TEA TROUBLES
MEDIATION (CAUCUS ONLY) &/OR CLIENT COUNSELING

Teaching Note

The underlying facts and the purpose of both simulations are the same – a client has a very weak legal argument; they are likely to lose if their dispute were to be litigated. Even though the client's position makes some sense, and the current problem was not of their doing, the governing contract terms do not permit their profitable products to be sold for approximately five years. Unless they reach a negotiated agreement with the other side, they will lose a threatened court battle.

The Client Counseling version sets up a discussion between the lawyer and client representative, in preparation for negotiations with the company claiming breach of contract. The lawyer's challenge is to "deliver the bad news" in a way that the client: understands the legal perils; prepares or authorizes the lawyer to negotiate considering that; and still trusts the lawyer is "on their side." The mediation version imagines that earlier negotiations have been unsuccessful, litigation has been threatened or initiated, and the parties (on the advice of counsel) have agreed to mediate. Because the PlentiCo client representative doesn't understand the weakness of their legal position (likelihood of a costly injunction as well as damages), they have offered only “nuisance value.” The mediated negotiations have stalled and appear to be at an impasse. The mediator is to assume that earlier efforts at improved communication, creative solutions, and the like have been to no avail because the parties' assessments of likely court outcomes diverge so widely.

The mediator believes that the only way to break the impasse is to provide a neutral evaluation. In this case, that means "delivering bad news" to the PlentiCo client. For the mediator, the goal is similar but not identical to that of the lawyer in a client counseling situation. The mediator needn't, indeed shouldn't, engender client confidence that they are "on the client's side." Instead, the mediator's challenge is to maintain client trust in their neutrality. Despite the "bad news" - negative evaluation on the legal merits – the client should not feel that that mediator is "on the other side", and they should feel the mediator understands why this is frustrating and seems unfair from a business perspective. Within mediation, it can be used to raise mediator practice questions including when within the process a mediator might wish to "deliver the bad news", whether the mediator should ask permission first (yes), and whether the mediator would be wise to check in with the lawyer first. (Probably also yes, depending) I suspect that, in this case, the lawyer would be aware of the legal bad news and would have anticipated the mediator's analysis, based on the contract language.

In real life and teaching, it's easy to imagine both simulation variations might occur. The lawyer might attempt to deliver the bad news in a client counseling session, pre-negotiation, or pre-mediation. If the lawyer’s message was not so clearly or skillfully delivered, or the client was particularly resistant, the mediator might find it necessary to do

so. (At that point in a mediation, it's not unusual for the client to listen and acknowledge that had been their lawyer's advice all along.)

The facts are straightforward: the client is PlentiCo, an enormous multinational company with consumer products in cleaning, hygiene, beauty, health, nutraceuticals, as well as snack foods and beverages. PlentiCo's representative is the head of a PlentiCo beauty and facial care business unit involved in the dispute.

Six months ago, this business unit launched three successful related products: an antioxidant green tea mixture, facial steam units designed for the tea mixtures, and a green tea-based topical facial mask mix. However, they recently received a threatening letter from the attorney for Tea-Your-Health, a business spun off from PlentiCo two years ago. The letter claimed that PlentiCo's health and beauty care tea-related products violated its contractual obligation under the P&A agreement to refrain from producing or manufacturing tea products for 5 more years.

Investigation within PlentiCo confirmed that Tea-Your-Health had been created in a spinoff two years ago by a group of former PlentiCo managers who had worked in its beverage division. The PlentiCo beauty and facial care unit had NO idea of the existence of this agreement. PlentiCo's legal department had failed to pick up any conflicts for the new products.

PlentiCo's representative sees this as silly, observing that their products can't compete with Tea-Your-Health because they are not beverages. They are adamant about continuing with these successful and profitable products, which required substantial investment. They are bound to a long-term contract with a supplier to manufacture the steam facial machine.

Unfortunately for PlentiCo, the language in the P&S agreement is unforgiving and seems to prohibit the new facial care tea-related products:

> "For 7 years, PlentiCo will refrain from producing tea products for consumer use and in any way competing with Tea-Your-Health by production and distribution of tea and tea-related products."

The Tea-Your-Health principals who negotiated the Purchase & Sale agreement terms are adamant that they intended broad coverage. They note that Tea-Your-Health's business was broadly described in the Purchase Agreement as "tea and tea products and accessories for consumption, health, and well-being." The-Tea-Your-Health intends to launch tea-based products for skin care – including concentrated tea facial masks and the like and shouldn't have to compete with PlentiCo's superior marketing and the strength of its name in facial skin care products– at least for the next five years.

Unless a reasonable negotiated agreement can be reached, Tea-Your-Health would sue to claim PlentiCo's profits. If an injunction were issued, PlentiCo could be forced to recall the new products, including the steam facial machine.

Since we are under a "Teaching Note" caption, I've rather obviously used this to teach lawyers and law students how to deliver bad news in a client counseling session, and to teach mediators

how to deliver bad news in the form of mediator evaluation. For the counseling context, they would have been assigned (at least) the first chapter in Client Science: Advice for Lawyers in Counseling Clients through Bad News and Other Legal Realities. If possible, it would also come after introductions to active listening and the psychology of decision-making.

I often introduce the "bad news" theme by providing two video clips of bad news delivered poorly. The first is from an episode of the British television series Doc Martin, when the doctor has to communicate the diagnosis of Klinefelter's syndrome to his patient [Season 3, Episode 7, "Happily Ever After" at https://www.dailymotion.com/video/x7rqt0h, at 8:06-9:44. I apologize that I couldn't find a video of just that clip]. The second is from "Curb Your Enthusiasm" *[Larry's Mom Dies: https://www.youtube.com/watch?v=OCkEsLYE3Ik]*. I then ask them to deliver bad news in a lighthearted "Imagining Bad News and Wishing for Magic at Hogwarts"). I have them pair up, one read the doctor's role and one read the patient's role. First, I have the doctor deliver the bad news as TERRIBLY as possible. Lots of energy and laughter. We debrief briefly, to elicit what was just awful. Sometimes I'll ask if they've ever seen or heard of bad news being delivered this badly. Often the answer is yes.

Then we talk about the elements of "good delivery": start with a preface of what's to come, be clear, and don't waffle. Present "their side" – the client's side of the argument or perspective first – how and why you understand it and recognize why they see it this way. Then move to the bad news – how and why the news is bad, and how and why the client's preferred outcome is unlikely. And then, of course, empathy and constructive ways to solve the client's problem.

Finally, we move to *Tea Troubles* and have the participants practice delivering bad news in that context.

I should add that if you have little time, you can of course skip the Hogwarts scenario and move straight to Tea Troubles. I do favor the approach of "do a terrible job" first, then ask what terrible things the lawyers did when delivering the bad news, ask how it made the clients feel, then discuss, provide an overview of best practices, have them do it well, and elicit client reactions.

When working with mediators on evaluation, I use a similar approach. Provide a short reading on mediator evaluation – how to do it skillfully. (At the risk of shameless self-promotion, you might use the following chapter, I co-authored Dwight Golann: "Using Evaluations in Mediation" in *AAA HANDOOK ON MEDIATION, p. 327,* Thomas E. Carbonneau & Jeanette A. Jaeggi, eds., *Juris Net, 2010,* Suffolk University Law School Research Paper, Available at SSRN: https://ssrn.com/abstract=1860200.There are no doubt others, but I'm familiar with this one. Another article to spark discussion of mediator evaluation – not the technique but the question – is one I also co-authored with Professor Golann, "Beyond Abstinence: Safe and impartial evaluation can be effective in Mediation," DISPUTE RESOLUTION MAGAZINE **(**September 12, 2019).

Then have the mediators do a purposely terrible job, debrief, followed by evaluation done as prescribed. A rich discussion is inevitable.