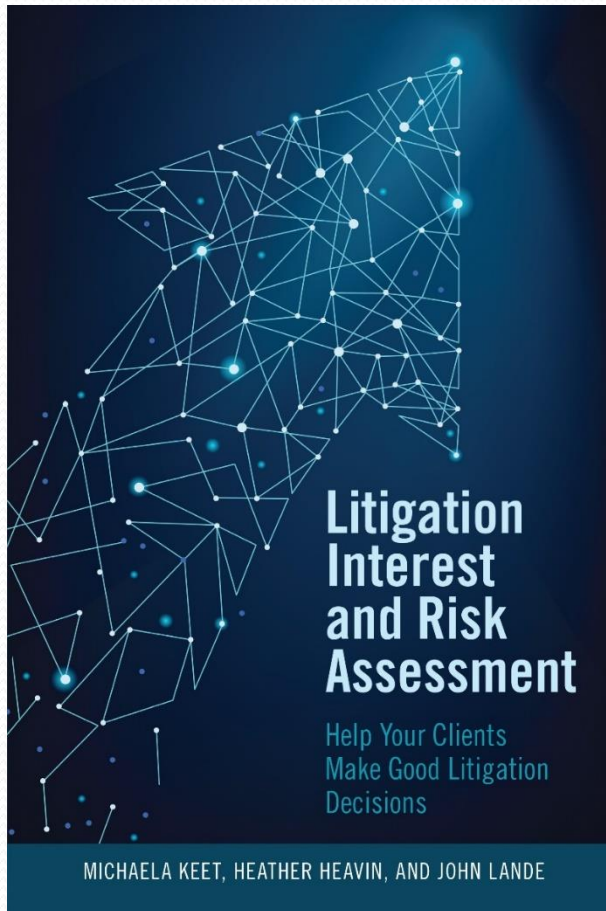


Helping Legal Clients Using LIRA Techniques

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Litigation Interest and Risk Assessment



- Practical guide with checklists
- Combines research on risk assessment and early dispute resolution
- Relevant for advocates and mediators
- For description of book to order, go to tinyurl.com/ybc5ou68

Study Finds New Lawyers are “Woefully Unprepared”

- Institute for Advancement of American Legal System and Ohio State Professor Deborah Jones Merritt did study with 50 focus groups.
- “The number one complaint from clients of lawyers . . . is lack of communication, or poor communication, and not being told what the hell is going on in their case.”
- “Somebody can know the black-letter law inside and out . . . and then their first day on the job they are sitting in front of somebody who is incredibly worried, incredibly anxious.”
- “Sometimes . . . we don’t ask the client, ‘Well, what does victory look like? What’s your goal here?’”
- “Failure to understand the big picture [created] difficulty developing strategies to guide client matters. These new lawyers knew the rules, but they did not know how to combine the rules into a successful strategy.”

Continuous, Self-Directed Learning

- The study emphasized that law students need to engage in continuous, self-directed learning.
- You won't need to learn everything you need just by completing all the requirements for graduation.
- The law is like the football rulebook. It doesn't tell you how to play real games and win.
- Take clinical and externship courses.
- Develop your own learning plan.
- [Read this blog post for more detail.](#)

Lawyers' Ethical Duties To Help Clients Make Decisions

Lawyers have ethical duties under Model Rules of Professional Conduct to:

- **Provide relevant information - 1.4(a)**
- **Provide understandable explanations - 1.4(b)**
- **Provide candid advice - 2.1**
- **Abide by clients' objectives - 1.2(a)**
- **Abide by clients' decision whether to settle - 1.2(a)**

LIRA Goals

- Improve party decision-making
- Fulfill fundamental ethical obligation of lawyers
- 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 due to self-serving, confirmation, hindsight, sunk cost, partisan role biases, and anchoring and reactive devaluation
- 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

Lawyers using LIRA process can help clients:

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

How to Help Clients with LIRA

- **Use key legal skills of asking good questions and listening carefully.**
- **Figure out what dispute really is about – jointly with 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.**

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 often want things in addition to financial outcome.
- Other goals include being treated with respect, good relationships, favorable precedent, apologies, future employment, or recommendation.

Common Sources of Conflict

Consider what conflict is about, such as:

- **Relationship conflict**
- **Parties don't trust each other**
- **Poor communication**
- **Fear of looking weak and "losing"**
- **Concern about setting precedent**
- **Lawyers want to perform for clients, increase fees**
- **Unrealistic expectations about trial outcome**

Understanding the Other Side

- Ask clients 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.**

Ask How You Can Be Helpful

- Don't assume that they just want you to tell them what they want to hear.
- 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.

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.**
- **Considering value of intangible costs may reduce expectations for monetary outcome, making it easier to settle.**

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 boss] 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.
- Tell clients that research shows that in most trials, one party is unrealistic and gets worse result than in settlement.
- Ask if they want realistic assessment.
- You may be confident you can persuade the court about some issues and less certain about others.
- Discuss uncertainties and how you would address them.
- Provide realistic range of likely court outcomes.

Expected Value of Court Outcome

Lots of ways that lawyers estimate court outcome:

- **Experience with similar cases**
- **Legal research and discovery**
- **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.

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.”

Simple Framework

The book provides framework using decision tree logic for estimating mathematical value of court outcome.

- **Combines process into a few steps**
- **Estimates probable resolution of key legal and factual issues to estimate court outcome**
- **Explicitly includes tangible and intangible costs to generate “bottom line” for settlement**
- **Can vary assumptions to develop range of likely court outcomes**

Steps in Simple Framework

Stage One: Estimate Court Outcome

- Step 1: Estimate risks regarding liability
- Step 2: Estimate damages
- Step 3: Estimate court outcome: 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

Using a Bottom Line

- Bottom line is “trip wire” to end negotiation if parties can’t reach agreement.
- Bottom line is major element of negotiation strategy in counteroffer negotiation process.

Lawyer as Dispute System Designer

- **Lawyers generally are DSD designers, orchestrating exchange of information and legal procedures.**
- **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**

Planning And Conducting Negotiations

- **Mutual education of lawyers and clients**
- **Realistically assess other side's perspective**
- **Develop bottom line**
- **Develop negotiation strategy**
- **Plan logistics**
- **Consider using multiple sessions**
- **Consider using mediation**
- **Pay attention and modify tactics as 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 because other side suggested ideas**

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 Two-Stage Mediation

- 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 refine goals and strategy.

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 as needed.**

LIRA in Criminal Cases

- Expected court outcomes may include: length of sentences, amount of fines, consecutive or concurrent sentences, probation, conditions of probation
- Tangible costs
 - Differ for defendants with private counsel and public defenders
 - Prosecutors have limited resources for entire caseload
- Intangible costs and interests
 - Defendants may be concerned about harm to family members, losing jobs, and numerous collateral consequences
 - Prosecutors may be concerned about consistency with similar cases, feelings of justice, policies, impact on victims, reputation, potential for publicity, and effect on their “win rates”

Transactional Interest **and Risk Assessment**

- **Expected outcomes** are net profits from plausible options, which are affected by financing, diligence of contracting partners, production efficiency, consumer reaction, market competition, and government actions
- **Tangible costs** of negotiating and consummating deals
- **Intangible benefits** include improved public image, development of business relationships, market expansion, and increased technical capabilities
- **Intangible risks** include lost opportunities to pursue other transactions, and organizational dysfunction or damaged reputation if deals blow up

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**

Resources

- **Article:** [Clark D. Cunningham, What Do Clients Want From Their Lawyers?](#)
- **Book:** [Client Science: Advice for Lawyers in Counseling Clients Through Bad News and Other Realities](#)
- **Article:** [Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better](#)
- **Article:** [My Last Lecture: More Unsolicited Advice for Future and Current Lawyers](#)
- **Book:** [Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money](#)
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