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MEDIATION: PROCESS AND PITFALLS

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I. INTRODUCTION

The Uniform Mediation Act ("UMA"), promulgated in 2001 and revised in 2003 by the National Conference of Commissioners on Uniform State Laws, defines "mediation" as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[1] In complex commercial litigation, mediation enables disputing parties to better manage risk by removing the wild cards of jury verdicts and unpredictable judges. Mediation can also be a great source of cost savings, depending on how well and early it is injected into the litigation process.

The concept of mediation as an optional, voluntary form of "facilitated negotiation" is long-standing and deeply engrained.[2] But increasingly mediation may, as a practical matter, be the only antidote to the realities of court dockets impacted by political and financial problems that reduce judicial resources and increase delay.[3] And mediation is not inevitably a matter of choice by the parties. Judges can compel "non-consensual" mediation (though not a settlement outcome) in a variety of ways: with statutory authority, under applicable court rules, or pursuant to inherent judicial power to manage the orderly and effective disposition of cases before them.[4]

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1. National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* § 2(1). The UMA text, as last revised in 2003, with the Drafters' extensive and useful comments, is available at http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm.
2. *See generally* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed,* 1 Harv. Negot. L. Rev. 7, 13-14 (1996).
3. As of mid-July 2012, nearly 9% of federal district court judgeships were vacant. http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies.aspx. Funding for state courts is a nationwide problem. Maria Dinzeo, *Nation's Biggest Court Dealt "Crippling Blow,"* Courthouse News Service, Mar. 5, 2012, http://www.courthousenews.com/2012/03/05/44425.htm; Ashley Powers & Alexandra Zavis, *LA County Courts Face $30 Million in Cuts*, L.A. Times, Apr. 18, 2012, http://www.latimes.com/news/local/la-me-court-cuts-20120418,0,4930069.story; Joel Stashenko, *State Court Funding Woes a Nationwide Problem, Panel Says*, N.Y. Law. J., Jan. 26, 2012, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202540066033&slreturn=1; New York State Bar Association Executive Committee Report on impact of court funding reductions, http://www.nylj.com/nylawyer/adgifs/decisions/011912nysba.pdf.
4. *In re Atl. Pipe Corp.*, 304 F.3d 135 (1st Cir. 2002); *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836, *26-27 (E.D.Wash. May 24, 2012); *In re African-American Slave Descendants' Litig.*, 272 F. Supp. 2d 755 (N.D. Ill. 2003). *See* Report of the Judicial Improvements Committee of the Southern District of

Since 1998, the federal district courts have been under a Congressional mandate to implement local rules requiring litigants in all civil cases to consider an ADR process at an appropriate stage of cases.[5] Mediation is one of the specified alternative processes.[6] In the Southern District of New York, for example, that mandate is implemented in Local Civil Rule 83.9, which empowers the assigned District or Magistrate Judge to order parties to mediation.[7] Judges in a number of states are similarly empowered to compel parties to engage in mediation.[8]

As cases get bigger and more complex, the alternative of mediating a resolution generally becomes more important and more complex. Mediation skill and know-how, and an up-to-date understanding of applicable mediation statutes, rules and case law, are hence necessary parts of the repertoire of anyone handling high-stakes commercial cases.

New York, "Pilot Project Regarding Case Management Techniques for Complex Civil Cases," October 2011, http://nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf, at page 11 (noting Court's power to order mediation). The efficacy of judicially-compelled mediation is not universally accepted by judges and practitioners. *E.g.*, *Nordyke v. King*, 676 F.3d 828, 829 (9th Cir. 2012)(en banc)(Kozinski, C.J., dissenting); John Roemer, *Court-Ordered Mediation Often Fails To Deliver*, LOS ANGELES DAILY JOURNAL, June 8, 2012, at 1.

5. Alternative Dispute Resolution Act of 1998, Pub. L. No. 100-702, 102 Stat. 4664 (1998) (codified at 28 U.S.C. §§ 651-658); 28 U.S.C. §§ 651(b) & 652(a).
6. 28 U.S.C. § 651(a) (defining "alternative dispute resolution process" and listing early neutral evaluation, mediation, minitrial and arbitration as examples).
7. S&E.D.N.Y. R. 83.9 (applicable to S.D.N.Y. only); *see also, e.g.*, C.D. Cal. R. 16-15.3 ("If the parties do not file a timely Request: ADR Procedure Selection, the trial judge may order the parties to participate in any of the ADR Procedures set forth in this rule," one of which is of course mediation.).
8. For example, subject to relatively modest monetary thresholds that vary according to county, the Uniform Rules for New York Trial Courts, Section 202.70(g), Rule 3 ("Alternative Dispute Resolution"), provide that "[a]t any stage of the matter, the court may direct or counsel may seek the appointment of an uncompensated mediator for the purpose of mediating a resolution of all or some of the issues presented in the litigation." The substantive ADR/mediation rules for commercial cases in New York County can be found at http://www.courts.state.ny.us/courts/comdiv/PDFs/NYCounty/Attachment1.pdf. Across the river, New Jersey Courts Rule 1:40, "Complementary Dispute Resolution Programs," at 1:40-4(a), "Referral to Mediation," states that "Except as otherwise provided by these rules, a Superior Court or Municipal Court judge may require the parties to attend a mediation session at any time following the filing of a complaint." Under the Texas Alternative Dispute Resolution Act, mediation is one of the enumerated ADR processes courts may use to discharge their statutory responsibility to encourage "voluntary settlement procedures" TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.002-154.003 (LexisNexis 2012).

II. THE DECISION TO MEDIATE

A decision to mediate is multi-faceted. You must consider the stage of the proceeding, the nature of the dispute, the number of parties, the personalities on all sides of the dispute, and the kind of mediation and mediator most likely to be successful.

A. Mediation Timing

Mediation is essentially a particular form of settlement negotiation. In our experience, an environment conducive to useful settlement negotiations, including a worthwhile mediation, is most often produced by what might be called "informed uncertainty"—uncertainty about the likely outcome of a case that remains in the minds of sophisticated counsel and clients, notwithstanding their having conducted reasonably comprehensive legal and factual investigations.[9]

In most cases, informed uncertainty takes time to develop, and hence a decision about mediation is first seriously addressed well along in a case, after much motion practice and discovery. That is a setting in which both sides are likely to have enough insight into their own and their opponents' positions to make a serious negotiation plausible. Mediation that is thrust upon parties who are not ready for it, as sometimes happens in court-ordered mediation references, can cause serious delay and waste of resources and ought to be resisted.

On the other hand, the best time to focus on mediation is not inevitably late in the process. Mediation moments can occur along a continuum of situations in the life of a case, perhaps even before a complaint is filed. Indeed, pre-complaint mediation ought to be considered in a variety of circumstances, such as:

- disputes between parties that will need or should want to continue to do business with one another, notwithstanding the current fight;
- intellectual property or business practice disputes that are of proportionally modest value to the potential plaintiff but possibly

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9. For a comprehensive look at the settlement process in high stakes commercial cases, which discusses mediation issues and strategies, see William C. Fredericks, *"Bet-the-Company" Litigation: Settlement*, in BET THE COMPANY LITIGATION 2011: BEST PRACTICE FOR COMPLEX CASES 439 (PLI November 2011).

existential to the potential defendant in the event of an adverse judgment; and

- disputes based on legal issues or for the most part on facts capable of determination by objective means (*i.e.*, other than by testimony of an interested party).

There are other circumstances in which early or even pre-filing mediation can productively occur. In our experience, for example, disputes involving sophisticated commercial clients that do not involve the legitimacy of core business practices or the integrity of very senior client personnel may make it possible to structure and exchange pre-filing discovery and legal analysis such that mediation can sensibly take place without initiating a lawsuit first. Counsel able to see and seize these moments will do their clients a real service.

B. Selecting a Mediator

Selecting a capable and appropriate mediator is crucial to an effective mediation. Potential cost savings and delay avoidance are two important reasons why litigants opt for mediation. But anyone with experience in mediating complex commercial cases knows that a successful mediation will require a significant investment of client and counsel resources. The gamble is that this investment may pay dividends if the mediation is successful. But if it is not it will simply have added to the litigation expense and most likely extend its schedule. Picking the wrong mediator can, all by itself, doom the effort.

As general context, counsel should be familiar with any applicable professional mediation standards or code of conduct. The most widely known of these is the "Model Standards of Conduct for Mediators," which is a set of standards evaluated and endorsed by the American Arbitration Association, the ABA's Dispute Resolution Section and the Association for Conflict Resolution. These standards address such things as process voluntariness, mediator impartiality, confidentiality, conflicts and mediator competence. In various states and specific subject areas, there are also more specialized codes of conduct applicable to mediators.[10]

There are times when a relevant contract term or court rule will determine the procedure for selecting a mediator and may as a

10. A helpful discussion of this potentially complex area, and a reprint of the Model Standards themselves, can be found in ELLEN WALDMAN, MEDIATION ETHICS: CASES AND COMMENTARIES 370-79 (JOSSEY-BASS, 2011).

consequence limit the universe of potential mediators or take that issue out of the parties' hands altogether. As a general matter, restrictions on mediator choice are inherently unfortunate. Whatever the restraints imposed by contract terms or court rules, selecting the right mediator remains a crucial task. We think keeping the parties and their counsel free to find the right mediator for their problem will in most cases improve the chances of a successful mediation. Accordingly, if there is a contract term limiting the parties' freedom in mediator selection, the parties may consider amending the term in order to increase the chances of selecting the best mediator possible.

There are many ways to identify candidate mediators, including: reviewing those you've used or heard about in the past; asking colleagues for recommendations; consulting mediation services and clearinghouses;[11] and researching mediator-authored mediation literature.[12]

No matter how you identified a mediator who is preliminarily of interest, the next step is to do serious due diligence. For a candidate about whom you don't already have such information, your due diligence should include:

- Checking into the mediator's prior assignments and outcomes, to the extent possible in light of mediation confidentiality, and checking references from counsel in those mediations;
- Finding and reviewing the mediator's website information;[13]
- Investigating the mediator's neutrality, *e.g.*, prior involvement with any of the parties or subject matter(s) involved in your case; and
- Conducting an in-person or telephonic interview, to gain insight into a mediator's interpersonal style and to address any issues

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11. Examples include: *JAMS* (originally an acronym for Judicial Arbitration and Mediation Services)(self-described as the largest private ADR provider in the world), http://www.jamsadr.com/aboutus_overview; *the International Academy of Mediators*, http://www.iamed.org; *the International Institute for Conflict Prevention and Resolution*, http://www.cpradr.org/Home.aspx; *Mediate.com* ("Mediators and Everything Mediation"), http://www.mediate.com/index.cfm; *Agency for Dispute Resolution*, http://www.agencydr.com/corporate/.
12. *See e.g.*, WALDMAN, *supra*, note 10 (a compilation of contributions from more than two dozen mediation professionals).
13. *See, e.g.*, Bruce Meyerson, http://www.brucemeyerson.com/; Christian S. Herzeca, *Mediation Meditations, An Inquiry into the Theory and Practice of Mediation . . . and Into the Mind of a Mediator*, http://mediation-meditations.blogspot.com/; Int'l Academy of Mediators, http://www.iamed.org.

that have may have come up in the course of the other aspects of your due diligence evaluation.

Many factors determine a person's capability as a mediator. One clearinghouse for mediator and mediation information suggests that the "ideal mediator"

- is absolutely impartial and fair and so perceived;
- inspires trust and motivates people to confide in him or her;
- has experience as a mediator;
- is able to size up people, understand their motivations and relate easily to them;
- sets a tone of civility and consideration in dealings with others;
- is a good listener;
- is capable of understanding the law and facts of a dispute, including surrounding circumstances;
- is able to analyze complex problems and get to the core;
- is creative, imaginative and ingenious in developing proposals and knows when to make them;
- is a problem solver;
- is articulate and persuasive;
- possesses a thorough understanding of the negotiating process;
- is flexible, patient, persistent, indefatigable, and "upbeat" in the face of difficulties;
- has a personal stature that commands respect; and
- is an energetic leader, a person who can stimulate others and make things happen.[14]

This is a long and elaborate list but it provides a good checklist when evaluating mediator candidates. Experienced and effective mediators touch most or all of these bases, though in varying combinations and degrees. Some are better at conveying empathy, some are more creative, some can dazzle you with their intellects. But to be effective in a complex, hard-fought and high-stakes commercial case involving sophisticated parties and counsel, a

14. CPR, *Mediation Procedure* (section on "Mediator Characteristics"), http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/613/Mediation-Procedure.aspx.

mediator really should, in some meaningful measure, have all or nearly all of these characteristics.

The nature of the dispute also figures importantly into the mediator selection decision. In mediation parlance, mediations are sometimes categorized according to whether they are "adversarial" or "problem-solving:" The adversarial approach usually assumes that the negotiation will focus on a limited resource—such as money—and that the parties will decide whether and how to divide it. In such a situation, the parties' goals conflict—what one gains, the other must lose. The problem-solving approach, in contrast, seeks to bring out and meet the underlying interests of the parties—the needs that motivate their positions.[15]

The approaches used by mediators are also sometimes categorized and assessed according to whether they are "evaluative," "facilitative" or even "transformative." Broadly speaking, an "evaluator" assesses the strengths and weaknesses of the parties' positions much as a judge might do and pushes the parties towards a resolution based on a predicted case outcome. A "facilitator" focuses instead on helping the parties engage in cordial and effective communications that illuminate case strengths and weaknesses on both sides, and may help suggest and refine settlement structures. A "transformative" approach is facilitator-like but also aims at identifying goals and interests of the parties that may not be technically at issue in the case but which, properly understood, may reveal broader relationship issues and opportunities that may contribute to a settlement that includes but isn't necessarily limited to the specific dispute that brought the parties to the mediation.[16]

These categories are often defined and discussed in the literature as distinct concepts. And some mediations will fit more or less neatly into one of them. There certainly are, for example, high-stakes commercial cases in which the problem is, in the parlance of one influential commentator, inescapably "narrow"—such as a dispute about money or goods between two parties who simply want to "win" the dispute and have no interest in future dealings or anything else

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15. Riskin, *supra,* note 2, at 13-14.
16. *See* WALDMAN, *supra,* note 10, at 19-23; Riskin, *supra,* note 2, at 23-24; Lea P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. Univ. L. Rev. 937 (1997); Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Mediate.Com, Sept. 2000, http://www.mediate.com/articles/zumeta.cfm.

outside the four corners of the case as it exists in court.[17] Such an "adversarial" case may be ideally suited for mediation by a former judge who has an "evaluator" style of mediation.

But commentators and practitioners alike understand that in reality these labels describe the ends of ranges of types of mediation problems, variants of which are often present simultaneously in the same mediation. To be effective in such circumstances, a mediator has to have both evaluative and facilitative skills that can be applied in combination to help resolve those problems.[18] One can imagine, for example, a patent infringement dispute that starts with a "narrow," "adversarial" litigation claim for infringement money damages but, through thoughtful application of both evaluative and facilitative techniques, ends with a mediated resolution that takes advantage of the parties' abilities to cross-license their technologies in new ways. The right mediator for such a matter might be someone with business experience and subject matter expertise in the area who has both substantive credibility and a first-hand appreciation of the inter-corporate relationship complexities of the high-tech world.

Put to best advantage, contrasts between "adversarial" and "problem-solving" mediation issues, and between "evaluative," "facilitative" or "transformative" mediators, are simply helpful ways to analyze the already identified issues and claims that have to be mediated and also to identify issues and party interests that could be helpful in achieving resolution. In some cases these distinctions could aid in selecting a mediator, given that people do differ in their interpersonal skill sets. This underscores the need to have insight into a mediator's interpersonal skills and approaches. As a practical matter, though, most experienced mediators with a good track record will have both evaluative and facilitative skills to use as the issues of a

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17. Riskin, *supra,* note 2, at 26-28. By contrast, a "broad" or "problem-solving" mediation would focus additionally on other issues affecting the interests of the parties, or even strangers to the mediation.
18. Thus Riskin refers to "The Problem-Definition Continuum: Goals, Assumptions, and Focuses" and to "The Mediator's Role: Goals and Assumptions Along the Facilitative-Evaluative Continuum." Riskin, *supra,* note 2, at 18, 23. Riskin developed a four-quadrant analysis framework that considers mediation strategies and impact on mediator selection according to the nature of the problems and mediator approaches: "Evaluative-Narrow," "Facilitative-Narrow," "Evaluative-Broad," and "Facilitative-Broad." *Id.* at 25-38. Though his article is now more than fifteen years old, the concepts and approaches Riskin developed seem well-established. A LEXIS search produces literally hundreds of citations to Riskin's article up to the present day.

particular mediation require. Having thought through the adversarial-versus-problem-solving and evaluative-versus-facilitative issues ahead of time will enable counsel to give such a mediator a much better preview of what approach your particular mediation will require.

III. WHO SHOULD PARTICIPATE?

Complex commercial cases are often complex at least in part because there are multiple parties on one or both sides of the "v," or because insurance coverage or other indemnification issues will be important to the willingness or ability of your client or an opponent to pay what might be required to settle the case. Counsel contemplating mediation in such cases need to weigh the pros and cons of including other parties and/or insurers in the discussion, which will surely be made more complicated and difficult as a result, but which may be necessary if there is to be any meaningful chance of success.

Mediation negotiations in cases with multiple parties on one or both sides of the "v" will usually present interesting strategic issues, varying infinitely with the circumstances of particular cases. For instance:

- If there are multiple parties on one or both sides of a case, to what extent is it possible and/or desirable to proceed with fewer than all of them? Which ones must be included either to entice a targeted opponent to participate or because technically or practically the case cannot settle without them?
- If you represent a plaintiff who has sued multiple defendants, would you prefer to try to start the settlement process by mediating with a defendant or two who have less-extensive or less-obvious potential liability, in the hope that settling with them will improve settlement leverage with the remaining defendant(s) who have clearer potential liability?
- Would structuring a settlement involving fewer than all defendants be complicated, such as when multiple defendants have allegedly injured the plaintiff(s) in a synergistic way (*e.g.*, as joint tortfeasors), and so may have contribution and/or indemnity claims that could be or have been asserted against one another. Structuring settlements in such cases, where there are non-settling defendants with significant potential liability, will need to take into account the applicable state or federal rules governing "good faith" settlements that may insulate the settling defendants from contribution claims by the

non-settlers and/or establish an "offset" reducing the plaintiff's potential recovery against the non-settlers.[19]

- Should defendants who have been sued by multiple co-plaintiffs insist that all of them be included in a mediation so that a settlement, if achieved, will be the end of the entire dispute?
- In a case where some or all defendants have potentially-available insurance coverage, should the insurers participate and if so how can they be required to do so?

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19. For example, under California Code of Civil Procedure §§ 877(a) and (b), where a release is "given in good faith" before judgment, the claims against other defendants are reduced by the amount of settlement, and the settlement discharges the party to whom it is given "from all liability for any contribution to any other parties." The offset is "*pro tanto*" and contribution claims by the settling defendants are barred. In New York, under General Obligation Law § 15-108, a release "given in good faith" relieves settling tortfeasors from liability "to any other person for contribution" and reduces a nonsettling tortfeasor's liability to the injured party by the greater of the amount of consideration the settling tortfeasor paid for its release or, alternatively, the amount of the settling tortfeasor's equitable share of the damages. The offset may therefore be *pro tanto* or *pro rata*, and contribution claims are barred. In diversity cases and in some federal question cases, the federal courts have simply applied the offset and bar rules from the forum state. *See, e.g., Getty Petroleum, Corp. v. Island Transp. Corp.*, 862 F.2d 10 (2d Cir. 1988) (holding that N.Y. General Obligation Law § 15-108 applies to actions brought under federal statutes in New York, including the federal trademark infringement action *sub judice*); *Koon Chun Hing Key Soy & Sauce Factory, Ltd. v. Eastimpex*, 2007 U.S. Dist. LEXIS 21254, *2-3 (N.D. Cal. Mar. 12, 2007) (following *Getty* and holding that Cal. Civ. Proc. Code § 877's offset rule applied in federal trademark infringement action). In most federal-question cases, such as those involving federal copyright and securities fraud claims, the federal courts have applied developing federal common law offset and settlement bar rules rather than borrowing state-law rules. However, the rules are not consistent across the Circuits. *See, e.g., Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d. Cir. 1989) (*pro tanto* offset applied under federal common law in securities fraud cases in Second Circuit); *BUC Int'l Corp. v. Int'l Yacht Council Ltd.*, 517 F.3d 1271, 1277-78 & nn.6-7 (11th Cir. 2008)(citing cases applying *pro tanto* and *pro rata* offsets; applying *pro tanto* offset in case involving federal Copyright claims); *In re Sunrise Sec. Litig.*, 698 F. Supp. 1256 (E.D. Pa. 1988) (adopting *pro rata* offset and contribution bar in federal securities case); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1228-32 (9th Cir. 1989) (applying federal common law offset rule in securities fraud case; rejecting Second Circuit's *pro tanto* offset in favor of *pro rata* offset and settlement bar expounded in *In re Sunrise Sec. Litig.*); *TBG, Inc. v. Bendis*, 36 F.3d 916, 925-26 (10th Cir. 1994) (declining to apply settlement bar to cut off contribution claims in federal securities fraud case); *Nelson v. Bennett*, 662 F. Supp. 1324 (E.D. Cal. 1987) (applying common law settlement bar rule in securities fraud action, while noting that some courts have adopted "no-bar" rule instead).

- In a multi-defendant environment, are there business reasons, or legal or contractual relationships, that make it desirable for the defendants to negotiate collectively with the plaintiff? This might be the case, for example, where there are prior agreements creating consensual contractual indemnification rights that would survive a "good faith settlement" determination.

- Do you propose to represent more than one plaintiff or defendant in the mediation? If so, you had better think things through very carefully beforehand so you and your clients don't find yourselves in a mess later on. For example, you and your clients should be prepared to have no secrets from one another during the negotiations, since maintaining "secrets" in that situation is virtually impossible as a practical matter. How will you deal with other potential conflict issues, such as apportioning financial responsibility among multiple defendants, or allocating offered settlement proceeds among multiple plaintiffs? In commercial cases involving sophisticated business clients, it may be possible to deal with conflict issues through the direct participation of inside counsel for the clients. But that won't always be possible and you should be prepared to confront the reality that you just can't mediate jointly.

The need to spot and think through strategic and potential conflict issues ahead of time is obvious, but it can get short-changed in the optimistic bustle of getting a mediation organized. This is an area where an experienced and skilled mediator can provide important help. The mediator's task is to help the parties navigate problem areas and find their way to common ground. The mediator will want to promote ways to help this along and to eliminate impediments. It makes sense for you and your opponent(s) to agree that the participants can consult with the mediator ahead of time about potential roadblocks and ways to structure the process to maximize the chances for success.

IV. INVOLVING INSURERS

Insurance coverage is sometimes an important piece of the mediation and settlement puzzle. In high-stakes commercial cases, insurance policies are often implicated because the defendants include directors and/or officers who are covered under corporate "D&O" policies.

In purely voluntary mediations, the participation of an insurer is, by definition, at the insurer's option. Insurers often balk at participating in mediations, preferring to stand back, await a proposed outcome, and then

negotiate the terms and extent of their contribution if any without having made any commitments during the mediation itself. This is another area where a skilled mediator can sometimes be a big help either before or during the mediation. A mediator with the proper skill and preparation can provide an insurer's representatives with a case and coverage assessment that is seen to be sufficiently neutral and well informed to overcome the insurer's disinclination to participate.

The leverage available to get an insurer to participate in a mediation is generally greater in situations where the mediation is or could be court-ordered under applicable laws or rules. In a few such cases, courts have viewed insurers as parties subject to the court's mediation authority, and hence subject to sanction for refusing to participate. In *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.*,[20] the appellate court ruled that a trial court may impose sanctions on an insurer for failing to appear at a court-ordered mediation session, and that a participant is permitted to report such conduct to the court as a basis for monetary sanctions without violating the mediation confidentiality privilege. In the circumstances, the *Campagnone* Court declined to award sanctions. In *Casaccio v. Curtiss*,[21] the Court followed *Campagnone* in ruling that the applicable rule of court did "authorize a trial court to sanction such an insurance carrier," though as in *Campagnone* the circumstances did not warrant sanctions in the Court's view.

There are, however, limits to what a mediator can or should do in eliciting insurer participation. *Travelers Casualty and Surety Co. v. Superior Court*[22] is an example of over-stepping those limits. In *Travelers Casualty*, the mediator was a state trial court judge sitting as a mediator in a court-ordered mediation of a clergy abuse case brought by multiple alleged abuse victims against the Diocese of Orange. He was also the actual trial judge in a parallel insurance coverage case initiated by insurers, who resisted participating in the merits mediation. The mediator-judge proposed to use that resistance as evidence of "bad faith" in the coverage case and the insurers asked the appellate court to intervene. The appellate court did intervene, holding that the mediator-judge had overstepped his proper authority by trying to coerce the insurers into participating in what is ultimately a process of *voluntary* dispute resolution.

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20. 163 Cal. App. 4th 566 (2008).
21. 718 S.E.2d 506, 508 (W. Va. 2011).
22. 126 Cal. App. 4th 1131 (2005).

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V. "GOOD FAITH" MEDIATION

The *Travelers Casualty* case just discussed illustrates that statutes and court rules authorizing a court to order parties to mediate do so without overturning the basic role of mediation as a process of *voluntary* dispute resolution. The limit of the court's authority is generally understood to be simply to require the parties to mediate in good faith.[23] The contours of the duty to mediate in good faith are, unsurprisingly, contextual and not clearly defined. But for the most part the duty seems to involve more or less objective obligations to participate in the organization and actual conduct of the mediation sessions. This involves such things as mediator selection, information exchanges, briefing, non-disruptive attendance at least at the beginning mediation session by a person with settlement authority, listening and responding to the mediator, and observing the obligations of mediation confidentiality.[24] But the essential character of the mediation process as a voluntary one must be accommodated in any definition of mediation good faith. As the Court of Appeal put it in *Travelers Casualty*:

> A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. To that end, a mediator must, among other things, respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time, and must refrain from coercing any party to join or continue participation in a mediation.[25]

VI. CLIENT INVOLVEMENT AND PREPARATION

The nature and extent of client involvement in and preparation for mediation will depend on the particular circumstances of a given case and client. While you have to make sure your client understands the mediation process, it will be the exception these days to find a client or client representative in a high-stakes commercial lawsuit who is not already very familiar, and indeed is most likely significantly experienced, with mediation.

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23. *See generally* Peter N. Thompson, *Codifying Mediation 2.0: Good Faith Mediation in the Federal Courts*, 26 Ohio J. Disp. Resol. 363 (2011); Richard D. English, *Alternative Dispute Resolution: Sanctions For Failure To Participate In Good Faith In, Or Comply With Agreement Made In, Mediation*, 43 A.L.R. 5th 545 (2012).
24. Thompson, *supra,* note 23, at 387-417.
25. *Travelers Casualty,* 126 Cal. App. 4th at 1140.

Preparing a client for mediation is largely a process of anticipating and preparing for the sequence of events that will or may unfold during the mediation. Here are some suggestions:

- Brief the client about the mediator's background and mediation style to the extent it is known. Is this an "in your face" mediator who will aggressively push the parties for concessions, or a more laid-back and "facilitative" mediator? The goal should be to avoid a surprised and discomforted client, which is rarely a good thing.
- Define and refine mediation goals and a strategy for reaching them. Many mediations succeed, despite very large initial "bid/ask" spreads, because the mediator and the parties manage, sometimes agonizingly slowly, to maintain mediation "momentum"— a progressive series of compromise moves. Have a strategy in mind that allows for this.
- Have a clear understanding with the client (or client's mediation representative) of the nature of settlement authority. In a corporate setting, understand how to go up the chain of command as circumstances may warrant if the representative's authority is exceeded but a settlement still seems possible and desirable.
- Discuss the client's mediation role. Will the client be an active advocate or a passive listener? Or will this depend on the subject matter or stage of the process?
- Make the client aware of the need to identify and correct any areas of inaccurate or incomplete information disclosures that could make a mediation settlement vulnerable. Mediations often occur in the midst of hard-fought discovery battles in which full disclosure of the material documents and facts is not yet complete. It may also be the case that prior disclosures have become potentially misleading in light of subsequently uncovered but as yet undisclosed facts. Counsel have a professional obligation to avoid deceit in mediation negotiations and the client should also be aware of its risks.[26]

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26. ABA Model Rules of Professional Conduct, R. 4.1 (1983), "Truthfulness in Statements to Others"; Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011); Dwight Golann & Melissa Brodrick, "*Mediating with Lies in the Room*" in WALDMAN, *supra*, note 10, at 199-226.

- In a court-ordered mediation, make sure the client understands the elements of mediation "good faith" discussed above.[27]
- Anticipate the possibility of impasse and a "mediator's proposal." Generally participants won't know whether a mediator's proposal is a good or bad idea until the issue arises at a particular point in the mediation, but it will help to have discussed the process and implications beforehand.

VII. MEDIATION BRIEFING AND ARGUMENT

The mediation agreement and pre-mediation discussions with the mediator should establish clear rules governing the nature and extent of pre-mediation briefing and initial mediation "opening statement" presentations.

Mediation briefing is generally the best way to educate the mediator about the strengths and weaknesses of the parties' positions. It may be possible to do that by relying on already existing briefs, such as recently submitted summary judgment briefing. But in our experience that is infrequently the best option. Your brief(s) must give the mediator the factual and legal ammunition she or he can quickly assimilate and use effectively with your opponent(s) in an accelerated, pressurized *negotiation* environment. A presentation prepared from the ground up for that purpose will usually be the best approach.

There is sometimes good reason to allow the parties to make *ex parte* written presentations in addition to any that are exchanged. This may help the parties make the mediator aware of sensitive issues or priorities that affect their willingness or ability to settle but that they are not—at least not yet—comfortable discussing openly with the other side. Corporate disputes sometimes involve sensitive personnel issues that a party does not wish to have out in the open. Since most of the actual mediation sessions will be *ex parte* anyway—sequential private sessions with the disputants—there should no objection in principle to *ex parte* briefs at commencement, at least as a supplement to briefs exchanged by the parties. They allow sensitive issues or priorities to be ventilated with the mediator, who will both be better informed and may be able to assist the party in navigating to a settlement without either distressing disclosures or risky non-disclosures.

Whether to make "opening statements" at the commencement of a mediation depends on the circumstances. There are cases in which the

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27. Part V, *supra*.

parties, including clients, have been through hearings and depositions to such an extent that adding opening statements to a mediation would add little except delay and expense to the process. In most circumstances, however, a mediation opening statement is an important occasion for your client's opponent(s) to hear about your case directly from you, unmediated by your opposing counsel. But there is a crucial balance to be struck. An opening statement needs to forcefully outline why yours is the winning position, but to do so in a way that does not insult or bait an opponent into a hardened antagonistic position.

VIII. MEDIATION CONFIDENTIALITY AND ITS LIMITS

With the increasing use of mediation in recent years, "all states have enacted statutes or rules designed to protect mediation communications from disclosure in legal proceedings."[28] Many of these statutes and rules are based on the UMA.[29] Others cover much of the same ground. They generally aim to insulate mediation parties against mediation communications being used against them in later proceedings, and to protect mediators from having to testify about mediation communications in later proceedings, which could threaten actual or perceived mediator neutrality and discourage qualified people from serving as mediators.[30]

The UMA has been adopted, thus, far, by ten states and the District of Columbia.[31] Statutes adopting the UMA are pending for 2012 in

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28. Jay M. Zitter, *Construction and Application of State Mediation Privilege*, 32 A.L.R. 6th 285 (2012).
29. *Id.*
30. *Id.; see also* UMA, *supra,* note 1, Prefatory Note ("Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes."); *Folb v. Motion Picture Indus. Pension & Health Plans,* 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (recognizing federal common law mediation privilege on grounds, in part, that "every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another."), *aff'd* 216 F.3d 1082 (9th Cir. 2000).
31. District of Columbia, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington. *See, e.g.,* 710 ILL. COMP. STAT. ANN. 35/1, eff. 1/1/04 (LexisNexis 2012); NEB. REV. STAT. ANN. §§ 25-2930 to 25-2942 (LexisNexis 2012); OHIO REV. CODE ANN. §§ 2710.01 to 2710.10 (LexisNexis 2012), Wash. Rev. Code § 7.07.010 to 7.07.904 (LexisNexis 2012); *see also* Uniform Law Commission, Legislative Fact Sheet – Mediation Act, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation Act.

Massachusetts and New York.[32] Defining the nature and extent of mediation confidentiality is the primary object of the UMA. Section 4 provides that a "mediation communication" (as defined) is "privileged" and "not subject to discovery or admissible in evidence unless waived or precluded as provided by Section 5," subject to the exceptions set forth in Section 6. The privilege is held by a "mediation party", the mediator, and a "nonparty participant" (such as an insurer).[33]

Whereas a mediation party may refuse to disclose, and may prevent any other person from disclosing, any "mediation communication," the mediator may refuse to disclose any communication and may "prevent any other person from disclosing a mediation communication *of the mediator*."[34] Thus, the mediator may refuse to say what anyone said during the mediation, but may only prevent the parties from saying what the mediator *himself* said. If the parties decline to assert the privilege, they may disclose what they themselves said, but they cannot say what the mediator said unless the mediator declines to assert the privilege. Nonparty participants are afforded the same protection as the mediator.[35]

Evidence and information that is "otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation."[36] Under Section 5, the privilege may be waived by express agreement by "all parties to the mediation."[37] Section 6 sets forth several "exceptions" to

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32. S.B. 683, 234th Leg., 2011-2011 Reg. Sess. (N.Y. 2011); A.B. 1756, 234th Leg., 2011-2012 Reg. Sess. (N.Y. 2011); H.B. 30, 187th Leg., 2011 Reg. Sess. (Mass. 2011).
33. UMA § 4(b).
34. UMA § 4(b)(2)(emphasis added). Mediation agreements often provide additional contractual protection for the mediator. *See* United States Arbitration & Mediation, *Sample Agreement to Mediate*, http://www.usam.com/services/med_agreement.shtml. Non-UMA states also afford protection to the mediator. For instance, in California, mediation confidentiality is not a "privilege" that must be "claimed" by any particular privilege holder or holders (such as the mediation participants). Thus, it may preclude mediator testimony even in situations where the parties are not opposed to disclosure (absent an agreement by the mediator and the parties to the contrary, as allowed under Cal. Evid. Code § 1122(a)). Moreover, Cal. Evid. Code § 703.5 provides that no mediator "shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding," subject to a few narrow exceptions.
35. UMA § 4(b)(3).
36. UMA § 4(c).
37. UMA § 5(a).

the privilege—matters as to which there is "no privilege"—such as "an agreement evidenced by a record signed by all parties to the agreement" (*e.g.*, a settlement agreement resulting from the mediation). Under Section 6(b)(2), the privilege does not apply to a meditation communication that is sought or offered in a proceeding to prove a claim to rescind or reform, or a defense to avoid liability on a contract arising out of the mediation, where it is shown that the evidence is not otherwise available and the need substantially outweighs the interest in protecting its confidentiality.[38] Except on limited topics in limited circumstances, mediator reports to a court are barred under the UMA and various state statutes.[39]

Exclusion of mediator testimony and reports may work to impede legitimate party interests, such as class counsel's interest in justifying a settlement for which court approval is mandatory. It may also protect a party who has not mediated in good faith under applicable court rules.[40] It may even bar evidence of the settlement agreement itself. And in situations where the parties have agreed to settle orally, it can protect a party with a case of post-agreement "cold feet" by barring evidence of the oral settlement agreement.[41]

In states that have adopted the UMA, the precise scope of the privilege and its exceptions are further refined by case law. As with any uniform law, courts in adopting states may look to the case law in other

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38. UMA § 6(b)(2); *see* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 68-73 (2006) (level of vigilance for maintaining confidentiality depends on the context of the subsequent litigation; outside California, relevant mediation communications are used regularly in court to establish or refute contractual defenses such as fraud, mistake or duress).
39. *See, e.g.*, UMA § 7, cmt. 1 (prohibiting reports by "a mediator" with three exceptions); Cal. Evid. Code § 1121 (extending the prohibition to include others, not just the mediator, and specifying one exception).
40. *See, e.g., Foxgate Homeowners' Assn. v. Bramalea Cal., Inc.*, 26 Cal. 4th 1 (2001) (on motion for sanctions against party and its attorney for failing to participate in good faith in court-ordered mediation, held no evidence of communications made during the mediation could be admitted or considered).
41. *Simmons v. Ghaderi*, 44 Cal. 4th 570 (2008) (in case where doctor authorized her insurer's representative to settle and claimants accepted offer, but doctor revoked consent and refused to sign term document prepared by mediator, claimants sued for breach and doctor asserted confidentiality, Court held that evidence of the putative oral agreement was inadmissible because there was no recording of the oral agreement by a court reporter or audio recording, and no written agreement signed by both parties, as required by Cal. Evid. Code §§ 1118, 1122, 1124, and because the document prepared by the mediator included no express agreement that it could be disclosed and was not signed by the doctor or her attorneys).

adopting states for help in interpreting and applying the statute.[42] In addition to the privilege, the UMA states that "mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State."[43]

In California, which has not adopted the UMA, Evidence Code Section 1119 provides that "[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . civil action . . . ."[44] It further provides that no writing "prepared for the purpose of, in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery" and that "[a]ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential."[45] As under the UMA, evidence that is "otherwise admissible or subject to discovery" does not become inadmissible or "protected from disclosure" "solely by reason of its . . . use in a mediation."[46] And as under the UMA, there is an exception for communications and documents as to which "[a]ll persons who conduct or otherwise participate in the mediation expressly agree" that the privilege does not apply.[47] And there is an exception for a "written settlement agreement prepared in the course of, or pursuant, to a mediation."[48] Any "reference" to a mediation during a subsequent trial, however, is an "irregularity" that constitutes grounds for vacating or modifying the decision in that trial.[49]

Whereas the UMA provides that a mediator "may refuse to disclose a mediation communication," the California Evidence Code goes further in providing that no mediator "shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at [the mediation]," subject to certain exceptions.[50]

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42. *See* UMA § 13 ("In applying and construing this [Act], consideration should be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.").
43. UMA § 8.
44. Cal. Evid. Code § 1119(a); *cf. id.* § 1115 (defining terms).
45. *Id.* § 1119(b) & (c).
46. *Id.* § 1120.
47. *Id.* § 1122.
48. *Id.* § 1123.
49. *Id.* § 1128.
50. UMA § 4(b)(2) & Legislative Note (noting that the Act does not supersede existing statutes that made mediators incompetent to testify, such as Cal. Evid. Code § 703.5).

California's mandatory "shall remain confidential" language is significantly stronger than the UMA's "confidential to the extent agreed by the parties."[51]

While the UMA and the California statute adopt quite different baselines for mediation confidentiality, they both permit the parties to modify the baseline by agreement. Under the UMA, the baseline is no confidentiality (except as required by other law and rules), but the parties may agree to make the proceedings more confidential to whatever extent they please. And in California, the baseline is absolute confidentiality, but the participants may agree to relax that requirement to whatever extent they please.[52]

Unlike the UMA, the California statute does not use the term "privilege" to refer to the protection it affords. It simply states that certain communications and writings are not "admissible or subject to discovery" and "shall remain confidential."[53] Thus, California courts refer to "mediation confidentiality" rather than "privilege."[54] The practical effect is to create something akin to but more protective than an evidentiary privilege. It does more than simply limit the participants' freedom by commanding that mediation communications "shall remain confidential."[55] Evidence concerning mediation communications and writings is not "admissible or subject to discovery" and disclosure of it "shall not be compelled."[56] A rule under which no one in the world can

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51. UMA § 8, cmt. (arguing that decisions as to confidentiality are "best left to the good judgment of the parties" and that a uniform rule enforcing confidentiality is "not necessary or even appropriate").
52. *Compare* UMA § 8 with Cal. Evid. Code § 1119(c) and § 1126. Under Cal. Evid. Code § 1122, a communication or writing "is not made inadmissible, or protected from disclosure" if "[a]ll persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally [on the record] to disclosure of the communication, document or writing."
53. *Id.* § 1119.
54. *See, e.g., Cassel v. Superior Court*, 51 Cal. 4th 113, 132 (2011) (noting that in contrast with the lawyer-client privilege, "the mediation confidentiality statutes do not create a 'privilege' in favor of any particular person," but instead "are designed to provide maximum protection for the privacy of communications in the mediation context"); *cf.* Rebecca Callahan, *Mediation Confidentiality: For California Litigants, Why Should Mediation Confidentiality be a Function of the Court in Which Litigation is Pending*, 12 Pepp. Disp. Resol. L.J. 63, 68 (2012); *Molina v. Lexmark Int'l, Inc.*, 2008 U.S. Dist. LEXIS 83014, at *87-88 (C.D. Cal. Sept. 30, 2008) (discussing distinction between the concept of a privilege meant to limit third parties from compelling disclosure and confidentiality meant to limit parties' freedom to voluntarily disclose information).
55. Cal. Evid. Code § 1119(c).
56. *Id.* § 1119(a) & (b).

compel disclosure of the subject communications is more protective than a privilege under which a "holder" of the privilege can "refuse to disclose" and "prevent another from disclosing" the subject communication.[57] The protection afforded to mediation communications is greater, since disclosure of mediation communications "shall not be compelled," whereas lawyer-client communications are only protected where there is a "holder" of the privilege who has the right to "prevent another from disclosing" the communication and has effectively asserted or "claimed" the privilege.[58] When the holder of an evidentiary privilege dies, the privilege dies with him and the communications are no longer protected (since there is no "holder" to "claim" the privilege). But evidence of things said (or written) during a mediation are inadmissible, and disclosure of them cannot be compelled, even if every participant has long since died or ceased to exist.

As in states that have adopted the UMA, the courts in states like California that have crafted their own statutory mediation privileges (or exclusionary rules) have further refined the scope and contours of the privilege.[59]

New York is one of the states that does not have a statute creating a general mediation privilege, at least for now.[60] Various New York courts have adopted local rules governing alternative dispute resolution, including mediation, that protect mediation communications and writings. For instance, in New York County, the Commercial Division of the Supreme Court had adopted a detailed, local rule providing that ADR proceedings, including mediation, "shall be confidential and nothing that occurs during the proceeding shall be disclosed outside thereof" except as allowed by the rule.[61] Under Rule 6, the terms of a settlement agreement reached by mediation must be kept confidential unless the

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57. Cal. Evid. Code § 954 (defining lawyer-client privilege in those terms).
58. *Id.*
59. *See, e.g., Travelers Casualty*, 126 Cal. App. 4th 1131, 1145-46 (party's insurers were within the statutory term "parties to the mediation," even though they were not parties to the underlying action, because the mediation privilege statutes were intended to apply to participants, not just parties).
60. *See* note 32, *supra*, and accompanying text.
61. N.Y. Cnty Sup. Ct., Comm. Div., Rules of the Alternative Dispute Resolution Program, Rule 6(a); *see NYP Holdings, Inc. v. McClier Corp.*, 836 N.Y.S.2d 494 (N.Y. Sup. Ct. 2007) (citing these rules for proposition that "It is the policy of this court, and specifically of the Commercial Division to maintain the confidentiality of submissions and statements made during mediation proceedings" and therefore declining to direct "disclosure or even production for in camera review of the [subject] mediation documents").

parties agree otherwise, except that any party may commence an action to enforce the agreement. As under the UMA and the California statute, otherwise-discoverable documents and information are not "shielded from disclosure merely because they are submitted or referred to in the ADR proceeding."[62] No party to the mediation may to seek to compel production of documents prepared for or generated in connection with the mediation or the testimony of the mediator in a subsequent proceeding. And if a party violates this rule by attempting to compel the testimony of the mediator, he must hold the mediator harmless against any resulting expenses.[63]

In addition to local rules adopted in some courts, and a statute that makes settlement offers inadmissible,[64] Article 21-A of New York's Judiciary Law creates a "community dispute center" which provides dispute resolution (mediation) services at specially created neighborhood centers "without cost to indigents and at nominal or no cost to other participants." Section 849-b(6) of Article 21-A creates a broad privilege for mediations conducted at these centers: "Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication."[65] Unlike the local rule discussed above, and the UMA, this is a "blanket" privilege with no stated exceptions.[66] However, given the limit on the amount of award that can be made under the program, it has no application to any significant commercial dispute.

The mediation privilege rules may be less clear where the mediation occurs in conjunction with federal court proceedings, or where the issue arises in a different court after the mediation has ended. Federal courts are governed by Federal Rule of Evidence 501: in diversity cases, where state law provides the rule of decision, the existence and scope of a privilege is a matter of state law; in federal-question cases the existence and scope of a claimed privilege is a matter of developing federal common law.[67] In federal question cases with pendent state-law claims,

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62. N.Y. Cnty. Sup. Ct., Comm. Div., ADR Rule 6(a).
63. N.Y. Cnty. Sup. Ct., Comm. Div., ADR Rule 6(b).
64. N.Y. C.P.L.R. § 4547 (Consol. 2012).
65. N.Y. JUD. LAW § 849-b(6), Art. 21-A (Consol. 2012).
66. New York State Bar Ass'n Committee on Alternative Dispute Resolution, *The Uniform Mediation Act and Mediation In New York*, Nov. 1, 2002, p. 25 (noting that it was unclear how the UMA, if adopted, would impact the existing privilege in Article 21-A).
67. *Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110, 1124 (N.D. Cal. 1999).

"the usual solution by the courts has been a preference for federal privilege law when it conflicts with state privilege law."[68] At least in the Ninth Circuit, that "usual solution" has governed mediation privilege issues in federal-question cases with pendent state claims.[69]

As yet no federal Circuit has adopted or recognized a federal common law mediation privilege.[70] Several lower federal courts have recognized and applied the privilege under the analytical framework set forth in *Jaffe v. Redmond.*[71] But other courts have been more cautious, declining to reach the question on various grounds, expressing doubt as to whether the privilege exists, and/or distinguishing the cases that have recognized the privilege.[72]

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68. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[2][c] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997).
69. *Dagdagan v. City of Vallejo*, 263 F.R.D. 632, 638 (E.D. Cal. 2009); *Folb*, 16 F. Supp. 2d 1164, 1169-70 (C.D. Cal. 1998).
70. *Molina v. Lexmark Int'l, Inc.*, 2008 U.S. Dist. LEXIS 83014, at *30 (C.D. Cal. 2008) (questioning existence of privilege on grounds that "[n]o Circuit court has ever adopted or applied such a privilege," and that the Fourth and Ninth Circuits have declined to consider whether a federal mediation privilege exists, and the Fifth Circuit has refused to infer the existence of a mediation privilege from a federal statute making certain mediation proceedings confidential), *citing Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 975 n.1 (9th Cir. 2007) (because appealing party had failed to make foundational showing, Court held that it did not "need [to] address whether the Ninth Circuit should recognized a federal mediation privilege"); *In re Anonymous*, 283 F.3d 627, 639 (4th Cir. 2002) (same); *In re Grand Jury Subpoena Dated December 17, 1996*, 148 F.3d 487, 493 (5th Cir. 1998).
71. 518 U.S. 1 (1996); *see, e.g., In re RDM Sports Group, Inc.*, 277 B.R. 415, 425-31 (N.D. Ga. 2002) (recognizing privilege after thorough analysis under *Jaffe*); *Folb*, 16 F. Supp. 2d at 1170 -1180 (C.D. Cal. 1998) (same); *Chester County Hosp. v. Independence Blue Cross*, 2003 U.S. Dist. LEXIS 25214, at *17-18 (E.D. Pa. Nov. 7, 2003) (holding that all of the *Jaffe* factors counsel in favor of recognizing the privilege); *Microsoft Corp. v. Suncrest Enter*, 2006 U.S. Dist. LEXIS 21269 (N.D. Cal. Jan. 6, 2006); *Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511, 512 (W.D. Pa. 2000).
72. *See, e.g., Sampson v. Sch. Dist.*, 262 F.R.D. 469 (E.D. Pa. 2008) (declining to reach question because communication in question was protected by a different privilege; citing lower federal courts in other Circuits that had recognized the privilege, and *Molina*, *supra*, which questioned its existence); *Molina*, 2008 U.S. Dist. LEXIS 83014, at *37-58 (distinguishing cases like *Folb* that had applied the privilege on grounds that they had involved third-party attempts to discover the mediation positions of their adversaries in subsequent cases, whereas in the instant case Lexmark merely sought to use information obtained during the mediation to establish the amount in controversy for purposes of determining whether federal jurisdiction existed).

Some federal districts have dealt with mediation confidentiality through local rules. For instance, Local Civil Rule 83.8 for the Eastern District of New York, governing court-ordered mediation, provides that the parties must be asked to sign an "agreement of confidentiality at the beginning of the first mediation session" to the effect that "all written and oral communications made by the parties and the mediator in connection with or during any mediation session are confidential any may not be disclosed to or used for any purpose unrelated to the mediation."[73]

Under Local Rule 16-15.1 of the Central District of California, civil litigants are required to participate in one of several designated ADR procedures, one of which is mediation before a neutral selected from the Court's "Mediation Panel."[74] Where this is the chosen ADR procedure, the rules impose a broad duty on the Court, the parties, counsel, the mediator, and anyone attending, to treat as confidential:

> the contents of the written mediation statements, any documents prepared for the purpose of, in the course of, or pursuant to the mediation, anything that happened or was said relating to the subject matter of the case in mediation, any position taken, and any view of the merits of the case expressed by any participant in connection with any mediation.[75]

The rule provides seven narrow exceptions to confidentiality, notably: disclosures stipulated by the parties and the mediator; disclosures to the Court or its staff in connection with operation of the ADR process; and use of a settlement agreement in enforcement proceedings.[76]

The validity of local federal District Court rules purporting to establish "privileged" or "confidential" status for mediation communications has not yet been established and caution is in order when dealing

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73. S.&E.D.N.Y. Civ. R. 83.8(d).
74. C.D. Cal. R. 16-15.1 & 16-15.4, eff. 12/1/11, available at http://court.cacd.uscourts.gov/Cacd/LocRules.nsf/a224d2a6f8771599882567cc005e9d79/15756d79e43177dd8825768d007a1b4d?OpenDocument.
75. C.D. Cal. R. 16-15.8(a).
76. C.D. Cal. R. 16-15.8(b). The Central District of California's prior rule provided simply that "All settlement proceedings shall be confidential" except for the settlement agreement itself. C.D. Cal. R. 16-15.8 (LexisNexis 2011); *compare* E.D. Pa. Civ. R. 53.3(3) (mediation "shall be confidential, and disclosure by any person of confidential dispute resolution communications is prohibited unless confidentiality has been waived by all participants . . . or disclosure is ordered by the assigned judge for good cause shown"); C.D. Ill. R. 16(E)(7) ("[t]he entire mediation process is confidential" and the mediator is "disqualified as a witness" in any future action); E.D. Tex. Civ. R. App. H(VIII) ("[a]ll proceedings of the mediation . . . are privileged and confidential in all respects").

with them. In *Facebook, Inc., v. Pacific Northwest Software, Inc.*,[77] the litigation battle between Mark Zuckerberg and the Winklevoss brothers over the origins of Facebook's social networking concept, the Winklevosses sought to nullify a mediation-produced settlement agreement by relying on mediation communications to prove they had been misled about the value of Facebook stock. The District Court rejected that tactic in reliance on its local rule on ADR communications confidentiality, which it viewed as creating a privilege against disclosure and use of such communications in later proceedings. The Ninth Circuit, while affirming on other grounds,[78] declined to endorse the District Court's reliance on its local rule. In an opaque discussion, the Court first noted that a "[a] local rule, like any court order, can impose a duty of confidentiality as to any aspect of litigation, including mediation," but then went on to observe that in federal court privileges are regulated by Federal Rule of Evidence 501, making it "doubtful that a district court can augment the list of privileges by local rule."[79] The Court did not further explain what it saw as the operative differences between a local rule "privilege" and a local rule duty of confidentiality. That leaves the authority of local District Court rules governing mediation confidentiality anchored, at least in the Ninth Circuit, firmly in mid-air.

In the States, the various rules and statutes that define mediation confidentiality vary by jurisdiction, and there is a continuum of protection, ranging from jurisdictions where the scope of protection is very broad (and the exceptions narrow or non-existent) to jurisdictions where it is narrower and the exceptions broader or more numerous.

The California approach falls at one end of that continuum: a broad rule—making all mediation communications confidential and excluding evidence of them in any subsequent proceeding—that has few and narrow exceptions.[80] Absent waiver by the parties, the California rule creates a near-absolute bar that applies even in malpractice actions.[81] But

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77. 640 F.3d 1034 (9th Cir. 2011).
78. *See, infra*, Section IX.C.
79. 640 F.3d at 1041.
80. *See, e.g., Cassel v. Superior Court*, 51 Cal. 4th 113, 117-18 (2011) ("We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected."); *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857 (2010) (same).
81. *Cassel, supra*, 51 Cal. 4th at 132-33, 138. *Compare* Laurie Kratky Dore, *Public Courts versus Private Justice: It's Time To Let Some Sun Shine In On Alternative Dispute Resolution*, 81 Chi.-Kent L. Rev. 463, 497-500, 511-12 (2006) (criticizing the "overly broad protection afforded by an absolute mediation privilege" and

even in California, there are things that may happen at a mediation that fall outside the scope of the exclusionary rule.[82] In urging States to adopt the UMA, the National Conference of Commissioners on Uniform State Laws argues that there is a need for uniformity given the multiplicity of statutes and "[c]ommon differences among these statutes" including "the definition of mediation, subject matter of the dispute, scope of protection, exceptions, and the context of the mediation that comes within the statute.[83]

> [U]niformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one State may be sought in litigation . . . in another State. . . . Without uniformity, there can be no firm assurance in any State that a mediation is privileged.[84]

When parties to an action in one state seek to introduce mediation communications from a mediation conducted in another state, there is a possible conflict of law. Under the approach of the Restatement (Second) of Conflict of Laws, Section 139, which is followed in many States, there is a *decided* preference for admitting evidence that is admissible *either* under the law of the forum *or* the law of the state with the most significant relationship with a communication—usually the state where the mediation occurred.[85] To at least reduce the risk of later surprises, counsel should consider including a choice-of-law provision in mediation settlement agreements that specifies the law that will apply to any post-mediation confidentiality disputes, and possibly even a description of the parties' meeting of the minds concerning the nature of mediation communication confidentiality desired in the circumstances.

Parties and mediators should also understand that, despite the general rules concerning mediation confidentiality, there are classes of cases

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urging that a qualified privilege with a good-cause exception "that permits at least some balancing of interests would provide a necessary safety valve and permit discovery of mediation-related information when justified by sufficiently compelling cause"); UMA § 6(a)(6) (express exception to privilege for malpractice cases based on conduct occurring during the mediation).

82. *See, e.g., Radford*, 187 Cal. App. 4th at 857 (while Cal. Evid. Code § 1119 covers evidence of "communications" during a mediation, it does not preclude evidence of "noncommunicative conduct" such as an attorney's declaration stating that the party challenging enforcement of the settlement agreement signed at the mediation had been presented with both pages of the agreement and had signed it).
83. UMA Prefatory Note § 3 ("Importance of uniformity").
84. *Id.*
85. *See, e.g., People v. Allen*, 336 Ill. App. 3d 457, 460 (Ill. App. Ct. 2003)(applying Restatement (Second) of Conflict of Laws § 139(2), test results that would have been privileged under Iowa law were admissible in an Illinois proceeding because there was no "special reason" sufficient to override Illinois's pro-admission policy).

involving judicial oversight where it would be difficult for settling parties to stand on their confidentiality rights, such as class actions (where disclose of certain mediation communications may be necessary to obtain court approval of the settlement), proceedings involving child abuse and neglect, and bankruptcy cases.[86]

Mediating parties should also know that the sanctions for violating court rules and statutory confidentiality requirements can be very harsh. In *Hand v. Walnut Valley Sailing Club*,[87] for instance, the plaintiff filed suit in federal court after his membership in a sailing club was revoked. After participating in a court-ordered mediation that failed to result in settlement, the plaintiff sent an email to his fellow club members disparaging the club's position and relating details of the mediation, including the club's settlement offer, despite a court rule expressly requiring that such information be kept confidential. As a sanction for this conduct, the District Court dismissed the plaintiff's lawsuit and the Tenth Circuit affirmed.

IX. ENFORCING MEDIATED SETTLEMENTS

Settlement agreements reached in mediation are contracts that, when enforced, are analyzed under traditional contract principals. But an otherwise-enforceable contract may be made unenforceable by a mediation rule or requirement. Here are some thoughts about how to increase the chances of leaving a mediation with an enforceable settlement agreement.

A. The Importance of Written Mediation Settlement Agreements

Many jurisdictions require that a settlement reached in mediation be in writing and signed by all parties.[88] California, for example, does

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86. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (class action); UMA § 6(a)(7) (mediation communications sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child are not covered by the privilege unless the protective services agency participated in the mediation).
87. 2012 U.S. App. LEXIS 6703 (10th Cir. Apr. 4, 2012).
88. For example, Florida's mediation statute provides an exception to the mediation privilege for "signed written agreement reached during mediation, unless the parties agree otherwise" FLA. STAT. ANN. § 44.405 (LexisNexis 2012). Arizona's statute provides an exception to mediation confidentiality for an "agreement that is evidenced by a record that is signed by the parties." ARIZ. REV. STAT. ANN. § 12-2238 (LexisNexis 2012).

not recognize and will not enforce an oral settlement agreement reached in mediation unless it is reduced to writing within 72 hours and then only (i) if it is "recorded by a court reporter or reliable means of audio recording" during the mediation, (ii) if the "terms of the oral agreement are recited on the record in the presence of the parties and mediator and the parties express on the record that they agree to the terms recited," and (iii) if the parties expressly agree to be bound on the record.[89]

The UMA, adopted in eleven jurisdictions,[90] provides an exception to the mediation privilege for a written mediation settlement agreement only. A comment to Section 6 of the UMA explains the rationale for this exception:

> The disadvantage of exempting oral settlements [from the mediation privilege] is that nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule of privilege. As a result, mediation participants might be less candid, not knowing whether a controversy later would erupt over an oral agreement. Unfortunately, excluding evidence of oral settlements reached during a mediation session would operate to the disadvantage of a less legally sophisticated party who is accustomed to the enforcement of oral settlements reached in negotiations. Such a person might also mistakenly assume the admissibility of evidence of oral settlements reached in mediation as well.[91]

It is certainly possible to find instances where courts have enforced oral mediation settlement agreements in particular circumstances. In *Willingboro Mall, Ltd. v. 240/242 Franklin Avenue, L.L.C.*,[92] for example, a New Jersey court enforced an oral mediation settlement agreement, the terms of which had been outlined in a letter sent by defense counsel to the Judge. The New Jersey Court interpreted New Jersey's mediation rule requiring that any agreement be reduced to writing as not necessarily requiring that it be reduced to writing *during* the mediation. The Court found that a three-day delay in reducing the oral agreement to writing was appropriate:

> In other words, a delay of three days to memorialize a settlement reached through mediation does not vitiate the settlement. To be sure, preparation of a writing memorializing the agreement at the mediation session may be the preferable and advisable course. We must recognize, however, that

89. Cal. Evid. Code § 1118.
90. *See*, *supra*, note 31.
91. UMA § 6(a)(1) & cmt. 2.
92. 421 N.J. Super. 445, 24 A.3d 802 (N.J. Super. Ct. App. Div. 2011).

> some disputes may be complicated and the writing to memorialize the agreement may require some time to produce. We hesitate to interpret the writing requirement of *Rule* 1:40-4(i) so rigidly that it becomes an impediment to resolution of a matter through mediation.[93]

The Court also relied on the fact that the parties had signed an agreement waiving the mediation privilege.[94] The lengths to which the Court felt obligated to go in justifying its enforcement of an oral agreement actually underscores the desirability of getting a written agreement in the first place. There is just no sound reason why a lawyer should run the risk that confidentiality statutes or rules may later prevent the introduction of evidence necessary to enforce an agreement of great value to a client.

B. The Agreement Should Express The Parties' Intent To Be Bound

A mediation settlement agreement may be unenforceable if it does not contain a statement that the agreement is binding on the parties or enforceable. As discussed above, many state mediation statutes make everything that is said and written during mediation confidential and inadmissible in court—including any settlement agreement reached during mediation—unless the agreement expressly states that the parties intend to be bound.

For example, California Evidence Code Section 1119 states that "[n]o writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible . . . ." Section 1123 creates an exception to this general rule of inadmissibility when the written settlement agreement is signed by the parties and demonstrates the parties' intent to be bound by the agreement by providing "that it is enforceable or binding or words to that effect."

In *Fair v. Bakhtiari*,[95] the California Supreme Court held that failure to satisfy section 1123 makes a written settlement agreement inadmissible and unenforceable. In that case, the parties' two-day mediation resulted in a signed, handwritten, one-page term sheet entitled "Settlement Terms." The parties jointly informed the court in

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93. *Id.* at 454.
94. *Id.* at 455 ("We agree with the *Beazer* court that *N.J.S.A.* 2A:23C-4 and *Rule* 1:40-4(d) present obstacles to enforcement of an oral agreement reached through mediation when the parties do not waive the confidentiality conferred on the proceeding. That case, however, is not before us.").
95. 40 Cal. 4th 189 (2006).

a filing that the case had settled in mediation and represented to the court during the case management conference that the parties were exchanging formalized settlement agreements.[96] The parties were unable to finalize the settlement agreement, however, because of a disagreement on the interpretation of a term included in their signed term sheet. Defense counsel informed the court that the parties had not settled and that the case should proceed "through the regular court process."[97]

Plaintiff moved to compel arbitration of the mediation settlement agreement pursuant to one of the terms in the term sheet, which provided that "[a]ny and all disputes [are] subject to JAMS [Judicial Arbitration and Mediation Services] arbitration rules."[98] Defendants opposed the motion on the grounds that the term sheet was inadmissible because it did not contain a statement of the parties' intent to be bound by the agreement and thus failed to satisfy the formal requirements of California Evidence Code section 1123.[99] Plaintiff argued that the parties' inclusion of an arbitration provision represented the parties' selection of a method for adjudication of any disputes concerning the agreement and therefore showed that the parties intended the agreement to be enforceable. The Supreme Court disagreed:

> In order to preserve the confidentiality required to protect the mediation process and provide clear drafting guidelines, we hold that to satisfy the "words to that effect" provision of *section 1123(b)*, a writing must directly express the parties' agreement to be bound by the document they sign. . . . A tentative working document may include an arbitration provision, without reflecting an actual agreement to be bound. . . . Durable settlements are more likely to result if the statute is applied to require language directly reflecting the parties' awareness that they are executing an "enforceable or binding" agreement.[100]

For a similar result, see *Haghighi v. Russian-American Broad. Co.*,[101] which concerns the enforceability of a mediation settlement agreement under the Minnesota Civil Mediation Act, which, like California's mediation statute, states that a mediation settlement agreement is not binding unless it contains a provision that says it is binding. The parties in *Haghighi* signed a settlement agreement

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96. *Id.* at 192-93.
97. *Id.* at 193.
98. *Id.* at 192.
99. *Id.* at 193-94.
100. *Id.* at 197-98.
101. 173 F.3d 1086 (8th Cir. 1999)(applying Minnesota law).

during mediation and continued to act as if they were bound by the agreement while negotiating the final settlement papers. But the agreement did not contain language stating that the parties *intended to be bound* by the agreement. The Eighth Circuit found that the agreement was thus unenforceable.

The UMA does not require that the mediation settlement contain a statement of the parties' intent to be bound and provides an exception to the mediation privilege for a mediation settlement agreement "evidenced by a record signed by all parties to the agreement."[102] The comment to Section 6 states that "the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement."[103] New York County's Commercial Division has promulgated ADR rules that make mediations confidential and that require that an agreement be in writing to be enforceable, but do not require a statement of the parties' intent to be bound.[104] But even where not required, an expression of the parties' intent to be bound can weigh significantly in favor of the enforceability of an agreement.[105]

Compare the results in *Fair v. Bakhtiari* and *Haghighi v. Russian-American Broad Co.* with the result in *Delanyis v. Dyna-Empire, Inc.*,[106] where the Eastern District of New York enforced a mediation settlement agreement that specifically stated it was *not* meant to be binding on the parties. In *Delanyis*, the parties engaged in mediation and came to an agreement. The mediator penned the parties' "Agreement to Settle" and included the following statement: "[W]hile not intended to be a legally enforceable settlement agreement, the parties have agreed to resolve the case of *Delyanis v. Dyna-Empire, Inc.et al.* pursuant to the following terms."[107] The handwritten settlement agreement was signed by all parties, their attorneys and

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102. UMA § 6.
103. *Id.* at § 6, cmt. 2.
104. *See* Supreme Court, New York County, Commercial Division Rules of the Alternative Dispute Resolution Program, page 3, *supra*, note 8.
105. *See Shah v. Wilco Sys., Inc.*, 916 N.Y.S.2d 82, 83 (N.Y. App. Div. 2011)(mediation settlement agreement is enforceable where it states that it is "final and binding" and "enforceable in any court of law of general jurisdiction" because it "manifests the intent of the parties to be bound by its terms and sets forth all the material terms of the contract.").
106. 465 F. Supp. 2d 170 (E.D.N.Y. 2006).
107. *Id.* at 172.

the mediator. After the mediation, the mediator emailed the parties to inquire whether he could notify the court that the case had settled. Plaintiff's counsel responded, copying defense counsel, that it had settled and that the parties were exchanging drafts. While formalizing the settlement agreement, however, plaintiff discovered the settlement was taxable and attempted to withdraw from the agreement. Defendants moved to compel enforcement of the agreement. The court found that while the parties expressly intended not to be bound by the handwritten settlement agreement, plaintiff had later accepted the terms of that settlement agreement when her counsel responded to the mediator's email stating that the matter had settled:

> However, following execution of the Agreement to Settle, the mediator contacted both parties to confirm that the case had settled and to determine whether he should inform the Court of the settlement. The Plaintiff's counsel e-mailed the mediator and the Defendants' counsel, affirming that the case had successfully settled and permitting the mediator to inform the Court of the settlement. Specifically, in response to the mediator's inquiry as to whether he could report the case as settled, the Plaintiff's attorney e-mailed stating "Yes, thank you so much for your assistance. I sent [the defendants' counsel] an e-mail earlier today and am waiting for a proposed copy of the settlement agreement." The Plaintiff's counsel's actions, as explained below, represent an affirmative acceptance of the settlement binding the Plaintiff.[108]

C. Where Enforcement and Mediation Confidentiality Intersect

Whether and the extent to which mediation communications are confidential (by statute, case law or party agreement) can be significant in enforcement proceedings. The rules governing exceptions to mediation confidentiality in enforcement proceedings vary widely.

In UMA States, exceptions to mediation confidentiality are set forth in UMA Section 6, discussed above.[109] Section 6(a) lists a number of very specific mediation communication subjects that are unprivileged. As they relate to mediation of complex commercial disputes, the chief exceptions under Section 6(a) are for: a signed settlement agreement,[110] and communications offered to prove or defend against a claim of professional misconduct or malpractice.[111] Section 6(b) defines two additional circumstances in which a later

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108. *Id.* at 174.
109. *See* text accompanying notes 28-39, *supra.*
110. UMA § 6(a)(1).
111. UMA § 6(a)(5)-(6).

forum is permitted to invade mediation confidentiality upon a showing that the evidence is not otherwise available and that the need for the evidence outweighs the interest in protecting confidentiality. One involves certain criminal proceedings.[112] The other, of far more interest here, is that mediation communications may be offered in a subsequent proceeding to rescind or reform or defend against a claim of liability on a settlement agreement.[113] The chief limitation on this "contract defense" exception is that, under Section 6(c), a mediator cannot be compelled to provide such evidence.

The "contract defense" exception under UMA § 6(b)(2), and in non-UMA jurisdictions that follow a similar approach, is potentially a very significant incursion into mediation confidentiality in enforcement proceedings. Such an exception encompasses the general run of contract defenses, and mediation settlement agreements are, after all, just contracts. Under such an exception, the door is presumably open to evidence relating to claims of misrepresentation, mistake and a long list of other defenses to contract enforcement. *FDIC v. White*, from the Northern District of Texas, is a good illustration.[114] There, defendants moved to set aside a mediation settlement agreement because it was allegedly coerced. Even though the parties had signed a mediation confidentiality agreement, the District Court allowed the defendants and defense counsel to testify about communications that had occurred during the mediation. The Court reasoned that the mediation process and the parties' confidentiality agreement did not create "an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation. Indeed, such a privilege would effectively bar a party from raising well-established common law defenses."[115]

On the other hand, *Facebook v. Pacific Northwest Software, Inc.*,[116] the Zuckerberg/Winklevoss litigation, illustrates how the parties' mediation agreements can preserve mediation confidentiality against "contract defense" claims, including even a claim that a mediation settlement was procured by fraud. In *Facebook*, after much litigation the parties mediated the Winklevosses' claim that Zuckerberg and Facebook had stolen their social networking idea,

112. UMA § 6(b)(1).
113. UMA § 6(b)(2).
114. 76 F. Supp. 2d 736 (N.D. Tex. 1999).
115. *Id.* at 738.
116. 640 F.3d 1034 (9th Cir. 2011).

and signed a handwritten, one-and-a-third page "Term Sheet & Settlement Agreement," which they stipulated was "binding," and by which Facebook would transfer a certain number of shares of the company's stock to the Winklevosses. The settlement fell apart while the documents were being finalized and Facebook filed a motion to enforce the settlement agreement. The Winklevosses argued, among other things, that the settlement agreement had been obtained by fraud because during the mediation Zuckerberg allegedly had represented that common shares of Facebook stock were worth far more than their actual value. The District Court rejected that argument and enforced the settlement agreement, relying on its local rule providing for confidentiality of mediation communications.

As previously noted, the Ninth Circuit declined to endorse the District Court's reliance on its local rule,[117] but affirmed nonetheless based upon the parties' very explicit pre-mediation "Confidentiality Agreement," which provided that

> [a]ll statements made during the course of the mediation or in mediator follow-up thereafter at any time prior to complete settlement of this matter are privileged settlement discussions. . . . and are non-discoverable and inadmissible for any purpose including in any legal proceeding. . . . *No aspect of the mediation shall be relied upon or introduced as evidence in any arbitral, judicial, or other proceeding.*[118]

The Ninth Circuit, having earlier found the Winklevosses to be sophisticated parties who had engaged in discovery, ruled that the Confidentiality Agreement

> precludes the Winklevosses from introducing in support of their securities [fraud] claims any evidence of what Facebook said, or did not say, during the mediation. The Winklevosses can't show that Facebook misled them about the value of its shares or that disclosure of the tax valuation would have significantly altered the mix of information available to them during settlement negotiations. Without such evidence, their securities claims must fail.[119]

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117. *See* text accompanying notes 77-79, *supra*.
118. 640 F.3d at 1041 (emphasis added).
119. *Id.* (emphasis added). *Compare Hauzinger v. Hauzinger,* 43 A.D.3d 1289, 842 N.Y.S.2d 646 (N.Y. App. Div. 2007)(in divorce action challenge to mediation settlement agreement between unrepresented spouses, where court had to determine fairness and reasonableness of agreement at time of execution, trial court did not abuse its discretion in refusing to quash subpoena for mediator testimony notwithstanding parties' mediation confidentiality agreement).

D. Prepare Ahead for A Settlement Agreement

Once an agreement in principle has been reached by the parties in a mediation, it can be very challenging to accomplish an effective written settlement agreement. Mediation settlements often occur at the end of long and tiring mediation days. Clients—particularly senior corporate managers—understandably want to escape from an unpleasant captivity, believe that their work is done and think "the lawyers" can handle the documentation details. "The lawyers" are typically also weary of the process.

It is very important to anticipate these realities, discuss them with clients and have a clear understanding that, if a settlement agreement is reached in principle, no one's work is really done until the agreement is effectively written down and signed.

Going into the mediation, counsel and client should have a sufficiently clear and specific understanding of the client's settlement objectives that counsel has a framework for preparing a draft settlement agreement that contains the terms critical to the client. If the dispute is about money, a draft may not be able to plug in the final to-be-paid amount, but it can certainly identify and provide for important collateral issues, especially any that are known in advance to be essential to a client. In a securities dispute, for example, if the return or cancellation of securities is likely to be important, counsel who are thinking ahead can develop a proposed process to be followed post-settlement. Even if that process is not subsequently acceptable to the settling opponent, the issue will have been identified and the path to a solution probably eased. Such a draft can: choose the law to govern the settlement; proposed a schedule on which settlement events (like payment) are to occur; state the parties' intent to be bound; describe the parties' responsibilities in connection with obtaining any required court approvals; and so forth. If the mediation is not happening in your office, take a laptop along, so that your draft can be tailored to fit any eventual agreement.

While mediation communications are protected to some considerable extent almost everywhere, a settlement agreement itself is not confidential in any later dispute between the parties. That means the agreement itself may be a means to memorialize important information from the mediation in a form accessible to a court in a subsequent enforcement dispute. For example, in the *Facebook* case, the Winklevosses might have fared better with their fraud claim if their settlement agreement with Mr. Zuckerberg had recited any representations he made about the value of Facebook stock to induce

the Winklevosses to settle. Put another way, if you want an enforcement court to know something about mediation events and communications that led to your client's agreement, do your best to reference them in the agreement.

X. CONCLUSION

Real mediation know-how is essential for counsel in high-stakes commercial litigation. Be opportunistic in identifying mediation moments, when you sense the opposing parties know enough to be realistic about resolving a dispute. If you are creative and careful in selecting the mediator, structuring the process, preparing the client and anticipating settlement roadblocks, you can do your client enormous service. Process issues, such as those involving confidentiality and settlement enforceability, can be anticipated and in most cases problems can be avoided by dealing with them in writing with your opponent. Creativity and care in these matters won't always close wide gaps in settlement positions, but they will build a negotiating environment in which an achievable agreement has its best chance to emerge.