

Should a Mediator Switch Hats?
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There are times when a mediator may be asked to become an arbitrator, to decide disputed issues for the parties instead of facilitating resolution of those issues by the parties, to switch hats as it were. How should the mediator respond?

Consider the following example: Two parties have successfully mediated all issues involved in the complicated and somewhat contentious dissolution of their marriage. The mediator has presided over numerous mediation sessions, and enjoys a high level of trust and confidence with both parties. They are deadlocked over the single remaining issue: In spite of prolonged efforts, they are unable to resolve their impasse. They ask the mediator to decide the issue for them, and agree to abide by the mediator's decision.

There are many reasons why mediators should decline to become arbitrators at the behest of their clients.

1. *Multiple roles are inconsistent with the mediation contract.* Most mediators emphasize the voluntary nature of the process, the parties' control over decision-making, the mediator's role as a facilitator, etc. Agreeing to act as a decision-maker imports an element of coercion into the process, and permits the parties to abdicate their responsibility for the outcome; the transfer of power creates confusion with respect to the mediator's role.
2. *The mediator unavoidably violates the principle of neutrality.* Most mediators explain to the parties that they cannot represent both of them, and they also cannot represent either of them against the other. While the parties may acknowledge these principles, they also believe – understandably and justifiably – that the mediator will do nothing intentionally that would harm either of them. Mediators studiously avoid the appearance of preferring one party over the other, and certainly should not act as an advocate for either party; the principle of neutrality is compromised to an even greater extent when the mediator becomes a decision-maker, whose function it is to *rule* in favor of one party and against the other.
3. *Waivers and consents may not be informed.* During the course of a mediation, a special relationship develops between the mediator and the parties. This is the relationship that generates the high level of trust and confidence. Even though the mediator may be objective and dispassionate, a bond develops. The parties often *feel* that they have a personal relationship with the mediator. Under these circumstances, can a waiver of the original contract and a consent to the new arrangement be truly informed?
4. *The change jeopardizes the deal the parties have already made.* Unless the parties are willing to enter into a final and binding settlement of all issues except the one they propose to submit to

arbitration, the resolution of other issues is jeopardized by the arbitration procedure. Each party believes very strongly in the rightness of his or her position. Each party has a high level of trust and confidence in the mediator's fairness. The logical conclusion is that when the mediator becomes the arbitrator, the mediator will see things the same way the party does. When that turns out not to be the case, there will be feelings of surprise and disappointment at a minimum; there may even be feelings of anger and betrayal. The losing party may then opt to back out of the mediated settlement.

5. *The decision to change roles ends the mediation process.* Once the mediator has changed roles, it is probably impossible to continue as mediator. The level of trust and confidence of at least one party in the mediator, and that party's corresponding belief in the integrity of the process, would have been seriously compromised if not destroyed. A mediator's moral authority derives precisely from the fact that the mediator does not act as an advocate for either party, let alone "rule" in favor of one and against the other.

With so many disadvantages, it is hard to imagine why a mediator would consider switching hats. Whatever short-term benefit the parties might be trying to achieve will be more than offset by the long-term consequences. The fact that the mediation process may be infinitely adaptable to the needs of the parties does not mean there are no boundaries. It is up to the mediator to establish and enforce those boundaries.

The recommended solution: Explain to the parties, gently, why it would be inappropriate to change roles. If they have truly reached an impasse, encourage them to hire an independent arbitrator to determine those issues they cannot resolve on their own. If appropriate (i.e., if the unresolved issues can be separated from those issues that have been resolved), explain the advantages of entering into a final and binding settlement of all issues except those remaining in dispute prior to the arbitration.

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