

University of Missouri School of Law

## University of Missouri School of Law Scholarship Repository

---

Faculty Blogs

Faculty Scholarship

---

4-25-2015

### **EVERYTHING I KNOW ABOUT DISPUTE RESOLUTION IS WRONG – ESPECIALLY WHAT YOU SAY ABOUT IT**

John Lande

Follow this and additional works at: [https://scholarship.law.missouri.edu/fac\\_blogs](https://scholarship.law.missouri.edu/fac_blogs)



Part of the [Dispute Resolution and Arbitration Commons](#)

---

---

## EVERYTHING I KNOW ABOUT DISPUTE RESOLUTION IS WRONG – ESPECIALLY WHAT YOU SAY ABOUT IT

APRIL 25, 2015 | JOHN LANDE | LEAVE A COMMENT

I think that it is accurate to say that at the ABA DR Section Conference we had a lively session entitled, “[Everything You Know About Dispute Resolution is Wrong – Can You Handle the Truth?](#)”

(At least it was lively for those who were able to squeeze into the room and not for the people who expected to see it via live streaming, which didn’t happen. Our apologies.)

Of course, we engaged in a bit of hyperbole in our title – Everything You Know (or Say) About Dispute Resolution is Wrong. We wanted to provoke some reaction – and we sure did. As Noam later put it, we rattled some cages as we discussed some inconvenient truths.

### Really?

My co-provocateurs – Alyson Carrel, Jim Coben, and Noam Ebner – and I started the session with Jim and Alyson doing a demonstration of a lawyer explaining DR options to a client. While Jim, as the lawyer, made various statements, Noam and I held up color-coded signs saying “True” (green), “Really?” (yellow), and “No Way!” (red). Snickers of recognition rippled through the room at times.

In a second scene, Noam and Alyson played co-mediators doing an opening statement in mediation, explaining how the process worked. This time, we circulated copies of the three signs to the audience and invited people to hold them up as they saw fit.

Perhaps not surprisingly, people often held up different signs for the same statements. [Here’s a list of the points in both scenes](#), including some that we think DR professionals sometimes present in a misleading way.

We used these demonstrations to illustrate some issues that arise not only in direct conversations with clients but also between colleagues, in our literature, on websites, and other places.

Thereafter said lively discussion ensued, including in small groups. Jim primed the pump with a brief presentation about how in our society, there are [many major policy issues where people act as if the facts don't matter](#) and, in our field, people often make somewhat similar suggestions – often in the form of suggestions that people focus on the future and not the past. He emphasized that the statements typically are based on good intentions but may be problematic nonetheless.

Then I argued that part of the problem is our sloppy concepts, not just the factual inaccuracies or unwillingness to consider the facts.

As an example, I described a true story about a mediation I did when I directed the mediation clinic at UALR. One student gushed that it was so “transformative” while another was disgusted that it was so “evaluative.”

I noted that [Len Riskin tried to rehabilitate the concepts of facilitative and evaluative mediation by developing a series of new grids](#) – and that people seem to have completely ignored the clarifying frameworks.

I have found that people often are sloppy in referring to positional and interest-based negotiation (or a myriad of analogous terms), often meaning simply that one is acting tough or nice.

Then we asked the audience to explain why we do these things. Some of the responses included that this reflected our professional identities, insecurities, inertia, convenience, comfort in accepting conventional wisdom, difficulty in building (or bucking) consensus, unawareness of what we are actually doing, sharing of socially-constructed reality, difficulty in conveying complexity, expression of aspirations rather than general reality, being attracted to simple stories of good and bad practice, self-interest, missionary zeal, and a professional conspiracy against the laity (quoting George Bernard Shaw).

## **What's the Big Deal?**

One person asked whether parties actually were misled by our statements. In other words, did it make any difference? I noted the study by Jeff Sovern, Paul Kirgis, Elayne Greenberg, and Yuxiang Liu finding that people misunderstood statements about waiver of arbitration.

There is a lot of evidence that much of the public is ill-informed or misinformed about many things such as the basic structure of our government, prominent office-holders, and major current events. If many people would be confused anyway, does it matter whether we provide misleading information?

We asked people to discuss these issues in small groups. I think that there were three categories of reactions.

Some people shared a concern that people in our field do provide misleading information and/or that consumers are confused. Some of our colleagues are very concerned about this and seemed to feel that our presentation validated their worries.

A second, and opposite, reaction was from practitioners who seemed to feel offended that we mischaracterized their procedures. Some people provided lengthy accounts about what they say to clients.

Of course, even if some practitioners' statements are 100% accurate, that doesn't mean that all statements by others in our field are similarly accurate. Indeed, those who feel that their statements are scrupulously accurate might feel particularly concerned if others contribute to confusion.

A third reaction, literally, was "So what?" From this perspective, these issues aren't things we need to be concerned about. It is not clear if these folks felt that this confusion doesn't occur or that if it does, it is not a serious problem.

One person told me that the concern about confusing concepts was just a concern of academics. (No offense taken.)

I disagree, having heard a lot of practitioners express great concern, for example, about the definition of mediation or that it was important that mediators use facilitative or interest-based approaches.

## **Does it Really Matter?**

[Tamara Relis's study of medical malpractice mediations](#) suggests that discussion of the facts does matter a lot to the parties, including to both plaintiffs and defendants. By contrast, she found that the lawyers on both sides generally focused on settling the cases and didn't value discussion of what happened leading up to and following the medical problems, which may not have been legally relevant. I suspect that many mediators in non-family civil cases have a similar perspective about this as the lawyers in a wide variety of these cases.

Unlike some people in our audience, I do think that it matters whether DR professionals value the facts appropriately and use clear concepts. Although some parties may not care about talking about the facts in their cases and some discussion of the facts can be counter-productive, in my view, this does not justify presumptively avoiding these discussions.

In my view, often the facts really DO matter. For example, I think that it does make a difference if one party really lied, cheated, stole, or battered the other.

Although we can't (and shouldn't try to) fully adjudicate the facts in negotiation or mediation, that doesn't mean that the facts should be considered irrelevant, as if each person's story is equally true or valid. To me, that's a Kafka-esque distortion of reality that undermines the legitimacy of our work.

I also think that it's important to be as clear and accurate in our thinking and statements as possible because I think it can affect the quality of our work. Sloppy thinking can lead to sloppy work.

In my view, it's a matter of intellectual and professional integrity to be as clear and accurate as possible. And while confusing statements wouldn't add to some people's confusion, I assume that it does for others.

## **What Can You Do?**

This is not to suggest that it is easy. It is not. These ideas are complex. There are wide differences in beliefs and practices in our field. We see people when they are under stress, often resulting in their diminished ability to process information.

There may not be one clear truth in a situation, the truth often is hard to determine, and it may not be productive to focus on facts in the past. And there are many more reasons why these problems are difficult.

But I think that part of being a professional is striving to provide the best and clearest service one can. For those who share this concern, it is important to recognize the problems – and help our colleagues to do so.

We shouldn't believe everything we think. And we should develop a mindset of careful (self-)scrutiny, sympathetically questioning ideas of our own and our colleagues.

We hope our session will stimulate people to be more sensitive to these issues in the future, perhaps with green, yellow, and red signs popping up in your head as you hear, read, and talk about our beloved field.

What do you think?

◀ CONVENTIONAL WISDOM    ▶ DISPUTE RESOLUTION FIELD    ▶ DISPUTE RESOLUTION PRACTICE  
◀ FOR TEACHERS AND STUDENTS

This site uses Akismet to reduce spam. [Learn how your comment data is processed.](#)

