Pursue Your Plan
for Movement Through
Caucus Rounds
to Settlement or Impasse

It is always your next move.
— Attributed to Napoleon Hill (1883–1970)
personal-success author

Step Ten covers the sequence of caucuses that take place after an initial offer and counteroffer have been made, until the caucus phase gives way to a final joint session. For lack of a better term, we will call them the negotiating caucuses, which start from the point where each side has staked out its initial position.

These caucuses may be considered the heart of the mediation session, where settlement is ultimately achieved or blocked by impasse. They comprise the second and third stages in the various classification systems described at the beginning of Step Nine. During the course of the negotiating caucuses, the parties gradually shed their preoccupation with the merits of the case and move into a pure negotiating mode, exploring settlement possibilities and (if possible) incrementally narrowing their differences to reach an agreement that both sides can live with.

The first section of this chapter will discuss what your mediator is likely to see as her job during this sequence and the types of activities she is likely to undertake as part it. The second section will map the typical “geography” of the negotiating caucus sequence. The final section—the longest part of this chapter—will describe steps you may need to follow during the negotiating caucus phase in order to get the best outcome for your client.
Step Ten: Pursue Your Plan for Movement

Some of the guidance in this step will advise you on adapting your predetermined plan to new developments. You will also find a broad range of tips on how you can work the caucus rounds covered by Step Ten for best results.

Step Ten includes nine substeps:

1. Chart offers and counters in writing throughout the session.
2. Use your mediator proactively.
3. Adapt to new information about the case.
4. Examine each new move from a communications perspective.
5. Adapt to your opponent’s moves in negotiation.
6. Defuse emotion in your side’s decision making whenever it arises.
7. Utilize natural downtime with your client and continue calling time-outs as needed.
8. Make the most of hallway moments and breaking bread.
9. Persist until the session outcome is certain.

10.1 Chart offers and counters in writing throughout the session.

It is very important to track the series of offers and counteroffers made during negotiations at the mediation session, says Bowen Tucker (Arlington Heights, IL), a retired Associate General Counsel. By doing so, “you get an accurate sense of where these discussions are headed. By about the third exchange of offers and demands, you can pretty easily see where the other side thinks they are going. And if you aren’t prepared to go there, you had better do something to change the momentum.”

As a litigator in private practice, the late Andrew Berry considered charting offers to be so critical that he included the practice when asked about secrets to successful mediation (see Sidebar I-1: “Andrew Berry’s Rules for Success in Mediation”). In Berry’s view, keeping track in this way enables you to develop a clear picture of “what’s negotiating to the
middle, how you signal what the middle is, [and] what’s a false middle.” In addition to the offers themselves, Berry also advised writing down any reasons that are offered to justify the numbers.

You can be sure your mediator will be keeping track of the offers for his or her own purposes, which is another reason to record the numbers yourself. Mediator Jay Cohen (Winter Park, FL) comments as follows on his own use:

I am always paying attention to how far apart the parties are from one another and what would happen if they split the difference right now. I’m watching that because a significant proportion of them do end up splitting the difference. The only question is, what was the difference at the time they split it?

Lawyers always say at the beginning of the day, “I’m not splitting this.” I tell them, “Well, I know you’re not splitting it right now. You could have done that without me. The only question is, where are you splitting it?”

Tracking of that numerical relationship between the parties is essential, because in addition to whatever you are telling a guy about how you are going to whip him down at the courthouse, he’s also paying attention—if he’s got any experience—to what kind of response he’s getting to the give he’s giving or the take he’s taking. Are you giving more than he is? Are you giving less? What are you doing here? Where are we heading? That’s what experienced folks pay a great deal of attention to.

Cohen adds: “The more you track your experience with those kinds of situations, numerically, the more comfortable you’ll get with the decisions you’ll make within that framework.”

10.2 Use your mediator proactively.

Steps Eight and Nine include advice to observe your mediator closely during the opening session and initial private caucuses. Those observations will have given you at least an
initial sense of how this mediator operates in practice—weaknesses as well as strengths.

“There is a big disconnect between the way people are taught to be mediators and what the legal profession really now wants in an effective mediation process,” says mediator Jean Baker (Washington, DC). “You just have to accept as a reality that the mediator isn’t perhaps going to understand the best way to use the process—so the advocate has to.”

You are less likely to encounter this problem if the applicable mediation rules allowed you and your opponent to select the mediator (rather than have one randomly assigned—see Step One), and if you were able to agree on a promising candidate (see Step Two). If your mediator is both talented and well suited for your dispute, you will be able to put yourself in her hands with confidence.

But that does not mean you should sit back and passively depend on the mediator’s skills at the expense of your own best judgment. “If the mediator is not doing his or her job effectively, an effective lawyer really should take control—should be proactive in the mediation so there is not a waste of an opportunity,” says Edward Mullins (Miami). “You should not let the ineffective or even effective mediator control the situation completely and just wait and not be aggressive. You need to control the situation and control the process and try to resolve if it looks like an acceptable deal could be had.”

Topics included in this substep: (1) using the mediator as a foil; (2) revealing your bottom line—or not; (3) controlling your messages to the other side; (4) getting the mediator’s input; (5) receiving your opponent’s message through the mediator; and (6) pressing for caucus remixing as needed.

A. Using the mediator as a foil

The primary recommendation that mediator Michael Lewis (Washington, DC) gives lawyers for using caucuses effectively is “to use the mediator as a foil” (in Bickerman et al., 2003, p.14). By this, Lewis means actively using the mediator “as someone who almost surely knows more about the other side than he or she can share with the party with whom the mediator is then working”—that is, you.
Among other specific activities, Lewis recommends using the mediator to “test ideas for settlement, test ideas for moving the dispute forward, [and] . . . help convince a recalcitrant person on the same side to move.” He says:

The ways of doing that vary. One can use questions for the mediator. What do you think, would the other side entertain this kind of a settlement? Or who on the other side of the table seems to be most willing to move and what might we do to help that person convince his or her side that we should settle this today?

But the general proposition is [to] use the mediator. Use what the mediator may know but can’t tell you explicitly. The mediator may know some things about the other side that he or she is not free to share with you. But at the same time, if you say to the mediator, or if you ask the mediator, well, would this work with them, if the mediator knows that it won’t work, he or she is going to say, “I don’t think so, based on what they’ve said to me thus far.” Similarly, if the answer is affirmative, the mediator might say something like, “Well, now, that’s a possibility; let’s keep focusing on that and see if we can develop it further because then I can take it back and try it out with them.”

My fundamental point for advocates is to use the mediator in more ways than as simply someone to carry a message. Use the mediator’s knowledge of the other side, which almost surely increases the longer the mediation lasts. The mediator will know more and more things about how the other side is viewing the world, and use that knowledge, even if the mediator can’t say to you, “Well, I know exactly what or where they are on this point, and I’m happy to tell you.” Because in many instances the mediator won’t be free to say that. But he or she will be free to use the information that [he or] she has to move the parties closer to agreement.

Lewis’s advice in this regard lines up with the shorter discussion in Substep 9.3H.
B. Revealing your bottom line—or not

Sometimes a party or her lawyer may be tempted to reveal their side’s bottom line to the mediator in a private caucus. For advice on when—if ever—you should consider doing this, read Sidebar 10-8: “Should You Ever Tell the Mediator Your Bottom Line?” The ethical risks of misleading the mediator about your bottom line are discussed in Sidebar 10-9: “Ethical Risks in Misleading a Mediator.”

C. Controlling your messages to the other side

You may assume that when you make a settlement proposal in private caucus, the mediator will communicate that proposal verbatim to the other side in their private caucus. However, this is not necessarily so. As explained by the late John Cooley in Mediation Advocacy (2002, pp.140–41, italics added), the mediator may choose among various “communication tactics”:

Typical communication tactics include: (1) the conduit tactic, in which the mediator merely reports the settlement proposals from each side to the other; (2) the surrogate tactic, in which the mediator additionally provides justification for the proposals; (3) the reshaping tactic, a more extreme tactic in which the mediator alters or embellishes the proposals with his own ideas about how the dispute may be resolved; and (4) the clarification tactic, in which the mediator obtains responses to specific questions or reiterates or highlights something that has already been said.

In Mediating Legal Disputes (2009a), Dwight Golann discusses the mediator communications tactics of rephrasing or withholding messages that a party wants to send the other side along with a settlement proposal. If a mediator deems some such comments too adversarial, she may choose to leave them out or “edit” them “into more constructive language.” An example of rephrasing: “We’ll come down to fifty, but tell them if they take this thing to trial, we’ll fry the defendant on the witness stand!” becomes ‘They’re dropping to $50,000’ and ‘They seem pretty confident they can make good points on cross examination of your guy’” (p.59).
Beyond these tactics, Prof. Golann raises the possibility that some mediators may even decide not to transmit an *entire offer* that they consider offensive—possibly without informing the offering party (pp.62–63).

In light of the polemical comments that some clients or even counsel may sometimes make in private caucus to accompany an offer, some judicious editing of such comments may be beneficial. However, the fundamental point here is that you must not assume the mediator will automatically convey your side’s offer and accompanying explanation or other message exactly as you state it to the mediator.

If you want to control your message, you will need to take active steps to ensure that the mediator communicates that message exactly as you want. As noted in Substep 9.8D, John Cooley’s *Mediation Advocacy* (2002, p.141) advises diplomatically reminding the mediator at the end of each caucus that you want her to use your specific wording in conveying your proposal to the other side—and literally writing down that wording for her if the message is complicated.

**D. Getting the mediator’s input**

Controlling your message does not have to mean disregarding the mediator. To the contrary, you may specifically want to get your mediator’s perspective on the best type of message to convey with an offer or the best wording for it, as noted in Substep 10.2A.

“Relationships, personalities, and modes of communication are as important to this process as numbers and law,” observes Christopher Carroll. Your mediator may well have good insights into what message to send and how, based both on her previous mediation experience and on the relationship she has been building with your opponents in private caucus.

Naturally, the more you trust the mediator’s skills, the more you are likely to seek the mediator’s input. To illustrate, suppose you are about to reach your side’s final number in a mediation session, with no deal on the table. Carroll mentions one mediator he knows as an example of someone with whom he can sit down and say, “It is the end for me, but I want your assistance in trying to communicate that in the most appropriate way.”
E. Receiving your opponent’s message through the mediator

Just as your mediator may put your message to the other side through the filter of a communications technique (see Substep 10.2C), the messages you receive from the other side may also be filtered. If you want to make sure you know exactly what the other side actually said, you will need to ask the mediator directly (though not confrontationally). For example, after the mediator conveys a message from the other side that accompanies its latest offer, you might say, “Thank you. Could you try to remember as best you can the exact words the other side used in saying that?”

By the same token, be aware that if the mediator was rephrasing needlessly confrontational language from your opponent, coaxing those confrontational words out of the mediator may elicit a counterproductively emotional response from your client (or even you). So there may be times when you sense it is better to let the mediator edit the message. Just be aware that such filtering may be taking place.

The communications dimension of parties’ moves is further discussed in Substep 10.4.

F. Caucus remixing

In many mediations, notes John Lande,

there is a standard pattern where there are opening statements, and then what someone called “terminal caucus”—“shuttle diplomacy” where the parties are in separate caucuses and the mediator goes back and forth, and each side doesn’t communicate directly. There isn’t a joint session until the end. Sometimes that works well, but part of the idea here is to be aware that there may be some situations where having one or more joint sessions may be valuable.

Caucus remixing is a technique typically used by mediators if negotiations are bogging down. This varies the typical pattern of shuttle diplomacy, where the mediator just keeps going back and forth between private caucuses for each side, and neither side ever talks to the other directly—sometimes called “terminal caucus.” In caucus remixing, the mediator
may try to create "a new group dynamic" by "shifting the participants into different groups" or "reconvening . . . all participants into a joint session" (Picker, 2003, p.51).

Other remixing possibilities include "speaking directly to the lawyer outside the presence of the client, suggesting a lawyer to lawyer meeting, or a principal to principal meeting" (Kennedy, 2010, p.155). Likewise, the mediator may call for a caucus in which "key decision makers meet apart," or one between experts retained by each side, or even one in which "one person meets the opposing team" (Golann, 2009a, pp.183–185).

If you diagnose terminal caucus in your own mediation, you do not have to wait and hope for the mediator to do something about it. You can actively press for some caucus remixing. Christopher Carroll describes a couple of remixing possibilities for a lawyer to suggest:

Maybe it is just, "Hey, let me pull their counsel aside," if I see that their client is troubled or bothered or inflamed. Have a conversation that way and leave it to [the lawyer]: "You know your client. You figure out the best way to get forward movement and I'll defer to you." Or maybe it is the opposite—you've got to get the opposing lawyer out of the room. That means I have got to neutralize myself and have the clients from each side sit there and talk to each other without lawyers. I'll talk to my client about how to do it.

Thomas Dye (West Palm Beach, FL) proposes a couple of other possible variations to consider:

Instead of separate private caucuses you could stay in the same room and make offers back and forth, and just walk out to the hall with the client when you need to talk privately. In other words, the exchange can go on between the parties. You don't have to have that mediator shuttling offers back and forth.

But if the mediator does separate you out, I can still accomplish my goal. The mediator comes into my caucus room and makes whatever spiel to me and my client. After that I say, "Okay, we would like to talk."