LOS ANGELES
Daily Journal
www.dailyjournal.com
THURSDAY, JUNE 14, 2012

Binding mediation: an oxymoron?

By Steven H. Kruis

In light of the self-determination and voluntary nature of the mediation process, "binding mediation" would appear to be a contradiction in terms. Not so, according to a recent Court of Appeal decision in which the court affirmed a $5 million binding mediation award.

In *Bowers v. Raymond J. Lucia Companies, Inc.*, 2012 DJDAR 7066 (Cal. App. 4th Dist. May 30, 2012), the trial court determined that the mediation award was enforceable under Code of Civil Procedure Section 664.6. The parties mutually agreed to proceed to a full-day mediation as part of a settlement agreement and authorized the mediator to render an award if case did not settle.

The case began when the plaintiff sued for defamation and related business torts. The defendant compelled arbitration pursuant to an arbitration agreement between the parties. After several days in arbitration, the parties reached a settlement whereby they would proceed to a "mediation/baseball arbitration." If the matter was not resolved at the conclusion of an all-day mediation, the mediator would "be empowered to set the amount of the judgment" against the defendant "at such amount between $100,000 and $5,000,000"

At the end of the mediation, the plaintiff demanded $5 million, and Defendant offered $100,000. The mediator ultimately chose $5 million. The plaintiff filed a petition with the trial court to confirm the mediation award. The trial court determined that only an arbitration — and not mediation — award could be confirmed. Instead, the trial court enforced the settlement agreement and subsequent mediator's award under Code of Civil Procedure Section 664.6, and entered judgment against the defendant for $5 million. The defendant appealed.

In affirming the judgment, the appellate court observed that Section 664.6 provides that if parties to pending litigation stipulate to settle the case, the court may enter judgment pursuant to the settlement. The record — including the transcript of the arbitration hearing, and then in a subsequent written settlement agreement and release — reflected a clear agreement between sophisticated parties providing for a full day mediation. If the matter was not resolved, the mediator was to select either the last demand or offer. The mediator chose the last, and apparently only, demand — $5 million — and the trial court properly entered judgment accordingly.

However, in *Lindsay v. Lewandowski* (2006) 139 Cal. App. 4th 1618, the appellate court reached a different result, and reversed a judgment based upon binding mediation. There the case settled in a "binding mediation," where the parties agreed that any impasse in the negotiation would be resolved by the mediator. Impasse was reached and the mediator rendered a "binding mediation ruling" that was between the last demand and the last offer. The trial court then entered judgment under Section 664.6 on a motion to enforce the stipulation for settlement over objection of one of the parties.

> Giving the mediator the power to bind the parties converts the mediation to "low-quality arbitration," without the procedural and substantive safeguards that govern arbitration.

According to the court, "binding mediation" is a deceptive, self-contradictory, and misleading term. Because mediation is a voluntary process, giving the mediator the power to bind the parties converts the mediation to "low-quality arbitration," without the procedural and substantive safeguards that govern arbitration.

That being noted, the court made it clear that the parties are not prohibited from agreeing that, if the mediation fails, they will proceed to arbitration. But if the same person is to serve as both mediator and arbitrator, great care must be taken to address what rules will apply during each phase of the dispute resolution process (e.g., mediation confidentiality rules, court-ordered mediation rules, arbitration rules, or some mix). Since that was not done, and there was some uncertainty as to the binding mediation process, the stipulation for settlement was unenforceable.

The *Bowers* court acknowledged the *Lindsay* decision and went to great lengths to distinguish it, primarily relying on contract principles and the modern trend that disfavors holding contracts unenforceable because of uncertainty. Thus, the current state of the law in California is that binding mediation is permissible so long as the parties are clear on the binding mediation process.

Permissible, but prudent? The more interesting question is whether it is prudent to give the same person — a mediator — the power to impose a binding decision on the parties. Effective mediation depends on candid and confidential communication between the parties and mediator, which is less likely to occur with the specter of a subsequent mediation award if the case does not settle.

Even in a case like *Bowers*, with sophisticated parties and a clear understanding of the process, mediating with the same person serving as mediator and then "binding mediator," is fraught with peril. The mediator's role as a decision-maker, imposing a binding decision on the parties, is inconsistent and antithetical to the trusting and neutral role of a mediator, where parties are free to share confidences in their efforts to settle the case.

Moreover, parties may develop false expectations of the mediator-turned-arbitrator, and feel betrayed by his or her binding decision. While permissible, the minimal cost-efficiency of having the same person serve as mediator and then arbitrator is outweighed by the potential for a frustrating experience that neither advances the interests of mediation nor arbitration. Binding mediation is an oxymoron.

Steven H. Kruis, Esq. *has mediated and litigated thousands of cases for the past 32 years. A former managing partner of a major San Diego law firm, he began mediating in 1993, and handles real property, business, probate, employment, and injury matters. He is a full-time mediator with Kruis Mediation. www.kruismediation.com.*

Reprinted with permission from the ***Daily Journal***. ©2012 Daily Journal Corporation. All rights reserved. Reprinted by Scoop ReprintSource 1-800-767-3263