BAGGING SETTLEMENT
MEDIATION

Teaching Note (All Phases)

Simulation design

This is a two-party mediation simulation, designed to be done in three phases: Initial contacts between counsel and then the mediator; an early dispute process dispute about documents to be exchanged (once the conflict is discovered in a preliminary call, the mediator is to try to work out a resolution), and the mediation itself. Prior to the mediation, the lawyers would presumably meet with their clients to prepare. Phase 3 is the mediation itself.
Please note that this was originally written as a simple mediation simulation, without the two earlier phases. It is still possible to use it that way – skipping phases 1 and 2. Or, depending on your audience and time constraints, you could just hand out and discuss phases 1 and 2, before role-playing through the mediation itself.

Factual/legal issues

This is a contract dispute, between Bagger Inc., a distributor and manufacturer of woven polypropylene bags, based outside of Philadelphia, and Delishco Inc., a large Cincinnati company. The parties' contract provided that Bagger would supply all the bags Delishco used in its orange harvesting operations. It stated that Delishco would pay 10 cents per bag for up to 500 million bags, over a five-year period, and that Bagger would be Delishco's exclusive supplier during that period. Under the contract, if Delishco had not purchased 500 million bags within 5 years, the contract would extend out to 8 years. According to Bagger (and stated in the contract), the price of 10 cents per bag represented a 25% discount under normal prices, in consideration for Bagger being named the exclusive supplier. For 18 months, Bagger supplied Delishco with bags: a total of 150 million bags were purchased during that period, for a total of $15 million.

Six months ago, Delishco spun off its orange harvesting operations and sold them to a separate company. Their contract made no mention of contractual obligations continuing to a successor. Delishco notified Bagger that it would not purchase any more bags.

Bagger (with their lawyer) interprets the contract language to mean Delishco was obligated to buy 500 million bags - if not in 5 years, then within 8 years. Delishco (with their lawyer) interprets it to mean doesn't have to buy bags if it doesn't need them. Bagger has demanded its lost profits on the balance of $35 million it would have received under the contract if Delishco had purchased the remaining 350 million bags.

Phase 1 – Initial contacts

Bagger's attorney is in Philadelphia and Delishco's lawyer is in Cincinnati. The role information sets up some pre-contact wariness. This is based on an email to a former

classmate now in Cincinnati that yielded information that the Delishco's lawyer's firm has a reputation for "stonewalling until they have billed a case significantly, even if a defense has little merits."
It also suggests a concern about Delishco's settlement authority, as the Bagger client mentioned that Delishco is a large, formal hierarchical company. He/she doesn't know where the marching orders are coming from.

On the other side, Delishco's lawyer has also done some sleuthing through a former classmate, who reported that Bagger's lawyer "often makes trouble: counsels clients to litigate whether or not wise, and bills cases aggressively before settlement." Delishco doesn't know about Bagger's decisionmakers or current business circumstances, but it's reputed to be a "shoot from the hip" company.

Both lawyers suggested two mediators they've worked with in their cities. It was agreed that the Philadelphia lawyer will call the Cincinnati lawyer, and vice versa.

The "action" in this phase is each lawyer's initial contact call with the mediator. From mediator's perspective, what should they ask and what should they disclose? When speaking with a lawyer you haven't worked with before, and the mediator was referred by the other side (with whom they have worked with), what should the mediator do to reassure any neutrality concerns? And how much detail about the case – legal and factual issues- should the mediator ask for, or permit? From a mediation advocacy perspective, what type of information can or should an attorney provide about the case, about the parties, authority, or the merits?

This exercise can give rise to a terrific class discussion about which mediator the lawyers would select, and why. At some point, there needs to be an agreement, or at least a coin toss, to determine who the mediator will be.

Note: if you don't have extra people to take on two mediator roles, you can do this with just one mediator and have the other lawyer as an observer/fly-on-the-wall. If so, you've framed an interesting discussion: what might be said – by the lawyer or mediator - in an "initial contacts" conversation that the other side would or would not be comfortable with.

Note also: The exercise assumes that each lawyer contacts the proposed mediators separately. That need not be. In "real life," I've had lawyers contact me together as part of their mediator selection process.

Phase 2 – Preliminary conference

This phase is a preliminary conference call the mediator would conduct with both counsel. I don't know whether other mediators do this, or whether it's a throwback to earlier days of mediation, but a joint preliminary conference call is part of my mediation practice. (If coordinating schedules make that too difficult, I will do preliminary conference calls

separately.) But I make sure both sides are aware and comfortable with the idea that these calls will be done separately. (No one has ever objected.)
There's a very short document for the mediator, summarizing bare bones information they would have learned in the initial contact conversation.

One topic a mediator should raise in the joint preliminary conference is document exchange or other discovery: What information do both sides need to be ready for settlement? What do they need to assess the case (the litigation BATNA) for their clients? In addition to documents relating to liability, it's important for both sides (and the mediator) to understand how they are approaching damages. Last and not least, a mediator should have eyes and ears open to opportunities for business solutions that might create value in the negotiations. Thus, it's useful to know something about the parties' business contexts, interests, and capabilities. Lastly, a mediator should be curious about the people involved, and dynamics between them. (While I would advise against probing regarding the clients' personalities in the presence of counsel, a mediator can ask whether counsel is comfortable describing the dynamics or any history or bad blood, etc. If not, they would be invited to share that information with the mediator in a separate conversation.)

The lawyers' Phase 2 instructions say, at the end: "Work with the mediator and opposing counsel to discuss and agree upon preliminary items such as documents to be exchanged, documents to be provided to the mediator, any other information gathering, and any other issues that should be resolved prior to the mediation. Your goal is to set up for a successful process - and a process that works to your client's advantage, if possible."

However, before that, and unbeknownst to the mediator, the lawyers' instructions also set up a conference conflict on the issue of information/document exchange. Because suit has not been filed, there has been no discovery. Bagger's attorney anticipates that Delishco may want to set up a "fishing expedition" for free discovery. Bagger is concerned that Delishco may try to use the case to learn more about their bag business. They fear Delishco is developing the in-house bag manufacturing capacity to sell bags to other companies and become a competitor. Bagger does not want to give away documents that would damage their case or enable Delishco to learn Bagger's business and customer lists.

The back story is that Bagger is VERY concerned about the possibility that the "Grains and Nuts" division of Delishco is aiming to compete in the food bag market. They know Delishco Grain and Nuts recently acquired a small bag business, gave all its bag suppliers notice that their contracts would not be renewed, and began manufacturing bags in house. That's why Bagger will refuse to provide any information to Delishco about their business operations, customer lists, or marketing plans that would end up helping Delishco make and sell bags.

Bagger very much wants to know when Delishco decided to spin off the juice division. Delishco may argue that's irrelevant; the contract is the contract. However, Bagger has a fraud theory that hinges on whether the contract negotiations took place when Delishco had already decided to spin it off. If so, Delishco would have known all along that the

contract minimums would never be met. Bagger's theorizes they wanted to capture a deeper discount.

On the other side: Delishco's lawyer wants to see Bagger's information regarding profit margins. They argue that, even under Bagger's theory, they would be limited to actual lost profits. Delishco's businesspeople have told the lawyer they think that all bag businesses operate with relatively low profit margins. It is important to learn what the real damages are. Mitigation is also important. While Bagger can handle a lot of bags, its capacity to produce is not infinite. If Bagger has been able to land new customers to fill capacity left open by Delishco, mitigation would be complete. Delishco wants to know their capacity, and what new customers they have approached or signed to fill it up.

There's no indication that Delishco is planning to start a competing bag business. A savvy, attentive mediator might have an inkling from the "Grain and Nuts" issue, that large multi-national Delishco's other business divisions might offer opportunities for creative solutions, worth exploring in the mediation.

One other issue worth discussing in class is whether Bagger's lawyer would choose to disclose how the Bagger witnesses would testify about conversations and assurances around the contract formation. It's a strategic question for Bagger's lawyer whether to raise it as early as the preliminary conference. (Of course, Delishco's lawyer anticipates it, though not the specifics, and would label it inadmissible parole evidence.)

Assuming these conflicts arise in the Phase 2 conference, the mediator's challenge will be to try to mediate a resolution. While they might be possible in the conference, I suspect that, in real life, the mediator would set up separate calls with counsel to learn what's driving their clients' concerns and resistance. With that information, and with their permission, the mediator should be able to provide reassurances and explanations where necessary.

Just in case, the simulation materials provide a document called "CONFERENCE CALL WITH COUNSEL - SECOND TAKE - RESOLVING DISPUTES BEFORE THE MEDIATION SESSION." This document is intended to make sure all groups are presented with the same challenges at this phase. (It recognizes that, in some groups, the mediator may not have asked about discovery and information exchange, for example, and these conflicts wouldn't have come out.). While labeled as a second-take conference call, I suggest giving students an option to have separate discussions before reconvening in another joint call, to work out terms.

Phase 3 – Mediation

Your teaching note author hereby confesses to running out of steam. This mediation problem has everything, really. Family business, emotion, large corporations, differing legal theories, different information about conversations, hidden information about notes on documents (that help the other side), and clients who might resist the lawyers. Rather

than repeat them here, I really do suggest reading the lawyer and client roles with some care before the class.

Having said that. I want to highlight two intentional aspects of the case that some mediators might miss.

(1) An alternative way of looking at damages and a perhaps more palatable framing for the defense.

Bagger is seeking its lost profits on 350 million bags. The price of those bags was 10 cents each; they would have been paid $35 million and would have had profits of $3.5 million. MCA NEEDS TO CHECK THAT on the profit margins. Yes, one approach to settlement would be to suggest a compromise – a discount to reflect risk: Delishco would pay some percentage and Batter would take less. The challenge is that, at some level, that requires both sides to acknowledge doubt in their versions of the facts and legal analysis.

Another option – less legalistic, maybe more palatable – is to ask: what if everyone had known this was not going to be as large an order? What if it had been presented as just the first 150 million bags? What would the market price have been? We were told the 10 cents per bag was approximately a 25% discount.

The parties' information suggests the market price for small orders would be 13-14 cents per bag. Some of the client information indicates orders might be priced at 12.5 cents per bag. Bagger's confidential information suggests that large orders (150 million is still large) might be at 11-12 cents per bag. Would it be fair to adjust the price to account for the real volume?

If Delishco had purchased the first 150 million bags at the "normal" 12.5 cents per bag, Bagger's profits would have been $5,250,000, instead of $1,500,000. The difference is $3,750,000. Even if Bagger might have offered a discount for a 150 million bag order, say 11 – 11.5 – 12 cents, Bagger's profits would have been $3,000,000 - $3,750,000 million - $4,500,000. That is $1,500,000 – $2,250,000 - $3,000,000 more than Delishco paid, and Bagger received.

In speaking with Bagger, the mediator can observe: "Your fraud theory says what Delishco should have done is let you know of the spin-off, and that they would only 150 million bags. If they had let you know, might you have quoted them at 11 cents, and received $3,000,000 in profits. What if you could get that difference $1,500,000, or close?"

In speaking with Delishco, the mediator may be able to learn and then capitalize on the fact that Delishco doesn't know Bagger might have quoted at 11-12 cents. They were told 10 cents was a 25% discount. With a little reverse math on a calculator,

that puts the "regular price" at 13.333 cents. If Delishco had paid that, the 150 million bags would have cost them approximately $20,000,000, instead of $15,000,000 – a difference of nearly $5,000,000. Could we call that the value of the discount? [Discussion ensues. If pushed, the mediator might carve out a range: "Well, if they had priced it lower, at 12 cents or 11.5 cents, what would it have cost? Would that have sounded like a fair price at the time?" Depending on their response and approach, the mediator might suggest that we are negating what the discount might be. Sometimes, the mediator might point out that a settlement of less than $5 million could be viewed as a "bargain"; it enables them to keep some of the discounts.

The mediation teaching point here is that it's good practice to dive into the damages. These numbers have meaning to the parties, not just as $ lost or to be paid, but as what they represent. Pay $ because we were wrong about the contract, or we committed fraud: heck no! Pay $ because, in retrospect, we wouldn't have gotten that discount if the higher-ups had told us their fancy business plans. We would have been happy with 11-12 cents as a fair price.

2) Yes, another business deal

This is a bid for broad mediation inquiry into the capacities of the parties, and their abilities to bring terms to the table that the other side will value. In this case, if the mediator thinks and asks broadly (or the mediation advocates do), they will discover that at least one division of Delishco would benefit from buying Bagger's bags. As a matter of mediator and advocacy practice, in addition to curiosity (asking broadly), no one will agree to agreements for future business if the atmosphere is poisoned, or the negotiations are aggressive or insulting. It will be helpful if Delishco expresses respect for Bagger's product, and if Bagger receives (and believes) assurance that the Delishco people they dealt with directly weren't trying to cheat them. It's textbook: they need to feel the other side isn't evil, and that the other side appreciates and respects their perspective.