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What's It All About? Finding the Appropriate Problem Definition in Mediation

By Leonard L. Riskin and
Nancy A. Welsh

Since at least the early 1980s, a segment of mediation proponents has persistently emphasized one potential advantage of the mediation process: its ability to escape or at least loosen the pinched perspective that typically dominates the settlement of cases that are or are likely to be in the litigation stream. We call these “court-oriented” cases. The idea is that mediation can help the parties exercise autonomy, not only in agreeing to a solution, but also in determining the focus of the mediation (“the problem definition”).¹ Such autonomy can lead to a broader problem definition and to processes and solutions that are better suited to the parties’ real needs.

With some notable exceptions, however, court-oriented mediations in “ordinary” civil, nonfamily disputes—such as personal injury matters, employment cases, contract and property damage disputes, and medical malpractice claims—have not fulfilled this great promise of mediation. Without doubt, some mediations deal with the parties’ underlying interests and nonlegal issues. However, it appears that the problem definition in most court-oriented mediation sessions is quite narrow, dominated by litigation risk analysis and valuation. Similarly, the outcomes of these mediations do not vary much from those produced by lawyers’ traditional bilateral negotiations.

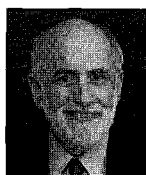
Often, the plaintiffs or defendants in these cases are “one-shot players.” They have little or no experience with litigation and the ways of courts (or private ADR providers). For them, involvement in litigation is far from ordinary. Indeed, many resort to the courts only because they have been caught up in once-in-a-lifetime, unique, or catastrophic events. Only the lawyers, mediators, and insurance claims representatives—the “repeat players” in the litigation system—consider such cases “ordinary.” The repeat players effectively narrow both

the definition of the problem to be addressed and the set of available remedies. They set the scope of inquiry and the procedures, often without any explicit discussion or recognition of the many available alternative formulations and often without the influence of the one-shot players.

The repeat players tend to focus narrowly on two questions: First, what would happen if the parties litigated this case? Second, how much is the defendant willing to pay and the plaintiff willing to accept to avoid the delay, risks, and costs of trial? In other words, they focus on litigation issues. The lawyers and mediators then implement mediation procedures that they think will enable them to address those questions efficiently. Such procedures typically exclude consideration of the parties’ motivations and underlying interests, limit opportunities for the parties to speak or listen to each other directly, and emphasize case evaluation. As a result, such mediations foster a bracketed understanding of the dispute and rational-cognitive-legal approaches to resolving it.

For many one-shot players who have chosen (or are likely to choose) litigation to resolve their disputes, this narrow approach may be wholly appropriate and useful. In *some segment* of cases, though, the dominant focus on litigation analysis means that parties miss opportunities for processes and outcomes that could better suit their needs. This suggests that there could be great value in developing a means to permit parties, especially one-shot players, to determine whether they wish to influence the development of the problem definition in their cases and thus capitalize upon one of the unique attributes of mediation.

In this article, we propose four mechanisms to enable mediation participants to explore problems broadly and then to decide what problem definition is most appropriate for the mediation of their case:



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- A three-step systematic method for determining the problem to be addressed;
- Two variations of a rule that could be adopted by courts (and private providers) that would require lawyers or mediators to implement this systematic way of working with problem definition; and
- A new rule under which a court (or private) mediation program would offer to customize any mediation in order to seek the most appropriate problem definition.

We offer these mechanisms here to stimulate a dialogue regarding the most effective and administrable approaches that could give parties—especially one-shot players—the opportunity to influence the focus of their mediation sessions.

A Three-Step Method for Identifying and Addressing “the Problem”

In many ways, this three-step systematic method represents a simple distillation of good practices in other mediation arenas. It includes mapping the problem; setting the problem; and addressing the problem.

Step 1: Mapping the Problem

To map the problem in the ordinary case, the parties need to reveal to the mediator—and potentially to the other parties—as much as is feasible and appropriate about all of the issues potentially involved in their court-oriented mediation. Obviously, in these types of cases, there will be litigation issues. In addition, though, there may be personal, relational, business/economic, community, and public policy issues and interests. It also may be helpful for the mediation participants to think about the three dimensions of conflict—behavioral, cognitive, and emotional—that Bernard Mayer has identified as necessary elements of full resolution,² as well as the five “core concerns”—appreciation, autonomy, affiliation, status, and role—that Roger Fisher and Daniel Shapiro tell us all negotiators share.³

To accomplish this, we propose that parties try to answer questions such as these:

1. What do you hope to accomplish and what problem(s) would you like to address in this mediation? How can the process, the mediator, or both help you accomplish these goals?
2. If the mediation focuses on the legal strengths and weaknesses of your case and the likely cost of continuing in litigation, will this be sufficient to help you reach a complete resolution of your dispute with the other party? If not, what other nonlitigation issues need to be addressed? How could they be addressed?
3. As you imagine settling this dispute, what are your most important needs or goals? (For example, are you most concerned about compensation for expenses? The availability of future medical care for you or your dependents? Training? An apology? Maintaining your reputation?)
4. What do you think are the most important needs or goals of the other side?
5. If not already described, is there anything besides the

- payment of money that would help to resolve this matter?
6. If not already described, do the parties need to change any behaviors to resolve this conflict? If yes, what behavioral changes are required?
7. If not already described, are emotions a significant part of this conflict? If yes, what outcome or procedure could help you (or the other party) feel at peace about this dispute and its resolution?
8. How would you describe the communications or negotiations you have had with each other up until now? Why haven't you been able to reach a resolution?
9. Do you have any questions about how the mediation process works? Do you have any questions or concerns about your role during the presentations or discussions? Do you have any questions or concerns about your role in making a decision about whether to settle your case?

Step 2: Setting the Problem: Selecting the Issues to Be Addressed in the Mediation Process

Once they have uncovered all of the issues that *could be* discussed in their mediation, the parties and lawyers must advise the mediator regarding those issues that they affirmatively wish to tackle. The following sorts of questions can help at this step. Should the mediation address:

1. All of your nonlitigation issues? If not, which nonlitigation issues should be addressed?
2. All of your underlying needs and goals? If not, which underlying needs and goals should be addressed?
3. All of the other side's underlying needs and goals? If not, which underlying needs and goals should be addressed?
4. The needs of individuals or organizations that are not direct parties to this lawsuit or potential lawsuit?
5. Behavioral changes, if these are an important part of resolving this dispute?
6. The parties' different understandings of what took place, if these are an important part of resolving this dispute?
7. The parties' emotions, if these are an important part of resolving this dispute?
8. All of the above issues explicitly? Alternatively, should the mediation process address certain issues only indirectly? How?

After discussion of such questions, the parties, lawyers, and mediator “set” the problem, that is, specify the issues that will comprise the substance of the mediation.

Step 3: Addressing the Problem

In this step, the parties, lawyers, and mediator establish the mediation process and begin to address the problem or problems they have set. In the mediation of a corporate contract dispute, for instance, in addition to legal issues, the corporate representatives may choose to speak with each other about the personal toll that each has borne and will continue to bear if the dispute is not resolved. They may even discuss their organizations' differing cultural expectations and their mutual need for recognition of and appreciation for their attempts to accommodate each other. In an employment mediation, the employer and a long-time employee may decide to include a discussion of the health needs of the employee's spouse

that have affected the employee's autonomy and that also restrict the retirement options available to the employee.

Court (and Private) Initiatives to Encourage Establishment of Appropriate Problem Definition

We do not expect that all or even most parties will choose to go beyond the discussion of litigation issues in their court-oriented mediation sessions. Nonetheless, we believe that explicitly taking the first two steps—mapping the problem and then setting it—will increase the proportion of cases that employ the most appropriate problem definition. In order for that to happen, of course, someone must foster the use of such a three-step process. We propose three initiatives that courts (and private ADR providers) could employ.

A Rule for Lawyers

Courts could adopt a rule requiring lawyers to consult with their clients in the creation of written, premediation responses to questions such as those posed previously and to submit such responses to the mediator in confidence. Although a lawyer could sign this document on her client's behalf, we also suggest a requirement that she certify that the responses represent the result of a thorough discussion with her client. This submission would help the mediator facilitate the first and second steps—mapping and setting the problem. Even if the mediator were not following the three-step approach, the submission would help the mediator identify the issues that the mediation process could and should address.

We are aware, of course, that many mediators and court-connected mediation programs already require the submission of confidential premediation statements. Generally, however, these statements reflect a narrow, litigation-focused problem definition even for those mediators and court programs that ask about nonlitigation issues. We suspect that lawyers often do not comprehend what information the mediator or program is requesting. They may understand "interests" as "positions" despite all of the books, court publications, and training programs that distinguish between these concepts. Our proposed rule provides more guidance to enable lawyers (along with their clients) to take a detailed look at the range of issues that could be addressed in mediation.

Although our proposal provides parties with the opportunity to address a broader version of their dispute, they should, of course, also have the power to address only narrower aspects. We hope that the simple requirement that lawyers and clients *consider and answer* these questions together will enhance lawyer-client dialogues and encourage lawyers and mediators to notice and seek opportunities to address nonlitigation issues, underlying interests, and the cognitive and emotional dimensions of the dispute. At a minimum, the obligation to consider such issues should increase mediators' confidence in the propriety of broadening their inquiry once the mediation begins.

A Rule for Mediators

Under this proposal, courts (and private ADR programs) would require that, in premediation conversations or during mediation sessions, their *mediators* ask some or all of the mapping and setting questions, and that they be competent to respond appropriately to the answers. Implementation of this proposal, like the one directed at lawyers, would require some work by courts and private ADR providers. This might include training sessions for mediators as well as lawyers. Lawyers would learn that they and their clients would be asked some or all of the mapping and setting questions before or during mediation sessions. Indeed, courts and private ADR providers that furnish educational information to lawyers about mediation for distribution to their clients could include these sorts of questions in their explanation of what to expect in mediation.

A New Program to Offer "Customized" Mediation

Our third proposal is that courts (and private providers) should offer to "customize" every mediation, beginning with some form of mapping and including an explicit process for setting the problem definition. We are *not* proposing that courts offer two mutually exclusive and rigid categories of mediation. Instead, our proposal would allow parties and lawyers to "customize" their mediation or choose—deliberately and knowingly—to avoid all the time and effort that would be required for such customization. Some court programs, such as the Circuit Mediation Office of the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the Northern District of California, already offer such customization routinely. The local rules for the Northern District of California specifically note that "[a] hallmark of mediation is its capacity to expand traditional settlement discussions and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy." Much can be learned from the experience of these courts' programs, particularly the manner in which they have made customization part of their culture. For other courts, however, this undertaking will be quite new and will require the education of mediators, lawyers, and parties.

Likely Concerns About the Proposed Initiatives: The Roles of Lawyers and Courts

Of the many potential objections to our proposals, two seem most significant. The first has to do with the likelihood that lawyers will resist the opportunity to expand mediation's problem definition for the identical reasons that they embrace the focus that currently characterizes court-oriented mediation: The emphasis in most ordinary mediations on knowledge of the law and litigation expertise reinforces lawyers' claims to the privileges of professionalism, including autonomy, status, and substantial fees. A law-and-litigation problem definition also matches most lawyers' psychological preferences for the resolution of disputes based on the application of standards and rules

and the avoidance of emotional issues. Most important, lawyers' transformation of their clients' unwieldy disputes and expectations into claims and remedies that can be addressed by the law has real strengths, and often is the best way to protect and foster clients' interests.

The concern about lawyers' resistance is well grounded, but there are interesting hints of change in the legal profession that may both encourage and gain support from courts and private providers' adoption of our proposals.⁴ Many lawyers, for example, express interest in using broader problem definitions, and growing numbers are forming groups of "collaborative" or "cooperative" lawyers who support each other through their practice protocols. New initiatives seek to bring aspects of the "collaborative" or "cooperative" approaches to areas beyond their original home in family law, including the "ordinary" matters that we have been discussing. In addition, certain influential elements of the commercial bar have expressed appreciation for a mediation process that includes litigation analysis, but also explores the parties' underlying interests.⁵

A second objection concerns the appropriate role of the courts. Should the courts offer to broaden the subject matter of a mediation session when access to this public resource has historically been conditioned upon narrowing the subject matter of a dispute in order to make it manageable and consistent with the unique mission of the courts? Further, is it the courts' role to encourage wide-ranging, nonlegal conversations at the same time that the Supreme Court is signaling to judges that they can and should decide early, at the pleadings stage, whether plaintiffs deserve access to the courts—or even a response from defendants?⁶ Throughout history, courts have evolved in response to the changing needs of society and the emergence of competing, successful models of dispute resolution. Examples abound. In medieval Europe, which had a patchwork of contradictory local laws and business practices, a private system known as the Law Merchant arose to create and apply commerce-facilitating rules and procedures to the resolution of international merchants' disputes. Over time, ordinary courts throughout Europe incorporated the Law Merchant's principles into commercial law. In recent years, U.S. courts have been adapting to the needs of particular subsets of disputants. For example, there are now business courts, mental health courts, juvenile courts, domestic violence courts, drug courts, and community courts. In each of these contexts, courts have concluded that their traditional processes and remedies were not sufficiently effective and have therefore chosen to offer additional services.

Similarly, courts can decide that court-connected mediation should have the capacity to be responsive to those parties who desire or need a more inclusive dispute resolution process. Having this option could enhance these parties' sense of being treated fairly by their courts, which is likely to influence their perceptions of the substantive fairness of their agreements and the institutional legitimacy of the courts. As noted earlier, some courts already invite parties to go beyond a litigation focus in mediation. These

courts can serve as models for others.

In addition, though other countries' courts reflect their own procedures, histories, and values, it may be useful for courts in the United States to consider some aspects of the mediation program that the courts of the Netherlands recently institutionalized. There, mediating and judging are understood as different in terms of process *and* problem definition. Dutch judges, who may meet with the parties and lawyers several times to investigate and attempt to resolve the case, are taught to ask, "Will my decision solve your problem?" If the answer is "Yes," then the judge should retain the case, continuing the investigation into its legal merits and issuing a decision. On the other hand, if the parties acknowledge the importance of nonlegal issues, the judge urges them to try mediation, specifically to address those issues.

Litigant Influence on the Process

Through any of our proposals, courts would offer a real "value added" for the disputants and disputes that do not quite fit the mold provided by the standard litigation focus in court-oriented mediation. Indeed, in the United States, where most citizens accessing the courts are one-shot players, it seems quite appropriate that our courts should allow such litigants to influence the design and focus of the process so that it will respond to their unique needs. ♦

Note

The Office of Mediation and Arbitration of the New Hampshire judicial branch is proposing to adopt one of the procedures recommended by Professors Riskin and Welsh in the Notre Dame Law Review version of this article. According to Karen Borgstrom, director of that office, the plan is to integrate a questionnaire, based on the Riskin and Welsh proposal, into each mediation program administered by the New Hampshire courts.

For a fuller treatment of the issues raised in this article, see the article on which it is based: Leonard L. Riskin & Nancy A. Welsh, Is That All There Is? "The Problem" in Court-Oriented Mediation, 15 GEO. MASON L. REV. 863 (2008).

Endnotes

1. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 18 (1996) (describing problem definition as "[t]he focus of a mediation—its subject matter and the problems or issues it seeks to address").

2. BERNARD S. MAYER, *THE DYNAMICS OF CONFLICT RESOLUTION: A PRACTITIONER'S GUIDE* 41–46 (2000).

3. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

4. See JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2007).

5. See ABA SECTION OF DISPUTE RESOLUTION TASK FORCE ON IMPROVING THE QUALITY OF MEDIATION, *FINAL REPORT: APRIL 2006–MARCH 2007* (2007).

6. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 2009 U.S. LEXIS 3472 (finding that plaintiffs' complaints did not allege sufficiently plausible claims to survive a 12(b)(6) motion).