2021 CLM Construction Conference
Sept 22nd – 24th, 2021
San Diego, California

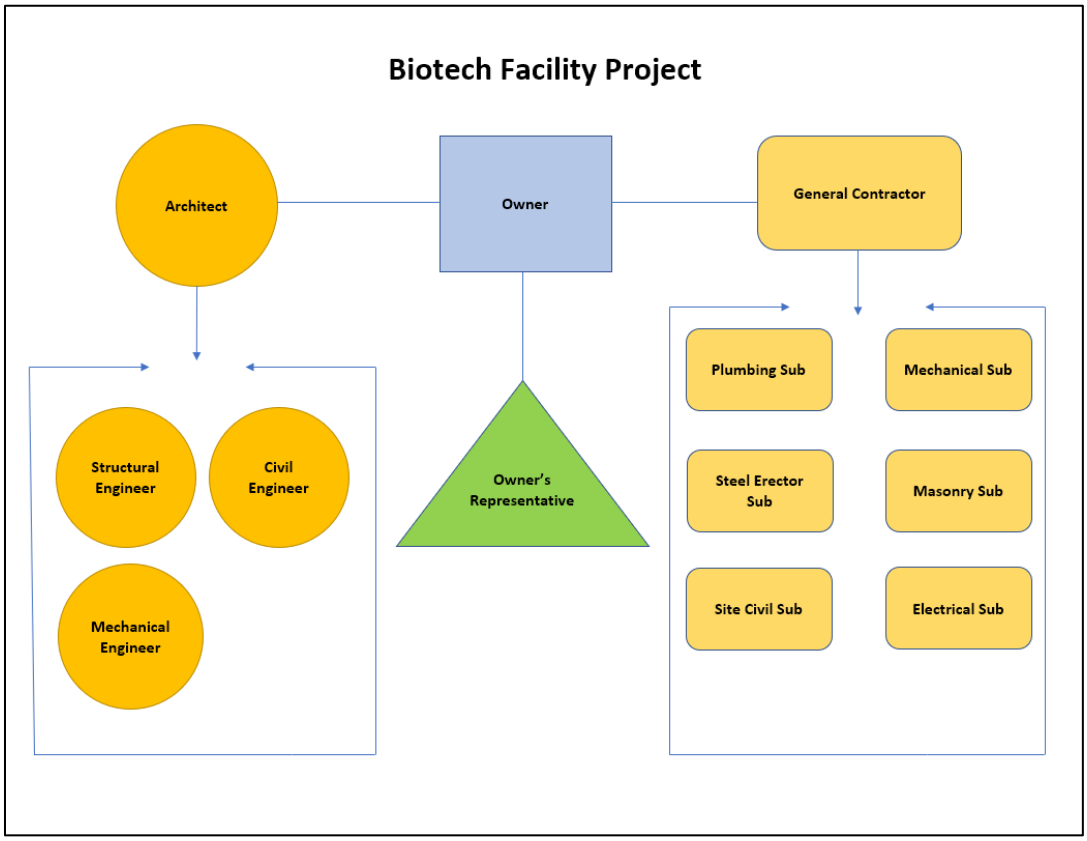
Strategies for Success in Mediation Settlement Involving Complex Construction Issues

Summary

Though nearly all in the audience are themselves certainly experts in handling construction mediations, the ever-changing complexities in construction design and delivery methods as well as the fact that mediation is part of the landscape for nearly all moderate to large scale construction disputes justifies a pause to consider what works best to resolve mediated construction claims, what does not work so well and what new concepts should be explored and tried. Insurers, contractors, design professionals and their attorneys can all profit from this panel's consideration and discussion of the best presentation and negotiation processes and protocols. Using a model case study to give the topic a framework, the panel offers their take on what works best (and what does not) in a manner that attendees and readers can immediately use with their own claims and cases.

I. The Mediation Case Model

A. Description of the Model Scenario



The intent of this presentation is to offer not only best mediation practices, but also alternatives to the norm so that such alternatives can be utilized or, at a minimum, spark the kind of thinking that will promote other creative ideas to resolve difficult to settle complex construction disputes.

II. Before the Mediation

A. Getting the Timing Right

Construction disputes of course are often expensive to litigate and may take years to conclude. Early resolution through mediation, even if it does not produce a resolution, can sharpen the parties' awareness of the nature of the dispute, improving further settlement negotiations (or a later renewed mediation).

But finding the "right time" to mediate is a matter of considering the circumstances of the dispute. Often, discovery, expert submissions and financial analyses are necessary before a reasoned evaluation of the case is possible. A key legal issue in the case, if resolved by motion practice, could affect settlement decisions.

In some instances, parties select a mediator, and after discussions with the mediator, conclude that mediation sessions should not be scheduled immediately. There are also instances when only a portion of a complex dispute is susceptible to mediation. Parties and counsel may plan for limited mediation, with the hope that later negotiations can include a broader array of project constituents.

These sessions can yield settlement, and (if not) other benefits, in terms of information exchange, preliminary analysis of positions and preparation for further negotiations (and perhaps later mediation sessions).

B. Best Mediator Selection Criteria

The choice of a mediator can of course have a critical impact on the conduct of mediation. A good mediator cannot succeed where parties truly do not wish to settle, but a mediator that is not right for the specific dispute may derail a potential settlement even where parties do wish to settle. Many mediators are lawyers and ex-judges who are often strong on legal analysis but not experienced with architecture, engineering, or construction management. Other mediators are construction subject matter experts but may be less skilled with the conduct of mediation and the formulation of settlement alternatives. Still other mediators charge rates or have scheduling limitations that make them unavailable. And there may be circumstances where a particular expertise (such as experience with the type of project in dispute—a biotech facility project that we use as a model for this piece, for instance—or knowledge of insurance issues) may be key to resolution of the disputes.

It is rare to find the ideal mediator for a case as there are too many variables in a construction dispute to think that one person will have the complete combination of skills. Some of the desired characteristics are paradoxical. An effective mediator must be capable of commanding the respect of the parties, but at the same time, empathy and patience are essential.

Counsel should gather as much information as they can about mediator candidates, including the mediator's official *curriculum vitae*, as well as other sources of information: Seek out industry participants and their counsel who have experience with the mediator, who can speak to intangibles.

Further, it is wise to interview mediator candidates about their experience with the kind of dispute present in your case (both as an advocate and as a mediator). Discuss the information you gather with opposing sides and their counsel. Parties often can, by agreement, eliminate candidates not right for the job.

Finally, make sure that the mediator candidate is provided complete information about the parties and people that will be involved in the mediation. Independence is a key element of the trust that the parties must have in the mediator. Full disclosure makes it unlikely that potentially disqualifying connections between a mediator and individual parties or their counsel arise during the process.

C. The Pre-Mediation Conferences

There are many options for pre-mediation conferences to potentially include, though this panel squarely favors them in some form, recognizing that the format and purpose for them may need be molded to the nature of the dispute, the history of it, the parties involved and the goals the parties have for the mediation process. Here are the chief considerations for the pre-mediation-conference:

- Opening demands required?
- In person or remote?
- Private or group?
- Homework required of the parties.
- Timing – well before the mediation or on mediation eve?
- Discussion of "what has prevented this case from resolving?"
- Consideration of required attendees and those who should NOT attend (Beyond simply those with authority)?
- Should a multi-day mediation ever be recommended before the event starts?

D. Pre-Mediation Statements

Though there is debate about the value of confidential mediation statements versus the full exchange of such statements among all parties as well as the mediator, there is little disagreement that mediation statements are critical to the process. Along with preparing for the mediation and attending it, the preparation of the mediation statement is not only a key means to deliver each party's position to the mediator (and where appropriate the opposing party), but it also serves to focus the parties to the importance of the event and to ready each to engage in serious resolution negotiations. Hard to imagine a scenario where the statements are NOT profitably prepared and exchanged.

Though statements are typically prepared and submitted shortly before the mediation, oftentimes owing to the schedule of the mediator, the parties, and their counsel. However, the better practice may be to compel the parties to prepare and exchange the statements further in advance of the mediation and even before the pre-mediation conference(s) is held. Doing so will allow the mediator and the parties to get a better sense for the dispute and the barriers to resolution so that the pre-mediation conference(s) are more meaningful and productive.

Pre-mediation statements serve a variety of purposes. Parties should consider which of these purposes may be most important in their particular circumstances. One purpose is to educate the mediator about the facts and claims in dispute. But, in many instances, there are a variety of other documents

(pleadings and briefs from the ongoing case, expert reports and the like) that can provide more concentrated and complete information. There is little point in reiterating these facts if such is the case. Instead, a brief summary of the case, with reference to the already-existing materials, works.

A second purpose is to inform opposing parties about the strengths (of your positions) and weaknesses (of their positions). The goal, at a minimum, is to ensure that opposing parties understand your position. An analysis of this type should look ahead to the potential trial in the case, as well as to these considerations:

- What claims appear very likely to succeed and what are the damages that may be awarded on such claims?
- What claims are likely to fail?
- What defenses are likely to prevail?
- What damage theories cannot be sustained?
- Is there a significant gap in the other side's proof?

The purpose is not only to convince the other side that your side is right, and they are wrong, but more importantly, to plant seeds of doubt, to suggest that the outcome (in the absence of settlement) is not as rosy as the other side may predict. Where the result is uncertain, and the time and expense to achieve the result is burdensome—the settlement prospects are greater.

Some choose not to disclose their best evidence. But that approach decreases the chances for successful mediation, as it reduces the ability of the parties to fairly assess the risks and benefits of settlement. And a skilled mediator will encourage parties and counsel to be candid as part of the mediation process. The better approach is to provide a cogent, powerful statement of your party's position, with the message that your case will only get stronger.

A third purpose for pre-mediation statements is to frame the structure of negotiations to make the mediator's job easier. So too, a well-organized set of supporting materials (key exhibits, excerpts of depositions, expert reports) demonstrates that your side is prepared to continue the fight if the matter does not settle.

A final purpose for pre-mediation statements is to apprise the mediator of any obstacles or opportunities that have prevented resolution. Parties may agree to submit (or the mediator may solicit) private statements that can address such obstacles and opportunities. It is helpful for the mediator to know the history of negotiations to date, along with reasons why the case has not yet settled. And there may be information about the circumstances of the opposing party that could make settlement more or less likely. Specific suggestions for how to address obstacles and exploit opportunities will help the mediator prepare for more effective negotiating sessions.

Regarding the decision to keep statements confidential or to share them with opposing parties, counsel may be tempted to refuse to provide copies of their pre-mediation statement to other parties, on the rationale that they prefer to "surprise" an adversary at the mediation. That temptation typically should be resisted, as keeping the parties' positions confidential does not promote candor, honesty, and a willingness to work hard towards resolution. If discrete information needs to be kept confidential, the submission of a separate, private statement to the mediator (in addition to the main pre-mediation statement) best serves that purpose.

E. Ensure Necessary Information Exchange

When a claim has been formally filed, full discovery has been conducted and trial is pending, the full exchange of information needed for a productive mediation has likely taken place through those mandated processes. In contrast, early or pre-suit mediations are particularly dependent on dedicated and focused voluntary mutual exchange of information needed for each party to evaluate their positions in the dispute. Failed early mediations can often attribute that to the lack of a full exchange of information and to each party's uninformed views on the merits of the case. That failure can be minimized by compelling each party to seek what they need from the other party well before the mediation event and by a pledge demanded of them by the mediator that the parties will participate in the mediation session with information sufficient for them to negotiate in good faith.

What do the parties need in order to have a reasonable chance of settling their dispute? The parties should have equal access to essential project materials: the contract(s) and subcontract(s), plans and specifications, change orders, minutes of job-site meetings and other critical project documents. They may need to defer mediation until such disclosures are made. If one or more key depositions (or expert reports) are required to answer essential questions, again, mediation may be deferred. Conversely, perfect knowledge is not required, and time and money spent in exhaustive discovery can often better be used to negotiate a settlement.

F. The pre-game side conversations. Worthwhile? Being prepared also means preparing the likely target parties.

It is also smart for parties and their counsel—particularly in multi-party claims—to confer with the likely major-target parties to maximize those parties' willingness to prepare for and attend the mediation with the intention to appropriately participate and contribute to the settlement effort. Leaving those discussions to chance or delaying them until the mediation itself will not promote resolution.

III. Mediation Solutions for the Complex/Multi-Party Case

A. Opening statements or not?

In many jurisdictions, opening statements at mediations have been abandoned, as parties, counsel and mediators argue that by the time a dispute reaches mediation, the parties know their opponents' positions, such statement are seen as posturing events and sometimes the statements can serve to chill negotiation particularly if they are strident or accusatory in a setting that was intended to promote compromise and resolution.

While those points and concerns have validity and in the right case, it may be best for the process to move directly to separate break-out sessions with the mediator, other cases, particularly complex construction disputes can profit from an initial plenary session featuring opening type statements. The reasons for this recommendation are many:

- The opening statement may be the only time the opposing party hears an unfiltered statement of your party's position. Too often, a party fully knows only its side of a dispute or hears the other party's position only through the spin of its counsel's description of that case. Even the most objective attorney will never give the other party's case the full-throated description that the advocate for the opposition will deliver.

- The opening statement contributes to the sense that the mediation is in fact an important event to which each side should bring their "A" game and devote themselves fully. Reducing the mediation to almost a meeting – like protocol may not foster serious negotiations.

- The opening allows counsel for design professionals, contractors and other clients that present well to call on their clients to participate in that presentation. The fact that the client speaks well and convincingly will be one more factor for the opposing party (and the mediator) to consider when assessing the other party's exposure and risk.

- The opening statement can be an opportunity to reframe the dispute and to put it in a context that favors your side. Prepared for and delivered well, that presentation can start the mediation with an advantage for your side.

- If appropriate, a willingness to compromise is far better delivered directly and not only through a mediation statement.

B. Teamwork concepts = aligning natural allies to streamline the process + promote resolution.

Team building can be an important facilitator in mediations with numerous parties. This requires identifying the parties who are in the right position to carry on negotiations with other parties. These team players become agents of the mediator in exploring with other parties the potential resolution of issues. This process frees the mediator to pursue dialogues which have a greater potential for resolution of other issues or disputes.

Using the model described earlier, in a mediation of a dispute arising from claims asserted by an owner of a biotech facility against the general contractor, assume that the general contractor has impleaded all the subcontractors with potential responsibility for the individual claims asserted by the owner. Perhaps several subcontractors contributed to defects and/or to a concurrent delay for which the general contractor is arguably responsible to the owner.

Here the general contractor is a candidate for team building, since it is knowledgeable about the role played by each of the subcontractors and is motivated to be part of a global resolution. This motivation arises from the pass-through nature of the general contractor's exposure as, typically, the general contractor is protected by contractual indemnities that cause a transfer of exposure to the trades responsible for the work.

C. Isolate and address tough issues first.

Any construction mediation with numerous parties always includes sub-issues and disputes presenting varying degrees of difficulty. Identifying and segregating the disputes which present deal-breaking obstacles is critically important to the overall success of the mediation.

Once the tough issues are isolated, the mediator and the parties can focus on what it may take to achieve resolution. Perhaps further facts are called for, or an investigation needs to be conducted. Consultants retained for the parties in the mediation, or those retained by or for the mediator, may play a critical advice role in this process.

D. Use confidentiality to promote settlement.

Confidentiality is an important facet of the mediation process, an obligation that the mediator is obliged to maintain with care. But it is also a settlement device.

In many multiparty construction mediations, a number of parties are similarly positioned. This similarity of position causes anxiety about the discussions with other parties in the class, particularly concerning offers and demands. Anxiety looms large for a party that might be discovered to have committed to pay multiples of the number a similarly- situated party settled for.

These anxieties can be reduced by treating individual discussions and offers with each of the similarly situated parties as confidential from each other. This approach has the added benefit of encouraging dialogue because each party in the class may negotiate with confidence that other discussions will not undermine their positions.

A good rule for this approach to confidentiality is that the higher up the chain of privity, the less confidentiality for settlement offers is required. In other words, in a construction defect case, the claimant/owner can be expected to be aware of all individual offers that make up the total settlement amount; the general contractor can be expected to be aware of all individual offers from its subcontractors; and so on down the line of privity. But the general contractor need not be made aware of settlement amounts coming to the owner from the design team, which frequently will have a contractual relationship with the owner that is separate from the general contractor.

E. Best alternative to a negotiated agreement vs worst alternative to a negotiated agreement

These terms, derived from the Fisher and Ury book "Getting to Yes" discussing negotiation techniques, are tools mediators sometimes use to re-frame difficult negotiations.

BATNA is the best result one can realize if the other person refuses to negotiate--if they tell you to "Get lost!" It is not necessarily an ideal outcome--unless one's ideal outcome is something one can achieve without the cooperation of the other person. It is the best one can do without them.

Conversely, the WATNA is the worst result a party would ultimately achieve if it called off negotiations, for example, by terminating mediation. The Best Alternative to a Negotiated Agreement and Worst Likely Alternative to a Negotiated Agreement are not true negotiation tactics, but rather are benchmarks against which offers to settle can be evaluated.

F. Best use of the private meetings

While opening statement are not a mediation constant, private meetings are of course a near required facet of the process. Such sessions are an opportunity for the mediator to draw from the parties their true concerns, what roadblocks exist to settlement, confidential facts and arguments and a myriad of other issues that may need only be discussed fully in a private setting. Here are points to consider in such sessions:

- Do not he "rushed" into the demand and offer process. While the mediator's charge is to assist the parties to resolve the dispute, the parties and their insurers need have the opportunity to fully explain their position on all disputed issues that must be resolved. Parties especially are jaundiced when the private meetings too early turn to negotiating, where they believe their positions have not been fully discussed and understood.

- Ensure that the mediator understands which facts, statements, documents, or positions are confidential. Typically, unless so stated by the party or counsel, whatever is given to the mediator, can be used.

G. Use of Blind Negotiations

As described in Heley, "Mediation of Construction Cases Using Blind Negotiations," William Mitchell Law Review, Volume 34, Issue 1, when the mediator and parties elect to negotiate under a "blind" format, they reduce the extent of information provided to each party regarding interim settlement positions. The mediator typically publishes the claimant's opening demand to all defending parties.

From that point forward, until either the case settles or hits impasse, the mediator negotiates with confidential numbers from all parties. Under this approach, the mediator will not disclose a single party's settlement offers or demands to any other party up to and through the final settlement or impasse.

"In response to the opening demand, the mediator will speak to all defending parties to confirm the claimants' opening demand and secure a contribution toward settlement from all defending parties. The mediator will then add up the contributions of all the defendants and disclose the total of these contributions to the claimant as the collective offer. The mediator will not disclose individual contributions from each defendant. After the plaintiff considers the opening offer and responds with a new demand, the mediator will keep the new demand confidential. Instead of disclosing the new demand, the mediator simply discloses to each defendant the gap between the claimant's new demand and the defendants' collective offer. Then, the mediator again meets with each individual defendant to determine if additional contributions can be secured toward settlement.

As the mediation progresses, the claimant will know the total amount offered by the defendants but will not know any individual contribution from a specific defendant. Each defendant will know the total amount it agreed to contribute toward a settlement and the gap between the demand and the collective offers. As the gap is reduced, each defendant can ultimately determine what contribution will be required on its behalf in order to reach a settlement point. If a settlement is reached, the claimant will know the total amount offered and ultimately accepted to settle the case. The claimant will not know, however, how the amount was raised or any individual defendant's contribution toward the settlement. Additionally, each individual defendant will not know the total settlement amount, but instead will know only its respective contribution toward the settlement amount. Blind negotiation prohibits any single party from knowing what the other parties contributed to the final settlement. Further, no party other than the claimant will know what the claimant accepted as a final settlement amount." Id. Heley @ 283-284.

There are, of course, pros and cons to this approach. The benefit is the tactic promotes recalcitrant parties to negotiate in the face of concerns that otherwise may chill negotiation progress. The con to

this method is some parties view it as promoting settlement as a "game" rather than as a fact- and reason-grounded basis for resolving difficult disputes.

H. How much, if any, do you hold back from the mediator?

While the mediator is no doubt a fine fellow or lady, their task of course is not to administer justice nor to determine the "correct" resolution result. Their intent is to help the parties reach a negotiated resolution, regardless of the terms nor the extent to which justice is realized. Accordingly, the discussion of the extent to which full disclosure to the mediator is always required or wise is necessary. As noted earlier, the mediation process is best served by parties speaking freely and with candor. That is one of the bases for the mediation statutes in most states that make the process confidential and/or privileged. In contrast, the parties may be best served to judiciously provide the mediator with full disclosure. These considerations on the "full/ limited candor with mediator" issue is worth noting:

- Discussion of a party's ultimate position on a disputed issue, especially the party's settlement range or final demand or offer may not best be had with the mediator.

- Where an issue is problematic for a party, full candor may not be in the party's interest, unless conveying that position is coupled with a request that the concession remain confidential. Often the desire to keep the position confidential must be weighed with the impact on a party's credibility if that position is NOT disclosed.

IV. Creative Solutions to Commonly Encountered Mediation Problems

A. How to break the impasse

There are a number of techniques to use to break an impasse or negotiation stalemate including the concepts developed below in sections IV.B.-J. Generally, many potential hurdles to resolution can be perceived BEFORE they actually develop and can be headed off by the pre-mediation and mediation practices described in this analysis. Where adherence to these principles nonetheless does not prevent an impasse, these options should be considered:

B. Bracketing

Where parties have stalled in their "demand and offer" process, the use of brackets to give a framework to the negotiations, without fully committing the parties to concrete demands and offers, can be a powerful tool. Compelling the parties to agree to the low and high ranges in which negotiations will be conducted going forward can reduce the anxiety that straight negotiating can sometimes cause. While securing agreement on a bracket can itself be difficult, the fact that a bracket gives the parties at least the sense of further control of the process can be effective.

C. Creative solutions to remedy problems. Alternatives to $. Drafting releases to address the non-monetary settlement.

There are too many creative solutions to the mediation impasse to list them here, but one key resolution concept to consider is the use of non-monetary resolutions, in whole or in part. Particularly in the realm of claims against contractors which often do not benefit from insurance coverage, offers of products or services may be more efficient for the offeror and more productive and timelier for the

claimant. Offers of services are less compelling when suggested by design professionals given their comparatively reduced monetary value, especially when compared to their more robust—and typically more available—professional liability coverage.

Preparation of the release to memorialize such product or service-based resolutions are challenging but, with negotiation, achievable.

D. Identify and isolate impediments to a resolution.

As noted, the best mediators are adept at determining initial difficult issues to segregate and address either early or late in the mediation process.

The identification of such issues can most profitably be achieved in the pre-mediation conferences and calls. It is also best to secure all parties' buy-in to the identification and separation of such difficult issues.

E. Direct attorney to attorney or insurer to insurer negotiations

When the mediator or parties/attorneys can identify a specific impediment to negotiation progress, be it an issue or person, proposing that direct party to party or attorney to attorney negotiations should be contemplated. Care must be given to avoid too bluntly offending the need (person) for such direct type of negotiations, but with proper guidelines, these direct discussions can change the settlement dynamic. Insurer concerns over party-to-party negotiations are valid but typically are manageable.

F. Do not declare an impasse too quickly.

The mediation process is rarely rote and is of course impacted by the variety of the claims and people that use the process. So too, there is no formulaic determination for when a mediation reaches an intractable impasse. Parties and the mediator should not quit too quickly or too early abandon their best efforts to determine alternative ideas to re-start negotiations. Likely every attendee at the conference or reader of these materials has participated in successful mediations that at some point during the event showed little to no sign of a future resolution. Let that shared experience give parties hope.

G. Let the parties decide what is needed to break an impasse.

When negotiations lag or an impasse does result, a prudent mediator should allow the parties and counsel to propose means to clear the logjam. The mediator certainly can suggest concepts the parties can consider but deferring to the parties often can empower them to take control of the process in a manner that re-sets the negotiations.

H. The Mediator Proposal Pros/Cons

While most often offered by the mediator as a means to break a late-in-the-process impasse, the use of the "mediator's number" can be alternatively problematic or game-changing. In that process, the mediator typically offers to give the mediator's assessment for at what number the dispute should settle. Most often the mediator conveys that number confidentially and the parties, also confidentially, agree to it or reject it.

- Pros to the “mediator’s number” concept

    - It can lead to a settlement as it can be seen as a validation of a settlement number that carries the approval of the mediator.

    - It also gives the parties the cover they may expect they need to convince all hierarchies the number is appropriate.

- Cons to the “mediator’s number” concept

    - If the number is not agreed upon, even though the process was confidential, the number may serve as the “floor” for any follow-on negotiation.

    - By relying on the mediator to propose the potential final number, the parties and their counsel lose some control over the process.

I. Partial Settlements

Partial settlements are preferred over total settlement failure and are certainly worth pursuing both to whittle down the claim and to promote momentum for future negotiations.

J. Do not let even partial mediated achievements be lost or forgotten – document them.

ALL settlements should be documented by the parties and the mediator—even partial resolutions—before the parties leave the mediation event.