

Part I: Vignette on Attorney-Attorney Negotiation
Suggested Dialogue as the Basis for Improvisation
(Total Time for Part I: 65 minutes)

Role Players: Alfreda Robinson as Kelly Miller, the Attorney for Rick Gonzales
Doug Frenkel as Pat Collins, the attorney for G&B, Inc.

To save time and retain a tight focus, the action does not begin at the very beginning. The moderator (Isabelle Gunning) introduces the role play as beginning part-way through the negotiations, after initial introductions, pleasantries, unpleasantries, and expositions of each client's case have concluded. The attorneys engage in the adversarial, hard-ball style that is commonplace among attorneys and businesspeople. By the end of the negotiation, they begin to open to the possibility of a more collaborative approach, but do not pursue it fully in this vignette.

Time allocated for the role play: Approximately 10 minutes

Pat/Doug: What is it going to take to make this thing go away?

Kelly/Alfreda: This thing?

Pat/Doug: This lawsuit. Come on. Let's be real about this. A lawsuit to resolve a family spat?

Kelly/Alfreda: This is no "spat," as you call it. Rick has some bona fide concerns about the viability of the company itself – so long as it's under Roberto's control. And given the family dysfunction, I've advised him that the best way to resolve this once and for all will be to go to court. A judge's order will be dispositive. And he can then get on with his life.

Pat/Doug: So he sues? "We had to destroy the company to save it?" This is crazy.

Kelly/Alfreda: That's an unfortunate choice of words. Rick hasn't made any allegations about his father's mental competence. Although it he's pushed to it, I'm sure Rick could mount a pretty good case on that issue.

Pat/Doug: There's not a shred of evidence to support any claim like that.

Kelly/Alfreda: There doesn't really have to be, does it? Just the allegations alone, plus the process of disproving them, and their public airing – that could be all that's needed to break Roberto. At any rate, to break his control over the company.

Pat/Doug: These are empty threats with no foundation and no logic. Think about it. If creditors and suppliers believe they have reason to question whether the CEO of G&B is of sound mind, the next step is to question whether the company's financials are sound. And then, well, Rick wouldn't have much left to fight over would he? The company would be finished, taking Rick's income with it.

Kelly/Alfreda: I can see your point. We've gone through some of the financials that have been produced in discovery. You've got some real problems there. Even criminal problems, I'd say.

Pat/Doug: Is this what Rick is after? Some kind of public whipping of his father?

Kelly/Alfreda: No, maybe just a private apology. That could be a good start. You know they've treated Rick pretty shabbily – the father and brother, both.

Pat/Doug: So, you're telling me that if Roberto and Leo somehow acknowledge Rick's own hurt in this struggle over company control, then Rick will drop the suit?

Kelly/Alfreda: Well, it depends upon what that acknowledgment is. Words alone are not enough, but words matter.

Pat/Doug: I'm not authorized to offer an apology. And you know I have to be careful about the words I use, since they could be seen as an admission of wrongdoing – which, of course, my clients would deny. If I could get Roberto and the rest of the family to agree to some sort of acknowledgment or apology, what would they get in return? A reduction on the monetary claim? More generous terms for Leo to repay the loan?

Stop action for discussion.

Panel analysis

Commentators: John Lande and Michael Martin

Moderator/Isabelle: We recognize that in many jurisdictions, courts require some form of ADR as part of the pre-trial litigation process. But, even though settlement negotiations may be mandated, attorneys can use the negotiation process in different ways. We have two questions for discussion, which I'll present now as an overview, but which we'll address separately to assure there's sufficient time for both questions and for discussions between the audience, our commentators and our role players.

We'll ask John Lande to take the lead in responding to our first question:

- How would you use what we've just seen in this vignette to teach your law students about the risks and benefits in using negotiation to resolve a business dispute? You've done an extensive study of how business people tend to view attorneys and litigation. Without doing a scholarly presentation, could you link some of the key points you found there with some of the key points we've seen here? And how would you convey those points to your students? (Time allocation: approximately 5-7 minutes with commentator; 15 minutes in discussions between audience, role players and panelists)

We'll ask Michael Martin to lead off the discussion of our second question:

- At the beginning our attorneys used a fairly standard, adversarial negotiation style, but by the end of the vignette the attorneys had opened the door to a more collaborative, problem-solving approach. The idea of an apology was even discussed. As a law teacher who teaches students about advocacy, how would you use this vignette to explore the risks and benefits of an adversarial negotiation strategy compared to a collaborative approach? How would you speak with your students about strategic choices when litigation is on-going simultaneously with ADR? (Time allocation: approximately 5-7 minutes with commentator; 15 minutes in discussions between audience, role players and panelists)

Summary

Moderator/Isabelle: Summarizes key points made during the discussions of both questions. Gathers/summarizes issues to prompt further dialogue on the DR Section website. Prepares the audience for Part II: Party-Party Mediation Assisted by Attorney Advocates. The moderator can tell the audience that a further round of negotiations between Pat and Kelly, using a more collaborative, problem-solving approach, managed to resolve the issue of the loan. Leo has issued a promissory note to G&B with provisions for payments to be withheld from Leo's G&B salary. Rick remained dissatisfied, however, about the leadership of G&B. Unknown to Roberto, Rick has identified a publicly held corporation interested in acquiring G&B. The new company has promised to install Rick as Chief Operating Officer of the new division (G&B), with a seat on the board of the new corporation. (Time allocation: approximately 7-10 minutes)

Mid-Program Break (10 minutes)

Suggested Dialogue as the Basis for Improvisation (Total time for Part II: 80 minutes)

Role Players: Alfreda Robinson as Kelly Miller, the Attorney for Rick Gonzales.
Michael Pinard as Rick.
Doug Frenkel as Pat Collins, the attorney for G&B, Inc. (represented solely by Roberto Gonzales).
Tim Wilton as Roberto.
Phyllis Bernard as the mediator.

To save time and retain a tight focus, the action does not begin at the very beginning. The moderator (Isabelle Gunning) introduces the role play as beginning at the end of the second stage of mediations, after initial ground rules have been laid, and each party has presented their perspective on the dispute, with additional commentary by their respective attorneys. Roberto has written authorization to speak on behalf of G&B. This authorization is in the form of a corporate resolution passed in a recent board meeting attended by all the family except Rick.

**Up to this point in the mediation, the tone has been remarkably civil.
(Time allocation for the role play: 20-30 minutes)**

Mediator/Phyllis: Thank you both for helping us to better understand the situation. And thanks to your attorneys for the additional input. All around the table we've heard concern expressed about the company, G&B, the family, and the future. I think it's also fair to say that on all sides, there's some significant pain – which must be dealt with in order to move forward. What I'd like to ask now is to work on identifying ways the family can move forward with mutual respect and the company can move forward with profitability – two of the things that I heard both of you want very much.

Roberto/Tim: He may want it, but he doesn't know how to give it. He doesn't know the meaning of the word respect.

Rick/Michael: And profits aren't anything you've seen in years, old man.

Mediator/Phyllis: We've been here a while, and these are difficult matters. It's time for us to go into separate sessions. I'll spend some time with each of you, speaking with you individually. I'll shuttle back and forth between you. Sometimes an intermediary can help develop some creative solutions. While you're with your attorney, I'm going to ask you to brainstorm. For now, not focusing on legal issues. Mediation can be especially good for developing solutions that people can live with even if it's not necessarily what the courts would do in the same circumstances.

The role players split into separate parts of the stage. The mediator meets first with Roberto/Tim and Pat/Doug

Roberto/Tim: I want to mention a couple of important differences between me and Ricardo. It seems he objects to my business style. I give people credit when they need it, particularly the small Latino grocers I sell to. We lose some money, but the goodwill is important to me. These people are my people. They helped me when I had hard times, and I will help them now. Ricardo and the others in the family are not hurting for money. I will not stand for a greedy attitude in my children.

Pat/Doug: Ricardo has also threatened to make G&B's hiring preferences a legal issue. As if he should be some sort of whistleblower for a reverse discrimination claim. This is not part of the official pleadings as filed with the court; but it's part of the background that you need to understand.

Roberto/Tim: Yes, I hire Latinos over other people. They speak my language and the language that most of my employees speak. I trust them; I am familiar with them. We have to stick together. Ricardo says the law does not allow this, but I say this is my business and I can hire who I want.

Mediator/Phyllis: And so, Senor Gonzales, *es muy importante*, it's very important to you that the company – whoever is running it – maintain its allegiance to the Latino community. *El padron* must be *fidel*. Would you say that's the most important thing?

Roberto/Tim: *Si*. Yes.

Mediator/Phyllis: Regardless of who is running the company?

Roberto/Tim: Yes.

Pat/Doug: But who runs the company matters, too.

Roberto/Tim: I do not trust a big corporation to maintain the human side of my business, and I do not trust Ricardo about that either. He just wants money and power and forgets about loyalty to family and his people. He wants to forget he is Latino. He sues his own father. He is not a man to be entrusted with my life's work. I trust Leo; he does things the way I say they should be done. But Ricardo bosses Leo around. I do not know if Leo can hold his own against Ricardo if I am not there.

Mediator/Phyllis: And what about your daughter, Lena?

Roberto/Tim: Lena is a girl. She should get married. She should not be messing around with my business anymore. It was OK when she was first out of college. But it is now time for her to settle down.

Mediator/Phyllis: You sound a bit tired, Senor. This has been hard on you.

Roberto/Tim: What I want to do is to get out of the day to day running of the business and let Leo handle that. But I will always be in charge. I will always have the final say. Together with Ernesto, God rest his soul, I made this business and it will be mine until I die. And I will not let Ricardo and his Anglo ideas take over.

Mediator/Phyllis: And so, Senor Gonzales, it is also critically important for you to be able to trust that whoever runs the company in the future will care about it, because this is your life's work. You would not hand it over lightly.

Roberto/Tim: Correct.

Mediator/Phyllis: Although you recognize that at some time such a change may be necessary, if only because none of us is immortal.

Roberto/Tim: *Claro.* Clearly.

Mediator/Phyllis: Senor Gonzales, you have shared with me some values very close to your heart concerning G&B, Inc. Could you please talk with Pat for a while about ways to describe those values? What I'm looking for are standards, objective measures to know whether a new *padron* is on the right track from your perspective? Meanwhile, I need to ask you: from all that you've shared with me here, what do you want me *not* to share with Ricardo when I speak with him?

Roberto/Tim: I have no problem with your telling him everything I've said. Oh, except for what I said about Lena. I wouldn't want her feelings to be hurt. She's a good girl.

Moderator/Isabelle: The mediator joins Rick and his attorney, Kelly, who have been conferring in private while the mediator caucused with Roberto and his attorney, Pat.

Rick/Michael: I can save you some time. I've been through this mediation crap before. I know the drill. Let's just cut to the chase: Is the old man ready to step down?

Mediator/Phyllis: I left Roberto and Pat with an assignment, the same topic I'm going to raise with you. I asked them to work on describing the qualities of the person he would trust to run the company.

Rick/Michael: Did I make the list?

Mediator/Phyllis: I asked for standards, criteria. I didn't ask for names.

Rick/Michael: And we don't need to. Because we all know my name won't be on any list of his. So, given that, let me just fill you in. I don't need the old man's approval. I don't need his cooperation. I already have enough votes to push him out: me, my mother, and Lena. Lena knows that if she stays with G&B under Papa's control, she'll never have an opportunity to be the hot shot executive she deserves to be. And Leo – he has no *cojones*. So long as he gets a money deal that leaves him sitting pretty he doesn't care. He'll vote my way, too.

Mediator/Phyllis: And what way would that be?

Rick/Michael: I already have an acquisition lined up with a Fortune 1000 company. They'll install me as chief operating officer of the new division, G&B, Inc. It's a done deal – so long as the rest of the family goes along with it. I won't need him.

Mediator/Phyllis: But you're here, in mediation, talking to him through me.

Rick/Michael: Because the court says I have to be here.

Mediator/Phyllis: Well, judges often tell us they want the parties to mediate, even if they don't reach a full settlement of all issues. In mediation the parties will be able to say things and to hear things that just won't happen in a court

room. And since you have to live with the solution – not the judges – the judges would like you to have some say in the outcome. If you want to take advantage of that opportunity. Holding a family together while the family business makes a big transition can be quite difficult. Perhaps there are some things you've been trying to communicate to your father that he just hasn't been able to hear until now. Perhaps hearing it from a neutral third person can help?

Rick/Michael: He's stubborn. He's old school. He just doesn't understand that times have changed. And we've got to change with them.

Mediator/Phyllis: Could you talk with me about what those changes would be? How would you describe the future G&B, Inc.? What does it look like? How does it interact with the community? Clearly your father isn't the only one that's passionate about the business. You are, too. Could you talk with me about what matters most to you?

Moderator/Isabelle: The mediator continues "shuttle diplomacy" between the parties and their attorneys. She clarifies that Roberto does indeed have authority to speak for the company; but she asks Roberto to prepare for the possibility that changes in circumstances might also change the votes of other family members. In time, they develop the following standards for transfer of the family business: The company keeps its name; the business stays in the same physical location; initiate joint venture with banks or the Small Business Administration for financial support (loans, extended lines of credit) for small grocers instead of merely protracting payments; committing resources to employee and management training for current employees and for the support of minority suppliers; sponsor a public school in the predominantly Latino neighborhood near the business (perhaps through in-kind supplies of food). G&B is sold to the Fortune 1000 company with these stipulations, to be in place for 10 years.

Stop action for discussion

Panel analysis

Commentators: Dwight Golann and Amy Wind

Moderator/Isabelle: Again, we have two questions to focus our discussions, with two panel members leading off the comments. I'll read the questions first so we have an overview of where the discussion is heading; but we shall discuss them one at a time.

We'll ask Dwight Golann to take the lead in responding to the first question:

- In some quarters, mediation has been marketed as a way to resolve legal matters without involving attorneys. You are on record as believing that

lawyers do have a vital role to play in mediating many cases. We are not asking here for the scholarly treatment, but for the classroom teacher's perspective. There's a lot that happened in this vignette, both on stage which we heard, and off-stage that we didn't hear – including the private discussions between attorney and client that occurred while the mediator was caucusing with the other party. How would you use this vignette to teach your students about the attorney's role in mediation compared to the attorney's role in litigation? (Time allocation: approximately 5-7 minutes with commentator; 15 minutes in discussions between audience, role players and panelists.)

We'll ask Amy Wind to lead off our discussion of the second question:

- One of the greatest advantages mediation offers is flexibility to meet the needs of the parties in ways a court room trial simply cannot and probably should not. Mediation asks parties to develop creative resolutions that might differ from more standard litigation results. How would you use this vignette to teach law students about the benefits of a mediated party-to-party resolution compared to what could have been achieved in litigation with the lawyers taking center stage? What are the downside risks to choosing mediation, and how would you encourage your students to minimize those risks? (Time allocation: approximately 5-7 minutes with commentator; 15 minutes in discussions between audience, role players and panelists.)

Summary

Moderator/Isabelle: Summarizes key points made during the discussions of both questions. Gathers/summarizes issues to prompt further dialogue on the DR Section web site. (Time allocation: 7-10 minutes)

End of Program