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HOW TO BE AN EFFECTIVE ADVOCATE IN MEDIATION

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Introduction

> **Persuade your neighbors to compromise whenever you can. Point out to them that the nominal winner is very often the real loser – in fees, expenses and waste of time.**
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> **There will still be work enough for lawyers.**
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> Statements attributed to A. Lincoln, a working lawyer in Springfield, Illinois, circa 1860.

Although mediation is now widely practiced, it has a relatively short, but extremely robust, history. In the United States today, on both state and federal levels, virtually every lawsuit in every jurisdiction is routed at some stage to a pre-trial mediation program. Despite an uneven level of mediator skill, often with no meaningful mediator training and sometimes less than enthusiastic participant commitment to the process, many cases nonetheless resolve. A private alternative dispute resolution industry has developed in short order to such an extent that some mediators have million dollar practices and judges retire early from the bench to become full-time mediators. What all this tells us is that clients want to resolve their disputes short of a litigated conclusion and that they are willing to pay for it, particularly given the alternative.

Alternative dispute resolution {"ADR") officially traces its history to 1976 when Harvard law school professor Frank E.A. Sander urged that we look at courts as resolvers of disputes, not merely the *situs* of trials.[1] In 1979, the CPR Institute for Dispute Resolution ("CPR") was founded by Jim Henry, who enlisted the aid and support of the major consumers of legal services—America's corporations, whose general counsel were interested in ADR for its cost savings benefits. In 1990, amendments to the Federal Rules of Civil Procedure mandated that

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[1] *See* Charles B. Renfrew, et al., *Into the 21st Century: Thought Pieces on Lawyering, Problem Solving and ADR*, for brief discussion of the history and emergence of alternative dispute resolution as "one of the most significant movements in U.S. law in the latter half of the 20th century," CPR Institute for Dispute Resolution and Alternatives, Vol. 19, No. 1, January 2001 at 7-9.

the federal district courts experiment with their own ADR programs.[2] In 1993, the ABA christened its first new section in almost twenty years – the Section on Dispute Resolution—which today is the ABA's fastest growing section, with over 7,500 members.[3].

In 1993, CPR (now known as CPR International Institute for Conflict Prevention & Resolution) joined forces with leading franchisors to establish the CPR National Franchise Mediation Program, which committed franchisor members to encourage the use of mediation in franchise disputes. Since its inception, the National Franchise Mediation Program has helped to resolve approximately eighty percent of all disputes submitted to it. Although the number of disputes submitted to the CPR program (205 through August 4, 2005) appears to be substantially less than the total number of litigated or arbitrated franchise disputes, many factors may contribute to this: some franchisees may view the CPR process as franchisor-created and, therefore, biased; numerous other mediation service providers, including court-sponsored panels, compete with CPR for franchise disputes; and, some franchisors and franchisees may not regard all disputes as suited to mediation. (*See*, CPR Franchise Dispute Resolution Report as of August 4, 2005, Exhibit A, for breakdown of types of franchise disputes submitted to Program, and matters closed "successfully" through mediation or negotiation).

Moreover, not everyone has embraced mediation, or, indeed, ADR generally, as serving society's best interests. Some academics and jurists regard mediation with alarm as they perceive it as part of a growing system of private dispute resolution that takes place not only

[2] Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482.

[3] American Bar Association Section of Dispute Resolution website, www.abanet.org/dispute/aboutsec, August 9, 2005.

outside the courtroom but also out from under the watchful eye of the law.[4] These critics are concerned that the explosive growth of mediation represents a private system of justice that is available only to those who can pay for it, and threatens the institution and delivery of public justice.[5] Juries, they worry, will one day only resolve disputes for those who cannot afford to pay for a mediator's time and skill.

In 2003, Chief Judge William G. Young of the United States District Court in Boston circulated a letter to his judicial colleagues that decried the lack of jury trials in commercial disputes. Judge Young complained that business and political leaders were "assisting in the slow but steady erosion of juries …by… opting out of the legal system altogether." "If we don't use our courtrooms, we will lose them, and much more besides," said Judge Young, according to a report of August 5, 2003 in the Boston Herald newspaper.

ADR also still evokes negative response from some lawyers, who view it as a poor substitute for the work of real lawyers—the trial of disputes before judges and juries. Often one

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[4] See, for example, Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, Ohio St. J. on Disp. Resol. 679, 693-694 (2004) for argument that arbitration and mediation are "more destructive" to public justice than confidential settlements because while "confidential settlements… usually hide only the final result of a dispute…, arbitration and mediation [hide] the beginning and the middle, such that the public likely never even knows such a dispute existed…."

[5] See generally, Owen M. Fiss, *Against Settlement*, 93 Yale L. J. 1073, 1085 (1984). opining that every settled lawsuit deprives the courts of an opportunity to provide an adjudication for the benefit of society. With every settlement, wrote Professor Fiss, society is deprived of justice at a price society that does not know it is paying.

Compare, however, the contrary opinion expressed by Professor Grant Gilmore in *The Ages of American Law,* 111, (Yale University Press 1979), who wrote, "In heaven there will be no law, and the lion will lie down with the lamb . . . . In hell, there will be nothing but law, and due process will be meticulously observed."

The opposing views of Professors Fiss and Gilmore were discussed by Anthony M. D. Willis in remarks made on the occasion of the 25th anniversary of the CPR Institute of Dispute Resolution. "Mediation in a Cold Climate," Into the 21st Century, 21-22.

hears trial lawyers complain that they go from mediation to mediation with nary a trial or adversarial hearing between. Mediation, these lawyers argue, is part of the "dumbing down" of the system of justice, where everything is capable of settlement and nothing, or virtually nothing, is litigated to conclusion.[6] Mediation is not sufficiently "macho" to merit their time and attention, and these lawyers often either discourage their clients' participation in mediation or treat it so perfunctorily that its utility is marginal.

Lawyers who resist mediation, or treat it as not worthy of their talents, are doing their clients a disservice. Like it or not, mediation is an integral part of the dispute resolution process. Moreover, as franchise lawyers, we must follow the lead of clients, franchisor and franchisee alike, who see mediation as particularly well-suited to franchise disputes because of the frequent desire to preserve the parties' long-term relationships.

It is not enough to show up at mediation because a case has reached that stage in the litigation or arbitration process when the court or tribunal administrator has ordered mediation to occur. Being an effective advocate in mediation is just as important as courtroom advocacy, and much more likely to result in a resolution that your client can accept than will a jury's verdict or arbitrator's award.

In this paper, we examine some of the key issues that face an advocate in mediation. Our goal is to help the advocate recognize ways to enhance his effectiveness in mediation, and thereby enhance the parties' opportunity to resolve their dispute in an efficient and fair manner.

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[6] In fact, although fewer cases are litigated to conclusion than ever before, the number of cases filed has increased five-fold since 1962. Of the cases filed, the number of contract cases tried has dramatically declined in the last fifteen years. *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, compiled by Marc Galanter, prepared for the Symposium on The Vanishing Trial sponsored by the Litigation Section of the American Bar Association, December 2003.

I. Timing of Mediation

The first step in effective mediation advocacy is to recognize when the right time is to mediate a dispute. Although a court may not order mediation until trial is approaching, the parties and their advocates need not accept the court's schedule as their own. Indeed, one of the features of mediation that distinguishes it from its rule-bound cousins, litigation and arbitration, is that the rules in mediation are few. If the parties agree to mediate, regardless of the formal stage of the case, they can proceed to mediation on their own timetable.

Trial lawyers often say that a case is not yet "ripe" for mediation. What does this mean? Often, we mean that we have not turned over every rock in an effort to gather enough information about the dispute and its participants through discovery to know whether our side is likely to prevail should a judge or jury have to decide the legal merits. In a franchise dispute, however, particularly one that occurs while the parties have a continuing business relationship, the legal merits of a dispute are only one of several key elements to consider in negotiating a resolution. Prevailing on the merits often comes at great cost to the business relationship—positions have hardened through depositions, the stakes have raised with each new bill for legal, expert and investigative services, and suddenly the cost of being wrong looms as large in the client's budget as the benefit of being right. Indeed, a poor early result may be preferable to a good later result from a business person's perspective.[7]

Many franchise agreements require mediation as a condition-precedent to filing suit or demanding arbitration. Typically, pre-suit mediation clauses in franchise agreements are enforced by the courts under the Federal Arbitration Act ("FAA") even though the FAA does not specifically address mediation, *see e.g.*, Thompson v. Insurance Co. of N. Am., C.A. No.

[7] Remarks by Lawrence McIntyre, General Counsel, Toro Industries, at August 8, 2005 mediation presentation in Boston, MA.

3:96CV567-P, 1998 U.S. Dist. LEXIS, at *10 (W.D.N.C. Feb. 23, 1998) (enforcing mediation/arbitration clause); Allied Sanitation, Inc. v. Waste Mgmt. Holdings, Inc., 97 F. Supp. 2d 320, 327 (E.D.N.Y. 2000) ("The concept of arbitration plausibly embraces all contractual dispute resolution mechanisms, consistent with Congress' design to foster alternative means to resolving litigation."); CB Richard Ellis, Inc. v. American Envtl. Waste Mgmt., 98-CV-4183, 1998 U.S. Dist. LEXIS 20064 at *3-4 (E.D.N.Y. Dec. 4, 1998) ("Because the mediation clause in the case at bar manifests the parties' intent to provide an alternative method to 'settle' controversies arising under the parties' 1997 agreement, this mediation clause fits within the Act's definition of arbitration."); AMF, Inc. v. Brunswick Corp., 621 F. Supp. 456,460 (E.D.N.Y. 1985) (noting that the "essence of arbitration is to have third parties settle disputes"), even when the franchise agreement does not provide for arbitration.

Recently, the District of Maryland joined the ever-growing list of courts to enforce contractual pre-suit mediation agreements under the FAA. In G&R Moojestic Treats, Inc. v. MaggieMoo's International, LLC, C.A. No. WMN-04-1694, the court enforced a franchise agreement's pre-suit, non-binding mediation requirement even though the contract did not include an arbitration clause. Under the G&R franchise agreement "[e]xcept as otherwise provided in this Agreement, all controversies, disputes, and claims arising out of or related to this Agreement (including any claim that the Agreement or any of its provisions is invalid, illegal, or otherwise voidable or void), the relationship between Franchisor and Franchisee, Franchisee and Franchisor's affiliates, or Franchisee's operation of the Store shall first be subject to non-binding mediation." The franchisee-plaintiffs nevertheless filed a multi-count complaint in federal court without first requesting or offering to participate in mediation; the franchisor demanded pre-suit mediation and ultimately moved the court to stay the case and order mediation.

Recognizing the "liberal Congressional policy, as embodied in the FAA, favoring the enforcement of agreements to arbitrate," the court granted the franchisor's motion, stayed further proceedings in the case and ordered the parties to mediate their dispute. "The fact that the procedure conceived of in this instance will be non-binding does nothing to change the possibility that it may result in a final settlement of the attendant lawsuit. If anything, the non-binding nature of the proceeding ensures that neither party can legitimately claim lasting prejudice by forced participation therein."

Over the objections of the franchisee, who argued that the FAA did not mention, much less encompass, non-binding mediation, the court granted the franchisor's motion, holding that the "… "liberal Congressional policy, as embodied in the FAA, favoring the enforcement of agreements to arbitrate" applied with equal force to agreements to mediate. "The fact that the procedure conceived of in this instance will be non-binding does nothing to change the possibility that it may result in a final settlement of the attendant lawsuit. If anything, the non-binding nature of the proceeding ensures that neither party can legitimately claim lasting prejudice by forced participation therein."

In the absence of a contract clause requiring pre-suit mediation, lawyers often wait until just before trial to suggest mediation, sometimes for no good reason. Lawyers and some clients may believe that an early expression of interest in mediation signals weakness and a lack of confidence in the ultimate merits of their position. For most business people, however, the ultimate mirror of their success is the results they achieve in business—not how engaged they become in protracted and expensive litigation. Although situations may exist where waging war through litigation is part of a business strategy, more typically business people want to solve the problem in front of them so they can move on to more profitable activity. Lawyers should take

the lead in suggesting mediation as a "settlement event" early in the life cycle of a dispute. It is often the absence of a "settlement event" until late in a dispute that puts the parties on a default schedule that is keyed to litigation milestones (for example, complaint, answer, motion, depositions) rather than their own business needs.

Another standard reason for delaying mediation is the stated need to take discovery to learn the "facts" of the case. Frequently, however, the core "facts" are not in dispute. Discovery becomes a search for additional information that will help the parties "spin" the known facts to their advantage, or search for "facts" that will shore up an early and sometimes incomplete assessment of a dispute. Despite efforts by the judicial system to put some reasonable limits on discovery (particularly in federal court), it is cold comfort to a business litigant to know that depositions are generally limited to ten per case, shall not exceed seven hours each, and that interrogatories are limited to twenty-five, including subparts. Most litigators who have done a litigation budget will tell you that the bulk of the expenditures are for discovery.

Formal discovery is not the only way to uncover those genuinely disputed or unknown facts that are actually to each party's settlement analysis. Mediation can also serve as a fact gathering process so that each party has a reasonable basis of information upon which to base its settlement decision. Often this process can begin in the mediator's prehearing conference with each party, with the mediator asking whether either side needs any information in order to be fully prepared to reach a resolution. The effective mediation advocate will know what currently unknown information is a settlement barrier to his client and will request the mediator's help in shedding light on it in an efficient manner during the mediation. The earlier in the dispute life cycle that the mediation occurs, the more important the exchange of necessary and unknown or incomplete information is. The mediator can not only facilitate the exchange of information, but

can help the parties set simple rules for the exchange. First, any information exchanged that would otherwise be discoverable does not become undiscoverable because it has been produced in mediation, which is a confidential process. Second, any expert reports prepared for use in the mediation or statements made during the mediation may not be used against the offering party in any litigation. The mediator can help keep the parties from trying to get "free" or wide-ranging discovery by focusing them on what each needs to evaluate settlement.

Another occasional objection to early mediation is the client's perceived need to inflict pain on the other side through the cost and expense of litigation, irrespective of the amount of self-inflicted pain that is a by-product of that decision. This "Damn the torpedoes—full speed ahead!" approach to dispute resolution often signals that one's own client is not yet ready emotionally to put the dispute behind him. The need to vent emotion is a reality in dispute resolution, and helping your own client get through this stage, and preparing your client for equally strong emotion from the other side, are important elements of effective advocacy in mediation. Mediation may present a better opportunity to vent and get down to business than more adversarial systems of dispute resolution where venting seems only to prolong the dispute and set back its resolution (compare the offended business executive who walks out of a deposition in a huff with opposing lawyers screaming at each other with the same offended executive who has a dogged and tireless mediator counseling her to recommit to resolution rather than walk from the mediation after a similarly perceived offense).

II. Selecting the Mediator

Selecting the mediator may be the most important aspect of the mediation process. Many may argue that the attorneys representing the clients, the facts, the timing of mediation, or other factors are more important, but if you are going to facilitate a voluntary settlement with a

meeting of the minds, then the selection of the mediator may be the most important part of the settlement process. A bad mediator may not only waste precious resources and a settlement opportunity, but may create an even worse situation by creating greater antagonistic behavior between the parties and/or by taking positions that may forever impede the parties from reaching reasonable resolution. In other words, if a mediator who has been billed as a credible independent party (and the clients are convinced of such) takes an extreme position, the parties may place undue weight on the mediator's thought process, irrespective of the wisdom of the mediator's suggestions. If the mediator is in "left field," the client may easily reject the mediator's view entirely and default to a view that its position is the one and only position, and therefore may refuse to settle.

How does one go about selecting a good mediator?

The selection of a mediator can be as simple as contacting the mediation program organization identified in your written agreement (or if none is identified, any one of a number of mediation program sponsors) and having it select a mediator for the parties. This approach to selecting a mediation administrator may let both parties feel neither will have an advantage with the mediator since neither party selected the mediator. The blind selection of a mediator, however, can more likely be seriously problematic to both sides. Each party first needs to evaluate what is at stake in the mediation and then determine what type of person would be a good mediator. Although parties to a mediation may get lucky with the blind selection, frequently that is not the case.

In selecting a mediator, there are a number of issues that the advocate needs to address:

- Should the mediator be a full-time, professional neutral?
- Should the mediator have experience in and/or knowledge of the franchise industry?

- Should the mediator have previous experience mediating franchise claims?
- Should the mediator be a former judge?
- Should the mediator be a franchise lawyer?
- How much does the mediator charge?
- How available is the mediator to serve?

Before you propose or select a mediator, the advocate should do his own due diligence, including:

1. If you are mandated by contract to use a particular organization, review the organization's materials, such as its web site and brochures and mediation rules. Review the list of mediators for those whom you think will be helpful to your particular situation.

2. If you don't like the contractually designated provider's list of potential mediators, consider asking opposing counsel to agree to change the organization or go outside the organization's panel.

3. Once you have been provided or created a list of potential mediators, start to review the mediator's qualifications and history. If the mediator candidates are lawyers, look for any reported cases that he or his colleagues have been involved in to determine their clientele and positions they have espoused in the past. Check the firm where he has practiced to ascertain its background, clients, potential institutional or positional conflicts, and standing in the legal community. Also, look for articles or books written by the proposed mediator to gauge potential bias and the extent of his knowledge of the industry or subject matters involved in your case.

4. Consider interviewing the mediator before selection. This may give you a sense of whether the mediator's style is "facilitative" or "evaluative," or may provide other clues to the

mediator's approach, all of which could be very important for your case.[8] You do need to manage any pre-selection interviews carefully and should suggest to your opponent that he do the same, so that he does not question your integrity or that of the mediation process because of undisclosed contact with the mediator. Although neither you nor the mediator wants to be put in an awkward position if someone asks you if you have had prior contact concerning the case to be mediated, it is perfectly appropriate to inquire about the mediator's style and request the names of other attorneys whom you may contact about their past experience with the mediator.

5. How much does a prospective mediator cost and how available is she? As cost is generally shared (although not always equally), a high hourly rate should not be a selection barrier to an otherwise effective mediator. Availability, on the other hand, may be a more difficult issue – a mediator who is so successful that she is not available for months may not serve the parties' interests in reaching resolution quickly.

6. Ask your colleagues about their experience with any proposed mediator. Request a list of the mediator's previous mediations along with the parties and the attorneys involved so that you can do a reference check with the lawyers involved. (You may not always get the parties' identities due to confidentiality, but you should be able to get the lawyers' names and contact information.)

How do the parties agree on a mediator?

The franchise agreement may already have a contractual process in place which provides for a mediation organization to administer the mediation, and for the organization to select the mediator or provide a list of candidates for the parties to select, rank and/or strike. Many courts have mandatory mediation and the judge appoints the mediator. If neither the contract nor a

[8] *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harvard Negotiation Law Review 7 (1996).

court dictates the mediation process, the parties can determine what, if any, organization they may use to help facilitate the mediation and they have free rein to agree upon anyone as a mediator. The goal of mediation is settlement and you should use the best mediator available. Even judges will at times allow you to go outside the list of court appointed mediators if you indicate a true desire to settle and show why a different mediator may be helpful.

Once you have done your due diligence on potential mediators, you then need to approach the other side to reach agreement on the mediator. One approach to expedite agreement is to propose mediators that have experience with your opponent's side of the industry, whether it be the franchisor or franchisee. In other words, if you as franchisee's counsel are proposing mediators, try to propose potential mediators with a franchisor background. Contrary to popular belief, there are mediators who have experience with the franchisor side who will be fair and open minded. In selecting a mediator with franchisor experience, you are in effect lessening the burden of the franchisor advocate in selecting that particular mediator who you have determined to be fair. You must always keep in mind that a mediator is a facilitator and <u>not</u> a decider. Therefore, the best mediator will be one who can see both sides of the issues and be able to communicate, not only with the lawyers, but with the parties themselves. Proposing mediators who are biased toward one side or the other will not facilitate the mediation process, but only delay it, assuming that the other side is astute as to the position or bias of the proposed mediators.

In selecting the mediator the choices are as follows:

1. The mediation organization selects the mediator without input from the parties;

2. The mediation organization proposes a list of mediators from which the parties strike and select mediators and then the mediation organization chooses the matching mediator;

3. The court appoints a mediator, or

4. The parties independent of the organization or court select the mediator.

The fourth choice may be the best method. First, you will know who the mediator is because each party has had the chance to review his or her credentials and have mutually selected that particular mediator. Also, each party presumably would have done its due diligence concerning the mediator in its selection of such and neither party can (or should) blame the mediator for a waste of time, competency or otherwise. The most beneficial method of selecting the mediator from the authors' point of view is for the parties to have a meeting of the minds on the particular person so that there is no perceived advantage to one or the other and that the mediation starts out on the right foot with a mutually agreed upon mediator. Perception plays a big role in the mediation process especially as to the clients and what they think the role of the mediator is or will be.

Should the mediator be a former judge, a litigator or neither?

The advocate's knee-jerk reaction may be that a former judge will make the best mediator. This may not be necessarily so, as judicial experience and temperament, while helpful criteria, perhaps, for an arbitration may not be so for a mediation. Unless you are seeking an evaluation of complex legal issues in your mediation as part of your settlement strategy, there generally is no independent need for the mediator to be a former judge. A judge's experience in deciding cases is presumably based upon the application of the law to the facts, and, by definition, has been virtually entirely "evaluative." Mediation, on the other hand, does not necessarily need an "evaluative" approach as if in a court room. A good mediator will at times disperse with the law and facts and will be a "listener" to determine from the parties' the "real" goals and objectives, which can be materially different from the limited range of judicial

remedies available if the facts and the law are applied and determined by a judge as if in court. Creative business solutions often are more likely to emerge if parties are encouraged to discuss broader issues than their narrow legal rights.

On the other hand, a judge can be very helpful if the parties perceive the mediation in a different light if a judge "presides." Theoretically, a judge as mediator could have greater perceived credibility than a lawyer or lay person mediator. This is something that the mediation advocate also needs to evaluate when determining who might be the right mediator for the matter at hand. However, if the attorneys are doing their job properly, they can demonstrate to their respective clients the credibility of the to-be selected mediator who is not a judge. A non-judge mediator may be more flexible than a judge. A judge is used to applying the rules of evidence, rules of civil procedure and other guidelines in making determinations. Also, a judge is trained to "tell" the parties and the lawyers what to do, instead of allowing the parties to do it for themselves (i.e., a mediated settlement). A good mediator is the most creative after listening to the parties, and thinks outside the box to reach a mutually agreed upon settlement based upon the *parties'* goals and objectives.

If a judge is not necessary for mediation, then should the mediator be a litigator? Again, one must remember that mediation is a vehicle to try to reach the settlement, not a verdict. A litigator may be well suited to understand the law and how lawyers create positions and theories, but may not be a good transactional or business lawyer in the sense of understanding true principles of the franchise business. In the opinion of the authors, a good mediator is one that will understand the facts and the law but more important, the business aspects of the dispute. A litigator, like a judge, will be able to strictly apply the facts to the law, but will he be able to mediate a settlement with such an approach? A transactional/business lawyer may have a better

aptitude for understanding the business aspect of the dispute and the business relationship of the disputing parties. A transactional/business lawyer may also have a better mindset for settlement than the litigator who looks forward to argument and dispute in representing one side vigorously before the trier of fact. If it is going to be a litigator, what type of litigator is it? Is it a pound the desk type of litigator or is it a good even-keeled litigation attorney who represents both sides; or will it be a business lawyer who looks to make the best deal knowing that there needs to be reasonable negotiations and review of the matter from a dollar and cents and relationship standpoint. Therefore, it is not necessary in mediation that the mediator be a judge or a trial attorney. The advocates are not using the mediator to determine the application of law, objections or motions. The mediator is there to help facilitate the parties to reach a settlement, not a verdict.

Is it necessary for the person selected as a mediator to be professionally trained as a mediator? Having mediation training cannot hurt, but is not necessarily determinative to whether or not one should be selected as a mediator. It is the authors' experience that there are many who can serve as good mediators even though they have not had formal training. However, with that said, choosing between those who have training and those with no mediation training, the plus would go to the one with the formal training. One hopes that the formal training ingrained upon the selected person the importance of maintaining the integrity of the mediation process by not becoming an advocate or trier of fact in the role of a mediator. The element of mediation training should not be determinative, but should be only another factor in conducting one's due diligence of potential mediators.

A more important question may be whether or not the person selected as a mediator should be one who does nothing but mediate and does not practice law or business as his primary

occupation. Again, this also should not be a determinative factor in selecting a mediator. A mediator who does nothing but mediate does not have to worry about perceived or real biases, concerns with whether or not her clients will appreciate that she did or did not take an aggressive approach to one side versus the other and helped the other side with a perceived beneficial settlement. A full time mediator would at least, facially, be concerned with nothing but being a true facilitator of settlement resolutions and not worried about how the attorneys in her firm, clients or others will view her in her everyday practice.

Finally, whether it be a judge, lawyer, or business person, does that person need to have franchise knowledge or experience? It depends.

Sometimes, advocates prefer to have someone who has no knowledge of the franchise industry so as not to have any type of bias or preconceived understanding of the franchise relationship overshadow the mediation. A franchisee may argue that a person without knowledge is better in cases that involve claims of good faith and fair dealing, standards, duties of the franchisor and similar claims. A mediator without franchise experience may not know or fully understand that the typical franchise agreement is by its nature slanted toward the franchisor for the benefit of the system or that it typically provides that the franchisor has fewer contractual obligations than the franchisee. Do you want someone who already understands the relevant franchise statutes and relationships especially in cases where the franchisor was compliant even though from a business point of view it may have breached some duty? On the other hand, if someone is knowledgeable in the franchise industry, he will know the norms in connection with franchise agreements, the extent of contracted for duties and obligations and fully understand a position that may be to the disadvantage of the otherside. For example, if the claim is about violations of certain franchise statutes, the franchisee may want a mediator with

franchisor background or experience so that he or she will know what it means to be in violation of franchise statutes. For the most part, it is the authors' opinion that a mediator with some knowledge of the franchise industry will be helpful in resolving a franchise dispute; while others will advocate for one with no knowledge/experience so that they can "teach" the mediator and possibly gain an advantage. This may be a better approach for arbitration rather than for mediation. Again, mediation is the facilitator for a voluntary resolution. A mediator who knows the industry should be helpful in formulating settlements in a dispute. Without this knowledge, the mediator may be at a disadvantage in being creative to help resolve the matter.

III. Arrange for a Pre-Mediation Conference Call

Most professional mediators will arrange an initial call with attorneys for all the parties shortly after being retained. If the mediator does not do so, the advocate should suggest this. Most mediators will agree to include any clients (particularly inside counsel) who may wish to participate in the call.

The pre-mediation call has multiple purposes:

- **Clarify the terms of the mediator's engagement**

If you have not received a draft agreement to mediate, request one in advance of the conference call. The call gives you an opportunity to ask any questions and negotiate any needed terms, such as the division of responsibility for the mediator's fee, if you have not already done so. Many mediators would prefer having the parties work out payment issues before retaining them, but most will help if it is impossible to do so without assistance. Remember that a 50-50 split is not the only way to divide payment, especially if one of the parties is in financial straits.

- **Introduce the subject of the dispute**

Be prepared to describe the highlights of the situation succinctly and without rancor.

- **Set the time and place of the mediation**

If anyone other than the mediator is hosting the mediation, be sure that there will be sufficient rooms for the parties to meet separately as well as space for them to meet together. Food often helps people relieve tension; there should be provision for at least lunch to be brought in. No one should be surprised if a franchisee balks at holding the mediation in the offices of the franchisor or its counsel, regardless of whether there is any rational basis for the concern.

- **Raise any issues affecting settlement that are important for the mediator to know in advance**

If a ruling on an important motion is pending or the current negotiation may be affected by other proceedings (such as the franchisee's bankruptcy or other imminent settlements), alert the mediator and explain the need for speed or delay.

- **Discuss who will attend the mediation session**

This topic frequently is the most delicate to arise in the call. Generally the parties will be expected to attend the mediation in person. Questions may arise concerning whether the franchisee's spouse should attend as well. Ideally, the representative(s) of the franchisor should have some familiarity with the circumstances of the dispute but be sufficiently removed from the fray to be able to make an independent judgment about how to proceed. They should have authority to reach a resolution on the spot or, if that is impossible, be able to confer regularly by telephone with those who do. Most important, they should have the personal skills to be able to interact effectively with the franchisee. These representatives need to participate in person, not merely by telephone, if the mediation is to have the maximum potential to succeed.

In addition to the parties, it may make sense for a franchisor with insurance coverage to have a representative of the carrier present at the mediation. If the franchisor is reluctant to have

the franchisee know about the coverage at an early state of the dispute, arrangements may be made for the insurance representative to wait in a separate room during any joint session. Of course, this tactic robs the carrier's representative of the ability to assess the franchisee and its positions directly.

- **Determine what written information should be sent to the mediator in advance**

On occasion there will be correspondence, court papers or documents that would be helpful and can be sent in advance of any specially prepared submissions. In general, court complaints and (especially) answers are useful only to the extent that they tell the story of the dispute. Judicial decisions on motions for summary judgment or dismissals, if they exist, can fill this role.

- **Clarify that counsel may speak to the mediator separately before the mediation session**

There are times when the mediator may wish to inquire about a particular point in a written submission or discuss who the most appropriate people are to be present at the mediation session. Although separate telephone calls are common in mediation, they may catch the inexperienced by surprise. You should consider whether you may wish to initiate such a call yourself, particularly when there are interpersonal issues between the parties to which you can alert the mediator in advance.

IV. Send the Mediator a Written Submission

The purpose of a written presentation provided in advance of the session is to educate the mediator about the facts and the law of the dispute and to flag any sensitive issues that may arise at the mediation. For that reason the submission generally is not shared with the other side. If the dispute is of relatively recent origin, however, and the positions of the parties not previously

exchanged or understood, you may agree to exchange copies of most portions of the submissions between counsel. In that case any confidential material should be sent separately to the mediator.

Your written submission should include at least:

- A brief recitation of the background of the dispute, with necessary attachments, such as the franchise agreement and any relevant correspondence
- Identification of any critical legal issues, accompanied by hard copies of those cases, if any, that are important for the mediator to read before the session
- Discussion of any sensitive issues of which the mediator should be aware before the parties come together
- The history of any settlement negotiations to date
- Your thoughts about productive avenues to explore at the upcoming session.

Once the mediator has read the submissions the mediator may call one or both attorneys separately to discuss how best to proceed. In particularly sensitive situations you may want to suggest meeting separately with the mediator and your client before any joint session or eliminating the joint session completely.

V. The Joint Session--How Necessary is it?

Some mediators and advocates believe that the opening joint session is unimportant and that the real work of mediation occurs when the parties are in separate rooms and the mediator is shuttling between them, conveying offers and counter-offers that narrow the settlement gap. The success of private caucus negotiations is often, however, influenced by what happens, or does not happen, at an opening joint session.

What are the purposes of the opening joint session?

- **Introduction of mediator, parties, process**.

The opening session is the formal commencement of the mediation, and is often the

mediator's first in-person introduction to the lawyers and their clients. While the lawyers may be generally familiar with the rules of mediation from their prior experiences, their clients may be new to the process. The opening session offers the mediator the opportunity to take control of the process, and to establish her impartiality in the eyes of the parties. For the advocate, the opening session likewise offers the opportunity to form some preliminary impressions about an unknown mediator, and to make sure that one's own client is familiar with the process and has the opportunity to ask the mediator questions about the process, so that uncertainty about process does not become a settlement obstacle. The opening session also allows the advocate the opportunity to speak directly to the opposing party – which is an opportunity quite different from a deposition – which is usually the only opportunity that advocate and adverse party have to interact in litigation or arbitration. Some lawyers, and indeed, some mediators think that the real work of mediation takes place in private caucus when offers and negotiating strategies are framed, and consider skipping over, or giving perfunctory treatment to the opening session. In a case where emotions run high, a mediator may prefer to skip the opening session rather than risk further antagonizing the parties. Other mediators are reluctant to lose the opportunity for skilled advocates to talk directly to each opposing party.

- **Advocate's opening statements**

Because lawyers do not usually have the opportunity to speak directly to opposing parties, often a party has not heard an analysis of his claim or position from anyone other than his own advocate, and may not appreciate the other side's view of his case's weaknesses. If the opening session is skipped or hurried, the advocate may miss a genuine opportunity to advance the settlement agenda by talking directly to the opposing party. The opening statement is the occasion for the advocate to outline her case, and let the opposing party realize that the dispute

has another side to it, and that defenses exist. While it can be important to give a taste of what awaits in the courtroom, counsel should remain respectful and be mindful of the emotion that many parties bring to their disputes. The opening statement is also when each advocate identifies the relief they expect, and usually the lawyers talk in terms of how large a verdict they will get, or whether there will be any recovery at all. This approach frequently concentrates on what each side sees as its "rights" or "claims" that a court or arbitrator's ruling will vindicate. But in mediation, advocates must recognize that "rights" or "claims" are often only part of the solution to a dispute, the parties may have other interests that a court or arbitrator is unable to take into account in a judgment or award, which may be crucial to the dispute's successful resolution. The opening statement gives each advocate the opportunity to identify those interests, and to listen if to the other side does so. For example, in an encroachment dispute, a franchisee's "real" interests may be more linked to increased expansion opportunities than to the injury suffered by the encroachment. The effective advocate should also listen carefully to the legal basis for the "rights" and "claims" of the other side, to prepare for later stages in the mediation when the advocate may urge the mediator to become "evaluative," at least, of the other side's claims or defenses.

- **Role of emotion in opening session**.

Lawyers occasionally suggest that the mediator skip the opening joint session, and mediators occasionally make the same suggestion themselves, for fear that parties, and sometimes their lawyers, will become "emotional." Disregarding or attempting to "squelch" emotion may result from a mediator's or a lawyer's personal discomfort or inexperience, and it may deprive parties of the critical opportunity to tell their story, and express their feelings, in their own words. Indeed, if a party's emotional connection to the dispute is not expressed, it may

remain a settlement barrier. The effective advocate should not be afraid of the emotion of his client – it is frequently the unstated reason for the dispute, and letting the other party understand the emotion that the dispute involves can help the settlement process. Moreover, the effective advocate should also not be afraid of the emotion of the opposing party—it is a real element of the case, and it needs an acknowledgement if the dispute is to be settled at mediation.

- **Role of parties in opening session.**

Litigation and arbitration narrowly circumscribe a party's personal participation, and it is not uncommon for parties to feel that the lawyers and the process have taken control of their dispute from them. That sense of exclusion from the process can be a significant settlement barrier. When the mediator, in contrast, gives the parties the opportunity to add to their lawyer's opening statements, or asks after each opening statement whether a party has any questions of opposing counsel, the parties should gain confidence in the mediation process and in the mediator. The effective advocate should be sensitive to the client's personal role in mediation - it is the client's dispute, not the lawyer's. The client is not an object to be spoken about, and referred to in the third person. By enlisting the client's participation in the opening session, the advocate improves the settlement environment. Moreover, by asking the opposing party if he has any questions, the advocate also helps the opposing party see him as someone who is genuinely interested in the fairness of the process, and not merely in achieving a particular outcome. Frequently, the mediator will ask the parties if they have questions following the opening statements, but an advocate need not wait for the mediator to ask, and may gain a valuable connection with the opposing party by soliciting his input.

- **Identifying "missing" information**.

If formal discovery has not begun, the parties may each base their positions upon

assumed, but as yet unknown, facts. The opening statements give the mediator the ability to identify what key facts are unknown, and to discuss ways of gathering those facts in the context of the mediation. Because the parties can control the mediation process much more effectively than litigation or arbitration, they and the mediator may be able to establish shortcuts to gathering the unknown information that will keep the mediation on track. The effective advocate should seize upon the mediation as a settlement event, and identify any "missing" information that is critical to a resolution of the dispute, and be prepared to suggest a solution or approach to gathering the information without having to engage in formal discovery. By failing to recognize the flexibility that mediation affords, the lawyer may miss a settlement opportunity and consign the client to expensive and time-consuming discovery.

VI. Candor and the Mediator – How Far Does it go?

The key element of mediation is confidentiality. Therefore, candor is an integral part of the mediation process. True candor, however, is a by-product of the mediator establishing his or her credibility. Candor is always encouraged, but should be selective at times. One key rule is not to make misrepresentations to the mediator, especially in private. It is one thing to have your parties' position embellished and "twisted" for the other side to hear even when in the presence of the mediator, but it is another thing to be 100% candid with the mediator in private. If both sides stick to their embellished positions, it will be next to impossible to resolve the matter. The candor, in regulated doses, is important to keep the mediation process moving. A good mediator will ask the right questions to illicit the true intent and position of your client.

A good mediation advocate will also be assessing the mediation (and mediator) as it progresses to determine whether significant progress is being made and if not, what additional facts and issues need to be privately shared with the mediator. The disclosure of these facts and

issues to the mediator does not mean that the mediator will then run to the other side and reveal what you have told the mediator, but it can be used to help the mediator evaluate how he or she addresses certain settlement points. You must be clear with the mediator what facts and issues are not to be disclosed to the other side, but that they are for the mediator's use so that he or she can try to advance the ball knowing the additional circumstances. The additional information may be helpful for the mediator not only to move the other side but your clients also. This part is left to the advocate to determine how much candor is necessary to reach a resolution. A good advocate will not release all of the information at the beginning, but will continuously adjust to the mediation session and determine when additional information is necessary. For example, you as the advocate know certain things that will push your client and that if the mediator can explain certain negatives that the client has refused to previously acknowledge or address (mental blank on certain issues), it may help facilitate movement. However, we then come to how much information should (or can) an advocate reveal so as not to breach client confidences or ethical rules, which is not covered here as that is a paper unto itself.

Another by-product of using candor with the mediator is that should the mediation not be successful, it could still be helpful to eventually resolve the case as you and your clients will have had the opportunity to have the opinion of an independent third party that has supposedly garnered the clients' respect and credibility. Don't disregard a mediation that didn't result in a settlement as it could ultimately resolve the case. As we know well too often, the lawyer is sometimes stuck with clients that see it one way and only one way, which then becomes very costly and "dangerous" to the client, in that they may be forgoing a real opportunity to amicably and effectively resolve the franchise dispute.

The best mediations in the opinion of the authors are the result of controlled candor because the lawyers understand the confidentiality of the mediation process and how to use candor with the mediator. Candor can also backfire by allowing the mediator to have inside information that may then "taint" his or her opinion of the party or the strength of the parties' position and arguments prior to knowing the "truth." This is when you as the advocate earn your pay. Too many bad facts may take you away from settlement; or for the other hand, may help to convince your clients that they need to change their position, because after mediation, whether it be arbitration or court room litigation, they have a chance of losing and to hear that from the mediator that has credibility could be priceless.

VII. How the Mediator Can Help the Advocates

Traditional litigation or arbitration focuses on the parties' respective legal rights – for example, what a contract means or what damages are due – and not on other, broader interests that may affect dispute resolution. These broader interests may be relational, personal or process driven, and are often unknown to, or unappreciated by, the other side. An effective mediator, particularly one with a facilitative approach, can help the parties appreciate these broader interests in a way that a judge or arbitrator cannot.

The advocate expects the mediator to bring value to the process. Shuttling between rooms and carrying offers and counter-offers brings very little added value to the settlement process. Although some mediators may be willing to play such a passive role, more effective mediators will coach both sides through a negotiation by serving as a window on what the other side is thinking, and a mirror on the reasonableness of the positions taken. Moreover, if a mediator appears uninterested in taking an active role in the negotiation process, the effective advocate should press the mediator for more involvement.

The information that each side presents to a mediator in private session is confidentially communicated unless the party authorizes the mediator to pass on the information to the other side. The mediator can help the negotiation process by urging each side to authorize the exchange of information that is likely unknown or unappreciated by the other. This does not require that the mediator convey all information that is communicated; controlling the flow of negative information may avoid breakdowns or setbacks in the process. If the mediation advocate cannot understand why the other side has taken a certain position, or why it has reacted in a particular way, the advocate should urge the mediator to explore the reasons behind the position or reaction. Indeed, often one's own client has a conviction that potentially stands in the way of settlement. The advocate can encourage in private session direct discussion between his client and the mediator, which likely will lead the mediator gently to probe the client's conviction, and suggest settlement options or a way of re-thinking an issue that the advocate may not feel comfortable presenting to the client. Once the mediator understands a party's motivation (whether it be emotional, or a rooted conviction of a "right"), the mediator can advance the settlement process explaining that motivation to the other side.

The mediator often serves as a sounding board for the parties' settlement positions. While an advocate may want to tell the other side that no offer is forthcoming, or that an offer is "our last and final offer," the mediator can talk through that position, and help the advocate understand how expressing the position, even if true, would decrease settlement potential. Parties are frequently in mediation because they have not engaged in direct settlement discussions. The mediator should solicit compromise proposals from each side, as he moves them toward a meeting point.

As the mediation progresses, the mediator may become more "evaluative" as the parties have more confidence in the mediator and the process. Often, the parties will ask the mediator to express a legal opinion on the "correctness" of a legal position taken by a party. Early in the mediation, the mediator should resist expressing such opinions, as it may shut down negotiation—a party may act as if its position has now been validated, and believe that no further movement is warranted, or a party may withdraw from the process in a belief that the mediator has "decided" the case against him. In the later stages of the mediation, however, the mediator may use some gentle evaluation, along with a discussion of the potential economic ramifications of pursuing the dispute in court or arbitration, to move the parties along. This dynamic sometimes leads to a mediator's proposal, in which the mediator expresses a range of what he thinks is "fair" or "reasonable," given the relative strength of the parties' legal positions and the cost and risks of seeking full vindication.

VIII. Have you Hit the Brick Wall or Can you Still Salvage the Mediation?

One of the most difficult parts of any mediation is the downtime when the mediator is doing shuttle diplomacy. There literally can be hours at a time when there is no communication with the mediator, the other side or anyone related to the mediation, the potential, in short, for *pure boredom*. This time does not, however, have to be pure boredom. A good advocate will use this time to his advantage (and not to bill another client for work he is doing during the downtime). It is important for the advocate continuously to assess the mediation process, even the downtime, and to help interpret this for his clients and try to reposition them toward settlement. Questions from the mediator, the last conversations with the mediator and even the amount of time that the mediator is spending with the other side can be used by the advocate to help ease the client's anxiety, and further candid discussions/evaluations between the lawyer and

the clients. During this time, the lawyer should be discussing with the clients the last proposal that was before them and what new alternatives or ways to activate a mutually acceptable settlement.

Body language is also important. What is it that the mediator is telling you (and/or your clients) directly and most important indirectly. What signs have you received from the other side as to their posture concerning settlement issues. A good advocate needs to maximize the information learned about the other side's interests and possible options to settle. Therefore, the advocate should almost place himself in the role of the mediator and listen to and "voice" both sides, drop his guard (in private only) to help advise the parties to see the issues in a different light to create possible settlement proposals.

The good mediation advocate will determine whether or not he needs to help with the rhythm (pace) of the mediation and whether or not there needs to be arbitrary (or real) goal posts such as the "must catch the last plane of the day" syndrome to move the parties. The advocate needs to help his clients to understand that they are close or that they may lose momentum if they don't react in a certain manner. Normally, if the mediation was established properly, there would have already been guidelines as to how long each party must be prepared to participate in the mediation so that you do not reach the last plane syndrome. However, if that has not been established, and even though it may seem like a childish act, sometimes it can be helpful to force the parties to seriously contemplate the last offer to possibly push the parties into settlement. On the other hand, a drawn out mediation session can also be helpful in that it wears down the parties and makes them think hard about their position and the offer on the table. More time to analyze may help the parties come closer to a meeting of the minds. The lawyer plays an integral role along with the mediator in the settlement process.

There always comes a time in a mediation session when it seems like you have hit a brick wall. However, a good mediator, and especially a good mediation advocate lawyer will be continuously thinking about how to reach a settlement. Sometimes, the mediator and both lawyers need to speak without their clients or just the lawyers, one on one. It is at times helpful to separate the lawyers from the clients so that there can be additional candor shared (without violating ethical issues) with the mediator and among the lawyers. Lawyers have a tendency to talk more easily about potential settlements that the clients may not necessarily want to hear at this time. The mediator may gain insight from such candid discussions. Downtime and a private conference with the other lawyer and the mediator can be instrumental tools in reaching a mediation settlement.

IX. If You Reach Agreement, Do Not Leave Without Putting Something into Writing

Many mediations drag on into the evening. By the time the parties reach agreement in principle, everyone is tired and eager to leave. Optimistic promises to begin drafting a settlement agreement the next day abound. Unfortunately, buyers' remorse, occasionally fed by the remonstrances of spouses, partners, or other Monday morning quarterbacks who were not part of the mediation process, sometimes kicks in. Parties then may claim that they reached no agreement, (or worse, they left early and their lawyers had no authority to agree for them), that any agreements reached are not binding because they were oral, or that their recollection of the terms is different from everyone else's.

There are significant legal hurdles in attempting to enforce oral agreements reached in mediation. In some state's statutes may require a writing before a mediated agreement can be

enforced.[9] In others the fact that everything is said in a mediation is considered confidential except for whatever is incorporated in a written agreement has precluded enforcement of oral agreements.[10]

Even if a court orders a hearing into whether the parties reached agreement there are significant hurdles to overcome:

- The party claiming agreement must prove that the parties intended to be bound
- The same party has the burden to prove the terms that were agreed to
- It is extremely difficult to accomplish either of the above without calling on the mediator to testify. The law on whether the mediation confidentiality agreement permits the mediator to decline to do so – or prevents such testimony even if the mediator would like to give it – remains in flux.[11]

As difficult as it may be to convince everyone to remain a while longer, the best practice is to write something on the spot, even if by hand, or to dictate the essence of the agreement into a tape recorder and ask each of the parties to express assent. If a future, more formal agreement is contemplated, the draft may say so, but the safest practice is to state explicitly whether the parties intend the interim agreement to be binding in case the final agreement never is executed.

At the opposite extreme from oral agreements is the party (generally the franchisor) that, once an agreement in principle has been reached, downloads twenty or so pages of boilerplate and demands signatures on the spot. The franchisee and its counsel understandably react, especially if the hour is late, and protest that they need time to consider (and probably amend) the proffered document before signing it.

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[9] See, *e.g., Fair v. Bakhtiari*, No. A100240 (Cal. Oct. 12, 2004); *Ali Haghighi v. Russian-American Broadcasting Co.*, 577 N.W.2d927 (Minn. 1998).

[10] *Vernon v. Acton*, No. 49S02-9809-CV-488 (Ind. 2000).

[11] *See New Horizon Fin. Services, LLC v. First Financial Equities, Inc.*, 278 F.Supp.2d 259 (D. Conn. 2003).

There are two ways of ameliorating the situation. The first is to determine whether an interim agreement, with a deadline for finalizing the more complete version, will suffice. The second is for the party offering the boilerplate to do so early in the mediation, perhaps at the first sign of progress, with a request for consideration and the surfacing of any concerns about the draft as early in the day as possible.

X. If You Fail to Reach Agreement, Leave the Door Open

Many disputes do not settle on the day of mediation. One or both parties may need time to reflect on what they have learned. Perhaps it is unrealistic to expect the rosy expectations with which people sometimes enter mediation to change in the course of a day or two.

If a session must end without agreement, settlement often remains a live possibility. At this point both counsel and the mediator should consider what would have to change to increase the prospect of resolution. Most mediators, having waited a few days, will initiate contact with the attorneys to determine where things stand. Counsel should discuss with their clients how to respond to such inquiries. If the mediator does not initiate follow-up, counsel should not hesitate to do so. At that point it may be fruitful to discuss further strategies, which include at least the following possibilities:

- scheduling a future session with additional participants
- negotiating further through the mediator by telephone
- awaiting the conclusion of some other pending process or negotiation before resuming negotiations
- requesting a mediator's proposal

Even mediators who are reluctant to make proposals at the initial session may be willing to do so at this juncture, especially if no other avenue appears productive. Counsel should make clear which of the following alternatives is sought:

- a proposal that the mediator, based on information that may have been shared confidentially, believes is most like to settle the matter

- a proposal based on the mediator's evaluation of the legal rights of the parties and the most likely outcome if the matter were to proceed to adjudication, whether in arbitration or in court

The first option is used more commonly, because it tends to be within the range that both parties are likely to accept.

Often, it is the mediators who are the most persistent who achieve the greatest number of settlements. Counsel should be persistent as well. Further creativity, or sometimes just plain doggedness, frequently pays off.

XI. Conclusion

Abraham Lincoln (1809-1865) and Charles Dickens (1812-1870) were contemporaries who had very different experiences with the law, and saw its potential quite differently. Dickens, as a young London journalist who reported on court proceedings, observed that "the one great principle of English law is to make business for itself." Lincoln, on the other hand, counseled his neighbors and clients (often the same people) "to compromise whenever you can … there will be enough work for lawyers." Dickens' dark view of the legal system's approach to dispute resolution is best summarized in his 1852 novel *Bleak House*, when he wrote,

> Becoming involved in a lawsuit is like 'being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by a single bee; it's being drowned by drops; it's going mad by grains.' Hundreds and hundreds of people are exposed to such torture each year, some of them actually choosing to initiate the process. They invariably find the experience painful, protracted, and expensive. Yet there remains a queue of victims impatient for their turn.
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> Charles Dickens, *Bleak House*, 1843

As lawyers, we have the opportunity to help our clients chose between Lincoln's and

Dickens' vision of effective dispute resolution. We hope that this paper encourages effective mediation advocacy, advancing Lincoln's ideals and making Dickens' picture of litigation a thing of the past.