

How You Can Help Clients Assess Their Interests and Risks

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Quinnipiac-Yale Dispute Resolution Workshop

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Thanks for Coming

- I'm happy to be back with so many friends
- This program is based on book I am writing with Michaela Keet and Heather Heavin based on their extensive research
- Working title: "How to Help Clients Make Smart Litigation Decisions: Carefully Assessing Clients' Interests and Risks"
- This program should be informative and fun

Today's Agenda

- Note lawyers' and mediators' duty to help clients make informed decisions
- Identify important risks of litigation – and how you can help clients understand them
- Describe why lawyers often do a bad job in assessing litigated cases, if time permits
- Really important – hear your experiences

Stone Soup Process Today

- We will use Stone Soup process to elicit and disseminate knowledge from this program
- Notetaker take notes without names
- I will post summary on Indisputably blog
- If you don't want your statements to be included, let notetaker know
- Questions?

About Me

- Graduated from Hastings Law School in 1980
- Practiced law and mediation in Bay Area
- Got PhD in sociology of law from University of Wisconsin in 1995
- Taught at University of Missouri since 2000
- Retired, but still active
- Regularly blog on Indisputably.org

About You

By show of hands:

- **Have you represented clients in litigation?**
- **Have you mediated cases in litigation (or that might have been litigated)?**
- **Have you taught law or mediation?**
- **Are you a law student?**
- **Anyone I left out?**
- **Practiced for more than 20 years?**
- **Practiced for 10-20 years?**
- **Practiced for less than 10 years?**

Litigators: How Do You Discuss Interests and Risks with Clients?

- **Identify clients' interests?**
- **Discuss possible trial outcomes?**
- **Discuss legal fees and costs?**
- **Other possible consequences of litigation (eg, time, effect on reputation or relationships)?**

Mediators: How Do You Discuss Interests and Risks with Clients?

- **Identify clients' interests?**
- **Discuss possible trial outcomes?**
- **Discuss legal fees and costs?**
- **Other possible consequences of litigation (eg, time, effect on reputation or relationships)?**

Everyone: Problems Discussing Interests and Risks with Clients

These can be difficult tasks. What problems have you had discussing:

- Clients' interests?**
- Possible outcomes at trial?**
- Legal fees and costs?**
- Other possible consequences of litigation?**

As I describe our research, let us know how much it does – and doesn't – fit your experience

Litigation Has Benefits

Litigation is extremely important. It can:

- **Resolve disputes directly, and**
 - **Provide structure promoting settlement**
 - **Create BATNAs**
- **Promote justice**
 - **Deter potential lawbreakers**
 - **Hold individuals and entities accountable**
 - **Provide legal remedies**
- **Help develop legal doctrine**

. . . And Risks

- **May lose in court – great uncertainty**
- **Incur tangible costs – legal fees and expenses**
- **Incur intangible costs, e.g., stress, delay, harm to reputation, opportunity costs**

We will focus on intangible costs – often ignored or given short shrift.

Lawyers' Duty to Help Clients Make Informed Decisions

- MRPC Rule 1.4(b): “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
- Rule 1.0(e): Informed consent is “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the **material risks** of and reasonably available alternatives to the proposed course of conduct.”

Advising Clients About ADR

- Rule 2.1: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”
- Comment 5: “[W]hen a matter is **likely to involve litigation**, it **may be necessary** under Rule 1.4 to **inform the client of forms of dispute resolution** that might constitute reasonable alternatives to litigation.”

Mediators' Duty to Help Clients Make Informed Decisions

- Mediators have weaker ethical duty
- Model Standards of Conduct for Mediators:
“Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes **free and informed choices** as to process and outcome.”

Litigation Stress

Litigation can:

- **Interfere with parties' mental, emotional, and physical lives**
- **Produce flashbacks, nightmares, and physical symptoms**
- **Degrade cognitive functioning and increase cognitive biases**
- **Focus parties on past, prevent moving forward**
- **Disrupt physical and emotional treatment**

Damaged Relationships

Litigation stress can:

- **Make parties obsess and overwhelm support system**
- **Make parties “shut down” and disengage**
- **Interfere with lawyer-client relationships**
 - **Increase clients’ sensitivity to lawyers communication**
 - **Create suspicion if lawyers are on their side**
 - **Cause “decision fatigue”**

Aside re Decision Fatigue

Parties - especially one-shot parties - seem at risk of decision fatigue in long mediations

- Have you observed this?**
- What can mediators do to reduce this?**
- What if mediators planned two-session mediations: first to plan information exchange, second to resolve dispute?**

Organizational Dysfunction

Litigation can create organizational problems:

- **Cause board members, executives, employees to fear for their future**
- **Damage employee morale**
- **Harm health, productivity, and decision-making**
- **Lead employees to focus on personal interests, which may conflict with organization's interests**
- **Cause internal conflict about handling of case**
- **Create groupthink bunker mentality**

Opportunity Costs and Reputational Damage

Litigation can:

- **Divert time and energy away from organization's goals**
- **Impose opportunity costs**
- **Impede innovation**
- **Damage brand and reputation**
- **Require repair of brand and reputation**

Your Experience

- **Have you seen problems like these in litigation or mediation?**
- **Briefly tell us about them, without providing names or identifying details.**

What We Suggest

- **Help clients identify interests and risks as soon as appropriate**
- **Lawyers should make this routine part of initial consultation**
- **Mediators should ask about this at appropriate times in caucus**

Below are examples. More in handout and blog.

For Individual Parties

- What are your most important goals in this case? Why are they important to you?
- Most people have some fears or concerns about litigation. What are some of your fears or concerns?
- Do you have any concerns about how long this will take?
- How do you think it would affect how people think about you?
- How do you think it would affect relationships with people you care about?

More Qs for Individuals

- **Litigation can be stressful. How do you generally respond to stress?**
- **Some people see counselors to deal with stress. Do you see a counselor now? Might it help to see a counselor to deal with the stresses of this case?**
- **[Describe discovery, including depositions.] How do you feel in a deposition? Is there any information you would not want to provide?**
- **[Describe trial, negotiation, mediation, arbitration.] Which sound like they might be best for you? Why? Which would you want to avoid? Why?**

Bottom Line Qs for Individuals

- How much less would you accept [or more would you pay] to:
 - Resolve case in, say, 3 months instead of a year
 - Avoid risk of losing at trial
- Would you prefer to:
 - Have trial to present case publicly and get court decision, or
 - Settle to avoid publicity and risk of losing

For Organizations

- How much time will case require of officers, executives, and other employees?
- How would case affect goals and opportunities?
- How would case affect growth and innovation?
- How would case affect internal dynamics, eg, morale, absenteeism, conflict?
- How would organization be portrayed in mainstream and social media?
- How would case affect brand and reputation?

Bottom Line Qs for Orgs

- What is estimated cost of problems you identified?
- How much would it cost to counteract these problems?
- [For plaintiffs:] How much would it be worth to avoid these problems?
- [For defendants:] In addition to payments for any liability, how much more would it be worth to avoid these problems?

Horrible Record of Predicting Trial Decisions

- **Although most cases settle, decisions to go to trial often are foolish**
- **Have you ever gotten a worse result at trial than the other side's last offer?**
- **What if that happened in 4 out of 5 of your trials?**
- **Trial judgment was more than D offer and less than P demand in only 10-20% of trials**
- **Plaintiffs made errors in 50-65% of trials**
- **Defendants made errors in 19-29% of trials**

Why Is It So Hard to Avoid Decision Errors?

- **A zillion variables, eg, witnesses, lawyers, judges, evidentiary rulings, jurors**
- **Cognitive biases leading to over-optimism**
- **Conspiracy of optimism between lawyers and clients**
- **Prison of fear preventing candid negotiations**

How can you avoid these problems?

Avoiding Litigation Decision Errors

- Anticipate cognitive biases – clients' and yours leading to over-optimism
- Ask clients if they want candid opinions
- Be both tactful and candid with clients
- Acknowledge uncertainty
- Do decision tree analysis
- Help consider DR procedural options
- Explicitly discuss tangible and intangible costs



Thank you very much!