12-8-2020

Concepts That Can Help Practitioners Help Parties Make Decisions in Disputes

John Lande

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DECEMBER 8, 2020 | JOHN LANDE | 2 COMMENTS

The good folks at the Association for Conflict Resolution of Greater New York and CUNY Dispute Resolution Center at John Jay College invited me to give a talk as part of their monthly breakfast series. Last week, I gave a presentation, *Helping Parties Make Decisions About What's Really Important*, which synthesizes ideas I have been working on for a while. The audience was very engaged and although the program was scheduled for 90 minutes, some people stuck around for more than 30 minutes after the program formally ended. Here's a link to the video and powerpoint from the presentation. This post addresses some of the provocative issues we discussed.

Our Main Job Is to Help Parties Make Decisions

My main premise is that our dispute resolution community fundamentally is about helping people make decisions about processes, procedures, and issues in managing their conflicts.

As I discussed in my post, What is (A)DR About?, our community not only includes private neutrals, administrators, researchers, etc., but we also include lawyer-representatives and judges. (This post uses the term "lawyers" referring to their work as representatives, distinguishing lawyers' work as neutrals.) Litigation and trial are critically important dispute resolution processes in themselves (pp. 223-228). And lawyers and judges do a lot to promote dispute resolution outside of court. Obviously, litigation imposes substantial tangible and intangible costs and sometimes it is unnecessary, wasteful, and harmful. Of course, ADR processes also are very problematic at times, as many of us point out in our work. But all of these processes can be helpful, especially when they are well suited to particular parties and situations.

Party decision-making is central to our work. Lawyers' fundamental ethical duty is to help clients achieve their objectives by providing clients relevant information, understandable explanations, and candid advice. Mediators' central role is to help parties make decisions. Even in arbitration and litigation cases, where adjudicators may make final decisions, parties may make many decisions along the way, including whether to settle.

Dispute resolution practitioners help parties navigate a complex system of dispute resolution processes and issues. Practitioners help parties assess their conflicts, and then select, design, and participate in processes for dealing with their disputes.

Some concepts can help practitioners help parties make good decisions in disputes by better:

- understanding the world
- communicating with each other
- planning, performing, and analyzing actions

Unfortunately, the basic concepts in our field are a hot mess. We rely on general models of negotiation and mediation that are extremely confusing, in part because they bundle together distinct variables that often aren't bundled in real life.

Unbundled Concepts

We would do soooooooo much better to unbundle our traditional models. The following unbundled concepts, which are elements of traditional negotiation and mediation models, can help practitioners communicate more clearly and better plan, perform, and analyze their actions.

Types of Dispute Resolution Decisions

- **Dispute resolution process** (e.g., negotiation, mediation, arbitration, trial)
- **Procedures in process** (e.g., information sharing, logistics, timing)
- **Resolution of issues** (issues that parties are concerned about)

Factors to Consider in Resolving Issues

- **Value of options** (e.g., expected court outcome, profit from deals)
- **Tangible costs** (e.g., legal fees and expenses)
- **Intangible costs and interests** (e.g., stress, relationships, reputation, loss of opportunities, and lots more)

Parties' and Practitioners' Cognitions and Actions Relating to Counterparts

- **Goals** (e.g., partisan advantage, joint gain, fairness)
- **Assumptions** (e.g., zero-sum, positive-sum, negative-sum outcomes as well as assumptions about other issues)

- **Attitudes towards counterparts** (e.g., hostile, polite, friendly)
- **Relevant norms** (e.g., law, parties' interests, normal practice, "going rates")
- **Communication process** (e.g., counteroffer, interest-and-options, norm-based)
- **Tactics** (e.g., dirty tricks, information sharing, and many more)

Lawyers' and Mediators' Actions Relating to Clients (with examples of variables noted in parentheses)

- **Listening** (timing, and amount and quality of attention and understanding)
- **Helping parties assess their case** (whether practitioners help parties conduct assessments and, if so, the timing, amount, and quality of help)
- **Assessing options** (whether practitioners assess options and, if so, the timing, appropriateness, amount, quality, and confidence of assessment)
- **Predicting outcomes** (whether practitioners predict outcomes and, if so, the timing, appropriateness, quality, and confidence of predictions)
- **Giving advice** (whether practitioners give advice and, if so, the timing, appropriateness, amount, quality, and confidence of advice)
- **Applying pressure** (whether practitioners apply pressure and, if so, the timing, appropriateness, nature, intensity, and effect of pressure)

People often combine elements of different bundled models in a single case. For example, in an actual divorce case, the parties used counteroffer, interest-based, and norm-based processes to resolve different issues in the case (pp. 42-44).

Not all of these concepts would be relevant in each case. But they identify a manageable set of issues for practitioners to consider in planning and performing their work. Moreover, these checklists do not address all dispute resolution issues. For example, they don't include some actions performed by adjudicators.

Parties' perceptions of these issues inevitably change during their disputes. As parties proceed in their disputes, they learn more about likely outcomes, tangible and intangible costs of various processes, and procedural options. Practitioners vary in how explicitly, systematically, and thoroughly they help parties make these assessments.

Practitioners also vary their interventions during a case. They generally start by listening, and they use a combination of other actions as cases progress.

A framework of unbundled concepts like this does not imply the appropriateness of particular interventions in particular situations. Rather, it can help people make more careful and specific judgments about appropriateness than is possible with the bundled models.

Illustrations of Unbundled Concepts

Audience members in the ACR / CUNY program asked if these concepts could be useful in various contexts. Would they be helpful in cases that aren't litigated? For example, what about community mediation or ombuds processes?

Consider a classic "barking dog" case in a community mediation center, where neither party has consulted a lawyer or filed a lawsuit. The mediators might discuss the procedures in the process – commonly called "ground rules" – and discuss possible revisions or additions to the procedures. The mediators might listen carefully, asking questions about the parties' goals, assumptions, attitudes, and norms that they think are applicable – as well as their assessments of *their counterparts' perspectives* about these matters. They could help the parties assess the plausible options and consider the tangible and intangible costs of continuing the dispute. If the parties consider going to court, they might discuss how the court might react to various pieces of evidence and arguments.

An ombuds in a personnel office might also find these concepts useful. If an employee complains that her supervisor discriminated against her, the ombuds could help her consider procedural options within the organization as well as in EEO agencies and court. They might discuss possible outcomes in different processes as well as the likely tangible and intangible costs of pursuing them. The ombuds could help the employee to reflect on her goals, assumptions, and perceptions of the supervisor's attitudes. Based on this discussion, she might ask him to predict what might happen in the different processes, give advice about how to proceed, and even pressure her supervisor to make some changes.

The audience had lots of questions about how these concepts could be used in many different contexts including:

- child protection cases
- family business cases
- when parties have strong assumptions about the right way to handle a dispute
- when there is a "hurting stalemate"
- how to help parties consider their interests and possible outcomes of disputes
- when lawyers are paternalistic toward their clients
- when lawyers are adversarial toward the other side
- when large amounts of attorney's fees incurred make it hard to settle
- early dispute resolution
- taking advantage of zoom
- multi-stage mediation
- when "evaluative" or adversarial techniques are appropriate

- how practitioners can decide what cases to take or not

As we discussed in the program, in all these situations, practitioners can use the unbundled concepts to diagnose the problems and plan specific interventions to help parties solve the problems.

Of course, no concept or technique will be relevant and effective in every situation, but these concepts may help practitioners and parties assess situations and make the best decisions they can.

ASSESSING INTERESTS AND RISKS DISPUTE RESOLUTION PRACTICE FOR TEACHERS AND STUDENTS
INTERESTS AND MOTIVATION LAWYERING MEDIATION NEGOTIATION
SEEING THE WORLD THROUGH OTHERS' EYES SKILLS AND TECHNIQUES VIDEO

2 THOUGHTS ON "CONCEPTS THAT CAN HELP PRACTITIONERS HELP PARTIES MAKE DECISIONS IN DISPUTES"

Mark Hamilton

DECEMBER 8, 2020 AT 8:32 PM

I originally pursued law school with the idea of becoming a litigator and dreamed of the days I could be a successful trial attorney. As I have started and continued my law school career, I have noticed that the dream I once had has evolved. My exposure prior to taking an Alternative Dispute course was restricted to one mediation. Now, I see the possibilities and importance that both litigation and proper dispute resolution processes have for a client overall. I believe what is directly touched on in this article is what makes ADR an extremely intriguing and ever-growing process. Litigation and dispute resolution are not mutually exclusive. Thus, the importance of understanding all concepts that are best to advocate for your client are vital. I truly appreciate this article and its focus on the need to help individuals make decisions as I believe that is the fundamental purpose of pursing a legal career to begin with.

Taylor Van Zeeland

DECEMBER 8, 2020 AT 8:01 PM

I think this touches on one of the most fundamental aspects of the law and more specifically, ADR, there is no "one way" or "one process" to help our clients. The best part about dispute resolution is that you are able to take your client's interests and find the

most suitable method to help them, instead of forcing on litigation when it may not be appropriate. Just as you mention, as an attorney continues to work with their client and find the true value in the case, she is able to continue to adapt and find more suitable methods to help the client throughout the legal proceedings. As each attorney tackles a case differently, the legal community continues to find more and more methods to help their clients find the best outcome. By creating more solutions through different attorneys approaches and different dispute resolution methods, we can ease the pressure and anxiety clients have when they go through the legal system; and that is the ultimate goal.