BIO-CON v MICROTEX
NEGOTIATION, MEDIATION, OR ARBITRATION

Teaching Note

This simulation is a favorite of mine. I have used it as an arbitration, a mediation, and a straight negotiation. It came into being for the purposes of an arbitration experiment I proposed to the CPR Institute for Dispute Resolution in 2000, to test the impact of a three-member panel or solo arbitrators, and arbitrators' awareness of brackets on arbitral decisions and awards. CPR paired me with Tom Stipanowich, then a professor at the University of Kentucky College of Law,[1] for the project, and Tom gets full credit for locating the real case upon which this simulation was based. The setup for and results of this experiment are described in this note and the materials used are included in this simulation folder. Since then, I used it annually for approximately 20 years in my negotiation class; groups at impasse were sometimes prompted to mediate. It served as a capstone for the negotiation course, and we brought in "real fake" clients for the client roles. For many years, I was fortunate to work with a professor of business law at our business school, who made this an assignment for her students (and used it to teach contract and IP concepts). In later years, my negotiation class students and I actively recruited family, friends, neighbors, and law school staff (any warm bodies) to take on the client roles. Note: recruiting must start early; I even reference it in the syllabus. The simulation can also be used as a mediation.

The Plot Line

This a business contract and fraud dispute, arising from an unconsummated joint venture between Bio-Con, Inc. and Microtex, Inc. Both companies had been developing an anti-microbial product for medical devices. As a result of a conversation at a conference, the two CEOs began discussing a joint venture based on Bio-Con's new product, MGUPHIN. Prior to these discussions, Bio-Con had had a technical breakthrough; Microtex had acknowledged manufacturing and distribution strengths. They entered into a Confidentiality Agreement covering proprietary information disclosed during negotiations. Bio-Con demonstrated its product development process and informed Microtex that the system was being tested by scientists at an independent company. A joint venture team met with representatives of MegaMed, North America's largest manufacturer of medical equipment, regarding a possible long-term contract for the contemplated joint venture. The companies' science and engineering teams also met. Within a week after that, the Bio-Con's CEO signed a five-year lease for 20,000 square feet of laboratory and office space in the name of the joint venture in Industrial/Commercial Office Park where Bio Con was located.

[1] Tom went on to become CPR's President and CEO and later, a Pepperdine School of Law Professor and Director at the Straus Institution for Dispute Resolution.

Shortly thereafter, the negotiations between Bio-Con and Microtex hit a snag. Despite counsel's attempts to facilitate negotiations, on June 1, Microtex's CEO sent a letter to Bio-Con's CEO formally terminating the negotiations, expressing regret over irreconcilable differences in the parties' interests concerning the joint venture, and suggesting that both companies would be better off pursuing other business expansion opportunities. The Bio-Con CEO's response asserted that execution of a written joint venture agreement was a mere formality: the joint venture between Bio-Con and Microtex already existed under their mutual understanding and agreement, and because both companies had taken affirmative steps and undertaken financial commitments evidencing the joint venture. While the parties dispute the reason for the breakdown in negotiations, it is undisputed that no joint venture agreement was ever signed. There's a clear dispute over whether a contract existed, and how the various conversations and correspondence should be interpreted.

It came out later that a Microtex engineer had contacted a scientist at the testing company, discussed MGUPHN-coated surgical arms being tested, and obtained a component of a MGUPHN-coated arm. Bio-Con alleges it did so to reverse engineer the Bio-Con technology. Microtex disputes this and asserts that it had an independent scientific breakthrough that enabled it to produce its own anti-microbial coating product.

Microtex eventually entered a supply contract with MegaMed to fulfill its requirements for equipment coating for a period of years.

Bio-Con filed a demand for arbitration against Microtex asserting claims for breach of contract, breach of fiduciary duty (stealing the business opportunity with MegaMed), and breach of their Confidentiality Agreement (stealing proprietary information). Microtex denies all claims but agrees the arbitration provision applies to the dispute. Under the relevant arbitration rules (and by agreement of the parties), document discovery has begun, and depositions have been taken of three witnesses. Prior to the depositions of both companies' CEOs, counsel agreed to discuss the possibility of settlement with them. (Note that the arbitration provision references the CPR Institute for Dispute Resolution, as a nod to CPR's role in the origins of this exercise. As is always true, the parties are free to agree upon a different arbitration provider organization, and they are free to attempt settlement through direct negotiation or mediation. This can give rise to fruitful class discussion in any dispute resolution course.)

Negotiation Lessons, Experience, and Class Process

Among the important lessons in this case is the value of listening, understanding the other's perspective, and encouraging your client to do so as well. When lawyers meet with their clients, it is too easy to agree entirely with their perspective, taking their narrative as the only truth. This problem is written in such a way that the contract issues are murky. Even if there was no formal contract, there's a theme of breach of good faith, justified reliance, and potential fraud. Was Microtex

participating in discussions in good faith or to obtain technical secrets? The facts around testing the anti-microbial MGUPHN-coated surgical arm (and the way it was obtained) appear suspicious (even if ill-intent is murky). Was Microtex's later "breakthrough" due to its long independent scientific work, finally yielding results? Or was it due to information learned within the joint venture context?

As is so often true, each party distrusts the other's motives and feels resentment or anger at perceived slights or betrayals. One lesson is that, if negotiators act in an adversary manner, if they don't acknowledge the other's perspective fully and respectfully, a settlement is unlikely. Successful negotiators listen, demonstrate that they understand the other's perspectives - why they think and feel as they do - and communicate their own. This is helpful for settlement and essential for any settlement that will involve future dealings.

Every year, some student negotiators have managed to work out some future collaboration. I confess that wasn't the original goal of the exercise, but one can see the possibility in the problem context. To the skeptics, I confess this would be unusual and unlikely in "real life." The reason, just as real and surely legitimate, is that people do not wish to enter business dealings with others they consider untrustworthy – who have "betrayed" them. "Fool me once, shame on you. Fool me twice, shame on me." Who's the fool the second time around? However, if we learn that the "betrayal" was unintentional, motives were pure, etc., we *might* be open to trying again, with adequate safeguards this time. In this case, if and only if, Bio-Con comes to believe Microtex's beliefs were sincere, actions not ill-motivated, and at least the CEO didn't direct thievery of its secrets, they may be amenable to a future business relationship of some sort. That will only occur if negotiation communications are extraordinarily well done.

Prescriptions for feel-good, cooperative, mutual gain solutions are bonuses, they are not the main point or purpose of the exercise.

Having taught it for so many years, I believe Bio-Con v. Microtex demonstrates these takeaways:

1) We are all susceptible to partisan biases and judgmental over-confidence. That colors case assessment and makes settlement difficult or impossible. Translated to negotiation lingo: when both sides' perceived BATNAs (litigation or arbitration outcomes) are widely divergent, there's no ZOPA. Even if those biases are tempered in lawyers (unfortunately, not often), they are alive and well in our clients. The lawyer is obligated to attempt more objective analysis, by considering and listening to the other side's legal and factual positions. And the lawyer is obligated to communicate their analysis to the client.

On the topic of partisan perception bias and over-confidence, the simulation role instructions end with a questionnaire form asking each participant to record what they believe the % likelihood of a plaintiff's verdict to be, and what damages award is likely if liability is found. (To tease out these assessments, the form asks what they believe a range of damages might be, and then to name what damages figure they believe to be most likely.) As indicated in more detail later, the class results have never failed to demonstrate partisan perception biases.

2) The *way* a negotiator presents their perspective and analysis makes a tremendous difference in the way it will be heard. Arguing is not helpful. Well-framed (tactful) presentation of perspective can be. It's cliched but true, if a negotiator listens, expresses respectful understanding of the other's presentation (whether strident or tactful), and then skillfully communicates how and why they see it differently, there may be movement. BATNAs may shift.

3) Whether, when, and how much to spend time on legal and factual issues that lead to the dispute is a judgment call and an important one. Naturally, the right judgment call "depends". On the one hand, settlement seeks to put the legal dispute behind. Should they just negotiate, without worrying about the disputed issues? Maybe, if they learn that both sides see ambiguity and risk, and signal that they are "in the same ballpark." However, if they are locked into "ceiling" or "go now lower" points that are far apart, some discussion and understanding of why is necessary. If impasse results from widely divergent assessments of the BATNAs, and those are based upon one-sided information and perceptions, these must shift for settlement to be achieved.

   One plain hard-learned truth is that there will be no settlement if a negotiator demands a version of "admit they were wrong and we were right."

Class Set-up for Negotiation or Mediation

Clearly, an instructor can choose to set up this exercise in any way that works within their class or workshop context. I leave that to your judgment. The case is robust enough to work for a variety of purposes, provided the participants are given sufficient opportunity to digest the content. You can focus on client counseling challenges, on negotiation or mediation strategy and skills or process choices, or arbitration.

However, I thought it would be useful to describe how I've set it up in my negotiation course. First, I flag in the syllabus that an important "big" simulation will occur toward the end of the course. I don't schedule it for the last class, but rather for approximately the third to last class session (in a course that meets

weekly). The syllabus also sets out the strong request for students to recruit clients. I reference the need for clients early in the semester and mention "Parents love this. It enables you to show them what you are doing in law school without having to answer questions about it." I also promise never to pair law students with their parents or other recruited clients. The degree to which the students will be successful in recruiting clients has much to do with how local they are. I strongly recommend that the instructor make every effort to recruit as well. A word of caution: it's not necessarily difficult to recruit undergraduate students, especially if you work with a university pre-law office. However, I've had very mixed experiences with undergrads (and that's putting it kindly). Much better was the locked-in class of MBA students (who were required to participate within their business law course). I've also had luck with law school staff, including library staff. Too often under-appreciated, they enjoy being part of the law students' education. I wish I could say that I've had faculty volunteers, but that happens less often. In the early years, some local law firms were willing to circulate invitations to associates and paralegals. They saw the benefit of experiencing the client's role.

The students are required to contact their clients and to set up a meeting to prepare preferably well before the mediation or negotiation takes place. My syllabus and in-class exhortations make this clear. I generally suggest the meetings take place the week before the mediation or negotiation. (Pre-Covid, these meetings were required to take place in person. While an old-fashioned instinct tells me that's preferable, I have learned that post-Covid, client meetings tend to be done remotely. My suggestion is to give in and permit remote.) Lawyers and clients should understand those prep meetings often take 90 minutes. The lawyers must learn the client's perspective and any additional information, share at least their tentative analysis, and consider how to approach the negotiation or mediation, including how they will allocate roles within the process.

Lawyers and clients should fill out their questionnaire forms before the end of their initial meeting and send them to you (or upload them to the course platform).

Students should be told to begin scheduling both the client meetings and the four-way negotiation (or mediation) as soon as they have client contact information and know who their negotiation counterparts will be. That way, if schedules simply don't match, I can do some switching around. I strongly urge you to emphasize this and check during class to make sure they have worked on scheduling. It's not wise to wait until the client meeting.

I advise distributing the lawyers' role information EARLY – at least a few weeks before the exercise. A good reason to recruit clients early is to distribute their role information well in advance. This is not a light read, and the clients must read their role information BEFORE their initial meeting with the lawyer to prepare for the negotiation or mediation.

If you are not using outside clients in the negotiation session, you could schedule it during a three-hour class session. That's about how long it takes.

I hereby acknowledge that you could run this with a client meeting to obtain settlement authority, followed by a lawyers-only negotiation during class. You might ask that the lawyers try to have their clients on call if additional authority is needed. If so, I might suggest extending the negotiation period past class time. If progress seems possible, lawyers and clients should talk again, lawyers attempt to negotiate further, and so on, as occurs in practice.

If you are running this as a mediation, then having clients in the room (or, sigh, a Zoom room) is realistic and expected. However, I can't emphasize enough the "learning value" of having clients present in the negotiation, even if that happens less often. I have heard many anecdotes of lawyers and clients sitting down to "try and work it out" with explosions ensuing. Then they call a mediator. It's my optimistic fantasy that lawyers can learn (and teach clients) how to make these negotiations successful. Plus, even if your students won't ultimately have their clients in a four-way negotiation room, it's valuable to know how a client might feel about the process.

Back to logistical practicalities, when fortunate to have outside clients in the negotiation, I advise against scheduling a class session during the week their negotiations are to take place. This gives them maximum flexibility to accommodate clients' (and or mediator's) schedules.

Ask students to report their results to you (or to upload them) as soon as their negotiations are complete. If they haven't already done so, remind them to turn in the questionnaires. This will enable you to create a chart showing the class results, with columns reflecting each participant's analysis, based on the questionnaires. You can distribute or project this in class or, if possible, distribute it beforehand provided all negotiations are complete.

In Class

I begin the class by asking a representative of each group that reached an impasse to come down to the front of the room for their arbitration results. They are told they will have to report these results to their clients. (My syllabus or exercise instructions would have warned them that those who reach an impasse will participate in an arbitration deciding the case, but no preparation is required.)

I then explain that this case was once arbitrated before a room of approximately 100 arbitrators, and the results are in my folder. Each student pulls out a slip of paper, and we read their arbitration awards. Groans ensue. I then post the overall percentages of liability findings and the range of awards from the original CPR

experiment. We spend little or no time discussing solo vs. three-member panels (especially in recent years, as I did not find correlations when running a similar experiment in Cincinnati in 2015). I also mention that the numbers in the simulation have changed ever so slightly since the original experiment, where a number of liability and damages theories led to $ 2 million. In this revised version, different theories would take a decision maker to $2 million or $3 million. The change shouldn't affect decisions in very low or very high damages ranges.

Leaving aside any three-member vs. three-member panel insights, the most compelling takeaway is that a relatively homogenous group of lawyers (mostly white, middle-aged to older, mostly men, and no doubt predominantly in defense side or corporate practices) saw the same arbitration presentation and reached a wide range of results. I give the students full permission and encouragement to tell the story to future clients!

I then post or distribute the class results on the chart containing their and their clients' responses to the pre-negotiation questionnaire.

I hereby promise a phenomenally rich debriefing experience. You can focus on impasses, on groups that reached a cooperative/future agreement, and on the dollars. Look to the questionnaire results to see if they explain the impasses and the eventual agreement on the dollars. Inquire into time allocation between arguing and negotiating. Ask about how and whether they presented their client's perspectives. Do spend quite a bit of time on what it was like to work with clients – beforehand and in the room. How might they do it differently next time? It's worth focusing on the easy settlements and those with cooperative terms: what was their approach? How did they get there? Did anyone's client react very negatively or very positively to a statement or strategy by the other side?

On the negotiation strategy front: what are the dangers of aggressive anchoring? Inevitably, at least one negotiation (often many) involved one or both sides staking out a preposterous starting position. "We demand $30 million!" "We will pay nothing [or the equivalent of two cents." What impact does that have? The answer is, of course, anger, insult, loss of credibility, etc. Students should learn that a ridiculously high or low starting number is inefficient. It wastes time and risks poising or blowing up the negotiation. Generally, why should anyone settle for an amount worse than their worst-case scenario? They can take the risk that an arbitrator, judge, or jury will do that.

One last note about debriefing: I have often invited clients to attend the class debriefing (or just the first hour) but would not presume to require or even request it. They have already contributed a significant amount of time for the students' benefit. Sometimes, however, they do elect to attend for some or all of the class. (Pre-law students, 1Ls, and any retirees you managed to recruit may be interested.).

If you do have clients present, I suggest turning to them first: ask what they observed, how the process felt to them, and what their lawyer did or said that was effective. What did they find hard to understand? Were the explanations effective? Did they feel the lawyer understood them? Clients are generally happy to praise their lawyer in front of the class. You might also ask what was said or done that was counter-productive, made them retrench, etc. Ask how a (new) lawyer can build their client's trust and confidence.

If no clients are present, or after they leave, the students will no doubt enjoy talking about their difficult, impossible, uncoachable, and wonderful clients.

A note about the CPR experiment that gave rise to this case: The arbitration presentation at CPR was limited to an hour. To make that work we eliminated cross-examination and provided background stipulations to the arbitrators in advance. Experienced trial attorneys acted as counsel and witnesses. Arbitrators then deliberated, solo or in groups, some with instructions as to brackets. We collected the arbitrators' decision and award forms and went into a separate room to crunch the numbers. The CPR program moved to another topic for a short while. We then came back to report preliminary findings: the % of liability awards, and the $ ranges, and any correlations. Those results are provided on the simulation site.

A note about the organization of folders on this simulation site

So that no one has to reinvent the wheel, there's a folder containing copies of various memos written to recruited clients, pairing sheets, etc. These are all in MS Word form. Please feel free to adapt them for your own use.

For anyone seeking to re-stage this and re-do the experiment, the simulation folder includes the arbitrator questionnaires. The witness deposition summaries were used as the basis for our witness testimony.