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Levels of problem definition

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Practical ADR

Levels of problem definition

John Wade

Leonard Riskin has suggested that problem definition can take place at (at least) four conceptual levels — namely legal, commercial (or problem solving), personal and community levels.¹

As a conflict is diagnosed more carefully, the layers of causes are unpeeled. Problem definition progressively changes and expands.

The same conflict can be analysed at one or more of these levels. For example, where there is a dispute between a retailer and a buyer of a motor car over a persistent loss of power in the car, the 'issues' can be defined as follows.

Legal questions

1. What are the terms of the contract of sale (express or implied)?
2. Has a term been breached?
3. How serious and frequent is the breach?
4. To what extent is liability for the breach exempted by an exemption clause?
5. What statutes, if any, also apply to this consumer contract?
6. Has the breach caused any foreseeable losses?
7. Has the buyer also caused a portion of the loss by contributory negligence or failure to mitigate damages?
8. How should the monetary damage caused be calculated (by expectation, restitution, reliance or indemnity measures)?

Problem solving or commercial questions

The narrow legal issues become hidden behind a series of questions which look at the bigger picture from a business perspective.

1. What should be done about the losses of power to the car —
 - in the past?
 - for the future?
 - in the short term?
 - in the long term?
2. By what process can the losses of power be measured?
3. How can the reputations of both parties be preserved and enhanced by the way they resolve this dispute?
4. If any problems occur with the car in the future, by what process can they be dealt with?
5. How can a flood of flow on claims be avoided or minimised?

Personal questions

Once a mediator or representative begins to listen to a client, she or he often discovers that the 'real problem' has little or nothing to do with its legal or even business clothing. To operate on the legal problems is to cut off the wrong leg. The following questions may also be relevant.

1. Why was I not treated respectfully in the past?

2. What should be done about past disrespectful treatment?
3. How will I be treated in the future?
4. How will I recover from the humiliation this has caused me in front of my friends/relatives/business associates?
5. I have often been treated badly by large businesses — how can this behaviour be improved?

Community questions

These are problems which arise out of the dispute for those who are not represented at the mediation or negotiation table (for example, the public in environmental disputes; children in custody disputes; future buyers in manufacturing conflicts; future patients in medical disputes).

1. By what process could other defective cars be located?
2. What can be done about any other existing defective cars —
 - in the short term?
 - in the long term?
3. How can this defect be avoided or minimised in future cars?
4. What quality management process can be set up to check future cars?

Competent representatives and mediators have the ability to listen, and then draft questions at the level which reflects accurately each client's concerns, and which are most likely to assist all disputants progress towards an acceptable solution. ●

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This article is extracted from
Wade J H Representing Clients

at *Mediation and Negotiation Bond
University Dispute Resolution Centre
2000 pp 76-78.*

Endnote

1. Riskin L 'Mediator orientations,
strategies and techniques: a grid for the
perplexed' (1996) 3 *Harvard Negotiation
Law Review* 71.