

INTRODUCTION: THE FOUNDATION OF THE BOOK

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1. Different Approach to Representation

This book serves one goal. It provides you, as a lawyer, a comprehensive approach to representing clients in mediation as a problem-solver. Much has been written about how mediators can create a problem-solving process¹ and many mediators have been trained to use a problem-solving approach,² but surprisingly little has been written on how to represent clients as a problem-solver.

The problem-solving approach in this book is tailored to realize the full benefits of the mediation process, a dispute resolution option that offers you constructive access to the other side and assistance from a neutral third party, who lacks any decision-making power. The mediator's sole purpose is to assist the disputing clients and their lawyers to resolve the dispute.³

¹ See, e.g., Dwight Golann, *Mediating Legal Disputes* 14–26 (1996); Christopher W. Moore, *The Mediation Process* 18–19, 55–56 (2nd ed. 1996); and Jay Folberg & Alison Taylor, *Mediation* 7–9, 38–72 (1994).

² Even though I could not find a rigorous study of the approaches taught in mediation training programmes, I came across ample anecdotal evidence that suggests that many, if not most, training programs teach mediators the interest-based or problem-solving approach. This approach seems to be taught in many court-connected programmes, by many private trainers, and at Harvard Law School (where Professors Fisher, Sander, and Mnookin train negotiators and mediators from around the world). Also, although a significant number of mediators are trained in the transformative approach, a number of them also seemed to have been trained in problem-solving.

³ For a more complete definition of mediation as well as an explanation of the process, see chapter 2, 'Familiarizing Yourself with Mediation'.

The mediation process is indisputably different from other dispute resolution processes like arbitrations and judicial trials where the third party makes decisions.⁴ The familiar adversarial strategy of presenting your strongest partisan arguments and attacking the other side's case may be effective when each side is trying to convince a neutral third party to make a favourable decision. But in mediation, there is no neutral third-party decision-maker, only a third-party helper. The third party may not even be your primary audience.⁵ The primary audience may be the other side, who surely is not neutral, can often be quite hostile, and ultimately must approve any settlement. In this different representational setting, the adversarial approach can be less effective if not self-defeating.

You need a different representation approach that is tailored to realize the full benefits of this burgeoning and increasingly preferred⁶ forum for resolving disputes. Instead of advocating as a zealous adversary, you should advocate as a zealous problem-solver.⁷

Many sophisticated and experienced litigators realize that mediation calls for a different approach, but they still muddle through the mediation sessions, guided by familiar approaches that have worked well in other forums like arbitration and court. Even though many lawyers prefer a problem-solving-type approach to negotiations,⁸ lawyers can be unsure how that approach translates into advocacy.

⁴ For readers less familiar with the critical distinctions between mediation and arbitration, you should remember that arbitration is like court, where a third party adjudicates the dispute and renders a decision although the third party is usually selected by the parties. Mediation is a negotiation process where the parties are assisted by a third party. The mediator has no decision-making power over the parties.

⁵ For a discussion on selecting your audience, see chapter 5.10, 'Select Your Primary Audience in the Mediation'.

⁶ See Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (Preliminary Version, 24 October 2003, prepared for Symposium on The Vanishing Trial sponsored by the Litigation Section of the American Bar Association, December 2003) (in this study sponsored by the Litigation Section, the author has preliminarily documented that while the number of federal lawsuits filed has increased, the number of trials has decreased, from 11 per cent in 1962 to 1.8 per cent in 2002, with comparable trends in the state courts. One of the documented replacements for trials is mediation) and John Lande, 'Getting the Faith: Why Business Lawyers and Executives Believe in Mediation', 5 *Harv. Negot. L. Rev.* 137 (2000).

⁷ See Andrea K. Schneider, 'Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style', 7 *Harv. Negot. L. Rev.* 143, 196 (2002) (in an extensive study of negotiation styles, 75 per cent of true problem-solving negotiators were considered effective as compared with less than 50 per cent of adversarial bargainers, a percentage that shrank to 25 per cent when examining adversarial bargainers who were unethical); Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 321–2 (2000) (authors concluded that clients are usually better off when a lawyer adopts a problem-solving approach over an adversarial one); and G. Richard Shell, *Bargaining for Advantage* 12–14 (1999) (other studies are cited that suggest that cooperative negotiators are more effective than competitive ones).

⁸ See Milton Heumann & Jonathon M. Hyman, 'Negotiation Methods and Litigation Settlement Methods in New Jersey: 'You Can't Always Get What You Want', 12 *Ohio St J. on Disp. Resol.* 253, 309 (1997) ('While 61% of the lawyers would like to see more problem-solving negotiation methods, about 71% of negotiations are carried out with positional methods instead.').

Most senior lawyers have never taken a course on dispute resolution. They either went to law school in a country where such courses are rarely offered or before such courses were offered or popular. And whatever courses are offered tend to be limited to teaching students to be mediators, not advocates.⁹

But new educational opportunities are taking shape. Many US law schools during the last five years began offering mediation advocacy courses¹⁰ and now some European law programmes are starting to offer courses on dispute resolution.¹¹ Law students can participate in mediation representation competitions that are flourishing in the US, Canada, and globally.¹² And, an increasing number of continuing legal education programmes is becoming available for practising lawyers, along with a scattering of intensive performance-based training programmes.¹³

Regardless of what opportunities might be available, lawyers do not seem convinced of the need for training until they participate in a programme and see firsthand what they do not know and what could be helpful to learn, as I have observed repeatedly when training in the US, 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 to be fully appreciated and embraced. Mediation advocacy training programmes seem to be following a similarly measured path toward wide use.

⁹ See Suzanne J. Schmitz, 'What Should We Teach in ADR Courses: Concepts and Skills for Lawyers Representing Clients in Mediation', 5 *Harv. Negot. L. Rev.* 189 (2001).

¹⁰ Although no survey has been compiled, when the first edition of this text was published in 2004 only a handful of known law schools offered a separate course on mediation advocacy. As of 2009, more than 35 law schools offer the course based on the adoptions of the first edition, and there are other courses using other books, but I do not know how many. Furthermore, separate courses on mediation and ADR included segments on mediation representation as reflected in the addition of materials to recently published mediation and ADR textbooks.

¹¹ This observation is based on anecdotal evidence from participating in the ICC Mediation Representation Competition in Paris for the last six years and hearing how the law students from the European law programmes had virtually no formal training in the first year or two, and are now getting some training. Also, when I assisted a European organization in developing a grant proposal to the European Union to fund mediation advocacy educational training for law professors, I learned how little formal education was taking place throughout the European Union.

¹² For a description of these competitions that offer students the opportunity to represent clients in mediations, see American Bar Association's Law Student National Representation in Mediation Competition at: <http://www.americanbar.org/groups/dispute_resolution/awards_competitions.html>; Canadian National Mediation Advocacy Competition at: <<http://www.cnmac.org/>>; and ICC International Commercial Mediation Competition at: <<http://www.iccwbo.org/court/adr/id24376/index.html>>.

¹³ For example, NITA has designed and launched a national mediation advocacy training programme that I helped design after conducting a pilot training for them. 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 US. And the CPR International Institute for Conflict Prevention and Resolution occasionally offers a mediation and mediation advocacy training programme. Some law schools like Pepperdine also offer intensive courses to practitioners.

In the absence of formal training, advocates learn on the job. It is rare that an experienced practising lawyer will show up in US mediations without some mediation experience. European lawyers also are gaining experience in those countries where there is significant mediation activity like in England and the Netherlands. Even though advocates are gaining experience, and practices are even solidifying in some jurisdictions, the skill level seems strikingly unsophisticated, as I have observed when conducting trainings and mediating. These observations have been confirmed in conversations with numerous mediators. The advocacy practices of many lawyers 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 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. Training in mediation advocacy is needed, including programmes that recognize the growing practical experience of lawyers.

This book provides you an in-depth presentation on how to improve your mediation advocacy skills. It offers a comprehensive problem-solving approach that applies from your first client phone call until the mediation process is concluded and highlights the many strategic choices that you should consider and assess throughout the mediation process.

As a problem-solving advocate,¹⁴ you should do more than try to merely settle the dispute. You should search for solutions that go beyond the traditional ones based on rights, obligations, and precedent. Rather than settling for win–lose outcomes, you should search for solutions that might benefit both sides.¹⁵ You should develop a collaborative relationship with the other side and the

¹⁴ See, e.g. Symposium, 'Conceiving the Lawyer as Creative Problem Solver', 34 Cal. W. L. Rev. (1998); Thomas Barton, 'Creative Problem Solving: Purpose, Meaning, and Values', 34 Cal. W. L. Rev. 273 (1998); Paul Brest & Linda Hamilton Krieger, 'New Roles: Problem Solving Lawyers as Problem Solvers', 72 Temple L. Rev. 811 (1999); Seamus Dunn, 'Case Study: The Northern Ireland Experience: Possibilities for Cross-Fertilization Learning', 19 CPR Inst. For Disp. Resol., Jun. 2001, at 153; Carrie Menkel-Meadow, 'Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education', 6 Harv. Negot. L. Rev. 98 (2001); Carrie Menkel-Meadows, 'When Winning Isn't Everything: The Lawyer as Problem Solver', 28 Hofstra L. Rev. 905 (2000); Carrie Menkel-Meadow, 'The Lawyer as Problem Solver and Third Party Neutral: Creativity and Non-Partisanship in Lawyering', 72 Temple L. Rev. 785 (1999); Carrie Menkel-Meadows, 'Toward Another View Of Legal Negotiation: The Structure of Problem Solving', 21 UCLA L. Rev. 754 (1984); Linda Morton, 'Teaching Creative Problem Solving: A Paradigmatic Approach', 34 Cal. W. L. Rev. 375 (1998); and Janet Reno, 'Lawyers as Problem-Solvers: Keynote Address To the AALS', 49 J. Legal Educ. 5 (1999). See also California Western School of Law, Center for Creative Problem Solving (2003), at <<http://www.cwsl.edu>>.

¹⁵ Many lawyers consider the idea that both sides can secure benefits as 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

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,¹⁶ use sophisticated techniques for overcoming impediments, search expansively for multiple options, and evaluate and package options to meet the various interests of all parties, including any possible interest in money. Enduring solutions, whether inventive or not, are likely because both sides would have worked together to fashion tailored solutions that each side would fully understand, could live with, and would know how to implement.

In this pitch for a problem-solving approach, I do not blindly claim that it is the only one that results in settlements. Lawyers frequently cite success stories, and even spectacular ones, when they use unvarnished positional tactics or a hybrid of switching between positional and problem-solving strategies.¹⁷ I do claim, however, that the problem-solving approach is more likely to produce consistently better results for your clients.

For problem-solving advocacy to be effective in practice, you should engage proactively in problem-solving strategies at every stage of representation. The practical problem-solving initiatives that are illustrated throughout this book should be used from the moment you interview your client and followed when calling the other lawyer about trying out mediation, selecting the mediator, participating in pre-mediation conferences, preparing any pre-mediation submissions, presenting opening statements, and participating throughout joint sessions and caucuses.

You should avoid the hybrid approach despite the claims of supporters that it is the best one, due to its flexibility. You should not let the appeal of flexibility mask the inconsistency it promotes. Shifting between hard positional tactics and creative problem-solving ones during the course of mediation can undercut the problem-solving approach. A hard positional move like a take-or-leave-it bluff, for instance, can thwart problem-solving moves of sharing information to uncover fresh options for settlement. Instead, you should pursue an intelligent adherence to problem-solving.

You should be persistent. It is relatively easy to engage in simple problem-solving moves such as responding to a demand with the question 'why?' in order to bring to the surface the other party's interests. But it is much more difficult to

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.

¹⁶ For a full discussion of how to identify clients' interests as opposed to positions, see chapter 3.2(a).

¹⁷ In the hybrid approach, lawyers switch between adversarial and problem-solving tactics, depending on how the mediation is unfolding.

stick to this approach throughout the mediation process, especially when faced with an adversarial, positional opponent. Trust the problem-solving approach. When the other side engages in adversarial tactics or tricks—a frequent occurrence in practice—you should react with problem-solving responses, responses that might even convert the other side into a problem-solver.¹⁸

You should even strive to create a problem-solving process when your mediator does not.¹⁹ Your mediator may fail to follow a problem-solving approach, despite professing to foster one, because he lacks the depth of experience or training to tenaciously maintain the approach. Or your mediator may candidly disclose his practice of deliberately switching approaches based on the needs of the parties—a philosophy that I have already suggested undermines the problem-solving approach. Or your mediator may follow a recognized alternative approach like an evaluative, transformative, or wisely directive one.²⁰ This book provides a framework for responding to different practices and approaches of mediators.

Finally, I should respond to the sceptics who think that problem-solving does not work for most legal cases because the cases are primarily about money. Claimants want only money, and defendants want only to pay the least amount possible. They see no potential to uncover creative solutions. For the sceptics, I offer 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.²¹

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 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 negotiation or mediation turn out to be predominantly about money, then at least you followed a representation approach that may have created a hospitable environment for

¹⁸ See chapter 1.6 'Converting Positional Negotiator into Problem-Solving.'

¹⁹ You can reduce these risks by selecting the right mediator. See chapter 4.2–5.

²⁰ See chapter 5.3(b).

²¹ See, e.g. Dwight Golann, 'Is Legal Mediation a Process of Repair—or Separation? An Empirical Study and Its Implications', 7 *Harv. Negot. L. Rev.* 301, 334 (2002) (In the only empirical study on the subject, the author found that 'almost two-thirds of all [mediated] settlements were integrative in nature. . . . The results suggest that both mediators and advocates should consider making a search for integrative outcomes an important aspect of their mediation strategy.').

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

resolving 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 moneyed issues. These issues can sometimes be resolved by resorting to the usual problem-solving initiatives discussed throughout this book. And, if they fail, you then might turn to a traditional positional dance, but one that has been refined to serve a problem-solving process by focusing on objective standards and justifications while avoiding tricks.²²

These responses were illustrated in a case that I mediated where 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 lawyers 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, nonmonetary needs. The claimant 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 by the defendant and a written introduction to future buyers by the claimant. 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 nonmonetary needs were met.

Sceptics also frequently inquire whether this approach will work if the other side has not read this book. The answer is yes it can, as will be illustrated in each chapter. And I will go one step further. Even if the other side has read this book or any other on problem solving and has firmly rejected the approach, the representation framework still can work. This book will show you how to represent your client in the face of an aggressive and skilled adversarial other side. You will learn settlement strategies including ones for trying to convert the other side into a problem-solver and coaxing the mediator to help convert the other side. In case nothing works in the mediation, you also will learn to diagnose the reasons for the impasse as well as identify alternatives to the mediation process that might work.²³

In short, the problem-solving approach provides a complete approach to representation that can guide you throughout the mediation process. Within the parameters of this framework, however, you have many choices to consider along

²² See chapter 1.3 'Problem-Solving Approach—Key Features'.

²³ See chapter 8 'Alternatives to Mediation'.

the path of representation and that will be examined in this book. For the experienced advocate, you will have the opportunity to reflect on and evaluate your current choices as well as expand the number of options to choose from. For the less experienced advocate, you will be presented with a menu of choices to evaluate for your case within a coherent framework. By adhering to the overall approach in this book, you will be prepared to thoughtfully and effectively deal with the myriad of unanticipated challenges that inevitably arise as any mediation unfolds.

Critical Juncture

Problem-Solving Choices

Reflect on current advocacy practices.
Consider other options.
Make choices.

2. Framework for Advocacy: The Mediation Representation Triangle

The approach in this book offers mediation advocates an alternative to relying on ad hoc, intuitive strategies as the mediation process unfolds. It offers a comprehensive and coherent framework that is configured into a Mediation Representation Triangle.

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. When each side is strong, the three-sided structure provides a sturdy and reliable framework.

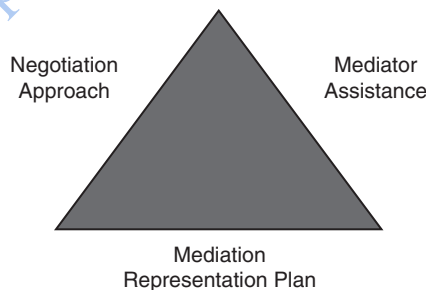


Figure 1 The Mediation Representation Triangle

The Mediation Representation Triangle links three key features for effective representation: you need to effectively negotiate, enlist mediator assistance, and plan your representation. These three features form the three sides to a triangle and are interdependent. If you negotiate poorly, enlist the mediator ineffectually, or develop a weak representation plan, you will fashion a wobbly framework for

mediation advocacy. If you do all three well, you will erect a sturdy one. You can remember these three features by remembering that you need to ‘Negotiate with a MAP’ (Negotiate with Mediator Assistance and a Plan).

The first side of this structure focuses on your primary role as a *negotiator*. Mediation is simply the continuation of the negotiation with the assistance of a third party, as is so often repeated. So first and foremost, you need to give attention to how to negotiate effectively in the mediation. Do you want to primarily problem-solve or primarily be positional? The problem-solving negotiation approach is developed in this book, while comparing and contrasting it with the more familiar positional approach, an approach popular among many Western trial lawyers as well as parties from bargaining cultures. The differences in each approach are reflected in the different beginnings, strategies, and likely outcomes.²⁴ Your choice is a vital one when representing clients in mediation.

The second side of this structure focuses on the second central feature of mediation advocacy—enlisting *mediator assistance*. You are in mediation. So what can the mediator contribute to resolving the dispute? As an advocate, you need a clear and precise understanding of the techniques mediators are trained to use and what they actually use in practice. Your understanding will profoundly affect how you represent your client—a point that will be accentuated throughout the book. As the mediation unfolds, you should enlist the mediator to employ the particular techniques that you think would be most helpful in resolving your client’s dispute.²⁵

The third side forms the base for the triangle—your *mediation representation plan*. As you formulate your negotiation approach and ways to enlist help from the mediator, you need to develop a consistent and complete plan for effective representation.²⁶

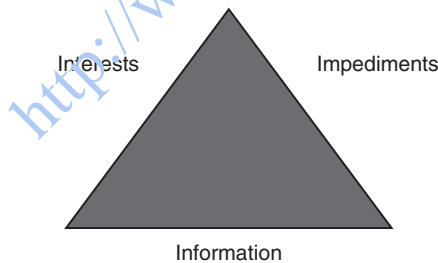


Figure 2 Planning Triangle / Three *Is* Triangle

Your plan should further three goals, which can be configured into a Planning Triangle. You should advance your client’s interests, overcome any impediments, and share necessary information while minimizing the risk of exploitation. These

²⁴ See chapter 1 ‘Negotiating in Mediations’.

²⁵ See chapter 2.3–8 ‘Familiarizing Yourself with Mediation’ and chapter 5.3(b) on the impact of mediator’s techniques on your representation.

²⁶ See chapter 5 ‘Preparing Your Case for Mediation’.

three *Is* make up the three sides of another interdependent triangle. These three *Is* shape every detail of your plan. If your plan fails to further any of these three goals, you will form a weak triangle and therefore a weak plan for mediation advocacy. If your plan advances all three goals intelligently, you will fashion an effective representation plan.

The first *I*, *Interests* (first side of triangle), encapsulates the primary goal of any plan—to meet your client’s interests. Viewing a dispute through the lens of your client’s interests can dramatically transform your view of the dispute including what is possible. Because this powerful concept is often misunderstood, it will be fully developed in this book.²⁷ Any plan should effectively advocate your client’s interests;²⁸ that is your bottom line.

The second *I*, *Impediments* (second side), considers the reason that you are in mediation. You are likely to be in mediation because an impediment is blocking a negotiated settlement. Any plan should focus on how to negotiate with the assistance of the mediator to identify and overcome any impediments.²⁹

The third *I*, *Information* (base of triangle), covers what information to gather, disclose, and withhold. Sharing information can help participants understand each other’s interests and the impediments as well as help uncover better solutions. But sharing poses a risk of exploitation. When the other side knows that something is important to you, for instance, the other side may try to extract a high price for giving you what you want. You need to resolve this notorious tension when considering what to share³⁰ and what information to elicit from the other side.

Any plan should be implemented at each of six key chronological junctures in the mediation process.³¹ You should advance your client’s interests, overcome

²⁷ See chapter 3.2(a).

²⁸ This goal of meeting interests is different from the goals in what has become known as ‘transformative mediation’ in which mediators focus on ‘empowerment’ of parties and parties’ ‘recognition’ of each other. See Robert A. Baruch Bush and Joseph P. Folger, *The Promise of Mediation—Responding to Conflict Through Empowerment and Recognition* (1994).

²⁹ See chapters 3.2(b) and 5.6(a).

³⁰ See chapter 1.3(b) and chapter 5.6(a).

³¹ See chapter 5.6(b). The term ‘junctures’ is used to identify points in the process of representation when you should focus on staying in a problem-solving mode. Junctures are not the same as stages in the mediation process in that stages identify the sequential steps in the mediation process. Junctures and stages, however, do overlap.

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

The mediation representation framework also applies during other junctures in mediation representation. You should engage in problem-solving to advance interests and overcome impediments in a way that takes advantage of the availability of a mediator when (1) initially interviewing your client, (2) approaching the other lawyer about the use of mediation, (3) preparing your client, and (4) drafting a settlement agreement or developing an exit plan from an unsuccessful mediation.

impediments, and share and gather information consistently at each juncture. You want to take thoughtful advantage of the opportunities offered at each one. The *six key junctures* that are fully developed in the book are:

(1) Selecting Mediator³²

You first should assess what mediator training, orientations, and experiences would help you resolve the dispute, given the interests you want to advance and the impediments that you need to overcome. And then you should select a mediator suitable for your dispute, realizing that how the mediator approaches the mediation will shape how you represent your client during each of the next five junctures.

(2) and (3) Pre-Mediation Conference and Submission³³

At each of these pre-mediation opportunities, you want to consider how the mediator might be helpful and what information you can safely share with the other side or the mediator. Pre-mediation conferences are typically between the lawyers and the mediator. Pre-mediation submissions are materials that you may send to the mediator and sometimes to the other side before the mediation session.

(4) Opening Statements³⁴

When preparing opening statements, you want to consider how to productively commence the mediation session. You have the opportunity set the groundwork for meeting interests and overcoming impediments by revealing how you plan to negotiate and how the mediator might help.

(5) and (6) Joint Sessions and Caucuses³⁵

As you plan for the mediation session, you should consider the critical choice of negotiating in a joint session with everybody in the room or in a caucus, also known as a private meeting or a private session, with just your client and the mediator. This choice will be influenced by how best to meet your client's interests and overcome impediments including how you think the mediator can contribute and whether you want to share information with the other side or only with the mediator.

Let me summarize: to be an effective mediation advocate, you need to effectively *negotiate*, know how to enlist *mediator assistance*, and pull it all together in the form of a *plan* that advances your client's *interests* and overcomes any *impediments*

³² See chapter 3.

³³ See chapters 5.15 and 7.1.

³⁴ See chapter 5.12.

³⁵ See chapters 2.6, 5.4, and 7.2(d).

while intelligently sharing *information* at each of the *six key junctures*. The first three italicized concepts that cover negotiations, mediator assistance, and planning constitute the triangular framework for mediation representation, and the other four italicized concepts of interests, impediments, information, and junctures cover the key features of your representation plan. Together, they provide the foundation for this book. Be sure to focus on these seven italicized concepts throughout this book as you proceed to Negotiate with a MAP.

The rest of this chapter gives you an overview of the book along with some of its key features.

3. Answers to Essential Representation Questions

The Mediation Representation Framework in this book offers answers to the numerous, persistent, and strategic questions that inevitably arise when representing clients in mediations. The answers to the following essential questions are proffered throughout the book.

- What types of cases are suitable for mediation?
- How do you approach the other lawyer about using mediation without looking weak or desperate?
- What should you include in an agreement to mediate?
- What credentials and experience should you look for when selecting a mediator?
- What do you want to accomplish in a pre-mediation conference?
- What information do you need to gather for the mediation session?
- What should you include in a pre-mediation submission?
- How do you prepare a mediation representation plan?
- How do you prepare your client for the mediation session?
- How do you use the mediation process to overcome any impasses and advance your client's interests?
- What information should you share with the mediator or the other side?
- How can you enlist the mediator to help you resolve your client's dispute?
- How do you evaluate your client's legal case using a decision-tree analysis?
- How can you convert an adversarial adversary into a problem-solving one and coax your mediator?
- How do you shape creative and enduring resolutions?
- How do you deal with issues that are only about money?
- How do you learn the other side's bottom line?
- How do you conclude a mediation?

4. Coverage of the Book

This book covers negotiation techniques, the mediation process, your role at each stage of your representation, and alternative processes to mediation if the mediation is not fully successful. This edition further develops a framework for

mediation representation, systematically integrates it throughout the book, expands and refines numerous sections, and adapts the information to representing clients in any culture or country. In particular:

Chapter 1 considers the foundational subject of how to negotiate in mediations. You should give special attention to the various choices for negotiating, realizing that mediation is simply a continuation of the negotiation process. The same skills needed for preparing and participating in a negotiation apply to mediation. If you use problem-solving strategies in negotiations, you will engage in the same strategies when representing clients throughout the mediation process. The more familiar positional approach is compared with the preferred problem-solving approach. If you do not already have a strong foundation in problem-solving negotiations, you should read this chapter with care because its main points are built upon and applied throughout the book. The second edition expands substantially the sections on the two negotiation approaches including adding new subsections on resolving moneyed disputes, dealing with emotions, and handling the sharing of information.

Chapter 2 explores the mediation process from the vantage point of an advocate. You should understand how the mediation process works, just as you need to understand how any forum works in which you represent clients. When representing clients in court, for instance, you must know the procedures and norms of settlement conferences, court appearances, and judicial decision-making. Similarly, you should know the mediation process, including its different stages, the function of opening statements, when to use joint sessions and caucuses, and the various approaches and techniques of mediators. The second edition substantially expands the sections on the ways mediators can contribute to helping parties resolve disputes.

Chapters 3–7 cover the distinctive knowledge and skills that you should know to effectively perform four specific roles in mediation representation.

- (a) Chapter 3 covers advising your clients about the mediation option.
- (b) Chapter 4 covers negotiating an agreement to mediate with other lawyers. The second edition incorporates new materials on how the mediator may assist you, including a substantially expanded section on options for caucusing and a new section on interviewing candidates and their references.
- (c) Chapters 5 and 6 cover preparing your case and client for the mediation session. The second edition substantially reorganizes, expands, and refines chapter 5 on preparing your mediation representation plan to comport with the mediation representation triangle. It also includes new approaches to assessing the value of opening statements and preparing effective ones as well as a much improved checklist.
- (d) Chapter 7 covers pre-mediation conferences, the mediation session, and post-session. The second edition reorganizes and expands the section on the mediation session and adds new subsections on generating movement after opening statements, proactively enlisting the mediator, searching for less familiar creative solutions, and navigating legal issues when drafting agreements. It also further refines techniques for bridging the final gap.

Chapter 8 prepares you for the possibility that the mediation may not result in settling all the issues. It describes a number of needs that may not be met in mediation and includes a glossary of alternative process solutions along with some guidelines on how to select the right process.

The book also includes more than 20 appendices covering decision-trees, sample agreements, selective mediation rules, and more. The second edition includes new appendices on attentive and proactive listening and cultural differences.

Culturally Neutral Framework for Representation

Finally, this edition provides a framework that is culturally neutral so that it should be helpful to you when representing clients in mediations between parties from different countries or between parties with different cultural upbringings within the same country.

The book also examines how the different upbringings of parties in the same dispute can produce distinctive interests, impasses, and communication styles that you may need to recognize and bridge. A method for bridging differences also is suggested. For example, the key concept of ‘interests’ is examined along with how interests can vary culturally—like in Japan where parties can have a deep interest in apology. That insight can help you recognize uniquely local interests that you ought to test in the mediation and possibly meet.

Cultural materials are integrated throughout the book, and various cultural practices are noted alongside familiar Western ones rather than segregated in a separate chapter, although you should find useful the Glossary of Cultural Dimensions in Appendix I. It informs the cultural references in the chapters. However, the book does not provide you an extensive catalogue of country-specific and comparative practices. There are other excellent books that already do that.³⁶

How to incorporate the substantive approach in this book into a representation plan for a cross-cultural mediation is illustrated in chapter 5.20.

5. Three Special Features of the Book

The book includes three special features that are designed to make the materials accessible as a reference.

1. *Critical Juncture Boxes*. You will see critical juncture boxes inserted throughout the text. Each juncture box signals a subject or moment in representation that is especially vital or particularly vexing. At each critical juncture box, you should

³⁶ See, e.g. Giuseppe De Palo & Mary B. Trevor (eds), *Arbitration and Mediation in the Southern Mediterranean Countries* (2007) and Nadja Alexander (ed.), *Global Trends in Mediation* (2nd ed. 2006) (comparative examination of 14 jurisdictions).

pause to give additional attention to the boxed topic or questions. Some of the boxes recognize that even among those who subscribe to a problem-solving approach, there is no single view of how to do it. Differing opinions would be expected especially because the best answer may depend on the needs of the particular dispute. For each view, I suggest the advantages and disadvantages. However, you are not left rudderless. I also make recommendations. By making the choices and recommendations transparent, you can independently determine whether to adopt or adapt the recommendations in your particular case.

2. *Key Concepts.* The primary section for developing each key concept is noted in a footnote whenever the concept shows up in another section of the book. Key concepts are used repeatedly throughout the book because concepts presented early are applied and further developed as you progress through the different stages of client representation. In order to reduce repetition each time a key concept arises in the book, cross-referencing footnotes are provided. If you skipped the section where the concept was initially presented or if you need to review the concept, be sure to look for the appropriate cross-reference in the footnotes.

For example, while the need to identify your client's interests will arise many times throughout the book, the definition of interests and how to identify them are primarily discussed in chapter 3.2(a), interviewing your client about interests. Whenever the subject of 'interests' is mentioned elsewhere in the book, the section of the book where it was primarily presented is cross-referenced in a footnote.

3. *Checklists.* At the end of most of the chapters, you will find handy checklists. The checklists are designed to be copied and used as portable reference tools to help you keep track of what you have done and what needs to be done for the representation covered in the accompanying chapter.