CHAPTER 11

CONCLUDING THE MEDIATION

§11.1 INTRODUCTION

At some point, the end comes. (No, not *that* end.) Face-to-face bargaining has produced an agreement, warm laughter, maybe even a hug. A lengthy series of caucuses conducted by the mediator has broken an impasse and has yielded a reluctant compromise between psychologically drained and deflated parties. Or, as a disappointed participant starts to get up to leave, someone—a party or the mediator—declares, "*Sorry; we tried, but we just couldn't get this one done.*" Resolution or not, how should the process conclude?

In this chapter, we first talk about the importance of the closing stage of mediation. We then discuss the process of drafting a final settlement agreement. Finally, we consider what the mediator should do if only a partial agreement is possible or if no agreement can be reached at all.

§11.2 THE IMPORTANCE OF CLOSURE

In General. "Closure" serves many valuable purposes when people have invested time, emotion or physical or intellectual effort. We see this in many walks of life: the elaborate closing ceremonies that are held for Olympic athletes, the final plenary session that tries to sum up the central themes of a three-day conference, the celebratory meal held by school or work colleagues when a difficult project has been successfully concluded. Often we experience the importance of closure by its *absence*. How do you feel when a book or a movie ends abruptly or peters out without a conclusion? How about when, at the end of a class or family reunion, people just drift off without a structured opportunity to say goodbye?

In Mediation. Whether or not an agreement is reached in mediation, orchestrating a deliberate ending and leaving adequate time for this final stage are important aspects of the mediator's management of the process. Like a successful opening session, the closing can accomplish a great deal more than drafting an agreement, declaring an impasse or otherwise taking care of the actual business at hand. Research suggests that parties who "own" and feel responsible for coming to

their own resolutions are more likely to honor the commitments they make.[1] The way the process ends can also affect the parties' willingness to renegotiate with each other if an agreement is reached but future disputes arise, as well as their ability to continue negotiating if no mediated agreement has been achieved.

Impediments to Closure. Unfortunately, the end often comes at a point when neither the participants nor the mediator is willing to devote additional time or effort to wrap things up properly. There are at least three reasons for this:

First, where reaching resolution leaves the participants feeling good, they may see no need for any further process and may be happy to dispense with what may be perceived as post-settlement "details." In some cultures, to suggest that the details need to be written down may be viewed by the parties as a sign of distrust.[2]

Second, after completing the hard, emotionally draining work of reaching an accord, participants may be tired and feeling as if the task is finished. If the process was a lengthy one, they may also be in a real rush to leave, anxious to attend to other commitments or save on further transaction costs.

Third, if no resolution was reached, parties who are dejected or angry may be in no mood to remain in the same room with each other, much less discuss the future course of the conflict.

Overcoming These Impediments. Effective mediators try to work around these hurdles and persuade the parties of the value of at least some sort of closing process. Here are some ways mediators can make the most of the final phase of the mediation process:

- **Bring the parties back together.** As we discussed in Chapter 10, toward the end of a caucused negotiation, mediators often try to have the final details of an almost-concluded agreement negotiated by the parties face-to-face. This affords them the chance to construct something together — in sharp contrast to the mutual tearing down with which they may have begun the process.
- **Savor and celebrate success.** If an agreement is reached, mediators can try to create an atmosphere in which the parties savor their success together. This can include congratulatory and complimentary statements by the mediator, stressing the hard work and sacrifices made by all involved and the ways in which the agreements the parties have reached are preferable to their court or other alternatives. This might include efforts to create a good-humored final connection between the parties in which small (or intimate) talk is encouraged, perhaps while documents are being drafted. After protracted mediations, a ceremonial meal or other celebration might even be held.

  The mediator can herself derive great satisfaction from these kinds of ceremonies. Few moments are as professionally rewarding as those that commemorate the thawing of damaged feelings or the restoration of relationships or contain an expression of sincere appreciation to the mediator by disputants-turned-allies.

1. *See, e.g.*, Craig A. McEwan & Richard Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 Law & Soc'y. Rev. 11 (1984).
2. *See* Christopher W. Moore, The Mediation Process 353-354 (3d ed. 2003); Dwight Golann, Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators 336 (1996).

- **Cement the agreement.** In addition to reducing the key elements of the agreement to writing, a mediator can cement a potentially fragile agreement by arranging for the parties to take immediate steps to put it into operation. This can range from suggesting that the first installment in a payment plan be made in cash on the spot, to having the parties call a joint press conference or other public announcement of the resolution (harnessing the commitment and consistency principles).

- **Emphasize the positive.** When agreement has not been reached or when further negotiations are contemplated, the mediator can pave the way for more constructive future dealings between the parties by underscoring — in a final joint session — what *has* been achieved. This includes emphasizing the measurable progress that may have been made toward possible resolution, including partial agreements that were reached on some of the issues, new information that was learned by each of the parties and factual disagreements that may have been clarified. The mediator may also point out less obvious gains, such as the parties' having heard and hopefully appreciated the seriousness of the conflict and the articulation of another perspective on it. Where further talks are envisioned, the mediator can make plans for the next session and, based on the progress already made, express optimism that a resolution can be achieved.

When the parties have reached an oral agreement to settle their dispute, there are normally three important decisions to be made: First, is a written settlement document reflecting the parties' agreements needed? Second, if so, who should draft it? Third, how should it be drafted?

§11.3 FORMALIZING AGREEMENTS: IS A WRITING NEEDED?

In some mediation settings, the answer will be clear: If the parties in a court-based mediation want to have their oral agreement ratified as a judgment by the court for purposes of future enforcement, there must be a writing.[3] Many community mediation centers expect their mediators to prepare written agreements for the disputants to sign and provide training to them on how to write agreements in clear and understandable terms.

In other mediation settings — most commonly private ones — the parties will be free to decide whether to have a formal written agreement. Sometimes this can become a point of contention between the mediator and the parties at the conclusion of the mediation. When this occurs, how should the mediator approach the issue?

In rare situations, the parties may have significant strategic, political or public relations reasons to avoid any writing at all. They may want to keep their agreement undocumented in order to be able to maintain to the outside world that they

3. On occasion, one party will insist on a court-approved writing while the other objects. (A common objection by debtors stems from wanting to avoid an official court judgment recorded against them.) Unless such differences are resolved, there can be no agreement.

did not settle. However, in most settings where there is a choice, experienced mediators try to adhere to this cardinal rule: No matter how much trust seems to exist, do not let the parties leave without reducing their agreements to *some kind of writing that they have signed.*

Why? Because the absence of a writing is an invitation to future disputes. Even when people are acting in the best of faith, their memories can fade quickly. If some of the negotiations were conducted in caucus or if there were any miscommunications in last-minute, hurried negotiations, there may be genuine uncertainty about the specific commitments each side made. In addition, parties leaving without a formal agreement in hand often have second thoughts about the negotiated outcome or are subject to "Monday morning quarterbacking" by friends, family or constituents with whom they discuss the agreement. When this occurs, recollections of what was agreed to or intended can quickly become distorted by the parties' changed attitudes about the deal itself.[4]

Here's another reason: Post-mediation disagreements about whether an oral settlement agreement was reached or what its terms were can find their way into litigation.[5] Mediators hate to become involved in such disputes, because when they occur, the mediator may be required to testify as to whether an agreement was reached[6] and, in the process, to take the side of one disputant against the other.

§11.4 WHO SHOULD DRAFT THE AGREEMENT?

In many situations, the participants will want and expect the mediator to draft any agreement that is reached. Even apart from those expectations, we believe that the mediator should seek to exert control over the drafting process. Effective mediator drafting can demonstrate close attention to detail and enhance the parties' respect for the final resolution. By contrast, allowing the parties to draft the agreement can be an invitation to further bickering, especially when one side seeks to gain an advantage through partisan phrasing of terms or "nibbling" for small added concessions on final details.

However, where lawyers are involved, they commonly offer to "take things from here" by reducing agreed terms to writing, often after the proceedings have concluded. They may have their own preferred language for liability releases and other standard terms or take professional pride in their own drafting ability. They may be motivated by the desire to offer traditional lawyer services to their clients after a process in which, in part, they took a back seat. When attorneys make clear that they want to do the formal agreement drafting, the mediator generally has

4. *See, e.g.*, GEORGE A. TALLAND, Disorders of Memory and Learning 18-19 (1969), and FREDERICK C. BARTLETT, Remembering: A Study in Experimental and Social Psychology 38, 191, 213 (1967).

5. *See, e.g., Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (Cal. Ct. App. 1994); *Riner v. Newbraugh*, 563 S.E. 2d 802, 211 W. Va. 137 (2002). *See generally* JAMES R. COBEN & PETER N. THOMPSON, *Disputing Irony: A Systematic Look to Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

6. Establishing whether an oral agreement was reached can require a mediator's testimony about the content of mediation discussions — for example, offers accepted or rejected — that otherwise would be treated as confidential. Courts are split on whether to hear such evidence. *Compare, e.g., Ryan v. Garcia, supra* note 5 *with Few v. Hammock Enters.*, 511 S.E. 2d 665 (N.C. Ct. App. 1999).

little choice but to defer to their wishes.[7] Nevertheless, even here the potential for second thoughts, blurred memories and competitive gaming (if not reneging) during the drafting points to the wisdom of the mediator's recording and having the parties initial at least an *outline* of the agreed terms before they leave the room.[8]

In many of the court, agency and community settings in which volunteers mediate, there is an expectation that there will be a written settlement agreement and that the mediator will draft it. In some of these settings, the basic format of the agreement is outside the participants' control. Courts and agencies with well-developed mediation programs in specialized areas sometimes require the use of preprinted forms containing standard provisions that can be filled in or modified. Where this is not the case, what principles should guide the drafting process?

§11.5 DRAFTING SETTLEMENT AGREEMENTS: PRINCIPLES AND OBJECTIVES

The task of drafting a mediation agreement can sometimes be straightforward. Certain agreements need to contain only a simple exchange of promises—for example, "*Mary Hatfield agrees that she will not play her piano later than 9:00 p.m. from Sunday through Thursday. Joseph McCoy agrees that if he believes that Mary has violated this agreement, he will communicate his concerns to her in writing.*"

In other situations, however, the task of agreement drafting can be deceptively complex, especially for inexperienced mediators. If time is limited, the mediator may be tempted to launch right into putting words down on paper or computer. But a settlement agreement is a form of contract, and important choices need to be thought through: How formal or informal should the language be? How detailed or general? To what extent should the agreement try to anticipate things that could go wrong in the future? Answers to these questions would seem to depend on the potential audiences for the agreement and the effect different language choices might have on them.

Audiences. The primary audience for the parties' agreement is, of course, the parties themselves. The language of the agreement they sign has the potential to solidify their commitments, govern their future behavior, help them monitor each other's compliance and avoid further disputes. From this perspective, it would seem that the terms of the settlement agreement should be as specific, detailed and clear as possible.

7. Who will do the final document drafting is sometimes determined by contract. Some private mediators include provisions in their retainer agreements specifying whether they will or will not draft the final agreement; in some cases this may be a factor in the parties' selection of the particular neutral. This decision may also reflect legal and ethical concerns. For example, in jurisdictions where drafting final divorce settlements is considered the practice of law, mediators who are not lawyers must limit their drafting of agreement terms to informal summaries or memoranda of understanding and must leave the drafting of final court documents to lawyers retained by the parties. *See* §12.6, *infra*. Note, however, that the enforceability of such memoranda of understanding, drafted on the premise that a more formal contract will follow, is not a sure thing. *Compare, e.g., Golding v. Floyd*, 261 Va. 190 (2001) *with Snyder-Falkinham v. Stockburger*, 249 Va. 376 (1995).

8. GOLANN, *supra* note 2, at 363-337.

The second principal audience for many agreements is the court, agency or community organization with the authority to enforce the agreement in the event that a party later complains of noncompliance. Focusing on this audience would also seem to point in the direction of producing agreements that are strong: clear, understandable, complete and readily capable of being enforced.

But highly detailed language may be difficult to draft under the pressure of deadlines, with the participants anxious to be done with the mediation and on their way. In addition, the parties often come with potential "shadow" audiences for the agreement: others with whom they may share the document and who may influence what they subsequently think of it. How might this affect drafting choices? Can you think of reasons why, and circumstances when, general settlement terms might be preferable to highly specific ones?

Let's examine these and related drafting issues in action in a setting with which you are familiar. Here is a hypothetical agreement in the version of *Wilson v. DiLorenzo* in which the homeowner agreed to allow the contractor to return and finish the job.

Settlement Agreement

Wilson v. DiLorenzo

1. *Defendant will complete Plaintiff's kitchen renovations in a professional manner. Plaintiff will not unreasonably deny Defendant access to the kitchen for these purposes.*
2. *The renovation will be completed in no more than three days. If it takes longer, Defendant will pay Plaintiff $100 per day for each day the project is delayed.*
3. *Defendant will guarantee the kitchen cabinets for 20 years and labor, countertop, linoleum and lighting for 3 years.*
4. *Plaintiff will receive a $500 reduction in the balance due as compensation for excessive past delays and use of "irregular" cabinets.*
5. *In consideration for the above agreements, Plaintiff will withdraw her claim when the work is finished.*

A Two-Stage Process of Agreement Drafting. There are typically two stages to the process of drafting settlement agreements. The first involves confirming and expressing in writing those terms that have already been agreed to in the negotiations. This first stage often leads to a second: deciding what to do on realizing that important details may have been overlooked or that the basic agreement might benefit from being strengthened.

The First Stage: Confirm and Put into Words the Agreements That Have Already Been Reached. Typically, the mediator begins by summarizing what the parties have agreed to and obtains their confirmation or correction. She then proceeds to draft appropriate language that accurately reflects these agreements.

Reducing verbal understandings to the written page presents the mediator with choices. Here are some guiding principles:

- **Use clear language.** It is obviously important to use language that is not so vague or ambiguous so as to set up the possibility of a new round of fighting (or a reviewing court's having to guess) about the document's meaning. Aiming for clarity also requires avoiding lofty language and unnecessary technical jargon. In the *Wilson* agreement above, does the word *professional* in Paragraph 1 meet these standards? How about *unreasonably*? How, if at all, could each of these sentences be improved? What do you think about the use of the word *consideration* in Paragraph 5?

- **Be specific.** When the parties read over a draft agreement, they should know with specificity who will do what, in what sequence and when. Important operational details need to be included to provide guidance to the parties and avoid future disagreements. In *Wilson*, this would certainly seem to call for adding a date when the work will begin. What about a starting *time*? Should the "three-day" time limit in Paragraph 2 be refined to specify "work" versus "calendar" days? Does the history of the parties' past dealings suggest answers to these questions?

  What about the particulars of the job left to be done and agreed to by the parties: installing the countertop and track lighting, rehanging the cabinets, fixing the linoleum seam and so on? Should these all be delineated in Paragraph 1? If so, how? What about the specifics of the "guarantees" offered in Paragraph 3? If these should be fleshed out in more detail, how would you do it? Is there a point at which increasing the level of contractual detail stops being helpful and instead risks destroying any prevailing atmosphere of trust? How do you know when that line is being approached?

- **Use language that is mutual, positive, purposeful and personal.** Agreements should be framed in their most positive and balanced light and should include, where possible, reciprocal promises by the parties. When agreements include real commitments by all the parties, not just one, this enhances their apparent fairness and reduces the risk of post-settlement regret.

  The mutuality of the agreement can also be enhanced by a preliminary "purpose" provision that sets forth the parties' shared overall objectives in reaching their agreement. While necessarily general and thus not susceptible to being enforced, such provisions can start the drafting on a positive note of joint commitment and may aid later efforts to interpret unclear provisions. What would you think of a preamble to the *Wilson* draft that read: "*The parties, desiring to end their litigation amicably and to have DiLorenzo and Co. complete and Ms. Wilson receive the kitchen renovation originally contracted for, have agreed as follows: . . .*"?

  Framing promised acts in positive terms—describing what the parties *will* do rather than what they *will not* do—underscores the contributions each will make to the future relationship and avoids any recitation of troublesome conduct that may have given rise to the conflict in the first place. Agreements should generally be drafted in language that

looks forward, not backward, especially in ways that might imply or assign blame for the events that led to the conflict.[9]

Given this guidance, how would you assess the second sentence of Paragraph 1 of the *Wilson* draft? Is this language necessary? Could it be drafted more effectively? How? What about Paragraph 4?

Finally, a personal, nonbureaucratic tone can be set by referring to the parties by name and relationship to the conflict rather than (or perhaps in addition to) their official "role" in the proceedings (plaintiff, defendant, complaining party, etc.). The requirements of a reviewing court or agency might have something to say about this.[10] In *Wilson*, how might the parties be referred to other than as "plaintiff" and "defendant"?

The Second Stage: Strengthen the Existing Agreement or Accept It as "Good Enough"? If the bargaining has been tough or prolonged or if the agenda failed to identify important issues, the basic agreement reached by the parties may be somewhat skeletal. (This can also occur where the parties' negotiations have been short and amicable.) Important topics—overlooked, omitted or incorrectly assumed to have been included in the deal—may only occur to the participants and the mediator once the drafting process starts. Getting concrete about the agreed general terms often has a tendency to focus the participants' minds on missing details.

However, each time a new and unresolved issue is introduced into the drafting process, it raises the possibility of renewed negotiations that could jeopardize a fragile peace. If the parties don't suggest or inquire about new terms, how is the mediator to decide when to risk "upsetting the apple cart" by introducing additional issues or considerations? At what point should the mediator view her job as done?

The Goal: Practical, Durable Agreements That Will Be Complied With. To us, the most important consideration in deciding whether to raise any new term is the extent to which it offers the possibility of strengthening the deal by enhancing the likelihood that it will be honored to its conclusion. In every mediation, the mediator's primary goal should be to try to craft a practicable and durable agreement—and to protect against the escalation of the conflict that can come from noncompliance.[11] The extent of contract strengthening needed to achieve these ends depends on the type of agreement that is involved.

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9. On occasion, a defendant will insist on agreement language that specifically disclaims or, at a minimum, "does not admit" responsibility for the events that spawned the dispute or claim. This reflects the reality that parties often choose mediation in order to avoid such determinations. But in some cases, it can also be a stumbling block to concluding an agreement, especially with a party who feels that he or she is a victim. How can a mediator prevent disagreements over such language from upending a settlement?

10. Court or agency rules or other legal requirements sometimes necessitate using potentially divisive language that has been avoided during the mediation. For example, where child support or school enrollment authorities need official documentation of a parent's rights, it may be necessary to include a term such as *primary custodian* in a parenting agreement. If such a requirement exists, how can the mediator work to ensure that it does not become an insurmountable obstacle to final resolution?

11. MOORE, *supra* note 2, at 348-349.

Types of Agreements. Agreements differ according to two major variables: (a) how long it will take the parties to fulfill their promises and obligations and (b) how clear (or not) it will be that compliance has occurred. The further into the future the agreement will extend and the more open to interpretation and disagreement the parties' compliance could be, the more important Stage Two strengthening becomes.

- **Completed or executed agreements.** In these agreements, all obligations that are part of the agreement will have been performed and completed at the time the mediation ends. Nothing is left to be done in the future. The simplest agreements involve an act—for example, the payment of an amount of money or giving an apology—in exchange for a signed release from liability and/or the immediate withdrawal of a claim. Such agreements are comparatively rare.

- **Executory agreements.** Most mediation agreements are based on promises whose fulfillment will not occur *at* the mediation session and thus are "executory" or not yet complete; that is, they hinge on a future event. Even a payment by check to resolve a simple monetary dispute is not complete until the check clears. Depending on the nature of these promises, there may be more or less potential for future conflict. At the time that an agreement is signed, terms yet to be satisfied can range from fairly mechanical ones, such as the payment of a specific amount of money on a specific day, to obligations that are far more susceptible to differing interpretations and disagreements, for example, a mechanic's promise to redo automobile engine work to settle a claim by an angry customer.

Building Strong Agreements. So what makes for a strong agreement? Strong agreements are:

- **Sustainable.** They can withstand changed circumstances arising during the life of the agreement that could interfere with the parties' meeting their obligations. During the second stage of the drafting process, the mediator therefore asks "what if" questions that attempt to anticipate future contingencies that could jeopardize compliance. This can be done by asking the parties "*what could come up that might affect or prevent your performing your commitments under this agreement?*" or by the mediator's trying to foresee these herself. The ability to do this requires placing oneself in the situation and, drawing on one's experience, identifying "future facts"[12]—factors that are internal or external to the parties—that could pose problems. For example: "*Mr. Stankowski, you said earlier that you cannot control your work shifts. What will happen to your proposed child custody schedule if you are assigned to work weekends?*"

  When future contingencies cannot be forecast with precision, the best approach to preserving the agreement is often *procedural*: an agreed

12. Louis M. Brown & Edward A. Dauer, Planning by Lawyers: Materials on a Nonadversarial Legal Process 485-491 (1978). In anticipating what could frustrate or destroy a mediation agreement in the future, the mediator shares much in common with those who counsel clients in business transactions, helping them anticipate and minimize future disputes.

method of communicating about and resolving future disputes. For example: "*In the event that Mr. or Ms. Stankowski cannot comply with their parenting obligations under this agreement because of future changes in their work schedules, and are unable to resolve any disagreements concerning their parenting plan themselves, they agree to attempt mediation to resolve their differences before initiating court action.*"

- **Practicable.** In their eagerness to reach an accord, parties sometimes agree to terms that they have not fully considered and may not really be able to perform, even under present circumstances. This is a prescription for noncompliance. In Stage Two of the drafting process, the mediator should therefore ascertain the parties' real capacity to perform their obligations under the agreement. For example: "*Mr. DiLorenzo, is the linoleum that is needed for the work to start on Saturday in stock? If you're not sure, should we make the start date later?*" or "*Ms. Anderson, can you really afford to make these new $170 mortgage payments out of your $400 paycheck each week? Have you considered your other fixed expenses? Shall we talk about them?*" As you can see from these examples, paradoxically sometimes the agreement as a whole can be made stronger — that is, more practicable and durable — by making the parties' substantive commitments weaker.

- **Complete.** In the parties' desire to reach an agreement, the failure to construct a complete agenda or the hope that certain thorny issues will "disappear" can lead participants, including the mediator, to assume that certain issues have been dropped or conceded as part of the negotiations. Nothing can undermine an agreement more quickly than the late (or even post-signing) discovery that an issue thought to be waived is still, in the mind of one party, unresolved. For example: "*Ms. Wilson, you mean you want your court costs, too? When you said you'd take a $500 price reduction and completion of your kitchen in three days to settle all your claims, didn't that include waiving your claim for repayment of your court filing fee?*"

- **Acceptable.** Parties who later regret the agreements they sign may be less likely to perform them. (They may also have second thoughts about the mediation process itself.) If the mediator suspects that a party feels that she is about to sign an accord she may later regret, the second stage of drafting should include an inquiry, in caucus, about whether the party has any reservations about concluding the matter that have not yet been raised. In most situations, despite the natural ambivalence that accompanies most compromises, the recalcitrant party will express a desire to complete the agreement. As mediators are often heard to say, the sign of a good settlement is when "everyone is a little unhappy."[13]

  But in some cases, there may be warning signals suggesting that the agreement is too fragile to conclude in its current form. Is it a product of a power imbalance? Has a disputant gone along until this moment without thinking how the agreement will look in a day or a month? For example:

13. While creative, value-creating, relationship-repairing solutions can truly make the process end on a shared high note, compromise endings — where everyone gives a bit — are much more common.

"*Ms. Johnson, in my experience most mothers in your situation would want to have the father at least share the responsibility for transportation. I noticed you were silent in agreeing to his demand that you pick them up and drop them off. Is that really what you want?*"

Note also that some mediators, wanting privacy while they write, prefer to ask the parties to leave the mediation room during what may seem like a long and awkward period. But excusing them may come at a price. During the "down time" of drafting, the mood in the room can yield valuable data for the mediator: Are the parties chatting warmly? Is there an icy silence? Any tears? The participants' conduct during the drafting period can provide helpful insight about whether the agreement is truly acceptable to everyone.

- **Measurable.** When obligations to be performed can be measured by objective standards, there is less risk of a future dispute. However, drafting contractual commitments in measurable, objective terms is often a challenge.

  Consider the *Wilson* case. The draft agreement promises that "the defendant will complete the plaintiff's kitchen in a *professional* manner." How might this wording be strengthened to make it more measurable and less subject to future disagreements? One way might be to specify the materials (brand name and/or grade) that will be used in the renovation. What about the quality of the labor and workmanship? A common drafting technique is to incorporate a standard of workmanship that will be complied with—for example, "*All labor will be performed in accordance with the standards of workmanship adopted by the Connecticut Home Building Contractors' Association.*" Does this completely resolve the problem?

  If not, another common approach, again, is to specify a *procedure* for resolving future disagreements: "*In the event that any dispute arises regarding the quality of Mr. DiLorenzo's workmanship, the parties mutually agree to hire kitchen contractor Phil Formica to appraise the work and resolve the dispute. The parties will equally share the costs of Mr. Formica's appraisal, and all decisions by Mr. Formica shall be final.*"[14]

- **Containing incentives.** In many situations, agreements can be strengthened if they include *positive* incentives to encourage compliance or *negative* consequences for breaching them. We saw an excellent example of a negative incentive in *Wilson*, when the contractor's own lawyer suggested adding a $100 per-day penalty for any delays beyond the agreed period of three days for his client to complete the kitchen.

  Now imagine a landlord-tenant case in which a tenant owing his landlord $1,000 in back rent agrees to pay off the debt at the rate of $100 per month over a period of ten months. A landlord wanting the money

14. Parties sometimes ask their mediator to serve as a monitor or even binding arbitrator in the event of a future dispute over compliance with the terms of a mediated agreement. (Recall that one of the mediators in the *Wilson* case volunteered to assume that function.) But other mediators resist undertaking such a role. *See* GOLANN, *supra* note 2, at 342. Can you see why?

sooner or concerned about the tenant's financial stability over the long term might agree to offer the tenant a *positive* incentive, to accept only $800, if the money were paid in installments of $200 over a four-month period.

- **Enforceable and Honored.** Like contracts generally, settlement agreements drafted by mediators and signed by the parties are not self-enforcing. However, in court-connected settings, such agreements are commonly approved by judges as court orders, which can then be enforced like any other decree. For example, in *Wilson*, one mediation ended with a resolution under which the contractor, Mr. DiLorenzo, agreed to pay the homeowner, Ms. Wilson, $1,500, plus court costs, within a specified time. In such a case, it would be common for the mediator to write up the parties' agreement as a proposed court order or judgment to be approved by the presiding judge. Then, if Mr. DiLorenzo failed to pay the judgment within the specified period, the settlement agreement could be enforced, with Ms. Wilson able to garnish Mr. DiLorenzo's bank account or take other collection action permitted by state law. She would not be required to relitigate her original claim.

  But suppose that Mr. DiLorenzo wishes to avoid an official judgment on the court records. (This is a very common scenario, especially for those concerned about their credit rating.) In such a case, the parties might mutually agree that Ms. Wilson would withdraw her complaint voluntarily without limiting her right to refile it and seek the entire amount of her original claim later in the event of Mr. DiLorenzo's non-payment.

  Note, however, that if Ms. Wilson agreed to these terms and Mr. DiLorenzo failed to pay the agreed-to settlement amount, Ms. Wilson would have to start from scratch, refiling and litigating her claim in order to be able to collect anything. Suppose Ms. Wilson—like many unrepresented parties—is unaware of what she may be giving up by simply agreeing to a $1,500 settlement without a court order behind it. Should the mediator point this out? Is this inconsistent with the duty of impartiality?

  If Ms. Wilson understands (or learns) what she is giving up, she might not like the prospect of having to start from the beginning. Or, having originally sued for nearly $15,000, she might feel that, even with a court judgment, she should not be limited to collecting only the settlement amount of $1,500 in the event the contractor failed to pay what he agreed to. To address such concerns, the parties might agree in the event of non-payment to the entry of a court judgment in an amount greater than $1,500. (But here, the contractor might balk.)

  Where mediation resolutions involve promises of future conduct other than paying money, unique enforcement concerns may come into play. As we have seen, the second mediation of Ms. Wilson's claim concluded with the contractor's agreeing to complete specified kitchen renovation work within three days and pay a $100 per-day penalty for each day of delay after that. Could this agreement be further strengthened? If so, how? Might such "strengthening" create the risk of standoff? Consider.

- **Optimal.** The final and potentially most rewarding strengthening move can involve steps to improve on the parties' agreement to try to satisfy more of their needs and interests. For example, in the *Wilson* case, the mediator learned in caucus that the contractor was concerned about potential harm to his reputation in Ms. Wilson's community that could stem from this dispute. Assuming that you thought that tensions had eased sufficiently in the mediation to make this suggestion plausible, what would you think of the mediator's suggesting to the parties that, in addition to their agreed terms, if Ms. Wilson were pleased with the work that he did in completing the job, she would allow the contractor to use photos of her kitchen in his advertising, perhaps in exchange for a further price reduction?

  Here's another variation on this theme: In a recent hotly contested employment discrimination case, a fifty-five-year-old worker sought back pay for alleged age discrimination, while his former employer defended the firing on the basis of the employee's poor performance. The claimant confided to the mediator in caucus that, while he needed money right now, he optimally might like to return to the company as a part-time consultant sometime in the future. However, he did not want the employer to know this, because he was afraid that the company might use the information to negotiate for a lower financial settlement and because he believed that they would not really consider him for a future position. No matter how much better an agreement might have emerged if this information were shared, the plaintiff understandably refused to do so.

  However, once a settlement agreement was *signed* (in which the defendant agreed to pay the plaintiff $60,000 in damages and the parties knew that they had secured an acceptable resolution), it was then possible to persuade them to let down their guard, disclose their true preferences and consider ways in which the agreed-to deal might be improved for both sides. In the end, the defendant (conceding now that the employee had "*lots of strengths*") agreed to guarantee the plaintiff two years of part-time work as a future consultant in a different company division, in exchange for a slightly reduced cash settlement now—a deal that both parties preferred. A noted negotiation scholar calls this a "post-settlement settlement."[15]

Working to Strengthen Agreements: Risks versus Benefits. In the abstract, it would seem *always* to be desirable to consider fortifying agreements by adding detailed terms and conditions that make them more durable. (After all, the parties can always reject such suggestions as unnecessary detail, worry or formality.) But such an effort does present certain risks.

First, it can be very time-consuming. As we have said, agreement drafting by the mediator often takes place at the end of long and difficult negotiations, at a time when the parties are anxious to go home or report to work, or (in court-connected cases) a judge is impatiently waiting to review and approve the

15. HOWARD RAIFFA, *Post-Settlement Settlements*, 1 NEGOTIATION J. 9-12 (1985).

settlement agreement before leaving for the day. Alternatively, if the mediation was a short one, the parties may not feel that it's worth it to spend a lot of extra time perfecting the agreement's details.

Second, even when the parties indicate their willingness to spend the time to try to improve their agreement and the setting permits it, differences or disagreement over proposals to improve the deal may require further bargaining, including returning to caucuses after having appeared to end on the high note of a joint session. If the mediator tries to introduce too many "what ifs" or strengthening options, this can sometimes kill an already good deal. It is said that "the perfect is the enemy of the good." For these reasons, the mediator may decide to leave well enough alone.

Third, as we have discussed, the potential impact of some strengthening moves may not fall evenly on the parties. Does this mean that the mediator should not suggest them?

The mediator's answer to this question will depend in large measure on how he sees his role. If he views his mission — as we do — as helping to forge durable agreements, he will err on the side of proposing new terms in furtherance of this goal — even if their impact might be seen as disfavoring one side. A transparent explanation of what the mediator is doing, tied to neutral goals the parties are likely to embrace,[16] can help such an effort: "*You can agree, can't you, that a strong agreement — one that's specific, that anticipates potential future problems and that encourages compliance — is better than one that may be easier to agree on now, but is more likely to fail in the future?*" Caucuses can then be used to test or explain potentially delicate new proposals. Parties who have come this far in their negotiations usually want their agreements to succeed. Unless they are not firmly committed to what they have already promised, they will likely see the value — to both parties — of strengthening the deal.

A Post-Agreement Role for the Mediator? In some situations, parties who have reached an agreement may need future assistance in order to fulfill its conditions or support its compliance. Especially where they have no other advisors, they may turn to the mediator for such help. This can include providing information about or helping to secure outside resources (e.g., anger management counseling for a father whose temper has been a barrier to seeing his children), overseeing future promised acts (e.g. a payment plan over time) or serving as a mediator or arbitrator of future disputes arising under the agreement. Do any of these potential roles raise concerns?

§11.6 BETTER THAN NOTHING: PARTIAL AND INTERIM AGREEMENTS

For many reasons — including an impasse on a major issue, an agenda too complex to tackle within a limited time frame or a "readiness" problem — total agreement may be unattainable. In such situations, the mediator may be able to suggest, and

16. *See* GOLANN, *supra* note 2, at 341-342.

the parties may be open to accepting a less-than-complete accord that preserves their right to pursue unresolved matters in the future. This can take two forms:

- **Partial agreements.** Some but not all of the issues are finally resolved, with the remaining issues to be negotiated later, submitted to an adjudicator or abandoned. For example, in a dispute over a planned new public art space, agreement might be reached on the total height of the structure, deferring the additional dispute over the environmental impact of increased traffic to an upcoming court hearing. Or, in a divorce mediation, the parents might conclude an agreement on a child custody plan and a process for selling their home, but refer a continuing dispute about division of stocks, bonds and pension assets to an arbitrator with expertise in pension appraisals and financial management.

- **Interim or temporary agreements.** Nothing is resolved finally, but the parties reach an interim agreement on what the status quo will be pending some next step — for example, a court hearing, an extended negotiating deadline or a recommendation from an outside expert. Designed to bring a measure of temporary stability to an uncertain situation, this is not (unless the parties agree otherwise) an audition for a permanent arrangement or a bar to either party's arguing for a different permanent outcome at some point in the future.

  Common examples of this are a union's willingness to work under the current contract while the deadline for any new labor agreement is extended or the agreement of a parent to pay a temporary amount of disputed child support pending a final court hearing. In such situations, even temporary agreements may be hard to come by, if, despite any language negating this, parties fear that a temporary agreement will be seen as a de facto permanent concession.

A Final Note on Mechanics. In settings in which a court or agency may be called upon later to enforce its terms, the language of an agreement must usually be reviewed and approved by an official of the host institution before it is finalized. In some court settings, the presiding judge will question the parties in court to confirm that they understand the terms of the agreement, have agreed to it voluntarily and know that it can be enforced by a court if it is not complied with.[17] Regardless of the setting, the process is not complete until provisions are made for the parties to receive copies of the signed agreement.

§11.7 WHEN NO RESOLUTION IS REACHED

When mediation concludes without a resolution of any kind, the parties' focus will often be on failure — dashed expectations, anger, disappointment, a new round of

17. Especially in situations in which the interests of absent third persons may be affected, a reviewing court or agency may conduct an inquiry into the terms of the mediated agreement in order to determine whether to approve it as a binding order. *See, e.g.*, Texas Medical Board's rejection of a mediated agreement purporting to settle allegations of substandard medical practice against a physician, *http://www.theheart.org/article/1268881.do*.

blaming or a renewed commitment to punish each other in the future. To prevent such an ending from leaving the situation worse off because of the mediation effort, the conclusion of the mediation needs to be managed carefully. What are some ways to accomplish this?

Stressing Accomplishments, Continuing the Effort? As we said at the beginning of this chapter, even complete "mediation failures" often produce some progress in the conflict, if nothing more than producing a greater appreciation of its seriousness. The astute mediator can attempt to reframe this "failure" into at least a partial success by summarizing what has occurred, and, if appropriate, offering to help further if there is hope of progress through continued mediation. For example:

"*Obviously, we weren't able to end things, at least not today. But I want each of you to know that, from where I sit, you both gave it a good faith and full effort and really listened to each other, maybe for the first time. These things are not always easy. Reasonable people can disagree about past events or what should happen in the future, and sometimes it's too much to expect that a conflict that took so long to build up will end in just a couple of hours. For what it's worth, I've seen harder cases, and I think this dispute is resolvable by agreement. But it will take some further reconsidering of each other's perspective, and some further changes in your positions. It's up to you. If you want to give it another shot—and you can tell me confidentially—call me. If you both want to continue, I will be delighted to set up another session. So think about it.*"

Agreeing to a Different or Streamlined Resolution Process. Even if there is no further interest in mediation, the parties may be helped to decide on a future method of resolving the dispute that is preferable to the court or other alternative they are facing. If they need a faster binding decision than the public court system or agency will provide, do they want to submit the dispute to a private arbitrator? Might they agree to submit key witnesses to videotaped depositions to cut down on travel costs? If there is a need to see how a key fact or expert witness comes across in testimony, might an abbreviated mini-trial[18] be arranged as a prelude to a possible new round of negotiations? A mediator knowledgeable about the range of ADR processes and the resources available to arrange for them can provide valuable procedural assistance to the parties.

Agreeing to Stipulated Facts. Sometimes in court-based matters, even if no agreement has been reached on any of the negotiating *issues*, mediators can work with the parties to shorten the time for resolution by developing a list of stipulated or agreed-upon *facts* to take to the judge or hearing officer who will adjudicate the case. For example: "*Mr. Cross and Ms. Blackwell, I'm sorry that we were not able to reach an agreement on Mr. Cross's claim for unpaid rent and Ms. Blackwell's counterclaim for return of her security deposit. You will now have to go into the court, and the magistrate will hear your case. I know you're both concerned about how much time this has taken. It seems to me that you agree on a lot of the*

18. *See, e.g.*, JAMES F. HENRY, *Mini-Trials: An Alternative to Litigation*, 1 NEGOTIATION J. 13 (1985); GOLANN, *supra* note 2, at 348.

underlying facts but disagree about what should happen in this case. Would it be useful to list the facts that both agree on? . . . Good. Okay, now Ms. Blackwell, you concede that you didn't pay your final month's (August's) rent and that you caused the wall gashes that Mr. Cross paid $650 to repair. But you disagree that it should have cost that much. Is that correct? . . . And Mr. Cross, you acknowledge that you were holding two months of security deposit received from Ms. Blackwell and that you deducted the August rent and the $650 from that amount. You also acknowledge that Ms. Blackwell returned her keys and gave you a forwarding address on August 31 but that you only mailed the check for the balance on the 46th day after Ms. Blackwell returned her keys, despite the state law requiring landlords to return deposit balances within thirty days. Is that correct? . . . "

Informing About Next Steps. Where the mediation is ending without an agreement of any sort, the mediator's task is complete when she informs the parties what will happen next. If the dispute is already in litigation, the future course of events may be clear: A court date or a conference with the judge lies ahead, efforts at information discovery will commence or resume, an outside agency will begin an investigation of the dispute, one side will move to have the case dismissed and so forth. In other situations, the future of the dispute may be less clear, and nothing further will take place unless a party takes the next voluntary step — for example, by initiating a court claim, going to the newspapers or calling a work stoppage.

Where the next steps are known, the mediator ought to clarify them, especially when the parties are unrepresented and the mediator will play no further role. For example: "*As you know, you have a court date next Tuesday at 9:30. There is nothing to prevent you from continuing to talk between now and then and even settling this matter.*" When unrepresented parties will proceed to a court or agency, it may also be prudent to emphasize that the court may know nothing about their dispute or settlement efforts and that they will have to start over again in explaining their perspectives to the judge or hearing officer. For example: "*Remember, if you go to court, you will have to start at the beginning. I do not inform the judge about anything that was said here, because it was all confidential.*" And, although it may not be the most upbeat note on which to conclude, in cases where things end in tension, the mediator's final contribution to the process may simply be to ensure that the parties can leave the mediation site separately and safely.