



Legal Education  
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## 52nd Annual Refresher: Family Law

Lake Louise, Alberta

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# Mediation Arbitration Process Design

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## MEDIATION ARBITRATION PROCESS DESIGN

What Is Process Design? .....	2
Competing Process Interests .....	2
Common Issues.....	6
Natural Justice .....	6
Confidentiality .....	7
Caucusing During Mediation.....	7
Same Mediator and Arbitrator .....	8
Informed Consent .....	9
Potential Options.....	9
Example 1: Present Formal Process by Default.....	9
Example 2: The Arbitrator has Discretion to Set Process .....	10
Summary .....	12

“For every complex problem there is a simple solution: And it is wrong.”

- Anonymous, Cited by Barry Johnston

Mediation/arbitration is an accepted and effective dispute resolution process. The process allows a great deal of flexibility and creativity in terms of choice. However, this hybrid process has both supporters and critics.

The advantages of the mediation/arbitration process are flexibility, efficiency, finality and incentive to settle in the mediation phase. The main advantage cited by many, is that the process itself creates the incentive to settle, as arbitration will occur if no deal is reached. There are many variations of the mediation/arbitration process such as final offer arbitration or arbitration followed by mediation, with the arbitrator bound by one of two set of awards. The most common form of mediation/arbitration is where the parties attempt to resolve their disputes using mediation and proceed to arbitration if they are not successful in reaching settlement. In all the combinations the advantage is that the parties have the opportunity to find their own solution in mediation. It ensures that the dispute will be resolved (in arbitration), even if the parties fail to reach an agreement.

There are disadvantages to this hybrid process. There is inherent risk with the dual role of the mediator/arbitrator. If the mediator is the same individual as the arbitrator, they will hear potentially “without prejudice” information that could influence their decision making. Critics point out that the threat of arbitration changes the innate nature of self-determination critical to the mediation process. Moreover, transitioning from mediation to arbitration, and possibly back, with shifting roles, can be confusing to the parties. Flexibility in process choice can also cause difficulty. For example, the choice to create a process that encourages access to justice with a simplified process creates ambiguity and may sacrifice the procedural safeguards that the judicial process exemplifies. There is a tension when working within this hybrid process, as mediation and arbitration have clashing goals and interests. Mediation is fundamentally based on the parties choosing the solution, whereas arbitration is a rights-based process where the law is applied to facts to arrive at a decision. As lawyers and arbitrators, we may be able to achieve a balance to these process tensions for our clients through the lens of becoming “mini designers” within the mediation/arbitration process. By encouraging informed consent, we can guide our clients through the process choices. In doing so, clients may be able to “fit the forum to the fuss” and achieve a resolution that balances their procedural interests, as well as their legal and financial interests.