

TIPS AND TECHNIQUES: HELPING PARTIES MOVE AHEAD AND OVERCOME ROADBLOCKS

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BEFORE YOU USE THIS LIST, REFLECT ON THESE THREE RULES:

- o You, the mediator, are a facilitator of the parties' journey to their own resolution. The parties have the right and responsibility of *self-determination* – use the tools below only to assist. In particular, the early parts of mediation involve critical elements such as introducing the parties to this very different process; developing their trust in you and in mediation; helping them hear and be heard in new ways; helping them begin to feel the power of this process to resolve their issues; and helping them obtain new perspectives on each other's situation. **Take time to build a foundation** which will enable them to *work* – until you have achieved a good start in the basics, you are not ready to use most of the techniques below.
- o Your most powerful tool is your *intuition* about what the parties' may benefit from at any given moment, based on your experience and thorough understanding of mediation. Reliance on tips like those below, rather than the basics of good mediation, is wrong. This list is only an adjunct to good basic mediation. And sometimes the answer is thinking less, not more.
- o **Avoid becoming part of the problem.** Parties sometimes get stuck because they are consciously or unconsciously resisting something that was more *your* idea than theirs. Always check in with yourself: are you contributing to an impasse without realizing it? Do you find yourself resisting or reacting to one party differently? Are you telegraphing an "answer" to the problem which is yours, not theirs? *Follow the parties.* It's their dispute, and your job is to help them negotiate and communicate, not develop a solution for them. If you find yourself frustrated because the parties don't seem to be going where you think best, you shouldn't try to go there!

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1. Don't get too specific too early. Once you move from convening to engaging the issues, start gently and with generalities. Moving too fast may invite parties to get stuck on positions, rather than delving further. Use your listening skills and segue into problem-solving by linking to issue identification and setting a smooth pace. As you begin to approach ideas

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for options, you should still be in the mode of listening much and saying little. Example: *"it sounds like you may need a redefinition of the job and a fresh start. Do you want to work on those goals now, or is there something else we need to talk about first?"*

2. View the possibility of impasse not as a problem, but a **portal** – **"a crack where the light can get in"** (in *Robert Benjamin's* words). Visualize, for yourself and your parties, that impasse may be an opportunity to abandon the pursuit of some perspectives and look at other, unconventional ones. Benjamin suggests that parties might even be told up front that *"we may get stuck at some point, and that's ok – we can work through it!"*

3. As you begin to get into problem-solving, look for opportunities to **emphasize the future and de-emphasize the past**. This provides a nice transition for the parties to move from the "same old – same old" into working on possible solutions, and allows the parties to recognize and affirm the change. Examples:

- o At some convenient point, perhaps after a break, say something like: *We've spent some time exploring where we are and how we got here, and that's important to help us understand what the problems and concerns are. [shift your physical position slightly] I'd like to suggest we now begin to focus on the future – where you'd like to be [six months] from now and how we can get there. Is that something you'd like to do?"*
- o Sometimes one or both parties seem stuck in the past like a broken record, even with your active listening. Remember that repetition may signal that the repeater feels unheard so far, or that the subject is exceptionally important. Thus, your first step is to do a "self-check" to make sure you're not getting ahead of the parties. Then, you might pause, lean forward, look directly at the party or parties and use a different tone of voice (to signal a change in direction), and say something like – *"it is clear how strongly you feel about what happened. I think I've got a pretty good understanding of the problem, and I get the sense that [party B, etc.] does too. At this point in the mediation, it sometimes is good to change direction a little and commit to working on ways to solve the problem. And what this means is that we would need to keep focused on the future – not the past. That may not always be easy, but it often works. Would you like to try it this way?"*
- o If a party agreed in principle to "futuring" but continues to wallow in the past, you might remind him/her of the agreement, and suggest a **"ground rule"** that will allow you to bring them back to a focus on the future. This kind of ground rule frequently becomes self-enforcing, as the party's own return to the past will trigger his/her own immediate recognition about the "violation."
- o If all else fails, you might take ownership of the process: *"I want to spend the rest of our time today talking about where we go from here."*

4. A variation of "future focusing" is to invite the parties to focus on **options or solutions rather than "the problem."** Explain if you like that a "problem" is a narrow focus,

while "solutions" is broader and therefore more likely to produce ideas for resolution.

5.. Parties faced with a new settlement option may display discomfort about details and the unknown, although the *core idea* is good. On the other hand, some parties may *move too fast* to embrace an attractive idea – and the devil is in the details! Either way, there is a constructive tool to deal with this: the **"in principle"** technique. Example: *"I know there's a lot of important considerations and details to work through, but IN PRINCIPLE, if Bob could get the right kind of job for you in that other division, do you think that might work for you?"* Once on the plateau of a tentative commitment to the core principle, you can transition to working through details.

6 Also, you can help parties **resolve the core of an issue involving complex secondary details "in principle" and temporarily move on**. For example, the parties might agree in principle that an employer will issue a reference letter to be attached to the settlement agreement – you can suggest that they come back later to the exact wording of the letter (so as not to get bogged down in secondary details and to build on the positive movement of the core agreement). Once you get used to it, you are likely find that the "in principle" tool is useful in most mediations, and the parties themselves may start using it on their own!

7 Help the parties **convert their statements**, ideas, and even their objections or fears into things that they and other people can work with positively – sometimes in joint session, sometimes in caucus. Here are some examples:

- o *"Would you like to propose that idea as a solution?" Or "can I take that to [other party] as an offer?"*
- o *"So ideally you would like [x]. Is there a way we can develop that idea into a plan?" Or "how can we get from here to there?" Or "what can we do to make that into something that [other party] is likely to consider?"*
- o *"I see you have some concerns about how that proposal would work for you. What would it take to make that into something you could accept?"* This may be a place to use the technique of "parallel option development" of two or more ideas, discussed in 63 below.
- o *"What do you think it will take for [other party] to accept your proposal?"*
- o *"[in caucus] "Let's spend some time on how to 'sell' your solution to [other party]."* It need not be a violation of self-determination or neutrality to work with or coach parties on how best procedurally to present offers or options to each other (discussed further in 20 and 21 below).

8. Remember that during mediation, parties develop trust in you and your process, which means you have considerable influence that can be used for good or for evil! A party may follow you a long way down the road of an idea that is bad for them, simply because they trust you. Particularly if a party seems cautious about developing an idea

while using tools like those under 6 above, check with yourself to assure that you aren't merely pushing your own idea too hard.

9. Don't go to **caucus** too soon just to deal with resistance or a perceived impasse – it can deteriorate into a "ping-pong" match where the parties merely conduct a debate or auction through you as intermediary. Parties need to grapple jointly with their issues as much as they productively can. Generally, think of the caucus as a tool to be used, not a routine process step. Sometimes, attorneys are too fond of caucusing, and depending on the issues in the case, the mediator may need to help them see the benefits of beginning and working substantially together. Further, you may want a party (or their counsel) to take responsibility for their ideas, rather than hiding behind you (see discussion in 20 below).

10 Where the options seem ossified or there's an absence of ideas, consider **brainstorming** with the parties. This means the parties are encouraged to suggest as many ideas as they can create, *without evaluation, criticism, or obligation*. Later they return to the ideas and eliminate or develop them. Encourage them to be creative, and even help them get a little bit crazy! This works particularly well with parties who have used brainstorming in organizations.

11 **An easel or blackboard** is a powerful tool – a way to display information and options visually and to organize and simplify them, and a way to have both parties focusing jointly on the same "page." Many people benefit from hearing *and* seeing information. The easel lets you decide how to most positively display and reframe the information, too – but be careful to be true to what the parties are saying, not just your preference or substantially different "spin." One way to do this is to draw from the parties' own words and phraseology, or to ask if you captured it accurately. It is a good idea not to identify an idea with its source -- mix things up so that people are less likely to defend their own ideas and find it easier to work with an idea from their counterpart.

12 **Hypotheticals** are a creative, non-threatening, and non-coercive way for you to introduce or reframe ideas for parties to consider, and can be part of brainstorming. A classic hypothetical is the "what-if." Example: *"I was just wondering –what if the employer were to provide a retroactive within-grade salary increase – might that help since they can't seem to see their way clear to a promotion?"* Caveat: while "what-ifs" are an important mediator tool, be careful of two things: (1) Don't become so aggressive in "what if-ing" that the parties stop being creative themselves and look only to you; and (2) don't cross the line between merely seeding ideas to be developed or rejected (which is assisting creativity) and pushing your own pet ideas (which is coercion).

13 A variation of the hypothetical is the "**some folks**," e.g.: *"I've seen some folks in child custody situations like yours exchange Thanksgiving for Easter. Would you like to explore an approach like that?"* Or, *"sometimes people in your situation look at opportunities for developmental assignments or training – want to talk about that kind of thing?"* Here, you are offering a *model* to prompt discussion as part of the creative process, not to dictate a result.

- 14 Another variation of the hypothetical arises where a party may be anxious about displaying an offer in development to the other side, but it would be nice to know whether it is remotely possible. Generally, you should help the parties develop enough trust in each other that they are willing to take some risks in exploring options. However, in exceptional cases, you might **relieve a party of the perceived burden of ownership** of an idea by offering to test it as a "what if" with the other party.
- 15 Sometimes, there are difficult, potentially explosive messages that need to be articulated if parties are going to achieve a level of understanding that helps resolution, and sometimes *you* will need to forthrightly, if tactfully, restate or reframe a difficult matter. Examples: an employee who appears to be unaware of performance issues (because a supervisor failed to provide feedback and constructive criticism); someone oblivious to personal behaviors that annoy associates; a family member with a firm but unstated perception of another's alcoholism. While you may not need to "go there" to reach resolution in some cases, sometimes the difficult subject needs to be broached to move people to a new and productive level of understanding or to "clear the air." **Don't be afraid of the truth** — the challenge is *how* to tell the truth tactfully and in a way that is constructive. Sometimes, a predicate statement -- "*I think it is important for you to hear something that you may not like and may disagree with*" -- is a good entry.
- 16 Particularly in cases where valuation is imprecise, parties may be anxious about **'going first'** with an offer. The first step may be to *help the parties focus consciously on their concerns* and see if they can find a way to develop offers they are comfortable making, but you also might offer help like the following:
- o The parties might authorize you to simultaneously disclose a mid-point or mid-range between them.
 - o Ask both parties if they would like to try this: they will write their best final offer on a piece of paper, fold it, and give it to you. You will step out of the room, review the two pieces of paper, and then advise the parties of [as the parties' authorize]: (a) whether the parties are reasonably close, (b) a settlement point or range between them, (c) whatever else the parties invent.
 - o If the parties agree, try the following or a variation: identify an agreed-upon mid-point value between the parties. Each party will submit a "bid" and the bid closest to the mid-point will be accepted by both parties -- and if the parties are equidistant, the mid-point will be accepted. (*Attributed to John Wagner, FMCS*).
17. A more formal and structured way of dealing with substantial differences between the parties' demands or lack of clarity about valuation is **"decision analysis."** Although details of this technique are beyond the scope of this list; briefly it works this way: In caucus, emphasizing confidentiality, you work with each party to develop their "best case" and "worst case" scenarios, both in terms of dollar valuations and percentage likelihoods of success/failure on motions for summary judgment and other steps likely to be encountered

in case development. These extremes will bracket reality. Generally, the analysis will cause the parties' positional demands to move toward each other, sometimes substantially. Then, discuss with the parties how they would like to use or share the information developed (for example, by allowing you to disclose overlapping valuations or a mid-point). For more information, see Aaron and Hoffer, "Decision Analysis as a Method of Evaluating the Trial Alternative" in Golan, *Mediating Legal Disputes*, Little, Brown & Co., 1996).

- 18 If a party strongly resists providing what he/she perceives is a direct benefit or "reward" to the other party, explore payment **options that do not go directly to the other party**, such as a donation to an agreed-upon charity.

- 19 Try reflecting with the parties on the **bargaining model** that they are using (particularly if it is an "offer-counteroffer" model), to get outside their mental "set." For example, describe a "zone" model in which you display a Bell curve and suggest that cases generally don't settle at the margins, but more likely within a "zone of settlement" between the two end zones of the curve. Together or in caucus, help them eliminate the end zones, and this becomes their "zone of settlement." A variation is to treat the first, broader zone identified as a "zone of negotiation" which everyone will then try to whittle down to a "zone of settlement."

- 20 **Avoid becoming part of "nickel-and-diming" and "auctions."** For example, if you suspect these tactics, you might test an offer by asking whether the offer is likely to be acceptable to the other side, and why or why not. Focus the discussion on what it is likely to take to resolve the matter and how to get there, and help parties avoid what can end up looking like game-playing to the other side. Attorneys who are used to the incremental, offer-counteroffer model of negotiation may benefit from a joint conversation of how they might use the very different mediation setting to proceed differently.

- 21 If facing a rigid or problematical offer or demand in caucus, suggest that it would be best for **the party (or counsel) to take the position to the other side**, and then **help** him/her develop a plan for justifying the position. Compelling them to take personal ownership and responsibility for justifying the position, may encourage them to reconsider or to invent other options. Just as important, it may the person face the challenge of *how best to present the offer*. This can be an opening for you to provide some "*process coaching*" on communication dynamics that the party can use (see next item).

- 22 Consider use of "**process coaching**." This is helping a party to develop the best way to present an offer, demand, or option to the other side – basically, good negotiation technique ("how to make it easy for the other side to see things your way"). This helps a party take charge of their case, and provides some constructive assistance on *how* to do it. It is not coercive to help a party see that they can be more persuasive by changing a tone of voice, providing some positive feedback to the other side, respectfully explaining how they arrived at a figure, etc.

23 Help parties **avoid devaluing their own offers or concessions – e.g.**, resisting the urge to say that he/she is happy to offer "X" because "X" is something they could have done anyway! This is a common rationalization people use to avoid appearing to be giving up something, but it *devalues* the offer, when what is needed is just the opposite.

24 **Test the margins** of positions to introduce flexibility. If someone demands \$5,000, ask *"does that mean you wouldn't take, say, \$4,750?"* Do something similar with the other party. **Get back to interests** by, for example, asking *"how would your life change if you got that \$5,000 and not the \$4500 they offered?"* or *"what does that extra \$500 you're demanding mean to you?"* Use this not to sell a specific amount, but rather to help the party avoid rigidity and be open to considering options and what is really important.

25 **Precedents:** Sometimes, one party (often an employer) is concerned about setting a precedent of paying money or providing something of value. While mediation does not set court type precedent, it may establish practical expectations. Some options to explore: a clause specifying the agreement's non-precedential nature; a confidential agreement (note that these may be difficult to develop and enforce); narrowing/isolating/removing a particular issue; writing the agreement to make the case unique (or helping the parties see that it is); reality-testing with questions to help parties consider whether a precedent is actually such a "big deal"; contrasting the risk of no agreement.

26 Psychologists say that people tend to react suspiciously to any offer or information presented by an adversary ("**reactive devaluation**"). Couple this with "selective perception" (the tendency to screen out data which do not fit preconceived views) and you can see why disputants need mediators. You, as the trusted neutral, sometimes can carry exactly the same messages, and offers and counteroffers, without the same negative burden. In practical terms, it means you can display or reintroduce and examine ideas that the parties otherwise reject. Also, you may find it useful to help parties understand this principle when they feel bleak about resolution. *Caveat:* don't let parties with a superficial knowledge of "reactive devaluation" glibly assume that it means that your function is to sell their positions!

27 Get the parties to **focus on relative priorities** of what they want/need, and do so visually with your easel paper. One model is to draw two visual pie charts that show the relative priorities each side assigns to things. Or, you might ask both parties to assign a "1 to 5" priority. See Robert A. Creo, "A Pie Chart Tool" in *Alternatives*, CPR Institute for Dispute Resolution, May, 2000.

28 If part of the problem is anxiety over the future on the part of a payee, consider a "**structured settlement**" (for example, where an employer buys an annuity designed to pay the Charging Party over time).

- 29 Break a problem into parts.** *"A journey of a thousand miles begins with a single step."* See if the parties can agree to work on a piece of a difficult problem – any part, just start somewhere. Even a small victory can yield results. If a party appears anxious about agreeing to the element, you can remind them that *"nothing is agreed to until everything is agreed to – but at least we have a start!"*
- 30** Where "zingers" or emotions get in the way of working on a multi-part set of money or other issues, set a robust ground rule about respectful listening and communication and **delve into the minutiae of facts or calculations.** With luck (and your help) the parties may get so caught up in parsing the details that they forget to "zing" each other – and, of course, with each agreed-upon detail or concession, the going gets easier!
- 31** Ask the parties to describe their perspectives on why they appear to be stalemated and/or how they can try to overcome their different perspectives on valuation. Parties sometimes need to internalize and focus consciously on their deadlock, and both you and they also may need a reminder that it is their dispute. Also, this provides a psychological time-out and change of pace which may lead to new insights.
- 32** If both parties are represented in the mediation, and there appears to be resistance linked to different views of the merits or worth of the case, consider a caucus with **just the representatives.** It may be easier to speak frankly in the absence of the parties. Given the representatives' considerable influence with their clients, the session may prepare the representatives to "reality-check" with their clients after they frankly reflect on the merits and valuation of the case without the clients present. You might ask each to summarize the relative strengths and weaknesses of the case, and facilitate a discussion of a fresh perspective on what the clients need to come to resolution. Sometimes, this will produce a discussion of how to deal with client perspectives, and new opportunities for creativity may be presented. Don't be surprised if one or the other attorney asks your help in reality-checking with his/her client! Caveat: Don't spend too much time with just the attorneys without bringing the clients back "into the loop."
- 33** If a payor is concerned about the short-term "hit" of a large pay-out, explore how to **segment payment of the sum** (for example, a time-payment schedule).
- 34** Sometimes, your optimistic **persistence** influences the parties to develop their own sense that "there must be a way to work this through." Be a bulldog; keep working the details and twisting and turning the combinations and the "what ifs."
- 35** One of the most basic techniques for overcoming impasse is to simply **take a break.** Tensions may be reduced and often things have a way of looking different when everyone returns. Perhaps suggest that the parties try to return with new ideas. During

the break, **change something** - take your coat off and roll up your sleeves, move to another room, rearrange the room you are in, provide food, candy or soft, drinks, etc. Suggest a "fresh look" when they return, or do a "global summary" (see paragraph 43 below).

- 36 People generally prefer to maximize their gains and minimize their losses. Therefore, it can be useful to *disaggregate* (**split up**) gains, to make them look more substantial altogether, and *aggregate* (join) losses, to make them look less substantial. For example, if a disgruntled employee seeks four objectives (including a new job in another organization) and management will provide the new job but not the other three items, it may be useful to present the package to the employee by breaking down the positive aspects of the new job - its benefits, salary, location, hours, etc. - while weaving the "other items" into a single whole.
- 37 Keep in mind the potential for varying perceptions on valuation - **money is not merely money**. Be prepared to consider the perceptual and emotional connections related to the meaning of money for particular parties. Money may represent retribution, respect, guilt, or other things. Plus, how money deals are packaged affects perceptions. 41 cents a day may be more palatable than \$145 a year. A package of products or services worth \$4000 may be easier to obtain than an equivalent or lesser amount of cash.
- 38 If one side won't come up with more money to resolve an issue, explore whether that side has access to **non-monetary things of value** that might be put on the table as part of an offer of settlement. Examples: a company that owns hotels might offer a week at a resort; a theater might offer season tickets; an auto dealer might consider a discounted car or a service package; an apology may affect value.
- 39 **Look for the best person to deliver a message or offer**. Often, there will be more than one representative of management present for an employer or company. Occasionally, as mediation proceeds, the aggrieved party will telegraph a greater degree of trust or liking, or perhaps some positive personal experience, with one of the people on the management side. If you see this, caucus with the management side and explore whether and how to use that specific person's heightened personal trust. For example, the next joint session might be between just that one person and the aggrieved party. The trusted management representative might then be more successful than others on the team in delivering an offer or "tough" message about valuation one-on-one with the aggrieved party. The reverse is true as well – sometimes, you may need to *remove* a person who is aggravating the other side.
40. **Impatience is always your enemy**. In fact, as you grow more experienced as a mediator and become more able to predict outcomes (or so you may think), impatience becomes an ever more subtle enemy. Be on guard. If that impatient feeling comes on,

take a break and reflect.

41. A simple and very useful technique in the face of resistance is to ask the parties if they would like to **set the issue aside** temporarily and go on to something else – preferably an easier issue. When you settle some issues you build momentum toward resolution of other issues. Getting agreement on something (anything, even process details!) creates positive psychological ambiance.

42. Refocus the parties on something else:

- o Ask them to describe how they might feel at the end of the day if they come to some kind of resolution. Occasionally, this may disclose an ambivalence or unacknowledged fear or interest that will give you a new avenue of inquiry.
- o Ask each of them to say something good about the other!
- o Ask them to talk about their power and choices: *"Do you feel you have the power to resolve the issues in front of us? Do you WANT to resolve these issues?"*
- o Ask the parties, or either of them, to put aside everything for the moment and focus on the ideal future. For example, ask: *"Where would you like to be [concerning the matter in impasse] a year from now?"* Follow the answer with questions about how to get there.
- o Ask each party to describe his/her fears about proceeding (but don't appear condescending and don't make them defensive).

43. You can sometimes assuage fears about resolution of one of several issues by making it clear that **no issue is finally settled until there is resolution of all issues**. This will manage expectations and avoid perceptions of bad faith. A party may need to reconsider a supposedly settled issue in light of the proposed resolution of a later one. Generally, however, don't make it too easy to re-open settled issues.

44. Try a **global summary** of both parties' positions/interests and what they've said so far, telescoping the case and the mediation so that the parties can see the part they're stuck on in overall context. Sometimes, the tough issue will seem less important. The global summary can be part of a "content free challenge" as described in paragraph 52 below.

45. State all the **areas they have agreed to so far**, praise them for their work and accomplishments, and validate that they've come a long way. Then ask whether they want to let all that get away! A variation is to suggest (if true) that the parties probably have reached a point where **they are more likely to settle the case than not settle** – which may help them redouble their efforts toward *how* to resolve things rather than *whether* to resolve things.

46 Where there is concern about commitment, the unknown, or the future, suggest a **trial period or plan**. Example: *'What if you tried this approach for three or six months or so, and then met again to discuss how it's working?'* Also, you can link a desired outcome (like changing a performance rating) to successful performance under the new agreement for some period. You can offer your help in reconvening with the parties, at their option, or in identifying **some other trusted intermediary** they might consult.

47 Creatively explore **enforcement/resolution options**, if a party is anxious about compliance. For example, the parties might be interested in designating a mutually-trusted third party (e.g., an employer's Ombuds, a different manager, clergy) as someone to assist with implementation or future disputes. If an employee reevaluation is part of a deal, the employee might like the idea of a different manager doing the evaluation. You also can visit typical provisions included in agreements which void the agreement if one party doesn't perform.

48 Translate options into a party's **personal language**. For example, if dealing with someone in the insurance business: *"in effect, this settlement represents a 'premium' you would pay to avoid a 'loss' in court later."* You can see how a similar approach might work for an auto mechanic, a roofer, or a health care professional.

49 Sometimes it is helpful to take a "time-out" from developing options *per se* and help the parties define something more basic in the form of **criteria for an acceptable outcome**. Example: *Before we focus on specific options for settling this matter, would you like to try to define the QUALITIES that any good outcome should have?'* Usually, these general criteria will track reasonable and joint interests like fairness, acceptability to ratifiers, etc. They give the parties something positive to agree on. Later, you can test options against the criteria.

50 Shake things up a little! Be a **catalyst**, and be creative. Offer a "what if" that is only marginally realistic or even a little crazy, just to see if the parties' reactions help them to get unstuck.

51 Ease tensions with **humor** – but be careful, as the parties might misinterpret. Generally, your *self-deprecating* humor is safest.

52 **Homilies** may help: *"As long as you stay flexible, you can't get bent out of shape!" "If there is a will, there is a way." "Remember that courts produce decisions, which may or may not be justice." "All polishing is done by friction." "Let's keep our eyes on the donut and not on the hole!"* Some mediators provide parties with a written list of homilies or quotes from famous people that describe the wisdom of resolving conflict.

- 53 A curious psychological phenomenon is the "persuasive power of nothing," or a "**content free challenge**" – a "**think again**" opportunity. Simply asking (actually or impliedly) people to re-examine their views sometimes results in a change in those views, *even if nothing else has really changed*. Stated another way, the implied "challenge" of a question about prior views, *in and of itself* may lead to a modification of the prior views. This may be most true for positions in which the person is not greatly invested. The practical application of this for mediators is connected to use of the *global summary* (see paragraph 43 above) with broad questions like *"considering everything we've heard and talked about so far, do you want to revisit [a particular position or demand]?"*
- 54 Try **role-reversal**. Say: *"if you were [the other party], why do you think your proposal [would] [wouldn't] be workable?"* or *"if you were [the other party] would you accept your proposal?"* This hopefully will get them to focus on the needs and interests of the other side. Follow up as needed with questions about how the proposal might be modified to be acceptable to the other side.
- 55 **Another role-reversal technique** is to ask each party to briefly assume the other's role and then react to the matter under consideration. You also can ask each party to be a "Devil's advocate" and argue against his/her own position. Be careful that your parties are flexible enough to be able to engage in this creative exercise. Some people aren't.
- 56 **Use a "time-out" mini-intervention**. When it is clear that the parties are talking past one another or not listening, or when one party has a way of provoking the other through certain behaviors, comments, or styles of expression, you can say: *"time out. I wonder if it would be good to focus for a minute on what just happened here. Bob, when you said [x], Jane, you appeared to react like [y]. Frankly, I think I've seen this happen a couple of times, and it seems to get in the way of things. Can we talk about it for a minute?"* You then can ask Jane to talk about her reaction of a few seconds earlier, clarify with Bob what his substantive message content was meant to be, discuss how Jane might have been able to hear such message content if delivered differently, ask Bob to try the different approach, etc. You can use the football "T" sign with your hands to signal the time-out. This is a vehicle for a side-bar conversation on details of the parties' interaction which can be very productive by getting the parties to do little things differently with big results. You can even set a "ground rule" about the behavior changes they recognize.
- 57 A variation of 55 is to ask Party A to **restate what they just heard** Party B say, and then ask Party B if A's repetition was accurate. Help them talk about miscommunication and how to avoid it. Continually listen and look for opportunities to help them clarify or learn insights about communication styles or other dynamics of their interaction. For some parties, you may want to provide some literature on the subject.

- 58 If the parties continue to engage in non-productive patterns of behavior (sniping, insults, non-interest-based approaches), you can **be blunt about their choices**. For example: *"you can choose to continue the same old [bleep] that hasn't worked so far, or you can try to do something that's more productive. What do you want to do?"*
- 59 Use **reality-checking** questions. For example, *'what do you think will happen next if this isn't resolved here [or if this goes to court?]'* Draw out, through questions and your general information, the emotional, financial, and other costs and risks of delay, litigation, or doing nothing. If a party appears naive about their rights and positions, you might suggest they take a break to check with their attorney, accountant, etc.
- 60 Consider whether the problem is the **absence of someone** from the mediation – a family member, a trusted advisor, someone with more authority to create options, etc. Where possible, it is useful to explore these kinds of questions (particularly on authority to resolve) *before* the mediation session.
- 61 If one of the problems is an **attorney or other representative** who dominates the conversation unproductively, try attending the *client* frequently to give him/her a full opportunity to speak – look at the client with an inquiring facial expression occasionally while the representative is speaking, or ask occasionally of the client: *"do you have anything to add?"* or *"is that the way you see it?"* If the representative is impairing the mediation, take a break and ask to speak with the representative one-on-one (explore how the dynamics are unfolding, how the other side is responding, and how things might be improved). Remember, however, that it is up to the client and the representative to choose who speaks. It also important not to humiliate anyone or threaten the attorney's perception of his/her power.
- 62 **Accentuate the positive!** Studies show, and common sense would indicate, that when faced with two options which actually involve identical outcomes, one of which is phrased positively ("vaccine A should save lives of 200 of 600 people in this village if this disease hits") and the other negatively ("vaccine A should hold deaths to 400 of the 600 people in this village if this disease hits"), people usually will choose the positive.
- 63 In addition to being personally positive, **maintain positive momentum** in the mediation. Look for opportunities to remind the parties (particularly when things look bleak) of their interest in resolution, the importance of "keeping at it," etc. Most mediators find that your general, personal positive attitude helps the parties be productive. It is useful to have the overall mediation be perceived as a potential "settlement event," meaning that participants develop a sense that the dispute can be resolved, that things generally are headed in a positive direction, and that if they persevere, resolution can happen! You can remind the parties of how far they have come, and suggest: *"at this point, I suspect you can see that we probably are going to settle this! We just have to figure out what it's going to take."* Offer a break, and when they come back, be in a renewed and positive mood to overcome final hurdles. Caveat: do not cross the line from being positive to becoming an aggressive salesperson for a particular resolution.

- 64.** Use **parallel option development** to help parties develop two or more options on separate tracks at the same time (particularly, mutually exclusive options). This can improve the efficiency of how the parties organize, develop, clarify, and evaluate each option. Each option can be developed on its own track but alongside the others, and eventually each can be weighed more knowledgeably. For example, in an employment dispute, label the Charging Party's possibility of leaving the organization as "A" and the possibility of staying in the organization in a reorganized job as "B" (or "leave" and "stay"), and then develop all aspects of each option. Help the parties remain open in principle for as long as reasonably possible to both "A" and "B" and variations that may develop. Use an easel to display the options, and "X" thru one option when it has been eliminated. This technique helps parties deal with the indecision arising from the psychological "approach/avoidance" conflict which arises sometimes.
- 65.** If a party seems a bit inarticulate, fearful, or confused, consider suggesting a "time out" opportunity for them to **write down** what they would like to say.
- 66.** Studies show that most people have a subjective emotional preference for **an appearance of fairness** – to be perceived as fair as well as to be treated fairly. As a mediator, be sensitive to parties' terminology around fairness, and to the potential for a *quid pro quo* balance. Sometimes, you need to inquire about what "fairness" means to a particular party before you can evaluate options.
- 67.** One factor that is related to 65 above is the negotiation principle that **concessions breed concessions**. Sometimes it is useful to remind parties of this.
- 68.** When faced with general resistance, ask the parties, "*what would you like to do next?*" and pause expectantly. Or say, "*frankly, it looks like we're really stuck on this issue. What do you think we should do?*" These questions remind the parties (and you!) that the **parties actively share the burden** of the impasse.
- 69.** **Use the clock.** Occasionally remind the parties what time it is and how long everyone has agreed to be together today. As you get within an hour or so of the "deadline," let folks know this – not coercively, but as a means of helping them sharpen their focus on dealing with what is important.
- 70.** **Ask one or both parties if they want to end the mediation.** Parties who have invested in the mediation (and who have internalized the "settlement event" mentality discussed in paragraph 62) often don't want it to fail, and may be re-motivated to find ways to come unstuck. This approach is particularly useful where one party may unconsciously enjoy the attention the process provides, or enjoy the other party's

discomfort. On the other hand, it is the parties' right to end the mediation, and sometimes they need to be reminded of that – *so don't fight the parties*.

- 71 Sophisticated negotiators think they "**know when not to settle**" – i.e., when the better strategy is to let things stew awhile or proceed into litigation. They have learned to resist psychological pressure to settle now lest the deal get away, as "another deal is always around the corner." If you appear to these negotiators to be pushing resolution, they may lose respect and trust for you and the process. Offer these negotiators a full opportunity to reflect on options, but do not oversell resolution.
- 72 **Be careful about misusing "Issue identification."** Some trainers and mediation programs require specific, even written, identification of what "the issues" are, early or in advance of mediation. Of course, it is good to prepare by broadly bracketing what brings the parties to the table, and it is important to help the parties explain and explore what they want and need to work on. But the danger is that a facile ID of "issues," particularly early, may actually encourage parties to both frame the mediation, and to continue to bracket how they proceed, *in terms of their positions*. The "issues" often are re-labeled *positions*, and in mediation we often want to make it easy to transition from the positions for *underlying or common interests*.
- 73 Consider **separating the parties**, in a case where the on-going relationship is not very important and the parties are aggressively averse. Particularly when you are potentially on track toward a settlement both parties can live with, the parties' sniping at each other can derail something that they actually can make work. Keeping the parties separate while you develop the last details with each side can keep them from "snatching defeat from the jaws of victory." Be truthful with them about why you are doing this – and, as indicated, if the continuing relationship is important, this approach is not the answer.
74. You can always propose **ending the mediation** yourself, if things don't appear to be going anywhere, and add, "*but as long as you are willing to work on this and consider movement, we can continue.*"
75. Ask each side to stretch themselves to develop a "**best and final**" offer as a very last step before mediation is ended. Urge them to take a break to work on their *BAFO*. Emphasize how important it is for each side to "sharpen their pencils" and do their very best in crafting this offer.
76. Help folks redefine "loss" for themselves. People generally want to avoid a loss, and what a "loss" is for each individual can have subjective and objective aspects, in different proportions. Based on what you have learned about the person in front of you, how can you help them gain additional perspectives on loss? Example – for a risk-averse individual mulling whether to accept a lower-than-ideal offer, you might ask say: "*one way to look at this is -- do you want to 'spend' that amount in what basically is a 'lottery' to see what a judge might give you instead?*"

77. It has been suggested that sometimes people in mediation go through a process not unlike Dr. Kubler-Ross's stages of grief – anger, denial, bargaining, etc. – until they may reach a point of *acceptance*. The prospective *finality* of a mediated outcome may inhibit this process of “mourning” a loss (such as the loss of hoped-for *revenge*). This adds another perspective on why the mediator needs to *slow down*, be sensitive to what the party is going through, and follow the party's pace.

78. **Suggest the use of *chance*.** Sometimes, a coin flip may be a good way to resolve a sticking point! Or, the thought may be **absurd** enough to help the parties focus afresh on what really is at stake or what other creative possibilities might be.

79. **Express your own frustration.** Once in a while, it may be useful to let the parties see your *own* anger or frustration at the impasse. Particularly if you have been a good and patient guide so far, the parties may be quite struck or even shocked at your perspective – and that kind of shake-up may be just what's needed to foster new perspectives.

80. Remember that your job isn't to overcome a roadblock *per se*, but to help the parties engage, analyze, and negotiate positively and constructively. The parties are **free to stick with a position** – they have a right to act on their own choices, and you have no business coercing the parties into a settlement. Sometimes, paradoxically, reminding the parties that “it's OK not to settle” **gives them freedom to take a fresh look**.

81. If the parties decide to end the mediation, suggest that before you end, you do a summary and overview so everyone understands where they are. Then, do just that – a global summary. Focus on the positives of anything they did accomplish or clarify. Be clear and frank about the matters that separate them, but don't dwell on negatives. Offer to “keep the door open” and suggest they do so too. End on as pleasant and positive a note as you can, and try to keep them on a friendly and respectful footing with each other. If they don't burn their bridges, there's a good chance they may settle later with or without your help. Plus, as indicated in 43 and 52 above, sometime the summary will produce a last-minute breakthrough before they leave!

82. Depending on the case, consider a **follow-up** call a few days or weeks after the mediation. You can ask if they have had any further thoughts or if anything has changed. Occasionally, this effort will act as a catalyst to reopen the matter.

DO YOU HAVE ANY OTHER TECHNIQUES TO SHARE?