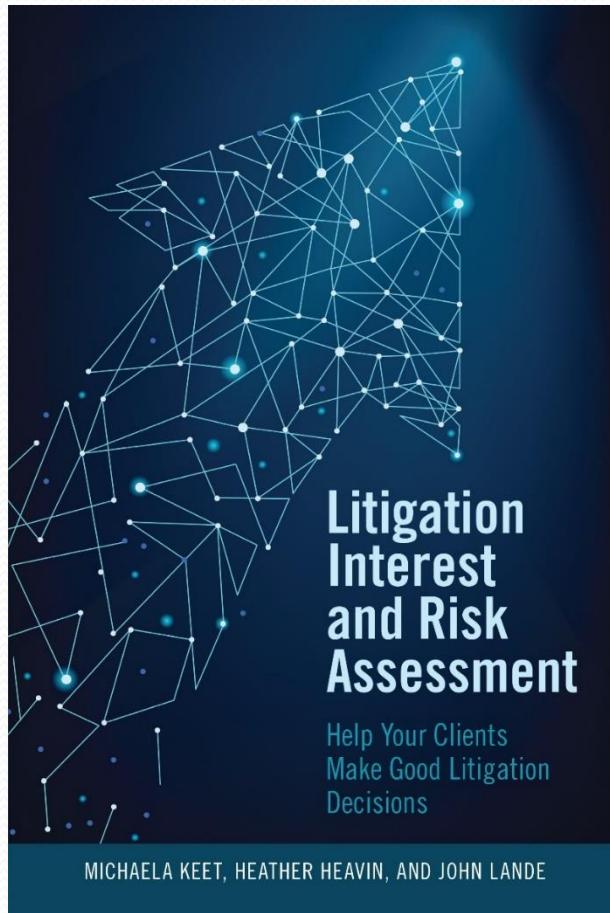


Helping Legal Clients Using LIRA Techniques

**Isidor Loeb Professor Emeritus John Lande
Center for the Study of Dispute Resolution
University of Missouri School of Law**



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, 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 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

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**

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](#)
- [More information about LIRA](#)
- [Indisputably blog](#)
- My email: landej@missouri.edu