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HOW CAN PRACTITIONERS HELP CLIENTS ASSESS THEIR INTERESTS AND RISKS IN LITIGATION?

John Lande

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OCTOBER 25, 2018 | JOHN LANDE | 5 COMMENTS

I recently visited our DR friends and colleagues at Quinnipiac, courtesy of an invitation from Charlie Pillsbury, the co-director of their Center on Dispute Resolution. He invited me to give a talk as part of the Quinnipiac-Yale Dispute Resolution Workshop.

I tested some ideas from the book I am writing with Michaela Keet and Heather Heavin, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*. Thanks to QU 3L Leah Mantei for taking great notes of the discussion.

Thirty-five people attended the presentation, including 14 who have represented parties in litigation, 8 who have mediated, 8 who have taught law or mediation, 4 law students, and 6 people in other roles. (This adds up to more than 35 because some people are in more than one category.) Of the practitioners, 3 said that they practiced for less than 10 years, 3 practiced for 10-20 years, and 20 practiced for more than 20 years. Of course, this was a self-selected group who probably are more knowledgeable and sophisticated about dispute resolution than the general populations represented in this audience.

This post highlights some practical ideas that the audience suggested. I didn't have time to probe people's responses in depth, but this discussion identified some interesting approaches and perspectives.

Here's the powerpoint I used, which outlines the key points I made, so I will not repeat them below. I started asking lawyers questions about their procedures and then asked mediators similar questions. I asked most of my questions before I presented our ideas to avoid influencing people's responses by my presentation.

How Lawyers Identify Client Interests

Generally, clients give lawyers problems to solve, and the lawyers try to help them understand what the options are under the law and develop a way to solve the problems.

One lawyer said that she discusses the financial perspective, discovery process, and what's important to clients at that time and into the future. She has a list of issues to discuss but tailors the discussion to particular clients' situations.

Lawyers representing organizations may identify some additional concerns. For example, a government lawyer focuses on the agency's general policy goals in addition to the perspective of the officials representing the agency. A corporate lawyer said that he discussed institutional planning and the potential precedential value relating to other cases that might be brought against the corporation.

Discussing Possible Trial Outcomes

A lawyer said that it's important to start by identifying the clients' goals and not "box yourself in" too early, saying that the outcome would depend on what they learn in discovery.

Another lawyer said the he meets clients in their homes, which he prefers to meeting in a conference room because it gives him a better idea of who they are. He identifies possible causes of action and discusses what they need to do to move things forward. He describes how things might proceed and what might happen in litigation.

One lawyer said that she frames the discussion in terms of the effects of various decisions that the clients might make. For example, if they decide X, then she thinks that Y is likely to happen. This is similar to a decision tree, where people consider the effects of possible events in litigation, but this focuses on the effects of clients' choices. For example, it might be about a choice early on such as whether to litigate or not, or a choice about possible settlement later on. She said that it's important to be really clear about what is going to flow from each choice they make.

Another lawyer said he was careful not to give clients false hope or unrealistic expectations.

Discussing Legal Fees

One lawyer said that he keeps it simple. In criminal cases, he charges a flat fee. In civil cases, he uses a contingency fee. He advances costs for things like medical records which clients pay for later on.

In cases in which the lawyers charge hourly rates, you can't control the fees because they depend on how cooperative the other side is.

Discussing Possible Consequences of Litigation

Discussion of possible consequences of litigation depends on the experience, sophistication, and goals of the clients. One lawyer said that he discusses the effects of discovery and negotiation with clients. Considering possible consequences involves a risk calculus that will affect whether and how they will proceed in litigation.

How Mediators Discuss Interests

Whereas lawyers represent clients, mediators don't have a single client who they are advocating for. Mediators work for at least two clients.

One family mediator uses narratives, not decision trees. Her only confidential meeting is the very first one. She usually asks people what are their goals, what keeps them up at night, and what scares them. Answers to these questions help her decide where to go from there.

When I did divorce mediation, I asked people to imagine what they would like their lives to be like in five years. Usually they had very similar interests, particularly about what would happen to their kids. They often had other similar interests such as financial security. Although increasing one spouse's security might reduce the other's feeling of security, often it was helpful to explicitly acknowledge that they had similar interests and to try to figure out a way to satisfy both spouses' interests.

Discussing Possible Trial Outcomes

Parties in mediation can be represented by lawyers and many parties do have lawyers. Lawyers, not mediators, are primarily responsible for educating parties about possible trial outcomes. Indeed, if mediators make predictions about trial outcomes, they risk being perceived as biased. When mediators do this, they usually do so in caucus, but even so, if parties or lawyers perceive that the mediator is bearing down on them, they may think the mediator is biased.

One mediator said that he asks questions but doesn't like to predict outcomes. He says that going to trial is like Russian Roulette because every case is different. In one case involving a self-represented party, he arranged for the party to consult with a legal colleague. Of course, some mediators are more forthcoming about describing potential outcomes in detail.

A government lawyer said that in whistleblower protection cases, they have data to help them evaluate at the outset of the cases whether there is actually a valid claim. This is an example of a situation where there is a general pattern of court results (such as parenting

schedules and child support guidelines) where people generally can predict what the potential outcomes might be.

Decision Fatigue in Marathon Mediations

I have been concerned that the norm for many civil mediations is to push for settlement in a single session, which often can last long into the night in an effort to nail down an agreement. Research has shown that parties can experience "decision fatigue," which can undermine their informed decision-making because they may not have the mental resources to consider the options carefully. As a result, parties in these marathon mediations may settle just to "get it over" and later regret doing so.

To address these problems, I developed the idea of "planned early two-stage mediations" in which the first session would focus on exchanging information and planning to get additional information needed for the second session, which would focus on resolving the dispute. The first session would be scheduled soon after the parties have done some basic fact-finding and legal research. If the parties are ready to settle at the first session, a second mediation session would not be needed. If parties plan for the possibility of a second session, they are less likely to feel pressured to settle too soon. I briefly described this idea and asked for people's reactions.

A mediator said that attorneys he regularly works with often share the information they need before mediation convenes and they know that they can have a second session if needed. In multiparty disputes he mediates, they plan specific stages of the process, often with 20-30 meetings.

One person noted that some mediators pride themselves in high settlement rates and may use marathon mediations to get people to settle. Some people view this favorably and he said that it's important to confirm that people feel good about the process.

Another person described a mediation conducted by a retired judge who told people that they could not leave, get food, or make phone calls until they settled the case, which they did -16 hours later. This is an extreme example that presumably is more coercive than run-of-the-mill marathon mediations.

A mediator described collective bargaining mediations, which often start at 4 pm. He said that people pick up momentum at 10 or 11 pm and keep going to resolve a whole series of issues.

A family mediator described a case in which the husband flew in for a 6-hour mediation. The mediator could see that the wife was "fading away" and said too many "yesses" that weren't healthy. So the mediator stopped the mediation because the wife was just giving up.

Someone described expensive weekend spa mediations with the goal of agreeing to divorce by Sunday night. The parties take breaks with spa and massage. Although this process provides time for people to reflect, there is a risk of too much pressure to settle if there is a strong expectation that there will be an agreement by the end of the weekend.

One mediator said that he has tried to change the presumption of a one-session process, but the lawyers won't let him do so. It drives him crazy but says that there's nothing he can do to change it.

A mediator described his experience with community mediations working with parties who generally were self-represented. The mediations generally did not run more than two hours. In many cases, the parties would call after the first session to say that they resolved the matter and didn't need to return to mediation.

To reduce decision fatigue, a mediator suggested scheduling shorter sessions, using "walking caucuses," taking breaks, and generally giving people time and space to make decisions.

Timing of Discovery and Mediation

In the culture of modern civil litigation, people often wait to mediate until late in litigation, after discovery is mostly completed.

Someone noted Dwight Golann's observation of a "80/20 rule": People get 80% of the information they will collect in litigation in the first 20% of time. The rest of the time is devoted to getting the last 20% of the information.

A former large-firm litigator said that the first 20% of discovery was the material that each side wanted the other side to see. After that, they resisted providing the information that actually would provide useful evidence for the other side, and would engage in major discovery battles.

Reactions to Questions About Parties' Interests and Risks

I reviewed the list of questions we developed to ask parties about potential intangible costs of pursuing litigation, which are included at the end of this post. Here are reactions to the

questions and the process of asking them.

One person likes the questions as long as they asked out of real curiosity and are not just leading questions. I absolutely agree and responded that the way practitioners ask these questions is REALLY important. Practitioners should ask them in spirit of genuine curiosity and mutual education and not to lower expectations inappropriately. The timing and sequence are important. Practitioners should ask the questions in a natural way given the flow of the discussion, not as a clinical checklist. The questions should be tailored to individual situations, and practitioners should decide which questions to ask or not.

Someone thought that lawyers need to develop rapport with clients and learn their goals before asking these questions. So she thinks that it is too early to ask them during the initial intake. She said that the questions are good for an early counseling session after learning "where they're coming from."

A family practitioner noted that divorce judgments may be available online, so he alerts clients about this possibility and asks whether this is a concern of theirs. This illustrates why it's important to talk about those things ahead of time, such as asking clients about their interest in privacy. Some people might not care, but others might.

Regarding the question about how much money parties would be willing to sacrifice to avoid some of the intangible costs, one person said that it would be hard for people to evaluate unless they have a specific offer to consider rather than thinking about it abstractly in a vacuum. I responded that the wording of the full question (not the condensed version in the powerpoint) included an assumption of a specific amount of an offer. The problem of waiting until clients receive actual offers is that they may have already incurred the intangible costs (e.g., delay, loss of privacy). Lawyers may ask clients about these issues early in a case to get initial reactions and prepare clients to make decisions later in their cases. When planning for actual negotiations, lawyers can ask these questions again in the context of plausible concrete options.

One person noted that some cases are subject to arbitration agreements and asked how that would change parties' decision-making. I responded that there are some similarities and differences between cases that might be resolved in arbitration and trial. For example, arbitration generally offers more privacy than litigation. Thus the discussion with clients should be tailored to their particular cases.

A family lawyer asks some clients how they think that the other side might answer her questions. For example, she sometimes asks what they think their spouses would say that their goals are. A government lawyer said that he asks clients what they think other side will do.

These questions suggest that trying to understand what opponents are thinking – their analyses of their interests and risks – can lead to a resolution.

ASSESSING INTERESTS AND RISKS INTERESTS AND MOTIVATION LAWYERING MEDIATION NEGOTIATION SKILLS AND TECHNIQUES

5 THOUGHTS ON "HOW CAN PRACTITIONERS HELP CLIENTS ASSESS THEIR INTERESTS AND RISKS IN LITIGATION?"

Taylor Hansen

NOVEMBER 30, 2018 AT 12:47 AM

I found this post incredibly interesting especially the portion on decision making fatigue. I have found in recent experiences that anyone can get in a rut of decision making fatigue, even myself. I have witnessed that this occurs not only in stressful times of conflict, when we utilize dispute resolution methods most, but also in times of happiness such as buying a house or event planning. I am then curious how the facts of a given situation leading to mediation would impact how quickly decision making fatigue occurs or if certain personalities are more prone to this type of fatigue.

I did find the proposal of a two part mediation intriguing but upon reading the provided reactions found that I agreed with the person who discussed the expensive spa weekends for divorcing couples. Even with plenty of relaxation, parties still might feel the pressure to settle by Sunday night, thus just delaying the marathon of decision making until the end of the weekend.

In light of that example I also wonder how costs play a role in deciding whether to split up mediation time; whether parties with more resources would be willing to split up mediation sessions, thus increasing potential fees for the mediators service, travel, and other necessities. Then, might parties who have fewer resources to spend be the ones more likely to dive in to a marathon mediation session to try and get it over with as soon as possible not realizing that splitting up their sessions might actually save time?

I think informing clients on decision fatigue is necessary and would hope that more mediators and attorneys would do as the one mentioned by a commenter and stop a mediation when decision fatigue has set in and become unhealthy for one of the parties.

As a law student I think issues like this that explore the challenges of helping clients on a human level and not just a legal one are some of the most important.

Michael Forella

OCTOBER 27, 2018 AT 12:04 PM

The "How Mediators Discuss Interests" section was particularly interesting to me after having just learned about mediation in my first ADR course in law school. In class, we discussed how particularly in divorce mediations, envisioning a post-mediation future can help achieve a successful mediation through realized shared interests.

★ John Lande

OCTOBER 28, 2018 AT 8:39 AM

Michael, I'm glad that you found this useful.

If you haven't read this post focusing on parties' intangible interests and risks, take a look.

In law school, we radically de-contextualize litigation. Parties are portrayed as cardboard characters who function only to illustrate points of legal doctrine. Litigation can seem like merely a game with bloodless winners and losers.

In real life, litigation is extremely stressful for most parties – and often for their lawyers too. Lawyers and mediators can help their clients to realistically anticipate how litigation might unfold so that they can make smart decisions about what they want to do.

As you may know, most parties settle and only a small fraction of cases go to trial. Often, this occurs late in litigation, after parties have already lost a lot of time, money, and other things they value. If parties do go to trial, it's important to give them realistic expectations about what is likely to happen.

Lawyers and mediators often refer generally and briefly to intangible costs, but I think it's important to help clients think about them specifically and concretely, as described in the post I mentioned.

So when you are in practice, you should help your clients consider these things at the earliest appropriate time.

Jim Alfini

OCTOBER 26, 2018 AT 12:17 PM

Hi John,

I see that you are putting your “leisure time” to good use. You are an inspiration to all retirees.

Jim Alfini

★ John Lande

OCTOBER 26, 2018 AT 12:56 PM

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