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Decision-Making as an Essential Element of Our Field

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DECISION-MAKING AS AN ESSENTIAL ELEMENT OF OUR FIELD

JUNE 3, 2020 | JOHN LANDE | LEAVE A COMMENT

Several contributors to the [Theory-of-Change book](#) suggested that we should reconceptualize our field, shifting away from defining it in terms of particular dispute resolution procedures such as negotiation, mediation, and arbitration.

I think that this idea makes sense, and this post suggests that we should include a decision-making lens that may be part of a helpful, unifying concept. Paraphrasing [Len Riskin](#) (quoting George Box), all concepts are imperfect but some are useful. I think this would be useful.

Our field seeks to solve problems when parties lack good (or sometimes any) practical dispute resolution options to choose. We are concerned when:

- Parties' lack access to procedural options and legal services
- Lawyers use a paternalistic approach that undermines clients' decision-making
- Parties and lawyers engage in ritualized negotiation that limits parties to adversarial processes and options
- Parties and lawyers engage in ritualized mediation in which mediators constrain parties' procedural and substantive options
- Parties are required to mediate in situations that are not appropriate or well-designed for particular cases
- Parties are required to participate in arbitration imposed by powerful counterparties, eliminating options for weaker parties

We have responded to these problems with numerous approaches to increase and improve parties' decision-making including:

- Public education about range and use of dispute resolution options
- Dispute prevention
- Unbundled legal services, providing more options for choosing specific legal services
- Increased range of processes in the "[dispute resolution toolbox](#)"
- Increased access to dispute resolution processes

- Triage systems, such as the multi-door courthouse, to increase choice of procedural options
- Technological assistance and online dispute resolution
- Early dispute resolution options
- Increased range of professional techniques (e.g., interest-and-options negotiation in addition to counteroffer technique)
- Dispute system design to tailor procedures in individual cases and continuing series of cases

Incorporating Decision-Making as a Critical Element of Our Field

I suggest that we build on Deborah Eisenberg's idea to define our field as process strategies. I think of our work as focused on process design, strategy, and decision-making in managing conflict.

In the [Theory-of-Change book](#), Deb argues that we should define our field in terms of process strategies that “lawyers and others use to help individuals, communities, organizations, and nations accomplish change, create value, or address conflicts.” This framing addresses the question “What are the desired interests and goals [of the client, community, court, or organization] and which process strategies can best be applied to accomplish them?” It includes “not only **reactive** processes that respond to conflicts but also **proactive and preventive** legal process strategies (such as transactional deals, policy reform, consensus-building, and organizational change).”

She is refining and elaborating these ideas in a forthcoming article, but this is sufficient as a jumping off point for this post.

Deb's concept focuses on choice of process, which a critical part of our work, especially considering the wide range of process options to choose from. Since dispute resolution processes can be tailored to fit particular parties and circumstances, this concept might be expanded to “process **design** and strategy.”

This concept might be further expanded to include assistance in making decisions about particular issues or disputes in whatever process that parties are using. This is the subject of my recent book, co-authored with Michaela Keet and Heather Heavin, about [litigation interest and risk assessment \(LIRA\)](#). Helping parties understand their interests, risks, and options is at the heart of what our field does. That's embedded in our concepts of developing BATNAs and [bottom lines](#) – and helping parties use these analyses to make decisions about their cases.

To illustrate, consider a family law matter where we can help parties **choose a process** (e.g., negotiation, mediation, collaborative law, or litigation), **design the process** by making procedural agreements about how to conduct that process, and **make decisions** about specific issues in a case such as property division, parenting arrangements, and child support. Thus we try to help parties make decisions about both the process and subject matter of their issues.

So, building on Deb's concept of process strategy, we might define our work as process design, strategy, and decision-making in managing conflict. This is a mouthful and not as catchy as ADR. But it may be a better way of defining who we are and what we do than "ADR," which most of us don't like anyway.

What do you think?

[← BATNA](#) [← BOTTOM LINE](#) [← DISPUTE SYSTEM DESIGN](#) [← FOR TEACHERS AND STUDENTS](#) [← OUR COMMUNITY](#)

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