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**FORUM 2013 INTENSIVE PROGRAM – MEDIATION**

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## **I. INTRODUCTION**

An effective mediation is ultimately an exercise in control. It allows the parties to control, or at least limit, the risks they would otherwise face before a judge or jury. The parties can achieve more tailored results by agreement than would be available from the blunt instrument of a verdict, judgment or even an arbitration award. If they negotiate a solution, in the form of a payment plan, an agreed injunction, or restructuring a contractual relationship, they can create a path around obstacles like personalities or other factors that have pushed the parties apart, and direct them back to a productive business relationship or efficient separation, before litigation sours their dealings irretrievably. Furthermore, a negotiated solution can provide confidential treatment of issues that might, if made public, have system-wide implications, whether from adverse publicity or other consequences. Finally, this procedural tool can reduce legal expenses on both sides, as well as the diversion of time and personal energy that would be more productively spent in conducting the underlying business.

Mediation therefore holds increasing appeal for the resolution of franchise disputes. Properly used, this tool can provide the fastest, fairest, and least expensive route to resolution of a dispute.

## **II. WHY AND WHEN TO MEDIATE**

### **A. Why To Engage In Mediation**

Most participants in a good-faith mediation process will perceive the event as a worthwhile endeavor. Bringing the parties together for discussion and negotiation has the potential to help identify each side's strengths, weaknesses and beliefs, narrow the gap between the parties in the dispute and provide a flavor of the challenges they may face from the other side in the pursuit of their claims, even if settlement is not reached before the session concludes. The mediation event also provides the disputing parties with a look at the other side's evidence, underscoring what each side must do to develop an effective theory and admissible proof to support their claims and defenses.

There are some who are suspicious of the information flow that can occur in mediation, characterizing it in ominous tones as "free discovery." But whether the process of discovering facts is expensive or not, both sides can benefit from learning the strengths and weaknesses of the claims, counterclaims and defenses.

There are a few assumptions that explain the rationale for mediation. The first premise is that franchisors and franchisees share a goal of resolving disputes as quickly and inexpensively as fairness and the nature of the dispute will allow. In such cases, mediation can be an extremely effective tool for reaching resolution, creating an "event" that brings the parties together and requires them to articulate their goals and the obstacles they see to reaching those ends.

Mediation will not be successful where resolving the dispute is not the motivation of the parties. In some disputes, one or both parties have not defined their goals, and may squander the occasion by trading accusations or other emotional venting. In other disputes, one side may want to pressure the other, establish a court precedent, or use the dispute to wage part of a bigger battle with others who are not in the room. In those situations, mediation may result in a

frustrating and pointless expenditure of time and resources, and even give rise to accusations of bad faith.

The second assumption is that the parties have first tried to resolve the dispute through negotiation, but failed. Some sticking point exists – it may be timing, personalities, lack of information, lack of understanding, or any other reason.

Where parties want, in good faith, to resolve disputes fairly, quickly, and inexpensively, and where they have begun to define the way to do so, then mediation has a high probability of bringing them to an agreed resolution. Skilled mediators and mediation services report consistent success rates of 65%-85% (depending on the source of the numbers and how they're defining success).<sup>1</sup> Modern mediation offers well-defined, sophisticated processes for reaching agreement.

## **B. When To Engage In Mediation**

Mediation can be triggered in several different ways: by the terms of an existing franchise agreement or other contract between the parties, by the standing order or case specific order of a court, or by the joint decision of the parties after a dispute has arisen between them. We will examine each of those paradigms, and then discuss how each model can contribute to resolving disputes as fairly, quickly, and inexpensively as the dispute allows.

Overall, the timing of mediation may determine its benefit. Pre-dispute mediation frequently offers the benefits of reduced cost, an enhanced opportunity to preserve the franchise relationship, and a flexibility that is only possible in a confidential setting. Early mediation, however, may face the frustration and challenge of a lack of information – by either side or both – regarding the strengths and weaknesses of the parties' positions. Mediation after a party files a lawsuit or arbitration demand can achieve many of the efficiencies of pre-dispute mediation, provided the parties understand the claims, have evaluated their own position and the approach of the opposing party, and act early enough to avoid sinking substantial resources into the process of litigation. In a post-filing franchise mediation, though, the parties often lose the option of confidential treatment, given the obligation of a franchisor to disclose the essential terms of settlement with its franchisees. Later in the case, after some discovery, the parties will have shown their strengths and weaknesses and may be more realistic in their goals. Finally, mediation can even occur productively on appeal. Often mandatory, and frequently free, appellate mediation can often walk the parties back from the risks and finality of parting ways and enforcing judgments.

### **1. Mandatory Mediation Under A Written Agreement**

Franchise agreements drafted in the last ten years will frequently include a mandatory mediation clause that conditions the right to bring an arbitration or lawsuit on having first participated in some form of private dispute resolution, whether a meeting of principals or a

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<sup>1</sup> See e.g., Scott G. McLester, *Mediating franchise disputes: an alternative to litigation or arbitration*. The Free Library. (July 1, 2005), [http://www.thefreelibrary.com/Mediating franchise disputes: an alternative to litigation or...-a0134534791](http://www.thefreelibrary.com/Mediating+franchise+disputes:+an+alternative+to+litigation+or+...-a0134534791) ("The CPR Institute for Dispute Resolution has in the past reported success rates in excess of 80 percent for its mediations."); Lisa Blomgren Bingham, J.D., Tina Nabatchi, Ph.D., Jeffrey M. Senger, J.D. & Michael Scott Jackman, M.P.A., *Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes*, 24 Ohio St. J. on Disp. Resol. 2 (2009) (study of civil cases handled by Assistant United States Attorneys indicated that 65% of the cases settled when parties engaged in ADR).

formal mediation, or both. Such provisions are intended to bring the parties together one last time, before their disagreement becomes public and much more difficult to solve.<sup>2</sup> If a party to a contract with mandatory mediation ignores that contractual requirement, and files suit before participating in mediation, courts differ on whether the action may proceed or, in the alternative, should be stayed or dismissed.<sup>3</sup>

While many mandatory mediation clauses are short and provide little detail, the better practice is for the clause to be reasonably comprehensive. Examples include the following types of provisions:

Before filing [suit or arbitration], either party must first participate in mediation by serving written notice (the "Notice") on the other party requesting mediation. If either party brings [suit or arbitration] before participating in mediation, the parties consent to the [court's or arbitrator's] [staying the matter pending mediation or dismissing the matter without prejudice.] [Franchisor may seek to exclude certain disputes such as the collection of royalties or enforcement of trademark rights.]

The mediation shall be held in [location] or [at a mutually-agreeable location.] Within ten days of the Notice, the parties shall select a mutually-agreeable mediator. If the parties fail to agree to a mediator within this time period, either party may apply to [JAMS, AAA, or other provider] with a request that the provider select a mediator within seven days of the request. The parties shall split equally the cost of the mediator.

If the parties do not resolve their dispute through mediation within [ ] days of the Notice (the "End Date"), the condition of participating in mediation has been met and either party may bring [suit or arbitration]. From the time of the Notice until the End Date, all statutes of limitations shall be tolled.

The most helpful clauses allow a realistic amount of time for a mediation to occur, keeping in mind the challenge of coordinating schedules for the parties, their counsel and a mediator. If the time is unworkably short, the parties might consider a stand-still agreement to accomplish the same end, but that may require more cooperation than parties can achieve when they are on the brink of suit.

Franchisors and their counsel vary in their views of mandatory mediation clauses. Some disfavor the clauses because they believe mediation works only when the dispute is ripe for resolution, which often requires discovery and requires parties to become realistic about the risks of the suit. They prefer the flexibility of seeking mediation when they believe the case is ready for it. Others favor the clauses because they find that, though some suits may not be ready for resolution, the process's high effectiveness rate warrants the requirement. Further,

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<sup>2</sup> Anecdotally, modern mediation clauses appear to have become more common in franchise agreements after industry-wide discussions that followed publication of "Organization Design for Successful Franchising," Selden, Andrew C., *Franchise Law Journal*, Vol. 20, No. 1 (Summer 2000).

<sup>3</sup> See, e.g., *B & O Mfg., Inc. v. Home Depot U.S.A., Inc.*, 2007 WL 3232276 (N.D. Cal. Nov. 1, 2007) (dismissed pending mediation); *R&F, LLC v. Brooke Corp.*, 2008 WL 294517 (D. Kan. Jan. 31, 2008) (stay pending mediation); *Bombardier Corp. v. National R.R. Passenger Corp.*, 298 F. Supp.2d 1 (D.D.C. 2002) (denying motion to dismiss because mediation clause ambiguous as to whether it was a condition precedent).

with Item 3 requirements for disclosure of the material terms of even confidential settlements of litigation with franchisees, mandatory mediation pre-suit allows for a level of confidentiality that will not be possible if the dispute progresses to litigation.

## **2. An Ombudsman Program**

Some franchisors offer an ombudsman program to franchisees who find themselves at odds with the franchise system. Under such a program, a franchisee has the opportunity to speak with a designated business or legal representative to resolve disputes prior to litigation. The representative may negotiate directly with the franchisee in an attempt to resolve disputes in the most informal and expedited fashion possible. The benefit to this approach, much like engaging in mediation early in a dispute, is that the parties may be flexible in their positions, because they have not spent substantial time or money advocating their position. Immediate or prompt informal dispute resolution may even allow the parties to salvage a troubled business relationship. In fact, the informal dispute resolution process is highly effective in preventing the irreparable breakdown of a business relationship, as it allows the parties to resolve their disputes while maintaining their status quo in the franchise system, and without taking public positions that are hostile to one another.

The success of an ombudsman approach depends almost entirely on the effectiveness of the mediator, both in obtaining results from the franchisor and in earning the trust and respect of franchisees.

## **3. Court-Ordered Or Court-Sponsored Mediation**

Some courts have promulgated rules that offer or require mediation at specified points in the litigation. Many federal judges, for example, require the parties to report on settlement at the first status conference, and sometimes will urge mediation before the issues are even joined. (While pressure from the bench may send the parties to mediation earlier than can be productive, an effective advocate will advise the Court candidly if it is too early for such an approach to work, and request leave to address the issue after other events unfold in the case.) Additional rules provide a convenient mechanism to allow parties to petition the court to order mediation, sometimes without revealing that the request was anything other than the Court's own good idea.<sup>4</sup> In either scenario, the court may direct the parties to work with a magistrate judge assigned to the case, with other court employees, or with a private mediator chosen from a panel of approved mediators.

Even after the entry of judgment, court-ordered mediation can still be an option. For example, all the United States Circuit Courts have a mediation process for appeals, sometimes mandatory.<sup>5</sup> In the Ninth Circuit, for example, there are nine "circuit mediators," all of whom are full-time employees of the court. The court's website explains, "They are highly experienced and qualified attorneys from a variety of practices and have extensive training and experience in negotiation, appellate mediation, and Ninth Circuit practice and procedure."<sup>6</sup>

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<sup>4</sup> A compendium of processes in courts in all states appears at <http://courtdr.org/court-adr-across-the-us>.

<sup>5</sup> See table listing appellate procedures in L. Hooper, D. Miletich, and A. Levy, Case Management Procedures in the Federal Courts of Appeals (2d Ed. 2011, sec. K, Table 13; see also [http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/\\$file/MediCon2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/$file/MediCon2.pdf).

<sup>6</sup> <http://www.ca9.uscourts.gov/mediation/mediators.php>.



#### 4. Voluntary Mediation

Mediation can also be voluntary and consensual, prompted by the suggestion and choice of the parties at any stage of a dispute. The business world and the courts have warmed to alternative dispute resolution, leaving largely in the past such ancient questions as, “Will we be perceived as weak if we raise the issue of mediation?” In aftermath of rules like Federal Rule of Civil Procedure 26(f), the parties often must confirm to the federal or state court judge very early in the case that they at least have discussed among themselves the potential for settlement. Rather than a sign of weakness, a mediation discussion today looks simply prudent, as litigants seek to limit the cost and time of lawsuits and associated discovery. Zealous representation of a client does not preclude the exploration of compromise.

Some cases are ripe for mediation from the outset. The dispute may not be a large one, or the parties may value the continuation of their relationship, or the business owners may prefer a quick settlement to the costs and distraction of ongoing litigation. On the other hand, there are cases that simply are not ready for resolution. One or both sides may need or want discovery, or a ruling on a particular issue. Frequently a party and/or its counsel may harbor unrealistic optimism about the results that can be obtained or the costs of reaching them. In these cases, early mediation would likely be in vain.

Some counsel and their clients look for the “optimal” or “perfect” moment to mediate. A better goal is simply to find an effective time to mediate, to avoid letting the perfect be the enemy of the good. One recent approach is to engage in what one commentator calls planned early negotiation<sup>7</sup> or another calls early active intervention,<sup>8</sup> mentioning mediation early and engaging in dynamic assessments as a dispute unfolds, testing to see when it may be ripe for resolution. With good lawyers, acting in good faith on both sides, there is a point where the parties will have the information they need for an effective mediation: knowledge of the key facts, insight into each side’s strengths and weaknesses, and a sense of the reasonable cash value or other deal points that will allow a settlement. That is the point at which meaningful negotiations can occur.

Parties may choose to retain a neutral facilitator at the beginning of a dispute, to help them reach ripeness quickly and inexpensively, and then to resolve the dispute through negotiation or mediation. For example, if the parties have a mandatory mediation clause, they could choose a neutral who applies the principles of planned early negotiation. The neutral would first assess whether the case is ripe for standard mediation at that stage. He or she would inquire whether each party has the information it needs to have reasonable confidence that it can assess the dispute for purposes of negotiating or mediating resolution. If both the parties indicate yes, the parties proceed to negotiation or standard mediation.

If the parties are not ready, the mediator has a number of choices.

- If there is certain information each side needs, the mediator might arrange for and supervise a prompt exchange of documents or short depositions to be done within, for example, 14 days.

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<sup>7</sup> *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*, John Lande (ABA 2012) (“Lande”).

<sup>8</sup> *Id.*, App. T.

- If the parties need a court ruling on a point of law, the mediator might suggest the parties work with the arbitrator or judge to arrange for a limited discovery/expedited briefing procedure.
- If the parties need to work through some issues before they're ready to mediate, the mediator may try to work with the parties separately in person or by phone to work through the issues.
- If the parties want traditional discovery and motion practice, the mediator could work with them to quicken the pace and lower the cost of the discovery.

After any of these conditions is satisfied, the parties could negotiate directly or work with the mediator in a standard mediation format. If a session fails to resolve the dispute, the mediator could help the parties fashion a procedure to continue the settlement discussions. It may be that the parties need a break to reflect, or that they need to exchange further information. If one or both parties decide that they want to try the case, the mediator could assist in working out a plan for finishing discovery and trying the case as quickly and inexpensively as possible.

A clause along the following lines should trigger early mediation, as long as the parties retain a mediator skilled in applying the process.

Before filing [suit or arbitration], either party must initiate early active intervention (EAI) by serving written notice (the "Notice") on the other party requesting EAI. The EAI facilitator should structure the dispute resolution to allow for the fastest, cheapest, resolution that fairness and the nature of the dispute allow, including but not limited to conducting mediation when the case is at an appropriate stage for mediation likely to be successful.

The rest of the mediation clause would have standard terms like those discussed in section II(B)(1) above.

### **III. HOW TO CONDUCT AN EFFECTIVE MEDIATION**

#### **A. Selection Of The Mediator And Form Of Mediation**

##### **1. Training And Track Record Are Important**

One of the most important factors in the mediation process is selecting the appropriate mediator to conduct the proceedings. Parties might hope to agree upon someone who will understand their respective concerns and claims, whether as a result of experience in the substantive industry, experience as a lawyer or experience as a judge. There is rarely a shortage of suggestions for the mediation of franchise disputes, given resources like franchise organizations or associations, former or current executives or consultants in the field, or experienced practitioners.

Such experience may be useful, and may shorten the time for a mediator to get up to speed on the disputed issues. All too often, though, parties overlook the importance of the training and track record of the candidates for a mediator position. That information is often

hard to obtain, given that prior mediations may have been confidential. Accordingly, it is often important for the parties to interview a mediator, as well as to obtain reviews from those who have worked with him or her before. Fundamentally, the choice of a mediator will often determine the technique or techniques that will be employed in an effort to solve the parties' dispute. Accordingly, it is essential that parties understand not only the credentials of a mediator, but how each particular mediator has been trained, and how he or she traditionally approaches warring parties.

## **2. The Choice Of Mediator Often Determines The Method Of Mediation**

There are several prevailing methods of that mediators use in bringing parties together. The most prominent among the techniques are facilitative, transformative and evaluative mediation. As set forth below, a mediator conducting a facilitative mediation acts as a truly neutral third party, and does not generally offer his or her opinions regarding the issues in dispute among the parties. In contrast, an evaluative mediator provides his or her opinions concerning the parties' issues in dispute, and may offer a prediction of what the likely result would be should the case go forward to trial. An evaluative mediator may also recommend a settlement range.

The effectiveness of a particular style or type of mediator often will depend upon the nature of the dispute and the personalities of the parties. If parties are cordial with each other, and the dispute does not involve challenging or novel concepts, the parties may benefit the most by retaining a facilitative mediator to bring the parties together and offer ways to maintain communication during the mediation session. Alternatively, the parties may opt to retain a transformative or evaluative mediator.

### **a. Facilitative Mediation**

A facilitative mediator meets with the parties, together and separately, and tries to bring them to a mutually acceptable agreement. In the course of doing so, he or she may assist the parties in weighing their own position, understanding the position of the other side, and obtaining information they need to make a decision. A skilled facilitative mediator may try to help the parties "brainstorm" to formulate their next settlement proposal in creative and appealing ways.

It is unusual for a facilitative mediator to value a case, or decide whether the position of one party or another is valid. However, in some instances an attorney may ask for the mediator's opinion. This request may stem from a difficulty in dealing with a client – or an adversary – who may have unrealistic expectations. The advocate may hope that the client will respect the opinion of a neutral third party (or honestly wants to know if the mediator disagrees with their evaluation of the case). In such situations, a mediator should be willing to offer a well-reasoned and tactful opinion.

### **b. Transformative Mediation**

In this style of mediation, the mediator meets only in joint sessions with the parties, rather than in private caucuses. The focus is upon creating an environment of constructive dialogue between the parties, rather than upon an immediate settlement. There is no pressure to settle, and in fact settlement is not even considered the primary goal. Instead, the goal is to transform the relationship between the parties.

**c. Evaluative Mediation**

If a dispute presents novel or complex issues, the parties might consider retaining an evaluative mediator, who will provide an objective and unbiased viewpoint in analyzing the dispute, in an effort to educate the parties about the strengths and weaknesses of their respective positions. The success of such an approach will depend on many factors. An evaluation from a well-respected mediator, who hears and assess the positions of both sides, can bring clarity to a dispute in which one or both sides are not accurately assessing the risks they face. On the other hand, a mediator who evaluates and then declares a likely result can make it more difficult to resolve a matter if one or both parties do not respect the evaluation. There are horror stories of mediators who have heard only part of the relevant information, and then “shot from the hip” in declaring what the likely result would be. If the predicted outcome of the dispute does not resonate with both sides, then the divisions between them may become deeper. If that situation unfolds, then settlement may not be achievable, at least until a court or an arbitrator rules on all or part of the underlying issues.

Whenever possible, the selection of the mediator should involve a collaborative effort by all of the parties involved in the dispute. That joint effort will allow all participants to feel confident in the fairness of the mediator. If a party does not like, respect or trust the mediator, that dynamic will substantially lessen the possibility of achieving a successful mediation result. By arriving at an agreement on the person who will conduct the mediation proceedings, the parties reduce the chances of antagonism that may derail the mediation.

**B. Mediation Services And Costs**

Once the parties have agreed to engage in mediation, they must decide whether the mediation will be self-administered, or instead will be run by a mediation service and governed by its rules. Organizations like Judicial Arbitration and Mediation Services (“JAMS”), the CPR, and the American Arbitration Association (“AAA”) are among the most recognized mediation services, although this is by no means an exclusive list. An administering organization can assist the parties by supplying the resumes and checking the schedules of available mediators, as well as with administrative tasks like the exchange of information between the parties. JAMS and AAA charge an administrative fee, in addition to the mediator’s fee, for the management of cases and the resources needed to assist the parties through the mediation process.

The evaluation of who should pay for the mediation can look like a smaller version of the underlying issue in dispute. In some kinds of cases, it is typical for one party to bear the cost of the mediation. This is a common approach in employment or consumer disputes, in which the employee or consumer is required to mediate by an employee handbook/policy or consumer contract, and may lack the financial means to share in the mediation cost. In other kinds of cases, most commonly commercial disputes, the parties share the expense, including the administrative fee, hourly rate for the mediator, and any expenses if the mediator must travel to another office. Some commentators believe that a franchise should offer to pay entirely for a mediation, believing that it sends a signal of respect, as well as confidence in one’s position, to do so. Others reason that a non-contributing party may view as a “free ride” any mediation session that does not require a deposit or payment, and may not attend the mediation session in good faith. By requiring all parties to share in the costs of mediation, they conclude, everyone has an investment in the process and the parties are more likely to come to mediation with an honest intention to resolve their dispute. Customarily, where the responsibility is not spelled out in a contract or an industry custom, the expense of a franchise mediation is a shared one.

### **C. Before The Mediation**

Confucius was right when he said, "Success depends upon previous preparation, and without such preparation there is sure to be failure." That principal is as true for a successful mediation as it is for trial work. Yet a surprising number of lawyers, litigants – and even mediators – come to a mediation session without effective preparation. Some appear without any preparation at all, expecting the client and the mediator to undertake all the work of bringing the parties together. We suggest the following steps in order to maximize the effectiveness of the crucial mediation day.

#### **1. Internal Preparation**

First, before meeting with the client, it is important for counsel to performing a thorough case evaluation. Gather, review and organize the important documents and information. It is essential to know:

- What the current causes of action are;
- What the damage components are (including interest and attorneys' fees to date);
- How strong the evidence is on both sides;
- What the strengths and weaknesses are of the parties' legal positions;
- What the expenses will be if the litigation continues; and
- How solvent the other side is, if your client is expecting to recover damages.

From that base of information, counsel can outline for the client the overall financial risks of proceeding, as well as any business risks that might flow from declaratory judgments or injunctive relief requested by the other side.

#### **2. Preparing Your Client To Participate**

It is pivotally important to prepare your client to strategize and to participate in the mediation. First, define what a successful result would look like from your client's perspective. Explore the client's goals, discuss alternatives, lay out the risks facing both sides, and use that information to shape the negotiating strategy together. It is frequently the case that the client representative attending the mediation does not have at his or her fingertips all the financial or substantive information required to set that strategy. There may be additional information in the hands of the client's business team, and it is far more effective to obtain that knowledge before the mediation, rather than in a scrambling break from negotiations. The client's business team may also have had contact with the business people on the other side, especially where the parties have an ongoing relationship. Accordingly, it will add to the effectiveness of the mediation if you and your client are able to define in advance what the other side's vulnerabilities are, and what their business goals are likely to be.

It will be essential to make sure that the person attending the mediation will have the necessary authority to proceed. If the mediation is court-ordered, some judges have very specific requirements. For example, one extremely effective magistrate judge requires,

In the event settlement authority delegated to any defense representative appearing at the settlement conference has been set by a committee and such authority may not be unilaterally exceeded in any amount by the representative

designated to attend the settlement conference, then the entire committee must be fully identified in the defense settlement statement (name, position, work address for each member) AND the entire committee or a quorum thereof empowered to enter into any agreement to settle the case MUST attend the settlement conference. Failure to follow this directive may result in a re-scheduled settlement conference AND payment of attorney's fees, expenses and other costs incurred by any other party during preparation for the settlement conference and attendance at the conference. Additional sanctions, including default, may be appropriate.

Case Management Procedures, Hon. Philip Frazier, United States District Court for the Southern District of Illinois, <http://www.ilsd.uscourts.gov/documents/Frazier.pdf>. The requirement to identify committee members by name, and to require travel, will often increase the flexibility and authority of the client representative instead.

It is also helpful to prepare your client for the skills and personality of a particular mediator. Some private mediators have been judges, and expect deference to their own opinions that a private practitioner may not require. Some prefer a formal atmosphere, while others will try to break down barriers and resistance with informal greetings, stories and personal connections. You will want to prepare your client to connect with the mediator (and to understand what the mediator is doing if he or she is warm and sympathetic to an adversary your client has grown to dislike intensely). Some clients are unnerved by a mediator who seems receptive to the opponents, rather than lecturing them about the weakness of their position. Some clients may not realize that a mediator who is curt and pessimistic in a breakout session may be equally disapproving with the other side. It will be important for you to gather and share as much information as possible about the mediator's personal approach to the mediation process.

Mediators differ, not only in personality but also in the methods they use to understand and resolve particular disputes. Some are trained in the field of mediation, and understand techniques like setting brackets, baseball arbitration, shuttle diplomacy, and other established ways to reach agreement. Others may give you a "gut" evaluation and watch for a reaction from you and your client. Some have a background in your client's industry – and others do not. Once you and your client assess the background and experience of the mediator, you can discuss the most effective ways of taking advantage of particular strengths, and compensating for what might be a weakness in the context of your particular suit. If you prepare your client for the mediator, your client will know how to behave, procedurally and substantively, in the mediation session. In addition, your client will recognize what the mediator is trying to accomplish in his or her approach to the other side.

Once you and your client have obtained the necessary information and authority to deal with the other side and the mediator, and have established the client's goals, the next step is to develop a strategy for achieving that result. This requires a thoughtful assessment of what structure and amount to include in your initial settlement proposal, the likely response of the opposing party, and what your client's next negotiation positions will be. Many lawyers wait until the morning of the mediation – or the mediation session itself – to frame those proposals. It is far more effective to map them out in advance. A thorough strategic discussion in advance will assist you in shaping the direction and effectiveness of the mediation for the benefit of your client. While the other side of course may bring surprising positions to the mediation, you will be able to adapt and adjust if you have a firm grasp of what results the client would like to achieve.

### **3. Preparing The Other Side**

In advance of the mediation, you have a valuable opportunity to prepare the other side to understand the strengths of your position and any weaknesses in its own. If your adversary has requested information, and is unlikely to resolve the dispute without knowing those facts, you can make a solution more likely by providing the material. It is rarely a good idea to surprise opposing counsel or the other party with new documents or information at the mediation. They may need time to consider a new development, and have the ability to control the pace by terminating or rescheduling the discussions. Once you have exchanged the information reasonably necessary for both sides to make a decision, you might try to set the level of the opponent's expectations, by holding an initial round of discussions, or proposing an initial term sheet, before bringing the parties together with the mediator.

### **4. Preparing The Mediator**

Finally, it will be important to prepare the mediator well in advance of the actual meeting with the parties. It often helps the process to have a joint telephone call among the lawyers and the mediator, in which each side can explain the dispute and their respective positions without the risk of offending or entrenching the parties. Many mediators request a mediation statement, with clear direction about whether that statement should be shown to the other side. Counsel may also wish to send the mediator copies of key documents or expert reports, if that information will be useful in understanding and crafting a solution to the problem dividing the parties. If the mediation statement is to be shared, there is an opportunity to lay out the facts without vitriol, to educate the principals on the other side about facts or law that their lawyer may not have explained clearly, or that they may not yet have absorbed in the press of complying with discovery obligations and motion practice.

In addition to joint and objective information, a good mediator will frequently provide an opportunity for a private conversation with each advocate. In that setting, the lawyers can provide a heads up about personalities, client control, system goals, or other information inappropriate to share with the other side.

Finally, many magistrate judges and judges will ask for an estimate from each side of what the litigation is likely to cost their respective clients if it does not settle, and whether there is a fee-shifting provision in the underlying agreement. That information will allow the court to evaluate where the tipping point may be as negotiations proceed.

### **D. At The Mediation**

The parties may choose to present opening statements during the joint session at the commencement of the mediation. By using opening statements, the parties can express their viewpoints concerning their dispute and analyze the strengths and weaknesses in the other parties' positions.

Opening statements often provide the disputing parties a realistic view of their opponents' positions in connection with the dispute. The opening statements and the joint session may also allow the parties to conclude one way or another whether their opponents are attending mediation in good faith. The joint session and the opening statements may set the tone and the level of expectations among the parties and allow them to realize that emotions and bad blood among them should not overshadow the goal of ultimately resolving their dispute.

Assuming a mediator requires the parties to participate in opening statements and a joint session, counsel should determine how best to utilize those opportunities to facilitate resolution and not to polarize the parties. The substance, form and tone of opening statements can either bring the parties closer together, or distance parties from each other, ultimately affecting the ability to compromise. Counsel must walk a fine line between effectively advocating his client's position and not alienating the other side to the point of chilling any chance the adverse parties will try to reach a resolution.

After the joint session, the mediator often will engage in "shuttle diplomacy" with each party in separate caucus sessions. During the caucus sessions, the mediator will probe for more facts from the parties and sort out their strengths and weaknesses in the dispute. During shuttle diplomacy, the mediator can often determine whether settlement "pressure points" exist and determine ways to overcome them. During that time, the mediator will reinforce with each party the benefits of early settlement versus pursuing the dispute through litigation or arbitration.

During shuttle diplomacy, the mediator may explore creative opportunities to effectuate settlement with the parties. For instance, while one party may have a very strong position warranting payment from the other party to resolve a dispute, if the potentially paying party is unable to afford making the level of payment expected by the other party, the mediator may explore more creative solutions that will allow the parties to avoid a stalemate. Creative solutions may include, for instance, payments over time, the entry of a consent judgment (if there is existing litigation), or alternative business solutions such as an early termination of a relationship or even the extension of a relationship.

The mediator and the parties must maintain mutual respect and trust during the mediation session in order to achieve a successful result. The mediator must be able to accurately assess when each side is reaching its settlement limits, regardless of any "hard line" positions the parties may take. By the same token, the parties must be forthcoming with their positions with the mediator and trust that the mediator will work to foster an environment where both parties feel they have the opportunity to reach a reasonable resolution. If trust between counsel, the parties and the mediator is lost among any of the dynamics during mediation, the mediation event likely will not result in a resolution of the dispute.

An effective facilitative mediator should avoid, to the extent possible, passing judgment on the parties and their positions. Mediators who offer "judgments" often run the risk of emboldening or alienating one or both of the parties, rendering the resolution of the dispute less likely. While there are some settings in which an evaluation may be appropriate, see Sections II(A)(2)(a) and (c) above, the risk of a counterproductive reaction is extremely high.

Every mediator wants to resolve every dispute presented (and without that success, the mediator cannot build the kind of track record and references that attest to the effectiveness of his or her own dispute resolution skills). In efforts to reach the goal of a final resolution, mediators may resort to suggesting settlement terms to the parties in order to avoid a stalemate or impasse, especially where the mediator determines that the gap in the parties' positions is just too significant to bridge.

The use of a settlement bracket, for instance, is a classic method used by mediators to break the settlement stalemate. Consider the following: Party "A" refuses to offer more than \$100,000 to Party "B" to resolve a dispute, Party "B" refuses to accept less than \$500,000 from Party "A", and neither party will move from its positions. If the mediator suspects either party would move from its position if the other side moves, the mediator may establish a bracket



where he says, “if “A” agrees to pay “B” \$200,000, will “B” agree to accept \$400,000?” Provided both parties agree to the bracket suggested by the mediator, in this scenario the mediator has moved the parties closer by \$200,000. The mediator can continue using the bracket strategy to bridge the gap to resolve the dispute.

Mediators will also employ the “silver bullet” to break up an impasse between the parties in mediation. Taking the same scenario between “A” and “B” above, instead of offering a bracket, the mediator may pick a number between the settlement numbers provided by the parties. For instance, the mediator may pick \$400,000 as the silver bullet, find out if “A” would pay “B” \$400,000 if “B” were willing to accept it, and find out if “B” would accept \$400,000 if “A” were to offer it. If both “A” and “B” concur with the \$400,000 silver bullet, the mediator helps break the stalemate and successfully settles the case.

It is important to memorialize a mediation settlement promptly, in order to avoid any “buyer’s remorse” or misunderstanding of the terms agreed to during the mediation. If drafting and executing a formal settlement agreement before the conclusion of the mediation event is not an option, the mediator often will require the parties to draft and execute a “memorandum” of settlement. Whether a handwritten term sheet, or a list of commitments read into the record in court, it will be essential to commemorate the essential terms of a settlement so that it can be enforced if one part or another tries to re-trade the deal, or to walk away entirely.

The memorandum should list the key terms of settlement between the parties – for instance, any monetary settlement, any action or cessation of action one or both of the parties must take to effectuate the resolution, and post-resolution obligations (such as confidentiality and releases). The memorandum or term sheet will frequently state that it will be replaced with a more formal settlement agreement to reflect its terms. Parties may also choose to add provisions in the memorandum as to the timing for completion of the drafting and execution of the formal settlement agreement, and may define any additional role the mediator shall play in connection with completing the settlement.

There has been substantial discussion in reported decisions about the enforceability of a mediation term sheet or memorandum. For example, in the notorious dispute between Facebook and the Winkelvoss twins, a mediation session resulted in a one and one-third page handwritten “Term Sheet & Settlement Agreement.” That list of commitments purported to end the dispute between the parties, requiring the Winklevosses to give up their networking site ConnectU in exchange for cash and a piece of Facebook.<sup>9</sup> When Facebook’s lawyers later presented the twins and ConnectU with 130 pages of documents to achieve that end, including a Stock Purchase Agreement, a ConnectU Stockholders Agreement and a Confidential Mutual Release Agreement, they refused to sign. Facebook’s deal lawyers moved to compel their signatures, claiming that the terms in these documents were “typical” and “required to finalize” the Settlement Agreement. In response, the twins argued that if these terms were really “required” and “typical,” then they must be material, and their absence from the Settlement Agreement rendered it unenforceable. The Ninth Circuit put an end to the quarrel and found the terms of the settlement agreement were sufficiently definite to bind the parties, even though “some material aspects of the deal were to be filled in later.” The Court observed, “... [A] term may be “material” in one of two ways: It may be a necessary term, without which there can be no contract; or, it may be an important term that affects the value of the bargain. Obviously, omission of the former would render the contract a nullity.... But a contract that omits terms of

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<sup>9</sup> *Facebook, Inc. v. Pac. Northwest Software, Inc.*, 640 F.3d 1034 (9th Cir. 2011).

the latter type is enforceable under California law, so long as the terms it does include are sufficiently definite for a court to determine whether a breach has occurred, order specific performance or award damages....This is not a very demanding test."<sup>10</sup>

Accordingly, in completing the mediation process, it is prudent to obtain the signatures of the authorized representative for each side, their counsel and the mediator. Several mediation services have forms that can be obtained and reviewed in advance. If there is no such form, or if the service's form is unacceptable for some reason, consider bringing a laptop and a jump drive, to permit an efficient listing, printing and signing of terms. If that technology is not available, then the old-fashioned handwritten term sheet can be just as effective as an electronic one.

#### **E. Scope Of Confidentiality**

Anyone who has regularly attended mediations over the course of his or her career has probably heard a mediator make a general statement to the effect that all parties should feel free to be completely open and honest with the mediator because all communications made during the course of mediation are confidential. This is a generally true statement, which is supported by various state statutes and court rules and echoed in many of the mediation rules and guidelines published by ADR providers. However, there are exceptions to the scope of mediation confidentiality. Book chapters and lengthy law review articles have been written analyzing the legal bases for confidentiality in mediation and the exceptions to that rule. We offer the following overview of various statutes, rules and guidelines for maintaining confidentiality in mediation, and highlight certain of the most common exceptions and challenges that may arise in franchise mediations.

In a franchise context, it is also important to note that confidential treatment may not be possible if a mediation is successful, and results in a settlement agreement, if the underlying dispute falls into certain categories that must be disclosed in an FDD or to prospective franchisees. For example, if a franchisor resolves a lawsuit arising from the franchise relationship, there are circumstances in which the formal settlement agreement may need to be disclosed publicly, including all material terms, whether or not the agreement is confidential.<sup>11</sup> While it is beyond the scope of this paper to address that disclosure issue in depth, practitioners in this field will need to be familiar with the disclosure obligations required by both federal and state regulations.

#### **1. Uniform Mediation Act**

The Uniform Mediation Act ("UMA") was promulgated by the National Conference of Commissioners on Uniform State Laws, in collaboration with the American Bar Association's Section on Dispute Resolution, in 2001 and amended in 2003. It has been enacted by ten states and the District of Columbia and, as of early 2013, has been introduced in the state legislatures in an additional three states.<sup>12</sup> One of the stated goals of the Uniform Mediation Act is to

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<sup>10</sup> *Id.* at 1038 (internal citations omitted).

<sup>11</sup> See, e.g., 16 C.F.R. Part 436, FTC Franchise Rule Compliance Guide, p. 38; see also North American Securities Administrators Association, Inc., 2008 Franchise Registration and Disclosure Guidelines, p.37 n.2.

<sup>12</sup> Uni. Mediation Act, (Last Revised or Amended in 2003) Drafted by the National Conference of Commissioners on Uniform State Laws, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act>.

“promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests.”<sup>13</sup> In accordance with that goal, the UMA generally provides that, subject to certain enumerated exceptions, all written or spoken communications made during or in connection with mediation are privileged and not discoverable or admissible in evidence in any adjudicatory proceeding, unless waived.<sup>14</sup> As part of the privilege, parties may refuse to disclose and prevent any other person from disclosing any verbal or non-verbal communications (including written or otherwise recorded statements) made during mediation or before or after the mediation if in connection with the mediation process.<sup>15</sup> The mediator and nonparty participants may refuse to disclose their respective mediation communications, and may prevent others from disclosing them as well. The privilege does not, however, apply to the underlying facts of the dispute. In other words, information that would normally be subject to discovery or admissible in evidence does not become exempt from discovery, or inadmissible, simply because it is used or discussed in mediation.<sup>16</sup>

Among the exceptions to the privilege are mediation communications that:

- Constitute a written agreement signed by all the parties;
- Take place during a public mediation or are part of a record which is open to the public;
- Represent threats or plans to commit bodily injury or violent crimes;
- Are used to plan or commit a crime or conceal ongoing criminal activity;
- Support or refute claims of professional malpractice or misconduct by a mediator, a party or party representative (including attorneys); and
- Relate to abuse of a child, elderly or disabled person.<sup>17</sup>

In addition, the UMA includes a qualified exception to the privilege when an adjudicatory body (e.g., a court or arbitration panel) determines that the information sought is otherwise unavailable and the need for it outweighs the interest in confidentiality in a felony case or when the information is relevant to an attempt to rescind, reform or avoid liability on an agreement entered into at the mediation.<sup>18</sup> Notwithstanding these exceptions, the UMA provides that it does not supersede state statutes that provide mediators are incompetent to testify and that allow mediators to be awarded costs and attorneys’ fees in the event they are wrongfully subpoenaed.<sup>19</sup>

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<sup>13</sup> Uni. Mediation Act, (Last Revised or Amended in 2003) Drafted by the National Conference of Commissioners on Uniform State Laws, Prefatory Note, [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf).

<sup>14</sup> *Id.* at Section 4.

<sup>15</sup> *Id.* at Section 2(2) and Section 4.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at Section 6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at Section 4, Legislative Note.

Although the UMA has not yet been widely adopted, practitioners, especially those who may mediate in many jurisdictions throughout the United States, would do well to become familiar with its provisions. At the very least, doing so can alert lawyers to the various confidentiality issues that may arise in the mediation context. Beyond the UMA, however, counsel must become acquainted with the mediation confidentiality protections and exceptions in the jurisdiction(s) in which they primarily practice.

## **2. State And Federal Statutes And Rules**

The benefit of a uniform statute such as the UMA becomes apparent when one realizes that 49 states and the District of Columbia have passed legislation or enacted court rules that address confidentiality in cases referred to mediation by courts.<sup>20</sup> Over 250 different state statutes in some way touch upon the issue of confidentiality.<sup>21</sup> When considering the broader category of all statutes and rules that in some way affect mediation, the number is a staggering 2500 plus.<sup>22</sup> Furthermore, statutes and rules that govern mediation proceedings are not always easy to locate. They can be found in rules or codes of civil practice and procedure, rules of court, rules of evidence and independent statutes.<sup>23</sup> Some of the inconsistencies that result from this plethora of statutes and rules include whether mediation communications are privileged and, if so, who holds the privilege, the extent to which a grant of confidentiality applies, whether mediation communications fall within the evidence rules protecting settlement discussions, procedures and remedies available in the event of a breach of the privilege or confidentiality, whether confidentiality can be waived and what exceptions to confidentiality apply.<sup>24</sup> Complicating the problem even further is the question of which state's law applies when mediations take place across state lines, such as when mediation communications take place over conference calls, the internet or videoconferencing.<sup>25</sup> Whether federal or state law applies is also not always clear.<sup>26</sup>

In addition to the many and varied state laws and rules are the rules of federal district courts. The Alternative Dispute Resolution Act of 1998<sup>27</sup> ("ADR Act") mandates that each United States district court "shall authorize. . . the use of alternative dispute resolution processes in all civil actions."<sup>28</sup> The ADR act further requires each district court to adopt a local rule that

<sup>20</sup> Oberman, Susan "Confidentiality in Mediation: An Application of the Right To Privacy," 27 Ohio State Journal on Dispute Resolution, Number 3, 2012, 539, at 546-547, note 36.

<sup>21</sup> Uni. Mediation Act, Prefatory Note, [http://www.uniformlaws.org/shared/docs/mediation/uma\\_final\\_03.pdf](http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf)

<sup>22</sup> *Id.*

<sup>23</sup> See Oberman, *supra* at 613-615.

<sup>24</sup> *Id.* at 615-61; see also Ronald K. Gardner, J., Michael L. Sturm, & Tacie H. Yoon, *I've Got a Secret (Don't I?): Maintaining the Confidentiality of Settlement Discussions, Mediations and Arbitrations*, ABA Forum on Franchising, Annual Meeting Program Materials, Tab W-24 (2008) at 11-13.

<sup>25</sup> See Uni. Mediation Act, prefatory note *supra*.

<sup>26</sup> For a detailed discussion of choice of law and mediation privilege, See Garner, Scott B. and Kennedy, Shawn M., *Frailty Thy Name is Privilege: Mediation Confidentiality and its Jurisdictional Challenges*, ABA Section of Intellectual Property Law, 26<sup>th</sup> Annual Intellectual Property Law Conference (2011) at 1-5.

<sup>27</sup> 28 U.S.C. §651 *et seq.*

<sup>28</sup> 28 U.S.C. §651b.

provides “for the confidentiality of the alternative dispute resolution processes” and prohibits “disclosure of confidential dispute resolution communications.”<sup>29</sup> Since the ADR Act leaves the details of the local rule to the discretion of each district court, there is a wide variation in the resulting confidentiality provisions.<sup>30</sup> Suffice it to say that, when representing a party in federal district court, it is important to consult the local rules to see what they provide with respect to confidentiality in mediation.<sup>31</sup>

Despite the differences in the multitude of state and federal rules and statutes, the law governing confidentiality in mediation can be divided into three general categories: rules of evidence, privileges, and confidentiality statutes and rules.<sup>32</sup> Evidence rules pertaining to the confidentiality of mediation communications include Federal Rule of Evidence 408 and similar state evidentiary rules that protect the confidentiality of settlement discussions. However, these evidence rules generally only prevent evidence concerning actual settlement offers and negotiations from being admitted into evidence; they do not typically constitute a general grant of confidentiality to all mediation communications.<sup>33</sup> For example, these evidence rules may not prevent the disclosure of settlement negotiations outside of court, nor do they apply to discovery requests.<sup>34</sup> Furthermore, a party may not be able to rely on the rules of evidence to prevent evidence of settlement negotiations from being admitted in non-judicial proceedings such as arbitrations or administrative hearings.<sup>35</sup>

Many state statutes governing mediation go a step further than Rule 408 and similar state evidence rules by creating a privilege for mediation communications.<sup>36</sup> The extent of the privilege varies from state to state. Some may only allow a party to assert a privilege against the disclosure of settlement discussions in court, while others allow all participants in the mediation to refuse to disclose settlement discussions in any type of adjudicatory process, but may or may not allow a participant to prevent someone else from disclosing mediation communications outside of such a proceeding.<sup>37</sup> In addition, some federal courts have recognized a federal common law mediation privilege, pursuant to Federal Rule of Evidence 501 which allows the federal courts to recognize federal common law privileges. However, this privilege has not been uniformly accepted by federal courts and there is little federal circuit court

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<sup>29</sup> 28 U.S.C. §6562d.

<sup>30</sup> See Gardner, et al., *supra* at 11-13.

<sup>31</sup> *Id.* at 13.

<sup>32</sup> Jay Folberg, et al, *Resolving Disputes Theory, Practice, and Law*, Second Edition, Aspen Publishers (2010) at 481-485.

<sup>33</sup> *Id.* at 481.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 482

<sup>37</sup> *Id.* at 483-484

authority regarding the existence of a federal common law privilege for mediation communications.<sup>38</sup>

The broadest protections can be found in statutes and court rules that characterize all communications made during or in connection with mediation as confidential and prevent any of the mediation participants from disclosing such communications, subject to certain exceptions similar to those provided for in the UMA. One example of such a statute is the Administrative Dispute Resolution Act of 1996, which prohibits voluntary or compulsory disclosure of mediation communications unless all parties and the neutral consent to disclosure, the communication has already been made public, a statute requires public disclosure or a court determines that the need for disclosure in certain limited situations outweighs the policy in favor of maintaining confidentiality.<sup>39</sup> Other examples of similarly broad confidentiality protections include a local rule of the United States District Court for the Northern District of California, and statutes in Minnesota, Colorado, California<sup>40</sup> and Texas.<sup>41</sup> Finally, many courts include confidentiality protections in their orders requiring parties to mediate.

### **3. Rules, Guidelines And Agreements Of Private ADR Service Providers**

In addition to the various rules and statutes that govern confidentiality in mediation, many ADR service providers have published rules, guidelines and agreements that address confidentiality. While we have included examples from the American Arbitration Association/ICDR, JAMS/JAMS International and CPR, counsel should be sure to review any rules, guidelines and agreements provided by the service provider for the mediation. For example, both the Commercial Mediation Procedures of the AAA and the International Mediation Rules of the International Centre for Dispute Resolution (the International Division of the AAA) provide that, when parties have agreed in a contract or stipulation to conduct a mediation through the AAA, they are deemed to have made AAA's procedural guidelines a part of their agreement.<sup>42</sup> Section M-10 of both sets of procedures prohibits the mediator, subject to applicable law or the parties' agreement, from divulging confidential information disclosed during the mediation, obligates the mediator to preserve the confidentiality of all documents given to the mediator and provides that "[t]he mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum."<sup>43</sup> The procedures further require the parties to maintain confidentiality and prohibit the parties from attempting to rely on or introduce into evidence in any forum the views, suggestions or proposals related to settlement made by the parties or the mediator, admissions made by any participant or evidence regarding whether or not any party was or was not willing to accept a

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<sup>38</sup> See Gardner, et al. at 15-18; See also, Crouch, Dennis, *Federal Circuit Court Ducks Question of Mediation Privilege* (November 15, 2011); available at: <http://www.patentlyo.com/patent/2011/11/federal-circuit-ducks-question-of-federal-mediation-privilege.html>

<sup>39</sup> 5 U.S.C. §574.

<sup>40</sup> See Gardner, et al., *supra* at 11-13.

<sup>41</sup> See V.T.C.A., Texas Civil Practice and Remedies Code, §§154.053, 154.073

<sup>42</sup> AAA Commercial Mediation Procedures, Amended and Effective June 1, 2010 at M-1; ICDR International Mediation Rules, Amended and Effective June 1, 2009 at M-1; available at [www.adr.org](http://www.adr.org).

<sup>43</sup> *Id.* at M-10.

settlement proposal made by the mediator.<sup>44</sup> In addition, AAA has adopted the Model Standards of Conduct for Mediators, which addresses confidentiality in fairly general terms, requiring the mediator to maintain the confidentiality of information obtained by the mediator “otherwise agreed to by the parties or required by applicable law.”<sup>45</sup>

JAMS makes available on its website a variety of agreements that the parties are encouraged to adopt with or without modification. The first of these is the JAMS Mediation Agreement whereby the parties agree that the “entire mediation process is confidential,” and that “[a]ll statements made during the mediation are privileged, and are made without prejudice to any party’s legal position and are inadmissible for any purpose in any legal proceeding.”<sup>46</sup> The agreement also states that all mediation communications and conduct will not be disclosed and are privileged and inadmissible in evidence under “Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule or common law provisions.”<sup>47</sup>

JAMS has a separate sample Confidentiality Agreement designed specifically for use in California that contains the same confidentiality provision as the Mediation Agreement but adds provisions that state: 1) confidentiality may only be waived by an express written waiver signed by the mediator and all parties; 2) any settlement agreement is not subject to the Confidentiality Agreement unless the settlement agreement so provides; and 3) participants in the mediation will require others in their organization to abide by the Confidentiality Agreement before confidential information regarding the mediation will be disclosed to them. A separate JAMS Stipulation for Settlement, also designed for use in California, includes a provision expressly waiving the terms of the Confidentiality Agreement for purposes of enforcing the settlement.<sup>48</sup> Additionally, JAMS International Mediation Rules contain a confidentiality rule very similar to the AAA confidentiality rule discussed above, except that the JAMS rule also provides that “[f]acts, documents or other things otherwise admissible in evidence” in any legal proceedings do not become inadmissible because they are used in mediation.<sup>49</sup> Finally, JAMS Mediators Ethics Guidelines<sup>50</sup> include a section regarding confidentiality which provides, inter alia, that a mediator should explain to the parties any applicable laws or agreements regarding the confidentiality of mediation communications and that a mediator “should not disclose confidential information without permission of all parties or unless required by law, court rule or other legal authority.”<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> Model Standard of Conduct for Mediators, American Arbitration Association (adopted September 8, 2005), American Bar Association (adopted August 9, 2005), Association for Conflict Resolution (adopted August 22, 2005), available at [www.adr.org](http://www.adr.org).

<sup>46</sup> JAMS Mediation Agreement, Revised May 2005, available at [www.jamsadr.com](http://www.jamsadr.com).

<sup>47</sup> *Id.*

<sup>48</sup> JAMS Confidentiality Agreement—CA, and JAMS Stipulation for Settlement – CA, [www.jamsadr.com](http://www.jamsadr.com).

<sup>49</sup> JAMS International Mediation Rules, Effective August 1, 2011, Rule 11, available at [www.jamsadr.com](http://www.jamsadr.com).

<sup>50</sup> JAMS Mediators Ethics Guidelines, available at [www.jamsadr.com](http://www.jamsadr.com).

<sup>51</sup> *Id.*; The Introduction to the JAMS Ethics Guidelines makes it clear that the guidelines are intended to be national in scope and are therefore necessarily general and not intended to take the place of any applicable local laws or rules.

The Franchise Mediation Program of the International Institute for Conflict Prevention & Resolution (ICDR) has several rules that address confidentiality.<sup>52</sup> Rule 7 prohibits the mediator from disclosing any information received from a party to any third party without the producing party's permission. The entire mediation process is deemed to be confidential according to Rule 8 which forbids the parties and the mediator from disclosing to a third party any details regarding the mediation process, including any statements made or information disclosed, unless the parties agree otherwise in writing. Rule 8 also mandates that the entire process is to be treated as an offer of compromise under the Federal Rules of Evidence and other applicable laws or rules and that evidence regarding the entire procedure will be inadmissible in any subsequent proceeding.<sup>53</sup> Finally, Rule 10 provides additional protection for confidential information by disqualifying the mediator from serving as a witness, consultant or expert in any other matter or proceeding related to the subject matter of the mediation.<sup>54</sup>

#### **4. Common Exceptions And Challenges To Confidentiality**

The exceptions provided for in the UMA capture the exceptions most commonly acknowledged by the various statutes, rules and cases that govern confidentiality in mediation. For example, the UMA, and most states, recognize an exception to the confidentiality of mediation communications that allows a written agreement entered into as part of the mediation process to be admitted into evidence. This most commonly occurs in an action brought by a party enforce a settlement agreement entered into at the mediation.<sup>55</sup> Many states also include exceptions to their confidentiality protections that enable participants to report evidence of child abuse or evidence relating to the commission of a crime to proper authorities.<sup>56</sup> Some courts and rules also recognize exceptions that allow parties or a mediator to disclose to the court the failure of a party to participate in good faith in the mediation or other violations of court orders.<sup>57</sup> In addition, the UMA and some states include a catch-all exception that allows a court to admit evidence of mediation communications in certain instances when the evidence is otherwise unavailable and the need for it outweighs the interest in protecting confidentiality.<sup>58</sup> In Texas, for example, the statute that contains a broad grant of confidentiality also provides that, in the event the statute's provisions conflict "with other legal requirements for disclosure. . . the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure."<sup>59</sup>

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<sup>52</sup> CPR Procedure for Resolution of Franchise Disputes, available at [www.cpradr.org](http://www.cpradr.org).

<sup>53</sup> *Id.* at Rule 8.

<sup>54</sup> *Id.* at Rule 10.

<sup>55</sup> Uni. Mediation Act, Section 6(a)(1), Comment 2 and statutes cited therein.

<sup>56</sup> Uni. Mediation Act, Section 6(a)(3), (4) and (7).

<sup>57</sup> *See*, Garner, et al. *supra* at 5-8.

<sup>58</sup> Uni. Mediation Act, Section 6(b).

<sup>59</sup> V.T.C.A., Texas Civil Practice and Remedies Code, § 154.073(e).



Another exception that has been recognized by some courts and some statutes<sup>60</sup> allows evidence of mediation communications to be admitted in court in support of a malpractice or breach of fiduciary duty claim brought by a party against his or her attorney or other professional who advised the party at mediation. For example, *Avary v. Bank of America*<sup>61</sup> involved a situation in which a wrongful death lawsuit was settled at a mediation in which the executor of the estate (the Bank) along with several beneficiaries of the estate participated. Following the mediation, one of the parties brought a breach of fiduciary duty claim against the Bank for failure to disclose to the beneficiary an offer that was made during the mediation. The Texas appeals court held that the trial court should have allowed the beneficiary to take discovery from the bank regarding the offer. In so holding, the court reasoned that the Bank's fiduciary duty to the beneficiaries fell within an exception to the applicable Texas statute that allows disclosure of communications made at mediation when there is a "legal requirement for disclosure." In another Texas case,<sup>62</sup> the same Texas appeals court held that the trial court abused its discretion when it failed to allow testimony of the mediator in a malpractice case brought by a client against her lawyer for his failure to properly advise her of the risks and benefits of the settlement she entered into at the mediation.

Finally, it is important to remember in the franchise context that while mediation communications may be confidential, the resulting material settlement terms may fall within the category of information that must be disclosed to regulators and prospective franchisees, even if the settlement agreement contains a confidentiality clause.<sup>63</sup>

## **5. Practical Advice Regarding Mediation Confidentiality**

In light of the quagmire that constitutes the law of mediation confidentiality, the following are a few practical steps lawyers can take to protect the confidentiality of mediation communications and properly advise their clients regarding the exceptions to confidentiality.

### **a. Before The Mediation**

Counsel should make every effort to become familiar with the law regarding the confidentiality protections and exceptions of the jurisdiction in which the mediation takes place and explain the law to the client. Remember that this may include statutes, rules of evidence, rules of procedure, local rules and the terms of the court order, if any, requiring the parties to mediate. Exceptions to confidentiality may also be found in the applicable case law. Additionally, review any rules or guidelines and suggested or mandatory agreements that are published by the ADR provider you are using.

The best way to protect confidentiality is to enter into an agreement with the mediator and opposing parties wherein all participants agree to maintain confidentiality. Terms to consider including are:

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<sup>60</sup> See *e.g.*, Minn. Stat. § 595.02, subd. 1a(3) and Central District of California, Local Rule 16-15.8.

<sup>61</sup> 72 S.W.3d 779 (Tex. Civ. App.—Dallas 2002, writ denied).

<sup>62</sup> *Alford v. Bryant*, 137 S.W.3d 916 (Tex. Civ. App.—Dallas 2004, writ denied).

<sup>63</sup> See, *e.g.*, 16 C.F.R. Part 436, FTC Franchise Rule Compliance Guide, p. 38; see also North American Securities Administrators Association, Inc., 2008 Franchise Registration and Disclosure Guidelines, p.37 n.2.

1. A broad definition of protected mediation communications to include all statements (verbal or written) offers, promises and conduct made during the mediation or in connection with the mediation (including pre- and –post mediation communications with the mediator).
2. An agreement that contains the following concepts:
  - All mediation communications are confidential and may not be disclosed to third parties, except persons associated with the parties who have a need to know and who agree to be bound by the terms of the confidentiality agreement;
  - To the extent allowed by applicable law, all mediation communications are privileged, made without prejudice to the party's legal position and inadmissible in any legal proceeding, including for purposes of impeachment;
  - The mediator will not be subpoenaed or called as a witness to testify regarding the mediation process or mediation communications;
  - Confidentiality may only be waived by an express written waiver signed by the mediator and all parties; and
  - Any written settlement agreement entered into during or following the mediation is not subject to the confidentiality agreement, unless the settlement agreement so states.

**b. During The Mediation**

Counsel should carefully consider, in consultation with the client, what information should be shared during the mediation. The client must be told that information that is otherwise discoverable in the case does not become privileged simply because it is used or discussed in mediation. As a result, the client and counsel must carefully consider whether to reveal potentially damaging information that has not been requested through discovery. Occasionally a party wishes to share certain information with the mediator but not the other side. It is important during private caucuses to make it clear to the mediator what information may and may not be shared with the opposing party.

**c. At The End Of The Mediation**

It is important that any written settlement agreement address whether the Confidentiality Agreement applies to the written settlement agreement or term sheet or if, for example, the parties will be allowed to disclose some aspects of those documents. It is possible that a party may need to attach the agreement as an exhibit to a later court filing in order to enforce its terms. In addition, franchise settlement agreements often include a qualification to any promises of confidentiality, given that the material terms may need to be disclosed not just to employees or advisors, but also to regulators or governmental agencies, or “as otherwise required by law.” A party may need to disclose a settlement agreement to its auditors, a potential acquirer, or other third party. Accordingly, the wording should be tailored to the potential needs of the participants in each mediation, with careful consideration given to the complex web of statutes, rules and common law that address the confidentiality of mediation communications and agreements.

#### **IV. THE ETHICS OF MEDIATION**

All lawyers are bound by the rules or codes of professional conduct adopted by the jurisdictions in which they are admitted to practice. In this sense, all lawyers involved in the mediation process are bound by the same rules. However, mediation presents particular ethical issues for lawyers, depending in part on the role they play in the process. Accordingly, we examine separately the ethical obligations of lawyers serving as mediators and lawyers representing clients in a mediation.

##### **A. Ethical Obligations Of Mediators**

###### **1. Applicable Standards**

The rules, standards or guidelines that govern the conduct of mediators fall into several categories:

###### **a. State Mandated Codes Of Professional Conduct For Attorneys**

All 50 states and the District of Columbia have adopted rules or codes that govern the professional conduct of attorneys licensed by that state. Most of these state codes or rules include some form of Rule 2.4 of the ABA Model Rules of Professional Conduct which provides that lawyers serving as third party neutrals (including but not limited to mediators and arbitrators) must inform unrepresented parties that the third-party neutral is not representing them. These codes may have other specific rules addressing mediator conduct, but a survey of those rules is beyond the scope of this paper. However, attorneys serving as mediators should make themselves aware of any such mediator-specific rules included in the professional codes of conduct to which they are subject.

###### **b. General Mediation Statutes, Court Rules And Lawyer's Creeds**

As discussed in section III.E. above regarding confidentiality in mediation, many states have statutes or court rules that govern mediation in general. Some of these statutes, rules or creeds include provisions that are relevant to mediator ethics, including the common requirement that the mediator maintain the confidentiality of information provided by the parties. While a comprehensive survey of such rules and laws is beyond the scope of this paper, it will be helpful for counsel for the participants to understand the nature and complexity of rules that may apply to the mediator in the forum they have selected for a mediation proceeding.

###### **c. State-Specific Standards Of Conduct For Mediators**

A number of states have adopted standards of conduct or ethical rules for mediators.<sup>64</sup> In most cases these are promulgated by the state's supreme court but in some states, such as

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<sup>64</sup> See, e.g., Mediator Code of Ethics, (Adopted by Order of the Supreme Court of Alabama, December 14, 1995 and effective on March 1, 1996, including amendments received through June 1, 1997.) available at [http://alabamaadr.org/web/roster-documents/med\\_Code\\_Ethics.php](http://alabamaadr.org/web/roster-documents/med_Code_Ethics.php); Florida Rules for Certified and Court-Appointed Mediators, (Amended May 19, 2011) available at: [http://www.flcourts.org/gen\\_public/adr/bin/RulesForMediators.pdf](http://www.flcourts.org/gen_public/adr/bin/RulesForMediators.pdf); Ethical Standards for Mediators, Georgia Commission on Dispute Resolution, available at [http://www.godr.org/index.php?option=com\\_content&view=article&id=58&Itemid=57](http://www.godr.org/index.php?option=com_content&view=article&id=58&Itemid=57); Indiana Rules of Court, Rules for Alternative Dispute Resolution, (Amended January 1, 2011), available at <http://www.in.gov/judiciary/rules/adr/>; Manual of Standards and Ethics for ODR Approved Mediators, Directors and Staff, Nebraska Office of Dispute

Nebraska, the requirements were created by a governmental agency that oversees or certifies mediators. Additionally, while in certain states the rules or standards apply to all attorney mediators, in other states, such as Florida, they apply only to court-appointed mediators or, as in Virginia, to certified mediators. Finally, in states such as Texas, the rules are aspirational and depend on voluntary compliance.

**d. Model Rules And Ethical Guidelines Of ADR Providers**

The ABA Model Rules of Professional Conduct (2009), the ABA Model Standard of Conduct for Mediators (2005), and the Uniform Mediation Act (2003)<sup>65</sup>, while not binding in any jurisdiction, are useful as general guides to the ethical obligations of attorney mediators. In addition, mediators should be familiar with the ethical standards of any ADR Provider with which they are affiliated. For example, the AAA has adopted the ABA Model Standards of Conduct for Mediators; CPR is a joint sponsor of the International Institute for Conflict Prevention & Resolution-Georgetown Ethics Commission on Ethics and Standards in ADR Model Rule for Lawyers as Third-Party Neutral<sup>66</sup> and JAMS has published its Mediators Ethics Guidelines.<sup>67</sup>

**e. Ethics Opinions**

Additional valuable guidance can be obtained from the Formal Ethics Opinions of the American Bar Association<sup>68</sup> and the ethics opinions of the bar associations of the 50 states.<sup>69</sup> Another helpful resource is the National Clearinghouse for Mediator Ethics Opinions.<sup>70</sup>

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Resolution (Revised June 2001), available at [http://supremecourt.ne.gov/sites/supremecourt.ne.gov/files/mediation/Statutes,%20Rules,%20Policies/ODR\\_Manual\\_of\\_Standards\\_and\\_Ethics\\_6-01.pdf](http://supremecourt.ne.gov/sites/supremecourt.ne.gov/files/mediation/Statutes,%20Rules,%20Policies/ODR_Manual_of_Standards_and_Ethics_6-01.pdf); Revised Standards of Professional Conduct for Mediators, (Adopted by the Supreme Court of North Carolina, effective January 1, 2012), available at <http://www.nccourts.org/courts/crs/councils/drc/standards/conduct.asp>; Ethical Guidelines for Mediators, (Adopted by Order of the Texas Supreme Court, June 13, 2005) available at <http://www.supreme.courts.state.tx.us/MiscDocket/05/05910700.pdf>; Ethical Standards for Mediators, Kansas Supreme Court Rule 903, available at <http://www.kscourts.org/rules/Rule-info.asp?r1=Court+Rules+Relating+to+Mediation&r2=316>; Standards of Ethics and Professional Responsibility for Certified Mediators, (Adopted by the Judicial Council of Virginia, effective July 1, 2011), available at <http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>.

<sup>65</sup> The Model Rules of Professional Conduct are available on the ABA's web site at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html), and the Model Standards of Conduct for Mediators are available on the ABA website at [http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model\\_standards\\_conduct\\_april2007.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.auth_checkdam.pdf).

<sup>66</sup> International Institute for Conflict Prevention & Resolution-Georgetown Ethics Commission on Ethics and Standards in ADR Model Rule for Lawyers as Third-Party Neutral, available at: <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/622/Model-Rule-for-The-Lawyer-as-Third-Party-Neutral.aspx>.

<sup>67</sup> JAMS Mediators Ethics Guidelines available at: <http://www.jamsadr.com/mediators-ethics/>.

<sup>68</sup> See, Formal Ethics Opinions of the American Bar Association, available to members at: [http://www.americanbar.org/groups/professional\\_responsibility/publications/ethics\\_opinions.html](http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html)

<sup>69</sup> For assistance in locating the ethics opinions of the fifty states, See, Georgetown University Law Library's "Legal Ethics Research Guide", available at [http://www.law.georgetown.edu/library/research/guides/legal\\_ethics.cfm](http://www.law.georgetown.edu/library/research/guides/legal_ethics.cfm) (Last visited June 10, 2013).

## **2. Common Ethical Duties And Challenges For Mediators**

While there are differences between the various codes of professional responsibility, standards of conduct and ethical guidelines, there are also many similarities. Although these standards, codes and guidelines group the mediator's ethical responsibilities under different headings, they all generally recognize duties related to disclosure of conflicts, competency, promotion of informed and voluntary participation, refraining from giving legal advice, and maintaining impartiality, confidentiality, candor and truthfulness. The following summary attempts to capture and synthesize the ethical responsibilities of mediators commonly recognized by these various standards.

### **a. Duty Of Disclosure**

Mediators have a duty under most standards of conduct to make a reasonable effort to determine if there are any factors, such as a mediator's past or present relationship with any of the parties or their lawyers, or personal knowledge regarding the underlying dispute, which might cause a reasonable party to doubt the mediator's impartiality. As soon as practicable after becoming aware of such information, the mediator should disclose it to the parties and should not proceed with the mediation if any party objects. In the absence of any objection, the mediator may continue to serve, unless it becomes apparent to the mediator that a conflict exists that would cast serious doubt on the integrity of the process, in which case the mediator should withdraw.

### **b. Duty Of Competency**

Most codes of ethics for mediators assert that the mediator should be competent to conduct the mediation, although what constitutes competency is not clearly defined. The Model Standards of Conduct for Mediators seems to focus mostly on the mediator's training and experience, while other standards, such as JAMS Mediators Ethics Guidelines, emphasizes that the mediator should have "sufficient knowledge of relevant procedural and substantive issues" and should be well-prepared by reviewing in advance all information submitted by the parties.<sup>71</sup> At any rate, mediators should inform the parties of the mediator's qualifications, and if any party objects, the mediator should withdraw. Not surprisingly, the codes also appear uniformly to agree that a mediator should withdraw if he becomes mentally or physically incapable of competently mediating the matter.

### **c. Duty To Promote Informed And Voluntary Participation**

Mediation today is, in many instances, not a truly voluntary proceeding. This is the result of the prevalence of contract provisions, such as can be found in many franchise contracts, requiring parties to mediate before they can litigate or arbitrate their dispute, along with the routine practice of many courts to order cases to mediation. Unfortunately, some attorneys treat mediation like a nuisance that must be checked off a list before they can proceed to the real work of litigating the case. As a consequence, the parties are many times not particularly well informed nor enthusiastic about the process. One of the mediator's responsibilities, recognized in most of the ethical standards, is to explain the process to the parties, including the mediator's role in that process. Mediators should attempt to ensure that the parties understand the

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<sup>70</sup> Available at <http://www.americanbar.org/directories/mediatorethicsopinion.html>

<sup>71</sup> JAMS Mediators Ethics Guidelines, *supra* note 50, at III.

mediator is truly neutral, does not represent any party and will not give legal advice. The mediator should also explain that the actual negotiation process is voluntary and that the mediator cannot impose a settlement upon any party. In the event a settlement is reached, the mediator should endeavor to make sure the parties understand the terms of the settlement and are entering into it voluntarily. In addition, the mediator should carefully explain the confidential nature of the proceeding and the potential limits on confidentiality protections. (See discussion in section II. E. Scope of Confidentiality, supra).

The mediator should communicate that, although the mediator will probe and test the basis for each party's position in an effort to encourage each party to realistically evaluate their case, the mediator will typically not give an opinion regarding any party's chances of ultimate success unless asked to do so by that party. Occasionally, parties may request that the mediator take upon the role of an arbitrator and make a binding decision regarding their dispute in the event the matter does not settle at mediation. Most ethical guidelines provide that mediators should not agree to take on such a new role unless the parties are fully informed about how such an arrangement affects the relationship between the parties and the mediator including the fact that the mediator may have learned confidential information during the mediation process that may have never come into evidence in the arbitration. A mediator should decline to serve as an arbitrator if she cannot make an impartial decision as a result of information gained or relationships developed during the mediation process.

**d. Duty To Refrain From Giving Legal Advice**

All codes of conduct recognize that a mediator should not give legal advice to the parties. This is a particularly difficult but crucial consideration when dealing with an unrepresented party. A mediator must make it clear to the pro se party that the mediator does not represent him and cannot give him legal advice. A mediator can relate the legal position of the opposing party but should not express an opinion about the validity of that position. In addition, even though a pro se party may (and they frequently do) ask for the mediator's opinion as to how they should respond to an offer from the opposing side, the mediator must make it clear that the mediator cannot give advice regarding whether to accept, reject or counter an offer. In addition, if an unrepresented party has questions about the legal effect of the settlement, the mediator should advise the party to seek review of the agreement by an attorney prior to executing it. In the case of represented parties, if requested, the mediator may provide her evaluation of the strength of a party's case and the chances of success, but must make it clear that the mediator is not giving legal advice and that, ultimately, the party should rely of the advice of their own counsel. An adjunct concern for mediators is that they should be aware of the restrictions regarding the unauthorized practice of law in the jurisdictions in which they practice and be careful to abide by them.

**e. Duty Of Impartiality**

Most ethical guidelines and rules recognize that a mediator's duty of impartiality begins before the mediation convenes, continues throughout the mediation session and has ramifications even after the mediation concludes. As previously discussed, the mediator has a duty to disclose any potential conflicts and to withdraw if any party objects. Additionally, the mediator should honestly examine whether she has any personal biases regarding the parties, attorneys or subject matter that would prevent her from being impartial and, if so, should decline to mediate the matter. The duty of impartiality continues throughout the process and, should something occur during the mediation that affects the mediator's ability to remain impartial, the mediator should withdraw from the process. The mediator should also make sure that the

process is fair to all involved, such as ensuring that all parties have an equal opportunity to be heard. A mediator at all times before, during and after a mediation should avoid accepting any favors or items of value that might cast doubt on the mediator's impartiality. Additionally, even after the mediation is concluded, the mediator should avoid any conduct involving any of the participants in the mediation that might raise concerns about the integrity of the process unless the parties consent after full disclosure.

**f. Confidentiality**

A mediator should explain to the parties at the outset of the mediation the parameters of confidentiality protections provided by applicable law and the potential exceptions to such protections. To further ensure a greater level of protection, a mediator may want to encourage the parties to enter into a written confidentiality agreement (see discussion at section II. D. 5. Practical Advice Regarding Mediation Confidentiality, *supra*); indeed some mediators may require the parties to enter into such an agreement. In addition, the mediator should encourage the parties that to be open and candid with the mediator while at the same time assuring the parties that the mediator will not disclose to the opposing side any information that the party does not want disclosed. During private caucuses with the parties, the mediator should verify what information may and may not be disclosed to the opposing party. Further, without the consent of all mediation participants, the mediator should not disclose any information obtained from the mediation participants to third parties unless required by law. Finally, it should go without saying that the mediator should not use information obtained during the mediation for the mediator's personal benefit or the benefit of others

**g. Duty To Promote Honesty And Candor**

A mediator should make every effort to promote honesty and candor in the mediation process. First, the mediator should explain to the parties that the more open and honest they are with the mediator, the more effective the mediator will be in communicating their position to the opposing side and in helping the parties devise realistic and creative solutions to their dispute. The mediator can increase the parties' willingness to be honest and candid in their communications by faithfully ascertaining what may and may be not be communicated to the other side. Additionally, a mediator must be careful to accurately communicate offers and responses and should not knowingly misrepresent any information or circumstance during the process. Finally, a mediator should not knowingly pass on false information and should withdraw from the mediation if it becomes apparent to the mediator that the process is being used to further any illegal conduct.

**B. Ethical Obligations Of The Advocate In Mediation**

**1. Applicable Standards**

As with attorney-mediators, all attorneys representing parties in mediation are governed by the applicable professional codes of conduct, mediation statutes, court rules and lawyers creeds<sup>72</sup> in the jurisdictions where they are licensed or authorized to practice law. Court orders compelling the parties to participate in mediation may also impose ethical duties on the parties

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<sup>72</sup> For example, the Texas Lawyers Creed, promulgated by Order of the Texas Supreme Court and Court of Criminal Appeals (November 1989) provides that lawyers shall advise their clients of the availability of alternative methods of dispute resolution, including mediation, available at <http://www.texasbar.com/Content/NavigationMenu/ForThePublic/FreeLegalInformation/Ethics/TheTexasLawyer'sCreed-English.pdf>.

and attorneys, such as the duty to participate in good faith. In addition, counsel would be well-advised to become familiar the ABA Model Rules of Professional Conduct and the Ethical Guidelines for Settlement Negotiations published by the Section of Litigation of the American Bar Association.<sup>73</sup> While not binding in any jurisdiction, these resources provide good, general guidance regarding the ethical practice of law in general and in mediations in particular. Counsel may also want to consult the Ethics Opinions issued by the American Bar Association and the Bar Associations of the 50 states and District of Columbia, discussed supra in Section IV.A.1.e “Ethics Opinions.” Further, attorneys who represent clients in mediations that are conducted in states where the attorney is not licensed or authorized to practice law should be aware of any rules related to the unauthorized practice of law that apply to such representation.

## **2. Common Ethical Issues For The Advocate In Mediation**

Rather than attempt a comprehensive summary of the laws, codes and rules and creeds of the fifty states with respect to ethical obligations of attorneys in mediation, we rely primarily on the ABA’s Model Rules of Professional Conduct along with the Ethical Guidelines for Settlement Negotiations of the Litigation Section of the ABA, to highlight some of the most common ethical issues faced by the advocate in mediation. It is worth noting that many, if not most, of the Guidelines contain cross-references to the ABA’s Model Rules of Professional Conduct that have been adopted in whole or in part by most of the fifty states.<sup>74</sup> For organizational purposes, the discussion will be divided into the general ethical duties owed by the attorney in the mediation context and duties owed to the client.

### **a. General Duties**

#### **i. Telling the Truth (Or at Least Not Lying)**

One of the the most basic ethical obligations of an attorney in mediation is to refrain from making any misrepresentations of material fact or law. Most codes of professional conduct contain a rule similar to ABA Model Rule 4.1, which states that, “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.” Other rules that impact the duty not to misrepresent are contained in Model Rule 3.3 which prohibits attorneys from “making a false statement of fact or law to a tribunal” (which may apply to statements made to a mediator in court-annexed mediations) and Model Rule 8.4 which prohibits counsel from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”

At first blush, the duty not to misrepresent material facts may seem fairly straightforward, but when considered in the mediation context, these rules raise serious concerns about common negotiating tactics often referred to as posturing or puffing. For example, do the rules prohibit a lawyer in mediation from exaggerating the strength of his client’s case and downplaying or even failing to disclose facts or law that negatively impact his client’s case?

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<sup>73</sup> Ethical Guidelines for Settlement Negotiations, Section of Litigation, American Bar Association (August 2002), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/settlementnegotiations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/settlementnegotiations.authcheckdam.pdf).

<sup>74</sup> See, charts showing the states that have adopted as well as states that have amended the Model Rules of Professional Conduct, available at [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html).



What about a representation that the client's "bottom line" is a certain amount when in fact the client has approved a different amount? In ABA Formal Opinion 06-439 (2006), the ABA's Standing Committee on Ethics and Professional Responsibility addressed this issue.<sup>75</sup> It concluded that, while affirmative misrepresentations of material fact and "implicit misrepresentations created by a lawyer's failure to make truthful statements" violate Rule 4.1<sup>76</sup>, "statements regarding negotiating goals or willingness to compromise . . . ordinarily are not considered statements of material facts within the meaning of the Rules."<sup>77</sup>

According to the Standing Committee, an example of an implicit misrepresentation that violates Rule 4.1 would be a plaintiff's attorney continuing to negotiate a personal injury lawsuit on behalf of his client without revealing to the opposing counsel or the court that his client had died.<sup>78</sup> However, counsel does not have a duty to inform opposing counsel that the statute of limitations has run on the client's claim.<sup>79</sup> The committee draws a particularly fine line when it states that, while a lawyer cannot affirmatively state the client's board of directors has disapproved any settlement in excess of \$50 when in fact it had authorized a higher amount, the attorney could state that his client does not wish to settle for more than \$50.<sup>80</sup> In addition, an attorney may "downplay" his client's willingness to accept a certain offer in an effort to get a better offer, without violating the Rule.<sup>81</sup> Finally, "overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation" generally "are not considered material facts subject to Rule 4.1"<sup>82</sup>

## ii. Good Faith Participation

Some state statutes, and many court orders, impose a duty of good faith or "meaningful participation" upon parties participating in court-ordered mediation.<sup>83</sup> Unfortunately, what constitutes good faith participation in mediation is not well-defined.<sup>84</sup> Most statutes do not even attempt to define the good faith concept, and as a result, parties are left to ferret out judicial

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<sup>75</sup> ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006), available at the following link: [http://www.americanbar.org/groups/professional\\_responsibility/publications/ethics\\_opinions/aba\\_formal\\_ethics\\_opinio\\_ns\\_index\\_by\\_issue\\_dates.html](http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions/aba_formal_ethics_opinio_ns_index_by_issue_dates.html).

<sup>76</sup> *Id.* at p. 5.

<sup>77</sup> *Id.* at p. 6.

<sup>78</sup> *Id.* at p. 5.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at p. 8.

<sup>81</sup> *Id.* at p. 6.

<sup>82</sup> *Id.*

<sup>83</sup> Dr. jur. Ulrich Boettger, *Efficiency v. Party Empowerment—Against a Good Faith Requirement in Mandatory Mediation*, 23 Rev.Litig. 1 at p. 4 (2004).

<sup>84</sup> Thomas J. Satory and Gary M. Ronan, *Good-faith Participation in Compelled Mediation*, New England In-House, November 14, 2012, available at <http://newenglandinhouse.com/2012/11/14/good-faith-participation-in-compelled-mediation/>.

decisions interpreting the good faith requirement.<sup>85</sup> Rather than define good faith, the cases tend to discuss what constitutes bad faith or the absence of good faith. The behavior most commonly recognized by the courts as bad faith behavior in mediation is the failure to comply with the procedural requirements of mediation.<sup>86</sup> Other indices of bad faith include failure to negotiate in good faith and failure to bring a client representative with the requisite settlement authority.<sup>87</sup>

Interestingly, the Ethical Guidelines for Settlement Negotiations of the Litigation Section of the ABA does not specifically address the good faith requirement. Rather, Section 4.3 of the Guidelines addresses “Fairness Issues,” including the broad and somewhat vague proscription in Section 4.3.1 that attorneys “may not employ the settlement process in bad faith.”<sup>88</sup> The comment to Section 4.3.1 focuses on an attorney’s bad faith use of mediation to delay the litigation process when his client has no real interest in settling. However, this example is of little use in mandatory mediation because the parties are not choosing to be involved in the process in the first place. Although the law on this issue is not clear, to avoid a charge of bad faith, attorneys should, at a minimum, be sure to comply with all the procedural requirements of any applicable court order, rules or statutes governing the mediation process, including the furnishing of any required information to the mediator and/or opposing counsel, and should be sure to bring a client representative with full settlement authority.<sup>89</sup>

**b. Duties To The Client**

**i. Voluntary Participation And Self-Determination**

All of the ethical duties imposed upon lawyers by the code(s) of professional conduct apply to lawyers representing clients in mediation. Section 3 of the Ethical Guidelines for Settlement Negotiations<sup>90</sup> deals specifically with ethical issues involved in the lawyer-client relationship in connection with settlement negotiations. First, it is clear that the attorney must consult with the client regarding whether to pursue settlement discussions and, if so, the method of pursuing settlement negotiations, including whether (if not already mandated by the franchise contract or court order) to participate in a mediation.<sup>91</sup> In order for the client to make an informed decision regarding mediation, the lawyer must fully explain the process to the client, including issues surrounding confidentiality in mediation. Counsel must seek and honor the client’s input regarding the terms of any potential proposals.<sup>92</sup> Additionally, the attorney must obtain clear

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<sup>85</sup> *Id.*

<sup>86</sup> Roger L. Carter, *Oh, ye of Little Faith: Questions, Concerns and Commentary of Efforts to Regulate Participant Conduct in Mediations*, 2002 J. Disp. Resol. 367, 372 (2002).

<sup>87</sup> *Id.*

<sup>88</sup> Ethical Guidelines for Settlement Negotiations, *supra* note 73 at Section 4.3.1. Although the Ethical Guidelines do not have the force of law, they are good general guidelines for ethical behavior in settlement negotiations.

<sup>89</sup> For a more detailed analysis of the good faith requirement, See, Peter Klarfeld, Michael Lewis and Peter Silverman, *Mediating Franchise Disputes*, in ABA 32<sup>nd</sup> Annual Forum on Franchising (2009).

<sup>90</sup> Ethical Guidelines for Settlement Negotiations, *supra* note 73 at Section 3.

<sup>91</sup> *Id.* at 3.1.1.

<sup>92</sup> *Id.* at 3.1.2 and 3.1.3.

direction from the client regarding how much independence the client is willing to give the attorney in pursuing settlement discussion.<sup>93</sup> This is particularly important in mediation. Attorneys should make sure that the client is given every opportunity to express their views during the mediation process and, in the event a settlement is reached, it is the lawyer's responsibility to ensure that the client is entering into the settlement voluntarily, not as a result of coercion, and that the client fully understands the terms of the agreement as well as any ramifications of the agreement that may not be obvious to the client.

## ii. Representation Of Multiple Clients

Another ethical issue that arises in the mediation context has to do with a lawyer's representation of multiple clients. A lawyer has an ethical duty to ensure that her representation of multiple clients will not present a conflict of interest before accepting the representation (see Model Rule 1.7). However, sometimes the potential conflict does not become obvious to the attorney until the mediation, for example when settlement offers favor one client over another.<sup>94</sup> When the lawyer becomes aware of such a potential conflict between the interests of the two (or more) clients, the lawyer may continue the representation of both clients only if she is satisfied that she "will be able to resolve the matter on terms compatible with each client's interests" and the clients consent to the continued joint representation after full disclosure.<sup>95</sup> In some situations, the conflict cannot be waived by the client, as when an offer to one client is conditioned on that client's taking a position adverse to the other client. Under these circumstances, the lawyer should withdraw from the representation.<sup>96</sup>

The most difficult time to address such ethical issues is at the mediation table. These issues underscore the importance of careful planning of the mediation statement, the positions the parties might take, and the strategic choices they may have to make. In advance of the mediation, it is far easier to review engagement letters, advise clients of potential risks, and retain additional or substitute counsel where necessary.

## V. CONCLUSION

Mediation represents a valuable opportunity and technique to resolve franchise disputes in ways that may preserve a productive relationship, or at least conserve the resources of the parties – time, money and energy -- for more productive uses than litigation or arbitration. Given the increasing use of mandatory mediation clauses in franchise agreements, judicial requirements that the parties engage in mediation, and the growing track record of successful voluntary mediations, franchise lawyers are called upon to advocate in a new and effective ways. By thoughtfully selecting mediators and methods, carefully preparing their clients, and preserving the results of a mediation in enforceable ways, counsel can represent their clients zealously and ethically, and accomplish results that serve the business interests of franchisors and franchisees alike.

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<sup>93</sup> *Id.* at Rule 3.1.2.

<sup>94</sup> *Id.* at Rule 3.5 and Committee Notes.

<sup>95</sup> *Id.*

<sup>96</sup> Ethical Guidelines for Settlement Negotiations, Rule 3.5 and Committee Notes.

## SPEAKER BIOGRAPHY

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Ms. Morency received her undergraduate degree (A.B., magna cum laude, 1977) from Princeton University and her law degree (J.D., 1980) from the University of Virginia School of Law.

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In 2013 and eight prior years, *Franchise Times*<sup>®</sup> recognized him as one of the nation's top 100 franchise lawyers. *Best Lawyers* lists him as one of America's best Arbitration, Commercial Litigation, Franchise Law, Litigation - Intellectual Property, Litigation - Securities, and Mediation lawyers, and *Ohio Super Lawyers*<sup>®</sup> recognizes him in franchise law. He was chair of the Litigation and Alternative Dispute Resolution Committee and on the Governing Committee of the ABA Forum on Franchising, and is a member of the IFA/CPR Franchise Mediation Program Steering Committee.

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**Marcus A. Banks** is Senior Vice President, Litigation, Government Relations and Employment Law, for Wyndham Worldwide Corporation. He oversees litigation for the Corporation and two of its three business units. Additionally, Marcus oversees Wyndham's National Counsel Program, which represents a network of law firms that provide outside legal services to the Company throughout the world. He also oversees the Company's Government Relations Program, which includes, among other things, the tracking of legislation that could impact Wyndham's operations and maintaining participation in various trade organizations germane to Wyndham's businesses. Marcus also oversees Wyndham's Employment Law Group, which provides employment counseling, labor, employment relations and employment dispute resolution and litigation management for the Company. Marcus regularly speaks throughout the country on in-house litigation management and alternative dispute resolution issues.

Previously, Marcus served as Group Vice President – Litigation for Wyndham and Vice President – Legal for Cendant Corporation. Marcus started his legal career as an associate at Greenbaum, Rowe, Smith & Davis in Woodbridge, New Jersey. He received his J.D. from Columbia University and his B.A. from Stanford University.

**Karen B. Willcutts** is a mediator, arbitrator and special master with the Dallas office of JAMS. Karen enjoys handling a wide variety commercial litigation matters, including antitrust, securities fraud, insurance coverage disputes, complex breach of contract matters, partnership dissolutions, oil and gas disputes, franchise litigation and various business torts. In addition, Karen has extensive experience in employment matters ranging from age, race and gender discrimination to wrongful termination, sexual harassment, hostile work environment, disability and covenants not to compete. She is a former Associate Judge for Dallas County and is a former chair of the Antitrust and Business Litigation Section of the State Bar of Texas. Prior to taking the bench, Karen practiced law for 17 years with the Dallas office of Strasburger & Price, LLP, where she was a partner in the firm's business litigation section.

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