

How to Combine “Positional” and “Interest-Based” Negotiation and “Facilitative” and “Evaluative” Mediation

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Hello

- Thanks to Hastings Center for Negotiation and Dispute Resolution for sponsoring this conversation
- Feel free to put questions and comments in the chat and we will get to them after I finish my talk – and you can speak in our conversation at that time
- This powerpoint has links to publications with more detail, and we will provide a copy to you

We Need Good Language for Good Theory

- Theory is important because it guides actions
- Concepts are building blocks of theory
- It's a problem if we use different language for similar concepts or the same terms for different things
- Professional jargon is helpful in some fields because it promotes communication between professionals
- Jargon is problematic for dispute resolution because it confuses and excludes laypeople and other stakeholders

Benefits of Clearer Language

Clearer language could:

- Improve communication with disputants and other stakeholders
- Help students navigate worlds of practitioners, clients, and faculty
- Promote collaboration between researchers and practitioners
- Provide standard keywords for research

Our Field is a Tower of Babel

- Answering student questions often tripped me up
- Review of negotiation texts reveals confusion about negotiation models and even definition of negotiation
- University of Missouri “Tower of Babel” symposium provides more detail
- ABA Mediation Research Task Force demonstrates confusion about mediation models

Babbling Negotiation Models

Negotiation texts refer to two models with various names:

- “**distributive**,” “**competitive**,” “**adversarial**,” or “**positional**” negotiation
- “**integrative**,” “**problem-solving**,” “**cooperative**,” or “**interest-based**” negotiation

Completely overlook very common pattern, which I call “**norm-based**” or “**ordinary legal**” negotiation

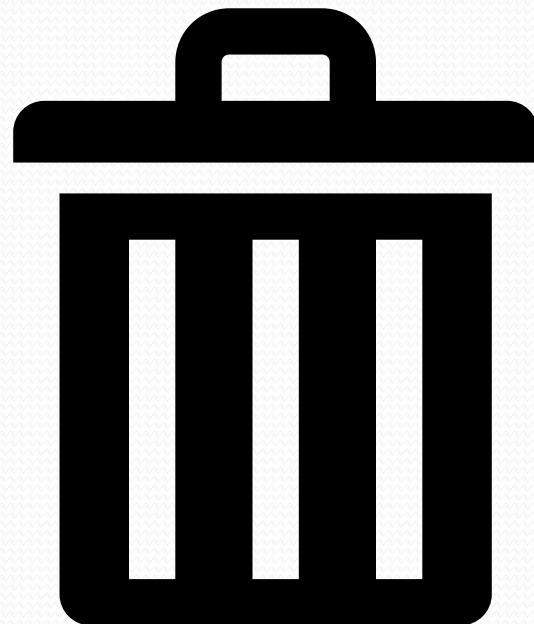
Better to Focus on Variables

- Negotiation models are based on variables assumed to be highly correlated, e.g., adversarial model:
 - goal of maximizing negotiators' results
 - zero-sum assumptions
 - treating the other side as hostile opponents
 - using counter-offer process
 - focusing on BATNA outcome
 - using various hard-bargaining tactics
- My study of actual negotiations shows that negotiators use different models for different issues or different models at different times in a case
- [A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation](#), 16 Cardozo Journal of Conflict Resolution 1 (2014).

Babbling Mediation Models

- Most common mediation models are “facilitative” and “evaluative”
- Riskin’s original concept combined very different variables
- ABA Mediation Quality Task Force survey of mediators found different views about actions helpful in most cases:
 - give case analysis, including strengths and weaknesses: 66%
 - recommend specific settlement: 38%
 - make prediction about likely court results: 36%
 - apply some pressure to accept specific solution: 30%

What to Do With Our Models



Helpful LIRA Framework

My book co-authored with Michaela Keet and Heather Heavin, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, provides a useful three-part structure:

- Expected value of options (aka alternatives to negotiated agreement)
- Tangible costs
- Intangible costs and interests

Negotiation and mediation can focus on these factors

Decision-Making About Disputes

- We help parties make decisions, often when they lack good (or any) practical dispute resolution options
- We help parties:
 - choose a process, e.g., negotiation, mediation, arbitration, or litigation
 - design the process by making procedural agreements
 - make decisions in a case about specific issues

Focus on Specific Variables, Not General Models

The following slides illustrate some variables to describe cases, which may change during a case. Some variables are related to others in some -- but not all -- cases.

Variable	Examples
Parties' and Lawyers' Cognitions and Actions Relating to Counterparts	
Goals	partisan advantage, joint gain, fairness
Assumptions	zero-sum, positive-sum, negative-sum
Attitude toward counterpart	hostile, polite, friendly
Relevant norms	law, parties' interests, normal practice
Communication process	counteroffer, interest-and-options, norm-based
Tactics	dirty tricks, sharing information, and more

Variables About Professionals' Actions re Clients

Variable	Examples
Lawyers' and Mediators' Actions Relating to Clients	
Listen	amount and quality of attention and understanding
Help parties assess case	if help is offered; amount and quality of help
Assess options	if assessment is given; amount, quality, and confidence of assessment
Predict outcomes	if prediction is given; quality and confidence of prediction
Give advice	if advice is given; amount, quality, and confidence of advice
Apply pressure	if pressure is applied; nature, intensity, and effect of pressure

Variables About Issues

Variable	Examples
Types of Decisions	
Dispute resolution process	negotiation, mediation, trial
Procedures in process	information sharing, logistics, timing
Resolution of issues	issues parties are concerned about
Factors to Consider in Resolving Issues	
Value of options	expected court outcome, profit from deals
Tangible costs	legal fees and expenses
Intangible costs and interests	stress, relationships, reputation, loss of opportunities, and lots more

How Should We Deal with Babel?

- The ABA Mediation Research Task Force recommended “development of more uniform definitions and measurements of mediator actions and mediation outcomes”
- Replace babbling “models” with clearer, concrete language
- Test: “Explain it to me like I’m a five (or fifteen) year old”
- This should not be limited to mediation

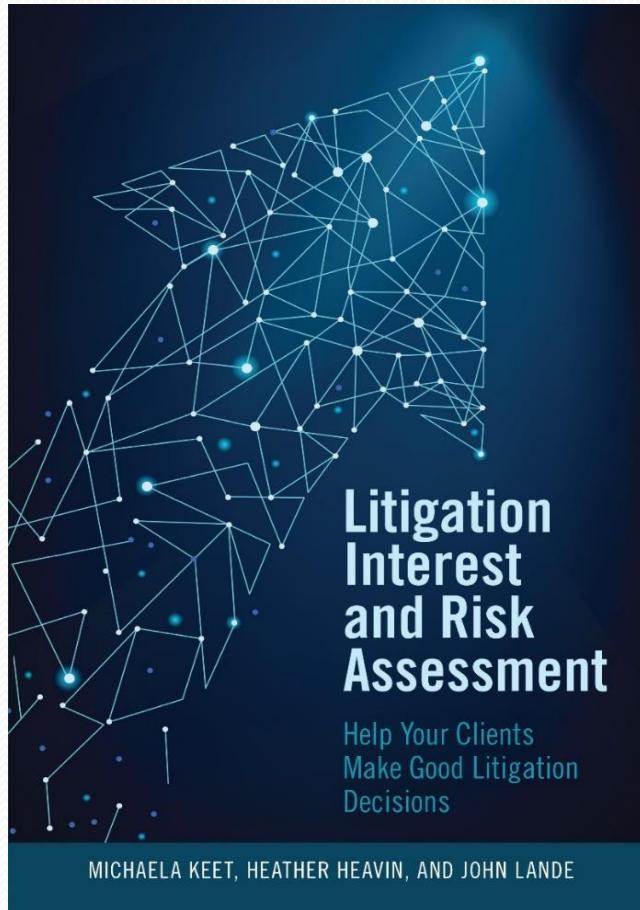
Ideas for Clear Language Initiative

- Agreement about important terms would improve communication
 - Of course, people could use any language they want
- This initiative might include:
 - review of academic and practice literature
 - discussion by experts
 - focus groups with academics, practitioners, and disputants
 - public forums and comments
- Can use different language than suggested here
- For more detail, see [We Need Clearer Dispute Resolution Language](#)



What Do You Think?

Information about the Book



**For description of book
and link to order, go to
tinyurl.com/ybc5ou68.**

**For 25% discount, use
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