604:Advanced Settlement Techniques & the Use of Mediation & Arbitration to Resolve Disputes

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Faculty Biographies

John Sabine DeGroote

John Sabine DeGroote currently serves as deputy general counsel and chief litigation counsel at McLean, Virginia-based BearingPoint, Inc., a global consulting firm with over 15,000 employees doing business in more than 130 countries worldwide. As BearingPoint's chief litigation counsel, Mr. DeGroote maintains primary responsibility for the company's worldwide litigation docket and litigation prevention strategies, which he manages with a team of five full-time in-house litigators. As one of three deputy general counsel, he is involved in the management of the company's legal department as a whole. He also manages the company's insurance portfolio and has been responsible for BearingPoint's intellectual property protection strategies, including its worldwide name change and rebranding from KPMG Consulting.

Prior to joining BearingPoint, Mr. DeGroote practiced with McKool Smith, P.C., a Texas-based litigation firm specializing in intellectual property and complex commercial disputes. Prior to joining McKool Smith, he served as vice president and counsel at First USA, Inc., where he maintained responsibility for litigation and intellectual property issues. Prior to practicing with First USA, he was an associate in the Dallas office of Jackson Walker L.L.P.

Mr. DeGroote has served on ACC's Litigation Committee executive board for two years. He currently serves as the chair of the Duke Law School Future Forum.

He graduated from Mississippi State University and received his JD from Duke Law School.

Eric D. Green

Professor Eric D. Green teaches negotiation, mediation, complex ADR processes, resolution of mass torts, and evidence at Boston University School of Law. He is a cofounder and principal of Resolutions, LLC, a mediation, arbitration, and ADR provider in Boston. He was a cofounder of JAMS/Endispute and a member of the Center for Public Resources Institute of Dispute Resolution since its inception. He was a coauthor of the first edition of *Dispute Resolution* (with Goldberg and Sander), and has written many books and articles on dispute resolution and evidence. Professor Green maintains an active ADR practice for complex legally intensive disputes.

Professor Green has successfully mediated many high stakes cases, including the United States v. Microsoft anti-trust case, the MasterCard/Visa merchants' class action anti-trust case, the Monsanto PCB cases in Alabama, the childhood and adult cancer cases in Toms River, New Jersey, and numerous large construction cases, including most of the disputes arising out of the design and construction of major league baseball and football stadiums. He has also mediated many complex, multi-party class action cases involving mergers and acquisitions, contract disputes, patent disputes, securities fraud, accounting problems, mass torts, employment, and consumer claims. Professor Green's involvement in Alternative Dispute Resolution started when he helped invent the "mini-trial," which he has since adapted and applied to many types of cases involving complicated issues of law, fact, and science. Professor Green also serves as the court appointed special master, futures representative and guardian ad litem in class or mass claimant matters.

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In his career Professor Green has delivered hundreds of lectures, panel discussions and training sessions on ADR and taught or supervised more than a thousand students in ADR while mediating more than a hundred cases a year. Professor Green was awarded a Lifetime Achievement Award from the American College of Civil Trial Mediators.

Melvin S. Merzon

Melvin S. Merzon serves as senior counsel for International Truck and Engine Corporation (originally International Harvester Company), located in Warrenville, Illinois. He works closely with company people-sales, engineering, reliability, purchasing, publications-and with local counsel, as necessary, principally handling product liability and warranty claims and transactional matters. In addition, he reviews numerous company publications, along with advertising and promotional literature for truth, accuracy, and legal compliance.

An adjunct instructor at Harper College, in Palatine, Illinois, Mr. Merzon has taught legal research and writing in the college's paralegal program for many years. From time to time, he has, as well, presented or moderated continuing legal education seminars and webcasts and has taught law-related classes to the military. In addition, he has authored a number of texts in legal research and writing, his most recent publication being *Good Grammar for Smart Professionals.*

Mr. Merzon is a member of the ABA and the Chicago Bar Association. He is active in ACC's Chicago Chapter, and has held major offices in the chapter. He is also a participant in the pro bono activities of the Public Interest Law Institute.

Mr. Merzon holds a BA from Wayne State University and graduated from the University of Detroit Law School.

Ross W. Stoddard, III

Ross W. Stoddard, III is an attorney-mediator with a full-time mediation practice, based in the Dallas area. He conducts 200-250 mediations per year, at the request of counsel and parties, as well as federal and state judges. Mr. Stoddard teaches *The Art of Effective Negotiation-Strategies, Tactics, and Ethics* in the Executive MBA Program at Southern Methodist University. He conducts advanced mediation training through the American Academy of Attorney-Mediators, Inc. and other bar/ADR associations.

Mr. Stoddard has conducted more than 3,000 mediations involving over $18 billion in aggregate claims, in litigation and pre-litigation matters, and business negotiations. He authored the chapter on the use of ADR in tort disputes in *The Litigator's Handbook,* published by the ABA section of litigation. Prior to becoming a mediator, his experience as a lawyer was in a broad range of transactions and litigations, primarily in business and contract matters. He also served as chair of Focus Financial Consultants, Inc. and in the U.S. Air Force Judge Advocate General Corps.

Mr. Stoddard served as a founding director and officer of the Association of Attorney-Mediators and THE ACADEMY, and on the council of the State Bar of Texas ADR section. He is a trustee of the Texas Center for Legal Ethics and Professionalism.

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Mr. Stoddard received a BBA with honors from Southern Methodist University and a JD from the University of Texas School of Law. He became trained as a mediator, and has completed more than 500 hours of additional training in mediation and negotiation.

Mark F. Tatelbaum

Mark F. Tatelbaum is the director of legal services for The George Washington University Medical Faculty Associates (MFA), a 501(c)(3) multi-specialty physician faculty group practice, located in Washington, DC. He is responsible for providing all legal services to the corporation. He also oversees corporate compliance and risk management and is responsible for managed care contracting.

Prior to joining MFA, Mr. Tatelbaum was an associate in the health care practice of the Washington, DC based firm of Arent Fox. Prior to joining Arent Fox, Mr. Tatelbaum was on active duty in the United States Naval Reserve Judge Advocate General Corps.

Mr. Tatelbaum received his BA from the University of Rochester and is a graduate of the Boston College School of Law.

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BREAK THAT IMPASSE: PRACTICAL SUGGESTIONS TO ELIMINATE DEADLOCK IN SETTLEMENT NEGOTIATIONS[1]

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I. Every Case Has an Appropriate Settlement Value. How Can You Find It in Yours?

An appropriate settlement value exists in every case. The parties might have to gather a few additional facts or get beyond their emotions or change the negotiation process, but there is an appropriate mix of consideration for every dispute. Some parties find it, some never do, and others figure it out only after enduring wasted time, effort and money.

There is no "silver bullet" that will work in every case and no seminar will show you a trick to get every case settled for a song, but this presentation attempts to further discuss options for those approaching deadlock or experiencing impasse. While most lawyers and clients have their techniques, there is no exhaustive list of ways to break impasses, and this paper is no exception. The listing of techniques below comes from practitioners[2] and scholars around the country and is designed to generate new ideas among those affected when the deal remains out of reach -- to generate methods that: (i) circumvent the parties' positions to arrive at their interests; (ii) manipulate every variable possible to generate new settlement options; (iii) eliminate procedural impediments to bridging the gap; and (iv) employ targeted means to limit areas in dispute if settlement cannot be reached immediately so that the parties can focus on the information truly required to get to settlement.

No matter how hard you try, impasse can be unavoidable. Sometimes there are holdouts, not all parties are rational, and a few actually want their day in court -- as they say, "some cases just don't settle." Let's make sure that, if yours won't settle, it isn't because you and your adversary have been more focused on the journey than the destination.

II. Compensation and Other Consideration -- What Exactly Is on the Table?

Cases often come down to a hard dollar number, but they don't always have to. Virtually all parties in commercial litigation are in some business other than the litigation business; almost all sell things, buy things, and have a presence in the marketplace. Noncommercial parties aren't in the litigation business either. Individuals may focus primarily on money in settlement negotiations, but they still have to consider when they will get paid, how their payments will be taxed, and what they can say about the settlement -- and these are just a few of the variables besides money that can be used to bridge the gap in settlement negotiations.

There is an endless supply of variables to add to the settlement mix as settlement approaches, and almost every dispute involves some issue other than money. In Getting to Yes we learned to look beyond the parties' negotiating positions to get to their true interests -- to

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[1] This paper is designed to explore many of the ways parties to litigation address negotiation stalemates. Additional ideas would be appreciated, and questions are welcome; please feel free to contact John Sabine DeGroote with either at degroote@alumni.duke.edu.

[2] In preparing this paper, the author solicited comments from trial lawyers, clients and neutrals on techniques they have used successfully to avoid or break impasses. Individual contributors are cited by name, city, state, and firm.

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determine what each side really needs rather than what they're asking for.[3] The list below enumerates a few of the things other than money that parties may value. Look at the problem from your opponent's perspective to determine what he or she really wants; some of what they want may be of no cost to you.

A. A Nonsettlement Example to Get You Started.

A great example of getting beyond positions to the parties' interests comes from a recent discovery dispute in Los Angeles. In a software failure case involving millions of dollars, the plaintiff's counsel learned that the defendant had investigated a separate but similar software failure at another customer's site and had prepared a written report, which was given to the defendant's attorneys. After reviewing the report, defense counsel concluded that it was irrelevant to the issues raised in the case, but placed the report on the privilege log and asserted various good faith arguments that it was privileged. In response to a threatened motion to compel, the defense lawyers went beyond the parties' positions to determine everyone's interests: (i) no one had the time or the money to fight over an irrelevant document; (ii) the plaintiff could not simply accept his opponent's word that the investigative report was irrelevant; and (iii) the defendant could not merely produce the report and waive the privilege because he risked a ruling from the court that the waiver would apply to communications beyond the report itself. In this case, the defense lawyer proposed a written agreement where the plaintiff's counsel would review the document in the defense lawyer's office, no waiver would be argued, and, after reviewing the document, the review would not affect any party's privilege arguments in any way. The plaintiff accepted the proposal, reviewed the document, and agreed that the document was irrelevant -- ending the dispute before it began and saving everyone time, money and effort in the process.

B. Business Terms -- Everybody Thinks of Them, but Nobody Thinks of All of Them.

1. Product or services in lieu of cash.

It is easier to settle a dispute when product or services can be provided in lieu of payment of money. Why not settle that dispute with your contractor for his commitment to put a new roof on your garage? It's valuable to you, and it doesn't cost him as much money.

2. Commitments to purchase, price changes, and even the "take or pay."

"One of the best ways to convince one side to pay/give up money is if they can get the money back in the future."[4] Again, commercial parties are not usually in the litigation business, and refocusing the settlement negotiations on a litigant's underlying business needs significantly enhances the chances that a settlement will take place. This can be true even when the parties have not done business for years; after lengthy, bitter battles, litigants often forget that they can do business together.[5] Obviously negotiation over product, price and delivery can add complexity to the negotiations, but this complexity results from the introduction of new variables to the mix of consideration available -- variables that can get the deal done. If immediate, concrete commitments to purchase or sell can't be reached before the dispute must settle, the parties can also negotiate: (i) enforceable promises to allow the other to submit a bid on the next

[3] Roger Fisher and William Ury Getting to Yes 41-57 (1981).
[4] Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP).
[5] John A. Moore, Miami, FL (Larson King, LLP).

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few projects;[6] (ii) formal rights of first refusal; (iii) concrete commitments to purchase (or to sell) a certain amount at a price to be set in the future by others (such as a sale at the market price, or a purchase at an appraised value); or (iv) an option where the purchaser may buy within a specified period of time or pay a predetermined price (known as a "take or pay").

(a) Propose a bond to secure future performance.

Occasionally the trust gap between the parties is so great they don't want to do business together. This can be overcome by a bond to secure a party's commitment. In light of litigation costs, performance bonds are relatively inexpensive, they demonstrate confidence that performance will take place, and they give peace of mind to those relying on performance.[7]

(b) Collateralize your commitment.

To further secure an obligation, some may consider taking collateral. No one likes to collateralize a commitment, but a meaningful offer to collateralize speaks volumes about one's belief that he will satisfy the obligation. This has the potential to eliminate the "trust gap" between litigants.

3. Endorsements, alliances, press releases and more.

Parties care about things other than prices, products and services. Other than goods, services and money, there are plenty of other nontraditional variables to consider -- a product endorsement, a joint marketing campaign, an alliance, a favorable product placement in retail outlets, a commitment to train your sales force on your supplier/opponent's new product line, trade show participation, sponsorships, and favorable publicity are just a few.

C. The Time Value of Money.

1. When to pay?

Occasionally one party is just determined to get a certain number,[8] and there are parties who would be better served getting a payout over time rather than in a lump sum -- whether for tax reasons, for reasons of convenience, or because they may not be able to responsibly manage a large sum of money all at once. Since opposing parties may place divergent values on a stream of payments over time, the parties may be able to employ the time value of money for all or part of the settlement consideration as a method of breaking negotiation deadlock.[9]

2. Structured settlements.

Structured settlements are a more formal method of making payments over time. In these transactions a structured settlement broker or annuity provider proposes a payment stream over time that: (i) can include (or specifically exclude) attorneys' fees; (ii) is guaranteed by someone other than the defendant; and (iii) is funded in advance by the defendant, who is able to discount

[6] Owen J. Shean, Vienna, VA (Wickwire Gavin, P.C.).
[7] Andrew N. Jent, Dallas, TX (CXO, L.L.C.).
[8] Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP).
[9] Owen J. Shean, Vienna, VA (Wickwire Gavin, P.C.).

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the payment stream to present value. The payments can be set to match the plaintiff's evolving needs, and plaintiff's tax obligations are deferred until the benefits are actually paid.[10]

D. Assignment of Claims.

1. Against third parties.

Multiparty litigation often involves arguments that someone else "did it." Some third party is responsible for the plaintiff's damages, and the plaintiff should look to the empty chair for additional consideration. The plaintiff often argues that it has no valid claim against that entity. One way to find out how both sides actually value the claim is for the settling defendant to ask for an assignment of the plaintiff's claims against the nonsettling defendant as an additional settlement term. This request conveys confidence in the settling defendant's belief that the third party caused the plaintiff's damages, and it "calls the bluff" of the plaintiff, who has contended all along that the third party is not really responsible. If the plaintiff agrees to assign the claim, the settling defendant has some recourse to bring the third party into the negotiations at the last minute (whether explicitly or through a separate transaction). If the settling defendant takes the claim and does not pursue this course, it may have a claim of value to settle with the third party later, which (like any dispute) may be settled for money, for services, or for other consideration.

2. Against insurance companies.

Coverage can be a big issue in settlement negotiations, and defendants occasionally have claims against their carriers. Assignments of these claims to plaintiffs can be considered,[11] but should not be undertaken lightly and should be free of collusion or other suspicious conduct.

E. Apologies and "We'll Do Better Next Times."

1. Admitting that a mistake was made.

Apologies can be a great way to help bridge the gap in settlement negotiations.[12] Many plaintiffs are reluctant litigants. If these plaintiffs feel that the defendant is genuinely sorry for its conduct and admits wrongdoing -- which can be done confidentially in mediation -- their appetite for the litigation may wane. While an apology "hurts but does not cost,"[13] given the circumstances, a sincere apology is often "a good thing to do."[14] One lawyer often on the plaintiff's side recently said:

> I am amazed that people don't realize that the simplest way to "bridge the gap", or just to get negotiations going, is for the defendant to say "hey, we screwed up and we're sorry". I can't tell you the number of times that my plaintiff clients have said they would drop their monetary demands substantially (to my horror) if

[10] Phil Giovine & Vincent Ciampi, New York, NY (American International Companies).
[11] Owen J. Shean, Vienna, VA (Wickwire Gavin, P.C.)
[12] Sally J. McDonald, Chicago, IL (Piper Rudnick).
[13] J Joseph Reina, Dallas, TX (J Joseph Reina Attorney at Law).
[14] Ross W. Stoddard, III, Irving, TX (Ross W. Stoddard, III, Attorney-Mediator); Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP).

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> the defendant representative would simply look at him eye to eye and apologize.[15]

Even if the defendant does not admit that a mistake was made, the defendant may, if genuine, be able to explain how decisions were made and that the defendant is truly sorry for the outcome; this can be particularly true in highly emotional cases like medical malpractice cases.[16]

2. Committing to change the process.

The reluctant plaintiff may also be persuaded by a defendant's credible commitment to change the process. In one case, a very aggressive plaintiff's lawyer with a perfect client wrongfully arrested was stunned when his client pushed for a reasonable settlement after a senior officer on the police force apologized and committed to implement changes that would prevent a similar occurrence in the future.[17] These commitments can also be made more effective if given in writing and overseen by a new person in charge of implementing the reforms.[18]

F. Offers to Assist.

If you or your client has unique expertise, your counterparty may value your service as a consulting expert in the case against other parties. While you cannot alter your role as a fact witness, you or another at your company can consider providing consulting witness expertise as part of the settlement mix.

G. Letters of Reference and Other Post-Termination Considerations.

Although generally limited to employment litigation, employers may want to consider positive letters of reference,[19] a resignation in lieu of dismissal, temporary health benefits, outplacement services,[20] and other post-employment terms in order to achieve settlement of these cases.

H. Attorneys' Fees.

Plaintiffs' lawyers don't like to hear it, but reducing their fees (in dollar terms or percentage terms) can get a deal done. This tactic is rarely used but can be most effectively employed during the latter stages of the negotiations when relatively small dollar amounts are at issue, everything else has been tried, and nothing will get the plaintiff beyond a certain (often round) number.

I. Confidentiality Clauses.

Confidentiality clauses have value to someone, or no one would ask for them. Since every concession can assist in breaking an impasse, parties may consider trading a confidentiality

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[15] Paul J. Dobrowski, Houston, TX (Dobrowski L.L.P.).
[16] Mark Tatelbaum, Washington, DC (GWU Medical Faculty Associates).
[17] Robert M. Manley, Dallas, TX (McKool Smith, P.C.).
[18] Robert M. Manley, Dallas, TX (McKool Smith, P.C.).
[19] Sally J. McDonald, Chicago, IL (Piper Rudnick).
[20] Dwight Golann. How to Borrow a Mediator's Powers. Litigation, Spring 2004, at 43.

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clause for something of value, or they may propose a confidentiality clause as a part of a package of concessions to get the negotiations back on track.

J. Donate the Difference to Charity.

Splitting the difference sometimes works, and sometimes it doesn't. Some parties prefer to donate a portion of the difference to charity. In some instances, the parties each agree to donate 50% of the difference to charities agreed upon in advance.[21] They can be the favorite charities of the plaintiff, the defendant, or neither, but this approach benefits the plaintiff because it is an out-of-pocket cost to the defendant, yet the defendant can take pride in not paying the difference to the plaintiff and, presumably, may achieve some tax advantage in the process. There is also a possibility that the charity may have some connection with the underlying lawsuit, which may further satisfy a litigation-adverse plaintiff. Importantly, charitable donations have at least one other potential use in the class action context: if a court is having difficulty approving a class action settlement because the defendant may benefit if the settlement pool is not claimed in its entirety, either side may propose that a portion of the unclaimed settlement consideration be donated to charity so that the court is satisfied that the settlement will cost the defendant a sum certain.

K. Split -- or Flip for -- the Difference.

No, it's not a sophisticated technique, and this paper promised you a litany of ways beyond splitting the difference to get deals done; however, this is still likely the most popular way to get beyond impasse. Be careful, though -- do you want to be the last one to give in before the parties throw up their hands and split the difference? If splitting the difference doesn't get the job done, you can flip for the difference[22] (although only the senior partner on the case should be permitted to call "heads" or "tails!").

III. Changing the Negotiation Environment -- a Simple Solution to a Complex Problem.

A. The Negotiation Environment May Be Getting in the Way of Your Negotiation.

We have all heard of the negotiator who puts his opposition in a chair lower than the rest, who changes the temperature of his opponent's room, or who seats his opponent looking into the sun. You may notice some of these problems, and you may not -- how comfortable were you when you bought your last car? Did you remedy the situation? Changing your environment may seem a simple solution, but impasse requires change, and often a simple change in environment can break an impasse. As with nonmonetary consideration, there is an infinite number of ways to change the negotiation environment, which leaves you with an infinite number of variables to work with as you break that impasse.

[21] Barry Greenberg, Miami, FL (Sloto, Greenberg & Berk, P.A.).

[22] Charles Guittard, Negotiation of Settlement G43, Advanced Negotiation Seminar, State Bar of Texas (1994).

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B. Environmental Changes to Consider.

1. Relocate the negotiations.

(a) To neutral ground.

While you may not have a preference, consider the impact of the situs of the negotiations on the other side's negotiators. For ADR proceedings, one renowned neutral states that "[t]he place you suggest for holding the ADR proceeding may be as important as the ADR process you suggest."[23] Don't get stuck with an impasse because the negotiations had to take place at your law firm -- move the negotiations to a hotel or a resort or another place where both sides can be comfortable or, even better, to the mediator's neutral offices, which are probably set up for your comfort throughout the session.

(b) To a place near the other side's ultimate decision maker.

Some practitioners have had good luck moving major negotiations, such as critical mediations between large companies, to a place where there is easy, in-person access to the CEO.[24] Even if the other side brings a negotiator with technical authority, you may want him or her to be near the ultimate decision maker so that the matter can be concluded on the spot.

(c) To the Courthouse.

One judge whose comments were solicited for this paper suggested that negotiations be reconvened in the courthouse on a Monday or a Tuesday, while jurors are in the halls.[25] This approach is likely to make the prospect of trial more real to clients and to ferret out those lawyers not eager to go.

2. Employ dedicated settlement counsel.[26]

Dedicated settlement counsel can be invaluable on large cases as they approach trial or other deadlines, such as discovery deadlines, where clients want to keep their trial teams focused on the task at hand. Settlement counsel, generally acting as a team wholly distinct from the trial team, can take the position that they are "above the fray" of the day-to-day fighting in a case -- they have been hired to get to the bottom of a complex problem and, implicitly, they are on the case for a short period of time to determine if settlement is feasible. Dedicated settlement counsel can truthfully say that the settlement team has been hired because the client is interested in settlement and an effective trial presentation if settlement is not reached; this may serve to underscore the client's willingness to go to trial while keeping settlement discussions open for a time. To maintain their effectiveness, a settlement team must maintain credibility through knowledge of the important details in the case, pressure points on both sides of the dispute, and creative avenues for the parties to resolve their differences.

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[23] John W. Cooley, The Mediator's Handbook: Advanced Practice Guide for Civil Litigation § 4.5.7 (NITA, 2000).

[24] Peter J. Brennan, Chicago, IL (Jenner & Block).

[25] The Honorable Mary L. Murphy, Dallas, TX (14th District Court).

[26] Richard L. Brusca, Washington, DC (Skadden, Arps, Slate, Meagher & Flom LLP); Robert J. Kheel, New York, NY (Willkie Farr & Gallagher LLP).

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Several types of lawyers can serve as settlement counsel. Since settlement counsel are seen as a credible alternative to trial counsel, lawyers with stature or familiarity with the opponent are often employed. Former judges, well-known trial counsel, and former partners and (current) acquaintances of opposing counsel are often retained.[27]

*3. **Change your surroundings.***

(a) Take a time out/sleep on it.[28]

Famed negotiation coach Chester Karrass said long ago that "[p]eople need time to accept anything new or different," and he termed the time to do so "acceptance time."[29] We often need time to discuss with our stakeholders new developments in negotiations, and we often need time to allow facts to overcome emotions. And even if we don't need time to talk to anyone else, if it's late we may be "dug in" because we're tired.[30] Take a time out, and sleep on it.

(b) Change negotiators.

"During communications in general and impasses in particular, three things count: who's the messenger, how's the message being delivered, and what's being said."[31] Personalities matter, and your message may not be getting through because the other side has difficulty with the messenger. Consider changing your principal negotiator if you are not making progress.[32]

(1) Ditch the CEO.

The presence of the CEO can be an impediment to settlement,[33] and deadlock can quickly result when the CEO is required to negotiate in front of an entourage. When the CEO leads a fight into deadlock, there is often nowhere else to turn to break the impasse. Important deals are frequently forged outside the reach of the CEO, only to be presented for consideration in private with the appropriate amount of acceptance time.

(2) Bring the CEO to the Red Lobster.

Whether the CEO will be an impediment to negotiations in a given case is often personality driven; however, if lower-level negotiators have not achieved adequate results, the presence of the CEO may be helpful[34] and, in some cases, it's required. One federal judge in Texas (and outside a major metropolitan area) required the CEOs of three major companies to

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[27] Robert M. Manley, Dallas, TX (McKool Smith, P.C.).

[28] Perry E. Keating, McLean, VA (BearingPoint, Inc.).

[29] Chester L. Karrass, Give & Take: The Complete Guide to Negotiating Strategies and Tactics 1 (1974).

[30] Charles Guittard, Negotiation of Settlement G58, Advanced Negotiation Seminar, State Bar of Texas (1994).

[31] Thomas E. Crowley, Settle it Out of Court: How to Resolve Business and Personal Disputes Using Mediation, Arbitration, and Negotiation 125 (1994).

[32] Perry E. Keating, McLean, VA (BearingPoint, Inc.); Robert Little, Dallas, TX (Little Pedersen Fankhauser LLP).

[33] John Ofenloch Jr., Dallas, TX (CXO, L.L.C.).

[34] Barry G. Felder, New York, NY (Brown Raysman Millstein Felder & Steiner LLP).

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attend a mediation near the courthouse. Apparently the details of a settlement were worked out over dinner at the local Red Lobster -- with no entourage in sight.[35]

(c) Change mediators.

Not all mediators were made for all cases and all personalities, and a change in mediators can be an effective way to change the negotiation process in a given case. Your case might require a "Zen" mediator with a 10,000 foot perspective, or your case might require an accomplished subject matter expert.[36] If you have made the wrong choice, don't be afraid to try again.

(d) Change the translator.

In cases where one of the parties does not speak English, consider bringing your own translator. If the you believe something is being lost in the translation, or if you don't believe the translator is committed to the goals of the settlement negotiation process, hire a new one to ensure fair translations and a change to the process.[37]

(e) Change your immediate surroundings.

Go ahead -- switch chairs,[38] switch rooms, reposition who is sitting where, take your jacket off. No, this isn't rocket surgery, but it may work. If you're already at impasse, what do you have to lose?

(f) Have a massage and a cookie.

Don't laugh -- a recent "Texas Lawyer" article notes that one successful mediator has hired a masseuse to assist when mediations reach stalemate. In addition, she bakes chocolate-chip cookies fresh in her office and serves them hot during the mediation.[39] While these extra services may generate laughs for some, they serve as a change in surroundings and would seem to break the tension and give the parties something neutral to talk about -- two goals in most any settlement negotiation.

(g) Walk out.

Walkouts in settlement negotiations are inherently risky; walk out only if you are prepared for the consequences. While in mediation, walk out only after discussing it with the neutral.

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[35] Damon Young, Texarkana, TX (Young Pickett & Lee).
[36] Barbara "Biz" Van Gelder, Washington, DC (Wiley, Rein & Fielding).
[37] Melvin S. Merzon, Chicago, IL (International Truck and Engine Corporation).
[38] Perry E. Keating, McLean, VA (BearingPoint, Inc.).
[39] A Soft Touch, Texas Lawyer, July 19, 2004, at 3; Brian N. Hail, Dallas, TX (Godwin Gruber LLP).

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IV. The Merits of the Case: Is there Something You Know that I Don't?

A. Get Your Own House in Order First.

1. Get a Second Opinion.

Trusted counsel with no stake in the outcome of the case, whether it settles or goes to trial, can be a valuable resource. In addition, a frank consultation with local counsel can be enlightening; whether or not primary counsel is present is a matter of situational preference.

2. The Council of Gray Hairs.

Second opinions are great in theory but, if they differ from advice previously given, they can become a battle of experts. Consider bringing in three senior trial lawyers with no previous involvement in the case (and no stake in the outcome) and presenting both sides in a mock jury/focus group-style presentation for two or three hours. Every case can be boiled down to a presentation this audience can understand in a few hours, and you should get: (i) honest feedback; (ii) valuable give-and-take; (iii) comfort in the advice; (iv) trial themes, angles and strategies you may not have thought of previously; and (v) a peek at how your own trial lawyer will look on his or her feet.

3. Manage Your Own Client's Expectations.

Where did they get the idea that this case was worth that much money? Maybe it was you, maybe it was another lawyer on the case, or maybe it was a lawyer no longer on the case, but you may need to sit down and have a frank discussion with your own client about what the case is worth.[40] This talk may be supported by a second opinion or a jury test or the results of a discussion with a group of senior trial lawyers, but managing your client's expectations of probable outcomes and the costs required to get there may be the key to getting the matter resolved.

B. Never Miss an Opportunity to Present to the Other Side.

Assuming your own house is in order, make sure your message is getting through to the other side. Many trial lawyers, doubtless concerned that their trial strategy will be revealed, pass on the opportunity to present their case to the other side during the joint session in mediation. In response, one mediator asks: "How often do you waive opening in a civil trial?"[41] Consider this before you decide to not present your case to the other side in settlement negotiations: this is your one chance before trial to speak to the other side directly to show them what you're made of,[42] it's the perfect opportunity to help them appreciate their risks of proceeding to trial, and it can demonstrate to the other side your ability (and your willingness) to go to trial.[43] (Some parties have gone further to recreate the trial experience, agreeing that the statements at mediation will be the equivalent of the opening statements at trial and will be made by the attorneys who will make the opening statements.[44]) No matter who makes the presentation, consider a full-

[40] S. Cass Weiland, Dallas, TX (Patton Boggs LLP).
[41] Ross W. Stoddard, III, Irving, TX (Ross W. Stoddard, III, Attorney-Mediator).
[42] Robert M. Manley, Dallas, TX (McKool Smith, P.C.).
[43] Charles L. Babcock, Dallas, TX (Jackson Walker L.L.P.).
[44] John F. Kloecker, Chicago, IL (Lord Bissell & Brook LLP).

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blown PowerPoint,[45] don't be afraid to get your point across, and don't be afraid to use "their" evidence, which may be more persuasive to the other side.[46] A side benefit of this process is that your own trial team has to focus on the evidence, the trial themes, and the weaknesses in your case to get this presentation ready.

C. Make Sure the Other Side Has an Opportunity to Present to You.

Whether or not it's true, many aggrieved parties say they want their day in court. Plaintiffs want to tell how they were wronged, defendants want to talk about how they aren't responsible for what happened (if anything actually did happen), and no one wants to walk away feeling like their perspective doesn't matter. Give the other side an opportunity to tell their story, and be especially attentive while they are talking; it will further your efforts to settle the case, and you may actually learn something in the process.[47]

D. Hire a Neutral Evaluator to Serve Both Sides.

1. Elder statesman of the bar.

Sometimes parties need a second opinion. Consider presenting both sides of a dispute to an elder statesman of the bar who is respected by all involved.[48] Consider making this presentation somewhat formal, with written presentations, exhibits and oral argument. At the end of the process you are seeking a credible evaluation for both clients to use in arriving at a value of the case, so the more substantive the neutral's review the better. One commentator suggests a more involved process, where the parties present a mini-trial to the neutral, who candidly evaluates the evidence and discusses how others have recently settled similar cases and the likely result of the case if it makes it to trial.[49]

2. Magistrates and retired judges.[50]

If your client needs the stamp of a "judge" on the dispute at hand, consider retaining a sitting magistrate[51] or a former judge. Federal magistrate judges are often excellent mediators, and the mediation/settlement conference generally takes place at the federal courthouse, which provides all the stature and formality any client can need. Occasionally former judges can be used to advise as to the probable outcome of substantive motions, which may give the clients the answers needed to bridge the gap in settlement negotiations.[52]

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[45] Barry G. Felder, New York, NY (Brown Raysman Millstein Felder & Steiner LLP).

[46] David W. Kash, Phoenix, AZ (Jennings Strouss & Salmon, P.L.C.).

[47] Robert M. Manley, Dallas, TX (McKool Smith, P.C.); Sally J. McDonald, Chicago, IL (Piper Rudnick).

[48] Barry G. Felder, New York, NY (Brown Raysman Millstein Felder & Steiner LLP); Phil Giovine & Vincent Ciampi, New York, NY (American International Companies).

[49] Charles B. Craver, Effective Legal Negotiation and Settlement 295-97 (2nd ed. 1993).

[50] Phillip B. Philbin, Dallas, TX (Haynes and Boone, LLP).

[51] Barry G. Felder, New York, NY (Brown Raysman Millstein Felder & Steiner LLP).

[52] Phillip B. Philbin, Dallas, TX (Haynes and Boone, LLP).

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3. Get your judge to mediate.

Some sitting judges in some jurisdictions will "mediate" cases on their own dockets, perhaps with the parties achieving settlement.[53] Most judges, though, are not really "mediating" so much as using their "bench leverage" to encourage the parties to consider resolution. The obstacle for a sitting judge to truly mediate their own cases is that the parties are reluctant to share the negative aspects of their case with the same judge who later may be making rulings after acquiring that information. If another sitting judge is mutually respected by the counsel for his or her "mediator-like qualities" and has the time to help, consider using them to help resolve your dispute, since the case won't be tried in front of them.

4. Add a neutral evaluation to a mediation.

(a) By the mediator.

Mediators are often hesitant to give neutral evaluations because it can terminate their apparent impartiality, but parties often seek the mediator's candid assessment of the facts,[54] and some mediators in complex cases do not hesitate to look at the facts in great detail. For example, one Texas neutral with a technology background has no qualms about getting into source code and system architecture in software disputes; he gives a "pretty unbiased view of how good a case each side has," and the results have been very positive.[55]

(b) Separate from the mediator.

Those who desire to maintain the neutrality of their mediator may wish for the mediator to engage a subject matter expert to evaluate all or part of a dispute. This may include expert opinions on complex matters such as valuations to patent claims or other specialized subject matters.[56]

(c) Jury test.

A jury test is one of the best ways to get a neutral evaluation of a case. Lawyers, clients, witnesses and experts may all have their theories, but a real jury (or a real mock jury) can give a true read on a case. Jury tests can help in to evaluate the parties' positions in a case (see generally "Get Your Own House in Order First," Section IV.A above), and they can be successfully used in the context of settlement negotiations as well. As more cases go to mediation before trial and focus groups are hired in more complex cases, some trial lawyers support the use of focus studies in mediation and settlement discussions.[57] Parties can employ the mediation process to preserve the confidentiality of their presentations, and neutral facilitators

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[53] Robert M. Manley, Dallas, TX (McKool Smith, P.C.).

[54] Robert J. Kheel, New York, NY (Willkie Farr & Gallagher LLP).

[55] Peter Vogel, Dallas, TX (Gardere Wynne Sewell LLP)..

[56] Robert Stanton, New York, NY (AON Risk Services, Inc. of New York); E. Wendy Trachte-Huber, Negotiation: Strategies for Law & Business § 7.04 (1995).

[57] David W. Kash, Phoenix, AZ (Jennings, Strouss & Salmon, P.L.C.); Robert L. Meylan, Santa Monica, CA (Greenberg Traurig LLP).

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can ensure that the process is fair to both sides. One specialist notes that parties employ focus research in settlement negotiations in two ways:

(1) Share the results of prior jury tests.

If the parties have previously conducted jury tests, they can simply share them in the context of a mediation. This requires full disclosure to gain the credibility required to give either study significant weight.[58] The party sharing the jury test can gain additional credibility by having its own lead counsel play the role of lead counsel for the opposite side in the jury test, which should remove at least one argument when the results are shared that the test was slanted.[59]

(2) *Joint jury tests.*

By this process the parties can agree to let a mediator direct the focus study based on information supplied to the mediator by the parties, or the parties jointly participate in a study, with the final report given to both sides.[60] While outside counsel never seem to like this idea (because it eliminates surprise, it takes time away from discovery, etc.), its time may have come.

5. Summary Jury Trials.

Once the case has matured and other settlement efforts have failed, summary jury trials ("SJTs") can be a very effective way to get the parties closer to resolving their differences.[61] By this method, the parties put on an abbreviated, nonbinding trial in less than a day. Through this streamlined process, where evidentiary issues are addressed in advance and the evidence is generally not presented "live," the parties get a true feel of how their case will present -- and how the jury will react to it -- without the time and expense of a full trial.[62] At the conclusion of the SJT, the jury "decides" a result, and is then made available for debriefing in the courtroom with all parties and counsel present The one-day SJT is then followed by mediation or settlement negotiations based on the new information provided by the jury.

E. Use the Confidentiality of Mediation to Your Advantage.

1. Reveal confidential witness statements and documents.

In most jurisdictions, discussions at mediation are non-discoverable. While revealing a fact in mediation does not exempt it from discovery if it is otherwise discoverable, mediation can be a forum for revealing facts, documents and other information not yet produced to the opposition.[63] This proffer can be an anticipated expert's draft report, undiscovered witness statements, tape recordings, and other information -- particularly if your opponent does not want it in the public domain. (See "Confidentiality Clauses," Section II.I above.)

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[58] Don Nichols, Ph.D., Odessa, TX (Courtroom Intelligence, Inc.).

[59] Lyndon G. McLennan, Jr., Dallas, TX (Courtroom Sciences Incorporated).

[60] Don Nichols, Ph.D., Odessa, TX (Courtroom Intelligence, Inc.).

[61] Christopher M. Joe, Dallas, TX (Godwin Gruber, LLP); The Honorable Mary L. Murphy, Dallas, TX (14th District Court).

[62] John W. Cooley, The Mediator's Handbook: Advanced Practice Guide for Civil Litigation § 6.4 (NITA, 2000).

[63] Melvin S. Merzon, Chicago, IL (International Truck and Engine Corporation).

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2. Reveal draft motions.

Mediation can be an excellent venue for the disclosure of draft motions. In cases where the client, or the lawyer, has some incentive to prevent a motion from being filed, revelation of a draft motion at mediation may assist in breaking an impasse. While this technique can backfire because the party receiving the draft motion has not had an opportunity to read it prior to mediation, it can be successfully used with motions relating to executive-level depositions, spoliation motions, and other incendiary subject matter. In these cases the party with the draft motion should note on the motion that it is a draft provided during mediation and should seek an agreement that the draft motion be returned at the end of the mediation with no copies made.

F. Eliminate all misunderstanding of costs and time to complete the litigation.

1. Separate meeting between the mediator and the principals.

In certain cases, usually late in the mediation session, some mediators will seek individual meetings between the mediator and the principals for each side, with no lawyers present. In addition to the benefits of reshuffling the players at the negotiating table generally, see "Reshuffle the Players," Section V.C below, the mediator may use this meeting to ensure that the principals are keenly aware of each party's risks and the true costs of the litigation going forward. This process should be undertaken only when the mediator has the trust of both sides and all parties and counsel are comfortable with this meeting format. In order to prepare the parties for this type of meeting, the parties should agree in advance of the mediation that such a meeting may take place when (and if) the mediator feels that it is appropriate.

2. Fixed fee commitment by outside counsel.

As deadlock approaches mediators often refer to counsel's litigation cost estimates to contrast against the "gap" in settlement negotiations, and this technique alone has contributed to many settlements. Although not popular with outside counsel, at least one mediator occasionally works to break impasses by asking counsel for all parties for a reasonable estimate of fees from the close of mediation through trial, with realistic assumptions about discovery, length of trial, and other variables. He then discusses that total with the principals to highlight the costs of proceeding to trial. If this tactic is not successful but the parties are getting closer, he then asks outside counsel if they will commit to that estimate (with all reasonable assumptions built in); often counsel's reluctance to do so, and the disclaimers inserted by counsel as they respond, provide an additional incentive for clients to bridge the gap.[64]

V. Procedural Tricks and Tweaks: Making Sure the Process Does Not Interfere with the Process.

Everyone -- clients, lawyers and other stakeholders -- has negotiation experience, and everyone's negotiation strategy is based in part on past experience. As a result, strategies differ; some negotiators don't want to reveal their bottom line, some don't want to move the "bookends" or "brackets" in the negotiation process, some like to walk out, some pound the table, and some are simply not comfortable negotiating at all. Occasionally a simple change in the negotiating process can alleviate concerns about "bookends" or stress over the midpoint between the

[64] Owen J. Shean, Vienna, VA (Wickwire Gavin, P.C.)

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settlement brackets, allowing the case to be resolved. Below are a few of these procedural tweaks.

A. Allow the Other Side to Tell Its Story.

See "Make Sure the Other Side Has an Opportunity to Present to You," Section IV.C above.

B. Reverse Roles to Generate Settlement Options.

Dale Carnegie told us in 1936 to "[t]ry honestly to see things from the other person's point of view,"[65] and that advice is no less appropriate today. One of the best ways to determine the other side's interests as a means to generate settlement options is to reverse roles and consider the problem from your opponent's perspective. As one client put it, "you may not fully understand what the other side wants, and they WILL correct you."[66] One commentator suggests convening a joint session where each side articulates the other's interests and discusses how the other side's interests can be optimally protected. "This technique may generate options that have previously been ignored. It should simultaneously induce each litigant to develop a greater appreciation for the needs of the other side." [67]

C. Reshuffle the Players.

Sometimes the mediator needs to meet with the parties without their lawyers. This can be to reemphasize the risks in the case, to simply change the negotiation dynamic, or for other reasons, but this often works. (See, e.g., "Separate meeting between the mediator and the principals," Section IV.F.1 above.) Similarly, impasse is often broken by a meeting between the principals themselves, without lawyers or the mediator or entourages or anyone else.[68] This change in dynamic can be paired with an apology, a commitment to do better next time, a focus on business solutions, or some other creative way to quickly resolve the dispute generated by "break-through" communications that might be more difficult in front of the larger group. Other combinations are mediators meeting with lawyers alone, lawyers meeting with lawyers alone . . .. You get the idea.

One mediator who takes reshuffling the players seriously combines it with changes in the environment (see Changing the Negotiation Environment -- A Simple Solution to a Complex Problem, Section III above) to resolve impasses. Hesha Abrams believes that, occasionally, "[t]he last ten yards really have to be accomplished in a private committed way where parties are free to brainstorm and to say things that may not be politically correct." With this in mind, she occasionally convenes a private meeting over a meal with one negotiator from each side. All parties have to agree to brainstorm solutions without rejecting anything out of hand, and all must agree that: (i) confidentiality is critical; (ii) any deal must be vetted by the larger groups; and (iii) all will be sensitive to each other's political realities. Through these private sessions, many of the trappings and history from the larger negotiations can be set aside, and deals can be reached.[69]

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[65] Dale Carnegie, How to Win Friends and Influence People 161-66 (1981 ed.).

[66] Perry E. Keating, McLean, VA (BearingPoint, Inc.).

[67] Charles B. Craver, Effective Legal Negotiation and Settlement 289-90 (2nd ed. 1993).

[68] Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP); Mark Tatelbaum, Washington, DC (GWU Medical Faculty Associates).

[69] Hesha Abrams, Dallas, TX (Abrams Mediation & Negotiation, Inc.).

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D. Easy Issues First.

As impasse approaches on the more difficult issues, some suggest addressing smaller, less controversial issues first.[70] With a little momentum, more time and effort invested in the "deal," and an end in sight, parties may be more likely to come to agreement, through concessions or through creative thinking, on the bigger issues postponed to the end.

E. Check the Math.

In contract disputes where there may be several different sets of numbers on the table and several parties to pay them, "the math" can be a daunting, yet critical, issue to address. As impasse in these cases approaches, one lawyer advises to "[c]heck, double check and keep checking the arithmetic. Getting agreement on the math can build the cornerstone for overall agreement. Also it provides some discrete issues which can be traded or offset." Parties may also want to require initials on spreadsheets or summaries forming the basis of the final agreements so subsequent disagreements over the total settlement figure are avoided.[71]

F. The "Net Recovery" Technique.

A mediator can make headway by simply recharacterizing the problem and emphasizing how much the litigants' positions are really worth. An advocate of the net recovery technique describes it as follows:

> When you get close, it generally does not make sense from a business perspective to fight any more, particularly if you think that you will get them to your figure, only if you litigate some more. What a good mediator will do is then take the difference between what you want, and where the other side is at, and then subtract out costs and attorneys' fees, taxes, and any other monetary or non-monetary cost of continuing. You are often left with a relatively small number. Then the question becomes, is it worth it to fight for that small amount? Frequently, the answer is no.[72]

G. Fantasy Football Draft.

No, this technique can't be used all that often, but it does emphasize how creative thinking can tweak the process to get the parties to what they need. By this process, one trial lawyer resolved a dispute over a customer list between two former partners by listing all the customers and implementing a "draft" by each side -- the parties alternated selecting customers from a list of all the customers until there were none left to pick from. At the end of the process the parties did a little more trading, decided they could live with what they had, and moved on.[73]

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[70] Sidney R. Hill, Jr., Ph.D., Starkville, MS (Mississippi State University); Lance Lerman, Herndon, VA (Cisco Systems, Inc.).

[71] Owen J. Shean, Vienna, VA (Wickwire Gavin, P.C.).

[72] Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP).

[73] Michael P. Cash, Houston, TX (Cash Allen, L.L.P.).

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H. Auction (Probate/Asset Division).

Probate matters can generate emotional disputes that are difficult to settle. When settlement negotiations over a list of assets break down, the parties can auction each item in dispute among themselves and settle with the estate (or other disputants) once the property is divided.[74]

I. The Last Best Offer.

The last best offer is, in effect, the verbal equivalent of a walk out. In a last best offer, the offering party concludes a negotiation discussion (or series of discussions) with an offer that is represented to be the best, and last, offer forthcoming from that party.[75] Parties employing the last best offer technique should be very careful, since negotiations often break down with a last best offer when very little additional consideration would have gotten the settlement done.

J. Rule 68.

Offers of judgment, provided for in Federal Rule of Civil Procedure 68 and otherwise, can be an effective way to break settlement deadlock.[76] They are effective because: (i) they create downside risk for the party rejecting them; (ii) they serve as an open offer for the recipient to think about for a certain amount of time; and (iii) they often generate offers high enough to get the deal done. One practitioner who defends employment matters often uses Rule 68 offers after settlement negotiations break down, and he feels that the tactic is frequently successful because opposing counsel are required to sit down with their clients and explain that the plaintiff may be responsible for all costs -- even if the plaintiff obtains a favorable verdict.[77]

K. "Don't make the other side's counsel look like an idiot."

One neutral has learned that some cases don't settle because one party has developed unrealistic expectations based in large part on advice of counsel. In that case, the dispute may not settle for what the case is truly worth because the lawyer who set the unrealistic expectations would rather try the case and lose it that have his or her bad advice exposed. When this occurs, the neutral tells the other party that valuing the case at what it's exactly worth won't get the case settled; he says that, if the party wants to settle the case, "don't make the other side's counsel look like an idiot." If you want to settle the case, you'll have to give the other side something so their lawyer does not have to admit that he gave bad advice. It may not be fair, but it can get these cases settled.[78]

L. Discuss "Feasibility" rather than "Fairness."

One accomplished neutral shifts the focus of his mediations from "fairness" to "feasibility" late in the mediation when one party contends that the other's offer is "unfair." At

[74] Ross W. Stoddard, III, Irving, TX (Ross W. Stoddard, III, Attorney-Mediator).
[75] Robert Stanton, New York, NY (AON Risk Services, Inc. of New York).
[76] Phil Giovine & Vincent Ciampi, New York, NY (American International Companies).
[77] Louis H. Watson, Jr., Jackson, MS (Louis H. Watson, Jr., P.A.).
[78] Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP).

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that point, he reframes the discussion, saying something akin to: "I understand that you don't think it is fair, but I'm trying to focus us now on what is feasible, i.e., what you two might be willing to do that will work to get this done, that you both might think is unfair."[79]

M. The "Whisper Number."

1. Mediators' whisper numbers.

No matter what they're called, "whisper numbers" are a popular way to break stalemates.[80] In the whisper number process, the mediator asks litigants nearing a stalemate: "what if I could get the other party to *x*"? Presumably the mediator is testing the bounds of the parties' settlement range, as he is likely asking a similar question to the other party. In this situation, the party agreeing to, or indicating some appetite for, a hypothetical "*x*" has not really agreed to it. If the mediator never gets an offer of "*x*" from the other side, the settlement brackets have not been moved and the parties are free to resume negotiations at a later date.

2. Whisper numbers from opposing counsel.

Mediators don't have a monopoly on whisper numbers. Counsel can also employ the technique, with a "my client hasn't agreed to this, but if I can get him to *x*, will you go there" question to opposing counsel.[81] If lead trial counsel does not desire to engage in this process, back channel communications, including associates, client representatives and others, can also be used to convey whisper numbers. A variation on this theme is the lawyer who contends he or she has client control problems and says something like: "I can probably twist my client's arm and get him to take *x*, but only if you offer it. Until then, our official settlement offer is $x + y$, but you should offer *x* so I can push my unreasonable client into getting this done."

N. Mini-Trials.

This method brings senior executives of both parties together with a mock jury-style presentation. Parties using this technique will present evidence on the case to one high-level corporate representative from each side not involved in the underlying dispute, plus a third-party neutral. The party representatives have full authority to settle the matter, and the third-party neutral serves primarily as a facilitator. Through this process, the parties meet together in numerous sessions, presumably caucusing with their teams and stakeholders behind the scenes, often coming to a resolution.[82]

O. Blind Bidding Enhancement.

In this procedure of last resort, a mediator accepts confidential submissions from parties experiencing deadlock. The plaintiff submits the lowest number it will take, and the defendant submits the highest number it will pay. The parties agree that, if the positions are within a

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[79] James Holbrook, Salt Lake City, UT (Callister Nebecker & McCullough PC).

[80] Eric D. Green, Boston, MA (Resolutions, LLC); Frances Turner Mock, Greensboro, NC (Smith Moore LLP); Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP); Owen J. Shean, Vienna, VA (Wickwire Gavin, P.C.).

[81] Mark T. Josephs, Dallas, TX (Jackson Walker L.L.P.).

[82] John W. Cooley, The Mediator's Handbook: Advanced Practice Guide for Civil Litigation § 4.5.7 (NITA, 2000).

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predefined range, they will split the difference; if they are outside that range but within other preagreed parameters, they will continue to negotiate; and, if they are beyond a certain difference, the mediator will terminate the negotiations without disclosing the parties' positions.[83]

P. Cybersettle and other Alternatives.

Cybersettle, found at cybersettle.com, is a technology-driven alternative to lawyers hoping to see if settlement is possible without disclosing their bottom line. Under the Cybersettle procedure, each side submits settlement proposals (demands for plaintiffs, offers for defendants) and the numbers are compared pursuant to Cybersettle's formula; if the defendant's offer is within 20% of the plaintiff's demand, a settlement is reached. If no settlement is reached, offers are never revealed.

Q. Doubleblind: The Mediator's Proposal.

If all parties agree, a mediator's proposal can be used in cases at or near impasse during mediation.[84] Under this technique, the mediator simultaneously proposes a settlement in which all material monetary and non-monetary terms are included. The mediator proposes a deal which "might" be acceptable to both parties, though likely beyond the desired settlement of either (i.e., the "gap"). The mediator asks each party to accept or reject the proposal, responding confidentially ONLY to the mediator. If you reject the proposal, you never know what the other side did; if you accept, you either have a deal or know that the other side rejected, which establishes no precedent for future offers.[85] The number selected by the mediator can impact settlement negotiations in the case going forward, however; therefore, this process is not recommended unless both parties truly trust the mediator.[86] For a sample Mediator's Settlement Proposal, see Appendix Three.

R. High/Low Agreements.

High/low agreements are binding contracts to settle within a predetermined range at a given point in the future, despite the circumstances of the case at that time. An example is a high/low agreement to settle a case between $10,000 and $50,000 after trial; the parties agree to accept the outcome of the trial if it is between $10,000 and $50,000, but, if it is over $50,000, the payment will be capped at $50,000, and if the verdict is $0 or less than $10,000, the plaintiff gets $10,000. Under this model the plaintiff gives away the possibility of a runaway in exchange for a certain modest payment; the defendant gives away the possibility of a $0 payment but substantially reduces downside risk. One interesting way to employ this technique is in multiparty cases, where the plaintiff may want to make sure it covers its costs by settling with one defendant but does not want to drop the defendant from the lawsuit.[87] A high/low may also be used in conjunction with a pending motion for summary judgment. This is particularly effective

[83] John W. Cooley, The Mediator's Handbook: Advanced Practice Guide for Civil Litigation § 4.5.7 (NITA, 2000).

[84] Eric D. Green, Boston, MA (Resolutions, LLC); James E. Lyons, San Francisco, CA (Skadden, Arps, Slate, Meagher & Flom LLP); Paul Murphy, Santa Monica, CA (Murphy Rosen & Cohen LLP); Ross W. Stoddard, III, Irving, TX (Ross W. Stoddard, III, Attorney-Mediator).

[85] Charles Guittard, Negotiation of Settlement G43, Advanced Negotiation Seminar, State Bar of Texas (1994).

[86] Don Campbell, Dallas, TX (First Southwest Company).

[87] Mark Tatelbaum, Washington, DC (GWU Medical Faculty Associates).

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when the opposing counsel each perceive the MSJ is likely to be decided in their own favor, and are willing to "put their money where their mouth is."

S. Trial to a Neutral with a Blind High/Low.

A trial to a neutral with a blind high/low combines the confidentiality and convenience of arbitration with the risk-shifting of a high/low agreement. Under this technique, the neutral will hear evidence and pick a number that will either be accepted (if within the settlement range) or adjusted (if outside the agreed range). [88] One trial lawyer believes that, if the presentations and submissions are not confidential, the parties should have one final chance to settle the case before the neutral renders any decision. Under these circumstances, "the parties can usually bridge the gap. If not, they are unreasonable at their peril."[89]

T. High/Low Baseball at the Final Positions (or Mid-Point Arbitration).

High/low baseball at the final positions also involves an agreement on a high and a low coupled with a presentation to a neutral but, in this case, the neutral decides an evaluation of the case/damages and, whichever side is closest to the neutral's number, gets awarded *their* number. This process can take place at the outset of litigation, or it can apply to a case at any point in the litigation process -- for example, the parties can wait until motions for summary judgment or other important rulings are made before transferring the case to the arbitration panel.[90] No matter when the case is transferred to the panel. the object is to be as "accurate" as you can be in selecting your number. So, if the plaintiff says $100,000, the defendant says $50,000, and the neutral decides $70,000, then the defendant was closer and must pay only $50,000.[91] Under this technique both parties have an incentive to be reasonable and to value their cases realistically -- as we all should.

VI. More Facts, More Law or More Uncertainty: Changing the Circumstances of the Case When Nothing Else Works.

Sometimes cases don't settle because the parties aren't ready; they may need to do more research, they may need more facts, they may not have an accurate understanding of the potential costs or outcomes, or there may be too much ego involved. Some parties continue to hang on to that "silver bullet," believing that just one motion, or one deposition, will vindicate their position. The techniques below can be used by the parties to get the case better positioned for settlement.

A. Conduct a Specific Amount of Discovery and Reconvene.

Often the parties cannot settle because they predict differently how a witness will testify, whether a third party has certain documents, or whether one party's documents will provide support for a particular allegation or defense. Rather than "boiling the ocean," parties can agree

[88] Richard W. Casey, Salt Lake City, UT (Bendinger, Crockett, Peterson & Casey, P.C.); William Stoner, Los Angeles, CA (Hennigan, Bennett & Dorman, LLP).

[89] William Stoner, Los Angeles, CA (Hennigan, Bennett & Dorman, LLP).

[90] Ross B. Bricker, Chicago, IL (Jenner & Block).

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to a targeted deposition or two, or they can tailor a limited discovery plan to determine what is actually at issue prior to reconvening. If this discovery can be done informally, it will save the parties even more time and money and will get the matter resolved even more quickly.

B. Create Leverage.

For some there is a "simple mantra: Leverage is everything, so when you have it, use it."[92] Like it or not, cases often settle because of perceived risk. If settlement discussions have stalled, one party can work to bring the other back to the negotiating table by creating leverage.

1. Settle with someone else (multiparty).[93]

Settlement by one defendant in a multiparty dispute can have a great impact on the balance of the case. Although settlement credits, bar orders, and how each defendant's risk profile changes when a codefendant settles are beyond the scope of this paper, one settlement often breaks the logjam and causes a rush for the exits. Consider how settling a claim, a counterclaim, or a cross-claim may impact the risk profile of your counterparty to see if it brings the rest of the case closer to closure.

2. Create doubts about your opponent's case.

(a) Doubts about the facts.

New facts, witness interviews, and new documents often impact settlement negotiations. After an impasse, consider pushing for discovery in the area most likely to get your opponent to reconsider the impasse.

(b) Create doubts about the procedural posture.

If you are at an impasse, create leverage: file that motion for summary judgment; set that motion for sanctions for hearing; or notice that apex deposition. If you revealed your intent to file the motion in mediation and it did not break the deadlock, pursue it -- either you or your opponent is wrong on its likelihood of success. Once the motion is heard and ruled on, you may be one step closer to settlement, and the mere filing of such a motion may bring your opponent back to the table.[94] Remember, however, that motions can never be taken back; beware the "glass houses" rule in motions such as spoliation motions and sanctions motions; and know that motions questioning the conduct of opposing counsel can harden the parties' settlement positions.

(c) Create doubts about collectibility.

Plaintiffs are often in a case for money. Creating doubts about their ability to collect any judgment can quickly generate a settlement. This technique can include creating doubts about the financial viability of the defendant, or it can include revealing facts about any insurance policy and related authority that may call into question whether there is coverage for the acts in

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[92] Michael P. Maslanka and Theresa M. Gegen, Shattering Myths about Mediation, Texas Lawyer, April 5, 2004.

[93] Jennifer Spaziano, Washington, DC (Skadden, Arps, Slate, Meagher & Flom LLP).

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dispute.[95] This can be particularly useful in large cases where, without coverage, the plaintiff may never recover -- or the plaintiff may never recover beyond a certain, limited amount.

C. Get a Trial Setting.[96]

One judge in Texas recently said that, "when cases are reached for trial, better settlement offers are made."[97] This is likely true because "[b]luffing is a commonly employed tactic. As a result, a substantial number of cases are not settled until at or near the date of trial,"[98] and judges have even used mediation to get a case settled after jury selection and opening statements.[99] We all know that plenty of cases settle on the courthouse steps, and the purpose of this paper is, in part, to help get cases settled *earlier*. However, some cases won't settle until a firm trial date is set and trial appears imminent. Plaintiffs should recognize this, and should recognize that the only way to monetize their litigation investment may be to get to the courthouse.

D. Settlement While on Appeal.

Many of the techniques mentioned in this paper can be used to settle a case while on appeal; however, one creative technique for the parties who truly need less uncertainty is a high/low agreement while on appeal.[100] By this method, the parties agree to a minimum and a maximum recovery for the plaintiff depending on the outcome of the appeal. This creates a definite end for the litigation once the decision is handed down, yet it does not require the parties to actually break their settlement impasse. In arriving at the high/low range, don't forget that former appellate judges can also serve as neutrals. Consider hiring an appellate "panel" of neutrals to consider the arguments and advise you of the probable outcome; if you like the results, share them with the other side and negotiate a high/low agreement as you await the appellate result.[101]

VII. Narrowing the Dispute: Declaring a Partial Victory on the Way to Resolution.

A. Settle Half the Case.

Sometimes cases just don't settle, but the parties can almost always agree that there is no dispute about certain facts. If the parties are candid and forthcoming in settlement negotiations, cases can be substantially narrowed once explanations are given, documents are produced, or perspectives are better understood. If the parties can't settle the whole case, maybe they can carve out a limited area where disputes persist and settle the rest of the case.[102] This can: (i) cut discovery costs; (ii) reduce the defendant's overall risk; (iii) eliminate the plaintiff's risk of

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[95] Phil Giovine & Vincent Ciampi, New York, NY (American International Companies).

[96] The Honorable Joseph M. Cox, Dallas, TX (160th District Court); The Honorable Mary L. Murphy, Dallas, TX (14th District Court).

[97] The Honorable Joseph M. Cox, Dallas, TX (160th District Court).

[98] The Honorable Robert A. Wenke, The Art of Negotiation for Lawyers 32 (1985).

[99] Ralph C. "Red Dog" Jones, Dallas, TX (Parham, Jones & Shiver, L.L.P.).

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getting nothing; and (iv) reduce the time and attention both sides have to spend on the matter. [103] This can be particularly effective when a case involves two relatively distinct claims with little overlapping proof.

B. Settle all but Fees.

It's a fact that legal fees and costs drive many cases. In cases where fees are recoverable from the defendant, consider whether all issues in the plaintiff's case, other than fees, can be settled, with fees to be tried to the Court later, without appeal, to expedite resolution.[104] While this may drive a wedge between your opponent and his or her lawyer, it may resolve the more expensive piece of the litigation and leave for expedited resolution the remaining issue of fees to be paid by the defendant.

C. Med/Arb.

The parties may consider executing an agreement that will convert the process to arbitration over any issue on which the parties cannot agree. This agreement to arbitrate remaining issues can come before the parties agree to mediate, or it may come as the parties gain success resolving the "big picture" issues in the dispute but need comfort that, other than a few minor issues, the litigation is "over." One litigant recently signed a med/arb agreement that provided, among other things:

> Dispute Resolution: The parties agree to appoint [neutral] as sole arbitrator to render a binding decision to resolve any disputes that may arise among the parties concerning the terms of this Agreement, the drafting of the final Settlement Agreement, as well as any disputes that may arise during the course of the performance of the settlement terms. [Neutral] shall have sole discretion to set the arbitration procedures. Any binding decision rendered by [neutral] as arbitrator shall be enforceable in [the applicable court].[105]

Obviously this tactic requires complete trust in the neutrality and fairness of the neutral, but it can be used to sidestep minor impediments to major settlements. Consider carefully, however, whether you want to have a mediator arbitrating major open issues in dispute -- generally it is not considered a good idea for a mediator to later serve as the arbitrator in the same case. You will likely need to share some of the "warts" in your case with the mediator during the mediation process, and you probably would not want the ultimate "decider" of your case to know about them or to be influenced by them.

D. Arb/Med.

Often considered a better alternative to Med/Arb for the not-yet-able-to-be-settled case is to arbitrate *first*, with the arbitrator sealing the award. The parties then mediate *after the arbitration*, with the arbitrator or another person then serving as mediator. If the parties are unable to reach a settlement during the mediation, only then is the arbitrator's award unsealed -- after which it becomes binding on all involved.[106]

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APPENDIX TWO: BIBLIOGRAPHY

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APPENDIX THREE

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ATTORNEY-MEDIATOR

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E-MAIL
StoddardRW@aol.com

October 26, 2004
[VIA FAX (3 pages)]

_____, Esq. (___) ___-____
Law Offices of _____

_____, Esq. (___) ___-____
_____

_____, Esq. (___) ___-____
_____

RE: **Mediator's Settlement Proposal**
U.S.D.C.(N.TX) Cause No.
_____ v. _____

Dear Counsel:

In an effort to resolve this matter at this time, as mediator I propose the following as a compromise settlement agreement to all parties. This "Mediator's Settlement Proposal" does not necessarily reflect my opinion of the settlement value of the case. Rather, it simply represents a proposal which may be within the "reach" of all of the parties, although slightly beyond the amount preferred by either party.

This Proposal is being presented simultaneously to all parties. You are requested to do the following:

1. **Immediately** upon receipt, **please telephone my voicemail [(214) 559-5660]** and leave word that you received this Proposal.

2. Immediately review this Proposal with your clients.

3. **Please respond TO ME ONLY no later than 2:00 P.M. FRIDAY, OCTOBER 29, 2004, via my voicemail [(214) 559-5660] AND via fax at (972) 869-4691 on the enclosed Fax Response Form that the Proposal is acceptable to your clients (or declined, if that is the case).** If you are unable to respond by then, please let me know and we will extend the response time as needed. **YOUR ACCEPTANCE IS CONFIDENTIAL AND WILL NOT BE REVEALED TO THE OTHER PARTIES, UNLESS ALL PARTIES ACCEPT THIS PROPOSAL.**

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In order for the Proposal to be effectuated, ALL PARTIES MUST ACCEPT IT, AS IS. If all parties accept the Proposal, then I immediately will advise each of you that the matter has been settled.

If any party declines to accept the Proposal, then I will advise each of you only that the Proposal is not acceptable to at least one party, and the case, therefore, is not settled by means of this Proposal. The only way to learn that the other parties are willing to accept the proposal is for your client to accept it. This is an opportunity to indicate your clients' amenability to resolving this matter fully at this time, without the risk of compromising your clients' bargaining position in the event another party is not amenable to this proposal.

HERE IS THE PROPOSAL:

1. At Closing, Defendant pays to Plaintiffs the total sum of ONE HUNDRED SIXTY-FIVE THOUSAND DOLLARS ($165,000.00) and pays to Intervenor the sum of SEVENTY THOUSAND DOLLARS ($70,000.00).

2. Each party bears their own taxable court costs and attorneys' fees.

3. At Closing, the litigation is dismissed with prejudice.

4. At Closing, Plaintiffs give Defendant a full, general release of all claims and Intervenor gives Plaintiffs and Defendant a full, general release of all claims.

5. Defendants' counsel drafts formal settlement documents, for review and approval by other parties' counsel.

6. Closing and funding to occur by November 13, 2004.

7. By counsel's signing the response form, EACH PARTY ACKNOWLEDGES THAT SUCH PARTY HAS CONFERRED WITH COUNSEL REGARDING THE ADVISABILITY OF ENTERING INTO THIS AGREEMENT PRIOR TO SIGNING IT.

I urge each of your clients to consider seriously this Mediator's Settlement Proposal. Certainly, you and your clients are fully capable of evaluating this case. However, in this case all of the parties may need to go slightly beyond their current proposed settlement amounts in order to resolve the case without incurring the costs and risks inherent in the lengthy litigation process of trial and appeal.

I look forward to your clients resolving this matter by agreement. Good luck!

Yours very truly,

Ross W. Stoddard, III
Attorney - Mediator

Enclosure

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FAX RESPONSE FORM

[VIA FAX (1 page)]

TO: Ross W. Stoddard, III (972) 869-4691
Attorney-Mediator

FROM: _____, Esq. (___) ___-____
Law Offices of _____

_____, Esq. (___) ___-____
_____

_____, Esq. (___) ___-____
_____

RE: **Response to Mediator's Settlement Proposal dated October 26, 2004**
U.S.D.C.(N.TX) Cause No.
_____ v. _____

DATE: October ____, 2004

Dear Ross:

Your Mediator's Settlement Proposal dated October 26, 2004 is:

_____ACCEPTED _____Declined

by my client(s) who is/are: _____Plaintiff _____Defendant _____Intervenor

Sincerely,

_____
Counsel

medpro2.for

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