

Dilemmas Facing Advocates and Arbitrators Who Mediate Grievances

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Abstract: Parties to grievance arbitrations appear increasingly comfortable with arbitrators who “switch hats” during hearings by offering to mediate settlements. Since mediation and arbitration are distinct processes, advocates who accept these explicit, and at times implicit, offers risk jeopardizing arbitral awards that follow failed negotiations. The risks posed by this form of med/arb include role confusion, ethical conflicts, scope of grievants’ participation, and inefficient use of finite resources. The practice also raises practical and ethical challenges for arbitrators. The article examines these, and other dilemmas in the context of interrelated surveys of labor attorneys and grievance arbitrators.

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“I’m not surprised when an arbitrator comes in, and asks ‘Is there anyway that we can talk about this?’”¹

Lawrence A. Pepper, Jr., Esq.

“Arbitrators mediate grievances. We are invited to do so by the parties. And, even though employed to decide a grievance, we may suggest --but perhaps should not—that the parties also employ us to mediate the same dispute.”²

John Kagel, Member NAA

Introduction:

In the years surrounding World War II, arbitration became the procedure of choice for resolving grievances over whether American employers had breached collective bargaining agreements (“CBAs”).³ A small cadre of labor arbitrators established the profession’s standards,⁴ and crafted what the Supreme Court of the United States later referred to as the “common law of the

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¹ 26th Annual Conference on Public Sector Labor Relations Law, April 7, 2006

² John Kagel, *Mediating Grievances*, 1993 PROC. OF THE FORTY-SIXTH ANN. MEETING OF THE NAT’L ACAD. OF ARB. 76.

³ Jerome T. Barrett with Joseph P. Barrett, 135 A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION (2004)

⁴ *See id*

shop.”⁵ By the 1950s a majority of these neutrals approached decision-making in keeping with their Code of Ethics,⁶ which unequivocally directed them “to determine the matters in dispute . . . [and] not undertake to induce a settlement.”⁷ This principle suited the parties of that era, many of who were prone to complain about labor arbitrators who attempted to mediate grievances.⁸ It also suited the American Arbitration Association (“AAA”), which has always cautioned arbitrators not to exceed the authority granted to them under the CBAs that they have been appointed to interpret.⁹

Starting in the late 1960s, with the retirement of the first generation of labor arbitrators, the ranks of neutrals became more diverse.¹⁰ As new men and women entered the profession, private dispute resolution was expanding to include a broader array of substantive areas (e.g., community disputes, matrimonial discord, administrative rule making, eminent domain).¹¹ During this same period, innovative and/or rediscovered Alternative Dispute Resolution (“ADR”) procedures were supplementing traditional arbitration and mediation.¹²

⁵ *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

⁶ NATIONAL ACADEMY OF ARBITRATORS, *THE PROFESSION OF LABOR ARBITRATION: SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF NATIONAL ACADEMY OF ARBITRATORS* 154-55 (Jean T. McKelvey ed., Washington: The Bureau of National Affairs, Inc., 1957).

⁷ *Id.* (emphasis added).

⁸ WALTER E. BAER, *THE LABOR ARBITRATION GUIDE* 95 (1974).

⁹ *Id.* at 94-95; *See also* *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (The arbitrator “does not sit to dispense his own brand of industrial justice . . . [his award is legitimate] only so long as it draws its essence from the collective bargaining agreement.”)

¹⁰ Cynthia Alcon, *Women Labor Arbitrators: Women Members of the National Academy of Arbitrators Speak about the Barriers of Entry into the Field*, 6 *Appalachian J. L.* 195 (Spring 2007); *see also*, *New Jersey Arbitrator Development Program*, American Arbitration Association (May 1976)

¹¹ Barrett *supra*, Note 3 at page 159

¹² Stephen K. Erikson and Marvin E. Johnson, *ADR Techniques and Procedures Flowing Through Porous Boundaries: Flooding the ADR Landscape and Confusing the Public*, *Practical Dispute Resolution*, Vol 5, No. 1, (2010); *see also* Barrett *supra*, Note 3 at pages 160 – 176.

These cultural changes coincided with increasing criticism within the labor/management community of the adjudicatory approach to arbitration.¹³ The process was being faulted as having become too time consuming, expensive, and formal.¹⁴ One commentator observed that these costs gave unions and employers “an incentive to reduce the number of grievances and to settle those that are filed without going to arbitration.”¹⁵

With grievance arbitration losing luster, and with support from government agencies, some companies and unions began to explore grievance mediation.¹⁶ This stand-alone procedure relies on neutrals to assist parties to find mutually advantageous, and perhaps even creative, solutions to differences over the application of CBAs. The process, in its pure form, is distinctly non-judicial. When mediation fails, unsettled grievances typically advance to hearing before a different neutral, under the contract’s arbitration clause.¹⁷ This separation of mediation from arbitration flows naturally from the discrete roles, duties, and standards applicable to each profession.¹⁸ As Lon Fuller observed:

Mediation and arbitration have distinct purposes and hence distinct moralities. The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what

¹³ Alex Elson, *Ethical Responsibilities of the Arbitrator*, in ARBITRATION AND PUBLIC INTEREST: PROCEEDINGS OF THE TWENTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS.

¹⁴ Stephen V. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270, 278 (1982); See also PAUL R. HAYS, LABOR ARBITRATION: A DISSENTING VIEW (1966).

¹⁵ Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 920 (1979).

¹⁶ See Barrett *supra*, Note 3 at pages 207 - 208

¹⁷ Matthew T. Roberts et al, *Grievance Mediation a Management Perspective*, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS (1989)

¹⁸ See CODE OF PROF’L RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES pmbl. 5 (2007) [hereinafter CODE] (explaining that “[t]he Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is not authorized in advance to make decisions or recommendations”).

he values more. The morality of arbitration lies in a decision according to the law of the contract.¹⁹

As will be shown *infra*, while stand-alone grievance mediation continues in use, many practitioners and neutrals are also comfortable with the mediation of grievances by the very arbitrators who have been appointed to hear them. Others, however, are less sanguine about combining adjudicatory and conciliatory roles in the same person believing that this amalgamation creates dilemmas for arbitrators and advocates alike. Several of those dilemmas are discussed in the remainder of this paper.

The Issues

Mediation by grievance arbitrators poses risks and rewards. The issues are less complicated when an arbitrator's appointment is expressly conditioned on the parties' clear understanding that she will mediate first, and (only as needed) arbitrate second. Then, the primary issues include: the neutral's mediation training and skills; the grievance's suitability for mediation (e.g. allegations of patient abuse); the grievant's role in ensuing negotiations; the appropriateness of "mediators' proposals;" and ethical constraints on resuming arbitration should mediation fail.

The issues expand in number and complexity when arbitrators either volunteer to mediate after a hearing has started, or yield to entreaties to "help us settle this thing." Under these circumstances, accepting a joint invitation to

¹⁹ Lon L. Fuller, *Collective Bargaining and the Arbitrator*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE: PROCEEDINGS OF THE FIFTEENTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS (Jan. 24-26, 1962) 29 (Mark L. Kahn ed., 1962). See generally *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warner Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960) (The Supreme Court, in the

mediate has certain risks. Uninvited intervention is even more problematic. As judges of the facts and the law arbitrators have tremendous clout. Their “suggestions” typically receive great deference.²⁰ What do advocates read into their offers to mediate? (For example, “She wants to help us solve the underlying problem,” or “We’re losing.”) Do some parties accede to the suggestion merely to avoid alienating the arbitrator? Do they then shun potentially viable compromises for fear of prejudicing their case if mediation fails?

How may all concerned maximize the benefits, and minimize the pitfalls, associated with this hybrid procedure? History and two recent surveys provide some answers.

A Little History

In 1973 Sam Kagel used the term “med-arb” to describe George W. Taylor’s activities, decades earlier, as “a permanent umpire for the hosiery industry and later at General Motors.”²¹ Together with Harvard’s Benjamin Selekman and Dean Harry Schulman of Yale, Taylor “viewed the grievance-arbitration system as an extension of the bargaining process, rather than as a legal procedure for adjudicating contract rights.”²² What Sam Kagel later labeled “med-arb” fits this philosophy since the process facilitates guiding labor and management toward win-win solutions, while the neutral’s decision-making power is held in reserve.²³

This hybrid procedure evolved in the permanent umpireships that were

²⁰ See generally *Steelworkers’ Trilogy* (1960), recognized that labor arbitrators have special qualifications to interpret and apply labor contracts).

²¹ Arnold Zack, *Unique Problems and Opportunities of Permanent Umpireships—A Panel Discussion*, 1989 PROC. OF THE FORTY-SECOND ANN. MEETING OF THE NAT’L ACAD. OF ARB. 182.

²² 1 LABOR AND EMPLOYMENT ARBITRATION, § 1.02[4] (Tim Bornstein et al. eds., 2005).

²³ See *id.* See also Zack, *supra* note 21.

common in America's depression era, mass production industries.²⁴ Initially, umpires were tightly constrained by narrow grievance/arbitration clauses. However, in time, labor and management expanded the authority of those arbitrators who had gained familiarity with their industry, bargaining history, customs, and practices. After earning the parties' trust and respect, George Taylor--and other storied arbitrators²⁵ - were awarded broad dispute resolution franchises. This power included the privilege of open participation in settlement discussions. Parties felt comfortable that they could trust these umpires to keep confidences, and to issue wise awards whenever mediated settlements could not be forged. The following description of Taylor's approach is instructive:

Taylor engaged in a hybrid system of mediation and grievance Arbitration . . . He rarely wrote formal opinions, and when he did so they were extremely brief. He used the device of showing his draft opinions to the advocates for both sides prior to issuing an opinion and award, to make sure that the language did not cause the parties a problem or have an effect in areas beyond the precise issue presented. He conducted hearings with a minimum of formalism. He believed that the labor contract was a skeleton . . . and that the mediated results of the disputes which were "decided" by him directly added to the totality of the bargain.²⁶

Taylor's perception of grievance-arbitration as an extension of collective bargaining was not the only theoretical model.²⁷ J. Nobel Braden, then AAA's Executive Vice President, was in the vanguard of intellectuals who believed that arbitrators must remain within "the four corners of the contract." His views

²⁴ See Zack, *supra* note 21.

²⁵ Zack, *supra* note 21 (noting that all labor arbitrators have been "lured with the glamour of a permanent umpireship, the socializing, stories about the grand masters participating in the parties sponsored by the auto and other industries.")

²⁶ *Id.* at 182.

²⁷ LABOR AND EMPLOYMENT ARBITRATION, § 1.02[2] & § 1.02[3] *supra* note 22.

reflected those of the Association's labor and management clients in the years following World War II. In a 1956 presentation to the National Academy of Arbitrators ("NAA"), Braden listed "attempted mediation by the arbitrator" that parties had raised to the AAA.²⁸ The debate has ebbed and flowed over the years with changes in society.

Today

In 1974 Maurice S. Trotta wrote, "[o]ccasionally an arbitration clause expressly confers upon the arbitrator the power to mediate prior to arbitration."²⁹ The word "occasionally" still applies over 30 years later.³⁰ It remains rare for CBAs to award the dual post of mediator and arbitrator to the same person.³¹ Today, however, many labor arbitrators feel comfortable merging both processes when hearing ad hoc grievances.³² This is one of many emerging changes in the labor arbitration profession.³³

The present Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, as amended and in effect June 2003, facilitates this dual role.³⁴ Section 2F permits arbitrators on their appointment to accept joint requests to combine mediation with arbitration.³⁵ The Code also anticipates (the more likely occurrence) that a single party may broach the possibility of

²⁸ J. Noble Braden, *Policy and Practice of American Arbitration Association*, p. 87, 1956 PROC. OF THE NINTH ANN. MEETING OF THE NAT'L ACAD. OF ARB.

²⁹ Maurice S. Trotta, *ARBITRATION OF LABOR MANAGEMENT DISPUTES* (Amacom 1974).

³⁰ BUREAU OF NATIONAL AFFAIRS, *BASIC PATTERNS IN UNION 5* (Bureau of National Affairs 1989).

³¹ *See id.*

³² *See* page 11, *infra*.

³³ *The Arbitration Profession in Transition - A Survey of the National Academy of Arbitrators*, Cornell Studies in Conflict and Dispute Resolution No. 3, Cornell/PERC Institute on Conflict Resolution, Ithaca, NY (2000), available at <http://digitalcommons.ilr.cornell.edu/icrpubs/1/>.

³⁴ *See generally* CODE, *supra* note 18.

³⁵ *Id.* at § 2F1.

mediation after the arbitrator's appointment. If the other side consents, the arbitrator may accept the dual role.³⁶ However, in the face of an objection "the arbitrator should decline."³⁷ Lastly, the Code no longer precludes arbitrators from suggesting mediation.³⁸ They may do so if "*it can be discerned* that both parties are likely to be receptive."³⁹ This discernment requires arbitrators to draw heavily on their wisdom and experience to gauge each party's probable willingness to mediate.

The Surveys

Parallel electronic surveys probing these issues were conducted among labor arbitrators, and among labor/management advocates.⁴⁰ Survey questions avoided the word "mediation,"⁴¹ relying instead on general terms such as "assisting with negotiating grievance settlements." This design was intended to gather information about techniques that may, or may not, fit within a consensus definition of mediation.⁴²

Although the response rates do not permit statistical analysis, certain trends clearly appear. As a general matter, many advocates and neutrals reacted

³⁶ *Id.* at § 2F2.

³⁷ The policy of the American Arbitration Association is that the arbitrator must decline to mediate when faced with an objection from one party. This is in keeping with Section 203(d) of the Labor Management Relations Act of 1947, as amended, stating, "[f]inal adjustment [of disputes] by a method agreed upon by the parties is hereby declared to be the desirable method for settlement." 29 U.S.C. § 173 (2006).

³⁸ CODE, *supra* note 18 at § 2F2c.

³⁹ *Id.* (emphasis added).

⁴⁰ The author--between October 2005 and April 2006--conducted these surveys using Zoomerang. He acknowledges the support of Frank Zotto of the American Arbitration Association, and of Ira Jaffe, a member of the National Academy of Arbitrators ("NAA"). With the NAA's cooperation its entire membership received an opportunity to respond to the arbitrator survey. 37 arbitrators who were not Academy members were also surveyed, as were 209 management advocates and 58 were labor advocates.

⁴¹ With the exception of specific queries about mediation training, and style.

⁴² For example, not all adherents of traditional problem-solving mediation concur that relational approaches, *e.g.*, transformative, fit within the definition of mediation. Depending on individual style and preference, both techniques are employed by arbitrators.

positively to grievance mediation by ad hoc labor arbitrators. The deepest differences between the two groups, as discussed *infra*, touched the timing of mediation offers, and the establishment of ground rules governing the process.

The survey revealed, in order of frequency, that arbitrators become engaged in mediating grievances by: accepting a joint request for assistance; inquiring whether joint discussions might be profitable; or suggesting that based on the record to date one of the parties may be disappointed by an eventual award.⁴³

In appropriate cases, advocates who responded to the survey expressed themselves as being amenable to explicit, and implicit suggestions by arbitrators that they become actively engaged in settlement.⁴⁴ This is especially true when they have had past positive dealings with an arbitrator. Advocates are most inclined to participate in mediating discharge and discipline cases. However, they may mediate contract interpretation disputes depending on the importance of the issue to their clients. Union representatives appear more inclined, than their management counterparts, to mediate major contract interpretation grievances such as challenges to subcontracting.

Many arbitrators, in turn, expressed comfort with helping to negotiate a

⁴³ Does this approach run afoul of the proscription that having been hired to arbitrate, the neutral “should not abuse his relationship with the parties by heavy-handed pressures which they, in their desire not to offend the decision-maker, may feel unable to fend off or reject”? Arnold M. Zack, *Suggested New Approaches to Grievance Arbitration*, 1977 PROC. OF THE THIRTIETH ANN. MEETING OF THE NAT’L ACAD. OF ARB. 113. Certainly, as the potency of an arbitrator’s inducements increase, so too does the argument that any resulting settlement was not voluntary. There is a clash between encouraging settlement, and a party’s due process right to choose her preferred dispute resolution forum. *See also* SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 2.6 (Thomson West ed., 2nd ed. 2007).

⁴⁴ This result is in harmony with a 1991 poll of New York labor attorneys, in which more than 55% of those surveyed favored arbitrators initiating mediation. Howard Stiefel, *The Labor Arbitration Process: Survey of the New York State Bar Association Labor and Employment Law Section*, 8 Lab. Law. 971, 974 (1992).

grievance settlement. This is especially true when they have a past relationship with either the parties, and/or their advocates. Arbitrators will broach this complementary service in response to one party's implicit signal (e.g., "This grievance is divisive."), or if they discern that *both* parties are likely to be receptive.

Arbitrators most commonly raise mediation either immediately before, or immediately after opening statements. The data suggest their preference for raising the subject *after* opening statements. Advocates, however, seem to prefer being asked *before* the hearing starts.⁴⁵ This said, a large number of arbitrators report that they mention mediation whenever "the moment is ripe."

Respondents to both surveys reported that ad hoc arbitrators, not infrequently, set ground rules before beginning mediation. However, they differ with respect to this best practice's actual frequency. The majority of arbitrators responded that they "always" set ground rules, while advocates reported that this occurred "occasionally" over their years of practice.⁴⁶ When ground rules are set the groups concurred that they most often touch confidentiality, and the conditions governing the arbitrator's resumption of decision-making authority. Not all arbitrators regularly reduce these protocols to writing, or place them on a stenographic record.

When mediation is adopted, a minority of the surveyed arbitrators reported limiting their participation to joint sessions. About 70% felt free to caucus with

⁴⁵ During a telephone conversation with the author, Arbitrator Ira Jaffe noted that broaching mediation after the opening could signal that the arbitrator has prejudged the case; and/or leaves the parties feeling that they have been precluded from establishing the nuances of their position.

⁴⁶ This difference may be attributable to the fact that each arbitrator was speaking of their current practice, while advocates were reporting their historical experiences with scores of arbitrators.

each party, and/or to hold private discussions restricted to legal counsel.

Moreover, caucuses with labor teams do not always include the grievant.⁴⁷

A substantial majority of advocate responders appreciated arbitrators' offers to mediate grievances. They primarily attributed these proposals to neutrals earnestly believing that mediated settlements are superior to arbitration awards. This perception coincides with the arbitrator tenet that mediation permits them to "make enduring contributions to the relationship between management and labor."⁴⁸ However, a few advocates reported suspecting that some arbitrators appear to encourage settlement for personal reasons. Indeed, "arbitrators who mediate should understand that their motives in intervening might be misunderstood as being influenced by ego, or the desire to avoid adding to a large backlog of awards that must be written."⁴⁹

As a whole, arbitrators who participated in the survey reflected a balanced understanding of the risks and rewards flowing from grievance mediation. As one neutral succinctly commented, "the obvious reward is the best resolution-one reached by the parties. The risk is that the arbitrator learns more than the parties are comfortable with as mediator, or tips more of his or her hand than the parties are comfortable with and the dispute is not resolved, thus resulting in delay in appointing a new arbitrator if desired by one or both parties."⁵⁰

⁴⁷ Arbitrators differ on the right of grievants--as third party beneficiaries of the CBA--to participate in negotiations. In discharge and discipline cases, or those involving allegations of discrimination based on protected class membership, excluding the grievant may be particularly dicey.

⁴⁸ WALTER E. BAER, *THE LABOR ARBITRATION GUIDE* 95 (1974).

⁴⁹ MAURICE S. TROTТА, *ARBITRATION OF LABOR-MANAGEMENT DISPUTES* (1974).

⁵⁰ See Survey, *supra* note 33 (The survey was conducted to assure the anonymity of all responders).

On Balance

With med-arb's current acceptance there is a lull in the academic debate between the proponents of pure decision-making, and the champions of a more flexible arbitral role. The remainder of this paper examines how labor arbitrators may mediate grievances without jeopardizing either party's right to a fair hearing, and to a vacation proof award.⁵¹

Competence

"Since arbitrators do mediate, they should do it properly."⁵²

Mediation and arbitration are quite distinct ADR processes. The competencies required of neutrals in these professions overlap, but are far from identical. While arbitrators and mediators must attend to "concerns about power, analysis of facts and issues, interactions with parties...there are important differences in how they do this."⁵³ Skilled mediators motivate and assist disputants to abandon polar positions in a mutual quest to find solutions that meet their actual needs. In arbitration, however, the "tables are turned." In that forum, each party strives to convince the arbitrator to apply rules governing contract interpretation and construction to its advantage.⁵⁴

Rarely do the competencies to be a stellar mediator and a distinguished arbitrator reside in the same neutral. A eulogy to Saul Wallen accented this

⁵¹ See DAVID C. ELLIOT & JOANNE H. GROSS, GRIEVANCE MEDIATION: WHY AND HOW IT WORKS 1 (1994).

⁵² *Arbitration and the Changing World of Work*, 1993 PROCEEDINGS OF THE FORTY-SIXTH ANN. MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, available at <http://www.naarp.org/proceedings/pdfs/1993-76.pdf#search>.

⁵³ *A Comparison of Mediation and Arbitration*, ACRESOLUTION, Spring 2005, at 23.

⁵⁴ *Id.* at 23.

singularity.⁵⁵ Wallen was praised as having the “rare combination” of talents to fill both roles, and “the sensitivity required to keep each role in its proper place.”⁵⁶ Not many arbitrators possess this unique talent mix. They may, of course, acquire fundamental mediation skills through training and then hone them by experience.⁵⁷ Thereafter, arbitrators who mediate grievances “should attend educational programs and related activities to maintain and enhance . . . [their] knowledge and skills related to mediation.”⁵⁸

Too, labor arbitrators who endeavor to mediate grievances need to accept that they are leaving the intellectual decision-making realm, and entering territory where emotions often control. As James C. Hill wrote, the greatest difficulty for an experienced labor arbitrator “is to discard his ingrained propensity to inject his own conclusions as to the rights and wrongs of conflicting claims . . . ”⁵⁹ Thus, in mediation, the capacity to “call-the-case” is secondary to learning and addressing the parties’ pragmatic and emotional needs.

This task is particularly difficult in labor relations where each party is rarely monolithic. Consider, the not atypical case involving a worker whose failure to follow a safety rule led to her discharge. An arbitrator would either sustain, or deny the resulting grievance by applying a just cause analysis. However, as a mediator this same neutral would face different dynamics. Such factors could

⁵⁵ *Arbitration and Expanding Role of Neutrals*, 1970 PROCEEDINGS OF THE TWENTY-THIRD ANN. MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS, <http://www.naarp.org/proceedings/pdfs/1970-0.pdf#search,at vii>.

⁵⁶ *Id.*

⁵⁷ See generally, Robert McKay, *Ethical Considerations in Alternative Dispute Resolution*, 45 THE ARBITRATION JOURNAL 15, (1990).

⁵⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS § IV.A.2 (2005).

⁵⁹ James C. Hill, *The Presidential Address: The Academy and the Expanding Role of Neutrals*, 1970 PROC. OF THE TWENTY-THIRD ANN. MEETING OF THE NAT’L ACAD. OF ARB. 198.

include: an up-coming union officer election; the Plant Manager's distaste for the grievant; a key witness's fear of testifying; a yearning by one party's lawyer to win "on his feet" after several consecutive losses; and the presence of the grievant's spiritual advisor demanding compassion.

Such conditions create the potential for a charged environment, in which conflicting personal agendas and varying emotional intelligence quotients may stymie negotiations. Managing the clash of interests requires skills quite different from those needed to run a hearing.

Conflicting Roles and Confidentially

Suggestions from a labor arbitrator qua mediator carry substantial weight. The neutral's freedom to declare an impasse and revert to the arbitral role is the source of real and perceived power. This, of course, was part of the equation that made permanent umpireships successful. Knowing that the umpire might exercise judicial power and rule on a grievance motivated the parties to listen to his wise mediation counsel. Ad hoc arbitrators are in a somewhat different position.

Today American labor arbitrators serve varied clients. Unlike umpires in the World War II era they are rarely wed to particular parties in a specific industry. As a result, with a few exceptions, ad hoc arbitrators lack the in-depth knowledge that allowed the umpires of yore to play both roles. This difference is dramatically demonstrated by the fact that while arbitrators today invite themselves to mediate, umpires were expected to engage in settlement talks.

Attempts to intervene as a mediator take many forms. A low-key approach

is simply asking – early in the proceedings – if the parties have considered settlement. Tactfully opening the door to mutual discussion avoids compromising arbitral neutrality, and allows the parties a final chance to save the transaction costs associated with a full-blown hearing.

Some arbitrators, however, will intervene at any stage if they perceive “exceptional circumstances.” The beholder’s eye determines what is “exceptional.” For some arbitrators, it could be the specter of sustaining the discharge of a long-service employee for having committed a “capital” offense such as theft. For others “exceptional” may be parties who are *pro se*, or represented by inexperienced counsel. For yet others it is a belief that parties should agree on answers to questions that will have profound impact on the bargaining unit. No matter how arbitrators may start mediating a grievance, they frequently become entangled in med/arb’s significant confidentiality issues.

Mediators time and again benefit from gathering facts, perceptions, and/or opinions that would be of little evidentiary relevance to an arbitrator. Indeed, caucuses frequently lead to confidential and private information being shared with the neutral outside of the other party’s presence. These disclosures are often vital to “cobbling out” a settlement. They allow the mediator to discover each party’s strengths and weaknesses, and to find overlaps between their needs. For example, a manager’s admission in caucus that “I meant to remind Grievant *not* to reset the conveyor” could position a mediator to move the parties toward settlement by asking, “Under the circumstance, would you consider reinstating the Grievant with lesser discipline?” If the grievance were eventually

resolved everyone would be pleased.

However, parties may come to regret such candor if the arbitrator's efforts at mediation do not result in a settlement. Returning to the previous example, most employer representatives would ask themselves whether the neutral could set aside the manager's admission of partial culpability. While most neutrals would respond affirmatively--and easily return to the arbitral role--the employer may come to doubt an arbitrator's integrity if the Grievant was subsequently reinstated even though the manager's admission never came into evidence.⁶⁰

Although such conflicts existed in principle in umpireships, the risks were lessened by the close working relationship between umpires (such as George Taylor) and the parties whom they served. In short, they were bound together by trust that had been developed throughout the years. Today, however, labor arbitrators infrequently have such close ties to parties. Accordingly, there is a need to act proactively when confidential, material information is disclosed to an arbitrator cum mediator.

One way to minimize conflict is to restrict mediation to joint sessions attended by labor, management, and the grievant. Joint sessions assure that each side knows what the other has revealed, thus avoiding complications arising from sharing confidential information with the mediator during caucus. Meeting jointly may help the parties "to see and understand the other person's point of view--to understand how they define the problem and why they seek the

⁶⁰ This could be because the employer did not volunteer the information, and the labor organization did not ask the "right question" during cross-examination.

solution that they do.”⁶¹ On the other hand, joint session mediations take time, and restrict facilitating settlement through “reality testing” questions. For example, “How will you compensate for the unavailability of your eyewitness?”

Mediation protocols are another way to negate dual role conflicts. This form of stipulation should: name the parties; identify the grievance; address confidentiality;⁶² affirm that following an impasse the neutral is authorized to arbitrate the grievance; and waive any right to challenge the resulting award based on the mediation having been conducted. The protocol should be reduced to writing, or placed on the stenographic transcript of the hearing.

Borrowing from Richard Chernick and Kimberly Taylor, a stipulation setting the terms before an arbitrator starts to mediate a labor grievance might read:

[Arbitrator’s Name], (the Neutral”) who has been appointed as arbitrator of Grievance No. ### between [Union Name] and [Employer Name], is authorized to conduct a mediation in this matter. (1) In her capacity as mediator, she may receive confidential communications from the parties *ex parte*. Such information may not be admissible in the arbitration, if the mediation ends in impasse. (2) The mediation shall be conducted in accordance with the Model Standards of Conduct for Mediators. (3) If the grievance is not fully resolved, the Neutral is empowered to proceed with the arbitration hearing, unless she elects not to reassume this authority. (4) The mere fact that the Neutral acted as mediator shall not be used as a basis to seek her disqualification as arbitrator by any court of competent jurisdiction, or by any agency that may have administrative oversight of this matter. (5) Also, the mere fact that the Neutral acted as mediator shall not provide any basis for a resulting award to be vacated or modified, and the parties VOLUNTARILY AND KNOWINGLY agree not

⁶¹ Heidi Burgess, *Transformative Mediation*, 1997, <http://colorado.edu/conflict/transform/tmall.htm>.

⁶² The stipulation that addresses confidentiality does so especially regarding information disclosed during caucus.

to seek vacation or modification, nor to oppose confirmation of the award on that ground.⁶³

The Grievant's Role

The Surveys revealed that grievants were present less than 50 percent of the time when arbitrators--turned mediators--caucused with union representatives. Although the absence of a grievant is in keeping with law and custom, it presents challenges and dilemmas.

Under federal law individual employees have the right to “present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, that the bargaining representative has been given opportunity to be present at such adjustment.”⁶⁴ However, “[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure”⁶⁵ So long as he was fairly represented, a settlement on terms that a grievant finds unpalatable does not violate his rights.⁶⁶ Accordingly, when grievances are mediated, labor organizations have the final say in accepting or rejecting proposed settlements.

Juxtaposed to this, mediators as guardians of the process are obligated to promote the “presence of the appropriate participants, party participation, and

⁶³ Richard Chernick & Kimberly Taylor, *Ethical Issues Specific to Arbitration*, in DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 179, 202 (Jack C. Hanna & Gina V. Brown eds., 2002).

⁶⁴ National Labor Relations Act, 29 U.S.C. § 159(a) (2006).

⁶⁵ Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965).

⁶⁶ Vaca v. Sipes, 386 U.S. 171, 192-93 (1967).

procedural fairness . . .”⁶⁷ At a minimum, they must be sensitive to the right of grievants to fair representation at the bargaining table. This may require addressing a grievant’s absence, or suggesting that his presence may expedite settlement. This certainly would be appropriate if a private right of action, such as a Charge of Discrimination alleging unfair treatment on the basis of national origin, was intertwined with the grievance.

Most arbitrators, at a minimum, will protect a negotiated settlement either by assuring that the grievant signs the resulting memorandum of accord or, alternatively, by requesting counsel to place the settlement on the record. At that juncture, it is prudent to ask the grievant whether she understands and voluntarily accepts the settlement.

Conclusion

Beyond these questions are more general concerns including: harmonizing the differing ethical standards governing arbitrators, mediators, and attorneys; quasi-judicial immunity’s application to arbitrators who acts as mediators; and duty of fair representation liability to grievants who feel they were coerced to settle by the union and/or mediator. Balancing these various issues should increase the effectiveness of mediation by labor arbitrators while limiting after-the-fact attacks on resulting settlements, or awards. More importantly, a proper balance will help assure that grievance mediation by labor arbitrators is a voluntary expression of self-determination by the parties.

⁶⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS § VI.A (2005).