Real Lawyering Practice Systems

John Lande

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So far, my pieces in the Real Practice Systems Project have focused on mediation. The theory is not limited to mediation, and this post applies it to lawyering.

In the mediation context, the theory argues that mediators have unique practice systems that grow out of their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases. They develop categories of cases, parties, and behavior patterns. They design routine procedures and strategies for dealing with recurring challenges before, during, and after their mediation sessions. Their systems are mixtures of conscious and unconscious techniques.

Comparing Mediators' and Lawyers' Real Practice Systems

Mediation processes are very varied. Lawyering processes are much more so. For example, lawyers perform different functions such as representation in litigation, transactional, and administrative matters. This post focuses only on pretrial lawyering, though there are analogs in other types of lawyering practices.

The Real Practice Systems Project Menu of Mediation Checklists supplies a useful framework to describe mediators' systems. Mediators' systems do not include everything in the checklists, but the checklists provide a useful structure for understanding the range of mediation systems. Here are the five general categories of checklists:

1. General information to provide in websites and/or other materials
2. Compliance with ethical requirements
3. Tasks before mediation sessions
4. Tasks during mediation sessions
5. Reflection and improvement of techniques

For categories 1, 2, and 5, there are obvious counterparts for lawyering. In categories 3 and 4, one can simply substitute "representation" for "mediation sessions."

For example, both mediators and lawyers sometimes produce websites with information about their background and experience, the types of services they provide, and how to initiate the mediation or representation process.

Mediators and lawyers both are subject to ethical requirements, though the specific requirements obviously differ.

Both may do some reflection after their cases.

Before mediators and lawyers agree to take cases, they may make some inquiries to consider if there are conflicts of interest, whether they are competent to handle the cases, and whether they want to take the cases.

Before mediation sessions, mediators often gather information about their cases. Lawyers may do some investigation before taking cases, though most of their investigation generally occurs afterward.

The heart of both processes is in category 4 – mediation sessions and lawyers' work in representation. Obviously, this is where the tasks most differ.

Pretrial Lawyering Practice Systems

Below is an outline of practice systems of lawyers interviewed for my study, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*. Although the ostensible purpose for pretrial litigation is to prepare for trial, such preparation is inextricably intertwined with negotiation because the expected trial outcome often is a major factor affecting negotiation. The lawyers in my study, who were selected because of their good reputations, recognized that most cases are settled but that they also need to prepare for trial. For example, one lawyer said that he "prepares for settlement from day one of the lawsuit" and that there is a "constant process of evaluating the claim" throughout the litigation.

In response to my questions, the lawyers described their general practice philosophies. In general, these lawyers believe in taking control of their cases as soon as possible and planning to negotiate at the earliest appropriate time.

The following outline provides a framework for their work, much like the mediation checklists described above. Of course, lawyers don't necessarily perform all the following functions, and they certainly don't do them all in every case.

- Understand your clients and their interests

- Identify your goals
- Determine key issues
- Conduct necessary legal research
- Investigate the facts
- Exchange information efficiently
- Follow the norms in your legal practice community
- Develop good relationships with counterpart lawyers
- Make strategic decisions about the timing of negotiation
- Enlist mediators' and courts' help when appropriate

Of course, this list doesn't include many pretrial tasks such as conducting discovery, engaging in motion practice, filing court documents, participating in judicial pretrial conferences, or preparing for an imminent trial.

Practice guides are full of checklists to perform some of these tasks, and lawyers develop their own conscious or unconscious procedures for some that aren't included in such texts.

Factors Affecting Lawyers' Systems

Presumably, much like mediators' systems, lawyers' systems are affected by their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and subjects in their cases. They develop categories of cases, parties, and behavior patterns, and they design routine procedures and strategies for dealing with recurring challenges at every stage of litigation.

The lawyers in my study generally were interested in being reasonable and efficiently satisfying their clients' interests. Some lawyers use different general approaches, such as taking tough positions and dragging out litigation for partisan advantage.

Other factors presumably affect lawyers' systems such as:

- Types of cases they handle
- Type of practice, e.g., private civil practice, legal aid, organizational inside counsel, criminal prosecution, public defender, public interest advocacy
- Whether they have a general practice or specialized practice
- Size of legal office in private practice, e.g., sole practice, small firm, or large firm
- Norms of their practice communities, which may be affected by their location in urban, suburban, or rural communities

The type of process presumably also affects their systems. For example, in litigation, the systems are different for trying and appealing cases than for conducting pretrial litigation. And lawyers' systems in litigation differ from processes other than litigation.

Lawyers have their own unique practice systems, just as mediators do. In both types of work, practitioners may be more or less conscious and intentional about what they do, and they could benefit from systematic reflection about their systems.

Lawyers who want to analyze and improve their systems can complete this 18-question real practice system self-assessment worksheet.

Law students can conceptualize the kinds of systems they would like to use after graduation by completing this 8-question real practice system self-assessment worksheet. Although they don't have legal practice experience to analyze, they can reflect on their backgrounds, values, and aspirations.

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