MEDIATING COMPLEX CASES AND TRICKS OF THE TRADE

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I. **Handling Different Forms of Complexity.** The parties will typically be more acutely aware of problems that arise from the complexity of a dispute than is the mediator. Sometimes, however, parties do not foresee all the attendant problems. Conferences, separate and with all parties, can help bring these issues to the surface before the formal mediation begins so that everyone, including the mediator, is prepared for them.

A. Legal Complexity

1. Employment cases are more often legally complex than not, *e.g.,* a sexual harassment case has multiple elements of liability, different standards for different forms of vicarious liability, may have pendant state claims and pre-emption defenses, damage "caps," and punitive damage problems.

2. Some employment cases present problems from other areas of law, e.g., covenant not to compete and trade secret problems; ethics problems in cases in which the employee is a professional like an attorney or therapist; regulatory and criminal law in many retaliatory discharge cases; securities and tax law in executive employee cases; corporate governance law in shareholder-employee disputes; bankruptcy law where financial viability of the defendant is in question; insurance law where the employer has a policy and a dispute over coverage; and ERISA and tax issues with respect to settlement of many cases.

3. Research and a thorough understanding by the mediator of the legal context prior to the mediation is key to success.

4. In some cases, the mediator should consider someone who is an expert in related legal field as a co-mediator. The accumulated wisdom that comes from experience in a specialized practice is important and legal research is no substitute for practical experience.

B. Multi-Party Complexity

1. Multiple Parties Defendant

(a) *Insurance Coverage* brings an independent party (the carrier) into the negotiation.

(i) The employer continues to have important interests at stake: impact on future insurance coverage cost; coverage threshold/deductible; impact of settlement on workforce and management.

(ii) The mediator should learn whether the carrier representative has experience in employment cases.

(iii) Insurance carriers tend to be more direct in their approach to negotiation. They tend to put more forthcoming first offers on the table, but may quickly reach the point of making a "take it or leave it" offer, which can be confusing for employee's counsel who has not experienced this approach. This can raise employee expectations of settlement that are not realistic.

(iv) The mediator should anticipate this problem and ensure good communication with the offer to prevent negotiations from becoming derailed.

(b) *Union and Employer* defendant cases

(i) The state of relations between union and employer will significantly affect the negotiation process.

(ii) The mediator should identify "hot button" issues and historical relationship concerns between the defendants prior to the mediation and prevent them from interfering with settlement.

(c) *Corporate Successor* Cases (Claim asserted against the corporate successor/buyer and predecessor/seller indemnifies the successor)

(i) The mediator should understand the nature and history of the transaction and issues that have

arisen between buyer and seller, as well as provisions of the purchase and sale agreement governing the rights of the defendants *inter se.*

(ii) The mediator should determine who controls the settlement decision if the defendants disagree.

(iii) The mediator should identify whether and how the interests of seller (settle claim at minimum cost) and buyer (ongoing business considerations) diverge, perhaps setting the stage for renegotiation of who pays how much to settle.

(d) Employer-and *Individual Employee Defendant* Cases (e.g., sexual harassment cases, non-competition and duty of loyalty cases).

(i) The mediator should assess whether the counsel for the defendants (if it is a single attorney) is acting under a potential conflict of interest and if so address that problem before mediation begins.

(ii) The mediator should understand whether the individual defendant is being held financially accountable by the employer, and ascertain the individual defendant's indemnification rights under applicable corporate law.

(iii) The mediator should understand whether the individual employee's employment status is jeopardized by the claim, and how that affects his or her negotiation posture.

(iv) The mediator should understand whether the individual employee is a significant participant in the employer's decision-making process, and whether personal resentment over the case will be an obstacle to settlement.

2. Other Multiple Defendant Problems

(a) *Public Employers* (*e.g.*, governing board and administrator; independently elected official and county board).

(i) The mediator should determine who has real power to make what decisions concerning settlement.

(ii) The mediator should determine the extent to which confidentiality can be, or is likely to be, observed during mediation.

(1) The mediator should caution the parties about the adverse consequences of loss of confidentiality and seek commitment to maintain confidentiality.

(2) The mediator should caution the parties separately about the potential for unauthorized disclosures by the other party and discuss strategies for dealing with unauthorized disclosures.

(3) The mediator should consider and inquire about the potential for back-channel communications between the employee and other participants, and its potential effect on discussions.

(4) The mediator should exercise greater than usual discretion in disclosures to participants and consider communicating with counsel only on sensitive subjects.

(iii) The mediator should consider seeking participation of an authoritative representative of the governing board to ensure "buy-in" but prevent cumbersomeness of full group participation.

(b) Financially Troubled Employers.

(i) The mediator should determine in advance the specific degree of authority the corporate representative will have in the mediation.

(ii) The mediator should seek direct participation by a creditor or trustee representative.

(iii) The mediator should seek advance disclosure of financial limitations on the employer and basis

for them, the give the employee side an opportunity to assess with confidence the employer's financial ability to pay.

3. Multiple Plaintiff Cases.

(a) *Co-Worker Plaintiffs Cases*.

(i) The mediator should caution Plaintiffs' counsel before the mediation concerning the conflicts inherent in counseling different clients where they are effectively in competition for a limited available amount of settlement money. Some suggestions the mediator can make are:

(1) Plaintiffs' counsel can suggest that clients agree in advance (and in writing), independent of the attorney, regarding how settlement money will be divided, whether individual settlements will be entertained, and how the decision to accept or reject an offer will be made if there is a difference of opinion.

(2) Plaintiff's counsel can suggest that individual clients have personal attorneys participate in the process.

(3) Plaintiffs' counsel can suggest that settlement be conditioned on approval of settlement by the court after hearing, advising each plaintiff to secure independent counsel to represent his or her interests in that hearing.

(4) Plaintiffs' counsel can secure independent counsel to represent each individual in the mediation or settlement deliberations.

(ii) The mediator should seek to identify any conflicts among employee-plaintiffs in the initial private caucus and consider the impact that will have on negotiations.

(1) Individuals may have different levels of desire to settle, different financial

demands or different non-monetary demands.

(2) Individuals may or may not have interest in separate settlement.

(3) The mediator must assess the different personality styles of the individuals and the degree to which they can be influenced by their attorney.

(iii) The mediator should discourage negotiation positions by the defense that could have the effect of derailing settlement by creating conflicts among the individual plaintiffs.

(b) *Multiple Suits and Counterclaims.*

(i) The mediator should clarify the full scope of the mediation, and whether other disputes will remain outstanding following settlement, as this will affect the settlement positions of the parties.

(ii) Where different plaintiffs are represented by different lawyers, the mediator should encourage joint preparation and presentation on the plaintiff side. This will either build trust and consensus among counsel or bring conflicts in objectives or strategy into focus.

(iii) The mediator should guard against use of mediation to commit a fraud or other violation of the rights of an absent third party.

(iv) The mediator should consider separately each aspect of the dispute (e.g., different probability of success may apply in a different forum; timing problems and *res judicata* considerations; abstention considerations; possibility of enforcement of summary judgment on liquidated claim pending trial of disputed claim).

(c) *Class Actions and Multi-District Litigation.*

(i) The mediator should be familiar with applicable law governing class actions (*e.g.*, availability of appeal of class certification decision; standards

for class certification; different standards applicable to different forms of class action; settlement structuring; and how this may affect settlement positions).

(ii) The mediator should consider the merits of the individual claims as well as the class claims.

(iii) The mediator should obtain all decisions in the case and transcripts of court appearances to understand judge's viewpoint concerning the case.

(iv) The mediator should consider what role, if any, the judge may play in the process (*e.g.,* providing parties with insight into his or her inclination on discretionary/management matters).

(v) The mediator should consider, in the event of a deadlock, isolating specific issues that can be framed for the judge to decide that will advance settlement.

(vi) The mediator should avoid suggestions of an ongoing role as monitor of settlement compliance because this changes the mediator's role and can adversely affect his or her effectiveness as a mediator.

4. *Absent Party* Cases

(a) Where a party has either not been invited to the mediation, or has chosen not to attend the mediation, the mediator must be on guard to a settlement that violates the rights of the absent party and bring the issue to the attention of the parties. Where appropriate, the mediator should withdraw from participation.

(b) The mediator should consider, at all stages, the perspective and possible positions, reactions and steps that the absent party could take that would frustrate a settlement or any party's expectations from a settlement, and assist the parties to anticipate the resulting problems for the settlement in developing an agreement.

(c) The mediator should consider whether the parties should enter into a "non-settlement," in which the parties take certain reciprocal steps without any actual agreement between them, where each will benefit from the consensus course of conduct so long as the other conforms to it.

C. Factual Complexity

1. Cases Presenting *Accounting Problems.*

(a) The mediator can suggest that the parties' accounting experts, directly or through an intermediary, jointly isolate and quantify the disputed issues.

(b) The mediator should take steps to ensure that the parties set forth their positions in formats that enable easy comparison with one another, to allow the truly disputed issues to be identified.

(c) The mediator should insist that supporting documentation be brought to the mediation in cases where accounting problems are presented. In accounting disputes, the dispute is sometimes a phantom, in which either or both sides' position is based on mistaken or incomplete information, or in which one or both sides is employing a faulty analytical methodology.

(d) Disputes over attorneys' fees can be approached this way, by conducting a review of the actual work done against the billing records (*e.g.,* comparing legal memoranda against the records of time required to research and complete them). This can only be done if all materials are compiled before the mediation in a manner that makes it possible to conduct the review.

2. Cases Involving *Massive Amounts of Data.*

(a) The mediator should address this problem with detailed preparatory sessions with the parties to establish a framework for exploring the problem.

(b) The mediator should help the parties develop an objective approach to obtaining or quantifying the critical data so that imbalance in information does not defeat the possibility of settlement.

(c) The mediator should suggest approaches to streamlining the development of factual consensus, such as:

(i) The audit approach of extrapolating a representative sample or samples.

(ii) Reliance on an authoritative independent evaluator of the information.

(iii) Substitution of rough but reasonable methods of making estimates that reduce the cost of obtaining information needed to make decisions.

(iv) Development of settlement formulas in place of absolute numbers.

3. Cases involving *unknown information*.

(a) The mediator should explore the question of whether both parties are prepared to enter into a settlement without hearing the information.

(b) The mediator should determine whether there are methods for reducing the level of uncertainty associated with the unknown fact. For example, the mediator could suggest methods of expediting the process of obtaining the information necessary to settlement.

(c) The mediator should explore whether the parties wish to enter into a settlement conditioned on the ultimate determination of the unknown fact. The classic example of this is the "high-low" settlement where the jury's verdict is the unknown "fact."

(i) One problem with this approach is that it may simply delay the dispute, and transform it into a dispute over what the unknown fact is. The approach works only where the fact is objective and can be learned.

(ii) A "winner take all" style of settlement in this situation also encourages opportunistic behavior where a party can influence the disputed fact.

(d) The mediator should explore the extent of difference between the parties' best guesses concerning the unknown fact and the information on which they are based. Use of reality testing and consideration of comparable situations may help narrow the differences in estimate to a point that allows for settlement.

(e) The mediator should determine if the unknown fact is actually critical to a settlement. It maybe that other issues that can be resolved with greater certainty outweigh the issue that the unknown fact governs.

(f) The mediator should remind the parties that it is never possible before the trial is over to know each bit of evidence that will be presented, but attorneys can estimate the probabilities based on experience, and should do so with the degree of ambiguity in the situation in mind. Ultimately, most specific facts will have a smaller impact on the outcome than the makeup of the jury pool on the day the trial begins.

II. **Tricks of the Trade**

A. *Preparation for Mediation.* Most parties, left to their own devices, arrive at the mediation ready to argue their own view of the case but otherwise largely unprepared for mediation.

1. Damage Calculation

(a) The mediator should require each side, particularly the plaintiff side, to develop and provide to opposing counsel a calculation of the damages being claimed (typically in spreadsheet form) with full explanation of the source of all figures and formulas used, and backup material to document the numbers used.

(b) The mediator should review in detail local jury verdicts, where available, and the state appellate district or federal appellate circuit case law on excessive emotional distress and punitive damages to provide a basis on which to assess the reasonableness of the parties' estimates of the "soft" damage elements.

2. Settlement Terms.

(a) The attorneys should jointly review a draft settlement agreement and identify points of contention to ensure

that they are known before the mediation begins and can be considered as the settlement offers are exchanged.

(b) Specifically, the tax treatment of the settlement should be discussed between the attorneys and any research needed to make decisions on that point done before the mediation begins.

(c) Preparing a settlement agreement in advance creates a concrete sense of the possibility of settlement, hopefully fosters a cooperative legal working relationship between the lawyers and makes it possible to sign an agreement at the end of the mediation, bringing full closure immediately at that point.

3. Review of Merits.

(a) The mediator should obtain position statements and copies of critical documents in the case and review them critically to identify the key points of both sides and analyze the vulnerabilities of each side's positions.

(b) The mediator should encourage, but not require, the parties to provide these statements to one another.

(c) The mediator should review the pleadings and/or EEOC charge and position statement, court decisions if any, and critical documents.

(d) The mediator should construct a chronology of the events in the case to place each action in proper context.

(e) The mediator should review the cases cited by the parties as well as doing independent legal research on points raised by the parties' submissions or suggested by the facts.

4. Establishing the setting for productive mediation.

(a) A mediation agreement setting forth the key elements of mediation confidentiality should be provided to the parties and signed by the time the mediation begins. It should expressly provide for the confidentiality of pre-mediation conferences.

(b) The identity of the parties attending the mediation should be determined in advance to ensure that each side has appropriate representation. Here it is especially important to emphasize the importance of having the decision-making authority on both sides present for the mediation, without predetermined authority limits.

(c) The process to be employed in the mediation should be explained to the parties.

(d) Each party should be asked if there is something that the mediator should know about either party or its representative that could create a problem during the joint session or be detrimental to reaching an agreement (*e.g.,* identify emotional parties on either side and what kinds of statements would be likely to provoke a strong reaction in joint session). Any such information should generally be shared with the other side. This *does not* mean that a party must avoid making statements that could provoke an emotional reaction on the other side—that is a matter of negotiating strategy for each side to consider—but this step not be taken without being aware of the potential consequences.

B. Joint Session

1. In the joint session, the mediator is presented with an opportunity to emphasize certain things about mediation, and should do so with a view to what the preparation has suggested may be the obstacles of this particular mediation. These points can then be repeated when the problem arises in caucus, reminding the participants of the initial comments. Some examples:

(a) The need for attorneys to remove the advocate hat once their position has been stated, and put on the counselor/problem-solver hat.

(b) The futility to seeking emotional vindication in a settlement, and the necessity of taking a detached view of the litigation.

(c) The lack of control each party has in a trial or summary judgment proceeding as contrasted with the

power of the parties to resolve their own dispute on their own terms in mediation.

(d) The benefits of "interest-based" bargaining, in which each side focuses on satisfying its needs or desires in the mediation rather than simply stating its negotiating "position."

(e) The need in mediation of disclose information that will affect the other side's assessment of the case in mediation, as contrasted to the usual "cards close to the chest" imperative in litigation.

2. The mediator should, where it may be helpful, restate the points made by each side in its presentation. This gives the side that has spoken the knowledge that it has been heard, and reinforces the key points to the other side, increasing the probability that they will be remembered.

3. Positive statements towards the other party and expression of a desire to reach a settlement should be highlighted. Each side may be asked to state what it would like to see happen at the mediation, and what outcome is desired. This may or may not include extend to making specific settlement offers in joint session.

4. The mediator should invite the parties to make statements in addition to presentations made by counsel, and where appropriate, ask follow-up questions designed to help the party express his or her subjective viewpoint.

5. The mediator should allow discussion of issues where a more complete exchange of information may be beneficial.

6. The session should not end without a detailed statement by each side of what the history of negotiations has been up to the date of the mediation.

(a) It is vital to know in whose court the ball lies, and if each side believes that it is in the other's court, that issue should be identified and the mediator should consider how to solve that problem.

(b) The mediator can, in that circumstance, ask one side to make the first compromise offer as a sign of good faith, or ask each side to make a first compromise offer to the mediator privately.

C. Private Caucuses

1. *Overcoming Obstacles to Settlement.* When the caucus stage begins, or during it, the mediator must gain a sense of what obstacles each party is bringing to the table. Caucus is where these are worked on. Some examples, and often there are several at once on each side, follow:

(a) *Emotional Investment in Dispute.* This happens on both sides. It is often evidenced by a party's repetition of points after they have been discussed and their weaknesses exposed, and by hardening of positions and retrogressive negotiation to prevent settlement when the negotiation appears headed towards settlement. This individual wishes actively to thwart settlement, often without being aware of it.

(b) *General Inability to Negotiate.* Negotiation is ambiguity and, to a certain extent, lying. People who seek certainty do not understand why it is necessary to make "unrealistic" early offers and take offense at them. They also often have difficulty understanding any point of view but their own.

(c) *Idealistic, Self-Focused Expectations.* Some parties see both litigation and mediation as part of a process that should provide them with divine justice. They have difficulty in taking a practical approach to dispute resolution.

(d) *"Need to Win."* For some people, compromise is a mystery; they genuinely do not know how to do it. At every turn, they seek more and do not understand give and take as the currency of settlement.

(e) *Lack of Forthrightness.* Lacking trust in the process and/or the mediator, a party who will not lay his or her cards on the table deprives the mediator of information needed to keep the process on track. This party just wants to send the mediator into the other caucus to argue the case, and does not appreciate the opportunity mediation provides to make a reasoned, but entirely self-interested assessment of the dispute so as to make an informed decision whether or not to settle. At bottom, this individual is afraid that s/he

will be influenced by the process and is afraid that s/he will not have the courage to "just say no."

(f) *Aggressive Negotiation Styles.* Think collective bargaining. This party comes to mediation determined to outlast its negotiating partner, to extract concessions by appearing uncompromising, to "nickel and dime" every point, to restate each point in a self-serving form, and to bluster about lack of interest in settlement.

(g) *Need to Vent/Day in Court.* Many parties enter mediation seeking vindication and a sense that their position is morally "right." They need to be heard, they demonize their negotiating partner, and they have difficulty in accepting any responsibility for the dispute except in a cynical form "It's my fault because I should have known better than to trust that dirty rotten …"

(h) *Pre-Determined "Bottom Line"* This party comes to the mediation with an undisclosed and fixed number that is the most unfavorable outcome that will be accepted, and seeks to remain aloof from being influenced by the mediation. Either an absent decision—maker (on the employer side) or a commitment to self, spouse or significant other (on the employee side) may play a part in this viewpoint. This sets up a situation in which any outcome less favorable than was anticipated before new information and new insights that emerge at the mediation have been considered, is seen as a "loss." This individual will struggle mightily to disregard good reasons to compromise. People will generally expose themselves to great risk rather than endure such a "loss."

2. *Some Strategies For Opening the Door to Compromise.* Here are some approaches that can be effective:

(a) *Let people to persuade themselves.* The transaction costs of litigation, tangible and intangible, should settle most employment cases. Sometimes asking the party questions that compile the pros and cons of litigation and calculate the premium over what is viewed as a reasonable outcome to buy peace best makes the case for compromise.

(b) *Confronting people with what lies ahead.* It may be necessary to become very blunt about the arguments and points that the other side can marshal and then ask "what do you think Judge ----- will do with that case?" or "What do you expect a jury will do with that case?"

(c) *Venting and Affirmation.* The mediator is an uninvolved person who can help either or both sides process some unhappy event that has occurred, whether it is being fired or harassed, or whether it is being sued. Listening to someone express the hurt feelings and letting the person know that it is all right to have those feelings has a healing power.

(i) Our system really does expect the employer to conform to a higher standard than an individual, and employees really do exaggerate what has happened or what has been said. Few people find it easy to fire someone. It is not easy to be accused of doing something morally wrong, and having others in the company know about it. These are real hurts and losses on the employer side.

(ii) Employees who lose jobs or experience harassment really do suffer a deep personal loss, even if they are now exploiting it for money. The attorney is paid to advocate for the employee and may be perceived by the time of mediation as an interested confidant. Affirmation of the harm and the perceived wrong does make a difference.

(iii) There are limits to the value of this. Profound hurts cannot be helped much in a single mediation, they need time to heal. Those with personality disorders will only hear affirmation as vindication of their unreasonable position.

(d) *Storytelling.* True stories of disappointed expectations in analogous situations in other cases that looked rosy at one point and turned out unexpectedly sour can be effective, because you cannot really argue with a story, especially a true story. Another way to do this is to ask counsel to describe a past case that looked good at

one point but turned out badly. This is a subtle way of confronting a party with the unanticipated reality it may ultimately face if the case does not settle.

(e) *Appeals to Self-interest.* This may begin with the phrase, "Here is why you cannot take this case all the way and *have* to settle, and why you need to be thinking about how to get the best outcome you can today.." This is effective with plaintiffs who have persuaded themselves that their emotional health has been shattered by the experience of which they complain—and it often is true. It is also effective with serious cases in which there is collateral damage to the employer (damage to morale, the potential for more claims, harm from publicity) in the picture.

(f) *Appeals to a Party's Virtuous Self-Image.* Where a party holds deep spiritual beliefs, and many people do, the mediator can gently contrast the principles in which the party professes to believe against the party's settlement posture and perhaps ask, "What would Jesus do?" Clients who are *not* religious are often looking worldly reasons to make a decision they can feel good about.

(g) *Get Over It!* In virtually every dispute, each party demonizes the other party as a means of gaining the moral high ground. This is almost always rubbish. We get into disputes with others because we have not had or used the tools at our disposal to prevent or resolve the dispute. We are almost always partially responsible, at some level, for the dispute. Mature people can recognize this without absolving the adversary of responsibility.

(i) As Abraham Lincoln once said, "There is so much good in the worst of us, and so much bad in the best of us, that it little behooves any of us, to talk about the rest of us."

(ii) The employer who has a problem with the employee who was trying to recruit supporters for a lawsuit over what looks like a hostile work environment but that she never was "really" bothered by should acknowledge that it is

paying for not managing the workplace better so that nothing like this ever happened.

(iii) The employee who has been kicked out where the "pretext" is inability to meet the new boss's expectations should acknowledge that making a few concessions to what the boss needed might have prevented the situation.

(iv) Given the emotional investment people have in employment disputes by the time they get to mediation, it takes extraordinary maturity to acknowledge responsibility.

(h) *Detached Analysis.* Some people come ready to play. They have resolved their issues with settlement, but need help in seeing the whole picture, and particularly with the uncertainty, to make intelligent decisions.

(i) *Get into the Negotiation Game.* Most often the allure of either the profit of a lucrative settlement or the savings from a lowball settlement (depending on the side) is the thing that gets a party thinking about how to bring the dispute to the end.

(j) *Coaching.* Those who have trouble with negotiation generally or with negotiating in the particular case may need only to hear how their approach will sound to the other side, and input into how a carefully crafted strategy could backfire from someone who has no horse in the race.

3. *Closing Strategies.* Like grieving, resolving a dispute generally may entails many trips back and forth between trying to craft a compromise and resisting compromise. The mediator should observe the dynamics of the interaction between lawyer and client. Sometimes the lawyer's best role is in advocating for the client to the mediator, and then privately counseling with the client. Other times, the best role is to acknowledge the value of the mediator's counsel concerning settlement. Most attorneys consistently play one role or the other, rather than changing roles depending on the client and the stage of the negotiating. This is the one shortcoming in mediation advocacy more prevalent than inadequate preparation.

(a) The most important form of communication that occurs in negotiation is the offer and counter-offer. The mediator must balance between the counseling and evaluative function in caucus and the need to get into the other room with an offer and start making some progress there.

(b) There are cases where aggressive negotiating styles will prevent settlement because exchanging offers (or continuing to do so) will simply end in deadlock. One approach in this situation is for the mediator to assume the posture of the adverse negotiator with both parties, working from purported "bottom line" positions to bring the parties within reach of one another.

(c) There are times when effective resolution will require private meetings (usually with the mediator present) between counsel only, or between the parties themselves.

(d) There are times when a break for a few days or a week is really needed, usually for exchange of information crucial to settlement decisions or to obtain approval from an absent party.

(e) Often, the mediator needs to (with one side or with both) review the key issues in the case, the probable outcomes with respect to each, and calculate probable outcomes of the case. This can confront a party with the low probability that any one outcome (and particularly the party's expected outcome) will be the ultimate outcome. It can demonstrate that the transaction costs of finding out how the case is decided create a great deal of room for a reasonable compromise.

(f) Offers that become specific with respect to terms are often used as a signal that the party is getting close to "take it or leave it." It is actually unusual for a party to be that definitive in an employment mediation, however. Many parties will never make their "best and final offer" because they believe that it will hamper them in future negotiations by setting a ceiling or basement on a future settlement position. They may be right, but they may also miss a chance to settle.

(g) When the parties get close, and one or both sides is concerned that what it views as a number that should complete the negotiation will be refused in favor of a counteroffer, it is possible to authorize the mediator to tell the other side that if *it* will make such an offer, it will be accepted, but that the offer is not being made.

(h) The mediator's proposal is the final closing tool. It is the "take it or leave it offer" made to both sides, either with or without explanation and justification, either immediately or with a deadline. Only the mediator knows what position each side took unless they agree, so the party who agrees and finds that the other party does not gains important information for future settlement purposes without disclosing its willingness to settle at the proposed figure.

(i) Once an agreement in principle is reached, it is critical to complete the settlement documents immediately. Doing this right on the spot (based on the points agreed to by counsel before the mediation) is best, so that no one leaves without a signed document that is legally enforceable.