Helping Lawyers Help Clients

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By John Lande

Consulting clients about dispute resolution options is easier said than done. This article suggests a strategy to help lawyers counsel clients in choosing dispute resolution options. Perhaps the most promising approach involves using dispute systems design (DSD) procedures to establish better ways of training lawyers to counsel clients.

Problems with rules requiring lawyers to discuss dispute resolution options. Although rules requiring lawyers to advise clients about dispute resolution options could be a helpful component of a strategy, such rules by themselves are not likely to be optimally effective. The ABA Model Rules of Professional Conduct do not clearly require lawyers to advise clients about dispute resolution options. There is a patchwork of statutes and rules in some states requiring or encouraging lawyers to consult with clients about dispute resolution options. Many of these rules are vague, nonbinding, or apply only when there is an actual negotiation or settlement opportunity. These rules generally do not require lawyers to do as much as they would need to obtain informed consent, which is defined in the Model Rules of Professional Conduct 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." Moreover, lawyers can easily evade these rules if they do not want to follow the spirit of the rules.

Dispute systems design approach. In DSD, a design team is composed of representatives of stakeholder groups concerned about the relevant issues. The design team consults members of stakeholder communities to identify perceived problems and goals. Then it develops a plan to address the problems and achieve the stakeholders' goals, which may include development of educational materials and training for key stakeholder groups. The team submits the plan for approval by the necessary authorities. It implements the plan and should periodically review and revise the plan as needed.

One can think of a lawyer's practice as a dispute system, and thus causing unnecessary problems. Even if stakeholders believe that the status quo may be generally satisfactory, they may want to improve it. In communities where there is not sufficient interest in changing the status quo, DSD will not work.

Communities dealing with lawyers' client counseling may be defined geographically and/or may be narrowed to particular types of cases. For example, the scope of the community could be a state or the boundaries of a particular court's jurisdiction. Thus a DSD project could be set up for lawyers practicing in a general civil court or specialized courts such as family or probate courts in a jurisdiction. Alternatively, a DSD process might be coordinated by specialized bars, such as those dealing with intellectual property, construction, or franchising disputes.

Bar committees, bench committees, and bench-bar committees are obvious candidates for organizing a DSD project about client counseling regarding legal dispute resolution. Such committees could appoint another committee to manage the project, serving as the design team described above. This committee would include representatives of stakeholder groups, particularly those with a strong interest in the project. It is also wise to include potential opponents who can identify potential problems that might be addressed. If their concerns are adequately addressed, they may be convinced to support—or at least not oppose—the committee's recommendations.

Obviously, clients have a major interest in how lawyers advise them.
about dispute resolution options and ideally should be included as stakeholders in a DSD process. This may be relatively easy for institutional parties who are repeat litigants, but it would be much harder to engage people without extensive litigation experience. In such DSD projects, the committee should plan to address the interests of one-shot parties.

The committee should begin by assessing how well the system currently operates, including the nature and extent of any relevant problems. It could do so using systematic methods (such as surveys, interviews, or focus groups) or informal consultations. After conducting this needs assessment, it can develop a plan to address the identified needs.

Possible strategies. Committees might develop protocols for lawyers to help clients assess dispute resolution options. These might include convenient checklists of questions that lawyers might ask clients to assess the clients' substantive and procedural interests, potential litigation outcomes, risk assessments, and clients' risk preferences, among other factors. For example, based on an analysis of various systems for choosing dispute resolution procedures, Frank Sander and Lukasz Rozdeiczer compiled lists of 16 process goals, nine features of various procedures, and 16 impediments to successful conflict resolution relevant to choice of dispute resolution process. Gregg Herman and I have suggested that factors relevant to parties' choice of dispute resolution procedures also include the parties' capabilities, their attitudes about different types of professional services, and assessments of and preferences about the risks of various procedures. Reviewing these analyses and local needs assessments, a DSD committee might draft a checklist for lawyers tailored to their cases.

Similarly, committees might develop materials to help clients understand the generally available dispute resolution options and the benefits and risks. These should be in plain English and readily accessible on the Internet and other appropriate media. Committees might sponsor trainings or other educational events to help lawyers use tools for client counseling. Risk analysis using decision trees can be a helpful tool for lawyers and clients in choosing dispute resolution processes.

Within the context of a DSD strategy, it may be appropriate for a court, state, or professional association to adopt rules or guidelines requiring lawyers to counsel clients in choosing dispute resolution processes. Such rules or guidelines are likely to be much more effective if they are adopted as part of a larger strategy including development of practical materials and training as described above.

The hope of DSD. The widespread availability and continuing innovation of dispute resolution processes is both a benefit and a curse for disputants. The benefit is that they can choose (and tailor) dispute resolution processes to fit their needs and preferences. The curse is that the increasing profusion of processes can be overwhelming and confusing. One of lawyers' most valuable services can be to help clients make these choices throughout a legal dispute. Lawyers themselves need help in counseling clients to make these decisions. Legal practice communities can use DSD to help lawyers and clients with this challenging task. There is no guarantee that legal communities will undertake such a process or that their plans would resolve all the problems. Legal communities that use DSD, however, are likely to help lawyers counsel clients about what processes would best meet their interests.