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Focus on Party Decision-Making

John M. Lande

FOCUS ON PARTY DECISION-MAKING

AUGUST 7, 2023 | JOHN LANDE | 3 COMMENTS

A major motivation in the modern dispute resolution movement has been to increase and improve parties' decision-making in their legal disputes.

Historically, parties often had little opportunity to exercise much control after they retained attorneys to handle their disputes. Attorneys often acted paternalistically, taking control over virtually every aspect of the cases. The legal system converted parties' conflicts into legal issues that often bore little or no resemblance to the problems that the parties actually were aggrieved about. That radically disempowered parties.

Interest-based negotiation and mediation generally were seen as opportunities for parties to re-assert control over their disputes. In particular, facilitative and transformative approaches to mediation are intended to enable parties to be the primary decision-makers, exercising self-determination in their current and/or future disputes.

Predictably, the legal system coopted mediation, incorporating it as a routine part of litigation in a process I called "liti-mediation." Attorneys generally dominate the process, which focuses on legal issues and is intended to "resolve" the cases efficiently. Parties' concerns and participation often are overshadowed by attorneys' and mediators' control of the process.

Our field developed various early dispute resolution movements in the courts and private dispute resolution. These are motivated to reduce the tangible and intangible costs of litigation and also to increase parties' control over their disputes.

The worst manifestations of late dispute resolution are settlements "on the courthouse steps." After everyone has invested substantial time, money, and emotion, attorneys engage in hurried high-pressure negotiations where adrenaline-soaked parties have little time to consider take-it-or-leave-it offers.

Even when attorneys seriously negotiate only after they complete discovery but before the trial date, parties generally have relatively little opportunity to influence the process and

outcome.

Preparing parties to negotiate or mediate before they engage their counterparts can really help them (re)claim control over their disputes. When parties are well-prepared in advance, they are as knowledgeable, confident, and assertive as possible. Preparation is an opportunity for self-empowerment.

My terrific co-authors, Michaela Keet and Heather Heavin, and I wrote *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions* to help practitioners help their clients participate as effectively as possible in negotiation and mediation. Michaela and Heather developed a simple framework for parties to assess their interests and risks in their disputes. This involves calculating their "bottom line," which is the estimated value of their best alternative to settlement reduced by the tangible and intangible costs of continuing to litigate. The book includes detailed chapters describing individual and organizational parties' intangible interests in litigation, which often are ignored or discounted. It has three chapters describing how lawyers and mediators can help clients consider their interests and risks. It also includes numerous practical appendixes. This appendix includes a list of things to discuss before mediation sessions and recommends that, when preparing for mediation sessions, attorneys and mediators should have conversations about key sensitive issues and then arrange for attorneys to provide written material about more objective issues.

My new article, *How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?*, discusses how attorneys, mediators, and courts can help parties make good decisions during mediation sessions by effectively preparing *before* mediation sessions. It includes a 10-page appendix with handy resources for parties, practitioners, and program administrators.

Helping parties prepare before mediation sessions doesn't absolve practitioners of their duties to help parties make decisions during mediation sessions. Indeed, it should help them fulfill those duties.

Take a look.

ASSESSING INTERESTS AND RISKS BOTTOM LINE COURT ADR DID YOU HEAR ABOUT?
INTERESTS AND MOTIVATION MEDIATION NEGOTIATION REAL PRACTICE SYSTEMS RECENT SCHOLARSHIP
RESOURCES SKILLS AND TECHNIQUES

3 THOUGHTS ON "FOCUS ON PARTY DECISION-MAKING"

Michael Lang

AUGUST 11, 2023 AT 3:12 PM

Where I diverge from this otherwise excellent piece and the advice offered is the unstated assumption that parties' are primarily (perhaps exclusively) concerned with an evaluation of " interests and risks in their disputes." Of course, the substantive outcome is vital. So too are three implicit goals: process, relationship and identity. Failing to inquire about and attend to these implicit goals has a direct and consequential impact on decision-making regarding the substantive provisions. For more on the nature and importance of these implicit goals, please see the article co-authored with Tzofnat-Peleg Baker, "A structured reflection for improving third party interventions and mediation practice: Reconsidering debrief," published early this year in CRQ https://doi.org/10.1002/crq.21361

★ John Lande

AUGUST 12, 2023 AT 7:37 AM

Thanks for your comment, Michael. Our views largely overlap. The LIRA book defines interests to include a wide range of intangible interests including concerns about process and relationships, as described in this post.

Thomas P. Valenti

AUGUST 8, 2023 AT 4:58 AM

Very meaningful post. Just to highlight, to me the parties are NOT the lawyers for the disputants, but the disputants themselves. We see too often, even in cases involving family members, estates, small business and partnership disputes, that the individual interests are lost when framed a legal theories.