbitration agreement governs the dispute, the Mediator should also consider whether the parties have agreed to have the arbitration administered by the AAA, and if not, whether the parties should be encouraged to enlist the services of the AAA or other arbitration administration services provider, as previously discussed above.

With the above information in mind, the Mediator can help the parties explore whether Med+Arb may be suitable for resolving their dispute if they fail to reach a mediated settlement. Preferably, this should take place prior to the commencement of the mediation, and as soon as possible after the Mediator has been engaged. As a part of the mediation process, the Mediator may assist the parties to resolve the terms of their Med+Arb agreement. In doing so, the Mediator will obviously need to proceed cautiously, weighing the parties' desire to explore Med+Arb against the risk a disagreement on the terms of the Med+Arb agreement could scuttle the entire mediation process.

If the parties want to use Med+Arb, but do not agree to enlist the administration services of the AAA or any other arbitration administrative service provider, the Mediator will need to be prepared (and appropriately compensated) to assist the parties to administer the arbitration.[23] This includes assistance to:

- identify potential Arbitrators who understand the issues, and request their disclosures;
- assist the parties to consider and resolve any conflicts;
- select an Arbitrator who is qualified and placed under an appropriate oath to serve;
- confirm the Arbitrator's appointment to serve pursuant to the parties' Med+Arb agreement;
- obtain the Arbitrator's deposit estimate;
- obtain funding for and hold deposits to pay the appointed Arbitrator's estimated fee, distribute payment for the Arbitrator's services, and refund any unused deposit;
- address possible disqualification and withdrawal issues; and/or,
- resolve questions about possible errors in the Arbitrator's ruling.

As already discussed above, the Mediator must take special care to avoid inadvertent disclosure of any confidential information to neutrals who are considered for appointment, and thereafter to the selected Arbitrator. This includes any mental impressions the Mediator has about the parties' positions, and certainly includes offers, counteroffers, and Mediator Proposals. To guard against this risk, the Mediator can remind counsel of this, and even recommend (or insist) that counsel (and even the parties) be present during any communications between the Mediator and the Arbitrator. The parties may even want to agree that the Mediator will be the only one to speak with the Arbitrator for the purposes of conveying any information they have agreed to provide the Arbitrator. These methods can be used by the Mediator as a safeguard against an inadvertent disclosure of sensitive mediation communications or other confidential information and preserve the Arbitrator's neutrality.

How Should an Arbitrator Approach the Role of a Neutral for Med+Arb?

As with any arbitration proceeding, the Arbitrator will, of course, need to treat a Med+Arb arbitration strictly confidential. Upon being invited to serve, the Arbitrator should make complete disclosures of relationships or information that may be perceived to affect the Arbitrator's impartiality. If the arbitration is not independently administered, the Arbitrator should determine whether disclosures and the Arbitrator's oath should be provided directly to the Mediator and/or the parties' counsel.

If a Med+Arb agreement has not yet been transacted, the Arbitrator may comment on whether it can suffice as the Scheduling Order for the process. If it has been transacted, the Arbitrator should review the Med+Arb agreement to consider whether it addresses the various factors discussed in the prior sections of this article. This includes whether the arbitration will be administered by the AAA or another arbitration administration services provider, and how the Arbitrator's compensation is to be estimated and funded.[24] The Arbitrator should also identify any other issues that may not have been addressed in the parties' Med+Arb agreement.[25]

The Arbitrator should not proceed further until the parties confirm in writing that there are no unresolved questions or concerns about the Arbitrator's disclosures or compensation terms. Thereafter, the Arbitrator's appointment should be confirmed in writing by the AAA or other administering entity, or if not independently administered, by the Mediator and the parties. Once appointed, the Arbitrator should provide an estimate for the Arbitrator's compensation, based on the amount of time required to navigate the stages of the Med+Arb process described in the parties' agreement, allowing time for any necessary travel, study, hearings, and preparation of a decision.

As the Med+Arb process commences, the Arbitrator should understand what information is to be provided for the Arbitrator's consideration in rendering a decision. How the Arbitrator may pose questions during the Med+Arb process should be understood. The Arbitrator should know whether a decision is expected to resolve all the parties' claims and defenses, or only on one or more limited issues. The Arbitrator will need to know whether to base any decision(s) on written submissions only, or after the submission of any other information, or after the conclusion of any planned presentation or hearing. If the Arbitrator is not appointed through an arbitration service, the Arbitrator may need to rely on the Mediator to help schedule and coordinate the Arbitrator's participation and involvement at the appropriate stages of the Med+Arb process.

When, how, and by whom the Arbitrator will be informed that the matter is ripe for decision should be understood, particularly if the arbitration is administered by the Mediator and the parties, and not the AAA. Having the Mediator inform the Arbitrator can help avoid inappropriate ex parte contact. The Mediator may also be the best person to inform the Arbitrator if a settlement has been reached and when it is expected to be finalized, fully implemented, and funded, so that no ex parte contact occurs before the settlement is final and any decision is rendered to end the dispute.

Throughout the Med+Arb process, the Arbitrator should, of course, remain neutral and be careful not to signal or reveal to the parties or the Mediator the Arbitrator's impressions about the issues or the parties' credibility. Rulings should be rendered within the authority granted under the Med+Arb agreement to avoid a challenge that the Arbitrator exceeded his or her authority.[26] Before binding rulings, the Arbitrator should have confidence that the parties consented to be bound under the terms of their Med+Arb agreement, and that "the key elements of traditional arbitration were satisfied, including notice of the hearing and the parties' opportunity to present evidence supporting their claims and defenses followed by a binding determination of their dispute."[27]

Finally, the Arbitrator should ensure that the ruling(s) have effectively resolved or addressed the issues submitted for decision. If the Arbitrator is to render a final and binding ruling on all claims in the dispute, the ruling must appropriately grant or deny all claims not otherwise addressed. Depending on whether the arbitration is self-administered or administered by AAA, a review of the Arbitrator's draft rulings by the AAA or by the Mediator may be appropriate to ensure no strings are left untied.

Once the Arbitrator has rendered rulings in accordance with the parties' Med+Arb agreement, the Arbitrator's service and jurisdiction to rule on the dispute should be concluded, subject only to resolving any clerical, typographical, or computational errors.[28] Of course, following issuance of the Arbitrator's ruling(s), the parties may work with the Mediator to reconsider settlement, assuming the parties have agreed that the ruling(s) are to be shared with the Mediator for that purpose.

Conclusion

Med+Arb is a different concept for combining mediation and arbitration to achieve early resolution of disputes without requiring the neutral to serve in the dual capacities of Mediator and Arbitrator. Med+Arb can help parties and neutrals overcome the concerns that attend the use of Med-Arb or Arb-Med and should be considered for disputes where the parties prefer prompt resolution in the event their mediation fails to achieve settlement.

Appendix A

Basic Outline for Med+Arb Agreement

[This outline should only be completed with the advice of legal counsel. It assumes a separate mediation agreement exists with the Mediator, and provides a template or checklist to provide for the appointment of the Arbitrator to serve in conjunction with a Mediator, receiving certain limited information about the parties' dispute during the mediation process, and enabling the Arbitrator to understand the issues and promptly resolve the dispute if the parties are unable to settle at mediation with the help of their Mediator.]

1. This Med+Arb Agreement has been prepared [__ in advance OR __ after] commencement of mediation, and is now in effect as the undersigned parties' agreement to submit to arbitration the following matters in dispute arising out of or relating to: [describe the transaction or relationship giving rise to dispute]:

__ all claims/defenses in parties' Pleadings/Statements of Claims and Defenses

__ only the following disputed issues:

Issue 1: _____

Issue 2: _____

2. The parties [__ agree/ __ do not agree] to keep the arbitration proceeding confidential, subject to the right to submit an award to a court of competent jurisdiction for enforcement.

3. The parties' Mediator is: _____.

4. The parties' Arbitrator is: _____, whose appointment is [__ confirmed OR __ pending confirmation] following consideration of the Arbitrator's disclosures, compensation terms, and deposit estimate provided to the administrator designated below.

5. The following entity/person is authorized to administer the arbitration:

__ _____ (insert AAA or other arbitration administration services provider); or

__ the Mediator

6. The parties shall, before mediation commences, advance deposits to the administrator to fund estimated arbitration costs and fees, which shall be [__shared equally OR __ Other: _____.] Sharing of costs and fees is subject to later award, if any, by the Arbitrator. Unused deposits shall be refunded to the parties.

7. The Administrator will submit the dispute to the Arbitrator for decision at the following time:

__ Promptly after impasse.

__ Promptly after impasse, if both parties reconfirm, the dispute shall be so submitted.

8. The following dates are established for the parties to exchange and submit to the Arbitrator one or more of the following written submissions:

__ Pleadings/Statements of Claims and Defenses: _____

__ Parties' Mediation Position Statements: _____

__ Parties' Supplemental Post-Mediation Briefs: _____

__ Parties' Supplemental Post-Mediation Reply Briefs: _____

9. The Arbitrator will attend [__ in person OR __ virtually] each of the following mediation activities on the dates indicated below:

__ Opening Joint Session (on _____, 20__)

__ Additional Joint Sessions (on _____, 20__), or as later scheduled.

__ (Assuming impasse) Closing statements in Final Joint Session (on _____, 20__), or as later scheduled.

10. The parties agree to require or waive each of the following for these proceedings:

__ Preliminary Hearing [__required] [__ waived]

__ Scheduling Order [__required] [__ waived]

__ Dispositive Motions [__required] [__ waived]

__ Evidentiary Hearing* [__required] [__ waived]

If the parties waive Evidentiary Hearing, there shall be no other arbitration proceedings unless the Arbitrator requires otherwise to complete the arbitration process.

11. The Arbitrator is permitted to pose questions during the mediation:

__ Orally, in a joint session in the presence of the parties and the Mediator.

__ In writing, to the Mediator, who shall deliver the parties' answers to the Arbitrator.

12. The parties shall have no ex parte communications with the Arbitrator. The parties may authorize the Mediator to convey to the Arbitrator certain non-confidential information appropriate to inform the Arbitrator on the disputed issue(s) to be resolved. The Mediator shall assist the parties to preserve the Arbitrator's

neutrality and exercise caution to not communicate to the Arbitrator any confidential information that has been shared only between a party and the Mediator, such as information concerning offers, counter-offers, or Mediator Proposals, or information about the Mediator's impressions of the parties' positions.

13. The Arbitrator shall be considered disqualified and shall withdraw, upon learning of:

- Material information conveyed only to the Mediator in confidence.
- Settlement offers or counteroffers exchanged between the parties.
- Mediator's impressions of the strengths, weaknesses, or credibility of a party's position.
- The Mediator's Proposal, if any, or any statements relating to any of its terms.

14. Proposed forms of award [__will] [__will not] be filed with the Arbitrator. If required, the parties' proposed forms of award shall be filed within __ days after impasse.

15. Unless otherwise agreed, the award shall be issued to [__ the parties OR __ the parties and Mediator] within __ days after the dispute is submitted to the Arbitrator, and shall be:

__ A standard award (stating the award of any damages to a party only).

__ A reasoned award (briefly explaining the logical reasoning for the Arbitrator's award, without specific findings of fact or conclusions of law).

__ An award that includes specific findings of fact or conclusions of law.

16. The award shall be:

__ Final and binding, subject to the Federal Arbitration Act.

__ Final and binding, subject to applicable law under the State of _____.

__ Subject to appeal under AAA Optional Appellate Arbitration Rules.

__ Advisory only and [__ is OR __ is not] admissible in future legal proceedings.

17. For claims for award of attorney fees and costs, the parties shall submit affidavits in support thereof within:

__ days after impasse.

__ days after post-mediation submissions (if specified above).

[SIGNATURES OF PARTIES]

© Copyright 2025, Richard L. Reed, Sr. All rights reserved.

Endnotes

[1] *See Single-Neutral Dual-Role Processes – Workable or Worrisome Redux,* AAA Mediation Magazine, by Richard H. Silberberg, https://mediationmagazine.adr.org/single-neutral-dual-role-processes-workable-or-worrisome-redux/ (https://mediationmagazine.adr.org/single-neutral-dual-role-processes-workable-or-worrisome-redux/) (November 9, 2025); *see also Pros and Cons of Med-Arb, a Little-Known Alternative Dispute Resolution Process* – a Harvard Law School blog by Katie Shonk,

https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/ (https://www.pon.harvard.edu/daily/mediation/what-is-med-arb/) (March 15, 2021). *See also* Stipanowich, Thomas J., *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators*, 26 Harvard Negotiation Law Review 265 (2020); *see also* Stipanowich and Mironi, *'Switching Hats': Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med-Arb*, New York Dispute Resolution Lawyer, Vol. 14, at page 51 (2021); *see also*, Welsch, Nancy A., *Switching Hats in Med-Arb: The Ethical Choices Required To Protect Process Integrity: A Practitioner's Guide*, 213 (Omer Shapira eds., 2021), https://scholarship.law.tamu.edu/facscholar/1482 (https://scholarship.law.tamu.edu/facscholar/1482). Pros and cons to using Med-Arb and Arb-Med are also discussed in The CCA Guide to Best Practices in Commercial Arbitration, *Hybrid Arbitration Processes*, at 591(4th Ed. 2017).

[2] For a thoughtful article on the pros and cons of changing roles, see Stipanowich, Thomas J., *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators,* 26 Harvard Negotiation Law Review 265 (2020).

[3] CCA Guide to Best Practices in Commercial Arbitration (4th Ed. 2017), at p. 597.

[4] CCA Guide to Best Practices in Commercial Arbitration (Fourth Ed.), at p. 603 ("The FAA and most state statutes do not define arbitration, and the decision whether a hybrid process results in a confirmable award may depend on how closely the process resembles classic arbitration, with submission of the dispute to a third party for a binding decision. See *Advanced Bodycare Solutions, LLC v. Tbione, Int'l Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008).")

[5] Parties who want rulings to be subject to appeal can consider adopting the AAA's *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84; 54 Tex. Sup. J. 961; 2011 Tex. LEXIS 361 (Tex. 2009).

[6] Of course, ADR agreements for advisory, non-binding awards are not subject to the Federal Arbitration Act. See *Advanced Bodycare Solutions, LLC v. Tbione, Int'l Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008).

[7] Mediator Proposals are somewhat analogous to Med+Arb because they are settlement recommendations (albeit non-binding) when the parties appear to be at impasse, requiring their complete acceptance of the Mediator's Proposal to overcome and avoid impasse. In keeping with their lack enthusiasm for Med-Arb and Arb-Med, Mediators may decline to give a Mediator's Proposal even if the parties want one since they can lead to grave disappointment in the Mediator.

[8] For a discussion on the circumstances for recognizing the best opportunity (or "window") for mediation of a dispute that is in arbitration, see Falek, Diego, *Opening Mediation Windows: Role of Parties, Contracts and Institutions,* 14 New York Dispute Resolution Lawyer 51 (2021) ("Many lawyers indicated that mediation during arbitration may be more effective, after parties had exposed their views and perspectives and updated their cost/risk analysis.")

[9] This agreement form is just a starting point for parties to consider. It should be fully vetted and adapted to the parties' needs by their respective legal counsel before presenting it for consideration by the Mediator and the Arbitrator.

[10] While the arbitrators are bound to confidentiality, the parties may not be bound in the absence of express agreement.

[11] See https://www.adr.org/clause-drafting/ (https://www.adr.org/clause-drafting/).

[12] The Arbitrator's duty of disclosure is a continuing one, and the same applies for any supplemental disclosures that become necessary during the proceeding. The Arbitrator's disclosures should be submitted only to the designated administrator, who will share them with the parties without involving the Arbitrator in direct discussions with the parties, to address any questions or concerns about them prior to confirming or reaffirming the Arbitrator's appointment. See, for example, the AAA's Construction Industry Rules, R-19 and Commercial Rules, R-18, for disclosure process required by the AAA. It is highly recommended that the AAA assist in administering the appointment of the arbitrator for the Med+Arb process, even where the arbitrator may have been pre-selected by agreement, to assist in preserving of the arbitrator's neutrality, and to handle matters of disclosures, disqualification objections, compensation, deposits, and confirmation of appointment.

[13] See the AAA's Construction Industry Rule R-19 and Commercial Rules R-18 related to the disclosure process.

[14] It is possible the Arbitrator could become subject to disqualification and withdrawal upon learning of sensitive information intended only for mediation purposes, offers or counteroffers exchanged between the parties and the Mediator, the Mediator's impressions of a party's position, or even a Mediator's Proposal or other confidential information. A disqualification challenge is best handled without involving the Arbitrator directly, another reason to consider use of the AAA. *See* AAA Construction Industry Rules, R-20 and AAA Commercial Rules, R-19, relating to disqualification of arbitrators.

[15] The AAA's fees range from a little over $2,000 to less than $20,000 for disputes up to $10,000,000. See, for example, AAA's fee schedule for construction disputes at https://www.adr.org/media/541pzco2/2025_construction-arbitration-fee-schedule.pdf (https://www.adr.org/media/541pzco2/2025_construction-arbitration-fee-schedule.pdf). Rather than self-administration by their attorneys, the parties could consider relying on and paying the Mediator to help the parties appoint the Arbitrator with their written consent, manage the collection of deposits and payment of the Arbitrator's fees, shield the Arbitrator from inappropriate ex parte contact, and resolve issues of Arbitrator disqualification, withdrawal, or unavailability. But this would need to be made clear in the Med+Arb agreement.

[16] Position papers could be exchanged and shared directly and simultaneously with both Mediator and Arbitrator, or the parties may prefer to have them provided to the Arbitrator through the Mediator, or the AAA or other arbitration administration service provider.

[17] If the Arbitrator is to attend and listen (virtually or in person) to the parties' opening statements and/or joint sessions, this can help the Arbitrator, along with the Mediator, gain better familiarity with their positions to achieve a more complete understanding of the legal aspects of the dispute. The joint opening session would also be an appropriate setting for the parties to meet the Arbitrator, if not already agreed upon. Consideration should also be given to whether the Arbitrator should be allowed to ask questions during joint sessions, either directly or through the Mediator.

[18] The parties might agree to post-mediation briefs after considering guidance from the Mediation to avoid inadvertent disclosures of confidential mediation information that might lead to disqualification of the Arbitrator.

[19] Of course, an award that includes specific findings of fact or conclusions of law is much more costly, and an Arbitrator may even decline to render one because it can require significantly greater effort and may be second-guessed in a court proceeding.

[20] The typical practice in arbitration proceedings is to have attorneys submit and exchange attorney fee affidavits. In some instances, a separate hearing to allow examination regarding the attorney fee affidavits may be appropriate.

[21] For reference, see the AAA's Construction Industry Rules, Fast Track Procedures, Rule F-12, which provides for the decision to be rendered 14 days from "closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs."

[22]See the AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes (2004), and the Model Standards of Conduct for Mediators (2005) available at the AAA's website, https://www.adr.org/panel/panel-ethics-and-guidelines/ (https://www.adr.org/panel/panel-ethics-and-guidelines/).

[23] Alternatively, the parties, Mediator and Arbitrator could agree to proceed in Med+Arb with the Mediator and Arbitrator assuming responsibility to independently administer separately the mediation and ad hoc arbitration.

[24] The Arbitrator's disclosures, compensation terms and estimated deposit should be submitted only the administrator of the arbitration, such as the AAA or the Mediator.

[25] For example, issues of joinder or consolidation of other parties, or issues that may require dispositive motions, may not have been identified by the Mediator and addressed in the Med+Arb agreement, and may need to be addressed before the mediation commences.

[26] See Federal Arbitration Act, §10(a)(4).

[27] CCA Guide to Best Practices in Commercial Arbitration (Fourth Ed.), at p. 607.

[28] To see how the AAA Rules would address the modification of awards, see R-52 of the AAA's Commercial Rules, and R-52 of the AAA's Construction Industry Rules.

(https://mediationmagazine.adr.org/author/richard-reed/)

Richard L. Reed, Sr.

(https://mediationmagazine.adr.org/author/richard-reed/)

Latest Posts



Ethics —
Party Self-Determination and the Authority Trap

(https://mediationmagazine.adr.org/ethics-party-self-determination-and-the-authority-trap/)
Susan Nauss Exon / October 5, 2026

(https://mediationmagazine.adr.org/ethics-party-self-determination-

and-the-authority-trap/)



A Yacht Named Change Order: California's Private Works Change Order Fair Payment Act (https://mediationmagazine.adr.org/a-yacht-named-change-order-californias-private-works-change-order-fair-payment-act/)
Theodore L. Senet / October 5, 2026

(https://mediationmagazine.adr.org/a-yacht-named-change-order-californias-private-works-change-order-fair-payment-act/)



MedAItion —
AI Across Borders and the Future of Civil Dispute Resolution

(https://mediationmagazine.adr.org/medaition-ai-across-borders-and-the-future-of-civil-dispute-resolution/)
Amy J. Schmitz / September 29, 2026

(https://mediationmagazine.adr.org/medaition-ai-across-borders-and-the-future-of-civil-dispute-resolution/)



Finding What You Can't See: Digital Assets in Divorce Mediation (https://mediationmagazine.adr.org/finding-what-you-cant-see-digital-assets-in-divorce-mediation/)
Jennifer Lupo / September 28, 2026

(https://mediationmagazine.adr.org/finding-what-you-cant-see-digital-assets-in-divorce-mediation/)



Mediation Aspects of SB940 in California —
Final Recommendations on Mediator Certification, but Pending SB 574

(https://mediationmagazine.adr.org/mediation-aspects-of-sb940-in-california-final-recommendations-on-mediator-certification-but-pending-sb-574/)
Mattie Robertson / September 21, 2026

(https://mediationmagazine.adr.org/mediation-aspects-of-sb940-in-california-final-recommendations-on-mediator-certification-but-pending-sb-574/)



International —
Settlement Is Not the Decision: What Process Design Owes the Parties

(https://mediationmagazine.adr.org/international-settlement-is-not-the-decision-what-process-design-owes-the-parties/)
Paul Sills / September 21, 2026

(https://mediationmagazine.adr.org/international-settlement-is-not-the-decision-what-process-design-owes-the-parties/)

Mediation Magazine provides the latest mediation insights, trends, best practices, and mediator professional development. It is published by the American Arbitration Association® (AAA®).

Quick Links

Articles (https://mediationmagazine.adr.org/articles/)

Columns (https://mediationmagazine.adr.org/columns/)

Archived (https://mediationmagazine.adr.org/archived/)

Editorial Board (https://mediationmagazine.adr.org/about-us/#editorial)

Submit an Article (https://mediationmagazine.adr.org/how-to-submit-an-article/)

Subscribe (https://mediationmagazine.adr.org/subscribe/)

Contact Us (https://mediationmagazine.adr.org/contact-us/)

Useful Links

adr.org/mediation(https://www.adr.org/mediation/)

Find a Mediator(https://mediatorsearch.adrapps.org/)

Mediate.com(https://mediate.com/)

ODR.com(https://odr.com/)

(https://www.linkedin.com/company/american-arbitration-association)

(https://www.instagram.com/americanarbitration/)

(https://twitter.com/adrorg)

(https://www.youtube.com/@AmericanArbitrationAssociation)

© 2026 American Arbitration Association. All rights reserved. Website designed and developed by Ironistic. (http://www.ironistic.com)

Privacy Policy (https://www.adr.org/privacy-policy) | Terms of Use (https://www.adr.org/terms-of-use)