THREE'S A CROWD
How To Resolve a Knotty Multi-Party Dispute Through Mediation

by James C. Freund

For business lawyers who negotiate, there's an ascending hierarchy of difficulty in the situations they have to face:

- When there are only two parties, and what they're negotiating is a deal, the bargaining may be spirited but it's relatively straightforward everyday stuff.

- If you add a third party (or more) to the mix, things become more complex – sequencing questions are raised, alliances may form – but at least the parties are all working constructively toward a common goal.

- Now go back to just two parties, but have the negotiations be about resolving a dispute instead of making a deal – that's tougher sledding, as emotions, posturing, and the specter of a looming lawsuit cloud the picture.

- Then stir in both of the intensifying factors – multiple parties trying to resolve a dispute – and the problems escalate almost geometrically.

- And for the final level of difficulty, make it a multi-party dispute where not only do past injuries have to be rectified, but at least two of the parties need to cut a new forward-looking deal in order for the entire brouhaha to be put to bed.

It's the multi-party dispute, and especially that ultimate situation – the multi-party dispute *cum* deal – that's the subject of this article. How do business lawyers, faced with a crowded, litigious and often chaotic situation, manage to create a workable framework and negotiate an overall resolution that terminates all litigation and allows everyone to walk away reasonably satisfied with the result? (Not ecstatic, mind you; if you're looking for that – or you expect some other kind of instant gratification – try bowling.)

But don't worry, my purpose is not to wallow in the complexity of it all. Rather, I'm going to try to offer some constructive advice on how mediation can deal effectively with the issues these kinds of situations present. My perspective will be that of the mediator, but I'll also offer some tips for the lawyers who represent the

parties involved. And although the mediation aspects I focus on are particularly meaningful in multi-party situations, most of them are also applicable to the typical two-party dispute.

Let me begin by stating the underlying premises of this article:

- There are plenty of multi-party disputes around.

- Quite often, these are not suitable for resolution by courts or arbitrators, which lack the flexibility needed to fashion workable results (while eating up lots of time and money).

- On the other hand, trying to resolve these disputes non-judicially by direct negotiations among the parties is hard work indeed.

- It's even more difficult when (as is frequently the case) some facet of the resolution requires negotiating a forward-looking deal.

- Under these circumstances, mediation is the best means of crafting a resolution that will satisfy all parties.

- But even in mediation, in order to reach an overall resolution, both the mediator and the party representatives must learn how to cope with the troublesome characteristics of multi-party disputes.

Just a word to any deal lawyers who may have read this far. Before you leave me and skip ahead to the next article – on the supposition that what I'm talking about is strictly litigator's turf – let me assure you this isn't the case. In my prior article in these pages, "Calling All Deal Lawyers – Try Your Hand At Resolving Disputes,"[1] I made an argument for how useful deal lawyers can be in dispute resolution generally. In the sort of case we're talking about here – featuring multiple parties and often calling for negotiations to craft provisions that guide future conduct – the deal lawyer's presence is even more requisite.

Some Examples of Multi-Party Negotiating

Let's begin by analyzing some relatively simple examples of what goes on in a multi-party negotiation. We'll start in the deal context where there's no pre-existing dispute. Assume a buyer (B) is negotiating to purchase a townhouse from the seller (S). B wants to use the entire house, but a tenant (T) occupies part of the

[1] 62 Bus. Law 37 (2006).

premises and has a legal right to stay on for the next two years. T has let it be known, however, that he would be willing to move early if provided with an appropriate financial incentive.

So, if you were representing B, how would you go about negotiating here? The central question is, where will the money come from to get T to move – from S or from B? And no matter which one of them writes the check, how will this figure in to the purchase price negotiations being conducted between S and B?

Here's the negotiating problem from B's standpoint. He's trying to work out a deal with S on the price for the townhouse, but how can he commit to a price with S without knowing (i) who's going to take care of T, and (ii) if it's going to be B, what it will cost. So the threshold question for B is, who to deal with first? Should B talk to T and find out the cost of getting T out of there, which B would then factor into his negotiations with S?[2] Or should B first deal with S, so as to know whether the house can be bought at an acceptable price – perhaps phrasing his offer to S this way: "I'm willing to pay $4 million for the townhouse, provided I don't have to spend more than $200,000 to get rid of T."

So, although there are some sequencing decisions to be made, the situation is garden variety, everyone appears to be unemotional, no one's committed to anything, and no past wrongs have to be righted.

Now, envision a multi-party *dispute*, and you can see how things start to get tougher. Assume a plaintiff (P) is suing two defendants (D-1 and D-2) for damage P has suffered from a faulty thingamajig. One defendant designed it, the other manufactured it. P doesn't know which of them is at fault, but he claims he's been damaged to the extent of $1 million, and it has to be one (or both) of their responsibilities.

You can bet there's likely to be some emotion here. P is mad at both defendants, while D-1 is pointing an angry finger at D-2 and vice-versa. And this kind of situation can put the parties in some uncomfortable positions. For example, what D-1 says in order to rebut an argument from P might actually strengthen D-2's hand vis-à-vis D-1.

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[2] An alternative would be for B to send S to negotiate with T. This may not be so smart if B is the one who will be paying T, since S would then lack a strong incentive to negotiate hard with T – unless S were worried that the cost of the payment will reduce the purchase price he'll get from B.

Let's say you represent D-1, and your client wants to settle the claim without having to go through a court proceeding. D-1 acknowledges privately that P has been harmed (although not to the full extent of the $1 million P is claiming), and he's willing to pay some (but not all) of a negotiated settlement.

What do you do here? Do you begin by bargaining with D-2 over how to split up the cost of the settlement (although without knowing at this point what the actual bill will be), and then, having the split in hand, try to negotiate the total damage settlement with P? Or do you start by bargaining with P about the aggregate damage before dealing with the issue of how D-1 and D-2 will whack it up? What you don't want to happen is that you hammer out a difficult agreement with the first party, only to find the second party unwilling to accept terms that fit your first deal, forcing you to go back and renegotiate it.

My general advice in these situations – which may not be applicable in all cases – is for the two defendants to work out their split first, as well as their mutual expectations vis-à-vis P, so that they present a united front in negotiating against P. This is easier if each defendant is willing to pay the same percentage amount, no matter what level of damage settlement is later agreed to with P. It's tougher if, for instance, D-1 has a limit – e.g., he's willing to pay 50% of the damage up to a $600,000 overall settlement, but at $300,000 out-of-pocket he's just about tapped out and wouldn't be willing to pay the same percentage at higher settlement figures. This may call for D-1 and D-2 to agree upon a schedule of sharing percentages that vary at different settlement levels. By the way, even if D-1 and D-2 are able to resolve their split, they still have the problem of who will handle the negotiation with P – a question which may be especially significant when they're not on the same page as to how much they'd be willing to pay if P hangs tough.

So there are problems, complete with lots of finger-pointing, but at least when you arrive at the magic numbers for the aggregate damage and the split, you're home. The even tougher case occurs when, in addition to resolving the dispute by a negotiated damage allocation, you also have to work out the terms of a forward-looking arrangement for at least two of the parties, in order to reach final settlement of the whole shebang.[3]

There are numerous areas in the commercial world where multi-party disputes arise. Distressed company situations, for example, require resolution of the conflicting disputes between the various creditor groups and other players to achieve

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[3] For an extended analysis of the usefulness of deal-dispute mediation, see James C. Freund, *Anatomy of a Split-Up: Mediating the Business Divorce*, 52 Bus. Law. 479 (1997).

a consensual bankruptcy – avoiding a forced sale (or worse, padlocking the company and selling it for scrap) – a sector made more complicated today by dueling crisis managers and hedge funds with interests in several camps. Complex construction projects with many stakeholders (architect, construction manager, consultant, general contractor, subcontractors, vendors/suppliers, insurers) are a prime source of multi-party disputes. Another obvious area is mass torts, with multiple plaintiffs and defendants creating many moving parts on the way to an overall settlement – one that not only avoids the litigation but also obviates the threat of some plaintiffs making separate deals with individual defendants.

The Case for Settlement

I'm a strong believer in the proposition that most commercial dollar disputes should be settled rather than decided in court. My reasons for this (set forth at greater length elsewhere[4]) include not only the usual suspects (expense, drawn-out proceedings, aggravation, negative energy, disruption of business, adverse publicity), but something I consider even weightier. To my way of thinking, litigation is not a logical way for business people to resolve a dispute. In other areas of running their companies, top executives try to make rational risk-reward decisions, basing their business judgment on an assessment of the probabilities. To "outsource" the outcome of their dispute to a judge or jury – triers of fact who are forced to decide all the way for one side or the other, even when the probabilities are much more balanced – strikes me as antithetical to sound business practice. And for a defendant faced with a huge claim, it's simply too big a risk to take – how much wiser to control one's own fate.

My position on settlement applies in spades in a multi-party dispute, especially one with some forward-looking deal aspects. The omnipresent litigation – often taking place in separate suits in different jurisdictions – is incapable of generating an outcome that effectively apportions the pie, and it certainly can't cut that necessary prospective deal. Only a negotiated resolution can accomplish what's needed.

But this is something that's very difficult for multiple parties to achieve on their own where the issues between any two often differ from those dividing other pairs or threesomes, interests vary widely, and the pending multi-state litigation could generate inconsistent results. Just getting everyone together in one place at one time may pose an awesome task for parties who frequently are hostile to

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[4] *Calling All Deal Lawyers*, *op. cit.*, pp 40-41.

each other and whose litigators – hired to protect their clients' postures in the various lawsuits – are unlikely to be spouting conciliatory verbiage.[5]

I'm going to take you through a hypothetical multi-party dispute *cum* deal situation shortly. You'll be able to see why, with all of the moving parts, it's so difficult for the parties to resolve the whole mess on their own.

I had a recent experience mediating one of these arduous situations, which we were fortunate enough to be able to resolve in a matter of days. Some years back, I represented a party in a complex mediation involving a host of litigants, where it took us six weeks of continuous activity to achieve a settlement. It's my belief that, although it may take time and is definitely no sure thing, mediation offers the best hope for getting the parties to the finish line.[6] That recent experience was what got me thinking about some of the special characteristics of this type of problem.

Getting the Mediation Started

Let's assume that the several parties to a dispute, having decided to try mediation, select me as the mediator. Here's what I think a mediator should be doing, or at least thinking about, before the actual in-person phase of the mediation begins, so as to maximize chances for a successful outcome.

The first big hurdle, undertaken in conjunction with the lawyers for each party, is scheduling a time and place for the mediation proper. Attempting to conform so many individual schedules can often be a challenge. Even in two-party proceedings, it's crucial for the mediator to try to schedule extra consecutive days. Most significant disputes are not resolved in a day, especially when you're trying to get multiple parties to agree upon a mutually satisfactory outcome. If everyone goes home before the task is completed, there's a risk of losing any ground that may have been gained.

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[5] For a detailed discussion of the problems in trying to settle disputes, see James C. Freund, *Bridging Troubled Waters: Negotiating Disputes*. 12 Litig. 43 (1986), later adapted in James C. Freund, *The Acquisition Mating Dance and Other Essays on Negotiating* (Prentice Hall Law & Business 1987).

[6] Many of the problems that arise in unassisted negotiating can be attributed to foolish moves by one side or the other which throw a monkey wrench into the works. Examples include premature "final" offers, dangerous bluffs, unwarranted threats that lead to counterthreats, and the like. One of the real advantages of mediation is that, by keeping the parties apart and limiting the information the mediator conveys back and forth, such ill-advised actions are prevented from occurring – which can be a real asset to a successful negotiation.

A related point is the importance of each party having its decision-maker present for the duration of the mediation. That individual is usually (but not invariably) a responsible business executive.[7] The mediator should make sure that all parties are fully committed on this score. How frustrating it is when the party representatives on the premises can't commit to anything. Mediation just doesn't work well unless the person who calls the shots (or at least recommends approval to a higher-up likely to abide by the recommendation) is on the scene.

In any mediation (but especially one with multiple parties), I try to get an early sense – mainly through my conversations with the lawyers before the in-person process has begun – as to whether each party is on board as far as resolving the dispute through mediation. I'm wary of getting into a situation – which can and does occur, particularly when the parties have been pushed to mediate by a judge or arbitrator — where one side prefers the impasse to remain unresolved, unless it can achieve in the mediation its adversary's unconditional surrender (which, of course, is well-nigh impossible). I want to be satisfied that all the decision-makers are entering the process in good faith, and that they understand a successful mediation requires some compromise.

I'll level with you – I also try to ascertain whether one or more of the lawyers involved may have an interest in keeping the litigation alive. Now, don't get me wrong. If a trial lawyer representing his client in the mediation has an honest and rational belief in the strength of his case – based on which he advises his client not to accept a negotiated result that's a lot worse – I may (as mediator) disagree with his view of the merits, but I don't question his *bona fides*. What I'm concerned about is the relatively rare case where the trial lawyer, irrespective of the merits, doesn't want to see his big case terminated prematurely. Partly for this reason, and partly because I can often sense that some new deal will have to be fashioned to resolve this imbroglio, I'm encouraged when I hear that a party's mediation team includes a deal lawyer as well as the litigator. And if I don't hear that, I may suggest it – although always stating that it's for the second reason, never the first!

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[7] I like to have a business person there even if the lawyers themselves possess the requisite authority to settle. Business people know (or at least *should* know) how to make a deal. And the more the dispute can be turned into a deal, the better the chances of resolving it.

Two caveats here. The advantage achieved through the active participation of business people can turn into a disadvantage if the specific person attending has been actively involved in the events that gave rise to the dispute (which is often the case) and, in addition, has such a need to defend his past actions that he lacks the flexibility required for a successful mediation (which needn't be the case, but sometimes is). Similarly, if there's a lot of bad feeling between responsible individuals on opposite sides, this can stand in the way of meaningful movement, dooming the mediation even before it starts.

Because a multi-party mediation is so much more time-consuming than one with just two parties, the mediator should make a special effort to get as much done in advance of the mediation proper as possible, so as to maximize effective use of the time that everyone is together. In this vein, the mediator ought to ask the parties to make written submissions (not too lengthy) of their views on the merits of the dispute. The mediator needs to receive these sufficiently prior to the meeting to absorb the information, pose any pertinent questions, and request necessary supplements.

In my experience, these initial submissions are as uniformly favorable to the submitting party as a trial brief. So I ask the submitters to send copies to the other parties, in order that everyone can see what's being argued. (I tell the parties to feel free to share privately with me anything of a conciliatory nature they want to pass along — fat chance.) Depending on time constraints, I may or may not authorize reply submissions – but if I don't, I'll get an earful of those comments when we get together. On the other hand, I treat as confidential both the questions I pose in response to the submissions and the answers I receive – I don't want others drawing any inferences from what I ask a particular party, and I'd like to encourage (though I rarely receive) candor in the replies.[8]

There's a special provision I've been using recently in the mediation agreement I sign with the parties – provided the parties want it and they generally do – that has even more value in multi-party situations than in two-party disputes. It says, in effect, that if the mediation doesn't result in a mutual agreement, I will then recommend a specific overall resolution for all parties. I spell out in the mediation agreement my method of arriving at this non-binding determination – not as an arbitrator might make an award, but on a compromise basis befitting a mediation, using a composite of various factors (including but not limited to the merits of the dispute). I tell them I'll present this recommendation to each of the parties separately, together with my rationale for reaching that result and why it makes sense for them to accept it (which may differ depending on each party's situation). Each party will be free to accept or reject my recommendation, but it won't be subject to further negotiation; and it only becomes effective if all parties consent. Having seen this provision actually work in a major case where the parties were far apart at the end of

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[8] One further word on this confidentiality issue. In the mediation proper, the general rule is that what a party tells me in private – and especially a party's sentiments relative to the resolution of an issue – is confidential unless I'm expressly authorized to reveal it. But with regard to the allegations that one party is making against another (or the pugnacious replies to those allegations), I tell the parties I'm going to assume (unless specifically advised otherwise) that I'm free to relate these to others. After all, these charges are obviously intended to influence my thinking, so the other parties should be given an opportunity to respond.

the mediation, I believe in its potential efficacy. Moreover, I think its looming presence provides some extra incentive for the parties to come to final terms on their own.[9]

For reasons I've gone into in more detail elsewhere,[10] I think a mediator of tough commercial disputes (and a multi-party dispute is certainly that) needs to be active and judgmental. He or she has to bring a splash of reality to the face of the parties' often exaggerated aspirations and intransigent postures – making them see the holes in their "winning" positions through impartial eyes, in order to justify the movement needed to bridge big gaps. So when I'm the mediator, and assuming the parties are receptive to my playing such a role, I give my views on the merits of the issues involved, help the parties arrive at a substantive basis for settlement, and try to play an instrumental part in actually negotiating it. Nothing short of this, in my view, has a decent chance of success in any significant dispute mediation – but especially one with multiple parties.

The Casino Caper

I find it most instructive to view this kind of analysis and advice against the backdrop of a specific situation. (My most recent book, *Smell Test – Stories and Advice on Lawyering*[11]– takes this one step further by using and then analyzing fictional short stories I've written.) Take a few minutes to review the following fact pattern – I call it "The Casino Caper"[12] – from the practice area I'm most familiar with, mergers and acquisitions. Mastering the facts – as any conscientious mediator or other dispute resolver must do in the real world – will help you grasp the negotiating points I'll be making down the road. And having a bird's-eye view of a real live mediator in action will give you the flavor of what's actually involved. Although the situation may seem complex at first, it really isn't – other than involving four parties whose interests are, shall we say, divergent.

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9 I'll have more to say on this subject in discussing The Casino Caper, *infra*.

10 See, e.g., James C. Freund, "The Neutral Negotiator – Why and How Mediation Can Work to Resolve Dollar Disputes" (Prentice Hall Law & Business 1994)(on file with the author).

11 ABA Publishing, 2008

12 This situation is entirely hypothetical – I have no actual model or precedent in mind. I confess to knowing very little about the hotel and casino businesses involved, so please excuse me if I ignore some fine points of the industries (including the laws governing conduct). You should assume that all of the companies involved are privately held, so no disclosure requirements are involved, and further assume that there are no anti-trust or other regulatory issues.

The central entity in The Casino Caper is a company that owns and operates hotels in the western United States – we'll call it "Hotels". A man named Herb Honcho owns all of Hotels' stock and is its chief executive officer.

Through a subsidiary, Hotels has a joint venture with a large casino owner and operator (let's name it "Craps"), to own and operate H-C, a casino hotel in Nevada. The joint venture runs for another ten years. Its terms are favorable to Hotels but have become unfavorable to Craps. In fact, Craps has asked several times to renegotiate the deal or, failing that, to be released from the joint venture.

A company in the entertainment business (we'll call it "Shows") wants to make a major move into the hotel business, and is especially attracted to the idea of owning a casino hotel where its talent can perform. It focuses on Hotels, covets the H-C casino hotel, and after studying the situation, proposes an acquisition to Herb Honcho.

Honcho, who is 65, decides it's time for him to leave the rat race and get into socially redeeming activities. The price Shows offers for Hotels is a pretty good one, and so, without extensive negotiating (and not too much lawyering) – and without notifying Craps – Honcho enters into a short-form agreement with Shows for Herb to sell 100% of the stock of Hotels (including its interest in H-C) to Shows for $900 million cash. A clear proviso to the sale is that Shows will only be willing to pay that $900 million if it ends up with Hotels' favorable interest in the H-C casino joint venture. On that score, however, there's a little problem – namely that the H-C joint venture agreement is ambiguous as to whether a transfer of the stock ownership of Hotels effects a transfer of its interest in the H-C joint venture without the need to obtain the consent of Craps (as would clearly be required if Hotels tried to transfer its interest in the joint venture directly).

When the Hotels-Shows deal is publicly announced – including reference to the condition to Shows' obligation that the H-C casino joint venture remain in place – Craps sees this as an opportunity to get out of the unfavorable joint venture, or at least to better its terms. So it promptly brings a court action in Nevada (whose law controls the joint venture) against both Hotels and Shows, seeking a declaratory judgment that the Shows acquisition of Hotels will, in the absence of consent from Craps as to transfer of control of H-C (which Craps makes clear will not be forthcoming), terminates the joint venture. Shows promptly challenges Nevada's jurisdiction over it – an issue as to which there are arguments on both sides.

The public announcement of the deal also sparks interest on another front. A large food company (we'll call it "Foods") has also been contemplating an entry into the hotel business. Now, hearing that Herb Honcho has put Hotels up for sale, Foods approaches Herb. He encourages Foods to top Shows' price, which it

does – offering $1 billion for Hotels. In addition to price, the other major difference between the Foods offer and the Shows deal is that Foods (a bible belt stalwart) does *not* want to get into the casino business, so its offer is conditioned on termination of the H-C casino joint venture.

Of the two deals, Herb Honcho prefers the Foods offer. Not only is it $100 million higher than the Shows price, but it eliminates the problem he faces on the Shows deal – the Craps lawsuit to terminate the joint venture. But isn't he already committed to Shows? Not so fast, says his lawyer – the Hotels-Shows short form agreement fails to state clearly whether it's a binding context or just an agreement in principle. So Honcho, taking the position that it was merely an agreement in principle (and without notifying Shows as to what he's about to do), proceeds to enter into a long form binding agreement with Foods at the $1 billion price, conditioned on termination of the joint venture, and with Honcho indemnifying Foods against any claim by Shows.

Honcho's lawyers then go into the Nevada court where Craps sued for a declaratory judgment and tell the judge that the suit is now moot, since its deal with Foods accomplishes what Craps is asking for – namely, termination of the joint venture. But when the Hotels-Foods deal is announced, Shows – predictably furious over Honcho's perfidy – brings an action in a Delaware court (where Hotels is incorporated and whose law controls the Honcho-Shows agreement), suing Honcho for breach of contract, suing Foods for inducing that breach of contract, and seeking specific performance of its agreement to buy Hotels. (And, you guessed it – Foods challenges Delaware jurisdiction, while Shows tells the Nevada court to wait a minute, that issue over the transfer of control without consent hasn't been mooted.)

So now the parties have a real mess on their hands.

- Shows and Foods are vying to own Hotels.

- Shows is relying on a questionable short form agreement, but Foods still has to worry about whether or not it's enforceable.

- In one state, Craps is suing Honcho and Shows, and in another state, Shows is suing Honcho and Foods – in each case with an uncertain outcome.

- Jurisdictional questions have been raised in both courts that will serve to delay any judicial decisions on the merits.

- Both Honcho and Craps (for different reasons) prefer Honcho's deal with Foods, but Shows still has the piece of paper that's arguably binding.

You can see, can't you, why this contretemps will be very difficult for the parties to resolve by themselves – especially since the various events and lawsuits have created bad feelings all around. As for the litigation in two different jurisdictions, it could drag on for a long time through appeals and such, might result in inconsistent verdicts, and is bound to make somebody unhappy with the ultimate decisions.

So wisdom prevails, and all four parties decide to see whether a four-way mediation can lead to a break-through. Let's assume I'm the mediator chosen by the parties for this task. All the preliminaries have taken place and now everyone is assembled in one place.

The Opening Rounds of the Mediation

Usually, at the outset of a two-party dispute mediation, I put everyone in a large room and let the parties and their counsel vent about the merits of their respective cases. I do this in part for psychological reasons: the parties have to feel the mediator has heard their strongest arguments, and the litigators (who, if the mediation is successful, won't get a chance to shine in court) need a forum to strut their stuff. But it also may have some practical benefits – for instance, the listening side's decision-making executive may be influenced by the venting side's version of the merits, while the mediator can get a feel for the strength (or lack of persuasiveness) of each party's case.

In a multi-party dispute, however, I suggest foregoing this – it takes up too much time, is too disruptive, and gets things off on the wrong foot. The parties have told the mediator where they stand in their written submissions – now it's time (and time is a valuable commodity here) to strike a positive note in terms of reaching an overall accommodation. I do, however, let each party put its best foot forward to me privately in our initial separate caucuses, so they can feel satisfied they've had that opportunity.

In the early stages of the mediation, in addition to trying to ascertain the parties' underlying desires, I attempt to get a handle on the dynamics among members of the respective teams. Let's say that each group contains a decision-making executive, a financial guru, an inside counsel, an outside litigator, and a deal lawyer (who may at times be the inside counsel). Sure, I know who the ultimate decision-maker is, but I'm also looking to see who's the *de facto* leader of the pack. The more the dispute involves a financial decision, the greater chance the financial

guru may be the key player; if litigation looms large, the litigator may take the lead; if the inside counsel has a lot of mediation experience, the executive in charge may defer to him or her. Once I've identified the leader, I'll gear my strategy to getting both the decision-maker and that person behind a resolution.

Within any group, there are often some hard-liners and some people of a more reasonable bent. A certain flexibility is the key to achieving good outcomes here. If the decision-maker (or the group leader, if that's someone else) is a hard-liner, then I know the mediation is in trouble before it even starts. But as I survey the participants in The Casino Caper, I'm glad to note that, at least on the surface, everyone seems willing to listen and be reasonable.

Discerning a Tentative Format for Resolution

At some point fairly early in the multi-party proceedings, I go off by myself to analyze what form a resolution might take. In The Casino Caper, I can envision at least three plausible outcomes.

1. *The parties return to their original pre-dispute situation and all litigation is dropped*. In other words, Hotels doesn't get sold under the existing agreements to either Shows or Foods – those agreements are terminated. The parties can begin new rounds of negotiations if they wish – and if the Hotels properties are growing more valuable each day, that might not be so bad for Honcho (although worse for Shows and Foods). Craps will have to live with the unfavorable-to-Craps existing H-C joint venture for the time being.

I can see a big problem with this outcome right off the bat. Although the matter isn't free from doubt, I've reached my own conclusion that Shows' position as to the enforceability of the short form agreement is a lot stronger than Honcho's argument that it's just an agreement in principle. Shows apparently believes this in spades, so it is going to demand some meaningful payment for giving up its rights under the Shows-Honcho agreement. That payment will presumably have to come from Honcho, since there's no way that Foods is likely to chip in.[13] Honcho is not going to be happy making payment of any kind, especially since he can't be sure of his ability to rekindle negotiations for the sale of Hotels.

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[13] Actually, Foods will probably seek something for itself from Honcho, especially through the indemnification provision in the Foods-Honcho deal. Honcho can argue that getting Shows to drop its inducing-breach-of-contract suit against Foods should be sufficient consideration, although this would require Honcho to admit the validity of the Shows-Honcho agreement, which he might not want to do.

I also have a strong sense (which the parties undoubtedly share) that this back-to-square-one resolution doesn't really accomplish much, while failing to take into account what has transpired in recent months. So I consider this strictly a fall-back position if the other possibilities don't eventuate.

2. *Foods gets to buy Hotels and all litigation is dropped.* Under this outcome:

(a) Craps receives a benefit because the H-C casino joint venture (which is unfavorable to Craps, but that Foods doesn't want) is terminated, and no longer presents a problem.

(b) Shows will have to get paid a substantial sum for going away without Hotels.. The bill, however, can be shared by Honcho and Foods. So, assume that Honcho and Foods are still talking about a $1 billion valuation for Hotels; and assume that Shows needs to receive $100 million to walk. Half of this might come from Foods (so its total cost is $50 million more than the $1 billion purchase price). The other half would be paid by Honcho out of the purchase price, so he ends up with $950 million – less than under the original Foods deal, but better than under the Shows deal.

3. *Shows gets to buy Hotels and all litigation is dropped*. Here's what Shows has to do to get there:

(a) It will have to pay a lot more than the $900 million it agreed to pay in the first deal, with the excess divided up between Honcho (to get him to give up the richer Foods deal) and Foods (which must receive something significant to walk away from the situation).

(b) At the same time (and this can only serve to diminish its eagerness to pay more to Honcho and Foods), it has to renegotiate the terms of the C-H casino joint venture to make it more favorable to Craps (and thus less favorable to Shows), in order to get Craps to drop its claim that Honcho's sale of Hotels without Craps' consent terminates the joint venture.

My initial impression is that #2 – the sale to Foods – appears logical and thus is probably the preferable direction in which to steer the negotiations. I'm influenced here not only by the complications inherent in # 3, but also for several affirmative reasons:

- Foods already has more money on the table than Shows, and for the purchase of fewer assets (since its deal excludes the H-C casino joint venture with Craps that's favorable to Hotels). Money is what it's going to take to incentivize Honcho and to pay off the losing bidder in either event.

- Foods will be able to get Honcho to chip in on paying off Shows – the motivation being that Shows has a good legal claim against Honcho for breach of contract.

- Since Foods doesn't want the casino, this moots the lawsuit with Craps, allowing the latter to terminate the joint venture with Hotels that's unfavorable to Craps.

I'll proceed tentatively with that in mind (although not sharing my initial determination with the parties), while keeping my eyes and ears open to evidence that a different format might be preferable. As a mediator, you can't get fossilized — you never can tell how you might have to adjust your thinking.

Gaining Valuable Information

I am aware that some mediators like to bring the parties together for substantive discussions, but even in two-party disputes – and especially where multiple parties are involved – I'm a strong advocate of the private caucus for a number of reasons. (I'll get into some of my rationale for this at a later point in the article.) Here, resuming discussions with each of the parties separately, I shift from listening to them vent to starting to make my own probes, in order to confirm that I'm headed down the right path. And this, of course, requires confidentiality.

One technique I sometimes use is to ask each of the groups three questions: (a) what their favored outcome is (but on a realistic basis, recognizing that everyone has to give something up in order for a settlement to take place); (b) what their second favorite outcome is (again on a realistic basis); and finally, (c) what their least favorite outcome is. I avoid labeling their answer to this last question as an absolute no-no or other similar indication of inflexibility, since I may have to push things in that direction, and I don't want anyone to lose any more face than they have to.

Another aspect I'm looking for in any dispute that has multiple issues (but of particular value when several parties are involved) is ranking the importance of the various issues to each party. Because the parties frequently have different views, it helps for me to know what's important to one (or a matter of relative indifference to another) in terms of overseeing the trading that will eventually have to

take place. In this regard, I also take note of which issues carry an added emotional component for one of the parties (as issues often do), going beyond the dollars involved. The emotional issues are not always the big ticket items, which means that I may be able to arrange a swap of one party's acquiescence on a small dollar issue that represents a real matter of principle for the other party, in exchange for the other's concession on a larger dollar issue that it doesn't care so much about.

In a multi-party dispute, I'm also looking for information that suggests to me some shared interests between two of the parties. These interests may lead to a coalition or alliance that I can use later to overcome some obstacles – although it also has the potential to hamper my efforts.[14]

At any rate, my probing of each of the parties produces some interesting information that I need to factor into my determination of what's the best format for moving ahead.

In talking with Foods, for example, I learn several things of note:

- that Hotels is not the only hotel chain they considered buying before making their move, and that at least one other chain is still available, although at a slightly higher price;

- that the $1 billion price tag they put on the deal is just about their limit, especially since under their offer, a key element of Hotels' value – the C-H casino joint venture – is specifically excluded;

- that the dollars they might receive for walking away could come in very handy in buying this other more expensive hotel chain; and

- that although their legal team puts up a brave front on the issue, Foods' top management is clearly bothered by Shows' claim against them for inducing a breach of contract – it's the kind of allegation that a bible belt company such as Foods doesn't appreciate having aimed its way.

With Honcho, although he says it all comes down to how many dollars he can put in his pocket and not be harassed by lawsuits, and even though he claims not to care who ends up with Hotels (as between Foods and Shows), my sense is that he would be sorry to see an end to the H-C casino joint venture, which has formed a major part of his professional image. As for the money, he definitely wants to end up with more than the $900 million he was going to get originally from Shows, but I

[14] For example, see the discussion in footnote 17.

think he realizes he'll have to take something significantly less than the $1 billion offered in the Foods deal.

With Craps, what I find out is something that really shouldn't have surprised me, since Craps is in the casino business. Notwithstanding the complaint in the Nevada lawsuit, its first choice isn't getting out of the unfavorable H-C joint venture agreement – that's strictly second choice. Its first choice is to stay in the joint venture under revised terms more favorable to Craps. After all, Craps invested a lot of time and money in developing the H-C casino business, and I can see that its management would be disappointed to step away from the results.

But the biggest education I receive comes from the time I spend probing Shows. What I find out is that Shows is genuinely determined to end up with Hotels, including the H-C casino. For Shows, there's no other company comparable to Hotels on the market – in effect, Shows really doesn't have a second favorite outcome.

Moreover, Shows is of the view – a view I sense is driven by its outside law firm, which isn't about to admit that the firm's short form acquisition agreement didn't do the trick[15] – that it has a binding contract to buy Hotels, and is prepared to go to the mat in court to uphold that position. Moreover, Shows gives short shrift to the argument on Craps' part that the H-C casino joint venture isn't transferred by the transfer of control of Hotels. (And, I must say, I've reached pretty much the same conclusion on my own.)

In short, I come to realize that this is not just posturing on Shows' part, and that to try to induce Shows to go away would probably cost more bucks than the other parties could afford. I also find out that, far from being tapped out, Shows has substantial excess funds available, which could be used to up the ante for acquiring Hotels (with the H-C casino) and also to pay Foods for going away.

And so that leads to my "aha!" moment – when I come to the realization that the format of resolution I originally thought to be the most promising (#2) is unlikely to be consummated, and the other format I considered too complicated (#3) could actually take root.

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[15] On occasion, I run across the flip side of that situation – where the lawyer whose document is at issue doesn't want to face the embarrassment of a court decision holding it ineffective, and accordingly works hard to achieve a negotiated resolution of the dispute.

Marketing the Revised Format

At this point, I go off by myself to figure out what such a deal would look like and how to get there – including the way to sequence the negotiations I'll be conducting with each of the parties. As a mediator in a multi-party dispute, you must have a game plan to follow if you expect to steer negotiations in a direction that can produce a successful outcome.[16] Here's what I work out, and what I then proceed to do.

I start with Craps which is, in one sense, the key to the whole resolution. I have to make sure that Craps is prepared to stay in the H-C joint venture if the terms are improved. And its people have to understand that they can't push too hard to better those terms, or else Shows (which needs a still valuable H-C casino to raise its sights on how much to invest in this project) won't be able to justify the additional dollars needed to make things work.

Assuming that goes well, I next approach the Shows team – and let me paraphrase my pitch to them. "I've got good news and bad news for you. The good news is that, in my opinion, the best way to resolve this is for you to 'win' by acquiring Hotels with an H-C casino deal in place. And on that score, I've satisfied myself that if the joint venture terms were revised somewhat for Craps' benefit, Craps would stay on and relinquish any claim that it's entitled to terminate the joint venture on the sale of control of Hotels.

"But here's the bad news, fellows. You're going to have to dig deep into your wallets to up the ante – both what you have to pay Honcho and what you'll have to pay Foods to go away – and without as favorable a deal on the H-C casino as you originally thought you were getting, although without the specter of the Craps termination lawsuit.

"Are you guys willing to go down this path? If you are, my next stop is to try to convince Foods to give up its claim to Hotels and go away in exchange for some dollars. If you're not, tell me now, and I'll start working on a plan whereby Foods wins and you end up taking a walk in exchange for some money."

Well, they reply, we want to buy Hotels, and we have the funds – but we don't know how much we'll be willing to pay until we see what the new H-C casino joint venture agreement is going to look like. I tell them I appreciate this point,

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[16] For my "game plan" approach to negotiating generally, see James C. Freund, *Smart Negotiating: How to Make Good Deals in the Real World* (Simon & Schuster, 1992).

I'll be working on both matters simultaneously, and I understand that any numbers we discuss to pay Honcho and Foods are conditioned on your ability to work out a satisfactory forward-looking deal with Craps. The response I get from the Shows team is guarded but certainly not unfavorable.

Then I go to the Foods group and tell them the bad news – that in order to achieve an overall resolution here, they won't be ending up with Hotels. My pitch (paraphrased) is what I believe to be the truth: "Shows is just intransigent, feels strongly that its contract is binding, and is prepared to go to court to prove it. And by the way, fellows, as a matter of law, I think Shows' position is much the stronger one. As for you guys, well, Hotels isn't the only fish in the sea; and you'll be entitled, as the price for giving up your claim, to receive a payment from Shows and/or Honcho. I'll work hard on getting you something substantial. By the way, you might find those walkaway dollars very helpful, as you reach for that alternative hotel chain that's more expensive than this one."

Finally, I go to Honcho, who lets me know he's peeved that I'm spending so much time with the others. I reply (again paraphrased), "That's because all I've got to work out for you are the dollars (plus, of course, ending the litigation), while the other groups have some more complicated paths to tread and decisions to make. Whichever way we go, Herb, you're going to end up with something better than $900 million but less than $1 billion [and I tell him why that's so]. Let me tell you why I've decided to go the route of Shows ending up with Hotels [explaining my reasoning].

"But look, Herb, it's not only Shows that considers you bound under the original short form agreement – it's me, too [explaining why]. I'll try to get you as good a price as possible, but whatever you receive in excess of $900 million is gravy – found money, you might call it. Just remember, the value of that $1 billion Foods price needs to be reduced by the potential big cost of the indemnity you gave Foods. As a matter of fact, even the original $900 million you agreed to take from Shows was in doubt, because of the possibility that Craps might win its case to terminate the joint venture – in which case Shows is entitled to walk and would presumably do so.

"Listen, Herb, we're operating in a climate in which the H-C joint venture terms will be getting worse from Shows' perspective than what it originally planned on. Therefore, it's not going to be easy to wrench a lot of extra money from Shows, so you have to be prepared to chip in to whatever it takes to pay off Foods." Honcho looks glum but doesn't kick me out of the room.

Now I put Honcho and Foods into cold storage while I work on Shows and Craps – where the real action is. This is especially true with the Shows team, which is by far my biggest task. I have to raise their sights – paying more to Honcho,

paying a sizeable amount to Foods, and at the same time conceding better terms to Craps on the joint venture (which has the effect of making the Hotels acquisition less valuable to them). For this, I have to pull out all the stops.

First I emphasize the negatives, then the positives, along these lines (paraphrased): "You guys may be over-valuing the effectiveness of your short form agreement, which is at least questionable in the hands of an unsophisticated jury – or in the hands of a judge who thinks a traditional long-form agreement is what's needed to bind companies on major deals. And by the way, even if the short form agreement is upheld, the Craps argument that it doesn't serve to transfer the joint venture isn't frivolous, so you may find you're not getting what you bargained for. Let's face it, fellows, you made a great bargain the first time around. The fact that Foods was willing to pay $100 million more than you – and not even get the money-making H-C casino joint venture – is irrefutable evidence that there's a lot more value here, so you can afford to pay up."

Shows' reply is predictable – they don't know how much they can pay until they know what the terms are in the revised deal with Craps. But that's just what I'm interested in finding out – how much they're willing to invest in this situation. I've found that when, as here, there's an uncertainty affecting the final number, the way to proceed is to hypothesize a best case basis. So I tell them (paraphrased), "Look, I'll go to work on Craps, but meanwhile tell me how far you'd be prepared to go if (hypothetically) the Craps joint venture were to stay the same as it is now. Sure, I understand that this won't happen and that your ultimate number is contingent on how the joint venture terms work out – and I won't tell anyone else what your number is – but how about it?"

In a situation like this, there's always a question of whether to discuss the dollars in excess of $900 million that Shows will have to put up in aggregate terms, or whether to negotiate separately the amounts that will go to each of Honcho and Foods. In this case, my preference is to split up the two. In part, my reason is psychological – sure, the Shows people can add the two numbers together and moan loudly over the aggregate, but at least I'm not contributing to that malaise. The more compelling reason, however, is that it allows me to furnish better specific rationale to Shows for what is needed to incentivize those other two parties to sign on to the deal.

Now I go back to Craps with this pitch (paraphrased). "Forget all this lawsuit stuff about termination. The fact is you're a major player in the casino business. The best outcome for you is having Shows acquire Hotels, with you staying on in the H-C joint venture under improved terms. For that to happen, Shows has to come up in price to Honcho and also has to pay significant money to make Foods go away. I may be able to get them to do that, but not if you try to renegotiate the joint venture so much as to make it untenable for Shows. And although you can attempt to

leverage your argument that the transfer of control of Hotels doesn't transfer the joint venture without your consent, you should understand that Shows gives short shrift to the merits of that – and I must say [and here I'm being truthful], so do I.

"So don't push it too far – no heroics, please. Only seek improvement up to the level of equilibrium. And don't try to change everything – keep focused on a few key elements that make the terms unfavorable to you." They nod but don't commit; the nod is good enough for me.

So now I return to Shows and tell them I believe that Craps will be amenable to making a reasonable deal and will only seek changes in a few areas that shouldn't interfere with Shows' ability to make big profits. My message to Shows is clear – don't use this revision (which I might just refer to as a "tweaking") to lower by too much the amounts you're willing to pay Honcho and Foods.

Then I go to the Foods group, give them the lay of the land, and try to figure what amount of dollars they'll require to leave the field. Here, of course, I take the position (which I do believe) that Shows' short-form contract is binding, that Foods won't win in court trying to upset it, and that they face a very real problem in terms of the inducing-breach claim – so they'd better be reasonable.

Finally, I sit down with Honcho (who by now is really miffed at the lack of attention he's receiving) and here's what I tell him (paraphrased): "You did a bad thing [breaching the contract with Shows], but nevertheless I'm going to get you something more than you would have received in that first deal, albeit not as much as the illusory $1 billion Foods deal that was fraught with legal problems." From that point, I work on getting an idea of what figure Honcho will be willing to take.

So there are four moving parts, disputes to resolve, and one going-forward deal (the revised terms of the joint venture) to help negotiate. How to proceed now really depends on the various positions the parties take, but I'm on my way.

Some Reflections on Mediation

In a multi-party mediation, where the mediator is meeting separately with each of the parties, a real issue can arise as to what the people who aren't engaged with the mediator at that moment should be doing. They become restless the longer they're away from where "the action" is. How does the mediator keep them actively involved in the process?

I try to set up a regular rotation, where I don't stay with any one group too long, and the others know that I'll be meeting with them in the not too distant

future. I also try to give each group an assignment as they leave – something to work on in the interim, so they can come back to the next session with pertinent new information or with a response to some suggestion I've made to them in the prior session.

I usually discourage representatives of the parties from talking to each other outside the mediation room. I worry about a variety of things here – at one extreme, that they'll get angry at each other and depart the premises (or at least be tougher to deal with); at the other end of the spectrum, that one of them will concede a point that I want to use as leverage for a swap later on; or that an alliance may form that sidetracks the mediation away from the direction I'm working hard to establish.[17] I make an exception to this if two of the parties (in this case, Shows and Craps) will have to do business together going forward, and I think their respective executives need to get to know each other better. Assuming I consider the individuals reasonable enough to behave, I might encourage a get-together – perhaps warning them not to discuss the merits of the dispute but just to schmooze.

As I noted earlier, when mediating a dispute, I like to operate almost totally in private caucus with each party. One of the strongest reasons for this is that the mediator has to be able to tell a party which of its side's arguments are strong and which are not – going right to the merits. The party does not like the mediator's negative judgments, but it would be substantially more painful (and make the dispute harder to settle) if the negative judgments were conveyed with other parties present.

In this vein, a concern I have as a mediator in any dispute, but that's exacerbated with multiple parties, is the need to preserve the appearance (as well as the reality) of the mediator's neutrality. A party's team will listen to, and may well be influenced to move by, the mediator's negative judgments on an issue, but only so long as they're convinced the mediator is speaking from the heart and not from any kind of bias against them or in favor of someone else. And believe me, in the emotional, frustrating context of a multi-party dispute, this kind of paranoia (the friend of my enemy is my enemy) can find fertile ground.

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[17] So, for example, what if Foods and Craps were to get together and sketch out a deal along these lines: Craps would agree to allow the Honcho-Foods acquisition agreement to transfer Hotels' interest in the H-C casino joint venture, and Foods would agree to let Craps buy out Hotels' interest in the joint venture right after the first closing – thereby permitting Foods to pay extra for Hotels because of the funds it will be receiving from Craps. This may not be a bad solution for three of the parties, but Shows is certainly not going to let it happen; and if the idea were to get off the ground, it could derail the entire mediation.

There are various ways a mediator can (and should) attempt to combat this problem. She cannot, for instance, be peremptory – rather she must listen, acknowledge and discuss, at least at first. She can't be relentlessly negative on every aspect of a party's position; she has to balance this, at least partially, by speaking with approval of some aspect of the party's case.

I often like to go even further than this. I find some aspect of the matter that's obviously critical to the party's decision-makers – an aspect that, unless I'm able to get it for them (or at least a good approximation), I suspect they won't do the deal. It also has to be something that I think I can probably squeeze out of the other parties, at least if they receive something in exchange for it. I tell the team from the first party that I want to get them their pet point – that they deserve it – but it won't be easy. And then I say (paraphrased), "Let's work together to develop some arguments I can make to the other parties on this point – arguments that will have a lot more force coming from the neutral mediator than from you as the needy party."

One advantage of working in private caucus is the mediator's ability to adopt a party's constructive suggestion as the mediator's own – as if the mediator had thought it up – which makes it a lot easier to sell to the other side. If it's presented as coming from a party, the others will immediately be suspicious as to what the offeror has up his sleeve. So I ask the people who make the suggestion if they have any objection to me presenting it as my idea – to avoid that reflexive negative reaction. Usually they're agreeable, and that's how I do it.

A Draft Agreement in Principle (with Holes)

Assume that I make some progress in The Casino Caper toward getting everyone on the same page in terms of the format an ultimate resolution could take. I'm still a long way from home, though, in terms of the actual dollars to be transferred and the revised terms of the H-C casino joint venture agreement. Nevertheless, I think it makes sense at this juncture for me to draft a simple agreement in principle that sets forth the basic format of the deal. On matters where there's no agreement (such as the dollars involved), I simply leave a blank (or say "[amount to be negotiated]"). With respect to the joint venture deal, the draft agreement in principle can simply refer to it as "to be revised in accordance with the terms set forth in Annex A," and then leave Annex A blank. What I'm trying to accomplish here is to smoke out whether anyone has a problem with the basic format; if not, I can then press ahead on the numbers and the joint venture terms.

Let's say that this works, at least to the extent that everyone is willing to proceed within the format I've proposed. But each of the parties lets me know in no uncertain terms that it's not going to be any picnic to arrive at mutually agreeable terms.

The Foods team, for instance, makes it clear to me right off the bat that it will take a blockbuster of a dollar figure to make them go away – especially, they say, "because the merits of the lawsuit as to who's entitled to buy Hotels are definitely with us." Honcho argues that he doesn't want to sell for less than the $1 billion Foods was willing to pay him – particularly since Shows is now going to get the valuable casino it wanted so much. The Craps people tell me that the H-C casino joint venture agreement has to be substantially improved in a number of significant respects to make it worthwhile for them to stay on – otherwise, "we're outta here." And Shows, while admitting it can pay more than its original $900 million price, warns that its total outlay "won't be that much more – Honcho's not going to do a lot better than in the original deal, and we're not about to make Foods rich – and, by the way, the more Craps squeezes us on the joint venture terms, the less we'll have available to take care of the other two guys."

In other words, I've got my work cut out for me. Hey, no one said this would be easy.

The Deal Aspects

One question I have to deal with right away is whether Shows and Craps (with my help) should be negotiating the deal aspects of the forward-looking H-C casino joint venture concurrently with the negotiations taking place (through me) among Honcho, Shows and Foods on resolving the dispute. Under some other fact patterns, I could see deferring the bargaining on the deal until the dispute negotiations have been successfully concluded, or the parties are at least close to agreement. That's not the case here, however; in this instance, the deal negotiations need to proceed concurrently because Shows has to be satisfied with the revised joint venture terms in order to be willing to cough up the extra dollars required to take care of Hotels and Foods.

In terms of the deal aspect of The Casino Caper, I consider that strictly a two-party negotiation (with my help) between Craps and Shows. Although Honcho and Foods have an obvious interest in seeing this negotiation succeed (because the overall four-way resolution depends on it), I don't permit them to take part in the deal bargaining, whether through me or otherwise. The specific joint venture terms are none of their business, and I don't feel any need to keep them updated on what's happening there (other than a general report that "we're making progress.")

I won't go into detail here,[18] but my own favored technique in a dollar dispute is to get away from traditional bargaining – carrying offers and counters back

[18] For more detail, see *The Neutral Negotiator*, *op. cit*., pp. 27-31.

and forth – and engage in simultaneous private negotiations between myself and each of the parties in separate caucuses. I try with each party to find a common resolution at which it is comfortable settling the dispute, but without anyone knowing, until the end, just where its adversaries stand.

With regard to the deal aspect here, however, I do shuttle back and forth on specific issues, telling each party where the other stands (having received permission to do so) and urging them to close the several gaps. I find this approach – playing each party off against each other directly – better suited to trying to resolve multiple forward-looking business issues on which the parties clash.

The further question is whether to bring them together in the same room and let them negotiate directly with each other. There's no historic bad blood between Shows and Craps, so the frequent fear that they won't be civil towards each other isn't dispositive, although it sometimes is in other situations. A strong argument can be made for bringing them together if the issues to be negotiated are highly technical ones outside my area of knowledge, and I'm leery about conveying the parties' positions on things I don't really understand.

Nevertheless, in most instances I prefer to keep the parties separate and deal with each in private caucus. As a mediator, it's not enough for me just to carry messages back and forth; I feel the need to help shape the proposals transmitted, to ensure constructive movement toward an eventual agreement. The fact is I'm still negotiating with each party – telling them when I think a position they take is over-reaching, urging them to move in certain directions, trying to extract from them a variety of concessions. I can "call 'em as I see 'em" in private – and believe me, I do – but I'm reticent to do it in public. If I were to tell partner X that I don't agree with his argument on a certain issue in the presence of adversary party Y, it would unduly embolden Y and cause X to become hostile to me for my partiality towards Y.

So, for instance, I spend a lot of time here with the Craps group to ensure they don't try to cut too sweet a deal with Shows, since that will discourage Shows from adequately funding Foods' departure from the scene. I try to educate myself on what's significant in a casino joint venture. I make the Craps team show me precedents from deals they have with other hotels (or from the deals of other casino companies) and insist they hew to those terms rather than trying to better them. I tell them that Shows is relying on me to opine that the revised terms Craps is seeking are reasonable, so I need to be convinced of this – that they're not attempting to exploit the situation unreasonably. And when Craps isn't able to achieve as much as it seeks in a particular area, I point out that what they're getting is still a lot better than the status quo (if no deal were to take place) and certainly better than being out on their ear (if Honcho were to sell to Foods).

Ten Tips for Lawyers Representing Parties

I want to offer some advice to lawyers representing clients in multi-party dispute mediations, or for that matter, in any mediation. I've discussed this subject at more length elsewhere,[19] but let me just mention ten tips that might be helpful.

(1) Embark upon your assignment with a constructive problem-solving attitude – devoted to reaching an overall resolution, no matter how improbable that might seem at the outset. If you foresee some deal negotiations being required on your client's part, make sure someone on your team is skilled in that regard. Educate your client on what's needed for mediation to work in a multi-party setting – namely, some movement on everyone's part – and be prepared to prod things along in a constructive direction if the momentum seems to be lagging.

(2) Realize that you're in a negotiation not only with the other side but also with the mediator.[20] The bargaining with the mediator isn't adversarial (as it is in the case of litigants trying to settle a dispute directly between themselves) but rather akin to business lawyers negotiating an arm's-length commercial deal.

(3) By all means, put your best foot forward on behalf of your client's case in the opening stages of the mediation. But don't grossly overstate the strength of your arguments, which just serves to reduce your credibility with the mediator. If, in direct adversarial negotiations occurring prior to the mediation, you've already moved a certain distance from your initial position, you can mention that bit of history, but don't backtrack now to ground zero. And never feel you're doing your job by just remaining at the point you start out in the mediation – you've got to exhibit some flexibility.

(4) In dealing with the mediator, highlight those points that you consider sacred to your side and distinguish them from those that are bargainable.[21] Emphasize the issues on which you have strong arguments, to be sure, but also acknowledge that your positions on other matters are more vulnerable. The mediator will appreciate your realistic attitude, which can definitely work to your benefit.

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[19] See, e.g., *Anatomy of a Split-Up, op.cit.*

[20] This aspect is discussed at greater length in James C. Freund, *Representing Clients in a Mediation*, Vol 2 No. 9 ADR REPORT (Apr. 29, 1998).

[21] An example of this is the good job that the Shows lawyer and team must have done previously in convincing me that Shows is really determined to end up with Hotels, and, failing to achieve this in the mediation, is prepared to do battle in court to obtain that result.

(5) Recognize that your principal task on any issue you consider significant is (a) to get the mediator disposed toward your point of view, and (b) to persuade the mediator to communicate that view to the other parties, where it will have real impact. Help the mediator see why the positions the other party or parties have taken on the issue are unrealistic. Arm the mediator with ammunition to go forth – supplying analysis, rationale, key documents or extracts, pertinent case law, and such. And if you're worried about how the mediator will characterize your position on an issue to the other parties, instruct the mediator as to exactly what he should tell them (e.g., "They're dug in – they say there's not much room for them to move.")

(6) If you want to show the mediator that you can indeed be flexible, but without letting the other parties know where you're at, tell the mediator you're willing to go to point X – "but only after [one of the other parties] comes to point Y," and make it clear that the mediator can't mention your client and point X in the same breath to your adversaries. This kind of conditional offer incentivizes the mediator to try to move the other party to point Y, which is just what you want the mediator to do.

(7) Don't let the mediator be the sole person who is reflecting on how to solve a thorny problem. A little creativity on your part can go a long way to unfreeze a minor impasse – and what better way for you to utilize the downtime between sessions with the mediator.

(8) In attempting to get the mediator favorably disposed toward your side of the case, don't underestimate the importance of the mediator having a positive reaction to you on a personal level. Mediators are human, and they're going to be more responsive to someone they can relate to. You don't have to fawn or prostrate yourself, but on the other hand you should avoid coming across as cocky, obnoxious or sarcastic. Try to be businesslike and constructive, even when your views clash with those of the mediator. The worst thing you can do is accuse the neutral mediator of bias, based upon a position he or she takes that's contrary to yours or favors another party.

(9) Remember always, a smart negotiator has to know when to stop the music and grab a chair. I have nothing against lawyers for a party seeking advantages, and I appreciate the virtues of perseverance; but when the window of opportunity to reach agreement opens today, recognize that it may be gone tomorrow – people can change their minds, new factors might intervene. If you reach a point in the bargaining that's favorable to your client, then even though it may not be all you could hope to achieve by prolonging the process, this may well be the time to come to terms. The risk of losing the deal altogether simply doesn't justify the possible incremental advantage to be gained.

(10) Finally, here's what I recommend when, after exhausting all efforts to reach agreement on better terms, the only compromise that will swing the deal represents a negative stretch on your client's part beyond the realistic expectation as to outcome he had going in. Try to insulate the decision he has to make now from the emotions your team is feeling, from the frustrations that have accompanied the journey thus far. Phrase the sole issue your client needs to decide in these simple terms: If the deal was good enough to do at the level of your realistic expectation, does it still make sense at this required [say, 5%] stretch? If he answers yes, then tell him to shake hands on the deal, however reluctantly. If it's no, then sayonara.

The Denouement

Now, let's assume I make significant progress with each of the parties, but as the end of the scheduled mediation draws near (and people are preparing to leave to catch planes), gaps still remain on all four fronts. Assume also that progress has slowed to a crawl, the bargaining arteries have hardened all around, and tempers are beginning to flare. Here's where things stand at this point:

- Shows has come up to $930 million as the price for buying Hotels from its initial offer of the same $900 million of yore (arguing all along the way that the additional moneys were needed to pay Foods for dropping its claims). Honcho has come down to $970 million from his initial asking price of $1 billion – the same amount he was originally looking to get from Foods. So, some ground has been made up, but a $40 million gap remains.

- After a lot of angst, Shows has come up to offering $50 million to Foods to go away – doubling its initial offer of $25 million. Foods has reduced its ask to $75 million from the $100 million originally sought. So, there's still a $25 million gap.

- Shows and Craps, with my assistance, negotiated numerous points in a revised H-C casino joint venture deal and managed to reach tentative agreement on all of them except one important expense-sharing provision. If this provision were to come out Craps' way, it would be very costly tax-wise for Shows. If it came out Shows' way, it wouldn't be so bad tax-wise for Craps. Assume that no one's budging and there's no middle ground.

At this point,[22] here (paraphrased) is what I tell each of the parties: "In my judgment, we're unlikely to make much more progress today and time is running out. So you have a decision to make. Do you want to set a date down the road to resume the mediation, at which time we can try to close the gaps that so far have resisted closure? Or do you want to invoke the provision in the mediation agreement under which I recommend a specific resolution of all outstanding issues?"

This is a decision on which people can obviously differ, so each party holds a private caucus to deliberate on its response. If one or more parties are unwilling to resume the mediation at a later date, then it's over, and that triggers my role. Let's assume this is what happens here – all of them are discouraged with the recent lack of progress, have wearied of the effort, remain pessimistic about a future breakthrough, and want to get on with their lives. So it's up to me to propose a resolution – something that has to be accepted by all four parties or else they go back to war.[23]

As I ponder the terms to recommend, the main concept that runs through my mind is that of feasibility.[24] As I've made clear to everyone from the outset, I'm not making a value judgment as to where the resolution *should* take place or what is *fair* under the circumstances. I have to come up with a resolution that has a chance of being accepted by all parties – finding that precise juncture at which each would rather shake hands than return to court.

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[22] Devotees of the cooperative approach to negotiating would undoubtedly suggest that at this point we should be searching for shared interests underneath all the posturing. But the problem with this approach in most dollar disputes is that when you look beneath the positions a party takes, all you find are other, somewhat more reasonable, amounts of dollars! The real interests for many business people are precisely those dollars – dollars of cash flow or profit and loss or net worth, or dollars to provide a suitable return on other dollars previously laid out. It may be unfortunate, but money often forms the principal measuring stick of success or failure in the world of commerce – it's how the players keep score.

[23] Depending on the circumstances, I could make my recommendation that same day (after a short break to collect my thoughts) or defer it to a later date if I need time to work out some more intricate arrangement and accompanying rationale. Since I'll be presenting it to each of the parties separately, they don't need to come together in one place at that later date. For purposes of this article, let's assume that I feel comfortable making the recommendation to each of the parties while everyone is still assembled at the mediation location.

[24] I urge lawyers representing parties to keep this in mind. Because mediators have to assess the feasibility of particular settlements, one of the lawyer's main tasks is to make the mediator believe that pushing his or her client beyond a certain point just isn't feasible. But it only works if the party's requirements are realistic and the lawyer isn't seen as bluffing.

My recommendation is going to require movement by all parties, some more than others. Where, I ponder, is this most likely to come from? The relative positive and negative leverage[25] affecting the various parties is a crucial factor in determining this. If everyone knew where everyone else stood at this point, I'd probably feel a lot of pressure to "split the difference" between their several positions. But each one knows only where it stands, not its adversaries. So I can adopt an approach more consistent with the rationale I'll be using to persuade them to accept my resolution. It's crucial that the rationale I offer each party (which may differ, although the resolution itself is uniform) is convincing enough to generate a positive response.

Turning now from the general to the specific, I obviously have to loosen up Shows' pocketbook, which is crucial to the dollars involved. The best means of accomplishing this is to have Shows prevail on that tax-sensitive expense-sharing provision in the joint venture with Craps, thus freeing Shows up to pay more to both Honcho and Foods. And I'm hopeful that this "victory" for Shows (coupled with its prior "victory" in ending up as the acquirer of Hotels) will make it easier psychologically for Shows to accept the dollar stretch that's going to be required.

What's my risk with Craps if I award that provision in the H-C casino joint venture agreement to Shows? Frankly, I don't think it's very much. In pitching my resolution, here (paraphrased) is what I'm going to point out to Craps: "This mediation has been very beneficial to you. It's responsible for keeping you as the operator of the H-C casino, and it has provided you with a number of improvements in the joint venture terms. Look how much better this result is for you guys than if the mediation were to fail and you'd have to go back to operating under the existing agreement. And by the way, the tax result of that expense-sharing provision isn't so terrible from your perspective. But here's the bottom line, fellows – having this provision come out in Shows' favor is the only way I can get them to pay enough to satisfy Honcho and Foods."

Consistent with this, when I tell Shows how much it has to move up on the payments to Honcho and Foods, I'm able to say (paraphrased), "Hey I gave you what you wanted from Craps – now you have to be willing to pay more to these other guys."

My proposed resolution is for Shows to pay $940 million to Honcho for Hotels ($10 million more than Shows' last bid, $30 million less than Honcho's last ask) and to pay $60 million to Foods to go away ($10 million more than Shows' last

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[25] For an extended discussion of negotiating leverage, see chapter 2 of *Smart Negotiating op. cit.*

offer, $15 million less than Foods' last ask). The total out-of-pocket for Shows will be $1 billion. I tell Shows (paraphrased), "You have to spend in the aggregate at least as much as Foods was willing to pay for Hotels without the valuable H-C casino – that's an indication of market value that simply can't be ignored. Obviously, all of this increase doesn't have to go to Honcho. I could have divided the extra $100 million equally between Honcho and Foods, but I think Foods needs to come away with something more than $50 million, given its view as to the uncertainty of judicial outcome on your short form agreement. And, for various reasons, I'm hopeful that Honcho will accept the $940 million price."

Next I go to Honcho, and here (paraphrased) is what I say: "You're getting $940 million – a lot more than the $900 you were originally willing to take, and in that deal it was even questionable whether the H-C casino joint venture could be transferred. The Foods $1 billion price was always subject to you indemnifying them against the very strong claim that Shows has against Foods for inducing breach of contract – that indemnity could have ended up costing you a lot."

As for Foods, I forgot to mention that in nosing about earlier, I learned that $60 million would serve nicely as the extra dollars needed to fund that other hotel company acquisition.[26] So I remind them of this and then say (paraphrased): "– And look, guys, that's exactly what I'm recommending you receive – as well as getting you out of a nasty lawsuit that you walked into with your eyes wide open."

That's my proposed resolution and a little bit of my pitch. I also give each party a forceful speech (along the lines I discussed earlier) about all the reasons why it's preferable to settle rather than litigate. In addition, I'm very much aware – although I may not refer to it, except inferentially – that my judgment on the merits provides neutral cover for the responsible executives of the corporate parties, making it less likely that they'll be second-guessed by higher-ups.[27]

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[26] It's important for a mediator to be a good listener. This isn't just a passive exercise – not simply a matter of having patience and knowing when to keep one's mouth shut (although that's not unimportant). There's listening and then there's *hearing* – not just what is said, but what's left unsaid, what's hovering between the lines. A good mediator stays alert to the signals and clues that abound in a negotiation. For instance, parties will sometimes throw out a number by way of using an example; that choice of number may prove to be significant.

[27] I like to refer to this aspect as a "negotiated settlement insurance policy." Then too, in a dollar dispute, executives who refuse to settle at the mediator's recommended dollar amount do have to worry about the second-guessing that will be inevitable if they end up worse off at trial.

The parties let me know they'll consider the proposal. So, what do you think – will everyone accept it (because if even one of them doesn't, they're back at war)?

I'll tell you one thing – they better accept it, because I'm plumb tuckered!

* * *

So that's what the mediation of a multi-party dispute *cum* deal is really like. It's not brain surgery or rocket science, that's for sure, but it does call for a certain degree of energy, analysis and persuasion. If it works – no sure thing – it gets the parties to the finish line with an overall compromise resolution each of them can live with. That's something the courts can't accomplish and the warring parties have a hard time doing on their own. So, until someone comes up with something better, I strongly believe this is the way to go.