

# **Helping Legal Clients Using LIRA Techniques**

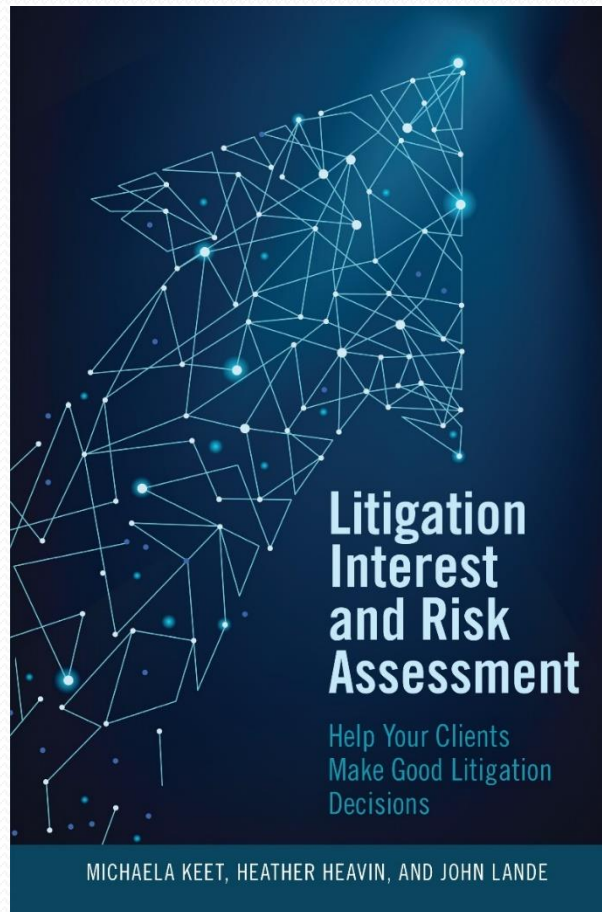
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# Litigation Interest and Risk Assessment



# Background

- Book is practical guide with lots of checklists in appendixes.
- It combines research on risk assessment and early dispute resolution.
- Although much is directed to advocates, it also includes material specifically for mediators.
- For description of book and link to order, go to [tinyurl.com/ybc5ou68](https://tinyurl.com/ybc5ou68). Available as electronic book. For 25% discount, use code 25LIRRA.

# Agenda

- **Three-part litigation interest and risk assessment (LIRA) structure**
- **Process to help clients make better decisions**
- **Potential to take advantage of these techniques in online environment**
- **Please ask questions as we go along.**

**Note: This is based on experience in US and Canada. It should be adapted to realities in Brazil and other countries.**

# LIRA Goals

- Improve party decision-making
- Fulfill fundamental professional ethical obligation of lawyers and mediators
- Improve results for parties, courts, and society by:
  - Reducing decision errors in going to trial after rejecting good settlement offer
  - Reducing tangible and intangible costs of litigation

# Causes of Bad Decisions

- Cognitive and motivational errors such as anchoring, self-serving bias, confirmation bias, hindsight bias, reactive devaluation, sunk cost bias, partisan role bias
- Dynamics of lawyer-client relationship producing “conspiracy of optimism” and “prison of fear” inhibiting candid assessment
- Reluctance of lawyers to communicate clearly and specifically about litigation risks

# Benefits of LIRA Process

**Lawyers often address elements of litigation but not as systematically as LIRA process, which:**

- **Explicitly focuses on intangible costs, which often are overlooked or undervalued**
- **Provides logical sequence to enhance party decision-making**
- **Enables practitioners to adapt process to their philosophies and needs of particular parties**

# **Lawyers' Use of LIRA**

**Lawyers using LIRA process can help clients:**

- **Understand their interests and litigation risks**
- **Identify key legal and factual uncertainties and possible outcomes to estimate BATNA values and develop bottom lines**
- **Explicitly consider tangible and intangible costs**
- **Develop wise and effective litigation, negotiation, and mediation strategies**

# Three Elements of LIRA

- Expected value of court outcome (aka BATNA value)
- Tangible costs of continuing to litigate
- Intangible costs of continuing to litigate

Note that LIRA process:

- Can and should be used before lawsuits are filed
- Generally focuses on monetary disputes – and can include non-monetary issues
- Focuses on future costs, not past (sunk) costs

# **1. Potentially Unfavorable Court Outcome**

- **Litigation can provide substantial benefits to parties and society . . .**
- **. . . but litigation is inherently risky and parties may get unfavorable court decisions.**
- **Parties' expectations about court outcome often are major factors in negotiation and mediation.**

## **2. Tangible Costs**

**Litigation imposes tangible costs including:**

- **Legal fees for represented parties**
- **Legal expenses for discovery, experts etc.**

# 3. Intangible Costs

**Being a party in litigation imposes many intangible costs on parties such as:**

- **Stress causing physical and psychological harm**
- **Feelings of unfairness, disrespect, victimization**
- **Being stuck in dispute, not getting on with life**
- **Damaged relationships**
- **Harm to reputations**
- **Loss of opportunities**

# Importance of Intangible Costs

- Intangible costs are very important to parties, sometimes more important than the court outcome.
- People often ignore or undervalue intangible costs, which reflect parties' interests.
- You can help parties identify and value intangible costs by asking how much it would be worth to avoid delay, risk, stress etc. of going to trial.
- Considering value of intangible costs may reduce expectations for monetary outcome, making it easier to settle.

# Helping Clients with LIRA

- **Use key legal skills of asking good questions and listening carefully.**
- **Figure out what the dispute really is about – jointly with the clients.**
- **Don't assume that dispute is about correct interpretation of facts or law. It may be. But it may be about other sources of conflict.**

# Common Sources of Conflict

- **Personality conflicts**
- **Underlying conflicts**
- **Large stakes**
- **Inexperienced lawyers**
- **Fear of looking weak**
- **Parties don't know or trust each other**
- **Parties don't know the case yet**
- **Poor communication, including with clients, counsel**
- **Concern about setting precedent**
- **Lawyers want to fight, perform for clients, increase fees**
- **Unrealistic expectations about trial outcome**

# Lawyer as Conflict Diagnostician

- Ask open questions such as “What is most important to you in this case?” “Why haven’t parties settled so far?”
- Parties generally want favorable financial result – but they vary in what they define as favorable (or acceptable).
- Parties often want other things, which may be as or more important than financial outcome.
- Other goals include being treated with respect, good relationships, favorable precedent, apologies, future employment, or recommendation.

# Understanding the Other Side

- Ask what they think are other side's perspectives and goals.
- Then ask if they think any of their perspectives or goals are justified.
- Follow up by asking if this affects their assessment of likely court outcome.
- Ask what might persuade other side to change their assessment.

# **Ask How the Case Has Affected Them So Far**

- **This can be a good, indirect way of finding out their interests.**
- **Generally, they will complain.**
- **Settling provides an opportunity for them to “stop hitting their head against the wall” – because it feels so good when they stop.**

# Discussing Intangible Costs

**Lawyers discuss intangible costs in many ways, such as:**

- **Asking: “Earlier, you said relationships were important to you. How would going to trial affect your relationships?”**
- **Coaching: “When I see people late in litigation, they often say it has taken a toll on them.”**
- **Delegating: “Please discuss with your spouse [or other advisor] how going to trial may affect you.”**
- **Telling: “Going to trial is likely to hurt your reputation and keep you from doing things you want to do.”**

# **Tangible Costs of Litigation**

- **Discuss how much they spent so far in litigation fees and costs ...**
- **... and estimate how much more they probably would spend to go to trial.**
- **You won't have exact figures. Round numbers are fine.**

# Assess Likely Trial Outcome

- Do this after asking about their interests.
- In US, research shows that in most trials, one party gets worse result than in settlement. Also true in Brazil?
- Ask if they want realistic assessment.
- You may be confident you can persuade the court about some issues and less certain about others.
- Discuss issues you might lose and how you would rebut the arguments.
- Provide realistic range of probabilities that the court would find in their favor on uncertain issues.

# Discussing Trial Risks

Lawyers discuss trial risks in many ways, such as:

- Identifying risks: “In trial, many judges would have questions about X.”
- Quantifying risks: “I think that the odds are 2 to 1 that the judge would decide Y about issue X.”
- Predicting outcome: “I think that most judges would decide Y about issue X.”

# Ask How You Can Be Helpful

- Don't assume that they just want you to agree with them.
- They may want:
  - your candid assessment of likely court outcome
  - understanding of the other side's views
  - advice about litigation or negotiation strategy
- Bottom line: don't assume.

# **Expected Value of Court Outcome**

**Lots of ways that lawyers estimate BATNA value:**

- **Experience with similar cases, noting similarities and differences**
- **Factual investigation**
- **Legal research about similar cases**
- **Consulting with other lawyers**
- **Decision trees**
- **“Big data” and artificial intelligence tools**

**Choice of method depends on many factors including amount at stake, experience, client preferences.**

# Simple Framework

**The book provides framework using decision tree logic for estimating mathematical value of BATNA**

- **Combines process into a few steps**
- **Systematically identifies substantial risks of adverse conclusions about legal and factual issues**
- **Estimates likelihood of outcomes of various issues**
- **Explicitly includes tangible and intangible costs to generate “bottom line” for settlement**
- **Can use different assumptions to develop range of likely court outcomes.**

# Steps in Simple Framework

## **Stage One: Estimate BATNA value**

- Step 1: Estimate risks regarding liability
- Step 2: Estimate damages
- Step 3: Calculate BATNA value: Multiply step 1 by step 2

## **Stage Two: Calculate Bottom Line**

- Step 4: Estimate Tangible and Intangible Costs
- Step 5: Calculate bottom line: Deduct Step 4 from Step 3

# Developing a Bottom Line

- **Develop bottom line by adjusting estimated BATNA value by amount of tangible and intangible costs.**
- **Bottom lines are “trip wires” to end negotiation if parties can’t reach an acceptable agreement.**
- **Bottom lines are major elements of negotiation strategies if parties focus on getting a better result than in trial.**

# **Lawyer as Dispute System Designer**

- **Lawyers generally are DSD designers, orchestrating preparation and exchange of information.**
- **LIRA provides more and better tools to design process.**
  - **Planning for optimal decision-making**
  - **Accommodating parties' process needs**
  - **Timing and sequence of process**
  - **Using mediation or other dispute resolution processes when appropriate**

# Consider Mediation

**Sometimes parties need help from neutral third party**

- **Neutral organizes process systematically**
- **Provides settlement event to focus on negotiation**
- **Provides independent help in doing LIRA**
- **Avoids problems of reactive devaluation where parties reject ideas just because other side suggested the ideas**

# **Planned Early Two-Stage Mediation**

- **There is a common norm of trying to complete mediation in a single session, especially civil mediations.**
- **This can put great pressure on parties to settle before they are ready, especially in marathon mediations.**
- **This can result in buyer's remorse, reneging, poor performance, complaints against mediators or lawyers.**
- **You can improve process by suggesting option of two-stage mediation so parties can consider LIRA issues after first session.**

# Doing PETSMs

- If parties settle in first session, they don't need second session.
- If they don't settle in first session, parties can do "homework" to prepare for second session.
- Planning for possibility of a second session gives "permission" to take time to get information, consult others, and reflect on mediation goals and strategy.

# **Planned Early MULTI-Stage Mediations**

- **You can take advantage of virtual mediation process to break mediation into multiple stages during a particular period, such as a week.**
- **Since parties and lawyers aren't traveling, they don't have to be together all at one time.**
- **Mediators can schedule caucuses with just one side without "dead time" of other side waiting.**
- **You can plan for authoritative decision-makers to participate for limited times at end of process.**

# Appendixes

The book includes helpful appendixes:

- **Lawyer's Interview Guide about Clients' Litigation Interests and Risks**
- **Discussing Litigation Interests and Risks with Family Law Clients**
- **Improving Estimates of Expected Values of Court Outcomes**
- **Decision Trees: A Quick Primer**
- **Decision Tree Example**
- **Self-Care by Practitioners**