ABA Section on Dispute Resolution's Arbitration Committee E-Newsletter

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Co-Chairs: Dana Welch & Louis F. Burke **Editor: Adam R. Martin**

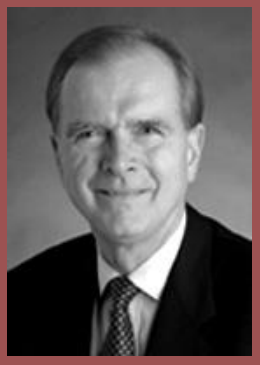
BINDING MEDIATION – AN ARBITRATION ALTERNATIVE

By: Peter G. Merrill

Binding Mediation is a simple ADR process that allows the Parties the opportunity to attempt to settle their dispute first though the use of the standard mediation process under the direction guidance of a Mediator. The Mediator conducts a standard mediation session with the Parties. If the Parties reach impasse and can't come to an agreement on how to settle their dispute, the Mediator is then charged with rendering his/her decision on how the dispute will be settled. The Mediator does not become an Arbitrator. The Mediator is not governed by the Federal Arbitration Act, State Arbitration Acts, State's Arbitration Code of Civil Procedures, etc. The Mediator is free to follow whatever process he/she chooses to be able to render his/her decision on how the dispute will be settled. His/her decision is then written on a Binding Mediation Settlement Agreement just as a normal Mediation Settlement Agreement would be written if the Parties had come to their own agreement on how to settle their dispute.

In John Cooley's book *Arbitration Advocacy (Second Ed. 1997)*, it states: "Med-Arb is often confused with a relative newcomer to the ADR process spectrum - "binding mediation". Insurance companies and plaintiffs' lawyers in search of finality in smaller-damage personal injury cases are turning to binding mediation routinely to avoid the disadvantages of arbitral or court adjudication – namely the substantial delay and costs associated with discovery, trial preparation, trial and possibly appeal." Although arbitration is generally less expensive and should be handled more expeditiously than the litigation process, the arbitration process can become very costly and time consuming especially if one or more of the Parties decides pursue extensive discovery including interrogatories, exchanges of documents, depositions, the issuance of subpoenas, etc.

Member Spotlight: Ed Lozowicki



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Welcome to the Inaugural Arbitration Committee Member Spotlight! In forthcoming issues of the E-Newsletter, we will be recognizing Committee Members who have made significant contributions to the Committee and the field of arbitration. This issue, we are proud to hear from Ed Lozowicki, a full-time arbitrator and mediator, and of counsel to Sheppard Mullin in San Francisco, at www.lozowickiADR.com.

1. How did you get into the dispute resolution field?

My first experience with alternative dispute resolution was early in my career when, as house counsel, I represented the company in the arbitration of union grievances. This process was required by the collective bargaining agreements and included such claims as wrongful discharge of employees and jurisdictional battles. Later, when I went into private practice, I acted as trial attorney in the arbitration of construction claims such as those for changed conditions, delay and disruption, and defective work. I also represented the clients in mediation of these claims pre-trial. In the course of this work I had frequent contact with the American Arbitration Association ("AAA") and got to know its professional staff.

Ed Lozowicki, Cont.

2. What roles do you currently play in the dispute resolution field—e.g., domestic arbitrator, international arbitrator, mediator, lawyer representing clients in these processes, other? What percentage of your time do you estimate that you spend in each of these roles?

Since I retired from private practice three years ago I no longer represent clients. Rather I now work as a full-time arbitrator and mediator. I am serving on the AAA, FINRA, CPR and California Public Works arbitration panels. The cases primarily involve construction, energy, real estate and securities disputes in the United States. Currently most of my work is acting as an arbitrator with a few matters where I serve as mediator.

3. How did you begin your career as an arbitrator?

While I was representing clients in AAA arbitrations, the Association appointed me to its commercial/construction panel and I began to hear cases. Later I was appointed to its Large Complex Case Panel. I also gave in-house training seminars on commercial arbitration, sponsored by AAA, to companies in Silicon Valley. In addition, I wrote a book on arbitration under the California Act which was published by AAA.

4. What knowledge, experience and/or skills are essential for a successful arbitrator?

Neutrality is most important. An arbitrator must be able to avoid any biases or preconceptions in dealing with the parties, witnesses and counsel. This can be challenging since one or more participants in the case may have difficult personalities which are not relevant to the merits. Keeping an open mind about the case is very important. This requires patience in that an arbitrator should not reach any final conclusions about the merits until all of the evidence and briefs are submitted. The ability to listen carefully is a key skill since an arbitrator frequently evaluates the credibility of witnesses and lawyers.

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Prior to commencing the Binding Mediation session, the Parties should have signed a Binding Mediation Agreement or Addendum that should include two very important points: (1) during the mediation process, the Mediator, during the private caucus sessions, may be provided with certain personal, private and confidential information by the Parties which may be taken into consideration by the Mediator in rendering his/her decision. (2) If any or both of the Parties fails or refuses to sign the Binding Mediation Settlement Agreement (written by the Mediator), the Binding Mediation Settlement Agreement shall be binding on the Parties as a result of signing this Binding Mediation Agreement or Addendum. The decision of the Mediator is similar to an Arbitration Award in that the Parties have pre-agreed that the decision maker will render his/her "Final and Binding" decision that will not require the written signatures or agreement of the Parties.

How many times have you conducted a mediation where the Parties were close to an agreement but would not budge any further? If you had a Binding Mediation Addendum with you, you could offer to the Parties that you could make the decision for them thus avoiding any further involvement with litigation or arbitration, which ever would be their next step in settling their dispute. It would save them the extra costs, time and the rigors and discomfort of proceeding through the litigation or arbitration process. On larger projects, one shoe does not fit all. My company, CDRS, recommends a graduated dispute resolution process such as: any dispute under $25,000.00 shall be settled through Binding Mediation. Any dispute between $25,000.00 and $250,000.00 shall be settled through Binding Arbitration utilizing a single Arbitrator and any dispute over

Arbitration Institute - SAVE THE DATE!!!!

The Tenth Annual ABA Arbitration Training Institute will be held on June 15 and 16, 2017 in Chicago at the ABA Headquarters. This program will feature leading arbitrators and advocates in plenary sessions on all aspects of the arbitral process. It is the *essential* annual update for all arbitrators and advocates. Small, facilitated breakout sessions will follow each of the plenaries to allow participants to exchange ideas and learn from each other. Concurrent sessions on securities, employment, construction and health care (new this year) arbitration will allow participants to delve more deeply into each of these substantive areas.

The Arbitration Training Institute is sponsored by the American Bar Association Sections of Dispute Resolution, Litigation, Labor and Employment Law, and the ABA Forum on Construction Law, as well as the American Arbitration Association, JAMS and the College of Commercial Arbitrators. ACE and CLE credit will be offered.

$250,000.00 shall be settled through Binding Arbitration utilizing a panel of three Arbitrators.

In California and Maryland, there are very strict guidelines relating to the arbitration process including extensive Arbitrator disclosure procedures, the website publishing of information about Arbitrator disclosure, the fees of the Arbitrator and Arbitration Provider, information on the Parties and the outcome of the Arbitration Award including who was the prevailing Party, the amount of the Award and other information that is generally not shared with the public, which pretty much eliminates the major privacy and confidentiality benefits of Arbitration. CDRS usually recommends the use of Binding Mediation in those states to provide a more private and confidential process. A CDRS Binding Mediation Agreement, attached here, is used when Parties elect to switch to Binding Mediation as opposed to Arbitration that is specified in their contract.

There is no limit on the size of the case that can be settled through Binding Mediation. *In Bowers v Raymond J. Lucia*, 12 C.D.O.S 5876, 206 Cal. App 4th 724 (2012), the decision of the Mediator was $5,000,000.00 which was affirmed by the California Appeals Court. Basically, courts follow and enforce contracts. If Binding Mediation is specified in the contract and both Parties were fully aware of and agreed to utilize the process, courts should "enforce the provisions of a contract" including the ADR methodology agreed to and specified by the Parties.

Although there are some disadvantages to utilizing Binding Mediation in place of Binding Arbitration to settle a dispute, in certain cases, it can be the simplest, least expensive and the most expeditious ADR process that the Parties can select to settle a dispute. There will be a follow-up article on the pros and cons, advantages and disadvantages, enforcement differences, etc. between Binding Mediation and Binding Arbitration in the next issue of this newsletter.

Peter G Merrill *is the President and CEO of Construction Dispute Resolution Services, LLC. who is widely recognized as the largest exclusive provider of construction ADR in the USA as they have Construction ADR Specialists located in all 50 states, Washington DC and in several foreign countries. Mr. Merrill serves on the Steering Committee of the New Mexico State Bar Association Dispute Resolution Committee and chairs the Arbitration Subcommittee. He also serves on the Executive Board of the National Association of Home Builders. CDRS website: constructiondisputes-cdrs.com.*

Ed Lozowicki, Cont.

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In addition to these qualities, some prior experience in trial work is helpful since it provides the arbitrator with experience in "sifting the wheat from the chaff" while weighing the evidence. Finally, some business experience is helpful in understanding the customs, practices, jargon and technology of particular industries.

5. Do you specialize in a particular subject matter or field? If so, how did you become involved in that field.

My longest experience is in the construction and energy fields. When I first started law practice, I was house counsel to an international corporation that had several operating divisions. I acted as primary counsel to its construction division and handled contract claims, labor disputes and regulatory matters. At the same time, I learned a great deal about the business and had the good fortune to visit many large projects and learn about the engineering designs and construction techniques needed to build them. Another division of the company had manufacturing plants which were large energy users. I represented them in public utility rate and regulatory cases which affected the plants, and learned about the energy business. In the process of all this in-house work I learned much about the construction and energy industries.

6. In your opinion, what is the most important issue in arbitration today?

When I started handling labor and construction arbitration cases as a young lawyer, the cases moved quickly through hearing and award with little discovery and motion practice. Nowadays in commercial arbitration the parties and/or their lawyers push for extensive discovery and depositions, and often file dispositive motions, all of which delays evidentiary hearings and drives up the cost of arbitration. Users of commercial arbitration are now critical of the high cost and long time required to obtain a hearing and award. Some users criticize the arbitration process as comparable to court litigation but without the benefit of appeal rights. To remain an attractive form of alternative dispute resolution arbitration must return to its roots as a streamlined process that moves faster and costs less. Arbitrators can facilitate these goals by controlling the kind and amount of discovery and motion practice permitted in a case. In commercial arbitration, an exchange of documents and live testimony with cross-examination at the hearings are often sufficient for an arbitrator or panel to evaluate the merits and reach a just conclusion.

7. Is there anything else you would like to tell the readers about yourself?

I have had the good fortune to serve on the board of directors of a national corporation and the governing boards of several non-profit associations. Seeing the inner workings of these organizations and their management has been illuminating and rewarding. I also enjoy teaching alternative dispute resolution for law students, and writing and speaking on that subject for ADR professionals.

Owens v. American Arbitration Association, Eighth Circuit Court of Appeals

By: Dana Welch, Committee Co-Chair

In *Owens v. American Arbitration Association*, 2016 WL 6818858 (8th Cir. Nov. 8, 2016), the Eight Circuit extended arbitral immunity to arbitral administrators. When the AAA panel was chosen, one of the arbitrators disclosed that he had consulted on unrelated matters for the same firms representing the parties, a company and its terminated CEO

The panel issued an initial $3 million award for the former CEO. The company moved to remove the arbitrator who had made the initial disclosure on the basis that his disclosure was incomplete. AAA did not have a rule or procedure on how arbitrators should be removed, but allowed the CEO to respond to the motion. (None of the arbitrators knew the motion had been made.) The AAA removed the arbitrator, and the remaining two panelists issued a $3 million final award for the CEO.

A Minnesota state court granted the company's vacatur motion, and the CEO turned around to sue AAA in Minnesota state court for breach of contract, unjust enrichment, and tortious interference with contract. AAA removed to federal court. The 8th Circuit dismissed the suit on the basis that arbitral immunity extends to arbitral providers.

Moral of the story: the only relief available to an unhappy party to an arbitration is vacatur, not a suit against the arbitrator or the provider.

Dana Welch is an arbitrator based in Northern California who is listed on the American Arbitration Association's Large and Complex Commercial Case and Employment panels, and the CPR Institute for Conflict Resolution and Prevention. She is the former Chair of the State Bar of California's Standing Committee on ADR, and is a fellow of the College of Commercial Arbitrators. **www.welchadr.com**

Call for Publications:

Just Resolutions

The Arbitration Committee is responsible for producing the June issue of the Section of Dispute Resolutions' E-Newsletter, Just Resolutions. We have decided to focus on the important issue of the circuit split on the NLRB position banning class action waivers under the National Labor Relations Act. We are actively seeking authors for the following 4 articles:

1. Introduction: setting the stage – how has the Supreme Court approached similar issues, for example, how has it dealt with the enforceability of arbitration agreements that waive certain state law common law rights?
2. Summation of the Split – How have the Circuit courts ruled on this issue and descriptions of major cases.
3. Pro article – Why the NLRB's position should be upheld.
4. Con article – Why the NLRB's position should not be upheld.

Deadline – If you are interested in writing any of these articles, please let Adam Martin know at arm3f@virginia.edu by January 13, 2017. The Draft articles will be due on April 14, 2017

E-Newsletter

The Committee is continually seeking short articles, case notes, news and recent developments, information about proposed or pending relevant legislation, and interviews, as well as information about relevant upcoming events. Articles should be **100-300 words**, concise, and on a timely topic. We also welcome links to longer articles or publications that members may have written.

Please include a suggested title for your article at the top of the page and try to keep citations to a minimum. Feel free to include either a link to your professional profile or a short professional bio (70-80 words).

Please send submissions as an e-mail attachment in **Word format** by **February 17, 2016** to Adam Martin at arm3f@virginia.edu