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JAMS has updated **Construction Arbitration Rules and Procedures.** See **www.jamsadr.com** for a detailed summary of the revisions.

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Sir Vivian Ramsey, High Court Judge in the Technology and Construction Court, London

Can the Cost of International Arbitration Be Controlled?

BY SIR VIVIAN RAMSEY

One of the common complaints of arbitration is that it costs too much. Those costs arise from both the costs that a party has to pay its lawyers, experts and others to conduct the arbitration process and the costs of the arbitration process itself. The costs may then be greatly increased when a party is unsuccessful in the arbitration and, under the relevant institutional rules or the law of the seat, has to pay the costs of the other party. In general terms, a party can exercise some control over the legal costs that it has to pay. Equally by choosing institutional arbitration or agreeing to the fees of arbitrators, a party can control that element of cost. What a party generally has no power to control are the costs that the other party

> *See "Can the Cost of International Arbitration Be Controlled" on Page 3*

Patrick J. O'Connor, Jr., Faegre Baker Daniels LLP

Sealing the Deal: Critical Issues in the Preparation of Mediated Settlement Agreements

BY PATRICK J. O'CONNOR, JR.

After more than a dozen hours of tense and tiring media-tion, the parties finally reach agreement. As a mediator, now what are you to do? The short answer is this: Don't let them out of your sight without first getting it in writing. The long answer can be a bit more involved.

Experienced mediators understand the importance of reducing the parties' agreement to a signed writing before they disperse. Without a signed writing setting forth the key terms of the agreement, parties have been known to

> *See "Sealing the Deal" on Page 5*

Mediation Decision-Makers Need "Decision-Quality Information"

BY HON. CAROL PARK-CONROY (RET.)

Hon. Carol Park-Conroy (Ret.), JAMS mediator and arbitrator

The decision on when to mediate is an important one. Indeed, one of the most common reasons why cases do not settle is because the parties tried to mediate too early in the dispute process. When is the right time to mediate? In my mind, it is when the individuals with settlement authority have "decision-quality information."

The federal government began to actively embrace the notion of alternative dispute resolution in agency administrative processes after passage of the Administrative Dispute Resolution Act of 1996 (ADRA) (5 U.S.C. 571 – 581). At that time, one of the agency leaders responsible for implementation of the ADRA began to talk about the need to have "decision-quality information" before engaging in mediation. As I found myself mediating more and more contract disputes, I began to appreciate that those three words—"decision-quality information"—were much more than a catchy little phrase. To the contrary, in my experience, cases settle in mediation when the people with settlement authority are able to attend the mediation and are armed with "decision-quality information."

So what is "decision-quality information?" Briefly defined, it is the factual and legal information needed to permit the person with settlement authority to make an educated and rational decision to settle a dispute. There are, of course, many variables associated with how much information that might be. At a minimum, it is the core information that is central to the dispute.

Why is "decision-quality information" necessary? Because, without it, the dispute probably will not be settled. If one or both parties do not have the information necessary to make an informed decision, it is too early in the dispute process for them to engage in mediation. If they do proceed anyway, perhaps due to a mandatory mediation requirement, the likely outcome will not be a settlement. Instead, the parties will have to decide whether they want to recess until they have gathered the necessary information before they continue trying to resolve their dispute. Alternatively, they might decide they want to move on, either to arbitration or trial. The better option usually is to recess and resume talks so that the parties can settle the dispute on terms they have negotiated. But such a recess also results in a loss of momentum and prolongs the process, making it more costly than it would have been had the timing been right.

When do you know you have "decision-quality information?" The nature of the necessary information depends entirely upon the complexity of the factual and legal issues presented by the dispute. Obviously, a complicated matter typically requires a great deal of information before the parameters of the dispute can be sufficiently ascertained and evaluated. The amount of money involved is usually another factor to be considered, even if the issues are not otherwise particularly complicated. Similarly, some decision-makers need more information than others before they think they have the information they need to settle a dispute. While this is in part a function of the complexity of the issues and the amount of money involved, it is also a reflection of the personality and experience of the person with settlement authority. The more cautious and less experienced he/she is, the more information will be needed before he/she has the right amount of "decision-quality information."

The right time to mediate is that point in the dispute at which "decision-quality information" has been obtained by both parties. While this may be early in the dispute, it more often occurs after the exchange of information, either informally or as part of the litigation process. When the parties have "decision-quality information," they are ready to resolve their dispute. ■

There are, of course, many variables associated with how much information "decision-quality information" might be. At a minimum, it is the core information that is central to the dispute.

UPCOMING EVENTS

ABA CONSTRUCTION FORUM 2015 MIDWINTER MEETING
January 29-30, 2015 The Westin Kierland Resort & Spa, Scottsdale, AZ

PHILIP L. BRUNER, ESQ. and **JAMES F. NAGLE, ESQ.** will speak on *Avoidance of Liability under the Federal False Claims Act* and **DOUGLAS S. OLES, ESQ.** will speak on *Common Mistakes in Drafting Construction Contracts.*

REPRESENTATIVE MATTERS HANDLED BY GEC NEUTRALS

PHILIP L. BRUNER, ESQ. successfully mediated the settlement of a $35 million dispute arising out of the construction of an automobile transmission assembly plant in Indiana. Mr. Bruner and **ZELA "ZEE" G. CLAIBORNE, ESQ.** were appointed as arbitrators by the International Chamber of Commerce to hear disputes arising out of the construction of a 2000-acre solar energy generation project in California.

KENNETH C. GIBBS, ESQ. recently served as Chairman of an Arbitration Panel, which heard a $30 million claim involving the construction of a semiconductor chip making facility in Portland, OR.

JOHN W. HINCHEY, ESQ. will serve on an ICC Tribunal in San Francisco, involving a $4 billion claim arising from the design and construction of a nuclear reactor plant in Southern California. He has also been appointed to an ICDR Tribunal in Houston involving a $100 million claim arising from the construction of a chlorine gas processing plant.

JAMES F. NAGLE, ESQ. recently mediated two separate, federal False Claims Act matters between the Justice Department and contractors.

BARBARA REEVES NEAL, ESQ. mediated a resolution to a dispute between a Southern California municipal entity and a contractor regarding differing site conditions.

HON. CAROL PARK-CONROY (RET.) was engaged to mediate claims arising from the construction of a new office building in Washington, DC.

HON. CURTIS E. VON KANN (RET.) served as a neutral evaluator and mediated a contract dispute involving the construction of grain storage domes and their foundations.

Can the Cost of International Arbitration be Controlled?

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may recover if that party is unsuccessful. It depends on unknown arrangements that the receiving party has made with its lawyers.

The English courts have now implemented major changes, following a detailed review of the costs of civil litigation. Those changes, known as the Jackson reforms,[1] focus on the need to reduce civil litigation costs. The overall aim is to give parties access to justice at proportionate cost. That aim is no less important in international arbitration. This article considers whether there are lessons that the international arbitration community might learn from this review of civil litigation costs and the subsequent reforms.[16]

Recoverability of Costs

The English court system has historically had a system of "costs shifting" by which the successful party generally recovers its costs from the other party. This is now enshrined in the court's procedural rules,[2] which deal with the ground rules for determining whether a party is liable to pay the other party's costs and include detailed rules for determining what sum is recoverable as costs.

By comparison, where costs are recoverable in international arbitration, there is little guidance in the relevant institutional rules either as to when a party might be liable for the other party's costs or how those costs are to be assessed. For instance,[3] under Article 37 of the ICC Rules, it provides first, "The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."[4] It then states, "In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."[5] These rules introduce cost shifting but leave a very broad and uncertain area of discretion.

The costs of the arbitration are often a significant element of the dispute and frequently end up being the most significant element. Despite this, parties proceed to arbitration with little guidance as to how the arbitral tribunal might approach questions of cost liability or what sum the other party might seek to recover by way of its own legal costs. In the English courts, where there is costs shifting, the

rules and court decisions deal with the impact of parties' conduct before and after proceedings are commenced, including an unreasonable refusal to participate in mediation or ADR,[6] the effect of exaggerating the sums claimed and the ability of claimants and defendants to obtain costs protection by making offers, including "without prejudice save as to costs" offers. While the potential applicable principles of costs recovery may be summarized,[7] the question facing parties to international arbitration is whether and, if so, how a particular arbitral tribunal will apply those principles to a given case. That raises questions of how far parties should agree to incorporate rules or institutional rules should include more guidance on this aspect.

The Jackson Reforms

Apart from the introduction of limited, "one-way costs shifting," the Jackson reforms do not deal with the principle of whether a party may recover costs. Rather, those reforms focus on reducing the cost of the litigation process and establishing a more certain basis for the quantum of recoverable costs. The Jackson reforms therefore seek to make the costs more transparent from the start of the litigation process and to ensure that procedural directions are made taking account of the cost impact. This avoids the problems that occur when, too often, costs are something that are ignored until the end, when inevitably they have been spent.

There are three key aspects of the Jackson reforms. First, there is an emphasis on proportionate costs and a process of costs management to achieve that outcome. Secondly, there are procedural changes to permit the court to limit the costs of litigation by making directions that achieve proportionate costs. Finally, there are changes in the extent to which particular legal "costs" are recoverable. I shall concentrate on the first two aspects in this article.

Proportionate Costs

The reforms have now limited the costs that a party can recover from the other party to proportionate costs.[8] For costs to be proportionate, they must bear a reasonable relationship to the sums in issue in the proceedings and the value of non-monetary relief, the complexity of the litigation, additional work generated by the other party and any wider factors, such as reputation or public importance. The intention is to avoid cases where the costs greatly exceed the benefit being derived from the litigation. For instance, it would be difficult to say that costs of $2 million would be proportionate to recover $200,000.

Costs Management

To ensure that the litigation is conducted at proportionate cost, the court now includes costs management[9] powers alongside its case management functions. The costs management process commences when the parties provide costs budgets at the start of the case. Those budgets contain an estimate of the costs of running the litigation through to trial. They are in standard form,[10] with costs being estimated for each phase: pre-action, issue of proceedings and pleadings, the case management conference, discovery/disclosure, witness statements, expert evidence, trial preparation and costs. Under each stage, a party will set out the assumptions on which its costs estimate is based. There is also an ability for a party to include contingencies as part of its budget.

These budgets are then discussed between the parties so that they can seek to agree costs budgets. If there is not agreement, the court will make rulings as to the appropriate figure to be included for an item in the costs budget. The costs budgets will then be approved as proportionate costs budgets. Subject to any major changes in the litigation, the parties are then bound by those estimates of recoverable costs in the budgets. There is no ability to amend the budget because of an inaccurate estimate or any error in the estimate.

The Jackson reforms therefore seek to make the costs more transparent from the start of the litigation process and to ensure that procedural directions are made taking account of the cost impact. This avoids the problems that occur when, too often, costs are something that are ignored until the end, when inevitably they have been spent.

The importance of the costs budget is that, at the end of the case, if a party is awarded costs, it will generally be awarded the sum that is in its costs budget, if it has incurred those costs. This means that the opposite party knows what costs the other party will be seeking to recover at the end of the litigation. It introduces an element of predictability into an area where normally there is no transparency. This allows a party to make tactical decisions knowing what costs are at risk if there is an adverse costs order.

In addition, when the court is giving directions, it can take account of the costs of making particular directions. For instance, if a party is seeking wide electronic discovery/disclosure at the cost of $1 million where the sum claimed is $500,000, the court can, in combination with its other powers, seek to reduce the costs of discovery/disclosure. By managing the costs in this way, the court can avoid the recoverable costs becoming disproportionate. Equally, by

dealing with costs at the beginning rather than leaving it all to the end, when the costs have been expended, the court has a real ability to control costs at a time when they have not yet been spent.

Procedural Changes

The procedural changes introduced into the court rules aim to reduce the costs of litigation. The first main area is discovery/disclosure. The English courts moved from a wide test of disclosure[11] to a narrow test of "standard disclosure"[12] in the earlier Woolf reforms. At the first case management hearing, the parties have to provide a disclosure report,[13] which identifies in broad terms the documents that might be the subject of an order for standard disclosure, together with an estimate of the cost of providing such disclosure. The court is then in a position to determine what order would be proportionate for the case. This might be no disclosure or disclosure of documents relied on by that party together with focused requests for the other party's documents or one of a number of other options from a menu.[14]

The second area is witness statements.[15] The court now has express power to limit the number of witnesses being called as well as the length of witness statements. Too often, witness statements are lengthy documents that do not concentrate on disputed areas of fact, but instead contain a chronology of documents, comments and other material that should not form part of the factual evidence. The cost of producing large numbers of unnecessarily long witness statements increases costs and inevitably prolongs the trial process. Under the English court process, evidence contained in documents is generally admitted without the need for each document to be proved.

The third area is expert evidence.[16] Again, there is too often a failure to concentrate on the issues that require expert evidence. To deal with this, in addition to identifying expert issues, it is now necessary to provide information on the cost of expert evidence before the court will grant permission for such evidence. New rules[17] for concurrent expert evidence now formalize the process of "hot-tubbing," which has been in use for a number of years in courts and is in common use in international arbitration.

Each of these procedural changes means that the parties have to identify the issues in the case at an early stage so that the directions can be tailored to ensure that the costs are proportionate to the case. Inevitably, this means that there is an element of front-loading in the costs of proceedings. The view is that these costs are well spent if they make the overall costs of the proceedings more efficient.

Lessons for Arbitration

As I have said, a major concern in arbitration is the cost of the process, particularly where there is costs shifting. Too often, the costs are left to the end. By establishing proportionate costs by costs budgeting at an early stage and by considering the costs of each procedural stage, the Jackson reforms allow the court to keep costs under control. There is no reason why this approach to costs should not also be applied to benefit the arbitration process. ■

1 *Review of Civil Litigation Costs: Final Report* by Sir Rupert Jackson, 21 December 2009 ("the Final Report").
2 The Civil Procedure Rules 1998 ("CPR"), introduced after the earlier Woolf reforms, are now subject to the 75th Revision as from October 1, 2014.
3 See Articles 28.3 and 28.4 of the LCIA Rules, Article 34 of the ICDR Rules and Rule 31 of the SIAC Rules.
4 Article 37.4 of the ICC Rules.
5 Article 37.5 of the ICC Rules.
6 See *PGF II SA v OFMS Company 1 Limited* (2013) EWCA Civ. 1288.
7 See, for example, *Costs in International Arbitration* by Colin Ong and Michael O'Reilly, LexisNexis (2013).
8 Proportionate costs are defined in Rule 44.3(5) of the CPR.
9 This is dealt with in Rules 3.12 to 3.18 and Practice Direction 3E of the CPR.
10 These are in the form of Precedent H: See Practice Direction 3E to the CPR.
11 See the original test in the appropriately named *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55.
12 See Rule 31.6 of the CPR.
13 See Rule 31.5(3) of the CPR.
14 See Rule 31.5(7) of the CPR.
15 See Rule 32.2 of the CPR.
16 See Rule 35.4 of the CPR.
17 See paragraph 11 of Practice Direction 35 of the CPR.

Sealing the Deal *continued from Page 1*

disavow agreement or dispute one or more of the terms. Without a signed writing, it can be difficult to enforce an agreement reached in mediation. The principal culprit is that which makes mediation so attractive and successful in the first place. To borrow a phrase about Las Vegas: "What happens in mediation, stays in mediation." The process is confidential. This is the hallmark of mediation. With the possible exception of parties subject to open-meetings and open-records statutes, the results reached in mediation are confidential. This makes proving a settlement reached in mediation challenging if the parties have not executed a writing that at least lays out the critical terms of their agreement.

Oral settlement agreements, while a challenge to enforce, are legally enforceable as long as the terms of the agreement can be proved.[1] However, proving settlement was reached in a mediation can be very difficult. Most mediations are subject to one or more state laws governing the mediation process. One common such law is the Uniform Mediation Act (UMA). The UMA was drafted in collaboration with the American Bar Association's Section on Dispute Resolution and establishes a privilege of confidentiality for mediators and participants. Section 4 of the UMA

states that mediation communications are privileged and a party may prevent any other party from disclosing such communications. While Section 6 creates an exception for an agreement evidenced by a record signed by all parties to the agreement, there is no exception for oral settlements. Moreover, while Section 7 permits a mediator to disclose whether a settlement was reached, there is no express permission allowing the mediator to disclose the terms of the settlement.

The breadth of the confidentiality protections afforded mediation communications is apparent from the decision in *Rojas v. Superior Court,*[2] where the California Supreme Court, in reversing the Court of Appeal, found that written materials prepared for purpose of mediation are absolutely privileged. While this decision did not directly address an oral settlement, it is a clear expression of the importance of confidentiality to the mediation process:

> *One of the fundamental ways the Legislature has sought to encourage mediation is by enacting several "mediation confidentiality provisions." As we have explained, confidentiality is essential to effective mediation because it promotes a candid and informal exchange regarding events in the past. This frank exchange is achieved only if participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes. To carry out the purpose of encouraging mediation by insuring confidentiality, our statutory scheme unqualifiedly bars disclosure of specified communications and writings associated with mediation absent an express statutory exception.*[3]

Given the importance the Legislature placed on the confidentiality of mediated communications, the Court determined that there was no "good cause" exception for disclosure of mediation communications. Therefore, unless a specific exception exists for oral communications in mediation establishing the existence of a settlement, the settlement cannot be proven.[4]

While "getting it in writing" is always good advice, not just any signed writing will do. The writing must include all the material terms of the agreement. Therefore, while it is common practice for counsel to draft a "full" settlement agreement after the parties have reached agreement in mediation, it is important for the writing created at the mediation to contain all the material terms of the parties' agreement. Two problems can arise if this is not the case. One or more of the parties may find that it "agreed" to something that does not accurately reflect what it thought it had committed itself to. In other words, the agreement may be enforceable but not accurately reflect the agreement reached. On the other hand, the writing may be so incomplete that it is not enforceable. In this case, the parties may have reached agreement, but because the writing does not reflect this fact, there is no enforceable contract.

The Indiana Supreme Court decision in *Horner v. Carter*[5] demonstrates the problems one can encounter trying to modify a mediated settlement agreement based upon communications occurring during the mediation. Dennis Horner sought to modify the maintenance provision in his marital settlement agreement in order to terminate his liability for monthly housing payments to his wife after her remarriage. The trial court excluded from evidence the husband's testimony regarding statements he claimed to have made to the mediator during the mediation process, and denied his request for modification. While the Court of Appeals affirmed the denial of relief, it opined that the trial court's exclusion of the proffered evidence was error. The Indiana Supreme Court found this dicta sufficiently troubling to warrant correction:

> *The Court of Appeals concluded that the husband's statements during the mediation could be admitted as extrinsic evidence to aid in the construction of an ambiguous agreement. We disagree. Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation. The benefits of compromise settlement agreements outweigh the risks that such policy may on occasion impede access to otherwise admissible evidence on an issue. In the present case, the husband's purported oral statements made to the mediator during mediation clearly fall within the express inadmissibility of mediation evidence akin to the offer or acceptance of a compromise on a claim of disputed liability or validity. Furthermore, the husband's testimony, seeking to establish and enforce an oral agreement allegedly reached in mediation, must likewise be treated as confidential and inadmissible. The trial court was correct to exclude the husband's mediation statements from evidence on his petition to modify the parties' settlement agreement.*[6]

This is not to suggest that the writing needs to be extensive or complex. In *Facebook, Inc. v. Pac. NW Software, Inc.,*[7] the parties disputed the ownership of Facebook. The litigation was complex and the dispute quite convoluted, due in part to a complicated stock purchase arrangement. Nevertheless, the parties settled their dispute, which was reflected in a "one-and-a-third page Term Sheet & Settlement Agreement." A dispute later arose whether there was a binding settlement agreement. The court determined that the term sheet was sufficient to create a binding and enforceable agreement. Moreover, the court held that, if the parties could not reach agreement on some of the non-material terms, it would impose reasonable provisions to fill in

the gaps similar to what is provided for under the Uniform Commercial Code.[8]

Release terms, and in particular the breadth of the release, often is a critical issue in settlement negotiations. While it is preferable to actually spell out the release language, it is not uncommon for the parties to handle this in a shorthand fashion. In *Chappell v. Roth,*[9] the parties reached agreement in a court-ordered mediation wherein the defendants agreed to pay a sum of money in exchange for a voluntary dismissal with prejudice and a "full and complete release, mutually agreeable to both parties."[10] After the mediation, the defendants' counsel delivered a check along with a release for the plaintiff to sign. The plaintiff balked, as the release included a hold harmless provision that had not been discussed at mediation. Rather than return the check, however, the plaintiff moved to enforce the settlement agreement. The North Carolina Supreme Court concluded that, notwithstanding the strong policy favoring settlements, it could not compel compliance with terms not agreed upon or expressed by the parties in the settlement agreement:

> *The parties failed to agree as to the terms of the release, and the settlement agreement did not establish a method by which to settle the terms of the release. Thus, no meeting of the minds occurred between the parties as to a material term; and the settlement agreement did not constitute a valid, enforceable contract.*[11]

Some state statutes governing mediation place an obligation on the parties to include specific language in settlement agreements reached through mediation. For example, a settlement agreement governed by the Minnesota Civil Mediation Act must contain specific language in order to be binding. The settlement agreement must contain a provision stating substantially that the parties were advised in writing that (a) the mediator has no duty to protect their interests or provide them with information about their legal rights; (b) signing a mediated settlement agreement may adversely affect their legal rights; and (c) they should consult an attorney before signing a mediated settlement agreement if they are uncertain of their rights.[12] In *Ali Haghighi v. Russian-American Broadcasting Co.,*[13] the Minnesota Supreme Court held that a settlement agreement signed contemporaneously on each page by the parties attending a mediation session, but that did not contain the magic language that it is a binding agreement, was rendered unenforceable as a mediated settlement agreement. The court rejected the argument that the statute applied only to mediations where the parties were not represented by counsel:

> *[Defendant] argues that the Legislature clearly intended to protect parties who are unrepresented at mediation and who might not be aware of the legal consequences of the proceedings. Thus, [defendant] argues that when parties are represented at mediation by attorneys, there is no need for the requirement that the mediation settlement contain a provision stating that it is binding. We disagree. Requiring that a settlement agreement contain a provision stating that it is binding, even when both parties are represented by attorneys, does not produce an absurd result. While [defendant] contends that the Legislature contended the statute to protect only unrepresented parties, it is just as likely that the Legislature contended that a settlement document state that it is binding in order to encourage parties to participate fully in a mediation session without the concern that anything written down could be used later against them. If the literal language of this statute yields an unintended result, it is up to the Legislature to correct it. This Court will not supply that which the Legislature purposefully omits or inadvertently overlooks.*[14]

[W]hile it is common practice for counsel to draft a "full" settlement agreement after the parties have reached agreement in mediation, it is important for the writing created at the mediation to contain all the material terms of the parties' agreement.

What role should the mediator play in assisting the parties in drafting a settlement agreement? There is little uniformity on this question. On the one hand, parties, particularly if one or more are not represented by counsel, may need the assistance of someone schooled in legal matters. On the other hand, the mediator is not counsel to any of the parties and is not retained to provide legal advice. Moreover, there may be unlicensed practice of law issues to consider particularly if the mediation occurs in a jurisdiction in which the mediator is not licensed to practice law. The American Bar Association's Section on Dispute Resolution in 2002 adopted a resolution advising that statutes and regulations governing the unauthorized practice of law should not directly apply to mediation. The Resolution states that mediation is not the practice of law and that legal discussions with the mediator do not create an attorney-client relationship or constitute legal advice. On the issue of drafting settlement agreements, the Resolution states:

> *When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or a settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement*

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> *that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel, and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their attorneys.*[15]

While the ABA's pronouncement on this issue is valuable guidance, it is not law. A particular state's UPL statutes or regulations may suggest a contrary result.[16] Moreover, while helpful, the ABA's guidance does not provide a road map to all of the issues that can arise with respect to the preparation of mediated settlement agreements. What if all the parties are not represented by counsel? May the mediator point out peculiarities of state law that must be complied with in order for the settlement agreement to be enforceable? May the mediator opine regarding the scope of release language or other terms? These questions and many more are frequently confronted by mediators when parties are wrestling with memorializing their agreement. Given the confusion over what is permissible for a mediator to do in connection with memorializing of the parties' settlement, the mediator must tread carefully and be cognizant of the governing jurisdiction's law on the issue. ■

1 *Dillard v. Starcon Int'l, Inc.,* 483 F.3d 502, 507 (7th Cir. 2007) ("Oral settlement agreements are enforceable under Illinois law.").

2 *Rojas v. Superior Court,* 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (Cal. 2004).

3 *Rojas v. Superior Court,* 33 Cal. 4th 407, 415-16, 93 P.3d 260, 265, 15 Cal. Rptr. 3d 643, 648-49 (Cal. 2004) (inner quotations and citations omitted).

4 The prospects for enforcing a settlement agreement reached in mediation are a bit brighter in federal court. The UMA is not directly applicable to federal litigation. Therefore, federal courts have enforced oral mediated settlement agreements. See *Platcher v. Health Prof. Ltd.,* 549 F. Supp. 2d 1040 (C.D. Ill. 2008). Nevertheless, the local rules of many federal courts provide that statements made in mediation are privileged, which can present challenges for enforcement of oral settlement agreements even in federal court.

5 *Horner v. Carter,* 981 N.E.2d 1210 (Ind. 2013).

6 *Horner v. Carter,* 981 N.E.2d 1210, 1212 (Ind. 2013).

7 *Facebook, Inc. v. Pac. NW Software, Inc.,* 640 F.3d 1034 (9th Cir. 2011).

8 See also *Capps v. N.W. Sign Indus. of N.C., Inc.,* 2007 WL 2363392 (N.C. App. Aug. 21, 2007) (Short term sheet containing four terms enforceable as court rejected defendant's argument that a memorandum could not be complete because it was short and did not contain typical terms found in a "final" settlement agreement. Specifically, the court determined that the lack of terms regarding details on how and when payments were to be made, the extent of release language, lack of confidentiality provision did not make the signed term sheet unenforceable.).

9 *Chappell v. Roth,* 548 S.E.2d 499 (N.C. 2001).

10 *Chappell v. Roth,* 548 S.E.2d 499, 500 (N.C. 2001).

11 *Chappell v. Roth,* 548 S.E.2d 499, 500 (N.C. 2001). But see *Santoni v. Sundown Cove, LLC,* 2009 WL 131310 (N.C. Ct. App. Jan. 20, 2009) (settlement enforceable where parties agreed that the plaintiff shall execute such releases as required by defendants in a form acceptable to defendants as this did not require a release mutually agreeable to both parties).

12 Minn. Stat. § 572.35, subd. 1(1). The Act does allow enforcement of mediated settlement agreements where the parties have "otherwise been advised of these conditions. Minn. Stat. 572.35, subd. 1(2). This is usually accomplished through a pre-mediation agreement. Advising the parties orally during the mediation session can create issues with respect to the confidentiality of such communications.

13 *Ali Haghighi v. Russian-American Broadcasting Co.,* 577 N.W.2d 927 (Minn. 1998).

14 *Ali Haghighi v. Russian-American Broadcasting Co.,* 577 N.W.2d 927, 930 (Minn. 1998) (inner quotations omitted).

15 ABA Section on Dispute Resolution, Resolution on Mediation and the Unauthorized Practice of Law, adopted by the Section on February 2, 2002.

16 See North Carolina State Bar Formal Ethics Opinion No. 2 (2012) (holding that an attorney-mediator cannot prepare a binding business contract for two pro se parties at the end of mediation, because the attorney-mediator had a "non-consentable" conflict of interest and would be improperly practicing law if he drafted the contract requested by the parties).