9-23-2018

REALITY-TESTING QUESTIONS FOR REAL LIFE AND SIMULATIONS – AND IDEAS FOR STONE SOUP ASSIGNMENTS

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SEPTEMBER 23, 2018 | JOHN LANDE | LEAVE A COMMENT

Litigation offers many potential benefits. It can help people solve difficult problems, make relationships and institutions function properly, and promote justice. It enables people to enlist legitimate, independent government officials to resolve disputes when the parties can't resolve disputes themselves. Indeed, litigation provides mechanisms for structuring dispute resolution processes that enable most parties to ultimately settle disputes themselves, without court adjudication. Individuals and organizations rely on the rule of law so that they can enjoy their legal rights, protected from fraud and other illegal behavior. Litigation is essential to enforce the rule of law, deterring potential lawbreakers who would behave with impunity if they had no fear that they would pay a price for acting illegally. It also provides some remedies for litigants who have been harmed and contributes to the development of legal doctrine.

While parties may receive significant benefits from litigation, they generally also incur substantial costs in the process. This post describes some of these costs and suggests that faculty incorporate these factors in their simulations and Stone Soup assignments in clinical, externship, interviewing, counseling, negotiation, and mediation courses. It includes questions that lawyers and mediators should ask their clients in real cases – and that students should practice in simulations.

Professionals' Problems in Complying with Duties to Help Clients Make Well-Informed Decisions

Lawyers and mediators are required to help clients develop realistic understandings of their cases in litigation. Rule 1.4(b) of the Model Rules of Professional Conduct states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Although lawyers are not required to obtain informed consent for all client decisions, this is a useful concept for

lawyers to consider generally. Helping parties make informed choices is an important element of self-determination under the Model Standards of Conduct for Mediators.

This is way more easily said than done, however. Everyone is subject to numerous cognitive biases, and litigants and lawyers are especially prone to some biases that impair their decision-making. The dynamics of lawyer-client relationships aggravate decision-making problems, often leading lawyers to confuse clients rather than communicate clearly.

Litigation is inherently uncertain and it's hard to accurately predict court outcomes or the tangible costs of litigation, i.e., legal fees and expenses. While most lawyers and litigants probably don't use formal decision analysis techniques, they understand the general logic. They recognize that there is a range of plausible court outcomes and that some options are more probable than others, leading to some estimated result or range of results. They also know that clients will incur the tangible costs, which generally can be quantified though not predicted with certainty.

There are numerous knotty problems that make it especially hard to assess *intangible* litigation costs, as described below. Based on extensive research by Michaela Keet and Heather Heavin, we wrote a guide book for lawyers and mediators to help clients assess their interests affected by litigation, including both tangible and intangible costs. It is entitled *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, published by the ABA Section of Dispute Resolution

Carefully Assessing Material Risks of Intangible Costs of Litigation

Sometimes, litigants' intangible costs are much more important to them than the tangible costs. Although litigants and their lawyers may generally recognize that litigants will incur some intangible costs, they often do not consider the various intangible ways that litigants can be harmed and do not carefully assess these costs when making litigation decisions.

Individual litigants suffer "litigation stress" to varying degrees. Litigation can interfere with their normal mental, emotional, and physical lives. Participation in litigation can produce flashbacks, nightmares, and physical symptoms. Some parties obsess about their cases, causing difficulty with social situations and in going to work or school. Litigation stress can degrade people's cognitive functioning, depleting mental resources, stimulating fight-or-flight reactions, and increasing the risk of cognitive biases. Litigation can disrupt diagnosis and treatment of parties who have been physically or mentally injured. The legal process also can strain parties' relationships, causing their support systems to "burn out." Litigation often requires parties to repeatedly provide detailed accounts of traumatic events to strangers. This can keep them focused on the past, reaffirming dysfunction while under-

mining attempts to move forward. Litigation stress can interfere with parties' abilities to litigate effectively, impairing their memory, for example. If parties have to make too many decisions in a short period, they are at risk of suffering "decision fatigue."

Litigation stress also can damage lawyer-client relationships. Clients' dependency and vulnerability can increase their sensitivity to perceived slights such as their lawyers' apparent or real disinterest in communicating with clients, and possibly declining confidence in getting a successful outcome. While these problems can occur in virtually any case, they may be particularly serious in some cases, such as when the parties have mental health issues, suffer from chronic pain, and are involved in cases involving sexual harassment or sexual assault, divorce, or medical malpractice claims.

Organizational litigants also incur substantial intangible costs by participating in litigation. It can harm internal dynamics within organizations, impose opportunity costs, and damage their reputations. When organizations are parties in litigation, their board members, executives, managers, and other employees may fear that their future with the organization is in jeopardy. Employees may worry that they may not be able to continue to work in the organization or get a good job with other employers.

Litigation can change the social atmosphere within organizations, eroding morale and destabilizing their culture in multiple ways. For example, it can affect employee absenteeism, physical health, productivity, and decision-making. Different employees and units in the organization may have conflicting perspectives and interests in the handling of the litigation, which can cause internal discord. In reaction to intense pressure of a lawsuit, decision-makers can experience high levels of uncertainty, emotion, and pressure, causing them to misperceive crises and make decisions that are not in the organizations' best interests. Litigation can divert energy away from organizational goals and can impede innovation. It can quickly damage companies' brands and reputations, reducing their value. Organizations may need to develop expensive and time-consuming strategies to rehabilitate their reputations and address other intangible damage.

Tamara Relis summarized empirical research about litigants' experiences, concluding that "litigants seem to suffer in some way at nearly every stage in litigation, whether precipitated by lawyers, judges, courts or simply 'the system.'"

> [Their] experiences are basically reconstituted to fit into legal compartments that generally exclude many matters often most important to litigants. Moreover, clients receive little help from lawyers in dealing with the emotional realities of their circumstances. … [C]lients often do not receive adequate costs information, at least not early on. Hence, clients in diverse dispute types commonly perceive charges as extortionate

> or unfair. Moreover, many do not feel they receive value for their money. … [L]egal costs, normally out of litigants' control, often end up being far more than they expect, despite little they can do about it. … [Litigants] commonly suffer communication and comprehension difficulties thus frequently are confused by things they hear from their lawyers, and may not understand what is going on. Equally, despite their strong need to hear about how their cases are progressing, litigants often feel insufficiently updated, consequently feeling alienated and badly treated. … [Some litigants] either hear about the insincerity of negotiations and/or perceive negotiating processes as unfair, sometimes viewing their focus on money as trivializing issues most important to them. Furthermore, numerous litigants feel left out of negotiations and consequently many feel obliged to accept any resulting offers (particularly due to much stress, pressure, worry and incessant costs fears). … [N]otwithstanding the emotional value of trials, large numbers of litigants suffer severe anxiety and stress, both before and throughout their time in court. This is exacerbated by the fact that litigants generally have misconceived expectations about courts, what courts do and how they do it. Once inside courts, litigants lose total control over their cases, are permitted only to advance truncated versions of their stories (despite their significant need to express themselves) without comprehending why, and experience feelings of frustration, disappointment and humiliation because of how they perceive they were treated.

In short, being a litigant can ruin your whole day. Or year. Or several years. Indeed, harmful effects of litigation can persist long after it ends.

Lawyers can reduce clients' intangible costs of litigation by monitoring clients for litigation stress and decision fatigue, promoting good communication and decision-making, discussing alternative processes for dispute resolution, and engaging other professionals as appropriate. This is particularly helpful early in a case, but also can be helpful later in a case.

Applications in Legal Education

Given lawyers' and mediators' duties to help clients make informed decisions, it is quite appropriate for faculty to include this as part of their instruction. In simulations of lawyer-client interviews and mediations, students typically are instructed to ask reality-testing questions. Often, these questions involve second-guessing the likely results at trial – aka analyzing parties' BATNAs. Sometimes, this may include discussion of possible legal expenses and perhaps some general discussion of intangible costs of litigation. Often, however, consideration of intangible costs is given short shrift or completely ignored.

For several reasons, students would especially benefit by examining clients' material risks of intangible costs in depth. These costs can be extremely important to clients, who typically don't have the knowledge and experience to anticipate them very well. As repeat players, lawyer-advocates and mediators should be in position to help clients carefully assess them. While this is true in theory, Michaela and Heather's research suggests that many lawyers are reluctant to have these careful conversations with clients. So it is appropriate to prepare law students to do this when they are in practice.

In some ways, these issues lend themselves better to simulations than questions about likely court results or legal expenses. Typically, students in simulations don't have enough information about the law or the facts to do a very good job of analyzing these factors. In simulations, students are in a much better position to discuss clients' interests and intangible costs. If desired, faculty using tried-and-true simulations can add some brief material in clients' instructions to elaborate these issues.

Faculty could encourage or assign students to explore some of the questions in the following section, adapting them as appropriate to the facts in the case. These questions assume that the lawyers or mediators have already elicited critical facts about the case from the clients. The questions do not address potential outcomes at trial or tangible costs, which also should be discussed with clients at some point during the simulations.

The questions are particularly appropriate early in litigation or even before suit has been filed. Some of the questions may be appropriate later in litigation and may be appropriate for mediators.

As Donna Shestowsky's research suggests, lawyers generally should ask clients' about their interests and concerns *before* giving their assessments because clients are especially influenced by their lawyers' advice.

In general, it's helpful to start with open-ended questions and ask follow-up questions as appropriate. These questions should not be intended to put pressure on parties to lower expectations, which lawyers and mediators sometimes do. The extent of any pressure typically is a function of the intent, context, tone, and sequence of the questions. Ideally, professionals should ask these questions in a spirit of genuine curiosity and mutual education with their clients.

In simulations in negotiation and mediation courses, it is very helpful to require lawyer-student pairs to simulate an initial interview before the simulations of the negotiation or mediation process. Many colleagues do this in multi-stage simulations. I used to have students

do simulations covering six stages, which I think were very valuable pedagogically. Many colleagues aren't ready to go that far but do include an initial lawyer-client interview stage.

Below are separate sets of questions for individual and organizational clients. Some of the questions oriented to individuals may be appropriate for organizational clients. The questions are oriented for lawyers to ask their clients. In mediation simulations where lawyers represent clients, the questions could be adapted to ask lawyers about their clients' interests and perspectives.

Students should use or adapt these questions as appropriate in each case. Some of these questions may not be relevant in particular cases and obviously they should ask only questions that are relevant. They can put clients at ease if they ask these questions in a conversational manner instead of simply going down a checklist of questions.

Stone Soup assignments in which students interview real-live lawyers or mediators might encourage or require students to ask about the subjects' experiences or perspectives about some of the following issues.

Model Questions to Assess Individuals' Interests and Material Risks of Intangible Litigation Costs

- Have you been involved in a lawsuit before?
- Do you know about lawsuits that friends or relatives have been involved in?
- What are your most important goals in this case? Why are they important to you?
- Most people have some fears or concerns about litigation, even people who have been through many lawsuits. What are some of your fears or concerns?
- How much do you think about this case? Does it distract you from your work or family life?
- How do you expect the litigation process to work in your case?
- How long do you expect this case will take before it is over?
- Of course, it would be great if the case could be resolved tomorrow. Obviously, it will take longer than that. Do you have any particular concerns about the length of time that this will take?
- If this case goes on for, say, a year, do you think it would affect the way that people think about you?
- If this case goes on for, say, a year, do you think it would affect your relationships with people you care about?
- If this case goes on for, say, a year, would that prevent you from doing anything important to you?

- Litigation can be stressful at times. How do you generally respond when you are in stressful situations?
- It will be important for me to know if you are having a hard time. What is the best way for you to let me know this?
- Some people find it helpful to see a counselor to help them deal with stress. Do you see a counselor now? Do you think it might be helpful to see a counselor to help deal with the stresses of this case?
- In the litigation process, each side is entitled to get information from the other side through a process called "discovery." So they might ask you to provide copies of documents, answer written questions, or participate in a deposition. In a deposition, the other lawyer asks you questions and a court reporter makes a record of exactly what you said. I would be there to answer any questions you might have and to object to any questions that are inappropriate. But you would have to answer the questions yourself. How do you think you would feel during a deposition in this case? Is there any information that you would not want to provide to the other side?
- There are several different ways that this case could be resolved. Of course, one possibility is that it would go to trial and a judge or jury would make a decision. Although you see this a lot on tv, only a small proportion of cases actually go to trial. Most cases are resolved through negotiation between lawyers in consultation with their clients. Some parties use mediation, which is like negotiation except that there is a neutral mediator who helps both sides try to reach agreement. The mediator doesn't have the power to make a decision, so if the parties don't agree, they would use another process to resolve the case. Some parties use arbitration, which is like a court trial except the arbitrator is a private professional and the process is conducted privately. The arbitrator's decision is binding like a court's decision.

  This is a very brief description of some of the major ways to resolve lawsuits. Do you have any questions about how they work? Which of these processes sound like they might be the best for you? Why? Which of these processes would you want to avoid? Why?

- As we discussed, litigation can take a long time and be stressful. That's one reason why people often settle their cases instead of going to trial. To avoid the delay and stress of trial, plaintiffs often settle for less than they think they would get at trial and defendants often pay more. I want to understand what's important to you in this case and how much it's worth to you.

  For example, if we could settle this case in three months instead of a year, how much would that be worth to you? In other words, if you would [get / pay] $X in a year, how much would you be willing to [accept / pay] to resolve this in three months?

- Even in the best cases, there always is some risk in going to trial. How important is it to you to avoid that risk? [For plaintiffs:] In other words, if you think you might get $X if you win at trial but might also get nothing, how much would you accept to avoid the risk of losing? [For defendants:] In other words, if you think that you might not have to pay anything if you win at trial but might have to pay $X if you lose, how much would you pay to avoid the risk of losing?
- Some people really want to go to trial to present their case publicly and have the court make a decision, which they expect would be in their favor. Other people want to avoid the publicity of a trial and the risk of losing. How would you feel about going to trial?
- If you don't go to trial, do you think that you would regret it?

Model Questions to Assess Companies' Interests and Material Risks of Intangible Litigation Costs

The following questions are designed for businesses and can be adapted for other types of organizations.

- In proceeding in litigation in this case, how much time and energy will be required of directors, executives, and other employees?
- How might this case affect your company's ability to focus on your goals and opportunities?
- How might this case affect plans for future growth and innovation?
- Litigation is stressful and can interfere with good decision-making about how to handle the litigation. Sometimes people are overly optimistic and sometimes litigation leads to groupthink or internal conflict. What, if any, problems like these would you anticipate?
- How might this case affect your employees' morale and identification with the company?
- How do think that your company would be portrayed in the mainstream business and news media coverage of this case? How might your company be portrayed in social media?
- How might this case affect your company's brand – how the public perceives your company and your products and services?
- How might this case affect your company's reputation and relationship with stakeholders such as customers, suppliers, contractors, or lenders?
- Might there be reputational *benefits* to litigation in this case?
- What resources would be required to counteract any of the problems you just identified?
- In assessing the costs and benefits of this case to your company, what dollar amounts would you estimate as the cost of any problems you identified?
- [For plaintiffs:] How much would it be worth to your company to avoid the problems you just identified? In other words, if you might get $X from the litigation, how much would you accept to avoid these problems?

- [For defendants:] In addition to payments for any liability in this case, how much more would it be worth to pay to avoid the problems you just identified?

ASSESSING INTERESTS AND RISKS BATNA DISPUTE RESOLUTION PRACTICE FOR TEACHERS AND STUDENTS LAWYERING MEDIATION NEGOTIATION RECENT SCHOLARSHIP SEEING THE WORLD THROUGH OTHERS' EYES SIMULATIONS SKILLS AND TECHNIQUES STONE SOUP PROJECT