No good deed goes unpunished and, while a well-orchestrated mediation can resolve disputes quickly, creatively and cheaply, taking a strategic “time out” during an arbitration proceeding can be problematic for the unwaried.

More businesses and individuals are resorting to alternative dispute resolution in lieu of litigation. In turn, they are increasingly utilizing neutral arbitrators in more creative ways. One strategy is to deploy arbitrators as mediators, creating a two-hat professional in a single conflict. This typically occurs in one of two ways: First, parties may agree, contractually or later, to take a good faith whirl at mediation before commencing arbitration. Alternatively, they may come to believe that an interruption of the arbitration to allow for ad hoc mediation would be a good idea and prevail upon the arbitrator to take on the mediator’s role as well.

Of course, using two separate neutrals – one as mediator and one as arbitrator – would be tidier. But that approach seldom happens. Engaging two neutrals can be perceived as doubling the hassle. It can increase the cost and time required for vetting, mutual selection, conflict-clearance, scheduling, getting up to speed and possible loss of settlement momentum. And, in the case of mediating during a short arbitration hiatus where time can be of the essence, the perceived efficiency of one person personally handling both roles seems to make it a must.

But these two-hat endeavors raise questions of efficacy, posing problems that seem to arise more often in the ad hoc context than during pre-arbitration procedures. One immediate question is whether using the same person provides the best chance of a resolution. There are indications that it makes the mediation effort more difficult and less productive than if a different person were engaged. The rub lies in the stark differences between the roles of arbitrator and mediator and the nature of mediation itself.

As the judge agreed to by the parties, an arbitrator is both the authority figure and the decision maker. In contrast, much of the benefit of mediation lies in the fact that the mediator is perceived as a free agent, has no power over anyone, decides nothing and simply facilitates resolution by the parties themselves. These are substantially different roles that require discrete and unique talents. Many veterans of the process will attest that it is the unusual person who is polished in both roles.

Moreover, for mediation to be most productive, both parties must be comfortable with strategically confiding in the mediator. This is the time to candidly discuss a case’s strengths and weaknesses, assess the practical difficulties ahead such as costs, witness availability or business disruption and identify the need for creative solutions. Indeed, this is also the time to discuss whether the party wants to do business with the adversary again in the future. A classic mediation setting promotes this confidence. The parties do not have to deal with the specter of the arbitration hat making a later appearance as decider.

A mediator must have the freedom to probe. An effective mediator must express her views about the issues, offer novel approaches and demonstrate why prompt settlement can be in a party’s best interests. The information freely imparted by the parties can be extremely useful to the mediator in the delicate process of divining and harmonizing the parties’ objectives and bringing them together. However, when a mediator knows that he may well revert to being the arbitrator, the relationship may become cautiously neutered and arms-length. Surely, when a mediator, implicitly or explicitly, says, “I won’t say much to you, please don’t say much to me,” the proverbial hand-tied-behind-the-back can seriously compromise the prospects for effectiveness.

There are potential ethical and practical issues as well in a two-hat approach.

If the mediation fails, the neutral, now having donned an arbitrator’s hat, may be saddled going forward with those intimate details that parties presumably would never have conveyed to a decision-maker. Think of it as a bell that cannot be unrung even for the most conscientious neutral. Worse, that bell can provide the grist for attacking the award as being the product of arbitrator bias, including alleged misuse of confidential information conveyed during the mediation phase, and even attacking the neutral.

This could be a particular problem in the international sphere. For example, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for a “public policy” exception and, in locations where a legal system is inclined to look

---

**Jack Boos**

Jack Boos, a partner in the San Francisco office of Kirkpatrick & Lockhart Preston Gates Ellis, co-chairs the firm’s arbitration practice.
for non-enforcement rationales to protect its
nationals, can be exploited to the detriment
of the prevailing party.

The major arbitral institutions have ex-
pressed ambivalence about the two-hat proce-
dure. The American Arbitration Association/
American Bar Association Code of Ethics for
Commercial Arbitrators provides in Canon
I D that “…an arbitrator should avoid con-
duct and statements that give the impression
of partiality toward or against any party.” It
then states in Canon III B that “…an arbitra-
tor should not discuss a proceeding with any
party in the absence of any other party.”

However, the code goes on to conditionally
tolerate the two-hat procedure, providing in
Canon IV that “…an arbitrator should not…
act as a mediator unless requested to by all
the parties…."

Conversely, the American Arbitration As-
sociation Rules for Commercial Arbitration
also provides: “At any stage of the proceed-
ings, the parties may agree to conduct a me-
diation conference under the Commercial
Mediation Procedures in order to facilitate
settlement. The mediator shall not be an ar-
bitrator appointed to the case…."

Left unsaid in the Code of Ethics is just what
kind of “request” would pass muster; what sort
of disclosures and consents would be required
to reasonably protect the two-hatted neutral
against subsequent charges of bias.

In order to attempt to inoculate oneself
against such a charge, the wise two-hatted
person would present the parties an exqui-
sitely-worded disclosure and consent form
prior to agreeing to serve as a mediator. This
would describe the freewheeling nature and
candid give and take of mediation. It would
also offer assurances that comments made in
the mediation would not be taken into con-
sideration for use as a basis for making an
award, to the extent reasonably possible. The
parties would be asked to waive the confi-
dentiality of mediation and not challenge an
award on the basis of the arbitrator also hav-
ing served as mediator. Such a disclosure and
consent form would go a long way toward
promoting the integrity of the arbitration
process, both in fact and perception.

This sort of inoculation, of course, does
not resolve internal quandaries on the part of
the neutral. The conscientious neutral will be
at pains to compartmentalize what has been
said and done in the mediation context and
not allow it to impede a fair arbitration and
award.

Whether the two-hat approach can work
depends on specific circumstances, includ-
ing who the neutral is and the degree of op-
timism that a quick mediation effort would
pay off. All in all, parties would be better off
engaging a separate skilled mediator. ❖