WHAT CAN BE DONE TO ENFORCE MEDIATION AGREEMENTS?

Most states have legislation dealing with enforcement of mediation, but there still are some gray areas that require counsel's ingenuity

BY BRUCE R. PARKER

AS LITIGATION delays and costs increase, defense counsel will receive more requests from clients to consider mediation as an alternative. In order to give clients competent advice, counsel must appreciate the potential disadvantages, as well as advantages, of mediation. One potential disadvantage is the uncertainty over whether a mediation agreement—that is, a written or oral agreement reached following mediation—is legally enforceable.

Although most states have enacted legislation requiring mediation in specific areas of the law, few have mediation legislation on construction disputes,[1] leaving mediation agreements resolving construction disputes to be determined by common law contract principles.

Although there may be situations in which the enforceability of a mediation agreement would not be important to a client, one could assume that most clients would prefer not to deplete their resources to achieve an agreement that is not enforceable. Some commentators argue, however, that the primary attributes of mediation are incompatible with enforcing mediation agreements by either statute or common law.[2] To the extent that this argument serves as a defense to an effort to enforce a mediation agreement, it is briefly discussed later. It is beyond the scope of this article to analyze whether mediation agreements ought to be enforceable as a matter of public policy.

Bruce R. Parker is a partner at Goodell, Devries, Leech & Gray in Baltimore. He was educated at Johns Hopkins University (B.A. 1975) and Catholic University of America (J.D. 1978). *The author expresses his appreciation to Richard Ames-Ledbetter and Mitch Neuhauser for their assistance in the preparation of this article.*

ENFORCING MEDIATION AGREEMENTS IN ABSENCE OF LEGISLATION

A. Written Mediation Agreements

1. Substituted Contract or Executory Accord?

In the absence of legislation, one must look to common law contract principles as authority to enforce a mediation agreement. While no case has been found in which a court has enforced a mediation agreement in the absence of legislation,[3] there is a substantial body of law with respect to the enforceability of settlement agreements. In most respects, a mediation agreement is similar to a settlement agreement resolving an adversarial proceeding, and an analysis of the law regarding the enforcement of settlement agreements will offer some insights.

Distinguishing a substituted contract from an executory accord is important because each affords different enforcement rights. A substituted contract is also referred to as a novation,[4] and is "accepted by the obligee in satisfaction of the original duty and thereby discharges it."[5] In contrast, an executory accord is an "agree-

1. ABA Standing Comm. on Dispute Resolution, *Legislation on Dispute Resolution* 7-71 (1990) [hereinafter ABA, Legislation] contains a complete listing of state alternative dispute resolution statutes.

2. *See* Steven Weller, Court Enforcement of Mediated Agreements: Should Contract Law Be Applied? JUDGES' J. 13 (Winter 1992).

3. *But see* the discussion, *infra*, of Verne R. Houghton Ins. Agency v. Orr Drywall Co., 470 N.W.2d 39 (Iowa 1991). *See also* Wright v. Brockett, 571 N.Y.S.2d 660 (N.Y. Sup.Ct. Bronx Cty. 1991), as an example of statutory enforcement of mediation agreements.

4. Cathleen Cover Payne, *Enforceability of Mediated Agreements*, 1 OHIO ST. J. ON DISP. RESOL. 385, 387 n.13 (1986) [hereinafter Payne].

5. RESTATEMENT (SECOND) OF CONTRACTS § 279 cmt. a (1981) [hereinafter RESTATEMENT]. *See also* 6 CORBIN ON CONTRACTS § 1269 (1962) [hereinafter CORBIN]; Payne, *supra* note 4, at 386-87 n.13.

ment that an existing claim shall be discharged in the future by the rendition of a substituted performance."[6] Unlike a substituted contract, it does not discharge the underlying claim immediately. Instead, the underlying claim is discharged when the parties complete the performances promised in the mediation agreement.[7]

This distinction becomes important if one party breaches the mediation agreement. If the agreement is a substituted contract, the breach does not revive the discharged claim, and all the non-breaching party's rights are controlled by the new agreement. If the agreement is an executory accord, the original claim is suspended until performance of the agreement is completed. If one party breaches the agreement, the non-breaching party is permitted to enforce either the original contract or any rights under the settlement agreement.[8] Section 281 of the Restatement (Second) of Contracts states, "Breach of the accord by the obligee does not discharge the original duty, but the obligor may maintain a suit for specific performance of the accord, in addition to any claim for damages for partial breach."

Before beginning mediation, a party should consider whether its interests are best served by negotiating a substituted contract or an executory accord. If this issue is not considered until after the mediation is "completed," a party may find it impossible, as a practical matter, to re-open the mediation to push for a specific type of agreement it would have preferred. Construction-related disputes present a variety of situations, some of which are more suited for one type of settlement agreement than the other. For example, a party that believes its adversary committed wrongs justifying punitive damages may want to keep that specter alive as an additional incentive for the opposing party to perform an executory agreement fully.

Some counsel suggest that, at least in those situations in which the parties have an ongoing relationship, a substituted contract is more consistent with the goals of mediation, which arguably works best when parties are interdependent and the self-interests of both are promoted by restructuring the interdependent relationship. If a dispute arises in the early stages of what is expected to be a long construction project, the parties are arguably better served by having their relationship restructured entirely through the use of a substituted contract. With a substituted contract, parties can get relief from bad business decisions or unanticipated economic factors, while at the same time forging a stronger relationship with each other.

Unless the parties' intent is clearly articulated in the agreement, courts often have difficulty distinguishing a substituted contract from an executory accord.[9] In *Elliott v. Whitney*[10] the parties acknowledged their previous contractual arrangements in their settlement agreement and stated, "Each of the parties hereby releases and absolves the other from any and all liability arising out of any business association or agreement heretofore made between the parties." The Kansas Supreme Court concluded that this language clearly reflected the parties' intent to extinguish the old contract on execution of the settlement agreement.

Generally, if the agreement does not release all prior claims expressly and immediately, courts are unlikely to construe it as a substituted contract. For example, in *Johnson v. Utile*[11] the Nevada Supreme Court found an executory accord where the nonbreaching party expressly released its prior claims for damages resulting from the defendant's failure to deliver a functioning well, on the condition that the defendant drill a second well. The promise of future performance rendered the agreement an executory accord.

In *Savelich Logging Co. v. Preston Mill Co.*[12] a logging company inadvertently cut timber on land owned by Oregon, thereby incurring liability for timber trespass. The parties executed an agreement pursuant to which the logging company was to cut timber on state land and pay the state double the value of the timber.

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6. CORBIN § 1269.
7. RESTATEMENT § 281. *See, e.g.*, Clark v. Elza, 406 A.2d 922 (Md. 1979).
8. Clark, 406 A.2d at 925-26.
9. Payne, *supra* note 4, at 385, 387 n.13; Clark, 406 A.2d at 926; Winkleman v. Oregon-Washington Plywood Co., 399 P.2d 402 (Or. 1965) (language "canceling" prior agreement and applying payments as "settlement" sufficient to create substituted contract); Bradshaw v. Burningham, 671 P.2d 196 (Utah 1983) (specific language modifying existing contract constituted substituted contract); Fidelity Deposit Co. of Maryland Inc. v. Olney Assoc., 530 A.2d 1 (Md.App. 1987) (substituted contract found where settlement agreement had language specifically releasing and acquitting all prior claims and debts).
10. 524 P.2d 699 (Kan. 1974).
11. 472 P.2d 335 (Nev. 1970).
12. 509 P.2d 1179 (Or. 1973).

When the company failed to pay, the state sued for damages based on the original trespass claim. The court rejected the company's argument that the settlement agreement was a substituted contract that extinguished rights or liabilities that existed for the trespass claim, noting that the settlement agreement failed to contain an express provision as to when the timber trespass claim was to be released.[13]

One claiming under a substituted contract has the burden of proving the parties intended an immediate release of prior claims.[14] In the absence of evidence demonstrating that the new agreement was intended to serve as a substituted contract, courts presume that the parties intended to release their existing claims and liability only on the performance of the new agreement.[15]

Another issue counsel should consider before deciding on which type of agreement to execute is the effect of the statute of limitations. When parties enter into an executory agreement, the original duty is suspended until the parties perform, thereby discharging the original duty, or one party breaches the accord, thereby lifting the suspension. Suspension acts to toll the statute of limitations on the original claim. Only on a breach of the executory accord will the statute of limitations resume running for the original claim.

If a party believes that its claim may be barred by a limitations defense, it probably should attempt to negotiate a substituted contract. Limitations will not begin to run on the substituted contract until there has been a breach. Conversely, if the limitations period on the underlying claim is longer than the period would be for a substituted contract, a party might be better off with an executory agreement.

2. Facts To Be Proved

A settlement agreement is enforceable if it satisfies the requirements of contract formation.[16] Similarly, if a party seeks to enforce a mediation agreement, it must prove that all elements of an enforceable contract exist, including proof of the parties' mutual assent to all material terms, consideration and legal capacity of the parties to bind themselves.

As to mutual assent, the plaintiff must prove that the parties voluntarily agreed to be bound to all material terms of the proposed contract.[17] To varying degrees, moral and economic pressures exist in most situations and, consequently, courts will not void a contract for lack of consent unless the pressure constitutes legal duress or undue influence. Courts apply an objective standard in determining whether there was mutual acceptance of terms, and evidence of acceptance includes verbal expression, conduct and even silence when there is a duty otherwise to speak.[18]

Some commentators argue that participation in mediation and execution of a mediation agreement are sufficient evidence of their mutual intent to be bound, even in the absence of specific language of intent in the agreement.[19] A countervailing argument is that without legislative enforcement, parties are free to argue that the mediation agreement was never intended to have legal effect but rather was intended only to reflect their good faith efforts to restructure their relationship.

A party that contends it participated in mediation because it was voluntary and that it never intended the mediation agreement to be legally enforceable can find support for that position from those who argue that mediation agreements ought not to be enforceable. One argument opposing enforcement is that requiring parties to negotiate whether an agreement will be enforceable distracts them from resolving the primary issues in dispute. On a more

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13. *See also* Beechwood Commons Condominium Ass'n v. Beechwood Commons Assocs. Ltd., 580 A.2d 1 (Pa. Super. 1990); Worldwide Lease Inc. v. Woodworth, 728 P.2d 769 (Idaho 1986) (executory accord found where future performance formed basis for compromise agreement); Clark, 406 A.2d 922 (executory accord where release of claims conditional on future performance).

14. *See* Washington v. Reed, 504 P.2d 745, 747 (Or. 1972).

15. Clark, 406 A.2d at 926 (unless there is clear evidence to contrary, agreement to discharge pre-existing claim will be regarded as executory accord).

16. *See* Spaulding v. Cahill, 505 A.2d 1186, 1187 (Vt. 1985); Dowsett v. Cashman, 625 P.2d 1064, 1068 (Haw.App. 1981); Munna v. Mangano, 404 So.2d 1008, 1010 (La.App. 1981); Don L. Tullis & Assoc. v. Benge, 473 So.2d 1384, 1386 (Fla.App. 1985); Heese Produce Co. v. Lueders, 443 N.W.2d 278, 282 (Neb. 1989).

17. *See, e.g.*, Cross v. District Court, 643 P.2d 39, 41 (Colo. 1982); Munna, 404 So.2d at 1010.

18. Rosenberg v. Townsend, Rosenberg & Young, 376 N.W.2d 434 (Minn.App. 1985).

19. Robert P. Burns, *The Enforceability of Mediated Agreements: An Essay on Legitimation and Process Integrity*, 2 OHIO ST. J. ON DISP. RESOL. 93, 112 (1986) [hereinafter Burns].

fundamental level, others suggest that litigation to enforce is inconsistent with the essence of mediation. For example, Professor Lon Fuller asserts that the central quality of mediation is "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will direct their attitudes and dispositions toward one another."[20] He argues that mediation works best when the parties free themselves from the shackles of legal rules and look to trust and understanding in order to solve their problems.

A case raising similar issues is *Wright v. Brockett*,[21] an ejectment action in New York state court in which the plaintiff moved for an order seeking to have the defendant vacate her apartment immediately pursuant to a written "mediation-arbitration" of a dispute that originated in the criminal court. The defendant-tenant had filed a criminal complaint alleging that the plaintiff-landlord had recklessly endangered her life and had otherwise harassed her. The matter was referred to the local dispute resolution center.

The parties were successful in reaching an agreement, which was labelled an "award" and was signed by the parties and the "mediator-arbitrator." Under that agreement, the defendant agreed to vacate the apartment on a specified date, but she contended that mediation was not a competent forum to resolve the dispute because she was unrepresented, the mediator had failed to explain her rights to her and the agreement was not supported by adequate consideration.

The court noted that under New York law, if a dispute is submitted to ADR and the parties agree in writing to consent to arbitration, which produces an award, the award is enforceable. The court held, however, that the mediation did not comply with the requirements of an arbitration under New York law and the agreement could not be enforced as an arbitration award.

The court then analyzed whether the award was enforceable as a settlement agreement. It noted that under New York law an agreement reached through mediation mandated by the housing court must be presented to the court for its review with the parties, and it concluded that since n agreement made in open court was conditioned on review by the court, it was "contrary to sound public policy" for the court to give greater weight to the mediation agreement. The court ruled that the mediation award was not enforceable on summary judgment but that a full evidentiary hearing was necessary in order to determine whether the mediation was free of coercion.

After establishing the parties' mutual assent to be bound, a plaintiff must show an exchange of adequate consideration. Section 74 of the Restatement provides that forbearance to assert a valid claim or defense made in good faith is adequate consideration to support a contract. Courts have followed the Restatement in upholding settlement agreements where the underlying claim may have been invalid, as long as the party forbearing to sue did so in good faith.[22]

Finally, the party seeking to enforce a mediation agreement must show that it performed or that it had a valid excuse for non-performance, and a material breach by the party seeking to enforce the mediation agreement discharges the other party's performance.[23] If the breach committed by the party seeking to enforce a mediation agreement was not material, however, it will not preclude a court from awarding damages or equitable relief.[24]

B. Oral Mediation Agreements

1. Enforceability

Courts view settlement agreements as contracts enforceable under common law principles of contract law. For the majority of jurisdictions, this principle is applicable to both written and oral agreements.[25] As long as there is mutual assent as to all material terms and ad-

20. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 326 (1971).

21. 571 N.Y.S.2d 660 (N.Y. Sup.Ct. Bronx Cty. 1991).

22. *See, e.g.*, LeMaster v. Amsted Indus. Inc., 442 N.E.2d 1367 (Ill.App. 1982); Leiken v. Wilson, 445 A.2d 993 (D.C. 1982).

23. Hubler Rentals Inc. v. Roadway Express Inc., 637 F.2d 257, 260-61 (4th Cir. 1981).

24. RESTATEMENT § 369, cmt. a.

25. *See, e.g.*, Hubbard v. Peairs, 509 N.E.2d 41, 45 (Mass.App. 1987); Sheffield Poly-Glaz Inc. v. Humbolt Glass Co., 356 N.E.2d 837 (Ill.App. 1967); Poulos v. Home Fed. Sav. & Loan Ass'n, 385 S.E.2d 135 (Ga.App. 1989); South Carolina Ins. Co. v. Fisher, 698 P.2d 1369 (Colo.App. 1984); Kazanjian v. New England Petroleum Corp., 480 A.2d 1153 (Pa.Super. 1984); Lyle v. Koubourlis, 771 P.2d 907 (Idaho 1988); Lewis v. Gilbert, 785 P.2d 1367 (Kan.App. 1990).

equate consideration, most courts will enforce an oral agreement.

In the absence of a statute or court rule requiring that they be in writing,[26] oral settlement agreements are enforceable. Courts have enforced the oral contract by applying the rationale of Section 27 of the Restatement:

> Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

For example, in *Pascarella v. Bruck*[27] the parties to a medical malpractice action reached an oral settlement for $25,000, which defense counsel promised to reduce to writing. Prior to receiving the written settlement agreement, the plaintiff rejected the oral settlement, deciding that she was confused at the time it was reached. The New Jersey Supreme Court found the oral agreement enforceable, stating that where parties have orally agreed to the essential terms of a contract and intend to be bound by those terms, the fact that they contemplate the later execution of a formal document to memorialize their agreement has no effect on the validity or enforceability of the oral agreement.

A decision inconsistent with the rationale of Section 27 is *Verne R. Houghton Insurance Agency Inc. v. Orr Drywall Co.*,[28] in which an insured disputed its insurer's assessment of the value of damage it had sustained to one of its trucks. The parties submitted their dispute to "arbitration-mediation" and were successful in reaching an agreement that was reduced to writing. The insured agreed to release all claims it had against the insurer resulting from the accident, and the insurer acknowledged it did not have any claims against the insured. The agreement was executed by the mediator and insured, but not by the insurer. Pursuant to the agreement, however, the insurer issued a settlement check to the insured, in return for which the insured executed a "policyholder's release" acknowledging that the payment was in settlement of all amounts due under the policy.

Later the insurer's agent filed a claim against the insured for unpaid premiums, and the insured counterclaimed for breach of fiduciary duties, alleging delays in presenting its property damage claim to the insurer. The insured also filed a third-party claim against the insurer that alleged bad faith in processing the claim.

The trial court dismissed the insured's claims on the ground that the mediation agreement and the policyholder's release barred all claims except the agent's claim for additional premiums.

The Iowa Supreme Court reversed and held that the "policyholder's release," which had been executed by all parties, did not include the insured's bad faith claim against the insurer. The court appears to have assumed that the mediation agreement was unenforceable because it had not been executed by the insurer. The court did not address why the agreement was unenforceable against the insured, who had signed it. Neither did the court address why the oral mediation agreement memorialized by the written agreement was unenforceable. There was no evidence that the parties disputed any of the terms of the unexecuted mediation agreement.

The statute of frauds may render an oral settlement agreement unenforceable. Among the five types of contracts generally subject to the statute, the two most relevant to construction disputes are contracts that cannot be performed within one year and contracts conveying real property.

If an oral contract, by its express terms, is incapable of being performed within one year, it is unenforceable. If an owner and prime contractor create a substituted contract for a project expected to last more than one year, the contract is not within the statute of frauds if completion within one year is not impossible.[29] Conversely, if the oral contract expressly requires a party to perform an act more than one year from the date the agreement is reached, the oral contract is subject to the statute of frauds and unenforceable.

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26. *See* Conlin v. Concord Pools Ltd., 565 N.Y.S.2d 860 (App.Div. 3d Dep't 1991); Stone v. First City Bank of Plano, 794 S.W.2d 537 (Tex.App. 1990); Am. Casualty Co. v. Western Casualty and Sur. Co., 120 N.W.2d 86 (Wis.App. 1963). See Gojcaj v. Moser, 366 N.W.2d 54, 58 (Mich.App. 1985) (oral settlement agreements not enforceable under Michigan statute); Omaha Nat'l Bank v. Mullenax, 320 N.W.2d 755, 758 (Neb. 1982).
27. 462 A.2d 186 (N.J.Super. 1983).
28. 470 N.W.2d 39 (Iowa 1991).
29. Fisher, 698 P.2d at 1372; RESTATEMENT § 130.

Even if an oral settlement agreement is subject to the statute of frauds, however, courts will enforce the contract if there has been full performance by the party seeking to enforce the agreement. Although contract damages generally will not be awarded to a party that has only partly performed, courts will allow recovery based on restitution.[30]

2. Authority of Attorney

A client's execution of a settlement agreement negotiated by the attorney eliminates any question regarding the attorney's authority. Absent that execution, a party seeking to enforce the agreement must prove that opposing counsel had the express authority to bind the client to the oral agreement.[31]

In *Mitchell Properties Inc. v. Real Estate Title Co.*,[32] the Maryland Court of Special Appeals noted there is a prima facie presumption that an attorney has authority to bind clients by actions regarding the litigation, but this presumption is not applicable to settling the claim. In order to enforce the settlement agreement, the moving party must show that the opposing party's counsel acted with authority of the client and that the attorney's authority expressly extended to settling the claim.

In *Ducey v. Corey*[33] the New Hampshire Supreme Court refused to enforce an oral agreement after finding that a party's attorney lacked authority to enter into the oral settlement agreement. The agreement had been negotiated by counsel for both parties, and the court was advised of the agreement. But the plaintiff refused to accept the agreement, and the defendant moved to enforce it. The plaintiff testified that she had not authorized her lawyer to settle her claims and had not been told that a specific amount had been offered. In addition, the plaintiff testified that she had to leave the jurisdiction and had instructed her attorney to keep her advised of developments, which he had not done. The court concluded that the attorney had neither express nor implied authority to agree to the settlement.[34]

3. Effect of Confidentiality

A detailed discussion of whether mediation proceedings ought to be confidential and the extent to which mediations are confidential under existing law are beyond the scope of this article. Since a rule of confidentiality significantly affects the enforcement of oral mediation agreements, however, some observations are appropriate. Most commentators seem to agree that a broad rule of confidentiality is needed if mediation is to be effective.[35]

Although a broad rule of confidentiality also affects the enforceability of written mediation agreements, its predominate effect is felt when parties seek to prove the terms of an oral agreement. In *Jallen v. Agre*[36] the Minnesota Supreme Court refused to enforce an oral settlement agreement because the moving party could not prove that the parties had actually reached an agreement. The parties had no records of oral negotiations, nor could they agree as to what took place during the negotiations. The court noted that this situation illustrated the importance of "making a record of settlement negotiations and of any agreement reached."

Sworn testimony generally is required to prove the terms of an oral agreement. In *David v. Warwell*[37] the trial court concluded that the parties orally settled their dispute regarding the purchase of real property, but the Maryland

30. Fotinos v. Baker, 793 P.2d 1114 (Ariz.App. 1990) (equitable estoppel will avoid statute of frauds bar to enforcement of oral settlement agreements); Sims v. Purcell, 257 P.2d 242 (Idaho 1953). Some courts define partial performance narrowly. *See, e.g.*, Jackson v. Shain, 619 S.W.2d 860 (Mo.App. 1981).

31. Rosenberg, 376 N.W.2d 434 (attorney has no implied right to compromise client's claim); Cross, 643 P.2d at 41 (attorney had no implied authority).

32. 490 A.2d 271 (Md.App. 1985).

33. 355 A.2d 426 (N.H. 1976).

34. *But see* Sheffield Poly-Glaze, 356 N.E.2d 837 (refusal to invalidate oral settlement agreement where party opposing enforcement testified his attorney misinformed him as to terms of agreement).

35. *See, e.g.*, Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986) [hereinafter Freedman & Prigoff]; Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 SETON HALL LEGIS J. 1 (1980); Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955 (1988) [hereinafter Brazil]; Comment, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984) [hereinafter *Protecting Confidentiality*]; Lawrence R. Freedman, *Confidentiality: A Closer Look*, in ABA Special Comm. on Dispute Resolution, *Alternative Disputes Resolution: Mediation and the Law: Will Reason Prevail?* 68 (1983). *See also Special Supplement—Confidentiality and Alternative Dipute Resolution*, 2 ALTS. TO HIGH COST OF LITIG. 5 (1984).

36. 119 N.W.2d 739 (Minn. 1963).

37. 586 A.2d 775 (Md.App. 1991).

Court of Special Appeals reversed. The court held that in the absence of a written contract containing finalized terms, there was insufficient evidence to conclude that the dispute had been resolved. A particularly important factor was that the trial court had not received any sworn testimony as to the terms of the agreement. The court held that the terms of the oral settlement agreement had to be proved at a full plenary hearing.

Proving the terms of an oral settlement agreement in a state with a broad rule of confidentiality is difficult. Those rules often preclude a party from eliciting testimony from the mediator regarding the existence of an agreement.[38] Some go further and preclude testimony from the parties.[39] Some statutes recognize an exception to the rule of confidentiality when a party seeks to enforce the terms of a mediation agreement.[40] Since most states do not have broad mediation statutes applicable to construction disputes, statutory rules of confidentiality generally will not be a problem,[41] but common law evidentiary principles, as well as the Federal Rules of Evidence, provide confidentiality in some situations.

Under common law evidentiary principles, the admissibility of settlement negotiations depends on whether the statement sought to be introduced constituted a settlement offer or a statement of fact regarding the case.[42] Following this distinction, courts exclude offers to compromise but admit factual statements made during negotiations by a party, unless the speaker explicitly made the statement hypothetically or accompanied the statement with the words "without prejudice."

To bolster protection for statements made during settlement negotiations, a number of states have adopted Rule 408 of the Federal Rules of Evidence, which makes offers to compromise and conduct or statements made in settlement discussions inadmissible.[43] While Rule 408 appears to be broad, it has severe limitations. Most important is the exception that statements made during settlement negotiations are admissible when offered to prove the existence or terms of an agreement.[44] Therefore, the rule should not preclude a party from calling the mediator as a witness regarding the existence of the oral agreement and its terms.

If applicable, a rule of confidentiality will make it very difficult for a party to meet its burden of proving the terms of an oral mediation agreement. Unless the credibility of a party can be challenged, if two equally credible witnesses have conflicting views on whether there was mutual assent to all material terms, the party with the burden of proof should not prevail.

C. Defenses to Enforcement

Just as contract law can be applied to a mediation agreement to determine if there was intent, consideration and performance, general principles of contract law also provide the framework for evaluating defenses to the enforcement of a mediated agreement. The mechanics and dynamics of the mediation relationship will affect the availability of these defenses. The presence of a neutral third party during negotiations adds a factor not present in the typical contract situation and can operate to make some defenses less viable when a party seeks to enforce a mediation agreement. Finally, confidentiality, to the extent it is made a part of the mediation process, may operate to hinder the efforts of the plaintiff and defendant to prove the terms of the contract and establish relevant contract defenses.

1. Mutual Mistake

Section 151 of the Restatement (Second) of Contracts states, "A mistake is a belief that is not in accordance with the facts." Under Sec-

38. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE. ANN. § 154.073.

39. Virginia Confidentiality in Mediation Act, VA. CODE ANN. § 8.01-581.22, which provides that unless parties otherwise agree, confidential materials and communications during the mediation are not subject to disclosure in any judicial administrative proceeding.

40. WYO. STAT. § 1-43-103.

41. As of 1990, 13 states were listed by the ABA as having broad ADR confidentiality statutes that could be applicable to construction disputes. See *ABA, Legislation, supra* note 1, at 113-14.

42. EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 274 (3d ed. 1984). *See* Cole v. Harvey, 198 P.2d 199 (Okla. 1948) (in suit for work done, no error in receiving evidence of statements of amount due during negotiations for compromise).

43. Freedman & Prigoff, *supra* note 35, at 40.

44. Brazil, *supra* note 35, at 981; *Protecting Confidentiality, supra* note 35, at 449. *See also* Moving Picture Machine Operators Union Local No. 162 v. Glasgow Theatres Inc., 86 Cal.Rptr. 33, 37 (Cal.App. 1970) (evidence of accord and satisfaction not excluded by state rule similar to Rule 408).

tion 152, a mutual mistake provides a defense to the enforcement of a contract "[w]here a mistake of both parties at the time a contract was made has a material effect on the agreed exchange of performance, the contract is voidable by the adversely affected party unless he bears the risk of the mistake." The availability of this defense is limited, as the "mistake must be of an existing or past fact which is material: it must be as to a fact which enters into and forms the basis of the contract. In other words, it must be the essence of the agreement, the sine qua non . . . it must be such that it animates and controls the conduct of the parties."[45]

Reformation is available only to revise a contract in order to reflect the true agreement of the parties. The purpose of reformation is not to make a new contract for the parties but rather to express the contract which the parties had made for themselves.[46]

The mediation process makes it less likely that a party could succeed in voiding a mediation agreement by arguing mutual mistake. The process implies deliberate and concentrated negotiations. Good mediation is designed to assist the parties in thoroughly discerning and carefully articulating their interests.

There are valid policy reasons for making the defense of mutual mistake less available to the participants in a mediation. One commentator has stated:

> In mediation, negotiations frequently revolve around uncertain facts and issues. Courts should be less receptive to legal claims based on mistake, since parties to a mediation are aware of the inherent possibility of errors in judgment. Many settlements are upheld in spite of mistakes as to law or fact, since, by settling, the parties have demonstrated a preference for reaching a final resolution over clarifying inaccuracies.[47]

In jurisdictions with a broad rule of confidentiality, it may be impossible for a party to prove the existence of a mutual mistake if it is not able to introduce evidence of positions taken and statements made by the mediator and the parties during the mediation.

2. *Ambiguity*

Closely related to the defense of mistake is the concept of ambiguity. Often what was thought to be clear to the parties when the oral agreement was reduced to writing later becomes ambiguous to the party resisting enforcement. A broad rule of confidentiality may make it impossible for a party, when faced with the defense of ambiguity, to prove the parties' intent. Parole evidence could be unavailable under a broad rule of confidentiality. The inability to introduce parole evidence undermines the parties' legitimate interest in realizing the fruits of mediation. Preventing a party from introducing parole evidence of intent to refute a claim of ambiguity because of a desire to cloak the mediation process in confidentiality subjects that process to abuse.

In *Bartros v. Farm Credit Bank of Saint Paul*[48] the bank sought to foreclose on a mortgage pledged to secure the payment of a note. Pursuant to a Minnesota mandatory mediation statute, the parties successfully mediated their dispute. The executed written agreement included a provision that the borrower could purchase a portion of the mortgaged land from the bank at an agreed price. When the borrower sought to enforce this provision, the bank asserted that it had not intended to sell that portion of land for the stipulated price without a deed back for the remainder of the unencumbered land. Although both parties admitted that a deed back provision had been discussed in the mediation, it was not included in the written agreement.

The Minnesota Court of Appeals held that the agreement was ambiguous, which raised an issue of fact and permitted it to look to extrinsic evidence to ascertain the parties' intent. Because the confidentiality provision of the state's mediation statute did not apply to actions to reform or set aside mediation agreements, the court was able to hear testimony regarding what had occurred in the mediation. It concluded by enforcing the agreement as written because the evidence showed that the parties had not intended to include the deed back clause.

3. *Fraud and Misrepresentation*

A misrepresentation is an assertion that is contrary to the facts, according to Section 164

45. 17A AM. JUR. 2d *Contracts* § 213 (1991).
46. RESTATEMENT § 155.
47. Payne, *supra* note 4, at 395. *See also* DAN B. DOBBS, LAW OF REMEDIES § 11.10, at 773 (1973).
48. 1990 Minn.App. Lexis 272 (unpublished opinion) (1990).

of the Restatement. In order to void a contract on the basis of a misrepresentation, a party must show the misrepresentation was either material or fraudulent. A misrepresentation is material if it is likely that a reasonable person would be induced to manifest assent to the contract because of the misrepresentation, and it is fraudulent if made with the intent to induce the other party to rely on it and with knowledge of its falsity. If a statement is fraudulent, the other party only needs to show that reliance on the statement, not that reliance was reasonable. It should be noted that under Section 161 of the Restatement, an omission can be a misrepresentation in situations in which there is a duty to disclose.

Although misrepresentation may be a defense to the enforcement of a mediation agreement, its effectiveness depends largely on the scope of a rule of confidentiality. If the party seeking to enforce the agreement denies making the representations, the defendant may be hard pressed to prove the statement without the mediator's testimony. Conversely, the party seeking to enforce the agreement could be disadvantaged without the mediator's testimony if that testimony would establish that the opposing party was not misled by the representation.

4. Impossibility and Impracticability

Under Section 261 of the Restatement, when an unforeseen event occurs that makes it impossible or impracticable for one party to perform its contractual duties, courts often excuse that party from performance, provided the event was not due to that party's fault.

> "A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticeable when it can only be done at excessive and unreasonable cost." . . . The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.[49]

The Restatement lists several events that can give rise to the defense of impracticability: (1) the destruction or unavailability of the subject matter of the contract or a specific thing necessary for performance of the contract; (2) the death or incapacity of a person necessary for the performance of the contract; or (3) a change in the law rendering performance of the contract impossible without violating the new state of the law.

The defense of impossibility and impracticability usually is predicated on events or facts that develop after the agreement is reached. Since the facts giving rise to the defense do not occur during the mediation, proof of the facts should not be affected by a rule of confidentiality.

5. Unconscionability

If a court, as a matter of law, finds a contract or a clause in a contract to be unconscionable at the time it was made, the court may refuse to enforce the contract, modify the contract, delete the unconscionable term, or limit the application of the unconscionable clause to avoid an unconscionable result.[50] Unconscionability basically is a question of fairness.

It is doubtful whether a party could credibly raise this defense to an agreement reached through mediation. To the extent mediation produced an excessively unfair agreement, the more appropriate defense would be duress and undue influence.

6. Duress and Undue Influence

For an agreement to be binding, it must be the result of the parties exercising their free will. Conversely, "an agreement obtained by duress, coercion, or intimidation is invalid, since the party coerced is not exercising his free will."[51] To show duress, a party must prove a threat of sufficient gravity to induce the other party to enter into the contract. What the threat is has changed drastically since the early common law.

Historically, duress as a defense to the enforcement of a contract was actual imprisonment or fear of loss of life or limb. Modern courts recognize a broader spectrum, most notably, threats to economic concerns. Threats considered "improper" and thus the basis for the defense of duress include: a threat of a

49. Transatlantic Finance Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966), *quoting from* Mineral Park Land Co. v. Howard, 156 P. 458, 460 (Cal. 1916).
50. RESTATEMENT § 208; U.C.C. § 2-302.
51. 17A AM. JUR. 2d *Contracts* § 234 (1991).

criminal or tortious act that will injure the person, family or property of the other party; a threat to institute criminal prosecution or a bad faith threat to institute civil proceedings; or a threat to breach the duty of good faith and fair dealing under a contract with the other party.[52]

Under the Restatement, any threat is improper if "the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends."

Closely related to the concept of duress, and perhaps more relevant to the mediation context, is the defense of undue influence. Section 236 of the Restatement defines undue influence as the "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who, by virtue of the relationship between them, is justified in assuming that that person will not act in a manner inconsistent with his welfare." Like duress, the essence of the defense is that a party's assent to the contract was not the result of free will but of the other party's unfair use of a dominant psychological or economic position.

The presence of a mediator should curtail the possibility of overt threats in the mediation process, but in several other respects, mediation may be susceptible to claims of undue influence. Mediation is often chosen over litigation because the parties have a significant ongoing relationship they want to protect. The relationship, however, may be characterized by unequal power—for examples, landlord and tenant, labor and management, contractor and subcontractor. Contending that mediation amplifies inequality, some commentators argue against using mediation between parties with disparate social or economic positions.[53]

Duress or undue influence exercised by a third party, such as a mediator, can be the basis to set aside a mediation agreement.[54] The proper role of the mediator in bringing about a resolution to a dispute is subject to debate. In many cases the line between encouragement and undue influence may be difficult to draw, particularly with parties of unequal economic power. Private mediation organizations employ mediators whose compensation may be in part dependent on the success of the mediation. Economic incentives of this type create an environment in which undue influence can occur.

The law of fiduciary duties has been suggested as an appropriate means of defining the obligations owed by mediators. If mediation is to be effective, it is essential that clients develop a trusting relationship with the mediator. A critical factor in determining whether a fiduciary relationship exists is whether the injured party "justifiably trusted" the mediator. If "justificable trust" exists, courts often find that a fiduciary relationship exists.[55]

Issues also may arise with respect to the duty, if any, of a mediator-lawyer to provide legal advice to an unrepresented party who may be sacrificing significant legal rights.[56] Failure of a mediator to advise an unrepresented party of rights it is releasing, combined with suggestions to enter into an agreement, provide fertile grounds for a party to argue later that there was misrepresentation, undue influence and breach of fiduciary duties.

Although mediation generally is considered voluntary, there are occasions when litigants find themselves ordered by a court to mediate "voluntarily." In certain circumstances, such as labor negotiations, it is the function of the mediator to "pressure" the parties to settle. In those cases, courts are reluctant to examine the conduct of the mediator.

In *Local 808 v. National Mediation Board*[57] the D.C. Circuit held that it would not interfere with efforts by the National Mediation Board to settle a railroad dispute unless the "board continues mediation on a basis that is completely and patently arbitrary and for a period of time that is completely and patently unreasonable, notwithstanding the lack of any genuine hope or expectation that the parties

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52. RESTATEMENT § 176(1).

53. See Comment (Owen M. Fiss), *Against Settlement*, 93 YALE L.J. 1073 (1984); Robert P. Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller nd Fiss*, 4 OHIO ST. J. DISP. RESOL. 129 (1989).

54. Burns, *supra* note 19, at 99.

55. *See* Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?* 53 U. CINN. L. REV. 744-48 (1984).

56. *See, e.g.*, NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 122-35 (1987) [hereinafter ROGERS & SALEM]; Chaykin, *supra* note 55, at 756-57.

57. 888 F.2d 1428 (D.C. Cir. 1989).

will arrive at an agreement." The court noted that the "unique role of mediators requires such a deferential judicial posture."

Although a few decisions have been reported in which mediators of domestic disputes have been sued for conflicts of interest,[58] no cases have been found involving a commercial dispute in which a mediation agreement was set aside or the mediator sued for wrongful onduct. One problem faced by the plaintiff is proving proximate cause.

In *Lange v. Marshall*[59] the defendant was an attorney who attempted to mediate a divorce settlement between the plaintiff-wife and her husband. During the discussions, the wife began suffering from depression and entered a psychiatric hospital for treatment. The attorney continued to conduct conferences in an effort to reach a settlement. Eventually the parties agreed to a settlement that was submitted to the court for review. Pending the review, the wife obtained separate counsel and objected to the settlement before it received approval. A substituted agreement was then negotiated and approved by the court.

The wife sued the mediator-attorney for malpractice. A jury verdict for the plaintiff was reversed by the Missouri Court of Appeals. The court held that there was no evidence that the husband would have agreed to a settlement more favorable for the wife had the mediator not acted wrongfully by negotiating the agreement when the wife was mentally and emotionally disabled. The court did not analyze whether the mediator may have breached a fiduciary duty which, if found, might have affected the causation analysis.

If a plaintiff can establish that a mediator exercised undue influence or that the mediation agreement was executed under duress created by the mediator, an argument can be made that the plaintiff should be entitled to recover from the mediator at least the expenses incurred in having the mediation agreement voided.

D. Remedies for Breach

Assuming that a mediation agreement satisfies the elements of a formal contract and is not subject to any defenses, a party seeking to enforce it can recover damages if it is breached. If the mediation is conducted while there is pending litigation, a party may seek an expedited enforcement of the agreement and an award of damages from the court with jurisdiction over the underlying litigation.[60] If the mediation agreement was breached after the underlying litigation was dismissed, many courts will refuse expedited enforcement of the agreement and will require the party to institute a separate action to enforce the mediation agreement.[61]

In some instances, an award of damages may not fully compensate the injured party. If damages are unavailable or inadequate, a party may seek equitable relief. Equitable relief is unavailable if there is an adequate remedy at law,[62] but a party can recover damages and equitable remedies for the components of the claim for which there is no adequate legal remedy.[63] Among the equitable remedies a plaintiff may wish to pursue are specific performance,[64] injunctions, or a declaratory judgment of the parties' rights under the contract.[65]

According to Section 357 of the Restatement, specific performance generally is available against a party who has committed or is threatening to commit a breach of a contractual duty. It is granted in order to produce, to the extent possible, the same effect as if the party had fully performed its contractual duties. Under the same section, a party also may seek injunctive relief against a party who has threatened or has committed a breach of a contractual duty. Although the ultimate effect may be the same, the primary difference between specific performance and an injunction is that specific performance seeks to enforce a contractual

58. *See* In re Wehringer's Case, 547 A.2d 252 (N.H. 1988) *appeal dismissed*, 489 U.S. 1001 (1989); Horak v. Biris, 474 N.E.2d 13 (Ill.App. 1985); Martino v. Family Service Agency of Adams County, 445 N.E.2d 6 (Ill.App. 1982).

59. 662 S.W.2d 237 (Mo.App. 1981), *cert. denied*, 466 U.S. 973 (1984).

60. *See, e.g.*, Easton Environmental Endeavor Inc. v. Industrial Park of Calvert County, 413 A.2d 1355 (Md.App. 1980).

61. ROGERS & SALEM, *supra* note 56, at 159.

62. RESTATEMENT § 359(1). However, specific performance of a contractual duty can be obtained notwithstanding a liquidated damage clause in the contract. *See* RESTATEMENT § 361.

63. RESTATEMENT § 358(3), cmt. c.

64. *See, e.g.*, Dickey v. Thirty-Three Venturers, 550 S.W.2d 926 (Mo.App. 1977) (specific performance recognized as remedy for breach of settlement agreement); Winkleman, 399 P.2d 402; Elliott v. Whitney, 524 P.2d 699 (Kan. 1974).

65. Elliott v. Johnston, 673 S.W.2d 807 (Mo.App. 1984).

duty, while an injunction directs a party to refrain from doing an act that would constitute a breach of a contractual duty.

Because of the equitable nature of specific performance and injunctive relief, they are not available if the relief would cause unreasonable hardship or if the terms of the contract are grossly inadequate or otherwise unfair, according to Section 364 of the Restatement. Section 369 states that specific performance and injunctive relief are available despite a breach by the party seeking relief, unless the breach was sufficiently material to discharge the other party's duty to perform.

Since settlement agreements are construed in accordance with contract law principles, the doctrine of promissory estoppel should be applicable to enforce a settlement agreement otherwise unenforceable as a contract. Under the promissory estoppel doctrine, a promise that the promisor should have reasonably expected would induce action or forbearance by the promisee is enforceable if injustice would result were the promise not enforced.[66] Most courts which have permitted recovery under the doctrine utilize it when consideration is lacking under traditional contract analysis.[67]

As an alternative to seeking enforcement of a mediation agreement, counsel may wish to consider incorporating the mediation agreement into a consent judgment. The benefit of this approach is that a separate action need not be instituted to seek recovery for a breach of the agreement. Instead, recovery can be obtained more expediously, and therefore less expensively, by requesting post-judgment proceedings.[68] One disadvantage of this approach is that the consent judgment will become a public document, thereby eliminating privacy.[69]

Enforcement of Mediation Agreements under Statutes

As of 1990, 46 states plus the District of Columbia had statutes that either require or encourage mediation. The vast majority of the mediation programs are limited to specific subject matter areas, such as labor and employment disputes, divorce settlements, child custody disputes, consumer complaints, civil rights violations, environmental and natural resource concerns, neighborhood disputes; debtor-creditor relationships, and even minor criminal complaints.

No programs have been found that are limited to the construction field. Only five states—Colorado, Florida, Minnesota, Oregon and Texas—have legislatively created mediation programs whose scope would encompass construction-related disputes.[70] The enforcement provisions of the statutes vary, reflecting the different contexts within which the mediation is to occur.

A. Statutory Enforcement Options

The ABA Special Committee on Dispute Resolution offered alternative enforcement provisions in its Model State Legislation on Mediation:[71]

> Option A: Agreements unenforceable unless so provided. A written resolution agreement shall not be enforceable in court nor shall it be admissible as evidence in any judicial or administrative proceeding unless such agreement includes a provision which clearly sets forth the intent of the parties that such agreement shall be enforceable in court or admissible as evidence.
>
> Option B: Agreements enforceable. If the parties involved in a dispute reach an agreement, the agreement shall be reduced to writing and approved by the parties (and their attorneys) and shall be presented to the court as a stipulation and, if approved by the court, shall be enforceable as an order of the court.

One commentator has suggested additional options, including (1) mediated agreements are enforceable to the extent permitted by common law contract principles; (2) mediated agreements are enforceable only when the agreement contains an express clause stating that

66. Restatement § 90(1). Dulany Foods Inc. v. C.M. Ayers, 260 S.E.2d 196, 204 (Va. 1979); Smith v. Lefrak Organization Inc., 531 N.Y.S.2d 305 (App.Div. 2d Dep't 1988); LaMarque v. North Shore University Hosp., 502 N.Y.S.2d 219 (App.Div. 2d Dep't 1986).

67. *See* Calamari & Perillo, Contracts § 105 (1970).

68. United States v. Armour & Co., 402 U.S. 673, 681 (1970); Rogers & Salem, *supra* note 56, at 159; Payne, *supra* note 47, at 402-04.

69. Rogers & Salem, *supra* note 56, at 162, and cases cited therein.

70. Colo. Rev. Stat. § 13-22-301 et seq.; Fla. Stat. § 44.1011 et seq.; Minn. Stat. § 572.31 et seq.; Or. Rev. Stat. § 36.100 et seq.; Tex. Civ. Prac. & Rem. Code Ann. § 152.001 et seq. In addition, there are local court rules that allow trial judges to refer construction disputes to mediation.

71. Lawrence R. Freedman, Legislation on Dispute Resolution 287 (1984).

the mediation will be enforceable in a court of law; (3) mediated agreements will be generally enforceable unless the parties expressly agree that it is unenforceable; and (4) mediated agreements are never enforceable, even if the parties expressly agree to their enforceability.[72]

B. Enforcement Statutes

Among the five states with statutes broad enough to include construction contracts, two—Florida and Oregon—are silent on enforcement. Texas provides that if parties to a mediation reach and execute a written agreement resolving the dispute, the agreement is enforceable in the same manner as any other written contract. Minnesota includes additional preconditions to the enforcement of an agreement to ensure that the parties fully intended to enter into an agreement that would bind their interests. Minnesota also departs from common law contract principles by providing that a court may set aside or reform a mediated agreement if appropriate under principles of contract law or if there was "evident partiality, corruption or misconduct by a mediator prejudicing the rights of a party." The statute adds, "That the relief could not or would not be granted by a court of law or equity is not grounds for setting aside or reforming the mediated settlement agreement unless it violates public policy."

Mediation statutes often include provisions requiring the review and acceptance of the mediation agreement by a court or governmental agency before the agreement becomes enforceable. These requirements reflect a concern that even in private mediation, there are public interests that must be protected. The nature of the subject area covered by the statute will determine the degree of interest that society has and will retain in the outcome of mediations.

An example is Colorado's statute, which requires the court that originally referred the dispute to mediation to approve the result reached by the parties. Similar review and approval requirements are required universally in domestic relations mediation,[73] and also are found in such areas as farm mediation[74] and landlord-tenant disputes.[75]

Mediation statutes also address the circumstances under which the statute of limitations will be tolled. For example, Oklahoma provides that during the mediation process all applicable statutes of limitations are tolled as to the participants.[76] Similarly, Washington provides that any applicable statute of limitations is tolled from the signing of the pre-mediation agreement until the execution of the final mediation agreement.[77]

C. Case Law Interpreting Mediation Legislation

An example of an unsuccessful attempt to enforce a mediation agreement resulting from a mandatory mediation is *Barnett v. Sea Land Service Inc.*[78] *Barnett* involved the mediation of a longshoreman's claims against a vessel owner under a local rule of the U.S. District Court for the Western District of Washington requiring mediation agreements to be in writing to be enforceable. The owner believed that a settlement had been reached, although it was not put in writing. The longshoreman argued that there was no agreement because there had been a mutual mistake regarding the terms of the settlement.

The trial court refused to allow the mediator to testify regarding the existence of an agreement because it was undisputed that no agreement had been executed. The Ninth Circuit affirmed. It did not address whether there had been a mistake, because "until the settlement is reduced to writing, it is not binding on the parties." The effect of the rule was to render unenforceable what might have been an enforceable oral settlement agreement.

In *Rizk v. Millard*,[79] a Texas case, an inventor and his investor agreed, after suit was filed by the investor, to mediate their dispute. The parties successfully reached an oral agreement

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72. Burns, *supra* note 19, at 95.
73. *See, e.g.*, MINN. STAT. § 518.619(7) (child custody agreement not enforceable unless adopted by court).
74. *See, e.g.*, MINN. STAT. § 583.26(9)(a) (written mediation agreement submitted to rural finance authority for approval of debt restructuring).
75. COLO. REV. STAT. § 38-12-216(2) (in mobile home park landlord situation, agreement submitted as stipulation for approval of court).
76. OKLA. STAT. tit. 12, §§ 1801-1813.
77. WASH. REV. CODE § 7.75.040.
78. 875 F.2d 741 (9th Cir. 1989).
79. 810 S.W.2d 318 (Tex.App. 1991).

in the mediation and prepared a written agreement, but they failed to sign it. The defendant-investor later told the plaintiff he could not meet the financial obligations he had agreed to in the mediation agreement and suggested the case be rescheduled for trial. The plaintiff moved for sanctions alleging that the defendant's actions violated the mediation agreement.

The trial court considered mediation to be a "discovery tool" and found that the defendant had abused discovery by disavowing the agreement. It granted the plaintiff's motion for abuse of discovery, struck the defendant's pleadings and entered a default judgment for the plaintiff. The Texas Court of Appeals reversed, relying on a Texas procedural rule requiring all settlement agreements to be in writing. Until the agreement was signed, the court said, the defendant had a right to revoke his consent.

In *Bennett v. Bennett*,[80] a Maine case, a husband appealed from a judgment granting his wife a divorce. The husband argued that the trial court erred by denying his motion to compel his wife to sign a mediation agreement allegedly reached between the parties. The husband relied on a Maine statute that authorized the court to submit disputes to mediation and provided that any agreement reached by parties through mediation was to be reduced to writing, signed by the parties and submitted to the court as a court order.[81] The husband argued that because his wife failed to sign the agreement to which she had assented, the statute mandated that the court order the wife to sign the agreement and submit it to the court for an order.

The Maine Supreme Judicial Court disagreed, stating that if a court were required to do that, it would have to engage in the "time-consuming process of exploring what transpired between the parties during the course of the mediation in order to determine if they had reached any agreement and, if so, the actual terms of that agreement." This was "contrary to and would undermine the basic policy of the mediation process that parties be encouraged to arrive at a settlement of disputed issues without the intervention of the court."

ENFORCEABILITY OF PRE-MEDIATION AGREEMENTS

Before a mediation begins, an agreement usually is signed by the parties and the mediator, which, among other things, addresses the degree to which the mediation will be confidential and the mediator's duties. If the agreement meets the criteria for a contract, it will be enforceable subject to the contractual defenses discussed above.

Among the issues that can arise concerning a pre-mediation agreement are whether the promises to mediate and to keep the mediation confidential are enforceable and whether language limiting the mediator's duties can be used as a defense by the mediator if sued by one of the participants.

A. Enforcement of a Promise to Mediate

1. Voluntary Mediation

Voluntary mediation can result in one of two ways. First, parties who do not have a pre-existing contractual relationship or whose contract does not contain a mediation clause may agree to mediate their dispute. Second, a contract may require that the parties mediate their dispute before they can initiate litigation.

Since parties cannot be compelled to reach an agreement through mediation, at first blush it might seem that it would accomplish little to order a party to participate in "voluntary" mediation, but several courts that have considered this issue have ordered parties to mediate before they are permitted access to the courts.

In *AMF Inc. v. Brunswick*[82] the parties resolved an earlier dispute with a consent decree providing they would submit future disputes to a third party for a non-binding, advisory opinion. The subject suit was brought by AMF to compel Brunswick to release data supporting its advertising claims regarding a new product to a third party for an advisory opinion. AMF argued that the Federal Arbitration Act[83] was applicable and that it required the parties participate in the non-binding process to which they had agreed. Brunswick countered that since binding arbitration was not required by the consent decree, the act was not applicable.

The federal district court held that the non-binding process required by the consent decree

80. 587 A.2d 463 (Me. 1991).
81. 19 ME. REV. STAT. § 665.
82. 621 F.Supp 456 (E.D. N.Y. 1985).
83. 9 U.S.C. § 1 et. seq.

was a viable means, like arbitration, to settle disputes. Requiring that the parties attempt to resolve their dispute through the non-binding process was consistent with the goals of the act, it continued, and therefore the act was applicable. It ordered Brunswick to participate in the process.

The court stated that it would have enforced the clause under contract law principles if the act were not applicable. Specific performance of the clause would have been an appropriate remedy, it said, because a remedy at law would be inadequate since it could only "approximate the skilled, speedy and inexpensive efforts available by way of specific performance."[84]

The *AMF* holding is significant because it provides a basis to argue that if mediation can be compelled under the Federal Arbitration Act, a mediation agreement also should be enforceable under the act's enforcement provisions. There are fundamental differences, however, between a contested arbitration proceeding under the act and a voluntary mediation. No case has been found in which a court has considered whether a mediation agreement is enforceable under the act.

Enforcement of a promise to mediate only begs the question whether there is an effective means by which parties can be forced to mediate "voluntarily" in good faith. Contracts and pre-mediation agreements often contain an express promise that the parties will mediate in good faith. Even if a good faith clause is not included, most courts will read an implied covenant of good faith and fair dealing into the agreements.[85]

One can easily imagine situations in which a failure to mediate in good faith could support a claim for damages. For example, assume A, not wishing to mediate, makes an unreasonable demand known to be unacceptable to B and otherwise refuses to participate in the mediation. A, following the termination of the mediation, sues B. A's suit is ultimately defeated by a motion for summary judgment. In this situation, B could argue that it is entitled to damages for A's breach of the implied covenant of good faith and fair dealing in the pre-mediation agreement. B would argue that the court's finding that there were neither facts nor law to support A's allegations is circumstantial evidence that had A mediated in good faith, A would have reached an agreement because of the weakness of its position.

Case law in this area is difficult to reconcile. Several decisions hold that damages cannot be sought for a breach of a promise to negotiate in good faith because the promise is nothing more than an "agreement to agree," which is unenforceable.

In *Candid Productions Inc. v. International Skating Union*[86] Candid was in the business of purchasing television rights to ice skating competitions. The union, which was the governing body for amateur competitive skating, had had a contract with Candid for a number of years. Included in the contract was a clause that required the union to negotiate in good faith with Candid over the broadcasting rights to its skating championships. The contract also gave Candid the right to match an offer by a third party if an agreement was not reached in the parties' initial negotiations. The parties were unable to reach an agreement, and the defendant signed a contract with CBS.

Candid alleged in its action that the union had breached its promise to negotiate in good faith by having contract discussions with CBS before it had begun negotiations with the plaintiff. The union conceded, for purposes of its motion for summary judgment, that it did not negotiate in good faith, but it argued that the good faith negotiation clause was unenforceable because of vagueness.

The U.S. District Court for the Southern District of New York stated that when a duty to perform is definite and the contract provides a reference by which a defendant's performance can be evaluated, courts will enforce a duty of good faith negotiations in order to prevent a party escaping from the obligation it contracted to perform. But here, the court held, the clause in dispute was unenforceable because the par-

84. *See also* Devalk Lincoln Mercury Inc. v. Ford Motor Co., 811 F.2d 326 (7th Cir. 1987) (affirming dismissal because plaintiff failed to comply with mediation clause prior to suing); Yaw v. Walla Walla School Dist. No. 140, 722 P.2d 803 (Wash. 1986) (referring to agreement to mediate disputes between employer and employee, court noted, "Washington courts have long required parties to follow dispute resolving methods they have contracted to before they may resort to the courts").

85. *See* Steven J. Burton, *Breach of Contract and the Common Law Duty to Bargain in Good Faith*, 94 HARV. L. REV. 369, 404 (1980), for a list of jurisdictions recognizing the general obligation of good faith.

86. 530 F.Supp. 1330 (S.D. N.Y. 1982).

ties had not agreed to do anything other than to try to reach an agreement.[87]

A different result was reached by the Third Circuit interpreting similar language in *Channel Home Centers v. Grossman.*[88] Channel was a prospective tenant in a mall owned by the defendant. The defendant had executed a detailed letter of intent acknowledging that as an inducement for Channel to enter into a lease, the defendant agreed to withdraw the store from the rental market and to negotiate with Channel for a mutually agreeable lease. After proposed lease terms had been exchanged and discussions were still in progress, the defendant leased the space to one of Channel's competitors. Channel's motion for a preliminary injunction was denied, and the trial court entered judgment on the merits for the defendant, finding the letter of intent was unenforceable for lack of consideration.

On appeal, the defendant argued that a promise to negotiate in good faith is enforceable only if the parties have otherwise reached an agreement of the underlying transaction. The Third Circuit reversed, acknowledging that an agreement to enter into a future contract is unenforceable but concluding that the letter of intent contained an unequivocal promise by the defendant to withdraw the store from the market and to negotiate the proposed leasing transaction in good faith. The court found that there was compelling evidence from which to conclude that the parties intended their promises to be binding. The court held that the letter of intent had sufficient specificity to render it an enforceable contract for which Channel could recover damages if it was able to prove that the defendant failed to negotiate in good faith.[89]

Even if a claim for breach of an express or implied duty to mediate can be asserted, the party making the claim will have considerable difficulty proving the claim if confronted with a broad rule of confidentiality. Without evidence of the positions taken by the parties in the mediation, it would be difficult to prove that the defendant failed to mediate in good faith.

Despite the difficulties in proving a claim of bad faith, it nevertheless may be tactically advisable to seek an order compelling mediation before litigation. That might make sense if one feels that bad legal advice or a misunderstanding of the facts is precluding the parties from reaching an agreement. Mediation would offer an environment in which the principals could talk to each other without their attorneys obstructing the dialogue. The suggestions and opinions of an unbiased mediator might cause the parties to rethink what had been dogmatic positions.

2. *Mandatory Mediation*

Unlike arbitration, which resolves a dispute regardless of whether a party actively participates, mediation cannot succeed unless an agreement is desired by both parties. In an effort to put "teeth" into legislatively mandated mediation, some statutes try to define good faith in order to give a court standards to evaluate claims of bad faith mediation. For example, Minnesota attempts to define "good faith" in its Farmer-Lender Mediation Act,[90] but the case law suggests that even with objective standards, it is difficult to show that a party mediated in bad faith.

In *Obermoller v. Federal Land Bank of Saint Paul*[91] the bank participated in a mediation under the terms of the Minnesota act, despite its contention that the act did not apply to the dispute. Following an unsuccessful mediation, the farmer sought an injunction against the bank to halt foreclosure on his farm, arguing that the bank had mediated in bad faith. To support his claim, the farmer pointed to the fact that throughout the mediation, the bank continued to assert that the law did not require it to mediate the dispute. The bank argued that it did not have to attend the mediation sessions and that

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87. *See also* Alaska Creamery Prod. Inc. v. Wells, 373 P.2d 505, 510 (Alaska 1962); First Nat'l Bank of Maryland v. Burton, Parsons & Co., 470 A.2d 822 (Md.App. 1984) (commercial agreements to negotiate on terms and conditions to be decided unenforceable).

An analogous line of cases holds that specific performance will not be ordered for personal service contracts. *See, e.g.*, In re Taylor, 91 B.R. 302 (D. N.J. Bankr. 1988); In re Noonan, 17 B.R. 793 (S.D. N.Y. Bankr. 1982); Podlesnick v. Airborne Express Inc., 627 F.Supp. 1113 (S.D. Ohio 1986), aff'd, 836 F.2d 550 (6th Cir. 1987).

88. 795 F.2d 291 (3d Cir. 1986).

89. *See also* Thompson v. Liquichimica of Am. Inc., 481 F.Supp 365, 366 (S.D. N.Y. 1979) ("agreement to agree" is not closed proposition, in contrast to agreement to use best efforts to conclude agreement, which is "closed proposition, discreet and actionable").

90. MINN. STAT. § 583.27.

91. 409 N.W.2d 229 (Minn.App. 1987).

"by being present it had gone beyond what was required."

The trial court denied the request for an injunction, and the Minnesota Court of Appeals affirmed. The court noted that the farmer had not submitted an affidavit of the mediator and that without such evidence it would be very difficult to conclude whether a party had mediated in bad faith. The court also held that the bank's refusal to abandon its claim as to the applicability of the act did not constitute bad faith.

Similarly, in *Rizk v. Millard*[92] the Texas Court of Appeals held that the defendant's decision to repudiate a mediation agreement to which it had assented but had not signed was not a breach of the duty to mediate in good faith.

B. Enforceability of Confidentiality Clauses

Most pre-mediation agreements include a provision that the mediation sessions will be confidential and that the mediator will not be called on to testify in court as to what transpired during the mediation. Since an agreement of confidentiality involves, of necessity, a waiver of the constitutional right of subpoena, it can be subject to close scrutiny.

Even if a pre-mediation agreement passes the constitutional test, some courts may still not enforce a confidentiality clause for public policy reasons.[93] *Simrin v. Simrin*[94] illustrates the conflicting policies examined by courts in enforcing confidentiality agreements.

Simrin was an action to modify a divorce decree. The divorced wife called as a witness the rabbi who had mediated the divorce settlement. He declined to testify, asserting that the parties had agreed expressly that their conversations would be confidential and that neither would call him as a witness in any subsequent legal action.

On appeal from the order modifying the custody decree, the wife argued that the trial court had erred by not ordering the rabbi to testify. The California District Court of Appeal affirmed, although it acknowledged that honoring the agreement sanctioned a contract to suppress evidence, contrary to the public policy of promoting the admissibility of all relevant evidence. A countervailing public policy favors procedures designed to protect marriages, and without confidentiality, the process of marriage counseling would be frustrated.

Similarly, the Ninth Circuit in *National Labor Relations Board v. Macaluso*[95] concluded that encouraging effective mediation is a sufficiently important public interest to overcome the court's desire to hear all relevant evidence. The parties to a labor dispute gave two very different views of whether they had reached an agreement in the mediation, and the mediator's testimony was the key to resolving the onflicting testimony. Noting that eliminating the mediator's testimony "conflicts with the fundamental principle of Anglo-American law that the public is entitled to every person's evidence," the court nonetheless revoked the subpoena served on the mediator.

Other courts and commentators have reached the opposite conclusion, arguing that confidentiality provisions should be unenforceable as a matter of public policy.[96]

Before a party agrees to include a broad confidentiality clause in a pre-mediation agreement, it should consider whether it may be tactically disadvantaged by the clause during the mediation by not being able to discuss publicly information revealed in the mediation. For example, if a contractor bidding on several large jobs believes it may soon be defaulted on a project in progress and wants to prevent rumors of the possible default from adversely affecting its chances of being awarded a contract, it might suggest to its surety and the owner that they mediate their dispute. Under such circumstances, absent a confidentiality clause, the owner would enjoy some leverage

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92. 810 S.W.2d 318 (Tex.App. 1991).

93. *See Protecting Confidentiality*, *supra* note 35, at 450 (validity of contracts restricting use of evidence in judicial proceedings is subject to "some doubt"); JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 271 (1986) (court would not necessarily be bound to honor private contract, although it may be persuaded by public policy considerations to do so).

94. 43 Cal.Rptr. 376 (Cal.App. 1965).

95. 618 F.2d 51 (9th Cir. 1980).

96. *See* Trustees of Leale and Watts Orphan House in City of New York v. Hoyle, 139 N.Y.S. 1098, 1099 (Sup.Ct. Westchester Cty. 1913) (court will not be ousted of right to consider evidence by provision in lease that lease not be put into evidence); Cronk v. New York, 420 N.Y.S.2d 113, 118 (N.Y. Ct.Cl. 1979) (citing Boyle, court concluded provision that attempted to prevent court from considering legally competent evidence void as against public policy). *But see* Note, *Contracts to Alter the Rules of Evidence*, 46 HARV. L. REV. 138, 142-43 (1932) (contract to deprive court of relevant testimony is impediment to ascertaining facts).

over the contractor. A broad confidentiality clause in a pre-mediation agreement, however, would prevent the owner from publicly disclosing the contractor's problems, thereby eliminating some of its settlement leverage. Moreover, if the owner revealed information during the mediation and shortly thereafter the contractor's bids on the other projects were rejected, the contractor could argue that it was injured by the breach of the confidentiality clause and entitled to damages.

C. Enforcement of Pre-Mediation Clauses Intended to Immunize Mediators

Pre-mediation agreements typically contain one or more of the following propositions to which the participants are asked to agree: (1) the mediator is not a judge; (2) the mediator has no authority to compel parties to reach an agreement; (3) the participants acknowledge the impartiality of the mediator; (4) the parties acknowledge the integrity of the mediation process; (5) the parties acknowledge that the mediator does not stand in a fiduciary capacity or serve as an advocate or counsel for any party; and (6) the parties agree that the mediator has no coercive authority to make a binding decision and is not under a duty to provide legal advice.

The intent of these clauses is to limit by contract the legal liability of mediators by attempting to narrowly define their duties. If a mediator functions as a fiduciary notwithstanding the pre-mediation agreement, it is unclear whether a mediator could "enforce" the pre-mediation agreement as a defense to a claim that he breached his fiduciary duty.

Compelling arguments can be made that mediators, despite contractual denials, do function as fiduciaries. One test is whether the injured party "justifiably trusted" the mediator. Virtually all courts and commentators acknowledge the need for trust and confidentiality in the mediation process. It would be difficult for most mediators to argue that the participants were not justified in trusting them.

No cases have been found that address whether a pre-mediation agreement that denies the existence of a fiduciary relationship can be used to defeat a claim that a fiduciary relationship existed and that a breach of the fiduciary duties injured one of the participants. If parties are told by a mediator that, in order to facilitate the mediation process, they should be honest, candid and open with the mediator, courts may not be receptive to arguments that a fiduciary relationship cannot be found. It remains to be seen how willing courts will be to enforce mediators' efforts to curtail their legal responsibilities.[97]

CONCLUSION

Most jurisdictions have mediation legislation or court rules requiring mediation in specific subject matter areas. Relatively few states have enacted mediation legislation sufficiently broad to encompass construction disputes. States that have mediation legislation applicable to construction disputes differ in the degree to which they enforce a mediation agreement.

Absent legislation, a mediation agreement, whether written or oral, is enforceable subject to common law contract principles. With respect to an oral agreement, proving its terms may be difficult, depending on the degree of confidentiality imposed on the mediation process. Counsel should reduce an oral mediation agreement to writing promptly and include in the written agreement an acknowledgement of the parties' intent to be legally bound by the agreement.

One way to enforce a mediation agreement without instituting a separate enforcement action is to incorporate the mediation agreement into a consent decree. However, a consent decree will deprive the parties of the privacy provided by the mediation.

Finally, despite the voluntary nature of mediation, it may make sense to seek a court order compelling a party to fulfill its contractual promise to mediate, particularly if the party expressly promised to mediate in good faith. Although the law in this area is not clear, authority exists to provide a basis to seek legal or equitable remedies in these circumstances.

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97. For a discussion of attempts to avoid the "fiduciary relationship," *see* Chaykin, *supra* note 55, at 736-44. Chaykin refers to the concept of "justifiable trust" as the "essential consideration" in determining whether a fiduciary relationship exists.