

THE
A-LIST
WILL BE RECOGNIZED



THE RECORDER

ESSENTIAL CALIFORNIA LEGAL CONTENT An ALM Web site

30 DAY
FREE
Web Trial

This Site | Law.com Network | Legal Web
Enter Keywords

[HOME](#) [NEWS](#) [CASES & COURTS](#) [IN PRACTICE](#) [SPECIAL REPORTS](#) [EVENTS](#) [LAWJOBS](#) [ABOUT US](#)

[Home](#) > Empowering the Mediator

Font Size: [+](#) [-](#)

Empowering the Mediator

By [Philip Diamond](#) [Contact](#) [All Articles](#)

The Recorder | July 31, 2012



[Print](#) [Email](#) [Reprints & Permissions](#) [Post a Comment](#)



Philip Diamond, Diamond
Dispute Resolution
mediator
Image: courtesy photo

On its face, the phrase "binding mediation" sounds like a contradiction in terms: Mediation, by definition, is a voluntary process, in which the parties themselves, with the help of a neutral third party, reach an agreement, which becomes "binding" only if the parties say so. This is of course contrasted with arbitration, in which disputes are submitted to a neutral third party who imposes an outcome upon the parties after an adversary hearing in which evidence, including sworn testimony, is received. A hybrid of these two processes, sometimes referred to as "med-arb" has also been used for many years. In med-arb, the parties agree to first attempt to settle the dispute through mediation, but if the mediation is unsuccessful the mediator then takes on the role of arbitrator. A typical adversary arbitration hearing is then held, and the arbitrator (who initially came into the dispute as a mediator) renders an award, which is then confirmed by the court.

THE 'BOWERS' CASE

A more recent development in alternative dispute resolution is the concept of "binding mediation," which was the subject of a recent California appellate decision which may have important implications for mediation and the ADR process in general. In *Bowers v. Lucia* (2012 WL 1939722), the parties to a business dispute engaged in a multi-day binding arbitration of one portion of their dispute (the other portion to be decided later in a related civil action). Before the arbitration was concluded, however, the parties entered into a settlement agreement, which they put on the record before the arbitration panel and thereafter confirmed in a written agreement. The agreement provided that both the arbitration matter and the pending civil matter were to be submitted to mediation, with the following essential terms:

- The matter would be submitted to a mutually chosen mediator.
- The parties would engage in one full day of mediation.
- If the parties were unable to reach agreement through one full day of mediation, the mediator would be empowered to set the amount of a judgment against the defendant, between \$100,000 and \$5 million.
- The mediator's decision was to be entered by the superior court as a legally enforceable judgment with no objections by the parties.

For reasons not described in the opinion, and apparently at the request of the mediator, the agreement was thereafter modified as follows:

- If the dispute hadn't settled after one full day of mediation, the parties were to submit to the mediator their last and final settlement positions, between \$100,000 and \$5 million.
- The mediator was then empowered to set the amount of the judgment by choosing either plaintiff's demand or defendant's offer (as in "baseball" arbitration), with that amount to then be entered as a legally enforceable judgment in the superior court.

After one full day of mediation, the parties were unable to agree upon a settlement amount. Their last and final settlement positions were the defendant's offer of \$100,000 and the plaintiff's demand of \$5 million. The mediator thereafter allowed the parties to continue to submit information for his review, and he also met

Risks in Big Data
Attract Big Law Firms
[Click Here for Full Story](#)

LITN LAW TECHNOLOGY NEWS

Advertisement

LAW TECH DAY **CONNECT LEARN ENGAGE**

FREE CLE - accredited half day
Law Technology Workshop
SEPT. 19, 2012
Commonwealth Club, San Francisco

THOMSON REUTERS™ Kroll Ontrack.

The Focal Point LLC

Find similar content

Companies, agencies mentioned

Key categories

Most viewed stories

Tablet Takedown: Apple-Samsung
Patent Spat Headed to Trial

Jurors Hear Competing Claims in iPad
Copycat Case

Quinn in Hot Water with Koh

Jury Seated in Apple-Samsung Tablet
Trial

Circuit Reassigns Case, Citing Judge's
'Dismissive Attitude' to Class Action

Advertisement

separately with defendant and defendant's counsel. He then chose the \$5 million figure and entered an award against defendant in that amount. Plaintiff petitioned the trial court to confirm the award. Defendant, who in the meantime had obtained new counsel, objected to confirmation of the award on the bases that: a) it was not an "arbitration" award and the court therefore had no jurisdiction to confirm it; b) the settlement agreement lacked mutual consent; c) the settlement agreement was too uncertain to be enforceable; and d) the agreement unconstitutionally deprived defendant of his right to jury trial. While the trial court apparently agreed that it could not confirm the award as an "arbitration award" because there was in fact no arbitration, the court rejected defendant's other arguments, and enforced the settlement agreement pursuant to Code of Civil Procedure §664.6 (which allows the court, upon motion, to enter judgment pursuant to the terms of a settlement agreement signed by the parties or agreed to orally before the court). Judgment for plaintiff was entered accordingly, and defendant appealed.

The court of appeal affirmed the judgment, rejecting defendant's arguments that the settlement agreement lacked mutual consent and was too uncertain to be enforceable, finding that there was substantial evidence that the parties had agreed to the mediation process, with the mediator being empowered to make a binding decision, without conducting an evidentiary hearing, if the parties were unable to reach a settlement. The appellate court further rejected defendant's argument that the settlement agreement unconstitutionally deprived it of a jury trial. The court found that CCP §631 (which provides the statutory means for waiving the right to a jury trial in a civil case, and which was not complied with) was inapplicable because the parties had agreed to resolve their dispute through a nonjudicial forum, and despite the absence of any statute expressly authorizing the type of ADR process to which the parties had agreed.

PRACTICAL CONSIDERATIONS IN BINDING MEDIATION

With the *Bowers* decision, it is now apparent that, with an appropriately drafted agreement, a "binding mediation" award given by a mediator following an unsuccessful mediation and without an adversary evidentiary hearing is enforceable in California. But is that process a good idea? Here are some thoughts as to the "pros" and "cons" of this "binding mediation" process that litigants might want to think about if they are considering using it:

Pros:

- The parties know going in that, even if an agreement isn't reached, the dispute will be resolved, and resolved quickly.
- The process is faster, and cheaper, than the traditional "med-arb" process because there is no evidentiary hearing following the unsuccessful mediation.
- Because the parties design the process, 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, although the "baseball arbitration" approach that was used in the *Bowers* matter is designed to force each party to be "reasonable" in its last and final settlement position in order to maximize the possibility that it will be chosen for the award, that approach might not be appropriate for all disputes. The parties might instead choose to provide the "binding mediator" with only an agreed-upon range, or simply let the "binding mediator" reach his own result without any constraints from the parties.

Cons:

- The "binding mediator," 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 "binding mediation" agreement, there are no safeguards for a fair hearing. For example, whereas *ex parte* communications with a mediator are perfectly acceptable during the settlement process, it seems that, as happened in the *Bowers* matter, and unless the parties specifically agree otherwise, *ex parte* communication with the mediator remains acceptable even after his role has changed to decision-maker. This deprives a party of the ability to respond to information provided *ex parte* by the other side. On the other hand, the possibility of that happening is always present in "binding mediation" if separate caucuses are held.
- Because there is a possibility that the mediator might become the decision-maker, parties and counsel during the mediation process may be less forthcoming with the mediator as to facts, issues, and settlement positions, which could hamper the settlement process (a problem which "binding mediation" has in common with "med-arb").
- Unlike with arbitration, there are no statutes or court rules governing the appointment or conduct of the "binding mediator," or of the process itself, nor (other than what the parties might provide in their "binding mediation" agreement) is there an underlying contract that might give some guidance as to the "binding mediator's" powers. It is therefore critical that the parties, and the mediator, think through the process in detail up front, and document those details before engaging in it. Those details might include: a) whether the mediation may include separate caucuses (which could impact a party's ability to respond to positions taken by the other side out of that party's presence; b) whether, as occurred in the *Bowers* matter, the mediator may receive, *ex parte* or otherwise, additional "information" following the mediation session; c) whether, and to what extent, mediation confidentiality is to apply to the process; and d) whether the mediator is required to provide the parties with a written explanation of the award.



TOP JOBS

Partner/Group,
Intellectual Property,
Silicon Valley, CA
The Partners Group
Mountain View, California

Legal Recruiter -
Attorney, Partner, Group
and Merger Division
Mestel & Company
San Francisco, California

MORE JOBS
POST A JOB

Advertisement

LTN LAW TECHNOLOGY NEWS
Interested in legal
technology news?
Get the latest in:
Product Information
LawTechNews.com

Advertisement

Need CLE?

CONCLUSION

If the parties to a dispute choose to do so, and if they properly document their intention in an agreement signed by the parties as well as by counsel, they can empower a mediator to impose an outcome in a dispute if they are unable to resolve it through mediation. Further, that outcome may be based solely upon information received by the mediator during the mediation process. With an appropriately drafted written agreement, "binding mediation" might provide a useful mechanism for the efficient resolution of appropriate disputes.

But the parties — and the mediator — must be mindful that, in return for "swift justice," the parties are giving the mediator enormous power, and enormous responsibility, without the benefits of the arbitration process with which to exercise that power and responsibility. In arbitration, the arbitrator need not follow strict rules of evidence, and is "not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make [his] award *ex aequo et bono* [according to what is just and good]." *Vandenburg v. Superior Court*, 21 Cal.4th 815 (1999). However, an arbitrator at least has the benefit of an adversary hearing, typically with sworn testimony, cross-examination, and documentary evidence, on which to base an award. The "binding mediator," on the other hand, has only the information provided during the mediation process to go by, with that information typically including briefs, documents, arguments of counsel, and unsworn oral statements of the parties and others. All concerned should therefore go into the "binding mediation" process with eyes wide open, and with full knowledge of the risks and benefits.

Phil Diamond is a mediator and arbitrator in all areas of civil litigation. With offices in San Rafael, Phil handles matters throughout the state of California. For additional information, please visit Phil's [website](#). He may be reached at (415) 492-4500, or by email at phil@diamonddisputeresolution.com.

In Practice articles inform readers on developments in substantive law, practice issues or law firm management. Contact Vitaly Gashpar with submissions or questions at vgashpar@alm.com.

[Subscribe to The Recorder](#)

Comment on this article

[Terms & Conditions](#)

Display Name:

Your e-mail (not displayed with comment)

subscription@alm.com

My Comment:

Comments are not moderated.

For more information, please see our [terms and conditions](#).

To report offensive comments, [Click Here](#).

REVIEW

POST

From the Law.com Network

THE RECORDER

Jurors Hear Competing Claims in iPad Copycat Case

dbr DAILY BUSINESS REVIEW.COM

\$5.9 million settlement reached with bank for jailed fraudster Nevin

New Jersey Law Journal

No Emotional-Distress Claim for Seeing Pet Killed, N.J. Supreme Court Says

Smart Litigator[®]

[The Affordable State-Specific Case-Prep Solution](#)
Available in NY, NJ and PA
editions - research, draft and

New York Law J

Second Circuit Revisits Securities Fraud Act



**'Buried' Arbitration Clause
Can't Bind Employee, Calif.
Court Rules**



Shapiro

**Justice Watch: Employers
say 1938 labor law doesn't
meet today's reality**



**Retirement Benefits
Slashed for Former Judge
Barred From Bench**



prepare even the most complex
cases with ease.



**Lawyer Sanctioned
Behavior That 'Tarnish'
Justice System**

the LAW.COM network

LAW.COM

Newsire
Special Reports
International News
Lists, Surveys & Rankings
Legal Blogs
Site Map

ALM NATIONAL

The American Lawyer
The Am Law Litigation Daily
Corporate Counsel
Law Technology News
The National Law Journal

ALM REGIONAL

Connecticut Law Tribune
Daily Business Review (FL)
Delaware Law Weekly
Daily Report (GA)
The Legal Intelligencer (PA)
New Jersey Law Journal
New York Law Journal
GC New York
The Recorder (CA)
Texas Lawyer

DIRECTORIES

ALM Experts
LegalTech® Directory
In-House Law Departments at the
Top 500 Companies
Top Rated Lawyers
The American Lawyer Top Rated
Lawyers
The American Lawyer Legal
Recruiter's Directory
Corporate Counsel Top Rated
Lawyers
The National Law Journal
Leadership Profiles
National Directory of Minority
Attorneys

BOOKS & NEWSLETTERS

Best-Selling Books
Publication E-Alerts
Law Journal Newsletters
LawCatalog Store
Law Journal Press Online

RESEARCH

ALM Legal Intelligence
Court Reporters
MA 3000
Verdict Search
ALM Experts
Legal Dictionary
Smart Litigator

EVENTS & CONFERENCES

ALM Events
LegalTech®
Virtual LegalTech®
Virtual Events
Webinars & Online Events
Insight Information

REPRINTS

Reprints

ONLINE CLE

CLE Center

CAREER

Lawjobs