Problem-Solving Advocacy in Mediations: A Model of Client Representation

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contribute to relationship conflicts, it can be difficult to decipher the nature of the conflict. In *Erin Brockovich*, a structural conflict that contributed to a relationship conflict between the attorneys across the table might have impeded a settlement. A large utility company that thought that it had all the power despite losing a vital motion resented being forced to defend itself against the allegations of uneducated, poor people who were represented by an under-funded and inexperienced attorney.

Value Conflicts can be the most intractable ones because they implicate a party's core personal or moral values. This narrow category can embrace matters of principle, ideology, or religion that can not be compromised. A grassroots environmental group, for instance, may have difficulty settling with a housing developer because to do so might compromise the group's ideology of preserving all large tracts of open space.

Value conflicts can be difficult to recognize in court cases, because values can be masked by all too familiar legal categories, arguments, and remedies. When a party wants to win in court, for example, the party may be motivated by the need for a clear victory to preserve a personal value, such as personal integrity.

For the last two components of the mediation representation formula, I turned to examining the mediation process itself. This subject is mediation representation. But how does mediation fit in? The last two components cover how to enlist assistance from the mediator and how to negotiate at key junctures in the process.

D. *Strategy: Enlist the Assistance of the Mediator*

For this next component, I needed to consider the types of assistance that can be offered by the third party in the room, the mediator. The mediator can contribute in three general ways: by the way the mediator implements his or her orientations, uses his or her techniques, and controls the mediation stages. The particular contributions depend on the type of mediation process envisioned. In a problem-solving process in which the advocate does not scheme to manipulate or "game" the mediator, the third party can be enlisted in the various ways described in this section.

1. *Mediators' Orientations*

Mediators bring a mix of distinct orientations to the mediation process. They can be grouped into four discrete areas: (1) How will

the mediator manage the mediation process? Will he or she be primarily problem-solving, evaluative, or transformative? (2) Will the mediator approach the problem narrowly as primarily a legal dispute or more broadly? (3) Will the mediator involve clients actively or restrictively? (4) Will the mediator use caucuses extensively, selectively, or not at all? When an advocate knows the mediator's mix, then he or she knows some of the opportunities for enlisting the mediator for assistance.

Assuming that the dispute in *Erin Brockovich* is now in mediation, Ms. Brockovich might decide that it would be helpful for her clients to personally and passionately convey their fears and suffering to the other side. It became clear after the negotiation session that the plaintiffs needed some version of a "day in court" and that the defendant did not fully understand the plaintiffs' anguish. Knowing that the mediator conducts most of the mediation in joint sessions, Ms. Brockovich would prepare her client to talk to the other side, reaffirm her preference to minimize the use of caucuses, and be prepared to object politely if the mediator prematurely moves toward a caucus.

The mediator's orientation should be especially highlighted, because it can singularly shape an attorney's representation strategy. An attorney's entire approach to interacting with and enlisting assistance from the mediator will be influenced by the mediator's process management, that is, how problem-solving, transformative, or evaluative the mediator might be.[44]

For example, realizing that the mediator will stay in a problem-solving mode gives an attorney the freedom and security to share information (including interests), brainstorm options, recognize weaknesses in his or her client's legal case, and remain open to creative solutions other than the ones in the legal papers. The attorney can feel comfortable asking the mediator for help in sorting out interests, facilitating an evaluation of the legal case, or developing multiple options. The attorney also has much freedom and security with a transformative mediator who is trained to support whatever sort of process is structured and implemented by the attorney, client, and the other side. However, the attorney cannot rely on the transformative mediator's expertise or initiatives to create or direct a process, as the transformative mediator is committed to being non-directive.

In contrast, consider the impact of mediator evaluation on advocacy. Whenever an attorney approaches me about this topic, I ask

44. *See* ABRAMSON, *supra* note 2, at chs. 4.2(b)(i) and 5.1(e)(i). **R**

the same simple question: does knowing that the mediator might offer an evaluation influence how you would represent your client in mediation? The answer is "yes" every time.

Mediation evaluations can take a variety of forms. For instance, mediators may assess the reasonableness of settlement options, assess consequences of not settling, or recommend settlement proposals either as the mediation unfolds or as a "mediator's proposal."

Knowing that the mediator may formulate one or more of these types of evaluations can induce the attorney to approach the mediation more like an adjudicatory process than a negotiation. This mediator role can change the nature of the mediation process. Instead of viewing the mediator as a facilitator with whom the attorney can have candid conversations, the attorney is likely to view the mediator as a decision-maker who must be persuaded. Instead of formulating a negotiation strategy based on meeting parties' interests, the attorney is likely to formulate a strategy designed to convince the mediator to recommend a favorable evaluation.

Consider in what specific ways an attorney would circumscribe his or her representation if the attorney thought the mediator might evaluate. Would the attorney and his or her client talk less candidly if the attorney were to take into account the possibility of the mediator performing any of these other roles? Would the attorney avoid recognizing any weaknesses in his or her legal position, other than the safely obvious ones, to the mediator or the other side? Would the attorney eschew compromises, especially ones that deviate from the remedies sought in the legal case? Would the attorney hide and disguise information in order to avoid coloring unfavorably the mediator's view of the dispute? Would the attorney be likely to advance partisan legal arguments at the expense of interest-based creative option building?[45]

Affirmative answers to these questions prompt many attorneys to return to the traditional adversarial approach so familiar in the courtroom, in which the attorney withholds unfavorable information, hides any flexibility to avoid implying a lack of confidence in the legal

45. *See* Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator's Role*, 24 FLA. ST. U. L. REV. 949, 950, 983 (1997) (passionately arguing for "flexible mediation that permits judicious use of evaluative techniques," the author still had to recognize that when the advocate knows that the case will be evaluated, the parties are "more likely to present information as advocacy and less as background for negotiation or problem-solving." In addition, "if mediation veers too far from" its facilitative assumptions, the author concluded, "it loses some of [its] creative and transformative potential.").

case, and presents carefully crafted partisan arguments and positions that are designed to persuade a decision maker to act favorably.

Alternatively, an attorney might problem-solve but do so in a selective way that reduces the risk of an unfavorable assessment by the mediator. In such a constricted problem-solving approach, an attorney could still share and advocate his or her client's interests and engage in such problem-solving moves as brainstorming options and designing creative solutions, but only up to a point. The attorney will avoid sharing information or showing flexibility that may risk a less favorable evaluation from the mediator.

This strategic behavior can dilute the potential of a problem-solving process by limiting the ability of parties to uncover optimal solutions. Withholding information may hide important matters relevant to devising solutions. Hiding flexibility may cramp the search for imaginative solutions.

I have seen firsthand how attorneys and clients withhold unfavorable information and flexibility. In one instance, after three days of arbitration hearings, the parties agreed to convert the proceeding into a final-offer arbitration process in which each side would submit a final offer, and I would select one. The final offers barely resembled what each side had advocated during the hearings. While this anecdote is surely not surprising because an advocate would never be expected to reveal acceptable settlement terms during an adversarial hearing, it illustrates the point that should be as obvious as what happened in the anecdote: there is a tendency to hide flexibility in an evaluative/adjudicatory process. This point was further illustrated in a recent case where I was operating as a mediator who might evaluate. After four hours of mediating and then reaching an impasse, both sides selected the mediator's proposal scheme where I would formulate a proposal that each side would either accept or reject, without advising the other side unless both sides accepted. The party that took the most inflexible position in the mediation and tenaciously hid any hint of legal vulnerability accepted a mediator's proposal that was one-third of that side's uncompromising position in the mediation.

Consider what might have been the impact on the parties in *Erin Brockovich* if the case had gone to a mediator who might evaluate. PG&E would likely be reluctant to disclose its interest in avoiding bad publicity, because this information might be exploited by the mediator. The mediator might attach a financial value to a confidential settlement and then add the value to a recommended payment by

PG&E. Disclosing that interest, however, might lead the parties to devise other beneficial solutions.

The utility company would likely be restrained when brainstorming for creative solutions, because it may want to avoid revealing too much flexibility. It may not want to imply that it would be willing to accept something qualitatively or quantitatively less than what it is seeking in court. So, even though the utility company might find it desirable to devise solutions that would avoid negative publicity, for instance, it may not want any appearance of flexibility to influence the mediator when formulating any evaluations or settlement proposals.

In view of this strategic need to hide information and flexibility, an attorney may be induced to fashion this constricted form of problem-solving advocacy, one that is based on a narrowly focused adversarial plan and presentation. Such an approach would require a sophisticated and nuanced form of advocacy in order to minimize stifling the creative problem-solving potential of the mediation process. The advocacy would consist of a blended problem-solving-adversarial strategy that could not be implemented casually because of the need to carefully identify and segregate risky information from safe information and then to artfully and persuasively disclose only the safe information. It is a strategy that would need to be actuated proficiently in the heat of the mediation, realizing that too much candor might result in a less favorable mediator assessment and too little candor might result in a less optimal negotiated result.

An attorney might be more confident pursuing a constricted problem-solving approach if the type of carefully designed safeguard in the Centre for Effective Dispute Resolution (CEDR) Mediation Rules[46] was adopted. The rules ensure that all participants approve an evaluation role at the optimum moment in the process as well as limit the type of evaluation. The rules give the mediator *conditional* recommendation authority:

> If the Parties are unable to reach a settlement in the negotiations at the Mediation, and only if all the Parties so request *and the Mediator agrees*, the Mediator will produce for the Parties a *non-binding recommendation on terms of settlement*. This will not attempt to anticipate what a court might order but will set

46. The CEDR is a major dispute resolution center based in London. *See* Centre for Effective Dispute Resolution, *at* http://www.cedr.co.uk (last visited Jan. 20, 2005).

> out what the Mediator suggests are appropriate settlement terms in all of the circumstances. (emphasis added)[47]

CEDR's Guidance Notes state that

> "The intention of paragraph 12 is that the Mediator will cease to play an entirely facilitative role only if the negotiations in the Mediation are deadlocked. Giving a settlement recommendation may be perceived by a Party as undermining the Mediator's neutrality and for this reason the Mediator may not agree to this course of action."[48]

2. *Mediators' Techniques*

Basic mediation training emphasizes learning and honing a set of widely used techniques, such as promoting communication through questioning and listening methods, dealing with emotional dimensions of disputes, overcoming impediments including money impasses, helping parties assess their BATNAs, and generating creative options, among other valuable skills. An advocate can solicit the mediator to use any of these techniques at propitious moments in the mediation process.

For example, an advocate might suggest to a mediator that one of the obstacles to settlement is a relationship conflict between the parties. Then the attorney might ask the mediator to assist the parties in implementing a suitable intervention. The mediator might help the parties constructively explain to each other why they are upset, assist them in clarifying their perceptions of each other, focus on other ways to improve their communications, and cultivate their problem-solving attitudes.

For a data impasse, an advocate might ask the mediator to help the parties resolve what data are important, negotiate a process for

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47. *See* CEDR, MODEL MEDIATION PROCEDURE AND AGREEMENT, ¶ 12 (8th ed. Oct. 2002), *available at* http://www.cedr.co.uk/library/documents/MMPA_8thEdition.pdf (last visited Feb. 28, 2005). For a somewhat less strict approach, see The CPR/CCPIT, MEDIATION PROCEDURE FOR DISPUTES SUBMITTED TO THE U.S.-CHINA BUSINESS MEDIATION CENTER, §7 (2004), *available at* http://www.cpradr.org/pdfs/Intl_China_Procedure04.pdf (last visited Jan. 2, 2005); DAINI TOKYO BAR ASS'N, RULES OF PROCEDURE FOR ARBITRATION AND MEDIATION, art. 25 (Advisory Opinion) (June 9, 2000), *available at* http://www.niben.or.jp/chusai/e_chusai/e_qanda/e_rules.htm (last visited Jan. 2, 2005).

48. *See* CEDR, *supra* note 47, *Guidance Notes: The Mediation*, 9-12. *See also* CPR INSTITUTE FOR DISPUTE RESOLUTION, MEDIATION PROCEDURE FOR BUSINESS DISPUTES IN EUROPE, R.6 (1996), *available at* http://www.cpradr.org/formbook/pdfs/1/medprocedures2.pdf (limiting the recommendation power to after the parties fail to reach a settlement and after parties consent to receiving the mediator's final settlement proposal). **R**

collecting reliable data, or develop common criteria that can be used to assess the data.

When a data conflict is over (the likely judicial outcome) instead of asking the mediator to give a prediction (an evaluation) - a request that would likely compromise the problem-solving process[49] - the attorney can ask the mediator to help each side further analyze the legal case. The attorney might ask the mediator to guide the participants in calculating the value of each client's total BATNA by using a decision-tree plus methodology.[50] A client's total BATNA can be divided into two distinct components, public and personal, and a value for each component can be separately calculated.

The *public BATNA* covers the portion that the attorney is qualified to calculate. The attorney has the expertise to predict the likely judicial outcome, the probability of success, and the likely legal fees and court costs the client will incur. Attorneys frequently make these predictions in their law practices. Based on discovery, legal research, and experience - information that is mostly available to both sides - attorneys routinely estimate these key inputs that are used when employing decision trees for calculating the value of the public BATNA. In *Erin Brockovich,* the judge's ruling denying the defendant's motions surely gave both sides further insight into one key input, the probability of success in court. In addition, as Ms. Brockovich gathered more damaging evidence after the failed negotiations, the plaintiffs' probability of success continued to increase.

The other component, the *personal BATNA*, addresses the portion that the client is uniquely qualified to calculate. It is the component idiosyncratic to the client. For example, the client can best assess the added value of going to court to establish a judicial precedent or to be vindicated. The client can best approximate the added cost of possibly destroying a continuing relationship with the other party by going to court. The client is the expert. Only the client can quantify his or her own subjective views of these additional litigation benefits and costs. This will not be easy for the client to do. Instead

49. *See infra* Part D.1 (suggesting that if an attorney knows that a mediator might offer his or her own evaluation of the legal merits, the attorney will likely shift from a problem-solving to an adversarial mode of advocacy in an effort to induce a favorable assessment).

50. A decision tree is a mathematical technique for estimating the value of an uncertain outcome (e.g. winning in court) by multiplying the probability of an event happening times the likely outcome if it happens (e.g., how likely to win in court). The plus component involves asking a particular set of questions that will help a client attach a value to a set of personal costs and benefits. *See* ABRAMSON, *supra* note 2, at app. A. **R**

of inviting the client to use a formal decision tree,[51] the attorney can take the simpler yet still demanding approach of asking him or her some probing questions. This supplement to decision trees is the plus analysis. For example, the attorney might ask the client – a plaintiff, for instance - to confront and resolve how much less money he would be willing to accept to settle now and not suffer the risks of waiting out the litigation or suffer the risks of destroying a relationship in the litigation. In other words, how much money would the client be willing to sacrifice for the benefit of settling now?

Factoring in the plaintiffs' personal BATNA weighed heavily in *Erin Brockovich* when the plaintiffs began to abandon their attorneys after the attorneys recommended the use of arbitration. Only after one of their attorneys, Ed Masry, highlighted the personal costs of waiting for any money until trial (the negative personal costs of their BATNA) did the plaintiffs reluctantly accept what they viewed as the faster but less satisfactory forum of arbitration that lacked a jury and right to appeal.

The value of the client's total BATNA is simply the sum of the values of his or her public and personal BATNAs, a critical benchmark when weighing whether to settle or continue litigating.

When encountering an interests conflict, the advocate may ask the mediator to help the parties pinpoint shared or non-conflicting wants, identify objective criteria for overcoming conflicting wants, and search for increase value and productive trades. Court cases typically present conflicting substantive wants because of the nature of the litigation process in which plaintiffs' attorneys draft complaints bursting with demands and defendants' attorneys draft answers rejecting almost everything.

When the interests conflict is the classically distributive one over money, the sort of dispute that may appear unresponsive to the problem-solving methods considered in this article, the advocate might consider an approach that avoids the traditional negotiation dance of offers and counter-offers. The advocate might select a method designed to prevent the error of failing to settle due to not revealing the information that would have shown that the parties were within a settlement range. The advocate might ask the mediator to use a scheme that can provide a safe pathway for parties to move toward their bottom lines. Six such schemes are described and analyzed in

51. The *Mediation Representation* book does recognize that it is possible to construct a decision-tree that incorporates the probability that the litigation choice could produce personal benefits or costs. It also offers a simple example of how to do it. *See* ABRAMSON, *supra* note 2, at 309 n.8. **R**

Mediation Representation. They are: binding final-offer arbitration, a mediator's proposal, hypothetical testing, confidential disclosure of bottom lines, confidential disclosure of settlement numbers, and a safety deposit box.[52]

A structural impasse in an attorney-client conflict can arise due to the inherent structure of the relationship, a bad relationship between the attorney and client, or both. A perceptive advocate might solicit the mediator to help the other side overcome an attorney-client conflict. If it has arisen because the other attorney thinks his or her client should settle while his or her client wants to pursue the litigation, for instance, the mediator can facilitate a discussion of the different views and ways to bridge possible differences.

When an advocate recognizes that parties' personal values may be implicated in the impasse, he or she may enlist the mediator for help by suggesting the nature of the impasse. Then, the mediator might assist the parties in clarifying their core values to find out whether their values are truly at stake or truly in conflict. If in conflict, the mediator may try to help the parties work around their personal values because compromise is usually unacceptable. The mediator can help parties search for an overarching shared goal, ways to avoid defining the problem in terms of a particular value, or solutions that do not compromise the value. Or the mediator might assist parties in reaching an agreement to disagree.

Returning to *Erin Brockovich*, Ms. Brockovich, sensing a relationship conflict due to poor communications in that PG&E did not understand her clients' interests and perspective, might ask the mediator to help improve the communications between the parties. In making this request, the parties can benefit from the mediator's training in posing questions, active listening, and reframing what is being said.

3. *Mediators' Control of the Mediation Stages*

A problem-solving process follows somewhat predictable stages from beginning to end. The process stages can include the opening statement of the mediator; gathering information (opening statements of parties and attorneys, discussions in joint sessions and caucuses); identifying issues, interests, and impediments; overcoming impediments; generating options (inventing); assessing and selecting

52. *Mediation Representation* describes and assesses the strengths and drawbacks of each of these six methods. *See* ABRAMSON, *supra* note 2, at ch.7.2(d)(iii). **R**

options; and concluding (agreement or impasse).[53] Knowing that a mediator exercises control over these stages gives the advocate other ways to enlist the mediator's assistance. The advocate can request that the mediator use various stages in ways that may advance a client's interests or overcome any impasses.

Frustrated that she can not secure critical data, for instance, Erin Brockovich could plan to raise this data impasse when the mediator reaches the stage of identifying impediments to settlement. Realizing that Pacific Gas & Electric is approaching the dispute as distributive, as if the dispute is only about paying a lump sum of money, Erin Brockovich could plan to invite the mediator to help the parties generate multiple options when the inventing stage is reached.

At the end of the two-credit mediation representation course at Cardozo Law School in January 2004, I asked the five experienced professional mediators who conducted the end-of-the-course mock mediations whether any of them reacted to the student-attorneys suggesting how they could be helpful in resolving the dispute. The mediators uniformly expressed both that they were surprised, because it was so rare, and how helpful it was to hear the student-attorneys' analyses and suggestions.

E. *Implement Plan At Key Junctures in the Mediation Process*

Finally, these four distinct components of the model had to be woven together. I had to consider how a problem-solving approach that involves the analysis of interests, impediments, and ways to enlist the mediator's assistance can be implemented by an advocate in the mediation process. The advocate needed a representation plan that could be used throughout the mediation process.[54] However, simply saying "throughout the process" was too vague, leaving the advocate with little practical guidance. So, I perused the mediation process to isolate discrete representation junctures where an attorney should consciously implement his or her focused plan to advance interests and overcome impediments. I identified six key junctures.[55]

53. *See* ABRAMSON, *supra* note 2, at ch. 2.3. **R**

54. *See* ABRAMSON, *supra* note 2, at ch. 5.16 (Checklist for Preparing Case and Mediation Representation Plan). **R**

55. Junctures are not the same as "stages" in the process, in that stages identify the sequential steps in the mediation process. Nevertheless, junctures and stages can overlap.

There are other junctures in the mediation process. Attorneys should engage in problem-solving representation when (1) initially interviewing his/her client, (2) approaching the other attorney about the use of mediation, (3) preparing the case for