Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2007 Issue

Binding mediation is no mediation at all


Saler

By Alan G. Saler

Although mediation is no longer in its infancy, its implementation is evolving, and the courts have begun to confront perplexing issues affecting its form and use. In *Lindsay v. Lewandowski* (2006) 139 Cal.App.4th 1618 [43 Cal.Rptr.3d 846], the court addresses the relationship between mediation, and its much older cousin, arbitration, and in particular the fundamental distinction between these two means of alternative dispute resolution. The decision underscores the pitfalls of agreeing to so-called "binding mediation" and seriously questions employing such a process for resolving potential future disputes. The *Lindsay* panel's reasoning is compelling and offers a cautionary tale.

In *Lindsay*, the parties participated in a private mediation before retired Orange County Superior Court Judge Robert Polis. During the mediation, they reached a settlement, which Judge Polis reduced to writing in the form of a Stipulation for Settlement. Matters became complicated, however,

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when the parties executed two slightly different versions. Most of the parties signed the version that provided that if a dispute arose as to the terms of the settlement, the parties would "return to the mediator for final resolution by binding arbitration." The words "by binding arbitration" were added to form language that preceded it. The word *arbitration* was typed in above the word *mediation*, which was then crossed out. Another settlement provision required Lindsay to pay Lewandowski $190,000, but if the parties could not agree upon the payment terms, the dispute would be submitted to "binding mediation" before Judge Polis. Lindsay signed this version. (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1620.)

Shortly after the two versions were executed, Lindsay retained new counsel to challenge the settlement's enforceability. Relying on Code of Civil Procedure section 664.6, the other side moved for judgment enforcing the settlement, including a court order compelling binding mediation to resolve the payment terms dispute. Judge Polis submitted a supporting declaration in which he described what occurred during the mediation. He detailed his retention, an initial mediation proposal, and his preparing the stipulation for settlement. He explained that "binding mediation" is a procedure he regularly employs and which he explains to both sides before they sign the stipulation for settlement. If a dispute arises, he asks the parties to each submit their "final offers" and hears oral argument as to why he should select their version. He then chooses as the final binding provision the term or terms of either one party or the other. (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1621.)

The trial court granted the plaintiffs' motion to compel arbitration of the payment-terms dispute, finding the parties had "agreed to an alternate dispute resolution clause." Apparently not troubled by the arguably partisan nature of Judge Polis' testimony, Orange County Superior Court Judge Dennis S. Choate ordered the parties to return to Judge Polis "to resolve their dispute over the terms of the Stipulation for Settlement, including the meaning of the term "binding mediation." (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1621.) Lindsay responded by attempting, unsuccessfully, to disqualify Judge Polis under former Civil Code section 1281.9, subdivision (c)(2), which provided that "a party shall have the right to disqualify one court appointed arbitrator without cause in any one arbitration...." (*Ibid.*)

Thereafter, Judge Polis issued a "binding mediation ruling," determining that Lindsay should pay $190,000 in cash. His written ruling described binding mediation as "simply a normal mediation process . . . within the framework of an agreement in advance by the parties that any impasse reached shall be resolved by the mediator who will select and propose a compromise figure circumscribed by the last two bargaining positions conveyed before the impasse." He added that "binding mediation has only one accepted meaning; that is, that the parties who enter intend that there shall be an agreement at the end of it, even if the mediator must make the final call." The trial court subsequently granted a motion to confirm the binding mediation award and to enforce the stipulation for settlement, entering a $190,000 judgment for Lewandowski. (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1622.)

The Court of Appeal unanimously reversed. Quoting a leading commentator on alternative dispute resolution Knight, Fannin, Chernick & Haldeman, Cal.Prac.Guide: Alternative Dispute Resolution (The Rutter Group 2004) ¶3:12.2, p. 3-4), Justice Bedsworth's majority opinion begins by acknowledging "a school of thought that recognizes binding mediation as a perfectly acceptable means of dispute resolution." He thereafter cites the only reported decision to define the concept, *Frain v. Frain,* (1995) 213 Mich.App. 509, [540 N.W.2d 741], where the court concluded that "binding mediation is functionally the same as arbitration." The *Lindsay* court clearly thought otherwise. (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1624.)

The arbitration/mediation debate

Focusing on the fact that the word *mediation* was crossed out in one of the stipulations, Justice Bedsworth questioned the parties' intention when they purportedly agreed to binding mediation. In this instance he found the term material and uncertain. He observed that the parties separate use of the terms *arbitration* and *mediation* revealed that they "did not regard binding mediation as the equivalent of arbitration." (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1623.) Neither did the *Lindsay* court. Indeed, in his concurring opinion Justice Sills eloquently characterizes binding mediation as "a half-baked arbitration" or "not 'mediation' but simply a low-quality arbitration." (*Id.* at p. 1627-1628.) He is highly critical of the term *binding mediation*, which he characterizes as "deceptive and misleading." (*Id.* at p. 1625.) He bemoans the "oxymoronic character of the concept," stating that he "can think of nothing more self-contradictory than 'binding mediation.'" (*Id.* at p. 1626.) He blames "Madison Avenue and MBA types" for having taken over what was "once called private judging" replacing it with the moniker "alternative dispute resolution." (*Id.* at p. 1627.) He surmises that "'binding mediation' has come into existence because it is kinder and gentler." But he insightfully chides that "[a] mediator with binding power is an arbitrator, not a mediator." (*Id.* at p. 1626.)

While the *Lindsay v. Lewandowski* decision applies to an unusual fact pattern, the pronouncements by Justice Bedsworth and Justice Sills emphasize the significant drawbacks of a binding mediation process. Unlike Judge Polis, who characterized binding mediation as

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"simply a normal mediation process," they express significant reservations concerning its interpretation and use. For example, Justice Bedsworth cites the absence of any rules for binding mediation, in stark contrast to the statutory provisions and Rules of Court that govern contractual arbitration (Code Civ. Proc., § 1280 et seq.), contractual mediation (Evid. Code, § 115 et seq.), and court-connected mediation programs (Cal. Rules of Court, rule 1620 et seq.) He therefore questioned whether "[t]he arbitration rules, the court-ordered mediation rules, the mediation confidentiality rules, or some mix" should apply and whether it is the trial court's role to decide. He refused to significantly burden other appellate courts with deciding on a case-by-case basis the outcome of a settlement process, the goal of which is to avoid further litigation, not to create it. (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1624-1625.)

Justice Sills went to great lengths to point out the meaningful distinction between arbitration and mediation. Mediation's hallmark is that it is voluntary. "You go to mediation, you like it, you don't, you settle, you don't, no big deal." (*Lindsay v. Lewandowski, supra,* 139 Cal.App.4th at p. 1626.) He also astutely explains why "'binding mediation' may actually retard settlement" by discouraging lawyers from candidly disclosing to the mediator opinions of value, difficulties they are having with their client, and other information that may be crucial to resolving the dispute. (*Id.* at p. 1627.) A mediator "frequently hears things from the lawyers that he would never hear were he the trial judge or arbitrator." (*Id.* at p. 1627-1628.) Such candid disclosures are unlikely to take place if a lawyer thinks it is possible the mediator may become the arbitrator. Herein lies the rub, and, according to Justice Sills, this is one practical reason why Rule of Court, rule 1620.7, subdivision (g), "requires a mediator to exercise 'caution' when combining mediation with other alternative resolution processes and to do so only with the 'informed consent of the parties.'" (*Id.* at 1628.)

The lessons of *Lindsay*

What are the lessons lawyers and neutrals should learn from *Lindsay* in considering whether to engage in binding mediation? First, so long as there is informed consent, parties are free to agree that if the mediation fails, or a dispute arises over a mediated settlement, they will proceed to arbitration before the same person. If the parties however, want the mediator to later morph into an arbitrator, they must reduce to writing such an agreement. Keep in mind that many clients have enough difficulty distinguishing between mediation and arbitration, so you run the risk that they will later say they did not understand what they were signing. You must, therefore, make certain any agreement explicitly specifies the neutral's intended, expanded role, including whether as an arbitrator they may consider facts presented to them during the mediation. Before signing, the writing should advise the parties of their right to select a different neutral to preside over what effectively will become an arbitration.

In *Lindsay,* the court permitted the mediator to submit a declaration describing what had occurred. The appellate court's opinion does not mention whether Lindsay objected to the this declaration on the ground that mediation confidentiality prevented the court from considering it. (*Foxgate Homeowners' Ass'n. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14 [108 Cal.Rptr.2d 642].) In *Foxgate*, the California Supreme Court held that Evidence Code "[s]ection 1119 prohibits any person, mediator and participants alike, from revealing any written or oral communication made during mediation." (*Ibid.*) Evidence Code section 1121 also prohibits the mediator from reporting to the court what occurred. (Cf. *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 362 [134 Cal.Rptr.2d 716] [holding that parties cannot impliedly waive the evidentiary protection afforded by mediation confidentiality]; Contra, *Simmons v. Ghaderi* (2006) 143 Cal.App.4th 410, 421 [49 Cal.Rptr.3d 342, 350] [holding that doctrine of estoppel bars party from relying on the protections of mediation confidentiality].) Hence, in documenting the terms of any agreement, bear in mind that in the event of dispute, both sides may be unable to call the neutral as a witness.

Second, aside from the challenging, technical aspects of memorializing an agreement to participate in "binding mediation," there are critical ethical concerns to consider when a neutral takes off one hat and puts on another. No party should be bullied into a settlement. A party or their counsel may consciously or subconsciously defer to the mediator's perceived preference if that neutral may later wield the power of an arbitrator. A settling party having second thoughts might later challenge the settlement as coerced. (*E.g., Morgan Phillips Inc. v. JAMS/Endispute LLC* (2006) 140 Cal.App.4th 795 [44 Cal.Rptr.3d 782] [involving allegation that arbitrator resumed acting as a mediator and tried to force the parties to settle.])

Third, binding mediation, if agreed to at the outset, or before a settlement is reached, creates a subtle appearance of impropriety because it gives the mediator a financial incentive if the case does not settle. In addition, neutrals with a penchant for decision-making may not push hard enough for a settlement, choosing instead to resolve the dispute through arbitration. If, therefore, the parties decide early on that they want the mediator to serve as the arbitrator, they might be wise not to inform the mediator until after all efforts to negotiate a settlement have been exhausted.

Finally, there is the larger concern that when a mediator steps out of his or her designated role, he or she may be unable to prevent what was learned in private caucus from influencing the

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arbitration award, even if such a confidential disclosure is not part of the evidence adduced by the arbitration proceeding. Similarly, the neutral might be more inclined to render a decision that reflects the compromise he or she was unable to broker during the mediation, rather than ruling as the merits would otherwise dictate. Could these be some of the reasons this mode of conflict resolution has not gained popularity? If binding mediation does become popular, it could have a significant, chilling effect on the mediation process by discouraging lawyers from revealing, even confidentially, their cases' weaknesses and vulnerabilities.

Binding mediation offers some limited advantages

While binding mediation should be used sparingly, in certain limited instances, there are some advantages to it as well. It insures resolution by a neutral in whose abilities the parties have confidence and whom they believe will rule impartially. It can ensure finality. Recently, I mediated the resolution of a nasty landlord-tenant dispute. The settlement permitted the tenant to remain in her apartment and required the landlord to make various repairs by a specified date. The parties agreed that if a dispute arose over the sufficiency of the repairs, I would be the final arbiter of their adequacy. The agreement also required the landlord to pay the arbitrator's fees. To no one's surprise, all the repairs were made in a timely manner.

Counsel, on occasion, have asked me to oversee the formal process of documenting a settlement in case a dispute were to arise. I have never had to make a ruling in any of those cases. The specter of an agreed-upon neutral's prompt and binding intervention may well explain why. If so, this is another effective use of binding mediation. Even then, however, the Memorandum of Settlement I employ at the conclusion of a successful mediation includes the following language: If the parties are unable to agree upon the terms and conditions of a more formal settlement agreement, the settlement memorialized in this Memorandum of Settlement is binding and fully enforceable pursuant to Civil Code section 664.6.

Always remember that the goal of any alternate dispute resolution process is finality. If the parties wind up in court litigating the process, counsel, and possibly the neutral, will be called to account.

Alan G. Saler is a full-time mediator and arbitrator with Dispute Eradication Services in Sherman Oaks and is also affiliated with Resolute Systems, Inc.