

# Striving for the “Bullet-Proof” Mediation Settlement Agreement

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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 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-

cal matter in the preparation for the mediation. Ensuring that they are present or will be available to approve and execute (even by fax or PDF) the agreement is essential. Whether organizations, trusts, governmental entities or the like require approval from a board or other supervisory entity should be determined in advance so that the necessary steps can be appreciated and addressed by all before the session. And with respect to individuals, inquiry should be made if there are others whose opinion on a settlement decision is crucial so that arrangements can be made to ensure that approval is obtained during the session and so avoid the possibility of a settler's remorse scenario.

**Mediator Conduct**—Cases relating to mediator misconduct have been brought both to set aside a mediation settlement agreement and to impose personal liability on the mediator. These cases, like those discussed above, generally fail and in some cases, mediators may be protected by statutory or common law immunities varying in reach and scope. But again, avoiding even the commencement of such litigation is the goal, and it goes without saying that a mediator must comply with all of a mediator's duties including making appropriate conflict disclosures, maintaining the confidential nature of the mediation, and assuring a setting in which the parties can exercise their right of self-determination. While there are few situations in which it is the mediator's role to assess the fairness of the resolution to the parties, there are some situations in which the fairness of the outcome may be material to the court's review, such as in class action settlements or some family matters. In such cases the mediator should consider what role he or she should appropriately play to fulfill all obligations as a mediator and foster an enforceable resolution.

### III. Recording the Agreement

**Record the Agreement**—This may seem an obvious step, but many mediations end with only an oral agreement and a promise by one of the parties to prepare the necessary papers. It is increasingly difficult to ensure that an oral mediation agreement will be upheld; it may not be possible, in fact, in many jurisdictions as a result of mediation—or settlement-specific requirements and/or confidentiality provisions. Accordingly, taking the time to record the agreement, even if it is late at night when the mediation is finally concluded, is a step that should be taken if at all possible. (Again, bringing agreement drafts to the mediation, skeletal though they may be, is very helpful in this regard.)

Any specific requirements for enforcement under the governing state law must be identified and followed. The nature of the writing required in states that require a writing must be confirmed. In addition to a document physically executed by all parties, some states will enforce, for example, a recital of the settlement agreement in open 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 arbitral 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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