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## **Binding Mediation**

*The Time Has Come for this ADR Process*

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When I first heard of “Binding Mediation,” I told myself that it was an oxymoron and couldn’t possibly work in settling disputes. My first introduction to binding mediation was when I attended an “Advanced Mediation” program at the Straus Institute for Dispute Resolution at the Pepperdine University School of Law in 2004. Prior to attending that program, I thought that I had a full comprehension of all forms of ADR, however, binding mediation was a new term for me, so I decided to look into binding mediation to see if there was any validity to it being an effective form of ADR. I found that I needed to have an open mind to really appreciate the value of binding mediation. I had to put aside my belief that mediation would only be a successful ADR process if the parties reached a mutual settlement to their dispute.

Binding mediation is an ADR process that has been utilized to settle disputes for many years. At Pepperdine, I purchased a copy of 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.” Until I read this, I was under the impression that arbitration was most likely the least expensive, most expeditious and simplest process to settle a dispute with guaranteed finality. It brought to mind President Abraham Lincoln’s quote: “Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time.”

Having now been involved with several binding mediation cases across the U.S., I have concluded that binding mediation is the least expensive and most efficient ADR methodology to settle a dispute with finality. Especially on smaller disputes, when there is virtually no discovery necessary, binding mediation should prove to be the best ADR method to settle a dispute. Arbitration is generally considered to be far less expensive, more expeditious and simpler than litigation; however, it can become more costly and drawn out if the parties pursue many of the tenets of litigation such as extensive discovery, use of multiple testifying experts, witnesses, etc. One of the few reasons that an Arbitration Award may be vacated under Section 10 of the Federal Arbitration Act, is: “refusing to hear evidence pertinent and material to the controversy....” The Federal Arbitration Act, Uniform Arbitration Act, State Arbitration Acts, State Codes of Civil Procedure, etc., specify rules and procedures that must be followed in conducting the arbitration process. There are no “Binding Mediation Acts” that govern the binding mediation process. It is basically in the hands of the mediator and the parties to agree on the process to be followed in conducting a binding mediation. Binding mediation commences with a standard mediation process. Should the parties reach impasse on any issue(s) through the standard mediation process, the mediator will be called upon to make a final and binding decision that will settle the unresolved issues. It is important to recognize that the mediator is a mediator and not an arbitrator. Many states have Mediation Acts; however, they generally relate only to the confidentiality of the mediation process and the documents and testimony exhibited and introduced during the mediation process.

As an example of how expeditious the binding mediation process can be: My company, Construction Dispute Resolution Services, LLC (CDRS), had a request from a contractor who indicated that he needed a decision on a dispute with a homeowner “As soon as possible.” The contractor was in Santa Fe, NM where CDRS has its office. That was on a Friday afternoon. I contacted a mediator in the area, got the parties to sign a Binding Mediation Agreement, and had them drop off the signed Agreement in the CDRS mailbox with a check to cover the expected time of the mediator. We held the binding mediation session that next Monday, one business day after the request had been made. The mediator was called on to render his decision, which the parties accepted, and then they went on with their construction project. Should that dispute have been sent to court or even arbitration, it most likely would have caused that construction project to shut down pending the arbitration award or court decision.

If the parties have multiple issues being addressed through the binding mediation process, should the parties come to an agreement on any of those issues during the mediation session, a standard Mediation Settlement Agreement should be written to reflect the agreement between the parties and signed by the parties prior to the mediator continuing on with the binding mediation process. If the parties have come to an agreement on any of the issues in dispute and have not agreed to settle all disputed issues, the binding mediation process will require two different Settlement Agreements. (1) A standard Mediation Settlement Agreement should cover those issues that were agreed to by the parties which should be signed by the parties, and (2) a Binding Mediation Settlement Agreement, written by the mediator, which will reflect the decision of the mediator on the remaining issues in dispute. Both the standard Mediation Settlement Agreement and the Binding Mediation Settlement Agreement should be signed by both parties; however, it is not required that either or both parties sign the Binding Mediation Settlement Agreement.

Should the parties have reached a resolution on any of the issues in dispute, it is important for the parties to first sign the Mediation Settlement Agreement that will reflect the issues in dispute that were settled by the parties prior to having the mediator render his/her (his) decision on the unresolved issues. If the mediator renders a decision on the unresolved issues prior to the parties signing the Mediation Settlement Agreement and one of the parties does not like the mediator’s decision, which is most likely the case, and that unhappy party gets upset and walks out of the mediation session, then there will be no signed Mediation Settlement Agreement on the issues that were agreed to by the parties. Always get a signed Mediation Agreement on the resolved issues prior to issuing a decision by the mediator on the unresolved issues which will be contained on the Binding Mediation Settlement Agreement.

As it is the responsibility of the mediator to render a decision on any unresolved issues, he/she will be rendering the decision based on the information that was provided during the mediation session including information that was shared with the mediator during any private caucus meetings with either or both of the parties. Should the mediator have any questions for the parties prior to rendering the decision, the mediator is free to ask them. Unlike an arbitration award where the arbitrator can take up to 30 days to issue an award, the mediator is charged with rendering the decision at the conclusion of the mediation process to allow the parties to sign the Binding Mediation Settlement Agreement. The mediator should not allow for post-mediation submittals or other information to be submitted after the mediation session has closed. Some attorneys have a problem allowing the mediator to render a decision if normal discovery and submittals were not made prior to the mediation session.

There is one major disadvantage of utilizing binding mediation as opposed to standard mediation. A mediator, in conducting a binding mediation, must have a different behavior than is customary in a standard mediation. In a standard evaluative mediation, the mediator shares his thoughts on the merits of the case with the parties, usually in a caucus setting. A “binding mediator” must be careful to not indicate to the parties what the mediator is thinking on the merits, what might be a fair settlement offer, etc.,

because it might influence the parties into settling or not settling based on what they perceive might be the mediator's decision. If a party perceives that the mediator is favoring their position on the dispute, they might not settle and will take their chances on the mediator deciding in their favor when you issue your decision. Conversely, if the mediator gives a party the feeling that the mediator is favoring the position of the other party, they might tend to try to settle the case prior to the mediator rendering his decision, which they perceive would most likely be favoring the other party. As a result of the limitations of the mediator in discussions with the parties, it should be expected that the possibility of reaching a settlement through the mediation process is somewhat diminished. **The lower possibility of settlement by the parties during the Binding Mediation process is perhaps a small price to pay to avoid the more costly, lengthy and more complicated arbitration or litigation process.** Binding mediation does offer the parties a chance to settle the dispute but if settlement is not reached through mediation, the mediator will have a much better understanding of where the parties are in their positions related to the dispute.

There are basically two primary ways that binding mediation can be utilized. It can be written into a contract or the parties may elect to utilize binding mediation if they come to an impasse at the conclusion of the mediation process. How many times have you been involved in a mediation where the parties come close but do not reach a settlement? Wouldn't it be great if the mediator could then be called upon to make a decision which would keep the dispute from continuing on with a more costly and lengthy arbitration or litigation to settle the dispute? Virtually every time that a CDRS ADR Specialist serves as a mediator, he has a copy of a Post-Mediation Binding Mediation Addendum ready to present to the parties and or their attorneys should they reach impasse. The parties have not been told of the binding mediation option prior to the mediation as it is important that the parties not hold back on sharing all information with the mediator which will increase the chances for settlement during the mediation session. If the parties understand that the mediator will not be involved in rendering a decision on this dispute, they should be open to share anything and everything with the mediator which should add to the chance for success in the mediation process. Note that it is only with the agreement of both parties and the mediator that the binding mediation process can be utilized at the end of a mediation session. The mediator does have discretion not to offer binding mediation if he does not feel comfortable having the responsibility to render a final and binding decision in that particular case.

A mediator always should have the option to recommend that the mediation become a binding mediation should the parties reach impasse. The primary responsibility of the mediator is always to put his/her best efforts into having the parties reach a settlement during the mediation process. Only if the mediator feels that he/she can render an unbiased and fair decision should the mediator recommend binding mediation to the parties at the end of an unsuccessful mediation. The mediator will most likely have already formed an opinion or might even have decided how he would settle the dispute by the end of the mediation session. If the parties are close to settlement, the mediator's recommendation of moving on to the binding mediation process may be able to save them a great deal of time, money and anguish. Should the parties have come close to a settlement, the mediator may suggest to the parties that the decision as a binding mediator will be somewhere between the two last offers of each party, similar to a "high-low" or "bounded" arbitration. The mediator will have a better acceptance to the binding mediation process if the mediator indicate that you will stay within the last offers of the parties.

With binding mediation, there is no need for a pre-mediation conference call to set up discovery as is customary with arbitration. Without any formal "Binding Mediation Rules," the mediator has the authority to allow limited discovery and other processes that he/she feels should be required for the binding mediation process. The mediator has the authority to allow whatever he feels is appropriate for the binding mediation process. Although it is not required, in binding mediation it is recommended that the parties submit a list of those participating in the binding mediation process to allow the mediator to do a conflicts check. In binding mediation, there are no requirements related to mediator disclosure that

would not normally come into being for a normal mediator although it is recommended that the mediator not have any conflicts that might have influenced his binding mediation decision.

Although binding mediation generally is used on smaller cases, there is one notable case where binding mediation was specified in a contract of a rather large case, and the decision of the mediator was enforced by the California Appeals court. *Bowers v. Raymond J. Lucia*, 206 Cal. App 4<sup>th</sup> 724 (2012). It was a “Baseball Binding Mediation” case where the decision of the mediator was \$5,000,000.00 which was then upheld by the California Appeals Court. *Bowers* demonstrates that courts are willing to support enforcement of new ADR methodologies such as “Baseball Binding Mediation.” The enforcement of a Binding Mediation Agreement is different than the enforcement of an arbitration award. As the Binding Mediation Settlement Agreement is a contract and is not subject to any of the provisions of any arbitration acts, should one of the parties not comply with the decision of the mediator, the Binding Mediation Settlement Agreement will need to be presented to the courts as a breach of contract issue rather than a motion to enforce an arbitration award.

One of the advantages that an arbitrator has over a mediator who renders a final and binding decision is that an arbitrator has “arbitral immunity” similar to “judicial immunity” that is granted to judges. In all Binding Mediation Agreements or Binding Mediation Addendums, the mediator and mediation provider should be granted “the same legal immunity that is afforded to arbitrators.” CDRS does not recommend that a person (and the mediation provider) serve as a mediator in a binding mediation without being afforded the same legal immunity as is granted to an arbitrator or judge. It is assumed that each ADR professional carries the appropriate insurance to cover any possible legal action against them, however, the granting of arbitral immunity in a contract calls attention to the parties that the mediator (and mediation provider) is basically not subject to any future court action should one or both of the parties be unhappy with the service of the mediator in the binding mediation process.

The selection of the proper ADR process to settle future disputes is always a difficult decision, especially on large projects where one specified ADR process might not be appropriate for all disputes. If it is a very large dispute, most likely a panel of three arbitrators would be the best method to settle the dispute. A lesser dispute might be best handled by a single arbitrator. If the dispute was of a minor nature, perhaps binding mediation would be best. CDRS recommends on larger projects that there be multiple ADR processes specified in the construction contract such as: EXAMPLE: “All disputes under \$25,000.00 shall be settled through binding mediation. All disputes between \$25,000.00 and \$500,000.00 shall be settled through arbitration with a single arbitrator. All disputes over \$500,000.00 shall be settled through a three-person arbitration panel.” Regardless of the process that is specified, it should yield a final and binding resolution to the dispute. Mediation alone may not yield a resolution to a dispute.

It is important that a Binding Mediation Agreement or Addendum state these very important provisions:

1. Should one or both of the parties neglect to sign the Binding Mediation Agreement, it shall be binding upon the parties by virtue of signing this Binding Mediation Agreement (Addendum, Contract, etc.).
2. The parties understand that the mediator may have been privy to private and confidential information, provided during the mediation process, that might affect or be used in the decision of the mediator.
3. The mediator and mediation provider shall be granted the same legal immunity that is afforded to an arbitrator.

In recent years, California, in Section 1281.96 of the California Code of Civil Procedure and Maryland, in Section 14-3902-05 of the Maryland Commercial Law Code, have specified that much of the information that is usually considered confidential related to arbitration hearings be published on the

website of the arbitrator or arbitration provider including the name and fees of the arbitrator, what percentage of the fees was paid by each party, the name of the non-consumer party, the results of the arbitration award including the amount of the claim and the amount of the award, other relief granted in the award, and other information that is generally considered confidential. In addition, there are specific requirements related to arbitrator disclosure that go well beyond what is usually required of an arbitrator including a requirement that the arbitrator issue a disclosure statement within 10 days of his appointment. CDRS has a special [Binding Mediation Agreement](#) that we use when parties, especially in California and Maryland, wish to change to binding mediation to settle a dispute where their contract specifies binding arbitration to settle their disputes. Most states have “Mediation Confidentiality Acts” or similar acts or regulations which should afford almost the same degree of confidentiality that you would expect through the arbitration process.

Binding mediation may not be the best methodology to settle all disputes; however, it certainly has its place in the ADR industry and should prove to be the least expensive, most expeditious and simplest ADR process to settle a dispute. If you have an open mind and consider the nature of possible disputes, the size of the potential disputes, the time and energy that might be required in settling disputes, binding mediation might be the best ADR methodology to be specified in an agreement or contract to settle future disputes. Please also consider offering binding mediation should the parties in a mediation come to impasse. Binding mediation works.



**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 is currently serving as the chairman of the ABA Arbitration Committee’s Arbitration Rules Subcommittee. CDRS website: [constructiondisputes-cdrs.com](http://constructiondisputes-cdrs.com).