2013

What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy

Elayne E. Greenberg

What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy

By Elayne E. Greenberg

The Problem

Paradoxically, when lawyers opt to mediate or arbitrate, lawyers may still wind up selecting, shaping and advocating in these dispute resolution processes to resemble the very litigation process they have sought to avoid.[1] After all, litigation likely comports with the lawyer's own conflict style, comfort level and concepts of justice.[2] As a consequence of this litigation bias, we see that the metaphorical doors of a multi-door courthouse that once offered a menu of dispute resolution choices are increasingly leading us back to one choice: a variation of the litigation door. Even though the Model Rules of Professional Conduct confirm that a lawyer's litigation preference may be within ethical parameters, this practice may, at times, directly contravene his client's interests. Let me explain.

Consider Sally Soprano. Sally Soprano gained her fame, not as one of Peter Gelb's Metropolitan Opera divas, but as a dispute resolution icon in the well-worn negotiation simulation between an opera singer questionably past her prime and an opera house in desperate need an operatic lead. The private instructions of this negotiation exercise inform Sally's lawyer that she wants the part so much, she would even be willing to perform for free. Many aspiring lawyers in law schools throughout the country and experienced lawyers seeking to hone their negotiation skills in negotiation training courses have enthusiastically played the part of Sally's lawyer. And too many times, these lawyers have supplanted Sally's wishes with their own by negotiating Sally's compensation at the risk of costing Sally the lead. Of course, these lawyers justified their actions, because they believed that compensation was more important than landing the lead role. According to many of the lawyers' thinking, who in their right mind would want to work for free? Sally Soprano teaches lawyers the challenge and importance of representing their clients' wishes, even when those wishes don't comport with the lawyer's own values and biases.

This same lawyer/client tension potentially emerges when lawyers, the ultimate consumers of dispute resolution services, opt to mediate or arbitrate. Lawyers may select neutrals, shape the process and advocate in the chosen dispute resolution process in a way that comports with the lawyer's own conflict style and is more akin to the lawyer's litigation-bent, sometimes at the expense of their client's expressed needs. This issue's column will discuss this tension and suggest ways ethical lawyers might proceed. Part One will explain the correlation between a lawyer's philosophical map and the litigation-bent decisions that shape his or her arbitration and mediation use. In Part Two, I will explore the ethical parameters that guide this discussion. In Part Three, I will suggest strategies for lawyers to better honor their client's wishes and deal with this ethical tension. Finally, I will conclude by framing this problem as part of the lawyering evolution that is experimenting with the most effective ways to integrate dispute resolution into a lawyer's case management.

Part One: Understanding the Lawyer's Litigation-Bent: The Correlation Between a Lawyer's Philosophical Map and Advocacy Decisions

Dispute resolution scholars Tom Stipanowich and Jacqueline Nolan-Haley red-flag that the lawyer's advocacy decisions are increasingly shaping arbitration and mediation processes on a continuum to resemble the litigation default.[3] The lawyer's philosophical map may influence the types of neutral that is selected, the lawyer's style of advocacy and the procedures incorporated into the chosen dispute resolution process. Over three decades ago, Professor Len Riskin described the lawyer's "standard philosophical map" as one that is more consistent with an adversarial system: parties are adversaries; legal conflicts are about rights and rules; the law provides the answers to disputes; and emotions, people and relationships are undervalued.[4] Even though we may take pride in the fact that as individual lawyers we are each our own person, as a group many of us share similar psychological traits that contribute to why some lawyers have a litigation bent.

Goldfien and Robbennolt's study on law students' preferences for mediator's styles contribute that as a group, lawyers tended to measure on the Myers-Briggs Type Indicator (MBTI) as having a Thinking, Introverted orientation.[5] Translated into lay people's terms, lawyers who are thinkers have a bent to defining the problem narrowly and rely on more objective standards such as the law.[6] Those lawyers with the introvert dimension prefer to keep the information to themselves rather than share information with colleagues, a defining value in a collaborative approach.[7]

Goldfien and Robbennolt's study also gives us some insight into how a lawyer's conflict style and philosophical map may in some cases contribute to shaping dispute-resolution processes into veritable litigation clones.

Although many of the study participants indicated a general preference for mediators who were creative and at times used elicitive techniques, the participants also indicated a preference about half the time for lawyer-mediators who were more directive. According to the study, the participants preferred directive and evaluative behaviors in context.[8]

In his aptly penned law review article "Arbitration: 'The New Litigation,'" Tom Stipanowich laments how arbitration is no longer an expeditious forum for justice. How ironic that arbitration has reworked itself to resemble the litigation process it has been trying to avoid. Among the examples he cites to illustrate the judicialization of arbitration include increased discovery, docketing problems that cause endless delays for hearings, judicial review of awards and challenges to arbitrators' impartiality.[9]

Professor Jacqueline Nolan-Haley opines in her award-winning article, "Mediation: The 'New Arbitration,'" how the core mediation values of party self-determination and party control of the outcome are becoming obfuscated by the injection of adjudication-like practices in mediation. Adversarial advocacy and evaluative mediators collide with the purpose of party self-determination. In another example of mediation's lost benefit, the value of mediation becomes muted when it is part of a med/arb process. Mediation as a free standing dispute resolution process or as part of a mulit-step process is being altered to resemble more of an arbitration policy. Multi-step processes are in practice compressed so that the arbitration stage remains at the center.[10]

The optimists among us believe all is not bleak. The legal culture is in the midst of an evolution, and this "backlash" is a natural part of any cultural shift. Similarly, the lawyer's "philosophical map" continues to evolve as more and more law schools teach aspiring lawyers not only the skills of dispute resolution, but the values underlying each process.

Part Two: The Ethical Parameters

Ethically, lawyers should avoid shaping dispute resolution processes into litigation-like forums unless the client agrees to such modification. Although ethical lawyering lore educates that it is the attorney who decides the strategy and the means for achieving the client's objectives, a more careful reading of the Professional Rules of Conduct suggests that this is not an absolute.[11] According to the Professional Rules of Conduct for Lawyers, attorneys may take the lead so long as the client does not object to the means.[12] Injecting another bit of reality into ethical lore, the ethical codes for mediators and arbitrators remind lawyers that respecting party self-determination[13] and achieving justice for both parties[14] are central to these alternative dispute resolution processes. As a natural corollary, lawyers who opt to mediate or arbitrate their client's disputes, believing these processes will advance their client's interests, also have an ethical obligation to calibrate their advocacy in a way that will promote their client's interests in these forums. This discussion is framed, in part, by the lawyer's ethical obligations to their clients as detailed in the Professional Rules 1.2, 1.4 and 2.1.

Prior to selecting a dispute resolution process or means to advance a client's interest, a lawyer has an ethical obligation to consider the multi-dimensions of his or hers client's interests, As the client's advisor, Rule 2.1 prescribes that lawyers "in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation."[15] Depending on the interests of the client, the lawyer may recommend mediation or arbitration as a preferable forum instead of litigation. In his commentary, Roy Simon suggests that it "may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."[16]

Whatever the lawyer is recommending, the lawyer still must consult with the client about the means of resolving the dispute. Rule 1.2 (a) provides, in relevant part, that "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means to which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.…" However, in those situations where the attorney and client do *not* agree on the means, Rule 1.2 is silent about how the attorney and client should proceed. In his comment, Simon advises that if the attorney and client are not able to reach a "mutually acceptable resolution of the disagreement," the client may discharge the lawyer or the lawyer may withdraw from the case.[17]

The challenge for ethical purposes is how you characterize "means." If lawyers shape mediation and arbitration in a way that it looks like litigation, does mediation and arbitration become so radically altered that they almost become a different "means" that implicate additional ethical action? I suggest that when a chosen dispute resolution process has morphed into a means that is a litigation clone instead of the alternative dispute resolution purpose the process purports to offer, that dispute resolution process has in actuality become a different means.

Part Three: Recommendations

Extrapolating from the ethical codes and comments, I posit that when lawyers shape mediation and advocacy processes into litigation-like processes they ethically need to do more. First, they should make sure that the client is fully informed about the means the attorney is using. All mediations are not alike. Directive mediation is distinctly

different than an elicitive mediation.[18] Similarly, all arbitrations are not alike. An arbitration with a panel that includes a party-appointed arbitrator, extensive discovery and a non-binding award is a distinctly different process than an expedited arbitration with a binding award.

Second, when selecting, shaping and advocating in a chosen dispute resolution process, the lawyer must distinguish his personal biases from his professional acumen. As Sally Soprano reminds us, if an attorney's biases are directing his choices at the expense of advancing his client's interests, that attorney's conduct is in direct contravention of the Professional Rules of Conduct for Lawyers.

Conclusion

As our legal culture continues to experiment with the ethical and effective ways to integrate dispute resolution into lawyering, there is not a clear or easy path. Rather, as with any cultural evolution there are steps forward, backlash reactions and supportive cultural shifts that need to take place before dispute resolution is fully and effectively integrated into lawyering. The increase of client-centered dispute resolution processes such as mediation spotlights the tension between a lawyer's own biases about conflict resolution and the client's expressed interests.

Now more than ever, a client's interests need to be center stage. Although some attorneys may pooh pooh this, defending that they know better, more client-centered attorneys appreciate that their clients may know best. Effective attorneys pause and develop a heightened awareness of when the attorney's own biases may collide with the client's interests.

In order for such dispute resolution processes as arbitration and mediation to be true alternatives rather than variants of litigation, increasing numbers of lawyers need to expand their lawyer's philosophical map. Another helpful step would be to continue to revise the Professional Rules of Conduct for Lawyer from a more litigation-centric guide to a more integrated advocacy and dispute resolution guide, to help lawyers resolve the inevitable ethical conundrums that will continue to arise when they use ADR processes as advocates. Bravo, Sally Soprano!

Endnotes

1. *See, e.g.*, Jacqueline Nolan-Haley, *Mediation: The "New Arbitration,"* 17 HARV. NEGOT. L. REV. 61(2012); Tom Stipanowich, *Arbitration: The "New Litigation,"* 1 Univ. Ill. L. Rev. (2010).
2. Jeffrey H. Goldfien & Jennifer K. Robbennolt, *What If the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles*, 22 Ohio St. J. on Disp. Resol. 277 (2007).
3. Stipanowich and Nolan-Haley, *supra* note 1.
4. Chris Gutherie, *The Lawyer's Philosophical Map and the Disputant's Philosophical: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negotiation L. Rev. 145 (2001).
5. Goldfien and Robbennolt, *supra* note 2 at 310.
6. *Id.* at 311.
7. *Id.* at 311.
8. *Id.* at 306.
9. Stipanowich, *supra* note 1.
10. Nolan-Haley, *supra* note 1.
11. Simon's NY Rules of Professional Conduct Annotated 2013 Edition, Rule 1.2 Scope of Representation and Allocation of Authority Between Client, Comment 2 (2012).
12. *Id.* at Rule 1.4 Comment 3 (2012).
13. ABA Model Standards of Conduct for Mediators, Standard I Party Self- Determination (2005).
14. ABA Code of Ethics for Arbitrators in Commercial Disputes Canon I guides that arbitrators have an obligation to conduct the arbitration in a way that protects each party's rights (2004).
15. *See supra* note 11 NY Rules of Professional Conduct 2.1 Advisor.
16. *See supra* note 11 NY Rules of Professional Conduct Rule 2.1 Advisor, Comment 5, Offering Advice.
17. *See supra* note 11 NY Rules of Professional Conduct, Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer Rule, Comment 2.
18. Leonard I. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1,30 (2003). Professor Riskin uses the terms directive and elicitive to distinguish mediator conduct on a spectrum. On one end of the spectrum, the directive mediator directs the mediation process and the parties' mediation outcome. On the other end of the spectrum, the elicitive mediator supports party autonomy and self-determination.

Elayne E. Greenberg is Assistant Dean for Dispute Resolution Programs, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's University School of Law. Professor Greenberg can be reached at greenbee@stjohns.edu.