“How to Settle the Non-Settle-able EEO Cases”

OR

“GOING TO VEGAS WITH KITTY!”

EEOC EXCEL Conference

August, 2013

Denver, CO

By: Kitty Grubb

Attorney – **36** years. Licensed in two (2) States.

Received her law degree *with honors*. Then, was conferred:

LL.M. (a graduate law degree) in **Labor and Employment Law**, and also a Graduate Law Certificate in Employee Benefits Law, both from Georgetown University Law Center; and

LL.M. in **Litigation and Dispute Resolution** from George Washington Law School.

All total, Kitty has 4 LL.M.'s, a Graduate Law Certificate, and 16 hours towards her 5th LL.M. in the law.

It is reasonably believed she is the only attorney in US history to achieve that distinction.

Further, for over a decade, Kitty has been The Distinguished Visiting Professor of Medical Jurisprudence and Healthcare Law at a medical school.

She has given about 500 *pro bono* lectures for continuing legal, or professional, education credit, including **twice lecturing at the American Bar Association's (ABA's) highest level, at its National Institute, concerning Employment-Law topics**. She has taught literally 100's of attorneys-mediators in the South.

The Washington (D.C.) *Times* named her *"**Who's Who**"* and as one of the "five employment-practice experts (names) you need in your Rolodex".

Four years later, the National Patient Advocate Foundation cited her as "Most Outstanding Patient Advocacy and Healthcare Lawyer".

Kitty was included in the *Tampa Bay Magazine's "Tampa Bay's Top Lawyers"* (Business Law category).

- She was 1 of only 23 professionals-members of the **First International Conflict Resolution Delegation to South Africa**.

- Kitty was conferred the: Eleanor Roosevelt Award; Annie P. Selwyn Award; Knoxville, TN YWCA Tribute to Women Award – Government Category (though not a governmental employee), as well as being nominated for other honors, such as the Rosa Parks Award.

Arbitrator, including:

- US Federal Mediation & Conciliation Service's (FMCS') Panel of Arbitrators, with additional training from FLRA concerning FLRA, and also on the

- US National Mediation Board's (NMB's) Panel of Arbitrators (concerning railroad and airline disputes);

Mediator, for many panels and forums, including:

EEOC (internal mediation) RESOLVE Panel; US Post Office's (internal mediation) REDRESS SE-Area Blue Ribbon Panel; etc.

[For the US Post Office, alone, Kitty has handled about 400 Federal-sector mediations.]

Kitty has also received additional conflict-resolution training from various entities, such as EEOC, Harvard University Law School, etc.

Kitty is also an Early Evaluation Expert (EEE).

Kitty is a sports official in three (3) sports,

Including having trained at the US Olympic Training Center –

Basic Referee College, and also at the

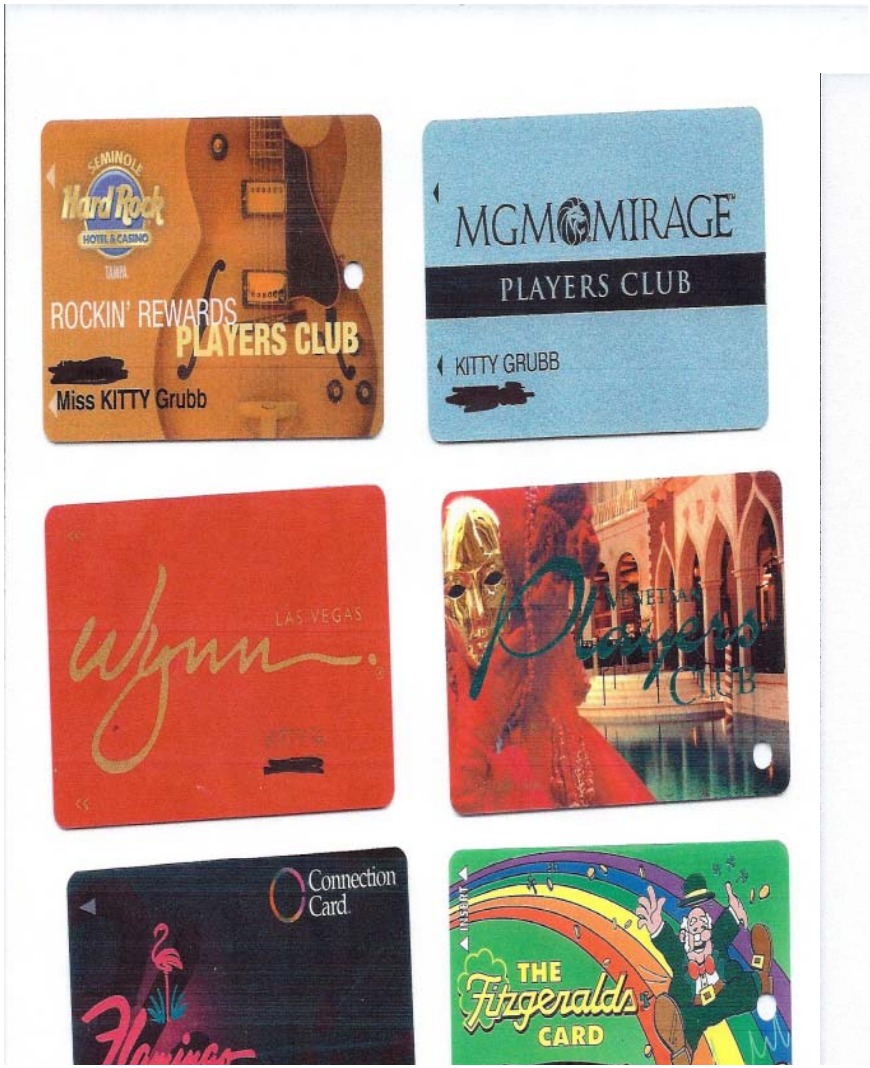
Advanced Referee College (US Olympic Training HDQ's – Colorado Springs, CO).

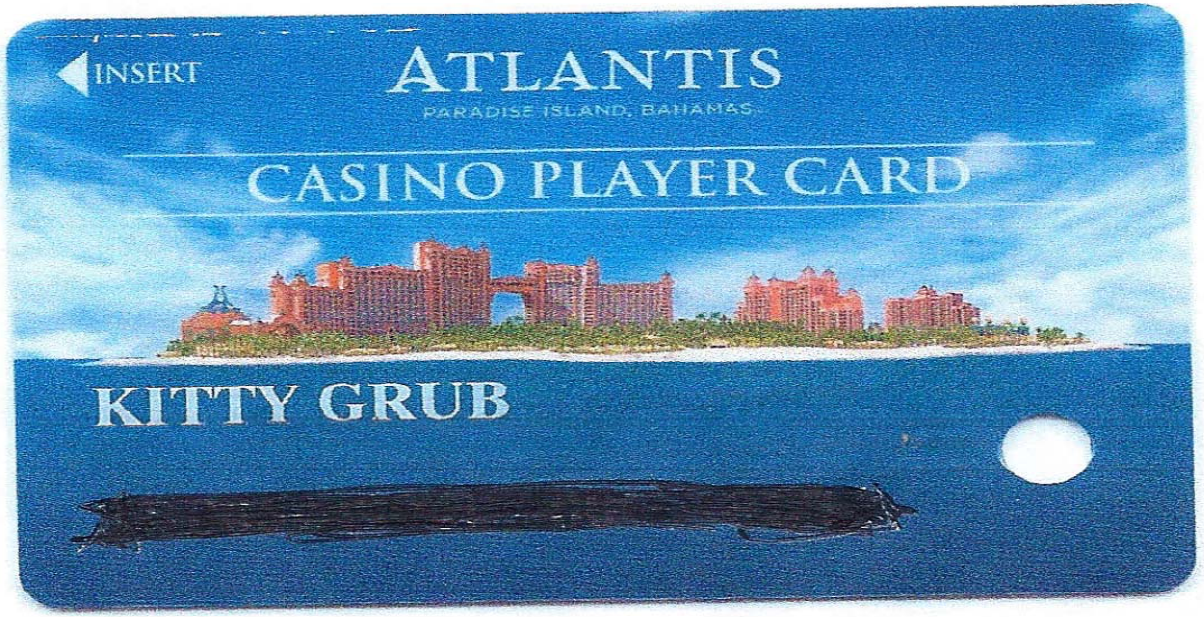
The reason she's here today is to share some of her knowledge, skills, and abilities (KSA's) concerning ADR, with a particular focus on:

"**How to Settle the Non-Settle-able EEO Cases**"

The most important KSA Kitty has concerning settling the unsettleable EEO cases is that she is …..

Also a Gambler Extraordinaire




INSERT
ATLANTIS
PARADISE ISLAND, BAHAMAS
CASINO PLAYER CARD
KITTY GRUB

The most effective mediation strategy you can ever have, or will ever have, is

"GOING TO VEGAS WITH KITTY!"

What is meant by that?

Why is it effective?

When is it effective?

With whom is it effective?

These and other law-school Socratic questions will be now explored about this most effective mediation strategy you can ever have, or will ever have.

In running the litigation race from start to finish, you must realize and recognize - from start to finish - it's a **GAMBLE.**

G-A-M-B-L-E

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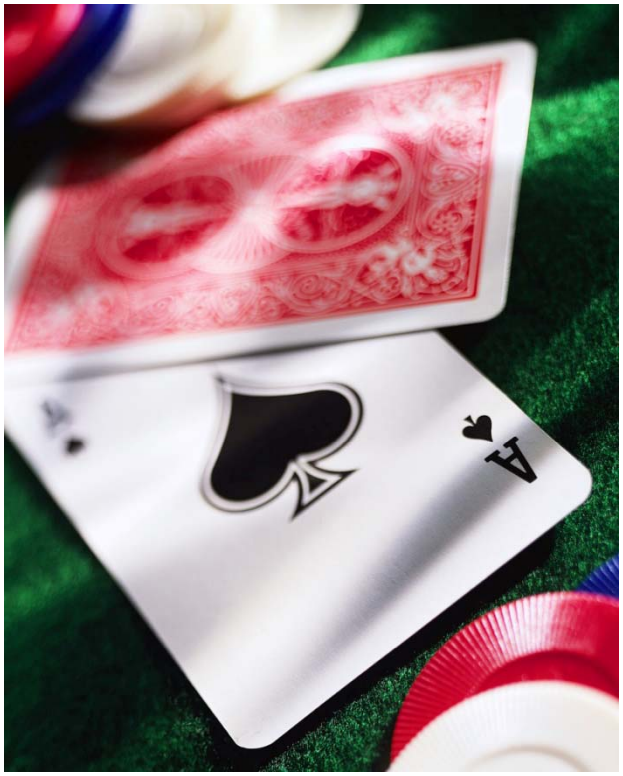

And, where is the #1 place to gamble?

With all due respect to all of the State of Florida’s, State of Colorado’s, etc. many wonderful gambling establishments, it’s:

VEGAS, BABY, VEGAS!

Please <u>listen</u>, and let your

favorite continuing-education lecturer, Kitty

SHOW YOU THE

MONEY

Let’s briefly discuss why cases don’t settle.

For a PRIZE to the audience member listing the most reasons, please quickly list all the reasons you can think-of why cases don’t settle:

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Now that we have discussed why most cases don’t settle, how can “*Going to Vegas with Kitty*“ help me settle my cases?

?

First and foremost, DO YOUR HOMEWORK!

None of that, “The dog ate my homework!” and all the other similar “excuses” we sometimes make for not properly and also effectively analyzing and researching our cases from <u>the very outset</u>.

And, a critical part of your "homework" is conducting "*Going to Vegas with-Kitty* " analysis and research.

Before ever getting involved in any potential case, find out your party's and the involved-manager's(s') gambling habits, and learn its/his/her risk aversion(s).

Does he/she gamble?

If so, where?

When?

How often?

What kind of gambling?

How much time does he/she spend gambling?

Is your involved-manager a rated-player in Vegas (highest category of gambler, who usually receives lots of “freebies” and discounted items from casino’s)?

Do(es) the manager(s) play the penny slots for an hour or 2, and then, spend his/her time shopping, seeing shows, etc. when in a gambling city?

How much money has/have the involved-manager(s) ever lost gambling?

And lost all total gambling?

And most importantly, <u>how much money does he/she risk when they gamble</u>?

These are key facts to know before becoming involved in a matter, and further, become paramount facts when in mediation. You need to know those facts *before* you mediate.

YOUR MEDIATOR NEEDS TO KNOW THOSE FACTS, AS WELL!

When presented with a fair, if not whopping, settlement offer in mediation, I have observed countless plaintiffs reject it as soon as the settlement offer is presented.

I then ask them, “Do you go to Vegas (and gamble there)?”

Almost unbelievable, but truthfully, countless plaintiffs reply, “No, I never gamble!” or “I don’t believe in gambling!”, or similar words.

I then share what they’re now doing is gambling, and you would be surprised at the looks on their respective faces. **The light-bulb moment.**

In fact, I once had a plaintiff reject a massive settlement offer I was relaying.

Immediately thereafter, in response to my question, “Do you go to Vegas?,” the reply was he/she had never been to Vegas, as “It was a sin to gamble!”

I then-noted to that plaintiff, to whom gambling was a “sin”, that what he/she was doing then was “sinning” -- **wicked** “sinning”!, i.e., gambling with his/her case’s results.

AND, I also noted for his/her benefit that there were a lot more “fun” “sins” he/she might want to get involved with than gambling!

Had another mediation, where in reply to the "Do you go to Vegas?" question, the plaintiff said that "**Vegas was filled with folks going to Hell**".

When I asked "Why? How come?", that plaintiff responded in part that "Vegas was filled with gamblers all going to Hell!"

I then asked if he/she thought **they** **were "going to Hell?"** (due to their gambling with the settlement offer and not settling their case).

~~ Such case settled in merely a few minutes thereafter.

When asked by me “Do you go to Vegas?”, countless other plaintiffs say, “Yeah.”

I then ask, “How much money do you gamble when you’re there?”

And, plaintiffs often respond to me words to the effect, “I put two (2) $20’s (total $40) in my pocket,” and “When I lose that ($40), I quit gambling”.

I then share what they're now doing is gambling.

After the surprised look on their faces appears, I then add "And you're gambling a whole more than 'two $20's' now, aren't you?"

Lest you think the gambling mediation strategy is limited only to plaintiffs, please allow me to quick say, it is **not**.

"*Going to Vegas with Kitty!*" is a **universal** mediation strategy, effective for defendants as well.

For example, I will often ask Agency managers, supervisors, corporation owners, corporate representatives, HR personnel, LR personnel, and so forth "**If being there then at the mediation is part of their work."**

They all quickly and resoundingly reply, "Yes".

I then ask, "**Does your employer allow you to gamble at work?**"

The reply is "No, of course not!"

I then note they are not only **gambling at work**, they are also **gambling with someone else's money/not their own money, but rather, with Agency (and the taxpayers') assets**.

And, rather than quit while they were ahead (could settle for $X), they were getting ready to throw a lot more chips in (put a lot more money down), i.e., almost a “double down” in essence, when they could quit while they were ahead ~~ by settling and paying $X for sure, versus risking a given of $2X, if not $3X or $4X, plus unknown potential liability ($Y).

I am sometimes told by defendants (and plaintiffs, too, for that matter) in reply, "**Well, everything's a gamble.**"

To which I quickly respond, "Well, why did you come to work (to the mediation) today? You could die tomorrow -- after all, 'Everything's a gamble'. So, why not take off work today, and let's grab a plane, fly on out to Vegas, and really gamble."

And, if a plaintiff or a defendant should share with me that he/she really likes going to Vegas and gambling, ~~ well, all the better.

I then ask **if he/she were ever ahead (winning more than they had lost) when they were in Vegas**.

And, they all happily tell me how they were up $500, or a $1,000, or whatever.

I next ask, “What happened then?”

“Did you quit while you were ahead, or did you give all the money back to the casino -- and in fact, did you lose all that money, and even lose more of your own, to boot?”

The next thing I ask them is, “How long do you gamble? ‘Til your money’s all gone?” “Or do you then borrow off of your credit card?” “Or do you then wire your bank to send you more money?” “Or what?”

I then ask “If the house (the casino) always wins, sooner or later?”

And I further ask them, “What if you have to play *ad infinitum*?

Do the odds favor you in such regard?”

I ask if they think litigation stops because *they* want it to,

or

does it stop because both sides want it to, or until bankruptcy, or until the appellate, court years later says it stops.

Contrary to Vegas, in a way, litigation is like the Hotel California -- you can check in, but **never** leave – unless and until the other side, or the law, says you can.

So, even if you’re way ahead at one point in time, and even if you have a huge pile of chips you‘ve won, you have to keep on gambling until:

It’s all gone (Litigation budget “shot” to “you-know-where”),

until the other side says, “It’s over”,

or

until the law says it’s over.

And, guess what? The law can change/be changed - *and*

your victory soon becomes a loss, as Congress can and often does change the “rules of the game” **after** the case-results become known, citizens then-lobby Congress, and soon ….

Congress has snatched your victory and now-made it a loss.

Or, it could be post-litigation Agency rule-changing, either your own Agency's or another Agency's changes the rules due to your litigation victory.

So, to “snatch victory from the jaws of defeat”,

listen to Kitty.

The shoe fits, the strategy works. And works. And works.

Seems no one, whether plaintiff or defendant, wants to "*Go to Vegas with Kitty!*".

Try it. I verily believe you'll be most pleasantly surprised with the results.

Because my time is short, please allow me to share some other, lesser mediation strategies:

1. Play your Hand". "Play the Cards You Were Dealt". "All In". **Litigate your cases!** Sounds odd for the topic to be about mediation-strategies, and for me to say, "**Litigate your cases!**" But, please hear me out.

It is important, if not critical, that you develop/enhance your reputation for litigating your cases. If you're too new to have a reputation one way or the other, then get senior folks involved *before* the mediation -- <u>not</u> threaten that while you're in the mediation.

In private caucuses, I've had countless plaintiffs' attorneys say to me, "X (Agency's attorney X) never goes to court. Why I bet they've never tried a case," or "They haven't tried but 3 or 4 cases in their entire career, if that many."

In gambling, if you bluff, please know your bluff will sooner or later be called.

In gambling if you're a "player", folks know it, or can quickly ascertain that fact one way or the other. The same for whether or not you ever try your cases, and also whether you **effectively** try your cases.

So, even if you lost a case – in fact, got beaten like a drum in the case -- publicize the fact that you went to trial -- that you're a "player". The odds of winning sooner or later will help you.

And, to paraphrase Wayne Gretzky, "You miss 100% of the shots you never take".

Cases seem to settle when the risk of a brutal litigation, much less the risk of losing a brutal litigation, is real, rather than hypothetical or largely illusory.

2. Watch the Tables (while Players Are Gaming). Have your Agency managers and attorneys and HR/LR ***fully prepared*** to mediate, and be prepared yourself. While this should come as no shock, nor be a "strategy", regrettably, but factually, in mediations I encounter countless attorneys, managers, HR/LR, both plaintiff and defense, unprepared to mediate.

Often times, in fact, probably more times than not, your Agency's respective managers and supervisors *don't really know, and often don't even have a clue, what a mediation is, what it's supposed to achieve, why it's important, etc*. And, that also applies regrettably to some Agency attorneys.

Rather, the manager, supervisor, etc. is often sent some standard, pre-prepared form or sheets of paper to read, and then, told to appear at a designated time and place, i.e., the “show-up” letter.

- If all the manager, supervisor, etc. knows is to “show up”, then how do you think he/she will look like to the other side, after “showing up”?

One of the best ways to prepare your party, whether plaintiff or defense, for mediation – have him/her go to court and watch some trials currently being conducted.

Countless mediation-participants share with me they don’t want some folks “too dumb to get out of jury duty” or folks with “nothing better to do (with their time than jury duty)” deciding their fate.

Further, “watching the table” also means to **know what your case is worth within a reasonable range**. You would be surprised, if not stunned, the number of plaintiffs and also plaintiffs’ attorneys who haven’t a clue what their case is worth! And, if the attorney hasn’t a clue, then how’s their layperson-client supposed to know?

This is not a phenomenon limited to plaintiffs' attorneys. I've had many Agency managers, supervisors, HR/LR, etc., as well as their attorneys, virtually clueless as to what cases settle for --

I've conducted many, many mediations where Agency managers, supervisors, HR/LR, etc., and also Agency counsel, probably substantially overpaid.

3. When the Dealer Shows an Ace.

Fall in Love, But Never (in Love) with Your Cards.

When is the best time to “cut and run?”, to lick your wounds?”, to “advance to the rear?”

Sooner, rather than later. A “bird in the hand is worth 2 in the bush,” and that maxim also applies when the dealer is showing an ace.

If the opposition party's case is strong going in, do you think it will be less strong once opposition counsel deposes your agency's managers, supervisors, HR/LR, etc.?

If opposition party's case is strong going in, do you think it will be less strong once opposition counsel searches your Agency's records and documents, i.e., conducts discovery?

Even if you have a good case, if the other side also has a good case, whose case do you think will get stronger the longer the matter goes forward?

Yours or theirs?

4. “<u>Know When to Hold’m; Know When to Fold’m</u>”. If I had a dollar for every plaintiff who told me his/her Agency didn’t want to litigate with him/her, I could build my own gambling casino!

And, further, if I had a dollar for every Agency manager, supervisor, HR/LR, etc., including Agency counsel, who told me:

the employee would *never* find an attorney to take his/her case, or

who told me the jury would never believe the employee's case, or

who told me … ,

I could build my own chain of gambling casinos!

5. “<u>Double Down</u>”. You’ve got only one chance (one card) to make the best score, hopefully 21.

Most of the time, the highest and best chance for settlement is your initial/original mediation, not the 2nd mediation, not the 3rd mediation, etc., but the very 1st.

Hope springs eternal. Costs for both sides are usually then-lower. “Heels” haven’t been dug in. Etc.

Work for there to be an early 1st mediation, and further, work and *know* the case and the law BEFORE mediation.

And, above all else, research and know *“Going to Vegas with Kitty!”,* such as: knowing your party’s gambling history, risk-aversion, etc. and also knowing the other party’s gambling history, risk-aversion, etc., etc.

6. “<u>Splitting Your Hand</u>”.

When can it be done?

When is it wise?

7. “Vegas, Baby, Vegas”. “What Happens in Vegas, Stays in Vegas”. Hold your mediation early-on in a conducive location, at a conducive time, with conducive players.

And, for goodness sakes, keep what “happens in Vegas” in Vegas -- just that – confidential.

NEVER, EVER, NEVER brag, gloat, be gleeful, be happy, etc. Word gets around, it really does. Whether you win, lose, or draw, have on your “big girl/big boy” pants.

8. “Don’t Bust your Own Hand (out by Greed)”.

Or by Indecision.

Or by Ignorance, Especially Ignorance of the House Rules.

Also, as a respectfully-submitted strategy, have **your** own house rules, such as publishing on your website, that: when ethical, appropriate, etc., it is the policy of your Agency/your Department/your Division, etc. to explore mediation possibilities as soon as is reasonably possible in a pending matter.

With this so-posted and noted on your website, when you seek mediation, then you will not be perceived as evaluating your case as a weak one, but rather, keeping with your Agency's/your Department's/your Division's announced policy. And, you can even point that out to plaintiff or his/her counsel and to the mediator beforehand.

9. “Play the Odds”.

“(Chances Are) the Odds Are Right”.

Gamble in Friendly Forums, Where the Odds of Winning Are the Best.

10. "Love the Casino Who's Winning?!"

Getting Real (If You Truly Want to Preserve/Force an Employment Relationship). *Transformative Mediation*.

11. **Know What the Dealer Can/Can’t Do, to Help You.**

Role of a Mediator

The role of the mediator includes:

- assisting in the identification of issues,
- exploration of alternatives, and
- facilitating voluntary agreements.

The mediator is also responsible for

- assisting the parties in reaching informed and voluntary decisions while protecting their right of self-determination. Rule 10.310(a).

Thus, a mediator may :

assist the parties in accumulating necessary information in order to make an informed decision.

Consistent with the standards of impartiality and preserving party self-determination, a mediator may provide information that the mediator is qualified by training or experience to provide.

Though a mediator shall **not** offer a personal or professional opinion (including a legal opinion) intended to coerce the parties, unduly influence the parties, decide the dispute or direct a resolution of any issue,

- recognizing potential issues with respect to legal rights and obligations is nonetheless **permitted to respond in other ways**.

Mediation is, by definition, “a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute **without prescribing what it should be**.”

By its own terms, this definition casts the mediator in a proactive role, not simply encouraging, but **acting in a manner potentially facilitating, agreement between the parties**. More explicitly, the mediator’s role is to be A VEGAS DEALER – dealing the cards, helping the parties add up the cards, etc.

Per the Rules, the mediator “is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements.” I.e., Be a VEGAS DEALER!

The mediator may suggest potential resolutions, but may **neither make an offer nor announce an agreement not affirmatively decided upon by the parties**

A mediator is many things to many people, having obligations

- To all the parties,
- the mediation process, the courts, and
- the mediation profession.

At all times, “[a] mediator is responsible for safeguarding the mediation process.”

Accordingly, the mediator is ethically obligated to conduct the mediation in an informed and balanced manner.

Additionally and significantly, a mediator is required to “comply with all statutes, court rules, local court rules, and administrative orders relevant to the practice of mediation.”

Mediation parties have a privilege to refuse to disclose or prevent someone else from disclosing mediation communications.

Mediation “is an informal and non-adversarial process intended to help disputing parties reach a mutually acceptable agreement.”

A mediator is prohibited from taking on the dual role of mediator and notary.

A. It is not permissible for a mediator to dictate, over the parties' objections, who participates in a mediation caucus.

B. If someone should participate in a mediation, either a full session or just a caucus, that person is a mediation-participant subject to the confidentiality requirements.

C. It is ethically inappropriate for a mediator to make the determination as to whether a party has complied with a judge's discovery order.

D. It would be inappropriate for a mediator to cancel mediation merely because of the assertion that one party has not complied with a discovery order.

E. Although a mediator would not commit a direct violation of confidentiality by suggesting that a party, without the consent of all parties, discuss mediation communications with someone who does not attend the mediation, it is nonetheless ***unethical*** to do so -- because it could lead to a breach of confidentiality by another.

A mediator is not relieved of ethical responsibilities by writing the "agreement" up as a "scrivener".

12. **Always** Tip the Dealer!

Pay your Mediator *timely*.

Remember: The dealer doesn't make the cards -- only shuffles, deals, and reveals (non-confidential) them.

“A Mediator just like any other professional service provider is entitled to compensation at the time the services are rendered in accordance with the agreement of the parties or the Court order appointing the mediator. In the event the Mediator is not paid for his services at the conclusion of the mediation, the Mediator, like any other creditor, may seek payment in any lawful manner. “

“The mediator may report the fact of nonpayment of mediation fees to the court.”