Are There Restrictions on the Arbitrator Serving as Mediator?

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The different roles of arbitrators and mediators are well recognized in dispute resolution.

An arbitrator is essentially selected by the parties to provide a final determination of substantive issues, often with the expectation that the process will afford benefits in terms of speed, cost, finality and confidentiality.

Mediators, on the other hand, engage in a facilitative process in which they seek to assist the parties in achieving a settlement. Mediation often involves the disclosure of confidential information by one party to the mediator; this exchange allows the mediator to suggest possible resolutions based upon a clearer understanding of the interests of the parties.

If an arbitrator preliminarily serves as a mediator, however, can this result in the invalidation of the arbitrator's continuing authority to render an award?

Such an unanticipated disqualification of an arbitrator was recently considered in New Jersey in *Minkowitz v. Israeli* (Superior Court of New Jersey, Appellate Division, decided Sept. 25, 2013).

In *Minkowitz*, a matrimonial dispute, the parties had agreed to submit the matter to binding arbitration.

Thereafter, the attorneys and accountants for the parties met with the arbitrator to discuss certain limited aspects of the dispute and to receive recommendations regarding resolution. Various agreements in writing were reached, including a memorandum of understanding described as having been reached between the parties "after mediation with the assistance of the 'arbitrator.'"

Following these negotiations, one party sought not only to have these prior agreements set aside but also to disqualify the arbitrator because he had participated as a mediator. The arbitrator disagreed that his prior activities reflected mediation on his part. He continued with the arbitration (with the approval of the trial court) and entered further arbitration decisions relating to the remaining outstanding issues.

Eventually, the New Jersey Superior Court, Appellate Division, held that the prior agreements and memorandum of understanding were binding as settlement agreements that were not precluded by the agreement to arbitrate. These arbitrator-assisted agreements "were not the product of arbitration, but mediation." The court said, "Even though the parties contracted to pursue 'binding arbitration' their change of course to utilize mediation will not invalidate their settlement agreements."

The court further decided, however, that as the parties had interacted with the selected arbitrator as a mediator, he could no longer revert to his original role as an arbitrator with respect to the remaining issues. Accordingly, any arbitration decisions rendered by him subsequent to his service as a mediator were invalid and must be set aside. A

new arbitrator would be named for the remaining proceedings.

The court, in effect, determined that the concurrent roles of mediator and arbitrator are essentially incompatible. It pointed out that unlike an impartial adjudicator, a mediator "takes an active role in promoting candid dialogue by identifying issues [and] encouraging parties to accommodate each other's interests." Mediators "who may become privy to party confidences in guiding disputants to a mediated resolution cannot thereafter retain the appearance of a neutral fact-finder necessary to conduct a binding arbitration proceeding." Moreover, because such communications may be expected to remain confidential, their truthfulness is often not susceptible to determination through the mediation.

Conversely, the role of the arbitrator is to investigate, analyze and evaluate the facts, to resolve credibility issues and to determine whether a party has proven the elements of the request for relief.

The court concluded that, "while we recognize the [Arbitration] Act envisions a need for the flexibility to meet a wide variety of situations presented in arbitration proceedings, we are not persuaded the act intended an appointed arbitrator may first assume the role of mediator then switch back to conduct final arbitration proceedings. … An effective mediator gains each party's confidence and offers advice to steer them toward settlement. Those confidential communications gained in mediation are precluded from being considered in a court contest … and would similarly be precluded from consideration in an arbitration."

The court did recognize New Jersey Rule 1:40-2(d) dealing with "mediation-arbitration" hybrid hearings, but even there emphasized that "the rule does not address whether the same party may perform both functions."

In further support of its position, the court noted Canon IV of the Code of Ethics for Arbitrators in Commercial Disputes approved by the American Bar Association and the American Arbitration Association, which states, "An arbitrator should not be present or otherwise participate in the settlement discussions unless requested to do so by all of the parties. An arbitrator should not exert pressure on any party to settle."

This position has most recently been addressed in the amended Commercial Arbitration Rules adopted by the American Arbitration Association, effective Oct. 1, 2013. New Rule 9, "Mediation," provides for mandatory mediation in any arbitration case where the claim exceeds $75,000 unless one of the parties opts out of this requirement. However, the rule specifically directs that, "Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case."

The holding in *Minkowitz*, as well as the above guidelines provided in ethical and procedural rules, should serve as a warning to both parties and arbitrators.

As the court in *Minkowitz* notes, arbitrators are vested under the New Jersey act "with broad discretion over discovery and other procedural matters 'to conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties … before the hearing.'"

Moreover, these conferences often involve negotiations among the parties and arbitrator as to how the arbitration should be conducted. For example, should evidence be presented through the presentation of reports rather than through live testimony? Should there be limitations as to claims that will be presented or elements of damages that may be considered?

In such circumstances, one can well envision an unhappy party contending that the arbitrator's suggestions with respect to the appropriateness of certain procedures or claims during these pre-arbitration conferences represented a form of mediation that should disqualify the arbitrator's subsequent service as a neutral adjudicator.

I would suggest that the holding of the New Jersey court does not necessarily reflect a position that would be adopted by a majority of courts. After all, in *Minkowitz*, the parties were represented by counsel, who had agreed to

arbitration and then, subsequently, agreed to engage in settlement discussions with the arbitrator voluntarily, with a resulting final agreement with respect to certain discrete, limited issues. In such circumstances, there would seem to be little reason to conclude, as did the court, that the parties had somehow waived or forfeited their right to continue with the appointed arbitrator (although admittedly, engaging in a mediation that is likely to include disclosure of confidential and other inadmissible information to the arbitrator may not reflect the wisest course).

Nonetheless, if a party fears that the opposing party may seek to later characterize the conferences as mediations warranting the arbitrator's disqualification, specific action should be taken to reflect that they have been conducted with the understanding and agreement of all of the parties that such a disqualification should not eventuate. In other words, if there is any question that the pre-arbitration discussions with the arbitrator may be perceived as a mediation, the concerned party should have a written understanding that these discussions will not result in the replacement of the arbitrator for engaging in activities incompatible with the responsibilities of that role.

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