Helping Parties
Make Decisions About
What's Really Important

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December 3, 2020

Plan for Our Conversation

- **I will present my main premises:**
  - **Conceptualizing how to help parties make decisions is important**
  - **Clear, concrete concepts are more helpful than vague models**
- **I will describe three cases to provide basis for conversation**
- **This will be like very big focus group – focusing on concepts, not specific techniques**
  - **I will summarize in Indisputably blog post**
  - **Respond orally, chat or email: landej@missouri.edu**

Where I'm Coming From

- **Graduated from law school in 1980**
- **Took mediation trainings starting in 1982**
- **Practiced law and mediation through 1986**
- **Doctoral student in sociology, 1989-1995**
- **Faculty member since then**
- **Wrote articles about mediation through 2008**
- **Studied collaborative and cooperative law in 2000s**
- **Wrote about "vanishing trial" and value of courts & trials**
- **Focused on <u>dispute systems</u>, including lawyering and courts, since then**
- **Wrote *Lawyering with Planned Early Negotiation* in 2011**
- **Wrote *Litigation Interest and Risk Assessment* in 2020**

What We Do and Who "We" Are

- **This grows out of evolution of my thinking**
- **Spoiler alert: <mark>Our community helps people make decisions about processes, procedures, and issues in managing conflict</mark>**
- **"We" not only include private neutrals, administrators, researchers, etc. -- we also include lawyer-advocates and judges**
- **Blog post: What is (A)DR About?**

What Are We Concerned About?

We are concerned when:

- **Parties lack access to procedural options and legal services**
- **Lawyers are paternalistic, undermining clients' decision-making**
- **Parties are stuck in ritualized adversarial negotiation**
- **Parties are stuck in ritualized mediation with limited procedural and substantive options**
- **Parties must mediate in inappropriate situations or poorly-designed processes**
- **Weaker parties are required to arbitrate with powerful parties**
- **Parties engage in unnecessary, wasteful, and harmful litigation**

So What Have We Done?

We developed:
- Public education about dispute resolution options
- Problem-solving / dispute prevention
- Unbundled legal services
- Expanded "dispute resolution toolbox"
- Increased access to dispute resolution processes
- Triage systems to make choices of procedural options
- Technological assistance and online dispute resolution
- Early dispute resolution options
- Increased range of professional techniques
- Dispute system design

Why Are Concepts Important?

Concepts and conceptual frameworks help people:

- understand the world

- communicate with each other

- plan, perform, and analyze actions

- build theories

Useful concepts help practitioners help parties

Our Field is a Tower of Babel

- **Answering student questions about our models often tripped me up**

- **Review of negotiation texts found 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**

Texts completely overlook 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
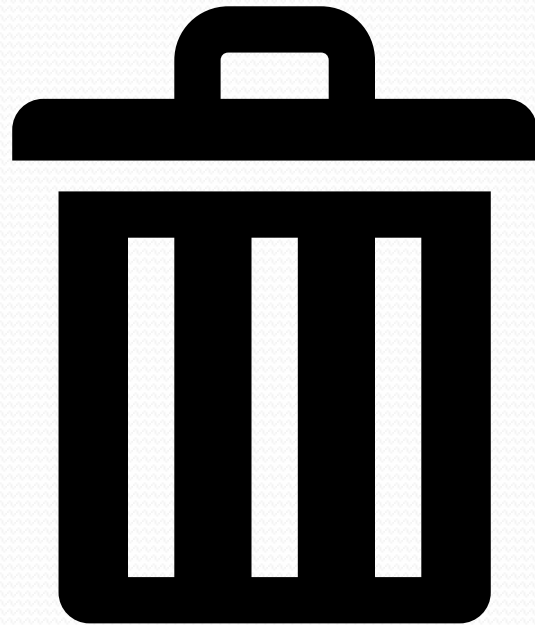
Party Decision-Making is Key

- **Lawyer representatives' and mediators' central role is to help parties make decisions**

- **Even in arbitration and litigation cases, where adjudicators make final decisions, parties make decisions along the way, including whether to settle**

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, litigation, or trial**
  - **design the process by making procedural agreements**
  - **make decisions in a case about specific issues**

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 to develop useful strategies and bottom lines:

- 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 Issues

Variable	Examples
Types of Dispute Resolution Decisions	
Dispute resolution process	**negotiation, mediation, arbitration, trial**
Procedures in process	**information sharing, logistics, timing**
Resolution of issues	**issues that 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**

Types of Cognitions and Actions

Variable	Examples
Parties' and Practitioners' 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, "going rates"
Communication process	counteroffer, interest-and-options, norm-based
Tactics	dirty tricks, information sharing, and more

Practitioners' Actions re Clients

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

Concepts Better Than Models to Help Parties

- **We need to [unbundle and un-Babel our models](#)**
- **You may have noticed that preceding two slides relate to cherished "models" in our field**
- **Goals, assumptions, attitudes toward counterparts, norms, process, use of power – are elements of adversarial or cooperative negotiation models**
- **Listening, helping parties make assessments, practitioners making assessments, predicting outcomes, giving advice, and applying pressure – are elements on "facilitative" - "evaluative" spectrum**

Three Cases to Test Ideas

- **Actual cases from interviews with lawyers**
  - **Divorce, union grievance, personal injury**
- **Purpose of conversation is to test what concepts help practitioners help parties**
  - **How helpful are concepts I presented?**
  - **How are these concepts problematic?**
  - **What other concepts would be helpful?**
- **Note that focus is on <u>concepts</u> that help plan and use techniques – not techniques in themselves**

Divorce Case

- **Salam lost his $65k job and is not working, having rejected best offer of $38k.**
- **Wendy was stay-at-home mom, now works as housecleaner.**
- **Wendy initiated divorce, but values Salam as dad and doesn't want to hurt him.**
- **Child support is focus of conflict.**
- **No problem working out parenting arrangements.**
- **Cooperatively working out plans to sell house.**
- **Lawyers previously worked together cooperatively.**

Union Grievance

- Chen was fired as trucker after losing commercial driver's license due to arrest. Demanded $30k backpay and reinstatement.

- Shipco offered reinstatement but no backpay.

- Lawyers fought over everything.

- Chen was in desperate financial situation.

- Union got social media pressure from membership.

- Shipco was concerned about relationship with union regarding upcoming collective bargaining negotiation, and didn't want settlement to set precedent.

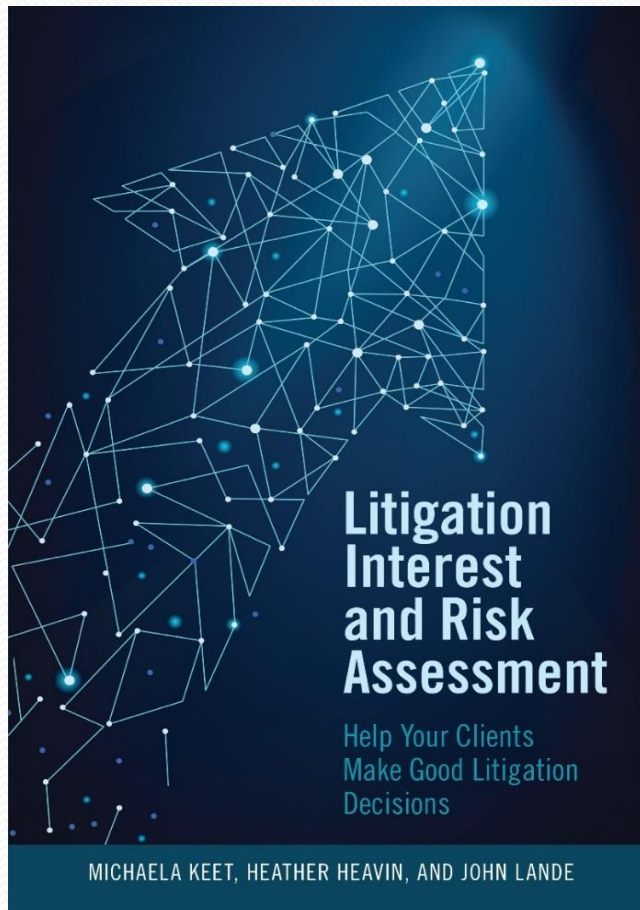- Parties exchanged offers, but didn't explicitly discuss interests

Personal Injury Case

- **Sonya was in a car accident with L'Von, who died.**

- **Sonya was seriously injured and immediately filed suit, concerned about possible distribution of L'Von's assets.**

- **She was nurse and changed careers because of PTSD.**

- **Both sides completed extensive discovery.**

- **Lawyers hadn't previously worked together, and interactions were professional.**

What Concepts Would Help Practitioners Help Parties?

Information about LIRA Book

Litigation Interest and Risk Assessment

Help Your Clients Make Good Litigation Decisions

MICHAELA KEET, HEATHER HEAVIN, AND JOHN LANDE

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

For 25% discount, use code 25LIRRA before December 31.