

Process, Strategy, & Tactics in Labor-Management Mediation

BY PAUL D. ROOSE

This article takes you through the steps of a labor-management mediation from the initial contact with the parties to the tentative agreement. Based on the author's experience as well as the experiences of other mediators, this article focuses on common strategies and tactics used by mediators to obtain a successful outcome.

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When management and union fail to reach an agreement during contract negotiations, they often call in a mediator.¹ At this juncture, the parties have generally been bargaining for weeks or even months. One or both sides believe that they cannot make further progress without the assistance of a third-party neutral.

The mediation of labor contract disputes (known as "interest disputes") is not a science; it's an art. Each mediator has a unique style, shaped by personality and experience. This article describes some of the techniques and strategies that labor mediators can use to help the parties mediate interest disputes.² It also touches on the pros and cons of certain bargaining tactics in the mediation setting.

As a general rule, mediators in the labor-management field have had experience as a negotiator for either an employer or a union. They bring to the table an insider's understanding of the dynamics of collective bargaining. No amount of study or training can substitute for this practical experience.

While mediation of interest disputes has no rule book, it is not simply a constant improvi-

sation. In general, the disputes share many similarities. Certain patterns recur regularly, so mediators can apply similar techniques. Of course, every generalization has exceptions. In this article, I highlight both the norms and the exceptions.

Setting Up the Mediation

There are certain essential procedures and principles every labor-management mediator must follow in an interest dispute. For example, the mediator must communicate with both bargaining teams prior to the mediation. The mediator should never rely on the representations of one side that the other side wants to mediate. It is good practice to communicate with the chief spokesperson for each side before scheduling a mediation, no matter how many times the mediator has worked with that individual before.

The reasons for this are both practical and strategic. Parties locked in a dispute are usually having communication problems. Otherwise, they probably would not need outside assistance. Indeed, it is the mediator's task to help establish better communication. As a strategic matter, the mediator needs to demonstrate impartiality. This

cannot be done if the mediator is talking only with management or only with the union.

The Joint Session

Once both sides have told the mediator that they wish to mediate, the mediation can be scheduled. The schedule should be appropriate to the case. When mediating a dispute during a strike or with a looming strike deadline, a much more compressed schedule is in order. A less urgent dispute can proceed at a more leisurely pace.

The first step in the mediation is to invite both bargaining teams to attend a joint opening session. This session serves a dual purpose. First, it allows the mediator to describe to the bargaining teams the role the mediator will play and the mediation process. These remarks should be delivered even if many on the bargaining teams have heard them before because it is likely that at least one person has not. Second, the joint session allows each side to air its positions to the mediator in the presence of the other.

The mediator should make sure that everyone understands what will happen in the joint session and the private caucuses. It is a good idea to invite the advocates and even members of each bargaining team to ask questions or express any concerns they may have about the role of the mediator or the mediation process itself.

Mediators generally ask the parties to observe a confidentiality agreement concerning the mediation. Things said in the mediation, as well as any proposals, "supposals," "what-ifs" or trial balloons are to remain within the mediation process. The agreement should permit each bargaining team to communicate with its leadership about the progress of mediation. However, it is prudent to ask the bargaining teams not to put such communications in writing to avoid having them wind up as news items in a union or company newsletter or the press. Another danger of publicizing the details of mediation is that it tends to lock the parties into positions, making settlement more difficult.

The mediator asks questions about the parties and the status of their agreement. How many people are in the union's bargaining unit? What are their job classifications? Is the contract at issue the first agreement between the parties, an expiring agreement, or a "reopener" on limited issues? If it is an expiring contract, what is the

expiration date? What other bargaining units does the employer have? What is the status of these contracts? The mediator, by making such inquiries, indicates to the parties his or her interest in the particulars of the dispute as well as the broader environment in which the contract exists.

The mediator should ask both sides to identify the open issues on which they disagree. The moving party (usually the party seeking to change some aspect of the agreement) should speak first, then the party preferring the *status quo*. Requiring both sides to identify all the disputed issues will give the mediator leverage later on to exclude other issues that may arise that were not previously identified.

The joint session can take anywhere from 20 minutes to all day, depending on the number and complexity of issues. The time is well spent. First and foremost, in the joint session the mediator is educated about the issues and the reason why each party holds the position it has taken. Second, the mediator can observe the parties and how they interact, obtaining clues about what may be an impediment or a stimulus to settlement. Third, the joint session provides an opportunity for the mediator to ask probing or clarifying questions in order to understand the parties' interests and positions. Finally, it enables the parties to once again exchange

their viewpoints on the issues. The mediator should advise the parties to listen carefully to each other during these exchanges. Ideas that could lead to resolution of an issue may emerge.

Sometimes, a few issues get resolved on the spot during the joint session. This often occurs when one side has reconsidered an issue and decides to take it off the table or agree to the other side's last proposal. This is helpful as a first small step toward an agreement.

The joint session can seem tedious and many labor-management mediators skip this step altogether. Occasionally, I do so myself if the parties are so angry with each other that time spent in the same room would be counterproductive. In this and certain other situations, going directly to separate meetings with each bargaining team (known as caucuses) is more productive. On one occasion, a union negotiator confided to me that the union was ready to drop most of its proposals, but in a joint session, she would feel compelled to explain and defend each position. In that case, we began the discussion of issues in caucus.

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The Caucus

Caucuses are a time-honored tradition in labor-management negotiations. Caucuses are the place for bargaining teams to try out ideas, formulate new proposals, or modify existing ones. There is no hard and fast rule about which caucus to meet with first. In most cases, the mediator begins with the union, since it is normally the moving party on the majority of issues. Sometimes, management wants to meet with the mediator first because it has an idea how to proceed toward a settlement. The mediator should defer to the parties' preferences on the order of caucuses, unless there is a conflict about this. Then it is the mediator's call.

The mediator's participation in caucuses is a critical part of any mediation. But there are times that a bargaining team wants to caucus without the mediator present. This must be respected. However, regular exclusion of the mediator from frank internal discussions reduces the mediator's effectiveness. It leaves the mediator with fewer clues as to the direction to push the issues. If this occurs too often, the mediator should raise it as a concern with the bargaining team.

It is tempting for the mediator to start talking and giving opinions in the initial caucuses. But this is not a good idea. At this stage, it is more important to let the bargaining team members talk. Active listening is the key mediator skill called for during this opening phase. This can give the members of the bargaining team the confidence that the mediator understands their point of view. Statements like, "That must have been a shock to you when they made that proposal," can help demonstrate that the mediator is listening and empathizes with the bargaining team's position. This is essential if the mediator is going to be able to move the team later in the process.

Mediators need to understand the individuals on each bargaining team in order to influence their decisions. This means learning everyone's name and role in their respective organizations. There is usually one hard-liner on every bargaining team. This person may be the union's chief steward or its chapter president, or it may be the employer's business manager. Once the most militant (or conservative) individual on a bargaining team is willing to move on an issue, the whole team usually comes along. Mediators should be attuned to such behavioral dynamics.

During each caucus the mediator should always ask the bargaining team if anyone has any ideas for resolving the dispute. Usually each team would prefer the other side to make the first move. Especially at the beginning of the mediation, the bargaining teams tend to view the medi-

ator as an extension of the other side. ("If you are not one of us, you must be one of them.") Therefore, teams are reluctant to disclose their true intentions. Persistence and patience on the part of the mediator are almost always required to glean this information.

The Bargaining Process in Mediation

The mediator is in charge of the bargaining process during the mediation. When caucuses take place, how information is shared and who should be involved in the process—these are primarily mediator decisions.

Calendar management is a challenging part of the mediator's job. An iron law of labor relations is that if two mediation sessions are scheduled, the dispute will never settle on the first session. Therefore, I generally schedule one session at a time. The only problem with this is that people are busy and their calendars fill up. As a result there can be large gaps between sessions. If that happens, the mediator can assign "homework," which takes the form of tasks for each side to complete between mediation sessions. This can help maintain the momentum of the mediation.

Sometimes it is helpful to spin off a given issue to a mediation subcommittee. This is particularly appropriate when an issue involves only part of the bargaining unit, but it looms large enough to hold up a settlement of the entire contract. Another time it is useful is when there are team members on each side who have expertise on a particular subject in dispute, such as health benefits, and they seem capable of developing a solution if pulled away from the large teams. The more abstract a dispute, the harder it becomes to resolve. In this situation, it can be helpful to suggest that individuals from outside the bargaining teams join a sub-committee as advisors, especially if people who are less knowledgeable are on the bargaining teams. Sometimes a bargaining team objects to dividing the group for fear that unity will be lost. This is a common reaction on the union side. This concern can be addressed by assuring the bargaining team members that they are still in charge and that any recommendation made by the subcommittee must be approved by the full bargaining team. Balky teams will often agree to the subcommittee process if this ground rule is in place.

An exchange of relevant information is often necessary to resolve a bargaining impasse. If the union requests information from management, the mediator should review the request and encourage the company to supply any information that might be useful for resolving the dispute. Conversely, the mediator should discourage both

sides from getting sidetracked by time-consuming and (in the mediator's judgment) unnecessary information searches.

Working the Caucus

As a rule of thumb, management retains all rights except those expressly limited by law and the collective bargaining agreement. So the union is generally seeking to insert into the agreement more limitations on management's rights. Also, unions tend to be more democratic (management might say "anarchic") as organizations. Management tends to be more hierarchical (unions might say "dictatorial"). These fundamental differences result in more union proposals at the bargaining table, compared to those offered by management. Thus, the union is usually the moving party in contract negotiations.

The contract between the parties generally does not change radically from iteration to iteration. For example, most public-sector contracts in California have been in place for 30 years or more. Thus, the parties have a long and established bargaining history. The burden is on the moving party to show why a change is required. I tend to lean a bit harder on the change-seeking party on each of the issues in dispute.

In mediation involving an existing agreement, it can be useful to ask the union to consider whether or not it has used the agreement to full advantage. For example, if the union wants to change the language on seniority rights in job bidding, the mediator could inquire: Did the union file any grievances based on the current language? If so, what was the outcome? Did the union take the case to arbitration?³ If not, why not? Did the union prevail? If not, why not? How does the proposed change address the perceived inadequacy of the contract provision? The mediator often finds that unions have not systematically thought through these threshold questions.

Mediators will find often that both sides have made ill-advised proposals prior to the onset of mediation. For example, a union may make a bargaining proposal to modify contract language and later withdraw it in the interests of an overall settlement. This can be worse strategically than never having made the proposal at all. The reason is that management can use the union's withdrawal of a proposal to modify the contract against the union in a subsequent grievance arbitration.⁴ An arbitrator may rightly infer that the union saw a

weakness in the existing language, then made an unsuccessful effort to change it. The mediator normally arrives too late on the scene to prevent the unnecessary proliferation of proposals.

Employers often propose to make explicit in the agreement certain management rights that are already implied there or contained in law. This can hurt the employer in a subsequent arbitration. I sometimes ask the employer, "Have you tried to assert this right without the language you are proposing? Did the union grieve it? Did the union prevail?" Nine times out of 10, the answers to these questions reveal that the contract change is unnecessary or at least premature.

Experienced mediators usually discuss the BATNA (best alternative to a negotiated agreement) with each party. The mediator reminds the parties of the costs and risks of administrative or legal proceedings that may follow mediation if the dispute is not settled.

When the union threatens a strike as the next step, or when management threatens unilateral imposition of terms and conditions, it is generally not helpful for the mediator to pass these statements from one side to the

other. However, it is important to let each side know when proposals rise to the level of strike issues. But mediators generally do not have enough credible information from either side to assess the potential effectiveness of a strike or job action.

Triaging Multiple Issues

Some mediators will not intervene if too many issues are on the table. The mediator might say, "Call me when you've got it down to six issues." However tempting it is to say this, I don't think it is realistic. Sometimes the parties need an outsider to help them sort through a plethora of issues. The union normally brings up the most issues. More often than not, this is due to complex internal union politics and a diverse set of personalities and interests in the bargaining unit.

The mediator assists the union, and less frequently management, in sorting its proposals for mediation purposes. I always remind the bargaining teams that this culling is only for the purposes of the mediation, and that they are free to revert to their prior positions if the mediation fails. If management is having trouble addressing the union's proposals because of their sheer number, the mediator can coax the union into dividing its proposals into these four categories:

"I tend to lean a bit harder on the change-seeking party on each of the issues in dispute."

1. *Educational Proposals.* These are proposals that have educated the employer and now can be dropped for purposes of mediation.
2. *Committee Issues.* These are issues that the union will agree to assign to a labor-management committee, (e.g., work rules or safety). These issues can continue to be discussed with management after the contract is signed, with no guarantee of the outcome.
3. *Modified Proposals.* These are proposals altered to meet expressed concerns of management.
4. *No Change.* The union is holding to its current position on these items.

Taking a list of this kind back to management often generates movement in kind. It signals to management what the union's critical issues are and can inspire management to develop counter-proposals in areas of key concern to the union.

Packaging Issues

The term "packaging" refers to grouping issues together rather than dealing with each one separately. Package proposals generally come with an "all or nothing" admonishment: "If you don't accept our proposal on item A, then we will withdraw our acceptance of your item B."

There are two phases during a mediation when packaging is helpful. The first is in the early stages when there are a large number of open issues. "Mini-packages" can be used in this situation. The bargaining teams meet together to discuss related issues and float proposals across the table. "If you agree to our language change on overtime rules, we will agree to your proposal on comp time restrictions." Or, "If you drop all the changes you proposed in Article 7, we will drop all of ours. We will live with the *status quo*."

Packaging is critical at the end of the mediation when just a handful of issues remain and trade-offs are necessary. At this stage, the mediator seldom relays offers of settlement unless they address all the unresolved issues. Each side needs to look at the contract as a whole. Each side considers the acceptance of one proposal conditional on acceptance of all proposals.

Acting as Messenger and Interpreter

A major element of the mediator's job is to facilitate communication between the two bargaining teams. The mediator carries messages back and forth and sifts and shares information in a way that moves the process forward. Both bargaining teams are likely to say many negative

things about each other during the caucuses. They can also be expected to make threats if they do not get what they want (such as a union threat to file an unfair labor practice charge over surface bargaining, or a management threat of layoffs if labor costs continue to rise). Usually, this saber rattling is best left inside the caucus. The mediator knows that each party induces the other party to move by its own movement, not by threats.

The mediator must transmit the resolve of each side to the other in a forceful and firm way, without inflaming an already hot situation to the point of combustion. The mediator's job is to cull through the union's message to locate its most persuasive points, then restate them to management, and vice versa. In so doing, the mediator hopes to shake each side's attachment to its own positions so that the parties will be willing to move toward a deal.

In the language of labor talks there are many meanings of the word "no." Bargaining often stalls because the bargaining teams don't know what the word really means. "No" can signal the following (from the softest interpretation to the hardest):

1. *We really like the idea but don't like the way you wrote it or said it.*
2. *We really haven't given it much thought yet, or we don't understand it.*
3. *We actually kind of like it, but we know it is worth something to you so we want something in exchange.*
4. *It is already covered in the law, you already have the right to do it, we don't want it in the contract.*
5. *It is a good idea, but it costs money so it will have to be costed out of the total economic package.*
6. *It is an erosion of our power/ rights.*
7. *We really don't want it, but we might accept it if you will accept something that we really want.*
8. *This is a major philosophical issue for us, it cannot be bought at any price, and we will strike/take a strike over it.*

In carrying a message of rejection from one bargaining team to another, the mediator should communicate what kind of "no" is involved. When the message signals some movement, the mediator can accentuate the positive without over-selling. For example, a management spokesperson might say, "The union's shift-differential proposal would force us to raise customer rates. Besides, it was an unfair labor practice for them to raise the issue so late in bargaining. We might

be able to put a quarter percent toward this, but we'll never agree to their proposal." The message the mediator can take to the union bargaining team might be: "The employer is willing to spend another quarter percent to try to fix this problem. I know that is well short of your proposal, but it is a step in the right direction."

Here's another example involving health insurance benefits. Suppose the employer has proposed a \$25 co-payment for office visits and prescription drugs. In the caucus with the union bargaining team, its spokesperson says, "Our members already pay too much for medical. They'll strike if we bring that back to them. We're not opposed to raising co-pays a little, but their idea is ridiculous. It's regressive, too." The message the mediator can take back to management might be: "The union is willing to talk about raising medical co-pays. They say they will

Christiansen,⁵ can divine what the bottom line is for management and deliver that message to the union in a most convincing way. She looks everyone in the eye, and says, "They won't offer a penny more." She has an ability to be simultaneously sympathetic yet firm. When Dorothy speaks, people believe her.

Humor can be used to defuse a tension-filled mediation. Well-timed jokes or quips can help relieve some of the tension. War stories also can be instructive. I sometimes tell cautionary tales of exhausting all-night mediation sessions in the hope that the parties will get serious about bargaining earlier in the evening.

Breaking Deadlocks Over Compensation

Most labor-management mediations center on the issue of compensation. Finding creative ways to end impasses over pay is among the most chal-

When "unexpected glitches" arise during the final joint meeting of a successful mediation, "there is usually enough good will (or mere exhaustion) to make the parties amenable to compromise."

never agree to the magnitude of what you proposed, but they are open to starting a conversation on the topic."

Before conveying a proposal to the other side, the mediator must first understand what it is in order to make sure it is conveyed accurately. Suppose the employer wants to offer a 3% salary increase upon ratification but the mediator incorrectly understands the offer to be a 3% increase retroactive to the contract expiration date. If the company's proposal is communicated incorrectly, the union's expectations will be raised and this will make a deal more difficult to achieve at the end of the day. The mediator can avoid this problem by first asking clarifying questions before communicating any proposals to the other side.

In some cases, however, a proposal needs to remain deliberately vague. If the mediator is trying to nudge both sides toward a settlement, a more conceptual "what-if" is sometimes the best strategy. For example, the mediator might say to management's bargaining team: "The union would be willing to look at some trade of shift differential for base pay adjustments, if you are interested in exploring that."

The manner in which the mediator delivers a message can be just as crucial as the message itself. One of my mediator mentors, Dorothy

lenging parts of a mediator's job. Here are some options labor-management mediators use:

Move the money around.

The management negotiator may have put on the table all that he has been authorized but the union still won't accept it. The mediator can suggest repackaging the offer to make the deal more acceptable to the union. For example, some of the money set aside for salary improvements could be used for health benefits. Perhaps management would agree to a larger percentage raise, as proposed by the union, but implemented at some future date. Some employers will agree to do this because a 4% raise mid-year, for example, has the same one-year cost as a 2% raise for the full year. However, others will balk because the second year will begin with a 2% higher payroll base than the employer previously anticipated.

Add a year, or more

If a one or two-year deal just isn't coming together, the parties could agree to extend the term of the agreement in order to spread out costs, establish labor peace for a while, or "backload" additional compensation items into later years of a long-term deal. Occasionally, the parties need to look at a shorter contract to reach agreement. The mediator might ask, "Is there

some way to put together a one-year deal, just to buy both sides some time?”

Sometimes the parties will compromise their short-term issues in exchange for a longer-term solution. Compensation formulas are a good example. The two sides may be able to agree to measure future compensation by reference to comparable jurisdictions. Formulas can be set up to extract a precise amount, or merely serve as a guide. Revenue-based formulas are also widespread, especially in school districts. The advantage of formulas is that the parties negotiate a comparison or formula that appears fair to all sides up front. Then they agree to live with the number this formula produces.

Generating Settlement Options

The spectrum of mediators' styles range from “interventionist” to “counselor.”⁶ The former tend to suggest compromises or creative proposals to both sides; the latter manage the process, letting the parties generate the solutions.

Ideally, the settlement should come from the bargaining teams. However, I have seldom mediated a dispute in which my ideas were not a part of the final deal. Mediators rarely suggest the entire answer to the dispute. Usually the basis of any settlement includes ideas that come from the mediator as well as the parties themselves.

Mediators generate ideas from their knowledge of other contracts and from listening carefully to both sides. They should be careful not to become discouraged when the parties reject their ideas. For every 10 options I have tossed into the hopper, only one has made it into the final agreement. By listening closely to the reasons for the rejection, other suggestions for settlement may come to the mediator's mind. Moreover, the process of rejecting the mediator's suggestions can inspire the parties to come up with their own ideas for settlement.

Even if one bargaining team rejects a settlement option, the mediator can still float it to the other bargaining team in the next caucus. The rejection might be softened or withdrawn if the other side is interested in the option.

If both sides agree on a particular point but can't agree on the wording for the contract, there is nothing wrong with the mediator suggesting language. Often, a mediator's suggested phrasing is more acceptable to both sides.

An issue on which the parties have reached a tentative agreement prior to or during mediation can be reopened by the mediator in order to fix a remaining problem. For example, if management appears to be firmly against equity adjustments, the union might live with that if the employer

agrees to its previously withdrawn vacation proposal.

Much of what goes on at “closing” is hard to label or even describe. But here are some tactics mediators use to help wrap things up.

Focusing the parties on deadlines.

In private-sector bargaining, final negotiations often go on all night because the contract expires at midnight and the parties agree to “pull the plug” at 11:59. This gives the parties more time to reach agreement without forcing the union to follow through on a threat not to work without a contract. In the public sector, however, expiration of the contract does not often create the same sense of urgency. The employer continues to honor the terms and conditions of the expired agreement. Many mediations occur well after the agreement has expired. Nonetheless, the mediator can create deadlines in order to achieve agreement. In one case, I informed the parties that the mediation would move to the fact-finding phase unless they resolved all non-economic issues by a certain date. I knew that neither side really wanted to proceed to that phase. This strategy succeeded in clearing a lot of issues from the table.

Wearing out the parties.

Marathon bargaining is a time-honored tradition in labor-management negotiations. “Nothing good happens until the sun goes down” is a truism of the trade. In some cases, it really does work. People are sometimes less resistant to changing their positions in the dead of the night. Moreover, both sides can brag later about how they worked “around the clock” or “till dawn” to hammer out an agreement. Much of that is for the public relations value to impress those who really do count—the governing board that must adopt the agreement and the union members who must ratify it.

Hold a sidebar meeting with a key negotiator.

Usually there is an opportunity during the mediation for the mediator to take the chief negotiator for a party into the corridor for a brief, candid chat outside the pressure cooker of the caucus. Mediators often see this as an opportunity to ask, “What will it take to make this deal?” However, this technique may give the bargaining team the impression a deal is being made behind its back. To avoid this, I have sometimes asked for permission to meet with the bargaining unit's chief spokesperson (or with the spokespersons from both sides). To allay the team's concerns about being left out, I have suggested that

another team member participate in this discussion. This can be an effective way to communicate with a lead negotiator and move the dispute toward resolution.

Make “package” recommendations.

Another end-game strategy is for the mediator to put together a set of recommendations on the unresolved issues.⁷ Settlement options recommended by the mediator may be needed in order for the union membership to ratify a settlement. “The mediator said this is the best we can get, so we might as well live with it,” is a common union refrain. Often, the final document outlining the tentative agreement is entitled “mediator-recommended settlement,” even in cases where the parties struck the deal with a minimum of mediator intervention.

Strategies for Getting Unstuck

If a mediation seems headed for failure, it is often helpful to arrange for a face-to-face meeting of the parties’ chief negotiators and principals, such as the employer’s chief executive officer and the president of the union local. If a mediation is going to blow apart, the mediator wants the parties to know it and confront each other directly. The reasons are twofold. One, a direct meeting avoids having a mediation fail due to a misunderstanding or miscommunication by the mediator. Two, it can break a seemingly intractable logjam if the attendees agree to a compromise package that they can take back to their bargaining teams.

At this meeting, the mediator can summarize the key remaining differences and invite the parties to correct any misstatements of their positions. These meetings can be acrimonious. But in my experience, once the air is cleared, they can become highly productive. The reality that the mediation is drawing to a close sets in. Silence works on the room. The mediator can encourage those with new settlement ideas to speak up. It is helpful to have a writing board handy so that “what if” proposals can be written for the group to look at. This process can produce new options that both sides may be willing to take back to their respective bargaining teams.

In some cases, the mediator may find that the dispute is simply not ripe for settlement. For example, the union’s leadership may believe that it is necessary to conduct a strike vote or even a strike in order to pacify a militant faction in the union local. Or the employer’s governing board may be deeply divided so that no labor agreement could emerge until after the next round of elec-

tions. Under circumstances such as these, there is nothing a mediator can do to bring about an agreement, so further mediation sessions would not be productive.

If settlement options do not emerge, the mediator should adjourn the mediation. When applicable, the mediator can send the case to fact-finding.⁸ However, it is prudent to delay that referral until after a one-week cooling-off period. This gives the parties a chance to think things over and decide if they really want to risk going to a more formal venue.

An alternative to ending the mediation is to announce a recess. When a recess is called the mediator instructs the spokespersons for the bargaining teams to contact the mediator if they come up with a new idea for settlement. If a promising option is suggested, the mediator can schedule a conference call between the chief negotiators or another mediation session can be held.

The Satisfaction of a Handshake

When the parties have agreed on a resolution of the issues, one side often prepares a typed or handwritten summary of the agreement. Sometimes, however, the parties request assistance from the mediator in preparing the settlement agreement. Most mediators will assist, provided that the parties acknowledge that they are ultimately responsible for the language in their agreement.

Unexpected glitches can arise during the final joint meeting of a successful mediation. When this happens I help the parties resolve the problem on the spot without more caucusing. At this point there is usually enough good will (or mere exhaustion) to make the parties amenable to compromise.

Once both sides have reached a verbal understanding or signed off on a tentative agreement, the parties agree on their timetable for union ratification and adoption by the employer’s governing board. Issues such as how soon retroactive paychecks will be issued are often discussed at this juncture.

I always congratulate everyone on the bargaining teams when they reach an agreement and shake hands to seal the bargain.

Conclusion

Being a labor-management mediator is gratifying. We often make a critical difference, heading off potentially disruptive strikes and other community-rendering disputes. But it is not a good

“Ideally, the settlement should come from the bargaining teams.”

profession for someone who craves attention. Many of the disputes we work on are of great interest to the press. But in news articles we are usually referred to as the anonymous “state mediator.” Due to the nature of collective bargaining, the two sides to the agreement bear the responsibility for the success or failure of their negotiation. They are in the limelight; mediators are properly left in the deep background.

Nevertheless, most labor-management mediators have been tempted from time to time to tell reporters what is really going on in the negotiations. However, succumbing to this temptation would violate our ethic of confidentiality. Moreover, it would make the goal of reaching a settlement more difficult.

Labor-management mediators do complex, challenging work. They are often thrust into the middle of badly deteriorated relationships where trust is virtually nonexistent. But unlike a marital

dispute, in which separation is a possibility, walking away from each other is not an option for unions and employers. With few exceptions, there are no divorces in labor-management relations. Mediators need patience and the ability to remain calm in the midst of the resulting storms.

Often, the mediator becomes the lightning rod for parties who are angry with each other. The parties frequently “shoot the messenger” without apology. But the mediator must get up and keep going.

The work does not entail the difficult task of healing an entire broken relationship. It is limited to putting together a single contract or resolving a grievance. By doing this, labor-management mediators help management and unions take an important step toward reconciliation. I hope this article stimulates further discussion on how labor-management mediators practice their craft. ■

ENDNOTES

¹ Many state governments employ full-time mediators for contract disputes occurring in the non-federal public sector. The Federal Mediation and Conciliation Service and the National Mediation Board have jurisdiction over most private sector disputes, federal government disputes and public sector disputes in those states that do not have a state mediation service.

² Collective bargaining mediation falls into the general category of “interest disputes,” since it involves crafting a new or amended contract. Grievance mediation, in which the mediator assists the parties in resolving a grievance filed under an existing contract, is not the subject of this arti-

cle. Grievance mediation is considered a “rights dispute.”

³ Most collective bargaining agreements allow for binding arbitration of grievances.

⁴ A party to a grievance arbitration can introduce bargaining history as evidence, provided that the proposal in question was introduced during on-the-record bargaining. That the proposal was later withdrawn, even if it was withdrawn during mediation, is a matter of record based on a review of the final signed contract language.

⁵ Dorothy Christiansen is retired from the Federal Mediation and Conciliation Service and now works as a private mediator.

⁶ Thanks to Professor Herb

Oestreich from San Jose State University for coining these terms.

⁷ My recommendations, when in writing, are always confidential and off the record. I write that on the document itself. I do not want the parties to think that they can cite my recommendations in a later fact-finding, arbitration or in the press. My recommendations are never for public consumption unless the parties jointly request it.

⁸ Under California law, parties in K-12 and higher education may not legally strike or unilaterally implement changes without going through a post-mediation fact-finding process.