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KEET AND HEAVIN ON WHY LITIGATION INTEREST AND RISK ASSESSMENT IS SO DARN IMPORTANT FOR LAWYERS AND MEDIATORS – AND HOW YOU CAN MAKE STONE SOUP WITH IT

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KEET AND HEAVIN ON WHY LITIGATION INTEREST AND RISK ASSESSMENT IS SO DARN IMPORTANT FOR LAWYERS AND MEDIATORS – AND HOW YOU CAN MAKE STONE SOUP WITH IT

JULY 25, 2018 | JOHN LANDE | LEAVE A COMMENT

[Michaela Keet](#) and [Heather Heavin](#) (Saskatchewan), have been studying “litigation interest and risk assessment” (LIRA), something you probably teach using different names. You probably emphasize the importance of analyzing BATNAs and preparing for negotiation and mediation, which are basic elements of LIRA.

Building on their own and others’ research, they developed a simple but comprehensive framework for practitioners and parties to assess parties’ interests and risks in litigation. It involves identification of factors affecting possible outcomes at trial and probabilities of various events. It also includes careful assessments of both tangible and intangible costs of going to trial, which is important because lawyers and litigants often do not carefully consider intangible costs such as litigation stress, damage to relationships and reputations, and loss of opportunities. Good practice includes consideration of parties’ goals and interests as well as alternative ways to achieve their goals.

Michaela and Heather’s framework is useful for quantifying and communicating risks and valuations so that parties can participate effectively in decision-making about negotiation, mediation, and litigation. Lawyers and mediators have ethical duties to help clients make informed decisions and this framework can help them comply with these obligations and provide high-quality professional service.

Michaela and Heather have translated their research into teaching and practice. They have used their framework in their courses and found that it helps students become more effective problem-solvers. The lawyers, mediators, and judges they have worked with have been very interested to learn how they can do better LIRA.

Here’s a four-minute video that summarizes their work:

Simple Framework for Risk Analysis - Heather H...



ABA Book on Helping Clients Assess Their Interests and Risks

Michaela, Heather, and I are collaborating on a book on practical techniques, entitled *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, which the ABA Section of Dispute Resolution will publish. It will synthesize material from the following publications, among others, and present it as a handy practice guide.

Heather D. Heavin & Michaela Keet, *Litigation Risk Analysis: Using Rigorous Projections to Encourage and Inform Settlement*, *Journal of Arbitration and Mediation*, (forthcoming).

Heather D. Heavin & Michaela Keet, *Skating to Where the Puck Will Be: Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes*, 76 *Saskatchewan Law Review* 191 (2013).

Heather D. Heavin & Michaela Keet, *A Spectrum of Tools to Support Litigation Risk Assessment: Promise and Limitations*, 15 *Canadian Journal of Law and Technology* 265 (2017).

Michaela Keet, *Informed Decision-Making in Judicial Mediation and the Assessment of Litigation Risk*, 33 *Ohio State Journal of Dispute Resolution* 65 (2018).

Michaela Keet, *Litigation Risk Assessment: A Tool to Enhance Negotiation*, 19 *Cardozo Journal of Conflict Resolution* 17 (2017).

Michaela Keet, *Settlement Counsel: An Innovative Strategy for the Management and Resolution of Commercial Litigation Files*, 95 *Canadian Bar Review* 357 (2017).

Michaela Keet & Brent Cotter, [Lawyers' Ethical Obligations, Innovative Models of Legal Service and a Time of Regulatory Upheaval: Settlement Counsel as an Instructive Model](#), 96 Canadian Bar Review (forthcoming).

Michaela Keet & Brent Cotter, [Settlement Conferences and Judicial Role: The Scaffolding for Expanded Thinking about Judicial Ethics](#), 91 Canadian Bar Review 364 (2012).

Michaela Keet, Heather D. Heavin & Shawna Sparrow, [Anticipating and Managing the Psychological Cost of Civil Litigation](#), 34 Windsor Yearbook of Access to Justice 73 (2018).

Michaela Keet, Heather D. Heavin & Shawna Sparrow, [Indirect and Invisible Organizational Costs: Making Informed Decisions About Litigation and Settlement](#), 20 Cardozo Journal of Conflict Resolution 49 (2018).

Brea Lowenberger, Michaela Keet & Janelle Anderson, [Collaborative Policy-Making, Law Students, and Access to Justice: The Rewards of Destabilizing Institutional Patterns](#), 34 Windsor Yearbook of Access to Justice 148 (2017).

[My work on planned early dispute resolution](#) meshes nicely with theirs and will be incorporated in our book.

Making Stone Soup with LIRA

We all say that preparation is important – it's more popular than mom and apple pie – but we have only vague ideas about how people actually prepare for negotiation and mediation. We sometimes list general factors or approaches, but usually that's as far as we get.

If I was a betting person, I would bet that negotiators generally don't do it in the rational way we preach. And considering how important everyone says preparation is, it would be good to learn how people actually do it.

As Charity Scott described, [we can use students as "scouts" to find out how things actually work in the real world](#). So I suggest that faculty use a Stone Soup assignment instructing students to interview people about how they actually analyze cases before negotiation and mediation. You can use or adapt this [set of questions](#) that students might ask.

◀ ASSESSING INTERESTS AND RISKS ◀ BATNA ◀ DISPUTE RESOLUTION PRACTICE ◀ FOR TEACHERS AND STUDENTS
◀ LAWYERING ◀ MEDIATION ◀ RECENT SCHOLARSHIP ◀ SKILLS AND TECHNIQUES ◀ STONE SOUP PROJECT

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