

**UPCHURCH WATSON WHITE & MAX
MEDIATION GROUP**

AND THE UNIVERSITY OF FLORIDA

LEVIN COLLEGE OF LAW

INSTITUTE FOR DISPUTE RESOLUTION

ARE PROUD TO CO-SPONSOR

TODAY'S WEBINAR:



MEDIATING FRANCHISE DISPUTES

MEET OUR PRESENTERS...

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MEDIATING FRANCHISE DISPUTES

RICARDO J. CATA AND SHELLEY LEINICKE
MEDIATORS WITH
UPCHURCH WATSON WHITE & MAX

FRANCHISING STATISTICS

AS OF 2018

MORE THAN 900,000 FRANCHISE
ESTABLISHMENTS IN THE U.S.

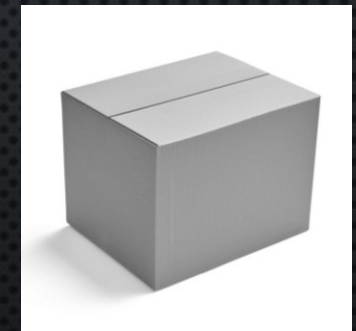
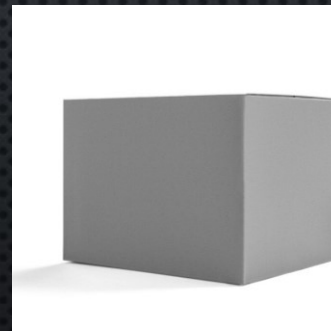
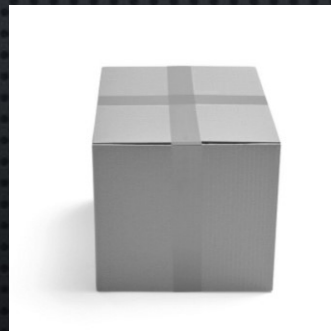
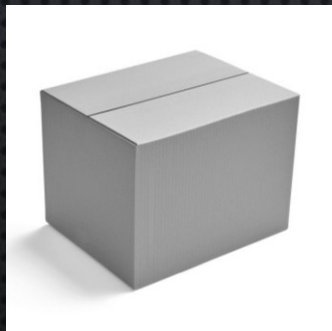
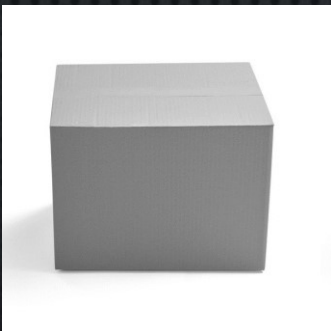
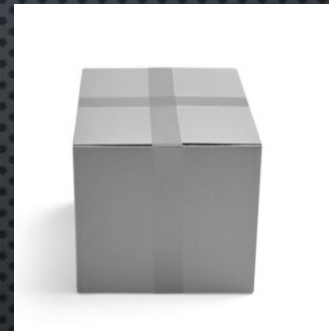
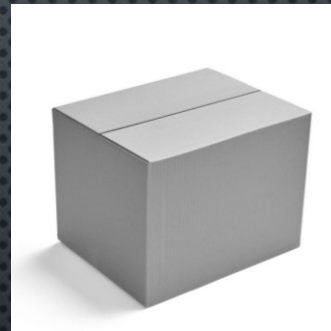
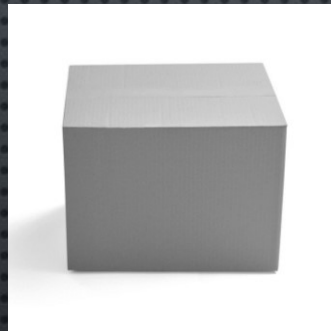
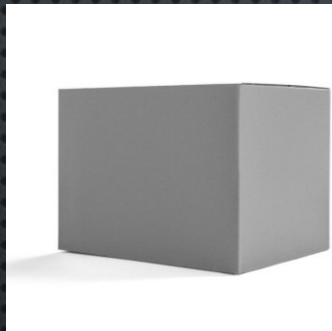
* EACH “MART” = 100,000



FRANCHISING STATISTICS, CONT.

- THERE WERE ALSO AN ESTIMATED 3,000 DIFFERENT FRANCHISORS OPERATING IN THE U.S.
- IT IS ESTIMATED THAT MORE THAN 900,000 FRANCHISE BUSINESSES ACROSS OVER 300 BUSINESS CATEGORIES IN THE U.S. PROVIDE NEARLY 18 MILLION JOBS, AND GENERATE OVER \$42.1 TRILLION TO THE U.S. ECONOMY.

ABOUT ONE OUT OF EVERY 12 BUSINESSES IN THE U.S. IS A FRANCHISE



FRANCHISING STATISTICS, CONT.

- ACCORDING TO THE U.S. CENSUS BUREAU, FRANCHISES ACCOUNTED FOR 10.5 PERCENT OF BUSINESSES WITH PAID EMPLOYEES IN THE APPROXIMATE 300 INDUSTRIES IN WHICH FRANCHISING DATA WAS COLLECTED FROM 2007.
- ACCORDING TO THE INTERNATIONAL FRANCHISE ASSOCIATION (IFA), ALMOST 4% OF ALL SMALL BUSINESSES IN THE U.S. ARE FRANCHISES.
- IT IS ESTIMATED THAT THE FRANCHISE INDUSTRY ACCOUNTS FOR APPROXIMATELY 50% OF ALL RETAIL SALES IN THE U.S.
- IT IS ESTIMATED THAT A NEW FRANCHISE BUSINESS OPENS EVERY 8 MINUTES OF EVERY BUSINESS DAY IN THE U.S.

AS OF 2017

FRANCHISE OWNERS WERE:

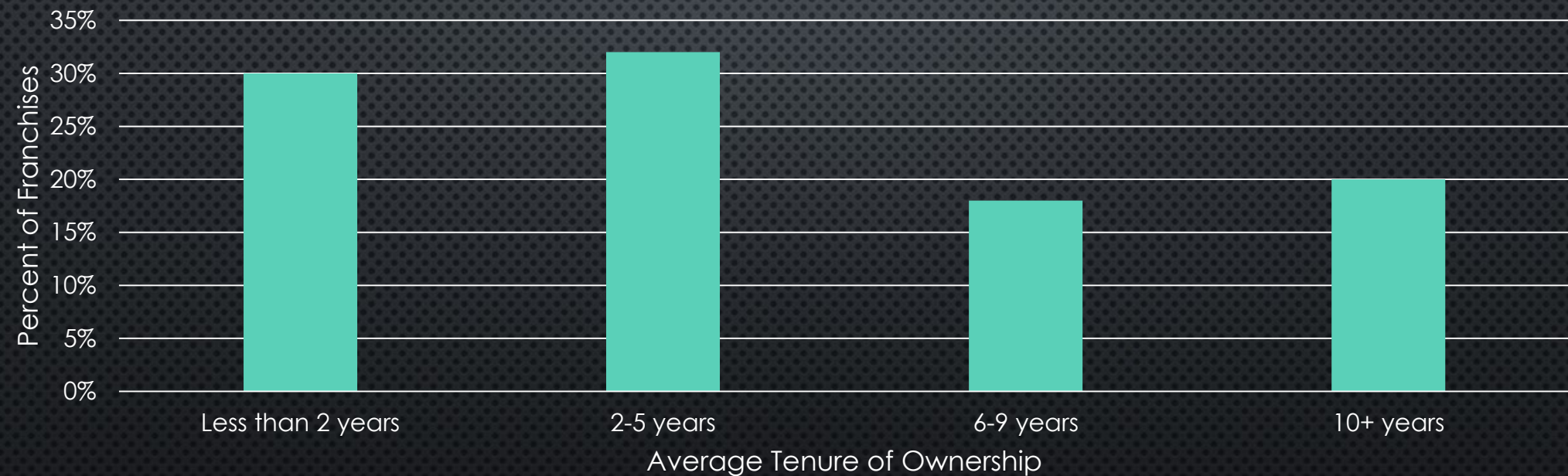
- 71.9% MEN
- 28% WOMEN



FRANCHISING STATISTICS, CONT.

- THE MEDIAN PRE-TAX INCOME FOR MALE FRANCHISEES AVERAGES AT \$73,261; AND FOR FEMALE FRANCHISEES AVERAGES AT \$54,408.
- THE AVERAGE LENGTH OF A FRANCHISE CONTRACT IS 10 YEARS.
- MOST FRANCHISE COMPANIES HAVE FEWER THAN 100 UNITS.
- THE MEDIAN AGE OF FRANCHISE OWNERS IS 45 TO 54 YEARS.
- 44% OF FRANCHISE OWNERS HAVE A BACHELOR'S DEGREE; 19% HOLD AN ADVANCED DEGREE; AND 12% OF FRANCHISEES ARE U.S. MILITARY VETERANS.
- 70% OF FRANCHISE OWNERS WORK AN AVERAGE OF 40 TO OVER 60 HOURS PER WEEK.

OWNERSHIP TENURE FOR FRANCHISEES



FRANCHISING STATISTICS, CONT.

- THE AVERAGE INITIAL INVESTMENT FOR FRANCHISEES IS \$520,000 ACROSS 3,500 BRANDS IN 200 SECTORS.
- THE MOST POPULAR FRANCHISE SECTORS ARE: QUICK-SERVICE; LODGING; BUSINESS-RELATED. THE TOP FRANCHISE INDUSTRY IS FAST FOOD.
- MULTI-UNIT OPERATORS CONTROL 54% OF ALL FRANCHISES OUTLETS, WITH 87.7% MULTIUNIT OPERATORS BEING IN JUST ONE BRAND.
- THE IFA, IN ITS 2018 FRANCHISE BUSINESS OUTLOOK, REFLECTED A CONTINUED GROWTH IN THE FRANCHISE INDUSTRY, FOR THE EIGHTH YEAR IN A ROW.

THE RISE OF FRANCHISOR- FRANCHISEE DISPUTES

INDUSTRY GROWTH BEGETS GROWTH IN DISPUTES



Mediating Franchise Disputes

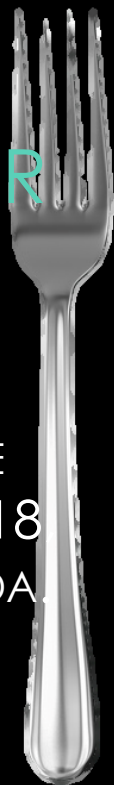
FRANCHISE AGREEMENTS ARE LENGTHY AND COMPLEX DOCUMENTS,

REFLECTING THE RIGHTS GRANTED TO THE FRANCHISEE AND THE OBLIGATIONS OF THE FRANCHISEE TO OPERATE A BUSINESSES IN COMPLIANCE WITH THE FRANCHISE SYSTEM, AND THE RIGHTS AND OBLIGATIONS OF THE FRANCHISOR AS TO THE FRANCHISEE.



RESTAURANT SECTOR

THE INCREASE IN FRANCHISOR-FRANCHISEE DISPUTES HAS BEEN PARTICULARLY NOTICEABLE IN THE RESTAURANT SECTOR DURING 2018 BOTH IN THE U.S. AND IN CANADA.



THE RISE OF FRANCHISOR-FRANCHISEE DISPUTES, CONT.

- USUALLY, AS THE NUMBER OF FRANCHISEES WITHIN A GIVEN FRANCHISE SYSTEM GROW, SO DO THE NUMBER OF DISPUTES RELATED TO A COMMON ISSUE TO ALL OR VIRTUALLY ALL OF THE FRANCHISEES WITHIN THAT SYSTEM.
- IT IS PROBABLE THAT, DESPITE EARNEST EFFORTS ON BOTH SIDES TO AVOID A DISPUTE, A TIME WILL COME DURING THE COURSE OF A FRANCHISE TERM WHEN THE FRANCHISOR AND THE FRANCHISEE MAY NOT AGREE ON A KEY OR IMPORTANT ISSUE, OR SEE THINGS DIFFERENTLY AS TO THAT KEY ISSUE.

CONSEQUENCES OF DRAWN-OUT DISPUTE



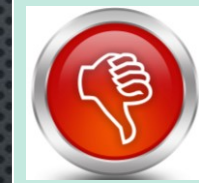
Negative repercussions

- Costs
- Business disruptions
- Bad publicity
- Dramatic business outcome for one (or some) side(s), with potential for significant damage awards if matter goes to litigation or arbitration



Long court or arbitration fight

- Destruction of franchisee's business
- Possible destruction of franchisor's business
- Or damage to the system and its mark.



Risks particular to newer system

- Diverting management attention as well as financial, marketing and operational resources from growing and improving the system
- Adverse outcome (or unhappy, vocal franchisees) can likely further aggravate the situation by making it difficult for franchisor to sell new franchises.

DISCLOSURE REQUIREMENTS OF FRANCHISORS VS. PRE-SUIT MEDIATION

ANOTHER REASON TO AVOID ESCALATION TO LITIGATION OR ARBITRATION

MANDATORY DISCLOSURES REQUIRED UNDER STATE AND FEDERAL PRE-SALE FRANCHISE LAWS

- U.S. FEDERAL TRADE COMMISSION'S TRADE REGULATION RULE, "DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING FRANCHISING", 16 C.F.R., PART 436: **FRANCHISOR MUST DISCLOSE**, UNDER ITEM 3 OF ITS FRANCHISE DISCLOSURE DOCUMENT, **CERTAIN CIVIL ACTIONS AND RELATED SETTLEMENTS** [16 C.F.R. § 436.5(c)].
- UNDER THIS RULE, "**ACTION**" INCLUDES: "... **COMPLAINTS, CROSS-CLAIMS, COUNTERCLAIMS, AND THIRD-PARTY COMPLAINTS IN A JUDICIAL ACTION OR PROCEEDING, AND THEIR EQUIVALENT IN AN ADMINISTRATIVE ACTION OR ARBITRATION.**" [16 C.F.R. § 436.1(A)].



MOREOVER, THE DISCLOSURE REQUIREMENTS UNDER THE RULE ARE NOT LIMITED TO “ACTIONS” COMMENCING IN THE U.S.

HOWEVER, ITEM 3 DOES NOT REQUIRE
THE DISCLOSURE OF PRESUIT
SETTLEMENTS OF DISPUTES!

MANDATORY DISCLOSURE REQUIREMENTS ARE ANOTHER SIGNIFICANT FACTOR
FOR FRANCHISORS TO CONSIDER NEGOTIATIONS AND MEDIATION BEFORE ANY
“ACTION” IS COMMENCED.

ON THE OTHER HAND

THE SAME DISCLOSURE REQUIREMENTS MIGHT DISCOURAGE A FRANCHISOR FROM SETTLING DISPUTES AFTER AN “ACTION” HAS BEGUN, PARTICULARLY IF THE SETTLEMENT TERMS COULD BE VIEWED AS A CONCESSION OF WRONGDOING BY THE FRANCHISOR. THE FRANCHISOR WOULD NEED TO CONSIDER THE IMPACT OF THE DISCLOSURE RULE ON A PENDING LITIGATION OR ARBITRATION ON A CASE-BY-CASE BASIS.



MOST COMMON AREAS OF FRANCHISE DISPUTES

COMMON ALLEGATIONS AGAINST FRANCHISORS

- BREACH OF CONTRACT
- FRAUD AND MISREPRESENTATION
- BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
- VIOLATION OF APPLICABLE FEDERAL AND STATE FRANCHISE LAWS.

“FRAUD AND MISREPRESENTATION” ALLEGATIONS

- SOME FRANCHISEE CLAIMS ALSO INCLUDE FALSE OR MISLEADING “EARNING CLAIMS” IN THEIR ACTIONS AGAINST FRANCHISORS. SOME FRANCHISORS DO INCLUDE “EARNINGS” REPRESENTATIONS IN DISCLOSURE DOCUMENT GIVEN TO PROSPECTIVE FRANCHISEE - THE UNIFORM FRANCHISE OFFERING CIRCULAR OR UFOC.
 - DISCLOSURE DOCUMENT MUST BE PROVIDED TO A PROSPECTIVE FRANCHISEE AT LEAST 14 DAYS PRIOR TO THE PROSPECTIVE FRANCHISEE SIGNING ANY AGREEMENT RELATED TO THE FRANCHISE.
 - IF A FRANCHISOR DECIDES TO INCLUDE AN EARNINGS CLAIM, IT MUST FOLLOW THE NORTH AMERICAN SECURITIES ADMINISTRATION ASSOCIATION, INC.’S (NASAA) FORMAT AND GUIDELINES, WHICH HAVE BEEN APPROVED BY THE F.T.C. AND VARIOUS STATE AGENCIES AND PERTAIN TO THE TYPE AND NATURE OF THE EARNINGS INFORMATION THAT CAN BE INCLUDED IN THE DISCLOSURE DOCUMENT.

ENCROACHMENT CLAIMS

- THESE INVOLVE DISPUTES OVER TERRITORIAL RIGHTS WHICH OFTEN OCCUR BETWEEN THE FRANCHISOR AND FRANCHISEE DUE TO THE FRANCHISOR'S DESIRE TO CONTINUE TO GROW THE FRANCHISE SYSTEM.
 - MANY FRANCHISE AGREEMENTS CONTAIN CLAUSES ALLOWING THE FRANCHISOR TO EXPAND THE SYSTEM, AND, ON A PLAIN READING, PRECLUDING A CLAIM TO EXCLUSIVE TERRITORY ON THE PART OF THE FRANCHISEE.
 - SIGNIFICANT DISPUTES AND LITIGATION HAVE RESULTED OVER THIS TOPIC. THEREFORE, THESE CLAUSES NEED TO BE CAREFULLY CONSIDERED BY BOTH SIDES IN LIGHT OF THE CASE LAW AND THE SPECIFIC LANGUAGE OF THE CLAUSE AT HAND.

ENFORCEMENT OF NON-COMPETE CLAUSES

- MOST FRANCHISE AGREEMENTS CONTAIN PROVISIONS DESIGNED TO RESTRICT THE FRANCHISEE FROM COMPETING WITH THE FRANCHISOR BOTH DURING THE TERM (IN-TERM), AND AFTER THE TERMINATION OF THE FRANCHISE AGREEMENT (POST-TERM).
- SOME STATES MAY IMPOSE A LIMITATION ON THE ENFORCEABILITY OF THESE CLAUSES. (EXAMPLE: CALIFORNIA'S §§ 16600, ET. SEQ., CALIFORNIA BUSINESS & PROFESSIONAL CODE.) THE DISTINCTION BETWEEN AN "IN-TERM" AND "POST-TERM" COVENANT MAY BE AN IMPORTANT LEGAL DISTINCTION UNDER THESE STATUTES AND RELATED CASE LAW.

FORUM SELECTION CLAUSES

- THE PARTIES OFTEN AGREE TO INITIATE LITIGATION OR ARBITRATION IN A SPECIFIC JUDICIAL OR ARBITRAL FORUM INDICATED BY THE FRANCHISOR (WHICH ARE AT TIMES SEEN AS JUDICIALLY FAVORABLE TO THE FRANCHISOR OR GEOGRAPHICALLY INCONVENIENT TO THE FRANCHISEE). SOME STATES HAVE ADOPTED MEASURES DESIGNED TO MAKE FORUM SELECTION CLAUSES UNENFORCEABLE, RESULTING IN PRELIMINARY LITIGATION ON THIS TOPIC.

THE INCREASED USE OF MEDIATION IN FRANCHISE DISPUTES

LITIGATION OR
ARBITRATION WITH
FRANCHISEE IS USUALLY
A NO-WIN SITUATION.

EVEN IF THE FRANCHISOR
PREVAILS ON ALL CLAIMS,
DRAWN-OUT LITIGATION OR
ARBITRATION REPRESENTS A
SUBSTANTIAL TOLL ON BOTH THE
FRANCHISOR AND THE FRANCHISE
SYSTEM.



GOOD RESULTS: ANOTHER REASON FOR THE SHIFT

- FRANCHISE MEDIATION HAS, OVERALL, YIELDED GOOD RESULTS. FOR EXAMPLE, THE FRANCHISE MEDIATION PROGRAM OPERATED IN CONJUNCTION WITH THE INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION AND RESOLUTION (“CPR”), REPORTED THAT SINCE ITS INCEPTION IN 1994, THE PROGRAM HAD ACHIEVED “... A SUCCESS RATE OF APPROXIMATELY 80% ...” IN MEDIATIONS IN WHICH THE FRANCHISEE AGREED TO PARTICIPATE.
- LIKEWISE, SETTLEMENT RATES IN FRANCHISE MEDIATIONS RANGING FROM 65 TO 80% HAVE ALSO BEEN REPORTED BY OTHER MEDIATION SERVICES.

BENEFITS OF MEDIATION

- REDUCES LEGAL COSTS
- REDUCES RISKS OF LITIGATION
- REDUCES OPERATIONAL AND BUSINESS DISRUPTIONS OF DRAWN-OUT LITIGATION
- AIMS TO PRESERVE THE EXISTING BUSINESS RELATIONSHIP BETWEEN THE PARTIES.

IT'S **FASTER** AND MORE **FLEXIBLE**

FAST

- SCHEDULED QUICKLY
- MEDIATION CONFERENCE TYPICALLY COMPLETED IN ONE DAY

FLEXIBLE

- PARTIES CAN DRAFT AN AGREEMENT OF THEIR CHOOSING –
- WITHOUT A “WINNER “OR “LOSER”

MUCH LESS EXPENSIVE THAN LITIGATION OR
ARBITRATION

NO

- WITNESSES
- DISCOVERY
- EXPERT FEES
- OTHER COSTS AND DELAYS ASSOCIATED WITH LITIGATION OR ARBITRATION

\$25 MILLION

ANNUAL SAVINGS FROM USING FRANCHISE MEDIATION

FOR MEMBER COMPANIES OF C.P.R. INSTITUTE FOR DISPUTE RESOLUTION (ESTIMATE)

EVEN WHEN IT “FAILS,” MEDIATION SUCCEEDS

EVEN IF A SETTLEMENT AGREEMENT DOES NOT RESULT, THE MEDIATION PROCESS WOULD, AT A MINIMUM, PROVIDE EACH PARTY WITH A SIGNIFICANT “VIEW” OF THE OPPOSING PARTY’S CASE, AND IT WOULD ALSO GIVE THE PARTIES AN OPPORTUNITY FOR AN EARLY EVALUATION OF THE FACTUAL AND LEGAL WEAKNESSES AND/OR STRENGTHS OF THEIR OWN CASE, AND OF THE OPPOSING PARTY’S CASE (INCLUDING AS TO DAMAGES), AND ANALYZE THEIR BEST AND WORST ALTERNATIVE TO A NEGOTIATED AGREEMENT (“BATNA” AND “WATNA”).

Mediating Franchise Disputes



MORE FRANCHISE AGREEMENTS CONTAIN AN EARLY MEDIATION PROVISION

- USE OF MEDIATION HAS BECOME MORE PREVALENT AS A RESULT OF THIS COMPONENT OF THE DISPUTE RESOLUTION CLAUSE.
- SOME MAJOR FRANCHISORS HAVE AGREED TO MEDIATE WITH THEIR FRANCHISEES, PRE-LITIGATION OR PRE-ARBITRATION, ALL DISPUTES WHICH ARE NOT RESOLVED THROUGH HIGH LEVEL NEGOTIATIONS – AS PART OF THE NATIONAL FRANCHISE MEDIATION PROGRAM.

BOTH FRANCHISEE, FRANCHISOR HAVE A STAKE IN FINDING A SOLUTION TO THE DISPUTE

MEDIATION IS A GOOD PROCESS TO RESOLVE FRANCHISE DISPUTES BECAUSE:

- FRANCHISOR AND FRANCHISEE HAVE OFTEN ALREADY BEEN INVOLVED IN A BUSINESS RELATIONSHIP
- HAVE ALREADY INVESTED SIGNIFICANT AMOUNT OF TIME IN THAT RELATIONSHIP, AS WELL AS SIGNIFICANT HUMAN RESOURCES, FUNDS, MARKETING, TRAINING AND OPERATIONAL RESOURCES
- TYPICALLY HAVE ALREADY BEEN ENGAGED IN DIRECT NEGOTIATION EFFORTS.

THUS, BOTH SIDES ARE ALREADY WELL-INFORMED AS TO THE NATURE AND ISSUES OF THE DISPUTE.

MEDIATION ADDRESSES EACH PARTY'S INTERESTS

UNLIKE LITIGATION OR ARBITRATION, MEDIATION CAN ADDRESS EACH PARTY'S INTERESTS IN A MANNER THAT IS NOT TYPICALLY AVAILABLE IN COURT OR ARBITRATION BY:

- SHAPING CREATIVE SOLUTIONS, IDEAS, TERMS, CONDITIONS, ALTERNATIVE AVENUES FOR A RESOLUTION AND MONETARY SOLUTIONS
- MINIMIZING PAYMENTS UNDER A SETTLEMENT BY BEING CREATIVE IN HOW TO STRUCTURE IT FOR TAX PURPOSES
- DECIDING THE MANNER AND TIMING OF THE PAYMENTS
- GIVING THE PROTECTION OF CONFIDENTIALITY AT MEDIATION; OUTCOME IS ALSO CONFIDENTIAL
- MINIMIZING THE INVESTMENT OF EXECUTIVE TIME
- REDUCING POTENTIAL ADVERSE PUBLICITY.

MEDIATION IS ALREADY FAVORED

- WHEN ASKED AS PART OF FRANCHISE GRADE.COM'S FRANCHISE EXPERT SURVEY OF 2015: "WHEN REVIEWING ALTERNATIVE DISPUTE RESOLUTION CLAUSES, WHAT DO YOU FEEL IS THE MOST REASONABLE STRUCTURE FOR A BALANCED RELATIONSHIP?" MORE THAN 50% ANSWERED THAT MEDIATION FOLLOWED BY ARBITRATION BEST SUPPORTED SUCH A RELATIONSHIP.
- 66% PERCENT OF RESPONDENTS TO THAT SURVEY BELIEVED THAT MEDIATION PRIOR TO THE COMMENCEMENT OF ANY TYPE OF LEGAL ACTION WAS THE BEST PATH FORWARD FOR A FRANCHISOR AND ITS FRANCHISEE.

WHEN RESOLUTION IS REACHED THROUGH EARLY PRE-SUIT MEDIATION

Franchisor is under no obligation to disclose dispute/outcome in franchise disclosure document

It can keep a conflict from metastasizing throughout franchise system, potentially inhibiting brand success

WHICH FRANCHISE DISPUTES MAY NOT
BE SUITABLE, OR LESS SUITABLE,
FOR MEDIATION?

SOME EXAMPLES: DISPUTES IN WHICH

- AN UNWAVERING OR NON-NEGOTIABLE PRINCIPLE OF THE FRANCHISOR WITH SYSTEM-WIDE RAMIFICATIONS MAY BE AT STAKE
- ONE PARTY DESIRES AN OPPORTUNITY TO ESTABLISH NEW CASE-LAW PRECEDENT, OR DEFEAT EXISTING ADVERSE CASE-LAW PRECEDENT (E.G. CLAIMS OF TERRITORIAL ENCROACHMENT SUCH AS G., SCHECK VS. BURGER KING, AND ITS PROGENY)
- THE TERMINATED FRANCHISEE CONTINUES TO USE THE FRANCHISOR'S TRADE MARK WITHOUT CONSENT OR PAYMENT — IN THAT THE FRANCHISOR WOULD IMMEDIATELY SEEK INJUNCTIVE RELIEF IN STATE OR FEDERAL COURT.

MORE EXAMPLES: DISPUTES IN WHICH

- CONFIDENTIALITY RESTRICTIONS IN THE FRANCHISE AGREEMENT OR OPERATING MANUAL ARE BEING VIOLATED
- SEVERAL FRANCHISEES ARE INVOLVED, AND/OR THE DISPUTE RELATES TO ISSUES OF CONTENTION THROUGHOUT THE FRANCHISE SYSTEM. FRANCHISOR WOULD BE UNDER GREATER LIMITATION IN ITS NEGOTIATING POSITION, AND IN ITS FLEXIBILITY AS TO A NEGOTIATED AGREEMENT
- ISSUES EMERGE RELATED TO PUBLIC HEALTH ASSOCIATED WITH THE FRANCHISEE OPERATION.

COMPONENTS OF A SUCCESSFUL MEDIATION

FOR PARTIES AND MEDIATORS
AND IN ANTICIPATION OF A SETTLEMENT

AS TO THE PARTIES

- BE WILLING TO NEGOTIATE IN GOOD FAITH — WITH AN OPEN-MINDED APPROACH TO FINDING A SOLUTION — AND TO COMPROMISE
- HAVE A SINCERE INTEREST IN WORKING HARD ON FINDING A MUTUALLY ACCEPTABLE PATH TO A RESOLUTION
- BE WILLING TO STAY INVOLVED AND FOCUSED ON FINDING THAT PATH, WITHOUT CONCERN FOR CATCHING A FLIGHT OR BEING BOUND BY WHATEVER TIME WAS ORIGINALLY RESERVED FOR MEDIATION

PARTIES SHOULDN'T

BLOCK AN OTHERWISE
POTENTIALLY SUCCESSFUL
MEDIATION BY BEING UNWILLING
TO COMPROMISE AND
BECOMING “ANCHORED” FROM
THE OUTSET TO A PERHAPS
UNREASONABLE POSITION.





A MEDIATION HAS THE GREATEST CHANCE OF SUCCESS WHEN NEITHER PARTY HAS THE LUXURY OF BEING ABLE TO WALK AWAY FROM THE MEDIATION WITHOUT AN AGREEMENT. BOTH SIDES NEED TO BE EQUALLY INVESTED IN THE OUTCOME OF THE MEDIATION.

BEFORE MEDIATION

- SEVERAL DAYS BEFORE, BOTH PARTIES SHOULD SUBMIT THEIR RESPECTIVE WRITTEN POSITIONS, WITH KEY OR RELEVANT PLEADINGS OR DOCUMENT(S), TO THE MEDIATOR – ON A CONFIDENTIAL BASIS, OR SHARED WITH THE OTHER SIDE IF AGREED TO BY THE PARTIES
- THIS WILL ALLOW THE MEDIATOR TO BECOME INFORMED AS TO THE NATURE AND DETAILS OF THE SPECIFIC CLAIMS AND DEFENSES IN THE DISPUTE, THE FACTUAL AND LEGAL ISSUES, AND CLAIMED DAMAGES, WELL BEFORE THE CONFERENCE.
- THE SUBMISSION WILL ALSO HELP THE MEDIATOR TO HAVE INFORMED PRE-MEDIATION CONVERSATIONS WITH BOTH SIDES, AND ALLOW THE MEDIATOR TO BEGIN DEVELOPING THOUGHTS, IDEAS AND INQUIRIES AS TO POTENTIAL AREAS OF AGREEMENT, AND SUGGESTIONS ON HOW TO ADDRESS THE AREAS OF DISAGREEMENTS.

MORE

- THE MORE INFORMATION AND KEY DOCUMENTS AND CORRESPONDENCE BOTH SIDES, AND THE MEDIATOR, CAN OBTAIN BEFORE THE MEDIATION, THE BETTER PREPARED BOTH SIDES AND THE MEDIATOR WILL BE FOR THE VARIOUS DIRECTIONS THE MEDIATION CONFERENCE MAY (AND LIKELY WILL) TAKE.

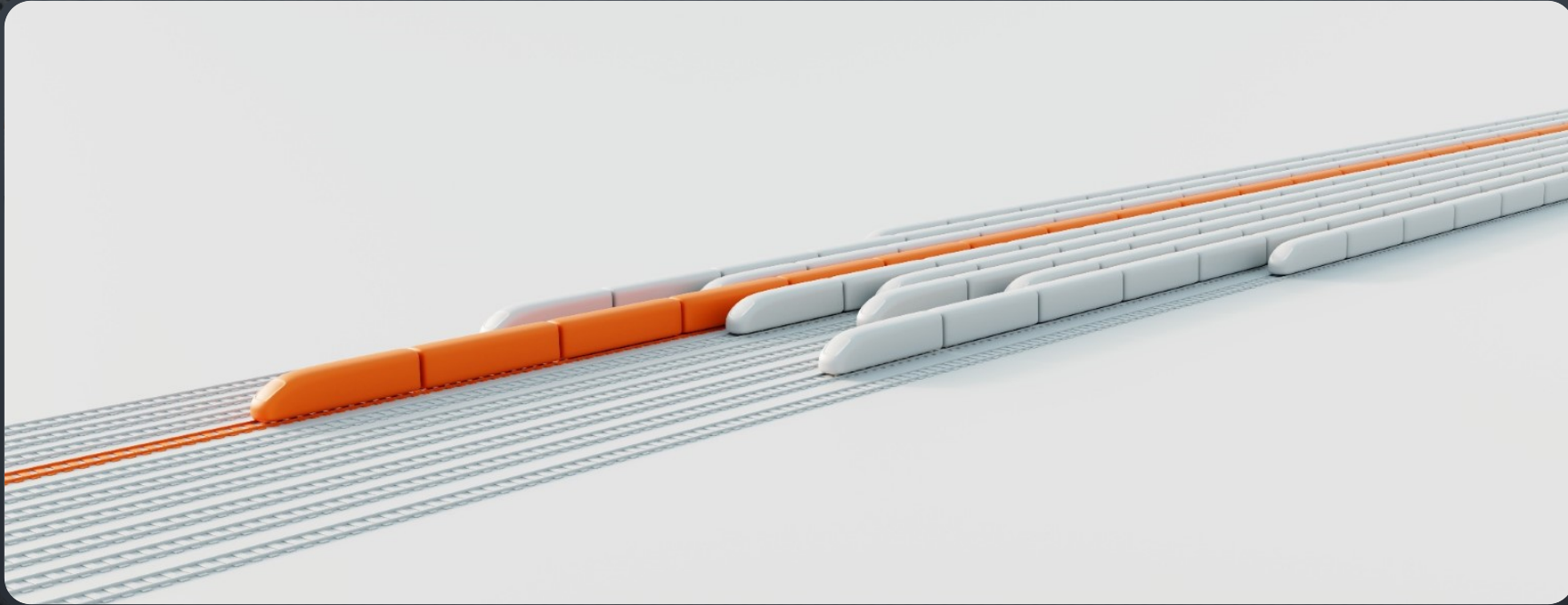
BEFORE & DURING MEDIATION

IN THE APPROPRIATE CIRCUMSTANCES, THE PARTIES MAY CONSIDER CONSULTING WITH LIABILITY, DAMAGES AND TAX EXPERTS BEFORE MEDIATION AND, WHEN APPROPRIATE, MAY WISH TO HAVE SOME OF THESE EXPERTS AVAILABLE BY TELEPHONE DURING MEDIATION.



DURING MEDIATION

- MEDIATIONS ARE MOST LIKELY TO PRODUCE AN AGREEMENT WHEN ALL DECISION MAKERS ARE PRESENT DURING THE MEDIATION (IN MOST COURT AND ARBITRATION MEDIATION RULES, THIS IS REQUIRED). WITHOUT ALL DECISION MAKERS PRESENT, IT IS VERY DIFFICULT, AND AT TIMES IMPOSSIBLE TO REACH A RESOLUTION AT MEDIATION THAT WAS NOT PREVIOUSLY CONSIDERED BY EITHER SIDE.
- LIKEWISE, ANY GUARANTOR OF FRANCHISEE'S OBLIGATIONS OR SPOUSE INVOLVED IN FRANCHISE OPERATIONS SHOULD ALSO BE PRESENT OR AVAILABLE AT MEDIATION, SO THAT ALL STAKEHOLDERS CAN HAVE AN EQUAL OPPORTUNITY TO PARTICIPATE IN THE RESOLUTION OF THE DISPUTE.



AS TO THE MEDIATOR

THE MEDIATOR'S SKILLS AND EXPERIENCE ARE MOST VALUABLE TO BOTH SIDES AND TO BREAKING A POTENTIAL IMPASSE. THE MEDIATOR CAN KEEP THE MEDIATION GOING, SUGGESTING ALTERNATIVES AS TO AREAS OF COMPROMISE, OR FOCUSING THE PARTIES ON CONSIDERATIONS NOT PREVIOUSLY ENTERTAINED BY EITHER PARTY.

MORE ON SELECTING A MEDIATOR FOR FRANCHISE DISPUTES

- SELECTING THE RIGHT MEDIATOR IS A VERY IMPORTANT FACTOR FOR INCREASING THE PROSPECTS OF A SUCCESSFUL MEDIATION.
- THE SELECTED MEDIATOR SHOULD UNDERSTAND FRANCHISING, THE COMPLEX DYNAMICS AND INTRICACIES OF A FRANCHISE RELATIONSHIP AND LEGAL ISSUES INVOLVED IN FRANCHISE DISPUTES, AND BE WILLING TO KEEP PARTIES TALKING AND NEGOTIATING, EVEN WHEN IT APPEARS THERE MAY BE NO COMMON GROUND LEFT FOR A RESOLUTION.

AN EFFECTIVE MEDIATOR WILL:

- REVIEW THE PARTIES' PRE-MEDIATION WRITTEN SUBMISSIONS, REACH OUT AND SPEAK TO THE ATTORNEYS ON BOTH SIDES PRIOR TO THE MEDIATION, AND START DEVELOPING THOUGHTS AND IDEAS PRIOR TO THE MEDIATION AS TO POTENTIAL AREAS OF AGREEMENT, AND POTENTIAL SOLUTIONS AND IDEAS AS TO AREAS OF DISAGREEMENT, SO AS TO BE AS KNOWLEDGEABLE AS POSSIBLE ABOUT THE DISPUTE, AND BE IN THE BEST POSITION TO MAXIMIZE HIS/HER ROLE IN FINDING A MUTUALLY AGREEABLE PATH TOWARD A RESOLUTION.
- HELP PARTIES COMMUNICATE, IDENTIFY AND NARROW ISSUES DURING MEDIATION, EXPLORE AREAS OF AGREEMENT AND CONSEQUENCES TO BOTH PARTIES OF NOT SETTLING, AND DEVELOP A PROBLEM-SOLVING APPROACH WITH BOTH SIDES TO IDENTIFY POSSIBLE OPTIONS NOT PREVIOUSLY CONSIDERED.

PERSISTENCE PAYS

- IF AN AGREEMENT APPEARS TO BE CLOSER, OR LIKELY, THE MEDIATOR SHOULD ENCOURAGE PARTIES TO KEEP NEGOTIATING AND NOT TO POSTPONE OR ADJOURN THE MEDIATION, EVEN IF THE HOUR IS LATE, UNTIL AN AGREEMENT IS REACHED AND DOCUMENTED CONCERNING ALL THE KEY AND RELEVANT POINTS, AND SIGNED BY THE PARTIES.
- OTHERWISE, AFTER THE PARTIES TALK TO THEIR SPOUSES, OR TO THE CFO, CEO, OR COO OF THE FRANCHISOR OR OF THE MULTI-UNIT FRANCHISEE, THE DEAL THAT MAY HAVE BEEN WITHIN REACH MAY NO LONGER BE AVAILABLE.
- IF A SETTLEMENT IS NOT REACHED DURING THE MEDIATION, THE MEDIATOR SHOULD STAY ENGAGED AND IN CONTACT WITH THE PARTIES AS LONG AS NECESSARY OR INDICATED SO AS TO ASSIST THE PARTIES TO CONTINUE BUILDING UPON PROGRESS MADE DURING THE MEDIATION CONFERENCE TOWARD AN ULTIMATE RESOLUTION.

IN ANTICIPATION OF A SETTLEMENT

- IT WOULD BE A GOOD PRACTICE FOR THE PARTIES' LAWYERS TO BRING TO THE MEDIATION A FORM SETTLEMENT DOCUMENT IN THEIR LAPTOPS, AND THEN "FILL IN THE BLANKS" WHEN A SETTLEMENT IS REACHED, AND THE MEDIATOR SHOULD MAKE SURE THAT NO ONE LEAVES THE MEDIATION WITHOUT THE SETTLEMENT BEING COMPLETED AND SIGNED BY ALL THE PARTIES AND LAWYERS.
- THE LAST THING ANY LAWYER OR PARTY (OR MEDIATOR, AS THE GUARDIAN OF THE PROCESS), WOULD WANT IS TO HAVE A POST-MEDIATION FIGHT OVER THE TERMS OF A TENTATIVE SETTLEMENT, OR TO HAVE ONE SIDE HAVE "BUYER'S REMORSE" THE DAY AFTER A LONG MEDIATION, AND PULL OUT OF A NON-DOCUMENTED AND UNSIGNED "SETTLEMENT AGREEMENT."

UNDER FLORIDA MEDIATION LEGISLATION AND RULES ...

... IF A PURPORTED AGREEMENT
REACHED BY THE PARTIES DURING
MEDIATION IS NOT DRAFTED AND
SIGNED BY THE PARTIES AND
LAWYERS AT THE MEDIATION,
THEN THERE WAS NO MEDIATION
SETTLEMENT AGREEMENT.



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