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Finding Harmony in Conflict: Leverage the Dynamics Connecting Mediation and Arbitration in Family Law

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Family law disputes involve deep emotions. Even when effective, litigation exacerbates tensions and can undermine emotional healing. In contrast, mediation and arbitration offer opportunities to address legal issues as well as relational aspects of conflicts. Embracing the interconnected dynamics of mediation and arbitration can foster more harmonious outcomes..

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We typically view mediation and arbitration as completely separate. Consider, instead, the synergy between mediation and arbitration. Nothing in the New Jersey Rules of Court precludes a hybrid model if we openly address how to use alternative dispute resolution methods.

In a linear approach, mediation occurs first and if mediation does not result in a resolution, the process transitions to arbitration. However, keeping the two methods entirely separate fails to leverage mediation's collaborative environment with arbitration's binding decision-making.

Two for the Price of One: Balancing Negotiation with Structured Adjudication

Perhaps not literally, but if undertaken seriously and explained to clients, the value of planning for a hybrid process becomes clear. Preparation for either mediation, arbitration or trial requires parties to articulate their positions and evidence. Crystallizing arguments helps to identify key issues and to understand each party, which can accelerate negotiations or target issues for adjudication.

Lawyers who frequently mediate and arbitrate know the technicalities of *Minkowitz v. Israeli*, 433 N.J. Super. 111 (2013) (which predates the existence of Rule 5:1-5 and the related appendices). In *Minkowitz*, the parties agreed

to arbitrate their contentious divorce and then litigated over whether the arbitration award was enforceable and whether the court could modify or overturn it. Id. at 131, citing *Fawzy v. Fawzy*, 199 N.J. 456, 477, 973 A.2d 347 (2009).

The *Minkowitz* Court also addressed whether one person could serve as both mediator and arbitrator. The Court's decision on this point led to the enactment of Rule 5:1-5. Critically, the Court reverted to the linear model for mediation and arbitration. *Minkowitz* at 145, citing to Rule 1:40-2(d) defining complementary dispute resolution "[m]ediation-arbitration," which it defined as "[a] process by which, after an initial mediation, unresolved issues are then arbitrated."

Within the parameters of Rule 5:1-5, practitioners may arrange to revert to mediation during arbitration, or to arbitrate limited issues during mediation. The flexibility of ADR permits parties to extract issues from mediation to arbitration at any time. Then, once armed with a decision which might impact other issues, or which might have been a roadblock, negotiations may resume.

Trust and Dialogue Increase the Likelihood of Amicable Settlements or Compliance with Orders

The value of N.J.R.E. 408 (confidentiality of negotiations) cannot be overstated. In high-conflict cases, parties often find themselves entrenched in disputes that seem insurmountable. The protections of these principles encourage communication between parties when mediators allow each side to express their needs and interests. This process often reveals underlying issues and hidden emotional drivers.

In a mediated dialogue, the focus shifts from adversarial confrontation to collaborative problem-solving. Mediators explore mutually beneficial solutions that address the core issues of the dispute. A mediator may recommend suspending or terminating mediation until the parties resolve issues that are blocking negotiations. Rule 1:40-1(h)(2)(C) (mediator shall terminate the session if…the mediator believes continued mediation is inappropriate or inadvisable for any reason (emphasis added)). To achieve that goal, leverage the power of arbitrating select issues, by agreement under Rule 5:1-5(A)(3), thereby building consensus, which must be memorialized in a written agreement that identifies the issue that will be arbitrated, and ideally the arbitrator, the funding of arbitration, and the procedure for resuming mediation after the arbitrator's decision. Rule 1:40-4(i). The *Minkowitz* Court allows for the possibility that parties who agree to proceed in binding arbitration can change the process to mediation without rendering their settlement agreements invalid. Id. at 139.

Practical Considerations for Implementing Hybrid Mediation-Arbitration Models

In *Minkowitz* "This case unraveled because the parties agreed to arbitration, then chose to do something else." *Minkowitz* at 137. To adopt the integrated model of mediation and arbitration, not chronologically, attorneys and the mediator/ arbitrator cautiously prepare retainer agreements.

1. **To waive or not to waive. Carefully consider whether to use separate professionals as mediator and arbitrator. Perceived financial savings may be enticing but elusive.**

Traditionally, if the parties use one professional, or to extend a mediator's role into arbitrator, the writing reflects that the parties knowingly and voluntarily consent to the arbitration. Rule 5:1-5(b(A)(iii) and (iv):

> "You both acknowledge having been made aware, through your separate counsel, of the Court Decision of *Minkowitz v. Israeli*, and understand that an arbitrator may not assume the role of mediator and then assume

and/or resume the role of arbitrator unless there is such a written agreement from you and your attorneys. You are also aware that an arbitrator should not be present or participate in settlement discussions, unless requested to do so by all parties. With full knowledge of the holding in *Minkowitz v. Israeli*, and having had the opportunity to consult with and discuss same with each of your separate attorneys, you waive any conflict associated with my prior retention as mediator and authorize me to serve as an arbitrator on the same issues."

To satisfy Rule 5:1-5(b)(A)(iii) (the parties must have had sufficient time to consider the implications of their decision to arbitrate) and Rule 5:1-5(b)(A)(iv) (the parties have entered into the Agreement or Consent Order to arbitrate freely and voluntarily, after due consideration of the consequences of doing so), a professional operating in only one capacity – solely as mediator or arbitrator - should document that for the parties. For example:

"Voluntary Waiver of Conflict to Allow the Arbitrator to serve in the dual role of Mediator and Arbitrator: Not applicable. The parties acknowledge that their counsel has advised them of the holding in the 2013 Appellate Division case of Minkowitz v. Israeli. The parties shall not ask the Arbitrator to also serve as their Mediator."

Also consider asking the arbitrator to attempt resolution during an "Intensive Settlement Conference." If that possibility exists:

"The Arbitrator shall not conduct any settlement discussions with the parties during the course of the Arbitration without authorization by each party in writing, which authorization shall specifically address the issue to be negotiated. With full knowledge of the holding in *Minkowitz v. Israeli*, and having had the opportunity to consult with and discuss same with each of your separate attorneys, you acknowledge that at any time during the arbitration you may ask the Arbitrator to settle one or all issues and that the Arbitrator's willingness to do so shall not act as a bar to them continuing the arbitration on those issues, or any other issues addressed herein, should such negotiations fail. Specifically, the Arbitrator's interim role as if they were a mediator of one or more than one issue at any time during the proceeding shall not be considered a bar to them arbitrating those same issues."

2. Arbitrator's Disclosure Form

Appendix XXIX-D is a mandatory form for arbitrator/umpire disclosures. Rule 5:1-5(F). The disclosure "shall be reviewed and executed by the arbitrator/umpire prior to execution of an Agreement or Consent Order submitting a family law matter dispute to arbitration/alternate dispute resolution." An arbitrator who accepts a *Minkowitz* waiver should document the proceedings and acknowledge their duty to disclose how the arbitrator's individual interests may evolve:

"Your Arbitration Agreement acknowledges that the Arbitrator shall not conduct any settlement discussions with the parties during the course of the Arbitration without authorization by each party in writing, which specifically address the issue to be negotiated. With full knowledge of the holding in Minkowitz v. Israeli, and

having had the opportunity to consult with and discuss same with each of your separate attorneys, you have asked the Arbitrator to settle the following issues: (insert specific issues here)."

"The Arbitrator's interim role as mediator of these issues shall bar them arbitrating those same issues if negotiations fail. You accept this agreement as an amendment to the Arbitrator/ Umpire Disclosure Form (Appendix XXIX-D) previously executed by the arbitrator."

By embracing the interconnected dynamics of mediation and arbitration, lawyers can provide more comprehensive and harmonious outcomes. Abandoning a linear progression provides more creative and targeted solutions. As the field of family law continues to evolve, integrating mediation and arbitration represents a forward-thinking approach that aligns with the needs of complex family conflicts.

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