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

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

Harold Abramson†

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† Harold Abramson, Professor of Law, Touro Law Center. I want to thank Dwight Golann, Lela Love, Ken Rosenblum, and Barbara Swartz for generously finding the time to offer valuable comments, as well as my research assistant, Joseph Wilson, for putting the footnotes in proper form.

I. WHY A DIFFERENT APPROACH TO REPRESENTATION

Recently, I was shopping for a notebook computer and encountered an unfamiliar processing chip. The salesperson explained that the Pentium Series III and 4, originally designed for a large desktop computer and modified for use in a notebook computer, proved inefficient in meeting the needs of a small, mobile device. Computer manufacturers needed a processor that was custom-designed for the needs of notebooks and so Intel built a new chip, the M Processor, from the ground up.¹ Well, that is what I tried to do in *Mediation Representation-Advocating in a Problem-Solving Process*.² Rather than simply tweaking the well-honed strategies and skills that work so effectively in the courtroom, I focused on building an advocacy approach from the ground up that would realize the full benefits of a problem-solving mediation process. Although much has been written about how mediators can create a problem-solving process³ and many mediators have been trained to use a problem-solving approach,⁴ surprisingly little has been written on how to represent clients⁵ in this

1. See Tom Mainelli, *Banias: The Mobile Chip to Beat?*, PCWORLD, Oct. 15, 2002, at <http://www.pcworld.com/news/article/0,aid,105957,00.asp>; see also Kai Scherer, *IDF: Banias Fever Breaks Out*, ZDNet UK at <http://reviews.zdnet.co.uk/hardware/processormemory/0,39024015,10001951,00.htm> (Sept. 16, 2002) (last visited Feb. 28, 2005).

2. See HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* (2004) (Recipient of 2004 Book Award of the CPR Institute for Dispute Resolution).

3. See, e.g., DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* 14-26 (1996); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 18-19, 55-56 (2d ed. 1996); JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-9, 38-72 (1984).

4. Even though I could not find a rigorous study of the approaches taught in mediation training programs, I came across ample anecdotal evidence that suggests that many, if not most, training programs teach mediators the interest-based or problem-solving approach. In informal surveys of mediators compiled when I have conducted advanced mediation training, for instance, I was informed that most, if not all, of the participants received basic training in some variation of problem-solving. This approach also seems to be taught in many court-connected programs, by many private trainers, and at Harvard Law School (where Professors Fisher, Sander, and Mnookin train negotiators and mediators from around the world). Also, although a significant number of mediators are trained in the transformative approach, a number of them also seem to have been trained in problem-solving.

5. My book is the first one to focus exclusively on how to be a problem-solving advocate. It develops a coherent theory and comprehensive approach to representation. Other books have ably presented an amalgam of strategies for advocates in mediation. For example, one book explains how to conduct a traditional negotiation dance of offer and counter-offers in mediation. See MICHAEL P. SILVER, *MEDIATION AND NEGOTIATION: REPRESENTING YOUR CLIENTS* 121-27 (2001).

burgeoning and increasingly preferred process.⁶

This article follows my personal journey of constructing a model of client representation suitable for a problem-solving mediation process. The model, labeled as the mediation representation formula, forms the foundation of *Mediation Representation*. Developing it was an incremental process that drew upon much of the excellent work done in the field of negotiation, mediation, and mediation representation.⁷

Let me start by defining a problem-solving mediation process. In such a process, the mediator's sole purpose is to assist the clients and their attorneys in resolving the dispute. The mediator knows how to structure a process that can provide both sides with an opportunity to fashion enduring, and when at all feasible, inventive solutions that can go beyond what a court might be willing to craft. The mediator serves as a guide by managing a structured discussion that includes gathering specific information; identifying issues, interests, and impediments; and generating, assessing, and selecting options for settlement. The mediator knows how to involve clients constructively and to use various dispute resolution techniques at propitious moments in the mediation session. The mediator poses open-ended and focused questions, reframes issues, conducts brainstorming sessions, and uses recognized strategies for defusing tensions and overcoming impasses. The mediator may use private caucuses to gain confidential information and employ suitable methods for helping participants evaluate the strengths and weaknesses of their legal cases, methods that do not involve the mediator rendering his or her assessment. If the dispute does not settle, the mediator may help the participants – the attorneys and the parties – to select a suitable

6. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (Preliminary Version Oct. 24, 2003) (prepared for the Symposium on the Vanishing Trial sponsored by the Litigation Section of the American Bar Association, San Francisco, CA, Dec. 12-14, 2003) (documenting that while the number of federal lawsuits filed has increased, the number of trials has decreased, from 11.5% in 1962 to 1.8% in 2002, with comparable trends in the state courts. One of the documented replacements for trials is mediation.); see also John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000).

7. See generally ABRAMSON, *supra* note 2; ERIC GALTON, REPRESENTING CLIENTS IN MEDIATION (1994); JACK COOLEY, MEDIATION ADVOCACY (2d ed. 2002); GOLANN, *supra* note 3; Videotape: Representing Clients in Mediation: How Advocates Can Share a Mediator's Powers (Dwight Golann 2000) (on file with the ABA Section of Litigation); MOORE, *supra* note 3; ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Penguin Books 1991) (1981) [hereinafter FISHER ET AL.].

alternative process, including litigation, for ultimately resolving the conflict.

There are, of course, other processes for resolving legal conflicts, a well-recognized reality that has generated much debate over what processes can be rightfully called mediation. After reading and listening to much of the thoughtful debate and observing how loosely the term is used by such diverse sources as judges, the media, and the United Nations, the final clincher in my intellectual pursuit to define mediation occurred when I encountered an oven advertisement on television. The manufacturer's salesman was presented as a "great mediator" when he offered a range that could "cook two different foods, at two different temperatures."⁸ It is too late to justify a favored, circumscribed definition of mediation. Mediation is simply a negotiation conducted with the assistance of a third party. This generic definition should fit any process that can be legitimately classified as mediation.⁹ Instead of debating the definition of mediation, we should focus on defining the adjective in front of the noun. Is the mediation problem-solving, transformative, evaluative, or something else? *Mediation Representation* focuses on one particular adjective: problem-solving.

Problem-solving mediations should be distinguished from judicial settlement conferences because some mediations can resemble settlement conferences.¹⁰ These settlement conference-type

8. Maytag Corporation ran a national television advertisement that it called "The Great Mediator (pizza or casserole)." In the advertisement, the "Maytag Man" appears as "a great mediator" who has the answer to the question that has "aroused fierce passions for centuries: What's for dinner?" The mediator presents a new range that can "cook two different foods, at two different temperatures, for one complete meal." The advertisement ran from August 1999 to December 1999. Interview with Nicole Kaczmarek, Operations Manager, LB Works, Advertising Agency for Maytag Corporation (July 2003). The salesman was mediating using an evaluative approach in which he offered a solution that would meet the needs of both parties to eat different foods.

9. See, e.g., KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 23-25 (2d ed. 2000); GOLANN, *supra* note 3, at 14-26; MOORE, *supra* note 3; FOLBERG & TAYLOR, *supra* note 3, at 7-9, 38-72.

10. See Videotape: Comparing Settlement Conferences and Mediations (Abramson and Cronin-Harris, NYS Bar Association, 1999) (on file with NYS Bar Association); see also Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 507-11 (1985). A significant difference between a directive, evaluative mediation and a judicial settlement conference is the power possessed by the third party. In mediation, the person lacks ultimate decision-making power while in a judicial settlement conference, the person may be the ultimate decision maker.

mediations, like judicial settlement conferences, can consist of the third party hearing each side's arguments, asking questions, challenging partisan points, assessing arguments and legal positions, and hinting at or urging compromised settlement terms. Such mediations, using dispute resolution nomenclature, are often a directive, evaluative process. Attorneys can prefer this sort of mediation process because they know how to represent clients in such a process, using the familiar adversarial strategies of presenting their strongest partisan arguments and criticizing the other side's case.

These adversarial strategies may be effective in settlement conference-type processes as well as in court and arbitrations where each side is trying to convince a third party to make a favorable decision or to steer the negotiations in a favorable direction. However, in problem-solving mediation, there is no third party decision maker or evaluator, only a third party assistant. The third party assistant usually is not even the primary audience.¹¹ The primary audience is the other side, who is surely not neutral and can often be quite hostile. In this different representational setting, the adversarial approach is less effective, if not self-defeating.

Many sophisticated and experienced litigators realize that mediation calls for a different approach, but they still muddle through the mediation sessions. They are learning on the job. Even though many attorneys prefer a problem-solving approach to negotiations,¹² attorneys are still in the early stages of figuring out how to do it in mediations. Many attorneys went to law school before courses on dispute resolution were offered, and the dispute resolution courses that have emerged in law schools over the last twenty-five years have been largely limited to teaching students to be mediators, not advocates.¹³ Continuing legal education programs are only beginning to focus on

11. While the mediator may not be the primary audience, the mediator, along with the other attorney, are important secondary audiences. These secondary audiences require special attention at different points in the mediation, depending on what is happening during the mediation. For example, this article considers later how the advocate might enlist the assistance of the mediator to help break impasses, among other types of assistance. See *infra* Part V.C & D; see also ABRAMSON, *supra* note 2, at ch. 5.7 (Select Your Primary Audience in the Mediation).

12. See Heumann & Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: 'You Can't Always Get What You Want,'* 12 OHIO ST. J. ON DISP. RESOL. 253, 309 (1997) ("While sixty-one percent of the lawyers would like to see more problem-solving negotiation methods, about seventy-one percent of negotiations are carried out with positional methods instead.").

13. See Suzanne J. Schmitz, *What Should We Teach in ADR Courses: Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 HARV. NEGOT. L. REV. 189, 204 (2001).

teaching representation skills, with many programs limited to sharing anecdotal experiences and idiosyncratic advice. *Mediation Representation* provides a comprehensive approach to representing clients in a problem-solving process, an approach that applies from an attorney's first client phone call until the mediation process is concluded.

In following my personal journey, this article first considers why I focused on the advocate in the process. It then identifies three key assumptions that underlie any model of client representation. Next, the practice of attorneys advocating adversarially is posed as the problem that the rest of the article proposes to resolve by developing a particular model of client representation for mediation.

II. EMPOWERING THE LAWYER-CONSUMER

I began thinking about mediation representation about ten years ago when asked to serve on a planning committee to design a program on the subject for the annual meeting of the New York State Bar Association.¹⁴ I welcomed this opportunity because as a dispute resolution professor, mediator, and trainer, I had developed an uneasy awareness of the limitations on improving mediation practices by focusing on the training of mediators. Giving attention to the advocates in the process seemed like a promising prospect.

Recalling a graduate course in microeconomics, I realized that mediation policymakers, practitioners, and academics (including myself) have been focusing primarily on only one side of the marketplace equation – the supply side, although for good reason. Mediation was still a relatively young profession – only about twenty to twenty-five years in the making, and much work needed to be done to ensure quality mediators. I also began to understand the limitations of what could be accomplished on the supply side. Policymakers can formulate professional standards, expand the number of hours for basic training, mandate training content, implement advanced specialized training, require mentoring, and possibly impose licensing (not something I personally endorse at this time). However, these valuable initiatives alone were unlikely to overcome the challenges posed by the nature of mediation practice. Many mediators mediate part-time and function like private settlement judges. Much of this mediation practice transpires unsupervised, behind doors locked by the confidentiality key.

14. The state bar association program was held in New York City in January 1994.

Frustrated by the limitations of what can be done to improve the quality of mediation practices on the supply side, I wondered whether a valuable opportunity was being missed by failing to give sufficient attention to the other side of the equation – the consumer side. According to microeconomic theory, you can improve the quality of services in the marketplace by educating consumers to make informed decisions. With this in mind, I turned to studying mediation representation practices as well as to writing and teaching to reach one particular set of consumers:¹⁵ lawyers who counsel clients, hire mediators, and participate in the mediation process.

If lawyer-consumers could learn more about the opportunities offered by a problem-solving process, how to select suitable mediators, and techniques of effective advocacy, they would know when to shop for a problem-solving process as well as what to look for during the mediation process. In return, mediators would realize that to get that business, they would need to hone their problem-solving skills. In addition, their behind-closed-door practices would be scrutinized by these better-educated advocates in the room, who could serve as a check on the quality of the mediation process.¹⁶

III. THREE ASSUMPTIONS WHEN CONSTRUCTING A MODEL OF CLIENT REPRESENTATION

I started my journey by reflecting on my experiences as a mediator and a teacher of students and mediators. After studiously observing advocates at work, hearing numerous accounts from other mediators and mediation advocates, and reading much of the relevant literature, I identified three pillars to support a model of client representation for a problem-solving process. They consisted of three succinct and widely cited propositions, which follow.

15. During the last ten years, others also turned to educating the mediation consumer. For example, the CPR Institute of Dispute Resolution, which serves a membership of 500 corporations and law firms, provides, among other services, education in ADR advocacy to lawyers and corporate clients. See CPR Institute of Dispute Resolution, at <http://www.cpradr.org>. Many bar associations currently offer education programs on mediation advocacy. See, e.g., programs offered by the ABA Section on Dispute Resolution, at <http://www.abanet.org/dispute/home.html> (last visited Feb. 4, 2005).

16. In my advocacy training, I include a module on how the advocate can prod the mediator toward a desired process such as problem-solving when the mediator lacks either the training or the persistency to do so. The somewhat provocative title of that teaching module is: “How to Deal with Aberrant Mediators.”

A. *Problem-Solving Mediation Can Offer Dispute Resolution Opportunities That Are Unavailable in Other Dispute Resolution Forums*

I will not take any space to defend this now widely accepted proposition except to recognize that mediation, when not conducted like a settlement conference, has the potential to produce creative and enduring solutions that meet the particular needs of disputing parties.¹⁷ Any model had to be designed to realize this potential.

B. *To Realize These Opportunities, Advocates Need an Approach to Client Representation Suitable for Mediation*

As already suggested, the familiar adversarial approach that has proven so effective in judicial trials, as well as in judicial settlement conferences and arbitrations, does not work optimally in a problem-solving mediation. Simply adjusting and refining trial strategies would not be enough to realize the full benefits of mediation. The model had to incorporate a different representation approach, one tailored to realize the full benefits of this forum. Instead of advocating as zealous adversaries, attorneys should advocate as zealous problem-solvers.¹⁸

C. *Mediation is a Continuation of the Negotiation Process*

Any model of client representation had to recognize that parties participating in mediation are simply continuing their negotiation in another forum. Therefore, the model needed to explicitly reveal the relationship between negotiation and mediation.

17. See generally KOVACH, *supra* note 9; GOLANN, *supra* note 3, chs. 2 & 3; MOORE, *supra* note 3; FOLBERG & TAYLOR, *supra* note 3.

18. See Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 196 (2002) (in an extensive study of negotiation styles, 75 percent of true problem-solving negotiators were considered effective as compared with less than 50 percent of adversarial bargainers, a percentage that shrunk to 25 percent when examining adversarial bargainers who were unethical); ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 321-322 (2000); G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 12-14 (1999). The authors concluded that clients are usually better off when a lawyer adopts a problem-solving approach over an adversarial one. Other studies are cited that suggest that cooperative negotiators are more effective than competitive ones.

IV. THE PROBLEM: ADVERSARIAL ADVOCACY

The sort of advocacy caricatured in the negotiation session of the movie *Erin Brockovich*¹⁹ has not been uncommon in mediations. Let me describe the sharp exchange of settlement offers in that negotiation. During the rest of this article, this dispute²⁰ will be used as a basis for demonstrating the elements of a formula suitable for representing clients in a problem-solving process.

Here is the scene and the transcript:

The judge just dismissed each of the eighty-four motions to strike filed by the defendant and upheld the plaintiffs' causes of action in a lawsuit brought by the residents of Hinkley, who claimed that the defendant Pacific Gas and Electric [PG&E] had polluted their groundwater. The judge directed the defendant's attorneys to "tell your clients they're going to trial." As a result, the attorneys for both sides agreed to meet at the law office of the plaintiffs' attorney to discuss settling the lawsuit.

SCENE: The Waiting Room.

Ed Masry, the attorney Erin Brockovich works for, glances at the defendants' attorneys who "ooze importance" and whispers to Ms. Brockovich, "The games are about to begin." Mr. Masry recruits and dresses up two of his secretaries to look like attorneys.

NEXT SCENE: The Conference Room.

The four of them, including Ms. Brockovich, walk into the conference room and sit down. Across the table, two attorneys representing the defendant are already seated.

The lead attorney for defendant Pacific Gas and Electric talks first and presents an opening offer:

SANCHEZ (PG&E lead attorney): . . . Let's be honest here. Twenty million dollars is more money than these people have ever dreamed of.

ERIN: Oh, see, now that pisses me off. First of all – since the demur, we now have more than four hundred plaintiffs . . . and (mocking her) "let's be honest," we all know there's more out there. Now, they may not be the most sophisticated people, but they do know how to divide, and twenty million dollars isn't shit when it's split between them.

19. ERIN BROCKOVICH (Universal Studios 2000).

20. Erin Brockovich was not a lawyer in the movie; she was assisting the attorney as a sort of paralegal. Rather than dealing with the relationship between a paralegal and the attorney who must make all the critical representation decisions, I simplified the discussion in the article by focusing on Ms. Brockovich's representation choices as if she were an attorney. *Id.*

And second of all – these people don't dream about being rich. They dream about being able to watch their kids swim in a pool without worrying they'll have to have a hysterectomy at age twenty, like Rosa Diaz – a client of ours – or to have their spine deteriorate like Stan Bloom – another client of ours.

So before you come back here with another lame-ass offer, I want you to think real hard about what your spine is worth, Mr. Buda [one of PG&E's attorneys] – or what you'd expect someone to pay you for your uterus, Miss Sanchez [the other PG&E attorney] – then you take out your calculator and multiply that number by a hundred. Anything less than that is a waste of our time.

[Sanchez, throughout her speech, has been reacting in a patronizing manner – as if Erin's words were of no import. As Sanchez picks up a glass of water to sip,]

ERIN: By the way, we had the water brought in special for you folks. It came from one of Hinkley's water wells.

SANCHEZ stares at the water and puts it down and says: I think this meeting is over.

ED responds with: Damn right it is.

[Erin gets up and storms out first.]

This sort of intensive, adversarial posturing can damage, if not derail, a problem-solving process, whether conducted with or without a mediator. Mediation advocates who prefer a problem-solving process need a more suitable approach to client representation.

V. SOLUTION: THE MEDIATION REPRESENTATION FORMULA

Mediation Representation presents a five component mediation representation formula in which attorneys advocate by using (1) a creative problem-solving approach to achieve the two goals of (2) satisfying their client's interests and (3) overcoming any impediments to settlement. During the mediation the attorneys (4) enlist the assistance of the mediator while negotiating with the other side at (5) key junctures in the process.

The first three components of the model focus primarily on how to negotiate in the mediation.

A. *Negotiation Approach: Creative Problem-Solving*

Selecting the negotiation approach was easy. If an advocate views mediation as a problem-solving process, then the attorney should negotiate as a problem-solver.

A problem-solving negotiator who is creative²¹ does more than just try to settle the dispute. Such a negotiator creatively searches for solutions that go beyond the traditional ones based on rights, obligations, and precedent. Rather than settling for win-lose outcomes, the negotiator searches for solutions that can benefit both sides.²² To creatively problem solve, the negotiator develops a collaborative relationship with the other side and participates throughout the process in a way that is likely to result in solutions that are enduring as well as inventive. Solutions are likely to be enduring because both sides work together to fashion nuanced solutions that each side fully understands, can live with, and knows how to implement. Solutions are likely to be inventives because both sides advocate for their client's interests instead of legal positions;²³ use suitable techniques for overcoming impediments; search expansively for multiple options; and evaluate and package options imaginatively to meet the various interests of all parties.

21. See, e.g., MNOOKIN ET AL., *supra* note 18; FISHER ET AL., *supra* note 7; Symposium, *Conceiving the Lawyer As Creative Problem Solver*, 34 CAL. W. L. REV. 267 (1998); Thomas D. Barton, *Creative Problem-Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273 (1998); Paul Brest & Linda Hamilton Krieger, *Lawyers As Problem Solvers*, 72 TEMP. L. REV. 811 (1999); Seamus Dunn, *Case Study: The Northern Ireland Experience – Possibilities For Cross-Fertilization Learning*, 19 ALTERNATIVES TO THE HIGH COST OF LITIG., at 153 (June 2001); Carrie Menkel-Meadow, *Aha? Is Creativity Possible In Legal Problem Solving and Teachable In Legal Education?*, 6 HARV. NEGOT. L. REV. 987 (2001); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer As Problem Solver*, 28 HOFSTRA L. REV. 905 (2000); Carrie Menkel-Meadow, *The Lawyer As Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship In Lawyering*, 72 TEMP. L. REV. 785 (1999); Carrie Menkel-Meadow, *Toward Another View Of Legal Negotiation: The Structure Of Problem Solving*, 31 UCLA L. REV. 754 (1984); Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375 (1998); Janet Reno, *Lawyers As Problem-Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999). See also California Western School of Law, *Center for Creative Problem Solving* (2004), at http://www2.cwsl.edu/mcgill/mc_main.html (last visited Feb. 4, 2005).

22. Instead of referring to “win-win” solutions, I suggest searching for solutions that can benefit both sides. I avoid using the more familiar, if not overused, “win-win” jargon because that jargon carries baggage that can blind people to the underlying valuable point that still retains considerable vitality. The “win-win” attitude can be sharply contrasted with the opposite one of “win-lose,” neatly capturing a fundamental difference between the problem-solving and adversarial approaches.

Many lawyers consider the idea that both sides can secure benefits as naïve, or not anchored in reality. However, the notion that both sides might be able to gain something in negotiations reflects an optimistic attitude that can open the mind to creative searches. The likelihood of finding such gains in negotiations is greater than in court. In negotiations, for instance, even the defendant who agrees to pay considerable damages may gain other benefits, such as no publicity, no precedent, and a continuing business relationship – benefits that are usually unavailable in court.

23. For a full discussion of how to identify clients' interests as opposed to positions, see ABRAMSON, *supra* note 2, at ch. 3.2(a) and FISHER ET AL., *supra* note 7.

For problem-solving advocacy to be effective, an attorney ought to engage proactively at every stage of representation, from the moment of the first client interview until the negotiation in the mediation is concluded. The attorney should be a constant problem solver. It is relatively easy to engage in simple moves such as responding to a demand with the question “why?” in order to bring the other party’s interests to the surface. However, it is much more difficult to stick to this approach throughout the mediation process, especially when faced with an adversarial, positional opponent. Trust the problem-solving approach. When the other side engages in adversarial tactics – a frequent occurrence in practice – the attorney should react with problem-solving responses, responses that might even convert the other side into a problem solver.²⁴

In this pitch for a problem-solving approach, I do not blindly claim that it is the only one that results in settlements. Attorneys frequently cite success stories when they use unvarnished adversarial tactics, as occurred in *Erin Brockovich*, or a hybrid of adversarial and problem-solving strategies.²⁵ The hybrid supporters claim that the best approach is a flexible one, a philosophy that surely is advisable in life generally as well as in legal negotiations. However, flexibility should not be confused with inconsistency. Shifting between adversarial and problem-solving tactics during the course of mediation can undercut creative problem-solving potential. A consistent adherence to problem-solving will more likely produce the best results for clients.

Finally, this pitch for problem-solving is bound to be resisted by those who fail to see any benefits for the legal cases that they typically handle. These skeptics see problem-solving opportunities for other attorneys’ cases but not for their own because their cases are only about money. This common reaction reflects a misunderstanding of the opportunities offered by problem-solving.

First, whether a legal dispute is mostly about money varies from case to case.²⁶ An attorney has little chance of discovering whether a

24. See ABRAMSON, *supra* note 2, at ch. 1.5.

25. In the hybrid approach, attorneys switch between adversarial and problem-solving tactics, depending on how the mediation is unfolding.

26. See Dwight Golann, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 334 (2002) (in the only empirical study on the subject, the author found that “almost two-thirds of all [mediated] settlements in the survey were integrative in nature The results suggest that both mediators and advocates should consider making a search for integrative outcomes an important aspect of their mediation strategy.”).

dispute is about more than money if the attorney approaches the dispute as if it is only about money.²⁷ Such a preconceived view backed by a narrowly focused adversarial strategy will likely blind the attorney to the other party's needs and inventive solutions. Both sides are more likely to discover comprehensive and creative solutions if they approach the dispute with open minds and problem-solving orientations.

Second, if the dispute or any remaining issues turn out to be predominantly about money, then at least the attorney followed a representation approach that may have created a hospitable environment for resolving the money issues. A hospitable environment can even be beneficial when there is no expectation of a continuing relationship between the disputing parties.

Third, the problem-solving approach can provide a framework for resolving money issues. This type of dispute can sometimes be resolved by resorting to the usual problem-solving initiatives such as the use of objective criteria.²⁸ If they fail, an attorney might turn to the familiar, adversarial negotiation dance of offers and counter-offers, but a version that has been tempered for a problem-solving process.²⁹

In short, problem-solving provides a comprehensive and coherent structure for representation that can guide an attorney throughout the negotiation in the mediation. By sticking to this approach, the attorney will be prepared to deal with the myriad of unanticipated challenges that inevitably arise as any negotiation unfolds.

At least one category of disputes is usually primarily about money. The classic personal injury dispute between strangers who will never deal with each other again can be only about money and therefore not open to creative resolutions other than a tailored payment scheme. However, even in these disputes, one side may occasionally want something more than money, such as vindication, fair treatment, etc.

27. In a recent case that I mediated, the parties arrived with extreme monetary claims on the table and a long history of failed negotiations. After more than three hours of mediation, the parties and attorneys negotiated a written apology signed by the defendant and a written introduction to future buyers signed by the plaintiff. The monetary issues were then resolved in less than a minute! The parties were apparently already on the same page for settling the money claims but were not ready to settle until some non-monetary needs were met.

28. See ABRAMSON, *supra* note 2, at ch. 1.3(a)(iii) on "Manage Remaining Distributive Conflicts" (considering how to use problem-solving moves to resolve easy distributive issues); see also *infra* Part V.D.2 ("Mediators' Techniques"). For other methods, see ABRAMSON, *supra* note 2, at ch.7.2(d)(iii), and text accompanying note 52 *infra*.

29. See ABRAMSON, *supra* note 2, at ch. 1.3(a)(iii) on "Manage Remaining Distributive Conflicts" (This section considers how to resolve difficult distributive issues by using tempered adversarial strategies. For example, an attorney can omit the use of traditional tricks and extreme threats, and instead emphasize principled arguments while engaging in the negotiation dance of offers and counter-offers).

Despite these benefits, lawyers gravitate toward an adversarial approach. The reason may seem simplistic, if not superficially glib: lawyers are too preoccupied with litigating. Negotiations are so enmeshed in the litigation process that negotiations and litigation have become an integrated, single process of dispute resolution.³⁰ Thus, lawyers are likely to approach the negotiated settlement of a court case with a litigator's mindset,³¹ one molded by an intensely adversarial legal culture and reinforced by attorney fee arrangements.

Many lawyers relish and many clients crave a fiercely combative approach to legal representation. Overly optimistic as well as insecure clients want to be protected by aggressive hired guns. They are not very receptive to reality checks and can become perturbed with lawyers who may not appear faithful to the cause when they flag legal risks and inquire about the other side's perspective and needs.

Legal training and experience teach lawyers to view legal disputes as zero-sum or distributive conflicts about money in which one party wins and the other one loses. The very function of courts is to declare winners and losers. Also, courts prefer awarding the winners monetary awards over such equitable relief as specific performance and inventive injunctions. Compelled by the well-established maxim that "equitable relief is not available to one who has an adequate remedy at law," courts prefer awarding damages, reserving creative equitable relief for when legal remedies prove inadequate. Before awarding most forms of non-monetary relief, counsel must convince the court that his or her client would otherwise suffer irreparable harm and that the equitable relief would be practical, convenient, and not sap judicial resources.³²

The litigator's mindset is also molded by the only too familiar routine for pursuing litigation. First, a litigator's conception of a dispute is shaped by the way he or she converts the dispute into a legal case. When drafting a complaint or answer, the attorney sculpts and fits the dispute into recognized legal categories and then reinforces this conception of the dispute with supporting partisan arguments. The attorney next engages in various strategies to bolster the legal case because the perceived likely court outcome will impact on the settlement value of the case. In addition to using old-fashioned puffery and bluffing, the attorney typically turns to various litigation strategies. By pursuing more discovery or a motion for summary

30. *See id.* at 13-14.

31. *See* MNOOKIN ET AL., *supra* note 18, at 108-18, 167-72.

32. *See* DAN DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION §2.5 (2d ed. 1993).

judgment, for instance, the attorney pursues the chance that more disclosure or a successful motion will strengthen the court case and its settlement value. The attorney may further press the other party to settle by resorting to litigation strategies that increase the other party's cost of staying in the litigation. By demanding voluminous discovery, for example, the attorney can purposely increase the other party's costs of not settling. As the attorneys and parties become consumed by these litigation tactics, the litigation and related negotiation become sharply adversarial.

The fee arrangements between attorneys and their clients, which can encourage unethical professional conduct, can fuel these litigation strategies. Obviously, an hourly rate arrangement can motivate less ethical attorneys to engage in adversarial strategies that prolong the litigation. It takes only one unethical attorney with the hourly rate incentive to prolong the litigation. Even though the alternative of a contingency fee arrangement may motivate early settlement (by working fewer hours, the attorney can make more money), it can discourage problem-solving searches for value-creating trades. A settlement that includes a new car or an apology instead of monetary damages, for instance, produces a settlement that cannot be neatly split so that the attorney receives one-third.

In short, when the litigator's mindset is adapted to legal negotiations, the approach is bound to be adversarial.³³ This adversarial approach has been long-standing, despite the finding of at least one prominent study that lawyers would prefer problem-solving strategies.³⁴ A study of New Jersey litigators suggested that lawyers may negotiate adversarially out of habit, a social practice that is less costly and more easily routinized than problem-solving.³⁵

The negotiation in *Erin Brockovich* surely exemplified the classic adversarial approach. It consisted of the exchange of extreme offers and counter-offers backed by muscular language. After the defendant's attorney characterized her offer as "more money than these

33. One creative solution for changing the litigator's mindset is to change the attorney who tries to settle the case. Instead of the litigator pursuing both the litigation and the negotiations, the litigator only litigates. Any negotiations would be handled by a separate settlement counsel who is committed to a problem-solving approach. For a thoughtful development of this solution, see William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 367-70 (1999). The author concluded that "the mind-set needed to do effective problem-solving is incompatible with the mind-set needed to pursue litigation whole-heartedly." *Id.* at 393.

34. See Heumann & Hyman, *supra* note 12.

35. *Id.* at 295-309.

people have ever dreamed of,” Erin Brockovich responded by scorning the defendant’s offer, conveying passionately and vividly her clients’ dreams, presenting an extreme and provocative counter-offer, and wrapping up her response with the unsettling water ploy that pointedly raised the health issue. The result of this series of moves was predictable, at least for that negotiation session: an impasse. However, could Ms. Brockovich have been an assertive advocate in a way that would not have sent the other side away? I will suggest how she might have advocated differently, in a way that might have transformed the negotiation into problem solving, as I explore the next four components of the representation model.

B. *Goal: Advance Your Client’s Interests*

For the next step in constructing this model, I wanted to fashion a guiding light for the negotiation. Any light should focus client representation on one overall goal within a problem-solving framework. I sought a goal that would isolate a key trigger for launching a problem-solving process. The obvious goal was to settle the dispute.³⁶ However, settlement as a goal did not shed much light. It is the goal of most negotiations, whether the parties are adversarial or problem-solving. Also, the goal failed to shape how parties and attorneys negotiate. I needed another goal.

For the goal to be effective it had to take into account the litigator’s embedded view of negotiations as a win-lose proposition; it had to be able to shift the litigator’s perspective. After reflecting on a full range of techniques and moves within the self-contained problem-solving approach, one single move stood out because it could instantly shift a negotiator’s perspective on a dispute from an adversarial distributive one to a problem-solving mutually beneficial one. This shift can happen when the attorney identifies and advocates his or her client’s interests. More specifically, an attorney should first understand his or her client’s interests, acquire an understanding of the other side’s interests, and then advocate to advance his or her client’s interests in a way that sufficiently addresses the other side’s interests to move toward an agreement. This focus should be the primary goal in a problem-solving process, a first move that can initiate problem-

36. A party settles when the negotiated solution is better than the alternative to settlement known as the BATNA (Best Alternative To A Negotiated Agreement). See FISHER ET AL., *supra* note 7, at 101-11 (coining the term “BATNA”). The BATNA is your client’s best option if the negotiation fails.

solving as well as serve as a guiding light throughout the negotiation in the mediation.³⁷

In *Erin Brockovich*, Ms. Brockovich could have shifted the negotiation from adversarial to problem-solving by focusing on the interests of both sides. Interests reflect parties' needs. The positions that attorneys typically advocate are solutions. In *Erin Brockovich*, the defendant offered twenty million dollars; the plaintiffs counter-offered with a hundred times the value of a spine or uterus. These monetary solutions were offered to meet each side's interests. However, there might have been other solutions. By switching the beginning of the negotiation from exchanging initial offers to exchanging information on the needs of each party, an attorney can open the door to a search for creative solutions. It is the first step in a problem-solving negotiation.

In *Erin Brockovich*, consider what might have been the interests of each side and how identifying them would have opened the way to multiple possible solutions. The interests of the ill and scared plaintiffs became clear as the story in the movie unfolded. They wanted recognition that they had been poorly treated and lied to by the defendant; they wanted to be treated with respect and dignity; and they desperately needed health care and a safe place to live for themselves and their families. In view of these interests, solutions other than or including the payment of a lump sum might have included receiving lifetime health insurance, buying out their homes, cleaning up the contaminated groundwater, and/or a public and sincere apology.

For the defendant, PG&E, what were its underlying interests? The company might have wanted to avoid bad publicity and financial distress, if not bankruptcy. In view of these interests, other possible solutions might have included burnishing its reputation as a responsible corporate citizen by cleaning up the site, securing government help with the cleanup, or offering health insurance to the residents, which might be cheaper than paying a single lump sum payment.

There is a second reason for selecting the goal of focusing on a client's interests: to make clear what is *not* the primary goal of problem-solving. Problem-solving is sometimes misconstrued to mean placing a premium on getting along with the other side at the expense of a client's interests. Correcting this false perception registered high when drafting the new assessment criteria for the ABA

37. The attorney should develop a solution that meets his or her client's interests better than the solution offered by his or her client's BATNA. For a full discussion of how to identify client's interests as opposed to positions, see ABRAMSON, *supra* note 2, at 98-104; FISHER ET AL., *supra* note 7, at 41-57.

Mediation Representation Competition.³⁸ We had heard numerous competition judges criticize students' advocacy as too cooperative at the expense of their clients' needs. We resolved to send an unmistakable message to students by adding a separate and specific judging criterion entitled "Advocating Client's Interests."³⁹

For these reasons, this explicit goal was added to the model: attorneys should advocate to advance their clients' interests.

C. Goal: Overcome Impediments

I also identified another primary goal, one that applies to any negotiation regardless of the objective: to overcome any impediments to settlement. This goal entailed a return to a basic premise: parties would not be in mediation unless they were facing an impediment in the negotiation; otherwise, the parties could probably settle the dispute without the assistance of a mediator. Selecting this goal was obvious. Less obvious, however, was identifying an impasse-breaking strategy that comported with a problem-solving approach.

A number of distinguished authors have devised methodologies that demystify the murky world of impasse-breaking.⁴⁰ The methodology developed by Dr. Christopher Moore,⁴¹ for instance, relies on

38. I served as Chair of this committee as well as host of the inaugural regional competition for the New York City area law schools. The annual competition includes about ten regional competitions with the final rounds held each year in conjunction with the annual meeting of the ABA Section on Dispute Resolution. The judging criteria are based on students performing a problem-solving lawyer role.

39. Building a relationship with the other side also is important. A separate criterion focuses on "Problem-Solving Relationship Building." However, the two criteria do not compete with each other.

The Rules Committee of the Mediation Representation Competition of the ABA Section of Dispute Resolution drafted the assessment criteria during 2000-2001 that became effective for the 2001-2002 competition year. See American Bar Association Section of Dispute Resolution, *Representation in Mediation Competition 2005: Rules and Instructions* (Dec. 16, 2004), at <http://www.abanet.org/dispute/rulesandinstructions2004.doc> (current version of the criteria).

40. See Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 297-331 (1999) (identifying barriers to negotiations based on economists' insights, psychologists' insights, flaws in the rationality assumption, and principal/agent conflicts); MOORE, *supra* note 3 at 60-61 (identifying five causes of conflicts: data conflicts, interest conflicts, structural conflicts, relationship conflicts, and value conflicts); GOLANN, *supra* note 3, at 153-241 (identifying three categories of impasses – process, psychological, and merits); Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 54-59 (1994) (identifying ten impediments to settlement).

41. See MOORE, *supra* note 3, at 60-61 (presenting a Circle of Conflict in which five sources of conflicts are identified along with possible strategies for intervention).

taking three discrete steps that can produce a tailored-made strategy for overcoming impasses. His approach is built around his critical observation that impasses can be divided into five conflict categories that he labels *relationship*, *data*, *value*, *interest*, and *structural*. Under his approach, you first inquire about the cause of the impasse; then you classify the cause into one of the five impasse categories; and finally, you devise a suitable intervention for overcoming the impasse.

Let me describe Moore's five impasse categories while leaving for the next section how advocates might use his classification system as a basis for enlisting assistance from the mediator.

Relationship Conflicts can arise when participants are deeply upset with each other, cling to destructive misperceptions or stereotypes of each other, or suffer from poor communication. These types of conflicts are common in disputes where parties distrust each other and are occupied with hurling threats. These disabling tensions can arise between clients, between attorneys, and between an attorney and his or her client. Clearly, a bad relationship between the attorneys in *Erin Brockovich* contributed to that failed negotiation.

Data Conflicts can be caused by inadequate, inaccurate, or untrustworthy information. Alternatively, they can be caused by different views of what is relevant information or different interpretations of relevant data. Data conflicts are common in court cases where parties may hold conflicting views of what happened, what might happen in court, or what is an appropriate interpretation of decisive data such as financial statements.

A common data conflict in legal disputes arises from conflicting views of how a court will likely rule. Too many lawyers and clients fail to thoroughly and objectively analyze all the benefits, costs, and risks of pursuing a judicial remedy. This common failure leads to poor legal advice to clients, unrealistically optimistic alternatives to settlement (unrealistic BATNAs), and impasses in negotiations and mediations. Virtually all mediators have seen cases where opposing attorneys were equally optimistic about the judicial outcome. One of the attorneys was proven wrong. Inflated assessments can lead clients astray because they overestimate the benefits of returning to court, and, as a result, they may mistakenly reject what otherwise might have been acceptable settlement proposals.

A data conflict posed one of the impasses blocking settlement in *Erin Brockovich*. The sides could not agree that the town's water was polluted by the defendant, PG&E. The water ploy during the negotiation sharply raised the safety issue in a provocative, confrontational

fashion.⁴² Ms. Brockovich could have made the same point differently. She could have asked the other side whether they would be willing to drink this glass of water from a Hinkley well. Then she might have stated, while holding the glass of water, that she would not want to drink the water until the people at this table could resolve whether the water was safe (the data conflict). These comments would have directed the discussion to the cause of the impasse and how to garner the information each side would need to assess the safety of the water and, if unsafe, the causation. This plan would have kept both sides engaged specifically in examining ways to overcome the impediment.

Interest Conflicts can arise when parties' substantive, procedural, or psychological/relationship wants conflict with each other.⁴³ Interest conflicts cover the classically positional conflict inherent in adversarial negotiations. They can be caused by parties wanting the same thing (such as property), wanting different amounts of the same thing (such as time), wanting different things that the other is not prepared to give (such as one party wanting a precedent that the other party opposes), or even wanting something that another is not even aware of (such as an acknowledgment or an apology). The *Erin Brockovich* negotiation presented the classic distributive conflict over money – the plaintiffs wanted more money than the defendant was willing to pay.

Structural Conflicts can be the murkiest to identify. The two most common, as well as easiest structural obstacles to spot, are impasses due to unequal bargaining power or impasses due to conflicting goals of attorneys and their clients, which are known as principal-agent conflicts. Other structural conflicts can be more subtle, such as those caused by no deadline, time constraints facing one side, a missing key party, a party without sufficient settlement authority, geographical or technological limitations that impact one side disproportionately, and unequal control of resources for resolving the conflict. Because the causes of structural conflicts also frequently

42. Several litigators who have seen the film segment have told me that they would have sipped the water offered by Erin Brockovich. They figured that drinking so little water would have been harmless and would have thoroughly defused the tactic. This reaction reminds us how astute attorneys can neutralize clever adversarial tactics.

43. In a problem-solving process in which the concept of "interests" performs such a vital and pervasive role, Moore's narrow and distinctive use of "interest" conflicts can be confusing. I prefer referring to "wants" or "desire" conflicts. Parties may reach an impasse because their substantive, procedural, or psychological wants or desires are in conflict with each other.

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).

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 Rules⁴⁶ 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

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).

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 process⁴⁹ - 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.

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.

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).

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.

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

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

Three of the key junctures arise before the first mediation session, when (1) selecting a mediator, (2) preparing a pre-mediation submission, and (3) participating in a pre-mediation conference. The other three junctures arise in the mediation session when (4) presenting opening statements, (5) participating in joint sessions, and (6) participating in caucuses.

Assuming that Ms. Brockovich thinks her clients should convey personally and vividly that they have multiple interests and that the two sides are likely to reach an impasse over whether the defendant contributed to polluting the town's water (a data conflict), she might prepare a representation plan for four of the junctures as follows. When selecting the mediator (juncture one), she would choose someone who would deeply involve her clients and who would know how to handle complex scientific data. When preparing a pre-mediation submission (juncture two), she would want to explain the substantial data conflict so that the mediator would come prepared to deal with it. During the mediation session, she may want to request a caucus with the mediator (juncture six) to share any information that is especially damaging to the other side and to discuss with the mediator how to productively present this information to the other side in the joint session (juncture five).

VI. CONCLUSION

This article described the five components of the mediation representation formula as well as how the formula was derived. This model of client representation that forms the foundation of *Mediation Representation* offers the advocate an approach to representing clients that takes full advantage of the distinctive opportunities in a problem-solving mediation process.

In *Erin Brockovich*, the plaintiffs did not use this approach, however. They used a traditional adversarial approach and achieved a settlement that was impressive, at least based on one criterion. They negotiated the largest payment ever in a direct-action lawsuit, although after a protracted period of angst and uncertainty for the plaintiffs and their attorneys. The plaintiffs were thrilled with the settlement because the payment vindicated them and seemed to offer them ample financial resources to meet their future needs. It was too

mediation, (4) preparing his/her client, and (5) drafting a settlement agreement or developing an exit plan from an unsuccessful mediation. See ABRAMSON, *supra* note 2, at 8 n.23.

late, however, for those who died or were destined to die from exposure to the contaminated water. In addition, whether this was the best solution for both sides will never be known. Parties are unlikely to know whether they achieved optimum resolutions if they approach disputes as if they are only about money.

Imagine how different the representation and the results might have been if Ms. Brockovich had identified both sides' interests and the impediments to agreement, and had enlisted help from a mediator at key junctures, searching for solutions that advanced both sides' interests. By fixating less on the size of the check and more on a tailored solution to meet both sides' interests, the result might have materialized sooner; it might have included lifetime health insurance with no deductibles, clean-up of the polluted water, the option of the utility buying residents' homes, individual lump sum payments for pain and suffering, a public and sincere apology by the utility, and more. The plaintiffs would have received what they needed while the utility might have met the plaintiffs' interests at less cost to it while beginning the process of resuscitating its debilitated reputation. This sort of crafted and possibly quicker result exemplifies the potential of mediation when attorneys advocate as problem-solvers.

This model of client representation ought to be applied by an advocate for the duration of the representation, starting as soon as the first client interview. This problem-solving role should be maintained when contacting the other side about the use of mediation as well as when preparing the case and client for the mediation session. Then, by advocating at every juncture in the ways suggested in this article, an attorney should be able to realize the full potential of a problem-solving process.