CHAPTER 5

MEDIATING GRIEVANCES

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Arbitrators mediate grievances. We are invited to do so by the parties. And, even though employed to decide a grievance,[1] we may suggest—but perhaps should not—that the parties also employ us to mediate the same dispute.

The purpose of this paper is not to generally debate whether arbitrators should or should not mediate. Since arbitrators do mediate, they should do it properly. To foster that aim, this paper has three purposes:

1. To describe the circumstances under which arbitrators mediate grievances;
2. To discuss, at least briefly, a checklist of appropriate practices to use in mediating generally; and
3. To determine whether there are particular practices that should be used or not used depending on the type of grievance mediation that is occurring.[2]

Circumstances Resulting in Grievance Mediation

Formal Mediation

Arbitrators mediate when the parties' collective bargaining agreement or submission provides for mediation and an arbitrator

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[1]Mittenthal, *Whither Arbitration?* in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 35, 38–39, 46.

[2]These topics have been touched on over the years in Academy Proceedings but have been overshadowed by the debate about whether arbitrators should mediate at all, or whether and to what extent mediation should be part of a grievance procedure. For a good summary of these points, see Zack, A Handbook for Grievance Arbitration: Procedural and Ethical Issues (Lexington Books, 1992), at 6–11.

is hired as the mediator. Well-known examples include the formalized mediation step prior to arbitration in coal, between AT&T and the CWA, and in many other industries. These procedures utilize "trained" arbitrators as mediators.[3] Other agreements provide for mediation as a precursor step to arbitration, where arbitrators may be called on to mediate on an ad hoc basis.

I am unfamiliar with any agreement provisions which automatically endow an arbitrator with the dual role of mediator in a formal grievance arbitration. I do know of one agreement, however, which, *after* the presentation of the evidence, requires the arbitrator to meet with counsel. If there is unanimous agreement, then the arbitrator mediates. If that effort is successful, the arbitrator issues an opinion and award incorporating the settlement. If mediation is unsuccessful, the arbitrator issues a final decision on the merits from the record.[4]

"Invited" Mediation

At virtually any point in the arbitration procedure the parties may invite the arbitrator to mediate. This invitation may occur at a prehearing conference before evidence is taken, at some point during the presentation of the case after the evidence is in, or even during a tripartite arbitration executive session. The invitation may have been prearranged by both parties or may be broached by one party. When that happens, sometimes the other party joins in the invitation. Whether mediation will proceed is the noninviting party's option. Arbitrators also have a voice in the decision. If they don't think the idea is a good one, they may choose not to mediate.[5]

One particular, relatively rare form of invited mediation is the task of cleaning up the "Augean stables" of a failed grievance procedure, where the arbitrator is called on to mediate a seemingly endless number of grievances the union has filed which have backlogged. There may be no other viable alternative but to

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[3]Goldberg & Brett, *Grievance Mediation and Other Alternatives to Arbitration*, 2 Workplace Topics 102 (1992).

[4]Association of Western Pulp and Paper Workers Local 13 and Georgia Pacific Corporation, Toledo, Oregon. One participant estimated that 30% of their arbitration cases are settled by mediation using this process.

[5]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §2(F)(2)(c) (1985). The Code is beginning to be viewed as containing strictures with legal force. *See Food & Commercial Workers Local 50N v. Sipco, Inc.*, 142 LRRM 2256, 2263 (S.D. Ia. 1992).

dispose of them in some way short of arbitrating each one, and the parties choose mediation to accomplish this.[6]

Arbitrator-offered Mediation

The arbitrator may offer to mediate at any point in the proceedings. I don't happen to think that this is a good idea, but it does occur. There should be at least moral restraints on the arbitrator as to when to seek permission to mediate. The arbitrator has been mutually hired to arbitrate and to decide a case. Mediation is a voluntary process, and any party may decline to participate. Parties know that they could have voluntarily agreed to mediate, so they should have little reticence in telling the arbitrator they do not choose to do so, even if the arbitrator suggests mediation.

Parties wanting to exercise that discretion face a difficult tactical problem. They don't want to offend the zealous and, hopefully, well-meaning arbitrator who suggests that mediation might be a good idea. To avoid a slight that may come back in the form of an adverse decision, the parties may go along, even against their better judgment. But, if they do, they almost precommit to a settlement, depending on the mediation style of the arbitrator. Parties who are afraid of offending an arbitrator and agree to mediate to avoid an adverse award will find it difficult to turn down the entreaties of the arbitrator-turned-mediator in the mediation process. They will be subject to the same kind of subtle coercion to settle in mediation as they were to getting there. Thus, the process of voluntary arbitration can become skewed, turning it away from an adjudicatory process contrary to the free mutual choice of the parties.

It may be that for these reasons the Code of Professional Responsibility puts constraints on the arbitrator. But the Code still does not bar an arbitrator from turning the case into a mediation and, unfortunately, may be read even to encourage that process:

> An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.[7]

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[6]Fuller, *Collective Bargaining and the Arbitrator*, in Collective Bargaining and the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books, 1962), 30. *See also* Cole, *Discussion, id.* at 96–97; Gregory, *Grievance Mediation: Advocate's View*, in Arbitration—Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1984), 146–148; Cole, *Discussion*, in Collective Bargaining and the Arbitrator's Role, *supra*.

[7]*Supra* note 5.

The vice of this statement is that arbitrators cannot be omniscient in their ability to "discern" that both parties are "likely to be receptive" to mediation.

There are four situations in which arbitrators may impose themselves as mediators—despite my view that they probably should not do so. The *first* is where facts emerge that neither party knew about during the hearing. The case then, in essence, becomes a different one: the parties are starting over at the end of the grievance procedure, and they may be amenable to mediating a solution to the case.

Second, an arbitrator may seek to mediate where it appears that an arbitration decision will leave the parties in a worse position than if they had reached their own settlement. From the ad hoc arbitrator's viewpoint, this may occur because "it becomes apparent to him that what the parties really need is not someone to judge their disputes, but a labor relations adviser."[8] From a permanent arbitrator's viewpoint, mediation may occur so often that the parties expect it, and the arbitrator becomes, in effect, "a kind of super-manager."[9] An example of this type of mediation is where, after the hearing begins, the parties realize that it will require several more days than they had originally contemplated. Mediation might be suggested to reduce the passions of the case as well as its costs, both of which have grown out of proportion to the underlying issue.

Third, an arbitrator may be tempted to mediate to show off: "The veteran . . . takes an understandable pride in his ability to play this difficult dual role" of adjudicator and mediator.[10] The arbitrator may be tempted to mediate to reach a "win-win" solution so as not to offend anybody by making a decision that someone is sure to dislike.

The *fourth* area of arbitrator-invited mediation occurs where the parties, for whatever reason—maybe a possible concession of weakness—do not invite mediation but nonetheless want the arbitrator to volunteer to mediate. A recent poll of lawyers of the New York State Bar's Labor and Employment Law Section showed that more than 55 percent of management attorneys and

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[8]Fuller, *supra* note 6, at 48. I distinguish an arbitrator's full-scale offer to mediate from a single statement to the parties, such as, "You both may want to settle this since a decision may not be the best thing for your relationship." (Peter Seitz told me he had said this in the baseball free-agency case, and it looks as if the judge in the NFL antitrust case did the same.) Or, where a case is dragging unnecessarily into extra days, the arbitrator says something like: "It doesn't matter who wins or loses if it is too expensive to play the game."

[9]*Id.* at 46.

[10]*Id.*

80 percent of union attorneys favor the arbitrator's initiating and taking an active role with both parties together in exploring settlement possibilities prior to starting the hearing.[11] The same poll found markedly diminished enthusiasm for arbitrator-initiated mediation during and after the hearing.

These bases for an arbitrator invoking mediation are not good ones. As I have suggested, substantial arguments may be made against arbitrators mediating on their own motion.[12] In the end they may, from time to time, suggest mediation of grievances they are arbitrating, and the parties will accept. Or the arbitrator will accept the parties' invitation to mediate. The question then becomes, "What happens next?"

Arbitrator as Mediator

Mediation has been called an art, but it is becoming more of a craft, if not a downright cottage industry. Mediators seem more organized in family law matters than in labor relations. Retired judges and law firms are hawking their wares as mediators to a public hungry for alternative dispute resolution (ADR). If arbitrators are going to handle the hot potato of mediating grievances, they need the skill to do so. Any craft has its artisans. The parties, if they invite mediation or the arbitrator suggests it, are entitled to have at least the level of a skilled artisan behind the effort.

The first problem with the arbitrator's mediating is the raw material. Bill Simkin, who should know because of his stature as director of the Federal Mediation and Conciliation Service (FMCS) and Academy president, stated, in addressing interest mediation:

> Arbitrators start off with significant assets. We are or should be fully familiar with labor agreement language and intent. We know a great deal about motivation and personality characteristics that influence behavior at the bargaining table. But we also possess disqualifying attributes.
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> A successful arbitrator makes his living by making decisions. Because this is so, the arbitrator-mediator instinctively develops quite quickly his own concepts of good solutions. But decision-making on the issues is not a basic mediation function. It is the parties who make the decisions. Any too-ready propensity by a neutral to make tentative decisions in his own mind or recommendations on the issues to the parties can be fatal.

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[11]Steifel, *The Labor Arbitration Process: Survey of the New York State Bar Association Labor and Employment Law Section*, 8 Lab. Law. 971, 974 (1992).

[12]Fuller, *supra* note 6, at 46.

> A closely related problem is that arbitration is not a process favorable to development of humility. The authority to make final and binding decisions immunizes us from the notion that we can be wrong. If we are fired as permanent arbitrators or never used again after an ad hoc decision, what are the reasons? Our likely reaction is that somebody was a poor loser. How often do we admit, even to ourselves, that we goofed? Mediators have egos too. This must be so if they are to survive. But the food for ego comes not from decisions on the issues; it comes from the belief that the mediator somehow assisted in a solution reached by others. And if a mediator does the very best job, he does not even get adequate recognition for a good idea. The parties grab it and claim it as their own.
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> Another frequent disqualification is that we tend to be thin-skinned. Defensive reactions to criticisms are probable rather than possible. In contrast, a mediator is thoroughly accustomed to being rebuffed. . . . When a mediator hears the word no, he is not gleeful, but his instant reaction is the necessity to do something different. There can be no personal stake in an idea.[13]

Many arbitrators have tried their hand at mediating interest disputes and have been successful at it, sometimes more by luck than by good planning. Yet, it is interesting that when parties adopt the grievance mediation program developed by Steve Goldberg and his colleagues, they do not allow arbitrators to start mediating without "training."[14]

The National Academy of Arbitrators has spent a great deal of time over the years on arbitration procedure but has paid scant attention to the mechanics of mediation.[15] Fortunately, mediation is beginning to be demystified. There are some excellent books that work through mediation for both the parties and the mediator and go through interest mediation step by step, almost as if the reader is there.[16] These books are important not only because they cover much essential ground about the delicate relationship be-

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[13]Simkin, *Fact-Finding: Its Values and Limitations*, in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23d Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books, 1970), 165, 173–74.

[14]Ury, Brett, & Goldberg, Getting Disputes Resolved (Jossey-Bass, 1988): "[O]ur primary message was that the mediator must prod the parties to engage in interests-based negotiation, rather than allowing them to treat the procedure as rights-based advisory arbitration." *Id.* at 152.

[15]LaRue & Lesnick, *Novel Roles for Arbitration and the Arbitrator: II. Transferring Arbitral Experience to Mediation: Opportunities and Pitfalls*, in Arbitration 1986: Current and Expanding Roles, Proceedings of the 39th Annual Meeting, ed. Gershenfeld (BNA Books, 1987), 34.

[16]Two good ones are Zack, Public-Sector Mediation (BNA Books, 1985); and Kagel & Kelly, The Anatomy of Mediation: What Makes It Work (BNA Books, 1989). *See also* Moore, The Mediation Process: Practical Strategies for Resolving Conflict (Jossey-Bass, 1986); Simkin & Fidandis, Mediation and the Dynamics of Collective Bargaining, 2d. ed. (BNA Books, 1986); Maggiolo, Techniques of Mediation in Labor Disputes (Oceana, 1971); Fuller, *Mediation—Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971).

tween the mediator and the parties, but also because they explain the process from the point of view of the mediator and thereby help the parties to understand why and how the mediator's activities are aimed at bringing about a settlement.

General Considerations for the Grievance Mediator

The aim of mediation is to bring about a settlement of the dispute between the parties. In the setting of collective bargaining, that includes not only resolving the grievance but also taking into account the impact of that resolution on the parties' overall relationship, including the content and intent of their collective bargaining agreement. As a consequence, the mediator must learn about and assess the bigger picture as to what settlement of the grievance could accomplish.

As participants in collective bargaining, the parties are or should be used to negotiations with each other. They are not strangers brought together once in a courtroom by chance, as in most civil cases. While their past history may not be optimal, that relationship must be taken into account by the mediator, both in the case at hand and for future cases. The most tricky part about grievance mediation done by an arbitrator is that an agreement should, to the extent possible, be the product of the parties. The mediator's opinions about the strengths or weaknesses of a case have only a limited place in the mediation process.

In my view, the mediator is engaged in three simultaneous activities, all of which are designed to encourage the parties to reach agreement. Depending on the circumstances, each is emphasized at different times, but each is in play at all times throughout the mediation. They are:

1. Establishing the credibility of the mediator to secure the confidence of the parties;
2. Identifying the areas of conflict and the facts or beliefs behind the conflict, and communicating this information effectively to the parties; and
3. Resolving the conflicts.[17]

A brief description of these considerations follows. Their effectiveness depends on how adroitly the mediator utilizes them—when to apply them and when to pass over them. While applicable

[17]Kagel & Kelly, *supra* note 16, at 1–3, 109–57.

to many aspects of grievance mediation, a secondary use of this review is its applicability to the activities of arbitrators as interest mediators, an activity now being embraced by the Academy.

Establishing Credibility. The parties cannot resolve their dispute by mediation if they do not have confidence in the mediator. They must get to know and trust the mediator as someone in whom they can confide, who will keep their confidences, and who will move them toward settlement. Considerations in achieving credibility includes the following:

1. Listen to the parties, including their representatives, the grievant, operating personnel, and others involved.
2. Get to know those involved on a personal level and share experiences in past mediation cases to build confidence.
3. Learn the "cast of characters," the goals of each person involved, who is supportive of settlement, who is an obstructionist.
4. Keep the process in perspective for the parties; do not build up expectations too high, but be persevering when the parties express pessimism.
5. Gain confidence, so that after listening to an entire group, the mediator can reduce the number of active participants to a manageable few for frank discussions.
6. Be faithful in terms of clearly and accurately transmitting proposals.
7. Be patient.

Identifying the Conflict. Without a proper understanding of the true nature of the dispute between the parties, there can be no resolution. Techniques to achieve this goal include the following:

1. In first sessions with parties, try to pin them down to *all* the issues they have, whatever the merits. As the number of issues begins to winnow down, this may prevent new issues from emerging.
2. Determine what the parties *think* the nature and details of the dispute are. This can be done in both joint and separate sessions, as well as in sessions with both spokespersons.
3. Press the parties to provide the bases for their conclusions, to state what they know to be the "facts" behind their positions.
4. Determine what facts the parties either separately or together do not know, figure out a way to test and communicate facts that one side claims to possess to the other party, and determine how to obtain crucial facts both parties do not know.

5. Learn the parties' priorities and "necessities" for settlement.
6. Learn where parties are particularly strong or particularly weak in terms of the learning and payoff of the alternative to settlement.

Resolving the Conflict. To instill trust and to uncover the necessary facts for resolving the conflict, the mediator must ensure that those with authority are present. For example, while many may be present at the arbitration hearing, what happens if the parties are also trying to settle a grievant's civil case, and no one can contact the grievant's personal attorney?

Crucial to settlement is that the mediator have a plan at all stages as to how to proceed, both for the short run and for overall resolution. That plan will necessarily change, but the mediator must be the conductor of the mediation in terms of how it moves forward.

There are two important moments in a mediation. The *first* is getting movement from the parties' initial positions and leading from there to the first matter that can be resolved. This is, as commentators put it:

> [T]he crux of the matter where cultivation of trust is concerned. That is simple to state but more difficult to accomplish. Simply put, in order to build trust the mediator must make very effective use of the first candor displayed by the parties. If this may be done, it is certain that greater candor will follow. If this is not done, it is equally certain that the parties will begin to retrench.
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> . . . Nothing fosters trust better than success.
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> Mediators must acknowledge this reality, and must proceed with particular care at the early stages of a mediation to assure that tentative expressions of trust are rewarded and built upon. This again makes patience a critical virtue in mediation.[18]

Orchestrating the timing or proposals and concessions, as well as knowing when to provide information and when to withhold it is crucial to this point. It may be so crucial that the order of issues determines the outcome of the effort, and the mediator should use acute care in deciding which issues to tackle first.[19]

Matters for the mediator to consider between the first sign of success and burgeoning trust and an ultimate deal include:

1. Listening carefully to the parties to pick up "signals" of change in position and for new ideas or approaches.

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[18]*Id.* at 118, 119.

[19]Zack disagrees, *supra* note 16, at 86–87. *Contra* Kagel & Kelly, *supra* note 16, at 120–23.

2. Nurturing the parties to come up with alternatives to their initial positions, suggesting—but not recommending—approaches that had not been explored before or, having once been discarded, now are ready for reexamination.
3. Looking for ways to reach trades on issues, including the withdrawal of proposals.
4. Discouraging positions that will enrage the other party or that will be perceived as being retrogressive.
5. Letting the parties know when movement is needed.
6. Firming up the agreement when proposals appear to be accepted.
7. Exploring and, if necessary, explaining the consequences of a position exposed by one of the parties.
8. Continuing to be patient.

The *second* particularly crucial moment is that of bridging the last gap, a moment where the whole settlement will come together or will fly apart. It is as tricky as landing a trout after bringing it all the way to the net. And there is not a mediator alive who has not had some big ones get away.

A mediator has been labeled orchestrator, facilitator, or evaluator.[20] The first two terms connote a mediator who does not inject opinions as to the propriety of particular positions. That type of mediator remains neutral throughout the process and allows the parties to reach agreement almost by themselves. The last two terms connote a mediator who readily gives opinions about the parties' positions, puts forward proposals, and acts as a participant rather than an informed observer.

In my view, there inevitably comes a point at which the mediator will have to put an opinion on the line. That opinion is *not* an arbitration opinion; it is a mediation opinion as to what it will take to settle. Clearly that consideration is different from what the mediator might do in arbitration, and it has no effect on any subsequent arbitration decision; it is designed to bring about settlement. As a last resort, it is essential to put the experience and prestige of the mediator on the line. This recommendation may incorporate precommitments that the mediator has lined up from each side prior to making it. In the end the mediator as neutral, but

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[20]Sochynsky, *Mediation*, in California ADR Practice Guide (1992), at 12–19; Necheles Jansyn, The Mediator Revisited: Profile of a Profession, 1960s and 1986 (New Brunswick: Rutgers Univ. IMLR Press 1990), at 121–22; Kolb, The Mediators (Cambridge: MIT Press, 1983), at 33.

not "neutered," is there for a purpose, and making recommendations is part and parcel of that purpose to resolve the dispute between the parties.[21]

As commentators have noted:

> Mediators can guard against imposing their preferences on the parties without resorting to sitting on their own hands. The key is *how* a possible basis for settlement is selected. It should not be grabbed out of the air nor should it simply be whatever strikes the mediator as fair.
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> The mediator must use experience and study to forecast where the relative bargaining strength of the parties would take them if they had all the time in the world to barter and work on effective communication. A mediator should be able to paint that picture for the parties much sooner than they themselves could enact it. Doing so holds the promise of saving the parties from wasted time and energy as well as the risk of hostile exchanges blocking any settlement.
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> An important caveat is necessary. When assessing each party's bargaining strength, the mediator must *not* simply accept hard-line positions that have been stated in an effort to gain an advantage in negotiations. The mediator must use the pressure points [what the mediator has learned about what the consequences of not settling could be for each party] to make certain that displays of strength are realistic. The mediator must press the parties to recognize how viable their alternatives are to a negotiated deal. The parties must also be pressed to consider common concerns . . . that ought to temper everyone's demands.
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> These steps will move the parties closer to their secret hearts [what the mediator has learned about what the *real* as opposed to stated bottom line is] and confidential inquiries should tell the mediator even more about the parties' actual expectations. With this information, the mediator may forecast where the relative bargaining strength of the parties would take them if they had all the time in the world to work on their problem. It is then time to begin actively moving both parties toward that goal, so they can achieve it with less wasted motion.[22]

And the "final, final"[23] is that, if the mediator brings about a settlement, write it out fully *then and there.* Don't wait or let anybody go home, no matter what the hour, and don't let others do it. Far too many purported settlements have slipped away without this happening. *Do it now!*

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[21]In making this recommendation, the mediator, regardless of the reserved power as arbitrator, should not act like a judge, in effect asserting the office as the reason for the parties to settle, however effective this may be for the courts. More effective results are likely to occur if the parties *know* that the mediator may arbitrate rather than flaunting this possibility. *See* Wall & Rude, *The Judge as a Mediator,* 76 J. Applied Psychol. 54 (1991).

[22]Kagel & Kelly, *supra* note 16, at 140 (emphasis in original).

[23]As we used to say in drinking. *See* Coyle, ed., Lang on San Francisco Dice (1983).

Obviously, these are only high points. Others would have different lists with a different emphasis. These comments could be extended into lengthy notes on each factor mentioned.

Considerations Unique to Grievance Mediations

The Arbitrator as Mediator

A "concern" that arises in an arbitrator mediating is the duality of roles. As hopefully has been made clear, the roles are different but can be blurred where "each party's primary effort during the mediation phase may be to persuade the neutral that it is 'right' and the other party is 'wrong.'"[24] The concern is that the parties will not focus on settling but concentrate on setting up or continuing the arbitration. A parallel concern, especially if mediation is invoked as the arbitration is drawing to a close, is that the arbitrator, now mediator, if effective, is going to learn the parties' "bottom line," which the parties will be reluctant to give because, if the mediation fails, the mediator will arbitrate a decision. On the other hand, if the parties disclose their bottom line, that information cannot be erased "but must inevitably affect the award. . . . Thus full-bore mediation may pose both a serious impediment to the independent judgment of the arbitrator and real risks for the parties."[25]

I suggest that the *first* concern is limited. If the mediator is patient and skillful, the problem of nonparticipation can change the momentum and, in most instances, get the mediation on proper track. Otherwise, there is no point in mediating the grievance at all.

The *second* point, although considered by some as not normally "good practice,"[26] also pales at the hands of a journeyman mediator. There is the risk that something said in mediation can influence an arbitration decision, but it is no more of a risk than where an arbitrator has to consider whether proffered evidence is inadmissible. When inadmissible, it is supposed to play no role in the outcome of the case. I do not find a lot of support for the notion that such a ruling on evidence taints the fair decisionmaking ability of the arbitrator. Clearly, where the parties themselves have

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[24]Goldberg & Brett, *Grievance Mediation and Other Alternatives to Arbitration*, 2 Workplace Topics 102, 109 (1992).

[25]Mittenthal, *A Code Commentary—Conduct of the Hearing*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1989), at 244.

[26]*Id.*

initiated mediation, they also necessarily trust the mediator to forget what was learned in a failed mediation in deciding the case.

A possible greater risk with respect to appearance is in the arbitrator-initiated mediation. To deal with the problem of trust, it has been suggested that a mediator in that instance might be more restrained than normal and not try to obtain confidential statements of bottom-line positions or refrain from putting forth an opinion as to settlement.[27] This is a place where a transcript is truly a great help, not only for the usual reasons, but for the discipline of the parties and the arbitrator. Whatever is heard from the parties in mediation simply doesn't count. The arbitrator is bound to the record in making a decision; the record is laid out in the transcript, and the decision must be based thereon.[28] When faced with that part of a decision depending at least in part on discretion, such as reinstatement, and unable to ignore what was heard in mediation, the arbitrator should have declined to mediate in the first place.

The setting of a grievance mediation is obviously much more constricted than a usual interest case. There can be less ability to "deal" in terms of alternatives, depending on the specific issue involved and the factual setting. If a case is particularly fact-specific or is confined to a narrow interpretation of the agreement, the confines of possible outcomes narrow. On the other hand, if the contract issue is a broad one or the provision is not strictly drafted, then settlement possibilities broaden.

It is appropriate to mention here a particular danger in mediating grievances where an arbitrator would typically have little or no discretion, such as normal contract interpretation cases. Mediated settlement of a single case could undercut the parties' intent, bargaining history, and practices. Clearly, the mediator should have these factors in mind and, if aware of such an impact, call both parties' attention to that possible result.

Ethical Considerations

Somewhat related to the above are ethical considerations where mediation of a grievance occurs. The bottom line here is that the arbitrator gets too cozy with the parties, either to please them or to get the matter over with. The fear is that the result, in the guise

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[27] *Id.* at 245.

[28] *See* Schoonhoven, ed., Fairweather's Practice and Procedure in Labor Arbitration, 3d ed. (BNA Books, 1991), at 149–52; Kagel, *Legalism and Some Comments on Illegalisms*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books, 1986), 180, 185–86.

of a mediated decision, will be an improper "consent" award, which will give the appearance of satisfying the union's duty of fair representation and/or the parties' obligations under discrimination laws but nonetheless hurt the grievant who otherwise had a worthwhile case. More politely stated, the dilemma is that the mediator will seek to resolve the matter based on what the parties collude to agree to rather than on the facts of a given case.[29]

Undoubtedly that scenario could be a real one. But the *Code of Professional Responsibility* requires that the arbitrator who signs off on a mediated award be convinced of its lawfulness and fairness. Some arbitrators go so far as to explain settlements to grievants on the record and to seek their affirmative understanding and assent before concluding the proceedings.

Conclusion

The above is a brief report about a complicated subject. Its purpose, in addition to the information it contains, is not to focus attention on whether arbitrators mediate. Arbitrators do mediate, but how well we do that will have a profound effect on our success and our contributions to collective bargaining.

MANAGEMENT PERSPECTIVE

NANCY CORNELIUS HOUSE*

AT&T's experience with grievance mediation began in 1985 when the Communications Workers of America (CWA)—AT&T's largest union—first proposed the process. I sat as an observer in one dismissal case and did not like what I saw. In early 1988 CWA again approached us about trying the process. At that time we had a huge backlog of arbitration cases, and that backlog was growing daily. Grievance mediation represented a possible way to reduce the number of pending arbitration cases as well as the associated monetary liabilities. The potential for significant cost savings was of interest to both parties. At the same time, however, there was some fear that mediation would be just another step in the grievance process which would add time and cost rather than reduce them.

After considering the potential rewards and risks, we agreed to a trial of grievance mediation in the 14 states of AT&T's Southern

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[29]Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, §2(I)(1)(a) (1985).

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Region. CWA representatives and I were instructed to work out the details of the procedure. The first major hurdle was drafting the rules to govern the process. Some idiot—and it may have been me—suggested that each of us write up a proposed set of rules. Then we would get together and combine the best of each to come up with the perfect set of rules. Was that ever a mistake! Each had approached the writing from a different perspective; our styles of writing were totally different; and we almost required a mediator to get us through the first meeting. Finally, we agreed to destroy our masterpieces and meet again in two weeks with clear minds and clean paper.

At our next, and incidentally our last, meeting to draft the rules, we focused on the broad questions that needed answering: How do cases get to mediation? At what point in the grievance process do we convene a mediation conference? What kinds of cases are appropriate for mediation, and how do we separate them from the rest of the cases?

All of our contract interpretation cases are heard at the national levels of CWA and AT&T. Those cases were therefore excluded from our trial.[1] We were left with only disciplinary cases, and we decided that any disciplinary case appealed properly to arbitration was a potential case for mediation. Recognizing that successful mediation requires openness and willingness to negotiate, and not wanting the process to become simply another step in the grievance procedure, we decided that the parties must mutually agree to a mediation conference within 15 days of the Union's appeal to arbitration or else the case would go directly to arbitration.

To keep the mediation process informal and comfortable for all participants, we agreed that the conference would be conducted on Union or Company premises in the city where the grievant worked and that the rules of evidence used in courts of law would not apply. Designation of two conference rooms in the same general area would permit the mediator to move easily between the parties and would give the parties a private place to caucus.

Probably the most controversial issue initially was who should attend the mediation conference. We finally agreed that fewer people would make compromise and open discussion easier. Attendees for the Company are the grievant's supervisor and district-level manager as well as a manager from Labor Relations, who acts as spokesperson for the Company. The Union spokesperson is a CWA staff representative, and other attendees for the

[1]Even now, with the mediation process included in our national agreements, contract interpretation cases are specifically excluded from the process.

union are limited to the Local Union president and the grievant.

We decided that the mediator would have no authority to compel the resolution of the grievance. To grant this authority would inhibit open and free discussion between the parties. The mediator conducts the conference in any manner most likely to produce a settlement. If no settlement is reached, the mediator assumes the role of arbitrator and gives the parties an immediate oral advisory opinion as to the party most likely to prevail in arbitration, along with the basis for that opinion.

The advisory opinion may result in more negotiations between the parties, but, in any event, if no settlement is reached, the grievance is then scheduled for regular arbitration. No mediator in a given case may serve as the regular arbitrator on that same case. In addition, nothing said or done by the mediator or the parties in mediation may be referred to in arbitration.

Several other important points are covered by our master mediation agreement. *First*, by agreeing to schedule a mediation conference, the Company is not acknowledging that the case is properly subject to arbitration, and the Company reserves the right to raise the issue of arbitrability at a later time. *Second*, we agreed to share equally the expenses of the mediator. The parties are, of course, responsible for compensating their own people and covering their own expenses associated with the process. *Finally*, we agreed to contract with Stephen Goldberg at the Mediation Research and Education Project at Northwestern University to conduct joint training for us.

Participants in the process must understand that the emphasis is on cooperatively resolving the grievance—not on "winning." This is not an easy concept for some participants to accept because, just prior to mediation, they may have been involved in very adversarial grievance meetings. We therefore learned quickly that it is the responsibility of the Company and Union representatives to make sure that their own people are informed about how the process works and what they can reasonably expect from it. If people understand and accept the process for what it is, the possibility of achieving a successful resolution of the grievance is greatly enhanced.

A Typical Mediation Conference

The mediator opens the conference by explaining the process of mediation and the roles of the mediator and the participants. This reinforces what the participants have already been told by their representatives and helps put everyone at ease.

Since all cases in our process involve discipline, the mediator asks the Company to make an opening statement explaining the facts of the case. The Union then follows with an opening statement. At the conclusion of these opening presentations, the mediator should have a clear understanding of what the dispute is all about. Normally, the mediator will then want to hear directly from the grievant. When the grievant has finished speaking, the immediate supervisor is also usually given an opportunity to say something. This gets people involved and often generates dialogue across the table.

Once the mediator is satisfied about the facts and everyone has had an opportunity to be heard, the parties are usually separated. From this point on, the mediator's job is to ensure that both parties address any weaknesses in the case and begin to move toward a mutually agreeable settlement.

It is absolutely essential that all participants understand the behavior of the mediator. The mediator is not there to help you win but to help you reach a compromise settlement. The mediator's role is to facilitate communications and cooperative problem-solving; to emphasize the future, not the past; and to find resolutions rather than fault. The mediator must look under the surface for issues to understand what is really going on—something which the parties may not want to discuss with each other. The mediator must understand the Company's basic concern and what the Union needs to settle. In addition, the mediator must be a person whom the parties trust and to whom they will confidentially reveal their real positions.

If a settlement is reached, we write it up, go over it carefully to make sure everyone understands it and agrees with its specific terms, and then sign off on it in the presence of both parties and the mediator. If no settlement is reached, the mediator gives us the advisory opinion that I referred to earlier. Sometimes this advisory opinion is given to both parties jointly; at other times it is given to the parties separately. Whether it is done jointly or separately in any given case depends upon the attitudes and feelings displayed by the parties during the mediation conference and upon the mediator's perception of which method is likely to be most constructive, or least destructive, in that particular case.

Some Problems

Most of the problems we have experienced to date with our grievance mediation process can be attributed largely to "growing

pains." In other words, they are difficulties that can be, and are being, overcome as we gain more experience.

For example, the people who attended the joint training for the Union were not necessarily the people who wound up presenting the case. Thus, the Union representatives sometimes do not understand the process and the rules. Sometimes they can be quickly clued in by the mediator, and only a few minutes are lost. On other occasions, however, this deficiency has materially hampered, if not entirely blocked, our ability to reach a settlement. The solution to this problem is, of course, more training of the right people as well as better preparation for the mediation conference.

I often call mediators after the conference to determine what the Company representatives need to change. Some have replied that the Company presentations often "go for the throat" of the grievant and create some negative feelings in the room. The mediators suggested that presentations should be factual without being overly negative regarding the grievant personally. After reading through some of the presentations, I essentially agreed with that assessment, and we provided our managers with additional training to specifically cover this point. Now we try to make the process less emotional and confrontational. We have found that the grievant and the supervisor are more open and there is a greater chance for reaching a settlement if the parties tell their stories in a factual, unemotional manner, at least in joint sessions. If emotions need to be vented, that can be done with the mediator while the other side is out of the room.

Finally, both of the Union representatives who negotiated this agreement with me have retired. One replacement decided that mediation was an additional step in the grievance process to get something for the grievant. Consequently, the arbitration and mediation requests were 20 times higher than before. My first conversation did no good, so I stopped approving any grievances for mediation. He subsequently withdrew the requests for arbitration. This game continued for about six months, and then we had a meeting with his superior. He has since agreed to appeal only those cases that the Union is serious about arbitrating. Since then, things have been working much better.

Strengths of the Process

The strengths of the process, in our judgment, are:

1. *Faster resolution of cases.* There are no transcripts, briefs, or written opinions to wait for as in arbitration. Mediators usually

spend one day on the process, whereas arbitrators require additional days for research and writing.

2. *Less expense.* In addition to the lower cost for mediators as opposed to arbitrators (resulting from less time spent, not from any material difference in daily fees), there are no attorney's fees, no court reporter or transcript, no hotel conference facilities, and no witness expenses. Furthermore, mediators can usually handle two, or even more, cases in a single day. I understand that the average cost for mediating a single grievance for many companies is around $350. For AT&T, the average cost is considerably higher because our labor managers must travel from Atlanta to wherever the grievant is located. Our figure is about $900. However, this is still much cheaper than arbitration, which, for us, requires an attorney from New Jersey and a labor manager from Atlanta for both preparation and hearing time.

3. *A less contentious atmosphere.* As noted previously, the setting is informal. There are no attorney objections. The focus is on resolving rather than on winning. And, finally, the parties make their own resolution rather than having a third-party decision forced upon them.

4. *Constructive results.* The focus is on the real problem, not just the grievance. The parties learn to resolve their own problems rather than depending upon an outsider to resolve them. And the parties learn settlement skills that carry over to other aspects of their jobs and lives.

Weaknesses of the Process

The weaknesses of the process, real or perceived, are as follows:

1. There are possibly fewer settlements at lower steps of the grievance procedure and more appeals to arbitration. Because the process is relatively inexpensive, either party may push "weak" cases to mediation merely to get "something." The Union, in particular, has little incentive to drop a bad case until after the mediation phase.

2. In discipline cases that would otherwise go to arbitration, the Company must always give, and the Union must always get, in order to reach a settlement.

3. If there is no settlement and the case goes to regular arbitration, we have simply added another step to the process, which takes up time and involves additional expense.

4. There may be some pressure to settle every case, regardless of the merits. This should not be. Arbitration is still available for cases which are not settled.

5. The other side has an opportunity to see what kind of case you really have before going to arbitration. My feeling on this is that all of the facts should have been presented in the lower steps of the grievance process anyway. It makes no sense to hold your big guns in reserve until arbitration if revealing them earlier will help to achieve a settlement. In any event, in mediation you present the facts. You are not required to reveal strategies that you might be planning to use in arbitration.

Our Results

While mediation is a part of our national union contracts at AT&T, it has been used very sparingly except in my region. In fact, it has probably been used no more than six to eight times throughout the rest of the country, while in the Southern Region we have approved mediation in 107 cases. Thus, my region's results are essentially those of AT&T as a whole at this point, as shown in Table 1.

Table 1

Grievance Mediation Cases, AT&T's Southern Region
October 1988 through February 1993

Case Status	Number	Percentage
Grievances approved for mediation	107	
Withdrawn prior to mediation conference:		
by the Union	12	
by the Company	6	
Mediation conferences	89	100.0
Settled at mediation conference	52	58.4
Settled after mediation conference	18	20.2
Withdrawn after mediation conference	7	7.9
Cases left for arbitration	12	13.5

Eleven of the 12 cases have been arbitrated, with 5 awards for the Company and 6 for the Union. The advisory opinion of the mediators was ultimately shown to be correct in 9 of the 11 cases (81.8 percent) that were arbitrated. The advisory opinion for 1 case still pending arbitration is in favor of the Union.

Comment

DANIEL ISH*

I have had the opportunity to read the papers written by Nancy Cornelius House and John Kagel. I enjoyed both papers immensely. Rather than addressing everything raised, my commentary will be somewhat eclectic because most elements of our subject were covered very well and need no further elaboration.

Two broad issues surface. The *first* involves the mediation process itself, including its merits, drawbacks, and complexities. The *second* involves the additional complexities raised by a hybrid process including mediation and arbitration—sometimes referred to as "med-arb."

Mediating Grievances

In many cases, there are significant advantages to mediating grievances rather than moving directly to arbitration. Mediation and arbitration are by-products of failure, namely the inability of disputants to work out differences in the workplace.[1] On the "ADR map,"[2] we move from negotiation to mediation to arbitration and sometimes to court adjudication. In terms of benefits to the working relationship of the parties, generally speaking, the preference is to resolve issues at the earliest point possible on the map.

As House underscores in her paper, the emphasis in mediation is on cooperatively resolving the grievance rather than on a win/lose result. This, of course, is easy to state but more difficult to implement since labor-sector relations tend to reflect the competitive and positional nature of traditional collective bargaining negotiation. As House points out, the grievance resolution process itself just prior to mediation may have been very adversarial. Perhaps the greatest challenge for the mediator is to educate the parties throughout the process that a joint problem-solving approach is preferred to an adversarial one. Considerable skill is required to do this—and most often this skill is learned from training and experience.

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[1]For a concise summary of the many issues surrounding mediation and an analysis of the advantages and pitfalls, see Goldberg, Sander, & Rogers, *Chapter 2*, in Dispute Resolution: Negotiation, Mediation, and Other Processes, 2d ed. (Little, Brown, 1992).

[2]*Id.* at 4.

John Kagel sets out a valuable checklist of appropriate practices to use in mediation. To be effective, a mediator must understand, either through learning or instinctively, the theory of agreement making. My approach has been to rely on Roger Fisher's negotiation theory,[3] supplemented by an understanding of the role of the mediator as an effective instrument in achieving agreement. I agree with Kagel's observation that background reading about the mediation process is necessary. I would go further and urge anyone who is considering being a mediator to undertake some skills training, even if it involves only a two- or three-day workshop. Mediation is very complex and difficult; a theoretical and practical understanding of agreement making is essential.

As arbitrators, we are accustomed to hearing the positions of the parties and determining facts, and applying principles in the context of those positions. It is necessary to get behind the positions of the parties to their underlying interests; this allows a greater generation of options and solutions as possibilities for settlement. Often the true interests of the parties have little to do with their stated positions. A demand for more money (the position) may have less to do with money than with recognition or status (the interest).

House commented upon the "go for the throat" approach, which may create negative feelings and impair potential settlement. A mediator attempts to separate the people from the problem—to focus on the problem at issue rather than the personalities of the players. As an independent neutral, the mediator brings a certain detachment to help the parties in achieving this goal.

In my view, mediation is more difficult than arbitration. It requires total, undivided attention to the process. Every word, nuance, body movement, facial expression, and sigh may be significant. A mediator's powers of observation must be finely tuned and operate at a maximum; it is a very active exercise for the mediator, whereas an arbitrator plays quite a passive role in a typical hearing.

Although it is a more difficult and stressful process than arbitration, mediation is intrinsically more satisfying when successful. There is a tremendous feeling of fulfillment accompanying an

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[3]I attended the Harvard Negotiation Program basic and advanced courses. The very basic theory is set out in Fisher, Ury, & Patton, Getting to Yes (Penguin, 1991), but there are several more useful more advanced publications available.

agreement which the parties perceive as fair, meeting their interests, settling their immediate problem, and perhaps enhancing their future ability to settle their own differences. Bill Simkin, former Academy president, stated that "the food for ego comes not from decisions on the issues; it comes from a belief that the mediator somehow assisted in a solution reached by others."[4] The differing roles of arbitrator and mediator can be compared with those of movie actor and stage actor; the former provides delayed gratification (maybe), whereas the latter provides immediate gratification.

A mediated solution gives the parties a greater opportunity to fashion a settlement which better takes into account the interests of all the stakeholders. The stakeholders include not only the employer, the union, and the grievant; other employees generally have an interest, and in some cases a particular employee, such as the victim in a sexual harassment case, may have a definite interest in the solution adopted. Generally the remedies available to an arbitrator are circumscribed compared with the range of options the parties can agree upon, especially with the help of a skilled mediator who can assist the parties in generating a broad range of solutions.

Studies have shown that mediated agreements are more enduring than solutions imposed by third parties.[5] This may result from more involvement in the process, which engenders a commitment to the agreement. This, of course, is not universal and is dependent on a number of factors.

The advantages of mediation are not limited solely to the result of the process but are inherent in the process itself. During the course of face-to-face interaction, stereotypes are dispelled and information is exchanged. Not all controversies are rooted in personality or data issues; some are interest controversies. The job of the mediator is to help the disputants abandon simplistic and misleading conceptions of the problem and begin to address the real obstacle to agreement. The mediation process can be a learning experience.

The mediation process is valuable also because it establishes a basis for future communication. Most of the traditional institu-

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[4]Simkin, *Fact-Finding: Its Values and Limitations*, in Arbitration and the Expanding Role of Neutrals, Proceedings of the 23d Annual Meeting, National Academy of Arbitrators, eds. Somers and Dennis (BNA Books, 1970), 165.

[5]Tyler, *The Quality of Dispute Resolution Processes and Outcome: Measurement Problems and Possibilities*, 66 U. Denv. L. Rev. 419, 436 (1989).

tional dispute-resolution mechanisms are oriented to resolving the specific dispute in question. In the context of labor disputes, clearly what is needed is ongoing dialogue, because most of the issues have long-term effects. Thus, a by-product of involvement in a mediation is an increasing awareness of better negotiation skills, which may enable parties to better resolve future issues. The value of the potential enhancement of the ongoing relationship cannot be overestimated.[6] The AT&T experience, as reported by House, supports this view.

House also points to the faster resolution of cases as a benefit to the grievance mediation procedure adopted at AT&T—faster than arbitration. This benefit may be more exaggerated in Canada, where, for reasons I do not completely understand, a 1-day arbitration hearing is increasingly rare; rather, it is not uncommon for arbitrations to last 5 to 10 days.

House refers to several weaknesses of the AT&T procedure. I will comment on two of the points she raises. *First,* she says that "the Company must always give and the Union must always get in order to reach a settlement." I wonder whether this observation depends on the definition of "give" and "get." This may be generally true with respect to the particular question in issue, but on broader issues or in terms of future resolution of issues, might it be that the Company gets as much, or more, than it gives?

The *second* point is with respect to the observation that there is "pressure to settle every case, regardless of the merits." I agree that this is a common problem parties experience once they commit to a mediation process. The answer, I think, is for the negotiators to properly assess when an agreement is less desirable to their principal's interests than the likely outcome at an arbitration hearing. In negotiation parlance neither party should agree to a resolution, even if it is strongly urged by a mediator, which does not satisfy their "best alternative to a negotiated agreement" (BATNA). The key is to assess accurately the totality of interests in determining whether the deal at hand is inferior or superior to the alternative.

I must say that the statistics of the AT&T program are impressive. If only 13.5 percent of the cases mediated end up in arbitration, the program is very successful unless the original 107 cases represent an inflated number because of the process. Also, I suspect that

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[6] *See generally* Rogers & Salem, *A Student's Guide to Mediation and the Law,* in Goldberg, Sander, & Rogers, *supra* note 1, at 104.

the 81.8 percent correctness ratio of the advisory opinions may ultimately lead to more settlements based on the advisory opinions.

The Mediation-Arbitration Hybrid

I share Kagel's reservations with respect to an arbitrator's first attempting to mediate. Sometimes this process is built into the collective bargaining agreement, whereas at other times it is done on an ad hoc basis, either at the request of the parties or at the suggestion of the arbitrator.

In the med-arb model, the neutral functions first as mediator, helping the parties arrive at a mutually acceptable outcome. If the mediation fails, the same neutral serves as the arbitrator, issuing a final and binding decision.

> The central advantage of med-arb over "pure" mediation followed if necessary by "pure" arbitration, in which different neutrals serve as mediator and arbitrator, is said to be that of efficiency. In the event that mediation fails, the parties need not educate another neutral; the neutral who has been serving as a mediator already knows much if not all the information he will need to make a decision.[7]

Lon Fuller long ago pointed out that in reality it is not quite so simple, "since the objective of reaching a . . . settlement is different from that of rendering an award . . . , the facts relevant in the two cases are different, or, when they seem the same, are viewed in different aspects."[8]

The biggest problem I have with med-arb—and one I have personally experienced—is in relation to my role as mediator knowing fully that, if the mediation is unsuccessful, I will be called upon to adjudicate the case. Mediators have a range of strategic positions they can take, from a neutralist role to a relatively high interventionist role. The neutral strategy seeks to avoid influencing the outcome of the negotiations—any decision is acceptable. The interventionist strategy seeks to actively challenge and possibly even refuse to accept an agreement. This may occur where there is a power imbalance or where protection of the grievant may be an issue.

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[7]Goldberg, Sander, & Rogers, *supra* note 1, at 226.
[8]Fuller, *Collective Bargaining and the Arbitrator*, Wis. L. Rev. 1, 30 (1963).

Generally, when I act as a pure mediator, I start with the former approach, but often I move toward putting more pressure on the parties as the mediation proceeds. However, becoming the arbitrator in the event that the mediation is unsuccessful can be problematic. Martin Teplitsky, one of Canada's leading mediators, describes the problem in this way:

> If you pressure parties as a mediator when you are also the arbitrator, it makes the arbitration appear a foregone conclusion. Yet in any adjudicative process it is essential not only that justice be done, but that it be seen to be done. The arbitrator must appear to be impartial if the parties are to feel that they have been fairly treated. It is impossible for an overactive mediator-arbitrator to maintain the appearance of neutrality in any particular dispute. It is for this very reason that judges who mediate at pre-trial conferences are not permitted to conduct the trial.[9]

There is another very practical problem in addition to the perception of not being sufficiently neutral because of interventionist actions. As parties move toward agreement, it is possible that an impasse may occur over a particular issue, often because a party overestimates its walk-away alternatives. At this point the mediator may have to become an "agent of reality"—explaining to one party, or both, what is possible as opposed to what is unrealistic. An important role for a mediator is to confront the parties with the consequences of failing to reach agreement. Of course, in a labor dispute the main consequence will be the result of a binding arbitration. If someone other than the mediator is to arbitrate, the mediator is quite free to advise the parties of potential or even probable consequences. However, where the mediator is the person who will be imposing a resolution, the freedom to be an effective agent of reality is circumscribed considerably without appearing to have prejudged the case. My personal experience is that I feel considerably more limited as a mediator when I may subsequently be the arbitrator than when I am a mediator only.

Kagel refers to another concern about parties revealing their bottom line, quoting from Richard Mittenthal:

> A parallel concern, especially if mediation is invoked as the arbitration is drawing to a close, is that the arbitrator, now mediator, if effective, is going to learn the parties "bottom line," which the parties will be

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[9]Teplitsky, Making a Deal: The Art of Negotiating (Lancaster House, 1992), at 130.

> reluctant to give because, if the mediation fails, the mediator will arbitrate a decision. On the other hand, if the parties disclose their bottom line, that information cannot be erased but must inevitably affect the award. . . . Thus full-bore mediation may pose both a serious impediment to the independent judgment of the arbitrator and real risks for the parties.[10]

I agree with his point, but it is interesting that Martin Teplitsky views the bottom-line issue not as a problem but as an advantage to med-arb. He states:

> However there are some advantages to "med-arb." It allows the arbitrator to find out during the mediation process the parties' priorities, and to plumb their bottom line. In this way, mistakes can be avoided, such as giving the wrong benefit, awarding too much or too little, or exceeding the range of the reasonable. These mistakes can be costly.[11]

Finally, I will comment on whether an arbitrator should offer mediation. We can argue that it is paternalistic to do so because the parties are generally capable of determining whether a deal is possible and usually they are more experienced at deal making than arbitrators. This argument should not be overemphasized, however. Often the parties may need the suggestion of an arbitrator to kick-start a negotiated resolution, with or without the assistance of a mediator. It is interesting that the New York poll[12] cited by Kagel indicates that a majority of advocates welcome the arbitrator initiating and actively taking part in settlement possibilities.

In the appropriate case, an arbitrator should not be reluctant to suggest that the parties explore settlement or that a mediator may be helpful. My practice where this occurs is to always urge the parties to consider seeking out another person to mediate so as to not "taint" the arbitration hearing which has already begun. Also, I suggest that I could act as a factfinder to brief the mediator. My experience, on the other hand, is that the parties either completely ignore my suggestions of potential settlement or, if they choose to mediate, they insist that I do the mediation. One reason the parties want the arbitrator to be the mediator is that trust, an

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[10]Mittenthal, *A Code Commentary—Conduct of the Hearing*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1989), at 244.

[11]Teplitsky, *supra* note 9, at 130.

[12]Steifel, *The Labor Arbitration Process: Survey of the New York State Bar Association and Employment Law Section*, 8 Lab. Law. 971, 974 (1992).

essential ingredient of mediation, to some extent has been established. Another, of course, is the economy of using the same person to play both roles.

Conclusion

In summary, my opinion is that members of the Academy should be prepared to be mediators by undertaking basic skills training. Also, although med-arb is not an ideal model, it is something that we will almost inevitably be called upon to do with increasing frequency in the future.