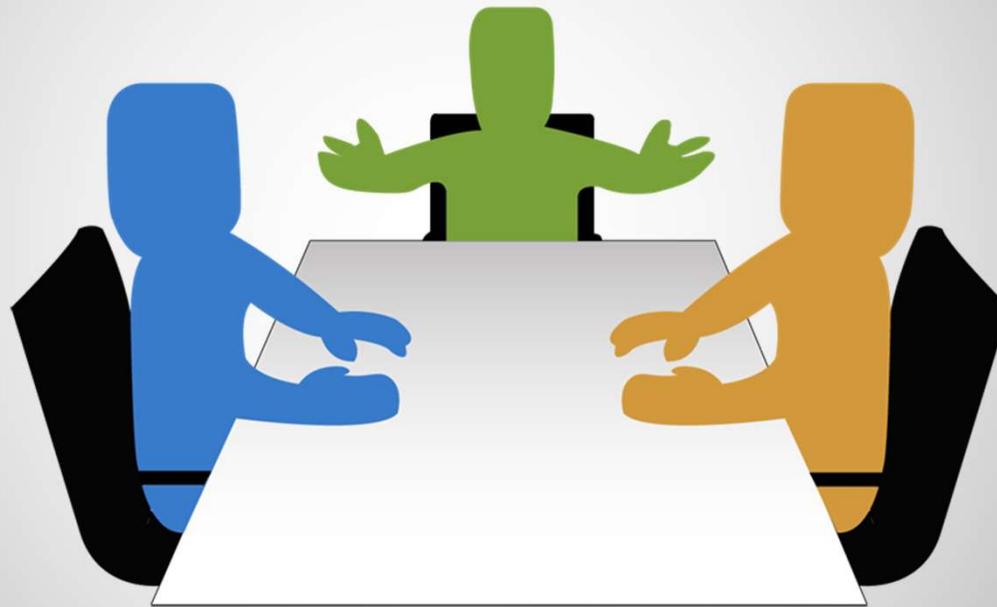


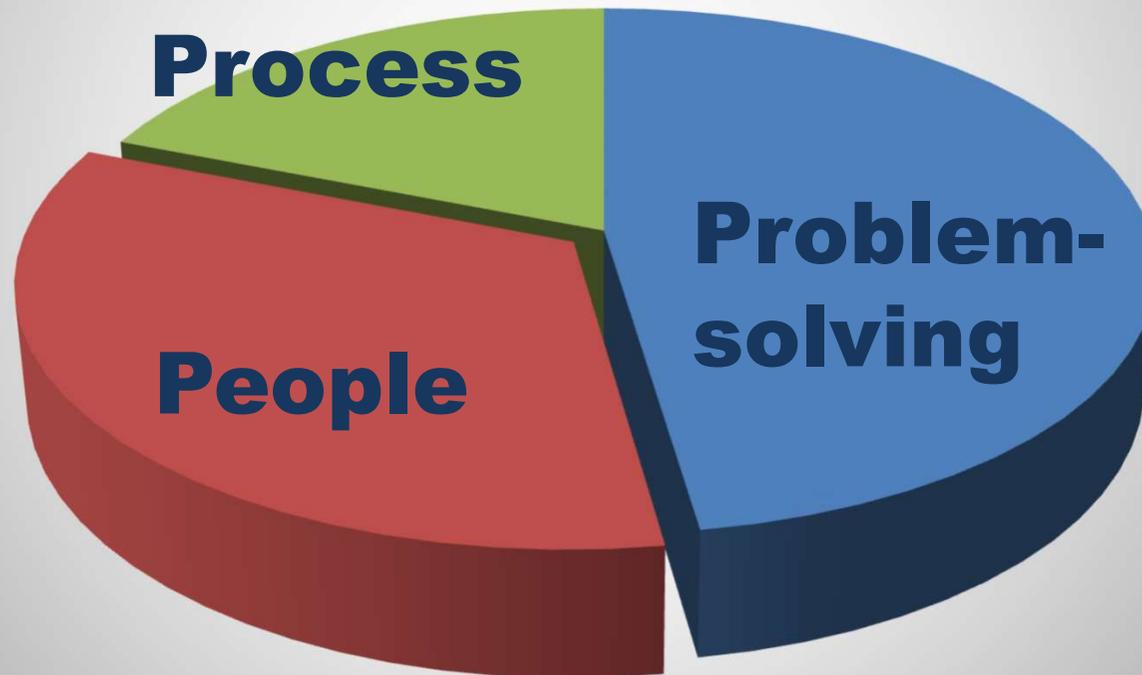
Problem-solving revisited



David Lim
(District Judge / Mediator)
State Courts - 26 September 2019

Problem-solving revisited

Three Essential Skills:



Problem-solving revisited

Key Features of Problem-solving:

- Understand the problem.
- **Identify the causes:**
 - historical & current events;
 - **differences in perceptions & their bases;**
 - differences in interests, concerns & priorities;
 - **emotional factors;**
 - importance of face, pride & ego.
 - **damaged relationship & mistrust.**
- Establish the parties' goals & aspirations.
- **Identify considerations that can / cannot be compromised.**
- Identify possible solutions & develop workable options therefrom.
- **Work on common ground.**
- Avoid or manage impasse.
- **Foster commitment to resolve the problem.**

Problem-solving revisited

Problem-solving in Facilitative Interest-based Mediation:

- **Mediator facilitates solution-focused negotiation by -**
 - **maintaining constructive communication;**
 - **eliciting useful information;**
 - **uncovering parties' underlying interests;**
 - **highlighting common and differing interests;**
 - **facilitating negotiation and the generation of options;**
 - **reviewing the options;**
 - **facilitating comparison between options and alternatives (BATNA/WATNA);**
 - **facilitating the selection of the best options as the solution.**

Problem-solving revisited

Why revisit the issue of Problem-solving?

1. My cousin's story.

2. A mediator-friend's story.

Problem-solving revisited

Limitations of the Facilitative Method:

- **Assumes parties –**
 - **are able & willing to collaborate;**
 - **have sufficient problem-solving skills.**
- **What if parties –**
 - **are not willing to collaborate?**
 - **have insufficient problem-solving skills?**
 - **lack imagination / creativity / motivation to generate options?**
 - **are cognitively biased towards each other's proposals?**
 - **are reluctant to propose options for fear of rejection?**



Problem-solving revisited

- **Should a mediator ever suggest solutions?**
- **When should a mediator adopt a more directive approach?**
- **How should suggestions be put across?**



Problem-solving revisited

Directive Approach to Problem-solving:

- **Mediator –**
 - **drives the discussion;**
 - **applies his knowledge, expertise and experience in helping parties find solutions;**
 - **identifies the problem and the causes;**
 - **determines the focus of the discussion;**
 - **suggests one or more possible solutions for parties to consider, discuss and develop;**
 - **highlights the pros, cons and implications of each option;**
 - **allows the parties to decide on the solution.**
- **Parties decide --**
 - **whether to take up Mediator's suggestion;**
 - **whether and how to settle.**

Problem-solving revisited

Dynamics of a Litigated Case:

- **Lawsuit has started.**
- **Parties –**
 - **form their expectations on their lawyers' advice;**
 - **are entrenched by their pleadings;**
 - **are fixated on their pleaded claims and remedies;**
 - **have expended legal costs;**
- **Relationship has been significantly soured by the lawsuit & parties are often closed to any collaboration.**
- **It is hard for parties to back down without losing face.**
- **The desire to avoid a trial might be motivation to find an exit through mediation.**

Problem-solving revisited



“What would you suggest I should do?”

“If you were me, what would you do?”

Problem-solving revisited

Role of the Mediator:

- **Help the parties talk through the problem & find a way to resolve their dispute.**
- **Should not advise or counsel parties to settle.**
- **Culturally some parties might tend to look to the Mediator for guidance.**
- **The Mediator has to be alive to the cues.**
- **There may be occasions when the Mediator needs to step up and take a more directive role or suggest solutions towards resolving the dispute.**



Problem-solving revisited

Advice v Suggestion

Advise = to counsel someone (often from a position of knowledge, experience or expertise) to do or refrain from doing something in response to certain circumstances so as to achieve a particular result or to avoid a particular consequence.

E.g. - “You should just pay him since your case is bad.”

“It’s best for you both to wind up the company and go your separate ways...”

Suggest = to offer someone an idea for consideration, leaving him/her with the option to accept or reject it.

E.g. - “Given that your case isn’t good, how do you feel about paying him off?”

“Do you think winding up the company and going your separate ways might be an option?”

Problem-solving revisited

“Value add” from the Mediator:

- **Knowledge, expertise & life experience.**
- **Objective, holistic, “big picture” perspective of the problem and its causes.**
- **Experience & precedents from settling similar cases.**
- **Position as an impartial, non-judgmental neutral whom the parties might look to for guidance.**
- **Sometimes the parties want / need / prefer to hear the solution from the Mediator (even though they might have thought of it).**

Problem-solving revisited

Whom to address the suggestion?

- **Both parties in joint session.**
- **Either party in caucus.**
- **Lawyers during preliminary or intermittent conference.**

How to present the suggestion?

- *“Have you thought of ...?”*
- *“What do you think of ..?”*
- *“Might be an option you’d consider?”*
- *“In a recent similar case I mediated, the parties ... What do you think?”*

Problem-solving revisited

Pros & Cons of Mediator's Intervention:

- **Pros:**

- **helpful when parties are stuck;**
- **expands scope for constructive, solution-focused dialogue;**
- **motivates parties to think up other solutions;**
- **helps make the mediation more efficient & solution-focused.**

- **Cons:**

- **suggested solution might not work;**
- **no ownership / commitment in the solution;**
- **parties might relegate the resolution to the mediator;**
- **usurps parties' role in developing their own solutions;**
- **mediator might come across as high-handed or biased;**
- **mediator might fall into the role of an adviser.**

Problem-solving revisited

Characteristics of a Workable Solution:

- **Specific**
- **Relevant**
- **Feasible**
- **Performable**
- **Measurable**
- **Acceptable**
- **Effective**

Problem-solving revisited

Case Illustration 1:

- **P & D = brothers.**
- **Started a company together.**
- **Equal shareholders & directors.**
- **Fell out because of different working & management styles.**
- **Each started his own similar business serving existing customers.**
- **Both accused each other of**
 - **mismanaging the company,**
 - **acting in breach of their fiduciary duties,**
 - **misappropriating the company's assets.**
- **Both commenced actions against each other for an account of the company's assets.**
- **Relationship damaged beyond repair.**

Problem-solving revisited

Case Illustration 1:

- **At the mediation, parties:**
 - **agreed to dissolve the company & divide the proceeds equally;**
 - **realised there were \$200,000 of debts yet to be collected;**
 - **some of the debtors were in financial difficulty, so final amount collectable unknown;**
 - **had no idea, and could not agree on, how to resolve;**
 - **did not want to have anything to do with each other anymore.**

Problem-solving revisited

Case Illustration 1:

- **4 options devised by the Mediator and the Lawyers for parties to choose:**
 1. **Write of the debts and wind up the company.**
 2. **Wind up the company but arrange with the debtors to pay each party his share of the debts.**
 3. **One party assign his interests in the company to the other party and let the other party recover the debts and divide the proceeds equally between the parties.**
 4. **Both parties (as directors) appoint a single lawyer (DC) to-**
 - **recover the debts**
 - **distribute the proceeds equally;**
 - **see to the dissolution of the company.**

(Parties must follow DC's procedure for giving instructions & share in her costs equally).
- **Pros & cons reviewed in detail.**
- **Parties opted for the 4th option.**

Problem-solving revisited

Case Illustration 2:

- **P & D = entertainment celebrities.**
- **Had a well-publicised falling out.**
- **Publicly made disparaging remarks about each other.**
- **Sued each other for defamation.**
- **Dispute polarised their fans.**
- **Fans' online comments exacerbated the dispute.**

- **Parties needed –**
 - **to resolve the dispute without tarnishing either party's image; &**
 - **to mollify and manage the expectations of their fans.**

Problem-solving revisited

Case Illustration 2:

- **Solution devised by the Mediator with inputs from the Lawyers:**
 1. **Immediately delete all social media posts disparaging each other.**
 2. **Both parties issue a suitably-worded single joint reconciliation statement** (with mutual retractions of all defamatory statements) for both parties to sign, screen shot, and post immediately on Facebook.
 3. **When the joint statement had received enough “likes”, the parties left the room to meet the reporters waiting outside.**
- **Mediator had to take an active role in helping parties negotiate the contents of the statement & suggest suitable words & phrases.**

Problem-solving revisited

Case Illustration 2:

*“We, **A** and **B**, would like to inform our friends, colleagues, business associates, clients, supporters and members of the media that we have mutually and amicably resolved all disputes and misunderstandings between us through mediation.*

*In particular, I, **A**, retract all remarks that might have put **B** in a bad light, and I, **B**, do likewise for **A**.*

We wish to put the past incidents behind us and we look forward to future professional collaborations together.

We thank everyone for their concern and seek their sincere support for us to move on.”

*Signed: **A***

B

Problem-solving revisited

Case Illustration 3:

- **P lives below D in the same apartment block.**
- **P was disturbed by noises from D's apartment and went upstairs to confront D.**
- **The confrontation got out of hand & both parties got into a heated altercation.**
- **Their relationship deteriorated seriously with constant quarrels and complaints about each other to other neighbours, the managing corporation, the police and each other's employers.**
- **Both also disparaged each other on social media.**
- **P and D then brought cross actions against each other for harassment and defamation.**

Problem-solving revisited

Case Illustration 3:

- **At the mediation –**
 - **parties -**
 - **were totally acrimonious and positional;**
 - **had deep mistrust for each other;**
 - **were not forthcoming with ideas or options to resolve the dispute.**
 - **their lawyers –**
 - **tended to support their clients' positions;**
 - **could not prevail over their clients;**
 - **had no ideas how to resolve the dispute beyond rehashing their clients' positional demands.**

Problem-solving revisited

Case Illustration 3:

- **The Mediator proposed –**
 - **to draw up a set of mutually acceptable rules of conduct & engagement for the parties to adhere to;**
 - **that D take certain reasonable measures to minimise the noise;**
 - **that P take certain measures to manage her own and her family's sensitivities & conduct;**
 - **that the parties should immediately delete all online posts about each other.**
- **The lawyers then assisted the Mediator in drafting the interim agreement for the parties to sign.**
- **The parties signed the interim agreement and the Mediator gave a return date in a month's time to review the situation.**

Problem-solving revisited

Case Illustration 3:

- **After a month –**
 - **the interim agreement worked;**
 - **there were no more altercations between the parties.**
- **The interim agreement was then transformed into a final agreement for the parties to sign.**
- **The lawyers (on the Mediator's suggestion), agreed to write on behalf their clients to the MCST & police to inform them that the dispute has been resolved.**
- **With that, the case was finally settled.**

Problem-solving revisited

Conclusion:

- **Mediators need to be flexible in style.**
- **Sometimes it may become necessary, and it is alright, for the Mediator –**
 - **to apply a more directive approach; and**
 - **even step up to suggest or devise solutions to help parties resolve the dispute.**
- **The cue comes from the parties and the dynamics of the situation.**
- **The solution has to be relevant, feasible and workable.**
- **The Mediator must maintain neutrality and impartiality, and avoid giving advice.**
- **The Mediator could also work with the lawyers to devise possible solutions to help settle the case.**
- **The parties remain free to decide whether to consider the suggestion, let alone adopt it.**

End of Presentation

Questions?

Comments?