

User Preferences and Mediator Practices: Can They Be Reconciled Within the Parameters Set by Ethical Considerations

By Edna Sussman

Edna Sussman is a seasoned arbitrator and mediator. She serves on the arbitration and mediation panels of many of the leading dispute resolution institutions including the American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), the International Institute for Conflict Prevention and Resolution (CPR), the World Intellectual Property Organization (WIPO) and the mediation panels of the federal, state and bankruptcy courts in New York. She can be reached at esussman@hnrklaw.com

Recent surveys have shown that users of mediation in commercial disputes value active and directive techniques in mediation. It would seem that a large number of such mediation users want someone who can get the deal done and a great many of them believe an evaluative mediator, who applies pressure for resolution, is more successful in achieving this result. The progressive movement of mediation away from its roots in a more facilitative or transformative model to an increasingly more common evaluative model in commercial cases raises a host of questions and concerns. An examination of what users really want and whether their wishes can appropriately be accommodated with current mediation models and practices within the parameters set by ethical standards are questions that must be examined. As the ABA Dispute Resolution Section noted in its pamphlet on Improving Civil Litigation (the "ABA Pamphlet")¹, while "there is great value in considering user's thoughts and experiences" one should "not equate high quality mediation practice with what lawyers and parties want."

Empirical Studies on Mediation Satisfaction

The American Bar Association Task Force on Improving Mediation Quality issued a report in February of 2008 (the "ABA Report")² summarizing its findings which were based on an extensive two year outreach to users and mediators. To elicit data, the Task Force organized a series of well attended focus groups in nine cities across the United States, collected over 100 responses to questionnaires and conducted telephone interviews. The participants included in house and non-in house attorneys whose responsibilities included working for parties in mediation as well as experienced civil mediators. The Task Force work was limited to private practice civil cases such as commercial, tort, construction and employment cases where the parties are typically

¹ American Bar Association, Dispute Resolution Section, *Improving Civil Litigation, Recommended Considerations for Civil Mediators in Private Practice* 2008 ("ABA Pamphlet"), available at http://meetings.abanet.org/webupload/commupload/DR020600/sitesofinterest_files/mediatorspamphletweb.pdf

² American Bar Association Section of Dispute Resolution, *Task Force on Improving Mediation Quality Final Report* (2008), available at <http://www.abanet.org/dch/committee.cfm?com=DR020600>

represented by counsel and did not include domestic, family or community disputes.³ The findings suggest that more evaluative mediation, with some pressure exerted on the parties, is preferred by many in the context of such disputes. Of those questioned the following percentages thought the listed activities would be helpful in about half or more of their cases:

- 95%—ask pointed questions that raise issues;
- 95%—give analysis of case, including strengths and weaknesses;
- 60%—make prediction about likely court results;
- 100%—suggest possible ways to resolve issues;
- 84%—recommend a specific settlement; and
- 74%—apply some pressure to accept a specific solution.⁴

Parallel results were found in a survey of 3,000 lawyers and parties over a six year period conducted by the Singapore Mediation Centre. An article by the Executive Director of the Centre reports that the responses of the 87 % of parties who use mediation who were highly satisfied with the mediation process indicated that 83 % said that an evaluation of the merits of the case was important; 89 % said that assistance in evaluating the case was important, 68 % said that recommendation of a particular settlement was important, 85 % said that suggesting possible options for settlement was important and only 35 % liked it when mediators were silent about their views.⁵ The article concludes that “[i]t would seem that in the Singapore context, a higher degree of mediator intervention is valued in order for parties to find mediation to be satisfactory.”⁶

A break down of the ABA Report responses reveals a noteworthy divergence between mediators and users in their perception as to best practices. When asked about recommending a specific settlement, eighty-four percent (84%) of users thought it would be helpful in half or more cases and 75% in most or all or almost all cases; only 18% of mediators thought it would be helpful in most or all or almost all cases, and only 38% thought it would be helpful in half or more cases. Similarly, when asked about applying some pressure to accept a specific solution, 64% of the users responded favorably for

³ As the ABA Report recognizes, mediator techniques could be very different in family mediation cases or cases where the parties are not represented by counsel. ABA Report, n. 2 at 19.

⁴ However, almost half of those questioned on the other hand felt that there were times when it was not appropriate for a mediator to assess strengths or weaknesses or to recommend a specific settlement. Thus mediators must be sensitive to what is appropriate in particular cases and work with the parties to tailor the process accordingly.

⁵ Loong Seng Onn, *Singapore: Non Court Annexed Mediation*, International Bar Association, Mediation Newsletter, Vol. 2 No. 1 (2006)

⁶ *But see* Patrick Mc Dermott and Ruth Obar, *What’s Going on in Mediation: An Empirical Analysis of the Influence of the Mediator’s Style on Party Satisfaction and Monetary Benefit*, 9 Harv. Neg. L. Rev. 75 (2004). Based on a survey of users of the mediation program at the Equal Employment Opportunity Commission the authors found that a purely facilitative model was more satisfactory to the parties. The discrepancy in the findings as to satisfaction with a more facilitative model is likely related to the more personal nature of employment disputes as compared to commercial or construction cases, again demonstrating the need to match the style to the problem. It should be noted that the authors also found that that monetary recoveries were higher with a more evaluative style of mediation.

most or all or almost all cases and 75% for half or more cases. Among mediators, however, only 24% responded favorably for most or all or almost all cases, while only 30% responded favorably for half or more of their cases.

The ABA Report observes that there is no direct explanation for the substantial discrepancy in the survey responses between users and mediators with respect to pressure but suggests two possible explanations: First, that mediators are more conservative in applying pressure as they are more aware of the possible disadvantages such as undermining self-determination or losing neutrality. Second, it is possible that mediators are using these techniques more often or more subtly than they realize but do not recognize that they are applying pressure.⁷

The ABA Pamphlet deals, *inter alia*, with the subject of persistence and follow-through by the mediator. The pamphlet notes that many commercial lawyers complain about mediators who throw in the towel when a mediation becomes difficult and want mediators who will help them work through the difficulty and help them achieve a settlement. The pamphlet suggests that a mediator consider whether when and how to exert modest and reasonable pressure to keep the parties progressing through the process but at the same time “consider how to avoid coercing the parties recognizing that self-determination is the core principle of mediation and that coercion violates generally accepted mediation practice ethics.”⁸

Mediator Styles and Ethics

The debate over facilitative versus evaluative mediation has had a long history. A host of scholarly articles have been written on the subject and the various mediator styles have been exhaustively treated.⁹ Professor Riskind’s seminal work on the subject set up a grid showing a continuum from facilitative to evaluative.¹⁰ Early commentators on the subject went so far as to say that “evaluative mediation is an oxymoron.”¹¹ More recently others have posited that all commercial mediation has evaluative elements.¹² Additional mediator approaches have been identified and include transformative¹³,

⁷ ABA Report n. 2 at 19.

⁸ ABA Pamphlet, n.1 at 5-6.

⁹ For a review of the various styles of mediation, see Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U.S.F. L. Rev. 577 (2008)

¹⁰ See Leonard R. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7 (1996); For Professor Riskind’s later thoughts on the subject see Leonard Riskind, *Decision Making Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1 (2003).

¹¹ Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation is an Oxymoron*, 14 Alternatives to High Cost Litig. 31 (1996).

¹² Kenneth Roberts, *Mediating the Evaluative-Facilitative Debate: Why Both Parties are Wrong and a Proposal For Settlement*, 39 Loy. U. Chi. L.J. 187, 209 (2007).

¹³ Robert Bush and Joseph Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).

understanding based¹⁴ and a process that focuses more on causes of conflict.¹⁵ Emerging from these discussions is the concept of informed consent. Commentators have suggested that the mediator obtain consent in advance for the style of mediation to be employed and identify the possibility that different styles may be employed as appropriate as the mediation develops.¹⁶

Ethical considerations underly the call for informed consent to mediator style. The Model Standards of Conduct for Mediators issued jointly by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution in August of 2005¹⁷ provides that "mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." Standard I states that:

"A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes."

Thus voluntary, uncoerced self-determination by the parties is the fundamental bedrock of mediation. Yet, mediators employ a myriad approaches that can be described as deceptive or manipulative. James Coben writes about what he refers to as mediation's "dirty little secrets."¹⁸ But he recognizes that using techniques that foster settlement are consistent with the basic observation that "mediators, although neutral in relationship to the parties and generally impartial towards the substantive outcome, are directly involved in influencing disputants towards settlement."¹⁹ Indeed, it is in part the mediator's art that causes parties to seek mediation as opposed to just engaging in direct negotiation.²⁰ Coben lists the myriad ways that mediators exercise pressure and persuasion including, managing the process, managing the communication, controlling the setting, timing decisions, managing the information exchange, engineering who is involved and when. It is when practices used by mediators slip beyond such facilitative tools that are part of the

¹⁴ Gary Friedman and Jack Himmelstein, *Resolving Conflict Together: The Understanding-Based Model of Mediation*, 2006 J. Disp. Res. 253.

¹⁵ Kenneth Kressel, *The Strategic Style of Mediation*, 24 Conflict Res. Q. 251 (2007).

¹⁶ Frank E. A. Sander, *Achieving Meaningful Threshold Consent to Mediator Styles*, Dispute Resolution Journal, Vol. 14, Number 2 (Winter 2008).

¹⁷ *The Model Standards of Conduct for Mediators*, (2005), available at <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>

¹⁸ James R. Coben, *Mediations Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception Tactics*, 10:1 Just Resolutions, Newsletter of the America Bar Association Section of Dispute Resolution 9 (2004).

¹⁹ *Id.* quoting Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 2d Edition at 327 (1996 Jassey - Bass Publishers)

²⁰ For a discussion of the many advantages of mediation over direct negotiation, see Edna Sussman, *The Reasons for Mediation's Bright Future*, New York State Bar Association, New York Dispute Resolution Lawyer, Fall 2008 Vol. 1, No. 1. at 57.

mediator's art that an examination of whether mediator behavior is coercive and unethical is required.

Duress and Coercion in Practice

Parties may feel that they are under duress and forced to settle for many reasons. A court date that is in the distant future, a dominant counter party, economic pressure to conclude the dispute, can all cause parties to feel pressured into settlement.²¹ Such factors are intrinsic to many negotiations and do not raise questions as to mediator conduct. In a treatment of coercion and self determination in mediation four different categories of coercion that may be created by the mediation process itself have been identified: coercion into mediation,²² coercion to continue with mediation, coercion to settle in mediate and coercion through reports to the courts.²³ Our focus is on the second and third forms of coercion that pertain to all mediations whether court ordered or voluntary.

Ethical canons and court ADR rules state plainly that self-determination, voluntary and uncoerced, is the guiding principle of mediation and that it is the parties who control whether the mediation continues. However, in fact there is considerable evidence that mediators often exert considerable pressure and use their wiles to keep people at the table and to pressure parties into settlement. Coercion and duress in mediation are subjects that come up with some regularity in the case law in connection with actions to set aside a settlement agreement reached in mediation. Indeed, the cases are replete with complaints by parties who feel they were coerced into staying at the table and settling the case.

The courts generally adopt the basic contract tenet that a contract obtained through duress or coercion will not be enforced and will require an evidentiary hearing if persuaded that sufficient facts are presented to raise a question of fact as to duress or coercion. Thus where it was alleged that the mediator imposed extreme time pressure and told the party that the court would have the embryos in issue destroyed rather than give them to her, that the property value in issue was grossly disproportionate to the cost of litigating further and that she would have a chance to protest any provisions of the agreement at a final hearing even if she signed the mediation settlement agreement, the

²¹ Coercion by the parties is outside the scope of this note but it is interesting to note the distinction drawn by the tribunal in *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17 at p. 39 (2008) in which the tribunal observed "since economic duress of a sort may be present in virtually any settlement, it must rest with judicial decisions to draw the line between on the one hand, economic compulsion exercised by the respondent ...over the claimant in order to force him to settle and, on the other hand, the normal operation of economic forces."

²² In the United States, under many court annexed mediation programs, the parties may be required to participate in mediation, often with a good faith requirement. A different choice was made in the United Kingdom where the courts concluded that up-front consent to participation in mediation was required and instead impose costs on parties that unreasonably refuse to mediate. See, Jacqueline Nolan-Haley, *Consent in Mediation*, *Dispute Resolution Journal*, Vol. 14, Number 2 (Winter 2008).

²³ Timothy Hedeed, *Coercion and Self Determination in Court-Connected Mediation: All Mediations are Voluntary, But Some are More Voluntary Than Others*, 26 *Just. Sys. J.* 273 (2005)

court held that if the mediator in fact engaged in such conduct the agreement would not be enforceable and set it down for a hearing.²⁴

The courts have identified factors illustrative of excessive pressure in a mediation and will review the following factors: (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.²⁵

While these seem to be appropriate measures against which conduct should be assessed, historically only in rare cases have the courts been persuaded that duress or coercion sufficient to defeat enforcement of a settlement agreement has been demonstrated. These lawsuits in which the parties claimed that they were coerced to continue with the mediation and to settle the case provide an interesting set of factual patterns for discussion as to mediator conduct.

Many cases involve undue pressure to keep parties at the table. Cases reviewed by the courts include a party's testimony that he was not permitted to leave the room throughout a lengthy mediation and had been sapped of his free will,²⁶ the testimony of a 65 year old woman claiming duress at a mediation which started at 10 AM and was concluded at 1 AM the next morning, while she suffered from high blood pressure, intestinal pain and headaches and was told by both the mediator and her lawyer that if she went to trial she would lose her house²⁷ and a party's testimony that he was diabetic and his blood sugar went up, was in severe pain, was prevented from leaving the building when he wanted to terminate the negotiations and his attorney would not let him leave without signing the agreement.²⁸ The courts refused to set aside the settlement agreement in all of these cases.

Other cases discuss the mediator's statements to pressure a party into settlement as a basis for a claim of duress and coercion. The courts have reviewed a case where a party contended that she was warned by the mediator of claims of insurance fraud against her, that the mediator bullied her, that she cried for an hour and no consideration was given to her distress.²⁹ In another case the party testified that he was threatened with prosecution in bankruptcy court.³⁰ Another litigant claimed that statements by the mediator as to the substantial legal fees that would be incurred made the party feel

²⁴ *Vitakes-Valchine v. Valchine*, 793 So.2d 1094 (Dist. Ct App. Fla. 2001)

²⁵ *Id.* 68 F.Supp.2d at 1142

²⁶ *DeVille v. United States of America*, 2006 WL 373491 (W. D. La. 2006)

²⁷ *Olam v. Congress Mortgage Co.*, 68 F.Supp.2d 1110 (N.D. Ca. 1999)

²⁸ *Peacock v. Spivey*, 629 S.E.2d 48 (Ct. App. Ga.2006)

²⁹ *Vela v. Hope Lumber & Supply Company*, 966 P.2d 1196 (Okla. Civ. App. Div. 1 1998)

³⁰ *Chantey Music Publishing Inc.,supra*, 915 So. 2d 1052

financially threatened and under duress.³¹ The courts have enforced the mediation settlement agreement in all of these cases.

The Second Circuit Court of Appeals addressed the question of whether a mediation settlement agreement can be set aside based on an inaccurate assessment of the case by the mediator. In that case the plaintiff had attended a mediation session with his lawyer. He claimed that the opposing counsel had given the mediator a copy of his bankruptcy petition and that based on that document the mediator explained that since the lawsuit was not listed in the petition, any recovery would go to creditors directly. The mediator was alleged to have said “you have no case” because the case belongs to the bankruptcy trustee and the only way the plaintiff “would ever see a dime” would be if “he agreed to the mediated settlement then and there.” Based on this “harangue,” the plaintiff settled. Subsequently plaintiff consulted bankruptcy counsel and learned that his claim was insulated from creditors of the estate. He opposed a motion made by defendant to enforce the settlement on the grounds that the agreement was voidable because he justifiably relied on the mediator’s fraudulent or material misrepresentation. The Second Circuit upheld enforcement of the settlement agreement stating that the “nature of mediation is such that a mediator’s statement as to the predicted value of a claim where that prediction is based on fact that can be readily verified, cannot be relied on by a counseled litigant whose counsel was present when the statement was made.”³² Indeed, where the party seeking to back out is represented by counsel at the mediation and had an opportunity to reflect, an attack on the mediation settlement agreement based on duress and coercion is much less likely to succeed.³³

Thus it seems the courts will generally uphold a settlement agreement reached in mediation in most cases notwithstanding claims of coercion and duress. But the question of how the courts would view a case brought against the mediator for damages alleged to have been caused by mediator conduct has not been the subject of extensive discussion by the courts.³⁴ The decision by the Australian court in *Tapoohi v. Lewenberg*,³⁵ in which claims against the mediator for damages were asserted, provides a cautionary tale as to potential mediator liability.

The Tapoohi decision

No reported cases were found in the United States in which the mediator was held personally liable for his or her conduct at the mediation³⁶ and only one case was found in

³¹ *Marriage of Banks*, 887 S.W.2d 160 (Tex. App. - Texarkana 1994)

³² *Chitkara v. New York Telephone Company*, 45 Fed. Appx. 53 (2d Cir. 2002)

³³ *Advantage Properties, Inc. v. Commerce Bank N.A.*, 242 F.3d 387 (10th Cir. 2000)

³⁴ For a treatment of why mediators don’t get sued, see Michael Moffitt, *Suing Mediators*, 83 B.U. L. Rev. 147 (2003); For a discussion of the potential liability of mediators as fiduciaries, see Rebekah Ryan Clark, *The Writing on the Wall: The Potential Liability of Mediators as Fiduciaries*, 2006 B.Y.Y. L. Rev. 1033 (2006).

³⁵ *Tapoohi v. Lewenberg*, VSC 410 (21 October 2003)

³⁶ The Mediation Case Law Project at the Hamline University School of Law Dispute Resolution Institute tracks and reports on all cases involving mediation and segregates them in various categories. There are

which it was discussed.³⁷ The *Tapoohi* decision is the leading case to date which discusses possible mediator liability. The case provides a road map to some of the dangers that may be occasioned by a more assertive approach to mediation as it explores some of the potential contours of mediator liability. While the decision was one on summary judgment in which all of the assertions had to be regarded as true, it evokes serious questions about mediator conduct.

The mediator in *Tapoohi* was an experienced and highly regarded barrister with extensive experience as a mediator and arbitrator in commercial matters. He was not conducting the mediation pursuant to an order of a court which in many jurisdictions would have given him immunity from suit, and he was not conducting the mediation pursuant to a written mediation agreement as many mediators do. The *Tapoohi* case arose in the context of a family property dispute and centered on a bitter disagreement over property in the estate of the parties' mother. Millions of dollars were involved. One of the parties, Lewenberg, attended the mediation in person with her solicitors and barristers while the other party, her sister Tapoohi, who was overseas at the time, attended by telephone, but was represented in the mediation room by barristers and solicitors. An agreement as to key points was reached and a written agreement was signed by Lewenberg in person and by fax by Tapoohi. After the mediation, Tapoohi discovered that as a result of the settlement she was liable for a significant capital gains tax. She filed a suit to have the settlement agreement set aside asserting: (a) that the agreement was subject to an express oral term that the parties would seek tax advice, after which they would negotiate the final terms of the agreement; and (b) that the parties had not reached a definitive binding agreement on the matters subject to the settlement.

Among others, Tapoohi sued her solicitors for their failure to ensure that tax advice was obtained before any final settlement. The solicitors brought a third party claim against the barrister and the mediator seeking contribution.

The affidavit evidence, which was accepted by the court for purposes of considering a summary judgment motion made by the mediator, was that Tapoohi's solicitor emphasized the importance of the tax implications in any settlement and said that a resolution could not be achieved until advice on the tax consequences was obtained. He said at the mediation that he was not sufficiently familiar with the tax implications and the settlement would have to wait until advice on those issues was obtained.

At 8 PM, by which time two of the legal advisers had left the meeting, an agreement in principle had been reached. Tapoohi's legal advisers suggested that it was late and they were not comfortable signing that night. The mediator said "you have got to stay, you have got to do the terms of settlement tonight." He stated that in light of the

virtually no cases reflecting suits against mediators and none where recovery was obtained. The case reports are available at <http://law.hamline.edu/adr/dispute-resolution-institute-hamline.html>

³⁷ See, *Lange v Marshall*, 622 A.W.2d 237 (Mo. App. 1981) in which the court, without reaching the question of what duties the mediator had to the parties who were not represented by their own counsel, found that plaintiff did not sustain any damage as a proximate result of the mediator's conduct.

acrimony between the parties there had to be a written settlement agreement that night, that it was in the parties' interest to sign something before they went home and that he always did it that way. It was stated that he spoke very forcefully and that those assembled acquiesced to his direction because he was an experienced mediator and they viewed a direction from the mediator as giving them no choice but to stay. In their affidavits they said that otherwise they would have adjourned the mediation.

The mediator dictated the terms of the settlement in detail. The lawyers were not actively involved. Tapoohi's solicitor said that he attempted to raise the question of advice on taxes but the mediator pressed forward saying that he wished to continue to dictate the settlement terms. A stumbling block arose in recording the consideration for the transfer of shares in a company as that had not yet been agreed. The mediator suggested a figure of \$1 as nominal consideration and that led to a further comment from the solicitor that tax advice would be needed before the consideration issue could be finalized. The \$1 sum was recorded in the document. Minor changes were made to the draft settlement but ultimately all parties signed the agreement. There was no term in the settlement agreement to the effect that it was subject to receipt of advice on tax issues being received to the satisfaction of the parties or that it was not intended to be final and binding but subject to further negotiations. Following the mediation it was discovered that the \$1.00 price suggested by the mediator created serious tax problems but attempts to vary that price failed.

While the parties and counsel all received the draft of the settlement agreement and had the opportunity to read it and make changes and corrections, the hour was late and no one caught the omission. Counsel said that at no time during the mediation did he believe a binding agreement was being entered into and he only passed the document along to his client based on his reliance on the mediator.

The court, in considering the mediator's motion for summary judgment, reviewed Tapoohi's position that the mediator had taken it upon himself to give advice as to matters that concerned her interests by taking these various actions. The court considered the duties of the mediator and noted that this was an area of the law as yet undeveloped. The court opined that it was loath to dismiss a claim where the duty owed to arguably vulnerable parties was uncertain. The court specifically cited, *inter alia*, to the alleged duty of exercising care and skill of a senior lawyer specializing in arbitration and mediation not to act in a manner contrary to the interest of a party, and not to coerce or induce a settlement when there was a substantial risk that the settlement was contrary to the interests of a party. The court raised the question of whether the mediator had contractually assumed an obligation to offer advice as to legal implications. The judge dismissed the application for summary judgment saying that it was for a trial court after hearing the evidence to determine the applicable legal standard and whether there had been an:

"imposition of undue pressure upon resistant parties, at the end of a long and tiring mediation, to execute an unconditional final agreement settling their disputes where it was apparent that they...wanted to seek further

advice...or where it was apparent that the agreement was not unconditional, or where the agreement was of such complexity that it required further consideration."³⁸

The court noted the mediator's defenses relating to causation and damages, issues as to which proof would be exceedingly difficult, and the claimed lack of any duty on the part of the mediator and the claim of judicial immunity. The court rejected those arguments on summary judgment and found that those issues required further consideration and review at trial.³⁹

Considerations for the Mediator

While many would say that the mediator in *Tapoohi* clearly stepped over the line of acceptable and ethical behavior, some of the conduct complained of is commonplace in mediation and may well represent precisely the kind of pressure users seek. The prospect that a court could entertain imposing personal liability on a mediator, especially where the parties were represented by able counsel and had every opportunity to review the draft settlement agreement, requires an assessment of some specific practices of mediators. When and how it is acceptable to try to keep people negotiating and what is proper and ethical to say to foster settlement are not easy questions.

A review of the patterns of conduct that emerge from the complaints lodged by parties and discussed in the published court decisions provides a road map for conduct as to which mediators should be especially cautious.

1. Strong arming the parties into not leaving when they want to or when they want to suspend the mediation to consult others
2. Strong arming the parties into not leaving when they are feeling indisposed
3. Strong arming the parties into working late into the night
4. Strong arming the parties into writing an agreement on the spot
5. The mediator writing the settlement agreement draft
6. The mediator talking about the cost of litigation
7. Mediator discussions/warnings/threats about additional legal action that would result
8. Mediator discussions of other consequences of failure to settle.
9. Mediator evaluations and discussions of likelihood of success in the dispute
10. Mediator giving legal advice

a. Keeping the parties in the mediation

There has been relatively little scholarly commentary about mediators coercing parties into continuing with the mediation despite a party saying he or she wants to leave, doesn't feel well, or it too late to continue. As such situations are intensely fact based, the dearth of writing on the subject is not surprising. As the ABA Report notes "[I]t is

³⁸ *Tapoohi v. Lewenberg No.2* [2003]VSC 410 (21 October 2003) at para. 86

³⁹ It is the author's understanding that the *Tapoohi* case was settled.

important to note the obvious distinction between 'pressure' on the one hand and coercion or intimidation on the other."⁴⁰ This is a crucial distinction and one that must be kept well in mind by all mediators to avoid stepping beyond ethical bounds when urging parties to continue working on resolution. But parties often look to mediators to keep the negotiation alive, and some persuasion by the mediator may be essential to assisting the parties in continuing to negotiate. Persuasion, properly handled in appropriate circumstances, would be viewed by many as part of the mediator's job. But mediators should be sensitive to physical impediments, to a stated need to consult others or to other circumstances that suggest that a suspension is in order and respect the parties right to control their participation.⁴¹

b. Encouraging a written agreement at the mediation

Mediators often encourage the parties to commit the agreement reached to a binding writing at the mediation knowing that without such a writing "settler's remorse" might set in and the deal might disappear.⁴² Telling the parties that recording the agreement on the spot makes the completion of the agreement more likely and enables the parties to flush out any latent areas of dispute so that they can be resolved while those with authority are present and focused on the matter would seem to many to be part of the mediator's task in assisting the parties to achieve a resolution. But again the distinction between persuasion and coercion must be carefully observed by the mediator so as to not force a writing before the parties are truly prepared to commit with finality.

Having the parties themselves be the ones to actually write up the settlement agreement rather than the mediator is a subject of some discussion among mediators. Many mediators absolutely refuse to be the scriveners of the agreement, while others do so in order to expedite the process but give ample opportunity to counsel to review and revise the draft. The *Tapoohi* case suggests that mediators should carefully consider whether they should record the terms of the agreement or suggest that counsel do so.

c. Advising on Unfavorable Consequences

Asking the parties if they have considered the costs of litigation and encouraging them to quantify that cost is a common tool used by mediators and does not seem objectionable properly posited. Asking questions that aid the parties in assessing how their interests outside the immediate dispute might be affected is also part of the mediator's job in helping the parties identify their interests. However, threatening language by the mediator and coercive statements that go beyond opening up a conversation about such collateral impacts should be viewed as being in breach of ethical requirements.

⁴⁰ ABA Report *supra* n.2 at 18

⁴¹ Many court ordered mediations require the parties to participate in the mediation in good faith and limit somewhat the parties' control over participation and the level of their engagement.

⁴² In order to assure party self determination, some court annexed mediation programs in the United States provide for a cooling off period of several days during which parties can change their minds about a settlement agreement.

d. Evaluating the merits

In a thesis that directly addresses the question of ethics and mediator evaluations, it has been suggested that before evaluations of the merits are conducted, the mediator should obtain informed consent from the parties.⁴³ Speaking not to reality-testing questions but rather to a concrete evaluation of the merits by the mediator, the dangers of giving an evaluation of the case are identified as jeopardizing neutrality, interfering with self-determination, and creating a risk that insufficient information may lead to an erroneous analysis and conclusion. The risk that information obtained in caucus may not be the same as a judge or jury would have before it, that an evaluation may end negotiations, and that if the parties are anticipating an evaluation they may be less candid with the mediator are also noted.⁴⁴

The authors warn that a failure to warn may be actionable under tort and contract theories that may attribute liability to the mediator. Informed consent would serve to obviate such claims and serve to assure party self-determination if properly and carefully couched so as to clearly communicate the basis for and limits of the evaluation to be given.

Whether the evaluation is given in a separate caucus session with one of the parties or before all parties in a joint session is of course a significant difference but even in caucus, before turning from a reality-testing questioning mode to an evaluation, a mediator would do well to caution the party as to the many limits on his or her ability to predict any result with certainty. Moreover, careful consideration should be given as to whether what might be viewed as legal advice should be given in an area in which the mediator is not expert.⁴⁵

e. Mediator Responses to Liability Potential

A mediator would be well advised, if not protected by quasi-judicial immunity as a court appointed mediator, to develop a well crafted mediation agreement that sets out the scope of the mediator's responsibilities. While, of course, one cannot fully effectively deflect liability for mediator misconduct by agreement, the scope of the mediator's responsibilities and the nature of the reliance that can be placed by the parties

⁴³ John W. Cooley and Lela P. Love, *Midstream Mediator Evaluations and Informed Consent*, Vol. 14 ABA Dispute Resolution Magazine, Winter 2008. A model script to use for seeking informed consent is provided in the article. See also, John W. Cooley and Lela P. Love, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 Ohio St. J. on Disp. Resol. 45 (2005).

⁴⁴ Some court annexed mediation rules do not permit evaluations by the mediator. See e.g., Florida Rules for Certified and Court-Appointed Mediators, § 10.370. "A mediator shall not offer a personal or professional opinion as to how the court in which the case has been filed will resolve the dispute."

⁴⁵ Recently issued rules for neutrals in the New York State Court Annexed mediation program provide for two categories of neutrals: neutral evaluators and mediators. Neutral evaluators must have five years of substantial experience in the specific subject area of the cases while mediators must have recent experience mediating actual cases in the subject area of the types of cases referred to them. New York Administrative Order of the Chief Administrative Judge of the Courts § 146 (2008)

on the mediator's statements can be enunciated and create a framework for mediation expectations. Mediators must be vigilant to ensure that their efforts to persuade do not lapse into coercion and should carefully consider whether they should be the ones recording the agreement of the parties. A mediator would be well advised to delineate the limits of his or her ability to accurately predict outcomes and to obtain explicit consent from all parties for any evaluation of the merits in joint session.

Conclusion

A significant number of mediation users have expressed the view that they appreciate evaluative mediators who exert some pressure to promote settlement. While user preferences cannot dictate mediator conduct, mediation is a tool used by parties to achieve settlement. As is often said in the context of arbitration, it is "the parties' process." With informed consent to a particular practice, mediators should be able to provide the service sought and provide evaluations as requested.

Pressure can be viewed as being in direct conflict with the mediator's ethical obligations which call for party self-determination and a voluntary, uncoerced decision. The mediation users' preference for pressure to settle requires further empirical study. What kind of pressure do users find helpful? Is it with further discussion of the merits of the case or by imposing some more tangible strictures such as not letting people leave the mediation or requiring that a writing be prepared? What kind of pressure do users find unacceptable? How different should the answer be, if at all, depending on the nature of the case and the presence and quality of counsel? Should there be a difference in the types of pressure that may be applied in a court ordered mediation as opposed to a voluntary mediation? Ultimately the analysis will undoubtedly result in an "I know it when I see it" litmus test, as each mediation presents its own unique challenges and requires an individualized process design and constant adjustments in approach as the mediation progresses. But a further exploration of the subject of appropriate mediator "pressure" and where and how it slips into "coercion" can lead to a better understanding by mediators of some of the limits they should impose on themselves in managing the mediation process and best practices can be developed consistent with ethical obligations. The ABA Report concludes that further examination be conducted to consider whether the recommendations made are useful in other practice areas, whether there are any implications from the work product for how mediators should be trained and how mediators can offer high quality services using various techniques.