Attorney Advocacy in Mediation

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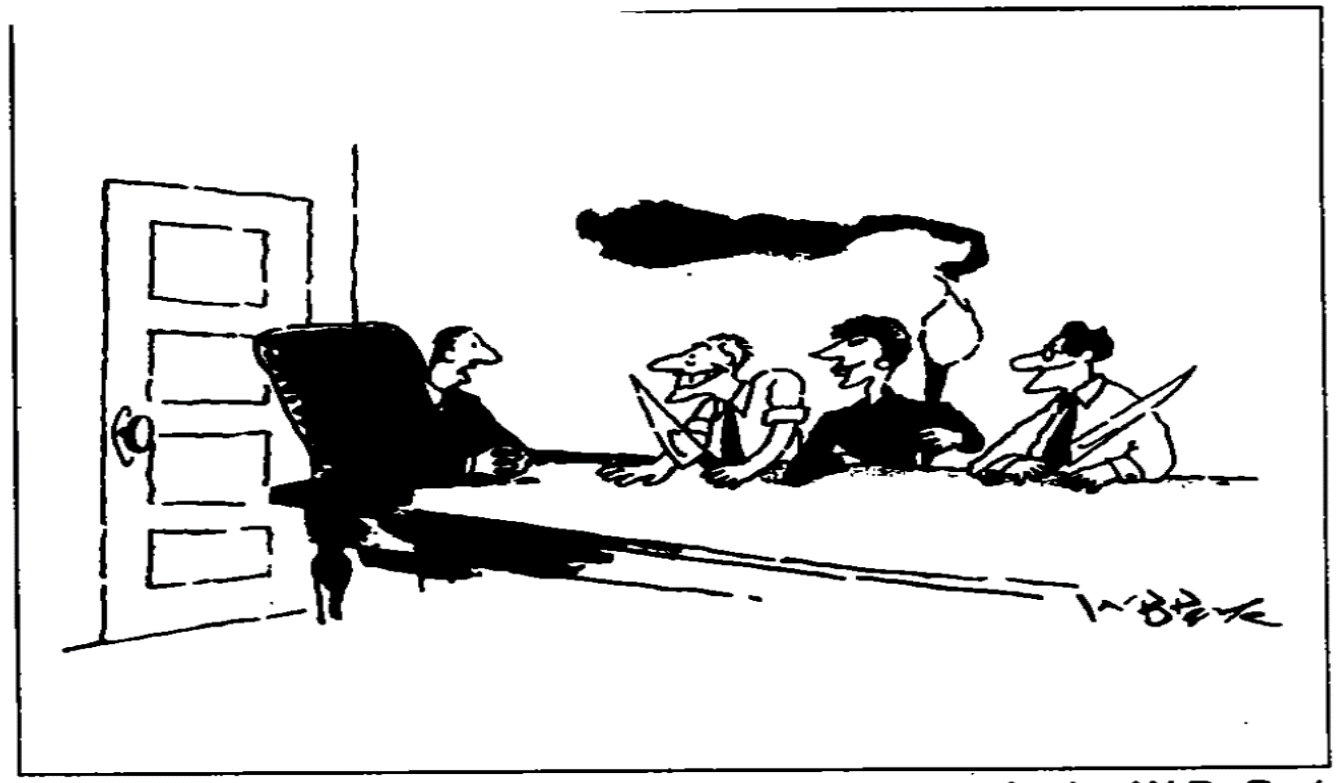
The Supreme Court of Ohio 2020 Dispute Resolution Conference

A Litigator's View of Mediation



Art by W.B. Park

I didn't mean to literally separate the people from the problem."
"This is mediation. There was no need to bring your discovery tools."

One Judge's View of Advocacy

"I shot a man in Reno, just to watch him die. After that, law school was pretty much a given."

"The lawyer aims to victory, at winning the fight, not at aiding the court to discover the facts."

Lawyers assist the judges in seeking justice as a nurse might assist a surgeon by throwing pepper in his face during surgery.

Jerome Frank, Courts on Trial, Myth and Reality in American Justice (1949).

Advocate's Preparation for Mediation

1. Understand the Mediation Agreement.
2. Understand opening process and steps of mediation.
3. Review pre-mediation submissions.
4. Assign speaking/listening roles.
5. Ensure presence of necessary decision makers.
6. Discuss authority to settle and reservation points.
7. Anticipate information accessibility/exchange.
8. Anticipate handling confidential matters.
9. Prepare to negotiate using the 7 Elements as your template.
10. Foresee insurmountable obstacles to going forward e.g., absence of a settlement event or existence of alternatives to a mediated settlement.

Advocacy Techniques – Opening Statements

Litigation Advocacy

“They harmed us by…”

“We’re right…they’re wrong.”

“The law/contract favors us.”

“We’re entitled to damages and we demand…”

Mediation Advocacy

1. Our interests are…
2. We want to know your interests
3. Open to create options to consider
4. Open to finding standards for evaluating the options
5. Open to persuasion…listening
6. We want to believe we have been heard
7. We value our relationship with (the other side)
8. We have an alternative to this mediation, but we prefer to reach agreement with you.

How Can You Affect How Well the Mediator Will Help You?

- Utilize Interest-Based Negotiation
- Establish your Credibility with the Mediator– For example, identify the weaknesses of your case in confidence
- Make Process Suggestions
  - Should the parties meet separately?
  - What about brainstorming a solution to that problem?
  - Have the mediator present your great idea
  - Have the mediator offer a reality test to your client
- Seek the mediator's advice on the substance and timing of your proposed settlement
- Cooperate on
  - Revealing information
  - Reframing the issues
  - Identifying objective standards
  - Active listening
  - Suggesting and considering creative options to satisfy interests of both sides

10 Mistakes Mediation Advocates May Make

1. **Inadequate Preparation.**
2. **Wrong parties in the room. Where are the decision makers?**
3. **Not letting the principals speak.**
4. **Failure to build working relationships with the mediator and the other side.**
5. **Failure to listen actively.**
6. **Not taking advantage of mediator confidentiality.**
7. **Inability to separate a party's perceptions and emotions from its positions, and from its underlying interests.**
8. **Failure to explore for creative settlement options with the mediator.**
9. **Ignoring BATNA, ours and theirs.**
10. **Lack of patience and perseverance.**

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Mediation Advocacy: Partnering with the Mediator

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Mediation Advocacy: Partnering with the Mediator

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I. INTRODUCTION

It is the job of the attorney in the midst of a dispute to manage the conflict and to get the best results as quickly and cost effectively as possible for the client. Mediation is a vehicle to do just that. However, the skills and strategies that are most effective in the courtroom are not effective at the mediation table.[1] It is necessary for the litigator to acquire a new set of "mediation advocacy" skills because traditional notions of trial advocacy do not ensure success in mediation.[2] Mediation is, after all, assisted negotiation. And, in mediation, the advocate is a negotiator—not a litigator—who has sought assistance. This Article melds the seminal conceptual work behind interest-based negotiation and mediation with the practitioner-oriented mediation advocacy literature to create a useful tool for the litigator-turned-mediation advocate. It is intended to make the conceptual framework more meaningful and accessible to the litigator.

This Article focuses on the relationship between the advocate and mediator, and it explores why and how the advocate can partner with the mediator to achieve optimal results. The bottom line is that the advocate, at the mediation table, should let go of adversarial tactics, not because they are morally wrong or "unfair" but because they stand in the way of achieving the best results in mediation. Most often, a mediator is trained in interest-based negotiation and works in the field because she finds creative problem solving superior to adjudication. To a mediator, adversarial tactics are obstructionist

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[1] *See generally* 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 (1999) (examining the literature on how attorneys should represent their clients in mediation, if at all, and concluding that proper mediation advocacy requires adjusting style and strategy around the barriers to dispute resolution in each particular case).

[2] *See id.* One scholar finds the term "mediation advocacy" "oxymoronic" and prefers merely to refer to "representation in mediation." Carrie Menkel-Meadow, *Ethics in ADR Representation: A Road Map of Critical Issues*, DISP. RESOL. MAG., Winter 1997, at 3, 3, 4.

and ineffective, and the advocate employing them is considered less than a partner in the mediation process.

Moreover, research shows that party satisfaction and compliance with mediated agreements

> stem largely from *how* the process works, and two features in particular are responsible. Those features are as follows: (1) the greater degree of participation in decisionmaking that parties experience in mediation; and (2) the fuller opportunity to express themselves and communicate their views, both to the neutral and to each other . . . .[3]

To take advantage of these findings, the mediation advocate and her client must be engaged with the mediator in the problem-solving process; merely accepting or rejecting proposals from the mediator or the other side is insufficient "engagement."

Part II of this Article suggests that in order to be an effective mediation advocate it is necessary to change from a litigator's mind-set of approaching disputes as a combatant, bent on winning, to an advocate's mind-set of working toward uncovering interests while creating and evaluating options to satisfy those interests. Part III proposes that a mediation advocate should make her client mediation savvy. She should prepare her client for a mediation that will be purposive rather than reactive and oriented toward building the future rather than defending the past. Part IV suggests that there is a need for thoughtful preparation and planning in anticipation of the mediation session. Part V explores the advantages for the mediation advocate who establishes credibility with the mediator as a mediation partner rather than as an experienced litigator. Finally, Part VI addresses the techniques of working with the mediator during the mediation session. It focuses on the elements of interest-based negotiation in collaboration with the mediator and on a willingness to solve process issues, which may arise during various stages of the mediation, again in collaboration with the mediator. Throughout this Article, five case studies provide examples of mediation advocates actively partnering with mediators during the mediation process.

II. CHANGING THE LITIGATOR'S MIND-SET

Mediation requires a change in mind-set from adversarial proceedings because the objective is different. At trial, the goal is to persuade the judge.

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[3] Robert A. Baruch Bush, *"What Do We Need a Mediator for?": Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 19 (1996).

In mediation, the goal is to persuade the other party to the dispute.[4] Because the conceptual framework underlying mediation is completely different than litigation, the rules of the game are changed and lawyers are asked "to do different things, to approach each other with different mind-sets, and to seek different outcomes for their disputes . . . ."[5] It is important to be cognitive of changing one's mind-set because the "adversary model" is a powerful heuristic.[6] If lawyers, who have been trained and primarily practice as litigators, are not conscious of its effects, they will operate subconsciously out of the adversary model.

The Harvard Negotiation Project and Professor Roger Fisher's seminal work, *Getting to Yes*,[7] offer another model for approaching dispute resolution. Most mediators are trained in and utilize some variant of this model for principled or interest-based negotiation. Part VI discusses in detail the elements and advantages of using the interest-based model. At its core, the model rejects the idea that looking for joint-gain solutions is naïve. It requires a willingness to negotiate on the merits and to move beyond mere positional and distributive bargaining. By coming to the table with interest-based negotiation "homework done," advocates give mediators the necessary tools to help them get the results they want.

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[4] *See* David Strawn, Defense Research Inst., Inc., *Ten Keys to Success at Mediation*, 1998 MEDIATION & ARB. SEMINAR G2-1, G2-3.

[5] Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 429 (1997) [hereinafter Menkel-Meadow, *Ethics in Alternative Dispute Resolution*] (citing Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 759–60, 794–801 (1984) [hereinafter Menkel-Meadow, *Toward Another View of Legal Negotiation*] (discussing the change in mind-set necessary to transition from an adversarial negotiation to a problem-solving negotiation).

[6] *Id.* at 409 (stating, in the context of ethical issues in alternative dispute resolution, that "[t]he first and most important dilemma is one that has plagued me throughout my career as a lawyer—scholar—practitioner: the powerful heuristic of the adversarial model").

A heuristic is an often subconscious rule of thumb or short cut for decisionmaking based on past experiences. For an enlightening explanation of the role of heuristics in both business and personal daily decisionmaking and the value in consciously recognizing and evaluating their use, see MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 1–41 (4th ed. 1998).

[7] *See generally* ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1991).

Think of mediation as "enhanced" and "value-added" negotiation.[8] Both the lawyer and the mediator are advocates—the lawyer is an advocate for her client; the mediator is an advocate for a resolution.[9] In addition, keep in mind that "[t]he mediator/advocate relationship is also a negotiation. The mediation advocate must recognize that he is also negotiating with the mediator . . . ."[10] By partnering with the mediator and taking advantage of the mediator's training and perspective, the advocate often can achieve results superior to unassisted negotiation.

III. MAKE THE CLIENT MEDIATION SAVVY[11]

Client preparation is essential for effective mediation. It is important for the client to take a much more active role in mediation than in adjudication. The client must communicate effectively with the mediator, and she must be comfortable with the process in order to do so. The principal player is the client because she must be satisfied in order for a settlement to occur. The preparation will depend on the experience and personality of the client. A client with experience in positional or competitive negotiations will need to adopt the same mind-set change discussed above.[12] In addition, an attorney should prepare her client to understand the attorney's role as a mediation advocate. That role includes the following: pressing the client's interest, working with the mediator and the other side sufficiently to forge satisfaction of both sides' interests, and facilitating a settlement.

The preparation requires more than just talking through the elements of a mediation. Books, brochures, videos, and even a rehearsal are appropriate tools.[13] "A client who understands the mediation process, has received

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[8] *See* Strawn, *supra* note 4, at G2-4; *see also* Bush, *supra* note 3, at 6–32 (asserting that mediation is properly compared to unassisted negotiation, not adjudication, and examining the value that mediators bring to the table in overcoming barriers to obtaining better results than in unassisted negotiation).

[9] *See* Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 982–83 (1998).

[10] *Id.* at 972.

[11] First and foremost, it is imperative to have the correct decisionmakers participating in the mediation. The representative of the client must have the authority to bind the company, the courage to use that authority, and, ideally, a personality that will foster conciliation. *See* Tom Arnold, *20 Common Errors in Mediation Advocacy*, 13 ALTERNATIVES TO HIGH COSTS LITIG. 69, 69 (1995).

[12] *See supra* Part II.

[13] *See* Strawn, *supra* note 4, at G2-4; *see also* Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <http://www.cpr.adr.org> (statement of Harry Mazdoorian).

guidelines for conduct during mediation, and has faced the realities of the dispute. can contribute significantly to achieving resolution."[14] Because the client is the ultimate decisionmaker, it is imperative that she "buys in" to the process.

Ideally, mediation is future-oriented rather than past-oriented.[15] A client who has been intimately involved in the underlying events may need extra prodding to move forward and look for solutions rather than dwelling on assigning blame for the past.[16] However, if the client is the defendant, explain the potential value in allowing or even encouraging the plaintiff to "vent"—to describe her feelings about the conflict. Prepare the client for this opportunity to let the other party get his story out and feel that he has been heard in the mediation room instead of the courtroom.[17]

It is not necessarily advisable for the attorney to be the "lead" negotiator. The attorney certainly is there to reassess the legal strength of the case as more information is developed (because litigation or arbitration is always an alternative) and to provide legal advice on advantages and risks of proposed solutions. However, often the client is better equipped to do much of the negotiation. An attorney who plays too active a role may add, rather than reduce, barriers to resolving the conflict. Jean Sternlight provides a detailed matrix for evaluating the roles based on the characteristics of the client and barriers to negotiating a resolution in the particular dispute.[18]

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[14] John Paul Jones, Defense Research Inst., Inc., *Mediation Advocacy: Fundamental Principles and Guides*, 1998 MEDIATION & ARB. SEMINAR L-1, L-7.

[15] *See* Menkel-Meadow, *Ethics in Alternative Dispute Resolution*, *supra* note 5, at 429.

[16] In fact, it has been suggested that an individual intimately involved in the underlying dispute is not the right client representative to have in the mediation room in the first place because it undermines the objectivity of that individual. *See* Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <http://www.cpr.adr.org> (statement of Marjorie Corman Aaron).

[17] *See* DOUG STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST 102, 163 (1999); *see also* JAMES K.L. LAWRENCE, *Alternative Dispute Resolution: Legal Developments, Drafting Guidelines and Psychological Benefits*, 47 LAB. L.J. 384, 395 (1996) (arguing that mediators should develop strategies to allow parties to vent strong emotions).

[18] *See* Sternlight, *supra* note 1, at 354–65. Sternlight's matrix suggests that the attorney should question whether the client would benefit from playing an active role in the mediation, whether the client requires protection by the attorney, and whether either the client, the attorney, the opposing party, or the opposing party's attorney has unrealistic expectations based on lack of information, is engaging in strategic behavior, has unmet monetary or nonmonetary goals, or is behaving irrationally. *See id.*

IV. PREPARATION AND PLANNING

Mediation preparation is critical. One commentator has described this process of preparing for mediation as a "New Beginning."[19] The advocate cannot expect success if she merely goes to the mediation and rehashes legal arguments and entrenched positions. Remember that in mediation legally irrelevant arguments may be very persuasive. As discussed below, identifying interests and developing options for creative solutions is the core of interest-based negotiation and mediation.[20] The bulk of this work should be done with the client before mediation; during the mediation, reassessment can occur. The mediation will be more efficient and effective if the advocate anticipates the information the mediator will ask of her and brings it with her. Whether this information is disclosed to the mediator or to the other side are questions the answers to which are best deferred to timely points during the mediation session.

V. ESTABLISH CREDIBILITY WITH THE MEDIATOR[21]

Some scholars and mediators are of the opinion that the lawyers merely get in the way and obstruct the mediation process.[22] However, it is likely that the real problem is entrenched litigation tactics that do not bend or adjust to the mediation process. It is critical at the outset for the advocate to establish credibility with the mediator and to communicate an intention to "buy into the process" and partner with the mediator to broker a settlement. If—or for the author, because—there is reason to accept a paraphrase of Roger Fisher,

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[19] Jones, *supra* note 14, at L-4. After a change in mind-set—in other words, the "unlearning" of "lawyering" skills—the assessment of the case from a negotiation/mediation standpoint is a "New Beginning." *Id.*

[20] *See infra* Part VI.A.

[21] For guidance on choosing a mediator whom the parties will trust and who will be effective, see Jones, *supra* note 14, at L-9 app. 1 (providing a checklist of factors to be considered in order to "[s]elect the [b]est [m]ediator"); Richard H. Ralston, Defense Research Inst., Inc., *Effective Advocacy and Mediation*, 1995 ADR FOR THE DEFENSE SEMINAR F-1, F-4 to F-5 (discussing consultation of court and administrative agency compilations of mediator lists, as well as the researching of mediators' local reputations, in order to ensure proper selection of a mediator); and Strawn, *supra* note 4, at G2-5 (suggesting obtaining success rates of mediators—and offering the instruction to ask for the percentage that go to trial, not just the percentage that settle during mediation, because mediation may make a later-brokered deal possible even if it does not happen at the mediation table).

[22] *See, e.g.*, Sternlight, *supra* note 1, at 279–82.

"good negotiators mediate their own disputes,"[23] a negotiation advocate at a mediation should choose to dance with the person the advocate has accepted as the mediator. That dance strongly suggests that the advocate partners with the mediator in creating productive working relationships without losing sight of getting what the client wants.[24]

As early as the first telephone conference or submission of the premediation statement, an advocate can do potentially irreparable harm to her relationship with the mediator. As one mediator has stated,

> Sometimes I am blind sided by the overly-aggressive tenor of an exchanged statement. This tips me off that the lawyer who has taken this approach either (1) has a poor understanding of mediation processes and settlement dynamics, or (2) is a likely obstruction to settlement. In either event, that lawyer loses credibility, and has tipped his mitt with me.[25]

The premediation statement and conference are the opportunities to begin the mediation dialogue and give the mediator the information she will need by way of background to help reach a settlement. The basic information she needs to know consists of the following: the stumbling blocks to unassisted settlement, the negotiation history of the dispute, the client's interests and needs, and creative solutions that may be explored during the mediation.[26] In addition, take the extra step and acknowledge "[w]hat settlement terms [the advocate believes] the other party or parties will need to settle the dispute."[27] It also may be helpful to provide the mediator with

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[23] *See* Michael Watkins, *Negotiating in a Complex World*, 15 NEG. J. 245, 253 (1999) (emphasis omitted) (paraphrasing Roger Fisher, *Negotiating Inside Out: What Are the Best Ways to Relate Internal Negotiations with External Ones*, *in* NEGOTIATION THEORY AND PRACTICE 71, 71–72 (J. William Breslin & Jeffrey Z. Rubin eds., 1991); *see also* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71, 99–104 (1998) (indicating the author's caution against the "lawyerization" of mediation which not only minimizes party participation but also requires that the mediator be a capable evaluator in addition to a facilitator of the process of creative problem solving).

[24] *See* Watkins, *supra* note 23, at 253. Watkins offers ten propositions for managing the complexities inherent in negotiation, one of which is that "[s]killed negotiators often are called upon to mediate even as they negotiate, and intervention by outside parties is commonplace." *Id.* at 252.

[25] Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <http://www.cpr.adr.org> (statement of John Wagner). John Wagner is the director of the Irell & Manella LLP Alternative Dispute Resolution Center in Newport Beach, California. *See id.*

[26] *See id.* (statement of Barbara "Bobbi" McAdoo).

[27] *Id.* (statement of John G. Bickerman).

information regarding the client's unique characteristics, sensitivities, and emotional needs.

To be most effective and efficient, mediators want and need to know what the barriers to settlement are and "whether the real sticking point is legal or factual or emotional . . . ."[28] Above all, the premediation correspondence should demonstrate an open-mindedness, a reasonableness, and a desire to settle. The client must understand that showing reasonableness, preparedness, and knowledge of the process is not a sign of weakness and will further her cause during the mediation process.

VI. WORKING WITH THE MEDIATOR DURING THE MEDIATION SESSION

A. *The Elements of Interest-Based Negotiation in the Mediation Setting*

1. *Identification of Interests*

Interests are the needs, desires, and fears *behind* each party's position.[29] Professor Menkel-Meadow describes the relationship between a monetary demand and a party's true interests as follows: "Although litigants typically ask for relief in the form of damages, this relief is actually a proxy for more basic needs or objectives."[30] This "proxy" is requested because, for the most part, it is the only relief a court can grant. In mediation, that is not the case. The premise is quite simple: as more needs or interests are identified, more solution options are created.[31] Although the positions may be in direct conflict, many of the underlying interests may be compatible.[32] Furthermore, because nonmonetary interests are likely to be valued differently by each side, the negotiation is taken out of a zero-sum game—giving something more to their side is not necessarily giving something up for our side.[33]

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[28] *Id.* (statement of Barbara "Bobbi" McAdoo).

[29] *See* FISHER ET AL., *supra* note 7, at 40.

[30] Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 5, at 795.

[31] *See id.*

[32] *See* FISHER ET AL., *supra* note 7, at 42.

[33] *See* Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 5, at 795. A zero-sum game is likened to a distributive negotiation where the benefit is seen as a pie of fixed size and a larger slice for the other side means a smaller slice for our side. *See* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS 165 (1996); *see also* RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTEGRATION SYSTEM 148 (1965).

The basic approach to identifying the interests of the other side is to put oneself in their shoes and ask why the other side is taking a certain position and why other options may be less attractive.[34] Do not forget the role of emotional and psychological interests, such as the need for recognition and security[35] or the need to feel heard and valued.

The advocate helps the mediator by identifying and sharing the interests of both sides. The other party may be inexperienced or unwilling to explore interests. If the advocate has identified the interests she believes motivate the other side, she may create more solutions by thinking of interests the mediator may not otherwise address. Furthermore, when either the advocate or her client presents her interests, it is important to be specific and forward-looking.[36]

A major barrier to dispute resolution in negotiation is that one party does not have full information regarding the interests of the other side and thus cannot see existing opportunities for settlement.[37] A party may be reluctant to share information for fear that it may be used against her. In the mediation, during private caucuses, a party can create an omniscient entity. Information can be shared confidentially. The mediator can identify which pieces of information will be useful in creating solutions, capitalizing on "overlap," or "moving the other side." The mediator then can explain to each party why he believes that sharing given pieces of information will be valuable. Fully informed of the benefits—not just of the risks—each party can decide whether or not to agree to give the information to each other. Disclosing to the mediator minimizes the risk and permits the benefits of information sharing.

Case Study 1: John Smith worked for Thermo-Seal for 15 years. During that time, he invented a bolt that would create a hermetic seal impervious to 5,000 pounds per square inch of pressure. When Thermo-Seal underwent corporate restructuring to become a distributor of machine tools and parts, there was no job for John. When John was terminated with a modest severance package, he sued, claiming age discrimination and wrongful discharge. As the parties entered mediation, they were $400,000 apart. The company was adamant that there was no place in the organization for John.

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[34] *See* FISHER ET AL., *supra* note 7, at 44.

[35] *See id.* at 48.

[36] *See id.* at 52.

[37] *See* Bush, *supra* note 3, at 13; Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 239–41, 248 (1993); *see generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow et al. eds., 1995).

John was equally adamant that he was entitled to have the opportunity to try a sales position, even if a reasonable period of training proved necessary.

What were John's other interests, if any? How might they be discovered?

In private caucus with John, John's attorney planted the thought with the mediator that John may relish recognition for his past service and the invention of a product, which served Thermo-Seal well for many years. In private caucus with the company, the mediator learned from Thermo-Seal's attorney that the company was building a new sales office in the suburbs. An apparent impasse broke when the mediator suggested an option, at first privately to the company, that it consider naming the sales office "Thermo-Seal—Smith Sales Center." With recognition for John's service to the company in place, the financial settlement soon was worked out.

2. *Optioning for Mutual Gain*

The next step in interest-based negotiation is to convert the identified interests into solution options, ideally for the mutual gain of each party. Initial brainstorming should be done with the client before the mediation. However, as new interests are uncovered, additional optioning sessions will be necessary. Optioning can be done through capitalizing on shared interests and dovetailing different interests.[38] A shared interest may be preservation of the relationship, maintaining a favorable reputation in a given industry, or even getting a product to market. By definition, each side understands and values the shared interest, and thus solutions centered around those interests are very viable. Optioning by dovetailing interests involves looking for "items that are of low cost to you and high benefit to them. . . . Differences in interests, priorities, beliefs, forecasts, and attitudes toward risk all make dovetailing possible."[39]

The beauty of mediation is that the advocate does not need to do this optioning alone. The mediator is trained in creating, and persuading, both sides to consider options. First, she brings the perspective of an "outsider," so she may be able to see solutions that a party, who is too close to the dispute, cannot. Second, she brings the experience of past successes to the mediation table and can draw from those solutions. The job of the advocate is to be open to possible solutions and to encourage the client not to dismiss new solutions automatically as unworkable.

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[38] *See* FISHER ET AL., *supra* note 7, at 72–73.

[39] *Id.* at 76.

Case Study 2: Tom Hart, the CEO of ABC Company, enjoyed a contract that gave him the right to purchase the company in 1999 from its founder, Abigail B. Clement, at fair market value. If an agreement on fair market value could not be reached, the parties agreed to mediate the dispute and, if necessary, submit the dispute to binding arbitration. In the event of arbitration, the prevailing party would be awarded attorneys' fees. Abigail demanded $2,000,000. Tom countered with $1,300,000. With little progress having been made, the mediator was contacted. She learned that Abigail planned to retire in Florida and use the proceeds from the sale to supplement other retirement income. Tom's counsel suggested that his client might accept the $2,000,000 demand if the payments could be spread over ten years (a present value of approximately $1,300,000. Tom's counsel added that his client would pay $25,000 per year for a ten-year covenant not to compete (amounts Tom would be able to treat as a business expense). The delayed pay-out option satisfied one of Abigail's important interests: prudent retirement planning.

3. *Legitimacy*

In mediation, unlike adjudication, each party must be satisfied with a proposal or there will be no settlement. Using and insisting on objective criteria to support and evaluate a proposal legitimizes the proposal and increases the chances that it will be accepted. For example, the "blue book" value of a used car is an objective standard.[40] Intangible but real feelings and concerns also add legitimacy to a proposal. However, because such intangible interests are more difficult to quantify, they must be conveyed to the other side with greater detail and specificity.

4. *Relationships*

A primary value of mediation over adjudication is the ability to preserve and even repair the relationship of the parties. In addition, treating the other side poorly makes no sense in mediation because it is difficult to reach an agreement with someone who is infuriated. Fisher and Ury instruct, "separate the people from the problem."[41] When the mediation advocate sets the problem aside from the egos and personalities, it is possible to partner with the other party and the mediator to attack the problem. Relax. Even if an ongoing relationship with the other side is not necessary, cultivate enough of

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[40] *See id.* at 85.

[41] *Id.* at 36–38.

a relationship so that the parties may work together to resolve the dispute. "Formality is simply anger with its hair combed."[42]

Case Study 3: Roberta DeVecchio has worked for Cosmetec for eight years and has received several annual awards as one of its outstanding sales persons. When the job of District Sales Manager became available, she applied but was turned down in favor of John Turner. John, who is the son of Cosmetec's major shareholder, is a recent college graduate, and he was hired into Cosmetec's managerial trainee program eighteen months ago. Receiving little solace from Cosmetec's manager of human resources, Roberta triggered the company's dispute resolution program and requested mediation. At the outset of the session, the mediator suggested separate caucuses so that she might explore the positions of the parties. Roberta was upset that she did not have an opportunity to express her disappointment in not being recognized by Cosmetec as a loyal and devoted employee who wanted to develop her career at the company. Her attorney sensed her frustration and proposed to the mediator that a joint session might be necessary to allow Roberta to express her feelings. While the mediator said she would suggest this to the company, Roberta's attorney went on to say that it would be critical for the company's representative to demonstrate that he was listening to Roberta and to acknowledge that she had feelings that the company understood.

In this study, Roberta's attorney suggests a strategy and explains how that strategy may improve the relationship between the parties, at least for the purpose of working out a settlement. Roberta's attorney might have gone on to say that demonstrating that the company listened to Roberta and expressly acknowledged that Roberta has been heard is not a sign of weakness nor a sign that the company will accede to Roberta's demands. Rather, it is a sign that the other side (Roberta) is worthy of being listened to and that her feelings are important.

5. *Communication*

Fisher and Ury have identified three central communication stumbling blocks to successful negotiations.[43] First, negotiators often are not really talking to each other but rather talk "merely to impress third parties or their

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[42] LEE BLESSING, A WALK IN THE WOODS: A PLAY IN TWO ACTS act 1, sc. 1 (1986) (depicting a career Soviet diplomat and an American negotiator walking in the woods on the outskirts of Geneva while discussing their interests and their relationship during a break in the superpowers' arms limitation negotiations).

[43] *See* FISHER ET AL., *supra* note 7, at 32–33.

own constituency."[44] This form of pseudo-communication is completely useless and counterproductive in mediation. Second, many negotiators fail to engage in true, concentrated listening.[45] Third, misunderstandings between negotiators can lead to misguided results, or no results at all.[46]

When listening to the other side and the mediator, carefully focus in order to receive the meaning of the communication. It is instinctive for litigators to formulate counter-arguments automatically, as a neutral or opposing party is speaking. When advocates react in this manner, they lose the opportunity to truly hear and appreciate what is being said. Thus, they lose the opportunity to use that information purposively. Part of active listening involves repeating back to the communicator an understanding of what that person said. This practice increases understanding and makes the other person feel heard.[47]

Finally, it is important to be conscious of the fact that messages can be altered unintentionally in translation. Consequently, advocates should ask the mediator to repeat back their messages before she carries them to the other side.

Case Study 4: Bruce and Sally's divorce mediation was progressing in fits and starts. On the issue of alimony, the parties had narrowed their differences to five-hundred dollars per month. Sally would have custody of their son and daughter with open visitation and alternate single day weekend custody for Bruce. Bruce wanted two-day weekend custody for his son during the fall when Sammy played select soccer on a team Bruce coached. When Bruce made the proposal, Sally wanted to respond with a reduced alimony demand to settle that issue first. With the mediator willing to deliver a revised alimony proposal—a step in compromise—Sally's attorney interrupted: "What message are we sending? Will Bruce perceive that we ignored or rejected his two-day weekend custody proposal? Is there a better way to show receptiveness to the custody proposal and still tentatively settle alimony first . . . and possibly set aside additional funds for the children's college education?"

In this study, Sally's attorney is sensitive to the message being sent with the communication and how it may be received, and he has taken the initiative to share his concern with the mediator, who had been ready simply to deliver the proposal. Sally's attorney did not want the communication

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[44] *Id.* at 32.

[45] *See id.* at 33.

[46] *See id.* at 35.

[47] *See id.* at 34; *see also* STONE ET AL., *supra* note 17, at 178–80.

misunderstood as a rejection or avoidance, which could result in an angry reaction.[48]

B. *Procedural Considerations*

1. *Opening Statement*

It is often a good idea to have the client present the opening statement. It can be an opportunity for the client to build credibility with the mediator because they likely have not interacted before. Once again, it has proven to be very effective to focus on a desire to settle and express an appreciation for the feelings and interests of the other party. The statement should be used to express the dispute from the point of view of the client. If the statement is thoughtful, sincere, and reasonable, rather than embellished and overly aggressive, it will be received better by the other party and the mediator.

2. *Caucusing*

a. *Initial Caucus*

As previously discussed, the mediator will be more willing and able to get the results the advocate wants if she believes the advocate's position is reasonable and is supported by objective criteria.[49] At this point, because the alternative is arbitration or adjudication, it may be useful for the advocate to set out the legal strengths and weaknesses of both cases. It often makes strategic sense for an advocate to concede, in confidence to the mediator, the weaknesses of her case and the strengths of the other party's case. It is an excellent way for the advocate to do the following: boost credibility with the mediator, save time, and demonstrate that her initial offer or demand takes these strengths and weaknesses into consideration. If the advocate has not demonstrated up front to the mediator that she appreciates a given strength or weakness, the mediator is likely to expect her to make an adjustment to her offer when it later surfaces.[50]

Disclosing the client's bottom line to the mediator at the outset is not advised. First, this position may change based on information gained through the mediation. Second, the client's bottom line may be considerably more or

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[48] "What we have here [would have been] a failure to communicate." Strother Martin as Captain upon the death of Paul Newman as Luke in COOL HAND LUKE (Warner Bros. 1967).

[49] *See supra* Part VI.A.

[50] *See* JOHN W. COOLEY, MEDIATION ADVOCACY 117 (1996).

less than the other side is willing to accept.[51] Once the mediator or the other side has this figure, it subconsciously may be difficult for the advocate to try to bargain far from it.[52]

b. *Intermediate Caucuses*

Just as the advocate provides the mediator with the objective criteria behind her initial offer, when she makes movement or proposes subsequent offers, she gives the specific reasons behind her offer.[53] Continuing to give legitimizing support for proposals keeps the mediation from degenerating into positional bargaining with the expectation of indefinite "tit for tat" movement.

c. *Final Caucus*

One commentator has suggested holding back from the mediator information favorable to you or unfavorable to the other side until the final caucus.[54] The reasoning behind this tactic is that it will result in a big "move" in your favor at the time in the negotiations when the "moving" is tapering off.[55] However, this strategy may backfire and result in a loss of credibility with the mediator and the other side at this critical juncture. Ultimately, an

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[51] *See id.*; *see also* Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <http://www.cpr.adr.org> (statement of Marjorie Corman Aaron). Likewise, it is obviously ill-advised to reveal a true bottom line to the other side in an early joint session. This disclosure "straightjackets" the mediator because there is nowhere to move. For example, John Wagner relays the following story:

> [T]he plaintiff's attorney was so enamored with the mediation process, and so intent [on] participating in good faith, that he offered his dead bottom-line number to the defendant before the mediation started. It was an almost unreasonably low number, and there was no place to go. The defendant was shocked but pleased by this low ball "opening" number, and was anticipating a really cheap out. It took a long time to convince the defendant that the plaintiff's lawyer was just an inept negotiator that didn't know any better, but once that was believed, the case settled on that first number.

Id. (statement of John Wagner).

[52] *See* COOLEY, *supra* note 50, at 117.

[53] *See id.* at 122.

[54] *See id.* at 121.

[55] *Id.* at 121.

opportunity for favorable settlement may be lost by this tactic. Partnering with the mediator may limit or eliminate this dilemma.[56]

3. *Confidentiality*

While a mediator will keep everything confidential unless she has express permission to disclose it, it may be useful to discuss the specific words that the mediator will use to convey information or an offer to the other side. After a long caucus, this will avoid any miscommunication with regard to which information is confidential.

4. *Consider Which Information Can Be Communicated More Effectively Through the Mediator*

a. *Reactive Devaluation or Reactive Valuation*

Reactive devaluation is the phenomenon that a given proposal is generally "rated less positively when proposed by someone on the 'other side' than when proposed by an apparently neutral third party."[57] The mediator can reduce reactive devaluation by offering a proposal as her own.[58] Conversely, reactive valuation or escalation can occur in response to a reasonable offer. The thought process in escalation is that "their opponent's very flexibility means that their own position must be stronger than they had thought."[59] Asking the mediator to communicate a proposal as her own also combats this phenomenon.[60]

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[56] *See* DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 172–74 (1986).

[57] Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS TO CONFLICT RESOLUTION, *supra* note 37, at 2, 15; *see also* Mnookin, *supra* note 37, at 246–47.

[58] *See* GOLANN, *supra* note 33, at 201; Mnookin, *supra* note 37, at 249. Jeffrey Z. Rubin called this the "tar baby" function of the mediator, "absorbing responsibility for a concession until the party who has made it is ready to assume credit for it." DEAN G. PRUITT, *Kissinger as a Traditional Mediator with Power*, *in* DYNAMICS OF THIRD PARTY INTERVENTION: KISSINGER IN THE MIDDLE EAST 136, 138 (Jeffrey Z. Rubin ed., 1981) (quoting Jeffrey Z. Rubin, *Experimental Research on Third Party Intervention in Conflict: Toward Some Generations*, 87 PSYCHOL. BULL. 379, 379 (1980)).

[59] COOLEY, *supra* note 50, at 29.

[60] *See* LAX & SEBENIUS, *supra* note 56, at 173–74.

b. *Floating an Untested Idea, Communicating Favorable Information*

Often an advocate has an idea for a creative solution, but fears that if she mentions it and it is not well received she will appear foolish or "soft." The mediator is an excellent conduit through which creative but potentially risky solutions can be communicated.[61] In addition, it is valuable first to express an idea to the mediator who may be able to refine and enhance it as well as decide the best way to frame it for the other side.[62]

As discussed above, often information that is conveyed by an opposing attorney is met reactively, with suspicion and hostility.[63] If there is information favorable to the advocate's case that has not come out through discovery and it appears that it will be helpful in "moving the other side," she may wish to convey this to the mediator who can pass it on to the other side. In this way, it will carry more weight and appear that the mediator did a good job of digging for relevant information rather than that the advocate was withholding a "bombshell."[64] Conversely, the negative effect of disclosing newly surfaced information may be softened if communicated through the mediator.[65]

c. *Presenting the Mediator with a Conditional Offer or Range*

If, strategically, the advocate does not want to communicate a willingness to offer a proposal unless she knows that the other side will agree to it, she can communicate it in confidence to the mediator. She then may have the mediator agree not to reveal her agreement unless the other party provides an offer in a given range or agrees to the mediator's proposal.[66]

5. *Adjust Process as Needed*

A mediator can provide a needed reality check to a client, if delivered cautiously. The risk, however, of the mediator switching from a facilitative

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[61] *See id.* at 27–28.

[62] *See id.* at 28.

[63] *See supra* Part VI.B.4.a.

[64] *See* LAX & SEBENIUS, *supra* note 56, at 28.

[65] *See id.* at 30.

[66] *See* Robinson, *supra* note 9, at 978–79 (advocating a "cautiously cooperative" approach to mediation advocacy in which the attorney begins cooperatively but is prepared to engage in competitive negotiations if the other side does not respond cooperatively); *see also* LAX & SEBENIUS, *supra* note 56, at 174.

role to an evaluative role is substantial, and the advocate must be in a partnering relationship with the mediator in order to offer her advice on accepting this new role.[67]

The unique advantage of mediation is the flexibility of the process; the parties own the process and have control over the rules. A mediator usually will welcome suggestions of a change in approach during the mediation session, if the current approach is not succeeding.[68] Process and approach suggestions by the parties are "not only fair but desirable."[69] The advocate's relationship with the mediator will influence whether that advocate's suggested change will be received favorably. Partners will fare better than combatants.

Case Study 5: Marjorie is facilitating a mediation of a dispute between G&P Products (G&P) and a former employee concerning unfair competition, including the breach of a noncompetition clause. The parties have stalemated, in large part over the enforceability of the noncompetition clause. The mediator is reluctant to express her views about that clause even though she has taught that subject in law school. G&P's attorney suggests to the mediator that an evaluation of the enforceability of the noncompetition clause is necessary. She proposes that the two attorneys caucus with the mediator to work out a process that will not compromise the mediator's impartiality if her evaluation clearly favors one side.

In this study, the risk remains that the mediator, despite the process caucus, may compromise her neutrality if she accepts the invitation to evaluate. Here, at least, one advocate made the overture and both advocates agreed to permit the evaluation, narrowed to a single issue, which may break the impasse. A seasoned mediation advocate guides the mediator on the timing and appropriateness of purposive evaluation during an essentially facilitative process.

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[67] *See* GOLANN, *supra* note 33, at 408; *see generally* Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COSTS LITIG. 111 (1994).

[68] *See generally* Marjorie Corman Aaron et al., *CPR's Online Seminar: ADR 2000: The Art of Mediation Advocacy: An Insider's Guide* (visited Jan. 15, 2000) <http://www.cpr.adr.org>.

[69] *Id.* (statement of John G. Bickerman).

VII. CONCLUSION

Good lawyering extends to the mediation process. A lawyer is expected to serve as an advocate for her client during mediation; this is not a role for a "potted plant." The mediation advocate needs to establish credibility with the mediator not only with respect to the process the mediator is using, but also on the merits of the dispute. The mediation advocate will explore and advocate interests underlying her client's position and create and evaluate options for resolving those interests as well as interests identified by the other side. The mediation advocate will craft unambiguous and understandable commitments and engage in active listening to build—or rebuild—good communication and working relationships.

Robert Mnookin, Chair of the Program on Negotiation at Harvard Law School, characterized the effective negotiator as a person who displays assertiveness and empathy, stressing that these characteristics are surprisingly compatible.[70] This characterization of an effective negotiator is especially applicable to the mediation advocate. Yet this advocate should not only display those skills toward her client and the other side. Rather, the advocate should be ready to do the following: empathize with the mediator as she works through the facilitative process, partner with her in brainstorming and evaluating options for settlement, and clearly and credibly assert suggestions for strengthening the mediation process and crafting a good substantive outcome.

> *As stated by John Honeyman to Audrey Botvinnik, "I'm an extremely effective negotiator. That doesn't mean I say no well. It means I say yes well. At the right time. When the right work has been done. When I negotiate, I find an agreement."*[71]

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[70] *See* Robert H. Mnookin et al., *The Tension Between Empathy and Assertiveness*, 12 NEGOTIATION J. 217, 226–28 (1996).

[71] BLESSING, *supra* note 42, act 1, sc. 1.