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AS GOOD AS IT GETS: THE RISE OF MEDIATION OPTIONS

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INTRODUCTION

Alternatives to litigation, as well as alternative ways to resolve pending litigation, have come to include the widespread use of mediation. The past ten years have seen an increase both in private mediation services and court-sponsored mediation programs. Spurred by statutory authorization and sometimes exercising inherent judicial power, a growing number of judicial systems have even begun to mandate that parties participate in court-supervised mediation before drawing upon the court resources required for discovery, dispositive motions, trials and even appeals. Franchise disputes, like other business disputes, are likely to be resolved short of trial on the merits, either by dispositive motion or settlement. Far more disputes are settled than decided by motion. Increasingly, mediation is utilized to achieve settlement. This workshop explores current issues in mediation, summarizes research on effective design of mediation programs and use of mediation resources, and provides practical tips for optimizing the effectiveness of mediation in the franchise setting.

I. DEFINING MEDIATION

Historically, "mediation" was defined as a process for dispute resolution in which a neutral third party facilitates negotiation.[1] Because mediation at its core was viewed as a type of negotiation, the mediation process was believed to be non-binding unless a negotiated settlement was reached and reduced to a written settlement contract between the parties.

Many commentators divide the world of litigation alternatives involving a third party neutral into two hemispheres. They placed on one side "binding" forms of dispute resolution and on the other side "non-binding" forms of dispute resolution. Pursuant to this view of the alternative dispute resolution world, all non-binding dispute resolution methods constitute a form of "mediation" and all binding forms of dispute resolution constitute a form of "arbitration." Some commentators have drawn into the definition of "mediation" any "non-binding process in which a third party helps the disputants to try to resolve a conflict themselves, rather than submit it to adjudication (either through litigation or arbitration)."[2] This broader view assimilates other traditional ADR methods, such as facilitation[3], early neutral evaluation[4], non-binding arbitration[5] and summary trial,[6] into a new, expansive definition of "mediation."[7] "Mediation"

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[1] *See* Alison E. Gerencser, Alternative Dispute Resolution Has Morphed Into Mediation: Standards Of Conduct Must Be Changed, 50 Fla. L. Rev. 843, 847 (1998).

[2] *See* Nancy G. Gourley, Eric D. Green and Richard J. Wolf, The Hard Road To Peace: Mediation 2000, (ABA Forum on Franchising), October 18-20, 2000, at 10.

[3] The "facilitation" method calls for an impartial third party to manage communication between two or more disputants and provide guidance in the design of creative solutions.

[4] The "early neutral evaluation" method calls for an impartial third party to analyze the case and provide an opinion as to the strengths and weaknesses of the parties' positions.

[5] In what is inappropriately called "non-binding" arbitration, a neutral third party is authorized to collect information, listen to all the parties and render an advisory opinion. Several commentators have pointed out that "use of the term 'non-binding arbitration' is a confusing non-sequitur that should be avoided. The essential difference between mediation and arbitration is that the former is always non-binding and the later is always binding." Gourley, Green and Wolf, *supra* note 2, at 6 n.7. Gourley, Green and Wolf point out that ADR terminology should respect the

increasingly is viewed as ranging from a "tightly controlled, relatively formal presentation of proofs and arguments before a former judge or other neutral who renders an 'advisory opinion' that the disputants are encouraged to accept, to a free flowing exchange of interests and feelings facilitated loosely and relatively informally by a lay conciliator whose goal is to 'reorient the parties to each other' and empower them to work out their differences directly."[8] The expansive definition of "mediation" views this ADR method as a continuum of non-binding dispute resolution processes with infinite variations in structure, process design and focus.[9]

One end of the mediation continuum relies heavily on legal analysis of the merits of the dispute and evaluation of the strengths and weaknesses of each party's case. The other end of the mediation continuum relies heavily on fostering dialogue between the parties and facilitating or assisting the parties in reaching a resolution. Because of the different variations of "mediation," parties have begun asking questions about the structure of the process and the approach of the mediator before submitting their claims to the mediation process. Where possible, the parties have designed, structured and configured the mediation process in the way that will best serve their need within a particular case.[10] In response to questions from the parties, mediators have historically staked out three basic approaches or orientations, which greatly influence the mediation process design and structure. These three approaches or orientations include evaluative, facilitative and transformative.[11] The "evaluative" approach coincides with the end of the mediation continuum that relies heavily on legal analysis and evaluation of the strength and weaknesses of claims.[12] In the middle of the mediation continuum, mediators use the "facilitative" approach that is associated with a proactive mediator managing the communication process and providing guidance to the parties on the design of creative solutions to disputes.[13] At the other end of the mediation continuum, mediators use the

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essential difference between "arbitration" and "mediation" and employ "modifying adjectives that address secondary characteristics (such as facilitative or evaluative) rather than the primary characteristics that define the essential nature of the process (binding vs. non-binding)." Id.

[6] In a summary trial, an impartial third party listens to all of the evidence in a trial atmosphere and renders a non-binding decision. In some forms of "summary trial" a jury may render the non-binding decision instead of the third party presiding over the proceedings. *See* Richard A. Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366 (1986).

[7] *See* Alison E. Gerencser, Alternative Dispute Resolution Has Morphed Into Mediation: Standards Of Conduct Must Be Changed, 50 Fla. L. Rev. 843 (1998).

[8] Gourley, Green and Wolf, *supra*, note 2 at 1 (footnotes omitted).

[9] Id.

[10] This may not always be possible as in the case of some forms of court-annexed mediation. When conducted under court rules, mediation sessions may be subject to procedural and structural constraints. In many instances, however, parties can opt to enter into private mediation outside the court-annexed process and regain the flexibility they seek.

[11] Daniel M. Weitz, Design: Factoring mediator orientation into court program planning, Dispute Resolution Magazine, Winter 2003, at 15; *see also* Leonard Riskin, Understanding Mediator Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 Harv. Neg. L. Rev. 7 (1996).

[12] Mediation variations that are often associated with the evaluative approach include early neutral evaluation, "non-binding arbitration" and summary trial.

[13] The mediation variation that is often associated with the facilitative approach is appropriately named facilitation.

"transformative" approach, in which the mediator offers little or no direction as to the process or outcome but rather focuses only on facilitating dialogue.

II. THE EVOLVING LAW OF MEDIATION

Mediation, in its various forms, has been a tool utilized by franchisors and franchisees in resolving disputes for many years. In some instances, use of mediation has been forced on parties to franchise disputes by court rules or statutes requiring mediation of all types of civil disputes. In addition, some franchise systems have sought to achieve some measure of predictability and control in the resolution of franchisor/franchisee disputes by inserting requirements for arbitration or mediation into their franchise agreements. Failure to comply with these procedures can delay (or bar) an aggrieved party's cause of action. Today, standard clauses in many franchise agreements require mediation before a franchisee can bring a lawsuit or initiate an arbitration.[14] These compulsory mediation clauses or agreements to mediate are typically treated as enforceable contracts by courts.

Many courts are now referring disputes to mediation at the beginning of litigation, either pursuant to court rule, or *sua sponte* under the inherent power of the court to manage its workload, or under a program that allows confidential requests for such a proceeding. Through orders of referral to mediation, courts have begun to invoke the use of "mediation" in its broadest sense, turning to a wide array of methods. Today, court-annexed mediation programs are prevalent in the state and federal court systems on all levels.

As the use of mediation has spread, the law of mediation has evolved. Legislatures and courts have refined the legal landscape related to enforcement of agreements to mediate, compelling mediation, and enforcing mediated agreements. Recent uniform legislation initiatives are directed toward the mediation process itself.

A. The Alternative Dispute Resolution Act Of 1998

After experimenting with ADR in the federal courts for years, the U.S. Congress passed the Alternative Dispute Resolution Act of 1998 ("ADR Act") and established "a permanent role for ADR in federal courts."[15] Congress previously had experimented with the use of ADR in federal courts in the form of two other acts that were set to expire after a limited time – the Civil Justice Reform Act of 1990 ("CJRA") and the Judicial Improvements and Access to Justice Act of 1988 ("JIAJA").[16] As one commentator offered, the ADR Act "salvages the ADR reforms authorized under the two previous acts, permitting courts to continue their experiments permanently and requiring courts that had not participated in those experiments to adopt ADR

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[14] Edward Wood Dunham, Jason M. Murray and Mitchell S. Shapiro, Advanced Litigation Topics: The Franchisor And Franchisee Perspectives, (ABA Forum on Franchising), October 28-30, 1998, at 2.

[15] Caroline Harris Crowne, The Alternative Dispute Resolution Act of 1998: Implementing A New Paradigm Of Justice, 76 N.Y.U. L. Rev. 1768 (2001).

[16] Id. The CJRA was codified at 28 U.S.C. §§ 471-482 and was passed to eliminate expense and delay in federal courts by promoting more effective judicial management through the use of litigation management techniques such as ADR. The CJRA required every district court to implement an "expense and delay reduction plan." 28 U.S.C. §§ 471-472. In response to the CJRA, several district courts instituted experimental ADR programs, including those involving various mediation alternatives. The JIAJA was passed in 1988 to authorize experiments with arbitration in some federal district courts. The ADR Act later superseded this act. 28 U.S.C. §§ 651-658.

programs of their own."[17] Accordingly, the ADR Act calls upon every district court to design and implement an ADR program.[18]

The ADR Act defines "alternative dispute resolution" as "any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, mini-trial, and arbitration." [19] "Arbitration" in its classical form is a process engaged in pursuant to a contract provision requiring arbitration, often conducted under rules selected by the parties, resulting in a binding award in arbitration enforceable through the courts. The form of "arbitration" contemplated by the ADR Act is a process ordered by the Court and conducted under court rules. Under the ADR Act, the court may not **order** arbitration without the consent of the parties[20] and any resulting award in arbitration is subject to being set aside in favor of a trial *de novo* at the request of either party.[21] The ADR Act provides that "[w]ithin 30 days after the filing of an arbitration award with a district court . . . any party may file a written demand for a trial de novo in the district court . . . . Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration."[22] Thus, the arbitration provided for under the ADR Act, unlike the traditional, contract-based arbitration, is non-binding.

Under the ADR Act, the United States District Courts must **require** parties in civil actions **to consider** some form of ADR at an appropriate stage in the litigation.[23] In addition, the ADR Act allows courts to choose whether to **require** civil litigants **to participate** in some form of ADR and allows courts to design forms of ADR processes that best serve the needs of particular cases.[24]

District Courts thus have broad discretion in applying the terms of the ADR Act. Indeed, even within the same state, federal District Courts may approach ADR differently. For example, in Oklahoma the Western District has adopted comprehensive rules specifying availability of a broad range of alternative dispute resolution mechanisms, including early neutral evaluation, non-binding arbitration, mini-trials, and summary jury trials, in addition to various forms of mediation.[25] Mediation in the Western District is provided by one of a panel of neutrals on a fee

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[17] Caroline Harris Crowne, The Alternative Dispute Resolution Act of 1998: Implementing A New Paradigm Of Justice, 76 N.Y.U. L. Rev. 1768 (2001).

[18] 28 U.S.C. §§ 651-658.

[19] 28 U.S.C. § 651(a).

[20] Id.

[21] 28 U.S.C. § 657

[22] 28 U.S.C. § 657(c). Unlike other forms of mediation, this "non-binding arbitration" cannot be mandated by the court and requires the consent of all the parties. 28 U.S.C. § 652(a).

[23] 28 U.S.C. § 652(a).

[24] 28 U.S.C. §§ 651-652. There are limitations on the alternatives available to the courts under the ADR Act. For example, the court may not require arbitration in the absence of consent, or in certain types of cases.

[25] LCvR 16.3, and Supplement, Western District of Oklahoma.

basis. In the Northern District of Oklahoma, each case is provided a "settlement conference", conducted by volunteer neutrals.[26] The settlement conference is, in essence, a mediation session. The Eastern District procedure is similar to the Northern District procedure, except that the settlement conference is, typically, conducted by a Magistrate Judge who is not taking part in the processing of the case.[27] The various approaches of the federal districts in Oklahoma follow directly from the experiments conducted under the CJRA. Both the Western and Northern Districts developed their programs in the early 1990's under the auspices of the CJRA and have merely refined them in response to the ADR Act.

B. Enforcement of Mediation Clauses Or Agreements To Mediate

As noted earlier, commentators have tried to sharpen the definitions of, and distinctions between, arbitration and mediation – the two major forms of ADR. Specifically, these commentators have noted that the essential difference between arbitration and mediation is that arbitration is binding while mediation is non-binding.[28] Despite continuing efforts to clarify the features of both processes, loose terminology has caused some confusion as courts have dealt with enforcement of agreements to mediate. Some courts have adopted language suggesting that arbitration has become synonymous with mediation for this purpose.[29] Because of the blurring of the line between arbitration and mediation, some courts have even turned to the Federal Arbitration Act ("FAA")[30] as a means of enforcing agreements to mediate.[31]

In AMF Inc. v. Brunswick Corp.,[32] the court noted that "[t]he Federal Arbitration Act, adopted in 1925, made agreements to arbitrate enforceable without defining what they were."[33] The AMF court also noted that case law provided a broad description of arbitration and recognized that the essence of arbitration is an agreement to have a third party decide a dispute.[34] Because courts have defined "arbitration" as broadly as "[a] form of procedure whereby differences may be settled,"[35] the AMF court held that "[n]o magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to obtain the benefits of the [Federal Arbitration] Act."[36] Nevertheless, the defendant in AMF argued that the parties did

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[26] NDLR 16.2, Northern District of Oklahoma. Most such conferences are conducted by volunteer neutrals who are local practicing attorneys trained in mediation.

[27] EDLR 16.3, Eastern District of Oklahoma.

[28] Gourley, Green and Wolf, *supra*, note 2, at 6 n.7.

[29] *See, e.g.*, AMF Inc. v. Brunswick Corp., 621 F. Supp. 456 (D.C.N.Y. 1985).

[30] 9 U.S.C. § 1 et seq.

[31] *See, e.g.*, Cecala v. Moore, 982 F. Supp. 609 (N.D. Ill. 1997); AMF Inc. v. Brunswick Corp., *supra*, note 29.

[32] AMF Inc. v. Brunswick Corp., 621 F. Supp. 456 (D.C.N.Y. 1985).

[33] Id. at 460.

[34] Id.

[35] Id. at 460 (quoting Pacific Indemnity Co. v. Insurance Co. of North America, 25 F.2d 930, 931 (9th Cir. 1928).

[36] Id. at 460.

not contemplate the kind of arbitration envisaged by the FAA because the opinion of the third party is non-binding and cannot settle the controversy. Defendant Brunswick was advancing the simple argument that its agreement to obtain a "non-binding advisory opinion" was not an agreement to arbitrate as contemplated by the FAA but rather an agreement to mediate. In a very fact-specific holding, the AMF court found that the rendering of a "non-binding advisory opinion" would essentially "settle" the dispute and accordingly found that the agreement to obtain a non-binding advisory opinion in a dispute was enforceable under the FAA.[37] Accordingly, the court entered an order compelling the Defendant Brunswick to comply with the agreement to obtain a "non-binding advisory opinion" in a dispute over the propriety of advertising claims.

In Cecala v. Moore,[38] the defendants successfully invoked the Illinois arbitration statute to stay a federal court proceeding pursuant to a mediation provision in a real estate contract between the parties.[39] The contract included a clause that required mediation of "any and all disputes or claims between Purchaser and Seller arising out of or relating to" its terms. Although the Cecala Court held that the FAA was inapplicable as a result of the contract's failure to satisfy interstate commerce requirements, the court ruled that the contract was governed by the Illinois Uniform Arbitration Act ("IUAA"), 710 Ill. Comp. Stat. 5/1-23, which to a certain extent tracks the language of the FAA.[40] Section 5/1 of the IUAA provides that "[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract."[41] Making no distinction between "arbitration" and "mediation," the Cecala Court granted defendants' motion to stay proceedings pending mediation pursuant to the IUAA.[42]

Courts have also held that the failure to comply with mandatory mediation procedures and contractual deadlines to mediate can determine the substantive outcome of a dispute. In DeValk Lincoln Mercury, Inc. v. Ford Motor Co.,[43] Ford's standard automotive dealership contract required the Dealer to submit "[a]ny protest, controversy or claim by the Dealer" to the Dealer Policy Board for mediation "within fifteen (15) days after the Dealer's receipt of notice of termination or nonrenewal, or, as to settlement of accounts after termination or nonrenewal, within one year after the termination or nonrenewal has become effective."[44] Mediation with the Policy Board was "a condition precedent to the Dealer's right to pursue any other remedy

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[37] Id. at 460-461. The court also held that "[w]hether or not the agreement be deemed one to arbitrate, it is an enforceable contract to utilize a confidential advisory process in a matter of serious concern to the parties. The agreement may be enforced in equity." Id. at 461.

[38] Cecala v. Moore, 982 F. Supp. 609 (N.D. Ill. 1997).

[39] Id.

[40] Id. at 612.

[41] 710 Ill. Comp. Stat. 5/1.

[42] Cecala, 982 F. Supp. at 615.

[43] DeValk Lincoln Mercury, Inc. v. Ford Motor Co., 811 F.2d 326 (7th Cir. 1987).

[44] Id. at 335.

available under th[e] agreement or otherwise available under law."[45] The Dealer, DeValk Lincoln Mercury, filed a lawsuit against Ford without first submitting its claims to mediation and after the prescribed time frame for mediating its claims had expired. The District Court granted Ford's motion for summary judgment and the Seventh Circuit Court of Appeals affirmed, holding that the Dealer's conduct did not constitute substantial compliance with the mediation clause and Ford had not waived the requirement of strict compliance with the mediation clause. Because the time frame for mediating its claims had expired, the Dealer's failure to comply with the mediation clause resulted in its claims being extinguished.[46]

Devalk is not alone in that holding. In Bill Call Ford, Inc. v. Ford Motor Co., 830 F. Supp. 1045 (N.D. Ohio 1993), the District Court granted summary judgment and barred a claim of an automotive dealership franchisee based upon the same mandatory mediation clause considered in DeValk. The Court in Bill Call held that "[t]here is no genuine issue that the Franchise Agreement between plaintiffs and defendant was terminated, and that the unambiguous terms of that agreement establish, as a condition precedent to suit, plaintiffs' utilization of mediation; an exercise they unquestionably failed to pursue. Accordingly, the defendant's motion for partial summary judgment as to count six of plaintiffs' complaint . . . is granted in its entirety."

C. Compelling Mediation Without An Agreement

Given the growing judicial and legislative belief that mediation is effective in resolving or narrowing disputes, the question arises whether a district court "possess the authority to compel an unwilling party to participate in, and share the costs of, non-binding mediation conducted by a mediator".[47] In In re Atlantic Pipe Corp.,[48] the United States Court of Appeals for the First Circuit specifically considered that issue. In Atlantic Pipe, the court recognized that the ADR Act[49] is one potential source of statutory authority for a district court to order mandatory non-binding mediation in the absence of a valid agreement to mediate. Specifically, the court noted:

> Congress passed the ADR Act to promote the utilization of alternative dispute resolution methods in the federal courts and to set appropriate guidelines for their use. The Act lists mediation as an appropriate ADR process. . . . Moreover, it sanctions the participation of "professional neutrals from the private sector" as mediators. Finally, the Act requires district courts to obtain litigants' consent only when they order arbitration, . . . not when they order the use of other ADR mechanisms (such as non-binding mediation).[50]

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[45] Id.

[46] Id. at 335-338.

[47] In re Atlantic Pipe Corp., 304 F.3d 135 (1st Cir. 2002).

[48] Id.

[49] 28 U.S.C. §§ 651-658.

[50] In re Atlantic Pipe Corp., 304 F.3d 135, 141 (1st Cir. 2002)(citations omitted).

In order for a district court to draw on the ADR Act as a source of authority, some form of the ADR procedures it endorses must be adopted in the judicial district by local rule.[51] The First Circuit made it quite clear that "[i]n the absence of such local rules, the ADR Act itself does not authorize any specific court to use a particular ADR mechanism."[52] Individual judges do not have the authority under the ADR Act to craft an appropriate ADR program. The ADR Act permits experimentation, "but only within the disciplining format of district-wide local rules adopted with notice and a full opportunity for public comment."[53] Accordingly, the court concluded that where "there are no implementing local rules, the ADR Act neither authorizes nor prohibits the entry of a mandatory mediation order."[54]

Apart from the ADR Act, however, a district court may draw on its "inherent power to manage and control its calendar" as a possible source for judicial authority[55] to compel mediation in the absence of a valid mediation agreement.[56] In Atlantic Pipe, the First Circuit noted that a district court's inherent powers are not infinite, but are constrained by four limiting principles, namely:

> First, inherent powers must be used in a way reasonably suited to the enhancement of the court's processes, including the orderly and expeditious disposition of pending cases. . . . Second, inherent powers cannot be exercised in a manner that contradicts an applicable statute or rule. . . . Third, the use of inherent powers must comport with procedural fairness. . . . . And, finally, inherent powers "must be exercised with restraint and discretion."[57]

After noting the absence of district-wide local rules adopting an ADR program pursuant to the ADR Act, the Atlantic Pipe court held that it was within the Puerto Rico district court's "inherent power to order non-consensual mediation in those cases in which that step seems reasonably likely to serve the interest of justice."[58] However, the appellate court also held that "a mediation order must contain procedural and substantive safeguards to ensure fairness to all parties involved."[59] It concluded that the mediation order in Atlantic Pipe did not contain adequate

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[51] Id. at 141.

[52] Id.

[53] Id. at 141-142.

[54] Id. at 142.

[55] The Atlantic Pipe court also specifically recognized that a court's local rules as well as the Federal Rules of Civil Procedure are potential sources of judicial authority for a district court to order non-binding mediation of a pending case in the absence of a valid agreement to mediate.

[56] Id. at 143. As an example, the court noted that "a district court may use its inherent power to compel represented clients to attend pretrial settlement conferences, even though such a practice is not specifically authorized in the Civil Rules." Id.

[57] Id. at 143.

[58] Id. at 145.

[59] Id. at 147.

[59] Id. at 148.

safeguards to ensure fairness to all parties. The order did not set forth either a timetable for the mediations or a cap on the fees that the mediator might charge.[60] The First Circuit therefore reversed the order mandating mediation and remanded the matter to the district court noting that "the district court is free to order mediation if it continues to believe that such a course is advisable or, in the alternative, to proceed with discovery and trial."[61]

Through the enactment of local rules that authorize specific ADR procedures, most federal districts have eliminated the need for district courts to rely upon their inherent powers to order non-consensual mediation. Where the local rules remain silent, the court's inherent power to manage its docket can provide the necessary justification for proceeding, as long as its mediation order contains the same or similar procedural safeguards as the rule would contain.

D. Enforcing Post-Mediation Settlements Or Agreements

The mediation process is no stranger to buyer's remorse. A mediation agreement, even when supervised by a court-appointed mediator, is subject to disagreements as to scope and meaning and inevitably, efforts to remake a poor deal. Generally, the enforcement of a post-mediation settlement or agreement relies upon the application of general contract principles and the public policy of the various states. Such principles have been employed repeatedly by both federal courts and state courts in deciding the enforceability of mediated settlements.

Most courts treat mediated settlement agreements as binding contracts and will compel enforcement of such agreements.[62] Courts are of the opinion that settlement agreements must present an alternative to litigation, thereby providing a final settlement of the controversy.[63] The fact that the court did not formally sign the agreement does not affect the enforceability of that agreement. It is the agreement itself that gives rise to the obligation.[64] When looking into whether or not the parties entered into an enforceable contract at the close of the mediation session, courts have held that state contract law controls.[65]

One of the main concerns when dealing with the enforcement of mediated settlements is the kind of proof a court must require where the parties are bound by confidentiality obligations. Will the duties placed on participants to maintain confidentiality prevent discovery of the mediation proceedings or the testimony of the mediator? Virtually every mediation session is conducted under an expectation of confidentiality. Either the statute or court rule will mandate confidentiality or the parties will agree to it. Yet, how can the court enforce a mediation settlement without reviewing the terms of that settlement or reviewing evidence of how it was reached? The courts that have faced this issue have had to balance the twin goals of protecting

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[60] Id. at 147.

[61] Id. At 148.

[62] *See, e.g.,* Olam v. Congress Mortgage Company, 68 F. Supp. 2d 1110, 1124 (N.D. Cal. 1999); AMF Inc. v. Brunswick Corp., 621 F. Supp. 456 (D.C.N.Y. 1985).

[63] AMF, 621 F. Supp. 456 at 459.

[64] Id. at 462.

[65] Olam, 68 F. Supp. 2d at 1119.

the finality of the mediation process and ensuring the confidentiality of court-sponsored mediation opportunities.[66]

The District Court for the Northern District of California dealt with these issues in Olam v. Congress Mortgage Co.[67] The court in Olam faced two main questions: (1) whether evidence about what occurred during mediation proceedings, including testimony from the mediator, may be used to help resolve the dispute over the enforcement of a mediation agreement, and (2) which law applied to the issue of confidentiality, state or federal. In this case, the plaintiff took the position that the consent she gave when signing a "Memorandum of Understanding" was not legally valid, and therefore, the Memorandum of Understanding was unenforceable.[68] The court discussed the choice of law issue first, holding that

> even when a local rule adopted by a federal district court pursuant to § 652(d) offers more protection to mediation communications than would be offered by the law of the state where the district court sits, the federal court must apply state privilege law when state substantive law is the source of the rule of decision on the claim to which the proffered evidence from mediation is relevant.[69]

After resolving the choice of law issue in favor of state privilege rules, the court discussed whether evidence about what occurred during mediation proceedings, including testimony from the mediator, could be used to help resolve the dispute over the enforcement of a mediation agreement. Because there was a substantial likelihood that testimony from the mediator would be the most reliable and probative on the central issues in the case, and because there was no likely alternative source of evidence on the issues that would be of comparable probative utility, the court held that testimony could be compelled.[70]

The court based its decision as to confidentiality on the case of Rinaker v. The Superior Court of San Joaquin County.[71] In the Rinaker case, the court discussed whether the confidentiality of a mediation conference conflicted with a minor's constitutional right to effective impeachment of an adverse witness in a subsequent juvenile delinquency proceeding. The court states: "When balanced against the competing goals of preventing perjury and preserving the integrity of the truth-seeking process of trial in a juvenile delinquency proceeding, the promotion of settlements must yield to the constitutional right to effective impeachment"[72] The court, however, held that the juvenile court should have conducted an *in camera* hearing to

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[66] The argument is that the parties would not realize the full potential of mediation unless they believed the proceedings would be confidential. Olam v. Congress Mortgage Company, 68 F. Supp. 2d at 1124. Some courts have held, however, that testimony and evidence of a mediation conference may be compelled in some cases. Id.; Rinaker v. The Superior Court of San Joaquin County, 62 Cal. App. 4th 155 (Cal. 3d DCA 1998).

[67] Olam v. Congress Mortgage Company, 68 F. Supp. 2d at 1124.

[68] Id. at 1118.

[69] Id. at 1125.

[70] Id. at 1138-1139.

[71] Rinaker v. The Superior Court of San Joaquin County, 62 Cal. App. 4th 155 (Cal. 3d DCA 1998).

[72] Id. at 167.

weigh the constitutionally based claim of need against the statutory privilege to determine whether the testimony was necessary.[73] After that determination was made, then the court could compel testimony if it thought it was proper to do so.[74]

To provide a cross section of the trends in the enforcement of mediation settlements, this paper examines representative decisions from six states that have actively sponsored mediation programs under statutes and court rules for many years. While the procedures in other jurisdictions may differ, many of the fundamental concepts will be the same as parties have seen in Texas, Oklahoma, Florida, California, New York and Illinois.

1. Texas' Treatment Of Mediated Settlement Agreements

In 1987 the Texas Legislature enacted the Alternative Dispute Resolution Procedures Act ("Texas ADR Act").[75] The Texas ADR Act encourages peaceful resolution of disputes through voluntary settlement or ADR procedures.[76] The Texas ADR Act provides: "If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract."[77] Pursuant to the Texas ADR Act, state courts have continuously found mediation agreements enforceable.[78] Additionally, state contract law supports the enforcement of agreements to mediate, as well as agreements that result from mediation..[79]

In In re Marriage of Ames,[80] for example, the court held that a settlement agreement reached through mediation was binding and could not be repudiated. In that case, the parties were ordered to mediation and reached a community property settlement agreement, from which the husband later tried to withdraw his consent. Relying on the Texas ADR Act, the court stated: "We interpret this statute to mean, *inter alia*, that a party who has reached a settlement agreement disposing of a dispute through alternative dispute resolution procedures may not

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[73] Id. at 170.

[74] In other words, through an *in camera* proceeding, the confidentiality of the mediation process can be maintained while the court considers factors bearing upon whether the evidence sought is significant enough to compel breach of the confidential mediation process.

[75] Codified as chapter 154 of the Texas Civil Practice and Remedies Code, Tex. Civ. Prac. & Rem. Code Ann. §§ 154.001-.073.

[76] Tex. Civ. Prac. & Rem. Code Ann. § 154.002.

[77] Tex. Civ. Prac. & Rem. Code Ann. § 154.071(a).

[78] *See, e.g.*, West Beach Marina, Ltd. v. Erdeljac, 94 S.W.3d 248 (Tex. App. Austin 2002); Stevens v. Snyder, 874 S.W.2d 241 (Tex. App. Dallas 1994); In re Marriage of Ames, 860 S.W.2d 590 (Tex. App. Amarillo 1993).

[79] *See, e.g.*, Ortega-Carter Am. Int'l Adjustment Co., 834 S.W.2d 439, 442 (Tex. App. Dallas 1992) (contract law applies to settlement agreements); Browning v. Holloway, 620 S.W.2d 611, 615 (Tex. Civ. App. Dallas 1981) (once a party accepts the agreement, enforcement is by suit upon the contract, either for breach or for specific performance).

[80] In re Marriage of Ames, 860 S.W.2d 590 (Tex. App. Amarillo 1993).

unilaterally repudiate the agreement."[81] The court also noted the policy considerations behind the enforceability of mediated agreements, stating:

> If voluntary agreements reached through mediation were non-binding, many positive efforts to amicably settle differences would be for naught. If parties were free to repudiate their agreements, disputes would not be finally resolved and traditional litigation would recur. In order to affect the purposes of mediation and other alternative dispute resolution mechanisms, settlement agreements must be treated with the same dignity and respect accorded other contracts reached after arm's length negotiations.[82]

The Ames court upheld the settlement agreement and held that final judgment of the case had to be in strict compliance with the agreement.

Similarly, the court in West Beach Marina, Ltd. v. Erdeljac[83] held that a settlement agreement reached in mediation regarding easement rights across property was enforceable as a matter of law. The parties in this case had entered a long and embattled pretrial process, including several settlement conferences and two mediations, which resulted in written agreements between the parties. The plaintiffs, appellees, sought specific performance of the agreement and damages from defendant's breach. Defendants, however, argued that the agreement was unenforceable because it left open issues to be resolved by the parties at a later date. The appellate court disagreed and enforced the agreement. The court stated: "During negotiations, the parties may agree to some terms of an agreement with the expectation that other terms are to be agreed upon later or that the parties contemplate a future additional written document. Such an expectation does not prevent the agreement already made from being an enforceable agreement."[84] The court of appeals affirmed the judgment of the district court, thereby enforcing the mediated agreement.[85]

Like the state courts, Texas federal courts continuously have enforced mediated settlement agreements. In deciding whether to apply state or federal law in evaluating enforceability, most courts have held that state contract law controls. The Lexington[86] case is

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[81] Id. at 591.

[82] Id. at 592.

[83] West Beach Marina, Ltd. v. Erdeljac, 94 S.W.3d 248 (Tex. App. Austin 2002).

[84] Id. at 260.

[85] It is important to note that, when trying to enforce a settlement agreement when another party has repudiated, the moving party must complete certain procedural requirements. Clopton v. Mountain Peak Water Supply Corp, 911 S.W.2d 525 (Tex. App. Waco 1995); Stevens v. Snyder, 874 S.W.2d 241 (Tex. App. Dallas 1994). The Clopton court, relying on the holding in Stevens, states: "A party can enforce the agreement even though the other party has withdrawn consent to the judgment. However, the party seeking to enforce the agreement must provide proper pleading and proof to support enforcing the settlement under contract law." Clopton, 911 S.W.2d at 527. In Clopton, the court therefore remanded the case to the trial court in order to give the non-repudiating party an opportunity to plead and prove that the settlement agreement should be enforced as a contract. Id.

[86] Lexington Ins. Co. v. Unity/Waterford-Fair Oaks, Ltd., 2001 WL 694582 (N.D. Texas 2001); Allen v. Leal, 27 F. Supp. 2d 945, 946 (S.D. Texas 1998) (court declined to exercise supplemental jurisdiction over the defendant's breach or contract counterclaim and dismissed without prejudice to permit a state court determination of the

an example of circumstances in which a court will enforce a settlement agreement resulting from mediation. In that case, the parties agreed at mediation that some issues would later be resolved by binding appraisal. The insurer sought to enforce the appraisal, contending it represented a settlement of the claim. The court agreed, and enforced the settlement agreement. Because the settlement agreement met the requirements of local contract law and the Texas Rules of Civil Procedure, such as being in writing, signed and filed with the papers as part of the record, the court granted the insurer's motion and enforced the agreement.

An issue that arises frequently when dealing with the enforcement of mediated agreements is confidentiality. Texas federal courts acknowledge the importance of the confidentiality of the mediation process, but will allow some information to be revealed in certain circumstances.[87]

In Datapoint Corporation v. PictureTel Corporation,[88] defendant PictureTel moved to compel production of a settlement agreement and testimony regarding its terms. The court found that the evidence sought was clearly discoverable pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, because it was relevant to the subject matter involved in the pending action then before the court, regarding fundamental issues of patent ownership and witness credibility.[89] Additionally, the court found that the information sought was not privileged. Plaintiff in this case relied on Southern District of Texas Local Rule 20(1), which states: "All communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities." The court, however, noted that this rule "does not render otherwise non-privileged settlement communications privileged. Rather, it deems them to be confidential and protected from disclosure."[90] The court, therefore found good cause to exercise its discretion and ordered disclosure of the settlement terms. Additionally, the court noted that it was not concerned about the affect of its decision on mediated settlement agreements, because the circumstances in this case required the court's decision here. The parties were prosecuting a lawsuit in which the terms of their settlement were material and discoverable. Those cases in which the terms of the settlement simply have no bearing on a subsequent lawsuit, therefore, will not be affected.

On the contrary, the court did not allow testimony of information from a mediation proceeding in Smith v. Smith.[91] In Smith, a court-appointed mediator was served a subpoena *duces tecum* to give testimony in a subsequent federal action. The parties who issued the subpoena contended that the mediator's testimony was necessary to refute plaintiff's claims in the subsequent suit that related to the settlement of state court lawsuits that the witness mediated. Similar to the Datapoint court, the Smith court held that evidence should not be

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counterclaim); Smith v. Smith, 154 F.R.D. 661 (N.D. Texas 1994) (the court relied on Texas law when looking to the issue of privilege of a mediation proceeding).

[87] *See, e.g.*, Datapoint Corporation v. Picturetel Corporation, 1998 WL 25536 (N.D. Tex. 1998); Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994).

[88] Datapoint Corporation v. Picturetel Corporation, 1998 WL 25536 (N.D. Tex. 1998).

[89] Id. at *2.

[90] Id.

[91] Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994).

excluded merely because it was presented in the course of compromise negotiations. It stated: "[O]ral communications and written materials that are otherwise admissible or discoverable are not made inadmissible or non-discoverable solely because they have been uttered or disseminated in an alternative dispute resolution proceeding."[92] The court, however, found that the defendants did not demonstrate that the mediator possessed discoverable or admissible evidence, and therefore, affirmed the order quashing the subpoena.

2. Oklahoma's Treatment Of Mediated Settlement Agreements

In 1983, the Oklahoma legislature adopted the first of a series of state statutes encouraging mediation of disputes. The Dispute Resolution Act[93] established a publicly funded program to provide voluntary mediators for community and small-dollar disputes. In 1998, state District Courts were specifically authorized to order all types of cases to mediation.[94] Pursuant to these two statutory schemes, numerous local courts and state agencies established mediation alternatives. Most recently, the Oklahoma legislature clarified the relationship of the two previous statutory schemes and amplified on the alternatives available to state and local agencies to establish mediation programs.[95]

The general rule in Oklahoma courts, like in the Texas Courts, is that settlement agreements resulting from mediation are enforceable and treated like other binding contracts.[96] In Vela v. Hope Lumber & Supply Co.,[97] defendants moved to enforce a settlement agreement resulting from mediation. Both parties initialed the agreement, denoted their understanding that the agreement was to be a "legally binding and enforceable settlement contract."[98] The court first noted that alternative dispute resolution processes, including mediation, are encouraged.[99] Additionally, the court added that settlement agreements resulting from these processes constitute contracts. The court emphasized, "Oklahoma law recognizes that an agreement to settle a claim constitutes a contract between the parties which should not be set aside absent fraud, duress, undue influence, or mistake."[100] The court found that the plaintiff signed the mediation agreement of her own free will, that she understood the nature and consequences of her acceptance of its terms, and that it contained no ambiguity. The court, therefore, affirmed the lower court's holding enforcing the mediation agreement.

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[92] Id. at 669.

[93] Okla. Stat., tit. 12, § 1801, et seq.

[94] District Court Mediation Act, Okla. Stat., tit. 12, § 1821 et seq.

[95] Choice in Mediation Act, Okla. Stat., tit. 12, § 1831 et seq., enacted in 2002.

[96] *See* Coulter v. Carewell Corp. of Oklahoma, 21 P.3d 1078 (Okla. Civ. App. 2001); Vela v. Hope Lumber & Supply Co., 966 P.2d 1196 (Okla. Civ. App. 1998).

[97] Vela v. Hope Lumber & Supply Co., 966 P.2d 1196 (Okla. Civ. App. 1998).

[98] Id., at 1197.

[99] Id. at 1198.

[100] Id.

Relying on the Vela holding, the court in Coulter v. Carewell Corp. of Oklahoma,[101] also enforced a settlement agreement resulting from mediation. In Coulter, the plaintiff moved to enforce a settlement agreement in a wrongful death action. The mediation agreement specifically stated, "We intend the above agreement to be a legally binding and enforceable settlement contract and acknowledge that we entered into same without coercion or duress."[102] Plaintiff refused to execute the release, and sought to enforce the settlement agreement without her release. The court, however, found that enforcement of the settlement agreement without the execution of the release was unreasonable and contrary to law. The court stated: "We further conclude that the signed mediation agreement evidences a meeting of the minds as to financial terms, and, [plaintiff's] acceptance of [defendant's] offer contained an implied promise to execute the release."[103] The court, therefore, enforced the settlement agreement in its entirety.

3. Florida's Treatment Of Mediated Settlement Agreements

By administrative order of July 26, 1989, the Supreme Court of Florida appointed a special committee on mediation and arbitration rules as a standing committee of the Supreme Court. The main purpose of the committee's tasks was to enhance alternative dispute resolution programs in Florida. A product of the committee's efforts is the amendments to the Florida Rules of Civil Procedure 1.700-1.780, regarding mediation.[104] Mandatory, court-ordered mediation was officially sanctioned by the Florida legislature in 1987, and since then, mediation has become institutionalized within Florida's court system.[105] Mediation, pursuant to chapter 44, is mandatory when ordered by the court, and any court in which a civil action is pending may refer the case to mediation, with or without the parties' consent.[106] The Florida Supreme Court set forth the comprehensive procedures for conducting mediation procedures, as well as minimum standards of mediators, in Rule 10 of the Florida Rules for Certified and Court Appointed Mediators.

Florida, like many other states, encourages the use of alternative dispute resolution mechanisms, such as mediation, and will enforce settlement agreements resulting use of those mechanisms.[107] In Sponga v. Warro,[108] the appellate court explained and enforced the general rule that mediation agreements should be enforced. In Sponga, a motorist who brought an action arising from an automobile accident moved to set aside a final order of dismissal, which

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[101] Coulter v. Carewell Corp. of Oklahoma, 21 P.3d 1078 (Okla. Civ. App. 2001).

[102] Id. at 1083.

[103] Id. at 1084.

[104] In re Amendment to Florida Rules of Civil Procedure 1.700-1.780 (Mediation), 563 So. 2d 85 (Fla. 1990).

[105] *See* Ch. 44, Fla. Stat. (2000).

[106] *See* § 44.102(2), Fla. Stat. (2000).

[107] *See* Tilden Groves Holding Corp. v. Orlando/Orange County Expressway, 816 So. 2d 658 (Fla. 5th DCA 2002); Sponga v. Warro, 698 So. 2d 621 (Fla. 5th DCA 1997); Trowbridge v. Trowbridge, 674 So. 2d 928 (Fla. 4th DCA 1996).

[108] Sponga v. Warro, 698 So. 2d 621 (Fla. 5th DCA 1997).

was based on a settlement agreement and release executed following mediation. The motorist filed the motion pursuant to Rule 1.540, Florida Rules of Civil Procedure, alleging that the order of dismissal should be set aside on the basis of mistake or newly discovered evidence. The court found this case to be one where one party entered into a mediation settlement agreement based on a unilateral mistake, and concluded that this was not an appropriate case for setting aside the settlement agreement and release.[109] The court made several strong policy arguments for enforcing mediation agreements. It observed, in relevant part:

> "[W]e think that cases settled in mediation are especially unsuited for the liberal application of a rule allowing rescission of a settlement agreement based on unilateral mistake. Mediation, like arbitration, is an alternative dispute resolution device. It is not to be engaged in casually or carelessly."[110]

The court also added: "The finality of it once the parties have set down their agreement in writing is critical."[111] Finally, the court placed the burden of ascertaining the true facts concerning the cause of a plaintiff's injury on the Plaintiff, and concluded that the burden must be satisfied before the plaintiff elects to settle a case in mediation. The court therefore denied plaintiff's motion to set aside the agreement.

Similarly, in Tilden Groves Holding Corp.,[112] the court denied a motion to set aside a judgment reflecting terms of a settlement agreement following mediation. The court in this case, however, addressed the standard of review of a Rule 1.540 order. The court noted that the general standard of review is gross abuse of discretion, but that a higher standard exists when it comes to mediation agreements. The court stated: "There is a more stringent standard of review, however, when the final judgment to be vacated follows a mediated settlement agreement."[113] Applying the standards, the court found that the circumstances of this case did not allow rescission of the mediated agreement. The court, therefore denied the motion to set aside judgment.

Another illustration of the enforcement of mediated settlement agreements in Florida is Trowbridge v. Trowbridge.[114] In that case, a wife sought to repudiate a mediation agreement that the trial court had approved and incorporated into a final judgment. Evidence showed that the wife knew the agreement was a final settlement of the case, and that she was instructed not to settle if she was unhappy with the settlement.[115] The court noted the finality of a mediation agreement, stating: "The mediation rules create an environment intended to produce a final settlement of the issues with safeguards against the elements of fraud, overreaching, etc., in

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[109] Id. at 624.

[110] Id. at 625.

[111] Id.

[112] Tilden Groves Holding Corp. v. Orlando/Orange County Expressway, 816 So. 2d 658 (Fla. 5th DCA 2002).

[113] Id. at 660.

[114] Trowbridge v. Trowbridge, 674 So. 2d 928 (Fla. 4th DCA 1996).

[115] Id. at 929.

the settlement process. . . . With the parties' execution of an agreement, mediation contemplates a prompt and final resolution of the case."[116] The court, therefore, enforced the mediation agreement and affirmed final judgment in the case.

Although the general rule is to treat mediated agreements like other contracts and to enforce them, courts have set these agreements aside for a number of reasons. These reasons typically include contract defenses such as fraud or duress. One issue left unanswered by the courts was the question of misconduct by a mediator, which the court provided an answer in Vitakis-Valchine v. Valchine.[117] In Vitakis-Valchine, the court held that alleged misconduct by a mediator was a valid basis to set aside a settlement agreement. In that case, a wife moved to set aside a mediated agreement on grounds of coercion and duress by her husband, his attorney, and the mediator. The court held that the wife failed to meet her burden of establishing that the marital settlement agreement was reached by duress or coercion on the part of the husband and his attorney. Because the trial court did not make any findings relative to the truth of the allegations of the mediator's alleged misconduct, the court of appeals could not address that issue. The court, however, did observe in **dictum** alleged misconduct by a mediator was a valid basis to set aside a settlement agreement. The court stated:

> During a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function. We hold that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through violation and abuse of the judicially prescribed mediation procedures.[118]

The court remanded the case for further proceedings the issue regarding the mediator's alleged misconduct.

4. California's Treatment of Mediated Settlement Agreements

California courts have also regularly upheld mediated settlement agreements. In fact, in 1981, the California legislature enacted section 664.6 of the California Code of Civil Procedure, which allows for the entry of judgments to enforce the terms of a settlement agreement entered into outside the presence of the court. Section 664.6 states, in pertinent part:

> If parties to a pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement.[119]

Mediated settlement agreements are just one example of such a settlement and state courts have consistently enforced such agreements. Section 664.6 was enacted to create a summary

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[116] Id. at 931.

[117] Vitakis-Valchine v. Valchine, 793 So. 2d 1094 (Fla. 4th DCA 2001).

[118] Id. at 1099.

[119] *See* Cal.C.C.P. §664.6.

procedure to specifically enforce a settlement contract without the need for a new lawsuit.[120] A judgment is entered if the litigants have agreed to the material terms of the settlement in a signed writing or orally before the court.[121] For a settlement agreement to be valid under section 664.6, two key elements must exist: (1) the formation of a contract, and (2) either a "writing signed by the parties" containing the material terms or an oral agreement placed on the record before the court.[122]

In Crivello v. Bethel Island Municipal Improv. Dist.,[123] a party to a mediated agreement appealed the court's enforcement of the settlement agreement reached during mediation. However, the court of appeal held the enforcement was proper because the agreement was signed by all of the parties. The agreement stated that the parties wished to settle their dispute and the agreement contained all the essential terms of the settlement: the amount to be paid, the terms of the agreement, and the responsibilities of both parties. Thus, the court determined that the agreement was intended to be an enforceable settlement of the dispute and the court's enforcement of it pursuant to section 664.6 of the code of civil procedure, was proper.

Mediation agreements are also enforced pursuant to state contract law.[124] Thus, because settlements are contracts, they are governed by the rules of contract interpretation. A valid contract requires mutual consent. In Berland v. Miller,[125] a dispute between neighboring couples was sent to mediation and resulted in a stipulation for settlement. The court upheld the validity of the mediated settlement and held that the parties' intent was clear by the language of the settlement, so no extrinsic evidence was admissible to contradict that language. The Court then enforced the agreement pursuant to Section 664.6.

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[120] Weddington Productions, Inc. v. Flick, 60 Cal.App.4th 793, 809-810 (Cal.App. 2d 1998). The Weddington Court noted:

> [T]he Legislature enacted section 664.6, which created a summary, expedited procedure to enforce settlement agreements when certain requirements that decrease the likelihood of misunderstandings are met. Thus the statute requires the "parties" to stipulate in writing or orally before the court that they have settled the case. The litigants' direct participation tends to ensure that the settlement is the result of their mature reflection and deliberate assent. This protects the parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle, and minimizes the possibility of conflicting interpretations of the settlement.

Id.

[121] Id.

[122] Id. at 810-812.

[123] Crivello v. Bethel Island Municipal Improv. Dist., 2003 WL 21481023 (Cal.App. 1st Dist. 2003). This case is not officially published and courts and parties are therefore prohibited from citing or relying on the opinions therein, pursuant to California Rules of Court 977(a).

[124] Weddington, 60 Cal.App. 4th at 810 (indicating that a settlement agreement is a contract, and thus the legal principles which apply to contracts generally apply to settlement contracts).

[125] Berland v. Miller, 2003 WL 1875463 (Cal.App. 1st Dist. 2003). This case is not officially published and courts and parties are therefore prohibited from citing or relying on the opinions therein, pursuant to California Rules of Court 977(a).

5. New York's Treatment of Mediated Settlement Agreements

New York courts have similarly upheld mediated settlement agreements based on contract principles alone. The New York law clearly favors stipulations between parties that resolve their disputes without court adjudication.[126] Stipulations of settlement, including mediated settlement agreements, are enforceable as contracts and are not lightly set aside.[127] However, the New York courts require the observance of certain formalities before a court will enforce a mediated settlement.[128] Section 2104 of the New York Civil Practice Law and Rules ("CPLR 2104") provides that:

> An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered.[129]

In Bartley v. Federal Express Corp., Inc.,[130] the parties in the action conducted a mediation under the auspices of the American Arbitration Association. Although the plaintiff's counsel was present at the mediation, the plaintiff participated by telephone. The attorney for the plaintiff accepted an offer to settle the case at the mediation while on the phone with the plaintiff. Later, plaintiff's counsel informed the attorney for the defendant that his client had "changed her mind" and would not sign the release. The defendants moved for an order enforcing the alleged stipulation of settlement between the parties reached at the mediation conference. Citing CPLR 2104, the Court noted that "to be enforceable, a stipulation relating to any matter in an action must be (1) made in open court, or (2) written and subscribed, or (3) reduced to court order and entered."[131] Because the settlement agreement was not "written and subscribed" or "reduced to a court order and entered," the court analyzed the issue of whether the mediation procedure satisfied the "made in open court" provision of CPLR 2104. The court stated that a stipulation is not made in "open court" merely because a neutral party is present.[132] Further, the court noted that "[a]n informal mediation conference is not the equivalent of a 'court convened' 'in an institutional sense' 'with or without a jury to do judicial business'."[133]

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[126] Wright v. Brockett, 571 N.Y.S. 2d 660, 665 (N.Y. Sup. Ct. 1991).

[127] Id. at 665.

[128] Rosenberg v. Inner City Broadcasting Corp., 2001 WL 995349 (S.D.N.Y. 2001).

[129] N.Y.CPLR Rule 2104.

[130] Bartley v. Federal Express Corp., Inc., 683 N.Y.S.2d 737 (N.Y. Sup.Ct. 1998).

[131] Id.

[132] Id. at 738-739.

[133] Id. at 739.

Accordingly, the court in Bartley denied the motion for an order enforcing the alleged stipulation of settlement.[134]

Because it is well-established that settlement agreements are contracts, they must be construed according to general principles of contract law. In Wolf v. Wolf,[135] the Second Circuit Court of Appeals stated that though the District Court for the Southern District of New York had jurisdiction to enforce a settlement agreement, the district court was not permitted to modify the agreement's terms. The court in Wolf indicated that when the terms of the agreement are unambiguous, "courts must take care not to alter or go beyond the express terms of the agreement, or to impose obligations on the parties that are not mandated by the unambiguous terms of the agreement itself."[136]

Along the same line, in a bankruptcy case, a federal district court sitting in New York denied a Rule 60(b) motion[137] for relief from an ordered stipulation reached through mediation and held that "it is important to provide parties confidence that if they go to mediation, and reach an agreement as part of that process, their agreement will be honored and enforced."[138] The court indicated that settlements are favored in federal law, and, therefore, a party attacking a settlement agreement bears the burden of proving its invalidity and unenforceability "either by fraud practiced upon him or by a mutual mistake under which both parties acted."[139]

In Rosenberg[140], the federal court indicated that since a settlement agreement is a contract, the enforceability of it is a question of state law, not federal law. Applying New York law to determine the enforceability of the agreement, the court then concluded that the agreement was not enforceable under Section 2104,[141] because it was never reduced to a signed writing or made in open court or entered into the court record. Thus, although New York courts regularly enforce mediated settlement agreements, the formalities of Section 2104 must be strictly adhered to.

6. Illinois's Treatment of Mediated Settlement Agreements

Based on contract principles alone, courts in Illinois have routinely upheld mediated settlement agreements. In Allstate Financial Corp. v. Utility Trailer of Ill.,[142] the parties reached

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[134] The Bartley court also stated that it is mindful that courts have held that entry of a stipulation of settlement in the minute book of the Clerk of the Court satisfies the "open court" requirement of CPLR 2104. Nevertheless, the Court held that a letter from a mediator evidencing an oral settlement cannot be equated with an official court record.

[135] Wolf v. Wolf, 2003 WL 1025378 (2nd Cir. 2003).

[136] Id. at **2.

[137] Rule 60(b) is applicable in bankruptcy cases under Fed. R. Bankr.P. 9024 with exceptions that are not relevant to the cited case.

[138] In re AMC Realty Corp., 270 B.R. 132, 145 (S.D.N.Y. 2001).

[139] Id. at 145-46.

[140] Rosenberg v. Inner City Broadcasting Corp., *supra*, note 128.

[141] *Supra*, note 129.

[142] Allstate Financial Corp. v. Utility Trailer of Ill., 936 F. Supp. 525, 527 (N.D. Ill. 1996).

an agreement at a settlement pretrial conference held by the court. Following the pretrial settlement conference, the plaintiff dismissed its action with prejudice, providing for the court to retain jurisdiction to enforce the terms of the settlement agreement. The District Court for the Northern District of Illinois entered an order in conformance with the agreement and then the parties began to negotiate the specific terms to be incorporated into a written document that would memorialize the settlement agreement. The terms of the written settlement document tendered to defendants differed from the one reached at the settlement pretrial conference. Among other changes, it reduced the $170,000.00 to be paid to the plaintiff in installments to a one time lump sum payment of $152,500.00. The defendant argued that the written settlement document did not represent the final agreement between the parties and demanded the inclusion of specific indemnity language in the written agreement. In response to the defendant's stance, the plaintiff filed a motion to enforce the written settlement agreement.

The district court in Allstate held that "a motion to enforce a settlement agreement is essentially the same as a motion to enforce a contract."[143] Recognizing that the motion was simply a contract action, the Allstate court stated:

> A federal court has ancillary jurisdiction to enforce a settlement agreement if the parties' obligation to comply with the agreement is part of the dismissal order of the case – either by a separate provision in which the court retains jurisdiction to enforce the agreement or by incorporating the terms of the agreement in the dismissal order. . . . Assuming that it has jurisdiction to enforce a settlement agreement, a federal court will look to the applicable state law in construing the terms of the agreement.[144]

After finding that it had jurisdiction, the Allstate court held that the parties intended to be bound by the oral settlement agreement reached at the pretrial settlement conference.[145] In addition, the court stated that "the subsequent drafting of the written document was only to memorialize the terms of the oral agreement; neither a written settlement document nor approval of the agreement by any non-party was a condition precedent to the final oral agreement."[146] Accordingly, the court found that the oral settlement agreement reached by the parties at the pretrial conference was enforceable. Apparently finding the modification of the payment terms by the parties not to be material, the court held that the settlement agreement reached at the pretrial conference, as modified by the parties with respect to amount and terms of payment, was enforceable.

In Capri Sun, Inc. v. Beverage Pouch Systems, Inc., a Lanham Act case, the parties participated in voluntary mediation and successfully reached a settlement.[147] The Court then dismissed the action with prejudice, but retained jurisdiction to enforce the terms of the settlement. The plaintiff, believing that the defendant continually breached the settlement

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[143] Id.; Herron v. City of Chicago, 618 F. Supp. 1405, 1409 (N.D. Ill. 1985).

[144] Allstate, 936 F.Supp. at 528.

[145] Id. at 528.

[146] Id.

[147] Capri Sun, Inc. v. Beverage Pouch Systems, Inc., 2000 WL 1036016 (N.D. Ill. 2000)

terms, brought a motion asking the court to reinstate the case and enforce the provisions of the settlement by court order. The court, noting that a motion to enforce a settlement agreement is essentially the same as a motion to enforce a contract, examined the plaintiff's claim to determine if the defendant had in fact breached the agreement.[148] Citing Allstate,[149] the Capri Sun court stated that a federal court would look to the applicable state law in construing the terms of a settlement agreement. Specifically, the Court stated in Capri Sun:

> A settlement agreement is merely a contract between the parties to the litigation, wherein generally the defendants promise some partial remedy in exchange for the plaintiff's promise to dismiss the case and release the defendants from any future liability for their conduct that formed the basis of the dispute. As such, the formation, construction, and enforceability of a settlement agreement is governed by local contract law. . . . Illinois law makes clear that ordinary contract construction rules apply to a settlement agreement.[150]

The court held that based on the formation of the contract and the facts presented, the defendant had not breached the settlement agreement and thus declined to exercise its retained jurisdiction and reopen the case. Although declining to exercise its retained jurisdiction, the court noted that it would entertain future enforcement actions should they become necessary.[151]

E. The Uniform Mediation Act

Among the recent efforts to define and refine the mediation process, the National Conference of Commissioners of Uniform State Laws (NCCUSL), in cooperation with, among others, the Dispute Resolution Section of the American Bar Association undertook to develop a proposed uniform state law related to mediation. The study and drafting process considered a number of topics, such as mediator qualifications and ethical guidelines, but the resulting proposed Uniform Mediation Act (the "UMA") is more narrowly tailored, addressing primarily the issues of privilege, confidentiality, mediator conflicts of interest, and who may attend the mediation session.[152] The report of the commission (the "UMA Report") was approved by the American Bar Association at its Mid-Year meeting in February, 2002. The report, and the action of the ABA, recommend enactment of the UMA in all states. As of the writing of this paper, only two states, Massachusetts and Illinois, had adopted some form of the UMA, according to the NCCUSL website.

The UMA Report outlines three basic principles underlying the proposed Act: promoting candor, encouraging resolution while upholding values of fairness and self-determination, and uniformity.[153] The proposed UMA addresses these principles, in part, by creating privileges for

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[148] Id. at *2.

[149] Allstate, 936 F. Supp. at 527.

[150] Id. at *2 (citations omitted).

[151] Id. at *6 (citations omitted).

[152] The complete report on the Uniform Mediation Act, including the text of the proposed Act, can be found at the NCCUSL website, www.nccusl.org.

[153] UMA Report, Prefatory Note.

certain mediation communications,[154] making them not subject to discovery or admissible in a proceeding, unless otherwise provided in the UMA.[155] The privileges outlined in the UMA vary by participant. Parties may refuse to disclose and may prevent any other participant from disclosing all mediation communications.[156] The mediator may refuse to disclose and prevent any other participant from disclosing the mediator's own mediation communications.[157] Nonparty participants may refuse to disclose and prevent any other participant from disclosing the nonparty's own mediation communication.[158] The section on privilege contains a provision similar to the evidence rule limiting admissibility of settlement negotiations, i.e., it provides that otherwise admissible or discoverable information shall not be inadmissible or protected from discovery only because it was disclosed during mediation.[159] The UMA also addresses the circumstances under which the privileges may be waived or precluded[160] and exceptions to the privileges.[161]

The UMA places certain additional requirements on the mediator, limiting the recipients and content of reports the mediator may make to courts, arbitrators or agencies [162] and requiring disclosure by the mediator to the parties of any conflicts of interest[163] The UMA does not specify any particular qualifications for a mediator, but requires that the mediator be impartial, unless the parties agree otherwise after disclosure.[164]

While the objectives of NCCUSL are unquestionably laudable, there has been considerable debate over the utility and appropriateness of the proposed UMA. Concerns center on the nature and scope of the privileges created by the UMA and whether or not the UMA improves on provisions related to privileges and confidentiality already embodied in state law. Notably, the UMA has not been adopted in such states as Texas, Oklahoma, and Florida, where the mediation profession is mature and the process of mediation thoroughly institutionalized. Nevertheless, the UMA and the UMA Report have sparked a healthy debate among mediation professionals and policy-makers on these important issues. This debate has

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[154] The UMA defines a "mediation communication" as "a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for the purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." UMA, § 2 (2).

[155] UMA, § 4 (a).

[156] UMA, § 4 (b) (1).

[157] UMA, § 4 (b) (2).

[158] UMA, § 4 (b) (3).

[159] UMA, § 4 (c)

[160] UMA, § 5.

[161] UMA, § 6.

[162] UMA, § 7.

[163] UMA, § 9.

[164] Id.

caused the various states to review their own policies and practices, which should ultimately result in improvements to the mediation process, even if the end result is not uniformity.

III. MAKING MEDIATION AND MEDIATION PROGRAMS SUCCESSFUL

With more than 25 years of practice experience with mediation results, a number of studies have examined the effectiveness of mediation techniques and official mediation programs. Just as there are many understandings of just what mediation is, there are many ways to evaluate its success or failure. Some of the most thorough and interesting studies have been conducted under the auspices of the ABA's Dispute Resolution Section, the section that is devoted to alternative dispute resolution. A brief summary of some of the findings of these studies provide a useful introduction to a discussion of the effectiveness of mediation and mediation programs in the franchise arena.

Among the aspects of mediation reviewed by the Dispute Resolution Section is the extent to which court-annexed mediation has met its objectives. In general, the purpose of implementing mediation in the court setting is to improve the administration of justice. Historically, the emphasis in this area has been on reducing cost and delay. At least one commentator now suggests that looking only at these "efficiency" measures may cause us to overlook the extent to which mediation serves other values of the civil justice system.[165] Among the additional values that may be served by mediation are "(1) the quality of justice, (2) party and lawyer feelings about the fairness and utility of court services, (3) party participation, (4) the clarity of the parties' understanding of their situation and options, and (5) the parties' feelings about our justice system's values and who that system is designed to serve."[166] Key in this discussion is indeed the "core value animating court ADR," that being "self-determination."[167] The concept of self-determination includes the parties' decision to settle, the parties' decision as to the terms of settlement (which may include options not open to the court or jury at trial), and, ultimately, the parties' decision to let the judge or jury decide the case. If self-determination is the core value, then one way to look at success or failure of mediation programs is to study participant satisfaction.

A number of studies have been undertaken in recent years to attempt to determine participant satisfaction among other barometers of effectiveness with court-related ADR programs. An analysis of the results in a number of these studies was discussed in a recent Dispute Resolution Section publication.[168] Among the findings in the compilation of results of these studies was a high degree of satisfaction with the mediation process.[169] While more than 70 percent of parties were satisfied with the mediation process and a like percentage were satisfied with mediation outcomes, parties to mediations of civil cases (like franchise cases)

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[165] Wayne D. Brazil, An Assessment: Court-related ADR 25 years after Pound, 9 Dispute Resolution 4 (Winter, 2003).

[166] Id., p. 5.

[167] Id., p. 6.

[168] Jennifer Shack, Efficiency: Mediation in courts can bring gains, but under what conditions?, 9 Dispute Resolution 11 (Winter, 2003).

[169] Id.

were slightly less satisfied than parties to such cases as family, small claims, victim-offender, and workers compensation cases.[170] In all types of cases surveyed, a high percentage of parties thought the mediation process was fair, and a slightly lower percentage thought their own settlement was fair.[171] Perhaps not surprisingly, those who settled their cases had a slightly better opinion of the process than those who did not.[172]

Other observers have summarized the available studies to address such issues as the relationship of program design to institutionalization of the mediation process, relationship of program design to likelihood of settlement, and relationship of program design to parties' perceptions of procedural justice.[173] Defining "institutionalization" as "regular and significant use of the mediation process to resolve cases," these observers note that voluntary mediation programs in courts have consistently smaller caseloads than those in which mediation is mandatory.[174] Their review of the available literature, however, finds that mandatory mediation "does not appear to adversely affect either litigants' perceptions of procedural justice or, according to most studies, settlement rates."[175] The studies also reveal that where judges actively refer cases to mediation, parties begin to request it themselves, before being ordered to participate.[176] Programs designed to encourage, rather than require, mediation (such as those in which lawyers are required to "consider" mediation as part of the pre-trial process) and to give lawyers more control over mediation "logistics", tend to increase requests for mediation.[177] The degree of input and support of both bench and bar for mediation greatly influences the success of institutionalizing mediation as a dispute resolution tool in a jurisdiction.[178] The findings in these studies are consistent with the authors' experience. Practicing law in jurisdictions where mediation is provided for by statute and/or court rule at the both the state and federal levels, the authors have observed a high degree of institutionalization, including higher participation in voluntary mediation as a means to resolve disputes.

While it is common for franchise agreements with mediation provisions to exclude certain types of disputes from requirements for mandatory, pre-litigation mediation, that does not preclude mediation of all types of franchise disputes in the litigation setting, either as part of court-annexed mediation programs or through voluntary mediation during the course of litigation. Indeed, the studies reviewed for the Dispute Resolution publication found no case characteristic for which mediation has been found to be detrimental to the dispute resolution

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[170] Id.

[171] Id.

[172] Id., p. 12.

[173] *See*, Bobbi McAdoo, Nancy A. Welsh, and Roselle L. Wissler, Institutionalization: What do empirical studies tell us about court mediation?, 9 Dispute Resolution 8 (Winter, 2003).

[174] Id.

[175] Id.

[176] Id.

[177] Id.

[178] Id.

process.[179] Case characteristics do not appear to affect either settlement rates or litigants' perception of fairness. However, the timing of mediation can affect settlement rates. Specifically, if motions, dispositive or otherwise, are pending, settlement is less likely.[180] This creates a dilemma. Deferring mediation until all discovery is complete and motions are decided substantially lessens the likelihood of significantly reducing the cost of litigation. One alternative is to schedule mediation earlier in the process—before dispositive motions are filed. Because this approach may mean the parties enter into mediation with less information about the merits of their positions, this may require rethinking the more "evaluative" or "merits-based" approach to mediation some lawyers and mediators focus on.[181]

Recent studies confirm the importance of the lawyer's attitude and client preparation in the success of mediation programs and mediation sessions. The support of the organized bar, and of lawyers in general, in any given jurisdiction speeds institutionalization of mediation as a dispute resolution technique. Furthermore, the degree to which lawyers prepare their clients for mediation has a measurable impact on the likelihood of success in any given mediation session and the client's perception of its fairness.[182] Lawyer attitude and approach to the mediation may also affect the attitude of the mediator during the mediation session. Specifically, although mediators are neutral as to the merits of the parties' claims, they are also human----they are less likely to respond well to "belligerent, position-based bargainers" than to those who "embrace a principled, interest-based style of negotiation."[183] Based upon the studies, it is suggested that "[l]awyers should adopt a cooperative rather than a contentious approach" during mediation sessions.[184] Such an attitude increases "both the likelihood of settlement and litigant perceptions of procedural fairness. . . ."[185]

The role of the mediator, and how the mediator fulfills that role, greatly influences the likelihood of settlement and the participants' satisfaction with the process and outcome. Specifically, mediators with more mediation experience achieve a higher settlement rate.[186] Substantive credentials are important as well: there is greater acceptance (or institutionalization) of the process if mediators come from the pool preferred by lawyers---litigators with knowledge in the substantive area involved in the mediation.[187] A greater degree of substantive knowledge may permit a mediator to display the characteristics that participants

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[179] Id., p. 9

[180] Id.

[181] For a discussion of the ways in which the choice of "facilitative" versus "evaluative" approaches may impact timing of the mediation *see* Daniel M. Weitz, Design: Factoring mediator orientation into court program planning, 9 Dispute Resolution 15 (Winter, 2003)

[182] *See* McAdoo, Welsh and Wissler, *supra*, note 173, p. 10.

[183] David A. Hoffman, Paradoxes of Mediation, Part II of II, 9 Dispute Resolution 30 (Winter, 2003)

[184] McAdo, Welsh, and Wissler, p. 10.

[185] Id., p. 9

[186] Id.

[187] Id.

find most effective. Participants studied believed that fairness of proceedings increased if the mediators were "active facilitators" or engaged in some type of "evaluation,"[188] either of which may require a greater degree of substantive knowledge than pure "facilitative" or "transformative" approaches to mediation. Interestingly, there are limits to the positive impact a mediator's view of the case can have on the outcome of the mediation: a mediator **disclosing** his or her view of the case will increase the likelihood of settlement and the perception of fairness, but when a mediator **recommends** a specific settlement, litigants' perception of fairness is negatively impacted, even though the rate of settlement increases.[189] A logical conclusion is that mediators should use their skills and experience to find the place on the continuum of mediation approaches that best suits the expectations of the parties and their lawyers.[190]

Mediator styles historically have been defined as either "facilitative" or "evaluative". The "facilitative" style is one in which the mediator does not evaluate, make predictions of court outcomes, or tell parties what they should do. The "evaluative" style is one in which the mediator expresses an opinion on the outcome and/or suggests a resolution.[191] The classical characterization of a mediator as either "evaluative" or "facilitative" may be inadequate to describe the most effective method for drawing parties together. Professor Leonard L. Riskin, who developed the "grid" of mediator approaches and classified them as either "evaluative" or "facilitative", has come to that conclusion himself. Riskin now believes that such approaches are inadequate to address the way issues arise in mediating disputes already in litigation. Rather than preliminary disputes that call for a general assessment of the underlying interests of the parties, Riskin recognizes that mediations conducted in the context of litigated (or soon-to-be-litigated) cases are often much more narrow and adversarial.[192] Riskin notes that mediation during the litigation process often fails to increase party self-determination.[193] His revised approach to mediator orientation is intended to address this failing. It does so by changing terminology to focus on the interaction of the mediator with the parties. The new terms Riskin uses are "directive" and "elicitive."[194] In this context, a "directive" mediator would steer the parties directly toward a goal or away from it, while an "elicitive" mediator would draw out information, perspective or influence from the parties in a broader way.[195] Riskin's new analytical framework also takes into account the reality that not only the mediator, but the lawyers and the parties, exercise influence on the conduct of the mediation. For example, the mediator may want to focus the discussion narrowly, while one party may wish a broader approach. Riskin's new methodology recognizes that each participant (mediator, lawyer, client)

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[188] Id.

[189] Id.

[190] For a discussion of this continuum, *see* Weitz, *supra*, note 11.

[191] Leonard L. Riskin, Who Decides What? Rethinking the grid of mediator orientations, 9 Dispute Resolution 22 (Winter, 2003)

[192] Id.

[193] Id.

[194] Id., p. 24

[195] Id.

has a predisposition toward a particular approach. Because the way in which those predispositions play out in the mediation session affect its outcome, the mediator must assess and address this potential difference in underlying views.[196]

The major lesson to be taken from Riskin's latest work is that mediation is a process in which all the participants have an influence on the outcome and the degree of satisfaction of all participants. In the authors' view, this argues strongly for developing and using mediation processes that permit (1) a clear understanding, in advance of the mediation, of the parties' expectations and (2) selection of a mediator who will be helpful to the process. On a practical level, the parties can identify their expectations in well-organized mediation statements, and then place themselves in the hands of a mediator who displays not only experience with the process, but also substantive expertise.

IV. FOCUS ON THE MEDIATOR

The results of research outlined in the previous section point up the importance of finding the right mediator. As any practitioner knows, that can be a daunting task. If the mediation is conducted by court order, the mediator may be designated by the court, but more typically, even in court-annexed mediation, the parties may select the mediator. Certainly, in pre-litigation mediation or in voluntary mediation during the course of litigation, the parties (and their attorneys) get to decide who will perform this important role.

There is no one way to find the right mediator for each dispute, but there are some resources available to the franchise practitioner and there are efforts underway to improve the general availability of information about mediator qualifications.

A. Resources for Mediators of Franchise Disputes

In locales in which mediation is more institutionalized and lawyers frequently participate in mediations, the best way to find a good mediator may be word of mouth. But in the absence of that resource, there are some generally available resources for the franchise practitioner.

One program that addresses itself to the franchise industry is the National Franchise Mediation Program (the "NFMP"), conducted under the auspices of the Center for Public Resources ("CPR").[197] Founded in 1993 by franchisors interested in finding new methods of resolving franchisor/franchisee disputes, the NFMP provides a structured program in which signatory franchisors are required to negotiate, then to mediate with franchisees who assert claims against them through the process. Franchisees are not obligated to mediate. If the franchisee chooses to participate and negotiation does not resolve the dispute, NFMP sends the parties five names of mediators in their area. If they cannot agree on a mediator, CPR will help them do so. Participants share the cost of CPR's $1,200 administrative fee and any fees paid to the mediator. CPR reports that the program has assisted with mediation of a wide variety of franchise disputes, including issues of franchise termination, franchise renewal, impact/encroachment, and alleged underreporting of revenues, with a 90% success rate.

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[196] *See*, Id. p. 24-25

[197] A complete description of the NFMP, the participating franchisors and information about its panel of neutrals for franchise disputes may be found at the CPR website www.cpradr.org. All descriptions in this paragraph are adapted from the information on that website.

Franchisors may join the NFMP without cost by executing a standard Commitment to CPR Procedure for Resolution of Franchise Disputes. Approximately 47 franchisors currently participate in the program, including McDonald's, Cendant Corporation, Doctor's Associates, Inc. (Subway Sandwich Shops), Sonic Industries, Inc., and many other prominent franchisors.

The cost of participating in mediation through the NFMP may be a limiting factor in utilization of this program. For example, the parties may be able to resolve their dispute through a half-day mediation at a total cost in mediator services of $1000 to $1500. Adding the $1200 CPR administrative fee may double the cost. Nonetheless, the roster of CPR neutrals can be a resource for those who may want to mediate outside the program.

Similarly, both the American Arbitration Association and JAMS have designated panels of neutrals for franchise disputes. Each of these organizations will administer the mediation process (for a fee) and parties may elect to use their mediation rules. Whereas JAMS typically uses "staff" mediators, the AAA mediators are typically private practitioners who may be engaged through AAA or separately.[198] Franchise lawyers may wish to use these resources to identify mediator candidates. In addition, the listserv of the ABA Forum on Franchising is a resource for identifying mediator candidates in a particular locale. Posting a request on the listserv for recommendations of qualified mediators for franchise disputes is likely to draw many responses.

B. Mediator Qualifications and Credentialing

As mediation has increasingly become institutionalized across the country, there has been growing concern about the difficulty of identifying capable mediators. State and federal statutes and court rules provide a patchwork quilt of requirements for inclusion on mediation panels. No jurisdiction presently "licenses" mediators or requires any specific educational or professional prerequisite for calling oneself a mediator. The trend in considering mediator qualifications has not moved toward such licensure, but rather has focused on some sort of "credentialing" of mediators, either through program standards or through professional organizations. These usually involve identifying certain minimum educational, training, and experience criteria and establishing a means of communicating to the public that a particular mediator has met the criteria. Other initiatives are aimed at identifying high-quality mediation training opportunities and providing guiding principles for providers of mediation and other ADR services. Coupled with renewed looks at mediator and ethics, confidentiality, and conflicts of interest, these efforts should eventually make it easier for franchise lawyers to identify mediators appropriate to the particular dispute.[199]

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[198] Detailed descriptions of the franchise mediation capabilities and the rules of mediation for each of these organizations may be found at their respective websites, www.adr.org and www.jamsadr.com. These sites are also resources for a wealth of information about mediation and alternative dispute resolution.

[199] For an in-depth look at the current status of mediator credentialing initiatives and related issues, *see* the Discussion Draft of the Report on Mediator Credentialing and Quality Assurance, prepared by the ABA Section of Dispute Resolution's Task Force on Credentialing, dated October, 2002, at http://www.abanet.org/dispute/taskforce_report2003.pdf.

V. THE PRACTICAL SIDE

The laws and theories of mediation are interesting in the abstract, but must be applied in concrete ways to the problems of real clients. Accordingly, we offer some additional practical suggestions when franchise lawyers and their clients face the prospect of mediation.

A. Timing

Initially, the parties must decide on the timing of the mediation. Some advocates state without reservation that franchisors and franchisees should mediate their disputes early before costly discovery and the preparation of expensive dispositive motions. Other advocates state that a meaningful mediation can only occur after the parties and their counsel have received and reviewed critical information that allows them to evaluate the strengths and weaknesses of the case. As a practical matter, whether you mediate early before discovery or later after some discovery depends in part upon the nature of the dispute and whether the parties intend to continue their business relationship.

Franchise disputes that are primarily focused on the termination or severance of the franchise relationship tend to be more adversarial and call for some evaluation of the case on the part of the mediator, lawyer and client. Disputes with issues causing the parties to focus upon termination of the franchise relationship generally arise when either the franchisor no longer views the franchisee as a valuable asset to the system or the franchisee no longer views the franchisor as an asset to the franchisee's business. The decision to end the business relationship causes a shift in the parties focus from "what's best for the system" to "what's best for me." Like a messy divorce, dispute resolution with a termination focus speaks the language of "zero-sum" and "right and wrong" rather than "win-win". Because of the views and attitudes of the parties as well as the added complication of "principles" when the parties focus is upon termination, economic business decisions may only be feasible after substantial discovery and court rulings on dispositive motions.[200] Accordingly, while early mediation should not be ruled out in these disputes, a mediation following some discovery and motion practice is likely to be more successful in resolving franchise disputes that are focused primarily on termination of the relationship.

On the other hand, franchise disputes where the parties still view the franchise relationship as mutually beneficial may lend themselves to early mediation. Mediation works best when the parties have a vested interest in resolving a dispute while preserving a beneficial relationship.[201] Because business solutions that preserve relationships are not concerned with attributing blame, mediation approaches which are more "facilitative" or "transformative" may be the most appropriate in these cases and can occur with little or no discovery having taken place. This approach can significantly reduce the cost of litigation and it allows the parties to work toward a business solution without having been subjected to hostile deposition questioning, burdensome document requests and aggressive motions.

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[200] Of course, if the case is pending in federal court, the parties should have at least the Rule 26 disclosures available to them to assist in evaluating the case, even if the mediation is scheduled early in the process.

[201] Because the focus is on preserving the business relationship, the parties will be more inclined to listen to creative business solutions and make sacrifices for the good of the "system" and the furtherance of the relationship.

Other types of disputes that lend themselves to early mediation are those involving termination-related disputes involving smaller dollar amounts. Spending large amounts of time and money on discovery and motions in a small-dollar dispute may make settlement more difficult. So in these cases, franchise parties may want to schedule early mediation to give settlement a chance and to do a little informal discovery. If such early mediations are scheduled before any formal discovery is completed, the parties might want to exchange a few pertinent documents at the same time they prepare mediation statements. When educating the mediator, they can educate themselves and each other about the facts of the case. This requires some degree of trust and cooperation among the lawyers, which can effectively set the stage for a successful mediation.

B. Mediation Approach

The timing of mediation depends on the nature of the dispute, whether the parties intend to continue their business relationship, and the amount in issue. Inextricably tied to the consideration of "timing" is the parties' decision regarding mediation approach. If the parties decide to schedule an early mediation this will most likely mean that they are entering into mediation with little information about the merits of their positions, thus emphasizing a more "facilitative" or "transformative" approach. However, once parties have spent the time and money to gather information through discovery they usually feel compelled to use it and generally want mediators who will engage in some type of evaluation of their case or at the very least serve as "active facilitators." As noted earlier, this desire of the parties may require of the mediator a greater degree of substantive knowledge than the pure "facilitative" or "transformative" approaches.[202]

After deciding the issues of "timing" and "mediation approach," the parties should be upfront with the mediator about their goals and expectations. The goal or desire of the parties to either continue or end the business relationship must be communicated. In addition, the parties should make sure that they convey to the mediator the mediation approach they expect. If the mediator is unable to take the mediation approach that the parties believe to be most helpful, then a different mediator should be selected. Some commentators have noted that the selection of the mediator "depends primarily on what the parties want from the mediator and this in turn depends on how the mediation is intended to function."[203] The parties should be sure to match the qualifications of the mediator with their expectations.

The overall approach to the mediation also affects the approach of the lawyers to the mediation session itself. The focus of the mediation may dictate either giving or not giving opening statements and the tone of those opening statements. If the approach is more facilitative, the lawyers might opt to reduce the time devoted to opening statements and make the statements more conciliatory or "solution-oriented" to encourage the opposing side to compromise. If the emphasis is going to be on the merits of the dispute and a more evaluative approach, opening statements should be designed to be more "proof-oriented" or argumentative, in an attempt to make the opposing side more concerned about losing.

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[202] The mediation approach selected by the parties should also guide the attorneys in preparing for mediation and circumscribe their opening statements at the mediation. If a facilitative mediation approach is selected the attorneys should be prepare to make opening statements that are invitations for peace, rather than a show to impress their clients with their gladiator skills as an oral advocate.

[203] *See* Gourley, Green and Wolf, *supra*, note 2, at p. 4.

C. Duration

The parties should also convey to the mediator their expectations regarding the duration of the mediation and the expenses associated with it.[204] Especially in private mediation, the parties are generally able to specify a particular duration of mediation, usually either a day or a half-day, with the option of continuing or reconvening later if necessary. How long to schedule for an initial mediation session depends on the case, but the half-day minimum may well be a bare minimum in many franchise cases. A great deal of the success of mediation depends on the extent to which the mediator gains the confidence and trust of the parties and the lawyers. It is extremely difficult for a mediator to establish that trust and then work through the substance of the dispute in an hour or two. Scheduling a full day (or longer) may in some circumstances encourage the parties to dally. Most practitioners who routinely participate in mediation of civil disputes, including franchise disputes, would probably concur that bargaining gets more serious and settlement more likely as the end of the scheduled mediation session approaches. So practitioners may consider scheduling a half-day in such a way that the time can be extended somewhat if negotiations are progressing positively.

D. Put it in Writing

Most mediations are conducted according to some written instrument—either a court order or an agreement to mediate. If it is a court order, most issues will be decided by court rule and will not be subject to negotiation or agreement with opposing counsel and the mediator. However, most private mediators use some form of written mediation agreement. Franchise practitioners should make a practice of obtaining the agreement and reviewing it well ahead of any mediation session. The agreement to mediate can include provisions setting forth the parties' expectations as to timing, mediator approach, duration, cost, and type of mediation statements or other documents required. Regardless of the details, having a written agreement to mediate is a good idea

It also should be evident from the previous discussion of enforcement of mediated agreements, that any agreement actually reached through mediation should be reduced to writing. Although the parties' expectations regarding the duration of the mediation session should be respected, the mediation participants (mediator, lawyer and client) should commit to staying late in order to memorialize in writing any agreement reached. Any scheduled flights or meetings should be postponed. Because memories fade and parties often have different recollections of terms and nuances to an agreement, it is imperative that the settlement agreement be memorialized in writing before the parties leave. As noted earlier, non-final settlement agreements often present enforcement problems for courts and create an unnecessary tension between the confidentiality of mediation sessions and the presentation of evidence necessary to prove the existence of an enforceable agreement. On the other hand, courts routinely enforce written negotiated settlement agreements. It is not necessary that the writing signed at the mediation session be a formal, polished settlement agreement, but it should contain the essential terms of settlement (who pays what to whom and when; what procedural steps need to be taken to close the case; who is releasing whom from what, etc.) and state what else, if anything, will be done to document the agreement of the parties. Often, the mediator will prepare the agreement points, the lawyers and parties will review and revise

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[204] Procedural and substantive safeguards placed in a court's mediation order may circumscribe the parties' expectations. See In Re Atlantic Pipe Corp., 304 F.3d 135, 147 (1st Cir. 2002).

them, and then everyone will sign an acknowledgement that "this is the deal." The parties may decide who will be the scrivener of the settlement agreement prior to the mediation and that person (whether the mediator or one of the attorneys) should either bring a laptop computer or have access to a computer to memorialize the agreement (although handwritten agreements are just as enforceable). The key is to get the deal signed. Accordingly, the parties should make sure that the people in attendance at the mediation have the authority to sign the settlement agreement.[205]

VI. CONCLUSION

Mediation can be a useful tool in early, less expensive, and more satisfying resolution of franchise disputes. The process is maturing, brought about by increased encouragement, by courts and lawyers, of use of the mediation alternative as part of the litigation process. The more experience franchise lawyers have with the process, the more they can learn to utilize it fully and the more comfortable they will become in selecting mediators and representing clients in mediation. Is this "As Good as it Gets?" No. It is getting better all the time.

[205] Authority to sign should not be a problem if the participants came to the mediation session with requisite authority to settle, as is typically required in court-annexed mediation sessions. In the absence of a court rule or order, the parties should include in their agreement to mediate a provision requiring persons with full authority to attend and those who attend to have authority to sign a settlement agreement.

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Jason also serves on the Board of Directors for the BAC Funding Corporation to aid the organization in its mission of fostering economic development in the Black business communities of Miami-Dade County. He serves as a member of the Miami-Dade County Black Affairs Advisory Board, Greater Miami Chamber of Commerce, and Miami-Dade County's economic development organization -- the Beacon Council. In addition, Jason serves on the Duke University Alumni Admissions Advisory Committee. Jason is a frequent lecturer and author both in the substantive areas of law in which he practices as well as in areas related to promoting equal opportunities in the legal profession for minority lawyers and the economic empowerment of minority communities.

Jason graduated from Duke University in 1988 with a B.A. degree in History, Political Science and English. He received his law degree from the University of Virginia School of Law in 1991. After graduating from law school, Jason served as a judicial clerk for the Honorable Joseph W. Hatchett, United States Circuit Judge, United States Court of Appeals for the Eleventh Circuit from 1991 to 1992.

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Ms. Gourley has been a member of the ABA Forum on Franchising since 1985 and has served on the Litigation and Alternative Dispute Resolution (LADR) Steering Committee, and as LADR Director. As LADR Director, she served on the Forum Governing Committee. She is a frequent speaker at the Forum on litigation and mediation topics. She also contributed the "Oklahoma" section of the newly-updated Forum publication "Covenants Against Competition."

In addition to her law practice, Ms. Gourley has served as an Adjunct Settlement Judge in the U.S. District Court and the U.S. Bankruptcy Court for the Northern District of Oklahoma, conducting mediations of pending cases. She also served two years as a part-time Administrative Law Judge for the Oklahoma Department of Labor, hearing wage and hour, child labor, and workers compensation coverage cases. She drafted legislation enacted by the Oklahoma Legislature in 2002 clarifying the application of various statutes related to Mediation in Oklahoma.

In addition to her service on the Forum Governing Committee, Ms. Gourley has been active in her state and local bar associations. She has served several terms on the Tulsa County Bar Association Board of Directors, as well as Editor of its *Tulsa Lawyer* monthly newsletter. She also served as President of the Board of Trustees of the Tulsa County Law Library. Ms. Gourley has served on numerous committees of the Oklahoma Bar Association and chaired the Legal Internship Committee for several years. She has also chaired both the Litigation Section and the Alternative Dispute Resolution Section of the state bar. She recently completed a three-year term on the Oklahoma Bar Association Board of Governors.