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Practice and Issues across Countries and Cultures

Volume II

Edited by

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Chapter 14

Mediation Representation: Representing Clients Anywhere

*Harold Abramson**

1. INTRODUCTION

You are bound to be skeptical of any title that claims to cover representing clients anywhere in the world. I surely would be. I reached this sweeping conclusion after much research and testing of the materials in my recently published second edition of *Mediation Representation*[1] and will justify the claim in this chapter. I will demonstrate how the framework for mediation representation presented in the book reflects a universal approach that can be adapted to work within any local context with parties employing their customary practices for representation. However, I also will recommend and illustrate representation practices that may help you get the most out of mediation, practices that you ought to consider adopting if they are different than your customary ones.

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1. Most of the footnotes in this chapter cite sections of *Mediation Representation*, the subject of this chapter, although the cited sections of the book include other citations for you to consider.

Arnold Ingen-Housz, *ADR in Business: Practice and Issues across Countries and Cultures, Volume II*, pp. 293–312.

My effort to develop a universal model of client representation began several weeks after I published the first edition of *Mediation Representation* in 2004. I shortly realized that the book that took ten years to research and test presented mainly a westernized approach to client representation. I became aware of these embedded cultural values when preparing an international dispute resolution textbook for which I needed to adapt the framework for use in cross-cultural disputes.[2] For the new second edition, I was determined to formulate a culturally neutral framework while refining it based on my research during the intervening five years.

Thus, the mediation representation formula in the first edition became the mediation representation triangle and the subtitle in the first edition of 'Advocating in a Problem-Solving Process' became 'Advocating as a Problem-Solver in Any Country or Culture'. In this chapter, I present this improved and succinct framework for client representation and demonstrate that the new subtitle is not puffery. This 'improved' framework can be used anywhere.

This framework is for advocates in mediations. It is tailored for resolving legal disputes in which clients are represented by attorneys. Although this chapter will be presented from the perspective of a mediation advocate, the framework also can be illuminating for mediators who have attorneys and clients in the mediation room.

However, this chapter does not explain how this framework applies in a cross-cultural or international mediation in which parties with substantially different cultural backgrounds are resolving a dispute. In this cross-cultural setting, parties may encounter unfamiliar cultural interests that may need to be met or cultural (not strategic) differences that may need to be bridged, a substantial topic that I cover elsewhere.[3] Although, I will point out where the framework applies to these cross-cultural differences as they might arise during the mediation.

2. THE NEED FOR A MEDIATION REPRESENTATION FRAMEWORK

Attorneys need to replace their default trial advocacy approach that works so well in court or arbitrations with a representation approach suitable for mediation. The familiar and well-honed common law adversarial or civil law inquisitorial strategies may be effective in forums where each side is trying to convince a decision maker to render a favorable decision. In mediation, however, there is no neutral third-party decision maker, only a third-party facilitator or advisor. The third party may not even be the primary audience. The primary audience may be the other side, who surely are not neutral, can often be quite hostile, and ultimately must approve any settlement. In this different representational setting, traditional approaches can be less effective if not self-defeating. Attorneys need an approach tailored for the opportunities offered by mediation.

Many sophisticated and experienced litigators realize that mediation calls for a different approach, but they can still muddle through the mediation sessions, guided

2. See Nolan-Haley, Abramson and Chew, *International Conflict Resolution: Consensual ADR Processes* (2005), Ch. 4.
3. See Abramson, *supra* n. 1, at Ch. 5.20 and Appendix J.

by familiar strategies that have worked well in other forums. Most senior US attorneys have never taken a course on dispute resolution; they went to law school before such courses were offered or were popular. And most attorneys outside the United States, regardless of level of experience, have never taken a dispute resolution course in law school. Even today, non-US law students have few opportunities to take such courses, although the number of offerings is starting to increase. Most courses on alternative dispute resolution or mediation, wherever they are offered, are largely limited to teaching students to be mediators, not advocates.[4]

But new educational opportunities are beginning to take shape. Many US law schools during the last five years began offering mediation advocacy courses,[5] although such courses are still relatively rare outside of the United States. Law students can participate in mediation representation competitions that are flourishing in the United States, Canada and globally.[6] Numerous continuing legal education programmes on mediation representation are now widely available in the United States and are emerging elsewhere. Practicing lawyers can enroll in one of several available intensive training programmes.[7] However, lawyers do not seem convinced of the need for training until they see firsthand what they do not know and what would be helpful to learn, as I have observed repeatedly when training in the United States, Europe and China. These training programmes have not yet reached the maturity of trial practice trainings that are almost prerequisites for entering the courtroom. The value of trial practice training took years in the United States to be fully appreciated and embraced, and mediation advocacy training programmes seem to be following a similarly measured path.

In the absence of formal training, advocates learn on the job. Even though advocates are gaining considerable experience, and practices are solidifying, the skill levels seem strikingly unsophisticated, as I have observed in training and have heard from numerous mediators. The representation practices of many attorneys

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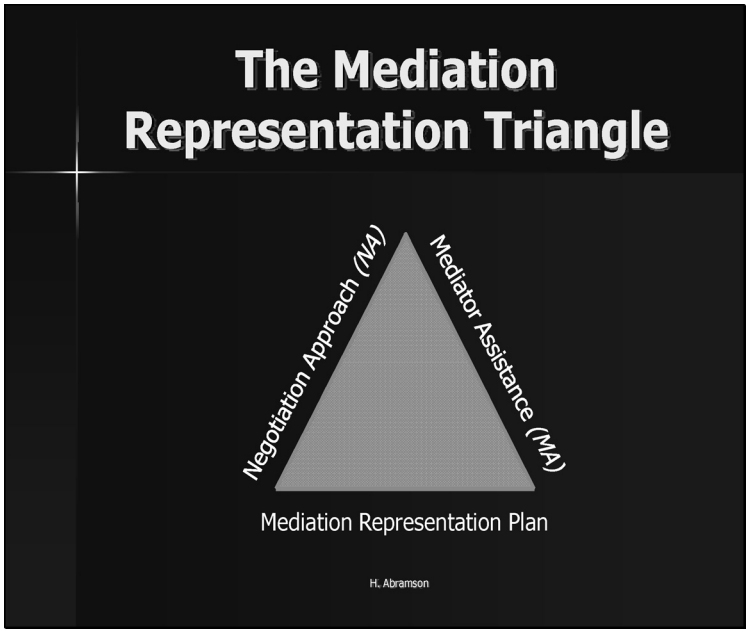
4. For a discussion of U.S. textbooks, see Suzanne J. Schmitz, *What Should We Teach in ADR Courses: Concepts and Skills for Lawyers Representing Clients in Mediation*, 6 *Harv. Negot. L. Rev.* 189 (2001).
5. Although no survey has ever been compiled, when the first edition of this text was published in 2004, only a handful of law schools offered a separate course on mediation advocacy. As of 2009, more than thirty-five law schools offered the course according to the number of first edition adoptions, plus more offerings by other law schools that have adopted other books, but I do not know how many. Furthermore, many separate courses on mediation and ADR may be including segments on mediation representation as reflected in the addition of new sections on the subject to virtually every recent edition of a textbook.
6. For a brief description of the competitions sponsored by the American Bar Association and the International Chamber of Commerce in Paris, see Abramson, *supra* n. 1, at Appendix Q: Mediation Representation Competitions-Judging Criteria. Also, in 2008, a national competition was launched for Canadian law schools. See <www.cnmac.org>.
7. NITA has designed and launched a national mediation advocacy training programme. The ABA Section on Dispute Resolution conducts an Advanced Mediation and Advocacy Skills Training Institute that is held each year in a different region of the United States. The CPR International Institute for Conflict Prevention and Resolution occasionally offers a mediation and mediation advocacy training programme. Also, Pepperdine Law School regularly offers an intensive course to practitioners.

do not seem to reflect a nuanced understanding of how to select a suitable mediator, how to take full advantage of pre-mediation contacts with the mediator or the other side, how to present effective opening statements and how to optimally utilize the choice between joint sessions and caucuses to advance clients' interests and overcome impediments. A framework custom-designed for mediation advocacy is needed, including one that recognizes the growing practical experience of attorneys.

3. INTRODUCE A TRIANGULAR FRAMEWORK

Mediation Representation offers a comprehensive and coherent framework for client representation that applies from your first client phone call until the mediation process is concluded, and the book highlights the many choices that you should consider and weigh throughout the mediation process. It offers an alternative approach to relying on a strategy shaped by courtroom experience and ad-hoc intuition. The framework can be configured into a triangle that links three key features for effective representation (Figure 14-1): Attorneys need to know how to: (1) negotiate, (2) enlist mediator assistance and (3) plan their representation throughout the mediation process. Any plan should include how to advance a client's interests, overcome any impediments and handle gathering and sharing information.[8]

Figure 14-1. The Mediation Representation Triangle



8. You can remember these three features by remembering that you need to 'Negotiate with a MAP' (*Negotiate with Mediator Assistance and a Plan*).

The triangle provides a fitting metaphor because of the inherent interdependence of the three sides. If one side is missing or weak, the entire structure collapses. If you negotiate poorly, enlist the mediator ineffectually or develop a weak representation plan, you will represent your client within a wobbly framework. If you do all three well, you will erect a reliable and sturdy structure for mediation representation. In this chapter, I will examine how this triangular representational framework can be adapted to local usage and how it accommodates multiple practices, including ones that I recommend.

4. INTRODUCE LOCAL PRACTICES (CULTURAL AND STRATEGIC) INTO THE FRAMEWORK

I only dared to make the broad claim that this triangular framework can work anywhere after much study and the discovery that it was feasible to design a practical and universal approach that can incorporate local practices – whatever they might be. For this framework to be viable, you do not need to know all the cultural practices in the world and stay current as they evolve – an undertaking that is daunting if not impossible and presumably the largest obstacle to designing a universal approach. You also do not need to know all of the strategic practices around the world. Instead, you only need to know your own practices. By negotiating, enlisting mediator assistance and planning for interests, impediments and information, as you customarily do, you can intelligently and successfully represent your clients in mediation, as will be illustrated throughout the rest of this chapter.

Whether your practices are the most effective ones, however, deserve self-analysis. Are your practices a product of cultural influences or considered strategic choices? To answer this question, you should consider the differences between culture and strategy.

Culture is a collective phenomenon that is shared with others and is derived from the social environment in which we live. It reflects patterns of thinking, feeling and acting. It is learned – a key distinguishing feature. This definition can be further clarified by emphasizing what it is not. It is not universal behavior that applies to all human beings. It is not inherited – not a product of our genetic programming. We all need to eat food to survive, for example; but the food we eat can vary considerably among different cultures. We all negotiate, but how we do it also can vary across cultures. These cultural differences can reflect different approaches to meeting universal needs. Finally, cultural behavior should be distinguished from our personality, which is unique to each of us. Our personality is a product of our genetic programming, unique personal experiences and cultural upbringing.[9]

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9. See Abramson, *supra* n. 1, at Appendix J, 449–450.

Culture shapes what are known as dimensions that can affect how parties resolve their disputes. Culture can shape the interests of parties that need to be met as well as the way parties behave during the mediation process. You can better understand your own behavior by considering the most common cultural dimensions relevant to dispute resolution and where your behavior fits along the continuum of various pairings. Common pairings include low-context to high-context communicators,[10] short-term to long-term orientations, competitive to cooperative negotiation approaches, punctuality to relaxed time orientation, individual to collective decision making, contract to relationship focus, fixed to renegotiable contracts and others.[11] In any negotiation, you may follow your familiar propensities or consider trying other ways to behave. The triangular mediation representation framework does not dictate how you should behave along these continuums.

Strategy is distinctively different from culture, although strategy can be influenced by culture. A strategic move is a choice to employ a tactic to advance your client's interests or gain an advantage over the other side. A strategic move can be influenced by culture because your preferred strategy can be based on your cultural upbringing. I remember hearing someone in China explain why Chinese people tend to make extreme first offers. 'Well, that is the way we negotiate here'. But strategy may not be based on cultural influences when a party varies her default practice by making a considered strategic choice for the next moment in the mediation, such as threatening to leave or raising her voice in anger. This distinction can be useful because different cultural propensities can be easier to bridge than differences based on strategic moves that are deliberately and tactically chosen.

With an awareness of cultural dimensions and strategic options, you can better understand your own choices and better assess which options might best serve your client. You may normally be a competitive negotiator as a matter of practice, for instance, but upon further reflection, you may strategically elect another approach that might be more suitable for your case.

Understanding your own culturally shaped behavior along with the behavior of others can help you recognize less familiar needs of the other side or possible cultural differences between the parties that need to be bridged. Techniques for identifying culturally influenced interests and bridging differences are separate subjects that will not be covered in this chapter.[12]

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10. Low-context communicators, like speakers from the United States, speak relatively more directly, with most of the meaning conveyed in the words, whereas high-context communicators, like speakers from many Asian countries, speak relatively less directly, with most of the meaning conveyed in the context, not in the explicit words.
11. If you are interested in reading more about culture and cultural differences, See Abramson, *supra* n. 1, at Appendix J. Although cultural issues are integrated throughout the book, this Appendix offers a single source reference that consists of four sub-appendixes: 'Glossary of Cultural Differences' that can help you develop cultural awareness, 'Guidelines for Working with Interpreters in Mediations', 'Ethical Issues Facing Mediators and Attorneys in Cross-Cultural Disputes', that offers a four-step approach for recognizing and dealing with ethical issues, and 'Seven Guidelines for U.S. Trainers When Training Abroad'.
12. Techniques can include researching the background of the other participants and enlisting the expertise of others at the table such as the mediator and the other side from a different culture

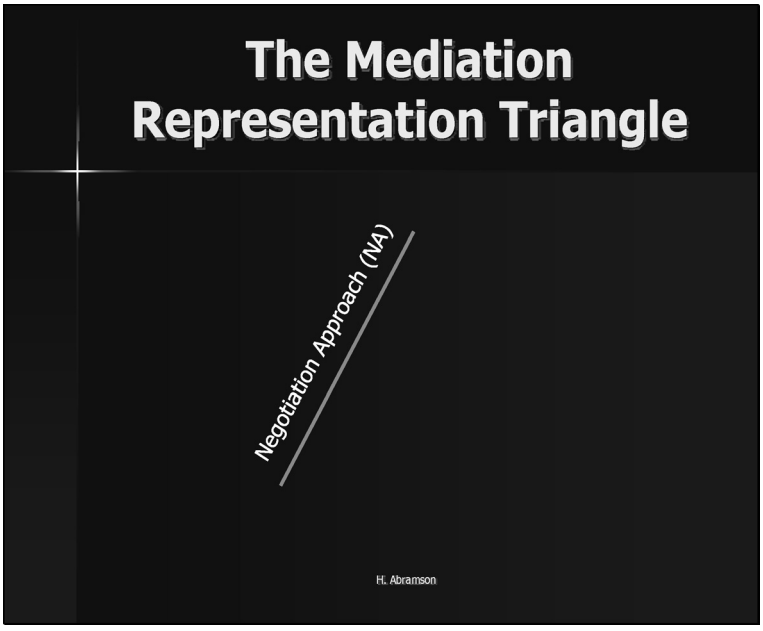
As I present the key features of the triangular mediation representation framework, I will highlight how local practices fit within the framework as well as suggest practices that might maximize the benefits of mediation for your client.

5. NEGOTIATION

The first side of this triangular framework focuses on your primary role as a *negotiator* (Figure 14-2). Mediation is simply the continuation of the negotiation with the assistance of a third party, as is so often repeated. And because you will be negotiating with the other side from the beginning to the end of the mediation, an effective mediation advocate must be an effective negotiator.

You negotiate in mediation, regardless of your cultural upbringing. But the way you negotiate can be influenced by your upbringing as well as your strategy. Cultural practices can vary in striking ways. I recall when haggling in a street bazaar in China and learning the hard way that first offers are much more extreme than I was accustomed to. Rather than a dance that may lead to prices that can be 10%–30% less than initial offers, I learned that final resolutions could be more

Figure 14-2. The Negotiation Approach (NA)



than your own. Or, you may avoid verifying whether the differences are cultural because of the difficulties of doing so and instead focus on bridging any differences, regardless of their causes, in a way that protects your client's interests.

than 90% less at least when negotiating with foreigners who do not know local price values.[13] In some Mideastern, Asian and other cultures, haggling practices can include post-deal concession demands. Cultural differences are not always cross-border, as I was reminded when bidding on an apartment in New York City. Oral sales agreements are not honored while waiting for the lawyers to draft written agreements, for example, although I encountered the opposite practice when buying outside of this location.

The triangular framework can accommodate any negotiation approach, including the two principal prototypes – positional and problem-solving.[14] Although your choice can be affected by your cultural upbringing and strategic factors, you should consider which one is the most effective for your case. You may follow your customary negotiation approach of positional negotiation to secure the largest percentage of the pie, for instance, or change for strategic reasons to problem-solving to uncover possible creative solutions.

Although you have a choice how to negotiate in mediations and the preferred approach of many lawyers can be the familiar positional approach, especially among many US trial lawyers as well as parties from bargaining cultures, I recommend a problem-solving approach to optimize the potential of the mediation process.

Let me explain the benefits of the problem-solving approach by first offering a definition for those less familiar with this approach.

> As a problem-solver who is creative, you do more than try to merely settle the dispute. You search for solutions that go beyond the traditional ones based on rights, obligations, and precedent. Rather than settling for win-lose outcomes, you search for solutions that might benefit both sides.[15] You develop a collaborative relationship with the other side and the mediator, and participate throughout the process in a way that may produce solutions that are inventive as well as enduring. Inventive solutions may be uncovered because you advocate your client's interests instead of legal positions, use rational techniques for overcoming impediments, search expansively for multiple options, and evaluate and package options to meet the various interests of all parties. Enduring solutions, whether inventive or not, are likely because both sides

13. See Graham & Lam, The Chinese Negotiation, *Harv. Bus. Rev.* 82, 84–90 (October 2003).
14. See Abramson, *supra* n. 1, at Ch. 1 on 'Negotiating in Mediations'.
15. Many lawyers consider the idea that both sides can secure benefits naïve. 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 possibilities. 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.

    I refer to solutions that can benefit both sides in an effort to avoid using the more familiar and overused 'win – win' jargon. That jargon carries baggage that can blind people to an underlying valuable point that still retains considerable vitality. The win – win attitude can be usefully contrasted with the opposite win – lose attitude in order to capture a fundamental difference between the problem-solving and adversarial approaches.

> work together to fashion tailored solutions that each side fully understands, can live with, and knows how to implement.[16]

As I advocate for problem-solving, I realize that the positional approach that can include unvarnished adversarial tactics can lead to spectacularly successful resolutions, as attorneys frequently point out. I do claim, however, that the problem-solving approach is more likely to produce better results for clients.[17]

For problem-solving advocacy to be effective in practice, you should engage proactively in problem-solving strategies at every stage of client representation, starting with your initial client interview through selection of the mediator and during the mediation session. You also should avoid a hybrid approach of both positional and problem-solving, despite the claims of supporters that it is the best one because of its flexibility. You should not let the appeal of flexibility mask the inconsistency it promotes and as a result how it can undercut the problem-solving approach. For instance, a hard positional move such as a take-or-leave it bluff can foreclose problem-solving moves of sharing information to uncover fresh options.

Skeptics think that problem-solving does not work for most legal cases because the cases are primarily about money, in which a party wants to get the most or pay the least. They see no opportunity to discover creative solutions. Consider these four responses:

> First, the endless debate about whether or not legal disputes are primarily about money is distracting. Whether a dispute is largely about money varies from case to case as experiences and studies have demonstrated.
>
> Second, you have little chance of discovering whether your client's dispute is about more than money if you approach the dispute as if it were only about money. Such a preconceived view backed by a narrowly focused adversarial strategy will likely blind you to other parties' needs and inventive solutions. You are more likely to discover and creative solutions if you approach the dispute with an open mind and a problem-solving orientation.
>
> Third, if the dispute or any remaining issues at the end of the day turn out to be predominately about money, then at least you followed a representation approach that may have created a hospitable environment for dealing with the moneyed issues. A hospitable environment can even be beneficial when there is no expectation of a continuing relationship between the disputing parties.
>
> Fourth and most importantly, the problem-solving approach provides a framework for resolving money issues. These types of disputes can sometimes be resolved by resorting to the usual problem-solving initiatives discussed throughout this book (*Mediation Representation*). If they fail, you then

16. See Abramson, *supra* n. 1, at 4–5.
17. For a specific illustration of the potential benefits of problem-solving advocacy over the traditional positional advocacy, see Abramson, Problem-Solving Advocacy in Mediation: A Model of Client Representation, 10 *Harv. Neg. L.R.* 103 (2005), 111–134.

might turn to a positional dance, but one that has been refined to serve a problem-solving process by focusing on objective standards and justifications while avoiding tricks.

These responses were illustrated in a case that I mediated when the parties arrived with only monetary claims on the table, a long history of frustrating and failed negotiations, and their case ready to go to trial. After more than three hours of structuring and conducting a problem-solving approach to the mediation, the parties and attorneys discovered that the parties had much in common as founders of successful family businesses, that the fraudulent problem arose due to a rogue employee, and that each had unmet non-monetary needs. The plaintiff was upset that any reputable business person would perpetrate such a fraud, and the defendant was losing business due to the claims in the litigation. With the benefit of an improved understanding of each side's perspective and the facts, they proceeded to negotiate a written apology to the plaintiff and a written introduction to future buyers for the benefit of the defendant and signed by the plaintiff. In this collaborative environment, they then confronted the remaining monetary issue and settled it in less than a minute! They quickly and civilly exchanged a few offers and counteroffers. The parties were apparently already on the same page for settling the money claim but could not until some non-monetary needs were met.[18]

Skeptics also frequently question whether problem-solving will work if the other side does not know how to problem-solve or, worse, is familiar with the approach and has rejected it. Problem-solving offers a structure for trying to convert positional negotiators into problem-solvers by attorneys not copying the positional tactics, asking good questions and responding by focusing on interests, objective criteria and generating options.[19]

In short, problem-solving negotiations can offer an opportunity to realize much of mediation's potential.

6. MEDIATOR ASSISTANCE

The next side of this structure focuses on the second central feature of mediation advocacy-enlisting *Mediator Assistance* (Figure 14-3). What can the mediator contribute to resolving the dispute? What value does the mediator add? A mediator is an expert who knows how to *assist* parties in resolving their dispute. As an advocate, you need to understand how mediators assist in practice, and then as the mediation unfolds, you can choose how to enlist assistance from the mediator.

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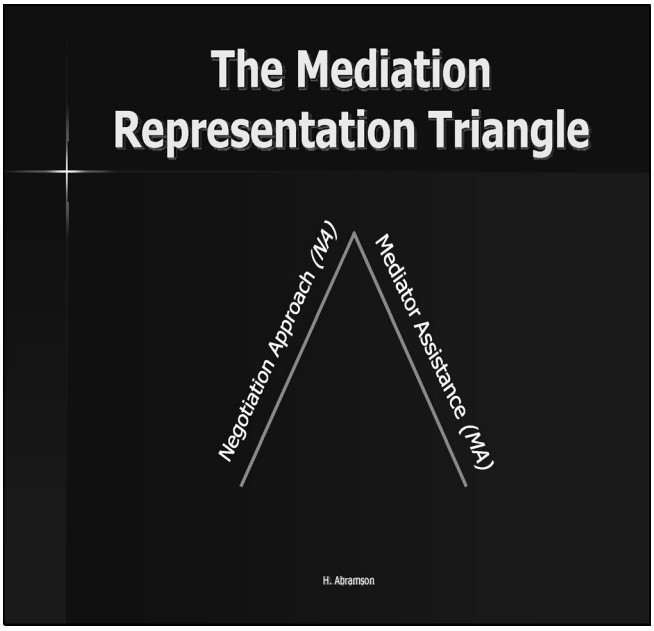
18. See Abramson, *supra* n. 1, at 6–7.
19. See Abramson, *supra* n. 1, at Ch. 1.7.

Figure 14-3. Mediator Assistance (MA)



There are three distinct ways in which mediators can be of assistance.[20] Each one is culturally neutral, although how each one gets translated into practice can be influenced by the cultural upbringing of the mediator, the cultural preferences of the attorneys and strategic considerations. The cultural upbringing of the mediator and strategic considerations can shape the mediator's default practices, the practices that the mediator automatically relies on, while strategic considerations also can cause the mediator to vary them. Even though your mediator may typically do everything in caucuses because that is what she was taught to do and she has found it to be an effective strategy, she may choose to vary that practice for strategic considerations. She may choose to switch to a joint session, for example, when it seems like it would be a productive move to bring parties together to talk directly with each other. Any of these local practices can be accommodated within the triangular representation framework.

First, a mediator brings to the mediation room his or her various approaches or orientations, which I divide into four neutral categories: (1) How will the mediator manage the process? (2) Will the mediator view the presenting problem broadly or narrowly? (3) Will the mediator use caucuses selectively, primarily or not at all? (4) Will the mediator involve clients extensively,

20. See *ibid.*, at 2.4–2.8 and 5.3–5.5.

restrictively or not at all? Practices can vary, and the practices can be a product of training and other cultural influences and driven by strategic choices by the mediator.

For example, how the mediator manages the process can vary across a continuum of practices from transformative, facilitative, evaluative, directive, wisely directive and authoritatively directive.[21] The choice can be a product of local practice. US litigators-turned-mediators tend to prefer practices in the evaluative and directive segment of the continuum, whereas British mediators, especially from London, can be more facilitative and Chinese mediators can be more inclined toward a wisely directive mediation practice. Of course, the mediator may select a different practice than his or her default one for strategic considerations, and you as an advocate can try to influence the choice of the mediator.

Caucusing practices offer another illustration of the influence of local culture. I recall training attorneys in Minnesota about how to use caucuses selectively, when an attorney informed me that they prefer mediating primarily in caucuses. I was told it was the culture in Minnesota to avoid dealing directly with each other when in conflict. When training attorneys in the Netherlands about the benefits of selective caucusing over all caucusing, I was informed that their default practice is to mediate in joint sessions. That is how they were trained, and they had never contemplated using caucuses – until this training!

Second, mediators use various techniques to prod movement. They can use techniques to improve communications, defuse tensions, overcome impasses, generate options and for many other purposes. These needs are mostly universal, although the particular techniques to deal with them can vary across cultures, and the triangular framework does not dictate the choice. For example, the default technique for bridging any final gaps can vary. In the northeast region of the United States, many commercial mediators prefer using a mediator's proposal,[22] whereas in other regions, commercial mediators prefer offering evaluations of the legal risks to prod closure. When there is a need to improve communications, some mediators prefer facilitating discussions in joint sessions, whereas others prefer separating the parties, with the mediator carrying messages back and forth.

Third, because each mediation stage serves a different purpose, mediators can use their control of the stages to stimulate movement by steering the mediation to a suitable stage. Or, you can try to steer the mediation. The mediator might ask the parties whether they have enough information to move forward to the stage of shaping a resolution, for instance, or you may ask to move backward to the stage of clarifying and overcoming an impediment because of different interpretations of critical data. Of course, not all mediators follow

21. See Abramson, *supra* n. 1, at Ch. 2.4.
22. See *ibid.*, at Ch. 7.2(g)(ii).

the same stages. As one obvious illustration, some mediators might follow a problem-solving process in which the mediator focuses on identifying interests, generating options and assessing them, whereas others might follow a positional process in which the mediator facilitates a negotiation dance of offers and counter-offers.

How you expect your mediator to assist you will profoundly affect how you represent your client.[23] If you expect the mediator to evaluate, you will likely withhold more information and present more partisan arguments, for instance, than you would if you expect your mediator to facilitate and problem-solve.

Finally, even though this framework accommodates a range of mediator assistance practices, you should consider enlisting practices that cultivate a problem-solving process. The benefits that were highlighted when considering problem-solving negotiations can be elicited by the mediator when the mediator helps parties improve communications, understand each other's interests, overcome any impediments, search for and assess creative options and bridge any final gaps without fracturing the relationship with adversarial tactics. If you think that it would be helpful for your client to communicate directly with the other side, for instance, you might ask the mediator to allow your client to participate actively in a joint session. If you are seeking a creative solution, you might ask the mediator to help the parties generate fresh ideas.

If your mediator is not oriented toward problem-solving or resists it, you can try to coax your mediator to follow a problem-solving approach. You can ask the mediator to help the parties identify their interests or work together to resolve the dispute, for example, even if the mediator does not seem to have the depth of experience to consistently problem-solve, candidly discloses his or her practice to alternative approaches or follows a recognized alternative approach such as an evaluative, transformative or wisely directive one.[24]

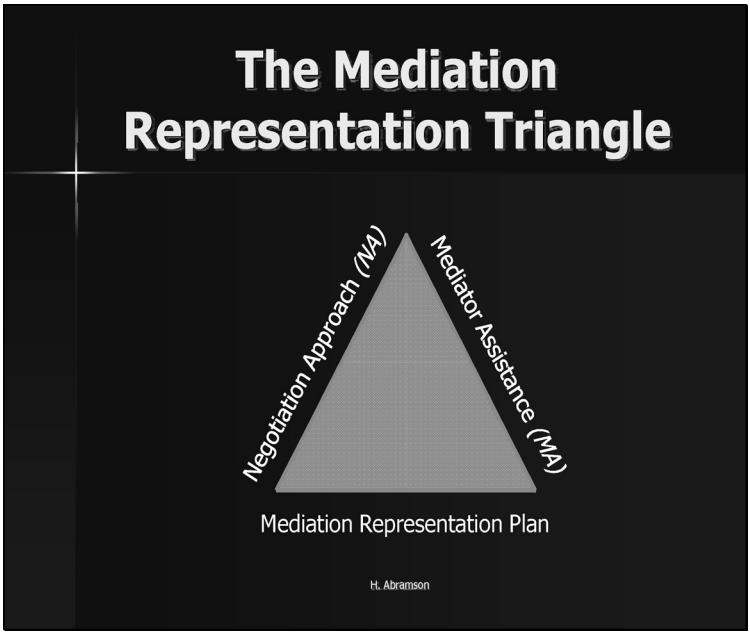
7. MEDIATION REPRESENTATION PLAN

The third side forms the base for the triangle – your *Mediation Representation Plan* (Figure 14-4). As you formulate your negotiation approach and ways to enlist help from the mediator, you should develop a consistent and complete plan for effective representation.

Any plan should further three goals that can be configured into three sides of an interdependent Planning Triangle. You should advance your client's *interests*, overcome any *impediments* and share necessary *information* while minimizing the risk of exploitation. These three I(s) shape every detail of your plan. If your plan fails to further any of these goals, you will form a weak triangle and therefore a weak plan for mediation advocacy. If you advance all of the goals intelligently, you will fashion an effective plan. Each of these I(s) is culturally neutral and therefore

23. See *ibid.*, at Ch. 5.3-5.
24. See *ibid.*, at Ch. 7.2(b).

Figure 14-4. Mediation Representation Plan



reflect planning goals for a negotiation anywhere, although the content of each one can vary across cultures.

Let's examine each of the I(s)

7.1. Interests

The first I, *Interests*, (the first side of the triangle, Figure 14-5) encapsulates the primary goal of any plan – to meet your client's interests. *Interests* is a term of art with particular meaning in negotiations. It focuses on the needs of the party that any resolution must meet. It is a concept that can transform parties' view of a dispute from a distributive one with winners and losers to a dispute that might be resolved with imaginative solutions. Any plan should effectively advocate your client's interests – that is your bottom line.

The concept of interests is culturally neutral, in my view, although some have argued that it reflects narrow westernized needs.[25] However, when interests are defined broadly to include any need that must be met to settle the dispute, the term avoids limiting itself to only particular cultural needs. The term covers any need of

25. See Abramson, *supra* n. 1, at Ch. 3.2(a).

Figure 14-5. Interests

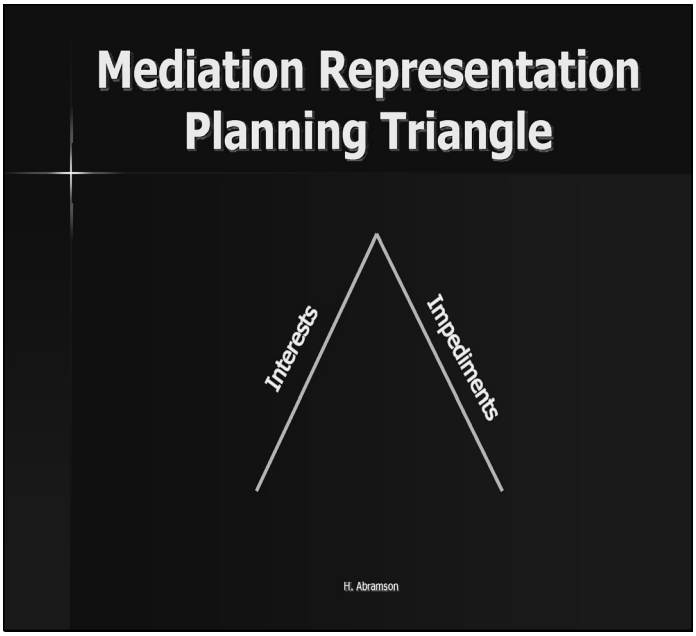
a party. For example, Westernized parties may have a primary interest in compensation, whereas parties from some Eastern cultures may have a primary interest in the relationship, with compensation as a secondary interest.

7.2. Impediments

The second I, *Impediments*, (the second side of the triangle, Figure 14-6) considers the reason that you are in mediation; an impediment may be blocking a negotiated settlement. The term *impediment* is a universal one when defined broadly to encompass any possible obstacle. Like with interests, impediments can be rooted in local practices, whether cultural or strategic.

Disputes between Western parties can face impediments over the details of a contract, whereas disputes between Eastern parties may face impediments over trying to build a relationship (contract-relationship dimension), for instance. Impediments also can arise between Western and Eastern parties over a Western party's need for a detailed contract conflicting with an Eastern party's need to develop a relationship. Different styles of communicating, as anyone who has done any cross-cultural negotiations knows, can be another impediment across cultures. Westernized parties, as low-context communicators who are accustomed to talking directly and hearing direct responses such as a YES that means YES can

Figure 14-6. Impediments



misunderstand a high-context communicator for whom an apparent YES can mean NO in context. However, these differences also can be strategic. The interest in a relationship over a contract and an indirect Yes can be tactics by a party to avoid committing to a contract. All of these impediments can be addressed within a representation plan.

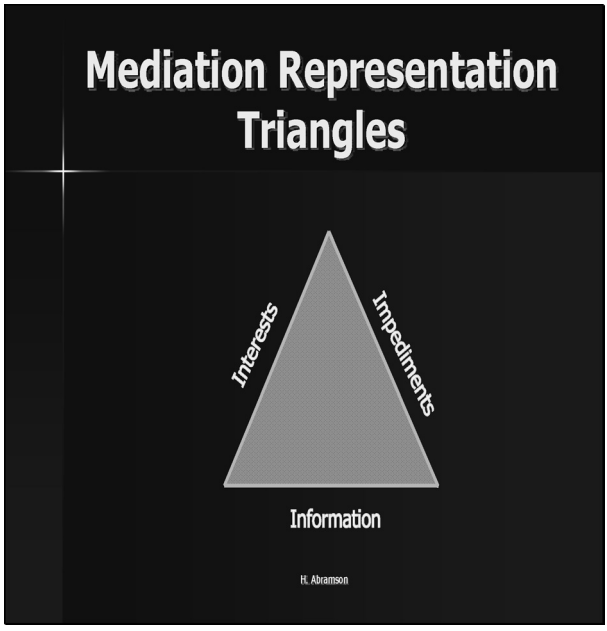
7.3. Information

The third I, *Information*, (the base of the triangle, Figure 14-7) covers what information to gather, disclose and withhold. Sharing information can be critical for helping participants understand each other's interests, identify impediments and uncover optimum solutions.

The need by parties for information is universal, regardless of locality or upbringing. However, local practices can vary regarding whether to share information, how to share information and what information to gather. As with impediments, information can be viewed and analysed through both cultural and strategic lenses.

Parties may withhold information in order to force the other side to expend resources to get the information or to avoid empowering the other side with information that the other side could use against them. A party can fear acknowledging legal weaknesses or asserting that a particular solution is important to gain in the

Figure 14-7. Information



negotiation, for instance, because the other side might exploit that information to its advantage. These withholding practices tend to be followed by US litigators who can operate under a presumption that most information should be withheld unless there is a compelling reason to disclose. In a problem-solving approach to mediation, attorneys ought to consider reversing this presumption and share information unless there is a good reason to withhold.

Once you decide to share information, you need to consider whether to share the information in a joint session or only with the mediator in a private caucus. That choice also can be influenced by culture and strategy. You may want to share information with only the mediator because you think sharing the information directly will upset the other side, may want to hear the private reactions of the mediator or may want to try convincing the mediator to become your advocate with the other side, among other possible reasons.[26] In a problem-solving process, attorneys should consider sharing information directly with the other side because of the benefits of collaborating, but exceptions can be justified, for example, based on the proprietary nature of the information or the need to test proposals before presenting them to the other side.

26. See *ibid.*, at Ch. 5.4(b)(ii)-(iii).

If a party wants to share information, how the information is conveyed can vary depending on cultural upbringing. Relative to people in the West, people from the East tend to share information indirectly. In a case study that illustrated this difference, Jeanne Brett[27] of Northwestern University found that the Japanese negotiators tend to share information through early presentation of proposals and counter-proposals that can be decoded by discerning any interests and priorities embedded in each proposal. If you assume that the other side will only make proposals favorable to their interests, she suggests you can infer their priorities by how their proposals and counter-proposals evolve. In contrast, the US negotiators tend to begin by asking questions and defer making proposals until after they run out of questions.

The information relevant to gather can vary based on how a party views the negotiation. A positional negotiator may see no need to learn about the other side's interests, and a problem-solving negotiator may see no value in eliciting an offer from the other side early in the information gathering stage of the negotiations, as illustrations.

Even though parties' need for information is universal, how information is handled can be shaped by various local practices that parties choose to follow. Within the favored problem-solving framework, you should consider sharing information directly with the other side unless you have a specific reason to not do so and should consider sharing and gathering information relevant to promoting a problem-solving approach.

8. KEY JUNCTURES

Any plan that addresses the three I(s) should be implemented at each of six key chronological junctures in the mediation process. The junctures cover selecting a mediator, pre-mediation contacts and the mediation session. At each juncture, you should consider how to take thoughtful and consistent advantage of any opportunities to advance interests and overcome impediments. Each juncture offers universal opportunities, but whether and how these opportunities are used can vary based on local cultural practices and strategic considerations.

The six key junctures are:

(1) Selecting a Mediator.

When initiating the mediation, you may have an opportunity to select a mediator with the other side. But how and whom you select will be influenced by cultural and strategic considerations. You first should assess whether a candidate's training, orientation and experiences would help you resolve the dispute, given the interests you want to advance and the impediments. Then you should select a mediator suitable for your dispute, realizing that how the mediator approaches the mediation will affect how you will represent your client during each of the next five junctures.

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27. See Jeanne Brett, *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries* (HA: Jossey Bass, U.S., 2001).

In a cross-cultural mediation, you should select someone who is both culturally trained and culturally suitable.[28]

(2) & (3) Pre-Mediation Conference and Submissions

Before the first mediation session, you may want to communicate with the mediator and the other side. This option is universally available, but whether any pre-mediation contact occurs and if so, how it is done, can be influenced by local practices.

You might consider engaging the mediator and the other side in a pre-mediation conference and by submitting pre-mediation materials.[29] Pre-mediation conferences might be held between the mediator and both attorneys or separately and by phone, email or in person and can serve a range of purposes from just connecting to commencing the negotiation process. Pre-mediation submissions consist of materials sent by the parties to the mediator and sometimes the other side.

For each pre-mediation contact, you ought to consider how to advance interests and overcome impediments. You should give special attention to how the mediator might be helpful and what information you can safely share with the mediator and possibly the other side.

(4), (5) & (6) Opening Statements, Joint Sessions and Caucusing

During the mediation session, there are ample opportunities for interactions between attorneys and clients and with the mediator

(4) Opening Statements

You want to consider how to productively commence the mediation session. You have the opportunity to set the groundwork for meeting interests and overcoming impediments by revealing how you plan to negotiate (positional or problem-solving) and how the mediator might help. Practices can vary over a full range of possibilities from each side meeting separately with the mediator to both the attorney and client presenting formal opening statements to the other side and the mediator, with all sorts of variations in between, including meeting the night before over dinner or before the formal session at breakfast. In a problem-solving process, you should consider preparing your client to present an opening statement with you to the other side as a way to set the tone and for your client to start communicating directly with the other client.[30]

(5) and (6) Joint Sessions and Caucuses

All mediations consist of joint sessions, caucuses or both. These three universal formats cover virtually all of the possibilities for conducting a mediation. Your choice and how to use each format can be influenced by cultural practices and

28. See Abramson, *supra* n. 1, at Ch. 4.2(d).
29. See *ibid.*, at Ch. 5.15.
30. See *ibid.*, at Ch. 5.9.

strategic decisions, as was illustrated in the discussion of mediator assistance in which examples were cited in Minnesota of the all caucusing format and in The Netherlands of the no caucusing format.

As you plan for the mediation session, you should consider the critical choice to negotiate in a joint session with everybody in the room, in a caucus with just your client and the mediator or in another variation of caucusing such as with the mediator and only the attorneys or only the clients. Your choice can be influenced by how you think the mediator can assist and whether you want to share information with the other side or only with the mediator.

In a problem-solving negotiation, you should try to conduct most of the negotiations in joint session with extensive client involvement and limited caucusing.[31] This mix may need to be adapted to local needs for spending more or less time in joint sessions, although one anecdotal insight into evolving practices in Japan should temper any impulse to habitually adapt to current practices. A Japanese academic observer told me recently that when Western-style mediations were first introduced in Japan, many were done in caucusing because of the face-preserving needs of parties, but that joint sessions are starting to be welcomed, to his surprise.

9. CONCLUSION

As presented in this chapter, mediation advocates need to know how to negotiate within a mediation process, enlist mediator assistance and pull it all together in the form of a plan that advances client's interests and overcomes any impediments while intelligently sharing information at each of the six key junctures. By adhering to this triangular framework, advocates will be prepared to thoughtfully and effectively deal with the myriad of unanticipated challenges that inevitably arise as the mediation unfolds.

Because this framework is universal and can incorporate local practices, it offers an approach to client representation that can work anywhere, as claimed in the title. This approach provides a reliable foundation for representing clients in any country or culture.

I would like to conclude with a point emphasized throughout this chapter. Even though the triangular framework can be adapted to accommodate local practices, problem-solving practices may offer advocates an opportunity to get the most out of the mediation process. If you do not already follow this approach, you might try it out.

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31. See Abramson, *supra* n. 1, at Ch. 5.4(a)(iii).