mediation interventions in collective bargaining & employment rights disputes

a guide to mediation strategies

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Introduction: part one: collective bargaining

There are, fundamentally, two types of employment disputes. The first are collective ‘interest’ disputes which are usually over the setting of pay and conditions, and typically involve employee unions negotiating with employer representatives. The second are individual disputes. These may also be ‘interest disputes’ over the pay and conditions of individual employees, but they are more usually ‘rights disputes’ over employment rights and obligations, or the alleged breach of those rights, for example by an alleged unfair dismissal from employment. The first and major part of this guide is about mediation of collective bargaining disputes. The second, shorter part is about mediation of ‘rights disputes’ such as claims of unfair or unjustified dismissal from employment.

Mediation of collective bargaining ‘interest disputes’ can be a somewhat different experience than mediating the typical individual ‘rights dispute.’ In the mediation of many rights disputes, there are often legal principles that suggest right and wrong outcomes, and point the parties towards a resolution. This suggests a directive or evaluative style of mediation in which the mediator is able to point to the likely outcome if the dispute was to proceed to an adjudication and to use that as leverage to move the parties towards a settlement point. In collective bargaining disputes, on the other hand, there are no rules or regulations to assist the mediator in guiding parties towards a resolution on the issues. So the mediation task is more challenging in that respect.

Add to that the number and nature of the issues usually involved in collective bargaining, the often complex mix of people, interests and relationships on each side of the bargaining table, the pressure the parties might feel from the prospect of a strike or lockout, and sometimes the “fish bowl” atmosphere generated by a high public profile, and it is not hard to see why the mediation of collective bargaining disputes is frequently a very demanding assignment for the mediator.

This guide has been prepared for a variety of uses, but primarily to assist mediators to become more effective, particularly in the mediation of collective bargaining disputes. Of course, each mediator brings her or his personal style and techniques to the circumstances of any particular dispute. Not everything that a mediator practices is easily articulated for a document.
like this. Some of what works is instinctive or personality driven, and trying to copy it or “mass produce” it doesn’t make sense.

That said, though, there are things in the nature of basic systems and techniques that can be learned from the experience of others and put into practice. And they can be backed up by pretty standard language adapted to the individual’s personal style, both in terms of “set pieces” such as a mediator’s first joint meeting with the parties, and in terms of more apparently spontaneous pieces such as the pre-strike reality check.

So the point of this document is not to point out “the one best way” with the expectation that everyone will march to precisely the same beat. In many respects, mediation is an individual art. But there are basic principles and practices that have worked for experienced mediators over many years, and we commend those to you here. We start with collective bargaining.

**Understanding collective bargaining**

*Are there theories or models of collective bargaining or labour negotiations that can serve as tools for the mediator in framing a dispute, organizing the mediator’s approach to the dispute, and ensuring that the mediator does not overlook some important dynamic in what is going on?*

The first key to being an effective mediator in collective bargaining disputes is understanding the theory and process of collective bargaining and the reality of how people bargain or negotiate (two terms we use interchangeably here). The second key is to be conversant with the legal framework within which collective bargaining takes place in your particular jurisdiction.

**Theories of collective bargaining**

It is an important advantage for a mediator coming into a collective bargaining dispute, or indeed for the negotiators themselves, to be able to view what is going on at and around the negotiating table in a cohesive way. In other words, to be able to connect and make sense of what is being said and done by the bargaining parties, rather than seeing their words and deeds as essentially unconnected pieces of behaviour. There are a few theoretical contributions that help us to do that.
Our approach here is descriptive, not normative. The intent is to prepare mediators to deal with behaviours that they are likely to encounter in collective bargaining disputes. This is not the place to advocate one approach to bargaining over another. Most recent negotiation literature tends to promote “interest based” approaches to parties to collective bargaining relationships, with a view to avoiding or minimizing the occurrence of industrial disputes.

Interest based bargaining was first popularly advocated over 20 years ago by Roger Fisher and William Ury of the Harvard University Negotiation Program in their book Getting to Yes, although the concepts date from the work of scholars such as Mary Parker Follett in the early twentieth century. Fisher and Ury’s approach has been elaborated upon in a series of follow-up books by them and their associates, and has been much copied by other writers over the past two decades.

Interest based bargaining is usually contrasted by its advocates in the labour relations field with traditional “competitive bargaining” or “positional bargaining” in which parties stereotypically take positions on issues and then, through a series of compromises, hopefully move towards mutually agreeable settlement positions. In this often exaggerated critique, negotiators become wedded to positions, losing sight of the real issues, launching personal attacks at one another, protecting wounded egos, and attempting to bully one another into submission. The reality, of course, is often – although, admittedly, not always – a good deal more sophisticated than this caricature.

The basic principles of interest based bargaining enunciated by Fisher and Ury can be stated simply enough. The parties focus on their respective and mutual interests and how those interests might be accommodated, rather than staking out positions on issues and defending those positions. They work together to generate a variety of options that might meet each of their interests before deciding what to do. They use objective standards to propose and evaluate solutions, rather than advocating on the basis of emotion, threat, superior bargaining power, bluster, or tactical behaviour. They settle on meritorious outcomes rather than mere compromises that fully satisfy no one. And they separate the people from the problems that they are trying to grapple with, “playing the ball, not the person,” and valuing a cooperative and trusting relationship.
While it is difficult to argue with the principles, it is probably a mistake for a mediator entering a collective bargaining dispute to be too judgmental about either the ethics or effectiveness of different bargaining approaches. And it is definitely a mistake to expect to encounter only interest based bargaining approaches, particularly where the mediator is called into a bargaining impasse under a strike notice.

The Mary Parker Follett anecdote most often cited in support of interest-based approaches to bargaining is that about the two sisters arguing over the splitting of an orange. After considerable acrimony and the taking of extreme positions, they eventually agree to split the orange in half. In fact, one sister threw away her half of the skin and ate her half of the fruit, while the other threw away her half of the fruit and used her half of the peel to bake a cake. Obviously, had they started by exploring their separate interests rather than staking out extreme positions, they would have both fared better.

While interests won’t always be so ideally congruent, the key for the mediator is probably to ensure that the parties understand that they might only derive maximum benefit by being open to helping the other party meet its needs as well. It may well be easier and more effective for the mediator to reinforce a sense of enlightened self-interest, rather than pushing the parties towards a “trusting, cooperative” relationship that they don’t feel. And don’t make the mistake of assuming that parties who have staked out positions on issues in negotiations are necessarily incapable of working from the inside out even while their “outside in” positions sit on the table. That is one area where the mediator does his or her most important work.

Collective bargaining is, by definition, a ‘pluralist’ activity. It’s starting point is that employees and employers have common, but also different interests in the employment relationship, that there is an inherent inequality of bargaining power between them in accommodating their different interests, that collective bargaining is an appropriate way to counter that imbalance of bargaining power, and that unions are the appropriate agents for workers in the bargaining process. It should, therefore, be unsurprising that unions and employers are often inclined to take traditional approaches in collective bargaining.

Generally speaking, mediators intervening in collective bargaining disputes, particularly under a strike notice or other indicator of an impasse, are likely
to find some elements of interest based bargaining intermingled with more traditional approaches. They will usually find that the parties have approached the negotiations with goodwill towards one another. They are likely to find the people inclined to deal with one another decently and reasonably. They are often likely to find that parties observe some of the principles of interest based bargaining. Most experienced negotiators, for example, and many less experienced ones, are quite capable of “separating the people from the problem”. Most are willing to take advantage of a mutually beneficial option if they can see one, and are prepared to look for it. Most can appreciate the difference between a position taken tactically and a bottom line interest. Most are prepared to listen to reason, even if they may be unable to accept where the reasoning takes them.

But a mediator is likely to find also that bargaining parties exhibit traditional “competitive” behaviours, and to be successful the mediator has to be able to deal with that. Parties do take positions. Sometimes they even get hung up on them. People do get upset at other people. Negotiators behave tactically, regardless of whether policy makers want them to or not. A mediator needs a frame of reference for managing a collective bargaining dispute that is capable of embracing the full range of bargaining behaviours and approaches.

**Collective bargaining as theatre**

One theoretical analysis that the mediator might find contributes to an understanding of tactical behaviour in collective bargaining is Raymond Friedman’s “dramaturgical” analysis in his 1994 book, *Front Stage, Backstage*. Dramaturgical analysis has been widely used in the social sciences. It involves analyzing human behaviours as theatre or drama. The underlying notion is that when people interact with others, they consciously or otherwise take on roles. Parents do it. Teachers do it. Police officers do it. Airline pilots do it. Mediators do it. Negotiators do it too.

“Taking on roles” doesn’t mean following a script. Rather, it means that people in various positions come to instinctively understand what behaviours – things like appearance, posture, speech patterns, and facial expressions, as well as more overt actions and words – are associated with the role in which they are cast. In other words, negotiators come to know how negotiators are expected to behave.
Mention of behavioural expectations suggests that there is an audience watching. And indeed there is. So people in roles act in ways that they believe people in those roles are expected to behave by those that are watching. Audience expectations and observations and evaluations and responses to the actor shape the actor’s behaviour. The actor tailors his or her behaviour, not merely to conform to expectations, but also to convince the audience that he or she is good in the role.

The key elements in the dramaturgical model are the actors who play the roles, the audiences who watch and react, the performances – the actions that each actor carries out to conform to role expectations and to influence the audience – and the stages. There are two stages: the front stage where actors are visible to the audience and have to stay in role, and backstage where actors can relax out of their roles and prepare for their front stage performance. Actors often manage conflicting role expectations by moving between backstage and the front stage.

How does all of this help a mediator’s understanding of collective bargaining? Perhaps most obviously, a mediator needs to appreciate that there are audiences – negotiators, their bargaining teams, perhaps their constituents – observing, evaluating and responding to her or his performance on the basis of expectations that parties have for mediators. Behaviours seriously out of line with what parties expect of mediators will have consequences. But the mediator is capable of shaping expectations to some extent, and of influencing the perception of how well he or she is doing, of his or her competence. The perception of competence, in turn, affects the mediator’s ability to influence the parties’ thinking on the issues.

More to the point for now, however, the value in seeing collective bargaining as theatre is in recognizing that negotiators are also playing to their audiences – again, their bargaining team members, their broader constituents, the negotiator and team members across the table, sometimes the media and broader public, and perhaps even the mediator. A mediator needs to keep that perspective in mind in interpreting the behaviours of bargaining parties, to avoid overreacting himself or herself and to ensure that the other party doesn’t overreact dysfunctionally either. A point forcefully and emotionally made across the table may signal an inflexible position on an issue, and suggest little chance of a resolution. But it might also simply reflect the sort of strong, “show ‘em we mean business” advocacy performance expected of the negotiator by his or her team members. In
which case, far from signaling inflexibility, it might even be a final precursor to the party backing away from the issue.

Lead advocates can often be a mediator’s best allies in bringing about a settlement, so protecting the credibility of the advocate is often important. The mediator needs to be sensitive to whether, when and how the mediator can support an advocate in playing the chief negotiator role and especially in meeting constituent expectations. Unless the negotiator is in fact the problem, there will rarely be any benefit to the mediator or to the prospects for settlement in trying to prevent negotiators from meeting the expectations of their role.

Finally in terms of the dramaturgical model of collective bargaining, the mediator needs to work towards a relationship with the bargaining parties, and particularly with the chief negotiators, that allows the mediator to interact “backstage” with those people who are important to achieving a settlement. The bluff and bluster on the front stage will ordinarily do no harm if kept in perspective, and if the chief negotiators – and when appropriate the full bargaining teams – are prepared to level with the mediator privately or in caucus. That is the backstage. You want to be able to confer with the negotiators there, while respecting their need to perform on the front stage.

All of these points are revisited later, in the discussion of mediation strategy. For now, we commend to you the dramaturgical model as one tool for interpreting and understanding behaviours that you observe as a mediator intervening in a collective bargaining dispute.

Negotiation is the language of labour relations and, in the hands of most humans, negotiation seems to be an irresistibly tactical activity. Without the right interpretive tools, you run the danger that things might not always be what they seem to be.

**Collective bargaining as a multi-faceted process**

Still the most useful theoretical contribution assisting both negotiators and mediators to “frame” and understand what is going on at and around the collective bargaining table is that put forward by Richard Walton and Robert McKersie in their 1965 book *A behavioral theory of labor negotiations.*
The essence of Walton and McKersie’s thesis is that, while collective bargaining is a single cohesive process, it is useful for analytical purposes to view it as the sum of four sub-processes, all potentially occurring simultaneously. This approach is also useful strategically, because each of the four sub-processes has its own strategic and tactical demands. In other words, to be successful, a negotiator (and, by extension, a mediator) has to pay attention to what is happening, and what he or she needs to have happen, in each of the sub-processes. Complicating matters is the fact that what happens in one sub-process is likely to have consequences, whether intended or unintended, in one or more of the other sub-processes.

The first sub-process Walton and McKersie called “integrative bargaining”. What they were referring to was that negotiators were observed to sometimes take a cooperative, problem solving approach to issues, particularly on matters where the parties recognized that there was no inherent conflict of interest between them. So long before Fisher and Ury popularized the term, traditional labour negotiators were seen to be selectively engaging in interest-based bargaining – where there was apparent potential for mutual gain or where one party could help the other with little cost to the first.

The second sub-process Walton and McKersie called “distributive bargaining.” It is what most of us would recognize as bargaining in the conventional pluralist sense. Collective bargaining parties see some issues as involving a direct conflict of interest between them. Gains by one party are seen as coming at the expense of the other party suffering a corresponding loss. On those issues, negotiators adopt “distributive” tactics, which might loosely correspond to traditional, competitive “positional bargaining” tactics. Mediators are likely to find this distributive sub-process pretty active when intervening in the usual situation where a strike notice has been issued.

Walton and McKersie termed the third sub-process they observed “attitudinal structuring.” What they meant, basically, was that relationships matter in collective bargaining – another tenet of interest-based bargaining long recognized by labour negotiators. The historical relationship between a union and an employer – particularly where there is a pronounced tone to it – will influence the process, and perhaps the outcome, next time the parties bargain. Negotiators and mediators need to understand that, and give it the attention it deserves.
Beyond the organizations, the relationships between the actual people involved in the bargaining are important. Some negotiators will have a history together, good or bad, that will influence the process this time around. Others will be establishing new relationships, with all of the dimensions inherent to new relationships – likes and dislikes, compatible and incompatible personalities, engaging and annoying habits, and so forth. People bring to the bargaining table their senses of humour, their intelligence and comprehension, their knowledge of the issues and the process, their egos, their tempers, and their quirks. The relationships that they form around the bargaining table can sometimes have a profound effect on bargaining outcomes.

Walton and McKersie purposely chose the term attitudinal “structuring” to reflect the fact that negotiators (and mediators) need to go beyond just recognizing that relationships can affect the collective bargaining process. They need also to realize that, where the nature of a relationship is not conducive to good bargaining outcomes, it should, and often can, be changed. So there are tactical considerations involved in reshaping relationships between parties and between people at the bargaining table from relationships that are blocking agreements (or “good” agreements) to those that facilitate them. Smart negotiators recognize the importance of this dimension, and work on it. Mediators may need to help, or if the parties are not attending to it themselves, the mediator may need to initiate the work on changing relationships.

The final sub-process is what Walton and McKersie called “intra-organizational bargaining,” meaning, in plain speak, bargaining that goes on internally to one party. There are two primary aspects to this.

First, a negotiating team has to negotiate not only with the other party, but with its own constituents as well. This is particularly obvious on the union side of the bargaining table, where a union leadership will often look to gain momentum going into negotiations by getting the membership excited about the prospects that lie ahead. The bargaining team then has to ensure, during bargaining, that the expectations of the membership are brought back in line with the reality that is evolving at the bargaining table, assuming that the negotiations are heading towards a creditable outcome, but one short of the initial proposals that got the membership excited in the first place.
Second, many labour negotiations involve some “factional conflict” within one or both parties. Different groups within the management structure or within the union membership have different interests or priorities for negotiation outcomes. Where that is the case, some internal negotiations and balancing of interests is going to have to occur before the party is in a position to conclude an agreement with the other side. This factional conflict often complicates the relationship between a negotiating team and its constituents. In some instances, and ideally, this factional balancing is actually played out within the party’s negotiating team, during caucuses and between bargaining sessions.

In fact, both types of “intra-organizational bargaining” can be reflected in the relationship between a chief negotiator and the members of his or her bargaining team, who represent the various parts of the constituency. A chief negotiator is often in the position of arguing for what is “realistic” while team members are pushing the hopes and ambitions of the constituents they represent. That is obviously a more complicated process where there are clear factional divisions within the constituency.

Perhaps the core point for us in Walton and McKersie’s model is that a negotiator, to be effective, needs to be aware of what is going on in all of these arenas, and to be tactically on top of what is occurring in each of them. The same applies to the mediator.

You can use Walton and McKersie’s four process model as another tool to organize your approach to a collective bargaining intervention. Monitor what is going on, and be aware of the potential, in all four sub-processes. And be aware of the implications of activity in one process for developments in another. You may be aware, for example, that the employer is prepared to make an improved pay offer. Is there a way that that can be managed that will change perceptions or relationships for the better, or that will enhance the prospects for cooperating on other issues? Should the intended proposal be restructured to more effectively accommodate the various factions within the union membership?

**Distributive bargaining strategies**
Walton and McKersie’s work can also provide some useful insights into the sorts of distributive or competitive bargaining strategies that a mediator is likely to encounter, particularly when intervening in impasse situations.
Walton and McKersie coined the terms “target points” and “resistance points” as key concepts in describing negotiators’ strategies in collective bargaining. By “resistance points” they were referring to what most of us would call “the bottom line.” What they were saying was that most negotiators going into collective bargaining have an understanding of the “worst” deal they can afford to accept on key issues or packages of issues, or as an overall settlement. In other words, they have an idea of the minimum levels of achievement that they have to reach before they can enter into an agreement. Union leaders, for example, usually have a notion, whether they be right or wrong, of what the membership will “buy,” and what they won’t. Indeed, a negotiator’s career depends on getting those judgments right.

But Walton and McKersie reported that successful negotiators had also calculated “target points” on key issues or packages, being their judgment on the best outcome they could realistically hope to achieve in the particular set of negotiations. These were the points that they set their sights on and directed their strategies towards.

The significance of these target and resistance points is that most competitive or distributive bargaining strategies revolve around them as the parties to collective bargaining each seek to maximize their gains, especially on high priority issues, and to minimize concessions that their constituents would see as losses, and to each do those two things to a sufficient degree that they are able to settle an agreement.

Going into collective bargaining, each party’s thinking on target and resistance points is known to it, but not to the other party.

To the extent that the parties adopt distributive or competitive approaches – as they will usually be doing when a mediator enters an impasse situation – the first thing that they will be attempting to do is to identify the other negotiating team’s resistance points. So the union bargaining team will be attempting to uncover the employer team’s internalized thinking about how far the employer is willing to go on the issues brought to the table by the union – a wage proposal, for example – and where the employer feels it needs to get to on the initiatives that it has brought to the table – perhaps, as an example, reduced staffing levels to cut costs. The employer’s bargaining team will, likewise, be trying to find out the union’s bottom lines.
Mediation interventions
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Needless to say, the positions that parties hold at the table do not necessarily reflect their bottom lines on the issues (although you should be alert to the possibility that sometimes they do). While “positional bargaining” is often portrayed these days as clumsy and outdated, experienced negotiators – far from becoming locked into exaggerated positions – know how to use positions on issues as tactical devices to implement their negotiation strategies.

It won’t usually do much good for the mediator to chastise parties about “positional bargaining.” What the mediator needs to do is to develop the same understanding that experienced negotiator’s have of the difference between stated positions and a party’s bottom line needs or resistance points. In other words, the mediator needs to follow the same first strategy as the bargaining teams – identify the parties’ resistance points on key issues or packages. The difference is that the mediator is trying to uncover both parties’ bottom lines. Once having done that, the mediator is able to make an initial assessment of whether the bottom line positions of the parties are compatible.

The negotiators are trying to do the same thing. At some stage during the collective bargaining process, a negotiator will make the judgment that he or she, or the team, has a pretty good idea of the other party’s thinking on its bottom lines or resistance points on the key issues (or preferably on all issues). At that stage, the team needs to evaluate whether the other side’s bottom lines (assuming their estimates are correct) are compatible with their own needs. In other words, can an agreement be reached without the need to change the other party’s bottom line thinking?

Let’s take an example. A union bargaining team is targeting a five percent salary increase (target point) but, in any event, knows that it won’t go back to the membership with anything less than four percent (resistance point). The union bargaining team sets out in negotiations to get a clear picture of how far the employer’s bargaining team thinks it can go on a salary increase. At some stage, although the employer may not yet have made any salary offer, the union negotiating team becomes satisfied, on the basis of what’s been said, that the employer is prepared to increase salaries, but is convinced that the employer is not prepared to go beyond three percent.

In this example, the union bargaining team’s first strategy is accomplished. They have identified the employer’s resistance point on the salary issue.
Their judgment on that may be right or wrong, but it is their judgment and so it is what they have to go on. In this example, the union negotiating team would have to conclude that the employer’s bottom line position is not compatible with even the union’s resistance point on salary, let alone the increase the union was targeting.

So the union has to launch a second strategy; it has to try to change the employer’s resistance point on the salary issue. What this means is that the union now has to change the management bargaining team’s real thinking about what it can or must do on salaries to get an agreement. That is something quite different than changing the employer’s currently stated position on salaries, which in our example would mean simply getting the employer to make any sort of initial proposal for a salary increase.

If, in this example, the union bargaining team had become convinced, instead, that the employer was prepared to eventually agree to a four percent increase, it would continue to push towards the targeted five percent, but with the knowledge that a saleable agreement on salaries was achievable without a change in the employer’s thinking. Of course, the union still has to figure out how to get that four percent put on the table, but that is a more straightforward matter of changing the employer’s position, a much less formidable task than changing the employer’s mind.

A third distributive strategy that collective bargaining parties pursue, simultaneously with the first (and, if necessary, the second), is to disguise their own resistance points, or sometimes to convey to the other party an inflated impression of what those resistance points are.

We should acknowledge that, at least in its most blatant form, this practice might be frowned upon. But realistically, it has been going on as long as collective bargaining has, and to simply brand it as “dishonest” oversimplifies bargaining as a human activity, and denies it’s “irresistibly tactical” nature in the hands of human beings.

What this strategy means in the example described above is that, other things being equal, the union negotiating team would prefer that the employer’s team became convinced that the union’s targeted five percent was actually the figure that needed to be reached for an agreement. In other words, that the five percent figure was actually the union’s bottom line or resistance
point. However, it would not ordinarily make sense for the union to say so in a way that was irrevocable, because it isn’t true.

For a party to irrevocably commit itself to a false bottom line opens up the possibility that the negotiations could break down even though the other party was prepared to meet the first party’s real bottom line. Of course, negotiators do sometimes make these kinds of mistakes, and again it is important that the mediator be able to distinguish real bottom lines from what are merely positions taken. And that you recognize when negotiators have painted themselves into false corners. It is more often the case, however, that – to continue our example – the union would be trying to persuade the employer that five percent or better should be a part of any settlement or was needed on the basis of various criteria, but would stop short of irrevocably drawing false lines in the sand.

A further complication arises in relation to a fourth possible strategy. It may be that a bargaining team believes that it has correctly identified the other party’s resistance points, that it has assessed those as being in some respects incompatible with its own, and that it has tried but failed to change the other party’s bottom line thinking. It may be that it is then appropriate that a party change its own resistance point on one or more issues. Imagine, for example, that the union bargaining team has come into negotiations with a bottom line of four percent on salaries, identified that the employer is only prepared to go to three percent, tried but failed to change the employer’s thinking on the issue, but assessed that the overall settlement package on offer (including three percent) includes sufficient gains on other key issues to represent a good deal for the union membership.

Time for the fourth strategy – changing a party’s own resistance point. This will often involve negotiations within a bargaining team. It will often involve negotiations between a bargaining team and its constituents (or parts of the constituency). And it will sometimes involve “intra-organisational bargaining” at both of those levels.

It might also involve other complications. A party’s thinking about their target and resistance points can change during the course of negotiations as new information comes to hand. But changing a resistance point – a party’s thinking about what is it’s bottom line – might involve the negotiator in modifying a position that has been previously stated, seemingly irrevocably, as a bottom line position. That can have implications for the negotiator, not
only for his or her relationship with the constituents, but also for his or her relationship with the counterpart across the table. It is the sort of maneuver that a mediator might expect to be called upon to assist with.

**Bargaining tactics and mechanics**

It is as dangerous to over-complicate the collective bargaining process as it is to over-simplify it. Traditional competitive or distributive bargaining consists essentially of the union and employer parties pursuing the four strategies discussed above.

You can expect that they each enter the negotiations with targeted settlement points in mind, but that they also have an idea of the minimum that they could settle for on key issues. They each work to identify what the other is thinking, and particularly the limits of how far the other party is prepared to go on key issues. When they think that they know, then they assess whether it is sufficient to forge an agreement. If not, they work to persuade the other party to change its thinking. And perhaps, depending on how the overall package is shaping up, they might need to revise their own bottom line thinking on one or more issues.

There are complexities that add to the mix. Sometimes a party won’t entertain a range of positions on an issue. It’s starting position remains it’s position; any available compromise is seen as devaluing the issue to the point that it is not worth having. They either get it or they don’t, but they won’t split the difference. Other complexities can arise because what happens on one issue might change what is acceptable on another issue, so parties sometimes think in terms of packages of linked issues, rather than exclusively in terms of single issues.

Factors that derive from Walton and McKersie’s other sub-processes might come into play and complicate things. Sometimes negotiators make wrong judgments, so that a logical analysis of what they are doing isn’t necessarily going to produce the right answers. And sometimes negotiators don’t know what they are doing at all. But usually, whether they recognize it or not, they are trying to follow the strategies described above.

For you as a mediator entering a collective bargaining situation, the value of Walton and McKersie’s model, interlinked with Friedman’s dramaturgical interpretation of collective bargaining, is in having a framework that enables you to make sense of the behaviours that you witness. This is not the place
to go into a detailed description of the countless tactical maneuvers that you might encounter as the parties pursue their bargaining strategies.

Bargaining in its distributive form can usefully be seen as a process in which the parties constantly push and probe one another for feedback as to where the other is prepared to go on issues, and why. What is the other party’s interest in the issue? Where do they need to get to to accommodate their interest? How far are they prepared to go to accommodate my interest? So a constant pushing and probing that serves the four strategies described above.

What forms does that “pushing and probing” take? Too many to list; everything from reasoned, in-depth discussion of issues, the taking of positions and speaking in support of those positions, modifying positions and the timing and presentation with which those modifications occur, to manipulative relationship, logistical, or emotion tactics, to threatened or actual strikes or other forms of work interruption or protest, and a thousand other possibilities in between. Some of it is natural, and some of it is more contrived.

For a mediator, the key is not being able to catalog every conceivable tactical maneuver. Rather it is in being able to make sense of the behaviours that you encounter, and Walton and McKersie’s four process framework and their strategic analysis of distributive bargaining strategies is commended to you for that purpose.

That said, there are some basic mechanics of bargaining that parties conventionally follow on the path to an agreement. Periodically, as the flow of feedback from “pushing and probing” is exhausted, one party or the other needs to take some initiative if the negotiations are to progress.

It is something of a convention in collective bargaining that the parties alternate those moves, though that is not always or automatically so. Things tend to grind to a halt if neither party makes a move when the process needs some initiative to move it along. Again, the mediator needs to be sensitive to the state of negotiations in these terms.

While the variations are endless, the range of usual initiatives available to the parties is fairly limited: offer a proposal or counterproposal on one or more or all of the issues, or decline to offer a proposal or counterproposal –
perhaps insisting that particular matters be dealt with first, or that the number of issues be prioritized and reduced, or that particular issues be removed from the table as a precondition for progress on other issues, or that more explanation or justification be provided. In declining to offer anything, the ball is being bounced back to the other party, who may or may not accept that it is again their move.

There are more creative initiatives, such as stepping sideways and offering a proposal that involves a conceptually different resolution of an issue than previously discussed. But most negotiations move towards a settlement through a process of pushing and probing, punctuated by the offering of proposals and counterproposals, variously involving large, small or no concessions to the other party. In this way, issues are tentatively settled, withdrawn, conceded, put on hold, moved closer to settlement, or left uncompromised and unsettled as the negotiations proceed. When moves are exhausted, or apparently exhausted, and some or all matters remain unsettled, then the parties have an impasse. That’s when the mediator is most likely to be called.

We turn now to the major part of this document in which we set out some ideas to guide the mediator’s intervention in collective bargaining disputes.

The timing of the mediation intervention

At what point in the collective bargaining process does a mediator get involved? Are there circumstances under which it might be best for the mediator to withhold mediation or to temporarily withdraw from the bargaining?

A mediator needs to be sensitive to the timing of the intervention because the mediation role will be different coming in at different stages of the collective bargaining process. The mediator needs to take control of the timing or pace of mediation depending on what he or she finds to be the status of bargaining.

The top of the cliff or the bottom of the cliff

One senior mediator described the ideal timing of mediation interventions in collective bargaining this way: the interventions should occur either at the top of the cliff – to avoid the negotiations toppling over – or at the bottom of
the cliff to help clean up the mess. What you don’t want to do too often, as a mediator, is to come into the negotiations half way down the cliff. That is where the punch-ups between the parties tend to happen.

At the moment in most jurisdictions, only a minority of mediation interventions occur “at the top of the cliff,” that is as the bargaining is just getting under way. But even at this early stage, you can expect to encounter a variety of different circumstances, and you need to be alert to which one you are walking into.

You may have a union and an employer who are bargaining for the first time, and looking for help in setting up their relationship. You may find parties who have worked together before, but who are nonetheless looking for expert advice or guidance in establishing their bargaining arrangements or improving the mechanics of their bargaining process.

On the other hand, sometimes parties will call a mediator in early because they have had a bad relationship. On the positive side, they may be looking for help to improve the relationship before getting down to bargaining over issues. But on the other hand, they may be looking to use the mediator as one more weapon to thrash one another with, or to carry messages between them so that they don’t need to work on improving their relationship. It is important to figure out quickly what it is that the parties want you there for.

**A focused intervention is best early on**

As a mediator coming in early in the bargaining, you should ordinarily be looking to complete the job of work and to pull yourself out of the bargaining, leaving the parties to get on with it. The job may be to help the parties patch up their relationship, or it may be to help them develop bargaining arrangements and protocols, or one of a number of other tasks. But whatever it is, it should be done with a view to promoting the self-sufficiency of the parties, rather than having them become dependent on the continuing involvement of a mediator.

The mediation role is to assist the parties up front in getting their relationship and processes right, and later in the bargaining to help resolve impasses if the negotiations are running into trouble.
Know when to back off
Likewise, you should be alert to the possibility that you are being called into the negotiations “half way down the cliff.” Sometimes, the reality is that a strike simply has to happen before any progress is going to be made towards a settlement. In one sense you will be under a lot of pressure in these circumstances, because a strike is guaranteed to occur if you don’t mediate.

On the other hand, you will occasionally walk into a case where a strike is going to happen regardless of what you do. In those cases it is usually best to back off, but letting the parties know that you will be available when they are ready to start moving towards a settlement: “When it is all over, you will need a way out of this. Ring me then.” But, of course, particularly if the dispute is a long one, you would continue to monitor the situation, and check in with the parties once in a while to get a feel for who is hurting, who is not, and when it might be productive to make a move to settle the dispute.

But don’t back off too easily
Having said all that, it is important that you not rush to a conclusion that a strike is inevitable, just on the bases of a strike threat and some tough talk when you first contact the parties. Sometimes the parties under threat of a strike will be looking for a way to avoid it, or will be receptive to a call from the mediator to make a last ditch effort to resolve the outstanding matters. Calling off a strike at the request of the mediator is often easier for a union than doing so on its own initiative.

Sometimes parties in a dogfight will scare themselves as much as they scare anyone else. So as a mediator entering a dispute where a strike has been signaled, you need to be alert to the possibility that the parties might be looking for a way out. But on other occasions, it will be clear to you that the parties, at least for now, are more interested in beating up on one another than settling the dispute. And that means that they are not ready for mediation. Under those circumstances, back off. To push too hard for an agreement at that stage may be not merely ineffective. Union members in particular might resent what they see as the mediator’s attempt to deprive them of their legal right to strike.

There is an old saying in labour relations circles that “no agreement should be reached before its time.” So, when entering a dispute, it is important to be sensitive to whether or not the parties are ready for mediation, and ready to work towards an agreement.
The structure of what follows
While mediation services such as the Federal Mediation & Conciliation Service in the United States will be increasingly moving in the direction of assisting bargaining parties with more proactive preventative mediation work, for the immediate future we can expect that most mediation interventions in collective bargaining will continue to be “at the bottom of the cliff.”

The parties have negotiated to an impasse; neither is prepared to move any further. A strike or lockout will often be pending, or may already be underway. Your role as a mediator is to guide the parties through the impasse to an agreement. Most of this document addresses ideas on how a mediator might do that.

We will discuss how to undertake an initial audit of the situation, and get a handle on the state of negotiations and what might be contributing to the difficulties the parties are having. We will talk about the sort of relationships that the mediator wants to establish with the parties’ advocates and members of the bargaining teams, and how you might handle internal problems that arise within a bargaining team.

We will examine whether there is ever a role for the mediator when problems arise between a bargaining team and its constituents, for example between the union bargaining team and the union membership. We will discuss how to handle hostile or disrespectful behaviours that are sometimes evident at the bargaining table.

We will describe at length techniques for testing the parties’ positions, exploring what flexibility exists, spotting opportunities for agreement, and assisting the parties in moving towards a settlement. And finally, we will talk about the impact of strike pressures on the mediator’s role, and how a high political or media profile can be dealt with.

First, however, before turning to mediation interventions at “the bottom of the cliff,” in the next section we deal in more detail with the role of the mediator intervening at the very commencement of negotiations, at “the top of the cliff.”
Mediation at “the top of the cliff”

*What is the mediator’s role when called in to assist the parties at the outset of their negotiations?*

There can be a variety of reasons why parties might ask for mediation assistance early in their negotiations. You may be asked to assist with improving a difficult relationship, or to help a number of unions or employers organize themselves for bargaining jointly. Or there may be other things on the agenda. Your first role is to figure out what the parties want from you, and that will largely determine the sort of contribution you can make.

One of the most fruitful interventions can occur when a mediator is asked by the parties – and particularly new bargaining parties – to assist them in getting bargaining under way. This provides the mediator with an opportunity to get to know the parties and their issues in a non-confrontational atmosphere. And it also provides the mediator with the chance to make sure that the parties put bargaining rules and procedures in place that give them the best chance of getting an agreement with minimal disruption.

Where the bargaining parties are new to the process (or where they have had trouble in the past and are looking to do things differently), it will often be helpful for the mediator to make a short presentation introducing the parties to good bargaining practices and stressing the importance of the parties developing a bargaining process agreement.

As a mediator of collective bargaining, you should have a 10 or 15 minute presentation along these lines in the kit bag of “tools” that you have at your disposal. You will find it useful, not only for new and inexperienced bargainers, but also for old-line negotiators who may have developed bad habits and become fixed in their ways.

Experienced mediators have many short “presentations” of this type available to them to meet a range of different situations that arise in mediation. They may be one or two minute presentations or 10 minute presentations, and they develop as re-useable tools by mediators reflecting on something that has worked for them in a dispute, and re-using it when similar situations arise again in the future.
Getting to know the legislation governing collective bargaining in your jurisdiction requires the investment of some study time, but having a working knowledge of the regulations will give you credibility that comes from expertise in the eyes of the parties. As a grounding for mediating collective bargaining disputes, it is probably second only in importance to having an understanding and appreciation of bargaining itself – the processes, conventions and ethics, and strategies and tactics.

Knowing the law governing collective bargaining and understanding the bargaining process itself are the two foundations which, along with basic mediation skills, will equip you to effectively mediate collective bargaining disputes.

**Assisting the parties with a bargaining process agreement**

One of the most useful devices that collective bargaining parties ought to have, but oftentimes don’t, is a preliminary agreement on how they are going to deal with one another. This is the bargaining process agreement referred to above, and assisting with its negotiation is a valuable opportunity for the mediator to help shape the future bargaining between, particularly, new bargaining parties.

Negotiating for a bargaining process agreement is also a useful exercise from a practical standpoint. First, a comprehensive process agreement serves to lay out the logistical and behavioural ground rules under which the negotiations are going to occur. Far better to sort out things like meeting times and places, the form that bargaining proposals will take, record keeping, and what to do in an impasse, in the generally non-confrontational atmosphere of the ground rules meetings than to try to agree on them later in the emotional heat of the substantive negotiations.

Second, meetings over a process agreement may be the first time that new bargaining parties have actually engaged one another in a negotiation forum. As such, these meetings may well be important to the parties in the process of understanding and testing one another, and can be quite influential in shaping their future bargaining relationship. Reaching agreement on bargaining arrangements can be a valuable taste of success that provides an important model and encouragement for the parties as they enter their negotiations over more substantive issues. And these preliminary negotiations are also a useful demonstration to the parties of what role a
mediator can play, and the limits of that role beyond which they have to take responsibility themselves.

A mediator can assist the parties with their ground rules in several ways. The first is to guide the parties in terms of the sorts of issues that they might want to address in their bargaining arrangements document. The following might be a useful checklist:

- a. Advice as to who will be the representative(s) or advocate(s) for the parties in the bargaining process
- b. Advice as to whom the representative(s) or advocate(s) represent
- c. The size, composition and representative nature of the negotiating teams and how any changes will be dealt with
- d. Advice as to the identity of the individuals who comprise the negotiating teams
- e. The presence, or otherwise, of observers
- f. Identification of who has authority to enter into an agreement/limits of authority
- g. The proposed frequency of meetings
- h. The proposed venue for meetings and who will be liable for any costs incurred
- i. The proposed timeframe for the bargaining process
- j. Advice on preferred positions in respect of the type and structure of agreements
- k. The manner in which proposals will be made and responded to
- l. The manner in which any areas of agreement are to be recorded
- m. Advice on ratification and signing-off procedures
- n. Communication to interested parties during bargaining
- o. The provision of information and costs associated with such provision
- p. Any process to apply if there is disagreement or areas of disagreement
- q. Appointment of a mediator should the need arise
- r. In the case of multi-party bargaining, how the employer parties will behave towards one another and how the union parties will behave towards one another
- s. When the parties consider bargaining is deemed to be completed.

You might suggest to the parties that they consider which of these points are applicable to their situation, that they draft proposed language on the relevant points, and that they meet to negotiate an agreed process arrangement or code. And there may be issues beyond this list that the parties will need to consider.

While ideally the parties will draft their own documents, part of what the mediator brings to collective bargaining is expertise on contract language. Indeed, when you come across good language, you should store it away in your bag of tools, available to help other parties in the future. There will be
occasions where you will want to put some sample language before the parties to assist them in their preliminary negotiations of a process agreement.

Even in these initial meetings over bargaining arrangements, you should generally avoid being drawn into chairing the meetings. These meetings are an important opportunity for the parties to develop and test out their own bargaining styles and skills. You don’t want the constant involvement of a mediator to become something the parties rely on for making progress.

On the other hand, this might be one phase of negotiations where it will sometimes be useful for the mediator to sit with the parties throughout the process. Your role may be to provide technical advice when asked. But it might also be more proactive, almost coaching new negotiators in aspects of bargaining.

You might, for instance, intervene for the purposes of ensuring that the parties understand what they are agreeing to, that they appreciate the implications of what they are agreeing to, and how the processes they are agreeing to will be implemented: “Let me ask what you understand that word ‘impasse’ to mean? How will you know when you have reached that point? And what do you understand will happen at that point under the language that you have just proposed?”

**Avoid mediation dependency**

As noted above, while you might sometimes stay with the parties for the entire process of developing their bargaining arrangements document, you don’t want them becoming dependent on having a mediator constantly involved in their substantive negotiations. Nor should the parties develop expectations that they should or would call for a mediator each time they have a difference of view in negotiations.

You can work in a number of ways at this early stage of negotiations to help the parties become self-sufficient, and at the same time create a proper understanding of the role of the mediator.

First, guide the parties in developing a comprehensive and workable bargaining process agreement. Second, if necessary because of the inexperience of the parties, educate the parties on the basic mechanics and ethics of bargaining. A lack of understanding of the basics can cause
hostilities and breakdowns in the negotiations that have nothing to do with the issues. If it looks to be necessary, encourage the parties to include basic mechanics – in what format proposals will be provided, how many copies, etc – and required standards of behaviour in the bargaining arrangements document.

And third, encourage the parties to specify in the document how, when and under what circumstances – preferably prior to the point of issuing a strike notice – they would recognise that their negotiations had reached the point that mediation assistance would be helpful. And have them commit in the document to involving mediation at that point.

Finally in terms of early mediation interventions, inexperienced negotiators in particular may tend to see the mediator who plays a pivotal role in getting their negotiations up and running as something of a security blanket. When things get rough, they instinctively reach out for that person. There are two dangers in that. In addition to avoiding a dependency on constant mediation, it is usually also advisable to avoid parties becoming too reliant on a particular mediator.

Realistically, it is probably inevitable that experienced mediators of collective bargaining develop relationships with certain bargaining parties over time to the point that those parties will routinely request those particular mediators, usually by simply contacting the mediator directly when they need help. From one perspective, that is a natural thing to do and no doubt often contributes to the mediator’s effectiveness with those parties.

On the other hand, it clearly has the potential to become dysfunctional if bargaining parties get themselves to the point where they feel unable to engage mediation at all without having a particular mediator involved, or if their attachment to a particular mediator makes it difficult or impossible for another mediator to gain any traction with them. Rather than hard and fast rules, this is a matter of balance that we need as mediators to keep in mind.
Mediating at impasse: doing the initial audit

When intervening during the negotiations or at the point of impasse, how does the mediator do an initial audit of the situation, and get a handle on the state of negotiations and what might be contributing to the difficulties being experienced by the parties?

As noted earlier, in most jurisdictions at the present time the initiative for mediation intervention in collective bargaining usually comes once negotiations are well under way or even at impasse. In coming into the negotiations, an important part of the role of a mediator is to quickly get a handle on where the negotiations are at, and to work out his or her role on the bases of the state of play and the needs of the parties. The situation might range anywhere from a complete breakdown in the relationship between the parties to two parties working harmoniously, but needing a hand to put the finishing touches to a collective agreement. What the mediator needs to do in the early stages of an intervention can best be thought of as conducting a full audit of the negotiations – the people, the process, and the issues.

When you enter a dispute, you can often start the audit by consulting other mediators who may have dealt with these or similar parties in the past. Find out what you can about the issues in the industry, about the history and bargaining styles of the particular union and employer involved, about the relationship between the two, and about the key people who you are going to be dealing with.

Next you make contact with the parties. Particularly where negotiations are under a strike threat, the parties are usually going to be receptive to the intervention of a mediator.

First talk to the parties separately
A mediator will ordinarily want to talk to the parties separately to get educated on the issues and the parties’ positions before convening a joint meeting. You need to avoid putting yourself in a position where one party finds out that you have been talking to the other without the first parties’ knowledge, and becomes suspicious of bias on your part. Remember that the parties are under pressure, particularly at the point of impasse, and sometimes see ghosts. So cover yourself by getting the parties’ agreement
that you can talk to each of them separately first up. It is often easiest to do that in a conference call with the lead advocates for each party.

For the first separate encounter, many experienced mediators prefer to speak one-on-one with the lead advocates for the union and the employer rather than, or before meeting with the full teams. Either way, you will normally want to talk to each side about the full range of issues discussed below, and you will want to cover them again when you eventually pull the parties together for a joint session. One senior mediator summarized the key questions this way: “Where are you at? What are the sticking points? What’s it going to take to settle it? How can I best help you?”

First you need each party to identify what have been the issues in the negotiations. Ask for their record of the negotiations and of what has been agreed. Have them identify what issues have been agreed and what they understand the agreements on those issues to be. Ideally, each party will be able to produce language on each of the agreed issues initialed by each party to indicate that the issues have been settled, subject only to the parties reaching an overall agreement on all issues. These are often referred to as “tentative agreements” or “TAs.” If there is no record of this sort, have each party write down what they believe has been agreed with the other party. Hopefully the two lists match. To the extent that they do, you can have the parties acknowledge that and formalize some agreements when you eventually bring them together in a joint session.

Have each party identify the issues that remain unsettled and in dispute between them. Have them identify their current positions on those issues and tell you the bases for those positions. If you don’t understand what’s being said, ask them to explain. Sometimes the intricacies of the issues or the industry jargon might be second nature to people who have been negotiating with them for a long time, but they can be a mystery to the mediator coming into the dispute. Make sure that you ask the necessary questions to understand the issues and the parties’ positions on them. If you fall behind in these initial separate meetings, in terms of your understanding of the things that divide the parties, you will have a very difficult time catching up as mediation proceeds.

Establish a rapport with the parties
A mediator coming into a collective bargaining dispute needs to get established in the position in two ways. First, the mediator needs to
establish some initial rapport with the parties, put them at ease with mediation and the mediator, and provide them some encouragement that the dispute can be resolved. Second, it is important to get agreement on the role that the parties want the mediator to play. Again, you can start to do these things in the initial separate discussions with the parties, and carry them on when you bring the parties together.

Sometimes, things can look pretty hopeless from the middle of a long negotiation that seems to be going nowhere, particularly to negotiators who are new to the collective bargaining process. Negotiators will sometimes experience genuine fear in those situations, when they reflect on the jobs or company fortunes that seem to be riding on their performance. They have been unable to reach a settlement, and often they won’t have any idea how you are going to help them get one. Under these circumstances, it is important that the mediator take steps to give the parties some confidence in the mediator and some encouragement that mediation will produce a satisfactory outcome.

Virtually all collective bargaining between established bargaining partners in Western industrial countries ends in agreement. Admittedly, some agreements come more easily than others, but virtually all bargaining disputes eventually get resolved. Explain that to the parties, but without pretending to be a miracle worker. A mediator might put it to the parties this way: “It may not look like it now, but this is going to settle one day. Don’t know when, don’t know what for, but one day . . . we’ll get it sorted.”

Part of this process of settling the parties down, and getting them encouraged and pointed in the right direction involves establishing some personal rapport with the parties. Part of that is understanding their issues and needs. Part of it is showing them your competence and expertise. Some of it is simply treating them as people, being interested in them, being able to talk reasonably knowledgeably about their sports or other interests. Some of it is personality. Or, if you like, leadership – mediators are leaders, guiding parties towards an agreement.

In some respects, mediation is a very personal profession. You need to understand and use the strengths of your personality to connect with the people that you are helping. In what are often tense situations, some appropriate lightness and humour is invaluable. If that comes naturally to you, then use it. A relaxed mediator is already half way to giving the parties
confidence in his or her ability to lead them out of their dispute. On the theme of “all things eventually settle,” I sometimes tells parties in the middle of difficult negotiations: “I have a fantastic record as a mediator. Every dispute I’ve been involved in has been resolved. Sure, one dispute took eleven years and seven months to get resolved, but it got resolved. This one will get resolved too, and we probably won’t even threaten that eleven year record. So let’s get started.”

A little natural and good natured humour can serve to relax the parties, perhaps get them to recognize that they have been operating at an uptight level, and also encourage them to think about the issues and what’s really important to them. One way or another, the mediator needs to connect with the parties, to settle them down, and to provide them with the confidence that there is a way out – but the parties are going to have to work with you to find it.

Define the mediator’s role
You also need to get agreement on what role the parties want you to play. Sometimes the parties won’t know what a mediator can do for them, and you will need to lay out the options.

You might occasionally go into a dispute where the parties will want the mediator to simply sit as an advisor on the sideline, listening and making helpful suggestions as the parties continue to deal with one another directly. At the other end of the spectrum, parties will sometimes be looking to the mediator to chair their negotiation meetings. Sometimes they will be looking for someone to act as a go-between, shuttling back and forth between the separate bargaining teams with proposals and counterproposals.

For negotiators who are new to negotiations and mediation, you may need to explain what a mediator brings to the process. Explain the advantages of being a neutral with no vested interest in the outcome of the negotiations, someone able to look at the issues and the parties’ positions dispassionately. Explain that you will be looking and listening, and offering observations and suggestions from a position of expertise on the process, but objectivity on the issues.

Explain that you’ll be asking some questions that might seem to them to be pretty basic, even “dumb” questions, but that you need to do so to make sure that you really understand the issues, that you really appreciate the parties’
positions and feelings on the issues, and so that you can spot areas where there might be common ground between them. Explain that part of your role might be to play “devil’s advocate” to help each party test whether their positions on the issues are really necessary, or are still the best one’s for them to be holding to: “I’ll be asking you straight up – why can’t you move on that? And it’s important that you give me a straight answer, that we’re on the level with one another.”

In explaining these things, you are beginning to exhibit your expertise to the parties, and to develop their confidence in you, and some ability to guide them.

You may also need to explain the limits of the mediator’s role. The mediator isn’t there to beat up on the other party for them, or to insist that one party behaves in the way that the other party wants them to. And, of course, you have no formal authority to impose anything on anyone. What authority you do have is unspoken. It comes from the credibility you have or develop in the eyes of the parties. And that comes from your neutrality, your integrity, and your expertise as recognized by the parties.

One caution: it is important that you not put too much pressure on yourself to be a miracle worker or to come up with all the answers. Emphasise that, while you are bringing some expert knowledge and skills to the process, you don’t know the parties’ needs the way they do. You don’t come to the dispute with answers; you are there to help the parties find the answers. That, in one way or another, is the mediator’s role.

Sometimes, particularly again where the parties are inexperienced, you will find that the bargaining process simply isn’t working at all, and your first role won’t be any of those described above. Rather, it will be stepping back to coach people in the basic mechanics of bargaining: “Let’s take a look at how you’re conducting these negotiations, and whether there might be some areas where you could be doing things more effectively.” Or, to specifics: “It would be better if you asked to have their proposals in writing, and then you put your counterproposals back to them in writing. That way there will be no confusion about what is being offered, and you will have a record of your negotiations.” Guiding the parties at this level is perhaps not the ideal role envisaged for a mediator. But if that is what you need to do for particular parties to bring them up to speed, then that is what you need to do. Hopefully they will carry the lessons forward into their future negotiations.
**The first joint meeting with the parties**

As noted above, you will have talked separately with each of the parties, or at least their advocates, prior to bringing the parties together for a joint meeting. So you will have an understanding of the issues and an appreciation of the state of the bargaining process.

At the initial joint meeting, unless your role is only as an advisor on the sidelines, you will want to canvass these issues of substance and process again, this time with the parties fronting one another around the bargaining table.

First, examine the parties’ record of the negotiations and what they have agreed on. Is there a common understanding of what issues have been settled? Is there agreement on the terms of settlement? Have they been reduced to writing and initialed as “agreed”?

And what is the status of such tentatively agreed items? Are those agreements “locked” pending only an overall agreement on other issues? That would be the usual status of tentative agreements or “TAs,” though it is obviously within the power of the parties jointly to reopen them.

Once in a great long while you, as the mediator, might want to take a peek into one of the tentatively settled issues if you think it can be reworked in conjunction with the still-unsettled issues as the only way to achieve an overall agreement. Usually, though, issues once agreed are “in the bank” pending an overall agreement on all issues. It is hard enough settling issues once, let alone twice, so there is not often an incentive to reopen them once agreed.

If there are any disputes at all over what has been agreed to date, then you need to get them sorted, documented, and tucked away. If it turns out that there is no common understanding on the status of an issue, then the issue has to go back to the “unsettled” column.

**Identify the issues that need to be settled**

Second, you need to have the parties put all unsettled issues on the table in front of one another, detailing their positions on each issue and outlining the reasoning that explains that position.
If key things have been said privately to you about an issue, or the implications of an issue, or the thinking behind a position, and those are not being put on the table for the other party to hear and deal with, then you might have to try to tease them out, but being mindful of not compromising the confidentiality of your private conversations.

It is important that you clarify and reclarify at the conclusion of this process that all unsettled issues are now identified and on the table: “So do we all have the same understanding that if we reach agreement on these five issues, then we will have an agreement? There are no other issues that we need to deal with? Can I hear both parties acknowledge that that understanding is correct please?”

What you are trying to avoid is the introduction of new or resurrected matters – whether deliberately hidden or simply forgotten or misunderstood – later in the process, something that tends to destabilize the balance of the settlement that you are guiding the parties towards.

You need to be insistent on this point: “Are you absolutely certain that there is nothing else out there that needs to be resolved as a part of these negotiations?” You need to be particularly careful about the status of issues that might have been withdrawn by a party. Clarify in front of both parties that the proposal has been withdrawn, and clarify the status of the issue – for example, that, with the proposal for change withdrawn, the current contract language on the issue would remain unchanged. Once a proposal is on the table, its withdrawal should be acknowledged and initialed in the same way as the settlement of an issue.

One caveat is appropriate here. In demanding clarification that all remaining issues are on the table in full view, be careful that a party doesn’t take the opportunity to throw new matters at the other party, under cover of the mediator. The point is to identify all of the issues that need to be dealt with if there is going to be a settlement.

Usually – but depending on when the mediator comes into the negotiations – they will all be issues that the parties have already wrestled with in the negotiations. So there should not often be any surprises. You are not fishing for the parties’ wish lists. You are seeking to identify all of the issues that have been brought to the table that remain unresolved.
It is worth finally reiterating that this clarification of the status of issues is a very important foundation for the mediation work that follows. You don’t want to leave the subject behind until you understand, as the mediator, the exact status of every issue that has featured in the negotiations.

Some are agreed, and the terms of agreement are documented and initialed. Some are withdrawn, and that too has been documented and initialed. Some are still unsettled and under active discussion. And some may be “parked” pending the outcome of discussions on other issues. You should have a clear understanding of what is to become of those “parked” issues when others are resolved.

This absolute clarification is not only vital to eventually getting a settlement; it is also an important protection for the mediator. You do not want to be drawn into adjudicating on the disputed status of issues where, for example, one party has proceeded on the basis that the other has withdrawn an issue, while the other party claims that it has never done so, and one or both parties want the mediator to bear witness to their position. So clarify and reclarify the status of things at the first meeting with the parties, and update the tally as mediation proceeds thereafter. Put it in writing, on paper or the whiteboard, and update it as issues are disposed of.

**Audit the process arrangements as well**

When first entering a collective bargaining dispute, in addition to clarifying the status of the substantive issues and assisting the parties in repairing ineffective bargaining practices, the mediator also needs to clarify the parties’ process arrangements.

Ideally, the parties ought to have negotiated a process agreement at the outset of their negotiations. In addition to any rights and obligations under a process agreement, there may also some entitlements and obligations under the applicable legislation that come into play in defining the arrangements for negotiating a collective agreement.

As a part of the initial audit, the mediator should walk through the agreed procedures to ensure both that he or she understands them and that the parties have the same understanding of what they are. What, for example, is the status of offers made by one party to the other? What is the status of tentative agreements reached? And so forth.
Sometimes the parties will have neglected to make any definitive arrangements. At other times they will have negotiated a process agreement, but some of these arrangements may have expired by the time a mediator has been called in. Some of the process issues may, in fact, be actively in dispute between the parties, rather than being just logistical matters that have been overlooked. The ideal would be to get these issues resolved first. But realistically, if the parties are at odds over them, they may need to be sorted with the substantive issues, in which case you need to make sure that they are recognized as being live issues in the “to be settled” basket.

**Clarify ratification procedures**

One set of arrangements that can sometimes become contentious are those to do with ratification and the union’s taking of employer proposals back to the membership for consideration and a vote. The formal ratification procedures themselves can cause problems, particularly where there are two or more unions negotiating jointly and they have different procedures and thresholds for ratification. Those are often constitutional issues and there is little the mediator can do to change them. But you need to make every effort to ensure that it is clear and agreed what procedures will be followed when the negotiating teams eventually reach a settlement.

A related issue that needs to be clear, both between the parties and in the mediator’s view of the negotiations, is the extent of the union’s obligations in taking proposals to the membership. There can be several twists to this. First, has the union obligated itself to take proposals from management to the union membership for their consideration. If not, it would ordinarily be the union bargaining team that determines whether and when it is prepared to take a proposal for settlement to the membership for a ratification vote.

The other side of the coin is whether the union bargaining team is obligated to recommend acceptance of a proposal for settlement that it brings to the membership for a ratification vote. The difference is between recommending that the membership accept a settlement, and merely presenting a proposed settlement for membership consideration.

Many experienced negotiators would argue that a properly representative union bargaining team ought not to take a proposal for settlement to the membership for ratification unless the union bargaining team has tentatively agreed to the package and is prepared to recommend it to the membership. That is the role of the bargaining team as agent for the membership. And,
accordingly, that a union bargaining team putting a proposal for settlement to the membership has an obligation to “sell” it.

As a mediator, you can explain the accepted “theory” of negotiations and the responsibilities of bargaining teams inherent in that. And you can urge that parties adopt processes that comply: “I think that you’ve got an obligation to either take what the employer has put on the table back to your membership and sell it, if you think it’s good enough, or go back in there and tell the employer that their proposal isn’t good enough and that they’re going to have to do better if they want a settlement. Those are your options as I see it. The membership hasn’t been at the table. They don’t know what’s available. They’re relying on you to tell them.”

You can expect that sometimes parties will want to do it differently – a union bargaining team, for example, preferring to move the responsibility off its own shoulders and onto the membership. Or going back to the membership for a symbolic rejection of a management proposal and a “rev up” for a strike vote.

Or a management believing that if the union members could just get a chance to vote on management’s proposal, they would buy it even despite the reluctance of the union leadership. Indeed, some on both sides of the bargaining table would argue that union members are entitled to see at least the employer’s last and best offer, as a matter of good practice and, legally, as a matter of good faith.

So there are certainly differences of view on point, and as a mediator, you are entitled to have and express yours. But perhaps most important is to be sure that you get clarified and agreed an understanding of what are going to be the obligations of the bargaining parties relative to proposals for settlement – whether they are as you would recommend or not – and ideally to have those understandings in place before proceeding to mediate the substantive issues in dispute. Otherwise, as noted earlier, these procedural issues have the potential to erupt – either naturally or in a contrived way – at critical points later in the process, and to derail a prospective settlement.

Think about the people too
The other ingredient that a mediator finds coming into a collective bargaining dispute is people – the members of the two bargaining teams. You need to assess them as well. You might be able to get some
information from colleagues who have dealt with the particular parties before. But to some extent you will have to size up the people for yourself.

People have different levels of competence, and they have competence in different areas. What are those levels and areas of competence with these people? How experienced are they in negotiations? People know some people and not others. People like some people and not others. What are the relationships here, within teams and across the table? Where is the authority in the teams? Who is in charge? What are the personal interests of team members in the outcomes? What issues matter to different members of the teams? As a part of your initial audit, give some thought to the people involved. It is likely that some of them will be key allies for you in driving for a settlement.

**Mediators: experts on the issues, or just on the process?**

Finally in terms of doing an initial audit of the negotiations at the point of entry, experienced mediators differ on whether, to be successful, a mediator needs to “go to school” on the issues that divide the parties in the negotiations.

Many senior industrial mediators strongly believe that to be most effective in mediating a collective bargaining dispute they need to know as much about the issues as the negotiating parties themselves. As one mediator put it, “*It is as if one of the advocates had gone home sick, and I’d been subbed in there as an advocate. I want to know as much about the issues as the advocates know.*” These mediators recommend investing the time and effort to learn about the issues, principally from the advocates, before trying to mediate the issues.

Knowing the issues involves having skills and knowledge in drafting and understanding contract language, in enough accounting and finance to understand how businesses operate and to read balance sheets, budgets and financial reports, and enough human resources and operations theory and practice to understand performance appraisal, salary structures, seniority systems, scheduling and rostering, and a whole lot more. It involves having the comprehension and “quick study” skills and interest to understand the industrial context in which your negotiations are centred – from health care to hotels to fish processing to manufacturing and beyond.
Many senior mediators have extensive labour relations backgrounds, so getting to know the issues is a natural instinct for them. Not all mediators share this view. There are some who feel that the mediator’s effectiveness comes from being an expert in the mediation process, and that that is where you ought to focus your efforts and your energy. They believe that the key is to be an expert in the process and to know just as much as you need to know about the issues to manage the process. Many mediators who come from backgrounds other than labour or management, are likely to be more comfortable with that approach.

Perhaps the key to your effectiveness is to be clear in your own mind which approach you are taking. The “issues and process expert” mediator wants to know enough about the issues to be able to proactively challenge the parties on the issues – on inaccuracies, or exaggerations, or illogicalities – and to be able to formulate possible solutions independently of the parties. The “process only expert” mediator needs to know just enough about the issues to be able to understand what the issues mean to the parties, to see the potential for compromise, and to spot the areas of overlap and possible agreement.

Establishing relationships with the parties

What sort of relationship does a mediator want to establish with the lead advocates and with other members of the two bargaining teams? How does the mediator go about building those relationships? How does a mediator respond when internal problems surface within a bargaining team? Is there ever a role for a mediator in the relationship between a bargaining team and its constituency?

Much of the relationship building that a mediator does occurs in caucuses with the separate bargaining teams.

Caucuses are an integral part of collective bargaining, and it is important that the mediator plays a role in them. Caucuses – sometimes termed adjournments – are called when one or both bargaining teams feel the need to withdraw from the table for private consultations within the team, during the course of a negotiation meeting. Sometimes, a caucus may serve as a retreat for a bargaining team under pressure. Usually, though, a caucus is an opportunity for the team to review its positions and priorities, the progress of
negotiations, and its strategies and tactics, or to assess and perhaps fashion a response to a proposal or suggestion put across the table by the other side.

As a mediator, you want the parties to have sufficient confidence in you that they are each comfortable having you in their caucus meetings, and moving back and forth between their own caucus meetings and those of the other side. The mediator’s credibility is reinforced, and his or her respect and reputation built, on an understanding of the confidentiality of those caucus sessions.

The only information that the mediator is entitled to carry from one caucus and present in the other caucus is that which he or she has been authorized by the first team to present to the second. The mediator knows that, and ensures that the bargaining teams appreciate that that is the way mediation operates: “I want everyone in this room to realize that I am going to want to talk to you about your bottom lines, about things that are confidential for you. And I need you to speak frankly with me. And I will never, ever say to the other side anything that you don’t authorize me to say to them.”

At the same time, while there are clear limits on what you can carry from one caucus to the other, hearing and being involved in the caucus discussions is an important way for you, as the mediator, to build your own store of information about the negotiations. It is in the caucus sessions that that you will really get to know the personalities on the teams, who is calling the shots – either within or behind the teams – and each party’s priorities and bottom lines. It is by cross-referencing the information and signals picked up in the private discussions of each party that the mediator identifies areas of overlap and possible compromise and settlement.

**Work with and through the lead advocates**

To the extent that it is at all possible, the mediator should deal with and through the lead advocates, respecting the fact that they have been appointed to those roles by their bargaining teams or constituents. You start to do that with the initial contact that you made with each of the advocates before pulling the two teams together for a joint mediation meeting.

The mediator’s objective is to develop a particular rapport with the two lead advocates. This involves dealing with their bargaining teams through them, protecting and enhancing their standing with their teams, helping them to an
extent when they need help, and eventually engaging them as your collaborators in finding a settlement.

You should – again, to the extent that it is at all possible – avoid bypassing the lead advocates to deal directly with other team members, or embarrassing the lead advocates or undermining their position or mana with either their own team or the other party.

Even an inexperienced advocate, or one who you can see to be making mistakes, has to be respected as the party’s chosen advocate. If he or she is making mistakes, find a way to help them that does not embarrass them, and ideally enhances their standing with their team.

The ideal would be for you to assist an advocate to correct their mistakes or to become more effective, and to do it in a way that improves their standing, and in a way that is apparent to you and the advocate, but not to anybody else. If you can do that, you will be well on the way to recruiting a collaborator who will work with you to settle the dispute.

One of the ways in which the mediator can sometimes help an advocate who is making mistakes is to privately run a “risk analysis” with the advocate, but in a way that depersonalizes the criticism and leaves decision making in the advocate’s hands: “Let me just tell you what I’m hearing and reflect that back to you in terms of the potential risks that I’m seeing . . . If you present the initial pay offer that you’ve been discussing with your team, from what I’ve seen and heard, I think that there is some real potential that that will be seen by the union as offensive . . . and that sort of misinterpretation could be counterproductive for what you are trying to do . . . I wonder whether it might be worth suggesting to your team that the number they have been talking about might be a little light to flush out the union’s position . . . and maybe suggest that throwing another percent on would do the job.”

That kind of analysis, presented one-on-one and in a manner that allows the advocate to adopt the idea and carry it forward, essentially as his or her own, moves the negotiations towards settlement — or skirts roadblocks that the mediator has foreseen — and does so in a manner that supports the advocate’s position, and in a manner that the advocate can appreciate.
Helping out the advocate

Another area in which the mediator can assist the lead advocate is in the management of the advocate’s team. Again, a key is in having the confidence of the advocates. You need the advocates to have enough confidence in you that they feel able to tell you what problems they are experiencing on their side of the table, and ask for your advice or assistance in dealing with the problem. Sometimes it will just be sitting in on the team discussion and working team members around to a realistic view on a tough issue that they are going to have to let go of in the interests of a settlement.

At other times, the problem might be with the behaviour of team members at the bargaining table.

For example, you might find that one or two influential union team members are, perhaps because of things to do with the past, constantly sending negative vibes across the bargaining table – body language, slapping pens down, exaggerated sighs, and so forth – disrupting what the advocate is trying to do, and causing the other side to block out any positive messages the advocate is trying to send.

Maybe there is a role here for the mediator to explain privately or in caucus “what I’m seeing and, while I understand there’s a history to it, I think that you are running the risk that they are going to ‘shut up shop’ and close their minds to what your advocate is saying . . .”

Again, what you are trying to do as the mediator – having identified a problem or had a problem brought to your attention by the advocate – is to try to remove what is a potential blockage to a settlement, to do it in an impersonal way that does not demean anyone, and to do it in a way that supports the role of the advocate as the leader of his or her team.

The problem may be more mechanical and less emotive, in which case it is probably going to be easier to fix.

For example, a team member talking over the top of the advocate or other team members at the bargaining table, or a team member resurrecting issues that have already been dealt with. Your role then is essentially explaining bargaining etiquette, again in the privacy of the caucus, in an impersonal way, and ideally in a light way that takes the sting out of the criticism: “There can only be one singer and one song at a time, otherwise the other
team is going to get conflicting messages, they’re going to get confused, they’re gonna fall out of their chairs.”

There will be times when, because of the internal politics of the union or the management structure, it will be impossible or at least highly risky for the lead advocate to try to rein in troublesome team members, perhaps even on small behavioural issues. It is particularly in those situations that the advocate might lean on the mediator for assistance, and as a mediator you need to be alert to those things.

“Short line-outs”
“Short line-outs” occur when the mediator calls one or more members of each team, but short of the full teams, into a huddle to discuss selected issues in this smaller forum. Short line-outs are often conducted with just the mediator and the lead advocates of the two parties. Short line-outs probably have more application in collective bargaining than they do in other types of employment mediation. Used selectively, they offer the opportunity for the mediator to work with the lead negotiators, at least partially free of the behavioural expectations of team members.

The effectiveness of the short lineout depends, in part, on the mediator’s rapport with the advocates, but also on the rapport and trust between the advocates themselves and on their sophistication in negotiating in this more intimate setting.

One important consideration in calling for short line-outs is to make sure that team members “left behind” are not left in the dark. You have already told the teams about the principles of confidentiality that a mediator abides by. You keep faith with the team members by explaining to them what you are going to discuss with the advocates when you pull them into a short line-out.

While the effectiveness of short line-outs depends on your rapport with the lead advocates, the short line-out is also an important tool in building those relationships.

The lead advocates or negotiators have two roles in the negotiations. Early in the bargaining process, they are the hard-nosed, perhaps even uncompromising champions of the interests and positions of their team and their constituents. Their team members and their constituents will want to
see them vigorously putting the case for their side and representing their people, taking the occasional jab at the other side. The other advocate’s constituents are putting the same sort of expectations on her or him.

In the early stages of your mediation involvement, when the parties are sparring with one another at this level, your short line-outs are to talk about process, and that is the way you explain them to the team members: “The way we’re operating at the moment is getting pretty hard on everyone . . . including me. So I want to pull your advocate together with the chief negotiator for the other side to see if we can sort out quickly some issues about the process that we are using.” And then you explore with the advocates how they get past the dysfunctional stuff that you see going on, or when they are going to be able to, and how the three of you are going to move the negotiations out of the debate mode and into the mode of finding some common ground and some settlement points.

Because that is the lead advocates’ second role – finding solutions, getting settlements. That is quite a different role from arguing the point, but that is a transition that has to happen if an agreement is to be reached.

An important part of the mediator’s role is to make sure that that transition does occur, and that team members understand that the advocate’s role becomes, at some stage during the negotiations process, to find solutions. And a part of the secret of doing that, in turn, is taking those lead advocates with you as the architects of the settlement.

So, later in the mediation, when you pull the lead advocates into a short line-out, it is no longer to talk about process. Instead, it is now to push for an agreement on the issues. By this stage, the lead negotiator should be seen by his or her people, not just as somebody putting their case forcefully, but as part of the process of finding a way out of the dispute. And you want the lead advocates seeing themselves – and their relationship with you, the mediator – that way as well: as part the mediation “team” that is going to fashion an agreement.

**When the advocate becomes a barrier to settlement**
The first rule is “always try to work with and through the parties’ lead advocates,” and that will usually be the successful approach. Nonetheless, once in a great long while you may find that a lead advocate is, in fact, a barrier to settlement – either because of personal conflicts or characteristics,
or because of her or his position on an issue that is out of touch with reality or with the views of the constituents. Under those circumstances, the mediator might be in the uncomfortable position of having to work around the advocate.

Even then, it is important to make every effort to work around the advocate in a way that respects the advocate’s position, and protects his or her standing as a designated leader. In other words, work around the advocate if you absolutely need to, but not in a way that causes the advocate to lose face with his or her people.

How a mediator works around the advocate depends on the circumstances. If there is wide opposition on the advocate’s own team to a position being maintained by the advocate, the key will be to find in caucus an opportunity for that opposition to be expressed in such a way that the advocate sees some risk to his or her own position or standing by holding to the position. Likewise if some aspect of the advocate’s conduct of the negotiations is a problem that is recognized as such by his or her team, that needs to be aired by team members in caucus in a way that causes the advocate to rethink his or her approach. The mediator’s role in caucus would ordinarily be to facilitate that happening, rather than raising the challenge himself or herself.

If the mediator is to challenge the advocate’s position or conduct, that normally needs to happen privately, one-on-one.

Again, the mediator’s approach might be to articulate the risk to the advocate’s position: “It may just be me, so help me with this . . . but I think that I’m hearing you say a couple of different things about the same issue . . . Now, if I can pick that up or get that impression, then it is likely that the other side can too . . . and the risk is that they play that against you . . . Tell me if I’ve got that wrong; otherwise, how do we avoid that coming back to bite you?”

Or: “Look, you guys may just be playing too sophisticated a hand for me, but I’m not hearing a lot of enthusiasm from your team for the position you are taking on that issue . . . If I’m right, then it seems to me that the risk you’re running is that you isolate yourself from some of your team, and that opens you up to having that used against you by the other side . . .”
Where an advocate is developing into a barrier to settlement, it is likely that it has happened before. What you are hoping to do, as the mediator, with this sort of risk analysis, is indirectly remind the advocate of his or her bad habits and of the likely consequences, and then help him or her to find a way out that removes the blockage.

There can sometimes be other ways around an advocate. If the problem is the advocate’s position on an issue, you might be able to move someone else into a position to deal with the issue: “This is kind of a technical thing, why don’t we have the technical people from each side come and talk to me about it.” Techniques like this will often be more effective once the advocate has recognized a risk and is willing to look for a dignified way out of it.

If there is a personality conflict, or an advocate’s approach simply rubs people the wrong way and generates a hostile reaction, then the trick may be for the mediator to keep the parties apart and engage in some “shuttle diplomacy,” carrying proposals between the parties, and perhaps even filtering or moderating the style of the messages so that the substance of offers isn’t lost in the abrasiveness of the presentation.

It would be rare that a mediator – and particularly a relatively inexperienced mediator – would directly challenge or obviously bypass an advocate. It is risky, and the risks are failing to mediate a settlement, being ejected from the mediation, making an enemy, and doing damage to your reputation. At the very least, there will be some relationships to repair for the future.

So it is not something to be done lightly. Sometimes, where you see a strong advocate leading a party away from a settlement, you may simply have to accept that it is the party’s dispute, not the mediator’s, the advocate has been appointed by the party, and ultimately the party has to take responsibility for the consequences. If, for example, a union advocate is “behaving badly” and his or her team is aware of that, but the advocate nonetheless has control of the workforce and the bargaining team, there is often not a lot that the mediator can do to turn the situation around.

It is only when an advocate who has become a barrier to settlement is in a weak position with his or her bargaining team and constituents that a mediator would consider directly challenging the advocate. Even then it is risky, and not recommended for an inexperienced mediator.
Dealing directly with a bargaining team’s constituents

It will also be very rarely that a mediator will want to get involved in the relationship between a bargaining team and its constituents, and that is most particularly so on the union side of the bargaining table.

Accompanying a management negotiating team that is committed to selling a deal to senior management won’t usually be a problem for a mediator, and may even be a welcomed opportunity, if it is felt that the mediator can bring some “neutral weight” or additional credibility to selling the deal. A union membership, generally speaking, is potentially a much more volatile proposition.

Many senior mediators would “never” go to a union ratification meeting, and would be most reluctant to go to a union “report back” meeting at which the union bargaining team is scheduled to report to the membership on the progress – or lack thereof – in the negotiations. It stands to reason that if the union team wants the mediator with them as they face the membership, it is probably not because they are bringing back good news. More likely, they are bringing bad news, or it may be that they are going to try to talk the members out of doing something that they want to do, such as strike.

If you are invited or tempted to address a membership meeting in the midst of mediating troubled negotiations, ask yourself why you are being taken there. It is, after all, constitutionally not your role to sell anything to the union membership. That is the role of the union bargaining team once they have a deal that they deem worthy of ratification, or a course of action that they deem worthy of pursuing.

It only takes one heckler in the crowd to point out the inappropriateness of the mediator acting as a sales agent for the bargaining team, and damage your credibility: “He’s a government mediator and he could sell refrigerators to Eskimos . . . But, brothers and sisters in the union, we are not Eskimos!! And we aren’t buying no stinkin’ refrigerators!!” You’d have to be good to recover from that sort of challenge. Let’s face it: if they don’t believe their own leadership, why are they going to believe a complete stranger?
You should only ever consider addressing a union membership meeting if you were doing so in support of the union bargaining team – the whole team – committed to selling a deal to the membership or persuading the membership to a course of action – but not industrial action – that would be instrumental in getting a settlement. It should go without saying that a mediator would never address a union membership in support of a proposition with members of the union bargaining team arguing in opposition from the floor.

A mediator should never close his or her mind to creative ways of assisting in educating members about issues in the process of their decision making about a contract settlement. But fundamentally, going before a union membership to sell them on something that the union leadership is unable or unwilling to do themselves is very, very risky and something that even the most experienced mediators will do only very reluctantly, if at all. It is not something recommended for a mediator new to collective bargaining mediation.

When a mediator is challenged

In most instances where a mediator is called into a collective bargaining dispute by the parties or by the issuing of a strike notice, the parties are going to be grateful for the help and generally respectful of and cooperative with the mediator. Once in a while, though, as things unfold, you might find yourself subject to challenge in one way or another.

For example, as a mediator you are often in the role of playing ‘devil’s advocate’ and may hit on some points that cause a party discomfort; the reaction might be to challenge your impartiality. Where that sort of challenge comes from a team member other than the lead advocate, the responsibility needs to be turned back on the team and the advocate.

The appropriate approach is probably to call an adjournment or, if the challenge occurs in caucus, to suggest a team meeting without you, to determine the team’s position on the matter. The expectation that you would convey to the advocate is that, if the challenge to you or your role did not represent the team’s position, you would not want to hear that sort of thing again.

Beyond that, though, most senior mediators feel that, if there is a significant challenge from an advocate or a team to their impartiality or the way that
they are conducting themselves, they would normally be prepared to walk away. As a mediator, you are only there to help. You can’t help if one or both parties don’t, for whatever reason, accept you. You are simply wasting your time. There is seldom any incentive or reason to fight to maintain or defend your role in the dispute. If you are no longer adding value, be prepared to walk away.

That is not to say that, as mediators, we are disposable at the whim of the parties or whenever one of the parties strikes out at the mediator out of frustration with the situation or anger at the other party.

Most mediators, while being prepared to walk away if they need to, would usually do a little probing first. If the challenge comes from an advocate, it might be appropriate to have a one-on-one meeting with the advocate to see what the problem is, whether it is real, and whether it is fixable. Sometimes it might be about whether you or the advocate is managing the mediation process.

You may want to ask for an explanation in front of the advocate’s team or in front of the other team: “Yep, that’s fine. You’ve challenged my impartiality. I accept that that’s your view. I’m not here to justify my position at all, but it would be useful to me if you would explain your view to the other party so they understand why we’re bringing a new mediator in.” It may be that the advocate hasn’t thought through the implications of making the challenge, and backs away from the idea of substituting mediators. Then, some further probing may be appropriate: “Well, sorry. You’ve got me confused now. I got the distinct impression that you were questioning my impartiality. If you’re not saying that, then I need to understand what it is that you are saying, and why you’re saying it.”

If the advocate has a genuine perception that, on reflection, is going to compromise your ability to do the job effectively, and is prepared to talk about that, then you will probably want to withdraw from the negotiations with proper explanation to the other party. If, on the other hand, it is clear to you that the advocate was just lashing out or trying to out position you, and he or she backs off when some explanation is sought, then the message is that the mediator is here to help, but that smacks at the mediator are out of bounds and won’t come cheaply.
In the final analysis, if challenged in a credible way, you as the mediator have to determine the appropriate course of action. The key is to recognize that the negotiations are not about you, and quite probably the challenge isn’t either. Be prepared to walk away if, for whatever reason, you are no longer in a position to help the parties.

**Overcoming bargaining deficiencies**

*When the mediator enters a collective bargaining situation in which the parties have not made sufficient or effective bargaining process arrangements or in which one or both parties don’t have adequate bargaining skills, how does the mediator deal with that situation?*

To be an effective mediator of collective bargaining disputes, you need to know something about the theory and practice of negotiation. You need to understand the negotiations process if you are going to be able to manage it.

Part of the mediator’s initial audit on first entering the negotiations is to assess the level of negotiation experience and expertise on the teams, as well as assessing the extent to which the teams, and particularly the advocates, are knowledgeable about the issues under negotiation.

In the worst case, you might find a shambles in which the parties have negotiated no bargaining process arrangements and the teams themselves have little bargaining experience and not too many clues as to what they are doing. And perhaps the hardest to deal with are the lazy teams, parties who don’t have a lot of experience and who aren’t showing much initiative to organize themselves or the process . . . nobody is taking notes, or keeping track of the status of issues, or indeed doing much of anything to order the bargaining process.

When you encounter these types of situations, as the mediator coming into a collective bargaining dispute, it is all too easy to be drawn into effectively conducting the negotiations on behalf of one or even both parties because they lack the skills to do it themselves. You should make every effort to avoid being drawn into that role.
Teach the bargaining basics
The better approach where there are deficiencies in process arrangements, or bargaining skills or knowledge, is to do a little coaching to correct the deficiencies and to make sure that the parties are better prepared for future negotiations.

You may find that some lead negotiators lack issues expertise, which is to say that they will be negotiating contract language to govern issues that they don’t really understand. This shouldn’t be surprising. Collective bargaining occurs across a wide range of industries, each with it’s own peculiar situations, practices, and jargon, and it takes time for even the brightest negotiator to get up to speed on all the issues in even a single industry.

The mediator can achieve a number of things by simply providing the advocate with some language that addresses the issue: progress the negotiations towards settlement, help out the advocate, teach them something about the issue, and win their confidence by demonstrating knowledge of the issue and by having access to valuable resources. If you don’t know the issue yourself, find out.

In other cases, the problem will be with process rather than issues. The parties may have failed to negotiate any useful bargaining arrangements, and they may lack an understanding of the rudimentary mechanics of negotiation.

Under these circumstances, what you need to do as the mediator is take the parties back to basics. Have them put aside fighting over the issues, and focus on developing an effective bargaining process. This may be as basic as helping the parties establish systems for keeping notes, or for making offers and counteroffers and recording them and signing them off. The mediator may actually have to walk a party through some of these steps – how to frame and present an offer, how to distinguish an offer that is intended to settle an issue rather than inviting a counterproposal, how to record tentatively agreed issues – at least one time.

But once those systems are established, there should be no need for the mediator to continue to be involved in carrying out those mechanics herself or himself for the parties. And beyond the point of instruction, you should resist doing so.
Not all negotiators will welcome the lesson
Not everybody will be as receptive as you would like to a mediator’s efforts to repair bargaining processes. Particularly when you are entering the negotiations late in the piece, you might find the parties are reluctant to leave off fighting over the issues to talk about process and put systems in place. Some people will be inclined to see the mediator as doing nothing more than attempting to stall the negotiations. Some experienced negotiators may be more of a problem in this respect than people new to the field.

As a general rule, less experienced negotiators are more likely to recognize it when they are floundering around unsure of where they are headed, and so are likely to be more receptive to efforts by the mediator to help them out on the issues, to bring some order into the bargaining process, and to give them some coaching on the mechanics of bargaining.

In short, if you come into the middle of negotiations that are a bit of a shambles, parties not knowing where things are at or where they are going, start by mapping out the status of issues, as previously discussed. Then turn the parties’ attention to creating some simple systems and processes to manage the way forward. Then educate the parties on how to think about their issues and positions, and how to generate options that the other party can react to and that move the issues forward towards a settlement.

Handling hostilities across the table

How does the mediator deal with hostility, anger, or other aggressive behaviour or personal incompatibility across the bargaining table?

As a mediator coming into a collective bargaining dispute, your aim should be to leave the relationships between the people and the parties at the bargaining table in better shape when you depart than they were in when you arrived. At the very least, you can’t allow the relationship to get worse as a result of mediation. So, in managing the process, the mediator has to police some limits on how the parties treat one another person-to-person.

That said, some portrayal of negative emotions across the bargaining table – anger, disgust, hostility and so forth – often accompanied by aggressive behaviours – raised voices, table-thumping, and the like – as expressions of disapproval of something seen or heard from the other side have been part of
labour negotiations in most jurisdictions for many years. Sometimes a dysfunctional part, but other times not.

When somebody loses their cool in negotiations, they might have blown it; or they might have very effectively demonstrated to the other party just how serious they are about the issue.

An element of personal aggression has been around long enough that it is seen by many experienced participants as a natural part of collective bargaining. It is not necessary for you as a mediator to try to eliminate this element, and some parties would resent it if you tried. To some extent, you have to be prepared to let this sort of expression run its course, and to be unphased by it.

To go a step further, in many collective bargaining settings – though not all – the use of profanity, either casually or in anger, either occasionally or routinely, is accepted. You may find that the parties appreciate it as a part of the “earthiness” of the experience that, in a small way, connects them to one another. Again, where that is the case, it is not necessary or productive for the mediator to try to eradicate it.

The notion that a mediator should oversee a process that includes, as one component part, people yelling at one another, or hurling profanities at one another across the table, may seem to run counter to the concept of mediation as an entirely “safe” process for the participants. But, to some extent, that’s just the way it is.

There are, as discussed below, limits, but in many collective bargaining settings it is accepted that the limits are different than they are in other employment mediation settings. Certainly, it is fair to say that the mediation of collective bargaining disputes is amongst the most “robust” mediation forums that you will encounter. One more reason why many mediators find it the most challenging and rewarding.

**Keeping it in perspective**
How the mediator handles hostility or aggressiveness across the table – in effect defines and polices the limits of what’s acceptable – is a matter of judgment.
Occasionally, as discussed in an earlier section, your mediation role may be limited to sitting on the sidelines, offering a bit of technical advice. However, if you are in a typical collective bargaining mediation role, you will be effectively managing the negotiations process. In that role, you must not only control the process, but you must be seen by the parties to be controlling the process and keeping people in order, including largely protecting people who need protection from inappropriate attacks. If you don’t manage the process this way, then you lose your status in the eyes of the bargaining teams, and with it you lose much of your ability to influence the parties.

But you also have to allow people to “vent” sometimes because, as noted, it is often a part of the process. It is sometimes necessary for emotions to be aired – on what is seen as the other party’s abuse of the process, or on an issue, or indeed on the way they feel about a person – before progress can be made towards a settlement. So sometimes the venting is not a barrier to settlement; it may be more in the nature of a checkpoint that has to be passed through to get to a settlement.

Some aggressive behaviour will be contrived and purely tactical, but that has been a part of labour negotiations forever, as well. A member of a bargaining team may be “let loose,” sometimes in an apparently out-of-control way for the purpose of impressing the other party with the strength of feeling about an issue or pulling the other party into line.

Sometimes an advocate will direct some aggressiveness at the opposing advocate or team across the bargaining table, when in fact the real audience for whom the performance is intended is his or her own team members.

In many such instances, an experienced advocate on the other side will read the performance for exactly what it is and either accept the “spray” or respond in kind, depending on what role is called for. It is not unknown for the advocate on the other side to have been alerted to the fact that the “spray” had to happen, and was on the way.

Experienced negotiators would often see this dimension to bargaining as part of the fun of the profession. As a mediator, you need to accept that it occurs and allow for it. See it for what it is, and take it in stride. But when it threatens to get out of hand, you need to call a halt to it, adjourn the meeting, and talk to the parties separately about it.
Particularly if you sense that hostilities across the table are going to be an issue in the negotiations, you may want to tell the parties up front how you intend to handle it: “I appreciate that this process brings out emotions, and it's got to be okay for them to be expressed. I recognize that people feel strongly about these issues. So there will be times that I will let behaviour go that you may not like. But if we get to the point that I think that people’s behaviour towards one another is detracting from what we are here to do, then I'm going to intervene and I'm going to ask you to stop it. And if I do that, I expect you to stop it. If you don't, then I'm going to call a break and ask you to explain to me how your behaviour is moving us forward.”

It is important then that you follow through if things do get out of hand, and restore order: “I'm sorry folks, but I have to say that the way that you are treating one another has gotten to the point that it is not acceptable to me. I understand that you are both serious about the issues. I understand that you've been at it a long time, and you are feeling some frustrations. I don't mind people losing their temper or raising their voices occasionally. But I am not going to chair a riot. So I want an adjournment, and I want to talk to each of you separately.”

**It is a matter of judgment**

As a mediator you have to make a judgment as to when behaviour goes beyond what is acceptable and functional for the process. Like most judgments, that is largely a personal thing that gets fine-tuned with experience. But senior mediators have some guides to judgment that they employ.

One suggested that the mediator ponder the following question: “Will something that has just been done or said be remembered a week from now in a way that does damage to the relationship between these people or these parties?” If the answer is “yes,” then it is probably time to intervene.

Another guide to making a judgment call is to think in terms of three stages of negotiation, all three of which might be played out in mediation. You might also find this framework useful in explaining to the parties your approach to putting limits on aggressive behaviour. The first phase of collective bargaining is advocacy and expression, and in this phase some aggression and antagonism is OK in forcefully representing a party’s positions and interests.
An earlier section described how effective negotiators switch from pure advocacy mode to settlement mode during the course of negotiations. The same thing has to happen to the negotiations themselves. So at some stage the negotiations need to turn to exploring options as the second phase, and eventually to finding solutions and translating them into settlements as the third phase.

While aggressive posturing and language across the table can be a routine part of the first phase, it is generally unhelpful in the second and third phases. At least at a conceptual level, most people can understand that difference. If aggression or argument more suited to the first phase surfaces in these later phases, or the discussion is drifting back to an unproductive level, it might be appropriate to remind the offending party that the negotiations have moved on from the debate phase.

**Personal attacks are usually off-limits**

As another guide to making a judgment call, it is usually appropriate to call a halt to aggressive behaviour or language when it is directed personally against someone across the table, rather than targeting the positions or issues or activities of the other party. Generally speaking, personal attacks are unprofessional and unhelpful to the process and the mediator will want to rule them out of bounds.

But even here, the mediator needs to be alert to what is going on and to exercise some judgment.

Some people who offer themselves as collective bargaining advocates have reputations – indeed, may relish such reputations – that precede them into any given set of negotiations: “the guy who took on the unions and cleaned up the industry,” or such like. In a sense they might be seen to have set themselves up for a personal attack for who they are, because who they are has come to personify what they represent. It is unrealistic to believe that they are never going to take abuse. Even then, however, attacking the person would usually be seen as hindering the settlement process and, at least once a couple of arrows have hit the target and made the point, the mediator would normally want to step in to stop any further personal abuse.

Sometimes a particular person will actually be a barrier to settlement or someone will be so disliked by the other party for something that he or she
has done that, as a practical matter, no real progress is going to be achieved until that point is made and acknowledged. It may be that it simply has to be said across the table that that person is a disliked or disrespected person who is seen as a stumbling block to settlement. It might be quite dysfunctional and resented if the mediator tried to disallow that expression. But again, once the point has been made, it is important that the mediator curb any further personal attacks and redirect the parties to the issues and the process, including finding ways around the stumbling block. Perhaps, for example, the offending party has to be moved off center stage, at least temporarily, if that is a realistic option.

**Interpreting aggressive behaviour**

The bottom line is that some degree of aggressive expression across the table is natural and even necessary in many collective bargaining settings. At times, the mediator may not only have to let aggressive behaviour run its course, but may also need to interpret it for the other side: “Look, it’s not really you he’s talking to, it’s the people behind him. He is putting on a show for his team members. Just ride it out. Let him have his moment. Now is not the time to get upset about it. If you need to respond to it, do it later.”

In offering that sort of interpretation, the mediator is taking much of the sting out of the aggressiveness and avoiding an overreaction by the other party that could escalate for reasons that don’t really have much to do with either that party or the issue itself. And, of course, at the same time the mediator is continuing to build credibility on the basis of demonstrated expertise in understanding the subtleties of the bargaining process.

As an aside on the same theme, a mediator’s interpretation to one party of the behaviours of the other party is a basic technique that goes well beyond this sort of negative behaviour. Parties want to know things about the other party. Some of this is just curiosity, but in other circumstances they want to be sure that they are not being “had”. So they might want, for example, to know what the other party is doing in caucus, and why they have been gone so long – something that often causes some agitation. Within the obvious and sacred limits of confidentiality, you may want to interpret that for them.

Let’s assume that you are aware, from having spent time in the caucus, that the other party has been working on what should be a reasonably attractive proposal, but is not in a hurry to come back to the table and present it. If the
progress of negotiations could benefit from the first party sweating a little longer, then you may not want to say anything too encouraging about what the other party is doing in caucus.

But if the progress of negotiations could, in your judgment, benefit from the first party receiving a boost in hope and encouragement, then you might be able to interpret the long absence for them: “Well, I know that they have been working hard on a proposal for you. But they have some limitations that they have to work around, and that can take time. I’ve always found that if there’s a chance somebody is going to give you something, it’s usually best to let them take as much time as they need. Hopefully, when they eventually get it together, it will be something that you can work with.”

Part of what the mediator is doing with this sort of interpretation is giving a party an insight into and appreciation of the dynamics that are happening on the other side, so that they can start to appreciate the other side’s needs, the pressures they are operating under, and the other side’s interest in and concerns with the issues under negotiation.

The other part of what the mediator is doing is shaping the party’s expectations by the phrasing used. If, for example, given what you know of the proposal that is on the way, you sense that it is going to generate a level of disappointment and anger that might derail the negotiations, then your interpretation of what the other side is doing might be phrased to lower expectations for the coming offer, and talk down its importance in the scheme of the negotiations.

What you are doing in effect is managing expectations to avoid unnecessary hostilities that would damage the bargaining process.

Testing the parties’ positions on the issues

*Beyond the initial audit, how does the mediator go about examining and understanding the parties positions or thinking on the issues, and testing whether and to what extent there is any flexibility?*

As a part of the initial audit when first coming into a collective bargaining dispute, you will have established what issues remain unsettled, the parties’ present positions or thinking on those issues, and at least briefly the reasons
behind their positions. But beyond that initial point, the mediator needs to start working to identify what are the key issues – those without which a party can’t settle – and to explore where the parties might be prepared to go on those issues or how their needs might be met in other ways.

How the mediator goes about that does not need to be particularly complicated. Basically, you probe. You have had each of the parties list outstanding matters. That is step one. The probe is step two: you start to explore those issues with each party: “You’ve got five outstanding issues here. Let’s talk about which two are the most critical to you. And if we could get some movement on those two, why don’t you just let the other three go?”

In making that sort of probe, you are not necessarily expecting the party to agree to waive three of the five issues. But you are encouraging them to think about bargaining – the likelihood of settling without all five issues, what their priorities are, which ones they could settle without – and ideally they will indicate to the mediator which are the key issues and which ones they are more flexible on.

Step three, you start a neutral examination of the bases for the claims and the importance of the issues to the parties, what they actually mean in terms that matter to the parties: “How many employees are actually covered by that clause? How much work do you do on Saturdays? What would be the effect of making the change that they are asking for? If I understand it correctly, if you gave them what they are asking for, the net effect would be that one employee would have to come in at seven o’clock on a Saturday instead of nine o’clock. And if it was rotated, each employee would be affected once every ten or twelve weeks?”

In part the mediator is attempting to understand what the issues mean for the parties. But in part this sort of exploration also serves to put the impact of the issue in perspective. If the other party’s position can be seen to have a valid operational reason, and to have an impact that is not outrageous, then that opens up the possibility that maybe there is room to move there.

Step four, particularly if there is no evident room for movement, you start to examine, on the basis of what the issue means to each party, whether there are alternative ways to meet a party’s need that won’t cause so much trouble for the other party.
Much of this probing activity is done separately in caucus with each of the parties. The mediator is looking for each party to reveal information on issues and priorities in the confidentiality of caucus that the mediator is not necessarily going to be authorized to share with the other party.

Sometimes, though, you may want to initiate discussion of an issue when everybody is at the joint bargaining table, so that there is some debate between the parties that keeps each honest in terms of the implications and costs of the proposals that are on the table. The mediator then takes that information into the separate meetings with each side and examines the issues further through the steps outlined above, moving from issue to issue, and back and forth through the steps.

**Spotting the key issues**

The best way to identify the key issues is to ask the parties in the systematic sort of way described above. But there may be other clues to what are the make-or-break issues in the negotiations.

One source of clues is in identifying the key people for each of the parties, something that the mediator begins to do from his or her initial audit on entering the negotiations, and continues to assess thereafter. You want to know who people are and what positions they hold with the employer or the union or both. You want to observe them at the negotiating table and especially in caucus, and see who is carrying the formal authority and the informal influence.

Calling for a short line-out can sometimes help to identify the influential players. Often short line-outs are called with just the lead advocates for the parties, but that isn’t always the case. Sometime issue experts come along. Sometimes you need more than the advocates, for a wider representation or perhaps just to protect the advocates with their teams. Suggesting – perhaps almost as an apparent afterthought – that the advocates might want to bring one or two others with them, particularly when you call an early lineout over process, can often give you a good idea as to who is important on the team.

Ultimately, in identifying the key people on the teams, you want to know what issues are important to them. While you can accept that most people negotiate for the greater good in collective bargaining, it nonetheless helps to know what issues affect people, and especially key people, directly.
The production manager knows what is needed in the way of rosters and isn’t going to come out of the negotiations with anything less. The financial controller might have limited interest in rosters as such, but a keen eye on overall payroll cost increases, while the industrial relations manager serving as the advocate may have different interests again.

Likewise on the other side of the table, the union delegates may be in different jobs, different plants, different points on the pay scale, or closer to retirement or redundancy than the next delegate. Look for the key people and the issues that matter to them.

**Identifying hidden agendas**
Sometimes the agendas will be hidden still deeper than that and the mediator will have to probe a little deeper to find them, and so to understand the parties’ thinking on the issues. You should, for example, be alert to any possible implications of a settlement beyond the union’s membership, and perhaps even beyond the employer involved in the bargaining.

Is the employer thinking that any improvements agreed to for the union members are going to have to be passed on to non-union employees. Some employers will feel, particularly on some issues, that there is no legitimate basis for denying non-union employees something agreed to for the union employees.

So in negotiating the issue with the union, the employer may be looking at double or triple or quadruple or ten times the cost of providing the improvement to just the employees represented in the negotiations. And in terms of overall staff morale and well-being, uniformity may be an important value for that employer, and the extended cost – rather than the obvious cost sitting on the bargaining table – may be what’s behind the employer’s reluctance to concede the issue.

On the other hand, a union may be in competition with another union for membership amongst the employer’s employees, and may see a particular issue in the negotiations as a defining issue that will separate this union from the other. Not only then is the issue much bigger to the union than the twelve employees who would be initially covered by the agreement, it also has implications for the employer being whip-sawed on issues by the two unions.
Employers can sometimes be subject to the same sort of pressures, knowing that to step out above the market in negotiating a contract with the union is likely to bring the wrath of the industry down on them.

Oftentimes these background factors won’t be discussed at the bargaining table, and the mediator will have to tease them out privately from a party’s advocate or in caucus. But sometimes they are more important in understanding the positions that the parties are taking than the issues themselves, so you have to get to them.

When an issue represents a membership-building strategy for the union rather than an extra benefit for twelve people, the value to the union of a “win” on the issue may be far higher than is evident on the surface or on the basis of what the employer is hearing across the table.

Sometimes the mediator, in looking for solutions, might have to interpret these things for the other party: “Why do you think that the union is so strong on this particular issue? They’re not backing off it at all. It looks like a lot bigger issue to them than it deserves to be. What do you think is driving it? Maybe they are looking for something to separate themselves from the other unions, and bring some more of your people across to this contract?”

Again, of course, a mediator would be careful not to carry information that he or she has had volunteered in one caucus across to the other one without authorization.

But at times a party will be unable to fully appreciate the strength of the other party’s resolve on an issue without hearing what the true agenda is, and under those circumstances it may be in everybody’s interest that the mediator be authorized to carry the message that the union has been unwilling to communicate directly: its not about these twelve employees, its about a membership drive; and that’s why we need it.

**Bridging the gaps**

In trying to promote a settlement in collective bargaining, what are some of the mechanics and techniques that a mediator uses, beyond the initial audit, to bring the parties’ positions together?
As described above, a mediator works systematically through the issues, meeting with the parties jointly, and in separate caucus sessions with each team, perhaps occasionally calling a short line-out where appropriate. During this process, it remains important that, as the mediator, you keep track of the issues jointly and with each party. Use whiteboards or some other visible system.

Many mediators use three lists: “settled” (including issues that are settled through withdrawal), “unsettled” (those that are still being actively worked on), and “parked.”

Parked issues are those that are on-hold for the moment for any one of a number of reasons. You may need to just get past an issue for now because no solution is emerging and it is threatening to close down the whole process. Or you may sense that an issue will tumble into place or off the table when some others settle, or will at least take on a different value when others are cleared up and thereby generate different options for settling it. Or sometimes you just don’t know where to go with an issue, or you think that the parties aren’t yet ready to settle it; either way it needs some time. A key is to keep the parked issues visible. You can’t forget them or allow them to become isolated but unsettled at the back end of the negotiations. Meanwhile, you keep working with the parties on the active issues.

How does a mediator move the parties’ positions or thinking on an issue? Well, a mediator can’t change a party’s position; only the party can do that. What a mediator can do is influence the thinking of the parties in ways that might cause them to change the way they are looking at the issues and perhaps re-evaluate their positions.

**Interpreting proposals**
Sometimes, when a party presents an offer, the mediator will need to go through the offer with the other party, translating it and interpreting what it means for their constituents, to ensure that the receiving party is reading the offer accurately. The mediator will often have the benefit of having been in a caucus when offers were being developed, and so knows what was intended.

Failures of communication are far from the only reason for breakdowns in collective bargaining, but they are one reason, and they ought to be the
easiest ones for a mediator to fix, as long as you are alert to them. Ensuring that a party is accurately reading a proposal and what it would mean in practice is one way a mediator can minimize communication failures.

In explaining and interpreting an offer for a party, you do need to make sure that the parties themselves nonetheless take ultimate responsibility for what the language means, and that they have a common understanding about that. If you don’t take care with that, you can be put in the position – either during the negotiations or when a dispute arises – of being called on to testify or arbitrate on what the offer or the language was intended to mean, and effectively on what the parties agreed to.

So often the best approach to interpreting an offer for a party is to bring the two bargaining teams or the two advocates together for the presentation of the proposal, with the mediator asking the “dumb” detailed, clarifying questions to establish exactly what the language would mean in practice: “This is second nature to you guys, but let me see if I understand this . . . under the language that you are tabling, if someone was held over for back-to-back shifts they would be guaranteed a minimum break of twelve hours before they could be required to come in again . . . either on a scheduled shift or on a callback . . . absolute guarantee, no exceptions. Is that how it would work? Is that how you both understand it?”

What the mediator is doing is having one party explain the proposal and what it means in practice in front of the other party, prompting further clarification if the mediator senses that there might be any doubt or confusion, and then having the two parties endorse a common understanding of the proposal.

**Fine-tuning language or proposals**

Sometimes a mediator can help promote settlement of an issue by providing the wording that does what each party needs on an issue. This requires that the mediator understand the issue, and be aware of language commonly used to deal with the issue and the problems that each party has with the issue. With those resources, the mediator can sometimes come up with the right language when the parties – because of inexperience with the issue, or lack of drafting skills, or because they are defensive with one another – are unable to do so themselves.
Oftentimes it will be sufficient for the mediator to just work from the language that the parties are sparring around – identify each party’s remaining problems with the issues, or suspicions as to how the language may be used against them, and “think out loud” as to how the language can be “tweaked” to meet the objections and do what the parties want it to do.

One caution is appropriate: when negotiations are bogging down over a piece of language, it can be tempting at times to patch together some language that satisfies the two parties at the moment, but that in the long haul is going to cause problems, and have to be interpreted and probably litigated. The parties are likely to be even more anxious than the mediator to get past the blockage and may be inclined to grab whatever compromise language the mediator comes up with. Tedious as it can be at times, it is really up to you as the mediator to walk the parties through the new language to make sure it really does the job. If it doesn’t, then you have to keep working at it.

While the mediator brings understanding and expertise to this sort of situation, you don’t want to put all the pressure on yourself to find the answers. Part of the reason for your approach is to get the parties themselves to recognize the problems that still remain with the issue. You want the parties to “think out loud” with the mediator in an effort to address the problems they see, but each still achieve what they need to on the issue.

Sometimes a mediator can promote settlement of an issue by fine-tuning the substance of an offer that a party is contemplating making.

Fine-tuning might, for example, make more effective use of the money in an employer’s pay offer: moving the money around a bit so that it benefits more employees more immediately (take it out of a proposed long service incentive and bolster the base pay proposal a bit), or benefits important decision-makers in the union bargaining team or membership (maybe move more of it into a long service incentive), or is more attractive to employees at the same price (push some part of the proposed pay increase back six months, allowing for a greater overall increase in the base at the same cost over the term of the agreement).

What precise fine-tuning is appropriate clearly depends on the circumstances. What the mediator is bringing to the situation is an ability to
think dispassionately about the issues and about how to massage what is on offer to better meet the needs of the parties.

**Searching for compatibility**

Stalemates occur in negotiations for a number of reasons. Sometimes they happen because the parties haven’t been communicating effectively. Where this is the case, a mediator can bring some order and systems to the process, and if necessary do some interpreting to avoid miscommunications.

Sometimes breakdowns occur because, given the parties’ interests and priorities, a settlement is in the works, but they just need agreeing on the precise terms. They haven’t got the formula right yet. Here, a mediator can help the parties by such techniques as providing sample language and suggesting some reshaping of offers.

But not all collective bargaining disputes are so easy to resolve. Sometimes breakdowns occur because the positions being taken by the parties appear to them to be incompatible, and neither party can see anywhere to move from where they are.

The mediator’s role here is to look for compatibility where none is apparent to the parties, and to translate any compatibility uncovered into settlements. But where there is only genuine incompatibility, the mediator has to try to change the parties’ thinking and positions. Now the mediator’s inquiries of the parties may become a little more challenging.

Sometimes a mediator will challenge a party to look at the issue from the other party’s point of view, often in terms of the issue itself and what it means to the other party: “You know, you’re going to do this guy. Have you thought about what the other side needs to settle this? Both sides have to eat. You are not giving him any place to go with the position you’re taking. You are giving him nothing to take back to his people, and he’s not going to get a ratification. Where do you intend to go from there? These are your employees. Are you willing to starve them out? Because unless you are prepared to loosen your position, that’s what it is going to take.”

What the mediator is attempting to do is have the party appreciate that, as a matter of human nature and bargaining reality, the other party also needs to achieve something out of the negotiations. That is obviously intertwined
with the substance of the issues under negotiation, but it is also a separate need that has to be understood and accommodated in its own right.

Or a mediator may try to get a party to look at the situation from a neutral perspective:  “OK, now let’s assume for a moment that you’re being interviewed by the media in the middle of the strike next week. How would you explain to the public your position and why there are no services available to them?”

Or: “What am I supposed to say if my boss calls me tonight and asks why this hasn’t settled?”

In each case, what the mediator is trying to do is force the parties to question the foundations of their own positions, to re-evaluate them and see whether they are really entirely defensible.

And the same questions can be put to both parties: “If we take this dispute out of the bargaining room into the public arena, how is it going to play?” And if the answer is that maybe it might not play so well, then you might want to rerun steps one, two, three, and four of the earlier section: “Let’s take a look at what alternatives we’ve got. And I’m not asking you to agree or disagree to anything at this stage. But let’s just sit down and take a serious look at all the possible ways we can handle this.”

In taking this sort of approach, you are not necessarily expecting that a party will suddenly see the light: “I’ve been such a fool!” In fact, more often than not, both parties are likely to think that the explanation they would give the media sounds righteous enough. But the mediator is getting them to think about their positions.

It is another part of the mediator’s probing technique. You are looking for any of the following things: compatibility in the parties’ positions on any given issue, or compatibility in their priorities across the issues that might suggest that an exchange is possible, or flexibility in their thinking that may suggest a way forward, or hints as to alternative approaches that may meet a party’s needs.

If a mediator finds compatibility because the parties put different values on issues, in other words they each value different issues most highly, then the mediator can work towards an exchange on these issues: “I know that you
don’t want to give this away, but something is going to have to give if we are going to get an agreement. If you can authorize me to say to them that, in exchange for A, you would be prepared to accept their positions on B and C, I think that I can get you A. And I know that’s a big one for you. But I need to be able to say to them that you will give them B and C.”

And to the other party: “I know that you don’t want to give this away, but something is going to have to give if we are going to get an agreement. If you are prepared to give away A, I’m pretty sure that I can get you a deal on B and C.”

What the mediator is doing first is, largely through his or her separate discussions with the parties, establishing that there is some compatibility in that the parties place their highest values on different issues. Having established that, the mediator is then moving to put together a deal that delivers for each of them on their highest priorities at the cost of some concessions on issues that matter less to them.

**Lowering expectations**

In an ideal world, the parties’ priorities would be exactly opposite and successful mediation would consist of pairing up the issues for exchanges in this fashion. Unfortunately, in most mediations, that is only going to take you part way to a settlement. When you have exhausted the possibilities for exchange, then you are down to the tough issues where somebody is going to have to settle for less – not merely less than they wanted, but often less than what they thought was their bottom line. This is way beyond just tidying up the parties’ communications. It involves a lowering of the parties’ expectations.

A mediator can only go so far in lowering a party’s expectations. Few bargaining parties can be talked into walking away with nothing, or with something that they know to be insulting or disrespectful in substance. And it is not a mediator’s role to talk a party into doing that. But sometimes in the heat of collective bargaining, parties can confuse what is a good deal with what is an acceptable deal. It’s the deal that is acceptable at the end of the negotiations, not the ‘good’ deal, that represents the bottom line. So in many negotiations, the parties’ expectations can be lowered during the course of the negotiations and still see them come out with an acceptable deal.
It is in these negotiations that a mediator can work with the parties through pretty much the same steps as discussed earlier, but now at a different level: “In an ideal world, you could walk away with all these things. But this isn’t an ideal world and it’s pretty obvious to all of us that you are not going to get all of these things unless you’re prepared to go to war with these people. So let’s take another look at what we really need to settle it, and where you might be able to give some things back to them. Let’s go back to the whiteboard, and you tell me which ones are your absolute ‘must haves’ ...”

**Mediating in the face of a strike**

Sometimes, despite the best efforts of the mediator, the parties aren’t able to resolve all issues in the normal course of the negotiations and the prospect of a strike (or other work interruption, or even a lockout) becomes a reality. How does this affect the mediator’s approach? Does it generate additional issues that the mediator has to be concerned with?

As a mediator pushing parties towards agreements, there will be times when you find that a bargaining meeting reaches the point where nothing productive is any longer being done. It may be ten or eleven at night, or just another meeting in a long sequence, the parties are mentally and physically exhausted, no further agreements are coming, tempers are fraying, the union team is looking for its media contact list, and a strike is on the horizon.

At such times the mediator has to recognize that bad things are more likely to happen than good things if the meeting keeps going the way it is. You may want to call a halt to the proceedings and calm the parties down, but make sure that you don’t lose them.

Suggest a plan: “Look, you know, I think we should just take a break. You’re going to have to agree to disagree tonight, but before you do anything, think through the consequences. So let’s take twelve hours to think about it. Let’s get back together at noon tomorrow just to be sure that the issues still look the same to you, and you’ve thought through the consequences, and you don’t see any options. In the meanwhile, I’m asking you please not to do anything until noon tomorrow.”

What the mediator is doing is trying to ensure that the parties don’t make bad decisions under the influence of tempers and fatigue, pushing for a
cooling off period, and giving the parties time for some sober reflection on the consequences of escalating the dispute. Though it is now at the sharp end of the negotiations, the process is much the same as earlier – the mediator is still probing to identify any remaining flexibility in the parties’ positions.

**Confronting the consequences of a strike**

For the same purposes, a mediator can more pointedly force the parties to confront the consequences of taking strike action by outlining the reality that at some stage the strike will be over, and asking “what then?”: “Ok, we know what’s going to happen if we don’t get it resolved here today . . . Let’s assume we can’t get it done, and you go on strike. One thing we know is that at some stage you’re going to be back at the table, you’re going to be looking at the same people, the issues are going to be the same. Your members will have lost three days pay so their expectations are likely to be higher, not lower. You’re still going to have to compromise to settle it. Isn’t there anywhere you can go before it gets to that point?”

This sort of exchange with the union team would ordinarily be occurring in caucus or in a one-on-one meeting between the mediator and the union advocate.

The mediator would be working away with the employer team as well, again making sure that they had fully confronted the consequences of a strike and its affect on the options open to the employer: “Ok, we know what’s going to happen if we don’t get it resolved here today . . . there’ll be a three day strike this week and another one the following week, and at some stage we’ll be back here looking at one another. You can guarantee that your relationship with the union will be much worse. Your relationship with your staff will be much worse, and that could take years to fix. Are you absolutely sure that there is nowhere you can move, even a little?”

And, in addition to pushing the parties this way in private, the mediator might also pull the parties together to jointly consider what a strike would do to their relationship, and to disabuse them of the idea – one that parties often have – that a strike will somehow greatly expand their options.

There are many potential negatives that can flow from strike action, and the mediator might focus on them in an effort to get the parties to finally rethink their positions.
For example, despite all the best planning, things often go wrong for the parties during a strike. In a high profile dispute, the media may turn against a party; if it is the union, that can demoralise the striking members and weaken the strike. People can be hurt or die. Someone else can do the strikers’ work, minimizing the impact of the strike and taking much of the pressure off the employer, at least short term. On the other side of the coin, an employer’s customers can go to a competitor, and they may not return. Business and jobs can be lost. There are a lot of potential negatives that can be avoided if a settlement can be achieved without a strike.

It is worth forcing parties to confront the fact that their options after the strike may not be all that attractive: “After six days of strikes, with another three days scheduled the following week, are you going to change your position and give them more? What sort of message is that going to send? If there is any chance of further movement, let’s talk about it now . . . don’t wait until the damage is done.”

And to the union: “Let’s say that after your members have given up six days pay, you come back to the table and you change your position. What sort of message is that going to send to the employer? You need to be very sure that you really want to get yourself into that sort of position.”

Virtually all strikes eventually end in an agreement that involves one or usually both parties compromising their pre-strike positions. A party never gets more after a strike than they were asking for before the strike. The parties usually each get less and they suffer the strike costs as well. At the death, a mediator will try to get the parties to confront that reality as a close-to-final spur to reconsideration of the parties’ thinking and positions.

Accept the inevitable
That said, the point should also be made that, in mediating under threat of a strike, you don’t want to push so hard for an agreement (even to avoid a strike) that you push parties into agreeing to things that they won’t be able to sell to their constituents, or agreements that will fall over before a final deal is signed and sealed. At some stage, the mediator may have to accept that it is the parties’ dispute, not the mediator’s, and maybe they need to be left alone to fight it out for a while.
At that stage, it might be appropriate for the mediator to acknowledge to the parties their right to engage in or take a strike, making clear that you, as the mediator, are not particularly troubled by that – you accept it matter-of-factly as something that is going to happen – and avoiding passing any judgments or condemnations of either party in relation to the strike (or lockout). But always leaving an opening for the parties to back off. So, perhaps, to the union: “Look, if you are going to strike, you’re going to strike. It is neither here nor there to me. I’m not going to lose any sleep over it. You’re perfectly entitled to go out on strike. Just make sure that your members appreciate that going out is the easiest thing in the world . . . And coming back with your head up and with some gains in your pocket is one of the hardest . . . But if you’ve got to go, you’ve got to go.”

And likewise to management: “You know, if this strike is going to happen, it’s going to happen. It is probably as good a time as any.” A mediator should also keep an eye to the future relationship between the parties, particularly where the strike is just a hiccup in a usually good relationship. You should work to put the strike in perspective and depersonalize it to the extent possible: “It is not a personal thing against you; they are simply taking their legal right to strike as a part of the bargaining process. We’ll all get through this eventually, and you will be back working together for many years to come.”

As a mediator, you can also educate the parties to understand strikes, and that helps put a strike in perspective as well. Strikes generally aren’t economically rational. Usually, one or both parties lose more than they will gain – at least in the immediate future – from the settlement after the strike. A strike over working conditions or rules may have no economic benefit at all, so if an employer tries to analyse it solely in terms of wages lost, he or she is likely to make some mistakes and misjudgments in dealing with it.

Likewise, the mediator might have to help the union understand the employer’s reaction to a strike or strike threat. An employer may well be prepared to take the economic loss that a strike will bring in order to make the point that this employer is not going to be pushed around. And that might be an emotional reaction by the employer, or it might be a more calculated investment for the future. Either way, a mediator can help the negotiations process by ensuring that neither party misunderstands the other’s thinking.
But give them every chance to call it off
While it is important to be able to take a strike in your stride once it becomes inevitable, you should take every opportunity as a mediator to provide the parties with a way out if they are looking for one. One technique is to lead the negotiating team through a stocktake of how well they have done: “You’ve got the fourth week’s leave, you’ve got the safety boots provided, you’ve got three percent on the table that your troops don’t have in their pay packets at the moment . . . A lot of contracts have been settled for less than that.”

You also owe it to the parties to make sure – again without passing any moral judgments – that they understand the potential downsides of a strike (or lockout). There is the loss of pay or productivity, of course. And there is the potential that what’s on the table will be pulled off in the event of a strike.

But, beyond that, they need to understand, too, that the antagonisms of the strike are just the visible parts of the damage being done to the employer-employee relationship, damage that can endure for many years. That can sometimes come home as a pretty stark realization to the operations people on the management negotiating team facing a strike, even if the lead advocate is relaxed about the prospect.

The idea that “your people” are going to hate you for years to come, and that that is going to be reflected every day on the shop floor, can be a sobering thought for a manager toughing out his or her way towards a strike.

It may sometimes be tempting in these late stages, where the mediator is looking for allies who might assist in avoiding a strike, to take advantage of internal divisions in negotiating teams – the operations manager concerned about future implications versus the gung-ho advocate confident of the employer’s ability to handle a strike; or the union leadership with a broader agenda than the workers. The advice offered earlier applies equally at this late stage. It is usually unwise, and always dangerous for the mediator to try to split the advocate from his or her team, or to get in the middle of a split that is opening up, even if the potential payoff might appear to be avoiding a strike. The strategy will usually bounce back on you, and is certainly best avoided by mediators new to collective bargaining.
In effect, the mediator confronting a seemingly-inevitable strike, has to do a balancing act, expressing empathy with each party and the party’s position, never condemning a decision to strike or to take a strike or to lockout, and never pressing to the point of denying a party’s legal right to take the action, but still continuing to press the reality check in a variety of ways, giving the parties every opportunity to abort the action if they want to, and to settle the dispute.

Refusing to negotiate during a strike
As a mediator in a strike or pre-strike situation, you will sometimes come across an employer taking the position that there will be no negotiations as long as a strike continues, or until a strike notice is withdrawn. The employer’s psychology is that to negotiate under a strike or strike threat is to reward the action and thereby encourage it, in this dispute and perhaps in the future as well.

Some employers will take this reasoning further to the point of saying that there will be no change in position following a strike, again because to reward a strike is to encourage strikes. Of course, strikes do sometimes change values and employers taking this position often find that – unless they are prepared to starve their employees into submission – they do in fact modify their positions in the interests of reaching a settlement following, if not during, a strike.

The employer taking a “will-not-negotiate” position during a strike or in the face of a strike notice can pose a real challenge for the mediator, particularly where a strike is called for an indefinite period or “until agreement is reached”. Where a strike is for a defined period – twenty-four hours or three days or some other finite period – the “will-not-negotiate” position is obviously less threatening. This is the sort of strike where the parties know the limits of their sacrifices during the strike, and it is often just as well to wait out the strike and reconvene negotiations on the other side, unless, of course, one party wilts during the strike.

Where the strike is for an indefinite period, or where a strike is likely to result from a “will-not-negotiate” reaction to a notice of intention to strike, then a mediator might need to be more inventive, and of course may not succeed.
A union sees its strike or strike notice as providing bargaining leverage. Calling off an indefinite strike without an agreement can deflate a membership that is keyed up for the strike. Most unions are not in a position to call members out on strike and back again at will. It is often the case that once the momentum is gone, its gone. Union leaders understand this psychology, and where it applies, will be reluctant to call off the strike in response to a “will-not-negotiate” position adopted by the employer. Likewise, a union will ordinarily be reluctant to pull a strike notice, if only because the whole process will have to be restarted if no agreement results from the resumed negotiations. Again, union membership momentum may well be lost.

Where that leaves the mediator – and indeed the negotiators – is waiting for one party or the other to fold, or engaging (when the time is right) in informal negotiations or “negotiations that never happened.” You may have to explore ways in which an offer can be informally put to the union and reaction informally gained from the membership, to be formally enacted after the conclusion of the strike. At other times, the mediator might have to convene “negotiations that never happened,” and may even have to act as witness or guarantor to terms agreed for later “negotiation” and implementation following the conclusion of the strike, terms that include the protocols and discretions that necessarily accompany such elaborate arrangements. The effective mediator does whatever, within ethical limits, needs to be done to achieve an agreement for the parties, no matter how unconventional.

**Mediating and the media**

*How does the mediator deal with the media during a collective bargaining dispute? If the dispute is a highly politicized one, or one with a high public profile, attracting a lot of media interest, does that change the mediator’s approach, particularly in a strike situation?*

Generally speaking, the public and the media aren’t particularly interested in collective bargaining. They will, however, tend to be more aware in cases where a mediator gets involved, because mediation involvement is often a signal to the media that the negotiations may be in trouble. Even in these cases, though, you should not assume that the public or media will have a great deal of interest, and there is certainly little to be gained by stimulating interest.
In most collective bargaining situations, any effort by bargaining parties to influence public opinion tends to be instinctive rather than having any well-thought-out practical tactical value. The public will be interested if they are, or are likely to be, threatened or seriously inconvenienced by a collective bargaining dispute, but probably not otherwise. Even where public interest is aroused, there is usually little that the public can or will do to influence the dispute.

Like the general public, the media has only a limited interest in collective bargaining. The news media reports news, and isn’t much interested in anything else about collective bargaining. Television news is even narrower, being interested in news with good “visuals,” and unwilling to devote much attention otherwise.

So, in most collective bargaining cases, there is usually not a lot of point in the parties attempting to negotiate in public, and the mediator should discourage them from doing so from the outset of his or her involvement. Try to get agreement that the parties will refrain from public or media statements, at least as long as the effort to mediate the dispute continues.

You should point out to the parties that, while there is little for them to gain by going public with their dispute, there are some dangers they run by going to the media. First, there can be no expectation by the parties that their “case” will be presented fairly or even-handedly by the media. That will only happen in the unlikely event that it corresponds with what is newsworthy.

Second, the issues in most bargaining disputes are far more complicated than the public is interested in, and so the media will always reduce the dispute to its lowest common denominator, often highlighting exaggerated positions that both parties know to be negotiable.

Third, most advocates have no training in dealing with the media. As often as not, they are likely to say something under the pressure of a microphone that confuses or offends the public, or more importantly the other party. So there are lots of good reasons that the mediator can cite to discourage parties from negotiating in the media.
The media in high profile disputes

That said, it has to be acknowledged that there are some collective bargaining disputes in which the public and the media will have an interest, and where there will have to be some contact with the media.

As a mediator, you will become involved in some disputes where one or both parties are committed to using the media and public opinion to what they believe will be their advantage. This is most likely where there has been a real breakdown in the negotiations and in the relationship between the parties. In this type of case, you will often be able to do little, at least until the parties have fired their ammunition, and perhaps until the media has largely lost interest. It is no coincidence that most high-profile collective bargaining disputes get resolved only after the dispute has finally disappeared from the newspapers.

In disputes where there is a high public interest, but in which the parties have recognized that there is little to be gained by negotiating publicly, then the mediator may be more involved in “managing” communications with the media.

People are naturally interested in strikes in industries that are genuinely essential in the short term – police, fire, health, for example – or in industries where significant numbers of people are going to be seriously inconvenienced by a strike – education or transportation, for example – or where an employer is important to the local economy. The media will want to be able to report what’s happening in cases like these.

There are two ways to manage this more effectively than simply allowing each party to say what it likes. The first is to have the parties agree to issue periodic joint releases summarizing the progress of negotiations and the prognosis for settlement. If it is not possible to be precise – as indeed it usually is not – about the likely timing of a settlement, then clearly the terms of the release would need to be appropriately obscure. It is better to give no information than to give uncertain or wrong information. Accordingly, releases should be no longer than is necessary to say what is known to be accurate about the process.

There will seldom be anything to be gained by the parties from issuing even joint press releases that give any detail about positions or settlements on issues, beyond identifying what the issues under negotiation actually are.
Most people, including most media people, understand the notion of confidentiality of agreements. They don’t like it, but they do understand it, and can usually accept it. If some press contact seems necessary, and the parties are agreeable to issuing joint press releases, it may be necessary for the mediator to mediate the content of releases in order to get the agreement of both parties. Your primary objective should be to ensure that the drafting, issuing and reporting of the release does no damage to the negotiations and the prospects for a successful outcome. That will normally mean that the release should say only what is minimally necessary to any meet public information obligations that the parties feel.

The second option, and one generally best avoided if at all possible, is for the mediator to personally manage the media contact. This might be necessary where the parties acknowledge the advantage of not negotiating in public, recognize that the dispute is such that the media have to have something, but are unwilling or unable to compile joint releases. Where this is the case, essentially the same rules apply.

The focus of your comments should ordinarily be on the progress of the bargaining process, not on the issues or more particularly the parties’ positions on the issues. The focus should assuredly not be on the mediator or what the mediator thinks. Mediators have no (public) view on the issues or the positions or behaviours of collective bargaining parties.

Where dealing with the media falls to the mediator, you should consult the bargaining parties about your intended release or remarks, and keep them to the necessary minimum. If there is nothing appropriate that you can report with any certainty, then: “There is no comment that I can give you at the moment” is the proper thing to say.

Very occasionally, mediation itself and the fact that it is being provided to the parties in a particular dispute will become a focus for the media, perhaps particularly in circumstances where there is some political involvement or otherwise a high profile. These can be very difficult situations for the mediator and are not recommended for those new to collective bargaining mediation. Generally speaking, the same rules still apply. Avoid talking to the media if possible; doing so will seldom help you, the parties, or the process of negotiations. If talking to the media becomes necessary, say only what is minimally necessary and known with certainty. Focus attention on the parties and the process, not on mediation or the mediator.
Part two: mediation of rights disputes

Much of what has been said about mediation in collective bargaining disputes is also applicable to mediation of rights disputes. Mediation is mediation, and the employment relationship is the employment relationship. For example, a mediator entering a rights dispute will do an initial audit of the issues, the people and so forth. The mediator will make an effort to establish rapport with the parties, even though the relationship is likely to be of shorter duration than that with collective bargaining parties. A mediator in a rights dispute will clear blockages to communication and handle what are often, particularly in dismissal cases, hostilities between the parties. And, if a settlement is to be obtained, a mediator has to identify the parties interests and needs, test their positions and push the bottom lines, and ultimately bring their expectations together. All of this is much the same as what we have already discussed in relation to mediating bargaining disputes. The differences arise from the different bases of bargaining power in rights disputes.

In collective bargaining, bargaining power is derived from industrial strength – the impact of withdrawing labour or, from the employer’s perspective locking the workers out of their employment. That in turn is influenced by the nature of markets, essentiality of the product or service, the role of the particular workers in the production or delivery process, and other similar considerations. In rights disputes, bargaining power largely derives from the legal merits of the dispute. If my legal rights have been breached, and I can prove it, I am in a strong position in negotiations or mediation, just as I would be if the matter went to adjudication.

And my bargaining power in mediation really depends on just how well I would fare in adjudication. If I would win on all points in adjudication and walk away from the court or tribunal with a sizeable payout, I have little incentive to negotiate directly or in mediation. If the legal merits of my case are more marginal, such that there is a chance I would win in adjudication, but also the chance I might lose, or that I might win on certain points but realise little in remedies, then I might be better off avoiding that risk and settling for something less, but certain, in negotiation or mediation.

This sort of thinking is what is generally referred to as ‘litigation risk analysis’ and it is a common approach in employment rights mediation. It is, in essence a ‘cost-benefit’ analysis on the advantages of settling the
matter in mediation or taking your chances in adjudication. In part, of course, that depends on the deal that the other party is willing to make. This is a style of mediation that is referred to as ‘evaluative’ or ‘directive’ mediation. It is one of four types of mediation that you might encounter in employment rights or workplace conflict disputes.

**Styles of employment rights mediation**

There are fundamentally four styles of mediation that are regularly employed in employment rights or workplace conflict matters. They are given different labels by different writers but can usefully be termed therapeutic mediation, facilitative mediation, settlement mediation, and evaluative mediation.

Therapeutic mediation is perhaps the least proactive style of mediation. It consists predominantly of active listening, and is sometimes employed in situations of diffuse workplace conflict to encourage parties to express their concerns and emotions about the conflict. It is not a style of mediation that is of prime focus here.

Facilitative mediation is often favoured by proponents of ‘pure mediation.’ It is a relatively passive style of mediation in which the mediator takes as his or her appropriate role the maintenance of an environment ideal for fruitful discussions between the parties. In this style of mediation, the mediator seeks to empower the parties to control both the process and the outcome of the mediation. To enable this, the mediator will work to clear blockages to communication, will ensure that the environment feels ‘safe’ for all participants, and perform other functions that facilitate open discussion and maximize the chances that the parties will find their way to a resolution.

Any competent mediator entering an employment rights dispute should engage in facilitative mediation practices. The only question is whether the mediator should go beyond purely facilitative practices and play a more active role in leading or pushing the parties towards a resolution, and indeed in shaping what that resolution looks like. If the mediator does take those additional steps, then he or she is venturing into settlement or even evaluative mediation.

Sometimes, facilitative steps will only serve to clarify that the parties’ positions really are incompatible, even if their fundamental interests are not. More passive mediators or those equipped with only facilitative skills or inclinations may well walk away at that stage, accepting that that dispute is
the parties’ dispute, not the mediator’s. Any mediator is entitled to adopt that position at some point in an irresolvable dispute, but in most employment rights disputes, it is a bit early at this stage to walk away.

Settlement mediation involves adding some persuasion techniques to the facilitative techniques. A ‘settlement mediator’ will push parties to recognize that settlement is better than non-settlement, and will encourage parties to rethink and compromise their expectations and positions on the basis that without compromise there is not likely to be a settlement. Settlement mediation is obviously a more proactive approach than facilitative mediation, but a settlement mediator will also employ a full range of facilitative techniques as required.

Evaluative mediation takes settlement mediation a step further. It is the most proactive style of mediation, but it is often used in employment rights mediation and in other mediations that take place “in the shadow of the law,” which is to say mediations over rights and obligations that are based in law or contract. An evaluative mediator will push parties to recognize that settlement is better than non-settlement by pointing to the likely or possible negative outcome should the case not be resolved in mediation and have to proceed to be determined by an adjudicator. The mediator will use an evaluation of the merits of a party’s case in that persuasion. In doing so, the mediator will also be able to help in ‘shaping’ the parties’ expectations of what would be a reasonable outcome and, interimly, what would be a useful proposal at a particular point in the process to achieve that reasonable outcome.

Evaluative mediation is, then, the most proactive style of mediation and the one in which the mediator is most likely to be ‘managing’ the process of mediation, and even influencing the final settlement, although the parties ultimately have the final say over the outcome and its acceptability. Our discussion from this point forward will focus on evaluative mediation of rights disputes, but recognizing that evaluative mediators also employ facilitative, settlement, and even therapeutic mediation techniques.

**What mediators do in rights disputes**

A mediator can perform a number of functions in a rights dispute. First the mediator will, if necessary, bring some order and control to the mediation process. The parties may or may not have been engaged previously in
discussions about the dispute or in efforts to resolve it through direct negotiation. Either way, the mediator will take steps to make sure that the interaction between the parties is reasonably orderly and functional. This is not to say that the mediator will eliminate all emotive or heated conversation. Only that the mediator will ensure that the process is kept on track and with the best chance of achieving a settlement. Sometimes, indeed, the mediator might determine that that requires an emotional or heated exchange before any productive discussions can take place.

Relatedly, a mediator will facilitate and improve communications between the parties if that is necessary. That might mean removing blockages to effective communication, whether they be emotions, particular people, or barrier issues. It might also mean ‘managing’ tactically poor communications, such as a proposal made at the wrong time or expressed in a way that would be dysfunctional rather than functional if allowed to go forward.

Another sometime role for the mediator is in legitimizing the roles and positions of the parties. For example, an employer who has dismissed an employee for alleged theft may have a difficult time accepting the legitimacy of engaging in mediation with the dismissed employee, who is now wanting his or her job back, or wanting some sort of compensatory payment for unfair dismissal. A mediator can assist with perspective by pointing to the employee’s legal right to pursue unfair dismissal redress and legitimize the proceedings by emphasizing that the employee is likely to achieve little if he or she does not have a legitimate case.

It is often the case that the mediator will be required to ‘educate’ one or both parties about the processes of negotiation and mediation before any productive discussion of the issues and how they might be resolved is possible. Parties are often unfamiliar with the mechanics and conventions of negotiation, and sometimes uncomfortable with the ‘give and take’ and what appears to some people as ‘game playing’ rather than ‘getting directly to the point.’ In other words, some people are less patient with the dramaturgical elements of negotiation and mediation, and may be inclined to rush the process without giving due regard to the other party’s perceptions and expectations, both substantive and behavioural.

As noted above, another of the functions of the mediator in rights disputes is persuasion and the promotion of compromise to achieve settlement. A
‘litigation risk analysis’ of the merits of the case is an important strategy in pursuing this function. More on this below.

Relatedly, the mediator can often assist the parties towards settlement by devising or suggesting possible settlement options that the parties might not have thought of. Or sometimes by suggesting and taking authorship of proposals that a party or even both parties favour, but which for one reason or another the parties have been unwilling to put forward. This would be one example of a role that mediators often play – ‘taking the fall’ for one or the other of the parties or for an advocate in relation to his or her client or constituent.

**The logistics and process of rights mediation**
The exact routine followed in employment rights mediations will, of course, vary somewhat from jurisdiction to jurisdiction, and indeed from mediator to mediator. However, the general format is likely to be as follows.

Typically, the mediator will want to first meet the parties separately and informally. This is an opportunity to begin an ‘audit’ of the parties, as well as an opportunity to begin the process of building rapport with each of the parties and giving the parties the opportunity to tell the mediator anything that is on their minds. Sometimes they will reveal their real interests, their motives, restrictions on their time, bottom lines, or other useful intelligence. Otherwise, this initial ‘meet and greet’ remains an opportunity for first informal contact.

Quite quickly the mediator is likely to bring the parties together in a joint session. Introductions will likely be followed by a monologue by the mediator explaining the value of mediation, the process that is to be followed, and the ‘ground rules’ surrounding mediation – its privacy, confidentiality, and courtesies, and the protocols and ethics that the mediator will observe.

It may be necessary next to clarify what the issue is, or issues are, for resolution. Sometimes the parties have quite different definitions of the matter to be settled. The mediator will want that clarified and agreed, and will want to be sure that all issues in need of resolution are ‘on the table.’ The mediator wants to be able to see everything that he or she has to deal with if the dispute is to be settled, and wants an assurance that if all of those
issues are dealt with to the satisfaction of the parties, then there will be a deal.

With preliminaries over, the mediator is likely in a rights matter to invite the moving party, the dismissed and grieving employee for example, either directly or through a representative, to present his or her account of what happened, to set out something about the legalities of the case, and to indicate the remedies that the employee is seeking. A party would ordinarily be entitled to make that initial presentation uninterrupted, and under most circumstances a mediator will ensure that that happens, or at least that the process comes close to an uninterrupted presentation. Questions might then follow, from the opposing party with permission of the mediator, or indeed from the mediator. The mediator will be particularly inclined to ask some questions if he or she suspects something inaccurate is being said, or something important is being not said, or if the principal parties – for example, a dismissed employee – has not been heard from directly.

The mediator will then invite the other party – usually a respondent employer, to put the competing case, under the same rules. Following these semi-formal presentations, the mediator might allow some debate to develop as a source of ‘venting’ for the parties, but also as a further source of ‘intelligence’ about the parties’ thinking, their needs and their bottom lines. While the mediator might allow some hot headed debate to flow, he or she is unlikely to have signed up to moderate a street riot, so a good mediator will never allow a spirited exchange to get out of hand.

At some stage, after both sides have had a full opportunity to express their view of the case, the mediator is likely to separate the parties and caucus with each of them separately to further probe for softness and bottom lines. Here is where ‘pushing and probing’ takes place, with the mediator armed with the litigation risk analysis based on the merits of the case gleaned from the parties’ presentations. So the mediator will be facilitating in the sense of ensuring that the atmosphere and the process remains functional for settlement, But also engaging in strong settlement and evaluative mediation techniques to move the parties towards settlement.

This process may involve bringing the parties back together at times for exchange of further information or viewpoints, or to put a proposal for discussion. Often, though, it tends to be a matter of ‘shuttle diplomacy’ as the mediator works with each side to refine their positions, counsels them on
appropriate proposals and counterproposals, and carries the proposals back and forth between them. Sometimes, the mediator might employ the variation of bringing just the advocates or leaders of the two parties together with him or her as ‘a settlement team,’ recruited as ‘collaborators’ with the mediator to find a resolution. This obviously involves some danger of isolating the advocates or leaders from the rest of their party, but it is an often used and often successful technique for mediators. A competent mediator will, of course, ensure that the advocates maintain the relationship with the rest of their party.

Once agreement is reached, then typically a settlement document would be drawn up and signed. The parties may or may not come back together for that process. Either way, the mediator would want to explain any conditions of the settlement, such as confidentiality if that is appropriate.

**The presentations by the parties**

In a typical employment rights case, the parties’ presentation should be prepared and structured in a manner similar to a presentation for a more formal adjudication forum. The difference is in the level of formality and the degree of ‘readiness’ of the parties’ material. The structure and understanding of the case should be the same. This is so because the merits of the case can be expected to dictate the outcome in adjudication. In mediation, likewise, the merits of the case should be the basis for the outcome.

In an adjudication setting, a rights case for presentation would typically consist of three parts: the opening statement, the presentation of evidence, and the closing statement or legal submissions. While in adjudication, these tend to be three quite distinct and separate phases of a party’s case, in mediation they all tend to run together as the party’s opening presentation of the case.

In a more formal setting, an opening statement sets forth the party’s ‘theory of the case,’ a cohesive, probable story that provides the adjudicator with a way of thinking about the case that will lead him or her to the conclusion that the party wants the adjudicator to reach. The ‘theory’ must also, of course, be one that the party can support with evidence and legal argument. A party’s theory of the case is in competition with the alternative theory being proposed by the other side. Was the employee mischievous and calculating? Or good hearted but misunderstood? Both are stories that an
experienced employment tribunal member or labour court judge will have seen before, so they are both reasonable ‘theories.’ They will compete for the adjudicator’s vote on the basis of the evidence.

The opening statement also sets out for an adjudicator what is to follow in the organisation and presentation of the case – who the witnesses will be, what their contribution will be, and so forth. The opening statement in a formal jurisdiction is then followed by the systematic presentation of evidence, much of it done in employment cases through the direct evidence and cross examination of witnesses. And finally the closing statement is where a party has the opportunity to add legal argument to the evidence previously presented to ‘flesh out’ the theory of the case originally presented and show an adjudicator how the evidence and the applicable legal principles lead to the conclusion that the party wishes the adjudicator to arrive at.

In an adjudication forum, the opening, the evidence, and the closing tend to be distinct parts of a case presentation. In mediation, they are more likely to be presented in summary form and to run together. So, an opening presentation in a typical employment rights case – say, an unfair dismissal claim – is likely to begin with the brief presentation of a cohesive theory or story of ‘what happened here’ – “this was a devious and calculating employee who finally got too clever for his own good, and got caught falsifying his travel expenses.”

The theory is then followed immediately by a summary of the evidence. In most mediation jurisdictions, it is not necessary for witnesses to actually present. Instead, a party is able to summarize the evidence that it has available and indicate that it will be presented at a formal adjudication hearing if the dispute progresses that far, and by which witnesses. A key witness may be brought along to the mediation meeting, particularly if a party wants the other party to see and understand what a good and credible witness he or she is going to be if the case has to go to adjudication.

The theory and summary of key facts and the evidence to support them would then be followed immediately in mediation by the introduction of legal argument that ‘brings the case home.’ Again, mediation takes place in a relatively informal setting in most jurisdictions, so an abbreviated legal argument is also appropriate. There are exceptions, but it would be unusual for extensive citations of legal case authorities to be necessary or appropriate.
in a typical employment rights case. Mediation is generally more suited to a more ‘conversational’ style of advocacy.

In any event, while a party’s case in chief is usually presented in a single presentation in mediation (subject, of course, to questions and answers, later clarifications and additions, and so forth), the point is that the case presentation should have the same structure as is so with more formal presentations in adjudication. The opening statement, the evidence, and the closing statement are all integral parts of the presentation of a rights case, and they should each serve the same purposes in mediation that they do in the more formal setting of adjudication.

Mediation is a widely used dispute resolution process for employment rights disputes, as it is for collective bargaining disputes. To be successful, it generally requires parties to be willing to cooperate with the mediator in the interests of settlement. On the other hand, a mediator is not entitled to expect parties to be ‘open books’ for the mediator to plunder. Advocates still have agency responsibility to their clients or constituents. What is needed is for parties to cooperate with the mediator, while recognizing that they are negotiating both with and through the mediator.

Accordingly, it makes sense for parties to be honest with the mediator in an assessment of the merits of their case. Otherwise, an experienced mediator will simply point out the holes in the case and undermine the party’s position on the desired outcomes.

At the same time, it makes little sense for a party to simply reveal ‘the bottom line’ to the mediator, particularly early on in the mediation process. That is tantamount to handing over the party’s case to the mediator for advocacy. But the mediator’s interest is in settlement, whereas the party’s interest is in a particular settlement that the party sees as justified and appropriate reward or remedy. So it is an interesting balancing act for parties between collaboration with the mediator, yet retaining direction and control over the conduct of the party’s own case, and negotiating with both the other party and the mediator.