They Should Call It Negotiation School, Not Law School

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Overview

- I will discuss:
  - Wrong-end-of-telescope view in legal education
  - Problems with traditional negotiation theory
  - Alternative theoretical tools
  - Negotiation tips for practice
  - Practical resources for further learning
- You will get a copy of this powerpoint with lots of links, so you don't have to take notes

Do You Wanna Know a Secret?

Every law school's "hidden" – misleading – curriculum:

- **Legal rules are the most important factor in disputes**
- **Most cases are decided by appellate courts**
- **"Thinking like a lawyer" is predicting court decisions**
- **Winning is the only – or most important – thing**
- **It's all about the money**
- **Lawyers and clients have the same perspectives**
- **Clients are mostly invisible bystanders in their cases**
- **Negotiation is trivial, barely worth mentioning**

Do You Wanna Know the Truth?

- Legal rules often are not most important factor in resolving disputes
- Most cases are not decided by appellate courts or even trial courts
- "Thinking like lawyer" is focusing on clients' interests
- Winning often is not the most important client goal
- It's not all about the money in many cases
- Lawyers and clients often have different perspectives
- Clients are the central actors in lawyers' work
- Lawyers negotiate all the time, much more than appearing in court

Trial is the Real "Alternative" Dispute Resolution

- **In federal courts, only about 1% of lawsuits go to trial.**
- **Tried cases "are typically high-risk, all-or-nothing cases, cases with unusual facts or intransigent parties, cases that defy compromise. Their outcomes, by comparison with ordinary work-a-day settlement cases, are costly, unpredictable, and sometimes bizarre. Because jury trials and jury verdicts are the most visible products of litigation, these extreme and unrepresentative cases distort public perception of the administration of civil justice."** Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 63 (1996).
- **Only a fraction of tried cases are appealed and, of those, only a fraction are decided with a written opinion.**

How Can You Use This Info?

- Provide context and help you navigate law school.
- Recognize that litigation is essential – and problematic.
- As you read cases in your courses, imagine what really was going on between the parties.
- Since few cases go to trial or are appealed, what was different about those cases?
- Why did lawyers make conflicting legal arguments?
- Lower court judges generally aren't stupid. Why do their decisions get reversed?

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."
- It recommends that students take 3 credits to develop ability to work with clients and 3 credits to develop negotiation skills.

What is Negotiation?

- Lots of definitions – no consensus
- My definition: "process of seeking agreement about a course of action"
- Unlike some definitions, this doesn't require:
  - Dispute
  - Exchange of offers
  - Legal "consideration" / quid pro quo
  - Goal of forming a legal contract
- Instead of using these elements in a definition, you can use them to describe different negotiations

Lawyers Negotiate in Every Type of Practice

Lawyers negotiate in virtually every context including:

- **Civil and criminal cases**
- **Appellate litigation**
- **Transactions**
- **Administrative law, i.e., dealing with government**
- **Internal organizational matters**

Lawyers Negotiate ALL THE TIME

- People often think of negotiation only as process with counterpart lawyer at final stage of a case.
- In fact, lawyers also negotiate throughout cases with:
  - Clients
  - Supervisors
  - Co-workers
  - Experts
  - Court reporters
  - Private dispute resolution professionals
  - Judges

Examples of Lawyers' Negotiations

Lawyers seek agreement with:

- **Clients about fee arrangements or scope of work**
- **Counterpart lawyer for extension of deadline**
- **Supervisors about arguments to include in a brief**
- **Co-workers about what to order for lunch**
- **Experts about content of opinion letter**
- **Court reporters about scheduling**
- **Mediators about materials to provide**
- **Judges about discovery schedule**

Click here for more examples of negotiation.

Traditional Negotiation "Models"

Negotiation theory describes two "models" – which are confusing and misleading, with various names:

- **Adversarial or positional – parties try to maximize advantage, starting with extreme positions**
- **Cooperative or interest-based – parties try to satisfy all parties by identifying interests and options for satisfying parties' interests**

Missing Model

Negotiation theory ignores most common pattern, which I call "ordinary legal negotiation" or "norm-based negotiation":

- **Negotiators start with generally-accepted norms and argue for advantageous modifications**

Click here for more information about negotiation models – and variables discussed in next slide.

Negotiation Variables

- Negotiation models assume that key variables are bundled together. My research shows that's often not so.
- Instead of models, focus on variables about whether parties:
  - Are concerned about other side's interests
  - Exchange counter-offers or use other process
  - Seek to "create value" (or "claim value")
  - Use a hostile or friendly tone
  - Use power to get their way
  - Use law or other norms as basis of argument

LIRA: Three Elements of Cases

- **Based on *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions***
- **Three-part litigation interest and risk assessment (LIRA) structure to develop bottom line for settlement.**
  - **Expected value of court outcome (aka BATNA value – best alternative to negotiated agreement)**
  - **Tangible costs of continuing to litigate**
  - **Intangible costs of continuing to litigate**

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**

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**

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**

Intangible Costs of Litigation

Litigation imposes serious intangible costs on parties, which often are overlooked or undervalued, e.g.:

- **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**

Developing Good Relationships with Clients and Counterparts

- **In practice, key tasks are to develop good relationships with clients and counterpart lawyers.**
- **Lawyers and clients often have very different perspectives. It takes careful work to get on the same wavelength.**
- **Lawyers' relationships with counterparts generally have a MAJOR impact on how cases work out.**

What to Do in Practice

- **Learn clients' interests and priorities, which may include:**
  - **Financial outcome**
  - **Winning / beating the other side / not losing**
  - **Getting rid of dispute / getting on with life & business**
  - **Getting respect, apology etc.**
  - **Lots of other things**
- **Strong advice: At outset of case, try to develop good relationship with counterpart lawyer.**
  - **If good relationship, case will be much easier.**
  - **If they aren't interested, be on guard.**

Prepare Wisely

- Make best estimates of expected court outcome:
  - Identify key factual and legal uncertainties
  - Conduct discovery and legal research to reduce uncertainties
  - Recognize range of possible outcomes
- Make realistic estimates of future legal fees and costs of going to trial
- Help client identify and value intangible interests
- Develop bottom line (which will evolve)
- Develop negotiation strategy considering negotiation “models” and especially the variables

Negotiation in the New Normal

- People often will continue to use video even after they feel safe meeting in person
- Professionals and many laypeople will be comfortable with it and appreciate efficiency
- People will need patience dealing with communication problems, extra time needed (especially to talk with clients), technology problems
- Negotiation and mediation may be broken into stages

What to Do in Competitions

- Always: your goal is to protect your client's interests
- Recognize that judges have different philosophies
- Try to achieve goals of multiple models
- Use "tit-for-tat" approach
  - Start cooperatively
  - Mirror counterparts' responses – cooperative or adversarial
- If appropriate, offer "easy way or hard way," saying you prefer easy way but you can do hard way if they want
- DON'T SAY: My goal is to reach settlement.
- DO SAY: My goal is to reach settlement <u>if we can satisfy both sides' interests</u>.

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

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