Resolution of Legal Disputes

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In General

- **This is overview of what I think is most important about (A)DR in legal disputes – sometimes different than traditional ADR theory.**
- **There are many variations in the US and around the world. Pay attention to local rules, norms, and practices.**

What People Can Do With (A)DR

- **Litigation is important … and it creates problems for parties and practitioners.**
- **The dispute resolution (DR) field offers many options for improvements and increased choices.**
- **Dealing with disputes is difficult and DR techniques are imperfect.**
- **DR practitioners should pay attention to problems and work to prevent and counteract them.**

What is (A)DR?

- What it's NOT (necessarily):
  - Work by neutrals (e.g., negotiation)
  - Interest-based
  - Party self-determination (e.g., arbitration)
  - Good process
  - Private process (e.g., public mandates and neutrals)
  - Innovation
- Dispute resolution, in my view:
  - Is planning, managing, and/or resolving disputes.
  - Includes lawyers, judges, court administrators – I consider them all as "DR professionals."

Clients Often are Frustrated with Their Lawyers

- Clients don't only want favorable outcome.
- Plaintiffs may want "extra-legal" goals including:
  - Admissions of fault.
  - Answers, apologies, and acknowledgments of harm.
  - Prevention of recurrences.
  - Retribution for defendant conduct.
- Clients want satisfactory process with lawyers, and often are frustrated by:
  - Lack of communication.
  - Lack of empathy and understanding.
  - Lack of respect.

New Lawyers are "Woefully Unprepared" to Work with Clients

Recent study found that new US lawyers are unprepared to:

- **Gain clients' trust, gather relevant facts, and identify clients' goals.**
- **Communicate regularly with clients, convey information and options so clients can understand, and help clients choose a strategy.**
- **Manage client expectations, break bad news, and cope with difficult clients.**

Relationships Between Counterpart Lawyers

- Term “opposing counsel” is misleading because counterpart lawyers often cooperate.
- Relationships between counterparts make a huge difference in how people act.
  - Cases can be cooperative – or your own private hell.
- Lawyers can intentionally create good relationships, which can benefit lawyers and clients:
  - Get to know each other personally.
  - Initiate mutually helpful actions.
  - Be respectful in front of clients.

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
- You can use them to describe particular negotiations instead of *elements* in definition.

Examples of Lawyers' Negotiations

- People often think of negotiation only as process with counterpart lawyer at final stage of a case.
- In fact, lawyers also negotiate throughout cases.
- Lawyers seek agreement with:
  - Clients about fee arrangements or scope of work.
  - Counterpart lawyers for extension of deadlines.
  - Supervisors about arguments to include in a brief.
  - Co-workers about what to order for lunch.
  - Experts about content of opinion letters.
  - Court reporters about scheduling.
  - Mediators about materials to provide.
  - Judges about discovery schedule.

BATNAs and Bottom Lines

- Standard advice is to calculate BATNA – best alternative to negotiated agreement.
- In lawsuits, BATNA is expected court outcome.
- General principle is that parties should not accept settlement worse than BATNA.
- But BATNA doesn't reflect costs of continuing to litigate:
  - Tangible costs of legal fees and expenses.
  - Intangible costs such as stress, harm to relationships.
- Bottom line combines BATNA and costs.

Biased Assessments of Court Outcomes

Lawyers and parties often make biased assessments of court outcomes for many reasons:

- **Court outcomes are hard to predict.**
- **Cognitive and motivational biases.**
- **Lawyer-client relationships lead to "conspiracy of optimism."**
- **Adversary system creates incentive for bias.**

"Positional Negotiation" Ritual

- Both sides start with extreme positions then make counteroffers, hoping to maximize their outcome.
- Positions supposedly based on expected court outcome – but obviously not.
- May be uncomfortable for everyone – especially parties because it is so unprincipled.
- Even lawyers sometimes feel hurt, insulted, angry.
- Hard on mediators playing along with "game."

Ordinary Legal Negotiation

- Very common negotiation process almost completely missing from dispute resolution theory.
- In many cases, lawyers realistically focus on expected court outcomes or typical agreements.
- Some haggling and discussion of parties' interests.
- Common in cases with relatively small stakes, where this process is the norm, and where lawyers value reputations for reasonableness.
- Lawyers may be able to "change the game" to OLN by discussing process with counterpart lawyer.

Interest-Based Negotiation

- Popularized by *Getting to Yes* book.
- Process involves:
  - Identifying both parties' interests.
  - Identify options for satisfying interests.
  - Identify criteria (such as parties' values, objective standards, law).
  - Pick option satisfying both parties' interests.
- Has potential to "create value."
- Also has potential for exploitation.
- Limited use in US litigation.

Facilitative and Evaluative Mediation Models

- Theory based on supposedly alternative models.
- Facilitative mediation consists of:
  - Helping parties develop and exchange proposals.
  - Asking about strengths and weaknesses of case.
  - Asking about consequences of settling and trial.
  - Helping parties understand their interests.
  - Helping parties develop options.
- Evaluative mediation consists of:
  - Assessing the strengths and weaknesses of case.
  - Predicting impact of settling and court outcomes.
  - Urging parties to settle.
  - Proposing settlements.

Research and Experience Challenges These Models

- **Models of facilitative and evaluative mediation are oversimplified and misleading.**
- **They are models "bundling" together different interventions.**
- **Some argue that facilitative mediation doesn't interfere with party decision-making but evaluative mediation does harm parties.**
- **Theorized interventions don't necessarily produce the theorized effects.**

Court-Ordered Mediation

- For several decades, some US courts have been ordering parties to mediate before going to trial.
- Theory is that if parties – and especially lawyers – are exposed to it, they will like it and settle.
- Particularly helpful for lawyers, who are afraid to suggest mediation for fear of appearing weak.
- It often has produced good process and results.
- Courts, lawyers, and mediators have become dependent on court-ordered mediation.
- It creates risk of coercion.

Dispute System Design

- Stakeholder groups collaborate to design process achieving specified goals for system, such as court.
- *Theory of Change* article lists 38 possible goals and 26 strategies.
- Courts should design mediation programs so parties and lawyers *want* to mediate.
- Courts have multiple "tools" in their "toolboxes" such as:
  - Sponsoring continuing education programs.
  - Encouraging practitioners' peer consultation groups.
  - Developing educational materials.
  - Recommending mediation without ordering it.
  - Shaping good legal and mediation practice cultures.

Goals of Early Dispute Resolution

- Help parties make good decisions.
- Tailor dispute resolution processes.
- Improve outcomes.
- Reduce tangible and intangible costs for parties and courts.
- Reduce sunk-cost bias.
- Reduce adversarial dynamics.

LIRA Goals

Improve party decision-making

- **Litigation interest and risk assessment (LIRA) fulfills fundamental professional ethical obligation of lawyers and mediators.**
- **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.**

Benefits of LIRA Process

Lawyers and mediators often address elements of litigation but not as systematically as LIRA process, which:

- **Explicitly focuses on intangible costs, which often are overlooked or undervalued.**
- **Provides logical sequence to enhance party decision-making.**
- **Enables practitioners to adapt process to their philosophies and needs of particular parties.**

Mediators' Use of LIRA

Mediators using LIRA process can help parties:

- **Do their own LIRAs.**
- **Identify key legal and factual uncertainties and possible outcomes to estimate BATNAs and develop bottom lines.**
- **Explicitly consider tangible and intangible costs.**
- **Develop wise and effective mediation strategies.**

Three Elements of LIRA

- **Expected value of court outcome (BATNA)**
- **Tangible costs of continuing to litigate**
- **Intangible costs of continuing to litigate**

Note that LIRA process:

- **Can be used before filing of lawsuits.**
- **Generally focuses on monetary disputes – and can include non-monetary issues.**
- **Focuses on <u>future</u> costs, not past (sunk) costs.**

1. 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.**
- **Being stuck in dispute, not getting on with life or business.**
- **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.**
- **You can help parties identify and value intangible costs by asking how much it would be worth to avoid delay, risk, stress etc. of going to trial.**
- **Considering value of intangible costs may reduce expectations for monetary outcome, making it easier to settle.**

Developing a Bottom Line

- **Parties develop bottom lines by adjusting estimated BATNA values by amount of tangible and intangible costs.**
- **Bottom lines are “trip wires” to end negotiation or mediation if they can’t reach acceptable agreement.**
- **Bottom lines are major elements of strategies if parties focus on getting a better result than at trial.**

Mediating with LIRA

- **Use key mediation skills of asking good questions and listening carefully.**
- **Figure out what dispute really is about – with parties and lawyers (often in caucus).**
- **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.**

Common Sources of Conflict

- Personality conflicts
- Underlying conflicts
- Large stakes
- Inexperienced lawyers
- Fear of appearing weak
- Parties don’t know or trust each other
- Parties don’t know the case yet
- Poor communication, including with clients, counsel
- Concern about setting precedent
- Lawyers want to fight, perform for clients, increase fees
- Unrealistic expectations about trial outcome

Lawyers and Mediators as Conflict Diagnosticians

- **Ask open questions such as "What is most important to you in this case?" "Why haven't parties settled so far?"**
- **Parties generally want favorable financial result – but they vary in what they define as favorable (or acceptable).**
- **Parties often want other things, which may be as or more important than financial outcome.**
- **Other goals include being treated with respect, good relationships, favorable precedent, apologies, future employment, or recommendation.**

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 realistically persuade other side to change their assessment.**

Ask How Case Has Affected Them So Far

- **This can be a good, indirect way of learning 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.**

Discussing Intangible Costs

You can 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 lawyer [or other advisor] 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 costs.**
- **Then discuss how much more they expect to spend if they go to trial.**
- **They may not have exact figures. Round numbers are fine.**

Lawyer Discussion of Trial Risks

- Lawyers have difficult challenge to assess likelihood and consequences of litigation contingencies in a case – and combine them into overall assessment.
- Assessment processes include:
  - Past experience, legal research, and intuition.
  - Consultation with others.
  - Decision trees.
  - Simplified LIRA framework using decision-tree logic.
- Clients often find lawyers' assessments vague and confusing.
- Good client decision-making requires good communication.

Mediator Help in Assessing Likely Trial Outcome

- Generally do this after asking about their interests.
- Parties may be confident they can persuade court about some factual, legal, or remedies issues – and less certain about others.
- Discuss which issues they might lose.
- Discuss possible rebuttals to other side's arguments.
- Discuss realistic probability that court would find in their favor on those issues.

Mediator Discussion of Trial Risks

Mediators discuss trial risks in many ways, such as:

- **Asking: "What's your sense of the probability that you can prove X (e.g., breach of duty) at trial?"**
- **Coaching: "In trial, many judges would have questions about X."**
- **Delegating: "Please discuss with your lawyer the likelihood that you will be able to prove X at trial."**
- **Telling: "I think that most judges would decide Y about issue X."**

Ask How You Can Be Helpful

- Don’t assume parties just want you to agree with them or take most extreme partisan position.
- They may want:
  - Process and outcome that feels fair.
  - Your candid assessment of their situation.
  - Understanding of the other side’s views.
  - Advice in negotiation strategy.
  - Help persuading the other side.
- Bottom line: ask, don’t assume.

Mediators' Assessments

- **Mediators differ about whether they give their opinions.**
- **Some mediators give opinions at outset, sometimes without parties' permission. This is problematic.**
- **If you are willing to give your opinions, ask parties if they want your opinion about any issues.**
- **Parties are more likely to accept your opinions if you first understand case and they ask for your opinion.**
- **They may not want your opinion and you should respect their wishes.**

Mediator as Dispute System Designer

- Mediators generally are DSD designers, orchestrating preparation and exchange of information.
- Mediation by video creates greater need and opportunity to design and manage the process.
- LIRA provides more and better tools to design process in consultation with lawyers and/or parties, including:
  - Planning for optimal decision-making.
  - Accommodating parties' process needs.
  - Timing and sequence of sessions.
  - Attendance of particular individuals.

What You Can Do to Promote Good Dispute Resolution

You may want to promote good dispute resolution in particular settings. Here are some suggestions:

- **Develop realistic theories of change.**
- **Promote good relationships of lawyers with clients and counterpart lawyers.**
- **Promote effective early case assessment processes.**
- **Use dispute system design processes to change disputing cultures.**
- **Be patient and persevere – this is long, slow process.**

Theory of Change

Process for producing social change including following steps:

- **Identify long-term goals.**
- **Identify elements needed to achieve goals.**
- **Identify assumptions about relevant context.**
- **Identify interventions to create desired change.**
- **Develop indicators to measure outcomes and assess performance.**
- **Write narrative explaining logic behind initiative.**

For More Details

What is (A)DR About?

Lawyers Are From Mars, Clients Are From Venus – And Mediators Can Help Communicate in Space

Study Finds That Law Schools Fail to Prepare Students to Work with Clients and Negotiate

Getting Good Results for Clients by Building Good Working Relationships with 'Opposing Counsel'

They Should Call It Negotiation School, Not Law School

How to Calculate and Use BATNAs and Bottom Lines with LIRA

BATNAs and the Emotional Pains from "Positional Negotiation"

Lessons From the ABA's Excellent Report on Mediator Techniques

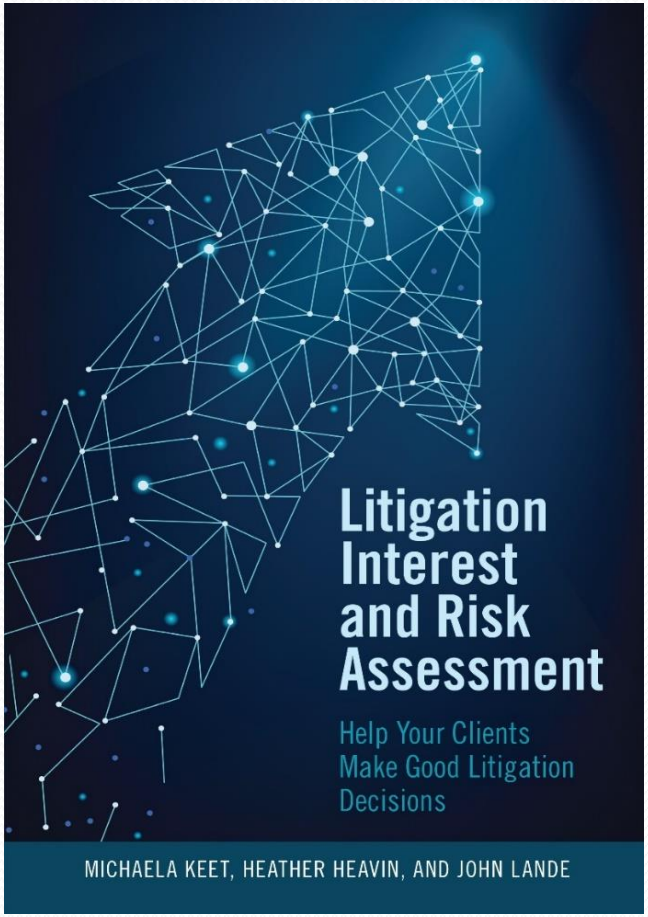
We Should Replace Mediation Models with a Unified Conceptual Framework

Courts Should Make Mediations Good Samaritans Not Frankensteins

The Dispute Resolution Movement Needs Good Theories of Change

Survey of Early Dispute Resolution Movements and Possible Next Steps

Information about LIRA Book



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

For More Information

- **My website:** law.missouri.edu/lande
- **Indisputably blog:** http://indisputably.org/author/john-lande/
- **Kluwer Mediation Blog:** http://mediationblog.kluwerarbitration.com/author/jlande/
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