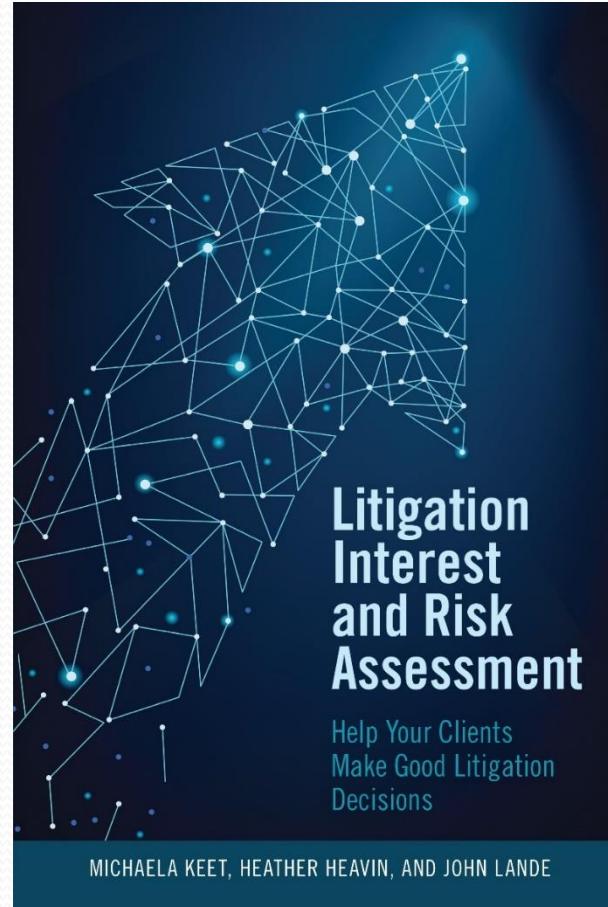


Helping Legal Clients Using LIRA Techniques

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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. 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, renegeing, 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.

Appendices

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**