

PRACTICE

Step Out of the Zone of Comfort: Make a Reasonably Aggressive Settlement Offer in Mediation

BY LISA A. AMATO

Let's state the obvious: mediation is a concentrated process in a continuation of negotiations. In a negotiation, parties that reach an agreement have succeeded in delicately engaging in and reasonably managing competitiveness and cooperation for the sole benefit of achieving their goals. Mediation provides a unique moment in the negotiation process where the attention of the parties and legal counsel are focused on the case without distraction.

When mediating business disputes, I see a critical opportunity that parties often fail to seize—the strategic advantage of anchoring the negotiation by making a “reasonably aggressive settlement offer.” This opportunity exists regardless of which party made the last settlement offer or demand or when that last offer or demand was made.

A reasonably aggressive settlement offer is one that, as the name indicates, is both reasonable and aggressive. It should, of course, be based on relevant numbers specific to the facts of the case. A reasonably aggressive settlement offer should be structured based on the strength of all parties, BATNA (the best alternative to a negotiated agreement) and WATNA (the worst alternative to a negotiated agreement), the target at which the goals would be fulfilled (also known as the “aspiration base”), and the bottom line beyond which BATNA is triggered (also known as the “real base”). Thoughtful evaluation of the case allows a party to structure an initial settlement offer designed to test how much or how little the other party may be willing to accept.

The negotiation strategy of anchoring has been thoroughly analyzed and discussed as a psychological tool.¹ Studies have produced overwhelming evidence that there is much to gain by making a reasonably aggressive settlement offer as an initial offer. A reasonably aggressive settlement offer creates a strong pull throughout the negotiation to such an extent that it influences the other party's judgment even when that party desperately tries to discount it.² The reasonably aggressive settlement offer manages the other party's expectations and guides the terms of the ensuing settlement discussion. While the other party may dismiss the initial settlement offer, she will be forced to think within the parameters that have been set by it. In other words, a reasonably aggressive settlement offer anchors the settlement negotiations.

Time and again, parties in mediation often struggle with identifying their initial settlement offer that day, which is unfortunate because it is a wonderful opportunity to anchor the settlement negotiations in that party's interest. This opportunity exists regardless of whether the parties have been negotiating in advance of the mediation or whether one party has yet to respond to a party's initial settlement demand. The mediation process provides a prime opportunity for any party to set the stage for its best possible negotiated outcome regardless of the earlier negotiation strategies used.

An unreasonably aggressive settlement offer or demand not based on relevant numbers is not helpful to the negotiation. Unreasonably aggressive settlement offers tend to teeter toward absurdity. They cross a line of plausibility and trigger the other party to shut down the negotiations resulting in the loss of valuable time during the concentrated negotiation opportunity available in mediation. (This is not news to anyone.) That absurdly aggressive offer is a nonstarter, a negotiation killer. Unfortunately, all too often this scenario plays out in mediation regardless of how extensively the parties have been negotiating in advance of the mediation. Rather than a knee-jerk reaction to the other party's settlement offer for the sole purpose of “sending a message,” a reasonably aggressive settlement offer based on relevant numbers, on the other hand, is far better suited to guide the negotiations on a successful trajectory.

Parties are often hesitant to make the first offer in mediation, and, when they do, they often make an offer that both parties know is not reasonable. Parties would be better suited to think more strategically about what is most likely to place them in the best position, and they should consider the use of a reasonably aggressive settlement offer. ☉



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¹Adam D. Galinsky's studies and writings on the anchoring effect of numbers in negotiations are the foundation for anyone desiring more information about this negotiation strategy. See Adam D. Galinsky, *Should You Make the First Offer?*, HARV. BUS. REV. ART. (July 1, 2004).

²"People tend to irrationally fixate on the first number put forth in a negotiation—the anchor—no matter how arbitrary it may

be. Even when we know the anchor has limited relevance, we fail to sufficiently adjust our judgments away from it." PON staff, *Integrative Negotiation Examples: Effective Anchors as First Offers*, HARV. L. SCH. PROGRAM ON NEGOTIATION BLOG (Apr. 11, 2016), available at <http://www.pon.harvard.edu/daily/negotiation-skills-daily/effective-anchors-as-first-offers>.

Words Matter: Being Mindful of Language in Mediation

BY THEODORE K. CHENG

More often than not, how you say something is as equally important, if not more so, as what you say. Toward that end, mediators should develop—and counsel and their clients should expect from their mediators—a sensitivity to how language is used in the mediation process. In particular, all participants in a mediation should avoid the use of labels that diminish mediation as an alternative dispute resolution process.

Mediation is a confidential, dispute resolution proceeding in which the parties engage a neutral, disinterested third party who facilitates discussion among the parties to assist them in arriving at a mutually consensual resolution. Selecting the appropriate mediator—one who is well versed in mediation process skills, with perhaps some knowledge of, or prior experience with, the subject matter of the dispute—is oftentimes necessary to maximize the likelihood that a resolution will be achieved. Because mediation is a non-adjudicative process, there is no judge or other decision-maker who will determine the merits of the dispute. Rather, the mediator's role is to try and improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them toward a negotiated settlement or other resolution.¹

Being mindful of the language that is used in this process can have a significant impact on the experiences of the participants who agree to undertake a mediation. For example, take the pre-mediation conference call. As the name suggests, this call typically takes place before, and in preparation for, the mediation session. One subject that is usually on the agenda for that call is whether there is any information or documents that the participants believe would be

helpful to exchange in order to have a more meaningful and productive session. This exchange is often referred to as "limited discovery." This likely happens more often during court-annexed mediations because the attorneys are already in a litigious mindset, thus tending to refer to apparent equivalents in that procedure when discussing the mediation process. Such nomenclature should be avoided in mediation proceedings, however, because the limited exchange of information and documents in connection with mediations is quite unlike discovery as contemplated under the U.S. legal system. The purpose of full-blown discovery in the litigation context is to comprehensively request information and documents that might conceivably bear on the claims and defenses interposed in the dispute (and perhaps reveal previously unknown claims and defenses). By contrast, the exchange contemplated in connection with a mediation encourages counsel and their clients to work together cooperatively and share information and documents that will assist them in both conducting a more realistic assessment of the value of the dispute and helping to make the mediation session as productive as possible. Framing this part of the process as a "limited exchange" helps to dispel the notion that it is anything like discovery associated with court proceedings.

Moreover, oftentimes counsel will raise any number of objections to engaging in even a limited exchange, such as burden, time, and confidentiality.² Those objections are rarely well founded since the specific information and documents in question will likely end up being produced during the formal discovery process if the dispute ever finds its way into the court system. This, of course, is self-evident if the mediation is being conducted under a court-annexed program. Of course, if the limited exchange of information and documents

ultimately leads to a resolution, then the clients will have saved themselves from the almost assuredly more expensive and invasive full-blown discovery required under court procedure rules. Thus, declining to engage in this limited exchange only delays the inevitable.

Opportunities arise during the joint session as well. After the mediator handles introductory and welcoming remarks that set the tone and the ground rules, participants are typically afforded, in the first instance, the opportunity to direct comments at each other. In commercial mediations, this opportunity is usually handled by counsel representing the participants. In those situations, the mediators or counsel generally refer to this as making an “opening statement.” Using that terminology, however, reinforces the notion that the participants are locked into something that is akin to a trial in a courtroom—an adversarial setting where they (or, rather, their counsel) attempt to persuade the mediator of their positions. With that mindset, the participants are not likely to have much success persuading the other participant of their contentions, as that has usually been the tenor of the dialogue before they agreed to mediate the dispute. Moreover, referring to this opportunity as an “opening statement” largely mischaracterizes the (perhaps) unique chance to have one participant directly address the other(s) in hopes of communicating something meaningful and, thereby, contributing to the possible resolution of the dispute. Perhaps a more palatable term might be “opening remarks,” thereby having this process naturally flow from and complement the introductory and welcoming words of the mediator.

For the same reason, it is a better practice to avoid referring to the participants in the mediation—counsel or their clients—as “parties,” “opposing parties,” or even “sides.” Again, using such labels only serves to heighten the conflict and reaffirm the mistaken premise that a mediation is somehow a combative environment. To the contrary, a mediation is meant to be a collaborative process where participants seek to engage in a dialogue—facilitated by the mediator—that will hopefully uncover areas of mutual gain and alternatives to the straightforward resolution of finding one participant in the “right” and the other(s) in the “wrong.”

Much about resetting the mindset here falls upon the mediator, who, after all, is the one participant in the mediation who is not entrenched in the dispute itself or so enamored of the contentions as to be potentially blinded by them.³ Two of the most powerful skills that a mediator brings to the table is the ability to listen and then to reframe what she hears. When those opportunities arise, the mediator can assist the participants by avoiding the use of litigation-laden labels and mindfully using language that elevates and respects the process. Although beyond the scope of this article, the thoughtful use of language becomes even more paramount when the interactions between the participants and/or the mediator raise cross-cultural and implicit bias concerns. Those considerations strike at the heart of how participants in a mediation receive and process infor-

mation and, more generally, communicate with each other and with the mediator. Mediators who either are alert to these issues or can anticipate them arising will be in a much better position to provide a meaningful and beneficial experience for the participants. Being mindful of language and avoiding unnecessary labels is something to which all participants in a mediation should aspire. ☉



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¹See Theodore K. Cheng, *Using Alternative Dispute Resolution to Address Your Entertainment Disputes*, RESOLVER (Fall 2015), at 9, <http://www.fedbar.org/Image-Library/Sections-and-Divisions/ADR/Resolver-Fall-2015.aspx> (last visited Sept. 20, 2016). There are also a number of organizations that provide more information on mediation as a dispute resolution mechanism. See also *Civil Mediation Resources*, N.J. COURTS, <http://njcourts.judiciary.state.nj.us/web0/civil/medipol.htm> (last visited Sept. 20, 2016); *What is ADR?*, N.Y. STATE UNIFIED COURTS Sys., http://nycourts.gov/ip/adr/What_Is_ADR.shtml (last visited Sept. 20, 2016); *ADR—And Introduction*, NAT’L ACAD. DISTINGUISHED NEUTRALS, <http://nadrn.org/faq-adr.html>; *About Mediation*, MEDIATE, <http://mediate.com/about> (last visited Sept. 20, 2016); INT’L MEDIATION INST., <https://imimediation.org> (last visited Sept. 20, 2016); AM. ARBITRATION ASS’N, <https://www.mediation.org> (last visited Sept. 20, 2016); *JAMS Mediation Process*, JAMS, <https://jamsadr.com/adr-mediation> (last visited Sept. 20, 2016).

²Whatever confidentiality concerns the clients may have are usually addressed by the general principles of confidentiality that cloak mediation processes, along with any additional confidentiality and protective order agreements the clients choose to execute among themselves.

³This entrenchment impairs the judgment and decision-making process, a phenomenon known as “client-think.” See Laura A. Kaster, *Improving Lawyer Judgment By Reducing the Impact of “Client-Think,”* 67 DISPUTE RESOLUTION J. 1 (Feb./Apr. 2012), available at <http://www.nadrn.org/articles/LauraKaster-Sep2012-CLIENTTHINK.pdf>.

The Best Laid Plans of Legislators and Mediators: The Case for Broadening the Scope of Mediation Confidentiality

BY CAMERON G. STOUT

The past three decades have seen the explosive growth of mediation. In California alone, hundreds of thousands of cases that otherwise

would have clogged its courts have been resolved through mediation.¹ Confidentiality is a central pillar of the mediation process. California

currently provides one of the most ironclad mediation confidentiality protections (“Protection”) in the country. It renders mediation communications inadmissible in any civil legal proceeding. Unfortunately, the California Law Revision Commission (CLRC) is considering exceptions that, if passed, would be, in certain important respects, nearly as porous as those codified in the Uniform Mediation Act (UMA).²

The prospects of (1) weakening California’s mediation confidentiality and (2) maintaining the overbreadth of the UMA’s confidentiality exceptions threaten the viability of mediation as an alternative to litigation. I submit that the objections of highly experienced California mediators,³ judges, and lawyers to the proposed California confidentiality exceptions are well-placed and should also inspire an overhaul of certain of the UMA’s confidentiality exceptions.

California’s Current Confidentiality Protection

California’s narrow confidentiality exceptions are codified in California Evidence Code §§ 703.5 and 1115-1128. Subparts (a) and (b) of § 1119 provide that,

“No evidence of anything said, or any admission made [or writing prepared] for the purpose of, in the course of, or pursuant to, a mediation [collectively, ‘mediation communications’] is admissible or subject to discovery” in any noncriminal proceeding.

With several narrow exceptions not pertinent here, § 703.5 renders mediators incompetent to testify in any civil proceeding about any mediation communication.

The California Supreme Court has characterized the Protection as “clear and absolute,” and affirmed that it “broadly provid[es] for the confidentiality of things spoken or written in connection with a mediation proceeding.”⁴ Nothing could be more definitive, and yet....

The State of Play in California

In early 2012, a threat to the Protection’s “clear and absolute” nature materialized when California Assembly Bill 2025 was proposed to create a new mediation exception: Mediation communications between a party and his or her attorney would be *admissible* in a legal malpractice, breach of fiduciary duty, or state bar disciplinary action in which the client’s claims against the lawyer arise out of professional negligence or misconduct (the so-called “Attorney Misconduct Exception”).

In the face of vehement objections, studies such as the CLRC’s “Study K-402” were undertaken to research the impact such a law would have. Yet on Aug. 7, 2015—apparently prior to completing background research or preparing a “tentative recommendation”⁵—the CLRC voted to draft legislation that would allow admission of mediation communications relevant to a party’s allegation of his or her lawyer’s misconduct at mediation. Objections to the CLRC’s decision reached a crescendo.

In response, the CLRC, to its credit, voted on Oct. 8, 2015, to narrow its proposed Attorney Misconduct Exception in several ways:

1. Keep Code § 730.5 intact. Mediators would remain incompetent to testify in attorney misconduct cases (other than in state bar disciplinary proceedings).
2. Maintain the Protection in any mediator misconduct case.
3. Retain the finality of mediation settlements.
4. Only allow the admission of mediation communications in attorney misconduct actions but not in other related matters.
5. Provide for an *in camera* review before subpoenas may issue.

Despite these restrictions, however, a real possibility still exists that the Attorney Misconduct Exception will become law in California. If this happens, mediation confidentiality will be compromised, and the viability of the process could be significantly thwarted. For the same reasons, serious thought should be given to narrowing the UMA’s similar confidentiality exceptions, as explained below.

The UMA’s Broad Exceptions to Confidentiality

As the situation in California sorts itself out, it is also important to analyze the UMA’s exceptions to the Protection through the California lens. UMA § 4 does provide that, absent waiver or an applicable exception (enumerated in § 6), mediation communications are generally inadmissible. Parties, the mediator, and nonparty participants also may refuse to disclose them. It is in the details of confidentiality exceptions 5 and 6, however, that we encounter the legislative devil.⁶ Those sections may be summarized as follows:

5. A mediation communication is not protected if it is introduced in a subsequent proceeding against the *mediator* involving his or her alleged professional misconduct or malpractice.
6. None of the people listed in exception 6 can invoke the Protection if a mediation communication is used in a later claim of professional misconduct/malpractice during the mediation against a party to it, her representative, or a nonparty participant.⁷

As set forth above, the UMA’s overbroad exceptions, particularly those requiring the mediator’s later testimony (California does not have such an exception), erode mediation confidentiality and the effectiveness of the process itself.

Why an Attorney Misconduct Exception is Counterproductive

For a mediation to be effective, *all* participants must be free to discuss the case’s strengths and weaknesses with unvarnished candor, confident that “what is communicated in mediation stays in mediation.” If this protective shield is compromised, however, the parties and their counsel will continually be looking over their metaphorical shoulders, focused more on how the admission of evidence of their frank comments could affect them later and less on working to resolve the case.

California’s proposed exception (and the UMA) also hobble the mediator’s effectiveness. For example, if this exception becomes law in California, could a mediator truthfully tell the participants that all mediation communications are confidential and inadmissible in another civil legal matter? Must a mediator proactively advise that confidentiality has important exceptions? How do mediators in states that have adopted the UMA address these issues?

While the CLRC’s goal of protecting legal service consumers during mediations is well-intended, I am not aware of any reliable evidence that a significant number of clients have sued their attorneys based on mediation conduct. Concerns about this relatively insignificant issue pale in comparison to the deleterious effect that carving out this proposed exception to the Protection would have.

Mediation confidentiality certainly does represent a policy choice. As shown here, evidence exclusion is often necessary. It allows participants in a mediation to determine the best available settlement, and, should they choose, to settle the dispute accordingly. If that Protection is abrogated, however, and the client files a claim against his or her lawyer for tortious advice or other mediation misconduct,⁸ that lawyer will undoubtedly seek admission of *all* relevant mediation communications to rebut the client’s claims. This would

pose a grave threat to the crucially important benefit of predictable confidentiality concerning mediation communications.

Conclusion

The CLRC should be persuaded to abandon the proposed Attorney Misconduct Exception to California's Protection. Moreover, if the UMA's exceptions are not tightened, other states considering the UMA should adopt it, if at all, without its broad exceptions. Mediation is by far the most effective way to manage the overwhelming volume of litigation in this country; it must be nurtured, not dismantled. ☉



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Endnotes

¹Even the Bible urges swift settlement: "Come to terms quickly with your accuser while you are going with him to court, lest your accuser hand you over to the judge, and the judge to the guard, and you be

put in prison." *Matthew 5:25* (ESV).

²A number of states (*excluding* California) have either adopted the UMA or are considering it. Although beyond this article's scope, the UMAs broad confidentiality exceptions may well have been a reason for California's decision not to adopt the UMA.

³I am indebted to Ron Kelly, a highly regarded California mediator and leading commentator on the broad changes that are under consideration to California's confidentiality exceptions. Those with an interest may contact him via his website, www.ronkelly.com, where you can sign up for updates on this vital issue.

⁴*See, Cassel v. Superior Court*, 51 Cal. 4th, 113, 117-118 (2011).

⁵According to the Aug. 3, 2016, update of the Study K-402 webpage, the CLRC "completed the background work requested by the [California] Legislature and is now in the process of formulating a tentative recommendation." *Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct—Study K-402*, CAL. L. REVISION COMM'N, last revised Aug. 3, 2016, available at <http://www.clrc.ca.gov/K402.html> (last visited Aug. 5, 2016).

⁶While many family law experts undoubtedly object to the UMA's seventh exception involving issues arising in the family law/child abuse context, this exception is also outside this article's ambit.

⁷Thank goodness for small favors: Mediators cannot be compelled to give testimony relating to such claims. (*See*, UMA § 6(c)).

⁸*See e.g., Cassel, supra* n.4.

Mediating Troubled Financing Relationships

BY ALEXANDER J. ZIMMER

Most financing relationships go smoothly and at other times—not so much. When a client's financial needs or capabilities change, the consequences are bound to affect the client's relationship with its financing provider. In many cases, evolving needs and capabilities create stress on the existing relationship and lead to uncertainty and conflict. How the client and the financier manage the rough spots, however long or short, affect the parties' long-term relationship, each party's business operations, and ultimately its bottom line. An early intervention mediation is a conflict management tool that can save both the client and the financier time, stress, and money before a difficult situation becomes intractable and hopelessly adversarial.

Mediation is a process that addresses trust and predictability in a business relationship, which are often the first casualties of continuing conflict between parties. Ordinarily, financiers and clients respond to each other's requests for funds or information and adjust to each other's requirements. But, requests for more financial support or new and additional information can quickly disrupt a working relationship resulting in frustration and uncertainty. Advances to the client slow, or stop altogether, and the financier finds its window into the client growing increasingly opaque.

When conflict reaches this level, the client-financier relationship is at a tipping point. The account representative prepares to defend his now troubled situation, measuring reasonableness against the necessity of protecting the financier from loss. At the same time, the client begins to make plans to protect his business and provide for continuing operations. Both sides devote more and more attention to protecting and defending their positions at the expense of tending to the regular day-to-

day business. Inevitably, anxiety and the tendency to assess blame grow.

While the goal is to find a workable solution that can be sustained over time, these circumstances make that goal very difficult to achieve. In haste to dispel concern about the future, either party may agree to proposals that are unrealistic or have little chance to succeed in redressing the mutual problems. Or, the parties may take the other extreme and propose solutions that will work for one but not the other. The costs of failure are high. The financier stands to lose:

- Time and productivity in its accounts management department;
- Time and productivity in its workout group;
- Legal fees and expenses of both its internal legal department and outside counsel;
- Principal and profits on the financing;
- Reputation costs; and
- The relationship with the client.

The client stands to lose:

- Time and productivity in responding to the financier's demands for information;
- Efficiency in operations due to diminished cash flow and attention diverted from operations;
- Profits from disrupted operations;
- Relationships with suppliers and customers from disrupted cash flow;
- Financial reputation; and
- Relationship with the financier.

A mediation conducted by a knowledgeable mediator can salvage the situation and help the parties reach an agreement that helps each of them. Here's how.

Simply put, mediation provides a neutral forum in which the client and the financier each have an opportunity to describe their own view of the circumstances and to find a workable solution. The mediator facilitates the discussion and helps the parties explore options for resolving their common problem—the troubled financial relationship. While each party is able to present its own needs and concerns, an experienced mediator can help the parties evaluate solutions realistically without making judgments or assessing fault. The nature of the mediation process accommodates the difficult issues that characterize troubled financial relationships.

Before a financing relationship becomes nonperforming or moves to “workout,” mediation gives the parties a chance to pause, reassess, and reach a workable agreement for resolving the situation. Although every troubled relationship is in some ways unique, four issues are always present: (1) diminishing trust, (2) growing uncertainty and loss of predictability, (3) narrowing perception of common interests, and (4) increasing conflict between freedom of action and cooperation. The mediation process ameliorates each of these issues by: (1) fostering better communication between the parties, (2) encouraging reciprocal understanding of each other's interests, and (3) offering a neutral view of the situation and options.

Simply beginning mediation demonstrates a willingness to address a problem and helps repair the loss of trust. Typically, each party will describe what the other did that “caused” trust to erode. An experienced mediator can help the parties to better communicate the reasons why they took certain actions and to see how those actions were perceived by each other. As communication becomes more precise, the parties have a greater chance of making themselves better understood and of understanding each other. Improved communication is the first step in articulating and identifying interests and reaching common ground.

Predictability is fundamental to a working financial relationship. The client needs to know that its needs will be met and the financier needs to know that the client will do what is expected. Neither party likes to be surprised. The unexpected is often the precipitating cause of conflict. One has only to look at the disruption caused by the recent Great Recession to see how businesses seemed compelled by events to act. The narrative of the mediation exposes the reasons for the actions behind the loss of predictability that characterizes

a troubled financial relationship. By nurturing improved communication and articulation of each other's situation, the mediator can help the parties see how they share great concern over the issue of predictability.

The mediation dialogue will address the narrowing perception of common interests caused by the conflict. Loss of trust and predictability drive the parties into a defensive posture that creates more and more distance from each other. From this perspective, vision of common interests diminishes. The mediator helps the parties see how poor communication, or outside events, may have contributed to the current conflict. Better understanding of each party's interests helps define the problem as mutual and creates motivation to find a shared solution.

Ultimately, the parties must confront the tension between the desire for freedom of action and the necessity of cooperation. A sustainable solution requires agreement on the balance of these competing drives. The mediation process provides the base from which agreement is possible. Improved communication and mutual understanding permit full exposition of the elements of the shared problem. Working with these tools the parties can explore options for resolving their conflict. As a neutral third party the mediator can help the parties test alternatives against considerations presented by the reality of the situation.

The benefits of adopting an early intervention mediation as suggested here are many. Experience shows that parties who reach agreement through mediation are likely to adhere to its terms. Both the client and the financier save time and avoid escalating risks inherent in fruitless “negotiations” between parties that are frozen in defensive positions. Both sides can save the legal costs that invariably accompany a deteriorating financing relationship. The relationship is far more likely to be saved than if the conflict devolves into workout or litigation. The benefits of implementing an early intervention mediation program far outweigh the risks of allowing troubled financing relationships to continue their costly, all too familiar course. ☉



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Vacatur: Some Practical Tips on Surviving the Finality of an Arbitral Award

BY MARCIA ADELSON AND JOAN D. HOGARTH

Independent studies demonstrate that the success rate of vacating an arbitration award is small. Courts prefer to take a “hands-off” approach to the arbitration process and often refuse to disturb the award.¹ One study shows that of the 277 legal challenges made to vacate awards over 10 months in 2004, only 14 percent of them were overturned. An updated 2012 study similarly reflected dismal numbers of successful vacatur ranging between 4 percent on the grounds of “manifest disregard” to 20 percent for arbitrators “exceeding

authority.” Arbitration is a contractual agreement to privately resolve a dispute by using a third party or neutral person(s) (the arbitrator) of the parties' choosing in a private hearing (the arbitration). The courts are loathe to meddle in a process the parties have agreed to use to resolve a dispute. “Courts are reluctant to disturb arbitration awards, lest the value of the arbitration method of resolving controversies is undermined.”²

Arbitration “is now favorably recognized as an efficacious proce-

dures whereby the parties can select their own nonjudicial forum for the 'private and practical' resolution of their dispute with maximum dispatch and at minimum expense."³ Thus, parties choose to use arbitration to resolve their disputes because they want expediency, confidentiality, cost efficiency, and finality. The parties' expectation is not to have the dispute extended indefinitely post award as that would undermine the purpose of choosing arbitration over litigation. "The role of arbitration as a mechanism for speedy dispute resolution disfavors delayed challenges to the validity of an award."⁴ Courts support the benefits of arbitration and thus their decisions to refuse to vacate in all but a limited number of cases.⁵ The process of overturning the award is known as vacatur. Vacatur is defined in Black's Law Dictionary as "a rule or order by which a proceeding is vacated."

The Narrow Federal and State Grounds for Vacatur

Historically, the goal of commercial arbitration was to quietly and privately resolve disputes among business colleagues who desired to foster and maintain their business relationships. The parties, thus, opted for independent third parties who knew the business and who would listen to the issues in dispute and render a fair and final decision. They did not want to take their disputes to the public forum where it possibly could take years to be resolved and trade secrets could be divulged. Attempting to vacate the award would bring the case back to the forum the parties chose not to use in the first place (i.e., the courts). However, there are situations where a party may want to seek to vacate an arbitration award, and there are situations where that request may have merit.

Courts refuse to undertake an expansive review of arbitral decisions and generally will uphold an award so long as the arbitrator "offers a barely colorable justification for the outcome reached."⁶

The Federal Arbitration Act (FAA) § 10⁷ provides the narrow grounds for vacating an award if the award was procured by corruption, fraud, or undue means; if there was evident partiality or corruption in the arbitrators; where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

New York's Civil Practice Law and Rules (CPLR) provide similar grounds for vacating arbitral awards in cases that are purely New York state-based (e.g., collective bargaining agreement cases in labor arbitration). The CPLR § 7511 provides, in part, that the courts will vacate an award if the courts find that the rights of that party were prejudiced by the arbitrator's corruption, fraud, or misconduct in procuring the award; or partiality; or exceeding his power or so imperfectly executing it that a final and definite award upon the subject matter submitted was not made; or failure to follow the procedure of this article.

Likewise, other states such as Texas with its Civil Practice and Remedies Code (CPRC) § 171.088, allow for the overturning of an arbitration award when the award is procured through corruption, fraud, or other undue means; the rights of a party were prejudiced by evident partiality by an arbitrator, corruption in an arbitrator, or misconduct or willful misbehavior of an arbitrator; or where the arbitrators exceeded their powers, refused to postpone the hearing after a showing of sufficient cause for the postponement, or refused to hear evidence material to the controversy.

"The FAA supports a strong presumption in favor of enforcing

arbitration awards.... [T]he policy of the FAA requires that the award be enforced unless one of those grounds is affirmatively shown to exist."⁸ Thus arbitration awards are rarely overturned. The court presumes that arbitration awards will be confirmed as a matter of formality. "[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."⁹

Practice Tips for Advocates

So, should the advocate continue to seek to overturn an award in the face of national policy favoring arbitration? To answer categorically "no" is to ignore the fact that sometimes there are bad arbitrators applying bad principles and making bad decisions. Parties are entitled to recourse and are not compelled to accept a bad award as final. For example, an arbitrator assigned to a case with multiple issues, multiple rules, multiple venues, and multiple parties made a decision to join all parties and to hear the case under one set of rules in a single venue. The court ruled that the arbitrator had exceeded the authority given to him under the parties' arbitration agreement. The court vacated the award.¹⁰ But the court remanded a case for confirmation at the lower court where the rules governing the arbitration called for delivery of the award within a certain time. Even though the parties "waited more than two years for a final decision," the court ruled that there was no showing of harm from the late award but that there would be harm if the case was not remanded to the lower court for enforcement of the arbitral award. The outcome, the court felt, would be the same regardless of when the decision was delivered.¹¹ It was in the interest of fairness and equity and under the respective vacatur statutes that the courts arrived at these decisions.

Therefore, the advocate who attempts to overturn an award is faced with (1) public policy that favors arbitration, (2) very narrow statutes that increase the probability that vacatur will not be easy, and (3) statistics that demonstrate that the percentage of successful challenges are extremely low. The advocate must be guided less by her zealotry to win a case for the client and more by the reasons arbitration was chosen in the first place. Moreover, she is now aware of how disfavored the request for vacatur is in the courts.

The advocate should know that "the burden to show invalidity of any arbitral award is upon the party who brings a proceeding to set it aside."¹² How should she prepare to meet the challenges of the final award? We offer these practice tips on how to identify and preserve legitimate objections thereby sparing the expense and exposure of a court hearing brought about by the failed attempt at vacatur:

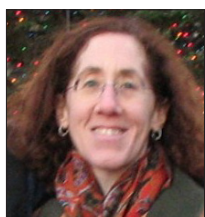
- Prepare a guideline detailing the arbitration procedures. Be as detailed as possible and, like any other contract, indicate the venue, rule of law that applies, the scope of the arbitration, the issues to be arbitrated, the type of award and fees that would be covered, and whether there are essential deadlines.
- Include an appellate review process much like the one that is offered by some arbitration providers such as the American Arbitration Association. This preserves the right of the parties to obtain a review from the arbitrator's decisions before attempting vacatur in the courts.
- Outline, with specificity, the qualifications or general nature of the arbitrator(s) skills and expertise, number of arbitrators to hear the case, etc. Advocates should be careful to avoid being too specific since many disputes may not take place for several years after an

arbitration agreement has been drafted. By then, circumstances may have changed, thereby making the guidelines defunct.

- Be vigilant during the arbitration process and especially at the hearings in the unlikely event that you desire to challenge the award. Know your case, know your client, and get to know your opponents and the arbitrator.
- Object to any departure from the rules of the agreed-to process. For example, if there is a belief that the opposing counsel or a party concealed evidence or new evidence is found subsequent to the rendering of an award, there must be some record to demonstrate that the concealed evidence was such that the arbitrator would have reached a different result if the evidence had been presented to the arbitrator, although discovery of new evidence is not normally grounds for vacatur.¹³
- Object, on the record, to the arbitrator's inclusion of issues that are not presented before him. A party to an arbitration waives his right to a vacatur of the award based on arbitrator misconduct where he had actual or constructive knowledge of the misconduct, and an opportunity to object, but failed to do so until after the award was rendered.¹⁴
- Be ever cognizant of disclosures or failures to disclose. If you have actual or constructive knowledge of these disclosures or conflicts of interests, the advocate should immediately bring this to the attention of the arbitrator or the service provider. Do not wait or risk an award in your opponent's favor. If a party goes forward with arbitration and the party has knowledge of the arbitrator's bias, or facts that reasonably should have prompted further limited inquiry, it may not later claim bias based upon the failure to disclose such facts.¹⁵ Additionally, arbitrators are under a continuous obligation to make disclosures. But the courts will not generally set aside an award for failure of an arbitrator to do so.
- Object in a timely manner if the arbitrator is late in rendering the award and the parties had established deadlines indicating that time was of the essence.

Conclusion

"[C]ourts are obligated to give deference to the decision of the arbitrator."¹⁶ Therefore, obtaining a vacatur of an arbitration award is very difficult. The odds of having the award vacated are very small and that is because the courts do not want to interfere in a private, mutually agreed upon process to resolve a dispute—a process designed to be faster, less expensive, and confidential. In the end, a zealous attorney is ethically obligated to advise her clients that the risks associated with vacatur are high. The client must be advised that he will most likely have to live with the decision because it is highly unlikely that the award will not be confirmed. The conversation should be part of the initial case strategy and a conversation that is repeated throughout the process. To the extent that there are indeed prejudicial and harmful effects to an award because of how it was procured or the unethical inappropriate behavior of the arbitrator, parties should take advantage of those narrow grounds provided under the state and federal arbitration statutes. ©



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Endnotes

- ¹Lawrence R. Mills, J. Lani Bader, Thomas J. Brewer & Peggy J. Williams, *Vacating Arbitration Awards*, DIS. RESOL. MAG. 23-27 (Summer 2005); Lawrence R. Mills & Thomas J. Brewer, 'Exceeded Powers': Exploring Recent Trends in Cases Challenging Tribunal Authority, ALT. TO THE HIGH COST OF LITIG. (Sept. 4, 2013). But see also Helen LaVan, Ph.D., Michael Jedel, D.B.A. & Robert Perkovich, J.D., *A Model to Predict Why Courts Vacate Arbitration Awards in Labor and Employment Disputes* (paper presented at 15th annual IIRA World Congress (Aug. 27, 2009)), indicating that there is a rise in successful vacaturs for labor arbitration awards.
- ²*Matter of Goldfinger v. Lisker*, 68 N.Y.2d 225, 230 (1986).
- ³*Matter of Sprinzen*, 415 N.Y.S.2d 974, 976 (1979).
- ⁴*Florasynth Inc. v. Pickholz*, 750 F.2d 171, 177 (2d Cir. (1984)) (citing *Sheet Metal Workers Int'l v. Standard Sheet Metal*, 699 F.2d 48 (9th Cir. 1983)).
- ⁵In *Florasynth*, the Court in discussing the status of an arbitral award, noted that: The award need not actually be confirmed by a court to be valid. An unconfirmed award is a contract right that may be used as the basis for a cause of action." *Florasynth*, 750 F.2d at 176.
- ⁶*Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 122 (2011).
- ⁷Federal Arbitration Act 9 U.S.C §§ 1-16 governs arbitration in federal and state courts.
- ⁸*Wall Street Assocs. L.P. v. Becker Paribas Inc.*, 27 F.3d 845, 849 (2d Cir. 1994).
- ⁹*Florasynth*, 750 F.2d at 176.
- ¹⁰*PoolRe Ins. Corp. v. Organizational Strategies Inc.*, No. 14-20433, slip op. 14 (5th Cir. Apr. 7, 2015).
- ¹¹*Hasbro Inc. v. Catalyst USAA Inc.*, 367 F.3d 689, 690 (7th Cir. 2004).
- ¹²*Caso v. Coffey*, 41 N.Y.2d 153, 159 (1976). See also *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1223 (11th Cir. 2000).
- ¹³*Sorrentino v. Weinman*, 2007 N.Y. slip op. 34423(U) (N.Y. Sup. Ct. Jan. 8, 2007), 2007 N.Y. slip op. 34423 (N.Y. Sup. Ct., 2007).
- ¹⁴*Lindenhurst Fabricators v. Iron Workers Local 580*, 206 A.D.2d 282 (1st Dept. 1994). In this case, counsel was party to "fraternizing" discussions between the arbitrator and the opposing counsel. Counsel failed to raise the issue then or even later when the hearing resumed. Counsel only did so after an unfavorable award.
- ¹⁵*Matter of Stevens & Co. [Rytex]*, 34 N.Y.2d 123, 129 (1974).
- ¹⁶*Goldstein v. Gross*, 2014 N.Y. slip op. 31125, 14 (N.Y. Sup. Ct. 2014).