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SHELLEY EADES

BLACK AND WHITE: Arguing that the inclusion of an arbitration clause doesn't make a document drawn up in mediation enforceable, Shartsis Friese partner Arthur Shartsis is zeroing in on the need for confidentiality and openness.

Air of enforceability

Court mulls if arbitration clause can turn deal prepped in mediation into fair game

By Mike McKee
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Arthur Shartsis says the case he's arguing before the California Supreme Court on Wednesday goes to the very heart of keeping mediations confidential.

But his opponent, Gilbert Serota, says Shartsis is simply misusing the state's mediation statutes to help his client renege on a valid settlement.

To say there's disagreement between the two San Francisco lawyers would be an understatement. But questions by the court's seven justices should clear the air quickly, and, incidentally, help further the educations of more than 750 students.

Fair v. Bakhtiari, S129220, is one of eight cases the Supreme Court will hear today and Wednesday in the historic mural room of the Santa Barbara County Superior Court. The justices travel once a year to cities where arguments aren't normally held as part of a special outreach session to educate students about the court system and increase public understanding of the judiciary.

Fair v. Bakhtiari could be a daunting case for students to follow because it deals with the complex workings of the mediation process. But it turns on a very narrow legal issue — whether an arbitration clause in a list of proposed settlement terms turns a mediated document into a binding agreement that's admissible in later legal proceedings.

Shartsis, a partner in Shartsis Friese who will argue the defense position, said last week that a ruling allowing confidential mediation terms to be admissible in trial courts or arbitrations would encourage opposing parties to be less than candid.

"You'd be looking over your shoulder," he said. "If you have a bright line of what you can do and can't do, then you can have some comfort that things will remain confidential."

The case began in 2002 when Thomas Fair sued business partner Karl Bakhtiari and ex-wife Maryann Fair for allegedly conspiring to run him out of the multimillion-dollar real estate business the three had founded.

Mediation before JAMS neutral Eugene Lynch, a former federal judge, led to a proposed settlement that included a $5.4 million cash payment to Fair for all his stock and interests. Negotiations reached an impasse, however, over what constituted Fair's interests.

Fair then filed a motion to compel based on the arbitration clause in the settlement. But it was denied by San Mateo County Superior Court Judge George Miram, who ruled that state Evidence Code §1119(b) makes anything prepared during mediation inadmissible in a subsequent arbitration or civil action.

San Francisco's First District Court of Appeal reversed in 2004, holding that the mediation document outlining settlement terms was admissible and that an enforceable agreement to arbitrate existed. The court said a settlement term subjecting all disputes to JAMS arbitration rules effectively made the document binding as a matter of law.

"The inclusion of this term requiring resolution of all disputes under JAMS arbitration rules," Justice J. Anthony Kline wrote, "shows that the parties contemplated that an arbitrator would, in the event of any disputes related to the settlement terms document, consider and resolve such disputes."

Justices Paul Haerle and Ignazio Ruvolo concurred.

In his high court brief, Shartsis argues that the appellate court misconstrued a sep-

arate evidence code, which allows exceptions to mediation confidentiality if an agreement expressly provides "that it is enforceable or binding or words to that effect."

An arbitration clause, Shartsis argues, doesn't constitute "words to that effect."

"Nothing in those words gives a clue that they make the entire document enforceable and binding," Shartsis wrote. "They do not even say there is an agreement."

Shartsis' opponent, Serota, a partner in Howard, Rice, Nemerovski, Canady, Falk & Rabkin, said last week that there "never was a question" that a settlement had been reached. It had been signed by all the parties and the mediator, he said.

"The mediation statute," Serota argued, "is being used [by Fair] as nothing but a convenient vehicle for reneging on a settlement agreement."

In his court brief, Serota asserts that admitting a settlement to show the parties' intent would not mean "exhuming" the negotiations. A need for confidentiality, he added, doesn't justify excluding an enforceable settlement when mediation succeeded.

"Rather," he wrote, "making parties honor their promises and be bound by their representations to California judges discourages the kind of bad-faith conduct and settler's remorse clearly evident here."

Shartsis suggested last week that if the appellate court ruling is affirmed, lawyers won't ever place arbitration clauses in mediated settlement proposals.

"Why would you take that risk that someone would say, 'Aha, gotcha,'" he said. "I think you just wouldn't do that."

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