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Rediscovering Mediation in the 21st century

TRANSFORMING THE LANDSCAPE OF RESOLVING FRANCHISE DISPUTES BY MEDIATION

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TRANSFORMING THE LANDSCAPE OF RESOLVING FRANCHISE DISPUTES BY MEDIATION

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I. Overview

Since the mid-1950's, franchising as a business model has become more frequently adopted in the U.S. by businesses seeking to expand sales of their products and services. With its growing popularity resulting in the creation of more and more relationships between franchisors and franchisees, it is not surprising that franchising has given rise to an increasing number of disputes.

This paper will provide a brief overview of why the franchise relationship provides a fertile ground for disputes and why mediation is a preferred mechanism for managing disputes in the franchise community. Lastly, one franchise mediation program, the Franchise Mediation Program administered by the International Institute for Conflict Prevention and Resolution (CPR), will be briefly described.

II. Why Disputes Arise in Franchising

As in the case of any business relationship, the relationship between franchisors and franchisees can give rise to disputes for many different reasons. Just as sellers and purchasers, and licensors and licensees can dispute, by way of example, quality issues or payment of royalties in the give and take of doing business together, so too can franchisors and franchisees face similar issues in the normal course of business. However, there are certain features of the franchise business model that may create an environment that increases the likelihood of conflict. Chief among them are the following:

A. Insufficient Due Diligence of Both Franchisees and Franchisors

Often times the seeds of conflict are planted even before the franchise relationship is formalized. Prospective franchisees are often eager to fulfill their dream of owning their own business and do not engage in sufficient due diligence before making a substantial financial commitment.[1] In their eagerness, they do not seek legal and accounting advice from professionals who have franchising experience and could counsel them in their review of key legal documents such as the

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It has been observed that prospective franchisees "are much like teenagers buying their first car—they really don't care what the fine print in the contract says, they are eager to get the keys and show their friends." Gardner, Ronald K. "What Representing a Franchisee Really Means." In F. Peter Phillips (ed.), *Managing Franchise Relationships Through Mediation*. New York: CPR Institute, 2008.

Franchise Disclosure Document (FDD)[2], as well as the proposed franchise agreement. Moreover, prospective buyers of franchises often do not use the information that is disclosed in the FDD. For example, under item 3 of the FDD, franchisors must disclose litigation that the franchisor has had with any of its franchisees. Similarly, item 20 of the FDD requires franchisors to identify all franchisees that have left the system within the last year. By neglecting to speak with such franchisees listed under either item, prospective buyers squander the opportunity to learn more about (1) problems experienced by existing or former franchisees, (2) whether such problems are system-wide, and (3) importantly, the franchisor's approach to handling conflict. Prospective franchisees need to know before cementing their relationship with the franchisor how the franchisor manages its relationships in the franchise system: whether in resolving disputes it takes a collaborative, mutual interest approach or whether it follows a more distributive, competitive approach.

Similarly, franchisors often have invested heavily in setting up a franchise program and are eager to roll out the brand and sell franchises. So they often fail to investigate the background and qualifications of prospective franchise owners. Even if franchisors are diligent in their review of prospective buyers, franchisors are precluded by the U.S. Federal Trade Commission (FTC) disclosure policy from reviewing the prospective buyer's business plan on the ground that any evaluation given to the prospective buyer would be a forward-looking statement and therefore prohibited by that policy from being made.[3]

B. Continuing Unrealistic Expectations of Franchisees

Even if due diligence has been properly conducted, the expectations of franchisees may continue to be unrealistic. Some franchisees desire to fulfill their dreams of owning their own business; others view the purchase of a franchise as a financial investment, with the primary objective being a return on that investment. In either case, once a franchise relationship is cemented, not all the marketing excitement generated by the promotional

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The Franchise Disclosure Document (FDD), formerly the Uniform Franchise Offering Circular (UFOC), is a legal document which must be presented to prospective buyers of franchises in the pre-sale disclosure process in the United States. The FDD provides extensive information about the franchisor and the franchise system which is intended to give prospective franchisees sufficient information to make educated decisions about their investments.

3

See Phillips, F.P. Interview with Kay Marie Ainsley, Appendix III. In F. Peter Phillips (ed.), *Managing Franchise Relationships Through Mediation*. New York: CPR Institute, 2008.

efforts of the franchisor will have dissipated and been replaced by a solid understanding of their rights and obligations as set forth in the franchise agreement.[4]

C. *Desire to Avenge Sense of Betrayal*

Often when a dispute arises between a franchisor and franchisee, the franchisee is feeling a deep sense of disappointment, indeed, even anger and betrayal. Many franchisees have invested their life savings and spent endless hours in building their franchise and promoting the brand. Moreover, the marketing efforts of franchisors generally position franchisees as a "partner" in the franchise system, a word having strong connotations of equality and collaboration. The implicit message that is received by franchisees is that the other "partner", that is, the franchisor, will assist them when there is a problem. So it is not surprising that when the support that they expected does not materialize and the "partnership" they were promised instead turns out be a relationship grounded in the legal realities of the franchise agreement, franchisees frequently experience feelings of anger and betrayal.

III. Why Mediation is an Effective Mechanism for Resolving Franchise Disputes

The very features of the franchise business model as described in II. above that create the conditions for fostering disputes in the first place also suggest that mediation would be an effective mechanism for resolving such disputes.[5] Although some reasons are more compelling for franchisees than for franchisors, both sides of a franchise dispute would benefit from mediation. Chief among them are the following:

A. *Cost Savings*

As is the case with business disputes outside the franchise context, costs savings is an oft-cited reason for using mediation rather than

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4 See Gardner, *supra* note 1.

5 Given the mutual interests of franchisors and franchisees as discussed in III. D. below, the facilitative (rather than the evaluative) style of mediation would be appropriate in facilitating a resolution that would satisfy those interests.

litigation.[6] It is well-known that U.S. litigation, with its extensive motion practice and U.S.-style discovery process, is long, arduous and costly.

High direct legal costs would be reason enough for parties in any business transaction to conclude that any alternative to litigation would be more appropriate, Implicit in the franchise model, however, are additional reasons why high costs are less tolerable especially for franchisees. For example, while franchisors normally have budgets that already include legal and administrative costs, most franchisees rarely include in their budgets dispute resolution costs. What this often means is that as litigation takes its course, the franchisee's operating cash flow is diverted to fund the litigation.

Mediation is relatively inexpensive and levels the playing field of resources available to both sides to resolve the dispute.[7] Typically the costs of the mediation are shared equally by the parties although some franchisors pay the entire amount of the administrative costs associated with having a provider of mediation services, such as the CPR, facilitate mediation with a franchisee.[8] Mediation also yields earlier results compared with litigation.

For these cost-related reasons, mediation is a preferred dispute resolution mechanism for handling franchise disputes.

B. Preservation of Business and Relationships

In addition to the direct costs discussed in III.A. above, there are intangible costs that are incurred, and disproportionately so by franchisees. Unlike most franchisors, franchisees typically do not have an in-house legal department that can manage the litigation process by minimizing the disruption to the focus of owners/managers on their business and limiting their involvement to only those legal matters in

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Many of the reasons to avoid litigation apply to arbitration as well.

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Purvin, Jr., R. "How Mediation Creates Value for Franchisees," In F. Peter Phillips (ed.), *Managing Franchise Relationships Through Mediation*. New York: CPR Institute, 2008.

8

E,g,, Wyndham Worldwide Corporation. McLester, Scott G. and Banks, Marcus A. "Mediation and Problem Solving in a Major Franchising Organization," In F. Peter Phillips (ed.), *Managing Franchise Relationships Through Mediation*. New York: CPR Institute, 2008.

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which their input is essential. Absent effective case management, during litigation, owners/managers typically become distracted from operating the franchise. This lack of attention to running the business can lead to delays in making operational decisions as well as a decline in customer service. Furthermore, as litigation between a franchisor and franchisee becomes public, as it usually does once a lawsuit is filed in a U.S. court, competitors in the franchisee's local market are put on notice that a window of opportunity may have been created to take market share. Ultimately, competitors can move into the franchisee's market as its business suffers.

Lastly, another intangible cost that is often overlooked in choosing a dispute resolution strategy is the emotional toll or cost of litigation that again falls disproportionately on franchisees. That emotional toll is magnified when coupled with the sense of anger and/or betrayal felt by many franchisees at the onset of the dispute. Moreover, the emotional cost is not confined to one individual because many franchises are either owned or managed jointly by two or more family members. These family relationships can be irreparably harmed in the course of litigation.

These intangible costs also suggest that mediation is a preferred dispute resolution mechanism for handling franchise disputes.

C. Business Perspective Prevails

Franchisees and franchisors are operated by business people who are better suited to viewing their differences as a business problem to be solved rather than as a legal dispute to be resolved. By maintaining this business perspective, they are able to retain control over the process by which the problem can be solved. They, not the judge, make the decisions regarding, and set the deadlines for, sharing information, obtaining expert opinions if and when necessary, and holding negotiations. Furthermore, franchisors and franchisees are not required to couch their grievances in terms of legal positions, that is, the claims and defenses that would be recognized by a court of law. This flexibility allows them to express the interests underlying their positions, as will be discussed further in III.D. below. Thus, unlike litigation where judicial decisions may be rendered by judges who have little understanding of the franchise business in the case, franchisors and their franchisees have an intimate knowledge of their business and are better able to make decisions that have a direct impact on them.

This flexibility also has particular significance in the franchise context because a franchisor and its franchisees are at heart a *system* composed of multiple entities, each interacting with or influencing the other entities.[9]

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A system is a set of interacting or interdependent entities forming an integrated whole. Central to understanding conflict in systems is that they are dynamical with each entity within the system interacting with one another in a nonlinear recursive process so that each entity influences the other. See Coleman, P.T. "Intractable Conflict."

Furthermore, whatever decision is rendered in a litigated dispute, it is typically applied to the parties to the dispute—who may not be the only franchisees with an interest in the outcome of the dispute. Mediation is effective for fostering a healthy system, one in which system-wide issues can be usefully addressed. And, in contrast to the public nature of a lawsuit filed in a U.S. court, mediation allows the parties to work out their differences in private without airing their "dirty laundry' in public and harming their brand to the detriment of *all* franchises.

An added benefit of mediation is that solutions to system-wide issues need not be confined to monetary damages that are typically awarded by U.S. courts; rather, solutions may be crafted that are broad, innovative and inclusive by involving all franchisees that are affected by the dispute. The value of the franchise brand can thereby be preserved and even enhanced without harming other franchisees in the system.

Thus, the flexibility of the mediation process makes it particularly suitable for harnessing the business perspective of the franchise system to drive the solution to the problem.

D. Satisfaction of Mutual Interests

Franchising is a unique business model that depends on the success of both franchisees and franchisors. In seeking success in the franchise context, both sides are highly interdependent because one cannot easily achieve success without the other also doing so. Inherent in the model is the common goal of both franchisors and franchisees of promoting the brand and profiting from it. In order to achieve that goal, both sides must recognize that it is in their mutual interest to preserve their relationship.

Mediation with its focus on understanding the interests of both sides in a dispute and finding ways to satisfy those interests would seem to be an especially suitable mechanism for leveraging the fundamental premise of the franchise business model and capitalizing on the common interests embedded in the model. Because mediation levels the playing field of resources available to both sides to resolve the dispute as discussed in III.A. above, franchisees are less likely to feel powerless as they often do when caught up in the litigation process. Because they are encouraged to participate in the mediation process, they can "tell their story" and express whatever feelings of anger and betrayal they may have toward the franchisor. The sense of empowerment thus created can often lead franchisees to *commit* to a solution which they have helped craft in contrast to being required to *comply* with a court order.

Commitment to, rather than compliance with, the outcome of a dispute is critical where the franchisor and franchisee will continue their

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relationship.[10] It influences the level of trust each has for the other which in turn determines (1) the degree to which compliance with a court order must be monitored, (2) the behavior of each towards the other going forward, and (3) the likelihood that new disputes will arise in the future because their interests were not satisfied.

E. Little or No Opportunity Cost

The likelihood of resolution is high in mediation of franchise disputes.[11] Even if no resolution is reached, after mediation the parties typically have a better understanding of the respective strengths and weaknesses of their cases. Moreover, the parties are not precluded from bringing a lawsuit at a later time.

IV. Franchise Mediation Program

The Franchise Mediation Program (the "Program") was established in 1994 by a group of nine franchisors.[12] This group created the Program to be independent of any franchisor/franchisee trade association in order to enhance the credibility of the Program. The Program has been endorsed by the International Franchise Association, the Asian American Hotel Owners Association, and the American Association of Franchisees and Dealers and has been used by other franchise trade associations.

The International Institute for Conflict Prevention & Resolution ("CPR") was selected as the administrator of the Program. CPR is a non-profit alliance of corporations and law firms established in 1979 to develop alternatives to the high costs of litigation.

10

For a discussion of the commitment/compliance models, see Ury, W.H., Brett, J. and Goldberg, S. *Getting Disputes Resolved.* San Francisco: Jossey-Bass, 1988.

11

It is reportedly close to 80% in disputes mediated under the Franchise Mediation Program described in IV. below.

12

These nine companies were Burger King, Dunkin Donuts, Hardee's, International Hotels/Holiday inns, Jiffy Lube, McDonald's, Pizza Hut, Southland, and Wendy's. Aronson, Morton H. "The Vision: How Mediation Can Help the Franchise Community." In F. Peter Phillips (ed.), *Managing Franchise Relationships Through Mediation*. New York: CPR Institute, 2008.

Detailed ground rules for resolving franchise disputes are set forth in the CPR Procedure for Resolution of Franchise Disputes (the "CPR Procedure"), a copy of which is attached hereto as an Appendix. To initiate a mediation pursuant to the CPR Procedure a Dispute Letter (a model Dispute Letter is attached as Appendix A to the CPR Procedure), is sent by either the franchisor or the franchisee to the other party and to CPR. If accepted by the recipient, the CPR Procedure requires the parties first to attempt to resolve their differences through negotiations between senior representatives without the intervention of a neutral third party. A majority of franchise disputes are resolved at this stage.

If CPR is notified within a specified time period that negotiations were not successful, and with the parties' express consent, CPR will provide the parties with names of five mediators located in the franchisee's region. If the parties cannot agree on a mediator from this list, they are asked to rank the candidates in order of preference and CPR will appoint the candidate with the lowest combined score.

Mediators are selected from the CPR Franchise Panel of Neutrals, who are located throughout the United States and qualified to mediate franchise disputes. Parties are free to select other mediators of their choosing, or to modify other aspects of the CPR Procedure if they both agree to do so. Parties seeking CPR's assistance in selecting a mediator are charged a fee – currently $1,500 – for CPR's services. Once the parties agree upon a mediator, CPR has no further financial interest in the proceeding and the parties retain the mediator directly. In the absence of an agreement otherwise providing, fees are divided equally between the parties.

Parties are also free to agree to use the CPR Procedure and to retain a mediator without referring to CPR or the Program in any way. The CPR Procedure and the CPR Franchise Panel of Neutrals are publicly available on the web at no cost, at www.FranchiseMediation.org.

Since the Program's inception, disputes have involved the following issues, among others:

- Impact/encroachment
- Under-reporting of sales or other financial violations of the franchise agreement
- Development rights of franchisee
- Termination of franchise
- Renewal of franchise
- Customer service

Since inception, a success rate of approximately 80 percent has been achieved in mediations in which the franchisee agreed to participate, with many more cases resolved without intervention of a mediator. Parties report that, as a

result of the Program, they are resolving substantially more disputes through informal negotiations without either party needing to report to formal mediation through the Program.

The Program is designed to encourage the self-administered resolution of disputes between franchisors and franchisees and therefore CPR does not have readily available data regarding the frequency with which the franchise community has adopted the CPR Procedure or selected a mediator from the CPR Franchise Panel of Neutrals. In addition to such data, information that would be of interest in understanding how the Program is used and measuring its success in the future include information about: (1) participation by industry, (2) party initiation (franchisor or franchisee), (3) party satisfaction as reflected in post-mediation surveys and as correlated with dispute resolution rates, industry participation, and party initiation, among other factors.

V. Conclusion

With the growth of franchising in the U.S., the conditions created by and the features inherent in the franchise business model create compelling reasons for using mediation as a preferred mechanism for resolving franchise disputes. The Program administered by CPR offers a procedure to facilitate more frequent use of mediation.

APPENDIX

CPR Procedure for Resolution of Franchise Disputes

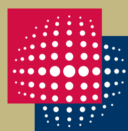
CPR Institute is the leading global **advocate** and **resource** for preventing and resolving business disputes.

The Franchise Mediation Program is only one part of an arsenal of materials that we have created specifically for the business community and its legal counsel. For a complete listing of such resources, please go to www.cpradr.org and click on Industries and Practice Groups.

CPR Institute offers a wide range of conflict prevention and management information and services in areas such as:

- Arbitration
- Banking and Financial Services
- Construction
- Employment
- Energy, Oil, and Gas
- Europe/International
- Information Technology
- Insurance/Reinsurance
- Mass Claims
- Patent and Trade Secret
- U.S./China Disputes

CPR's wealth of intellectual property and published material has educated and motivated general counsel and their firms around the world and helped to reduce the costs and risks associated with business-to-business conflict. CPR's proprietary panel of esteemed arbitrators and mediators, in conjunction with its self-administered arbitration rules and mediation procedures, have provided resolutions in thousands of cases, with billions of dollars at issue, worldwide.



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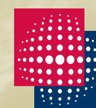
International Institute for Conflict Prevention & Resolution

The Franchise Mediation Program

A Conflict Management and Dispute Resolution Process for the Franchise Community

Endorsed by the International Franchise Association, the Asian American Hotel Owners Association, and the American Association of Franchisees & Dealers



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ABOUT CPR

The International Institute for Conflict Prevention & Resolution (formerly the CPR Institute for Dispute Resolution) is a membership-based nonprofit organization that promotes excellence and innovation in public and private dispute resolution, serving as a primary multinational resource for avoidance, management, and resolution of business-related disputes.

CPR Members – General counsel and senior lawyers of Fortune 500 organizations as well as partners in the top law firms around the world. It is a committed and active membership, diligently participating in CPR activities and serving on committees such as the Steering Committee of the Franchise Mediation Program.

The CPR 1,000 – CPR promulgates non-administered ADR processes, and makes available to its members a detailed roster of 1,000 of the highest quality arbitrators and mediators, with specialization in numerous practice areas and industries. If requested to assist parties to select an arbitrator or mediator for a particular dispute, we check not only the suitability, but the availability of all neutrals nominated, as well as disclose any conflicts of interest up front.

CPR Pledge Signers – More than 4,000 operating companies have committed to the Corporate Policy Statement on Alternatives to Litigation©. Moreover, more than 1,500 law firms have signed the CPR Law Firm Policy Statement on Alternatives to Litigation©, including 400 of the nation's 500 largest firms. This Pledge has been invaluable in bringing disputing parties to the negotiating table.

CPR's Commitment – CPR continues to be dedicated to providing effective, innovative ways of preventing and resolving disputes affecting business enterprises. We do so through leadership and advocacy, and by providing comprehensive resources such as information, training, consultation, neutrals, and networking opportunities for business, the judiciary, government, and other institutions.

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Franchise Mediation Program

A Conflict Management
and Dispute Resolution Process
for the Franchise Community.

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CPR Procedure for Resolution of Franchise Disputes

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FRANCHISE MEDIATION PROGRAM

I. Program Overview

The **Franchise Mediation Program** (the "Program"), was created in 1994 in collaboration with the International Institute for Conflict Prevention and Resolution ("CPR"). CPR is a non-profit alliance of corporations and law firms founded in 1979 to develop alternatives to the high costs of litigation.

The Program has been endorsed by the International Franchise Association, the Asian American Hotel Owners Association, and the American Association of Franchisees and Dealers, and has been used by many leading franchisors, franchisees and franchisee associations.

Detailed ground rules for resolving franchise disputes are set forth in the **CPR Procedure for Resolution of Franchise Disputes** (the "CPR Procedure"), which appears as the Appendix. The Procedure is initiated by a Dispute Letter, sent by either the franchisor or the franchisee to the other party and to CPR. If accepted by the recipient, the CPR Procedure requires the parties first to attempt to resolve their differences through negotiations between senior representatives without the intervention of a neutral third party. A majority of franchise disputes are resolved at this stage.

If CPR is notified within a specified time period that negotiations were not successful, and with the parties' express consent, CPR provides the parties with names of five mediators located in the franchisee's region. If the parties cannot agree on a mediator from this list, they are asked to rank the candidates in order of preference and CPR will appoint the candidate with the lowest combined score.

Mediators are selected from the CPR Franchise Panel of Neutrals, consisting of prominent neutrals located throughout the United States, who are well qualified to mediate franchise disputes. Parties are free to select other mediators of their choosing, or to modify other aspects of the CPR Procedure if they both agree to do so. Parties are also free to refer directly to the CPR Franchise Panel of Neutrals (available at www.FranchiseMediation.org) without reference to CPR for assistance.

Since the Program's inception, disputes have involved the following issues, among others:

- Impact/encroachment
- Under-reporting of sales or other financial violations of the franchise agreement
- Development rights of franchisee
- Termination of franchise
- Renewal of franchise
- Customer service

Since inception, a success rate of approximately 80 percent has been achieved in mediations in which the franchisee agreed to participate, with many more cases resolved without intervention of a mediator. Parties report that, as a result of the Program, they are resolving substantially more disputes through informal negotiations without either party needing to report to formal mediation through the Program.

II. The Mediation Process

Mediation is a form of negotiation facilitated by a neutral third party. Mediation – facilitated negotiation — should not be confused with binding arbitration or private judging. In mediation a third party (the mediator) meets with the parties in an effort to assist them in reaching an agreement. By contrast, an arbitrator holds formal hearings and hears evidence. The mediator has no power to impose an agreement; the arbitrator is empowered to issue an award enforceable in court.

Mediation is voluntary, nonbinding and confidential. It is also highly flexible and informal. Typically, disputes that are mediated are concluded expeditiously at moderate cost compared to disputes that are arbitrated or litigated. The subject matter of a commercial mediation can be complex or straightforward. The number of parties can be few or many. The process is far less adversarial than litigation or arbitration, and therefore less disruptive to ongoing business relationships. Because other options are not foreclosed if an agreement is not reached in the mediation, entering into a mediation process is essentially without risk.

In fact, most mediations result in settlement. With the assistance of a skillful mediator, parties to a great variety of business disputes usually bridge wide gaps in their positions and often not merely settle a dispute, but develop creative, mutually advantageous business solutions. The principle pre-condition is that the parties share a genuine desire to resolve the dispute promptly in a commercially rational manner.

Mediation is business-driven and result-oriented. Each party is given an opportunity to state its legal position and its views regarding the rights and wrongs of past conduct. However, the primary focus of the mediation process is on solving problems that hinder future dealings, and developing a solution that commercially benefits all parties.

One of the important attributes of mediation is that each party can disclose to the mediator — in confidence — sensitive information or commercial interests that the party would not willingly disclose to the other party in conventional direct settlement negotiations. With such information from both parties, a mediator can often identify shared interests and business alternatives of which the parties themselves may be unaware — and which conventional negotiation could not reveal, despite the skill of the negotiators.

Parties to a dispute who agree to engage in mediation frequently resolve their dispute even before the mediation process itself has begun. Indeed, this is especially true of disputes submitted to the Franchise Mediation Program.

III. The Role of the Mediator

The mediator, skilled in sophisticated communication and negotiation techniques, can facilitate negotiations in several important ways:

- By improving the effectiveness of communications among the parties;
- By helping each party to clarify its own underlying business interests and to understand the business interests of the other party;
- By probing the strengths and weaknesses of each party's legal positions privately and without antagonism;
- By exploring the commercial consequences of failing to reach agreement;
- By assisting the parties to generate options for a mutually advantageous resolution.

By interpreting the positions and interests of the parties in an adroit way, the mediator can actively add value to the resolution process, promoting understanding and facilitating the identification and exchange of information necessary to reach a business-driven resolution. Although the mediator does not make decisions, he or she may be requested by the parties to evaluate legal or factual positions of the parties, or to propose a "final and best solution," within the boundaries of confidentiality that the parties themselves have agreed upon.

On a practical level, mediators serving pursuant to the CPR Procedure also facilitate the administration of the process by scheduling, arranging, and chairing the meetings, and setting the agenda. This arrangement saves the parties the cost of mediations arranged through a provider organization.

IV. The Role of the Parties and Counsel

In a mediation, business executives or managers explain their legal positions and their business interests directly to their counterparts, rather than communicating indirectly through surrogates. Businesspeople have the best understanding of their company's interests and are best positioned to identify and evaluate creative, business-oriented solutions.

Counsel to the parties also have important roles to play in mediation:

- Counseling on the advisability of, and alternatives to, a negotiated resolution;
- Explaining, and persuading clients to agree to, the mediation process;
- Educating the client representative about legal issues;
- Drafting statements for submission to the mediator;
- Preparing for an effective client presentation;
- Serving as a "sounding board" for the client during mediation, and discussing legal and business options as the mediation progresses;
- Assuring confidentiality of the proceeding and protecting the client's litigation position;
- Drafting the settlement agreement and assuring its enforceability.

V. A Typical Mediation

A mediation conducted pursuant to the CPR Procedure progresses through the following stages:

- **Preparing for Mediation**. To educate the mediator about the dispute, the parties may agree to submit key information and concise statements shortly before the first mediation session. The CPR Procedure provides that these materials are returned to the producing party at the conclusion of the process, with no copies retained.
- **Location.** The mediation is conducted at the offices of the mediator, or elsewhere as the parties and the mediator may agree, and in the geographic region in which the franchisee is located.
- **Initial Joint Session**. At the initial joint session, the mediator usually explains the mediation process, hears short presentations from each side, and asks open-ended questions to clarify the parties' legal positions and underlying business interests.

- **Initial Separate Sessions (or Caucuses)**. The mediator often then meets privately with each party to explore in a confidential setting each party's underlying interests and concerns, both legal and commercial, and to help the parties to determine their priorities.
- **Subsequent Separate and Joint Sessions**. At this stage, the mediator may help the parties to generate options, evaluate alternatives realistically, and consider the consequences of not settling.
- **Completing the Process**. If the parties reach agreement, the mediator will ensure that the terms of the agreement are accurately recorded. If complete settlement is not possible, the mediator will seek partial agreement, and help the parties to consider options for the remaining issues.

The length of a mediation varies with the complexity of the dispute. Mediation of a typical franchise dispute may take 10-15 hours and involve two or three sessions.

VI. How to Participate in the Program

Parties may agree to use the CPR Procedure and to retain a mediator without referring to CPR or the Program in any way. The CPR Procedure and the CPR Panel of Franchise Neutrals are publicly available on the web at no cost, at www.FranchiseMediation.org. Parties seeking CPR's assistance in selecting a mediator incur a nominal fee – currently $1,500 – for CPR's services. Once the parties agree upon a mediator, CPR has no further financial interest in the proceeding and the parties retain the mediator directly. Most CPR Panelists' rates are in t he range of $250-$550 per hour, depending significantly on the location and experience of the mediator. In the absence of an agreement otherwise providing, fees are divided equally between the parties.

For more information, please refer to the program website, www.FranchiseMediation.org, or contact the Franchise Administrator, International Institute for Conflict Prevention and Resolution, 575 Lexington Avenue, New York, NY 10022, Tel. (212) 949-6490.

APPENDIX

CPR PROCEDURE FOR RESOLUTION OF FRANCHISE DISPUTES

Introduction

Disputes between franchisors and franchisees continue to arise. On occasion, those disputes have resulted in mutually destructive litigation. This Procedure is designed to encourage more effective and efficient management of those disputes.

A. Reasons To Initiate A Resolution Procedure

If either party to a franchisee/franchisor dispute believes the matter has not been satisfactorily resolved in the normal course of business, that party can initiate a Resolution Procedure under these rules. Participation is voluntary.

B. Initiating A Resolution Procedure

A Resolution Procedure is initiated by a Dispute Letter from the initiating party addressed to the other party and to CPR. (A Model Dispute Letter is attached as Appendix A.)

Within 10 business days after receiving the Dispute Letter, senior representatives of the initiating party and the recipient party will confer concerning the issues. The parties will negotiate in good faith in an attempt to resolve the issues.

C. Commencing Mediation

Parties who have submitted a Dispute Letter, and who resolve all issues in their dispute through negotiation, are asked to promptly advise CPR. Parties who have not resolved all issues in their dispute through negotiation, and who wish to proceed with this Resolution Procedure, should either agree upon a mediator or promptly notify CPR that they wish CPR to begin selecting candidates to mediate the dispute, as provided below.

D. Selecting The Mediator

Within ten (10) business days of receiving notice from both parties that it should begin the selection process, CPR will submit to the parties the names of no fewer than five (5) candidates from the region in which the franchisee is located, with their resumes, hourly rates and disclosures as provided below. If the parties are unable to agree on a candidate from the list within five (5) business days following receipt of the list, each party will, within ten (10) business days following receipt of the list, send to CPR a list of candidates ranked from

number 1 to number 5 in descending order of preference. The candidate with the lowest combined score will be appointed as the mediator by CPR.

Every mediator candidate will promptly disclose to CPR, and CPR will convey to the parties, any circumstances known to him or her which would cause reasonable doubt regarding the candidate's independence, impartiality or neutrality,[1] including any relationship of the individual with franchising or the franchise industry during the past five years. If such circumstances are disclosed, the individual will not serve, unless both parties agree.

E. CPR Fee; Mediator Expense

Parties are not obligated to seek CPR's assistance in selecting a mediator. Parties who do seek the assistance of CPR in selecting a mediator agree to compensate CPR $1,500 (plus reasonable and actual out-of-pocket expenses) as an administrative fee for its services in selecting the mediator. The mediator's compensation rate will be determined before appointment. The parties will each pay 50% of these fees and any other costs of the process.

F. Ground Rules

The ground rules of the mediation will be:

1. The process is non-binding.

2. The mediator will be independent, impartial and neutral.

3. The parties will cooperate fully with the mediator.

4. The mediator controls the procedural aspects of the mediation.

   (a) The mediator may meet and communicate separately with each party.

   (b) The mediator may hold an initial joint meeting with both parties and then decide when to hold joint and/or separate meetings. The mediator will fix the time, place and agenda for each session. There will be no record of any meeting. Formal rules of evidence will not apply.

5. At least one representative of each party who is active in the mediation will be authorized to negotiate a resolution of the dispute.

6. The process will be conducted expeditiously. Each representative will make every effort to be available for meetings.

7. The mediator will not transmit information received from any party to another party, or to any third party, unless authorized to do so by the party producing the information.

8. The entire process is confidential. Unless otherwise agreed to in writing, the parties and the mediator will not disclose to any other person any fact regarding the mediation process, any statements made or information disclosed in the course of the mediation, the Neutral Evaluation described in paragraph J below, or the terms of a proposed resolution. The entire Resolution Procedure shall be treated as an offer to compromise under the Federal Rules of Evidence and applicable rules of evidence of any applicable jurisdiction and inadmissible in any subsequent court or administrative proceeding to the fullest extent permissible.

9. In the absence of an agreement to the contrary, mediation proceedings under this Procedure shall have no impact on the parties' legal rights. Parties to any proceeding hereunder do not waive, but rather retain, every claim, defense, right or privilege under applicable procedural law or rule, and may initiate and judicial or administrative proceeding that they deem in their best interest.

10. The mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the mediation.

11. The mediator, if a lawyer, may freely express views to the parties on any legal issues underlying the dispute, without establishing an attorney/client relationship.

12. The mediator may obtain expert or administrative assistance subject to the agreement, and at the expense, of the parties.

13. Unless the parties agree otherwise, the procedure will be deemed terminated without any agreed upon resolution if:

    (a) After 60 calendar days from the date the Dispute Letter is received by CPR, a written resolution has not been agreed upon by the parties and a party has given written notice to the mediator of its intention to withdraw and the mediator has provided the parties with the Neutral Evaluation described in paragraph J, below, or

    (b) The mediator concludes that further efforts would not be useful and has provided the parties with the Neutral Evaluation described in paragraph J, below, or

[1] **Independence** means the absence of any objective link (personal or business relationship) between the mediator and any of the parties. **Impartiality** refers to a subjective attitude of the mediator, who should not favor one party over another. **Neutrality** refers to the position of the mediator, who should have no direct interest in the outcome of the mediation.

(c) A party essential to the resolution of the dispute gives written notice of an intent to withdraw from the procedure.

14. Neither CPR nor the mediator shall be liable for any act or omission in connection with the mediation.

15. At the beginning of the mediation, each party will agree in writing to all provisions of this procedure, as modified by agreement of the parties.

G. Presentation To The Mediator

At least five (5) business days before the first mediation conference, each party will deliver to the mediator a statement summarizing the dispute's background and such other information it deems necessary to familiarize the mediator with the dispute. The parties will submit jointly their franchise agreement and any other materials they agree upon. The mediator may request that each party provide clarification and additional information, and present its case informally to the mediator at the initial joint meeting or at later separate meetings.

The parties are encouraged to exchange all information submitted to the mediator to further each party's understanding of the other's approach to resolution of the dispute. Except as the parties otherwise agree, the mediator shall keep confidential any information submitted. At the conclusion of the mediation, the mediator will return to each party all written materials which that party provided to the mediator, without retaining copies.

H. Exchange Of Information

If either party has a substantial need for documents or other material in the possession of the other party, the parties will attempt to agree on the exchange of requested documents or other material. Should they fail to agree, either party may request a joint meeting with the mediator to assist the parties in reaching agreement. At the conclusion of the mediation process, the recipient of documents will return them to the originating party without retaining copies.

I. Negotiation Of Terms

The mediator may promote a resolution in any manner the mediator believes is appropriate. The parties are expected to initiate proposals for resolution. If the parties fail to develop mutually acceptable settlement terms, before terminating the procedure the mediator may submit to the parties a final settlement proposal which the mediator considers fair and equitable, **if both** (a) all parties request such a proposal **and** (b) the mediator determines that he or she is professionally qualified to do so. The parties will carefully consider the mediator's proposal and, at the mediator's request, discuss the proposal with the mediator. If any party does not accept the final proposal, it will advise the mediator of the reasons why the proposal is unacceptable.

J. Neutral Evaluation

If the mediator concludes that mediation techniques have been exhausted and the parties have not reached agreement, or if either party has given written notice of its intent to withdraw, the mediator may give both parties a written Neutral Evaluation of the issues, including the mediator's opinion of the likely outcome of the dispute at arbitration or trial, **if both** (a) all parties request such a proposal **and** (b) the mediator determines that he or she is professionally qualified to do so. (If a party has given written notice of intent to withdraw pursuant to Section F(13)(c) above, the Neutral Evaluation shall be given to the parties within 10 business days of the mediator's receipt of the notice and the parties' consent thereto.) Shortly following delivery of the evaluation, the mediator will call another mediation conference, in the hope that the mediator's evaluation will lead to a resumption of negotiations.

K. Resolution

If a resolution is reached, the mediator shall ensure that a written memorandum is prepared and initialed by all parties, incorporating all terms, including mutual general releases from all liability relating to the subject matter of the dispute. A formal settlement agreement shall be promptly circulated and executed.

APPENDIX A

Model Dispute Letter

[Name and address of franchisee/franchisor]
Attention [Officer of franchisee/franchisor]

International Institute for Conflict Prevention and Resolution

575 Lexington Avenue

New York, NY 10022

Attention: Franchise Mediation Program

Dear Sirs:

I request commencement of a *CPR Procedure For Resolution of Franchise Disputes* to address the following issue: [brief description of the issue or issues].

I understand I will be contacted by a senior representative of [franchisee/franchisor] within 10 business days after this letter is received by [franchisee/franchisor]. If the issue is not resolved by direct negotiation between the parties, and if all parties agree, I understand that CPR will be instructed to prepare a list of mediator candidates, at the parties' expense.

I [or a senior representative] will personally participate in any negotiation or mediation conference.

Sincerely,

[Franchisee/Franchisor]

CPR PRINCIPLES

CPR brings a distinct viewpoint to the field of domestic and international dispute resolution. Its tenets:

1. Most disputes are best resolved privately and by agreement.

2. Principals should play a key role in dispute resolution and should approach a dispute as a problem to be solved, not a contest to be won.

3. A skilled and respected neutral third party can play a critical role in bringing about agreement.

4. Efforts should first be made to reach agreement by unaided negotiation.

5. If such efforts are unsuccessful, resolution by a non-adjudicative procedure, such as mediation, should next be pursued. These procedures remain available even while litigation or arbitration is pending.

6. If adjudication by a neutral third party is required, a well-conducted arbitration proceeding usually is preferable to litigation.

7. During an arbitration proceeding, the door to settlement should remain open. Arbitrators may suggest that the parties explore settlement, employing a mediator if appropriate.

8. Arbitration proceedings often can be conducted efficiently by the Arbitral Tribunal without administration by a neutral organization, or limiting the role of such an organization to assistance in arbitrator selection or ruling on challenges to arbitrators, if necessary.

The Franchise Mediation Program reflects these principles.