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### S: Mediator Statement

This is a process in which the two of you have come together to present and discuss a problem or dispute that's going on. Then you'll have the opportunity to present and discuss solutions for resolving the matter."

"A few ground rules are important to help the process flow smoothly: One person at a time speaking, no interrupting, no name-calling, no making faces or emitting rude sounds of disgust or disbelief. Basic common courtesy will help a lot. Agreed?"

"We'll make progress more quickly if we take care to avoid 'linguistic irritators'. OK?"

"Do you want to achieve an out-of-court settlement?"

"Do I have your commitment to listen to each other; work hard toward a resolution; and bargain in good faith? Good faith includes keeping to the truth about the facts."

"Check whether you have whatever information you need to settle the case."

"The final money terms and your success depends on taking into account the way the other party feels about how they've been treated during negotiation."

"Although tangibles like the money settlement are important; intangibles such as pride, reputation and good will are very real and very important as you craft a resolution

together.”

“You’re both competent to come to an agreement.”

“Today we’re not going to conduct this as a “contest” to be won or lost. That’s not what we’re about. Instead, we’re going to discover the “best voluntary solution”.

“Today is the day to look forward, not dwell on the past.”

“You work creatively toward finding a resolution that feels good or at least workable and lets both parties leave satisfied or with an appealing solution.”

“I’m not going to try to solve your dispute or your problems. Your job is to figure out how to sufficiently take into account each other’s interests so you can craft a mutually satisfactory agreement.”

“Part of my role is to help you avoid common mistakes, such as:

- Insensitive or pugnacious remarks
- Guessing what the other party will do or find acceptable
- Getting too competitive toward winning instead of compromise
- Giving up too soon.”

“I’ll guide the process and you’re welcome to suggest process changes at any time.”

“I’ll be neutral but not passive. Hopefully I can point out things neither of you have thought much about.”

“What kinds of things do you want to happen or not happen in this process?”

“How would you like this to go?”

“We all want to be heard with complete attention. I encourage you to really listen to each other and avoid the temptation to anticipate the speaker’s endings. Keep up your focus on the speaker’s words, not on what you’re going to say next.”

“It’s particularly useful to ratchet up your active listening skills and listen intently to what’s beneath the words.”

“Listen for anything new; for something you didn’t know before.”

“Patience, flexibility, and self-determination are the keys of this process.”

“My job is not to tell you the answer. That’s for someone wearing a long black robe. I just help people figure out the puzzle pieces and how they might line up.”

“What works is: Courage and Compassion; Humor and Humility; Tolerance and Understanding.”

“We have the best chance of a good resolution if you both are able to talk together constructively, exploring and understanding each other’s interests and needs.”

“The way you get a solution is to cooperate with each other as you explore what might work for both of you.”

“Sharing interests and needs will assist you two in brainstorming options together.”

“The solution you create together doesn’t have to be what a judge would order.”

“I’m going to ask you to reflect back what interests and needs the other side expresses.”

“Conversation is a learning process where new helpful information will surface and be considered thoughtfully.”

“You may be adamant on one issue, but other issues may not be simply black or white.”

“You may be at an end point, but the other party may see things in a new way based on the discussion we’re going to have.”

“The more information you get, the wider your frame of reference and therefore the more possibilities you can see.”

“I think we can achieve a mutually satisfactory agreement efficiently and in a friendly way. As I see it, in order for us to do this we have to be willing to listen carefully to each other, share information about interests, and brainstorm for value creation ideas, not just dividing up a given amount. “

“At some point later it might be useful to spend some time looking at best and worst possible outcomes and probabilities.”

“It’s helpful to try to let go of the past in favor of concentrating on the present and the options available to you right now.”

“We’re going to experiment, try things, adjust until a workable combination shows up.”

“[When joint session is resisted] The other party is offended. They don’t want a joint session. I want you to meet them. I don’t see any disadvantage at all in having a joint session. It doesn’t have to be contentious. What is there to talk about? I told them \_\_\_\_.”

## O: Parties' Opening

Before we start, I'd like to check on how well each of you understand the other's point of view. So in your own words, \_\_\_\_\_, please tell us \_\_\_\_\_'s point of view." [Then: "How well does that express your POV? Any changes or additions?"]

"We want to have a discussion as fully informed as possible."

"I'm going to ask each of you to listen carefully while the other party explains the essence of the dispute to me. Let them have their say without interruption. Agreed? I'll ask clarifying questions. Try to distill it down to what you want and what is the factual and legal basis for your claim. Okay?"

"To conserve your time, I'm going to ask you to summarize your perspective concisely and get us to the heart of the matter."

"Could you please summarize the story from your viewpoint? Please tell me (briefly) what lead to this meeting?"

"How much is your claim?" [answer] "How did you arrive at that figure?"

"What are the main aspects of the claim? What problems do you want to solve?"

"What's the rationale for the claim?"

"What is the factual or legal basis for your claim?"

"What have you got to go on? What sorts of writings support the claim?"

"What have you got to back it up?"

"As they say in the legal system: "The faintest writing beats the best memory."

"Don't be discouraged as you listen to the other side or as they listen to you. Absolute truth is often an illusion because it's the first victim of a conflict."

"Do you have any more or stronger supporting statements?"

"Why should we believe that \_\_\_\_\_?"

"A court looks for a "preponderance of evidence" and then whether the evidence is "clear and convincing". Tell us what you've got."

“What documentation is there to justify \_\_\_\_\_?”

“What evidence is there that adds legitimacy to your assertions?”

“How are you going to meet certain burdens of proof?”

“Do you have any concerns, based on what you’ve seen and heard that you could sustain your burden of proof?”

“How does the situation look to you?”

“What is this dispute getting in the way of?”

“A commonly accepted test for evidence is: What would an unbiased critical person be likely to accept?”

“Is it okay with you that we pause here and hear from \_\_\_\_\_.”

“Is there any more information you want from the other side?”

“If you took this to court, what would you realistically expect?”

“How sure are you what the court would decide?”

“What do you think would help solve this problem?”

“What is it about what you just heard that creates a problem for you?”

“[To second party] This is your opportunity to express what you want to express; you don’t have to react right now to what you heard.”

“Dogmatic repetition of demands may wear down and drive away a target, but it’s not a sure-fire way to persuade.”

“ [When they ramble and stray, interrupt and say:] I heard you say (summarize) and you were telling me about \_\_\_\_\_. Can you tell me more about (main issue)?”

“When people keep looking backward it’s hard to look forward.”

“The story of the past is good for one complete run through, and it’s a tempting refuge; but it can be a prison.”

“Instead of looking backward, at some point you’re best served by breaking out and focusing on taking charge of what’s within your control now.”

“We can either stay stuck in the story of the past or be open to creative thinking about how to get to a better future.”

“I understand your pain, anguish, and frustration. Let me know when you’re ready to face the issues and look forward to a better time for yourself.”

“Let me share with you what I’ve heard. Please correct me if you hear anything wrong.”

“You indicated \_\_\_\_\_”

“One observation you made is \_\_\_\_\_”

“You are saying \_\_\_\_\_”

“It sounds like you’re telling me \_\_\_\_\_”

“You’re also telling me \_\_\_\_\_”

“I’m hearing \_\_\_\_\_”

“What I’m getting is \_\_\_\_\_”

“I think what I’m understanding is \_\_\_\_\_”

“To summarize, what you both seem to be saying is \_\_\_\_\_”

“And you have some concerns about \_\_\_\_\_”

“Is that accurate?”

“Is that right?”

“Have I heard you correctly?”

“I hear you. I understand.”

“Thank you \_\_\_\_\_. I think we all have a better sense of how you feel and what you are going through as \_\_\_\_\_.”

“It sounds like you’re saying you made some errors and you want the consequences to be over with sooner rather than later. Is that right?”

“What I’m hearing from both of you is a real interest in getting this resolved. With good faith collaboration that’s very possible. Working together you can do it.”

### **Mutual Understanding**

“You’ll make the most progress toward resolution by making this a conversation where you demonstrate understanding of the other side’s interests while you express yours.”

“I’d like each of you to be open and receptive to the perspectives of the other person.”

“You can hold onto your story while opening your perspective to understand their story.”

“There’s always room for, and even a need for, a variety of perspectives.”

“A rival is just a stranger whose story hasn’t yet been heard.”

“I’d like you to tell me the other party’s point of view; just as if you were speaking for them.”

“What have you learned just now that you didn’t know before that helps you understand \_\_\_\_\_’s perspective?”

“Imagine what each of you has perceived about the other is just the tip of an iceberg. What you haven’t seen yet, below the surface, is big and fascinating to be explored.”

“Our (they’re) behavior is much more obvious than the thinking and intentions behind it.”

“It’s not always obvious what reasons people have for what they do. We need to work more on getting the reasons out and understood.”

“We tend to judge outcomes without enough appreciation for what lead up to them.”

“The better you understand where they’re coming from, and care about it, the more you’ll be able get them to go in a direction you both want.”

“Even when we do nothing wrong circumstances can make us give other people great distress.”

“What did you hear when they said \_\_\_\_\_?”

“How do you feel or what would you like to say after hearing what you just heard from \_?”

“What did you learn in what you heard that casts a new perspective?”

“What’s best for you may not be best for \_\_\_\_\_.”

“I hear from \_\_\_\_\_ that he/she cares about \_\_\_\_\_ and \_\_\_\_\_. Can you reflect back what you heard in the way of needs, interests and concerns?”

“What do you think is the most convincing part of what you (they) said?”

“What effect does it have on you ... to hear \_\_\_\_\_ say \_\_\_\_\_?”

“Let’s back up. When he/she said \_\_\_\_\_, you had a reaction. Talk about different aspects of that.”

“What did you hear \_\_\_\_\_ say?”

“Please repeat back what you just heard?”

“Before elaborating on your story, please restate the other party’s perspective in your own words.”

“Can you tell me in your own words what you heard the other party talk about? What are they thinking? For example, I heard \_\_\_\_\_.”

"I wonder if you're willing to say back to \_\_\_\_ the interests he/she has expressed, such as \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_?"

"With your permission, let's try an exercise to sure your perspectives are understood. Each party repeats what they think the other party said and what they meant. Then we'll fix any misunderstandings or overlooked items."

"Just so there's no misunderstanding or misinterpretations about what \_\_\_\_ is trying to get across, please express in your own words what you just heard from \_\_\_\_ and ask for any clarifications you'd like."

"Just to be sure the meaning of your words were understood we'll paraphrase what we heard."

"Everyone has a tendency to guess at another's interests and concerns, often incorrectly. Let's check by asking, listening and re-stating what we learn. Then 'close the loop' by asking them if we restated it sufficiently. "[If they're not 'connecting'] I heard it a little differently; I heard \_\_\_\_\_, \_\_\_\_\_. Is this right?"

"I think we've got some information here that will help you see what happened in a different context."

"You know exactly what impact their actions had on you. Their actual intent may not be known as exactly. Do you want to explore that?"

"You've helped make your perspective very clear."

"Just imagine for a minute how this might appear to an outside neutral person; someone else looking at it from the outside."

"What do you think a person who doesn't know you, never met you, an impartial third party ... would feel is important in figuring out \_\_\_\_?"

"Why does it matter whether what he/she said is the exact truth? What would be affected?"

"You've different versions of history from each other. That's pretty common. Now step back for a broader perspective that can allow for differences and still seek creative solution terms."

"Lincoln famously said: 'If you would win a man to your cause, first convince him of your sincere friendliness.'"



### Reframing:

“Let’s not rush too quickly to the numbers. Instead, let’s work through the considerations that inform the numbers.”

“What are the issues we have to address so you can feel we’ve had a cooperative exercise?”

“How would you identify what’s underlying the needs and concerns you’ve expressed?”

“What’s fundamentally holding you back from having already reached agreement?”

“We’re trying to identify as many interests as possible from each of you. Then we can see which ones are complementary, non-conflicting. And what are the shared interests in common.”

“Apply relentless curiosity about the other party’s interests to spot tradeoff opportunities.”

“What do you imagine are some non-obvious reasons why they might say ‘No’ to your offer?”

“It seems there are \_(e.g. 3)\_ main issues here. [Give each a label; group them]”

“It sounds like these are the \_\_\_#\_\_\_ issues you brought to the table. The first has to do with \_\_\_\_\_. Another has to do with \_\_\_\_\_”

“There’s a couple of things working here: \_\_\_\_\_; \_\_\_\_\_”

“Is that a fair description of the issues?”

“Is there another way to characterize the \_\_\_\_\_ issue?”

“If we address these issues, would that help resolve the differences between you?”

“What would you like to say to \_\_\_ about your willingness to seek solutions to these issues?”

[Convert ‘Positions’ to discovering ‘Interests’, including interests of their constituents and influencers. Restate whatever is said (often negative)... toward recognition of underlying fears, concerns and needs. Then explore behaviors that might meet the needs.]

“You say your demand for \$XXX is nonnegotiable.”

[Reframe:] I’m hearing that long-term financial security is important to you, correct?”

“Let’s think about some novel and attractive ways of providing financial security to you.”

[Strip out any insults, the negative blaming language; get agreement on the underlying interests; and direct the discussion toward alternative ways to satisfy those interests.]

[If they say something like: “You’ve always got it wrong!. This is a dumb waste of time!”  
[Guess their concern as not being heard, understood or respected]. [Reframe:] “if I understand you correctly, it’s important to you to know your input will be taken seriously and taken into consideration if the meeting is to keep going toward discovering a resolution. Right?”

[If they say something like: “Ever since he was promoted, I don’t know how he could be so stupid to not know he’s turned into a ‘fricken tyrant.” [Guess there are some concerns about bothersome over-control behaviors.] [Reframe:] “I’m hearing that you’ve observed some specific things Ray is doing that are important to your feeling of security and autonomy.” “Do I hear you right?” “[Reframe blame as joint responsibility for tackling the problem] You both agree that a mistake was made; how do we make sure it doesn’t happen again?”  
“If I get what you’re saying, it’s important to you that ....” “You value ....” “You’d like ...”

[Metaphor] “When you’re willing to ‘lay down your arms’ so-to-speak, it’ll feel good to share the resulting ‘peace dividend’.”

“It sounds like while you’re found yourself in \_(frame)\_\_\_ situation, the desired situation is more like \_\_\_(reframe)\_\_. [Not causes; not solutions]” “Help me understand why you think that’s reasonable.” “[Upon their statement of a hard position] We all have our aspirations, I guess. And realistically what would go a long way to serve your interests.”

“That’s very interesting, could you please tell me a little about why do you want that?”

“Help me understand the problem you are trying to solve.” [Then reframe it in a constructive way.]

“I’m not sure I quite understand why you want what you just said.”

“That seems very important to you. Could you please help me see why.”

“You must have good reasons for believing \_\_\_\_\_. I’d like to know more why you think so.”

“You seem to feel pretty strongly about this. Please give me more understanding as to why.”

“I hear what you’re saying. I’m sure that has a good purpose. Could you please explain it to me?”

“I’d like to frame the issues that have been brought up today as follows: \_\_\_\_\_”

“Why not something like this: \_\_\_\_\_?”

“What if \_\_\_\_\_?”

“I hear that proposal. That’s certainly one possibility.”

“You may have a point there. How could you improve the proposal to make it more acceptable?”

“I hear blame, contributing factors and some desired states. Let’s see if we can create a suitable problem statement we can all agree on.”

## N: Negotiation

Beside the money, what else would you like?"

"What would you like to see happen?"

"What are your expectations?"

"Help us understand how this has impacted your life."

"What would be the ideal outcome? What would work best for you?"

"What interests would be served if you got some or all of your aspirations? Name some more."

"How do you want things to be different? Better? Improved?"

"What are the important things you want from this meeting?"

"When you go home tonight, what would you like to have accomplished?"

"What is the problem that your position solves for you?"

"What are your goals in negotiating for that position?"

"How does that position help you?"

"What are the consequences of not having \_\_\_\_\_?"

"What do you want to get out of this? Don't give me a number yet; just tell what other needs go with this situation."

"In what ways will their position hinder what you're trying to accomplish?"

"What will relief or resolution allow you to do?"

"Beside the money, what other interests or concerns do you have?"

"What are the values associated with \_\_\_\_\_ (object) or (action)?"

"Beside the hard facts, what assumptions, beliefs and interpretations are at work to get from the facts to the conclusions? How do any of these hinder a solution?"

"What background feeling goes with what you're saying?"

"Why do you feel \_\_\_\_\_ (or) that way? "

"What leads you to say that?"

"What's behind that statement?"

"Now I'd like to learn why you state a position that way."

"What is meant by that?"

"Talk about your reasoning on \_\_\_\_\_"

"Just so I have a more complete picture, please tell me \_\_\_\_\_"

"Would you like to add anything further? Anything else?"

"What else do you want to mention?"

"Is there anything you'd like to add?"

"Have I missed anything?"

"Would you say more about that?"

"Would you mind expanding on that a bit?"

"Why is \_\_\_\_\_ important to you?"

"Is that an okay spot to stop for now?"

“Nothing is agreed until everything is agreed. You can settle each issue tentatively so that if you give something you'll see what you get in return.”

“Each of you is entitled to your own point of view. It's not the same because you're not the same. You have to be able to see the other's point of view in order to create a solution between you.”

“Part of my role is to avoid frustration by alerting people to adjust to different negotiating styles. How would you characterize the style of the other decision maker? Fast? Intuitive? Deliberate and analytical? Also, it's best to refrain from using 'bottom line' language and stay flexible.”

“This is a negotiation. It's not about trying to convince the other party you're right and they're wrong. It's about making a deal.”

“Is there anything beside money to bring back onto the table?”

“The key to settlement is to make a proposal that makes it difficult for the other side to walk away. Make it good enough so they feel that rejecting your proposal might be a mistake.”

“Everyone sees the same things in a different way and we're all entitled to our own perceptions.”

“You're going to have to find some way to work together.”

“I'm sure we can find a middle ground.”

“Getting to a consensus that works for both of you can be done with a lot of determination. Are you willing to work hard to get a mutually satisfactory result?”

“Maybe your solution will be supported by logic; but it doesn't have to. You can always just pick a solution that feels good enough. You don't have to justify it.”

“Since you've more to explore, I don't see any compelling reason why you'd have to go to court.”

“Wait! You've been down that road. Take a break. Try this: Keep your attention inside your body long enough for three deep breaths. What are your sensations? What's behind the emotion that goes with that sensation?”

“Take a break in blaming and victimhood, and reflect on what might be your own contribution. Then take some responsibility for solving the problem.”

“When there is room for at least a little bit of honest gratitude; and when that's expressed out loud, it adds a lot of value to the situation.”

## Caucus

[Shuttle information, interests, priorities and perspectives; not just positions]

"I'd like to talk to both parties privately to clarify some things I heard and to discuss where this negotiation goes from here."

"I think it would be helpful if I met privately with \_\_\_ in order to discuss the issue of \_\_\_\_\_ in this case."

"I'd like to explore some things with each of you separately. While I'm with \_\_\_\_\_ this might be a good chance for you to take a break, get some refreshment or fresh air. I'll get back to you as soon as possible."

"Now that we are behind closed doors what are your thoughts?"

"Is there anything you want to express now that we're in a confidential private session?"

"What's important to you right now at this moment?"

"How is this going for you?"

"What's driving this case?"

"Who have you consulted with?"

"What is important that you might not have felt free to talk about in general session?"

"Tell me what's important here. What are your interests? What else, even minor interests?"

"I'm really sorry that happened to you. I appreciate what you went through."

"Tell me what would be a solution proposal that would be appropriate for you."

"Can you tell me in your own words what you heard the other party say? What are they thinking? [Might model it first for a minute summary]"

"Stand in the other person's shoes for a second. How would you resolve it if you were over there?"

"In arguments and negotiations it's very useful to do what actors do: Read the other person's part. Play the role. Try it now. Watch for glimmers of new understanding to help problem solving."

"Put yourself in his shoes. Put aside your personal feelings for a second and think about your choices. Letting this whole mess go to court is going to \_\_\_\_\_."

"We can never expect to be creative problem solvers generating alternative ideas while we're hanging onto judgmental certitudes."

"What do you want them to know?"

"If you want to influence them, then you need to understand their point of view."

"He/She is seeing things somewhat [very] differently. This is where they're coming from."

"Negotiation is all about finding out what the other party might want or need from you in order to give you what you want or need."

"You might tell the other side you're willing to give up something valuable to you, such as \_\_\_\_\_ in order to bargain."

"It's natural to feel like fighting, but it usually inspires revenge or retreat. Getting to agreement usually gets easier by trying persuasion and proposing something related to their interests."

"Your goal is not to win over them; it's to win them over ...to a creative solution that works for both of you. The goal is not victory; it's a mutually acceptable agreement."

"If your goal is to get them to change their mind, start by letting them score a few points; concede what you can and say what you want."

"If \_\_\_\_\_ is your goal, is \_\_\_\_\_ what's an effective way to pursue your goal? What's the rationale?"

"Which interests of yours does their approach fail to satisfy? How would you improve on it? In what respects is it not fair? Is there any way it can be made better for you without making it worse for \_\_\_?"

"What other ways are there of accomplishing your interests?"

"Dealing rationally with another person needs a strategy for mutual satisfaction."

"A person can act rationally alone; but when other people are involved, reasonableness works better and inspires reciprocity."

"My encouragement to you is to think about \_\_\_\_\_."

"I just had a thought. It may not have any merit; but what would you think of this kind of an approach?"

"Since life and learning are necessarily full of trial and error, mistakes are inevitable and neither side should be too hard on yourself."

"Apologize if you can. You might explain it was an inadvertent error, not intentional."

"How willing are you to reciprocate concessions?"

"What do you consider "fair play" in these negotiations?"

"This is not an easy case. It's a case that could be lost in court. Correct me if I'm wrong."

"Let's review the strengths and weaknesses as you see them."

"What do you think the other side needs to worry about the most in this case?"

"What could the other party say or do that would address or alleviate your concerns about \_\_\_\_\_?"

"Just to be sure I understand, if we reach a "Best Voluntary Solution" is there any reason you wouldn't make a decision in this session?"

"How does \_\_\_\_\_ help or hurt the goal and purpose of resolving this disagreement?"

"If they're not willing to go for some of your conditions, think about where you'd go from there while I'm off talking to them."

"Now when I go see the other party, I'm going to tell them \_\_\_\_; and I'm going to ask them \_\_\_\_\_. They'll probably say \_\_\_\_\_."

"That's a good point. Is there some way around that problem?"

"I still have faith that we haven't tried everything."

"You may be right that they won't budge, but it's worth trying."

[Before leaving] "Tell me what out of this you want me to keep confidential. If nothing, I'll take that as permission to share what feels useful to the negotiation."

"I'm going to get as much information as possible. So when we're about to go back to joint session, you've got to warn me which things I can't tell the other party"

[Caucus: 2nd round: Start with what they're concerned about. Take up where you left off. Phrased as a 'gain' is more likely to be accepted than 'reduced loss'.]

Dollar-specific Deal Making

*Coaching - Usually done in private caucus*

"When you get ready to make the first offer, keep your credibility.

If the first offer is outside the range of plausibility:

- It can appear foolish, greedy, arrogant or inexperienced
- It sends a message of disrespect at them
- Gives the other side no incentive to negotiate or take you seriously
- It can inspire anger and revenge that derails the whole thing."

"These things usually involve some back and forth. You might expect them to start low/high."

"Before we get into dollar amounts, how much responsibility is there on your part?"

"Make your first offer rationally defensible. Base your number on evidence and law. Make it so the other party will stay interested."

"Start with an optimistic (not outrageous) offer that's supportable by a comparative standard or plausible argument."

"Don't open with your real bottom line, leaving nothing for the other party to achieve through negotiation or you to give in trade for their movement."

"When you make your first offer, leave yourself bargaining room to get concessions from them in exchange for your movements."

"I'm going to encourage both sides to avoid an "insult range" of wide positions way beyond objective support."

"If you open the negotiation with an extreme number, a BS number, it'll likely be a non-starter."

"An extreme opening offer (or demand) acts as a disincentive for the other side's efforts."

"When someone proposes a number out of the ballpark it doesn't encourage negotiation."

"They might be thinking: You're not moving into a reasonable range so I shouldn't either."

"An extreme offer or proposal usually creates a reaction in the other party ... a counter-productive emotional reaction of being mystified or irritated or very angry. This usually inspires an extreme response and sets up a barrier for progress."

"Repeating a position or making small moves while staying high/low ... sends a message



that the other side is out of the acceptable range. E.g. "The gap is too large to bridge". It can give an inaccurate or misleading message on where the real range is and won't motivate the other side to move. Small moves at the end of negotiations send an accurate message."

"If you consistently negotiate in your range they'll begin to treat it seriously. It will educate them and accomplish what you'd like, most likely."

"Look at the how much money you have left before getting to the walk-away number and think of a plan for using it independent of how fast or slow they are moving. You could build in some safety by using a series of close-to-end moves that would signal when you're getting near your end."

"Have a movement plan in mind, independent of what they do, not just reactive to their movements."

"Your plan includes your goal, where you start, and movement increments as you approach your 'walk-away' number."

"Movement inspires movement by the other side ... and shows the case can be settled."

"Some, just some of your options include: a. Moving a substantial distance; b. Answer with an equally out-of-range number; c. Do what you would have had they proposed something more reasonable; d. Pack up and leave. What other options might there be? Which has the most positives and least negatives?"

### *First Offer*

"It takes some courage to make the first move."

"Thanks so much for making the first step. It shows a lot of courage."

"How about you starting the negotiation or 'get the ball rolling' with an offer. You can't expect \_\_\_\_ to negotiate with him/her self."

"What would you like to put on the table?"

"What would you like me to carry forward to the other party?"

"I know you have some ideas about what kind of a number is reasonable. But I encourage you to be fair and reasonable here. If you try to over-negotiate this thing you might miss an opportunity with the other party."

"You should make an offer that encourages movement by the other side."

"[If 'out of ballpark'] Wow, that's hard, because if you start there, they're going to feel they have to leave or start unreasonably (low/high)."

"Okay, but something equal to the best you might achieve at trial can easily be seen as a "non-offer"."

"What would help them understand the proper ballpark? What would give them an idea of where they have to be to keep it moving forward toward settlement?"

"It's like inviting people to an art gallery showing. You can't have just one painting on the wall. They'll lose interest and go away."

"Before we communicate that offer, let me ask you: Do you have any room to move? It's important to protect the future of the bargaining process."

"It might be a gesture of goodwill for you to begin by offering \_\_\_ e.g. to pay medical bills."  
"As I give them your proposal do you want to add some sort of commentary, some words that explain or convey more than the proposal alone can do?"

"That's a good start. Let me take it to them and see what they say. I assume you have some flexibility, right?"

"How does your starting proposal relate to your case analysis? "

"What signal are you sending with that offer?"

"How do you expect them to react to your offer? Hopeless? Defensive & cautious? Encouraged?"

"What's your "wish amount" and your "walk away" amount? I won't disclose any amount to the other side without your permission."

"As you begin, it might be good to have in mind three dollar amounts: What you aspire to; what you'd be content with; and third, what you could live with if it came to that."

*"If they had been reasonable, what number would you have begun with?"*

"What response to your offer do you think would have been appropriate?"

"\_\_\_ has made what he/she thinks is a fair offer. Do you see it that way? [if not] What explains your reaction?"

"If they had opened with a more realistic number, say around \_\_\_, what size proposal would you have been inclined to make?"

"To at least keep the process going, what amount of response would you need from the other side?"

"If you want a realistic response you need to make a realistic proposal ... in light of your analysis of case value."

"How would you feel about that proposal amount if it were made to you?"

“Suppose the same thing were being talked about over there and they sent me to tell you they want a more realistic number from you. What would be your reaction?”

“Is their offer fair? Better than fair? Less than fair? How much and why?”

“How’re you feeling about where we are right now?”

“What will it take to \_\_\_\_\_?”

“It sounds to me like if you were certain they would pay \_\_\_ you might be interested in the deal, but you don’t want to send them any weak signals. Right?”

“Give me two offers: One I can disclose immediately; one I can disclose ONLY if it will unequivocally settle the case.”

“If you like, I can test your bottom line walk away number before you commit to it by asking them about it as a ‘what if’.”

“Is there a reason why \_\_\_\_\_?”

“If you can agree with \$\_\_\_\_\_ you will have a Mutually Acceptable Resolution. Do you agree to this solution?”

“Do I have authority from you to test their willingness to pay/accept \_\_\_\_\_?”

“In order to arrive at a Mutually Agreeable Resolution, you need to alter your offer a bit (upward) or (downward). Go ahead; what would that be?”

“What’s keeping you from accepting their offer?” “And what else?”

“Are you telling me (and I have no hope or dream of getting them there) if they got to \$\_\_\_\_\_ you couldn’t get to (\$ same)?”

“Are you sure you want to end it on \$\_\_\_\_\_?”

“Would you accept \$\_\_\_\_\_?”

“I’ve spoken to \_\_\_ and I think they’ve lowered their sights a bit from the original figure.”

“It’s time to be realistic. It’s going to be difficult to get them to accept a number under \_\_\_\_\_. (why). If I suggest a number in the low \_\_\_\_, say \_\_\_\_ would you consider that?”

“They just won’t pay \_\_\_\_\_. I might be able to get them to go for \_\_\_\_\_. Will you accept that if I can get it?”

“That’s fine. I can ask \_\_\_ about it. But think about this: \_\_\_ may need to pay less/more to save face.”

“How would you react if (other party) suggested they might be able to \_\_\_\_\_”

"Wouldn't you want to settle for something near that?"

"You mean if they offered just \_\_\_\_\_(close) you'd refuse it?"

"Will letting go of \$\_\_\_ meet your need to solve this problem?"

"Why don't I see if I can get them to look at it \_\_\_\_\_. Let me see what they say. I'll get back to you soon."

"Let me take this to \_\_\_ and encourage \_\_\_ to consider it."

"Let's see what kind of reaction you get with that offer."

"I just want to see if they will go for it."

"The gap between your dollar figures will be resolved. You might as well be the ones to do it yourselves."

*Would You ...*

*"I've now spent enough time with \_\_\_\_\_ to have a better sense of how far they will go today to settle. I don't have a specific number to offer, but I'm confident I could get you somewhere between X & Y. What do you think?"*

"I realize you've made your last and best offer at \$XXX but that won't settle the case. I've talked to \_\_\_\_\_ at length and I believe they would settle for a number under \$YYY."

"There's no way to present that without something of value to him/her. He/she is going to say he/she has got to have something in exchange for that."

"I've listened to each side. I believe this is the current settlement zone, called the

"Zone of Possible Agreement", from: \$\_\_\_\_\_ to \$\_\_\_\_\_. I'm going to tell it to the other side. Is that range okay with you?"

"Would you come to \$\_\_\_ if they come to \$\_\_\_\_\_?"

"What would you say to \_\_\_\_\_"

"Is \_\_\_\_\_ something you'd consider?"

"What if you were willing to increase the attractiveness of your offer by writing a check right now?"

"Short payment plans are the most attractive. You feel you could get that done in what period of time?"

"I've asked \_\_\_\_\_ to agree to negotiate under \$XXX provided you agree to negotiate above \$YYY. I'm trying to help you both get into a reasonable range. Do I have your commitment to getting to that range?"

"How about authorizing me to increase (decrease) your offer by \$\_\_\_ ONLY if the other party comes down (up) by \$\_\_\_\_\_?"

"Would you consider \$XX if I could assure you of closure? ..If that would put an end to it. ... if it gives you a way out. You won't be seen as making this low/high of an offer."

"I realize you don't want to spend \$XXX, but if I can get the whole thing wrapped up for under \$YYY how close can you get? Would you be receptive to \$ZZZ?"

"She/He's at \$\_\_\_\_\_, you're at \$\_\_\_\_\_. I don't have authority from him/her to go to \$\_\_\_\_\_ and I don't have authority from you to go to the same figure. Can I go back to her/him and try to a commitment to go to that figure if you will?"

## A: Agreement

"It's clear you both share the common goal of reaching a mutually acceptable resolution."

"The key is to expose your needs and interests to each other and listen with an open mind. Focus on ways you can help the other person get their needs met."

"This is not a contest to be won; it's a joint problem-solving quest for a reasonable compromise solution."

"At this point it's time for both sides to begin working together to explore options toward a solution."

"Okay, now I want you to use your considerable problem-solving abilities."

"Now we're going to think about some optional ways to resolve the dispute. As many ideas as possible."

"I want to hear suggestions and tentative ideas about how you might overcome your differences and come together on some aspects of an agreement."

"What would be your suggestions?"

"What ideas do you have about how this might be solved?"

"How do you want things to be improved?"

"What would work well for you?"

"Do you see yourself in a different position in the future?"

"Try lots of exploration and experimentation ... sort of 'trial and adjust' negotiation."

"It helps to let go of the past and focus primarily on the present, the options available right now."

"New options and opportunities can be discovered when you view the problem from as many perspectives as you can."

"Think about what it would take to get this resolved ... for you and for them. What are some of the ways that come to your mind?"

"Think outside the box. As Einstein famously said: 'We can't solve problems using the same thinking that created them.' Use imagination, intuition and creativity."

"From what you've learned about their interests, how would you shape the elements of a deal that would be very beneficial to them in their eyes ... while not too bad for you?"

"If there are benefits to one party that cost less to the other party ... you're enlarging the pie to be divided."

"What do you want? What would you like to see happen today? "

"What ideas do you have on how this dispute could resolve itself? [Then, to other side] Without responding to what they just said, give your own fresh answer to the same question."

"This is the open discussion period where you ask each other questions, respond to what's being said and fill in the information gaps."

"It helps a lot if you show a little appreciation for anything good they say."

"Everyone is doing the best they can to get their needs met. Each has their own set of needs and their own sense of what's fair and right."

"If you look out for their interests very likely they will look out for yours. "

“The art of compromise is the willingness to give up something in order to get something else in return. We’re looking for trades.”

“Instead of an outcome being imposed on you, you can help determine it and it may not come from law; it may come from goodwill.”

“You can “agree-to-disagree” on past facts and think about where they want to go from here.”

“I hear you taking responsibility for what you feel were some mistakes. That’s often given credit by the other party. In what form would you like credit?”

“What could you have done differently to help avoid what happened?”

“Let’s move to constructive problem solving. What more information from \_\_\_ would you like to have in hand as you begin creating steps toward a solution?”

“Rather than rehashing the past, let’s focus on the future where there haven’t yet been any problems.”

### **Impasse**

“Sometimes virtue is its own reward. No one and no bad treatment can take it away.”

“There’s always a natural tendency to focus so much on their character that your tangible interests don’t get enough attention.”

### **Impasse Approach: What If’s**

“How would you react if the other party made this suggestion? \_\_\_ How would you modify this suggestion?”

“What if you could design a payment plan. How would it look?”

“What if you include non-monetary compensation, such as \_\_\_\_\_? Any ideas?”

“How would you think about this other option? \_\_\_\_\_. I’m not trying to convince you to take it, only to make sure you know about it and can consider the advantages and disadvantages. The choice is yours.”

### **Impasse Approach: Role Reversal**

“Stand in the other person's shoes for a bit and look at the issue through their eyes. How would you resolve it if you were over there?”

“If you were them, why do you think your proposal wouldn't be workable?”

“If you were them, why would you accept your proposal?”

“How would you tweak their proposal to make it better for you but still not too bad for them?”

“What are some of the criteria that would make it good for you? Bad for you? ”

“How about you being the mediator for a bit. Tell me what you heard them say.”

“Be the jury for a minute. Try imagining it from a totally impartial, objective perspective.”

### **Impasse Approach: Future and Future Relationships**

“I’ll bet you can each make a pretty good case for why it’s not your fault. But I don’t think it’s going to help you much to be arguing about it. You need to shift the question from “whose fault is this?” to “How might we resolve this problem ourselves?”

“How would you like to feel six months or a year from now as to what you did and as to your payoff for resolution today on this dispute? How can you make that future happen?”

“If compromise could resolve this today, how would the relationship be different than if you elect to fight to a public courtroom?”

“You might want to think about what extent this would ruin your rapport with them going forward if you push too far.”

“If you don’t resolve it and sue in court, maybe get some publicity, you will destroy the relationship. Do you want that?”

“Your apology can go a long way toward reconciliation. Randy Pausch (Carnegie Mellon professor who famously gave a “last lecture”) suggests these parts:

1. What I did (or said) was wrong. I won’t do it again.
2. I feel badly that I hurt you.
3. How can I make this better? Listen.

Best: Offer an action against your self-interest.”

“You might at least try saying something like: “We recognize you were \_\_\_\_\_ (injured). We wish you well.””

“The gentle art of loosing face may save the day.”

“Mistrust caused by past behavior doesn’t have to cripple your future and your options. You can put trust-guarding features into the agreement like incentives, monitoring and remedies.”

“You’re looking for a formula that gives you a better future than the status quo.”

“If the future is so uncertain, what kind of contingent agreement can you think of? Different obligations based on different future conditions or things that might happen. Some easily-measured external variables.”

“If you end up having to go to trial, and are worried about extreme outcomes, how about setting a guaranteed recovery in exchange for a cap on maximum recovery?”

“People in an ongoing relationship know the value of keeping it a good relationship by treating each other fairly.”

### **Impasse Approach: Parties Help**

“What would you like to do next?”

“What do you think we should do?”

“Our process doesn’t seem to be working well right now and I’ve nearly run out of ideas and would like your help to come up with fresh ideas to keep it going.”

“What would you suggest for me to do at this point?”

“I’ve got more confidence in you than you seem to have in yourselves. I’m going to leave you to discuss it and decide what to do ... and come up with a number.

Then I’ll check back with you; we’ll discuss it and I’ll take it to the other party.”

“What additional information or new arguments might help [each side] rationalize or justify movement?”

“This doesn’t seem to be working right now. What do you suggest that will allow us to have a more productive conversation?”

“An impasse is a temporary condition and you have the power to end it.”

“If you want to continue the mediation and get your resolution, keep it going.”

"We need a little movement."

"How do you see this dispute resolving itself?"

"I don't want to throw my hands up in the air at this point and say it can't be done.

Give me a new idea I can take to them."

"I'm totally stuck. I don't know what to do."

"If you were in my place what would you do to get it resolved?"

"Imagine yourself in my shoes. What would you tell yourself?"

"I think you both have to decide what to do now. It's as good as it's going to get."

"From here, you'll have to do it. It's ultimately your responsibility."

### **Impasse Approach: Neutral Evaluation (e.g. appraisals)**

"Reasonable, rational people would be capable of settling this dispute. Leaving all feelings aside for a moment, what do you imagine two prudent neutral people would do in a situation like yours?"

"Would you like to consider hiring an expert to make an evaluation?"

"Would you like someone to create a discussion draft of a settlement agreement?"

"I know it's frustrating and I'm with you; but realistically it appears the situation just won't work out quite the way you might hope."

"You know, I'm sorry but I just don't see that happening today."

### **Impasse Approach: Recess**

"Perhaps this would be a good time to take a break, stretch, get some coffee or fresh air and be back here together in \_\_\_\_ minutes."

"Why don't we take some time now to recess, step away and allow time to mull these things over in your mind as you walk around inside or outside."

"Before we finish today, each of you draft a confidential offer that won't be presented to the other until a phone call made by \_\_\_\_\_ at \_\_\_\_ p.m. on \_\_\_\_\_. Agree now that there will be no haggling during that call and during this recess. Either accept or reject one of the offers and return to this mediation on \_\_\_\_ at \_\_\_\_\_ to report the outcome."

### **Impasse Approach: Draw Out Passive Participants (In caucus)**

"We haven't heard much from \_\_\_\_\_. Will you indulge me and give me permission to imagine it's now a private meeting with \_\_\_\_\_, while you (all) stay here as a silent observer(s). I sense it will be useful to get everything we can out on the table."

"Imagine you're alone. Pretend they're not here. This is your turn to be heard. Tell me your views on what's going on."

"What do you want to get out of this? [If his attorney objects ...] "This is not a court. If he/she wants he/she can speak for him/her self."

"What are some your interests and concerns that haven't yet come out in the discussion?"

"How will these this case impact your life? Your relationships? Your future?"

"I need you to talk to me and tell me what you want."

"What are your hopes and expectations? What might you be worried about?"

"Great. This is good new information." [To atty]: "How is what we just heard, these new



ideas, something to factor into your team's options and perhaps help you construct a next offer?"

### **Impasse Approach: Other**

"We're rapidly moving toward impasse, and if we don't figure out where both sides want to move forward with this, we'll be ending the session."

"Think of someone you know well who's a good problem solver. How would they go about solving this problem? What special twists would they add to it? What assumptions or constraints would they bring in or ignore?"

[In caucuses] "The other party is ready to leave. Before you decide to leave too, let the other party know."

"We might have a cross between mis-spoken and mis-heard to sort out. Let's try again."

"I'll leave you some time alone to sort this all out. Let me know what you come up with."

"You may want to think whether there's a way to shift your resources around so that you could \_\_\_ and don't have to lose \_\_\_."

"What's going on here? We're so close to a settlement and your demand for an extra \$\_\_\_ is creating another impasse. What can we do?"

"I'm not giving you advice on what to do. In case it's helpful, know that in a different case, with somewhat similar circumstances, the parties were willing to consider \_\_\_."

"As food for thought, this is what helped resolve a conflict for another case: \_\_\_"

"Have you ever considered thinking about \_\_\_?"

"Sometimes it helps to step back and remember we have choices. How we receive messages; how we give out messages; how we see the world. Just try to think of a new perspective and view your situation from a different angle."

[After expression of willingness] "That's good to hear; what have you got in mind?"

"Let's look at what's in your best interest."

"The gap is down to only \$\_\_\_\_\_ remaining. Who else could benefit by transferring an amount to another deserving person or cause? Such as a child, a charity, a mutually incurred fee. Or invest an amount equal to the gap until you both might be ready to come up with a fresh resolution."

"It was horrible (what you went through). The only thing I can think of that'd be worse is recycled dwelling on it, reliving it over and over."

"In your analysis, what is your separate assessment of: Liability / Damages / Collectability ...and... Liability: Duty, Breach, Causality?"

(In caucus) "I just had a thought. It may not have any merit; but what would you think of this kind of an approach?"

"Now I'd like to have just the principal parties meet, without attorneys, to discuss principles only ... without discussion of numbers"

[When asked my opinion] "I believe it's best for both parties to take full responsibility for determining whether or not they settle and on what terms, without my imposing my own judgment or opinion. Let's think about how to analyze what you're considering."

"You are not alone in ever being at this point. Others have traveled the path and have successfully used some tried and true ways to close the last gap. Here's a set of choices (e.g. flip chart) to give you more food for thought:"

1. Talk some more, in different ways to try and convince the other side.
  2. Split the difference directly or by a formula whereby the gap is split if it is \$\_\_\_\_ or less after each makes a new confidential offer.
  3. Find something else of valuable to the other side to 'sweeten the deal'.
  4. Ask some neutral person and take their gap-breaker number.
  5. Take a chance on a coin flip. Whoever wins gets their last number accepted.
  6. Deposit 10 intermediate values on slips in a container and someone draws out one slip that determines the settlement value.
  7. Instead of paying the gap to the other party, pay it to their charity or a child or for some other mutually agreed benefit.
  8. In recess, get a trusted confidant to review each side's risks and potential gains, including getting on with your life, stop paying attorneys, reduce stress, focus better on work, regain control of your life.
  9. When the gap is for contested assets, hold an instant auction.
  10. When the gap is for many contested assets, one side creates two groupings; the other picks. (like dividing a remaining piece of pie).
- "Is there anyone else not here who might be strongly affected by your decision or critical of it? Is there anyone who could extend your authority or freedom? Do you want to talk with them privately and explain things?"

### Broken Ground Rules

Whoa, whoa, let's dial this back. We're here to listen to each other. So I'm going to have to make a rule of no interruptions. From now on, only one person at a time talks and everyone else listens. Understood? Agreed?"

"Hey, that statement makes me uncomfortable. Let's come up with another figure of speech."

"Wait a minute. One at a time. \_\_\_\_\_, you first."

"Is our agreement not to interrupt each other (or be rude) still in effect?"

"We were having a civil dialogue and it broke down. Let's go back to the civility."

"I feel your anger. Tell me more about it."

"I understand your need to express anger; but if you keep doing it I can't do my thing."

"It's clear you're quite upset and angry, based on your experience. Maybe both of you have a right to be angry. But staying in anger won't solve the problem."

"There's more than one way to respond to anger. There's always a choice to react and get caught up in it. Or, better yet, use it as a reason to investigate."

"Although venting feels good, a better feeling would be ending the strife."

"Let's not focus on anyone's emotional state and instead figure out what we need to do."

"Let's examine [the issue] with our minds and let our emotions rest a minute."

"Strong emotions have a way of short-circuiting the brain's rational thought processes."

"STOP! Everyone's worthy and deserves to get respectful treatment and attention."

"Take a second to notice if you're letting your emotions run you right now; instead of your deeper nature. Which has the upper hand?"

“Why don’t you both try to put past hurts behind you and look for ways to build a solution.”

“Blaming with rudeness will just make it harder to get to resolution.”

“A certain amount of accusation is understandable at the beginning. But it may not get you where you want to go.”

“I hear you as still in blame mode. I can only help you out of this mess if you’re willing to drop the blame mode, look forward and work with me toward reconciliation. If you can do that we’ll get a settlement that you’ll find appealing. Are you willing to work with me?”

“What we’re trying to do here is move away from blame and repetition of prior positions toward a more cooperative and creative process of problem solving ... inventing solutions for mutual gain or satisfaction.”

“Even if you don’t fully agree with what \_\_\_ is saying, by listening, understanding and empathizing you will help bring about the closure you want.”

“I want you to relax. Picture yourself at a beach sometime in the future, a month, a year, several years. What would your thoughts be then?”

“Imagine your personal coach is here. Imagine how he or she would guide you.”

“You seem like good people; quality people. You don’t seem like the type of people who would \_.”

“A tone of disrespect or a gesture of disrespect, can very easily creep into what you’re saying, sometimes without realizing it. That usually shuts down the listener. So try to be extra careful to show respect when you want your points heard or accepted.”

“People in conflict often lose track of how they treat others. Try to get back on track of how you want to be seen. Will being upset at them change anything, really?”

“I believe you are powerful enough to handle this calmly and easily, without resorting to the armor of anger.”

“It’s only when you both stop rubbing your anger against each other that we can discuss solutions.”

“We feel the power of your anger. Can you use that energy toward constructive action?”

### **Brainstorming/ Option Generation**

“How about a little lighthearted fearless brainstorming? Blue sky. Playful. Everything from the obvious to the ridiculous.” [Can try in joint, but less tension in caucus]

“Let’s say we’ve gone through the circumstances enough.

Let’s go on to something new. Where would we like to move to today and how are we going to get there?”

“What are some of your thoughts about the best way to approach this situation?”

“The more options you discover in brainstorming, the more likely you’ll find ideas better than a simple compromise.”

“What makes brainstorming good is giving every idea a ‘green light’, even if wild.

Build on ideas; we’ll evaluate later, not now.”

“Put aside your internal judge for a minute and let your internal creative nature come up with imaginative ideas.”

“I’d like to listen to any criticisms, but let’s put them off until we have thought up lots of

alternative options.”

“We agreed to brainstorm and you’re starting to evaluate the ideas. Would you be willing to hold onto that for now?”

“Feel free to come up with anything, no matter how wacky or far-fetched, whether or not you’d ultimately agree with it. No ownerships yet.”

“Try thinking of things that have high benefit to the other party and little cost to you.”

“Whenever an idea is proposed, focus initially on its positives because they may be stepping stones to better ideas.”

“I like the way you said that. We’re making progress.”

“Okay, that’s really something. I think we can work with that.”

“It helps to start from where they are; not from where you are.”

“H/She proposed \_\_\_\_\_. What do you propose?”

“What are some of the ways we can expand the options?”

“You’ve heard proposed solutions that are quite different. Now I like each of you to think up a third solution that can help each of you get some of what you want.”

“Without worrying about capitulation, you can broaden the scope of negotiation by thinking up potential trades. It shows strength and confidence, not weakness.”

“Has anyone heard of an approach that helped solve a similar situation?”

“Let the other party save face. e.g. Kennedy promised Khrushchev he wouldn’t invade Cuba.”

“When someone asked to be made a baron, prime minister Disraeli said: “You know I cannot give it to you, but you can tell your friends that I offered you one and you refused it. That’s much better.”

“What are some of the criteria we might use to evaluate potential solution ideas?”

“Here are some other ideas [with tone of no attachment] offered to keep the process going, not to tell you what to do or how you should decide.”

### *Movement Strategy...*

*“When someone makes an offer, there are only three possible responses: Accept, reject or make a counter.”*

“It may not be all you wanted, but at least it represents movement. That’s encouraging. How about making a counteroffer and see what response you get.”

“This offer may be disappointing to you, but it is not the final offer. What new offer can you make?”

“Concessions don’t always mirror each other. A concession you make may naturally seem greater if it feels like it hurts more to you. Same in reverse to them.”

“Concessions are the language of cooperation. Each party needs to sacrifice somewhat to secure a joint resolution.”

“Remember, the value or quality of an offer is both the dollar amount and the terms. When they make an offer, you decide the value and importance of the terms.”

“They made the last concession. Now it’s your move.”

“Please write down and show me what you think the other party’s first offer and final offer will be.”

“What would be (or have been) a reasonable number for them to start with?”

"What would you have them suggest?"

"What do you want to propose in order to help them do what you suggest?"

"That's an option. That's one thing you could do. What else?"

"I'm just wondering whether that's our only option. Are there any other approaches that might get us moving forward?"

"What other possible outcomes occur to you?"

"Is what they're doing affecting your thinking about what you should do? Keeping you from doing what you could to settle?"

"They gave me a new number. I took your \$\_\_\_ to them and they came up/down to \$\_\_\_."

"Get me some more money so we can settle this case. I don't know if you can get more authority by calling someone. Can you?"

"That's a respectable amount. Now how do we get them there? Help me figure out how to do this."

"They think \$\_\_\_ is a lot of money in this case."

"I believe they think \_\_\_\_\_. Their offer is contradictory to what they say. They say they have no room; but they increased their offer by \_\_\_\_\_."

"Just between us, I think you're a little light. I could be wrong, but \_\_\_\_\_."

"They've now come to \_\_\_\_\_. It was a battle to get them to move, but it's a good sign."

"He/she says it's very close to the end, and he/she is trying to make me a believer."

"I'm feeling very discouraged because he/she indicated they're close to the end."

"I beginning to suspect that \$\_\_\_ would be hard for them to walk away from... and maybe hard for you to refuse."

"Could I assume you'd reluctantly, reluctantly get to \$\_\_\_ if you could be sure they'd come that far?"

"We're running out of logic. Their number may not make sense to you, but we've got something to deal with. Can you accept it?"

"The problem may be that we're out of bargaining chips. What else can you offer?"

"Closing - Finalizing Agreement; Congratulations. Before we conclude, I'd like to help you nail down the specific terms of what you've both agreed to."

"Now we just need to finalize and formalize the agreement."

"Are there any other specifics of the agreement we need to talk about?"

"Is there anything else that's going to prevent you from signing this agreement?"

"When you explain the agreement to your strongest critic, what are they going to say is wrong with it? How will you explain why you agreed?"

"Well done. Congratulations on reaching a resolution. You earned it by working hard and working together to find an acceptable solution."

"Again, I want to thank you both for coming together today. I think this has been a very successful session and you've both worked hard to deal with some difficult issues and come to a positive resolution for both of you."

#### Review Interests and Goals (Impasse Breaking)

"What are the most important gains for you in what you've accomplished so far?"

"It's the actual reality to be dealt with. You can ask wishfully that things might be as you'd

like them to be or you can deal with them as they are.

“We can’t always get what we want; but you might find you can get what you need by working the process a little further.”

“From your inquiry into their interests and needs, what are some other things they might regard as positive in exchange for your needs?”

“You obviously have meaningful goals to reach for and obviously waiting for a perfect solution to float your way usually won’t work. The way to make progress is to aim high and make meaningful effort toward steady incremental compromises.”

“Have your interests changed any over the course of today? What is your current set of main interests and minor interests.”

“What other interests and concerns do you have that haven’t been talked about yet?”

“How about your goals? After hearing the discussion do any of your goals seem more or less attainable? More or less important?”

“What are the criteria for an acceptable outcome? Before we focus on the specifics would you try to define the qualities any good outcome should have?”

“Why are we here?”

“Now let’s get down to brass tacks; what do you really want?”

“If you could end this now, what would be acceptable to you?”

“We’re rapidly moving toward impasse. What do you want to get out of this today?

If we don’t find out where both parties want to go with this today, we’re done.”

“Let’s see if in what ways your goals and theirs are mutually reinforcing.”

“There’s no such thing as a conflict that can’t be ended. Conflicts are created, conducted and sustained by human beings, and they can be ended by human beings. I believe this one can be ended and will be.”

“How valuable to you is it to get this over with, get on with your life, avoid future contact with them, reduce stress, regain control of your life, begin using the money for something constructive, or other values in your life. Compare that with the last offer.”

### **Agreement Impasse Approach: Benefit of Success; Cost of Failure**

“A settlement avoids public exposure. Judgment from a court goes on the public record and it’s not good for reputations. It also increases the cost of credit..”

“Payment collection is much easier when the paying party agrees to terms.”

“Closure today saves years of waiting for the legal process to run its course.”

“You’ve already invested considerable time and energy in this. Make it pay off by going the last little bit toward agreement.”

“Would the expenditure of your time and energy in litigation gain you enough to be worth passing up this opportunity? When the gap is only \_\_\_\_\_?”

“Visualize yourselves at the edge of a tall cliff looking down and know that you could fall all that way down and end up at the bottom unless there is a little mutual flexibility to keep the process going.”

“Here’s where you’re most likely to agree, whether it’s fair or not. It may well seem somewhat unfair but the best choice(s) to stop the pain and go forward free of conflict. As I see it, \_\_\_\_\_.”

“You resolved \_\_\_\_%. Would it really be worth litigation for this last \_\_\_\_%?”

"It's like you're going forward on a difficult hanging bridge across a raging river and you're almost to the other side. Do you want to make it the last little going all the way back?"

### **Impasse Approach: Uncertainty and Risk**

"Do you really want to trade the certainty of what will happen today for uncertainty and risk of what will happen if it's not settled and someone else makes the decision for you?"

"Consider the downside if this case goes any further and you're forced to have an audience with a judge where law books determine the outcome instead of you."

"If it goes to a judge, the judge may well decide something neither of you like."

"What are you going to do if there is no agreement? What is the other party likely to do?"

"How many alternatives do you have? Is it between here and litigating in court?"

[BATNA] "Do you have a Better alternative to a negotiated agreement?" "What do you hope to get if you go to court?" "What do you think are your chances of getting that outcome?" "What will it cost you to get that outcome?" "What are the non-monetary consequences that might result, such as having to deal with \_\_\_\_ or stress of \_\_\_\_?"

"What do you think are your chances of collecting a judgment if you get one?" "What are some of the reasons in your analysis?"

[WATNA] "What would you expect might be the worst that could happen?" "If you don't settle today, and you don't get what you want from a judge, what would be the time, effort, cost and emotional worry to take it through the legal process such as delay, discovery, attorney fees, court costs?" "What value might you put on a disruption of your life keeping you from more productive activities and the stress of fighting in front of a judge?" "What other downsides can you envision?"

"What's a "Mid-case scenario" or "most likely" scenario between best and work case outcomes?"

"Conversation and dialogue is the least expensive part of any conflict."

"What's your cost/benefit analysis?"

"If you let a judge or jury decide this case have you considered you may end up paying even more /(less) than the choice presented here."

"You can't rely on the judge; so rely on yourself."

"Yes, you could give up and try the litigation "lottery"; but it's about as risky as doing brain surgery with a chain saw."

"Your choice is a sure gain versus some probability of future gain."

"Here's what lies ahead: \_\_\_\_\_. Do you want to settle this in court or is there a businesslike way to handle it?"

"There's a lot of risk and downside in this case if you don't settle. There's a reason why over 90% of cases settle."

"Now, in this private session, I'd like to ask your attorney to review what a trial would entail."

"It's hard to get away from making some form of decision. There comes a time when failure to decide ... like afraid to make a wrong decision ... becomes a decision itself."

"You can think of the circumstances of your dispute as the 'territory' you both occupy. When you let a judge invade your territory you've lost control to unpredictable and arbitrary action."

“In my experience the legal system doesn’t always work the way you’d hope.”

“What matters to a court is only part of what matters to each of you.”

“Both of you could go to court, but I don’t see how that’s a better option.”

“Maybe we might consider nailing down what’s been agreed so far and set aside some issues for later.”

“Why don't we table that issue for a little bit and discuss another issue, one where I imagine you're going to have an easier time getting resolution. Then we'll come back to that issue later.”

“If you absolutely can’t work everything out today, would you like to agree to try an approach for a period of time and then meet again to discuss how it's working?”

“Would you both like to try drawing up a “Declaration of Principles” to guide you on the way to a final agreement?”

### **Terms:**

This agreement is settlement of a disputed claim or claims and it shall not be deemed evidence or admission of liability or fault by any party for any purpose.”

“Each party agrees not make any negative or disparaging statements or comments, about any other party by any means, whether oral, written, electronic or otherwise.”

“Each party agrees to hold in strict confidence all facts of the dispute and terms of this settlement agreement except as required by law.”

“This agreement shall not pertain to these specific claims: (or issues) \_\_\_\_\_. All rights to those claims are preserved.”



## R: Resolution

(Review Motivations,)

Impasse Approach: How Confident?

“Give yourself a reality check. What’s your certainty level? 90%? 80%? 50%?”

“How strong is the legal merit and provable damages in this case?”

“How weak is the legal merit in defense and the possibility of facing a high verdict?”

“What do you want? What are you doing to get it? Is that working? If not, what can you do differently to make it happen?”

“Consider what you have control over and what you don’t:

Behavior or decision of judges -- No

Decision of juries -- No

Movements by the other side in negotiation -- No

The way the other side evaluates the case -- No

The way the other side opens with low-ball or high-ball offers -- No

The pace the other side moves with counter-offers -- No”

“So, what’s left?

Your own case evaluation -- Yes

Your own negotiating range -- Yes

Your own movement at any time -- Yes

Your own stopping point in negotiations” -- Yes”

“Take a long hard look at the reality of your situation.”

“Test your perception: How much is it like dreamlike desires vs. hard reality?”

“At this point you might step back and ask yourself: “To what extent am I approaching this as an exercise in make-believe; in a fantasy of ‘let’s pretend’ I’m going to get everything I want.”

“Let’s try a reality check from this standpoint. Have you considered \_\_\_\_?”

“Have you had experience with the same kind of case, same facts, same judge?”

“Ask yourself if your experience with situations just like this is sufficient to predict what the judge will do.”

“What people often don’t take into account is the fact that spending more time thinking about all the things in one’s own case results in overconfidence.

Opposing facts, evidence, arguments and legalities don’t get thought about as much, distorting one’s judgment.”

“You know you lack (e.g. the necessary written documentation to support your case) don’t you? How would a judge or jury be convinced that you \_\_\_\_? Plus, as you may be aware, \_\_\_\_ has \_\_\_\_ (e.g. two witnesses, both prominent in their field prepared to testify on their behalf.)”

“Now I’d like each of you to be a Devil’s Advocate and argue against your own position.”

“May I be a Devil’s advocate for a bit? Will you me permission to be blunt and direct?”

“May I give you an outsider’s view of it:?”

“How well do you meet the four-part legal standard of reasonableness? 1. Duty to care as a reasonable person would. 2. Breach of duty. 3. Causation with proof. 4. Damages with certainty of value.”

“We could argue or dispute the legal aspects all day and night. Or, we could try to get a negotiated solution to resolve them in a manner that helps satisfy the aspirations of both parties.”

### **Impasse Approach: Fairness and ‘The Principle’**

“Reasonable minds can legitimately differ on the degree of fairness in any situation.”

“There's no absolute measure of fairness. There's room for different perspectives; differences on 'evidence' & 'facts'; differences on interpretation.”

“The difference between a freedom fighter and a terrorist is merely one's perspective. The same person can be perceived as either a Warlord or a Liberator.”

“The same behavior can be interpreted as either ‘rigid’ or just ‘consistent’. Stingy or thrifty. Rude or just frank. Simultaneously, by different observers.”

“As an example of different perspectives, sex three times a week could be viewed as ‘very frequent’ or ‘seldom’; depending on different perspectives.”

“If I were to ask each person in the room to describe what's been going on I'd get a different answer from each person. No two alike. It's unrealistic to require someone to match one's own viewpoints and behavior styles.”

“For any act there are as many interpretations as observers. This is liberating. A limber, open mind gives one more choices on how to react and avoid being locked into a polarizing struggle.”

“People always give more generous interpretations of ourselves than others give us.”

“In the heat of argument, it's easy to lose perspective and just react. That's just human nature that happens to everyone.”

“Every angle on the evidence has its own perspective.”

“Whenever we don't see the whole picture, we can't be sure we know what's true.”

“Each of you is entitled to your own point of view. It's not the same because you're not the same. In order to create a solution between you, it helps a lot to be able to see the other's point of view.”

“It's unrealistic for everyone to hold same view. It's wishful thinking, a pipe dream not likely to happen.”

“Of course you are entirely free to choose which point of view you take. And do you allow that there might be other legitimate points of view?”

“Like most people, I have a hard time remembering that we all see the world through our own particular lens.”

“When we begin to see the possibility of other perspectives it's easier to deal with solutions.”

“We tend to assume we're sharing the same reality when in fact we're each living in a highly personalized internal world, interpreting and responding differently. Try visiting their reality.”

“I hear your devotion to principle. If you were to hold out on principle, it might feel good for a while, but would it really make the world better, by sacrificing your economic self-

interest?”

“There is always room for disagreement. People can disagree and still deal with each other, like in a family “

“I don’t know if it applies here, but there’s a saying that striving for “Perfection” usually gets in the way of finding something good enough.”

“The ‘best’ is the enemy of the good.”

“As Warren Buffet says, it’s better to be approximately right than perfectly wrong.”

“Your next offer doesn’t really have to be absolutely “right”. You just have to come up with a number where they can feel like they earned it.”

“I’m going to talk to them about how a big investment in ‘being right’ can sometimes interferes with solving the situation. While I’m gone, it’s a chance for you to ask yourself the same thing.”

“Do you want to be right or be done?”

“I understand your point of view, and sometimes the issue isn’t whether you’re right, it’s whether there’s any value in being right.”

“Right or wrong, at this point your best shot may be to shut this down with a final acceptance so you don’t have to think about it any more.”

“You probably have good reasons for feeling that would be fair. I like to listen to them.”

“Tell me some of your rationale about why that might seem fair.”

“It’s not possible to replay the past to make things feel more ‘fair’; but it is possible for you two to set aside the past, rise above blame, talk together, explore your alternatives, and create a vision for yourselves going forward.”

“Another way to think about it is to win, not by getting everything you want; but by not losing more than you otherwise would.”

“Another way to think about it is to subordinate the arbitrary goal of fairness and instead strive for a mutually satisfactory outcome.”

“Did you think the other side was just going to capitulate? Would that be fair?”

“Attachment to a particular outcome often creates suffering. Being open to creative possibilities is a way to end the suffering.”

“What are the possibilities?”

“Sure you were treated badly and you feel strongly about holding them accountable to a matter of principle. What they did might have been unfair, but we’re here for your best economic interest, not for a religious need to convert sinners, right?”

“Right & wrong or exactly truthful facts are beside the point now. You’re looking for a deal.”

“Did [the other party] wrong you with deliberate active malice? Or was it mistakes and misunderstandings?”

“Circumstances can make a difference. You might consider an offer based on what’s just and right under the circumstances.”

“A resolution doesn’t have to be “fair”, just “acceptable.”

“I understand it’s sometimes tempting to force an issue of principle in the hope of causing behavior modification on their part in the future, yet you could give yourself permission to abandon such a goal, depending on how realistic it might be.”

“Our human tendency is to believe truth and justice are only on one side. This case appears

more complicated, without one simple answer.”

“All things considered, including what you stand to gain, it can show strength of character to just hold your nose and sign.”

### **Impasse Approach: Outcome Doesn't Define You**

“However this comes out it can't damage who you are. That remains solid in your eyes and the eyes of others”

“As you know, the size of a particular pile of money can't determine a person's character or worth.”

“What you're simply figuring out here is what's prudently economically for you, considering all the alternatives and options under your control. That's all. Nothing more.”

“Don't let other people's conduct get under your skin no matter how they behave.”

“Although an apology toward you would be nice to hear, you know who you are and your high worth is untouched by anyone else's judgment.”

### **Impasse Approach: Review Accomplishments**

“Remember where you were when we started. [Review] and where we are now [Review] after so much progress. I see that you all are trying hard to work toward a complete solution.”

“The progress you've made is evidence that more can be done.”

“We're making progress, but we have less than full agreement so far.”

“By the progress I just summarized you've already demonstrated goodwill, good communication and an ability to create ideas that work. If you want to capture these gains, get more of them and get to full resolution ... you need to keep it going.”

“You've already invested considerable time and energy in this. Make it pay off by going the last little bit toward agreement. You wouldn't want all that to get away from you, would you?”

“The good thing is that both sides now recognize that unilateral victory is impossible and both feel there is a way out of your mutual pain by using fresh ideas, fresh alternatives.”

### **Impasse Approach: Divide & Concur ... or...Back up to Big Picture**

“Let's look at some of the pieces.”

“Do you realize how close you are, when you add up the pieces, it looks like ... “

“It's sometimes helpful to look at the situation as a whole in a different way.”

### **Impasse Approach: Morality**

“What is the right thing to do according to your best principles?”

“You can do what you want, but is it really the fair, ethical, and right thing to do?”

“Ask yourself if it is really the right thing to do according to your best principles?

How would you feel about yourself?”

“When you look back on today's negotiation, will you be able to know you acted according to your own values?”

“You appear to be highly professional, intelligent and caring. What would have been a higher level of consideration in this matter?”

“If you were to do the experience that caused this dispute all over again, what would you have preferred in what you did or the way you acted?”

Thanks to Dudley Braun ([Dudley\\_Braun@Hotmail.com](mailto:Dudley_Braun@Hotmail.com)) for these keys.