Chapter 10

MEDIATION DURING ARBITRATION

I. Mediation During Arbitration? Yes, No, and Maybe

Under what circumstances, if ever, should an arbitrator switch roles at an arbitration hearing and don the hat of a mediator? If the arbitrator decides to mediate, what ground rules should be established? What are the pitfalls? In this session, three experienced arbitrators provided their perspectives on these and other questions. Two relevant papers follow this discussion.[1]

Moderator: **Susan L. Stewart,** National Academy of Arbitrators, Toronto, ON

Panelists: **Janice K. Frankman,** National Academy of Arbitrators, Minneapolis/St. Paul, MN

Bill Houlihan, Arbitrator, Madison, WI

John E. Sands, National Academy of Arbitrators, Roseland, NJ

Susan Stewart: Welcome all of you to the session on "Mediation During Arbitration." My name is Susan Stewart. I'm a member of the National Academy of Arbitrators from Toronto, Ontario. At one point during the program draft, the session was actually referred to not as "mediation" but as "meditation" during arbitration. I actually thought that was a good idea. I would like to have the authority to direct my parties to engage in a little of that, or essentially chill out. Then I thought about that a little more and thought, what about "medication" during arbitration? I'm talking about the advocates, just to be clear. Those are the people I'm sometimes interested in medicating.

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[1]See Part II of this chapter, "Should Arbitrators Mediate? Yes, No, and Maybe"; and Part III of this chapter, "Mediation During Arbitration: An Argument Against Donning Two Hats."

But, indeed, the topic of this session is "Mediation During Arbitration." I have been practicing as a labor arbitrator for a little over 20 years. When I commenced my practice, I described myself as a labor arbitrator. That's how I saw my role. I think most of the people within my jurisdiction would have described themselves in that way. I now refer to myself as a labor arbitrator and mediator. And in my jurisdiction, we really merge those two roles.

That's not the case everywhere. There are some jurisdictions where mediation and arbitration are seen as very separate undertakings. You don't combine the processes at all. We are very fortunate that we have three very thoughtful and experienced individuals on our panel today who will lead us through the various approaches and the pitfalls associated with the different approaches. Their biographies are in your materials but I'm going to tell you just a little bit about them.

To my immediate left is Bill Houlihan. Bill is an attorney and he's a team supervisor with the Wisconsin Employment Relations Commission (WERC). You may have heard about Wisconsin recently, and that is where Bill has had a long and well-respected career. Bill is also involved in teaching. In addition to his 34-year career with the WERC, he is an adjunct faculty member of the University of Wisconsin Law School where he teaches a seminar on labor arbitration. He's been recommended to me as an interesting and very engaging speaker. He has an extensive mediation practice.

Our next speaker, who is beside Bill, is Janice Frankman. Janice is from Minneapolis-St. Paul. And I just want to say that Jan has done so much to prepare for this conference. She's been on the Program Committee, the Host Committee. She's hosting at the Dine-Around. She's really doing absolutely everything. As well, she found time to write a paper, which is in your materials.[2] In addition to the practice of law, Jan has been a part-time state administrative law judge (ALJ); she's done that for 22 years. And, she is an adjunct professor at the University of Minnesota Law School. She's done a lot of committee work, the focus of which has been professional standards and ethics for neutrals. I would commend the excellent paper in your materials that she has prepared for this conference.

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[2]See Part III of this chapter, "Mediation During Arbitration: An Argument Against Donning Two Hats."

And then to Jan's left is John Sands. John is a graduate of Princeton and Yale Law School. He's a member of the NAA. He's a very experienced arbitrator with a very broad practice. He has served as an arbitrator for the National Football League, the National Hockey League, Major League Baseball, and the U.S. Olympic Committee. John has also written a paper in your materials.[3] From John, we're going to hear about the middle ground.

The title of this session is "Mediation During Arbitration? Yes, No, and Maybe." Just to set the parameters of the discussion, we're going to hear from each of the panelists, Bill, Janice, and John, individually for a few minutes. Bill is going to talk about the "yes" perspective; Jan, "no"; and John, "maybe." So take it away, Bill.

Bill Houlihan: Thank you very much for having me. The question for this session is to mediate or not to mediate. I am here to advance the "yes" perspective. I think there are very good reasons to mediate at the outset of an arbitration hearing, and there are equally good reasons to refrain from doing so. Let me outline what I think the advantages are.

In virtually every arbitration case I've had, with very few exceptions, I start out by inviting the parties to mediate the dispute. I say something like this at the outset of the hearing: "Is it worth our while to spend a few minutes in an effort to try and resolve this dispute informally?" Or, "Is it appropriate to take some time to resolve this or have settlement efforts been exhausted?" That's how I greet the parties at the outset of the hearing.

I do it because, for those of you who have any exposure to the WERC, it's an agency that's had a culture of mediating disputes for years and years and years, long before I got there, and I've been there 34 years. There was an emphasis on the mediation of disputes of all kinds, contract and grievance, and anything else that walked in the door. I walked into that culture and became a part of it.

I initiate the invitation because I think it can be awkward at times for parties who are assembled, and with the inevitable preening that goes on at the outset of an arbitration case, to initiate it themselves. To kind of raise a hand and say, "Oh, God, could you please mediate this before we have to go on the record?" This rarely happens with me. So, I tender the invitation, and I get a mixed reaction.

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[3]See Part II of this chapter, "Should Arbitrators Mediate? Yes, No, and Maybe."

It's very common for the parties to just say "no." "No, thanks. We've done what we need to do, and we're here for a hearing." And we move on.

There are times where parties say, "Yes, we would like to take the opportunity. Why don't you sit right there, and we'll go out in the hall, and we'll avail ourselves of that opportunity." And, they do.

There are times, and a fair number of them, where I am invited to conduct a traditional mediation session, complete with back and forth ex parte communication, two parties and the separate rooms, which is essentially what I'm here to talk about.

I think that the arbitration procedure is created by and owned by the parties. My job is to do what they tell me to do. I try to do that. Some of it's expressed in the contract; the contract says, "We'll pick an arbitrator from a panel supplied by the Federal Mediation and Conciliation Service." That's how you end up in the room. "The arbitrator shall not add to, delete from, or modify the contract"; it's a very common provision. I try to honor that. It's there. I do my very best to honor it.

But, there are protocols for the hearing that don't appear in the contract. For example, do the parties assume I'll take control or does the company have the right to call the grievant adversely in a discharge case? It's a pretty big evidentiary ruling, and most contracts are silent on it. Arbitrators will give you various rulings that cover the waterfront, and I think they impact the hearing significantly.

So the question, "Do you want to try and mediate this?" is in my mind something that is typically not covered by contract, although periodically it is. And so I ask. The primary reason is because advocates like to retain control over the cases they bring.

Once you turn the dispute over to me, you lose control. You don't control the outcome anymore; I do. There are certain outcomes you can live with. There are certain outcomes you cannot live with. I think there are a lot of advocates who prefer to hang on to their disputes as long as possible. There are no surprises in the mediated settlement. There can be surprises in an arbitration award, inadvertent typically, but surprises nonetheless. I think parties would rather decide these matters by themselves.

In the time I've been an arbitrator, the process has gotten a lot more formal. It has many more of the legalistic trappings of a trial than it used to. This is a less formal alternative, and there are people who gravitate to a less formal forum as a reaction.

You'll find that there are arbitrators who are very good mediators, and you can take advantage of those skills. A good mediator can change the dynamics of a situation. He can filter out personalities. Matters that can't resolve because of a person or a couple of people can be taken out of the equation or significantly reduced in the process. There are times when I enhance communications. I spend my life listening to people, and I spend my professional life trying to do something with the things they tell me. There are a lot of people in our field and our society who talk, but there are a relatively few who listen. I think that leads to many breakdowns.

I bring a different perspective to the table. Mine is neither the company's nor the union's. To the advocates, I would say at the moment we are opening the record, "You are in as good a position to settle as you will ever be. You know your case. You know it as well as you'll ever know it. You know your witnesses. You know your facts. You know what the witness is telling you on the way in the hearing door, as opposed to what the witness told you six months ago. And, they may be different. You've prepped. You know the strengths and weaknesses. And you now have an outsider who occupies a persuasive role, who can talk to your client, if that's something that you think is constructive."

There are cases that many advocates would prefer not to have to take to trial for a variety of reasons, merits and fallout among them. There are clients who have unrealistic expectations of the process or of the arbitrator. The significant limitations of the arbitrator sometimes have to be pointed out.

Mediation allows for a focus on the problem that led to the dispute. Typically, something has caused this dispute, and I understand that someone did something to someone else and there's a contract provision that regulates it. But the mediation process allows for a pragmatic approach and an approach that focuses on the problem. It can be creative and flexible in a way that arbitration cannot be or should not be.

Consider a failed mediation of mine. The collective bargaining agreement had two relevant provisions. It had a just cause for discharge provision, and it had a provision limiting the role of the arbitrator—"The arbitrator shall not add to, subtract from, modify, amend, etc., any provision of this contract"—two fairly routine, standard provisions. There was an employee discharged for incompetence. The employee had been a solid worker for the employer for a number of years. She was an older worker, whose husband was dying of cancer. She had posted into a job she couldn't do.

She had been through a very lengthy process of evaluation that led to her termination, and the contract didn't permit her to transfer or bump or otherwise change positions in any way any party could identify. Over the course of time, her co-workers, who attempted to help her repeatedly and without success, developed a fairly adverse relationship to this woman. She was pretty much isolated. She had a job recording legal documents in a county registrar of deeds, and she made a lot of mistakes. When you make a lot of mistakes on real estate transactions, it leads to a lot of trouble. She was in a lot of trouble. The registrar had hooked up the employee's computer to her own in a way that allowed the registrar to monitor all of the employee's work. So every stroke on her computer, someone else watched. The employee was being constantly observed under a microscope.

The parties tried to mediate the dispute. We came to a series of resolutions. The first was that the parties created a new job, full time, and gave it to her. The parties waived application of the contractual transfer provision. The county board shot that resolution down, and so it failed. The parties went out to try and find someone who would swap jobs with her extra-contractually, but found no one who wanted to volunteer to come into a work environment where the supervisor hooked up an employee's computer to her own and monitored every keystroke. And so that resolution, although extra-contractual, failed. There was a vacant part-time job; however, under this contract, part-time jobs were not eligible for health insurance coverage. These parties were going to provide health care coverage to her and were going to pay for it out of an account funded by the amount of money that the management lawyer projected his trial and post-hearing brief fees to be. Oddly enough, the insurance company shot that deal down. So we went 0 for 3, and we went to hearing. At hearing, the employer filled the record with evidence that this woman couldn't do her job. Her co-workers confirmed that fact. And the parties stipulated that she had no contractual right to transfer or bump or move.

At the conclusion of the hearing, both sides said to me, "We think you should be creative in crafting this award." Now given the contract language I offered you in the beginning, and the history, I think the creativity came in the mediation. It was creative. You can like or dislike any of those solutions, but you've got to admit there was a fair amount of creativity there. I don't know that this arbitration clause and these facts permit a writer or an arbitrator the kind of creativity that's going to resolve this thing in a way that

addresses the issues that surrounded this woman. I fear the parties did not perceive the award as being at all creative. I don't know that it was.

I will tell you that an arbitration hearing can be an adversarial process. It can create hard feelings, it can bruise the participants, and it can leave scars. Mediation, less so. Sometimes people need to go through it. Other times people have huge institutional needs that would send them to a different forum. If used well, I think the process can be quick and it can save money. You can get it done quickly, and you don't have to pay all the litigation costs.

And last but not least, my pitch is that mediation tends to be half a loaf. Arbitration usually fetches winners and losers. It is wonderful to win. It can be agony to lose. It can be a particularly agonizing loss if you have advised your client, or whoever's paying you, that if he or she does this, then he or she will be in good shape, but then the award comes back and says something to the contrary to that; that's a bad moment.

So that's my pitch on the joys of mediating in arbitration. Thanks.

Susan Stewart: Thank you, Bill. And now, Jan, let's hear the "no" perspective.

Janice Frankman: Not that there isn't joy in mediation, because there is. I heard Bill make references to the culture in Wisconsin and I thought maybe I'd tell you a little about Minnesota and where we started. It informs the listener, I think, when you know a little more about how I came up in mediation.

I would say that Minnesota has been in the forefront of alternative dispute resolution (ADR). I am a mediator. I continue to mediate in mostly special education cases. I've mediated many, many employment cases but never a labor arbitration case. So I embrace the process. I think it's wonderful. It is a creative and wonderful process. But the question here is, is it appropriate within the arbitration process? My answer is "no."

Just quickly, as far as background in Minnesota, Walter Mondale was Attorney General in 1976, and the rules of the Office of Administrative Hearings, which was one of the first independent offices of ALJs in the country, included a mediation rule, which was not used until 1990. So that was an enlightened rule, I think, and we were finally prepared to use it. When we did, we served strictly as mediators. There was a clear firewall. We did not converse with any of our ALJ colleagues. If a case did need to go

to hearing, it went to a different ALJ. There was no conversation between us about the mediation.

We also have the flagship chapter of the Association for Conflict Resolution (ACR), formerly the Society for Professionals in Dispute Resolution (SPIDR). We were at the forefront of instituting ADR in the court system here in the 1980s. We have a rule, in the general rules of practice for the state district courts, Rule 114, which identifies nine different ADR processes, including the distinct processes of mediation and arbitration. As well, we have a Code of Ethics that follows the Model Standards of Conduct for Mediators, which is a national document, a collaborative effort adopted in 1994 by the American Bar Association (ABA) (at first only the Dispute Resolution Section), the American Arbitration Association, and SPIDR, at that time.

So there has been a lot of recognition of mediation as a distinct process. And that has informed my work and my practice and actually my comments here today.

I'm just going to give some high points here. There was reference to materials and papers, and they are not included in the hard copy here. They are on the data stick or the flash drive that you should have received when you registered.[4]

But, I'm going to just sort of underscore words that I think are very important in supporting my position, that it's not appropriate to don the hat of mediator when you've been hired to be a labor arbitrator. Mediation is a distinct process. It clearly is appropriate in this area of labor relations, as one of the foremost tests, in my view, of when mediation can most be successful, and that is when relationships, ongoing relationships, enduring relationships, long-term relationships should be preserved to the extent possible. But when parties have selected me as the labor arbitrator, I take that seriously. And I believe that's the service that they've hired me for, to conduct a fair and impartial hearing and to render an award accordingly.

The cornerstones of mediation are self-determination, impartiality, and confidentiality—self-determination of the parties, impartiality of the neutral serving as mediator, and a confidential process. We have well-established rules, and it's not just in Minnesota—I have colleagues across the country who have been involved with ACR, as I referred to earlier. The ABA has a very

[4]See Part III of this chapter, "Mediation During Arbitration: An Argument Against Donning Two Hats."

active Dispute Resolution Section, and the Model Standards of Conduct for Mediators[5] are recognized in state codes of professional responsibility. Model ethical rules promulgated by the ABA are followed in many, many states, including Minnesota. They make express reference to the Model Standards when a lawyer is acting as a neutral.

So, all of these set out distinct requirements and aspirations for the neutral, the parties, and to ensure the quality of the process. Consequently, it's my firm belief that it's inappropriate for an arbitrator selected to conduct an arbitration hearing to don the hat of a mediator at any time during the arbitration process. Thank you.

Susan Stewart: Thank you, Jan. We're going to hear about the "maybe" perspective from John Sands.

John Sands: Permit me, first, a personal observation. You know I've spoken before this and other organizations many times. But this is the first time that I've spoken without Marge Gootnick sitting in that front seat with her big smile, and coming up afterward and—you all know, many of you have shared this—saying, regardless of the quality of the presentation, "That was just the best panel I've ever seen." That was Marge. She was a wonderful person who lived in superlatives. She loved her friends and was very forgiving of them. So, Marge, you're here in our hearts and regardless of how well we all do, I'm sure you'll call it "just the best panel ever." Thank you for that.

This kind of reminds me of an FMCS program I did when I was a law school professor. It was one of those red-light, green-light sessions, you know, where they ask arbitrators, "Here's a hypothetical. If 'yes,' green light; if 'no' or 'denied,' red light." And those were the only choices. My colleagues all played the game and did their "yes" or "no" responses. And rejecting the rules, which I thought beggared reality, what I did was I prepared a sign, and when the moderator said, "Light your lights," I'd switch rapidly between the red and green lights and hold up my sign, which read: "It depends."

And that's basically what my "maybe" is. I agree with everything my colleagues have said so far. But the fact of the matter is, that's the way I see my role. Bill started by asking how many of you are advocates and then qualified it as in labor and management. And

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[5]American Arbitration Association, American Bar Association, & Association for Conflict Resolution, Model Standards of Conduct for Mediators (2005), *available at* http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf.

my first instinct was to raise my hand because I also view myself as an advocate: as an arbitrator, an advocate for the outcome, and as a mediator, an advocate for a solution to the parties' problems to facilitate their finding their own solution.

Now, why "maybe"? As Jan points out correctly, these are very, very different processes with very, very different skill sets. Arbitrators are private judges. We decide cases based on a record, a record that comprises evidence that has met standards of probative value that have to do with relevance, authenticity, and competence. And as those of you who are actively advocates for one side or the other know, and as I did when I was an advocate, the parties fight to make and protect the record that supports their respective cases. And it's arguably arbitral misconduct in the legal sense to base a decision on nonrecord or ex parte information. Our tools, as arbitrators, are essentially intellectual ones.

Now, by contrast, mediators can impose no decisions. We are constantly making judgments as to what to do next, based on what the parties tell us, and what we hear with not only our two ears but also with a third "ear" as well, which are, for the most part, ex parte communications, observations of nonrecord information, and visceral instincts. There's no record of the mediation. What happens in the process is confidential, for the most part, not subject to discovery by outsiders or used by adjudicatory tribunals in reaching decisions.

So what happens when the parties ask us to mix the processes? For example, even in a very adversarial employment arbitration, which is as close to litigation as you can get, after three days of hearing, the parties jointly asked me to mediate, because they wanted to solve the problem that had become clear: The issues were sufficiently muddy and complex that neither wanted to shoot craps on a record neither felt it could control.

Now, so what's the problem with agreeing to serve both roles in the same case? I thought to myself, "All right, what's the relevance of the difference in these processes and the problems those differences create for the parties, for me, and for the process?" Here are the four that came to mind: (1) Can the parties ever be sure at the outset that, if mediation should fail, the arbitrator can decide the case based exclusively on the arbitration record and not on nonrecord factors learned in the mediation process? (2) Can the med-arb provider ever be sure at the outset that if mediation fails, he or she can decide the case based exclusively on the record and not on nonrecord factors? (3) Can courts review-

ing the arbitrator's award resulting from a med-arb process where mediation failed ever be sure that the arbitrator decided the case, again, based exclusively on the record? (4) And conversely, for the mediation process, can I, as a med-arb provider, ever be sure at the outset that in the mediation process I can use the muscle of ultimate jurisdiction appropriately and not be accused of having pre-judged the case should I then have to put back on my arbitrator hat? There's a very fine line to be walked. These processes require different skill sets. And I think that the arbitrator who addresses the request to mediate, or the mediator to arbitrate, or at the outset to do both, must ask these questions. And then the answer to these questions will determine the "it depends," the "maybe."

So the first thing is, you have to know your skills. If you're not absolutely certain of your ability to mediate with muscle and avoid the appearance of pre-judgment or unfair bullying, don't do it. If you think you can, all right. That's the first step. If you're not absolutely certain of your ability to distinguish between record and nonrecord material and to base an arbitration award exclusively on the record, don't do it. If you think you can, okay.

The next step is to know your parties. And this, to me, is one of the most important because I've been doing this a long time. If I'm not absolutely certain of the professionalism of counsel, of their confidence in my skills, and of their control over their clients, I won't do it, because that's essential. If you have sophisticated representatives who know the pitfalls, who trust you, and who can control their clients, that's fine. These are important considerations because there's a wide range of potential pitfalls and negative consequences that we'll talk about later as to what you can do to avoid them by careful contract drafting.[6]

And there's also this: Know the case. If you believe that the issues are so intractable and the parties so intransigent that mediation is not likely to be successful, why waste time? Don't do it.

So these are the kinds of judgments that I think are relevant, and there are many others. That's why I agree with my colleagues that there are benefits to mediation. There are also potential pitfalls. But if you're an arbitrator who takes on the mediation mantle, they can be managed. But you must know them and make a rational decision as to your willingness to accept this role and

[6]For more discussion on pitfalls, see Part II of this chapter, "Should Arbitrators Mediate? Yes, No, and Maybe."

to perform it effectively. That's why my answer is, "It depends." Thank you.

Susan Stewart: Thank you very much, John. I have some questions for the panelists and we're going to welcome some questions from the audience as we proceed. I'm delighted that there are some advocates in our audience who can share their perspectives. I look forward to the perspectives of the other arbitrators and mediators in this room.

I just want to start this off by asking the panelists a few questions. I'm going to start with Bill. Bill, you indicated what you do at the outset of an arbitration, you ask the parties if they would like you to engage in mediation. Now, is it really voluntary when you, as the arbitrator, the person who ultimately is going to make the decision in the case, the person in power, solicit a decision of the parties to agree to mediation?

Bill Houlihan: You should probably ask the advocates that.

Audience Member: I want the arbitrator to look at our contract and say, "Did you violate the contract?" Not, "Can you come to an agreement?" When they ask the question in the hearing, there should be an answer. My answer is, "Let's get on with it. Let us present our case." So that's how I deal with it.

Bill Houlihan: I understand that the source of the question can be intimidating or even confusing.

Twenty years ago, 25 years ago, I would ask this question, and I would have a fair number of advocates really taken aback by just the fact that I'd ask the question. I expect that they considered the impact of giving me an answer that I did not want to hear. I expect that they considered whether that was going to be a problem for them in the subsequent decision. Of course, it would not. But, the perception is in the eyes of the advocate, I think. I don't get that any more. Susan told me that she was going to ask me this question, so I spent a little bit of time thinking about it. I believe that the process, at least in Wisconsin, was one where the culture and the expectation was that the request would go out. So I did a little sampling of a few advocates, and I said, "Tell me this. When you get the question, what's your reaction? I mean, what do you think?" And they were all pretty much, you know, "I don't mind telling you 'no.' If the answer is 'no,' I'm going to tell you 'no' and let's move on." And one guy said to me, "You know the field has evolved." It's not just your agency, and it's not just you. It's the whole labor and employment field and litigation in general. You can't litigate a case in this country in any forum without somebody

saying, "Don't you want to try and settle?" Your approach is about as gentle as it gets. Other forums, other regulatory entities, the courts, are a lot more assertive with litigants in terms of, "Here, I think you should be trying to settle this." I don't like the approach that suggests "I'm here to bring you together." I don't know that I would ever say that to anybody. I don't typically know you or anything about you. I don't know that you want to be brought together. And my very presence suggests you don't.

So I am much more cautious about what I say, whether that's inherently threatening or not. I don't believe it is, but I don't occupy your seat.

Susan Stewart: Someone over here has something pressing to say.

Audience Member: The issue that I want to raise is this: You have two parties who come to you and say they agree on what the outcome of the arbitration should be but, politically, are unable to tell the grievant. How do you handle that?

John Sands: It depends.

Susan Stewart: Does that surprise you, that answer?

John Sands: In New York practice when I was an advocate we used to call these "rigged awards." And the "it depends" answer for me is, if this is a contract interpretation question, the parties own the contract, and I am an extension of their collective bargaining process that created it. If they jointly agree that this is what their contract means, I will incorporate that resolution in an award. If, however, it's a disciplinary matter, I will do what former NAA President Eva Robbins of sainted memory used to do, which is to say, "Fine, I'm delighted to hear that. Put on your case, and the case you put on will determine what the outcome will be as to whether the independent interest of this member is going to be served or not."

In answer to the question, "But how can you put that out of your mind and still make a fair decision based on the record the parties produce?," here's an example. On cross-examination a witness volunteered inadmissible, prejudicial information that the parties agreed to strike. And the next three pages of the transcript are the attorneys' colloquy about exactly what it was that I should ignore. Despairing of my ability to "unring" that bell, I called up Eva and I asked, "Eva, how can I be sure that I've put this entirely out of my mind?" She replied, "Are you nuts? You're human, John. The parties hired you to do the best job you know how. They trust you.

Do the best you know how, and stop complaining." That was Eva Robbins, and I think that was excellent advice.

Janice Frankman: I'd like to bring us back to the question. First of all, the question is a good one, but I'm wondering if it really involves mediation. And to Bill's point as followed up by an advocate in the audience, how do you feel when an arbitrator suggested it? It does have to do with style, I think. We have evolved as a community, and we have established relationships. Certainly, trust in the relationship affects me. But I think the concern is, what does that do? It signals weakness. To me it would. If I were in your shoes as an advocate, I'd wonder, "Where did that come from?" Unless we are familiar and have an established relationship, then maybe you would have an understanding, because you would know what Bill means and what Bill's willing to do, that he's not exercising coercion, which is something that should never occur in mediation. As an advocate, I would be concerned if I didn't proceed, what the outcome might be if we continued in hearing.

Susan Stewart: Lots of people want to comment. Beber, you've had a hand up for awhile.

Beber Helburn: Arbitrator, Austin, Texas. A couple of comments. I won't sign something that says that I decided an issue that I didn't decide. But I have no problem signing something that says that at the outset of the hearing, facts came to light that had not been discovered before and the clients were willing to resolve the case, and I am simply signifying resolution. The other comment is that there is a possibility that for an ad hoc case there is some self-selection and the parties might select Bill because he has the reputation of mediating, trying to mediate, or they might select Janice because they know that they're going to walk in the room and put on their case and there's not going to be any mediating.

Susan Stewart: There's a pressing question back here.

Tor Christensen: Tor Christensen with Freeman. My question is that I had a circumstance a couple of years ago when I was an advocate in private practice. We had an arbitration. It was an emotional issue for my client. They were not interested in settlement. And it wasn't necessarily their call—it was their client's call. And that was really all the flexibility we had on our end. We put on our cases, and the union did not really have a very good case at all. The arbitrator took each of us and put us each into a room and he said, "Here's the downside of your case. Here's where I have a problem with your case. I think you should settle the case." He then went and did that with the other advocate and I assume gave

him the same recommendation—to try to put us into the mindset to settle the case. And I guess my question is, do you ever think that would be appropriate?

Bill Houlihan: I'm the "you always mediate" guy, but I am awfully reluctant to do that.

If you mediate contract disputes, you can be pretty aggressive with people because there are big institutional interests at play but individuals are typically not singled out. If you mediate in this grievance arbitration forum, there are a lot of individuals being singled out. If it's the grievant and the individual that made the decision either to bypass the grievant or to fire him or something, everybody's interests are right on the line. You have to be pretty diplomatic. It's easier to do when you can preface everything you've said with, "I haven't heard any of the evidence yet. I don't know who did what to whom. But there may be advantages to trying to resolve this."

The dynamics change once the evidence is in. I believe that the actual participants in the proceeding are very sensitive to what is being said. If you say, "Well, let me walk you through the weaknesses in your case," it will come across as judgmental. The more you push the parties to settle, the more you appear to have drawn conclusions as to the merits of the case and the parties' behavior. It can be effective in the sense that it can get results; however, it can do a lot of damage to the parties and to the process. I have been tempted to mediate post-hearing, but always refrained.

Susan Stewart: Thanks, Bill. Now, I wanted to direct a question to Jan, who, of course, advocates the "no" position. Jan, let me ask you, are there circumstances where you see a practical solution to a grievance that compels you to engage in mediation? Let's say you've got a matter that's going to proceed over many, many days, and you see a practical, realistic, doable solution that is slapping you in the face. Do you bring that to the parties' attention or do you just let the matter proceed to hearing?

Janice Frankman: I am a mediator and an arbitrator. I think the processes inform each other. I use the language of mediation a lot. I think I set the tone. But I don't mediate during an arbitration. I don't claim to be a mediator during an arbitration. I'm not going to do that. But I'm still using the language of mediation.

So I attempt to set a tone that suggests, that encourages people to stipulate where they can. That encourages collaboration during the process. It lets people know that I will entertain objections to evidence during testimony and will rule on that to narrow the

record. You only have to do that once or twice, and people realize, "Hey, I can do that. I can object to this because I believe it's irrelevant. She's not going to say 'I'm going to receive the testimony or the document into the record for what it's worth.'"

I also caution, when we start to get volumes of documents, that I read every page. I want you to know that, first of all, I take this seriously. So if you can reduce this record in some way and be effective, I encourage you to do that. I might not say that straight out, but I do that by setting the tone.

So I really am focusing on efficiency, cost, and reducing the issues, which are all sort of intertwined. First of all, proper mediation can take just as long if not longer than arbitration. So it's time is money. I am finding that many more cases are settling on their own for a variety of reasons. I think it does have to do with experience. I actually think mediation is a process that is embraced and better understood all the time. So those matters that come before me for a hearing I believe probably require a decision.

John Sands: To add to that, I will do something that I call, for lack of a better term, "stealth" mediation. I'm clearly arbitrating. I'm listening. But I do interact with the parties if I don't understand the answer to a question or if I don't understand the question. When that happens, I'll stop and I'll say, "Would you repeat that?" or "Would you rephrase that? I don't believe I understand it." But when it just becomes so clear to me what the solution to the underlying problem is, you don't want to blurt it out, you don't want to interfere with the arbitration process. But using what Jan correctly calls the "language of mediation," I will say after the particular answer or particular argument, "Do I understand correctly that . . . ?" and then I'll state my understanding in a way that makes clear that I do, in fact, understand. In other words, it's a rhetorical question. Having received confirmation that I do understand, I'll say, "Okay, if that's the case, do we need to hear X, Y, Z because L, M, N follows from . . . , and that's what you're trying to prove?" and they'll answer "Yes," and then ask for a break and go out and settle the case.

Or when they're arguing about a remedy, I'll say, "You're asking for X. Tell me how that will solve the underlying problem that created this, so that it doesn't arise again?" At some point they'll ask, "Can we have a moment to talk?" They'll go out in the hall, and it's settled. That's what I call "stealth" mediation. I haven't aban-

doned my role as arbitrator, but in a Socratic way, I've laid out the path to a rational solution.

Mary Jo Schiavoni: I'm an arbitrator. Many times at the end of a hearing I might address the parties and say, "We all know what is in the record and what the evidence has been. Do you want to talk before I leave and render my award? It is fine if you don't wish to do so. But you may wish to discuss the facts, the remedy, or just take an opportune moment to speak with the other side." I don't see this as abandoning my role as arbitrator.

Susan Stewart: I don't see it as abandoning your role as arbitrator but I think that arbitrators have to be careful about the message that they might be perceived as sending in making comments at the end of a hearing.

Jim Adler: Arbitrator, mediator from Los Angeles.

Susan Stewart: And first husband.

Jim Adler: I think there is some merit to Bill's approach of proposing mediation in every case. Then, if people select Bill, they know what they are getting and they know that his suggestion does not reflect an evaluation of the case. And if the parties say "yes," there is a need for the parties to consider and agree to a number of issues. I know John has a very elaborate agreement that he has the parties sign to deal with these issues.

Susan Stewart: And that's in the material.[7]

Bill Houlihan: I don't do this in writing, but if the parties say to me, "We would like you to mediate," or "yes, let's try this," then I say something like this: "You know, we're going to have ex parte communication. That means I'm going to put you in one room, and I'm going to put you in another, and I'm going to hear things in each of these rooms that either of you are not going to be privy to. You both understand that? I'd like us to talk about what happens if this mediation fails. Do you intend that I go forward and hear it? Or do you intend something else? Or do you want to wait until it's done, and we'll talk about it then?" I ask what, if any, limits they want to put on the amount of time and energy we put into this. If there's a court reporter, we put it on the record. If there's not, and commonly there is not, I say to the parties, "That's my understanding of what we all just agreed to. If anything transpires that I believe compromises me or that you believe compromises

[7]See Part II of this chapter, "Should Arbitrators Mediate? Yes, No, and Maybe."

me, I expect you to raise it pre-hearing if we go forward." That I do as matter of routine.

Eric Lindauer: I'm an arbitrator from Portland, Oregon. In addition to labor arbitration, I also mediate litigated cases. I think we're starting down a very slippery slope when we start moving off arbitration and down the mediation track. Mediation is a great process for resolving grievances because the parties can resolve a lot of problems underlying the dispute that you, as an arbitrator, cannot in the up or down decision. That's the attractiveness of mediation. But there are problems when you are asked to arbitrate a case and the parties then suggest that you serve as mediator. First, I think the problem is that once you leave arbitration and begin mediating the cases, you compromise a couple of things. One, I don't see how you can separate what is on the record and what is off the record. I think you are compromised by confidentiality and the disclosure of information. Second, if it doesn't resolve, you've left the parties in a worse situation than when you started because now, if they have to go through the process again and get another arbitrator, it just extends the grievance process. If you've said that it's okay, you can make the decision in a med-arb situation, then the product that comes out may not be as acceptable because the parties have all given you information off the record that you've now used. I just don't see how you divorce yourself from that information.

So, although I've been very tempted on many occasions to mediate cases because I think they'll have better results, I have resisted that temptation. You're either going to mediate or you're going to arbitrate. I think if you try to do both, you compromise the process.

John Sands: Yes. I couldn't agree with you more that it is a challenging process. You have to be confident of your own intellectual discipline to be able to make your decision based on the record and then to write it only with reference to record information. You are the advocate for the outcome. I make a distinction between neutrality and impartiality—impartiality is the ability to decide one way or the other without favoritism, without influences outside of the appropriate ones, which comprise the record. If you don't think that you can make an impartial decision having heard something in mediation, that's the point at which you have to withdraw as the arbitrator.

I've been lucky. I haven't had that happen, possibly because my capacity for self-delusion is infinite. But I've been able to do it. We just opened our file number 4,109. So, apparently, people think I can make a straight call. But I agree with you, I do not propose the process at all. But when I am asked to perform both roles, either in the course of an existing arbitration or at the outset of a dispute, I insist on having an express agreement by the parties that acknowledges the nature of the process, the risks involved, and their acceptance of my dual role.

I follow that course always in employment as opposed to labor cases because of the important distinction between the employment law community, who are litigators, and the labor-management community, who are, in fact, a community involved in continuing relationships that do not end with a particular dispute. In a labor-management situation, everybody knows the likelihood that we're going to see each other again. So we operate in a different way from the way the litigators operate. In a litigation context, we're not likely to see each other again, so I do not begin the dual process without an agreement, either an agreement for arbitration services or an agreement for mediation services that details of what I'm expected to do, and I get my money up front.

Here's the contract language I use to protect the med-arb process: "In agreeing to retain Sands both to mediate and arbitrate their dispute, disputing parties waive any objections they may have that, in mediation, Sands may receive ex parte communications and learn factual matters that will not be part of the record of their arbitration proceeding and assert their acceptance of Sands' ability, should mediation fail to settle any or all of the issues before him, to arbitrate and decide the remaining issues based exclusively on evidence in the record."

Understand that my agreement also contains a three-paragraph provision, entitled "Confidentiality, Immunity, and Indemnification," so that they acknowledge my immunity from process. If any of them call or subpoena me in any legal or administrative proceeding, they understand that I'm going resist it. They're going to pay for my resisting it for both my attorneys' fees and for my lost professional time. If a court nevertheless directs me to testify, I will, and they've got to pay me for that. In all of my practice, I've never been called to testify. In other words, you've got to protect yourself. You've got to protect the process. I agree, this is

dangerous. Whether you decide to go that route or not depends on your answers to all of the questions we've raised and your confidence in your ability to do it.

My first employment case was a sexual harassment mediation in the mid 1980s with a major financial institution. It took them 10 months to pay me $3,000 for a successful settlement. So I said to myself, "These people understand the time value of money. I'm not going to do it again unless I get the money up front." And you know what? They pay me. And actually, I'm usually the cheapest person in the room.

Audience Member: The question I have is: Wouldn't it be better for us, more ethical, to take a position that no mediation will take place if we're going to arbitrate?

Luella Nelson: I'm Luella Nelson from Portland, Oregon, and Oakland, California. When someone asks me to mediate when we are in arbitration, I tell them up front that there is a risk in that I am a hands-on mediator. That means I may very well learn something in mediation that they would not want to let me know as an arbitrator. So I tell them that if we do not resolve the case, and if at any point anybody feels like my bell has been rung or for any reason I cannot be the arbitrator because of what I have learned in mediation, anybody can say they want their case heard by another arbitrator. I can say that and they can say that. I expect they will be open about the facts, even if it means that they risk having to go to another arbitrator if we don't settle, because otherwise you're going to be trying to mediate without the facts you need to reach a settlement.

Joan Parker: And I think if I were to summarize where I stand on this issue, I'd say that it is very important to know your clients and how they view the arbitration process before you jump in and try to mediate their dispute. It is important to remember that the process belongs to the parties. Moreover, whether or not the arbitrator should mediate can depend on several factors such as the relationship of the attorneys and their comfort level with each other, and, most importantly, the arbitrator's relationship with the parties.

On the other hand, if you know the parties well, and you know they know each other well, you may be able to safely assume that they would not think it inappropriate for you to attempt to con-

ciliate their dispute. By way of example, I serve as a permanent umpire for two major television networks and their largest unions. I can tell you that when I walk into one of these networks, it is assumed that I am going to mediate. In other words, before I convene a formal hearing, the parties expect to informally discuss the case with me in hopes that through an off-the-record exchange, and with my assistance, an amicable settlement will be reached. And even if they can't fully resolve a grievance, at least they can narrow the issues or resolve some procedural matters that may arise during the hearing. However, the parties at the other network where I serve as permanent umpire are strongly opposed to mediation by the arbitrator. I have known this from the day I was first retained. Hence, I conduct myself accordingly.

When I am involved in an ad hoc case but feel that I know the parties, I might attempt to mediate, depending on the circumstances, but I'm very careful with the words I use. At the beginning of the hearing I might say something like, "Have the parties had an opportunity to discuss this matter prior to the hearing today, and do they have any interest in any further discussion now?" At the end of a hearing I might say something like, "We've had a long day, and I am ready to adjourn. Is there anything that has arisen today that the parties want to discuss off the record before we wrap up?" This might provoke somebody to say that he'd like a word with his adversary and/or the arbitrator before we set a briefing schedule or present closing statements. Sometimes parties hear something during the hearing that they weren't expecting, or they realize that their case has a weakness, and they want to talk. I don't force it and usually don't even suggest it. I just try to make it comfortable for the parties if they want to make a last-ditch effort to settle.

John Sands: It's a fair process.

Joan Parker: If they want me to try to mediate, I will. Most importantly, I just wanted to say, you can't risk stealing the process from them.

Susan Stewart: Thank you, Joan, and those were very appropriate comments to conclude this session.