Friedman Mediation
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We now have a new concept to add to the ADR lexicon — binding mediation. I know it sounds bizarre, how can mediation, a facilitative process to encourage the parties to voluntarily agree to settle a case, become a decision making process where the mediator dictates the terms of the settlement at the end of an unsuccessful mediation? Well, compliments of the parties and the California Court of Appeal in Bowers v. Raymond & Lucia Companies, 206 Cal. App. 4th 724 (2012), if the parties agree to binding mediation, the Court will enforce the mediator's decision under California Code of Civil Procedure, Section 664.6.

Binding mediation, as distinguished from a mediation/arbitration or "med/arb" is an even more dangerous process for the parties. Although a med/arb suffers from the same weakness of using the same neutral as mediator and arbitrator, at least it affords the parties a hearing and due process in an arbitration of the case. In contrast, a binding mediation calls for the mediator to dictate the terms of a settlement at the conclusion of an unsuccessful mediation.

How can the parties fully engage in mediation when they have to worry about what they say to the mediator about the case? Binding mediation eliminates the possibility of any candor from both the parties and the mediator. The mediator may be concerned that typical devil's advocacy engaged in during the course of a mediation may show bias on the part of the mediator who will decide the case at the end of the day.

If you are contemplating engaging in a binding mediation, I encourage you to read the Bowers case in terms of understanding what you are getting yourself into as well as in drafting an enforceable binding mediation agreement. If you are a mediator in such a case, there is little doubt in my mind that full arbitrator disclosure will be required in order to insulate the mediator's decision from collateral attack.

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