TACTICAL AND PRACTICAL CONSIDERATIONS IN THE USE OF MEDIATION AND MED/ARB

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INTRODUCTION

This paper considers the expectations of mediation in particular with an understanding of the Med\Arb combination in the labour grievance context and the relationship of both to traditional arbitration.

Med/Arb consists of a mediation which if unsuccessful is followed by a regular arbitration or alternatively when the mediator becomes an arbitrator and makes a decision on what was presented at the mediation without further evidence, or perhaps something in between. Decisions need be made at the commencement to define which of these varying processes is to be followed. The intent is to have a better understanding of the following;

1. The respective goals and motivation in choosing which process you want to participate in.
2. Deciding which process is best recognizing the expectations of your client.
3. Understanding the differences in the preparation for arbitration versus mediation and in particular the difference in preparation for a Med/Arb and recognizing the objectives of each of the three processes in terms of a different methodology in your preparation.
4. Which type of dispute dictates which processes you wish to utilize.
5. Considerations of choosing mediation or Med/Arb as opposed to arbitration.
6. The different role and skill sets of an arbitrator versus a mediator are significantly different, so what skill sets are required of a mediator/arbitrator in a Med/Arb.
7. A discussion of the process of Med\Arb and why it is so different from mediation on the one hand and arbitration on the other hand.

TWO TYPES OF LABOUR DISPUTES - A GENERAL OVERVIEW

In a general sense disputes in the labour context disputes fall into two categories. The first is interest based and over matters such as working conditions and are primarily of a policy basis. They are usually the subject of extensive negotiations between the union and the employer and often arise during or in advance of bargaining. The process involving a third party in bargaining is significantly different from the process involving a third party in grievance mediation. In collective bargaining disputes there may not be as many of the legal rules or regulations upon which to rely to assist the mediator in guiding the parties toward a resolution and therefore the mediation is more challenging and more interest based. In a collective bargaining process it would however definitely be a mistake for a mediator only to be considering interest-based bargaining particularly where the mediator is

being called into a bargaining position where there is an eminent strike. The mediator undoubtedly will find that the parties will tend to exhibit traditional "competitive" behaviours and for the mediator to be successful must be able to deal with these and to be able to manage this positional approach to negotiation.

The second types of disputes, usually in the form of grievances that actually go to arbitration, are what I would refer to as right-based (although settlement often is interest based) disputes and they usually involve individual employees' rights or obligations under the collective agreement. In turn, these grievances often tend to arise in two contexts. First is a prelude to bargaining when there seems to be a flurry of policy orientated-type grievances although they may involve a particular individual or a policy grievance from the Union, usually on as issue of interpretation of the collective agreement. The second type of grievance tends to be disciplinary usually at the tail end of progressive discipline or in a termination or something similar involving a specific individual. This is intended to be a broad categorization only.

The policy oriented style of grievances can often impact on a number of separate collective agreements of various locals where there is similar wording and there is often a concern from both sides of the impact of an arbitrator's decision. In some cases the parties don't necessarily want a resolution, and certainly don't want a contrary decision. They simply want the matter on the table and see if they get a go forward type of resolution without having a legalistic finding which is found in arbitration. These types of disputes are ideal for a mediation resolution. They are interest based although they have a rights based component because they fall within the interpretative sections of an existing collective agreement. The selection of a mediator is more oriented to an interest-based style.

In grievances such as in discipline there are often and usually very settled legal principles suggesting right or wrong outcomes which will then dictate the resolution that is to be forthcoming. It's in this context that mediation tends to be more evaluative with the mediator pointing out the likely outcome of the dispute and where Med/Arb is gaining popularity. In some cases the parties expect this evaluative approach and intend to live with the mediator's comments, often incorporated as a mediator/arbitrator decision and never proceed to what is considered a traditional arbitration.

In grievance arbitration the parties have the step process internal to the collective agreement. For that reason there is not discoveries or pleadings in labour arbitration which is available in other types of civil litigation. It is noteworthy however how often parties learn new material facts at the

mediation or arbitration which for some reason was not uncovered during the step process. In an employment termination outside the collective agreement context it might take a year to get to a hearing and there will be numerous exchanges of pleadings and discovery examinations. In terms of the grievance process, where there is a termination all parties try to get it heard quickly, but we seem to be finding ourselves bogged down in length of hearings and lack of exchange of information beforehand. These lend themselves to mediation if done early.

The Nova Scotia Labour and Workforce Development has a Conciliation Services Grievance Mediation Program which is worth considering. As its objective it provides:

> Grievance Mediation can be used once the grievance process has been exhausted and prior to the use of arbitration. The program is voluntary and initiated by a request for assistance from both parties. Once a request is received, a professional mediator is assigned to assist the parties. Meetings are normally scheduled within two weeks. With the assistance of the mediator, labour and management are guided through a process which is flexible, informal and creative. The main focus is to identify the interests of the parties in order to find a solution which each can see as a reasonable conclusion to the issue. In the event that the parties are unable to resolve the issue through the mediation process, each party has the right to exercise other options, including arbitration.
> Points of Interest
>
> * The parties control the process, actively shaping their own solution, which helps future communications and problem solving;
> * The program is a cost effective alternative to arbitration.
> * The mediator's services are provided at no cost to the parties. The process attempts to resolve issues in a short time frame, avoiding costly time delays and improving labour/management relations.
> * The Department's statistics show a success rate for Grievance Mediation in excess of 85%.

MEDIATION/ARBITRATION IN THE TRADE UNION ACT

Neither Med/Arb or mediation is unique to the labour movement, as it has been used extensively for many years in many other areas of commercial law disputes. However, there is now legislation in Nova Scotia under the Trade Union Act specifically appointing a combined mediator/arbitrator. The changes are unique and have significant implications as to the expanded role of the mediator/arbitrator. The first place to consider is the new procedure for mediation/arbitration in the Trade Union Act under Section 46.

MEDIATION-ARBITRATION

Procedure

> 46D (1) Notwithstanding any grievance or arbitration provision contained in a collective agreement or deemed to be contained in a collective agreement under subsection (2) of Section 42, the parties to a collective agreement may, at any time, agree to refer one or more grievances to a mediator-arbitrator, for the purpose of resolving the grievances in an expeditious and informal manner.
>
> (2) Where the parties to a collective agreement wish to make use of a mediator-arbitrator but are unable to agree upon one, the Minister shall appoint a mediator-arbitrator upon the request of the parties.
>
> (3) A mediator-arbitrator appointed under this Section shall attempt to assist the parties to the collective agreement to settle the grievance by mediation.
>
> (4) Where the parties to the collective agreement are not able to settle a grievance by mediation, the mediator-arbitrator shall attempt to assist the parties to agree upon the material facts in the dispute and shall then determine the grievance by arbitration.
>
> (5) When determining a grievance by arbitration, a mediator-arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as the mediator-arbitrator considers appropriate.
>
> (6) A mediator-arbitrator shall deliver a decision within thirty days after completing an arbitration of a grievance.
>
> (7) Sections 43 and 44 apply mutatis mutandis to a mediator-arbitrator and a settlement, determination or decision under this Section. 2009, c. 29, s. 3.

These amendments to the Trade Union Act were taken almost word for word from the Ontario Labour Relations Act. This is a unique approach to the division between mediation and arbitration generally referred to as Med/Arb. It contemplates, and the preferred practice, a merger of the two with the mediation being the fact finding as well as an attempt to find resolution and the arbitration being basically a summation and then a reliance by the mediator/arbitration on what was heard at the mediation for purposes of making a decision. There is often no actual arbitration hearing as such and the process becomes blurred with the mediator/arbitrator pulling findings from the mediation into the arbitration. Of importance are the powers that this section lays out. Firstly the mediator/arbitrator shall attempt to assist the parties to settle the grievance by mediation. The role of the mediator/arbitrator is then to assist the parties to agree upon the material facts in the dispute and then shall determine the grievance by arbitration. As well the mediator/arbitrator may limit the nature and extent of evidence and submissions and may impose such conditions as they consider appropriate.

Accordingly there is an attempt to do mediation, secondly to attempt to look at the material facts, and thirdly to impose conditions as they consider necessary in terms of the nature and extent of the evidence to be submitted. The last two areas are somewhat difficult to achieve in the context

of what people traditionally think of as a mediation or a prelude to an arbitration. With the mediator in a fact-finding situation, this paper will consider how to avoid this becoming a practitioner problem. This in turn will have significant implications as to the type of mediator/arbitrator you appoint, confidentiality of the process, implications for appeal if decisions are not based on evidence from the arbitration but instead components from the mediation and basically designing a process that will work combining the mediation component with the underlying finality of an arbitration. This paper will also consider when to appoint a person as a mediator and a separate person as an arbitrator versus the same person as a mediator/arbitrator.

It is interesting to contrast the mediation provisions in the Trade Union Act with the mediation provisions found in the Nova Scotia Commercial Arbitration Act. Although the Commercial Arbitration Act does not apply to labour arbitration it is useful to note the difference in the way mediation has been approached in Nova Scotia in both of these types of legislation.

> Mediation
>
> 39 (1) During any arbitration under this Act, the parties may agree to adjourn the arbitration and refer any or all matters in dispute to mediation.
>
> (2) Where a matter is referred to mediation pursuant to subsection (1), unless otherwise agreed by the parties, the procedure for conducting the mediation shall be as set out in Schedule C to this Act.
>
> (3) Where the mediation is unsuccessful, or where either party withdraws from the mediation, the arbitration shall re-commence at a time to be set by the arbitral tribunal.
>
> (4) Where an arbitration is re-commenced pursuant to subsection (3), the members of the arbitral tribunal may resume their roles as arbitrators without disqualification.
>
> (5) A mediator shall not act as a representative or counsel of a party in proceedings in respect of a dispute that is the subject-matter of the mediation and the mediator shall not be subpoenaed to give evidence as a witness in any such proceedings nor shall the mediator voluntarily offer to give such evidence.
>
> (6) The parties shall not rely on or introduce as evidence in any proceedings, whether or not such proceedings relate to the subject-matter of the mediation,
>
> (a) any views expressed, or suggestions made, by the other party in respect of a possible settlement of the dispute;
>
> (b) any admissions made by the other party in the course of mediation;
>
> © any proposals or recommendations made by the mediator; or
>
> (d) the fact that the other party has indicated willingness to accept a proposal or recommendation for settlement made by the mediator. 1999, c. 5, s. 39.

The process for mediation is in Schedule C to the Commercial Arbitration Act. It reads:

SCHEDULE C

MEDIATION PROCEDURE

Appointment of Mediator

1 The appointed mediator shall sign a statement verifying that the mediator has no interest in the case nor is the mediator aware of any circumstances that could raise the likelihood of a claim of bias.

Time and Place of Mediation

2 Unless otherwise agreed, the mediation shall commence no later than four days after the appointment of the mediator at a place determined by the mediator.

Pre-conference Preparation

3 Each party shall prepare a brief summary, not to exceed three pages, of the issues in dispute with the party's position with respect to those issues.

4 The summaries shall be delivered to the mediator at least two days before the first mediation conference.

Process

5 At the mediation conference, each party should be prepared to make a brief oral statement explaining the party's position.

6 Each party is expected to participate in structured negotiations with the active assistance of the mediator.

7 Each party should bring any documents the party needs in order to effectively negotiate.

8 The documents referred to above will be used by the mediator to understand the position of the party but may be kept confidential on request and, where confidentiality is requested, the documents shall not be revealed to the other party.

9 The mediator may caucus privately with any party during the mediation conference if the mediator considers that it will assist the process.

10 Any party may request a private caucus with the mediator at any time.

11 Each party shall co-operate in good faith with the mediator.

12 Each party shall make every effort to attend a scheduled conference and shall co-operate to avoid any unnecessary delays.

Necessary Parties

13 All parties necessary to the reaching of a final settlement should be present at the mediation conference.

14 The goal of the mediation is to reach an agreed upon settlement and, therefore, all individuals with the appropriate authority to agree to the settlement terms and conditions should be present at the mediation conference.

Presentation

15 Although oral evidence, other than that of the parties to the dispute, is not encouraged at a mediation conference, the mediator may allow persons other than parties to make presentations.

Representation

16 A party may be represented at a mediation conference by counsel or another representative and, where so represented, may request the opportunity to meet privately with counsel or that representative at any time during the mediation conference.

Resort to Other Proceedings

17 Unless it is necessary for a party to initiate or continue arbitral or judicial proceedings to preserve the party's rights, no party shall initiate or continue any arbitral or judicial proceeding in respect of any of the matters in the dispute that is the subject-matter of the mediation, during the mediation process.

Record

18 No transcript shall be kept of the mediation conference.

Confidentiality

19 The mediator, the parties and their counsel or representatives shall keep confidential all matters relating to the mediation, except where disclosure of a settlement agreement is necessary to implement or enforce that agreement.

Adjournment

20 The mediator may adjourn or cancel a mediation conference at any time.

Withdrawal

21 Either party may withdraw from the mediation at any time.

Settlement Agreement

22 When the parties reach a settlement, the parties shall reduce the agreement to writing.

23 Where the parties are unrepresented, the mediator may suggest the parties seek independent legal advice before a settlement agreement is signed.

"Without Prejudice" Proceeding

24 In all respects, the mediation conference is deemed to be a "without prejudice" proceeding.

Certainly the intentions are different in the Med/Arb component with the Commercial Arbitration Act keeping a strong division between the mediation and arbitration and the Trade Act pulling them together with the mediator/arbitrator making decisions on facts and witnesses. One of the delightful things about mediation is the ability of the parties to pull into its process whatever practices they want and it is possible and usually done by agreement in any event to pull over best practices from various models. However a harmonization of the two Acts would be beneficial to capture the best of both and to avoid possible interpretive ambiguity.

The Commercial Arbitration Act provides more procedural detail, but there are primarily three substantive provisions which do not appear in the Trade Union Act. Firstly, the mediation is legislated

as confidential and privileged. That is not referenced in the Trade Union Act. There is an issue of whether there is a requirement to file with the Minister a mediated settlement which is referenced more fully later in this paper and its impact on confidentiality, but the practice in labour is to consider the mediation component as confidential. If it moves to arbitration it follows the rules for arbitration and is not appealable in general. This presumes the arbitration decision is based on evidence from the hearing and not the mediation (which, as a practitioner I feel is a bit of a dark grey area), but that's the idea. The Med/Arb preferred practice is to merge the two. As stated it intentionally gets blurred when the mediator/arbitrator makes decisions based on the mediation component which affect the issues or witnesses in the arbitration component. I would recommend in a Med/Arb that an agreement be made that the decision is not appealable and be basically a simple award without reasons.

Secondly the Commercial Arbitration Act states that the mediator/arbitrator cannot rely upon, in the arbitration process, anything he or she heard during the mediation, or any of the proposals or recommendations made or the fact the parties had indicated a willingness to accept a proposal or recommendation. That is not present in the mediation-arbitration provisions of the Trade Union Act. Indeed it may be to the contrary as the mediator may limit the nature and extent of evidence and submissions and may impose such conditions as the mediator considers appropriate. I will keep emphasizing the intent to merge the two processes as the preferred practice, by agreement, versus holding a separate mediation followed by a separate arbitration conducted by the same person which raises issues this paper will consider.

Finally in the Commercial Arbitration Act, should the matter go to arbitration, under Article 48(1) unless the parties otherwise agree, there is no appeal of an award. Under the Trade Union Act the decision of an Arbitrator is considered final and binding upon the parties. For that reason among others I am not satisfied that the Trade Union Act's provisions speak of mediation in the traditional sense which we have always considered it to be. The mediator as a result of what he-she hears at the mediation makes decisions on admissibility of evidence and witnesses and this maybe appealable if there is no evidence referenced in support and this in turn may open up the mediation to review. Whether this is a practical concern depends on the topic.

The Trade Union Act in turn does something the Commercial Arbitration Act does not. That is the power of the mediator/arbitrator to limit the nature and extent of evidence and submissions and may impose such conditions as the mediator-arbitrator considers appropriate. This can be a great use in the right circumstances, but it requires a clear understanding at the front end of what process the

parties want and the mediator/arbitrator will follow. Should you not want the mediator/arbitrator to exercise these powers then you would need to make such agreements between the union and employer before the appointment and then to require the mediator/arbitrator to also agree. If the mediator/arbitrator is a Minister's appointment, then such powers cannot be restricted, and in all probability the mediator/arbitrator will see their role as utilizing these powers as so appointed.

As well since Section 43 of the Trade Union Act applies *mutatis mutandis* to a mediator/arbitrator and to any settlement, determination or decision, then a settlement which can only come from the mediation component, under Section 43(4) it provides that the mediator/arbitrator shall be required to transmit a copy of a settlement to the Minister which is then on public record. There is an alternative argument that either nothing or only a notice of a settlement and not the minutes of settlement need be filed. This is based on the concept of basic mediation confidentiality. Also that the arbitrator can determine his own procedure and thirdly the requirement to file a copy of a decision under 43(4) is based on a "decision" and as such 46(7) applies *mutatis mutandis* only to a decision of the arbitrator, but a settlement of the parties would not be included. Notwithstanding these arguments, the fact remains it is unclear and until that is rectified or judicially determined caution should be exercised if a confidential settlement is desired. Whether this is a practical problem depends upon the parties' exceptions. This is especially so as some settlements are predicated upon being confidential as a condition for reaching settlement. The courts have not grappled with issues of confidentiality in Nova Scotia or for that matter elsewhere in Canada as they have in the United States where it is a controversial topic and not totally clear as to outcome.

MEDIATION VERSUS ARBITRATION

Mediation was introduced as an alternative to the neutral-centred processes of arbitration and trial. The judge, jury, and the arbitrator were the focal points of those precesses. Historically, they have been the fact-finders and the decision-makers in a narrowly drawn framework of traditional rights and remedies. Control over the process and outcome was firmly within their purview and tight control has been exercised over the process.

Mediators, by contrast, are charged with an entirely different role and set of challenges. The parties are the focal point of the mediation process. Among other things, mediation can result in an early assessment by the parties of the relative strengths and weaknesses of their positions, a focussing and narrowing of the issues involved, an objective evaluation of the case, a tempering of the parties' expectations, and an expeditious calculation of the potential resolution in an arbitration. The mediator

is not a fact-finder, but is instead a broker of choice, assisting the parties in generating options for agreement. The parties and lawyers set the stage by revealing the background of the dispute. The information provided to a mediator, while it may coincide with the facts, is more accurately described as the parties' perceptions and which, to them, are facts. The parties frame the issues, claims, and defences. At least initially the parties are viewed as a primary resource when it comes to identifying their own interests and options for agreement. Without a willingness of the party to participate along these lines or without a willingness to engage in risk analysis, is not participating in good faith.

Frequently, with significant issues of fact and law in dispute, parties enter mediation by resolutely assuring themselves and the mediator that they will prevail if the case goes to trial. Since both parties cannot be correct, the mediator spends considerable time working to change the parties' perceptions. This enables the parties to take a more realistic view of likely outcomes, and paves the way for a more thorough assessment of settlement possibilities. One of the ongoing challenges for mediators is that they serve as guides, while the parties are invited and encouraged to choose their own specific paths to settlement. This challenge is compounded when the mediator is also to be the arbitrator in a Med/Arb.

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. Mediators should not coerce any party to make a decision or continue to participate in the mediation. However a mediator is not concerned if the settlement is good, bad, or ugly, or even correct or fair so long as it is enforceable. It is the parties' agreement and not the mediator's view of what is a good agreement. Basically a mediator's role is to get a settlement - any settlement - as long as the parties agree to it.

I read a judge's comment in a Class Action matter against Oracle Corporation in the United States District Court for the Norther District of California, June 19th 2007. A mediated settlement was being rejected by the judge. It is relevant in the judges comments as to a mediator's role:

> "It is also no answer to say that a private mediator helped frame the proposal. Such a mediator is paid to help the immediate parties reach a deal. Mediators do not adjudicate the merits. They are masters in the art of what is negotiable. It matters little to the mediator whether a deal is collusive as long as a deal is reached. Such a mediator has no fiduciary duty to anyone, much less those not at the table. Plaintiffs' counsel has the fiduciary duty. It cannot be delegated to a private mediator."

In arbitration, the role of the arbitrator is to listen to the evidence and make a finding as to

the facts, and render an award which binds the parties. Arbitrators first look backwards to find fault so a decision can be made of rectification or punishment to avoid recurrence of the initial problem. Mediators look forward to agreeable solutions which will prevent or minimize a recurrence of the initial problem. Mediation is less concerned with who is at fault and more concerned with a viable solution and is distinctive from arbitration in its inherent lack of consequences. You go to mediation, you like it, you settle, you don't, so what. In an arbitration, you go, you present, a decision is made, you live with it. The Med/Arb process blurs these distinctions in an expedited process with finality if the mediation does not work.

MED/ARB - A HYBRID PROCESS?

But what of the Med/Arb concept of a mediation which fails to reach a mutually acceptable settlement and then turns into an arbitration where the mediator is also the arbitrator. It has become quite popular and successfully utilized. It can however have unexpected consequences and care should be taken to ensure it does not retard settlement. Lawyers with extensive experience in conducting settlement conferences know that the person conducting the conference frequently hears things from the lawyers that he would never hear were he the arbitrator. For example, a lawyer might tell a mediator that his client doesn't recognize his exposure and cannot get him to understand the downside of his case. The lawyer will ask, "You can help, I think he will listen to you." Another lawyer might tell a mediator that he can possibly get another $50,000 if the other party will only come down another $100,000 on their demand. Or, both lawyers might tell a mediator what they candidly think are the weaknesses as well as the strengths in their case but ask the mediator to explain to each party the exposures they face so as to get movement toward settlement. But no lawyer in his right mind would ever tell such things to a mediator if he thought it was possible the mediator might become the arbitrator and adopt that reasoning.

There is a growing strong school of thought that if the mediation fails and becomes a traditional arbitration with witnesses etc. as opposed to the mediator/arbitrator making a decision on what was heard at the mediation, each party must be given the opportunity to select another arbitrator. The problem is to avoid an unintented consequence of the mediation to become a low-quality arbitration. The parties should understand that a form of binding mediation is not the equivalent of a full-blown arbitration. It really means that if the parties do not reach an agreement, then the mediator will make the final call. Question is on what basis is that call made. Accordingly, (and used almost universally in commercial Med/Arb but infrequently in labour Med/Arb) only a clearly written Med/Arb agreement signed by the parties can set forth a process whereby an

unsuccessful mediation morphs into a de facto arbitration. This is clearly a distinction from where there is a clear stand alone mediation and if unsuccessful is followed by a clear stand alone arbitration, even with the same mediator/arbitrator.

There can be and often are significant problems with the concept of Med/Arb. While there are recognized rules governing arbitration or to a lesser extent mediation, there is almost none for Med/Arb. Is the Med/Arb a blending of mediation and arbitration? Why is a person appointed as both mediator and arbitrator? I do not suggest that parties are prohibited from agreeing if the mediation fails that they will proceed with the same person acting as the arbitrator. However the issue is whether there is a clear division between mediation versus arbitration or an intentional morphing of them. What rules will apply to Med/Arb? The arbitration rules, the mediation rules (to the extent they exist), the mediation confidentiality rules, or some mix? If only some rules, how is one to chose? Should the arbitrator take evidence on the parties intent or understanding in each case? What if the mediator hears the parties' perception of the case, to what extend is that to be considered later in an award? Do you want the arbitrator to make a decision based on objective findings and legal principals or an interest-based decision? Do you want the mediator to make a mediator's recommendation that is binding on the parties often called binding mediation? These are not in themselves difficult questions, but are questions to answer and agree upon to ensure everyone is on the same page.

If the mediation component goes badly wrong or the parties object to what has happened in the mediation, then for a mediator/arbitrator it is almost unbearable to go through the arbitration now acting as arbitrator. You are left wondering whether you can rely upon something said, how you distinguish facts from evidence from perceptions from mediated comments, and you usually have lost the trust of the parties. This is especially so if during the mediation process you express views or opinions on the legal issues. In addition if you express sympathy or concern for a grievor then the Director of Human Resources may look at that as a sign of bias. Or alternatively if you express concerns that might be negative to a grievor or huddle in a corner to talk to a Director of Human Resources, then the grievor will not be satisfied with the arbitration process for the same reason and will make life difficult for the union thereafter. It is a very rocky road. I am particularly concerned about the pronouncements of strengths or weaknesses of a client's case in a mediation caucus and then when you become an adjudicator of fact must decide on the same issues, but probably with different facts brought in by evidence.

This emphasizes the importance of understanding what process you want and agreeing to it before the Med/Arb begins. I suggest the practice of appearing at an arbitration and telling the

arbitrator to act as a mediator and if agreement is not reached then to shift hats to an arbitrator may not be the best practice. If it is a mediation you want then consider hiring a mediator and if it fails hire an arbitrator. In this manner you get the best of both worlds. Alternatively if you want the mediator to wear an arbitrator's hat and make a decision on what was heard and presented in the mediation that is better. Included in the mediation can be an Agreed Statement of Facts or an agreed Exhibit Book.

There is a school of thought that says that an arbitrator once appointed should be able to suggest mediation or Med/Arb as opposed to arbitration. Some lawyers feel that is inappropriate at any point in time because the neutral is hired for a purpose - to arbitrate. There is another school of thought that says an arbitrator should not say to the parties he or she would prefer to do a mediation first as it creates issues of trust with the parties. Another example of a potential problem in Med/Arb is when a mediation fails and during the arbitration the mediator/arbitrator sees evidence that suggests the grievor will probably lose, but also sees an opportunity of a win win settlement. Should the mediator/arbitrator bring this to the attention of the parties during the arbitration hearing and after the mediation has concluded or ignore it, or make a finding with a recommendation? When does the role of mediator stop or does it slide through in some fashion into the arbitration? The Trade Union Act is silent. The Commercial Arbitration Act provides in 39 (1) During any arbitration under this Act, the parties may agree to adjourn the arbitration and refer any or all matters in dispute to mediation. There can come out in a hybrid process some very difficult ethical issues.

There is a Med/Arb approach which has been used successfully in Ontario. Below is a decision in Union of Needletrades Industrial and Textiles Employees v Dynasty Furniture Manufacturing Ltd of a well know and respected arbitrator Kevin Whitaker. This is a Med/Arb approach which does not really contemplate a mediation as I have discussed, but is a simplified arbitration with the Arbitrator interviewing witnesses and then issues a report to counsel, taking submissions and renders a decision. It certainly can and does work in certain cases and Arbitrator Whitaker as well as a number of others do it well. Its approach is worthy of consideration. This is a morphing of the two processes and is characteristic of what I consider a preferred approach.

Union of Needletrades Industrial and Textile Employees v. Dynasty Furniture Manufacturing Ltd., 2004 CanLII 25021 (ON L.R.B.)

DECISION OF THE BOARD; March 12, 2004

1. This matter consists of a number of unfair labour practice complaints. Pursuant to the Memorandum of Agreement between the parties dated January 19, 2004 in this matter, the parties have further agreed upon the following process to resolve the two outstanding areas of dispute in the unfair labour practices – those being the three discharges of January 9, 2003 and the issue surrounding the quantity of work performed in the Mississauga plant:

(i) On March 22, 2004, I will in the presence of each counsel, interview their potential witnesses as identified in our discussions of March 9, 2004, about events surrounding the discharges of January 9, 2003. These interviews will occur at a convenient place (including possibly the plant in Mississauga, the Board or counsel's office) to be arranged between myself and counsel;

(ii) I will immediately thereafter issue to counsel a brief report outlining the information I have gained through the interviews, my assessment of what facts in dispute need to be decided to dispose of the discharge issues, and a further description of the competing factual outcomes;

(iii) On Thursday March 25, 2004, I will convene a consultation at the Board to hear the parties brief submissions on the points raised in my report, following which I will issue a brief decision on the discharge issues;

(iv) A further consultation will he held at the Board on March 31 to mediate the quantity of work issue, failing which on that day, the parties will either agree or be advised by me of the process to be followed to adjudicate that issue.

(v) The consultation will continue on April 5 and 28, 2004 at the Board. It is my intention to have the process completed by April 28, 2004.

2. Following the disposition of the unfair labour practice complaints, we will then deal with the first contract matter.

"Kevin Whitaker"
_____for the Board

OTHER TYPES OF MEDIATION AND ARBITRATION

Another hybrid of the Med/Arb process occurs during an arbitration where you might consider differently how the evidence is brought in and how you want the arbitrator to not only conduct the arbitration as well as the criteria for the decision. Swear in the parties and all the witnesses together, they all raise their hands and make their own affirmation, at the beginning of the arbitration. Let them have a dialogue together with the arbitrator leading them through the hearing with various questions, reframing and restating. This works well and is less adversarial and combines the opportunity of the parties to meet and to discuss under oath and to ask questions of each other. I have utilized this procedure in both labour and commercial disputes and it has worked well where the parties really

need to talk but ultimately a decision must be made. It is a different process and yet allows the parties to come to their own decision during the arbitration component or ultimately a decision that everybody can agree upon and the arbitrator imposes. It's less about the legal requirements of how the evidence is brought in and more in terms of how the parties see the problem and discuss it among themselves. The Med/Arb process does not have to be mutually exclusive and can continue through the one proceeding. The use of "best offer" can also be utilized in this form of Med/Arb where each side puts forward changing offers through the Med/Arb and the mediator/arbitrator bargains a compromise that is agreeable to both sides or which the mediator/arbitrator can rule on if necessary.

THERE ARE ESSENTIALLY FOUR MODELS FOR MEDIATION.

These models are different and used differently, although most good mediators will use bits and pieces of each in every mediation. Especially if you are going into a Med/Arb, you must consider the style and models used by the mediator in terms of the nature of the dispute and resolution wanted.

Interest-based Mediation

Very basically interest based is the Fisher and Ury approach. Most people are familiar with the book *Getting to Yes* which was first produced approximately 25 years ago by Roger Fisher and William Ury of the Harvard University Negotiation Program. Many of these concepts again date back further to a work of scholars such as Mary Parker Follett in the Twentieth Century. However, it was Fisher and Ury's approach which seemed to bring these processes together. I understand *Getting to Yes* sells between 2,500 and 3,000 copies a month and is considered the most popular and highest selling book in the English-speaking world next to the Bible. Having made that statement it is also considered relatively junior in its scope and has now been surpassed by many other books and educational models, many prepared as well by Roger Fisher.

The basic principal of interest-based bargaining is relatively simple. The parties focus on their respective and mutual interests and how those must be accomplished rather than seeking out or staking out positions on issues and defending those positions. Putting into practice these principles however are much more complicated. It tries to avoid positions and firstly focuses on understanding the needs and interests of the parties as opposed to their legal rights. The parties participate in what is often referred to as principled negotiation. The mediator tries to expand the size of the settlement pie. What else is there, what else do the parties really want? The mediator needs training in process and techniques. The mediator also needs enough substantive knowledge not to get "smoked".

As to pitfalls the total process is longer with longer caucuses. It requires the mediator to build trust and repour with both sides. The parties (not just lawyers) are actively involved. There is a fear that this will position the parties so it must be done carefully. The participants may tend to get edgy and often impatient. They want to cut to the chase and move to settlement discussions. Impatience or getting too "legal" are the greatest pitfalls.

Transformative Mediation

Secondly there is the transformative style which is often used in the workplace directly. Transformative mediation tends to recognize the parties have a relationship which must be preserved and want to work off that basis. There are a number of well-known mediators who work exclusively in the workplace in the context of transformative mediation.

As to pitfalls it can confuse the counselling and mediation roles. It is not well understood in commercial mediation situations. There is an accepted distinction in the mediation community as between commercial and family mediation. This form of mediation is better suited to the family situation or where there is a recognized long term relationship to be protected, as well as in the workplace.

Settlement Mediation

Thirdly there is the settlement oriented or positional mediation. This is the style many negotiators are more comfortable with and it's based upon the tit-for-tat approach. A demand is made, a response received. When an olive branch is extended, an olive branch is extended from the other side. When a position is hard ball, the other side plays hard ball. Eventually you will get to a resolution. It is the simplest form of mediation for a mediator to work with.

This is the incremental bargaining toward a "central point". Again judges and lawyers knowledgeable in substantive law are used as mediators. It is a process the parties and lawyers tend to understand and have accepted so are comfortable with. It uses the traditional "dance" process. In part this has evaluative mediation components. The mediator tries to determine each sides bottom line and move them off it by using relatively persuasive techniques.

As to pitfalls this form of mediation overlooks the needs of the parties and consequently overlooks opportunities for settlement. The fear is that the mediator becomes simply the gatekeeper

or the passer of information without actually taking an active role in the process. It focuses usually on one type of settlement item - being money. Often meditations fail because there is a large difference of view of the facts or a large difference in view of the law as applied to known and - within reason - agreed upon facts. Settlement mediation is difficult to use if there is a divergence or large gap in each side's perception of the facts or law. Lawyers may be more reluctant to play their cards in the event the matter does not settle, thereby providing ammunition to other side. This can be an impediment to settlement as what is withheld maybe the very thing needed to persuade the other side to settle. This form can simply be a facilitative role to positional bargaining and thereby lose the true value in bringing the parties together.

Evaluative Mediation

The last style of mediation is evaluative. Essentially the mediator lays out what he or she considers the position of the parties, the strengths and weaknesses and their success or possible failure in an arbitration or court proceedings. It is a valuable tool considering that many mediations are a risk analysis. We all do evaluative. It is relatively easy to do. Every case has good facts and bad facts. We embellish the good facts and push back the bad facts. Mediators tend to look primarily at the facts as a risk analysis and caution the parties as to what it means if you were to go forward. As mediation is often labelled a risk assessment, so evaluative mediation is a natural component.

I often hear one side or the other say they want a tough mediator to bang heads and get the parties back on track. This usually comes with a rights based evaluative type of mediation. This is a high interventionist type of mediation by the mediator who usually has expertise in the area of the dispute and may try and advise or persuade the parties and bring his professional experience to bear on the content of the negotiations. Mediators are often judges and senior lawyers.

As to pitfalls it tends to blur mediation with arbitration. It can and often does, position the parties as you may find the evaluation tends to reinforce a party's perception of their legal rights. The problem in many cases is factually driven and it is difficult - (impossible?) - for the mediator to have all the relevant factual information available. If evaluative mediation works, then the other forms of mediation will work too. If it fails then it's over. It will be difficult to restart negotiations unless there is a dramatic change of view of the underlying facts. Be careful using evaluative mediation or hard ball or muscle mediation as it is unforgiving.

It is in this context that mediators/arbitrators in a Med/Arb need to be very careful. They tend

to look at mediation as an evaluative process of the legal positions of the parties, often throwing in a settlement oriented approach. The problem is that you have a mediator telling the parties they don't have a risky case, without the mediator knowing all the facts or all the evidence. He then goes into an arbitration, hears additional facts and may or may not make the same decision. This results in very unhappy clients who tend to rely on the mediator's words and when they don't follow through there is a view of bias and certainly a lack of trust. Having trust in the neutral is critical. If the mediator makes a comment in the mediation and acts differently in the arbitration then trust is lost.

WHAT DO MEDIATORS DO?

A good mediator has a natural ability. A great mediator has extensive and continuous training to hone and enhance that ability. A mediator does not go into a mediation and say today I will do transformative, or evaluative, or interest based or a settlement style. Instead a mediator will try all kinds of technique, often without thinking as to what they are, and what sticks and works will be used in that mediation.

Mediators spend time with the parties and during that period of time they listen, reframe statements in order to give that party the knowledge and belief that they understand what their concerns are. They show empathy (not sympathy). Empathy requires good listening skills and the ability to demonstrate an understanding of the other side's needs, interests, and perspectives, without necessarily agreeing. On the other hand assertiveness requires the ability to state clearly and confidently the interests and perspectives of one's own side. A good mediator has to do a lot of both, no matter how strong the emotions or how high the stakes. This can be surprisingly difficult.

This empathy is critical to the success of mediation. From that empathy mediators create trust and that trust again is critical. Without the trust of the parties, mediators are not effective. From trust comes influence and that influence is helping the parties see opportunities for resolution. It is in this context that mediators are successful but this practice is not appropriate in arbitration

Mediators assist the parties in reframing how they are looking at the case. This reframing can be done in a variety of ways, including being tough or intimidating with the litigants. But there are also other, more artful ways to help litigants view their case differently. Lawyers and litigants who adhere to this approach also subscribe to the old-school mediation model where a mediator uses intimidation to get the litigants to move. Fear plays a role in mediation and all mediators use it to some extent to get parties to move. Some mediators become the personification of fear such that the

participants become fearful of the mediator. Other mediators take a principled approach, where they remain connected to the participants while discussing possible down sides and risks of not settling the matter, without trying to create fear in the participants. Often each side wants that approach for the other side only and not apply it to themselves. When choosing a mediator, you should know which type of mediator will be most effective for your client.

Mediators use a variety of specific and defined techniques which are beyond this paper to discuss, but needless to say are extensive. However, the most important aspect for a mediator to be successful is neutrality and trust in a confidential process. It is not necessary that the parties trust each other but they must trust the mediator. If a mediator says something, you should be able to bank it, including the strengths or weaknesses of your case. Remember the mediator has the benefit of private meeting with both sides and will or should know what is working or not. This is where the neutrality and trust become really important.

With respect to the settlement-orientated side of back and forth proposals, it tends to leave the mediator with the knowledge as to where the parties are prepared to go or some of the strengths and weaknesses which may not come out in evidence at a later date. Needless to say we also recognize the parties often hold positions at the table that doesn't necessarily reflect their bottom line on the issues. Although we often think positional bargaining is outdated we also know that experienced negotiators know how to use positions on issues as technical devices to implement their strategies. We further know that when parties adopt positions or competitive approaches, they often enter into an impasse. One of the first things a mediator will do is attempt to identify the other party's resistant points and try to find ways to break those down. This creates issues of neutrality on the part of the mediator and the judgmental qualities which we want on the part of the arbitrator.

It is my strong view in the Med/Arb process where the mediator is not giving a mediator's proposal or making findings and it is intended to move to a regular arbitration, then the mediator should not be involved in the evaluative component as it prejudices their ability or certainly raises trust issues with the parties should the matter not resolve and move to arbitration with the same individual. The problem is you've now turned the mediation into an arbitration and the mediation is designed to make arbitration decisions and that is the area that those in the business are now finding difficulties are arising. The difficulty is that the evaluative component is an extremely strong tool of a mediator and yet is one I think should be not used in the Med/Arb process, unless it is intended for the parties to accept the mediator's proposal and not proceed to a standard arbitration. This raises the ability for the mediator to lose their effectiveness because of this constraint.

In practice most good mediators, if allowed to us all the tools of the trade, should be able to assist in getting settlement of the dispute. Mediations settle about 75% of the time regardless of the mediator's presence. The parties will do that anyway. It's the next 20% that takes the work of a skilled mediator and a solid mediation process. About 5% of cases don't settle and go to a hearing. Great mediators settle 95% of the time. Quite simply, great mediators need to know how to close or they will not get hired and are by-passed for a mediator with a better track record. Mediation is a championship performance and there are no exhibition matches. For the same reason you don't put into your championship game your B team, if you're going to do a mediation hire an experienced mediator and if you're going to do an arbitration hire an experienced arbitrator. If you're going to do a Med/Arb understand that you are not really looking at a mediation or arbitration in their traditional context and the considerations are very different.

THE JOINT SESSION AND CAUCUSING

The discussion about the role of a joint session poses another basic question, to what extent is mediation a structured process with identifiable stages that are generally part of its shape? It seems that one of the new issues is moving from having a joint session mediation to purely caucus mediation and this represents a fundamental shift in the shape of the process. Purely caucus mediation and its variants challenge the notion that the new (joint session mediation) is being replaced by the newer (caucus mediation), which can be unsettling. The success rate and satisfaction rate of both mediation and Med/Arb tends to be lower if the parties are litigation focused and efforts of the parties are to exert more control over the process. This is especially so when the parties move away from the joint session in mediation preventing the clients from engaging with each other and focusing only on the legal issues and the bottom line, to the exclusion of the interests of the parties. Mediators will try and use the joint session in almost all mediations at some strategic point.

A good mediator will need the opportunity to meet with the client separately and spend a lot of time with the grievor. Is that going to be okay with the employer? Now consider the joint session. In Med/Arb the concern with a joint session, other than lawyers reiterating their position, as it may "give away" facts or compromise positions. Eliminating the joint session (as an opportunity to educate and be educated about current positions/information--rather than attempting to negotiate deals) or downplaying its role shifts the centre of the process from the parties to the neutral. The mediator becomes more of a focal point, gatekeeper, and source of solutions. While in some cases, this approach in mediation may result in settlements, it is worth noting that it reflects a fundamental shift in the centre of the process, with a number of possible positive and negative implications. In

certain cases, a mediator who assumes a central role and eliminates or reduces the role of a joint session, may be able to "run interference" between the parties, manage the settlement discussions based on experience and judgment, and achieve settlements with sufficient regularity to anecdotally affirm the validity of that approach. In other cases, it is also possible the mediator-centred process may lead to, among other things lost opportunities to evaluate witness appearance, overlooked factual/information differences that are significant to the parties but apparently insignificant to the mediator, and missed opportunities to humanize the parties in each other's eyes. This is roughly analogous to the mediator doing the fishing for the parties.

The joint session not only serves as an informational/adversarial opportunity, but it also introduces a pacing element to the mediation process. While a joint session may be long or short, general or detailed, adversarial or relatively conciliatory in tone, it provides the parties with an opportunity to begin a process like mediation in a deliberative way, i.e. systematically working through the information, issues, claims, defences, including the updated, revised and supplemental ones. The joint session is to provide more than an opportunity to exchange information. Properly done, the joint session is also conveying the underlying message that the mediation process is going to be a carefully considered, well-paced, and open-minded process where the parties do not have to rush to a decision, make all decisions behind closed doors with all the guesswork and speculation that may be a part of that, and they are allowed to take the time that is reasonably necessary to allow the best ideas to bubble to the surface.

It has been suggested that the joint session can be eliminated when there are personal animosities between parties. In extreme cases such as sexual harassment that may be true. However most mediations involve some degree of personal conflict between the parties and that allowing them to express it in well-managed ways actually helps the process. Managing the outbursts, interruptions, and personal attacks is a foreseeable task for mediators in most cases. If the essential content of the personal conflict is identified by the mediator, it may even promote a better understanding of the conflict and ways to resolve it.

One final observation, to the extent that mediators move toward caucus mediation in response to pressures from who are looking for shorter, cheaper mediations, I don't think that it is justified. A focus on costs, alone, is short-sighted and may actually affect resolution rates and, therefore long-term costs. Additionally, many clients do not have a deep understanding of the mediation process, so they do not necessarily understand what they are giving up when they ask for a shorter, cheaper process.

REASONS GIVEN FOR THE SAME PERSON TO BE MEDIATOR AND ARBITRATOR

So let's step back for a moment and consider why the parties want Med/Arb. Often they simply consider it as firstly having a mediation and then having an arbitration and not a merging of the two. I have had lawyers say to me that they want to have the same individual as the mediator and the arbitrator as it is cheaper since there is only one neutral. I find this a false statement. The cost of a separate mediator versus the cost of the same individual being both mediator and arbitrator is exactly the same. They are paid by the day and they are paid a cancellation fee. There is no savings. In fact there may be an additional expense in that the mediation may not extend beyond one day and if it is successful then there are cancellation fees for the remainder of the scheduled days and if it is not successful there is often not sufficient time to conduct the arbitration in the remaining days resulting in both a cancellation and a rescheduling fee.

I've had more than one lawyer, often on the employer side, tell me they wanted mediation as part of the Med/Arb because they needed somebody to tell their client that there's a problem with the file or what could happen if they lose. It's a heads up of what to expect if the matter goes to arbitration. That is a dangerous place to be for a mediator who may become an arbitrator. It is a place for a mediator whose role stops at the mediation. As well mediators help parties understand the risk of arbitration or trial, but seldom if ever tell a party they have a strong case and go to a hearing. I've also heard, and this comes often from the union side, that they want to do a Med/Arb on a case they consider weak. That's a weak strategy also. It won't take long for the employer to realize and capitalize on it.

I've also heard parties say and I think this is with some validity that they really don't want to bring in 12 witnesses from the work place to talk about one grievance. It affects the morale on the floor, it creates controversy between employees, and it creates significant headaches for the employer in terms of scheduling. Lots of good reasons. Yet they need the knowledge of a binding decision from an arbitration in case the mediation fails, as resolution in some manner is necessary.

Also parties want the matter resolved quickly and less expensively than a long hearing. They also don't want to go through the mediation and then if not resolved go to an arbitration. Often they feel they are "right" and want a "binding mediation" so the matter can be resolved quickly. Essentially they are looking for a stripped down arbitration. This can work in some fact situations, but be disastrous in others, so be selective.

One or both of the parties want a confidential resolution. As an example in a termination case, it may be borderline legally, but the employer wants the employee gone. A financial settlement may work, but not one to be on the public record or one an arbitrator may be able to grant. A confidential mediated settlement works. As noted earlier the issue of confidentiality is a problem in a Med/Arb with the requirement of a filing of the settlement, or at least that there has been a settlement, with the Minister.

Often the parties want a guarantee of finality. They are concerned that if the mediation is not successful then they must go at it again in an arbitration. Perhaps they are uncertain that a mediation will work. Some have said to me that if they could not get a settlement then it is doubtful a mediator can and therefor they want a process that brings the matter to a conclusion.

The parties have almost reached a deal, so close they could almost taste it. But not quite there. Accordingly they want a Med /Arb as a last attempt to get settlement with a mediator knocking heads together. This unique role of a mediator was described in The Nova Scotia Labour Relations Board's decision of September 21 st 2007 in *IUOE and National Gypsum*, which quashed a subpoena where a mediator was called in a subsequent matter, but describes the role of the mediator at paragraph 26 as:

> "*Mediators are almost inevitably appointed from the ranks of well respected labour arbitrators or neutrals who are in private practice, and who are not on staff of the Department of Labour. They are perhaps seen as heavy hitters from outside who are brought in as a fresh face to figuratively twist arms, knock heads or otherwise cajole the parties into an agreement, using the full panoply of mediators' skills and asserting their sometimes distinctive and forceful personalities to achieve results".*

AN EXAMPLE - EMPLOYMENT TERMINATION

The following is an example of a termination done as a Med/Arb on an employment matter but not in a grievance context. The parties were looking to set it down for five days approximately six months later with an additional five days if needed. In the interim they were looking at setting discoveries etc. Under the Commercial Arbitration Act the arbitrator arranges a conference within seven days of appointment to identify the issues in dispute, discuss the procedures to be followed, establish time periods and deal with any other matters that will assist the parties to settle the differences and make the arbitration more efficient. This seems to be in part what Section 46 of the

Trade Union Act may look at. I think it is important to consider having this discussion early in the process, before dates are set, as opposed to the morning of the hearing.

The parities asked for the arbitrator to be the mediator. The parties were to exchange briefs and the neutral was to receive a copy, outlining the facts as the parties knew them, the issues and their legal positions with supporting materials. The purpose of this brief was obviously to inform the mediator, but was also intended to ensure that each side knew what were the issues and the legal positions. This is important so each party can understand their BATNA or best alternative to a negotiated agreement.

NOTE: Even in grievance arbitration it often happens that the parties have not a clear understanding of the opposing party's case until the arbitration begins. Exchange of briefs is a practice that should be encouraged in labour grievance Med/Arbs.

Secondly the lawyers were not to have any opening comments. The comments and their positions were in the briefs. The comments were to come from the parties and the neutral would lead the discussion. This tones down the adversarial content. The purpose of this was to recognize that the mediation belongs to the parties and not the lawyers.

NOTE: I am concerned in a mediation that it becomes an evaluation with positions being extended at the front end and the hardening of positions as we go through it. Virtually all good mediators will tell you that the idea of cooperation is the basic principle of mediation and the focus is of universal appeal. The cooperative approach is a primary reason matters settle. There are many studies that have been conducted demonstrating that cooperation as an affirmative strategy will more likely than not achieve the objectives. There are basically five rules in achieving cooperative solutions. First is being cooperative yourself, second you retaliate if the other side is competitive, third forgive if the other side becomes cooperative, be clear and consistent in your approach, and five be flexible. However litigators tend to be adversarial especially when they don't believe the other side sees things their way and therefore tend to approach the mediation process in a much more competitive and hostile manner. Many litigators come to the table assuming that this is the prelude to the main event and they are willing to do just about anything too win. This is particularly the case in Med/Arbs where the parties are also set to go to war if the mediation fails so the mediation is often seen as a lead-in to the main event.

Back to the example, the mediator was going to want to meet with the parties in a caucus

on an individual basis and talk to them directly and not just through their lawyer or rep. This again is critical. It may be hard to do in the context of a Med/Arb. If you have a workplace harassment issue it is very hard to sit down with a grievor for four or five hours and talk about what happened. That may be necessary if you want to know the facts which go back to the Section 46 issue in the Trade Union Act, but that does create serious questions of an imbalance and I might say raises issues of trust with the other parties.

The neutral indicated that should the matter not resolve and a traditional arbitration follows, the mediator would not be following an evaluative approach and did not want to have a discussion of the strengths or weaknesses of the case during the mediation. Here the parties had not agreed to follow a mediator's proposal if the settlement discussions failed. This decision was also intended to insure if the mediator became the arbitrator, then what was heard in the mediation as to the ultimate possibility of an arbitrator's award (evaluative) would not impact on the arbitration so that the comments of an evaluative nature could not come back to bite the mediator/arbitrator when putting on an arbitrator's hat.

The mediation resulted in settlement in the first day, which is not unusual, and was not resolved on the basis of the legal strengths or weaknesses although the lawyers very much had that in account when they considered their BATNA. The arbitration was going to take up to ten days of hearings and six to eight months of legal work. It was a resolution that was interest based and had value for both parties. It did not result in the employee resuming employment, but resulted in a severance of the relationship.

SAME EXAMPLE - LABOUR GRIEVANCE TERMINATION

There are a few key differences between an employment termination and a labour grievance termination that impact on a Med/Arb. The first is cost. The employment termination costs between $100,000 and $150,000 (HST in). There is a real incentive to find a solution and to avoid the loser paying the lion's share of these costs. Labour termination does not have the same cost deterrence as each side is responsible for it's own cost.

In a labour termination the employer probably does not want the employee back in any event. They have probably gone through a few years of successive disciplinary issues resulting in a culminating incident and want it over. In employment the termination was probably without a long disciplinary history. The union also cannot consent to a termination. It simply will not happen. That

leaves the grievor to agree and what is in it for him or her?

As a result the parties want a quick resolution and the Med/Arb appears to fill that need. To do the Med/Arb the traditional evaluative method is not helpful where the mediator raises concerns and risks and then becomes the arbitrator in a traditional arbitration. It can be helpful however and be used strategically where the mediator is to make a decision at the end of the mediation without a traditional arbitration. The mediator can try and broker a settlement and when using evaluative techniques timing is important. Too soon will discourage settlement. Too late will not allow enough time to bargain. Used correctly will allow both the greivor/union and the employer to see the light and get resolution. Termination in itself can be mediated in a Med/Arb if done as a mediation with the mediator/arbitrator making a decision by the end of the day if settlement is not reached.

As seen in this paper there is a host of potential problems with a regular mediation followed by a regular arbitration and using the same neutral. The better way is for a regular mediation with the mediator, if the mediation is unsuccessful, becoming the arbitrator and basing the decision on what was presented at the mediation, and better yet giving a bench decision at the end of the day. To assist the mediator, the parties should provide the mediator with the exhibits, an agreed statement of facts if possible and hopefully a short - few pages - summary of issues and positions. Include any helpful case law and provide it all a week before the mediation.

CHOOSING AND DEALING WITH A MEDIATOR AND ARBITRATOR

There is a well known training video to understand Visual Awareness, of six students passing basketballs. The audience is divided into two groups with one half asked to count the number of bounce passes and the other group is asked to count the number of chest passes. The video is about three minutes long and at the end of the video the trainer asks the audience did they see anything unusual. Traditionally only 20 to 30 percent of the audience see the unusual fact that a seventh student dressed in a gorilla outfit walked into the middle of the first six students passing the basketballs, pounded his chest, and walked off. The remaining group was so focused on counting the passes that they didn't see the gorilla.

I saw this video a number of years ago with a group of mediators and arbitrators and we fell into the same traditional pattern of probably two thirds of the room not having seen the gorilla the first time through the video and being totally embarrassed by their lack of observation. However which was even more interesting were the different comments coming from the arbitrators versus the

mediators at the debriefing. The arbitrators, perhaps a bit defensively, were saying so what if they didn't see the gorilla, they were asked to count the passes. That was their task, that's what they were to do and that's what they focused on. The mediators alternatively said once they saw the gorilla they knew the passes were irrelevant because it was a gorilla that was the issue. The mediators versus the arbitrators had a different perception of their role and that impacted on their approach and I think this is important when you're looking at the Med/Arb process.

If you want somebody to count the passes be sure you hire an individual who's primarily an arbitrator, with some mediation experience to do the Med/Arb. If you want somebody to find the gorilla be sure you hire somebody who's primarily a mediator, with some arbitration experience. Secondly you need to think in terms of the type of mediation you want. Do you want interest based, transformative, settlement oriented or evaluative? Both the union and the employer have to be in agreement. The employer can't say I want an evaluative mediation and the union says they don't. The selection of a mediator is a very unique process. As to arbitrators we know how they have decided in past cases. People have said to me that among other things they want an arbitrator who is somebody who can run a good hearing and somebody who is consistent in their decision-making process. However there is very little on who does what in a mediation as traditionally settlements are not reported. In the commercial world there are a number of mediators and they all have a particular style and bend in the way they approach their task. Clients know full well what kind of a mediator they want appointed. In some cases it will be an interest-based style. In some cases it will be evaluative. Clients tend to spend a lot of time selecting a mediator and you will need to do the same in the labour context.

There is also the question whether under the Med/Arb provisions of the Trade Union Act as to what kind of a combined role you want the mediator/arbitrator to do. Essentially why a Med/Arb versus a mediation and later an arbitration versus a mediation with an arbitrator's award based on the mediation information. There is also another use of Med/Arb such as the parties wanting the mediated settlement transferred into a consent Arbitrator's Award for enforcement versus a side agreement. You can appoint a mediator and then at the mediation agree that the mediator will become an arbitrator for purposes of a consent award.

PARTIES DESIGN OR AT LEAST AGREE TO THE PROCESS IN MEDIATION

Keep in mind in mediation the parties are completely responsible for designing their own solution. There are some general rules that I think should be followed:

1. Limit the number of persons present. Be selective of whom you bring to the mediation or Med/Arb. They may not be the parties who normally will be giving evidence at the arbitration.

2. The mediation should be confidential. Anything said in the mediation component should not be capable of being used in any fashion in the arbitration component and any documents exchanged during the mediation component should not be subject to review on appeal.

3. The mediation should be voluntary. The parties should be permitted to withdraw at any time. Mediation by definition is a non-binding process. It is the agreement reached which is bonding. The parties may look for what is referred to as binding mediation. Should agreement not be reached then the mediator is empowered to make a decision at that point no further evidence is brought forward. That has been used quite successfully in some jurisdictions and certain cases, but caution should be exercised because it doesn't fit all moulds.

4. The mediation sessions should be informal. This allows them to be cooperative in terms of finding solutions. Informality breaks down the barriers and allows for more free and open discussion and that brings the parties to resolution.

5. Because we are dealing in a labour context with a collective agreement, then the grievance mediation or the grievance mediation part of the Med/Arb should be a supplemental to and not a substitute for the steps of a contractual agreement procedure laid out in the collective agreement. In particular nothing said or used in the mediation component should be permitted to be used in the arbitration proceedings without the consent of the parties who made those disclosures. If it is intended that the mediator will make decisions as to what evidence may be called at a later date and what witnesses shall be excluded, then this should be clearly understood at the commencement of the mediation and the criteria to be used in making that selection process. As arbitrators we are acutely aware of the need of the parties to present their case and to not be judgmental until after all the evidence is in and final argument is made. The mediator/arbitrator can run afoul of that principle by making arbitrator decisions before the arbitration begins. It means the neutral is essentially relying upon informal statements made at the mediation and making that judicial determination on those

informal statements.

6. It is important that the mediator be permitted to use all normal and customary techniques of mediation and problem solving. This would include separate caucusing with the parties and the opportunity to meet with the grievor, possibly privately, and with the main individual representing the employer, possibly privately. It also means the mediator will need to meet with the lawyers privately and can manage the process in whatever fashion that particular mediator wishes. The ability of a mediator to have private caucuses with the respective parties is crucial to the mediator's success, yet it is in this context that the mediator must be concerned and cautious that the appearance of bias or favouritism does not appear to the opposing party.

7. Focus on whom you want as the mediator/arbitrator. I think it goes without saying there are some excellent arbitrators who make terrible mediators and there are excellent mediators who make terrible arbitrators. They have a completely different skill set.

8. Take care to know what process will be followed in the mediation. You have a right to discuss that with the mediator, prior to the commencement of the mediation. Usually that is done well in advance. Take the opportunity to provide the mediator with a summary of the issues and problems together with any relevant legal issues that you think they should be aware of. This is a break from precedent in the arbitration process. Make copies for the other side as well.

9. Have your client available for the mediation with the expectation that they will speak unguarded and will be talking directly to the mediator, probably at some length. You may or may not be present during some of those discussions.

10. Have a decision maker available at the mediation. The decision maker may or may not be the lead when it comes to giving the evidence. There is nothing worse than coming into a mediation without the right decision makers. Be sure these decision makers have the authority to enter into an agreement which might be put on the table.

11. You need to approach the mediation from a non-legalistic perspective. You need to be prepared to coach your clients in terms of the considerations that are not necessarily legal in nature. Again I recognize that many grievance mediations often have legal components and implications, but from experience I can tell you I have never heard lawyers presenting their legal case and the other side raising their hands and saying my gosh I didn't know that was a legal position. I

was wrong. You win. Therefore, it is of very little use to expound legal principles or statements at a mediation. That is the role of a mediator to assist in a risk assessment with the other side. Be cautious as to whether you want that done in the Med/Arb process with a mediator who will become an arbitrator because you may find yourself hamstrung or in difficulty in the arbitration process in persuading that arbitrator to a counterview from risks you discussed at mediation.

12. Be strategic in what information you release in the mediation. If there is something that is germane to the evidence and perhaps goes to credibility you might want to consider if you want to release that in the mediation or otherwise. In many cases it may be the very thing the parties need to see to come to a resolution. Alternatively you have given away your ammunition for the following arbitration. In the Med/Arb context it becomes more difficult because once you have given this information to the mediator, they are then in a very difficult spot as to whether they use it in the mediation or consider it in the arbitration. Some of the evidence is not admissible but may be germane to reaching a resolution.

13. Consider what you are going to do if the mediation fails. The arbitrator is human and what they've heard they can push aside but they will remember. Pick up on that in the way you present your evidence. You now have a better understanding of the opposing side's concerns. How do you factor that into your evidence presentation?

14. Seriously consider appointing a separate person as a mediator and if the mediation is not successful then appoint another individual as the arbitrator. We tend to approach arbitration in an adversarial sense, which is what it is intended, whereas a mediation is a collaborative approach. The skill set of the neutral doing the mediation versus the arbitration is quite different.

15. Alternatively appoint a mediator/arbitration with the intention of a decision being made on what was heard at the mediation if it is unsuccessful. I also would recommend in a Med/Arb that an agreement be made that the decision is not appealable and be basically a simple award without reasons.

IN SUMMARY - YOU NEED TO THINK DIFFERENTLY

Although mediation and Med/Arb was always possible, now we have legislated provisions in the Trade Union Act relating to the mediator/arbitrator and which must be considered. However my message is be strategic in your approach to the entire process. Be just as selective in who you appoint as a mediator as you are when you appoint an arbitrator. Essentially if you are going to have a separate mediation then schedule it in advance and have a separate mediator. Let the mediator have all the tools they need, arm the mediator with information on the problem and see where the matter takes you. Provide the mediator with a short pre-hearing brief of some kind laying out the issues and concerns.

Avoid showing up at a hearing and asking the arbitrator to become a mediator when that person is given only a grievance with an allegation by the union that the employer has violated articles of the collective agreement. With no idea what the problem is and no opportunity to prepare for the mediation process the neutral easily falls into the trap of trying to conduct a mediation in the context of an arbitrator's mind thereby losing some of the benefit of the concept of Med/Arb. In a commercial mediation, it takes approximately two to six hours for a mediator to prepare for the mediation process. To do so the mediator needs background information.

Take time well before the hearing to consider what you want as a process in the Med/Arb and why you want that process versus a separate mediation and a separate arbitration. The concept of Med/Arb imply a blending of the two with the award being made at the end of the mediation. If you want to merge the mediation and arbitration with a Med/Arb then have both sides agree on the process and what is to be expected before hand and appoint a mediator/arbitrator who will agree to these conditions as part of the appointment.