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# TALES FROM THE TRENCHES
# (WHAT WE HAVE LEARNED ABOUT MEDIATION, FACT-FINDING AND INTEREST ARBITRATION)

## PREPARATION BEFORE IMPASSE

1. Clients, even sophisticated clients, are frequently too anxious to get to impasse largely because they think that the mediator/fact finder/Public Panel member will naturally impose a resolution that is consistent with their position.
   Educating the client is critical that mediation, fact finding and interest arbitration are extensions of the negotiation process, not replacements.

2. We are constantly reinforcing best practices for negotiations to prepare for impasse. Nothing replaces a well-constructed written proposal with precise contract language so both sides know exactly what the proposal entails. Actually seeing the precise proposal in writing is very helpful in crystalizing the issues and forcing both sides to clearly articulate their position.

3. There is nothing wrong with an aggressive proposal that has a purpose, i.e. to serve as the basis to force discussions about a matter of concern. That is different from adding proposals merely to abandon them in an attempt to show movement.

4. Fully discussing and seeking agreement on every proposal is essential preparation for mediation. Clients need to be educated that they should modify and refine their proposals before impasse based on what they learn at the table. Of course you learn nothing is you have not shared your proposal with the other side and discussed it.

5. Use the mutual obligation to produce relevant documents during negotiations before impasse, e.g. if changes in health insurance are an issue there should be an exchange of relevant plan design documents and costs. It is also more productive to discuss money items if everyone agrees what they cost. The cost of 1% is a very useful tool.

6. If we can, we like to give the other side a chart showing comparisons with important comparables. We do that as early in negotiations as possible. It has the added benefit of educating both sides. For example, if recruitment and retention is a problem a simple chart showing salaries and benefits in comparable jurisdictions shows why.

7. We try to get as much agreement as possible on as many issues as possible before we get to impasse. That is helpful for everyone because it limits discussion to red issues and helps me to focus, educate and control expectations with my client.

## IMPASSE DECLARATION

1. Your target audience is the mediator. Never miss a chance to educate the mediator on what the issues are and why the parties do not have an agreement. The more the mediator knows in advance the more effective he/she will be.

2. That starts with a good explanation of the history – attaching all the written proposals, all the comparable charts, and the relevant data on health insurance.

3. The declaration also reinforces for our client what we are doing. No matter how many times we educate the client, otherwise, all of them expect the mediator to issue a decision.

4. A good mediator figures out how to reinforce that mediation is a negotiation, not a hearing or trial.

## FACT FINDING

1. Every client thinks fact finding is a trial or hearing.

2. We need to educate the client that it is an extension of the negotiations.

3. The whole point of Fact Finding is to generate a recommendation which is itself a proposal for where the Fact Finder thinks the parties should or could land.

## INTEREST ARBITRATION

1. Interest Arbitration is a conservative process with many circuit breakers to insure that the award falls within a range which is ultimately accepted as reasonable by the parties and the other stakeholders.

2. While it is true that there is a hearing to make a record, this is not a trial where a decision is issued on what is just. Rather, it is an extension of the negotiation process. That is why it is part of CSL §209 which deals with "negotiations."

3. It is essential to manage the client's expectations of what can be accomplished in Interest Arbitration.

4. Interest Arbitration works best when the parties have spent time trying to reach agreement. The process of negotiations done well reveals what is possible and what is untenable to both sides. It is very hard to know what is possible and what is untenable absent extensive negotiations where both sides have listened to each other. That also narrows the issues that are submitted to the panel.

5. One reason the panel is designed with partial members is to insure that the final award does not contain something which is untenable. The partial panel member can educate to safeguard against an award which contains something untenable.

6. It is an "urban myth" that panels award something that varies significantly from the existing pattern for that employer absent consent.

7. Panels are comfortable making awards dealing with money and health insurance because both are easy to understand.

8. It is very rare for an impartial to impose a contract term on operational issues absent consent. Consent only happens when the parties have spent the time and energy to educate each other on what is needed and precisely how it would work. E.g., a change from 8 hour shifts to 12 hour shifts is complicated. It is highly unlikely that a panel would compel that absent consent. That is true both ways.

9. There is a difference between ability to pay and willingness to pay. While it is technically true that an impartial can issue an award which requires increased taxes, that is not going to happen if the employer does not have the ability to pay.

10. Everything about Interest Arbitration is designed to encourage a negotiated agreement. That does not end at the hearing. The executive session is itself a very sophisticated negotiation.

11. It is not uncommon for there to be a negotiated deal even at the panel stage. But a deal is only possible if the client's expectations have been managed appropriately.