PUTTING IN A GOOD WORD FOR

C O M P R O M I S E

by Jim Freund

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***com – pro – mise (n) – A settlement of differences in which each side makes concessions* – American Heritage Dictionary**

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So, picture this scene. Moses descends from the mountain, tablets in hand. The Israelites in the valley anxiously await the latest news from their leader. Moses surveys the bustling throng, lifts his right arm for silence, and speaks in magisterial tones.

"The good news is, I got him down to ten. The bad news is, adultery is still in."

You didn't realize, did you, that this heretofore little-known Decalogue compromise sealed the deal….

This article is about forging compromises. I'm a great believer in them and an active practitioner of the craft. I would have thought that put me on the side of the angels – but when you read the copious stream of fire-breathing vituperation in the daily press, and watch those extremist yokels hijacking opinion shows on the tube, any receptivity to compromise appears to be in short supply nowadays.

I've chosen this topic because of my experience this past year mediating a series of big-ticket business disputes – a dozen of them to date. This total immersion has renewed my appreciation for how vital compromise solutions are in the world of commerce. Later on, I'll venture a few thoughts on the roles compromise plays elsewhere, such as in politics and international relations, but my main focus here is on the subject I know best – its function in the marketplace. I want to show you how compromise looks from the vantage point of a neutral in the middle, charged with trying to resolve a messy situation.

Negotiating Deals vs. Resolving Disputes

In the business world, the need for compromise arises both in making deals and in resolving disputes – a duality that's crucial to recognize in approaching the subject. I have an advantage here, not shared by most lawyers, of having spent the first three decades of my professional life making deals and the past 15 years trying to resolve disputes. The deal experience gave me a lot of useful insights into navigating the dispute area.

As a practicing lawyer, my main task was negotiating corporate acquisitions and other kinds of business transactions. It was a world where – except in the case of defending against a hostile takeover – the words we consistently heard from the top executives of our clients were, "Let's get this deal done." As a result, those of us in the trenches – the financial mavens, the investment bankers, the lawyers – were all imbued with a "can do" mentality. (For some folks, like the investment bankers, the message from on high was reinforced by the realization that they were only paid if the deal got done.)

So, we all behaved constructively and looked for ways to resolve impasse – to find compromises to thorny issues, to formulate outcomes that both sides could live with. In addition to looking out for the interests of our own clients, this sometimes required us to help the other side solve its problems in order for the deal to get done. A sense of solubility pervaded the scene. Even when negotiations bogged down, we figured we could ultimately work things out. After all, the fact that the parties were there voluntarily and still talking was proof that they wanted to do a deal. And the top executives, although frustrated, weren't really irate at each other, and could still negotiate their differences in (mostly) civil terms.

The crucial factor in deal-making is that if the negotiations prove unsuccessful, the parties can simply walk away from the table, terminating the talks with no further responsibility. As a result, unless your leverage is commanding, you don't take extreme positions in a transaction that your client wants to consummate, and you can't "stick" with impunity on anything less than a real deal-breaker.

And so, we all embraced compromise – reckoning that most deals wouldn't get done unless we could find accommodative solutions to divisive issues. Oh, sure, occasionally you ran into a cynic – such as Ambrose Bierce, who defined "compromise" in his *Devil's Dictionary* as "such an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due." And sometimes you'd hear one of the players moan about "compromising his principles." But in my book, any negative connotation to the word in the business world is undeserved; and a compromise – however messy and inelegant – that satisfies both parties sufficiently to do the deal is one hell of an accomplishment.

Although I'm not sure I'd go quite as far as Edmund Burke, who said, "All government – indeed, every human benefit and enjoyment, every virtue and every prudent act – is founded on compromise and barter."

But then, when you cross over from deal-making into the domain of resolving disputes, the road to compromise is a whole lot bumpier.

In part, it's emotional. Each side is often enraged at the other, which doesn't create an atmosphere conducive to compromise. Distrust is rampant. In contrast to the make-it-happen attitude pervading a deal, the parties to a dispute often display a noticeable ambivalence – one day, it's "Let's settle"; the next, it's "Let's go back to the mattresses."

In the typical one-shot dollar dispute that sprouts in the aftermath of a sale or other completed deal, the disputing parties generally have little or no existing relationship and thus lack shared interests that might facilitate resolution of the conflict . When (as is often the case) the dispute arises after one party has paid the other in full (as in a sale), the seller's possession of the money provides powerful leverage that often causes him to adopt a hardball posture. And there's little of the sense of solubility that marks the deal atmosphere – none of that stuff about helping the other guy solve his problems so as to make the deal happen. In a dispute, no one gives his adversary the time of day.

The typical deal contains dozens of issues to resolve, and no single issue other than price takes on disproportionate importance. You can make progress resolving individual issues one by one. But in a dispute – in which everything often depends on agreeing upon a single number – it's tough to make headway. Much more pressure is placed on the final breakthrough.

But here's what really distinguishes disputes from deals in the business world. In a deal, as I've said, if the parties fail to strike a compromise resolution, they just go home. But if that stalemate occurs in a dispute, they go to court, with the ultimate prospect of an all-or-nothing result dictated by a judge or jury, or sometimes by an arbitrator. So, someone who thinks he has a winning case is reluctant to accept a compromise that's less favorable to him than what he can achieve if he prevails in court.

As a result, the biggest hurdle in dispute resolution is the need to assess the litigation alternative against which any proposed settlement has to be measured. What's the most likely outcome in court, and how likely it is to occur? That's not an easy determination to make. Unlike many kinds of deals, there's often a scarcity of models or benchmarks to rely on in business disputes, which typically have their own unique facts and dynamics. You might be able to make an educated guess, but you can never know for sure what the judge will decide, let alone an unpredictable jury. What's more, because the judge can't whack up the dollars at issue somewhere in the broad middle

where a settlement has a chance of taking place, the negotiated resolution is bound to be at odds with an all-or-nothing litigation result.

Further complicating the matter is what might be termed the people element. The management of disputes generally falls into the hands of litigators – trial lawyers – who have some special interests and problems of their own in achieving a compromise settlement. Please understand, in raising this issue, I am *not* subscribing to the accusation sometimes heard – that the litigator's heart isn't into settlement because he's itching to try the case for the dollars and glory it'll bring. Rather, to mix a metaphor, it's a matter of some baggage that comes with the territory.

If (as is frequently the case) the lawsuit has started before the settlement talks begin, the litigators have been busy throwing their weight around – alleging fraud and depredation, seeking trebled damages, ridiculing their adversary's claims. In the litigation papers, everything is larger than life and choking on adverbs: the opponent's argument is "patently absurd," the simplest contractual phrase is "hopelessly ambiguous." And the litigators, who tend to be combative types, often reflect the indignation their clients feel.

To shift abruptly from all this bristling to a rational discussion of settlement possibilities requires a sizable psychological adjustment. And what further undermines the process is that the litigators can't tell whether a settlement will ultimately be reached – so the left hand is negotiating while the right prepares to resume the conflict. This uncertainty can deter trial lawyers from making conciliatory gestures or from taking positions that imply vulnerability or convey weakness. They're often hesitant about initiating settlement talks and reluctant to swap meaningful concessions, for fear this will complicate their lives if they have to go back to the mat. But that sort of rigidity is antithetical to the search for a workable compromise.

The litigator may also have trouble, of a more subtle variety, in his own camp. Clients like their gladiators to be tough, forceful advocates. Many successful trial lawyers respond to this by cultivating a hawkish image. It's hard for such a litigator – poised to defend his client's honor with gusto – to now prod his client in the direction of settlement. He runs the risk of being deemed a "softie," who's afraid to try the case and is ready to capitulate. Yet that prodding may be just what's needed, particularly with an irate client who wants his day in court but whose outlook at trial isn't rosy.

Lawyers who are skilled in the courtroom may not be equally comfortable handling negotiations at the conference table. Some of the qualities that make for a good litigator – the "winning" mentality, an instinct for the jugular – aren't conducive to

compromise settlements. Conversely, qualities honed in negotiation, such as knowing when to adjust your sights or lower the temperature of the encounter, are unlikely to get sharpened in the skirmishes of a lawsuit. And even if the litigator on your side is well-equipped in this regard, you have to be concerned that the trial lawyer on the other side isn't up to the task.

In my book *Smart Negotiating — How to Make Good Deals in the Real World*, published by Simon & Schuster in 1992 (the second edition of which is available in paperback), I advocated a four point "game plan" approach to negotiating deals. The approach was designed to answer the negotiator's most pressing questions: What do I want? Where do I start? When (and by how much) do I move? How do I close? The *Smart Negotiating* technique works quite well in the context of a deal, but it encounters some real problems where a dispute is involved. For instance:

—Assessing your realistic expectation for the negotiations (*What do I want?*) runs smack into the difficulty of predicting what's likely to happen in the litigation. It also faces the added hurdle that your adversary – whose presumed views must be factored into the assessment, in order to make your expectation realistic – is likely to have a different slant on the probable judicial outcome than your own.

—Determining an appropriate opening proposal (*Where do I start?*) – one that neither appears to overreach, nor manages to underachieve – is a crucial step toward launching the parties on the right path to a deal. In most disputes, however, each side is determined to put its best foot forward, so that the initial bid-and-asked disparity can be enormous. As a result, the negotiators are often discouraged from taking what seem like futile steps to try to close the gap.

—Engaging in a constructive concession pattern (*When – and by how much – do I move?*), designed to deliver both parties into the vicinity of their realistic expectations, is difficult enough in a deal context, but in a dispute – where there's no premium on momentum, and reciprocity can be viewed as a sign of weakness – it's very tough indeed.

—And arranging the ultimate compromise (*How do I close?*), where all the focus is on a single finite number with few opportunities to be creative or expand the pie, is no picnic − especially when the settlement calls for more "give" from one of the parties than he had previously anticipated.

As a consequence of these and other factors, many disputes remain deeply enmeshed in litigation, with only half-hearted forays in the direction of a negotiated

settlement. And these forays generally fail, at least until that moment, on the steps of the courthouse (and after a lot of time, energy and expense), when the parties finally face up to reality.

The Case for Compromise

As I said earlier, I'm a great believer in the virtues of compromise solutions to rip-roaring disputes. In the great bulk of commercial cases involving dollars, it makes real sense to settle rather than go to trial. Litigation is prohibitively expensive; it takes a long, long time to obtain a final judgment and then get through the appeal process; lawsuits are a continual source of aggravation and negative energy; they can disrupt business operations and create adverse publicity – to name just a few factors. But to my mind, one reason stands apart from all the others, especially (but not exclusively) when viewed from the perspective of a corporate defendant.

Assuming there's a substantial sum of money or something else of significance at stake in the dispute, it's simply too great a risk for a company to entrust its fate to the inscrutability of a judge or the vagaries of a jury or the uncertainty of an arbitrator. For business people, litigation is not a logical way to resolve a dispute. It isn't the way good executives run their companies – making rational risk-reward decisions, basing their business judgments on an assessment of the probabilities. By contrast, a judge or jury generally goes all the way for one side or the other, even when the probabilities are more nearly balanced.

When I was representing clients in these matters, I focused on devising a negotiating strategy to achieve an acceptable compromise deal. I conceded to my clients that this didn't represent a perfect solution, but I reminded them that untidy situations don't lend themselves to ideal outcomes. With a client who relished his adversary's unconditional surrender – unattainable through negotiations but possible in court – I empathized with the passion but then refocused the client on settlement as a way of controlling his own fate, rather than rolling the dice and facing the possibility of a devastating judicial decision. Operating in today's world, I might borrow the apt phrase of a younger colleague and tell the client, "The outcome of this dispute is just too important to your company to *outsource*."

I realize that other bolder advisors – particularly those representing plaintiffs – may commonly counsel the client to go for broke, and some less risk-averse executives may well be amenable to such advice. But the great bulk of the business people I encountered in my years of practice impressed me as more concerned with the

possibility of a serious adverse result than enthralled with the prospect of a complete victory.

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So that's the case for, and the problems attendant to, achieving compromise resolutions of disputes. The question then becomes, how to get the job done.

Well, this is just what I've been engaged in as a mediator since retirement and, most actively, during the past year. People who haven't been directly exposed to the mediation process frequently ask me what it's all about. Here's my long-winded reply.

The Virtues of Mediation

Because resolving disputes is so difficult, the parties involved have increasingly turned to mediation in recent years, as a means of introducing a sense of reality into the process and of generating constructive movement toward settlement. The neutral mediator helps the two (or more) parties, who disagree intensely as to what (if anything) one owes the other, find a compromise resolution each can live with.

I say "help" because that's all a mediator can do. Unlike arbitrators (who hand down binding rulings on cases just like a judge), a mediator – even if he or she holds strong feelings as to how the dispute should be resolved – has no power to force the parties to reach agreement or accept a particular result. They are free to disregard the mediator's recommendations and go to court. So a mediator's influence comes from his ability to converse confidentially with each side, process the information received, present his views to the parties, help them move toward common ground, and persuade them that it makes sense to settle.

Over the years, I've had a lot of success as a mediator in cases where I'm dealing with two (or sometimes more) parties who want to resolve their dispute but are having trouble finding an outcome that's mutually satisfactory. My setbacks have occurred primarily when one (or both) of the parties aren't participating in the mediation on a voluntary basis. They may be there because of a contractual provision requiring their attendance or because a judge has ordered them to seek a negotiated resolution before proceeding to trial. They're reluctant to enter into the process in the way it's intended. Perhaps they see some business advantage in keeping the lawsuit unresolved for a few more years, as its winds its laborious way through the courts. Or they may have an exaggerated view as to the strength of their case – a view they want vindicated by a judge – in which case they're looking for unconditional surrender by the other side. But

that sort of capitulation just doesn't occur in mediation, even on the part of a participant whose case is marginal.

The people I'm interested in truly want to settle, but are having trouble achieving resolution – and for them, mediation makes a lot of sense. A well-handled mediation can cope with many of the problems encountered in settling disputes – overcoming the parties' resistance to talking, surmounting their ambivalence, mitigating distrust, introducing a sense of solubility, maintaining momentum, and reducing the litigator's gladiatorial burden. In addition, an effective mediator can uncover shared interests suitable for reconciliation, advise the parties how the issues are likely to play out in litigation, add the mediator's credibility and imprimatur to proposed solutions, and help the parties find a mutually satisfactory resolution.

In terms of those four steps I referred to in *Smart Negotiating*, a mediator can also be helpful:

—A mediator can help the parties assess their realistic expectations and advise them how the various issues are likely to play out in the litigation.

—The mediator, dealing separately with the parties, can discourage them from digging into (and posturing about) their far-out "winning" positions – encouraging more reasonable starting points that provide the negotiations with a better chance of success.

—One of the mediator's principal functions is to help the concession pattern along by his private prodding of the parties to move constructively in the direction of each other.

—A mediator can be invaluable in bridging that final gap − proposing the terms of a possible compromise and otherwise taking the initiative in ways that the parties and their attorneys often find so difficult to do themselves.

A Few Words About the Mediator

I 'm convinced that the key to the process is the mediator – not just the quality of the individual, but the approach he or she takes toward the mediator's role. And on this subject there is some difference of opinion.

Let me illustrate this with a simple but pretty typical example. Imagine a situation where the plaintiff is seeking $10 million in damages in court. His lawyer advises him that they have a strong case. So the client is looking for a settlement in the

$7.5M-plus area. To give himself some bargaining room, he starts out settlement discussions asking for $9M.

The defendant's lawyer, however, believes the case could go either way. So the defendant is aiming at a settlement in the neighborhood of $5M. She begins by offering $3M.

As a result, there's a $6 million spread in their positions (between $9M and $3M), which both sides realize will be hard to bridge. So they decide to try mediation.

Now, some mediators restrict their role to acting primarily as a facilitator. They see themselves as providing important services, including fostering a constructive environment for the parties, helping each party understand its legal position, assisting them in their evaluations of what the other side proposes, trying to find out their underlying interests with a view to reconciliation, and possibly helping them to create additional values by "enlarging the pie."

Let's say the parties use such a mediator, and he or she is successful in getting behind those opening positions and gaining access to the actual expectations of the parties – perhaps even persuading them to communicate those to each other.

Does that mean there's a deal? Not by a long shot – because once the plaintiff comes down from $9M to $7.5M, and the defendant comes up from $3M to $5M, there's still a big gap of $2.5M. As for reconciling interests, the typical one-shot dollar dispute offers fewer opportunities for this than situations involving continuing relationships. And in my experience, creating value and enlarging the pie works best when the parties are close to a deal and just need something to get them over the hump – not, as here, where they have very different ideas as to the value of a case.

What I see in the complex commercial disputes I mediate is that when you get underneath the posturing to what is hopefully fertile ground for agreement, you discover that one (or often both) of the parties is unrealistic in terms of overestimating the strength of his case or anticipating the other side's giving in, or is misreading the situation in some other respect.

In my view, these parties need a different kind of mediator – not just a facilitator, but one who is activist and judgmental. To undermine those exaggerated aspirations, they need a splash of reality in the face – and the mediator has to function as the agent of that reality. They have to undergo the ordeal of seeing the dispute and their

"winning" positions through a pair of impartial eyes, in order to justify the sizeable movement needed to bridge a big gap.

And so, when I'm the mediator – and assuming the parties have indicated their receptivity to this approach – I give my views on the merits of the issues involved, help the parties arrive at a basis for settlement, and try to play an instrumental part in actually negotiating it. Nothing short of this, in my view, has a decent chance of success.

How I Go About It

Even when dealing with parties who went to reach a compromise settlement of their dispute, acting as a mediator is tough work. Maybe that's what attracts me to it. I freely confess that as I grow older and more removed from day-to-day professional activities, it feels good to discover that "I still have it." (And I just hope I'll be wise enough to realize when I've lost a step.)

The Opening Rounds

The parties and their lawyers typically start out in the mediation loaded for bear. The direct negotiations they've engaged in before the mediation began have gotten nowhere, serving only to raise the temperature of the conflict. My suggestion to them (prior to the mediation session) that each offer up some initial concession to generate the right mood is usually ignored. No one's in a rush to abandon those hard-nosed positions they've been taking with each other, just because a mediator tells them it would help if they did so.

Worse than that, in several cases I've discovered that the initial position one of the parties is taking in the mediation is *further away* from a compromise than the last position he took in the pre-mediation negotiations – he's going in the wrong direction! When that happens, I'm aghast and react strongly – "How can this be? We're here to settle this thing, not litigate it." Well, they reply, that was our number back then if we didn't have to mediate – so now that we're mediating, it's off the table. Or they say, well, we've reassessed our legal position since then, and it's stronger than we thought at first, so we're no longer offering the same thing. Oh, of course I realize that they'd be willing to settle at that pre-mediation number – although the other side clearly wouldn't – but it makes for extra effort just to get them back to the earlier level.

Even without that problem, the far out opening positions the parties take make the process extremely difficult. I had one case this year where, at the outset of the mediation, party A said, "You owe us $100 million," and party B said, "We only owe

you $2 million." How's that for a gap? (By the way, I did manage to get this one settled just before midnight of the second day, but believe me, it was no picnic.) And the little moves the parties tend to make – even though I'm constantly urging larger ones – generally don't bridge that kind of chasm.

You should see their written submissions in advance of the mediation highlighting the issues involved. You'd never dream they've come together with me to reach a compromise settlement. Every argument is no holds barred, all or nothing, with much of the fervor of actual litigation.

And this carries over to the sit-down mediation itself. When it starts, I bring the parties together in the same room for the first hour. The lawyers go at each other as real combatants – complete with threats, dire predictions, ridiculing of the other side's position – the works. I've considered dispensing with this segment in order to get the proceedings off on a more constructive note. But the parties (or at least their litigator lawyers) want to have at least one shot at expressing their strongest feelings to the other side – perhaps under the delusion that they can persuade the other party's decision-maker as to the futility of his cause. It doesn't happen, though – from all the evidence I've seen, everyone's ears appear closed to what the adversary has to say.

The Private Caucus

So, after that first hour, I put each side in separate conference rooms, and in most cases, they never talk to each other directly for the balance of the mediation. I shuttle back and forth between the two rooms, spending anywhere from ten minutes to an hour in each place, depending on what I'm trying to achieve at the moment.

I'm aware that some mediators like to bring the parties together for substantive discussions, but I'm a strong advocate of the private caucus for a number of reasons. The most obvious of these is that the mediator has to be able to tell a party which of his side's arguments are strong and which aren't – going right to the merits. The party won't like the mediator's negative judgments, but it would be infinitely more painful (and make the dispute harder to settle) if this were done with the other side present.

I serve as the agent of reality. I have to knock down those solid-sounding positions, in order to get them to see that they're not so solid. So, I tell a party that I'm viewing this as a neutral – as the judge will be looking at it if you don't settle here – and I think your position on this particular issue is a loser. Or (on an issue that they think is really strong in their favor), I see it as a toss-up.

But if all the mediator does is denigrate a party's arguments, he or she runs a real risk. I'm talking here about the need to preserve the appearance (as well as the reality) of the mediator's neutrality. Parties to a dispute will listen to, and may well be influenced to move by, the mediator's negative judgments on certain issues – but only if they're convinced the mediator is speaking from the heart and not from any kind of bias against them or in favor of the other side. And believe me, in the emotional context of a bitter dispute, this kind of commercial paranoia (the friend of my enemy is my enemy) can find fertile ground.

So I make a real attempt to combat this problem. I hear both parties out and engage in protracted discussions with them. I try to balance the negativity I display by speaking approvingly about some other aspect of the party's case that I think is deserving. Often I go further and seek that party's help on how best for me to communicate its strongest issues to the other side – in effect, becoming the party's agent to do a little "selling".

None of this can be accomplished with the other party in the room. And, at a later point in the proceedings, the mediator has to be able to suggest outcomes and dollar levels and such – places where a deal might take place – and this can only be handled in private.

In presenting my views to the parties, I'm conscious of the need to be consistent. I can't, for example, tell each side its case is a loser, in order to get them both to settle at any price. If my judgment is that the merits of a dispute are with party A, that's what I have to tell both parties. But that doesn't mean I can't nibble a little around the edges. So, in talking to party B, I'll stress how strong A's position is; but when I'm talking to A, I'll include such caveats as, "But you really don't know how good a witness X will be for you," or "You never can tell what a jury will do" – so as to sow a little well-placed doubt. And when the arguments are well-balanced, I'll often abandon any attempt to reach a judgment favoring one side or the other, throw up my hands, and tell them "it could go either way" – which may just be the strongest argument a mediator can make to encourage both sides to settle and not run the risk of an adverse verdict.

Some of the Difficulties

Why, you may ask, is it so difficult – even in a well-handled mediation – to get the parties to agree on a compromise resolution of the dispute? Well, one reason is that there's almost always something important about the case that's unclear.

At times, although the applicable law is clear enough, the parties have differing views of the facts underlying the dispute. This is tough territory for a mediator because, unlike a judge, he can't take testimony from witnesses or make credibility judgments on individuals who are telling different stories – and the people involved in the origins of the dispute are seldom sitting in the mediation conference room. The mediator can sometimes get enough of the flavor to offer a tentative view (such as, "I think the jury will find X's story more plausible than Y's"), but it's hard to come across as definitive here.

Sometimes the facts aren't in dispute, but the applicable law isn't conclusive or the relevant contractual language is ambiguous – and these discrepancies are being spun by skillful advocates in diametrically opposite directions. This is less troublesome for a mediator, who has the disputed agreement in hand, as well as pertinent cases and other authorities bearing on the subject. I feel free to express a view that such-and-such a judicial outcome is more likely than the alternative – especially regarding a subject matter that's familiar to me, such as mergers and acquisitions. I'm somewhat more cautious with regard to the derivatives and bankruptcy issues I've been dealing with this past year.

Unfortunately, in many of the cases I handle, *both* the facts and the law are in dispute – so I'm dealing with a moving target. And each side is vigorously promoting its own view to justify the meager concessions it's providing me with.

As I noted earlier, a real problem with many of the mediations I undertake is that there's only a single dollar issue at stake. In a dispute with multiple issues (such as exists in negotiating the typical deal), the mediator has a lot more room to maneuver. He can barter the outcome of one issue for another, or even end up sponsoring a "package deal" that resolves all the open points in one fell swoop. But in a single issue case, one party's gain is the other's loss and vice versa, and there's little to trade off.

In most disputes I handle, the ultimate compromise relates solely to resolving past events, and its terms are fixed at the time the settlement agreement is signed. There are seldom any forward-looking portions that might be fodder for cutting deals – where, for example, because you can't tell how something will work out, you can use the resultant uncertainty to bridge pesky gaps. In my stuff, what you see is what you've got to work with.

<u>Discussing Dollars</u>

I don’t get into dollars with the parties right away, but at some point I have to turn the dialogue away from arguing about the merits and onto the money involved. In a one-day mediation, which most of them are – although they don't always get resolved that quickly – I tell the parties that we'll talk about the merits in the morning, and then after lunch focus on the dollars.

I won't go into detail here, but my own favored technique is to get away from traditional bargaining – carrying offers and counters back and forth from room to room – and engage in simultaneous private negotiations between myself and each of the parties in separate caucus. I try with each side to find a common resolution level at which they'll be comfortable settling the dispute, but without either side knowing, until the end, just where its adversary stands (other than my providing them with general information such as, "The guys in the other room made a constructive first offer," or "Believe me, the two of you are still far apart").

My technique here sometimes makes the parties and their counsel uncomfortable. They're not used to this kind of a negotiation, even in a mediation. I have several reasons for doing this (in addition to the fact that it makes them uncomfortable!).

First, I'm hopeful they'll be more forthcoming with the dollars this way than otherwise, because they know their number won't be shared with the other side. This makes sense to me, and I presume the confidentiality is a positive factor – but candidly, I don't know if it works.

Second, I'm certain that if they heard some of the chintzy proposals I'm getting from the other side, they'd be indignant and self-righteous – attitudes that would probably induce them to reciprocate in kind. After all, it's just this sort of thing that played a major role in what went wrong when they tried to negotiate directly before the mediation began.

More generally, I'm convinced that many of the problems arising in direct negotiations can be attributed to foolish excessive actions by one side or the other that throw a monkey wrench into the works. A real advantage of mediation is that by keeping the parties apart and limiting the information the mediator conveys back and forth, such ill-advised exchanges are prevented from happening.

Finally, I pride myself on my negotiating skills. And when I negotiate with each side, it's in a non-adversarial way – more in the nature of deal bargaining between two parties who aren't at each other's throats. I feel I can accomplish more this way than by carrying provocative proposals back and forth. And when they bemoan not knowing

where their adversary stands, I tell them that they shouldn't be fussing about the other side's foibles, but rather concentrating on what makes sense for themselves.

I begin the dollar discussion by asking each side, "What do you have for me?" I get a concession from their initial positions, but it's almost always a small one. I express the disappointment I invariably feel, because otherwise they may mistakenly think they're getting close (since they don't know where the other side is) – while in fact, they still have an awfully, long way to go.

Because time is at a premium in a one-day mediation, rather than asking them to voluntarily improve on that first tight-fisted offer, what I find myself doing more and more nowadays is to make a specific suggestion to each side for a reasonable move in the direction of the other. I tell them plainly, "This won't be acceptable to the other side, but would *you* be willing to do a deal at X dollars?" The two different numbers I choose are often linked to the outcome of a particular issue. My experience has been that even when the move I suggest to a party is relatively modest – and certainly represents a level at which that side should be delighted to make a deal – its response usually doesn't come all the way to my number. Still, what I got is usually better than what I'd have been offered if the parties were left completely to their own devices.

I rarely suggest a number to either side that appears to have been just pulled out of the air. Rather, I attempt to support it with some plausible rationale. Note, I said "plausible" – it doesn't have to be (and rarely is) convincing or – at least with regard to intermediate numbers – even persuasive. But I believe plausibility is crucial – for me, it furnishes a litmus test as to whether the position being taken is defensible. My advice to negotiators has long been that if you can't support it with a plausible rationale, then don't take the position. Even if you back into the rationale used to buttress the number you want to proffer, there has to be some logic for your stand.

Although percentages can create a false sense of certitude about an inherently uncertain determination, I often use them to jump ahead to where I'm heading. For instance, I might tell a party who has the better merits on his $1M claim that, in my view, he has a 65% chance of prevailing in court – "So that suggests a deal at around $650,000, but you'll have legal fees of at least $100,000, so I think a settlement in the area of $550,000 would make sense for you."

At some point, I come to a judgment as to an appropriate range within which a resolution might take place. Feasibility is my byword here – what I ask myself is whether a number somewhere in this range is likely to be acceptable to both sides. Then, without revealing to them what I have in mind, I work on getting each side to its outer

edge of the range. I figure that if I can't at least accomplish this, then the mediation is unlikely to produce a resolution.

If, as sometimes happens, one side gets there but the other doesn't, I thank the compliant side but tell them that their adversaries aren't in the ballpark. If, as can also happen, neither side gets to its outer edge of the range – often stating that they lack authority to go that high or low – I tell them what I tried to do and failed to accomplish. Sometimes, this might spur them on; at other times, they just give me one of those looks that translates as, "It is what it is."

The Endgame

If I've been fortunate enough to get the parties into a range where an agreement is feasible to reach, then I turn to the endgame. The final effort to reach an acceptable compromise may not constitute the largest absolute move, but it's usually the toughest hurdle to surmount.

What often happens at this point in the process is that both parties feel they've given their all – walked the final mile. For fifteen years now, I've been observing this phenomenon – where a sense of entitlement (akin to, "I gave at the office"), mixed in with a muscular machismo and a reluctance to be seen as a patsy, all join forces to clog the bargaining arteries.

Needless to say, there's lots of bold talk and bluffing. To listen to these guys, they've gone as far as they can possibly go (when they haven't); they lack authority to move further (although even if true, this may only require a phone call to fix); and they're just itching to litigate this case (though I doubt anyone really wants to). I try my best to disregard all this – but coming from these warriors, you can never be certain that what seems like a bluff may just turn out to be real.

Sure, I'm aware of the various techniques experienced negotiators employ to get over this final hurdle; and in my deal negotiations of yore, I used (and then wrote about) many of them:

- Dividing up seemingly indivisible issues, so that you can satisfy party A's real concerns (which are generally narrower than those he has expressed) while at the same time protecting party B's essential interests (which are usually more limited than those he has previously advanced).

- Boiling down what are expressed as sacred principles into dollars (or their practical equivalent), which can be moved around – perhaps with a face-saving device to provide a hard-nosed or insecure bargainer the ability to back off without embarrassment.

- Expanding the pie, by adding some new element to the picture that permits party A, who now has more to gain from making a deal, to surrender more to party B than A was willing to consider previously.

- Swapping among separate issues – especially where the principle involved in one issue is of more concern to party A, and the larger dollars at stake in the other issue are more important to party B – and sometimes coming up with "package deals" that wrap everything together in a single compromise.

- Appreciating the significance of payments spread out over a period of time – so the recipient can say, "I settled for five million dollars" (the face amount of the payments), and the payor can say, "I got rid of the case for four million dollars" (the net present value of the future installments).

I'm also sure that at this point the disciples of the *Getting to Yes* school of negotiating would be searching for those "shared interests" of the parties underneath all the posturing.

But my experience in the bulk of mediations I've handled is that the techniques I just enumerated aren't readily available when crunch time arrives. (Deferred payments, though, can be useful in certain situations.) As for shared interests, I find that in most dollar disputes, when you look beneath the monetary positions a party takes, all you find are other, somewhat more reasonable, amounts of dollars. What the *Getting to Yes* people sometimes seem to ignore is that these dollars are the real interests for most business people. Money forms the principal measuring stick of success or failure in the world of commerce – it's how the players keep score.

So what the endgame often comes down to is some variant on "splitting the difference." And fortunately for me, accomplishing this is somewhat easier for a mediator than when two disputing parties attempt to do it directly.

In any dispute – mediated or not –, splitting the difference only works in the endgame, and premature attempts at this are usually unavailing. But in two-party bargaining, even when the gap has narrowed, there's still a problem – the tactical decision of who will suggest the split. If you wait for the other side to make the move, it might never happen. If you do it yourself, you run a risk.

Let's say the plaintiff has come down to asking $10.8 million to settle, the defendant has come up to $10.4 million, and each side has dug in tight. The $400,000 difference is less than 5% of what's at stake, which is a suitable gap for splitting. But if the defendant offers to split it at $10.6M, then – regardless of the caveats he attaches to his proposal – that $10.6M number becomes, in effect, his new position. Meanwhile, the plaintiff is still at $10.8M, so the likely resolution is going to be somewhere around $10.7M. And you can't imagine how important that resulting $100,000 differential is to the parties – even if not monetarily, then for more subjective reasons.

I included a bunch of suggestions in *Smart Negotiating* on handling the split so as to avoid this problem happening in two-party bargaining. Here's how I approach it in mediation. (Keep in mind that, under my approach, neither side knows where the other is at this point.)

Basically, I say to the plaintiff, "If I can get the defendant to $10.6M – I really don't think I can get him any higher – would you be willing to do a deal at that number? And don't worry, I won't tell them of your willingness to do so, unless they're also willing." If I get a "Yes" from the plaintiff, then I go to the defendant and say, "If I can get the plaintiff to $10.6M—I really don't think I can get them any lower – would you be willing to do a deal at that number? And don't worry, I won't tell them of your willingness to do so, unless they're also willing."

If both of them are willing, I go drink coffee for a while and then return to announce to each – with a big smile – that they've got themselves a deal.

<u>The Mediator's Proposed Resolution</u>

Sometimes, notwithstanding my attempts to narrow the gap, the parties are so far apart – and their bargaining arteries so hardened – that I realize we're not going to reach a resolution in the course of the mediation. When that happens, I tell the parties that there's no sense prolonging the agony – we should proceed to the final step.

There's a special provision I incorporate into my mediation agreement with the parties – provided the parties want it, and they generally do. It says, in effect, that if the

mediation doesn't result in a mutual agreement, I will then recommend a specific overall resolution to the parties.

I spell out in the mediation agreement my method of arriving at this non-binding determination – not as an arbitrator might make an award, but on a compromise basis appropriate to a mediation. I tell them it will likely be a composite of several elements, including my views on the merits of the disputed items, partially discounted by the degree of uncertainty as to whether such a result would be reached in court; what I've learned or inferred from my private sessions with each party; the business and financial realities and considerations involved; my sense of the negotiating factors and relative leverage; the feasibility of it being acceptable to both sides; and other appropriate elements that enter into a compromise determination.

I present this recommendation to each of the parties separately, going into great detail – including my rationale for reaching that result and why it makes sense for them to accept it (which will differ depending on each party's situation). Each party is free to accept or reject my recommendation – and I give them a decent interval to respond – but it's not subject to further negotiation and only becomes effective if both parties consent. If a party rejects it, I won't reveal to the rejecting party what decision the other party made. My recommendation and their reaction to it are not admissible in any subsequent court proceeding.

Having seen this provision work in a number of cases where the parties were far apart at the end of the mediation, I believe in its potential efficacy. Moreover, I think its looming presence provides some extra incentive for the parties to come to final terms on their own – although I'm aware of the counter-argument that it could act as a deterrent to meaningful moves on their part in the endgame.

It also points up one practical reason why mediation works in a corporate setting. In two-party dispute resolution without a mediator, it's difficult for the responsible executive to agree to a settlement figure that's much worse than what he's been advising his superior or the board to expect. But the mediator's judgment on the merits provides neutral cover for the executive, making it less likely for higher-ups to question his decision to settle. You could almost call it a "negotiated settlement insurance policy." And the responsible executive isn't going to want to see his decision to reject my proposal second-guessed, if and when the court's verdict turns out to be much more negative to his cause then what I've recommended.

Most of the time, my selection of a rational compromise number and the accompanying rationale bear fruit, and the parties accept the proposed resolution. That's

not to say they're ecstatic over the outcome. The more typical reaction of each side is, I'm going further than is reasonable with this number, but it's better than the alternative of continuing the battle in court. That's okay, though – I don't need plaudits or huzzahs. Having the compromise accepted is satisfaction enough.

And that's my bottom line on the resolution of business disputes. In most cases, and after a lot of sparring and posturing, the people responsible for deciding these matters make a rational determination to compromise their differences. Each time they do, it renews my faith in the system.

* * *

Well, that's what happens in business. How about in other areas of our national and international life?

International Disputes

The most intractable world conflicts in recent years have been between nations or factions within nations, in such venues as the Middle East, Northern Ireland and the Balkans. At times, the United States offers its good offices to help mediate such disputes, utilizing such able practitioners of the trade as Dennis Ross, George Mitchell and Richard Holbrooke.

Compared to what I (and other commercial mediators) go through in our trade, this kind of mediation is really tough on the mediators. They take a lot of heat from both sides, while prodding the parties to face reality and adjust their behavior to what's required for a deal. It's a task for which you not only need large doses of determination and perseverance but also a very thick skin.

Dennis Ross wrote a fine book a few years ago called *Statecraft*, in which he set forth his "Eleven Rules for Mediation" in this arena. I was intrigued by the comparison it offered with my own precepts for conducting a commercial mediation, so I wrote an article on the subject for the October 2010 issue of *Alternatives*, a dispute resolution publication of CPR (the International Institute for Conflict Prevention & Resolution).

In the deeply-rooted grievances that Ross and his colleagues deal with (described by one participant as "your grand-pappy did it to my grand-pappy"), each side sees itself as a victim of the other side. Self-proclaimed sacred principles drive each side to its most rigid position, and no one wants to be perceived as

conceding on them. Ross puts it this way: "One side's principle is the other side's impossibility." Then too, there's always the threat of external events – acts of terrorism, for example – triggering crises that must be dealt with to keep the mediation process from unraveling.

So, although in some instances the Ross guidelines coincide with my own, the differences are such that I closed the article with this thought:

"Whenever we commercial mediators feel a little frustrated in our work, we ought to pause for a moment and envision Dennis Ross, in a room permeated by ancient myths, dealing with a couple of Arafat wannabees, plus some terrorists in the wings – and be thankful for the dollars-and-cents 'problems' in front of us."

On the National Scene

I don't consider myself especially political, but I find myself appalled at the state of American politics today. Obviously, I'm not alone in this regard. As Tom Friedman put it in the New York Times (9/29/10):

> "We're a country in a state of incremental decline and losing its competitive edge, because our politics has become just another form of sports entertainment . . . and our main law-making institutions [are] divided by toxic partisanship to the point of paralysis."

Another Times op-ed piece after the recent mid-term election (by Charles M. Blow on 11/6/10) stated it this way:

> "We now stand in the twilight of American Moderation. We have retreated to our respective political corners and armed ourselves in an ideological standoff over the very meaning of America, having diametrically opposed interpretations of its past and visions for its future. Talking across the table has been reduced to yelling across the chasm."

Let me be clear here. I'm not dismayed that differences of opinion exist over specific issues – that's to be expected, and is actually a sign of good health in the populace at large. And although it pains me, I'm not surprised that so many individuals spout their loud, polarizing views on these issues – people have always done that, and it's what I see weekly in my mediations.

No, what appalls me is that so few effective people are stepping up to the plate to try to broker honorable compromises on these issues, in order that the country can move ahead. While our historical record as a nation in this regard is by no means flawless, by and large we've been able to do this in the past – even when the issues at stake were far more grave than the ones that divide us now.

I was an American History major in college, and that field remains one of my prime interests. The past episode that best illustrates my point is the memorable Compromise of 1850. It featured the man known to his contemporaries as "The Great Compromisor" – Henry Clay, the Whig senator from Kentucky. I've just finished reading a book on the subject, "At the Edge of the Precipice" by Robert V. Remini, which I recommend highly. Here's a brief synopsis of what went on back then, which could serve as a blueprint for what needs to happen today.

The drama began in 1849. Zachary Taylor had just assumed the Presidency. The issue before the nation was whether slavery would be introduced in the new areas we got from Mexico following the Mexican-American War – principally California and New Mexico. The battle lines between the North (for whom Daniel Webster was a principal spokesman) and the South (led by John Calhoun) were sharply drawn and chock full of invective. The southern states were holding a convention in Nashville to decide on what unified action to take – up to and including secession – if the South didn't obtain equal rights to the acquired territory. According to Calhoun, the South needed "justice, simple justice," and could offer no compromise – "no concession or surrender." The nation, in the author's words, "verged on a sectional crisis of catastrophic proportions – headed toward disunion and possible civil war."

Hey, folks, we're not talking here about a health plan or tax cuts for the wealthy – this was big stuff in a very complicated situation. And then, coming out of retirement and wading head first into this morass, was Henry Clay who recognized immediately that a complex compromise had to be struck. He devised the plan – an omnibus bill with a lot of moving parts and something for everyone. He worked the Senate floor and cloakroom tirelessly. He even persuaded Daniel Webster – who disagreed with some of the bill's features, but recognized its importance – to give a memorable and influential speech in its favor. And when the omnibus bill faltered, dispiriting the elderly Clay, Stephen Douglas stepped up to lead the fight for enactment of each of the separate parts.

It was messy, sure, but that's the way good compromises often are. It split the northern and southern Whigs and the party didn't survive. It was denounced by those who focused solely on the provisions that were negative to their cause – so what else is new? It also took a little ghoulish luck – the sudden death of Zachary Taylor, who had a different approach to this issue and might well have vetoed the bills, and his replacement by Vice-President Millard Fillmore, a Clay ally who eagerly signed them into law.

But one way or another – because enough people realized how important it was, and their leaders provided the impetus – it got done, and the Nation avoided the catastrophe for the moment. The Compromise gave the North ten years to build enough strength to enable it to defeat the South when war finally broke out, and a decade to find a leader who could save the Union – Abraham Lincoln.

But the author had more on his mind than simply recounting the absorbing tale of what happened 160 years ago. He puts it so well that I won't paraphrase, but quote him directly:

> "I also seek to show the importance of compromise in resolving problems of great magnitude in the history of the country. It has proven time and time again that little of lasting importance can be accomplished without a willingness on the part of all involved to seek to accommodate one another's needs and demands. This point is especially important today when the nation faces myriad problems, both foreign and domestic, that defy easy solution, and that will, in all likelihood, require both major political parties to agree to compromise their differences. With severe economic problems that threaten to pitch the nation into a deep recession; with other domestic issues, such as health care, energy, immigration, and social concerns such as abortion and gay marriage; with wars in the Middle East that verge on escalation throughout the region; and with terrorism rampant around the globe, compromise on the part of this nation's political leaders, and the leaders of other countries, becomes all the more necessary."

I agree whole-heartedly with Mr. Remini, and that's why I've written this piece – to put in a good word for compromise. I'm working hard to foster accommodation in my own commercial sphere. I just hope that those who are responsible for the well-being of our nation will, like Henry Clay, rise to the

occasion once again – overcoming all that toxic partisanship with a healthy dose of American Moderation.