The Mediator As Negotiation Advisor - Should the Mediator Give Advice to the Disputants?

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1. Introduction

According to a commonly accepted definition, mediation is "assisted negotiation".[1] The negotiator brings added value to the table, because he or she helps the parties negotiate more efficiently than without a third party.[2] However, the mainstream in mediation theory does not advocate a very active role of the mediator. In particular, it is often highlighted that the mediator should not play the role of an attorney or a negotiation consultant and give advice to the parties: "a mediator should ...refrain from providing professional advice."[3] There are some good reasons for a cautious approach, but all of them can be challenged. This paper tries to defend the concept of the mediator as a negotiation advisor against counter arguments and questions.

[1] Compare the definition in Goldberg, Sander and Rogers (1999, 123)

[2] Compare Rubin and Sander (1999, 81)

[3] Compare the AAA/ABA/SPIDR standards, cited in Moberly (1997, 675)

2. Questions concerning the concept of an advising mediator

A) Can an advising mediator be neutral?

The most important counter argument seems to be that as a negotiation advisor, the mediator cannot be neutral. Mediators are sometimes asked by the parties to be their representative, their attorney or their advisor in order to protect them against bad agreements. The standard argument against such a role is that the mediator cannot be neutral in this function.[4] For example, problems arise concerning conflicting interests and confidentiality.[5] While it is obvious that the concept of the mediator as a negotiation consultant creates several challenges for the neutrality of the mediator, it does not seem impossible to overcome these challenges. The issues of confidentiality and conflicting interests shall be addressed in separate questions.

B) Can an advising mediator deal with confidential information?

It certainly makes it more difficult to advise a party, if the mediator possesses a confidential information of another party but is bound by an agreement not to use it. But the mediator can still bring added value to the table, if the parties know that such a situation can arise and if he or she consults without using the confidential information. Furthermore, the parties may be even more willing to share confidential information with the mediator, if they know that it is the mediator's task to protect their interest.

In many cases it is crucial for a successful outcome that a party is willing to share confidential information with the mediator. On the one hand, it has been argued that therefore the mediator should not represent or advise a party because the other party will be reluctant to share confidential information fearing that the mediator will use this information against the party. On the other hand, the disputant may be more willing to share this information if the mediator wants to protect his or her interest. It can be a stronger incentive to reveal information when the mediator says " I am trying to protect your interest (and the interest of the other party too)" than when he or she just refuses to give advice in order to protect his or her neutrality.

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[4] For a detailed discussion of this question see Moberly (1997). The question relates to the debates about evaluative versus facilitative and transformative versus problem-solving mediation, compare Riskin (1996), Hoffman (1999) and Brodrick (1999). A statement in favor of an advising mediator is at the same time a statement in favor of an evaluative problem-solving approach.

[5] See for example Menkel-Meadow (1997, 432)

An example for this situation (and other aspects to be discussed) is the case Bryan vs. City of Oakdale.[6] In this simulation case an automobile owned by plaintiff D. V. Bryan was damaged when it was driven into a large hole on a street in Oakdale. When the City of Oakdale refused to pay for the costs of repairing the car, Bryan filed suit against the city requesting $ 469.93. Before the mediation took place, Bryan already had his car repaired by a friend for only $ 325. The attorney of the city believes that Bryan has a very weak case in court but he offered him $ 200 to settle the dispute but does not want to pay much more in mediation and wants the issue to be resolved quickly.

The crucial move towards settlement in this case is that Bryan reveals to the mediator (probably in a private caucus) that his car has already been repaired by a friend because this information allows the mediator to get an appropriate assessment of the case. Bryan might be more willing to tell the mediator this crucial fact, if he knows he will get advice on how to proceed from there. His initial reluctance could be due to his insecurity of the consequences of laying everything on the table.

C) Can an advising mediator deal with conflicting interests?

A similar approach seems to be applicable to the problem of conflicting interests. As a consultant, the mediator must advise the parties how to maximize their gains. This will likely include aspects of both creating and claiming value. In terms of creating value, there is no conflict of interests at all, the mediator just tries to help the parties expand the pie and create win-win solutions, which are ideally pareto-efficient. In terms of claiming value, there seems to be a contradiction to neutrality, because good advice to one party will necessarily hurt the interests of another party in the mediation. However, if it is a ground rule of the mediation, that advice on how to claim value will not go just to one party, conflicting interests are no longer a killer argument. In this concept, the mediator is an objective analyst of the ongoing negotiation trying to find joint gains. The mediator can consults parties on distributive aspects of the negotiation, but it is the mediator's duty to bring this knowledge to all parties. For a selfish negotiator indifferent to the interests of the other party, such a consultant is less helpful than a classic attorney because it is impossible to get "negotiations tricks" in order to "beat" the other side, but this would be against the whole idea of mediation anyway.

[6] See Goldberg, Sander and Rogers (1999), p. 221

One of the most promising ideas about mediation seems to be that as “assisted negotiation“ mediation can help solve the so-called “negotiator’s dilemma“.[7] The negotiator‘s dilemma describes the temptation for negotiators to claim rather than create value. The mediator can add value to the negotiation because he or she allows parties to be cooperative without being vulnerable. For example, if one party is very keen to settle (like the attorney of the city in the Bryan versus City of Oakdale case because of time pressure), but is afraid that the other party will take advantage of this pressure, the situation can be revealed to the mediator in a private session. The mediator can then ask the necessary questions in order to reach agreement without weakening the position of the vulnerable party.

D) Should the mediator give claiming advice to the parties?

At first glance it seems to be troublesome for the mediator to give advice to one party on how to claim value, but first one has to distinguish between purely distributive advice and a combination of distributive and integrative advice. For example, a mediator says to a disputant in a divorce case “I think you can get more child support if you allow more visits to the children”, this may sound like a claiming advice, but can in fact be an advice about how to create value by trading on differences[8] like Lax and Sebenius describe. For example, if in this case money is more important to one party and the right to visit the children is more important to the other party. This is an opportunity to create value: if the one party pays more for more visits, both parties are happier with the agreement.[9] However, the disputants may not be aware of this opportunity. Therefore, it could be a good idea that the mediator advises them to use such an opportunity. Of course, there are other possible tools available to the mediator like asking questions, reframing issues etc. to identify the opportunity. But giving direct advice may be the easiest and most efficient way to do so.

It can even be useful if the mediator advises the parties on the question of whether there is still value to claim on the table because he or she may be more experienced in negotiation analysis than the parties. The mediator could say “I think that we have used all possible options for mutual gain and that we have expanded the pie as much as possible (in terms of negotiation analysis we have reached the Pareto frontier), and the rest of the negotiation between you just regards the question how to divide the pie.” Even on this purely distributive rest it can be argued in favor of mediator advice.

[7] For a detailed description of the negotiator’s dilemma see Lax and Sebenius (1986, 158)

[8] Compare Lax and Sebenius (1986, 104)

[9] Raiffa (1999, 323) calls this procedure „post-settlement settlement“.

In purely distributive situations, claiming advice of the mediator will most likely lead to the fact that the value-claiming aspects of the mediation will become irrelevant if the mediator gives the claiming advice to both parties, and he or she should be obliged to do so. If the mediator consults both parties on the claiming aspect this will likely produce a 50:50 division of the value on the table and there are good ethical reasons for such a solution, at least it is intuitively convincing. A 50:50 division is not meant literally but in terms of negotiation analysis. For example, if it is the mediator's and/or the parties assessment that a plaintiff will get between 50% and 90% of his claim in court, which is the BATNA (the "best alternative to negotiated agreement")[10] of a mediation "in the shadow of the law", there is a ZOPA (a "zone of possible agreements") between 50% and 90%. A 50:50 solution in this case does not mean that the plaintiff gets 50% but that the agreement is exactly in the middle of the ZOPA (here 70%, which is the expected value of a lawsuit). The advice of the mediator can even go one step further: for example, in the same case if the plaintiff asks the mediator whether he should offer 80% as a "take it or leave it" bid, the mediator can advice him that "take it or leave it" is an extremely risky, but if credible, very effective tactic that has in general more disadvantages than advantages. However, as mentioned above, the mediator must then discuss the flip-side whether or not to accept this offer with the other party. In sum, it is a questionable assumption that value-claiming advice of the mediator to one party will necessarily hurt the other party. If the exact same arguments are given to the other party, this practice will generate two likely effects: first, a "fair" 50:50 division of the pie and second, the exclusion of "claiming tricks", which will help the parties focus on the more important and difficult value-creating aspect of the mediation.[11]

Another example of a possibly helpful mediator advice on value claiming is the identification of the ZOPA by the mediator preventing parties from making "take it or leave it" bids outside the ZOPA, which will likely lead to a break-down of the negotiation. For example, in the Bryan versus City of Oakdale case, if the mediator got the confidential information of the parties, the mediator knows that the ZOPA is between $ 200 and not much more than $ 200. If Bryan wants a complete reimbursement of his actual costs of $ 325 and insists on this claim it could be helpful to get the advice from the mediator that this position is dangerous because it might be out of the ZOPA (and the BATNA of the court trial could, with a considerable likelihood, even lead to nothing instead of the $ 200 already offered).

[10]Compare Fisher and Ury (1991)

[11]Mediator advice can therefore be usefull in both deal-making and dispute settlement negotiations, compare Goldberg, Sander and Rogers (1999, 72).

E) Is liability a problem for the advising mediator?

It is important to note that the mediator should be held accountable for his or her actions and that the more advice the mediator gives, the more he or she is in danger of making mistakes. However, the concept of an advising mediator outlined in this paper does not mean that the mediator should give advice like “I am absolutely certain of x, therefore you ought to do y”. Rather, the mediator should be cautious in giving advice and related judgements (for example predictions on the outcomes of lawsuits), but the mediator should not be too cautious to give advice at all for the reasons mentioned above. The liability question remains important in principle even if the mediator does not give any advice.

F) Should an advising mediator replace lawyers for the parties in a mediation?

If a party so desires, there is no disadvantage to being represented by a lawyer in mediation. In such a case some, but probably not all advice of the mediator may be unnecessary. On the one hand, one can assume that the lawyer knows the law and thereby the BATNA of the mediation in many cases and that the lawyer has some skills in claiming values for the client. On the other hand, the mediator may be more experienced in negotiation analysis and process skills and can still advice the represented party on how to create and even sometimes claim value.

If just one party is represented by a lawyer and the other party is not, the advising mediator can equalize existing power and knowledge imbalances and still be neutral by offering the same advice to all parties. The party without a lawyer might just need advising more than the other party. If all parties do not want or cannot afford a lawyer, the advising mediator offers additional value to the parties in the mediation service. The often used phrase “why pay two lawyers, if one could do the job alone?” sounds somewhat strange on the basis of the traditional concept of mediation and legal representation, but if this is the wish of the parties involved, it can be respected by an advising mediator.

G) Is there a contradiction between the concept of the advising mediator and the principle of self-determination of the parties in mediation?

Concerning this question what Moberly[12] says about evaluation in mediation is applicable: If the parties want advice, and believe it helps resolve their dispute, the principle of self-

[12]Moberly (1997, 672)

determination calls for allowing advice , not prohibiting it. The flip-side of this argument is, that the mediator should in fact be cautious to give advice, if the parties do not ask for it.

3. Summary

There are many good arguments for why a mediator should be cautious in giving advice to disputants, but none of them is so strong that this practice should not be used. On the contrary, mediator advice has a lot more benefits than costs: it creates value if the mediator uses negotiation analysis, it can advance the interests of all parties in a neutral fashion, provide an incentive to reveal confidential information to the mediator, and it can or cannot replace lawyers depending on the will of the disputants.

Of course, most if not all of the positive effects of mediator advice can theoretically be accomplished by a skillful mediator without giving advice. It is not the proposition of this paper that good mediation results are impossible without an advising mediator. The point made here is that all the arguments mentioned above lead to the conclusion that the mediator will get better results if he or she in fact decides to give advice to the disputants.

References:

- J. W. Breslin and J. Z. Rubin (1999): Negotiation Theory and Practice, Cambridge 1999
- M. Brodrick (1999): In People We Trust; The Essence of Mediation, in: SPIDR News, Volume 23, Number 4, Fall 1999
- R. Fisher and W. Ury (1991): Getting to Yes, New York 1991
- S. B. Goldberg, F. E. A. Sander and N. H. Rogers (1999): Dispute Resolution. Negotiation, Mediation, and Other Processes, New York 1999
- D. A. Hoffman (1999): Confessions of a Problem-Solving Mediator, in: SPIDR News, Volume 23, Number 3, Summer 1999
- D. Lax and J. Sebenius (1986): The Manager as Negotiator, New York 1986
- C. Menkel-Meadow (1997): Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyer's Responsibilities, in: South Texas Law Review, Vol. 38, No. 2, May 1997, 407-453
- R. B. Moberly (1997): Mediator Gag Rules: Is It Ethical for Mediators to Evaluate? In: South Texas Law Review, Vol. 38, No. 2, May 1997, 669-679
- H. Raiffa: Post-Settlement Settlements, in: Breslin and Rubin (1999, 323-326)

- L. L. Riskin: Understanding Mediator's Orientations, Strategies and Techniques: A Grid for the Perplexed, 1 Harv. Negotiation L. Rev. 7, 23-24 (1996)
- J. Z. Rubin and F. E. A. Sander (1999): When Should We Use Agents? Direct vs. Representative Negotiation, cited in Goldberg, Sander and Rogers (1999, 74)
- J. Sebenius (1992): Negotiation Analysis: A Characterization and Review, in: Management Science, Volume 38, Number 1, January 1992, 18-38
- J. Sebenius (2000): Dealmaking Essentials: Creating and Claiming Value for the Long Term, Boston 2000
- W. Ury (1991): Getting Past No, New York 1991