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LAW SPECIAL REPORT

Binding mediation: A way to end disputes quickly, cheaply

'This is truly 'rough justice,' and even more so than in arbitration'

GUEST CONTRIBUTOR

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As anyone who has been through the process knows, resolving civil disputes through full-blown litigation is enormously expensive, and can take years to complete.

For many years, various alternative dispute resolution, or ADR, methods have been used to reduce costs and expedite resolution of civil disputes. The two most-used ADR methods have traditionally been arbitration (in which an arbitrator imposes an outcome on the parties after a formal evidentiary hearing), and mediation (in which a mediator assists the parties in reaching an out-of-court settlement through an informal negotiation process).

A hybrid of the two, referred to as Med-Arb, is also sometimes used. In Med-Arb, the parties first try to settle the dispute with the help of a mediator, but if settlement doesn't happen the mediator takes on the role of arbitrator, presides over an evidentiary hearing, and issues an order.

A more recent development in ADR is binding mediation. In it, the parties agree to first try to settle their dispute through mediation – but, if they are unable to reach agreement, they give the mediator the power to make a decision for them. Unlike with Med-Arb, the mediator doesn't become an arbitrator, and there is no formal Arbitration hearing. Instead, the mediator makes his decision based solely upon what he has learned during the informal mediation process.

But what happens if one side or the other doesn't like the mediator's decision, and takes the position that the mediator doesn't have the power to impose an outcome on the parties, even if the parties have attempted to give him that power? While there had previously been some uncertainty in California on that question, a recent California Court of Appeal decision (*Bowers v. Lucia*) has now made clear that parties to a civil dispute do indeed have that power – and, as long as they have clearly and completely described in a written settlement agreement the process by which the mediator is to resolve the dispute if necessary, the mediator's decision will be enforceable by the court.

Does this mean that parties to a civil dispute should always agree to engage in binding mediation? Not necessarily. Here are some thoughts as to the "pros" and "cons" of using the binding mediation process:

PROS

Certain resolution. The parties know going in that, even if a settlement isn't reached, the dispute will be resolved.

Quick and cheap. The process is faster, and cheaper, than the traditional Med-Arb process because there is no evidentiary hearing following the unsuccessful mediation – and it is much cheaper and faster than litigation.

Self-designed, flexible process. The parties themselves design the process, so they and the mediator have a great deal of flexibility both as to the process itself and as to how an award is reached. For example, in the *Bowers* case, the parties agreed to use a "baseball arbitration" approach, in which the mediator's only option in reaching a binding decision was to choose between the parties' last and final settlement positions. That approach might not be appropriate for all disputes, however, and the parties might instead choose to provide the mediator with only an agreed-upon range, or simply let the mediator reach his own result without any constraints from the parties.

CONS

Lack of safeguards for fair hearing. The mediator in a binding mediation, as is the case with an arbitrator, is given ultimate power to resolve the matter. However, unlike the Arbitration process, and unless the parties so provide in their written agreement, there are no safeguards for a fair hearing. For example, because there is no formal hearing with sworn testimony, there is no opportunity for cross-examination of parties and witnesses in a binding mediation. Also, unlike the situation with Arbitration, *separate* communications with a mediator are perfectly acceptable, which means that, absent an agreement to the contrary, a party could be deprived of the ability to respond to information provided separately by the other side.

May decrease possibility of settlement. Finally, since there is a possibility that the mediator might become the decision-maker, parties and counsel during the mediation process might be less forthcoming with the mediator as to facts, issues, and settlement positions, which could make a settlement less likely to occur (a problem shared with Med-Arb).

FACTORS TO CONSIDER

So – when should parties to a civil dispute consider using binding mediation to resolve their dispute? I would suggest the following factors be considered in making that decision:

Financial constraints. Because binding mediation at this point provides one of the cheapest means of resolving disputes, the greater the parties' financial constraints the more they should consider using this process.

The need for speed. Sometimes one of the most important considerations is the need to get the dispute resolved as soon as possible (as, for example, where there is a pre-existing family or business relationship between the parties that is worth preserving, but which may be increasingly threatened the longer the dispute goes on). The greater the need for quick resolution, the more the parties should consider binding mediation. That's particularly true if the dispute has not yet resulted in a lawsuit.

The amount at stake. This is truly "rough justice," and even more so than in arbitration or Small Claims Court, as no one is under oath or subject to cross-examination. As a general rule, the greater the amount at stake, the more skeptical the parties should be about using binding mediation.

Whether there are non-monetary issues to be resolved. Sometimes there are non-monetary issues at stake in a dispute, as for example in neighbor disputes over fences or noise issues. These and other non-monetary issues might lend themselves well to resolution through binding mediation.

Confidence in the mediator. Finally, it's one thing to agree upon a mediator to assist the parties in reaching a negotiated settlement. It's quite another to do so when the parties are also entrusting the outcome of the dispute to the mediator if settlement isn't reached. One should never agree to binding mediation unless one has complete confidence in the neutrality, integrity, fairness, and intelligence of the mediator.

Is binding mediation right for every civil dispute? No. But in appropriate cases, it can provide a cost-efficient and quick alternative to litigation.

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Phil Diamond is a mediator and arbitrator in all areas of civil disputes and litigation. After graduating from the University of California, Berkeley, in 1971, and the University of California, Berkeley, School of Law (Boalt Hall) in 1974, he practiced civil litigation in a wide range of areas, on behalf of both plaintiffs and defendants, before becoming a mediator in 2004. With offices in San Rafael, Mr. Diamond handles matters throughout California through his firm, Diamond Dispute Resolution (www.diamonddisputeresolution.com). He may be reached at 415-492-4500 or phil@diamonddisputeresolution.com.