American Bar Association
Forum on Franchising

LITIGATOR'S GUIDE TO FRANCHISE TERMINATIONS

SETTLEMENT

C. Griffith Towle
Bartko, Zankel, Tarrant & Miller

October 9 – 11, 2002
The Fairmont Scottsdale Princess
Scottsdale, AZ

TABLE OF CONTENTS

I. INTRODUCTION

There are several things that every franchisor and franchisee should know before embarking on litigation.

First, litigation is an inherently uncertain process. There is no such thing as a sure thing when it comes to litigation. This is especially true if a jury is the ultimate trier of fact.

Second, litigation is inevitably very expensive. Most people know, if not based on experience then intuitively, that litigation is expensive. Nonetheless, the cost of investigating, preparing and trying a franchise termination case often far exceeds the client's expectations and can easily cost several hundreds of thousands of dollars or more. Moreover, there is only so much that counsel can do to limit the expense given that the opposing side may have a more costly approach to the litigation.

Third, litigation is a serious distraction. The resulting drain on the client's internal resources cannot be overstated. The client will need to devote significant time to gathering information, responding to questions from attorneys, participating in discovery, and otherwise assisting in the litigation process. All of this means that the client spends today's time and energy focusing on yesterday's problem, rather than focusing on tomorrow's business opportunities and challenges.

Fourth, sooner or later, the overwhelming majority of lawsuits settle. While counsel must prepare a case as if it will go to trial or arbitration, more than 95% of all lawsuits conclude in a negotiated settlement. It is important that counsel and client not lose sight of that fact.

It is incumbent upon counsel to discuss these truisms with the client as soon as possible -- ideally before, but no later than the outset of litigation. Depending on the client's frame of mind and experiences, as well as the nature of the underlying dispute, these conversations can be difficult. Nonetheless, a full and frank exchange regarding these facts early in the process will go a long way toward creating the necessary foundation for ultimately settling the dispute at the right time and in a cost-efficient manner.

With the foregoing in mind, this paper will focus on techniques for achieving a favorable settlement for the client, with a particular emphasis on mediation.

II. A STARTING POINT

A. Initial Case Evaluation -- Investigating the Facts/Claims and Understanding the Dynamics

Regardless of how or when a lawsuit is resolved, litigation counsel must develop a thorough understanding of the facts as they relate to a disputed termination. If possible,

counsel's factual due diligence should begin *before* the termination. To that end, counsel should review the relevant agreements, as well as *all* correspondence, e-mail, notes and other relevant materials from the client's files. It is important for counsel to emphasize that he or she needs to review *everything* -- in other words, "all" means all. At the risk of stating the obvious, this is necessary to ensure that counsel understands the history of the parties' dispute and is not surprised in the middle of litigation (or worse, during trial) by the revelation of facts or documents that are significant.

A review of the relevant documents should be followed up by interviews with key persons -- *e.g.*, the franchisee if you are representing the franchisee or the field consultant and appropriate decision maker(s) if you are representing the franchisor. As part of this interview process, counsel should also explore potential issues that may not be apparent at first blush. For example, (i) were breaches of the franchise agreement or other conduct that led to termination ignored for a lengthy period of time such that the franchisee is likely to assert a waiver argument based on the parties' course of conduct; or (ii) was the franchisee told or implicitly promised that everything was "okay" and not to worry about the problem; or (iii) were other similarly situated franchisees treated differently by the company? The answers to these and other questions will assist counsel in developing and analyzing the parties' claims or potential claims.

It is equally critical that counsel understand the client's business and the relevant marketplace dynamics. A fact or issue that might appear relatively inconsequential to counsel or the trier of fact may be extremely significant in the context of the client's business and the marketplace.

Counsel must also understand the law as it applies to the facts and claims (or potential claims) of the parties. As an initial matter, counsel should determine if the termination was in accordance with any applicable state franchise laws and the terms of the franchise agreement. For example, was the franchisee provided with the required notice (if any) and an opportunity to cure (if applicable)? Often, the franchise agreement requires something different than the applicable franchise law. Counsel will need to understand the relationship between the state franchise laws on these and other issues, on the one hand, and the terms of the franchise agreement and any other relevant agreements, on the other hand.

After developing an understanding of the applicable facts, law and claims, counsel can begin evaluating the potential outcomes of the dispute and developing an overall case strategy. At the same time, counsel should begin evaluating the case for settlement purposes and developing a settlement strategy. It is never too early to begin thinking about settlement. Nor should counsel ever lose focus on how best to position the case to achieve that end.

The perceived strength of the client's claim(s), what is at stake and the likely cost of litigation will generally determine the ultimate course of action, including whether, when and how to attempt to settle the dispute. However, other factors also often impact the prospects for settlement.

For example, an important factor in evaluating franchise litigation in general and for settlement purposes in particular are so-called "other business considerations" -- *e.g.*, how does the litigation and potential resolution of the litigation impact the franchise system as a whole? Depending on the factual basis for the termination, the franchisor may believe that must pursue litigation even if the cost will be disproportionate to any potential recovery by one or both parties. This type of dynamic often occurs in disputes involving an alleged breach of a post-term covenant not to compete or a termination based on a franchisee's failure to maintain system standards or product quality.

In disputes involving non-compete agreements, there may be little, if any, direct and quantifiable monetary damage to the franchisor or neighboring franchisees. Nonetheless, the perceived importance of this issue to the franchise system as a whole is often such that the franchisor will aggressively pursue a former franchisee who violates a post-term covenant not to compete. With respect to a franchisee who is terminated for alleged standards or product quality violations, he or she is likely to contest the termination and file a lawsuit or demand for arbitration. Depending on the facts, a relatively modest payment to the franchisee might resolve the dispute. However, the franchisor may believe that it cannot settle litigation involving systems standards (especially if there are health and safety concerns), because it will "send the wrong message to the franchise system." Counsel for both the franchisor and franchisee need to be sensitive to these and similar issues in the context of evaluating a case for settlement purposes.

In disputes involving these and other issues that have potential system-wide implications, the franchisor may want to consider enlisting the support of respected franchisees. Similarly, the erstwhile former franchisee may want to seek the assistance from current (or former) franchisees who can, for example, corroborate any claim that the franchisor has historically not pursued others for similar wrongdoing.

Counsel should also be aware that franchise terminations often create an emotionally charged environment. In many respects a franchise termination has the potential dynamics of a divorce. One or both of the parties may be hostile, angry or feel betrayed. The presence of these emotions, when coupled with the potentially significant financial consequences of a termination, can create significant complications and barriers to settlement.

B. What is Really At Stake and How Much Will It Cost?

The related issues of what is at stake and the potential cost of any litigation are usually, but not always, critical components in evaluating a disputed franchise termination for purposes of settlement. As previously noted, there are several factors that might prevent the parties from viewing a franchise transaction case from a purely financial perspective (*e.g.*, if the dispute involves an issue that the franchisor believes is important to the system as a whole and/or is being closely followed by the franchise community, or if there are emotional or personal considerations involved). Although there may be and often are other factors to consider, litigation counsel must nonetheless critically analyze what is really at stake (*i.e.*, the range of potential outcomes and

recoveries by the parties) and the likely cost of the litigation. This analysis should be undertaken at the outset of litigation and revisited as the case progresses to take into account recent developments (both expected and unexpected).

Counsel may want to use a decision tree of some type to assist in sorting through the range of possible outcomes and recoveries. With respect to determining the potential cost of litigation, counsel should prepare a case budget or otherwise attempt to estimate the total cost of each of the likely phases or components of the litigation.

The results of this analysis should be thoroughly discussed with the client. Not surprisingly, when confronted with the economic realities of litigation, many clients will adjust their views regarding how to proceed and the possibility of settlement. A client whose approach to the case had been victory at any price ("I don't care what it costs") often becomes more willing to explore alternatives to continued litigation once the true cost of pursuing such a strategy is understood. Moreover, even if the range of likely outcomes and economics would suggest that settlement is the best alternative, there is an obvious benefit to ensuring that the client makes an informed decision to proceed with litigation after taking into account all of the relevant factors, including the potential cost.

III. SETTLEMENT STRATEGIES AND TACTICS

The related questions of when and how to broach the subject of settlement are not capable of being answered in any definitive sense. Like so much of what happens in litigation, the answer is that it depends on a variety of factors and issues. Predictably, there is much disagreement among attorneys regarding this issue. There are some who believe that broaching the subject of settlement, especially before the litigation has commenced or early in the process, will be perceived as a sign of weakness by the other side and could therefore ultimately work against obtaining a favorable resolution for the client. Others believe that there is no wrong time to raise the subject and that the worst thing that can happen is that the other side is not interested in discussing the subject or will make a demand/offer that is so unrealistic as to effectively foreclose settlement discussions at that time. In such cases, the client and counsel will at least have learned that they have no choice but to litigate. Ultimately, the facts and circumstances of the dispute, rather than preconceived prejudices, are what should guide counsel in determining when and how to approach the issue of settlement.

For those who believe that raising the issue of settlement is a sign of weakness, many courts now require that counsel and sometimes the parties discuss settlement early in the process.[1] This provides a good excuse (to the extent one is really necessary) to broach the subject of settlement before the parties have invested too much time and money in litigation.

---

[1] *See, e.g.,* F.R.C.P. 26(f) which requires that counsel confer regarding the prospect of settlement at least 21 days before a scheduling conference is held or a scheduling order is due under F.R.C.P. 16(d). Similarly, many federal district courts and state courts routinely require that the parties participate in a court-sponsored mediation or early neutral evaluation program soon after a lawsuit is filed.

There are some cases in which settlement discussions are unlikely to be fruitful until at least some discovery is completed. This depends upon the particular facts and circumstances of the dispute. For example, if a franchisee alleges fraud or "course of conduct" as a defense to a termination, initial discovery and some depositions may be necessary before discussing settlement.[2] In these sorts of cases, counsel for the parties should consider proposing a schedule that provides for limited discovery early in the process followed-up by settlement discussions or a mediation. However, if the termination is based on the franchisee's failure to make royalty payments or something else that is relatively straightforward, there is less need to engage in discovery before initiating settlement discussions.

Similarly, there may be some cases in which settlement discussions are unlikely to be productive until the parties have a general idea of what the other side is really seeking in damages. All too often, one or more of the parties and counsel have a distorted view as to what is at stake. Depending on the facts and circumstances, counsel should consider some form of early and preliminary damages analysis (by experts if necessary). Of course, it is not unheard of for experts to offer opinions regarding the parties' damages that are either far too low or too high, which could create unrealistic expectations and ultimately impede settlement discussions. Counsel should consider this, as well.

In representing a franchisor in a termination case, one alternative to litigation that counsel should almost always consider is the possibility of reinstating the franchise agreement for a fixed period of time in order to provide the franchisee with an opportunity to sell the business. This is perhaps the easiest and most efficient way of resolving a disputed termination. As a prerequisite to a conditional reinstatement of the franchise agreement, the franchisor typically requires that the franchisee completely cure any outstanding breaches and agree to "shape up and fly right" on a going forward basis. In turn, the franchisee will have a fixed period of time in order to sell his or her business. If a sale is not consummated during the agreed-on period of time, the franchise is automatically terminated.

Assuming that (i) there are potential buyers of the business; (ii) the franchisee is provided with sufficient time to find a buyer (who is acceptable to the franchisor); and (iii) the franchisee's expectations regarding the value of his or her business are realistic, this alternative may be as close as possible to the proverbial "win-win situation." The parties avoid the cost, distraction and uncertainties of litigation. The franchisor gets a replacement franchisee who will presumably be better (and hopefully no worse) than the terminated franchisee. The franchisee is provided with an opportunity to sell his or her

---

2 Unfortunately, pursuing even focused discovery may complicate the prospects for early settlement and create the proverbial Catch-22. One party (often the plaintiff) may feel that it needs discovery in order to be in a position to adequately analyze the possibility of settlement. The other party (often the defendant) does not want to spend the significant time and money engaged in discovery if the case can be settled.

business as a going franchised-concern and realize the value, if any, created by his or her efforts in growing the business.[3]

IV. MEDIATION AS A PATH TO SETTLEMENT

A. What Is It?

Mediation is a non-binding process in which a neutral third party (the mediator) attempts to assist the parties in resolving their dispute in a confidential setting. Unlike in litigation, there are no winners or losers in a mediation -- the parties either agree to a settlement or they do not. The mediator has no authority to impose a settlement on the parties, although he or she may offer opinions or make recommendations (sometimes very forcefully). The principle benefit of mediation is that it is a flexible process, which often allows the parties to structure a creative or business solution to a dispute that would otherwise be resolved in a black-and-white fashion through a trial or arbitration. As a result, a settlement can be structured in which there is usually something for everyone.

Mediations essentially fall into two broad categories -- evaluative and facilitative. In an evaluative mediation, the mediator will evaluate the facts and the law as they relate to the parties' claims. The mediator will advise the parties as to what he or she believes is the likely outcome of the dispute and will assist the parties in resolving their dispute by addressing the resulting implications. In a facilitative mediation, the mediator will essentially "facilitate" the parties' efforts to reach a settlement. The mediator is less focused on the likely outcome if the matter were to be pursued to a judgment and more focused on creating an environment in which the parties can collaborate on structuring a settlement. Most mediators incorporate both facilitative and evaluative techniques to attempt to settle the disputes.

B. Why You Should Do It

Mediation is not a panacea for all that ails the legal system. There are no guarantees, it is expensive and on occasion the mediator is not adequately prepared or misjudges the case.[4] However, if the parties and counsel are prepared to engage in the process in good faith, a mediation generally provides the best chance of resolving a dispute (especially early in the process).

The most obvious reason for parties to participate in a mediation is, of course, to try to settle the dispute and move on -- this is, after all, the ultimate objective of a mediation. The parties also have some control of the outcome in a mediation. This is very different from a lawsuit or arbitration in which the fate of the case is determined by others.

---

3 The value of a franchised-business is almost always more (and often much more) than the value of a non-franchised business or the liquidation value of the assets of the business.

4 A full day mediation (including the mediator's preparation time) can cost anywhere between $3,500 and $10,000. In addition, the client will incur the cost of counsel's time preparing for and participating in the mediation.

Experienced mediators have an uncanny ability to sift through the facts/law and understand what a case is really about (which is sometimes very different from what the parties and/or counsel believe the case is about). Mediators can provide a fresh, if not neutral, perspective regarding the relative strengths and weaknesses of the parties' claims, and may see things that the clients and counsel have not considered or have discounted. In addition, the client may be more receptive to the opinions of an experienced mediator regarding the shortcomings of its case.[5] It should not be forgotten, however, that even a wise and seasoned mediator's comments, suggestions and opinions may be tainted by his or her overriding goal of settling the parties' dispute. After all, that is the mediator's job.

Even if a mediation is unsuccessful, the parties and counsel will invariably learn something of value during the process. For example, the parties and counsel may learn new facts, develop a further understanding of the opposing counsel's theories and contentions, or get a "reality check" from the mediator.

Finally, the parties' submissions and comments during the mediation are confidential. Thus, the parties can discuss the facts, contentions, theories, etc. without the fear that what they say will be used against them in litigation. This typically causes the parties to engage in more forthright discussions. It should be noted, however, that evidence that is disclosed during mediation is not *ipso facto* inadmissible. Generally speaking, and consistent with F.R.E. 408, the evidence is not rendered inadmissible if it is otherwise discoverable.

The bottom line is that in most circumstances, there are many reasons to participate in a mediation and few, if any, reasons not to.

C. When To Do It

Determining when to engage in a mediation is essentially the same as determining when to initiate settlement discussions. Generally speaking, sooner is better than later. As previously noted, an increasing number of franchise agreements require that the parties participate in a mediation before filing a lawsuit or demand for arbitration. In these cases, the parties have no choice but to engage in an early mediation.

While an early mediation of a dispute is invariably to the ultimate benefit of the parties, a settlement often is not reached at that time. Unfortunately, many times at least one of the parties (and/or attorneys) are simply not yet ready to resolve the dispute. Nevertheless, counsel should still consider recommending to the client that it participate in an early mediation. There is still a good possibility that the case will settle. Moreover, even if a settlement is not reached at that time, the parties and counsel will have a better sense of the issues. Rome was not built in one day, and the settlement of a complicated, emotionally charged franchise termination case often takes time. The parties can build on

---

[5] The benefits of immediately resolving a dispute almost always outweigh any benefit to pursuing or continuing litigation. A "difficult client" (or attorney) is often more receptive to this message when it is conveyed by an experienced and neutral third party.

any agreements or positive developments at the mediation for purposes of either subsequent mediation(s) or settlement discussions.[6]

D. Selecting a Mediator/ADR Service Provider

Assuming that an alternative dispute resolution ("ADR") service provider is not mandated by the franchise agreement or Court, there are many choices. The largest and most well known ADR service providers are the American Arbitration Association ("AAA"), JAMS/Endispute ("JAMS") and the CPR Institute for Dispute Resolution ("CPR"). There are also many small firms and individuals that specialize in ADR (including mediation). Although there are some differences between these service providers (including cost), they all provide similar administrative functions and have many experienced mediators on their panels. [7]

The choice of the individual mediator is ultimately far more important than the choice of an ADR service provider. In choosing a mediator, there a number of things that counsel should consider.

First, counsel and the parties must decide if they want a mediator with experience in resolving franchise disputes or who is knowledgeable regarding franchising. All things being equal, a mediator with some knowledge of or experience in resolving franchise disputes is preferable, but the requisite skills and temperament best suited to the circumstances of the dispute are more important. Moreover, it may be difficult to find a mediator who is knowledgeable about franchising who is not clearly identified as having represented either the side of franchisors or franchisees.[8]

Second, the parties must decide if they want to use a former judge, lawyer or non-lawyer as a mediator. There are pros and cons for each, but there seems to be a general preference to use a former judge as the mediator. Former judges have a unique understanding of the risks and likely outcome of litigation given their time on the bench, and the parties may be more willing to consider the opinions and suggestions of a former judge than a lawyer or non-lawyer mediator (the "gray hair" factor). There are, however, many qualified and extremely effective mediators who are not former judges.

---

6 It is not unusual for a case to settle some time after a mediation or after a second (or sometimes third or fourth) mediation session.

7 CPR is somewhat different from the other ADR service providers in that it administers the National Franchise Mediation Program ("NFMP"), which, as the name suggests, focuses on mediating franchise disputes. Both AAA and JAMS also have a number of mediators with experience in franchise disputes.

8 On the other hand, settlements may be more easily promoted if the mediator has been identified with one side or the other -- *e.g.*, a franchisee may be more willing to listen to a franchisee lawyer. Therefore, in some circumstances, it may be in the franchisor's interest to appoint a franchisee-oriented mediator or vice versa.

Third, and most importantly, the parties must decide what "type" of mediator is best suited for the particular dispute and the parties involved.[9] As previously indicated, most mediators employ both evaluative and facilitative techniques. That being said, however, there are numerous differences in how individual mediators go about their job -- *i.e.,* obtaining a resolution of the dispute. Some of the principal differences include:

- More low-key vs. more aggressive
- More common sense/practical ("big picture") vs. more focused on the law and particulars
- More proactive vs. more reactive
- More creative vs. more of a money broker

The list of stylistic differences goes on. The point is that there are many approaches to mediation and there is no one right way. Litigation counsel's responsibility is to recommend a mediator whose experiences, temperament and approach to resolving disputes is most likely to lead to a settlement of the case at hand.

Depending on your adversary, selecting a mediator can be somewhat of a difficult process. One way of short-circuiting potential disputes regarding selecting a mediator is to ask opposing counsel to identify five or six potential mediators that he/she believes would be appropriate for the dispute. To the extent appropriate, counsel should recommend that the client accept one of the mediators suggested by the opposing counsel.

E. The Mediation Statement

In almost all cases, the mediator will request that the parties submit a brief of some sort in advance of the mediation. The mediation statement serves as a road map for the mediator and is an integral part of the mediation process. Thus, it is important to give serious thought as to what to say, how to say it and whether the mediation statement should be confidential (*i.e.,* for the mediator's eyes only) or exchanged with the opposing side.

To some extent, the content of the statement will usually depend on whether the statement will be exchanged and any other particular requirements of the mediator. Typically, the mediator will request (if not insist) that the statements be exchanged. Given the objective of a mediation -- to resolve the dispute, which necessarily requires agreement by the parties -- the better practice is to exchange mediation statements, whether or not required by the mediator. There are occasions, however, when counsel or the client are uncomfortable disclosing certain facts, theories and settlement strategies to the opposing side. On such occasions, almost all mediators will permit the parties to

---

9 In selecting a mediator, it is sometimes also necessary to consider opposing counsel and his or her approach to litigation, as well as how you anticipate he or she will interact with the mediator.

submit a short confidential mediation statement in addition to the statement that is exchanged.[10]

The content of the mediation statement is also to some extent driven by the number of pages in which to say it. It is becoming increasingly common for mediators to impose page limits on mediation statements. Depending on the facts and circumstances of a particular case, this may prove somewhat challenging. However, most attorneys generally seem to find a way of telling their client's story within any imposed page limits.

The mediation statement is usually the first opportunity for counsel to present the client's view of what happened and why to the mediator. Broadly speaking, the mediation statement serves as the vehicle to advance the themes, theories and contentions of the litigation. The mediation statement tells the parties' "story" and provides "ammunition" to assist the mediator in resolving the dispute.

More specifically, most mediation statements include: (i) a more or less detailed recitation of the relevant facts; (ii) a brief summary of the procedural background of the litigation (if relevant and appropriate); (iii) an analysis of the parties' claims and legal theories; (iv) a discussion of the relief requested by the parties (*e.g.*, damages, specific performance, etc.); (v) a summary of prior settlement discussions (if any); and (vi) either a settlement demand ("wish") or a general statement regarding the client's views towards settlement. As in any brief, the goal is to tell a coherent story and do justice to the facts/law, without drowning the mediator in a sea of surplus information. To this end, less is often more.[11]

Most mediation statements are also accompanied by documents and other evidence, but it is important not to overwhelm the mediator with too much information. Thus, counsel must identify which documents (usually relatively few in number) and deposition testimony (if any) are necessary to assist the mediator in understanding the key facts.

F. Preparing the Client for the Mediation

Most people, and clients in particular, do not like surprises. Given this, it is important that counsel generally explain the mediation process to the client, especially if the client has little or no experience with mediation. A pre-mediation meeting with the client should cover at least the following subjects: (i) who should participate in the mediation (to the extent this has not already been determined); (ii) what is likely to occur during the mediation process; (iii) the role of the client; (iv) the role of the mediator and what to expect from him or her; (v) the role of counsel; and (vi) settlement alternatives and strategies.

---

10 Confidential or sensitive issues can also be discussed with the mediator in private sessions during the mediation.

11 There is always an opportunity to provide additional information or flesh-out certain key facts during the mediation.

It is essential that the appropriate persons participate in the mediation. At a minimum, this means that a decision-maker with the authority to resolve the dispute must attend. Additionally, and depending on the circumstances, the person(s) most knowledgeable with respect to the central underlying facts regarding the termination should also attend. It is equally important to ensure that the appropriate person(s) from the opposing side also participate.

Although all mediations are different, they generally follow a similar general format. Typically, at the beginning of a mediation, the parties, counsel and the mediator will meet for a joint session, during which the attorneys may make a brief presentation. At the conclusion of the presentations, the mediator may ask questions and/or comment on certain matters. Thereafter, the parties and their respective attorneys will go to separate rooms. The mediator will then meet with one side and then the other (and go back and forth). This part of the mediation process is somewhat akin to shuttle diplomacy (à la Henry Kissinger). Sometimes, the parties and counsel are brought together for additional joint sessions to discuss factual issues and/or proposed settlement terms. Additionally, the mediator may meet separately with one or all of the attorneys. Mediators will honor information given in confidence if so requested, and it is sometimes helpful to do so in order to assist the mediator in dealing with the other side.

As a rule, the role of the client in a mediation is initially limited, but increases as the mediation progresses. This is especially the case if certain facts regarding the termination need additional explanation or clarification and/or as discussions develop regarding the principle terms of any potential settlement. Depending on the facts and circumstances of the case, significant client involvement may be very important and helpful. For example, to the extent credibility is a factor (and it often is in franchise terminations) or when a significance of an issue to a franchise system as a whole must be emphasized, the client is often the best person to address such matters.

All mediators are different and there are many different approaches to mediations. As previously noted, the mediator's only objective is to resolve the dispute and, to some extent, is not generally concerned with how he or she accomplishes this. Thus, the mediator may employ any number of strategies, including benign trickery. It is important to explain this to the client , as well as the fact that the mediator will inevitably express unvarnished and critical opinions regarding the parties' claims during the course of the mediation. It is necessary for the client to listen to these opinions, and also to understand that the mediator is almost certainly conveying similar "tough" messages to the other side -- this is simply part of the process.

Counsel's role is to present the client's story, be prepared to answer questions (some of which may be difficult), sometimes act as a quasi-psychiatrist for the client, and otherwise address issues as they come up. As the mediator goes back and forth during most mediations, there is ample opportunity to discuss issues, developments and settlement proposals throughout the day. It is counsel's job to guide and/or facilitate these discussions so that they are productive.

Needless to say, it is extremely important that counsel and client thoroughly think through and discuss settlement alternatives and negotiating strategies before the mediation begins. For example, what, if anything, is an appropriate initial settlement offer or demand? Is there a number above or below which the client cannot or will not go and, if so, why? Is the franchisor willing to consider "reinstating" the franchisee? Does the "terminated" franchisee want to rejoin or remain a part of the franchise system? Are there any potential non-cash components to a settlement that might take the place of money?

G. The Mediation

A mediation is an extremely fluid and constantly evolving event. Although the general procedural framework of a mediation is somewhat predictable, how it unfolds is not. Mediations can be tedious, plodding, fast-paced, nerve-wracking, distressing or all of these and more. For this reason, it is important that the parties and counsel remain flexible, receptive to suggestions and comments from the mediator (as well as the other side), and constructive.

V. CONCLUSION

For many clients, it is sometimes difficult to fully appreciate all of the benefits that come from settling a dispute instead of pursuing litigation. For a number of reasons, this seems to be particularly true in franchise terminations. The franchisor may believe that the integrity of the franchise system hangs in the balance, the franchisee's livelihood may be at stake, emotions are involved, and lines in the sand may be drawn. Counsel may also be guilty of failing to perceive the benefits of settlement. After all, trial attorneys are trained to attack and win. Settlement somehow seems less satisfying.

Despite all of this, in all but a small percentage of cases, settlement is unquestionably the best alternative.