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Creative Solutions to Intramural Business Strife

When Parents Leave the Business to Cain and Abel

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Biography

The Hon. John Leo Wagner (Ret.) is the President of the International Academy of Mediators, a Fellow of the American College of Civil Trial Mediators and a Master in the Los Angeles Intellectual Property American Inn of Court. Judge Wagner has been listed as one of 2008's Top 40 Mediators in California by the *Los Angeles Daily Journal.* In 2007, he was listed as one of 42 Power Mediators by *The Hollywood Reporter, Esq.* He has been listed in *The Best Lawyers in America* for ADR for 2007-2009 and has been listed as a *Southern California Super Lawyer* in the field of ADR for that same period.

Judge Wagner is a former United States Magistrate Judge. He founded his Court's mediation program in 1985 and has over 24 years' experience in conducting business mediation. He has worked nationwide as a full-time ADR neutral since he left the bench in 1997.

He is presently on the mediation and arbitration panels of Judicate West Alternative Dispute Resolution in Los Angeles, and is on the Panel of Distinguished Neutrals of the CPR International Institute for Conflict Prevention and Resolution in New York City. Previously, he headed Los Angeles-based Irell & Manella LLP's ADR Practice Group and was the Director and a principal neutral for the firm's ADR Center in Newport Beach, California.

1. Introduction

> "And Cain talked with Abel his brother: and it came to pass, when they were in the field, that Cain rose up against Abel his brother, and slew him."
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> Genesis 4:8 (King James Version)

Notably, Cain and Abel engaged in only direct negotiation and sought no mediation. One would like to think that, had the brothers been guided toward a suitable intermediary, a different result would have obtained. Fortunately, today disputes involving even the most vexatious intramural business strife can (and most likely will) be guided to mediation. With adroit intervention on the part of counsel and the services of a skilled neutral, a fight to the death need not be inevitable.

2. The Special Nature of Intramural Business Strife

First, intramural business strife ("IBS") should be defined. It is the conflict that occurs within business associations between or among people that have at least one domineering common bond. Such bonds may come from family relationships established by blood or marriage; from a common ethnic background, from a shared religion, from a common history though profound trials of life (such as the bonds between those who survived the Holocaust or who served as comrades in arms during times of war), from a longstanding business association between families, from a strong and successful partnership established in a prior generation, from ties to a geographic community or from longstanding business relationships within a niche business community.

It is not unusual for overlapping bonds to be in place, which tend to magnify the conflict when things go sour. An example of this is the case involving a business in transition to the next generation that began as a partnership of two holocaust survivors who had married sisters in Israel and immigrated to the United States. Such litigation contrasts with "normal" litigation, which occurs between strangers or those with more distant business relationships. Now, I acknowledge that no piece of litigation is really "normal" as each case has its own distinctions. Still, the distinction drawn has the same sort of validity as the comparison between "normal" people and raving lunatics. You can tell the difference.

Ordinarily, such bonds strengthen relationships and motivate those bonded to take extraordinary measures to preserve peace and get along. When those measures fail, however, things tend to get nasty. As lawyers characteristically strive to engage with objectivity and professionalism, it often comes as a surprise when I declare that all litigation—or virtually all litigation—has an "emotional driver." Of course, there is an exception to every rule. Litigation brought by governmental entities to modify or preserve law may not be emotionally driven, and some business litigation can be driven with cold detachment as a matter of course. Still, if normal litigation is akin to a derailment, then the emotional content that is generated in a case where IBS is generated

by a dispute between family members or between bonded partners is more akin to a head-on train wreck. In these situations, the push toward mediation does not usually come from the parties themselves. Rather, the parties become quite used to—in some cases quite fond of—the feud. Like the Hatfields and McCoys, their work-a-day lives are dominated and (in an ironic way) enriched by the conflict. These are the folks whose employment has become litigation support, whose reason for being is to best (or hurt) the opposing party.

To do a good job in such matters, counsel must have the patience of Job, which is not the foremost characteristic of the vaunted "zealous advocate." Michael Landrum, a talented and experienced mediator from Minnesota, characterized the norm this way: "The joint problem-solving capacities of parties/lawyers are compromised by the tragedy of being born with hyperactive pugnacity glands subject to massive secretions with very little stimulus." In a case involving IBS, the "stimulus" is constant, resulting in a case that can soon spin out of control.

These clients demand lots of attention. They so incorporate the litigation into their lifestyle that they cannot envision it ending and in truth often do not want it to end. For instance, one matter involved a dispute between two elderly Iranian gentlemen who had emigrated to the U.S. after the fall of the Shah. The dispute involved the sale of a piece of property in downtown Tehran. Both were wealthy. They hated one another, but loved the sport of suing one another. The dispute has been going on for 15 years with no end in sight. The court-ordered mediation was doomed when both parties flatly refused to attend. For the legal professionals involved, litigation of this sort can assume nightmare proportions.

It is not too surprising, then, that opposing counsel, sharing a similar plight, often subsume their roles as "zealous advocates" and assume the role of statesmen. They cooperatively guide, push, shove, coerce and/or force their respective clients into the mediation process. Sometimes, this is done even at the cost of damaging the attorney-client relationship, risking that it will be ended, but hoping that it will be repaired by a rational result. Lawyers that do this are very good lawyers indeed, putting their client's interests to the forefront despite their self-destructive resistance.

Of course, the "statesman" approach requires independent, professional counsel and is manifestly the best case scenario. Sometimes, we are faced with opposing counsel that has "taken on" the raging emotional content of the client. This most commonly occurs when a family member or close personal friend undertakes the representation. Under these circumstances, the case will never see the light of the mediation process outside of 1) a firm court order requiring mediation and/or 2) an erosion of resources sufficient to make the unwieldy side desperate to avoid collapse and loss. In the absence of the first driver, the attempt to bring about the second driver can be financially disastrous for both sides and the business entity concerned.

3. Common Dynamics

It is axiomatic that you are hired to win. IBS cases are more thankless than most, in that it is harder to achieve a "win" that is appreciated as such by the client. Trial of such a case is most likely to result in unhappy clients, frivolous bar complaints and whiplashed claims of legal malpractice. Part of my mediation practice deals with resolution of legal negligence claims. I have seen cases where a lawyer obtains a favorable verdict (sometimes a huge verdict) in a case dominated by IBS, then still gets sued for not prevailing on certain claims, for not obtaining a verdict of the expected size or for making decisions that are subsequently second-guessed. The need to litigate goes on, only the target changes. These are the cases that keep you awake at night, wondering what you missed and what you could have done differently to get a better result, to get paid or to keep your tail out of the wringer.

More often than not, the lawyer is brought into the case involving IBS by prior, frequently longstanding, representation of the individual, family or company involved. Under these circumstances, maintaining professional detachment and objective influence can be challenging indeed.

4. The Vortex

I come from Oklahoma, where tornadoes are common and well understood. They come in all sizes and intensities, from the little "dust devil" that skirts harmlessly across the field, to the massive F4 that is a mile wide and can wreak total destruction for 100 miles.

Lawsuits are like tornadoes. They create a vortex, but instead of being fed by the confluence of warm and cold air, they are fed by the confluence of hot air and money. The more money that gets thrown into the eye of the vortex, the faster it spins and the larger and stronger it becomes. At a certain point, the money is no longer being voluntarily thrown in, but is being involuntarily sucked in by the force of the storm. This is the danger point—the point of critical mass where a lawsuit gets out of control and takes on a life of its own.

So long as the client is willingly contributing to the cost of the fuss, the relationship with counsel is peachy. The lawyer is making money and the client's emotional drive is being sated. Once the vortex becomes of a certain size, however, the litigation stops being satisfying and starts being painful. It is painful for the client because the budget is busted; it is painful for the lawyer because the busted budget causes fee payments to cease or diminish. Experienced lawyers anticipate the danger point and do their best to guide the matter to trial before it is reached. Unfortunately, this is difficult to do, because you cannot accurately predict the tactics or timing of the opposition. When opposing counsel is inexperienced, inept or is dominated by a "hyperactive pugnacity gland," statesmanship is not to be expected.

Still, it is at this point—the point when the critical point of pain has been reached and reality starts to set in—that the "ordinary" case is primed for settlement. This is not necessarily so with the case impregnated with IBS. Rather, the parties become "sacrificial" in their view toward the litigation. They will press counsel for a reduced billing rate, ask for them to take the matter on contingency (and feel some lack of commitment to the cause when counsel refuses) and perhaps be reluctantly content with a hybrid fee arrangement. If these concessions are not forthcoming, they will change lawyers or proceed *pro se*, but they will still doggedly pursue the litigation. This type of client is particularly dangerous in Federal Court where the matter is approaching trial, because the judge may not let you out just because you have not been paid. Mediation looks mighty fine when you see that trap looming.

This is when we see good counsel working cooperatively to move the case to resolution, but even with full cooperation between counsel that process usually takes some time. Consequently, even under the best of circumstances, the timing of the mediation in cases saturated with IBS is generally later than what one sees in the normal case. In those cases where counsel for one side or the other (or both) cannot embrace cooperative statesmanship, the vortex expands and the case spins out of either side's control. This is when it is useful to seek the help of the court in ordering the matter to mediation. Many courts will do this as a matter of course, so you just have to wait for it to happen, and then exploit the opportunity. In other courts, a subtle suggestion to the Court Clerk or a motion requesting mediation may be necessary.

5. The "Straw Man" Matter of Principle

It is important to understand the function of the "matter of principle" in the case containing IBS. In this context, the "matter of principle" is clearly set up as a "straw man" so as to justify the pursuit of a matter of dubious financial merit. This should be distinguished from the normal case, where a legitimate economic imperative masquerades (and perhaps is articulated as) a "matter of principle." An example of this is where an asbestos defendant resists settlement of a "plural thickening" case, believing that it will be "setting the price" of settlement for thousands of similar cases. There, the matter *is* economically driven and not really driven as a "matter of principle." This is so even where the defendant has spent many times what it would take to settle that one, isolated case.

Of course, the "floodgate" argument—if this matter is settled everybody in similar circumstances will also sue the company or expect at least the same amount—does not usually withstand scrutiny. This is because, as I have set forth above, lawsuits are emotionally driven. Generally, if a plaintiff has enough emotional content to file suit, suit will get filed. If not, suit will not get filed, no matter what has happened to someone else. Truth is, plaintiffs are notoriously self-centered. This is not to say, of course, that a large settlement in a similar case will not give some degree of comfort to a plaintiff who has already filed. It certainly can, but I have been surprised at the ability of counsel to distinguish such cases, where they would set the expectation bar too high. In the asbestos context, however, as in a limited set of other contexts (plant closings, toxic torts, etc.)

where a consortium of plaintiffs' lawyers is pursuing a concerted and coordinated effort to bring suits of the same kind, the floodgate argument has legs.

Once the litigation reaches the critical point of financial pain for the client and particularly when the economics of the case are strained or lop-sided, the client will tend to cling to some "matter of principle" in order to justify the decision to soldier on.

The real function of this "matter of principle" should be recognized for what it is, not what it is fantasized to be. First and foremost, it is not a genuine matter of principle. Civil lawsuits are, of course, about money—not principle. This becomes clear once one appreciates—as all lawyers do—that the primary result of a jury trial is the involuntary transfer (or, if a defense verdict, the avoidance of an involuntary transfer) of money. To be sure, injunctive relief can also be obtained, but in cases where the real focus is upon timely injunctive relief, the fight is fought early on with a TRO and motion for preliminary injunction. If the matter proceeds beyond this stage it will almost always boil down to money, no matter any rhetoric to the contrary.

When the "matter of principle" flag begins to be waived, it is done in order to justify action that is essentially irrational and not economically justified. This is absolutely clear when the cost of the litigation has already exceeded the potential recovery, or (on the defense side) has already exceeded what it would cost to settle the case. It remains obvious when cost and fee projections indicate that the point of economic non-viability will be surely reached.

Of course, the key to decelerating the vortex and getting it under control is to cut off (or at least reduce) its supply of hot air and money. It is certainly not the norm, but I have mediated cases where over $100,000,000 per side had been spent on the litigation before any sort of negotiation or mediation was ever attempted. A vortex that large is hard to tame. The hot air, of course, is generated in the first instance by the emotional content of the clients and their inevitably exaggerated view of the merits of their respective sides of the case. In some unfortunate situations, counsel—in the heat of battle—"supercharge" that hot air by taking on the client's emotional content as their own or by getting personally cross-wise with opposing counsel. It is very hard for the lawyers to decelerate the vortex on their own, even if they are very good and have maintained a cordial relationship with each other. It may be impossible if they are personally at odds, too. It is helpful to examine why this is so.

It is axiomatic that trial lawyers are hired for one primary purposed: to litigate, try and win lawsuits. Clients are all ears when their counsel tells them about their causes of action, their defenses and/or their counter-claims. They drink in the discovery to be done and the information obtained. They eagerly try to understand and have faith in even the most tangential theories supporting summary judgment. They believe that hearings went well, that depositions contain admissions and that the other side's expert is subject to devastation. They know that they *should* win and fervently believe that they will.

Moreover, clients easily turn a deaf ear to adverse truth. They believe in their case, and continue to believe when told that their cause of action is barred by the statute of limitations, that the motion for summary judgment failed, that they will make a bad (in fact, terrible) witness, that the facts were not as they supposed and represented, that their key expert self-destructed and that the judge is hostile to their cause. Such things are easily countered by denial and faith. Surprisingly, I find this is even so with very bright and sophisticated clients. When objective analysis paints a dark picture, they will still cling to the hope of an appeal (particularly, I might add, in IP cases, in light of the track record of the Federal Circuit). The amount of faith available for these purposes seems to be directly proportional to the amount of sacrifice (personal, emotional and monetary) that the party has expended.

Why is this so? I think it is just the nature of the beast, but that nature has certainly been demonstrated over and over again in the field. I once had a lawyer come in for mediation of a partnership dissolution case scheduled for 1:30 in the afternoon. I began the mediation by meeting with him in private caucus. I asked him about the emotional content of this client. He explained that he had just finished having lunch with his client and they had discussed the case in detail. Then he ripped a page from his yellow pad and handed it to me. It had about 15 items listed, setting out both the good parts and problems with the case.

Each item had been neatly checked off when he discussed it with his client. He then encouraged me to meet with his client privately, which I did. I began by asking an open ended question, "Well, Mr. Smith, can you tell me a little something about your case?" He willingly expounded and I sat back and listened. I did so for 45 minutes. During his discourse, he accurately hit every one of the points on the yellow sheet that were listed as favorable points. He did so multiple times, because there were not many of them: his lawyer was willing to take the matter through trial; the judge was fair and it was his hometown forum. They had survived the initial motion to dismiss. His lawyer had effectively cross-examined the other side's damages expert.

Then I asked him, does your case have any problems? He sat back, scratched his head and pondered for a few moments. Then he responded, "No, my case has no problems at all." I then inquired as to what his lawyer thought about the case. His response: "My lawyer entirely agrees with me—he told me over lunch that the case is "a lead pipe cinch." The next step was to go down the bullet points listed on his lawyer's yellow sheet. Those points included the following:

1. The case had been brought to him and filed after the expiration of the statute of limitations, and the primary cause of action would likely be thrown out on the pending motion for summary judgment.
2. The key expert witness had died the preceding week, after being paid but before finalizing his report.
3. The other side had discovered a "smoking gun" document that directly refuted the client's key deposition testimony.

4. It was recently discovered that a key factual witness had been convicted of fraud and was going to prison before the scheduled trial date.

5. The opposing party had been deposed and made a terrific, credible witness, whose story was fully documented by contemporaneous business records.

6. It was likely that the pending indictment of the plaintiff for tax evasion relating to the partnership investment would come down in advance of the trial.

7. His ex-wife's testimony regarding a key conversation with the opposing party would not be supportive of his position, as had previously been expected, because she was very bitter over the divorce and felt she had been cheated on the property division.

His eyes became wide as saucers. I guaranty that he had never actually heard and registered any of this bad news before (even though I knew for a fact that his lawyer had covered the same ground not two hours before), but he did "get it" when he heard it from me. I am no magician. I am convinced that the same result would have obtained had his counsel been the mediator and me the client's counsel. The point is that bad news from the advocate often will not register.

The case was a "perfect storm" disaster. Moreover, he was going to be a terrible witness and I told him so, tempering the blow by noting that I made a terrible witness myself. I shared that I did not consider that to be a poor reflection on my own character, nor on his. Perhaps our common trait of being lousy witnesses was not the best way to establish a common-ground connection with the man, but it worked well enough (along with the effective reality session) to get the case resolved on a basis he could live with. Needless to say, his lawyer knew that he had dodged the bullet and appreciated the value of the mediation process.

From the mediator's perspective, this was an easy case, because it turned out to be so lop-sided. It was the kind of matter that would have ordinarily been resolved between counsel long before it hit the mediation window, had it not involved such a large measure of IBS. The challenge comes when the case is more evenly balanced, with the emotional content reaching the high tide mark. Still, the lawyer in this instance practiced good mediation advocacy, because he clued me in and then stepped out of the way. This, of course, is not something most advocates would (or should) do, unless working with a mediator they trust. As with so many areas of the law, how you deal with a particular mediator is a matter of good professional judgment.

6. Overview: Mediation Advocacy Tips in Matters of Intramural Business Strife

There are a number of techniques that have proven particularly useful in IBS matters involving a high degree of emotional content. Such matters would include partnership disputes and dissolutions, disputes among members of an LLC and disputes among shareholders of closely held or family-controlled corporations. I tend to

characterize these techniques in three categories: 1) Extraordinary Preparation, 2) Conspiratorial Cooperation and 3) Machiavellian Creativity.

7. Extraordinary Preparatory Techniques

In the ordinary case there are certain mediation preparatory techniques that are smart and helpful. These, I believe, should generally be pursued, especially if the amount in controversy merits the cost of the additional effort. These techniques include mediation briefs and pre-mediation conferences. In an IBS matter, however, full-blown preparation for any mediation session is essential. I humbly suggest the following:

- **Designation of Specialized Counsel**

The old "good cop/bad cop" routine is an old and well known technique—but it remains venerated and used because it still works. Its employment in a case involving IBS should begin at the earliest stages of the case. Moreover, it should be practiced on two levels.

First, there should be a lawyer designated as the trial lawyer "bad cop" and the client-tending "good cop" that is primarily tasked with managing the client on a day-to-day basis. This often happens naturally, as when the lawyer responsible for a company's transactional work brings in a firm litigator to handle the lawsuit or when an outside "general counsel" brings in a lawyer to try the case. It can also be naturally set up when the lead partner delegates the day-to-day client contact to an associate attorney.

Second, preferably at the outset of the case (and certainly well before the case reaches the anticipated "critical mass"), there should be a lawyer designated as the "settlement counsel" for the matter. Once a lawyer is designated as "settlement counsel," that lawyer's role should be clearly defined for both the client and opposing counsel. In this regard, it should be made clear that the *only* job of the settlement counsel is to get the matter resolved. He or she will not engage in the day-to-day litigation and trial preparation, and will not try the case. This leaves an easy line of communication for the client to exploit if the cost becomes too high and settlement becomes—begrudgingly—more attractive.

More importantly, though, it opens up the back door to the other side's castle when there is little or no cooperation between lead trial counsel. The opposition knows that settlement counsel's *job* is to get the case settled. Consequently, that lawyer can time settlement efforts at will, because nothing he or she does can be stepping out of role so as to show weakness, as happens when the trial lawyer "warrior" suddenly wants to talk peace. Moreover, in a matter saturated with IBS, it serves another important function. It allows the settlement line of communication to remain open, without leaving the lead trial lawyer subject to the client's criticism of "not believing in the case" or "not being willing to try the case."

On the contrary, the junkyard dog can continue to strain at the leash, while the settlement counsel is independently engaging in settlement talks or setting up mediation. The designation of settlement counsel will open up a very useful line of communication with both the other side and with the client. These lines of communication are useful because they are not tainted by the day-to-day conflict between the litigating lawyers or the mutual bad taste that is left when a client makes unceasing demands on his own trial counsel.

As a matter of fact, the use of settlement counsel, when properly employed, is so effective that it creates an almost unfair advantage when one party is using this method, and the opposing party is not. This is best illustrated by the experience of a fellow named Larry Glassman, who practices nation-wide, but is based in Cincinnati, Ohio. Larry works full time as an independent "settlement counsel." He is hired by Fortune 500 and other established companies (and/or their law firms) to explore and create settlement options, and to represent companies through negotiations and settlement processes. That is his full-time job and he is very good at what he does.

Larry does not conduct discovery, litigate or participate in trial. He does not compete with litigation law firms for business, because he does not perform their function. Instead, he brings a wealth of experience as a former general counsel of a large corporation, a highly experienced trial lawyer and highly-specialized settlement counsel to bear.

One of the parties in a case I mediated recently on East coast had hired Larry along with a hard-charging litigation firm from the Midwest. The other side was represented at the mediation only by its trial lawyer, who was a partner in a leading East Coast firm. The case involved a supplier who had been caught red-handed by its largest customer violating a "most favored nations" pricing clause in its contract.

The CEOs had worked with each other for years, and "betrayal" was the word of the hour. It was important for Larry's client to preserve a long-standing—and profitable—relationship between the companies. I set up a session where each trial counsel made a presentation to me and the two company CEOs, sitting as a "quasi arbitration panel." The idea was to hear the presentations, excuse the lawyers, and let me triangulate a discussion between these two sophisticated business men with the hope of striking a deal and preserving the relationship.

The lawyer for the plaintiff customer went first. His presentation was direct but delivered with a conciliatory tone. The trial lawyer for Larry's client, however, delivered a sharply accusatory diatribe that personally attacked the opposing CEO and asserted that they were going to personally sue him and counter-claim for fraud. Faced with this, the poor lawyer representing the plaintiff tried to quickly change hats and become more "snarly." It put him in a very uncomfortable position, as he still had to take the primary role in the ongoing negotiation.

Larry, on the other hand, was personally untainted by his lead counsel's strident presentation. The trial lawyer stepped back from the negotiations and Larry stepped in, keeping the negotiations moving forward instead of being irretrievably damaged. The case was then settled, with the final settlement term being the delivery of an apology from the defendant's "bad cop" lead trial lawyer to the plaintiff's offended CEO. The CEOs then scheduled a golf date the next week, which indicates the level to which the relationship had been repaired. The mediation would have crashed and burned without the settlement counsel's role as the "good cop" and his lead trial counsel's role as the "bad cop," which allowed them to weave the final (and essential) apologetic "bargaining chip" out of whole cloth.

- **Selection of Mediator and Process Design**

Sometimes a mediator is selected because he or she is really good at facilitation; sometimes a mediator is selected because of a talent for evaluation and head-banging, but sometimes a mediator is selected because they are weak and can be easily manipulated. If you have an emotional and/or headstrong client, more often than not you will seek out a mediator that can apply facilitation and evaluation with equal ease when called for, and is experienced enough to have a well stocked "bag of tricks." This is the type of mediator you can trust to do an effective "reality session" with your client and help that client see reason.

A mediator who has the capability and willingness to adroitly do the "heavy lifting" in shifting unreasonable client expectations is a gem. Still, there are some situations where you have already done the heavy lifting and don't want your chastened client pushed into a position that is unfairly disadvantageous, especially when you know or suspect that similar progress has not been made on the other side. In this instance, it is important to carefully consider what kind of mediator suits your goals, and you may want someone who you can run roughshod over, so as to protect your guy and make your points directly with the other side's client.

The same is true with respect to the design of the process. Many mediators dislike joint opening sessions in IBS cases, because they tend to run up the emotional content and be counter-productive. Still, under some circumstances, having a face-to-face meeting may be necessary to cut a deal. The timing within the mediation process (up-front or later in the day), along with the ground rules and content of such meetings need to be carefully considered in a case infused with IBS.

- **Delegation of Roles in Mediation**

I am always amazed at how much time goes into preparation for a trial that is not likely to take place and how little time is spent on preparation for a mediation where the disposition of the case is much more likely. Fact is, we dispose of about 98% of the civil cases that are filed *prior* to trial. Moreover, there is a much greater ability to influence and control the course and outcome of a mediation than there is at a trial, where the

variables introduced by the use of a jury (or an inscrutable, arbitrary judge) are imponderable.

To exercise the maximum amount of control that is available to counsel, it is essential in a case infused with IBS that each participant's role in the mediation process be defined. Presentations, if there are going to be any, should be assigned. These are normally the bailiwick of the lead trial attorney, but there are instances where an associate attorney more intimately acquainted with the facts or law is called upon to do this. Also, in a very contentious case, it may be better to keep the lead trial counsel in the background and have local counsel or settlement counsel make the presentation.

Someone needs to take the role of the lead negotiator. Again, this may be the lead trial counsel, in-house counsel, local counsel, settlement counsel or the client himself. The important thing is that this role be clearly assigned and that the other players agree to respect and defer to the lead. This is easier said than done. Lack of internal coordination often results from intramural power struggles within the mediation team itself. Litigation partners on the case often compete for dominance and this tends to worsen if they come from different firms. Local counsel with a prior relationship with opposing counsel can go off on his own lark. He will be sorely tempted to informally exploit this prior relationship through back channels in order to later demonstrate his worth and importance to the team. Moreover, the business client and in-house counsel can disagree or be otherwise engaged in internal politics. Suffice it say that keeping a team coordinated and focused is a difficult task under the best of circumstances.

Add all the pressures of a matter teeming with IBS to the mix, including the client's growing lack of confidence in counsel simply because a mediation is taking place, and only the most adept mediation advocate can find a way through the thicket. Intramural discussions and disagreements can play out in caucus with or without the mediator, but it is rarely beneficial to display these to the other side, unless that discussion has been choreographed in advance. Also, if informal "hallway" discussions are to be pursued, someone should be delegated to conduct these and (if it is not the lead negotiator) report back to the person in charge of negotiating the deal. Sending mixed messages or contrary information by direct, mediated and back channel routes can be highly detrimental to obtaining the maximum benefit from the process.

Of necessity, mediators are control freaks, as the "magic" of mediation is created by controlling the flow of information between the parties and maintaining the ability to sift, clarify, reprise, characterize, sanitize, emphasize, un-demonize and normalize that information. Uncontrolled or (still worse) unknown "backchannel" communications during mediation can disrupt the controlled and "spun" flow of information being managed by the mediator and frustrate those efforts. This is fine, if what is planned and intended is to wrest control of the process from a weak or incompetent mediator (or a good mediator that is not seeing the case "your way") in order to take it over or to deliberately scuttle the mediation effort. On the other hand, if your objective is to resolve the matter (as is generally the case with a matter infused with IBS), this can be a great

blunder. Such blunders are most often made when the advance preparation is inadequate and the mediation team is not internally coordinated.

Finally, don't forget to assign the client a clear role and to coach him or her in how to play it. If you want the client to sit still and be quiet, then this better be well-understood in advance, because the ordinary impulse in a case containing IBS will be to talk frequently, loudly and without much governing discretion. If upset clients must advocate on their own behalf, teach them how and design it into the process. If a direct meeting between the clients is prudent, decide how this will be raised with the mediator and under what conditions you want it to take place. It is prudent to have the mediator in the room as one of those conditions. Once the client's role has been defined, assign a "client sitter" to assist with minute-to-minute client control and follow-through.

- **The Pre-mediation Conference**

The pre-mediation conference is one of the most useful tools available in managing a case laden with IBS. The current "state of the art" in mediation is for the mediator to routinely initiate such conferences. If, however, this is not done in your case, it is smart to force the issue and call the mediator directly.

There is nothing wrong with this from an ethical perspective. *Ex Parte* is the name of the game in mediation. Even if your mediator is a former judge, the rules against *ex parte* communication with a judicial officer or arbitrator simply do not apply. If you think that your opponent is still stuck in the dark ages and does not appreciate the difference between mediation (where *ex parte* contact is OK) and arbitration (where it is not), then you can clue-in the mediator and ask him to make himself similarly available to the other side—but you don't want to avoid *your* pre-mediation conference because the opposition is inept.

More adept mediation advocates not only call the mediator, but arrange for an advance one-on-one meeting and/or a meeting with the client. In a particularly nasty IBS matter that I did on the East coast, one side flew me out two weeks in advance of the mediation to meet the client and visit their new business. Thus, I quickly became acquainted with the "black sheep" of the family and her new, disapproved spouse. The other side—who I had worked with before— was made aware of this and approved of it, knowing that such action was necessary to diffuse the distrust that would have otherwise been present had I shown up "cold."

The pre-mediation conference with the chosen mediator is where the matter is likely first identified as a matter containing IBS. If, of course, the matter has been set up through an ADR provider organization such as Judicate West, CPR, AAA or JAMS, the fact that it is an emotional and difficult matter should be communicated to the case manager at the first opportunity. That way, the mediator can be advised up front and the case manager should know to set up pre-mediation conference calls.

The pre-mediation work may initially be done in a joint conference call, but the more prominent practice is to have separate calls with each side. The history of the matter is discussed; the problematic domineering "bonds" between the parties are identified and the dynamics between the parties and their respective counsel are explored. The mediation process is discussed and designed, and all participants (including insurers) are identified and approved. Lines of authority are identified and arrangements are made to secure the participation of non-attending players. The normal discussion of the operative facts and law, and the procedural status of the case are also discussed, as is the necessity for informal disclosures in advance of the mediation.

This is also the time to bring up the wisdom of "staging" the mediation. In a highly volatile matter, it may not be a good idea to caucus in the usual manner, having one side sitting around while the mediator meets with the other. Of course, where one side believes that the other has threatened violence, property destruction, arrest or deportation, having the parties on the same floor or even in the same building can be problematic and block progress.

The antidote for this is to have staged caucus sessions, where one side begins before the other arrives, and one side stays late while the other goes home early. Variations include having one day with the plaintiffs' side attending in person and the defendants' side available by phone, and then flopping it over the next day so that the defendants' side attends in person and the plaintiffs' side is available by phone.

- **Mock Mediation**

Recently, I was consulted by an attorney who was getting ready to proceed before another mediator I know in a big case, and asked to do a "mock mediation" over the phone. Frankly, this was a first for me, but it goes to demonstrate how thorough and creative sophisticated settlement advocates are these days.

Not only did I do the mock mediation (with his client in attendance for a mock "reality session"), but I also suggested that they make a pre-mediation PowerPoint presentation to the mediator in advance. The mediator, as expected, agreed to this and provided the other side the same opportunity. They, for whatever reason, declined.

It has been reported back to me that the matter settled on terms that were viewed as very favorable to the party I worked with. The lead attorney told me that he had never before felt so well prepared for a mediation.

Doing mediation work over the phone is not as strange as it sounds, because it is becoming more and more common to do full blown mediation sessions (particularly in "closing conferences" where documents are being crunched) by conference call and WebEx (a computer service where documents can be viewed and edited in real time while on a conference call). These are particularly useful in international mediation where the parties and counsel are spread all over the world. In a matter involving strong

IBS, I would resist doing this for an initial session, but it can actually help to keep things cool for follow-up after the initial face-to-face session.

Of course, the telephonic format works in the first instance, too, in an ordinary case without all the baggage brought by IBS. It just involves setting up multiple call-in lines (one for joint meetings and separate ones for caucus sessions).

- **Mediation Briefs and Supplemental Memorandum**

Two other methods of formal preparation are oft-times helpful. The first of these is the mediation brief (also referred to in some jurisdictions as a "settlement statement). There is always a choice as to whether or not mediation briefs are to be prepared, but they usually are. If briefs are used, there is a further choice is whether they are to be exchanged between the parties (as well as provided to the mediator), or whether they should just be provided to the mediator without party exchange.

In a case containing IBS, it may be wise to exchange mediation briefs, so as to clearly set out the negotiation history and to establish a common starting point. Exchanged briefs will usually be shown to the other side's client. Consequently, care should be taken not to include insulting or inflammatory language, as that is counter-productive, but a tempered exposition of your strong points of law and fact can be a useful jumping-off place for opposing counsel's pre-mediation reality talk.

Along with this, a second tool can be employed. It is often helpful to submit a confidential memorandum privately to the mediator, containing all of the secret, vitriolic, defamatory and inflammatory stuff. This is where you reveal that the opposing party is a drunk, uses drugs, cheats on his wife, has been defrauding the business, cheats on his taxes, has an account in the Cayman Islands, and was fired from his last job. It is also where you may reveal that the opposing expert has a felony conviction and has been refused permission to testify in at least 6 jurisdictions; that the judge's clerk is dating your wife's second cousin's daughter and has revealed that a decision on summary judgment is coming down soon; that there is a new decision that the other side doesn't know about that is directly on point and that there is $25 million in coverage that the other side has never taken the time to discover.

Why is this important? Well, it can provide useful information to the mediator, but much of this could be and probably was shared in the pre-mediation conference. More significantly, it allows you to demonstrate in writing to your own client that the mediator has been fully apprised of all the "good stuff" with which he or she has been obsessed and dearly wants the mediator to know. Both your credibility and that of the mediator go up once this is done. Later, it allows the mediator to set this stuff firmly aside as something he already knows about, as opposed to having to dwell on it during the mediation conference.

8. Conspiratorial Cooperation

When dealing with a lawsuit imbued with IBS, it is always a pleasure to deal with highly competent and skilled counsel. Perhaps it is surprising, but I find it to often be true that the level of professionalism among counsel is very high when they are both representing unruly, emotional clients. Occasionally, the lawyers recognize the difficult nature of their respective clients' personalities and quickly establish that they are "in the same boat." In the blessed situations where this occurs, a number of mediation tools are made available that are usually beyond reach in hotly contested litigation.

- **Productive Commiseration with Opposing Counsel**

There is something to be said for having a candid discussion with an opposing counsel that has acted in a professional, cooperative manner. In the first instance, the purpose of such discussions should be a joint recognition that the matter with which you are both saddled is one of intramural business strife. It is useful for both counsel (and later for the mediator) to have the benefit of their opposite number' assessment of the emotionality of his or her own client. Candid conversation about issues of client control and bullheadedness can pay off when the other side—now understanding your problem—is willing to make accommodations or participate in processes that are designed to help you both guide the matter to a mutually acceptable conclusion.

When a husband and wife, who were partners in a thriving real estate business were divorced, it skewed not only their personal and business relationship, but also their partnership's long-standing partnership with another partnership group that gave them their start in the business. As their interests were all intermingled, it became a real mess when the husband was accused of defrauding the other partners as the general partner of a failing deal, and when those other partners then discovered that the husband and wife had participated in a very profitable related deal without affording the partnership first crack at the business opportunity. In this instance, the lawyers quickly recognized that they were involved in a matter involving IBS and jointly concluded that each side would be better off with a settlement. Their clients were resistant to the idea, so they coordinated with the assigned judge to have the matter "ordered" into mediation.

It worked. The matter quickly settled between the husband and the partnership, leaving the claims between the partnership and the wife, who felt burned by both and disrespected because of her gender. The matter settled, but only after several long mediation sessions and a lot of creative follow-up. The key, of course, was a real estate deal and each side had to conclude that they were the more astute in real estate matters and had "out negotiated" the other. This took a long succession of proposals and counterproposals, and infinite patience on the part of counsel.

Of course, such tactics do not always work, and being stuck to a "tar baby" client is no fun. There is no rule that a client must be reasonable or even rational. It brings to mind the case of "Dr. T." Dr. T was a successful plastic surgeon, who founded a clinic

adjacent to a hospital where he had previously operated and had privileges. The success of his clinic—where he did outpatient surgery—was dependant on his maintaining those hospital privileges, so that there was recourse to a fully equipped hospital in the event one of his outpatient surgeries when wrong. The hospital, resenting the loss of revenue that resulted from Dr. T's successful clinic, pulled his operating privileges. Dr. T sued, alleging an antitrust violation. In a series of mediation sessions, he resisted settlement, and the matter went on to a bench trial. He lost, but the judge, while following the law, stated that he disagreed with it and invited the appellate court to reverse him.

Post-trial mediation produced an offer from the prevailing defendants of many millions of dollars, plus re-instatement of Dr. T's privileges. It was a very, very good deal for a case that had been lost. His young, talented lawyer had worked closely with me and cooperatively with the other side to extract this deal for his client. He strongly insisted that Dr. T take the deal. Dr. T refused, steadfastly sticking on a number 10 times that offered—a position that nobody (including, I suspect, Dr. T himself) considered to be reasonable. When I confronted him and also strongly recommended that he take the proffered deal, Dr T explained that he had grown up wandering in the desert of the Arabian Peninsula and that rather than compromise his principles he would rather lose the case, lose his practice and go back to the desert. The appellate court affirmed and Dr. T did, after an attempt to re-establish his practice in a different locality failed, return to the desert as a wandering physician. His lawyer, after years of labor, earned nothing but a hard lesson. He went on to become fabulously successful in his practice, but never took on a client of this ilk again. Sometimes the case that is imbued with excessive IBS is just not worth taking. Certainly any lawyer should think twice before taking such a case on a contingent fee basis.

As I was preparing this piece, I read a newspaper article about an electronics store purchasing manager who had run up $60 million in gambling debts. As he lost, he took larger and larger kickbacks from the company's suppliers to feed his gambling habit. As his gambling debt became larger, he bet more and more, always hoping for that big win that would pull him back into the black. The kicker is that the casinos kept extending him more and more credit, even when it seemed irrational to do so, because they knew the odds of his recovering what was owed were not good. Lawyers that take on a contingency or hybrid fee case where there is profound IBS often find themselves in the unenviable position of those casinos. They keep plowing more and more firm resources into a matter where there is little prospect of a return, but that will not end because of the client's "addiction" to the ongoing dispute.

- **Sending Clear Signals as to What You Will Recommend**

When saddled with a highly emotional or irrational client, it is useful to tell a cooperative opposing counsel (with candor but in confidence) that although you understand that your client's settlement position is a bit extreme, you are willing to recommend or even push something more reasonable. It would follow that you also ask opposing counsel for what you need to shore–up and internally support the more reasonable course of action. This may be a demand or offer in a certain range, the

provision of additional information or the agreement to use a particular mediator, viewed as likely to be effective with the problem client.

- **Exchanging Necessary Information**

It is often useful to discuss what information is lacking and will be needed for effective decision-making at the mediation session. For instance, if the client is absolutely convinced that his brother and former business partner has made millions after he stole the customer list, broke away and began a competing business, it would be useful to convey financials (perhaps on an "attorneys' eyes only" basis) that showed that the brother's business was in the red and failing. It would also be useful to reveal that this same brother's wealthy father-in-law was angry about the way his daughter was treated by the client when she went to work for the company and despite the new company's financial fragility has committed to fund the litigation "all the way to the U.S. Supreme Court." In a similar vein, information regarding damages theories and proof often needs to be exchanged in advance. Counsel should cooperate in scheduling the "key" depositions and expert reports in advance of the mediation session.

- **Minimizing the Litigation Cost**

Cooperative counsel often put off non-essential discovery, the deposition of an emotional party, the filing of motions and sometimes even court hearings in order to keep the cost and emotional content of a matter reasonably constrained. In cases entailing IBS, the volume of irrationality, anger and denial increase with the costs. It is not unusual in these cases for cranked-up clients to each direct counsel to essentially "pull out all the stops." When this happens, the expenditures in the case often exceed the amount in controversy by the time counsel can goad the matter into mediation. Moreover, if the matter involves fee-shifting, then the usual pattern is for the parties to disregard that the case is not economically viable on its merits and "bet the house" on recovering their fees.

9. Drawing on Machiavellian Creativity

Sometimes the ends do justify the means. Getting from point "A" where you have a huge, money sucking black hole of a case to point 'B," where you have a settled lawsuit and a happy client sometimes takes creative conniving and tactics Machiavelli would have been proud of. Here are some favorite "trade secret" techniques that populate my "bag of tricks" and demonstrate that unusual techniques are often called for and sometimes even work. Each of these processes and techniques started out as a handcrafted solution to a particularly thorny mediation problem. Some were one-shot solutions and some have been incorporated into my usual repertoire.

- **Expectation Testing Worksheet**

This technique simply asks two questions, set out on a worksheet. The people in the room (including all lawyers, parties, parties' spouses and family members, and any other hangers-on) are asked to fill out the sheet *without* consulting with one another, fold

it in half, and place it in the middle of the table. It is explained that the data collected is for the mediator's eyes only and will never be shared with anyone outside the room. In fact, it is my practice, once the responses are reviewed, to give the sheets to the lead counsel to "deep-six."

The first question is: "What will the first offer (or demand) of the other side be? It is explained that I am interested in having them crawl into the noggins of the other side and tell me what they *will actually do*, not what they want them to do or what they should do. Less sophisticated parties may get confused and think that I am asking for their own settlement position, which is not the inquiry at all. When such confusion becomes evident this is explained again and clarified (usually by their own lawyers).

The second question is: What will be the last, "bottom line" demand or "top line" offer of the other side? Again, it is explained that I am looking for where the other side can actually be pushed, not where they want them to go and not where they should go.

I explain that the exercise is designed to take advantage—in shorthand form—of the experience that they have had with the other side. They know those people and are in a better position than I to evaluate how they will behave. I say that I would be foolish not to take advantage of the history and knowledge they have in their heads, but that we do not have the time to fully discuss all of that, so this is a way to bring it out in a way that is useful to the mediation process. This validates that I am aware that they have the superior knowledge and understanding of the dispute, without having to spin our wheels in hours of historical discussion.

I then put them on their honor not to consult with one another and leave the room, telling them that I am going to do the same thing in the opposing caucus.

When I come back, I look at the sheets and tally the results. I average them, bracket them, and if I have enough responses I throw out the high and low and average them again. In a case seething with IBS, there is a tendency to "demonize" the other side and have reduced expectations as to what the opening offer or demand will be, and what the final position of the opposition will be. Often the results will vary significantly within a room, giving me the opportunity to set up fairly wide brackets that will then be used to define the collective expectations within that room. Once this data is mined out, I also have the ability to productively guide the other side so that they meet, exceed or miss these known expectations, as might be helpful to the particular settlement process.

The process has some advantageous side effects. First, it tends to focus attention on what the other side will do and away from what the parties in the room want. This tends to diminish expectations and set the stage for a later "reality session." Also, the prediction with respect to the other side's "bottom line" reveals whether their expectations are in line or exaggerated. Moreover, as the exercise is conducted without consultation, it tends to pinpoint those in the room that have unreasonable expectations and need attention. Those with pie-in-the-sky expectations are often surprised when the testing shows that their unrealistic aspirations are not shared by the others in the room. It

is interesting to note that usually the person highlighted as the one "off the reservation" is the client, but that is not always the case. Sometimes the client is dead-on with their predictions and it is the lawyer who is off. This is a good thing for the lawyer to know.

Finally, if the testing reveals that their expectations of the behavior of the other side are modest, and they showed up anyway, it indicates some willingness on their part to compromise toward those lesser expectations. I have attached in the appendix a sample of the Expectations Testing Worksheet.

- **The Greedy Game**

Mediations tend to go through several classic stages. The first is the negotiation stage, where the familiar shuttle diplomacy and ping-pong negotiation take place. The second is the mediator's proposal, which used to be the "last ditch" technique used to bridge a stubborn gap. These days, however, with the increasing sophistication of the practicing bar, the mediator's proposal is often anticipated and gamed. Even when it is still used (and we all still use it to some extent) it no longer represents the end point of a mediation process. The Greedy Game is a third stage technique that comes into play after the more conventional double-blind "mediator's proposal" has failed.

It is simple and works best when the parties have engaged in expanded expositions as to the avarice and greed of the other side. Once the mediator's proposal has failed, it is treated as having been rejected by both sides (whether it was or not). The proposal number is then treated as a "central fulcrum" or reference number. The parties agree to bid up or down from that reference number in the direction of their pre-mediator's proposal position. It is understood that neither side can adopt the reference number as their bid. The parties agree in advance that whoever bids closest to the reference number "wins" and that party's bid number becomes the agreed settlement amount. If the bids are equidistant, then the reference number becomes the agreed settlement amount. Thus, the greediest party tends to lose, and how you play the game is dictated by how greedy you think the other side will be. The beauty of the Greedy Game is that once the parties have both agreed to play, the case is settled. The amount of the settlement is then determined by playing the game.

The Greedy Game is valuable because it converts zero sum negotiation into a game where the object is not so much to come up with the best deal at the expense of your opponent, but to best your opponent by judging his character, outplaying him and "winning" the game. It is a pretty good surrogate for trial, but leaves both parties with a pretty good taste in their mouths even if they "lose," because they tend to take responsibility for their bid.

I have described the Greedy Game in its simplest form, but I have played with several variations, some of which have devolved into fairly complex processes. Included in the appendix is a short paper on Game-Based Gap-Bridging Methods, which contains descriptions of more complex mediation techniques, including the Two Inning Central Fulcrum Method (a variation on the Greedy Game) and Cruise Missile Arbitration, which

is not arbitration at all but a way to bridge large gaps with exceptionally difficult and combative personalities.

Cruise Missile Arbitration was born out of the fragments of a dispute between two brothers, who inherited a wildly profitable gas trading business similar to Enron. After years of squabbling (which, according to the younger brother, began when his older brother pinned and pummeled him on the kitchen floor when he was six), older brother sued younger brother for fraud. He obtained a judgment for $10,000,000 and eventually collected every dime, with interest, when younger brother refused to consider settlement either at trial or on appeal.

Younger brother had a stubborn, obstinate personality and was (like his hated older brother) filthy rich and not accustomed to negotiation. He only did deals on his own terms, which is why he let his brother's fraud suit get out of hand. Smarting from the reputational taint of the fraud judgment, he then filed suit against older brother for fraud and a plethora of other causes of action. The success of older brother's suit for fraud prompted eight (8) copycat suits, brought by current and former officers and directors of the company who held stock. Four of these were in state court and four were pending in federal court.

The suit against older brother was resolved in the first mediation effort (the case was weak, but older brother's insurer was willing to pay to avoid being embroiled in the feud and having to provide an expensive defense). Older brother used the insurance proceeds and credited the amount of the judgment he had recovered as part of the consideration used to buy out younger brother, and the business continued apace.

The remaining lawsuits pending in state court were to be mediated next. The federal plaintiffs were invited to join, but refused. The state case was settled, with me making the pitch to younger brother that, if he really wanted a chance at exoneration, he should pick his best forum and quit fighting on so many fronts. I shared that I thought that the federal forum was most advantageous for him and he in fact decided to settle the state court suits and fight the federal battles. Of course, once it became known that the state matters had settled, the phone rang and I was asked to now mediate the federal court actions, too.

In the mediation of the federal court suits, younger brother set out one absolutely unreasonable offer, stuck with it and would not move a penny further. Thus, Cruise Missile Arbitration was created. It worked, and all those matters were finally settled.

- **Bonding, Booze and Hardhats**

When severe IBS is present, it is sometimes necessary to be flexible and break entirely away from the usual mediation mode. Dr. D, affectionately known by all as "Prof," was from India. He was a brilliant scientist and his wife was, too. They worked together. They had two children, a son and a daughter, both of whom were grown. Prof was the world's leading expert on the manufacture of a volatile gas essential for making

advanced computer chips. It was also used in the defense industry in secretive, undisclosed ways. The defense contracts were very lucrative and Prof did very well. He hobnobbed with the Secretary of Defense and other highly placed government officials, who beat a path to his door because he was the sole-source supplier of a gas that was an essential defense commodity. He was getting on in years and he was bringing his son into the business. He turned out to be a wonderfully smart and capable young engineer. Still, Prof remained firmly in charge and made all significant business decisions.

Prof was courted by the top management of a huge international conglomerate that dealt in industrial gasses of all kinds. They entered into a deal where the larger company agreed to finance development of production facilities and marketing efforts in order to widely commercialize a new product to be made from the gas Prof produced. Once the deal was made by the high brass, it was delegated to others to implement. They dropped the ball. Prof became miffed both by their disappointing performance and the way he was treated. He sued to abrogate the remaining term of the contract and for damages. He claimed he was entitled to several hundred million dollars.

The first mediation session was held in Chicago only because it was centrally located. It was conducted for three days the week before trial, but little was accomplished. The company sent an assistant general counsel to negotiate, supported by a businessman Prof had never met but who was supposed to have full authority. Prof had sent Junior to represent the company and he did so well, but was tethered to Prof on a short leash. Prof was back home in the Southwest helping his wife prepare for their daughter's wedding, which was scheduled to occur the weekend after trial was to begin. The large gap was narrowed a bit, but then impasse was reached and we broke up on the Wednesday before trial. That Friday, I sent out a written mediator's proposal while engaged in my next gig in Montreal. Both sides rejected it on Saturday, and the case went to trial on Monday.

After Prof's lawyer had completed his opening statement, the parties were called up to the bench by the judge. She gently announced that Prof's wife had suddenly died that morning, while they were in trial. The defense immediately agreed to continue the trial, so that Prof could attend his daughter's wedding and then take his beloved wife's ashes back home to India, where they would be spread on the Ganges River, as was their custom.

Trial was re-set two months later, and the parties decided to take one last crack at settlement a week in advance of the trial. This time, I insisted that the mediation take place in Prof's home town, so that he would attend.

I also laid out some other ground rules. The Conglomerate was required to send someone from the parent company who as at least at the VP level. I wanted the boss of the guy who supposedly had "all the authority there was" in Chicago, and I got him. He was Mr. C, the Conglomerate's number 3 man. Mr. C was from South America.

He was also bright, gregarious and gracious. I think he has to be one of the very best corporate representatives I have ever worked with. It was easy to see how he had risen so high in the corporate hierarchy.

The day began in caucus with first one side, then the other. I was separately introduced to Prof and to Mr. C by their lawyers. Then the lawyers were excused and Mr. C, Prof and I met together.

There were ground rules for this meeting. The first was that the lawsuit would not be discussed until after lunch. The second was that we would first have lunch together. Prof and Mr. C immediately hit it off. Mr. C expressed sympathy for Prof's loss of his wife and asked about his daughter's wedding. We talked about family, India, South America, were we came from, where we had lived, sports and business. We discussed everything and anything but the lawsuit. We ate lunch together. Toward the end of lunch, Prof asked Mr. C if he would like to see his manufacturing facility, which was only about 20 miles away from the law offices where we were meeting.

Mr. C was enthusiastic. Junior brought around the car and we all piled in and travelled out to the plant. This was after 9-11, so the place looked like a fortress. High walls, barbed wire and guards greeted us. Prof was waved through and we went to his spacious office, which occupied half a floor of one of the larger buildings on the campus. Prof had an Indian throne chair in the room. His practice was to have his many high-profile visitors sit in the chair and have their photo taken. A bulletin board nearby had pictures of former Presidents, prominent politicians and high-ranking military officers, all sitting on the throne. He asked me to sit for a photo and I did so. Then he asked Mr. C to do so and he smiled and complied.

Then, while Mr. C was still in the chair, Prof slid aside a large wood panel and revealed a huge, fully stocked bar. Prof grabbed a large bottle of Hungarian vodka and three glasses, and handed them to Mr. C as he sat on the throne. Prof took his picture, announcing—"hah, now I have you," with the utmost good humor.

Mr. C, not to be outdone, promptly broke open the vodka, and poured three large glasses of the crystal booze. He handed one to Prof and one to me, and we downed them with toasts to each other and the process. Now being thoroughly tipsy, the three of us donned hard hats and toured the plant, which was plastered with warnings of possible explosions, volatile chemicals, environmental hazards and other life-threatening dangers. We finally finished the tour, went back to the law firm and only then commenced negotiations.

The drama continued, but suffice it to say that Prof and Mr. C, now fast friends, were able to close the gap to a mere $1million that day. I threw out another mediator's proposal late that evening and they each thought about it overnight. The next day they both agreed to settle on that proposal, which by happenstance was the precise number originally proposed from Montreal. It felt good to catch a lost case on the rebound. In cases with such deep IBS, creativity is a necessity and follow-up is the key to success.

10. Conclusion

As a general rule, a case involving IBS demands a process that deals with the emotional content first and the money second. In a properly designed mediation process the mediator should be made aware of the history of the dispute and the level of IBS that the lawyer perceives to be present at the earliest possible opportunity. The first flag should be waived before the case manager before the case is even set, so that the ADR provider organization can help you select a mediator with sufficient experience and a well-developed skill set in dealing with matters of this sort. This also allows the case manager to clue-in the chosen mediator in advance, so that the case is identified as one where pre-mediation work is necessary and so that the needed pre-mediation conferences can be scheduled.

The case where IBS is paramount takes infinite patience and resiliency on the part of counsel. The prospect of success is enhanced when both (or all, in a multiparty matter) attorneys recognize that the matter will take special handling and cooperate with the mediator to bring about the mutually desired result. Even more patience is required where this co-operation is supplanted by strife between the professionals. In this instance, the best course is to select the best mediator you can find, work with the mediator to get (and try to keep) your own ducks in order in the face of the opposition's provocative behavior, then stand out of the way as the mediator "works the magic."

APPENDIX

EXPECTATIONS WORKSHEET

(Note: This worksheet will be kept strictly confidential and will NOT be shared with the other parties)

I **EXPECT** THE OPENING OFFER/DEMAND OF _____

_____

[insert party name] TO BE $_____[insert amount]

I **EXPECT** THE "BOTTOM LINE"/ "TOP LINE" OF _____

_____

[insert party name] TO BE $_____[insert amount]

_____ _____

Print Name Signature

_____

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Using Game-Based Gap-Bridging in Mediation

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The Greedy Game

The Greedy Game is a simple process. It should be used only as a final gap-bridging technique. It should never be mentioned to the parties until after the settlement brackets have been closed substantially through mediated negotiation and a negotiating impasse reached. Generally it is better to do a double-blind mediator's proposal first. If that fails because one or both of the parties cannot get to the number proposed, then the prerequisites for using the Central Fulcrum Method have been established.

Using the mediator's proposal (or perhaps some other number if fatal flaws have since been found in the mediator's proposal) as the Central Fulcrum Amount, the parties agree to each submit a "bid" to the mediator. They further agree to settle the case for whichever bid amount ends up mathematically closest to the Central Fulcrum Amount. Finally, they agree that there will be no appeal from the result. In the event of a tie, where each bid is equidistant from the Central Fulcrum Amount, they agree to settle for the Central Fulcrum Amount.

The Two-Inning Central Fulcrum Method
(Binding, Two-Inning, Twilight Baseball Bid Arbitration)

Binding, Two-Inning, Twilight Baseball Bid Arbitration (the "Two-Inning Method") is a form of Baseball arbitration, modified to give the parties more control over the final settlement amount. It is used where the parties have a great deal of emotional content and are unwilling to arrive at "real" numbers until they have had an opportunity to "send a message" to the other side. As a more complex version of the Central Fulcrum Method, it introduces more of a "gaming" environment and provides more opportunity to discuss and strategize between attorney and client. It takes a little more effort to figure out how to "win" the game. It requires a little more explanation:

Binding

Binding means that the result of the Two-Inning Method is final. Both sides agree, as a condition to participating, that the Two-Inning Method will conclusively determine the final settlement figure and that they will be bound by the figure so determined. By entering into the agreement to engage in the Two-Inning Method, the parties are essentially settling the case by agreeing that the settlement figure will be whatever amount the Two-Inning Method determines. The Two-Inning Method is designed so that an amount certain will be fixed at the end of the "game" as the final settlement amount.

Each side agrees that there will be no appeal from the final settlement amount determination.

Two-Inning

Two-Inning means that the process will involve two rounds of bidding.

Bid Arbitration

Bid Arbitration means that the final number will be determined by one of the parties' bids, not by a decision by the mediator. Essentially, the Two-Inning Method takes the polarization out of the negotiation process, and instead focuses on bids postured from a pre-determined Central Fulcrum Amount that is determined by the mediator and shared with the parties.

Twilight Baseball

Twilight Baseball refers to a hybrid procedure that uses characteristics of both traditional 'baseball' arbitration and of 'night baseball' arbitration. In baseball arbitration, each side submits a final settlement offer to the arbitrator and to the other side. Each side is allowed an opportunity to adjust their figure after learning of the other side's offer. When final and best offers are reached, the arbitrator decides the outcome by choosing *one offer or the other*.

In night baseball arbitration, the offers are submitted "in the dark" only to the arbitrator. The arbitrator then chooses one offer or the other and generally does not reveal the amount of the losing offer to the winner.

Twilight baseball involves two rounds of bids (innings). Bids are postured above and below the Central Fulcrum Amount. In the first inning, each side's bid is an offer published to the other side, so that the opposition can use that information in considering its second inning bid. The second inning is dark, with the bids being submitted to the mediator confidentially without being shown to the other side. The winning bid is that which is mathematically closest to the Central Fulcrum Amount. It then becomes the agreed final settlement amount.

A party may choose not to submit a second bid, in which case the first bid stands and will be compared to the second inning bid of the opponent, with the number being closest to the Central Fulcrum Amount winning and becoming the agreed settlement amount.

Tie-Breaker Procedure

In the event of a tie, the parties agree to settle for the Central Fulcrum Amount, unless they all agree on a third inning of dark bidding conducted in the same manner as inning 2. In the event of consecutive ties, the parties may agree to play additional dark innings, but each bid submitted in connection with a particular inning must be between the bid previously submitted and the Central Fulcrum Amount. If any party facing a tie *declines* to agree to additional innings, then the case will settle for the Central Fulcrum Amount.

Cruise Missile Arbitration
(Complexly Modified Baseball Bid Arbitration)

The Central Fulcrum Methods are all well and good, but what happens when you cannot close the settlement brackets at all? Cruise Missile Arbitration was invented to deal with a situation where one of the parties has already experienced settlement using the Two-Inning Central Fulcrum Method. This party refused to compromise from his opening settlement offer, anticipating that it would be used again. This behavior frustrated the potential of using the Two-Inning Method. Something new was needed to put the parties back on a level playing field. Here are the rules of the game:

Defining the Launching Platforms

The last offer of each side becomes its "Launching Platform." The Launching Platform is significant because it is the point from which the mathematical calculation is made that ascertains the settlement amount. If the last settlement position of one side or the other (or both) is patently unreasonable, you can make movement to a number you specify a condition for "playing" the game.

For instance, consider a business contract case where the contract amount in controversy is $1 million and the plaintiff's demand is $24 million, offered to "get the defendant's attention" and emphasize that there is "some" punitive damages exposure. The defendant offers $100,000, indicating to the mediator that it considers the punitive damages claim frivolous (a proposition you agree with) and that it views its chances on summary judgment to be 90% in its favor (totally ignoring all those significant factual issues in the case).

The plaintiff has indicated in caucus that he wants full payment of the $1 million contract amount, but concedes privately that his chances of recovering punitive damages are virtually nil and that there are substantial factual issues in the case that affect liability. Thus, you condition entry into the game upon the plaintiff modifying its demand to $900,000.

The plaintiff agrees to go to $900,000. Neither side, however, will budge from their respective settlement offers of $100,000 and $900,000. Those numbers then become the "Launching Platforms."

Object of the Game

A party "wins" the game by landing an intact "missile" closest to the opponent's Launching Platform.

Armament

Each party is armed with 3 "Cruise Missiles." Each Cruise Missile has different characteristics and a different effect when launched.

Characteristics not Revealed

During the game, the amounts carried by each missile are conveyed to each side in three simultaneous rounds. However, the characteristics of each missile (i.e. whether it carries Strategic Dud, Conventional or Nuclear warheads) are not revealed for any missile until the end of the game, after all the available missiles have been launched.

Strategic Dud Missile

The Strategic Dud Missile consists of a number that is conveyed to the other side as an "offer," but which is actually not an offer at all, but instead a "Dud" having no effect. It can be used strategically to "send a message" (much like the function of the first inning in the Two-Inning Method) or to bluff with a generous "offer."

Conventional Missile

The Conventional Missile is a real offer that is binding on the party launching it, unless it is destroyed before the end of the game by a Nuclear missile.

Nuclear Missile

The Nuclear Missile will destroy any other previously launched missile within "X" number of dollars of where it "lands." I usually use a 5-10% "zone of destruction." In our example, there is $1 million in issue, so I would use a zone of destruction that would stretch $25,000-$50,000 on either side of where a Nuclear Missile lands. For example, if we use a $25,000 destruction zone and the Plaintiff launches a Nuclear Missile that lands on $599,000 it will destroy its own previous Conventional Missile offer of $575,000, along with any offer of the opponent that has previously landed within the $575,000 to $624,000 range.

No Mutually Assured Destruction (MAD)

If each side launches a Nuclear Missile within the same round and they land within each other's destruction zones, they do not destroy each other, but only those missiles previously launched that may have landed within their respective zones of destruction. The Nuclear Missiles each convey valid offers that go into the final calculation determining the settlement amount.

Final Calculation

Once all the missiles have been launched, the mediator reveals their characteristics to the parties and performs the final calculation that determines the "winner" of the game and the final settlement amount.

Tie Breaking Procedure

In the event that the game ends with two missiles being equidistant from their respectively targeted Launching Platforms, then each side is issued an additional

conventional missile that must be targeted between the two equidistant missiles. In the case of successive ties, this process is repeated until there is a "winner" that is closer or until two opposing missiles land on the same spot.

Variables

This game invites variation. The "Launching Platforms" and the range of the "destruction zone" can be adjusted. Instead of outlawing MAD, it can be incorporated. More than three missiles can be used. You can have both Tactical Nuclear Missiles (with a smaller destruction zone) and Strategic Nuclear Missiles (with a larger destruction zone) Different kinds of missiles (Napalm, Clustered, and MIRVed come to mind) can be created, defined and employed.

Multi-Party Application

Cruise Missile Arbitration can be used with multiple parties. The parties on each side can contribute to a "Cluster Missile" or Multiple Independently-Targeted Reentry Vehicle (MIRVED) missile. These would consist of "X" number of related offers that get transmitted simultaneously each round. The contributions of each party on a side can be known to their colleagues in interest or can be kept dark as between those parties. Suffice it to say that there are almost unlimited variations on the Cruise Missile theme. It is important in designing a Cruise Missile game to think it through so as to make sure that it inevitably leads to a mathematically certain settlement figure.