How to Increase Your Chances of Reaching a Successful Mediation Settlement Agreement

Webinar – January 13, 2016 – 2:00p to 3:15p ET

PROGRAM SUMMARY

Speakers: Conna Weiner and Edna Sussman

Ironically, settlement agreements resulting from a mediation, a process designed to prevent or end litigation, are often the subject of litigation themselves. This program will present measures that should be considered to increase the chances not only that the mediated settlement agreement will be “bullet proof” if litigation follows, but also to provide a process that eliminates or at least reduces the likelihood that any party will walk away from or seek to set aside a settlement. In striving for such a process and agreement, it is critical to pay close attention to all three phases of the mediation: (a) the contents of the agreement to mediate, (b) the conduct of the mediation, and, finally (c) the preparation of the documentation of the settlement agreement.

AGENDA

2:00 p.m. Welcome and Introduction of Speakers (5 minutes)

2:05 p.m. Successful Mediation Agreements (60 minutes)

The Legal Framework
Preparation for and conduct of the Mediation
Recording the Agreement

2:55 p.m. Conclusion and Questions (10 minutes)

3:15 p.m. Evaluation (5 minutes)

3:20 p.m. Adjourn
EDNA SUSSMAN, ESQ.

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Background

Current: Arbitrator and mediator since 1995, full time since 2003, Distinguished ADR Practitioner in Residence at Fordham Law School, Principal SussmanADR LLC

Former: Litigation Partner at White & Case, LLP; Of Counsel, Hoguet Newman Regal & Kenney, LLP; Litigation attorney representing clients and serving as an arbitrator and mediator in complex domestic and international commercial litigations, arbitrations and mediations. Cases handled involved claims or were determinative of transactions ranging in value from $1 million to $3 billion.

Dispute Resolution Experience

Arbitration – conducted over 100 arbitrations of complex multi-million dollar business disputes as chair, sole and co-arbitrator under many institutional rules in administered and ad hoc proceedings; one of six trainers for the American Arbitration Association’s new arbitrators and provides advanced training for the AAA’s ICDR international arbitrators.

Mediation – conducted over 100 complex commercial mediations; certified as a mediator by the Courts in New York and by the International Mediation Institute and serves on the mediation panels of the federal, state and bankruptcy courts in New York; provides mediation trainings for the American Arbitration Association and others.

Arbitration and Mediation Panels – (AAA) American Arbitration Association, ICDR (International Centre for Dispute Resolution), CPR (International Institute for Conflict Prevention and Resolution), Hong Kong, South China, Korea, Kuala Lumpur, Swiss, Vienna, Dubai, and British Columbia Arbitration Centres, Energy Arbitrators List Around the World, FINRA (securities disputes), National Futures Association, U.S. Institute for Environmental Conflict Resolution, federal, state and bankruptcy courts in N.Y., listed by ICC and LCIA.

Education and Professional Positions

Columbia Law School: (J.D. 1973); Barnard College (B. A. 1970)
American Arbitration Association, Director, member of executive committee
New York International Arbitration Center, Director, Vice-chair
Chartered Institute of Arbitrators, Fellow
College of Commercial Arbitrators, Fellow, Director, member of executive committee
ICC, U.S. Member of the ICC Consultative Task Force on the ADR Rules.
Representative arbitration and mediation matters:

- **Commercial contracts**: broad range of commercial disputes including delivery of defective goods, provision of deficient services, failure to pay, misrepresentations, fraud, commercial code issues, breach of warranties
- **Energy**: electricity production, pricing and distribution, oil spills, oil warrants, energy service company (ESCOs) disputes, PMPA, renewable energy credits, energy IP, fracking
- **Environmental**: environmental assessments, environmental cleanups, superfund/CERCLA, stormwater management, sewer and infrastructure disputes, environmental attribute credits
- **Intellectual property**: licensing fees, R&D disputes, ownership disputes
- **Corporate mergers, acquisitions and dissolutions**: breaches of reps and warranties, post-closing adjustments, earn-outs entitlement, post-sale competition by seller, asset valuation
- **Partnerships and Joint Ventures**: entitlement to payments and ownership, accounting, mismanagement and misappropriation, removal of general partner, breach of non-compete
- **Professionals**: accountant’s liability, attorney malpractice, fee collections
- **Financial matters**: bank/broker/customer, tax, guarantees, hedge fund, private placements, private equity, carry, mortgage backed securities, structured products, secured transactions
- **Insurance**: Bermuda form, credit risk, property and casualty, builders risk, malpractice, transit, mold, stop loss, fidelity, health, title, workman’s comp and employment practices
- **Franchises/dealerships**: terminations, failure to support, royalty payments, non-compete
- **Construction and Real Estate**: construction disputes, delay damages, developer/landlord and tenant disputes, breaches of contract for sale, sub-prime mortgages
- **Securities**: fraud, 10b-5, customer/broker/investment adviser, private placements,
- **Pharmaceuticals and Health Care**: product development, product delivery, licensing, royalties, distribution and marketing, therapeutic services, pharma company valuations
- **Aviation**: defective parts supply claims, ownership claims in intellectual property and aviation R&D corporation, real estate lease for crew layovers, sales commission for aircraft
- **Hospitality**: partnership disputes over development projects, many motel and fast food franchisee and distributorship disputes
- **Trusts**: family disputes including disputes concerning real estate and art
- **Employment** – wrongful termination, failure to pay earned stock and other compensation

**Bar Association Activities**

*New York State Bar Association*
- Editor-In-Chief, Dispute Resolution Lawyer; Chair 2010-2011, Dispute Resolution Section

*American Bar Association*
- Co-Chair, Arbitration Committee, 2010-2012, Section of International Law
- Co-Chair, Arbitration Committee, 2009-2012, Section of Dispute Resolution
- Chair, Renewable Energy Committee 2004-2007, Chair, Dispute Resolution Committee 2007-2009, Section of Environment Energy and Resources

*New York City Bar Association*
- Chair, Energy Committee 2006-2009, International Commercial Disputes Committee

*Energy Bar Association*
- Chair, Alternative Dispute Resolution Committee 2008-2009

*International Bar Association*
- Member subcommittee on IBA Rules on Investor State Mediation

*American Law Institute*
- Member Consultative Group, Restatement of International Commercial Arbitration
Selected Recent Presentations (See www.SussmanADR.com for a more complete listing):

- Decision making: what goes on in the tribunal’s mind? Center for International Legal Studies, forthcoming Salzburg May 2014
- Jurisdiction, Co-chair working session, London Court of International Arbitration, Oct. 2013
- Essentials for Efficient Dispute Resolution, 8th Annual ICC NY Conference, Sept. 2013
- Ethics and Arbitration, XII CBAr Int’l Arbitration Congress, São Paulo, Sept. 2013
- Cross Cultural Mediation in Action: Exploring The Challenges of Using ADR in International Arbitration, ABA International Section, April, 2013
- Willem C. Vis Moot East- Judge of Final Round, Hong Kong, March 2013
- Conversations with the World’s Leading Arbitrators; ABA, Section of Int’l Law, Oct. 2012
- Mediation vs. Arbitration vs. Litigation, session at Law, Justice and Development Week, World Bank, IFC, MIGA and ICSID, November 2011
- Saving Time and Lowering Costs, What are the Options that can Really be Accomplished International Bar Association/International Centre for Dispute Resolution, June 2011
- Promoting Settlement from Within Arbitration - New York State Bar Association, January 2011
- Guerrilla Tactics in Arbitration, ICC Austria, November 2010
- Legislative and other U.S. Arbitration Developments, U.S. Secretary of State's Advisory Committee on Private International Law Conference, October 2010

Recent Selected Publications (See www.SussmanADR.com for a more complete listing):

- Psychological Influences on Arbitrator Decision Making: Suggestions for Arbitrators and Counsel, American Review of International Arbitration, winter 2013
- The Debate: Unilateral Appointment of Arbitrators, ABA Section of International Law, Arbitration Committee Newsletter, July 2013
- All’s Fair in Love and War: or is it?: Reflections on An International Code of Ethics for Counsel in Arbitration, American Review of International Arbitration, Spring 2012
- Drafting the Arbitration Clause: A Primer on the Opportunities and the Pitfalls, Dispute Resolution Journal Spring 2012
- Mock Arbitration, NY Dispute Resolution Lawyer, Fall 2012
- Use of Dispositive Motions in Arbitration, NY Dispute Resolution Lawyer, Spring 2011
- Combinations and Permutations of Arbitration and Mediation: Issues and Solutions, in ADR in Business, editor Arnold Ingen-Housz (Kluwer Publisher,) 2011
- The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes, Revista Brasileira de Arbitragem, 2011
- The Energy Charter Treaty Can Foster Solutions to Global Warming, in Sustainable Development in International Investment Law, ed. Andrew Newcombe (Kluwer Publisher) 2010
The AAA provides arbitrators to parties on cases administered by the AAA under its various Rules, which delegate authority to the AAA on various issues, including arbitrator appointment and challenges, general oversight, and billing. Arbitrations that proceed without AAA administration are not considered "AAA arbitrations," even if the parties were to select an arbitrator who is on the AAA's Roster.
and other patent litigation, trademark and copyright litigation, related counseling, management of global patent, trademark/copyright group.
*Supply Chain issues, such as procurement practices, global supply and manufacturing, product shortages, quality issues, recalls.
*Counseling, contracting and collaborations involving transactions and business arrangements with government healthcare programs (such as Medicare, Medicaid, Federal Supply Schedule), private payors (HMO's, pharmacy benefit managers and other health insurance entities) and providers (community hospitals and academic medical centers), distributors (wholesalers, retailers, specialty distributors).
*Regulatory, including securities law disclosures, product research (such as research subject protection) and development, pharmaceutical and device product approval, labeling and launch requirements, federal and state law government affairs issues involving drugs and devices, sales and marketing practices counseling (advertising, promotional and anti-kickback/anti-bribery, False Claims, privacy (HIPPA, state laws, EU laws).
*Research and Development-related counseling and contracting, including clinical trials, clinical research organization agreements, sponsored research, material transfer and related agreements.
*Antitrust and Trade Association Counseling
*Numerous therapeutic areas and technologies, including transplantation and immunology, drug-coated stents, epilepsy, oncology, vaccines, ophthalmics, companion and farm animal diseases and pest control, orphan drugs (such as lysosomal storage disease therapies, radiology, vascular interventional, small molecules, biotechnology, generics, devices.
*Compliance policies, procedures, investigations (U.S. and as a global general counsel and compliance officer).

**Alternative Dispute Resolution Experience**

As an advocate: At Paul, Weiss, end-to-end representation of clients in three-year, ad hoc arbitration involving complex international commercial dispute. Parties chose to perform some discovery (documents, depositions), employ expert witnesses, etc.; full hearing before retired federal judge. Involvement in two significant ICC arbitrations while at Novartis.

AAA Commercial Arbitration Panel: biotechnology valuation; healthcare payor-provider disputes (provider termination and benefit coverage); creditor-debtor disputes; general commercial; franchise terminations

MA Fee Arbitration Board: Attorney-client fee disputes.

**Alternative Dispute Resolution Training**

Facilitation Skills for Mediators, Cambridge Dispute Settlement Center training, run by the Public Conversations Project, 2015; Health Care Arbitration, American Health Lawyers Association, 2015; AAA, Award Writing 2015; AAA Fundamentals and Best Practices for New AAA Arbitrators, 2013; Appointed AAA 2013 Higginbotham Fellow for up and coming diverse ADR professionals - week long training in arbitration and mediation rules, techniques, ethics; as Higginbotham Fellow, given access with the consent of the parties to observe several complex AAA arbitrations; Michael Lewis and Linda Singer's Advanced Commercial Mediation multi-day training (through JAMS); AAA Essential Skills for the New Mediator, 2012; AAA Payor-Provider Rules, 2010; Mediation

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Services of North Central MA -- mediation training and observations. Pursuant to confidentiality and party/AAA agreements, in my capacity as an AAA Higginbotham Fellow and over the past few years, I have had the unique opportunity to observe 4 significant, complex, AAA arbitrations, which included one before a three arbitrator panel and three additional sole arbitrator arbitrations, involving construction, music industry, law partnership and patent infringement disputes;

**Professional Licenses**

**Professional Associations**
Currently: American Health Lawyers' Association; Licensing Executives Society; American Bar Association (Section on Dispute Resolution); National Task Force on Diversity in ADR; New York State Bar Association (Section on Dispute Resolution) Massachusetts Bar Association (Member, MBA ADR Committee), Boston Bar Association.

**Education**
Oberlin College (BA-1983); University of Chicago Law School (JD-1986).

Significant post law-school continuing legal and other education/training:

**Publications and Speaking Engagements**
Publications:

Article: "Striving for the 'Bulletproof' Mediation Settlement Agreement," with Edna Sussman, CPR Alternatives and NYSBA Dispute Resolution Lawyer, April 2015

Outlines, Research Summaries and Forms for ABA Section on Dispute Resolution Panel: Mediation Convening and Intake Best Practices

Speaking Engagements (chronological order):

Panelist: 2013 ABA Section on Dispute Resolution Annual Meeting, "What Clients Are Looking for in Arbitration"

Presenter: 2013 ExecuSummit on ADR, "Arbitration Evolution"

Panelist: 2013: Massachusetts Law Weekly Panel for Inside Counsel, "ADR and Business Disputes"

Panelist, 2014: New England Corporate Counsel Association, "Dispute Resolution: Managing Your Exposure and Avoiding Your Day in Court (And What To Do If You Can't Avoid It)"

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Semi-Final Judge, ABA National Mediation Competition, 2014
Organizer and Moderator, Tech Sand Box (MA start-up incubator) program on Managing Dispute in Life Sciences Collaborations, 2014
Panel, Association of Strategic Alliance Professionals: Managing Disputes in Life Sciences Collaborations
Panelist, 2015 CPR Annual Meeting, ADR in Intellectual Property Cases
Panelist, 2015 ABA Section on Dispute Resolution Annual Meeting: High Technology ADR
Organizer and Moderator, 2015 ABA Section on Dispute Resolution Annual Meeting: Mediation Convening and Intake Best Practices
Current Board Membership: Community Dispute Settlement Center, Cambridge, MA; Chair, Program Committee

Citizenship
United States of America

Languages
English

Locale
Boston, Massachusetts, United States of America

Compensation
Hearing: $2450.00/Day
Study: $350.00/Hr
Cancellation Period: 0 Days
Comment: I practice in both Boston and New York and the surrounding areas. Therefore, I will not seek reimbursement for travel within a reasonable distance from Boston and will also generally waive travel expenses to the New York-New Jersey metropolitan area. I am very open to establishing agreed caps on any travel charges.
Cancellation: Written notice required; payment for all time and nonrefundable expenses incurred through date of notice and for post-cancellation wind-up time and expenses (return of confidential materials, etc.); if hearing scheduled, fees in accordance with AAA rules to
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"Mediation will not always be successful but it should not spawn more litigation.” *Willingboro Mall Ltd.* v. 240/242 Franklin Ave., LLC, 215 N.J. 242, 71 A.3d 888 (2013).

In their seminal 2006 article, James Coben and Peter Thompson expressed surprise at the volume of litigation about mediation; their study showed an increase of ninety-five percent from 1999-2003. While this increase is undoubtedly attributable to the increasingly widespread use of mediation rather than to any fundamental flaw in the process, the case law involving mediations offers important lessons for mediators, counsel and parties. While the courts rarely fail to enforce a mediated settlement agreement, this certainly has not stopped unhappy parties from engaging in expensive and time-consuming litigation that prolongs the dispute and strains relationships, precisely what the settlement achieved in the mediation was intended to avoid.

This article addresses measures that should be considered to increase the chances not only that the mediated settlement agreement will be “bullet proof” if litigation follows but also to provide a process that eliminates or at least reduces the likelihood that any party will walk away from or seek to set aside a settlement. In striving for such a process and agreement, it is critical to pay close attention to all three phases of the mediation: (a) the contents of the agreement to mediate; (b) the conduct of the mediation, and finally (c) to the preparation of the documentation of the settlement agreement.

I. The Legal Framework

In the United States, enforcement of a mediated settlement agreement, as is the case in many jurisdictions around the world, requires a court’s imprimatur. With fifty state jurisdictions and federal jurisdiction, there is no single body of law governing mediation or the enforcement of settlement agreements achieved through a mediation process.

Applicable state laws or court procedures can be determinative of the result achieved in enforcement actions on settlements. Significantly, as of this time, only twelve states have adopted the Uniform Mediation Act; thus meaningful differences persist. And as many commentators have noted, there is no uniform federal mediation law.

For example, the scope and nature of the confidentiality protections afforded to mediation vary across jurisdictions leading to different approaches by the courts in reviewing what transpired at the mediation. Jurisdictions also vary dramatically in connection with the formalities required for enforcement—requirement for a written agreement, a “cooling off” period during which consent can be withdrawn and language expressly stating that the parties intended to be bound are some examples.

A discussion of these often critical variations as they affect enforcement is beyond the scope of this article, but overriding principles emerge from the case law that should be considered in all jurisdictions.

The courts generally view mediation settlement agreements as contracts and apply traditional contract law principles to disputes arising out of efforts to enforce them. The general rule that the law favors the settlement of disputes by agreement of the parties is often quoted; indeed, settlement agreements may be viewed as “super contracts.” While the courts repeatedly state that they heavily favor the enforcement of agreements that settle disputes, where contract law claims and defenses are convincingly raised, the courts (or a jury) may hear evidence. We review the basic contract defenses to set the framework for a review of best practices. It must be remembered, however, that in states with a more rigorous regime for the protection of the confidentiality of the mediation, review of such defenses as coercion, fraud or lack of capacity may be found to be limited or foreclosed, converting mediated settlement agreements into what may be viewed as “super super contracts.”

**Binding Contract**—The question of whether the facts support mutual consent to all material terms necessary to form an enforceable contract is the area of potential attack that has been most successful in defeating efforts to enforce mediation settlement agreements. It is also the claim most likely to arise in complex business disputes since the parties are generally sophisticated, represented by counsel and accordingly less likely to find applicable other commonly raised defenses such as coercion, lack of competence, and lack of authority. Consistent with basic contract law, where the courts find that material terms in an agreement are not sufficiently definite to constitute a basis for finding mutual consent they have refused to enforce a settlement agreement. The fact that a few ancillary issues remain to be resolved will not generally defeat enforcement. It is not always clear at the outset, however, whether or not a court reviewing the matter will see the unresolved “ancillary” issues as material or essential to the very existence of an enforceable agreement; assessing the answer to these types of questions (such as in connection with releases) is the subject of much litigation in the area.

Abbreviated settlement agreements or memoranda of understanding, often prepared at the mediation session as a
shorthand recording of the terms agreed to, are frequently argued to be only agreements to make an agreement, which are not binding. The courts recognize the difficulty of generating a final settlement document in complex cases at the mediation conference. Here again, the key question is whether or not all material or essential terms have been agreed upon. The mere fact that a post-mediation, more complete document is contemplated will not defeat enforcement if a court finds such an agreement. The language the parties choose, however, can be critical in this determination. Where the parties made the settlement “subject to” a formal agreement, as contrasted with “to be followed” by a formal agreement implementing the terms agreed to, enforcement has been denied.

**Oral Agreement**—Consistent with the standard contract law principle which recognizes the validity of oral contracts (with the exception of contracts governed by the statute of frauds), absent a contrary governing law or rule, courts in the United States enforce a mediation settlement agreement in the absence of an executed written agreement if persuaded that there was a meeting of the minds as to all material terms and the parties intended to be so bound. However, the Uniform Mediation Act and state governing law or applicable court rules in an increasing number of states effectively require a writing or its equivalent.

**Duress and Coercion**—The courts adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced. While some courts have noted that a certain amount of coercion is “practically part of the definition” of a mediation, and indeed many would conclude that is what the parties are looking for, a considerable number of cases have been brought asserting claims that a mediated settlement agreement resulted from duress and thus should not be enforced. Notwithstanding the fact that some of the facts alleged in the cases are quite egregious, only in rare cases have the courts believed the claims to be persuasive in establishing such duress or coercion as to defeat enforcement of a mediated settlement agreement. But the courts will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact as to inappropriate duress or coercion. It should be noted that some cases are directed at contentions that the mediator himself or herself was the cause of duress and coercion.

**Fraud**—Even in the mediation context, with its unique negotiating framework and relationships, the courts have applied the contract rules quite strictly and required a knowing and material misrepresentation with the intention of causing reliance on which a party justifiably relied. Absent a duty to disclose, mere failure to disclose a fact that might be material to the opposing party is not a basis for defeating a settlement agreement. However, an evidentiary hearing may be required to determine whether an affirmative misrepresentation had been made and was the basis for the settlement.

**Mistake**—Mistake is frequently raised as a defense to enforcement of a settlement agreement, but it too is a ground that is rarely accepted by the court. The courts have often rejected claims of mutual mistake and the more difficult claim of unilateral mistake.

**Incompetence or Incapacity**—The law presumes adult persons to be mentally competent and places the burden of proving incompetence on the person claiming it. In the face of this burden, claims of incompetence, even based on facts that sound quite striking, have not met with much success in court where they have been raised to defeat enforcement of a settlement agreement.

**Lack of Authority**—Claims by a party that it had not signed the settlement agreement and that the signature by its attorney was not authorized have also not been viewed with favor. A party’s counsel is often viewed as having authority when counsel is present at a mediation session intended to settle a lawsuit, a presumption that has to be overcome by affirmative proof that the attorney had no right to consent. A settlement agreement signed by counsel can also be upheld on the basis that apparent authority existed where the opposing counsel had no reason to doubt that authority. But where a question as to the grant of authority by the client to the attorney, which must be clear and unequivocal, is persuasively raised, the courts have required an evidentiary hearing.

**II. Preparation for and Conduct of the Mediation**

Bearing in mind the common areas for attacks on mediation settlement agreements can serve to inform a careful analysis and calibration of how the mediation process is conducted from start to finish. Of course, the level of sophistication of the parties, the substance of the dispute and the nature of the parties’ relationship will affect what is practical, necessary and appropriate in the context of any particular dispute. Practitioners also will want to assess what methods may endanger the admittedly delicate mediation process and the ability of the parties to reach any agreement in the first place.

It is worth noting at the outset that many of the potential issues can be ameliorated significantly through pre-mediation preparation by the parties with the mediator and a robust agreement to mediate among the parties. As discussed further below, the issues to be considered should include: the nature of the process and the mediator’s role; confidentiality; focused pre-mediation information exchange; documents that will need to be executed to effectuate any agreement; approval authority; legal or practical conditions precedent to any agreed commitments; insurance limits, etc. Indeed, preparation should, if the circumstances warrant it, take as much or more time and effort as the mediation itself.

**Confidentiality**—The confidentiality of the parties’ communications with the mediator in the caucus model has been found by many practitioners to be essential to
their success in assisting the parties in achieving a settlement. As noted, state and federal law varies. Confidentiality issues have caused courts in some jurisdictions to refuse to explore such defenses as fraud or coercion because it would require breaching that confidentiality. Consideration should be given in the agreement to mediate to provide not only that applicable state and federal rules apply, but also expressly provide that, as a matter of contract, the mediation process and communications are confidential except for the enforcement of any written settlement agreement signed by the parties that may result and disclosures required by law. The mediation agreement can also provide that the mediator will not be called upon or subpoenaed to testify. Contracting for confidentiality among the parties should serve to protect the confidentiality of the mediation even in states or federal jurisdictions which offer a lesser standard of confidentiality.

Agreement on Terms—The most enduringly successful challenges to mediation settlement agreements stem from allegations that no binding agreement exists due to a failure to agree on material terms. Preparation with the mediator can help develop an “issues list” of what is in dispute and needs to be resolved. Pre-mediation information exchange can be critical to this effort. It is also very helpful in many cases to prepare an agreed draft of the settlement agreement, leaving out just the deal terms, and to prepare drafts of any important ancillary documents, such as releases, confidentiality agreements, non-disparagement agreements, or drafts of apologies, so that final terms can more easily be agreed during the course of the mediation. As noted, a court may find that the provisions of such an “ancillary” document constitute a material term of the agreement, and that, therefore, lack of agreement about the document is fatal to the enforceability of the entire agreement achieved during mediation.

Duress and Coercion—A discussion about the process, setting expectations as to how the mediation will be conducted including the mediator’s modus operandi, exploring the individual participants’ physical condition and their ability to continue with the mediation where that appears appropriate should assist in forestalling claims of duress and coercion. The agreement to mediate can address many of these issues and may be reiterated by the mediator at the beginning of the mediation.

Factors illustrative of excessive pressure have been stated by the courts to include (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisors to the servient party, and (7) statements that there is no time to consult financial advisers or attorneys. Mediation practitioners will undoubtedly recognize the presence of several, if not many, of these factors in mediations in which they have been involved but they are not necessarily an indication of coercion. Indeed, it is in part the mediator’s art in influencing the parties to stay at the table and achieve settlement that causes parties to seek mediation as opposed to just engaging in direct negotiation. Inherent in the mediator’s role is the exercise of some pressure and persuasion in working with the parties in managing the process, managing the communication, controlling the setting, timing decisions, managing the information exchange, engineering who is involved and when. While such process management is generally helpful to the parties, care should be taken to be sensitive and responsive to the particular individuals participating in the mediation to ensure the ability of all parties to fully exercise their right of self-determination, particularly when working with a vulnerable party.

Fraud—In negotiation puffing and omitting information by counsel and parties is permissible conduct; misrepresentations are not. Where a problem appears to be lurking, parties can be guided by informing them that misrepresentations may cause a settlement to crater in court and that it might be useful to specifically recite any representations upon which a party relies in the settlement agreement. Such advice should serve to discourage any fraudulent conduct that might otherwise have been pursued.

Mistake—While it is difficult to set aside any contract based upon a claim that a party or parties was or were unilaterally or mutually mistaken about a material term, preparation can obviate the problems that can arise. Inadequate preparation regarding legal requirements, insurance limits, tax implications applicable building or other codes, and other issues have created significant difficulties and in some cases litigation as parties attempt to reform or rescind the agreement to reflect reality. Courts analyze whether or not a party assumed the risk of a mistake and generally are not impressed when a party has failed to do obvious pre-mediation homework. Counsel and parties should be sure to inform themselves as to such issues and mediators should consider to what extent they can flush them out and encourage proper preparation without jeopardizing their impartiality.

Incompetence or Incapacity—Those attending the mediation should be alert to signs of illness, incapacity or incompetence, especially when a party is of an age or condition which makes it more likely that there could be an issue. While the urge to get the matter settled may be great, a pause to assure that all parties are present with all of their faculties intact is essential if any party’s behavior or appearance suggests there is a problem. If not satisfied that all are competent and not incapacitated, suspension of the mediation is necessary. The agreement to mediate can encourage parties to bring such issues to the attention of the mediator before and during the mediation.

Authority—It goes without saying that having people at the mediation with authority to settle is always a criti-
Mediation and a promise by one of the parties to prepare the court, an exchange of e-mails or a stenographic, audio or video recording. These formal requirements are strictly enforced by the courts and should not be overlooked.

The memorandum of understanding prepared at the close of the mediation need not be the final settlement agreement, but it should:

a. cover all of the material terms,
b. use language definite enough to be understood and to dictate performance,
c. set forth, if at all possible, methods for calculating numbers based upon information that is unknown or unavailable at the time of the mediation,
d. state, if it is the case, that the parties intend the agreement to be binding and enforceable in court,
e. take care in the use of language as to follow-up documents; reference can be made to “documents to follow” but do not make the agreement “subject to” follow up documents or “effective only upon” the execution of further documents, unless that is the result you want,
f. state that the parties have read or heard the terms of the agreement and understand them and agree to the terms,
g. state that the parties had the opportunity to consult counsel and were represented by and relied on the advice of counsel, if that is the case,
h. provide that the agreement shall be admissible in evidence in any proceeding to enforce its terms,
i. keeping in mind the discussion above as to the potential impact of mediation confidentiality on court review, consider whether or not to include a provision that mediation confidentiality is waived if any issue arises as to enforcement of the agreement,
j. be signed by the parties or authorized representatives,
k. state that they have authority to legally bind the party that they represent.

List Material Representations—If there are material representations on which a party has relied in making a decision on settlement, consider including them in the settlement agreement itself and including a statement that the listed representations constitute all the material representations on which the parties relied.

Prepare Ancillary Documents at the Mediation—If there are ancillary documents, don’t assume that these are details that will be worked out after the major items are resolved. The drafts of such agreements, hopefully brought to the session, should be completed at the mediation session or, as stated above, the settlement agreement should say that it will be “followed by” such documents not be
“subject to” their completion, if that is the intention. Attention to all documentation can serve to prevent what is in fact a change of heart from becoming a legally acceptable basis for overturning the agreement in a later dispute in court.

**Confirmation by Parties of Competence, Independence of Judgment, etc.**—In appropriate cases consideration should be given to asking the parties to confirm the following in writing, perhaps in a separate document to be signed by the parties in which they confirm that:

a. there were no material representations made to them in the course of the mediation that were not included in the text of the mediation agreement,

b. they understood that the mediator and the opposing party and counsel were not under any affirmative obligation to provide them with information,

c. they were suffering from no physical impairment that interfered with their ability to exercise their judgment in deciding to approve the settlement,

d. that they are acting voluntarily and exercising their independent judgment in making the decision to settle the dispute.

**Incorporate Into a Judgment**—If the matter is in litigation, consider having the terms of the settlement incorporated into the judge’s final order in the case or providing for the court to retain jurisdiction over the matter for the purposes of enforcement of the settlement agreement.

**Conversion Into an Arbitration Award**—If the matter is international and may require enforcement abroad, consider asking the mediator to serve as an arbitrator after the settlement is fully resolved to render an arbitration award based on the settlement agreement. Some jurisdictions around the world and some states in the United States expressly provide for such a procedure or deem the resulting agreement to have the same force and effect as an arbitrable award while others seem to bar such a role for the mediator after settlement is achieved. While this measure may be useful to consider it should be noted that whether or not such an award would be recognized under the New York Convention is not clear.

**Conclusion**

Familiarity with the bases on which mediated settlement agreements can be attacked in court should inform practitioners as to measures that should be considered at the various stages of the mediation, to discourage challenges to the agreement achieved and reduce the risk of a court overturning the settlement. At the same time, and of equal if not greater importance, the implementation of such measures will also result in greater user satisfaction with the process.

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**Additional Sources**

- Edna Sussman, User Preferences and Mediator Practices: Can They Be Reconciled Within the Parameters Set by Ethical Considerations?, 3 World Arbitration and Mediation Rev. 49 (2009).

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How to Increase Your Chances of Reaching a Successful Mediation Settlement Agreement

January 13, 2016 – 2:00p to 3:15p ET

MEDIATION ELOCUTION QUESTIONS

After reciting the terms of the agreement, confirm:

1. Heard/ read the terms
2. Understood the terms – any questions about any of them
3. agree with the terms as a complete settlement of this action
4. understand that this agreement is binding and enforceable
5. Had an opportunity to consult with your counsel
6. Any reason not competent or lacking in capacity today to enter into this agreement
7. Taking any medication or have any physical or emotional problems that interfere with capacity to decide?
How to Increase Your Chances of Reaching a Successful Mediation Settlement Agreement
January 13, 2016 – 2:00p to 3:15p ET

PROGRAM MATERIALS


Additional materials:


Hamline University School of Law data base of U.S. court decisions relating to mediation. Available at http://www.hamline.edu/law/dri/mediation-case-law-project/


Julia Rabich, Sarah Stoner, and Nancy A. Welsh, JUDICIAL REVIEW OF ARBITRATION AWARDS AND MEDIATION AGREEMENTS: TIPS FOR SUSTAINING DEFERENCE, Dispute Resolution Journal (February-April, 2012).


Edna Sussman, User Preferences and Mediator Practices: Can They Be Reconciled Within the Parameters Set by Ethical Considerations, 3 World Arbitration and Mediation Rev. 49 (2009).
Click here to go to the Commercial Arbitration Rules

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Click here to go to the Construction Arbitration Rules

Click here to go to the Employment Arbitration Rules

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