

BINDING MEDIATION: AN INEXPENSIVE OPTION FOR ADR

The hope and promise of alternative dispute resolution ("ADR") processes is that they will resolve disputes more efficiently and with less expense than litigation. But, when the parties cannot achieve a negotiated settlement and turn to arbitration, they find that standard arbitration, which allows discovery and motions, is not nearly as simple and inexpensive as they had hoped.

BINDING MEDIATION TO THE RESCUE!

Binding mediation, also known as mediation-arbitration, or "med-arb," allows the parties to participate in mediation first, but if they cannot reach an agreement, the ADR neutral changes hats; the mediator becomes arbitrator and makes a decision that binds the parties. This process can take place over a two-day period - one day for mediation and, if needed, a second day for arbitration - with no opportunity for discovery or motions. There are many possible variations, and the process can be tailored to the circumstances. Of course, the parties must first contractually agree to such a simplified process and waive other alternatives. Such waiver is more readily enforceable if the parties have relatively equal bargaining power, sophistication and legal representation. The binding mediation agreement should be carefully structured to properly address (under both state and federal law) questions of confidentiality, role of the neutral, notice, waiver and non-appeal.

Binding mediation is an ADR option that should be given serious consideration in health care related contracts. It may not be appropriate to address overly complex or extremely high dollar issues, but it can be an ideal choice for inclusion in physician or executive employment agreements, for example.

Binding mediation is an option that is increasingly recognized by courts and by statutes. A Colorado statute, for instance, defines med-arb as "a process in which parties begin by mediation, and failing settlement, the same neutral third party acts as arbitrator of the remaining issues." C.R.S. § 13-22-302(2.3). A significant number of courts have found binding mediation agreements enforceable. For a non-exhaustive sampling of binding mediation cases, see the listing below.

In conclusion, by creatively structuring non-traditional ADR provisions in appropriate agreements, the parties may end up much more satisfied with their dispute resolution experience. Binding mediation is a streamlined process that reduces burdens and expense, eliminates delay and provides a certain and final outcome so the parties can move forward more productively.

If you have any questions about this article or about binding mediation and ADR, please contact **Mark Sabey** at (303) 801-3538 or marksabey@hallrender.com or your regular Hall Render attorney.

Binding Mediation Case Samples

- *Rodriguez v. Harding*, No. 04-0200093CV, 2002 WL 31863766, at *4 (Tex. Ct. App. Dec. 24, 2002) - Rejecting challenge to med-arb award brought on the ground that the neutral engaged in ex parte contact with the parties prior to arbitration.
- *In re Cartwright*, 104 S.W.3d 706, 715 n.6 (Tex.App. 2003) - Interpreting Ethical Guidelines for Mediators to permit parties to request and agree to neutral third parties occupying dual roles.
- *Allied Erecting & Dismantling Co., Inc. v. Qwest Communications International, Inc.*, No. 08 MA 212, 2010 WL 4927617, ¶ 30 (Ohio.Ct.App. Dec. 2, 2010) - Agreement to neutral acting in dual roles implicitly waives statutory confidentiality protections.
- *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175, ¶¶ 27, 28 (Ohio.Ct.App. June 20, 2003) (unreported) - Since arbitration is a creature of contract, binding mediation agreement is enforceable if the parties waived of mediation confidentiality, consented to the mediator/arbitrator dual role and established the process for submitting evidence.
- *Miller v. Miller*, 707 N.W.2d 341, 345 (Mich. 2005) - Refusing to vacate award because parties contractually agreed to binding mediation and the hearing was sufficient for purposes of the Domestic Relations Arbitration Act when the agreement allowed the hearing to take place in two separate rooms.
- *Bowers v. Raymond J. Lucia Co., Inc.*, 142 Cal. Rptr. 3d 64, 70 (Cal.Ct.App. 2012) - Finding agreement to engage in binding

mediation sufficiently certain to be enforceable.

- *U.S. ex rel. TKG Enterprises, Inc. v. Clayco, Inc.*, 978 F.Supp.2d 540, 547 (E.D.N.C. 2013) - Finding that med-arb is not inherently unconscionable "especially where sophisticated business entities have agreed to such a provision in a commercial contract."
- *Kern Health Systems v. Allied Management Group Special Investion Unit, Inc.*, B258326, 2016 WL 1650523, *10 (Cal.Ct.App. April 25, 2016) (*unpublished*) - Recognizing binding mediation in a dispute between health plan and provider group.
- *Nike, Inc. v. Enter Play Sports, Inc.*, No. 3:14-cv-1104-SI, 2016 WL 3067439, *7 (D. Or. May 31, 2016) - Terms of settlement agreement, including binding mediation, were certain and enforceable.