BOXALL BATTLES
SEVEN PHASES
INCLUDING BUT NOT LIMITED TO
INTERVIEW, COUNSELING & NEGOTIATION

Overview Teaching Note

BoxAll Battles is a family and family business dispute, loosely based on a real story. I had the opportunity to interview one of the family members and review some documents from their litigation, but then took considerable license imagining points of conflict, emotion, and hidden information in lawyer-client meetings, discovery squabbles, negotiations. The goal was to create a valuable vehicle for teaching good practice in these contexts, with salient doses of ethical challenges and strategic choices. The fuller disclosure is that I wrote it during a Sabbatical semester the year before retiring from the faculty at the University of Cincinnati College of Law. My intent was to try it out it in my negotiation course. However, for variety of reasons, I didn't end up teaching negotiation in my last year there. Thus, this teaching note cannot report on my experience teaching it. I can only write about what each segment was intended to teach. I hope future users will find ways to communicate about their experience with it, add it as commentary or supplemental teaching notes, and perhaps improve the simulation itself.

Note: when I first sent a draft of this case to faculty on the dispute resolution listserv, one suggestion received was to make the roles gender neutral. I could see that wouldn't be as simple as changing to gender neutral names first names and changing he/she/his/her pronouns to they/their. The characters' histories and resentments are gendered, shaped by gender roles and expectations and their shifts over the past 40 years or so. That was a clear theme in the real dispute upon which this was based.

Professor Richard Bales at U. of Toledo suggested changing the resentments to more of older sibling/younger sibling, removing the apparent gender-related tensions. I think that's a good suggestion and would welcome anyone's creation of an alternate version. That would deserve a place on this simulation site, with full credit. However, I confess: having taken this 7-phase case this far, I will not be the one to do it.

Overview Plot Line - The Characters and their Dispute

The Nelsons are a wealthy family, due to the success of BoxAll, Inc., the company founded 50 years ago by the patriarch, Fred Nelson, who passed away 5 years ago. He was survived by his old spouse and two adult children, Keith and Dianne, all beneficiaries of the Nelson Family Trust and shareholders in BoxAll, Inc. The Trust's holdings include the BoxAll shares, as well as considerable real estate assets.

Keith Nelson followed his father into the business, working there from a young age. Keith assumed the position of BoxAll's President CEO 20 years ago, when the father retired from

active management. Keith's sister Dianne, earned a university degree in design, married a doctor, and never worked at BoxAll. She is now divorced. Their mother is 88 and declining.

For a long while, BoxAll was a relatively small but profitable business. It enabled the family to live very well, with more than sufficient income for a terrific home, private school and college tuitions, and frequent vacation travel. The profits earned from BoxAll also enabled the founder to make significant commercial real estate and side-business investments and generous annual charitable contributions.

BoxAll always provided annual profit share distributions to each family member. These increased not long before the father's retirement, and then grew significantly larger starting five or six years ago – well into seven figures - as BoxAll's profits also grew. For last two or three years, each check was higher than the last.

Fred Nelson also regularly invested in real estate, including two highly successful car washes, two substantial strip malls, and three small apartment buildings (all operated by various management companies). These properties were held in the Nelson Family trust, initially managed by Fred, with his wife as the first level beneficiary.

Upon Fred's death, 48% of BoxAll shares passed immediately to his wife, his daughter Dianne and son Keith, with a proviso for annual deduction from these profit shares of at least $500,000 for his spouse as her annual living support. The trust was also to cover costs of all necessary care or special requests for the rest of her life. The remaining 4% of the BoxAll shares, Fred Nelson's miscellaneous cash and stock accounts, and all real estate holdings went into the Nelson Family Trust and thus belong to the mother.

Fred named Keith as Executor of his estate and Successor Trustee of the Nelson Family Trust upon his death. The trust instrument provides that after the family matriarch also passes, the properties are to be appraised. Dianne and Keith are each to own a 50% interest in each piece of real estate and split the remaining 4% of BoxAll shares.

The dispute

Dianne believes Keith is cheating her and her mother out of their fair share of BoxAll profits by exploiting his BoxAll position to generate certain payments for his sole benefit.

Based on a conversation with their mother, Dianne also believes Keith tried to manipulate their mother into signing over three of her four BoxAll shares in her will, giving him 51% of BoxAll. That most recent episode further convinced Dianne that Keith has been getting away with illegal financial dealings to benefit himself at the expense of her and her mother.

According to Keith, Dianne called him and said:

> *Listen, big brother, don't think you can get away with trying to cheat me out my rights in BoxAll. I'm sure you've been hiding profits and double dealing to drive our profit shares down,*

> *and I'm going to get to the bottom of it. Now that dad's gone, you aren't going to get away with pulling the wool over little sister's eyes any longer. You'd be wise to see a lawyer and get ready for battle.*

This call did indeed cause Keith to contact a lawyer. Keith would acknowledge that his relationship with his sister and mother had deteriorated since their father's death.

On the financial side

The real estate holdings: At the time Fred Nelson passed away, his commercial real estate property held more readily quantifiable value than BoxAll. He owned two highly successful car washes, two substantial strip malls, and three small apartment buildings. Competent management companies have been operating and overseeing these properties. Keith believes these were worth at least $32 million at the time of their father's death. Neither he nor Dianne know what they are worth at this moment, but surely not less than that.

About BoxAll: When Keith and Fred ran BoxAll together, they both drew annual salaries of about $500,000, with sizeable bonuses in years the business did well. In some years, the bonuses were as high as their salaries, in other years they drew no bonuses. No one ever questioned or quibbled about these salary or bonus amounts or BoxAll strategic business or investment decisions. Everyone understood that BoxAll was to support their mother if Fred predeceased her, and eventually to go Keith and Dianne. Corporate practice (set by Fred Nelson father) has long been to distribute a minimum of 60% of net profits to then current and beneficial shareholders (the Nelson parents, Keith, and Dianne), with the balance going to employee bonuses and reinvestment in operations or new product development.

The BoxAll operating agreement provides for annual shareholders' meetings to review year-end financials. When the family was getting along tolerably well, the shareholders' meeting would take place at dinner in a private room at a posh restaurant. Dianne and their mother would each receive their BoxAll profit share check and a one-page BoxAll financial statement summary. Everyone would raise a glass to BoxAll and enjoy a great meal.

Last time, Dianne agreed with Keith's suggestion that they "skip the annual formalities" and vote via email and that the shareholders' meeting be deemed to have occurred based on the financial summary showing record breaking profits and the calculated shareholder distribution. Everyone seemed happy not to endure an uncomfortable evening together,

The numbers made it clear that BoxAll revenues and profits have grown at least 200% over the past two years. The most recent net profits were $10 million, leaving $6 million to distribute: $500,000 off the top to the mother, and then $5,500,000 more to allocate to her, Dianne, and Keith.

One of the issues giving rise to this dispute involves a loan to BoxAll by Keith, from his personal bank account, a few years ago. Dianne and her lawyer will eventually argue that the terms were too favorable to Keith; he (BoxAll) has been paying back the loan to himself at higher than market rates. Keith will disagree. He maintains that, at the time, BoxAll needed to invest in R&D (on new biodegradable packaging materials and a patented environmentally friendly reinforcement). BoxAll needed financing for these investments. Keith maintains that the available bank financing at the time would have been at a higher rate and required a security interest in the shareholders' personal residences. Keith wasn't willing to go there and knew Dianne wouldn't either.

Unsurprisingly, Keith's version of his conversation with the mother regarding her will and her shares BoxAll is different from Dianne's. Keith claims he raised the issue of her will to avoid future conflict with Dianne over control of BoxAll, which would surely drive the stock value down (to the detriment of the grandchildren). Keith maintains that their mother was indeed aware of what's going on, in general. With some trepidation, in a visit at her assisted living facility, he re-explained she is now the owner of 4% of BoxAll as well as real estate in the Nelson Family Trust. While she didn't remember the exact %, she said she said that she was aware that she had inherited a small share in BoxAll. She also agreed that their father had insisted her will provide for it to be split between Keith and Dianne after her passing. (They both had their wills drawn up by the same lawyer, many years before his death.)

Acknowledging the difficult relationship between him and Dianne, Keith explained that if the mother's 4% were equally divided –each sibling would then hold 50% shares in BoxAll. That would lead to continual conflict, likely to tear the family apart forever, and drive down BoxAll's value to future purchasers (to the detriment of Keith's Dianne's and the grandchildren's financial interests).

Then, Keith asked their mother if she would consider changing her will to divide her BoxAll ownership share 1% to Dianne and 3% to you. Keith stated that his goal was NOT to cheat Dianne out of any money: the equivalent value of the extra 1% should be given to Dianne by increasing her share of the real estate or cash reserves in the Nelson Family Trust. The mother said she understood completely and would think about it. Keith offered to take her to meet with her lawyer, if she decided it was a good idea.

This version of the conversation was apparently not the one relayed to Dianne. And that is what prompted Dianne's desire to look back at all the BoxAll books, acting on the suspicion that Keith has been cheating both her and their mother for quite some time.

Siblings' personal perceptions, conflicts, and interests

Without repeating all the details in the parties' role information, some highlights as to their personal interests and conflicts are below.

Dianne: It rankles Dianne that their father never asked her to play a role in BoxAll, and showed favoritism to Keith from the time they were kids. There's a clear gender issue written into the fact pattern. As a child/young woman, Dianne chalked it up to "the observable truth that only men ran businesses. This was already starting to change in the outside world when [she was] in high school and college, but not in [their]father's world.

Now, Dianne resents Keith's professional success. He has the BoxAll President title. Charities ask him to join their boards; fundraisers make him the dinner honoree.

Dianne has never had comparable recognition or respect. After a college degree in graphic design, Dianne worked in a large company's design department before marrying a doctor, raising their kids, and then divorcing. While she doesn't lack financially, she wishes she

had a place to use her intellect and skills. (She doesn't believe anyone would hire a woman in her early '50s who hasn't worked outside the home for the last 25+ years.)

Lately, Dianne has become interested in greater connection to the family business, using her graphic design talents. Her father once told a teenage Dianne his rule was that any Nelson could have a job at BoxAll, if they wanted it. Dianne never asked, but neither Keith nor her dad ever asked her.

Lately, Dianne has been thinking about using her design skills in a not-for-profit organization, helping with logos or promotions, or fundraising events. One path would be to start working with BoxAll to find her way back to professional design work, offer suggestions, and learn about marketing and promotion. Dianne thinks if their father were alive, he would make a place for her at BoxAll. If not at BoxAll, perhaps BoxAll people could introduce her to people in design and packaging in other companies. She doesn't want a full-time job at this stage, and she wouldn't want to work directly with Keith.

About equity and finances: Dianne wants to be recognized as an equal member of the Nelson family and does not want Keith to get away with cheating her and her mother . While Dianne doesn't need money, she doesn't want Keith to get more of BoxAll's gains than she does. Dianne will not agree to any arrangement that would allow Keith to get more. It's important to prevent Keith from pulling the wool over your eyes or hiding any shady dealings. Dianne demands full transparency, the right to know BoxAll's revenues and profits, and a say in the future of the business. The same is true for the Nelson Family Trust's real estate holdings. With respect to the real estate, Dianne doesn't want to have to deal with Keith regarding each property. It would be better to split them up. Dianne would most likely sell the properties that go to her, rather than worry about managing them.

Keith: Keith feels entirely under-appreciated, angry, and hurt by his mother's and sister's attitudes toward him. From Keith's perspectives, he followed in his father's footsteps and became the family provider. Keith worked his way through various positions in BoxAll before taking the helm. He saw BoxAll through rocky and uncertain financial times and made sound business decisions (notwithstanding some opposition) that yielded highly profitable results.

Keith feels that his sister and mother never exhibited any interest in the business, or the innovations he made; they were just happy to receive their distribution checks. That these have risen dramatically in recent years should earn their respect and gratitude, not suspicion and ire.

On the personal front, Keith was amicably divorced ten years ago and has solid relationships with his adult twin sons, neither of whom have any interest in working at BoxAll. Keith claims to be at peace with his life. He enjoys working with colleagues at BoxAll and being on various local charity boards. He anticipates BoxAll will be sold when he is ready to retire.

Whatever Dianne's and his mother's "issues" with their father or other resentments, Keith wishes they would stop throwing barbs at him. It's time to let it all go. The first cousins used to get along as kids; an end to family conflict will make that possible in the future.

As for real estate properties in the Nelson Family Trust: Keith has no attachment to any of them. Even if he ended up preferring one property vs. another, for his sons' sake, Keith can't see putting up a fight about any of them. Life is just too short. (These properties will be described in more detail in teaching note relating to phases of this exercise that contemplate valuation and sale of the real estate.)

PHASE 1 – INITIAL CLIENT INTERVIEWS

Keith's and Dianne's role information is as summarized above.

The lawyers' goals are to build sufficient rapport and trust with their potential clients so that they become actual clients, and to get essential information about their clients' dispute and relevant facts and circumstances. They must listen well, express understanding, and make the clients feel respected and confident that the lawyers will represent them well.

Dianne's instructions regarding retention of the lawyer state: "You may decide to retain this lawyer to represent you in protecting your interests in BoxAll and the real estate, and possibly take formal legal action against your brother. If you are not comfortable working with this lawyer – if they seem at all uninterested, unmoved, or less than competent – you won't do so. It's important that your lawyer communicate well, without patronizing you or minimizing the problem. There are plenty of other lawyers out there. On the other hand, if you would feel good about this lawyer representing you, then feel free to provide whatever information you like.

Keith's instructions are quite similar: "Your sister and your mother can be tough once they get an idea in their heads. You want to feel confident that this lawyer would strongly represent your interests in BoxAll and the real estate and take whatever formal legal actions become necessary. If you come to feel that the lawyer seems uninterested, unmoved, or less than competent – you can always find another. It's important that your lawyer communicate well, show you respect, and take this matter seriously. On the other hand, if you would feel good about this lawyer representing you, then do feel free to provide whatever information or perspective makes sense."

PHASE 2 – POST INITIAL INTERVIEWS

Lawyers' Instructions and Questions

True, your author has not (yet) taught this case. However, I intended this phase to prompt class discussion of practical and strategic issues. An instructor could decide to assign students to draft a retention letter, either as a pre-class assignment, or in-class. Of course, whether you make this assignment depends upon the goals of the course. My experience when teaching a lawyering course for the first time is that a retention letter is a difficult and thought-provoking assignment. Another option would be to ask well-respected lawyers to provide a model retention letter they might write in a case like this.

Students playing the lawyers on *both* sides are instructed to consider the following instructions and questions:

1) Draft a retention letter to your new client. Assuming you would attach it to an email as a pdf in the first instance, also draft the text of the cover email.

2) Create a list of the types of documents you would ask your client to gather and provide to you, if possible. This list would be attached to the client retention letter.

3) Assuming the documents are consistent with what their clients told them, they are asked whether they want to contact the attorney on the other side, or the mother's attorney and now they would approach it.

Dianne's lawyer's instructions ask whether they would at least seek to learn whether Keith Nelson had retained separate counsel. (This is to anticipate any conflict of interest between Keith's and BoxAll that may require separate representation.)

Dianne's lawyer is also asked: "What are your thoughts about the Nelson matriarch? Your client seemed to assume that her and her mother's interests are aligned because of their close relationship. But is that true? Her mother may already have a lawyer – the one who created her will and the Trust documents. What are your concerns about your client's mother and how should you address them? (This is to anticipate any competence issues for the mother, as well as possible conflicts between Dianne and her mother, who may need separate representation.)

After these targeted questions, Keith's lawyer's instructions state:
"Nevertheless, you anticipate that as soon as Mr. Nelson signs and returns the retention letter, he will press you about: *What are we going to DO? How can we stop my sister from making trouble by creating more conflict, making ridiculous accusations, and asserting control in a way that could harm BoxAll?*"

In parallel fashion, Dianne's lawyer's instructions state:

"Nevertheless, you anticipate that as soon as Dianne signs and returns the retention letter, she will press you about: *What are we going to DO? How can we stop my brother from getting away with anything and everything?"*

Both are told: "Of course, your initial strategic advice to your client will depend on documents provided and on what you learn from initial contact with the attorney(s) on the other side."

Both lawyers are asked: What are your thoughts about next steps? What's the best way to communicate them to your client?

At minimum, it would seem worthwhile to have these the students discuss these questions. You could organize the class into two discussion groups: lawyers and clients on both sides in separate rooms. Again, acknowledging I haven't yet done it, I think this would be a terrific place to bring outside well-respected practitioner lawyers (more than one, if possible) to discuss how they might respond to these questions, "in real life." That could be done in plenary, or in separate rooms if you want to be sure that confidential information remains confidential. Of course, the lawyers could make general comments in plenary, and then provide specific advice for each side of this case in separate rooms.

PHASE 3 - POST FIRST LAWYER-TO-LAWYER DISCUSSION
PREPARATION FOR SECOND CLIENT MEETING

From a teaching note perspective, the Phase 3 information for both lawyers is merely intended to set up the second lawyer-client meetings designated as Phase 4. Having this information ensures that these Phase 4 lawyer-client meetings will start from consistent places.

Of course, the instructor could use the Phase 3 information for a class discussion reviewing and commenting upon the lawyers' emails and discussion as described there. Why did Dianne's lawyer ask for documents? Why did Keith's lawyer comply? Without formal discovery, how can Dianne and her lawyer be sure (or at least reasonably confident that) complete information was provided? Why did the lawyers communicate their clients' concerns and explanations to each other? In fact, I think the lawyers' approach was professional, appropriate, and strategically sound (unless they had reason to believe the other was professionally unethical). However, I do believe it's worth a discussion with the students, either before launching into the Phase 4 lawyer-client meetings or, perhaps better, directly after. (After the meetings, there would be no problem including students in client roles in the class discussion, and even providing them with their lawyer's Phase 3 documents.)

Summary of both lawyers' Phase 3 instructions

The lawyers' instructions assume that they had contacted each other and spoken about their client's dispute. By giving the student lawyers this information, they can all start in in the same place, no matter what happened in their meetings.

The lawyers are informed that Dianne's lawyer initially contacted BoxAll's corporate counsel who put them in touch with the lawyer representing Keith.

Acting on her lawyer's advice, Dianne Nelson helped her mother to obtain separate counsel – the lawyer who had originally put together her and her husband's wills and the Nelson Family Trust documents. Dianne's lawyer spoke to the mother's lawyer and agreed to inform them of any developments, particularly if those might negatively impact the mother. The mother's lawyer explained she just wants peace; she wants her children to be treated fairly, even though she seems to agree with Dianne's assessment of her brother. While there may be a looming competency issue, according to her lawyer, she seems lucid in the moment, just forgetful.

Diane's lawyer's email to Keith's Lawyer initiating lawyer-to-lawyer meeting, noted that Diane's mother had obtained separate counsel, but for the time being, is content to be informed of any developments that might impact his client's interests.

In the meeting between the two lawyers, Diane's lawyer explained that, without seeing any financial documents, Dianne was angry that Keith had tried to manipulate their mother into leaving him ¾ of her 4% of BoxAll – 3% - instead of splitting it equally upon her death. Dianne asserts that Keith knows their mother is 88 and not entirely lucid. According to Dianne, their mother hasn't been formally diagnosed with Alzheimer's, she's obviously not with it. She remembers stories from "the olden days," but can't remember yesterday or even a few hours ago. Perhaps to cover her cognitive decline, she's highly suggestible – happy to agree with what people tell her.

Dianne's lawyer also explained that she is highly suspicious about Keith's financial management practices at BoxAll and wanted to examine all BoxAll's financial books and records. While all family members are now wealthy, she wonders whether Keith hasn't been stocking away more than his share. Though summary financial statements were handed out at shareholder's annual meeting, she hadn't kept them or focused on the details at the time.

Both lawyers agreed it would be good for their clients to resolve their disputes amicably - negotiate a resolution –after exchanging information but before filing formal legal actions.

Within a week after their conversation, as agreed, Keith's lawyer sent Diane's lawyer all BoxAll summary financial statements from the last ten years. These show BoxAll revenues and expenses, including executive salaries and any loans extended to BoxAll, as well as interest paid on loans. Dianne's lawyer reviewed them with a trusted accountant.

That review revealed Keith made a $3 million loan to BoxAll 5 years ago, from his own funds, with interest at 8%. Since then, as reflected in the financials, BoxAll has paid Keith interest and principal of approximately $300,000 per year ($240,000 of this was all interest the first year, and then the company started paying down the principal too.) At the time, commercially available interest rates at that time were much lower, in 4-5% range.

Dianne's lawyer conveyed their concerns about the loan in a brief follow-up email to Keith Nelson's attorney, asking what he knew about it and whether his client had any explanation, or any explanation for his efforts to influence the mother to change her will.

Keith's lawyer was not surprised they would question the loan rate and explained that, according to Keith: yes, when the loan was made, banks were *advertising* commercially interest rates in the 4-5% range. Those were teasers: only a large business (think Procter & Gamble) could get a loan at those rates. BoxAll's overall financials weren't great at the time; that's why they needed a loan. BoxAll's banker refused to lend at less than 10% without personal guarantees and mortgages on the homes of BoxAll shareholders. Keith believes he explained this at the annual dinner meeting, and none of them (including Keith) were willing to provide personal guarantees or mortgages. So, Keith decided to loan the company from his own money at an interest rate lower than the bank had quoted them.

Regarding the 4% BoxAll share allocation: Keith wanted his sister and her lawyer to know he wasn't trying to cheat her out of any money. He insists he explicitly told their mother that any difference in monetary value should be made up with other assets – property or cash reserves. He was worried that a 50/50 split would lead to conflicts that would diminish BoxAll's value and harm both of their financial interests. Their mother seemed to understand and agreed that future conflict would tear the family apart. Based on what's happening, Keith now assumes their mother didn't really understand or that she forgot and never conveyed it to Dianne. Keith is fully committed to carrying out his fathers' intent: that both siblings share equally in the financial value of BoxAll and his other holdings.

In light of this, Dianne's lawyer informed her via email that the document review revealed that Keith had made a $3 million loan to BoxAll 5 years ago, from his own funds, with interest at 8%. Since then, BoxAll has paid Keith interest and principal of approximately $300,000 per year.

The lawyer's email also reported what Keith's lawyer had said about the loan and the BoxAll % allocation. The lawyer asked Dianne: "Did you know anything about this loan, or do you remember discussing or approving it?" "Did you ever hear anything from your mother about Keith wanting to even up the financial impact?

Both lawyers are instructed to meet with their clients, discuss the information learned, check in about goals and interests for future negotiation, and consider next steps.

PHASE 4 –SECOND LAWYER-CLIENT MEETINGS

This phase is intended to set the lawyers' up for an attempt at negotiation to resolve their clients' disputes. It provides the clients' perspectives on questions and issues raised in the lawyer's earlier communication.

Two potential professional ethics issues can be found for Dianne's lawyer, when they learn that the mother did retain a separate lawyer, but Dianne attended her mother's first meeting with that lawyer. Did that waive any attorney-client privilege for what was said in that meeting? Was it a tacit recognition that the mother might not be fully competent? These will not be significant for the negotiations about to take place, but raising the questions would be a "teaching moment" for future lawyers.

Back to the upcoming negotiation: To a large degree, whether the lawyers will be able to reach a settlement in a lawyer-to-lawyer negotiation depends on what authority their clients' will give them by the end of this meeting. The lawyers will want to probe the clients' stated interests and priorities. Is it really Dianne's wish to "dethrone" her brother from the President's position? It's doubtful Keith will agree to that. Would that hurt the profitability and future valuation of the company? Is there anyone else who could step in and run it as well, even if Keith did agree? Or would Dianne agree to keeping Keith at the helm, if she can have a role there and future transparency, promises of no self-dealing, etc.?

If Keith would agree to "give back" some of what he made on the loan, or some of the bonuses, would Dianne feel that as a victory? On the other hand, Keith might see it as an admission of fault and be unwilling to do so. Regarding allocation of shares through their mother's will: Keith might value Dianne's recognition that his intent was not to get more $ but to reduce conflict (yes, by gaining control). Perhaps the siblings could agree that a third party could serve as a tiebreaker in the event of a conflict about a future business decision.

These types of solutions would be fodder for a mediator, but there's no real reason that the lawyers couldn't find them.

Both parties' information states that resolving property allocation isn't urgent. On the other hand, the current conflict might make it wise to settle any future property questions now. Both parties are ready and willing to deal and to have the properties appraised, with the appraisal cost to be paid out of the Trust. Both parties' information states that "if in the end, all the properties were sold and proceeds divided, that would be okay." However, if possible, each "would like to end up with certain properties, for sentimental and business reasons." Then, both clients are instructed: "You will provide some or all of the following information to your lawyer, if and only if [the other side] would agree to negotiating the eventual property allocation now."

This might inspire the lawyer to text, email, or call the lawyer on the other side to communicate with their client about this question. (If this exercise is being done in a classroom setting, you could suggest students step out to call each other. In real life, the lawyer might suggest a second meeting to gather information about their client's preferences and values attributed to the properties if the other side is willing. Or any agreement as to property allocation could be tentative, subject to a current appraisal on some of all of them, based on the client's requests.)

In fact, if the lawyers do discuss the property values and preferences with their clients and included these in a negotiation (or mediation in a next round), resolving the conflict becomes easier. That's because the parties value some of the properties quite differently. One could imagine Keith's lawyer saying: X property is valued at $Y, but Keith will agree to count it as $Y plus $Z to offset the loan and the bonus issue. Or Dianne's lawyer might propose Keith "pay" certain $ to compensate for the loan profits and "excess" bonuses, but then Keith will get a property he values highly (counted by Dianne as worth less than Keith does.) Perhaps Keith can swallow this "concession/admission" (meaningful to Dianne) as a sound business decision.

Here's how the differing valuations of the various properties stack up:

Property	Earlier Appraisal	Keith's ascribed value	Dianne's ascribed value	Notes
1. Compass Road Car Wash	$3m	$3m	$2-2.5m	K+ .5m-$1m
2. Dexter Road Car Wash	$2m	$5m	$2m	K+ $3m
3. Exeter Street Strip Mall	$3 m	$2-4M	$4-5m	D+$1-2-$3m?
4. Fairview Street Strip Mall	$5m	$1-2m	$2m	D+ 0-$1m?
5. Garnet Apartment Building	$6m	$6m	$8-9m	D+ $2-3m Wants it!
6. Hoover Apartment Building	$5m	$8m	<$4m	K+$1m D doesn't want it.
7. Ibid Apartment Building	$8m	>$8m	$8m	Both want it. (not so strongly)

The parties' differing property valuations and preferences for particular properties raise the age-old strategic question about when and how much information to disclose. For example, if Dianne's lawyer doesn't express any interest in the Garnet Street Apartments, or if the feign lack of interest, she may not end up with it. That's not a good outcome, given that she very much would like to own them. But it Dianne's lawyer expresses her strong interest, and the $8 million value she puts on it, that will no doubt be exploited by Keith's lawyer. ("Well, if we let you have Garnet Street, Keith is giving up a lot. He will need to have other properties worth $8 million for an even exchange.")

At least one reader of an earlier version of this simulation advised against putting the property valuation piece in at this stage. Is it realistic? Would the lawyer have spoken to

the client about the property? Would or should it be tied into a negotiated resolution of the dispute?

Obviously, I've opted to keep it here, recognizing that most groups won't touch the property valuation until they move to a mediation phase.

My thought is that it's useful to ask: how much should a lawyer know when? If Diane or Keith have strong confidence and trust in their lawyers, they might wish the representation to be longer term and broad. I would argue that the lawyers should at least be aware of an eventual property allocation requirement and ask if the clients would want to bring that into the negotiations. The property valuations give them more to "play with" just as they would a mediator. If the lawyers' see their roles as helping clients to resolve a problem – conflict – and achieve their goals – peace and a feeling they were fairly treated – a broad approach makes sense.

I am assuming that, for most groups, the lawyers will not resolve this – either the legal issues or the property allocation – at this stage. For those that do, a host of wonderful debriefing opportunities will be created.

As you'll see, the role information for Phase 7 directly states that earlier attempts at negotiating settlement of the legal issues were unsuccessful and invites the parties and lawyers to participate in a broad negotiation or mediation process to include and resolve the property allocation.

These two vignettes draw from the plot line in BoxAll Battles, but they imagine a discovery dispute that doesn't flare up in the BoxAll Battles negotiation sequence. They could easily be used as stand-alone exercises[1] focused on the challenges of explaining unwelcome legal obligations in litigation that are likely to provoke clients' emotion and resistance.

Having said that, one could certainly use it in conjunction with the more elaborate BoxAll sequence. After the first lawyer-client interview meeting and the initial lawyer-to-lawyer communication, the instructor could simply say: these lawyers have been successful in explaining to their clients that relevant documents must be exchanged in litigation. That's not always so easy. Let's step out of sequence and work on strategies for a lawyer to discuss the expectations of the discovery process with his or her client. Or, after the second meetings, you could ask students to imagine that documents were not exchanged informally in pre-litigation communication, and litigation has commenced. Dianne Nelson and their mother have sued Keith Nelson for various types of malfeasance.
In whatever context used, the vignettes are designed to draw upon the "core concerns" model first introduced in R. Fisher and D. Shapiro, *Beyond Reason: Using Emotion As You Negotiate* (Penguin 2006), as applied to the lawyer-client context in chapter 4 of M. Aaron, *Client Science: Advice to Lawyers on Counseling Clients through Bad News and Other Legal Realities* (Oxford 2012).

As is often true, one can find any of these core concerns operating in the vignette if you try. Having said that, I think the most salient of the core concerns for the parties are "autonomy," "affiliation," and "status" in both. The autonomy trigger is clear: neither party wants to be *forced* [by some judge] to turn over documents for the benefit of the other. There's inevitably an affiliation core concern in play, given that these two are siblings: how could my sibling do this to me? I also see a status trigger in both vignettes, as both wish to have their status recognized and respected by the other, and by the legal system. Arguably, status rings stronger for Dianne in the second vignette as she has long resented her brother's higher professional status as CEO of BoxAll.

Generally, I put students into small groups to discuss the core concerns they view as most salient. I then facilitate a plenary discussion of which core concerns seem might have been triggered – in the interaction and in the litigation that preceded it. Then I ask students to pair up in two's or threes. If in two's, then one takes on the lawyer and the other the client role. If a group of three, then one is the observer, takes notes for reporting to the later discussion.

I ask the clients to "ham it up," protest the other side's demands, say how outrageous it is, etc. The lawyer should be practicing "targeted active listening" as described in Chapter 4 of Client Science. In other words, their efforts at active listening should target the core

[1] The text of this teaching note is also included in the comprehensive teaching note for all phases of BoxAll Battles. But because it could also be used as a stand-alone, it deserved a stand-alone teaching note.

concern they perceive as most salient based on the client's words or situation. That interaction goes for five or six minutes. They can debrief and give each other feedback in groups – five minutes or so - with a prompt about how the "targeted active listening" made the clients feel and what the impact was. For the lawyer, what was difficult? What was awkward? The observers can be helpful here, providing feedback on what they saw and heard.

When I call the group back for plenary discussion, I usually begin with a general question about what was difficult and what was easy – what did they struggle with?
Sometimes, I ask lawyers to self-report on an effort at targeted active listening that was terrible – completely missed the mark – the anti-active listen. That generates a laugh and often a good sport volunteer. I ask them to play it out – what was so bad and why?

Whether or not I've started with the "anti-active listen," I always ask the clients or observers to report on a lawyer who did a GREAT job on at least one "targeted active listen." I ask them to replay it – set up the client's words and lawyer's terrific targeted active listen. Often, they have indeed done a terrific job applying the "targeted active listening" advice in *Client Science* to the vignette. We applaud it! It's not unusual to notice that the effort was laudable but could also have been even more effective. We discuss ways to improve or build upon it. Often, the interesting discussion involves other directions it might have taken.

Inevitably, the question arises: what if I get it wrong? What if I think this was all (or mostly) about affiliation, and I pick up on that theme: "Gosh, how awful to feel your own brother would do this." What if the client says: "That's not the problem. I'm at peace with my relationship with my brother. But I can't stand that he gets to force me to show my therapy records!" The lawyer's targeted active listening might be: "It just seems like a power play…". The punch line is that it's fine. Unless your active listening is consistently far off the mark, the client will give you credit for trying, and will help you find the keys to their emotions. Fundamentally, listening to understand, and then expressing that understanding, are acts of respect.

It's important for you to emphasize and the students to understand that to actively listen is NOT to agree. It is to connect with how the client feels and let the client know that you "get what it feels like." After that, the lawyer still must explain what the rules of civil procedure require. Hopefully, the client's emotional reaction will have calmed down and he or she will be better able to listen.

PHASE 5 – CORE CONCERNS IN A BOX

These two vignettes draw from the plot line in BoxAll Battles, but they imagine a discovery dispute that doesn't flare up in the BoxAll Battles negotiation sequence. They could easily be used as stand-alone exercises[2] focused on the challenges of explaining unwelcome legal obligations in litigation that are likely to provoke clients' emotion and resistance.

Having said that, one could certainly use it in conjunction with the more elaborate BoxAll sequence. After the first lawyer-client interview meeting and the initial lawyer-to-lawyer communication, the instructor could simply say: these lawyers have been successful in explaining to their clients that relevant documents must be exchanged in litigation. That's not always so easy. Let's step out of sequence and work on strategies for a lawyer to discuss the expectations of the discovery process with his or her client. Or, after the second meetings, you could ask students to imagine that documents were not exchanged informally in pre-litigation communication, and litigation has commenced. Dianne Nelson and their mother have sued Keith Nelson for various types of malfeasance.
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I ask the clients to "ham it up," protest the other side's demands, say how outrageous it is, etc. The lawyer should be practicing "targeted active listening" as described in Chapter 4 of Client Science. In other words, their efforts at active listening should target the core concern they perceive as most salient based on the client's words or situation. That interaction goes for five or six minutes. They can debrief and give each other feedback in groups – five minutes or so - with a prompt about how the "targeted active listening" made the clients feel and what the impact was. For the lawyer, what was difficult? What was awkward? The observers can be helpful here, providing feedback on what they saw and heard.

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PHASE 6 - STRATEGIC INTERLUDE I

Questions for Dianne Nelson's Lawyer

As its heading and text communicate, this segment and is intended to prompt an "interlude" in the form of class discussion about negotiation strategy in a litigation/settlement context.

This Interlude document states: "This interlude may be limited to Dianne's side. If the instructor opts to have all participants receive it, no matter what their roles, the discussion could take place in two groups, one for each side. Either way, it should take place before they read the role information for the BoxAll Pre-Later Meeting."

The more I think about it, the more I suggest keeping the class in separate groups – Dianne's side and Keith's side – to maintain the confidentiality of negotiation strategies for students who will soon negotiate with each other. That would tend to preserve the "fake reality" of students' roles and negotiating zealously on each side. In other words, it de-emphasizes the fact that they are all students in a class together working through a *simulated* – not real - negotiation. (If you keep them separate, you could raise each side's strategic issue in the later full debriefing of the negotiation.)

This interlude provides additional information that could add to the strength (and price tag) of Dianne's claims: accountant's finding that Keith had been paying himself arguably excessive bonuses. If some of these funds were added back into relevant years' profits, Dianne's and their mother were entitled to larger distributions in those years.

The strategic question raised is premised on the reality that an argument or rationale for a negotiation move by the other side tends to generate the most movement "upon entry" or at least, when first used forcefully. Revisiting it later tends to have less impact. Imagine both sides appear to be stuck in their dollar ranges, and Dianne's lawyer says: "You know we will be able to argue that Dianne's claim includes even greater profits, because Keith reduced those by his excessive bonuses. Those should be added back in." Keith's lawyer responds with: "Yeah, yeah, we know all about that. You pushed that line before, and it's already considered in our offer."
However, even if generally known to be an issue, emphasizing and using it later (with real dollar estimates), is more likely to inspire a significant negotiation move up by Keith's side.

Most mediators know this (or should). It seems worth sharing with negotiation students. It also raises the question of whether Keith's lawyer will recommend (another, more fulsome) effort to negotiate settlement directly, or whether to suggest going directly to mediation? There's no clear right answer, but it's worth thinking about. The calculus might involve an assessment of whether the other side would put everything on the table in negotiation or hold some "wiggle room" back for anticipated mediation.

One additional question raised in this Interlude is whether Keith's lawyer should share this information with counsel for their client's mother? Worthy of discussion. I think the answer is yes. A harder question is: what if Dianne does not want to convey the information? (Perhaps Dianne wants to reduce what their mother might seek to claim, if she goes that route. Not nice, but possible. And Dianne's lawyer's attorney-client privilege would conflict with the expectations of the mother's lawyer. How could Dianne's lawyer manage this.)

PHASE 6- STRATEGIC INTERLUDE II

Questions for Keith Nelson's Lawyer
Then shifting perspective to Dianne's lawyer and a mediator

As its heading and text communicate, this segment and is intended to prompt an "interlude" in the form of class discussion about negotiation strategy and professional ethics in a litigation/settlement context. It sets up quite a twist. Keith Nelson's lawyer has new, potentially explosive information about Dianne Nelson.

Interlude II states: "This interlude may be limited to Keith's side. If the instructor opts to have all participants receive it, no matter what their roles, the discussion could take place in two groups, one for each side. Either way, it should take place before they read the role information for the BoxAll Pre-Later Meeting."

This Interlude also prompts students to shift perspectives to that of Dianne's lawyer and a mediator. That doesn't mean Dianne's lawyers or any who will take on mediator roles must be involved in group discussion. In other words, considering different perspectives is wise, pedagogically, and in practice.

As was true for Interlude I, I suggest keeping the class in separate groups – Dianne's side and Keith's side – to maintain the confidentiality of negotiation strategies for students who will soon negotiate with each other. That would tend to preserve the "fake reality" of students' roles and negotiating zealously on each side. In other words, it de-emphasizes the fact that they are all students in a class together working through a *simulated* – not real - negotiation. This approach suggests having Dianne's lawyers discussing Interlude I only, and Keith's lawyers discussing Interlude II only, prior to reading and preparing for Phase 7.

Later, in the full debriefing, you would ask how the students how they worked with assigned Interlude's revealed information – with their clients, the other side, or a mediator. (The instructor could ask student to describe their interlude information to classmates who wouldn't have seen it or distribute both Interlude texts to the entire class.)

The Interlude reveal and tricky questions

Apparently, Dianne is romantically involved with BoxAll's Sales VP (also divorced). The lawyer has no real knowledge of Dianne's or the VP's real intentions but has thought about possible motivations. For example, the lawyer suspects Dianne may be seeking to control BoxAll so she can fire Keith and install her new boyfriend as CEO. The lawyer surmises that Dianne's VP boyfriend has been feeding information to Dianne about Keith and maybe promising her a BoxAll role and a title if Keith is forced out. Or, even if Keith remained, Dianne could insist that executive bonuses be more evenly distributed – less to Keith and more to other executives. If BoxAll were targeted for acquisition by a large company, she

could threaten to hold up any sale without terms favorable to those executives, including her boyfriend.

The lawyer's source (a tennis doubles partner) says that "Dianne seems to have mom on their side." Dianne told her that she likes to go to out to dinner with her mother and the VP to show her that BoxAll would be in good hands if Dianne had the deciding vote in the business. It doesn't hurt that the VP is handsome and charming to the mother. Dianne told her friend that she and her mother had a "good chuckle" at the idea that "We girls could win out at BoxAll after all those years of Nelson men keeping us out."

The lawyer knows that their mother has formally retained separate counsel to represent her in this dispute. But they do not know how involved the lawyer has been, or whether the lawyer has had her evaluated for competency of late.

The lawyer is reminded that they don't represent BoxAll in this matter. However, BoxAll's corporate counsel is a law school friend who originally referred Keith to them.

Students are asked to consider the following questions:

- What if anything should you do with this information?
- Does this new information impact whether you would prefer to first try to negotiate settlement directly, or whether to suggest mediating as a next step?
- Do you have an obligation to share this information with counsel for the mother?

As author of this simulation, now considering what to include in a teaching note, my first thought is: what diabolically difficult and very real questions to ask!

Theoretically, this information would strengthen Keith's case in the unlikely event of an arbitration or trial. It surely puts Dianne in a bad light, calling her motives and thus her credibility into question. Perhaps that's a reason to hold it back in a negotiation or mediation, at least initially. It will have more force as a surprise. And it may not be revealed through discovery. (The lawyer could decide not to ask Dianne about her relationship with the VP, should they ever depose her.) It's possible Dianne's lawyer knows about the relationship, but it's also possible Dianne has not revealed it to them.)

Should the lawyer disclose it to Keith? Well, isn't a client entitled to know what factors – arguments and facts – strengthen or weaken their case? If Keith later learns that his lawyer knew about the Dianne-VP relationship and failed to tell him, how will Keith feel about that?! The client's trust and confidence in the lawyer will be lost. Of course, the lawyer should first seek to investigate whether the gossip is true. If so, disclosure remains a ripe question; the answer will not make things easy.

The lawyer should anticipate that disclosure will stoke Keith's animus toward his sister; Keith will no doubt leap to conclusions (not mere suspicions) about Dianne's and the VP's

motivations. And he might decide to fire the VP. If the information is traced to the tennis partner, they will feel betrayed.

Moving on from the lawyer-client issue, the next strategic issue raised in this Interlude document raises a strategic issue parallel to that in Interlude I: Whether the lawyer now prefers an initial attempt to negotiate settlement directly (and in a more fulsome way than at Phase 4) or to suggest mediating as a next step?

The strategic question raised is premised on the reality that an argument or rationale for a negotiation move by the other side tends to generate the most movement "upon entry" or at least, when first used forcefully. Revisiting it later tends to have less impact. Imagine both sides appear to be stuck in their dollar ranges, and Keith's lawyer says: "You know Dianne's relationship with the VP puts makes her motivation and credibility suspect. " Dianne's lawyer responds with: "Yeah, yeah, we know all about that. You pushed that line before, and it's already factored into our negotiating position." However, using it later is more likely to inspire a significant negotiation move down by Dianne's side.

Most mediators know this (or should). It seems worth sharing with negotiation students. It also raises the question of whether Dianne's lawyer will recommend (another, more fulsome) effort to negotiate settlement directly, or whether to suggest going directly to mediation. There's no clear right answer, but it's worth thinking about. The calculus might involve an assessment of whether the other side would put everything on the table in negotiation or hold some "wiggle room" back for anticipated mediation.

The next question posed in this Interlude is whether the lawyer is obligated to share this information with counsel for the client's mother?

Worthy of discussion. I don't think so. The mother is clearly not aligned with Keith, and Keith's lawyer has never agreed to cooperate with her lawyer.

Of course, it's possible *Keith* will want to inform his mother about the sister's relationship, to drive a wedge between them, and suggest Dianne's motives are not pure. Would it waive any part of your and Keith's attorney-client privilege? Could Keith just confront Dianne or the VP – ask them the question - without raising a privilege issue? Perhaps most important: would it be strategically wise for Keith to do that? To fire the VP? Any of these would further intensify Diane's animus. It seems appropriate for the lawyer to discuss with Keith how his actions could impact litigation and settlement. Now that would be a tricky conversation!

Interlude II then invites students to consider the perspectives of Dianne's lawyer and a mediator, as set forth below.

> *Dianne Nelson's lawyer:*
>
> What if you are Dianne Nelson's lawyer and Dianne Nelson tells you of her romantic relationship with the BoxAll VP, but mentions no scheme to oust Keith and install her boyfriend? Or, what if she DOES tell you of her grand plan?

What if you are Dianne Nelson's lawyer and she tells you of the dinners with her mother and the VP boyfriend, and that she would like her mother to re-allocate ownership. She tells you it was her mother's idea, so that "we girls could win in the end."

My response: it isn't pretty, but it's covered by the attorney-client privilege. And it might cause the lawyer to be wary about this client, her candor, motivations, and character.

A mediator:

Assume the lawyers and parties decided to try to mediate their dispute and you are the mediator. You are in private caucus with Dianne Nelson and her attorney, and you learn this information from them.

Neither Dianne nor her lawyer disclosed or even hinted at any of this during the joint session. So far, Dianne has just talked about wanting "equality in everything."

Neither their mother nor her lawyer is participating in the mediation. You had spoken with the mother's lawyer beforehand, and he assured you that she would be happy with "whatever the kids work out." The mother's lawyer hadn't mentioned anything about dinners with Dianne and her new boyfriend. You suspect the lawyer is unaware, but you can't be sure.

What should the mediator do? What obligations does the mediator have?

Does the calculus change if the mediator learns this information in a side conversation with Keith's lawyer? What if Keith's lawyer tells the mediator that they have not yet shared this information with Keith?

The initial simple response is that the mediator cannot reveal to one side what the other has communicated confidentially, in caucus.

Trickier is the question of what information is owed to the mother's lawyer. It's not the mediator's place or obligation to communicate, based on what has been stated so far. Dianne still seems aligned with her mother. However, if the mediator comes to see Dianne as being in clear conflict with her mother's interests, query whether the mediator might suggest to Dianne's lawyer that they take a break and invite the mother's lawyer into the mediation. A mediation should not be used to perpetrate a fraud (nor should a lawyer be an instrument for their client's fraud). Nothing here rises to that level, but the mediator should be alert to it.

As for the last question – what if the mediator learns Keith's lawyer hasn't shared the information with Keith – this is trickier than it appears. Yes, the mediator must protect confidential information shared by each side, but that obligation is technically to the parties. The lawyers' share it only as the parties' representatives. [This is my own, first

blush analysis. I would welcome others' thoughts.] Having said that, it's hard to imagine a mediator telling the client what the lawyer does not want to tell time. The practical reality is that lawyers generally recommend the mediators for their cases. If they intentionally tell the client what the lawyer has not, this mediator will never get another mediation in this legal community. One option be for the mediator to raise with the lawyer the strategic wisdom of withholding this information from Keith. After all, when Keith learns the lawyer knew and failed to tell him, Keith's trust and confidence in the lawyer will unravel.

PHASE 7 – PRE-LATER MEETING AND POSSIBLE SETTLEMENT PROCESS

The information for each role contains information they would now know, based on communication that would have taken place after the lawyers' initial unsuccessful negotiation efforts. As suggested in Phase 6- Interlude I, Dianne's lawyer has informed her of the additional grounds for a claim against Keith – the excess bonuses uncovered by the accountant. Dianne is not surprised, but even more disgusted with her brother and "ready to be done." She wants to "wrap all of this up, make Keith pay for what he's done, and part ways. She absolutely does not want to co-own any property with him after their mother passes, not does she want to cede all her BoxAll shareholder rights and equal control.

On Keith's side, it appears no mention has been made of his sister's rumored relationship with BoxAll's VP; he expresses no awareness of it. When his lawyer raised the question of the bonuses, and the other side's intent to add these to their claims against him, Keith's response was that the bonuses were never hidden. He maintains that the father had approved of large bonuses as unofficial but entirely fair adjustments to the annual profit share distributions. According to Keith, their father said: "Your sister hasn't done a day's work in the last 30 years, and you've been at BoxAll every day. If BoxAll's business ever really takes off, you can triple that bonus. She'll still be rich enough." According to Keith, any of his large bonuses were justified by his extra work (covering for an exec who left) and savvy investments.

Both lawyers recommended that they undertake another attempt are resolving their and agree on a path forward to you. The lawyers promised their clients that, after discussion with opposing counsel, they would advise as whether to go to mediation or attempt direct negotiate first. The negotiations could be just lawyer-to-lawyer, with client authority, or with both Keith and Dianne (and maybe their mother) participating. The lawyer explained that in mediation, a neutral seeks to facilitate agreement. The mediator would likely insist on the parties (and maybe their mother) being there, though they could be in separate caucus rooms all or most of the time.

Both clients' response to their lawyers was: "Whatever works." When asked what they would need to see in a final, settle everything agreement, the clients asked for time to think about it.

The lawyers' Phase 7 role information brings them up to this point. In other words, the lawyers are told what they communicated to their clients, and the clients' responses. The lawyers' role information ends at the point where they have asked their clients what they would need to see in a final, settle everything agreement, and the clients asked for time to think about it.

When Phase 7 begins, the clients have done that. Their interests relating to BoxAll and legal claims, and their preferences and valuations of the real estate properties are contained in the clients' Phase 7 role information.

Property aside, Keith wants any settlement to take into account:

1) His contribution to BoxAll over the past 30 years – really his entire working life.
2) His half interest in BoxAll (after their mother's passing).
3) Their father's wishes and intent for him, Dianne, and their mother.
4) His need for some autonomy in making critical business decisions for BoxAll.
5) His desire to avoid business interruption/devaluation from Dianne's irresponsible actions.
6) The importance of presenting BoxAll well to future purchasers, and the ability to sell BoxAll at a time and on terms that are optimally favorable.
7) His desire to end up with no less than half the value of the real estate. If divided between them, the division should reflect his preferences and valuations.
8) His desire to be DONE with Dianne and his mother and this whole mess.

Dianne wants any settlement to take into account:

1) Keith's overcharging for interest on the $3 million dollar loan.
2) Keith's excessive bonuses for the past five years.
   (Any settlement should reflect some compensation for these claims, even if not the full amounts.)
3) The extreme humiliation she suffered while trying to review documents at BoxAll.
4) Her half interest in BoxAll (after your mother's passing).
5) Her obligation to make sure your mother is treated fairly, in accordance with her father's wishes.
6) Her shareholder's rights to monitor BoxAll's business until it is sold. Someone needs to monitor whether Keith is finding new ways to skim profits.
7) Her unwillingness to have less control over BoxAll's fate than Keith does.
8) Her desire to end up with no less than half the value of the real estate. If divided between them, the division should reflect her own preferences and valuations.
9) Her desire to be DONE with Keith and this whole mess.

Neither care if settlement is reached in negotiation or mediation as long as it gets done.

Parties preferences for and valuations of the real estate properties are unchanged from Phase 4., and are summarized in the chart below:

Property	Earlier Appraisal	Keith's ascribed value	Dianne's ascribed value	Notes
1. Compass Road Car Wash	$3m	$3m	$2-2.5m	K+ .5m-$1m
2. Dexter Road Car Wash	$2m	$5m	$2m	K+ $3m
3. Exeter Street Strip Mall	$3 m	$2-4M	$4-5m	D+$1-2-$3m?
4. Fairview Street Strip Mall	$5m	$1-2m	$2m	D+ 0-$1m?
5. Garnet Apartment Building	$6m	$6m	$8-9m	D+ $2-3m Wants it!
6. Hoover Apartment Building	$5m	$8m	<$4m	K+$1m D doesn't want it.
7. Ibid Apartment Building	$8m	>$8m	$8m	Both want it. (not so strongly)

Phase 7 contemplates substantial lawyer-client meetings for the clients to communicate their interests in settlement terms, and to review the property preferences and valuations. Lawyers would be wise to help clients set expectations: negotiation or mediation are unlikely to yield confessions of wrongdoing or irresponsibility from the other sibling. It may be possible to consider higher "exchange value" for a property as tacit concession on another issue (because the bonus was high or the loan interest rate could have been lower, etc.). They might even suggest listening to the sibling's perspective (heaven forfend) during a discussion, whether in mediation or negotiation.

I have to say, given the complexities, and strategic issues relating to disclosure of valuations, not to mention the family dynamics, I believe this case cries out for mediation. And a very skilled and experienced mediator. Let the mediator be the one to highlight the other's perspective, intervene to reframe tough sibling language and accusations.

Instructors will note, I have not provided materials for a Phase 8 – let alone a Phase 8 titled Option A-Mediation or Option B-Negotiation. At this point, everything should be primed and ready for the students – Keith, Dianne, and their lawyers, to decide how to proceed. If they opt for mediation, they will want to discuss the qualifications of a mediator. An instructor might offer CVs and websites for mediators or instruct the mediators to search online. The instructor might recruit local or remote mediators to mediate pro bono. (My experience is that they always say yes. And I advise the instructor to set this up long before reaching this point in the semester.) Or you might work with a mediation course instructor, to pair their students with Keith, Dianne, and their lawyers, and take it from there.

I look forward to hearing from any instructors who use BoxAll Battles, and welcome suggestions for its further development.