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*17 AN INTEREST-BASED APPROACH TO PRACTICING LAW

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Interest-based mediation is fast becoming the standard protocol for out-of- court dispute resolution. The Montana Supreme Court and many Montana district courts mandate mediation as a prerequisite to trial. The interest-based approach is not just useful for mediation; it's an essential skill for daily practice.

In my years of public and private practice, I have seen the whole range of client approaches to dispute resolution, from the hard-driving intimidator who wants to sue the living daylights out of the other side to the meek and fearful soul who seems willing to pay any price to make the discord go away. Some clients move from one approach to another along this continuum while a dispute is in court. We do our best as advocates and counselors when we recognize the different needs of our clients, and their opponents. Some needs involve legal issues. Some are altogether different.

As an "interest-based" approach to solving problems becomes more prevalent, we are called on to recognize and perhaps include these interests in our advice and representation. It is a rare lawyer now who practices without ever coming into contact with the opportunity, sometimes mandated, to seriously attempt to settle a case. An interest-*18 based approach to the entire process reaps rewards in mediation.

An "interest-based approach" simply means the lawyer looks at all the client's interests, some stemming from the specific legal problem before him or her, some personal and private, and those of the other side, before taking action or recommending a legal approach. The theory of interest-based problem solving is that the best solution to any conflict is the one that best satisfies the basic interests of all parties.

The interest-based approach was popularized in 1981 by Harvard professors Roger Fisher and William Ury in a bestselling book, Getting to Yes: Negotiating Agreement Without Giving In. Since then, the language of "win-win" agreements has become so commonplace that the grammar checker of my word processor prompts me to replace "jargon" each time I use it. The elements of the interest-based approach to conflict resolution contain a variety of simple steps, and practitioners of mediation use them in various combinations. The Fisher/Ury "method" is typical:

Separate the people from the problem

Deal with people problems (faulty communication, strong emotions and differing perceptions) separately from the substance of the dispute. Failure to pay attention to these issues may defeat an otherwise rational and acceptable settlement proposal.

For example, suppose your client is a tort plaintiff who is being offered a modest but not altogether unreasonable cash settlement in a complex case with uncertain prospects. The offer comes in the mail, in a letter which contains the following language:

"We believe your client is a malingerer and a fraud who has been attempting to manipulate the courts and cheat my client out of his hard-earned money. But my client has concluded that it's cheaper to pay him this sum than to go to court. Therefore we offer your client $10,000 if he will simply get out of my client's life and sign a release saying he will never bother him with this kind of garbage again."

If this offer is relayed directly to the client, his own emotions will be immediately engaged. The odds are against his being able to consider the merits of the offer, regardless of your reasoned advice. Yet you are obliged to inform him of the offer. You recognize that this letter writer was coming from a very strong emotion, perhaps originating in the

defendant client, that there are both ambiguous terms (how would the release be worded?) and a clear difference of perception on the merits of the case.

After taking some time to let your own emotional response subside (lawyers are people too), you can take immediate steps to communicate clearly with opposing counsel to clarify the proposal, acknowledge that his client is upset without affirming his negative description of your client, and negotiate some language for a release which is not likely to elicit an automatic denial. When you present the offer to your client, you can now reframe it in the new terms you have developed. You may inform him that the defendant was upset earlier and had used stronger language, but that both sides are ready now to consider a reasonably worded offer.

Your calm intervention deals with the "people problem" and preserves the substance for rational consideration. Your client may or may not accept the offer, but at least he will be able to consider its merits, with your counsel, apart from his emotional response.

Focus on interests, not positions

Positional bargaining is the sort of horse-trading often used in good faith, *19 trying to figure out some way to split the baby, compromise on damages, or divide property. One party makes known its demands, the other party counters with what it wants instead, and these two positions set the poles of the discussion. Under positional bargaining, if settlement occurs, it will be at some point on a line between the two positions. While positional bargaining has a long history in commerce and the law, it focuses the parties on the area defined by this limited line, when their true interests might lie outside the area of settlement discussions. This further polarizes disputants, making agreement less likely even if productive mutually beneficial solutions are developed.

Behind every position, however, are the parties' true interests. Because the concept of damages is the universal currency of the civil legal system, lawsuits tend to be about money, even when the parties are really interested in something they cannot get from money alone. Often they seek something a court cannot award, such as an apology or a change in institutional policy. Other times they seek something intangible, like a sense of justice or acknowledgment of their actual feelings and motivations; sometimes they simply want a sense of true closure. Lawyers have historically used suits for money as leverage to bargain for equitable relief and vice versa. But interests may be more fundamental than this.

*20 For example, parenting plans or child custody arrangements can involve numerous issues. Historically, parents frequently polarize around the designation of a "custodial" and a "noncustodial" parent. Too often, they resort to attacking each other's qualifications as a parent in a misguided attempt to bolster the strength of their own positions. Montana's new parenting plan legislation, effective last October, is designed to offer more opportunities to look for underlying interests, recognizing that the parents' and child's needs for companionship and support are not necessarily incompatible, and do not generally require a "win-lose" custody order.

It is common for a client to take an initial position of adamantly demanding some form of "full custody" in a dissolution. Behind this position, however, you may discover that he or she simply wants to preserve meaningful contact with the child or perhaps fears being labeled as the "noncustodial parent." Once this is clarified, some time spent on defining and implementing meaningful contact, and devising a parenting plan that identifies each parent as a full partner in caring for the child recognizes and satisfies these underlying interests without requiring that either be awarded "full custody."

Invent options for mutual gain

The key here is to start with the parties' underlying interests, including those outside traditional litigation positions, and seek creative options that may be better for both parties than those based on the initial positions.

For example, suppose your client is one of two beneficiaries in a close, contested probate proceeding. The two seek the same asset, a small commercial building on an undistinguished but large, well-located city lot. If the property is awarded to either of them, the other is left with nothing. There are no other assets to trade off or bargain over. The

parties would like to settle the matter, but haven't been able to agree on terms. On its face, it looks like the logical compromise resolution is to sell the property and divide the proceeds. Neither wins, but neither loses all.

The interests each has in this dispute are different, however. One party seeks the property as new headquarters for a large industrial plant located far off the beaten track. The other wants to use the property as a showcase for a landscaping business. If the parties brainstorm for new options, they might come up with several that satisfy all these interests, one of which is to use the property simultaneously.

There are actually hints of serendipity in this scenario. We can imagine how beautiful landscaping will enhance the industrial business's image at no cost to them, while also relieving them of property maintenance costs. At the same time, the busy office will attract more visitors to the landscaping, and enhance the reputation of the designer. There may still be practical details and equity balancing factors to consider to fully equalize a settlement, but this idea can form the basis for a truly "win-win" solution.

Making the effort to understand the opponent's interests as well as the client's, and operating to meet those interests, is practicing a different kind of law than some of us were trained to practice. For some, it is challenging, creative, and much more rewarding than traditional litigation solely in the "adversary system." For others it may seem like a waste of time and effort, diluting the excitement of the courtroom. But even the trial specialist can enhance client satisfaction by looking at the interests of both sides. Sometimes, the best alternative is going to trial. Other times, we make do with a compromise, or a settlement along the original position line. But when a creative lawyer or mediator discovers a truly "win-win" settlement option, the satisfaction lasts.

FNa1. Note 1. THE AUTHOR, Paulette Kohman, is a Helena lawyer who offers conflict resolution services. She also is a member of the State Bar Dispute Resolution Committee.

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