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Real Practice Systems Annotated Bibliography

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Real Practice Systems Project Annotated Bibliography

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*Thanks, with the usual disclaimers, to Russ Bleemer and Randy Kiser for comments on an earlier draft.

1. Introduction

Gary Doernhoefer, the founder of [ADR Notable](#), suggested that I produce this bibliography for its users. ADR Notable is an app providing case management software to help mediators handle case intake, bill clients, manage client documents, develop checklists and task reminders, take notes, build documents, and manage client relationships generally.

Gary recognized that our respective work complements each other's. I wrote a series of publications leading to what I call the [Real Practice Systems \(RPS\) Project](#). I became dissatisfied with traditional dispute resolution theories, which are greatly oversimplified and don't provide realistic portrayals of actual practice. These theories can mislead practitioners and parties about what to expect in their cases. Part of the problem is that mediation is very complicated and variable, even in the simplest cases. RPS analysis can be used in many dispute resolution roles such as mediator, advocate in mediation, negotiator, and litigator generally or in particular types of cases.

Creating Customized Mediation Checklists

Gary asked me to develop checklists for ADR Notable users. He was influenced by Atul Gawande's excellent book, [The Checklist Manifesto](#), which describes how the use of checklists in business and medicine has promoted greater efficiency, consistency, and safety. Gawande is a surgeon who showed how surgeons' routine tasks are so complicated that it's hard to avoid making mistakes because people overlook critical information or fail to ask the right questions in the heat of the moment.

Mediation also is a complex process. In *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals* (discussed in Sections [2](#) and [3.C](#) below), I demonstrated that sophisticated mediators can better understand mediation by considering multiple elements instead of focusing on single models such as facilitative and evaluative mediation.

So I developed this [menu of checklists for mediators](#), illustrating numerous factors affecting mediators' decisions in their practice systems. Their systems involve much more than their general techniques during mediation sessions. They also may include information about mediators' backgrounds and practice, compliance with ethical requirements, initiation of cases, participants' preparation for mediation sessions, communication with participants before mediation sessions, logistics and scheduling of mediation sessions, follow up after mediation sessions, and improvement of practice systems through careful reflection.

ADR Notable users can customize the checklists to fit their values, practice philosophies, and cases they handle. The checklists provide a detailed starting point for them to consider everything they might do in each case. RPS theory doesn't prescribe any particular mediation model or philosophy, though some mediators' systems are influenced by their perspectives of traditional mediation theories. This project encourages practitioners to become increasingly conscious of their own practice systems and intentional in developing their routines and strategies for dealing with

challenging problems. In crafting their checklists, mediators would modify or omit some elements from the master checklists and add elements specific to their own practices.

Getting a Deeper Understanding of Real Practice Systems

Gary wants to provide ADR Notable users with practical and theoretical background from my writings to help them consider their decisions about their practice systems. Hence this bibliography. I hope that instructors, trainers, presenters, program administrators, and authors will find these publications to be of value in your courses, trainings, presentations, programs, and publications.

RPS theory is the culmination of much of the work in my scholarly career. This bibliography is a mosaic of my publications about various topics. The next section focuses specifically on RPS theory. The remaining sections present publications about its precursors and related issues. This work is based on analyses of dispute resolution in the US, particularly in legal disputes. Presumably, it could be adapted to processes in some other countries.

I was motivated to develop RPS theory because of problems with traditional dispute resolution theories ([Section 3](#)). A fundamental part of lawyers' and mediators' jobs is to help parties make decisions in their disputes, which the traditional theories do not portray well. Helping parties make decisions is a challenging, complex task, and practitioners develop regular systems to do so based on many different variables ([Section 4](#)). Practitioners use litigation interest and risk assessment (LIRA) techniques to help parties understand their situations and options. This is especially valuable early in cases – as well as any time during cases whenever parties need to make decisions ([Section 5](#)). In mediation, attorneys and mediators can help parties make decisions by helping them prepare as well as possible before mediation sessions, ideally using LIRA techniques ([Section 6](#)). Practitioners may use a wide variety of technology systems throughout their mediation practice systems, starting by providing information and scheduling mediation sessions through drafting mediated agreements and participating in reflective practice groups. Technology systems are likely to play an increasing role in practitioners' systems, especially with the development of artificial intelligence systems ([Section 7](#)). Individual practitioners and organizations sometimes use “planned early dispute resolution” (PEDR) systems to minimize parties' tangible and intangible costs of disputing and to help them participate in dispute resolution processes. PEDR systems include pre-suit and early mediation as well as planned early multi-session mediation, among others ([Section 8](#)). By definition, practitioners' practice systems are dispute systems. Thoughtful practitioners use dispute system design principles and techniques to improve their case management and dispute resolution procedures ([Section 9](#)). Courts are dispute systems that influence practitioners' individual dispute systems ([Section 10](#)). Many mediators and advocates in mediation are lawyers. Legal education could help students incorporate RPS perspectives into their work from the outset of their legal careers ([Section 11](#)).

My publications build on the work of a wonderful community of scholars. This bibliography complements the extensive bibliographies in the *Litigation Interest and Risk Assessment* and *Lawyering with Planned Early Negotiation* books, and the article,

How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions? (described in Sections [5](#), [8](#), and [10](#)). [This post](#) includes a link to a bibliography on online dispute resolution compiled by Noam Ebner.

Using This Bibliography

Most of the entries in this bibliography are short blog posts and articles. It also includes law review articles and books, which provide more depth. Many of the shorter pieces are adapted from the longer ones. Some entries could fit in more than one section. There are links for the entries, so you can access them with one or two clicks.

Some poor lost souls might read all the publications cited in this bibliography. However, you probably will want to pick ones that you are most interested in.

This bibliography includes many of my publications, but it is not a complete catalog. True gluttons for punishment can check out my [SSRN page](#), [website](#), [Indisputably blog posts](#), and even [this video](#) of Gary interviewing me.

If you are not quite that gluttonous, you might read this bibliography as a collection of really short essays with links to longer versions if you want to read more.

If you're on a diet, you can get the ideas by reading the introduction to each section, the titles of the publications, and any blurbs that grab your interest.

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2. Overview of Real Practice Systems Theory

Real Practice Systems (RPS) theory grew out of a series of blog posts critiquing traditional dispute resolution theory and proposing alternative perspectives. The following article provides a systematic articulation of the theory. Although this article focuses on mediation, the theory can be applied to other regular processes of dispute resolution and lawyering.

[Real Mediation Systems to Help Parties and Mediators Achieve Their Goals](#). 24 Cardozo Journal of Conflict Resolution 347 (2023), 42 pages. This article provides a thorough explanation of RPS theory. It identifies problems with traditional mediation theories, argues that dispute system design theory provides a more realistic framework for analyzing mediation activities, outlines the rationale for RPS theory, and illustrates the theory by using in-depth analyses of the mediation systems of ten experienced mediators.

The mediators described their practice systems, which are based on their personal histories, values, goals, motivations, knowledge, and skills as well as the parties and the cases in their mediations. They developed categories of cases, parties, and behavior patterns that led them to design routine procedures and strategies for dealing with recurring challenges before, during, and after mediation sessions. Their accounts describe how they reflected on their experiences and evolved their techniques accordingly. The systems include unconscious routines and conscious strategies for dealing with challenging problems. This highlighted language describes the essence of mediators' real practice systems. Mediators and advocates in mediation can use the RPS framework to (1) become more conscious of how they think and why they act as they do in mediation and (2) intentionally improve their techniques.

[Why Do You Mediate the Way You Do?](#) Fall 2023, 10 slides. This powerpoint provides a concise summary of RPS theory. Under this theory, practitioners' systems for regularly handling cases include four general elements: (1) mediators' contributions to their mediations, (2) participants and types of cases mediators handle, (3) mediators' practice system designs, and (4) mediators' reflections on their systems.

[Ten Real Mediation Systems](#). SSRN (November 7, 2022), 8 pages. This article summarizes accounts of ten mediators specifying factors affecting how we handle continuing streams of mediations – our mediation systems. We describe our personal histories, values, goals, motivations, knowledge, and skills as well as the parties and cases we handle. We develop categories of cases, parties, and behavior patterns that lead us to develop routine procedures before and during mediation sessions and strategies for dealing with recurring challenges. We reflect on our experiences, leading us to improve our work. Traditional mediation theories influence mediators' thoughts and actions to some extent – along with many other factors. This article includes links to each mediator's detailed account of their system.

[Real Practice Systems Project Menu of Mediation Checklists](#). SSRN (December 1, 2023), 15 pages. This is a detailed menu of checklists for mediators, including

mediators' actions before, during, and after mediation sessions. The checklists also include items about information to provide on websites, compliance with ethical requirements, and reflection and improvement of mediation techniques. They are intended to help mediators become more conscious and intentional in their work, leading them to develop routines and strategies for dealing with recurring problems.

[Practitioners Tell Why Real Practice System Checklists Are So Useful](#). SSRN (December 27, 2023), 9 pages. This article summarizes perspectives of 14 practitioners. It illustrates how the checklists can help mediators carefully design their unique practice systems, starting from providing general information about their practices to engaging in self-assessments after cases – and everything in between. The checklists are designed for mediators to customize their individual checklists to reflect the kinds of cases and parties they work with and the procedures they find useful. Mediators can use the checklists throughout their careers to improve their skills through systematic reflection and participation in reflective practice groups.

[Why Do Mediators Mediate the Way They Do?](#) SSRN (February 1, 2024), 14 pages. This is Part 1 of a two-part series presenting action research about factors affecting mediators' practice systems and how they can improve them. It reports the results of a study of mediators who attended an educational program helping them consider their own practice systems. The study supports the fundamental premises of RPS theory. The attendees found the educational programs to be very valuable, and many said that it helped them learn about their own mediation approaches.

[Helping You Do the Best Mediation You Can](#). SSRN (February 1, 2024), 8 pages. This is Part 2 of a two-part action research series about factors affecting mediators' unique practice systems and how they can refine their systems. It suggests a practical program for mediators to understand and improve their practice systems, individually and in groups. It includes links to a 20-minute video, practical articles, a self-assessment worksheet, and menu of checklists for mediators to map their systems. It suggests how to organize ongoing educational practice groups. It also includes suggestions for sponsors of educational programs, faculty, and trainers.

[Reconciling Allegedly Alternative Mediation Models by Using DIY Models](#). SSRN (June 14, 2021), 4 pages. Relying on psychological theory and research about how mediators think, this article suggests how mediators can design optimal mediation models (which I now call "systems") for their individual practices to help them answer the question, "What do I do now?" The article lists numerous goals that parties sometimes have in mediation. By helping parties identify their goals and priorities, mediators can better choose appropriate interventions. When mediators are more self-conscious about their goals and potential interventions, they can develop better unconscious routines that they consciously adapt in actual cases. The article includes links to practical reflective practice resources for mediators to improve their work.

[How You Can Build a Mediation Model to Optimize Your Own Cases](#). Indisputably (February 22, 2022). Building on the work of psychologists Kenneth Kressel, Daniel Kahneman, and Amos Tversky, this post describes how mediators' mental models are

largely unconscious mixtures of formal models and “personal ‘mini-theories’ of conflict and role of mediators.” People use their conscious cognitive systems to develop unconscious routines. This is the essence of training and practice. With enough practice, routines can become “second nature” – that is, unconscious. This post highlights the Gordon Training Institute model in which people begin by being unconsciously incompetent, becoming consciously competent, and eventually unconsciously competent. It uses three hypothetical cases to illustrate different mediation models – which I now call “systems” – and how they evolved over time.

[**Using Real Practice Systems Resources in Practice.**](#) Indisputably (December 13, 2022). This post describes how mediators can use ideas and materials from this project to understand and improve their own mediation approaches. Trainers and mediation program administrators can use them to help mediators in their programs.

[**Charlie Irvine’s Challenge to Mediators to Describe Your Mediation System.**](#)

Indisputably (August 2, 2023). Charlie Irvine is the course leader of the University of Strathclyde’s (Scotland) MSc/LLM in Mediation and Conflict Resolution and the director of the Strathclyde Mediation Clinic. He challenged his students to write descriptions of their mediation systems. He described his experience doing so, writing, “The more I drilled down into what actually happens [in my cases], the more there was to say. It turns out mediation is a highly detailed, context-driven activity, varying from case to case and moment to moment. On a different day, with different people, I might do something different, and that too might succeed or fail. Yet, at the same time, the act of attempting to pin it down flagged up patterns across cases, helping me to stand back and see the bigger picture.”

[**How The Real Practice Systems Project Can Help Improve Mediation Quality.**](#)

Indisputably (January 9, 2023). This post begins by summarizing the limited efficacy of ethical, legal, and theoretical standards in protecting parties in mediation. Helping parties and lawyers prepare before mediation sessions should help the parties and mediators achieve their goals because the parties and lawyers are more likely to advocate effectively and be satisfied with the process and outcome. This post also discusses the benefits of mediators’ reflective self-assessments.

[**Doing The Best Mediation You Can.**](#) 14 Dispute Resolution Magazine 43

(Spring/Summer 2008), 4 pages. This article summarizes the findings of the Task Force on Improving Mediation Quality of the ABA Section of Dispute Resolution. Focus group subjects said that the following aspects of mediation are particularly important: (1) preparation for mediation by mediators and mediation participants, (2) case-by-case customization of the mediation process, (3) careful consideration of “analytical assistance” that mediators might provide, and (4) mediators’ persistence and patience. This article suggests several ways for mediators to continue developing their skills.

[**Takeaways From New Hampshire Mediation Training.**](#) Indisputably (December 10, 2017). This post reports the results of a study that Susan Yates and I conducted at an advanced mediation training. In response to an open-ended question, respondents said that their most challenging problems were lack of cooperation, unreasonable

expectations, and lack of preparation. They wanted to learn about dealing with apparent impasse and other difficult situations. The study included responses about (1) use of mediation memos, (2) conversations before convening mediation, (3) preparation before mediation sessions, (4) use of joint sessions, (5) frequency and helpfulness of various mediator actions, (6) dealing with emotions, fairness, and (7) giving legal information or advice. The study replicated questions from the ABA Section of Dispute Resolution Task Force on Improving Mediation Quality and produced similar results.

[Real Lawyering Practice Systems](#). Indisputably (January 28, 2024). Most of the pieces in the RPS Project have focused on mediation. The theory is not limited to mediation, and this post applies it to lawyering.

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3. Critiques of Traditional Dispute Resolution Theories

For most of my career, I used basic concepts in our field such as negotiation, BATNA (best alternative to a negotiated agreement), positional vs. interest-based negotiation, and facilitative vs. evaluative mediation. I wasn't comfortable with these terms, but I used them because they are deeply embedded in our theory and I couldn't imagine shifting to alternatives. Over time, I became increasingly dissatisfied with the theoretical concepts, which seem appealingly simple – but actually are very confusing. This section includes publications describing these problems and suggesting solutions.

A. “Alternative” Dispute Resolution Theory Generally

At the beginning the modern ADR era, starting in the last quarter of the 20th Century, lawyers, judges, and almost everyone else considered litigation to be *the* method to resolve legal disputes. Critics identified serious problems with litigation and reformers proposed alternatives such as arbitration and mediation. The legal system gradually recognized and embraced these processes under the umbrella term “alternative dispute resolution.” Over time, people criticized this term for several reasons. For one thing, the number of legal disputes in the US resolved by trial is dwarfed by the number of cases resolved without filing suit or resolved through negotiation. Also, this “umbrella” covers an ever-expanding collection of disparate processes that have little in common other than they aren't traditional litigation. Moreover, most dispute resolution doesn't involve legal issues and the dispute resolution processes do not occur in the “shadow of the law.” Thus they aren't “alternatives” to litigation. This conceptual confusion is reflected in our dispute resolution jargon, which makes little sense upon reflection.

[“Labels Suck.”](#) Indisputably (October 22, 2014). Using Andrea Schneider's pithy observation as a jumping off point, I noted confusion about the traditional terminology about lawyer- and client-centered counseling, positional interest-based negotiation, and evaluative and facilitative mediation. Many of us are pretty sloppy in our use of these terms. For example, people often think of client-centered counseling, interest-based negotiation, and facilitative mediation basically as being nice and the opposite approaches as being tough (if not naughty). So in my classes, I briefly defined the terms so that students recognize them and I described the problems with them. Then I warned them not to use the terms and instead focus on the concrete behaviors that these labels are supposed to represent.

[What is \(A\)DR About?](#) Indisputably (January 13, 2015). This post considers elements that might be essential to be considered ADR – and it rejects them all. These elements include use of neutral third parties, focus on parties' interests, party self-determination, good processes, private processes, and innovation. Although courts and litigation generally are not considered as part of ADR, courts often are used as tools of cooperation. People often identify ADR with the final process of dispute resolution, but that's like identifying an elephant solely by examining its tail and ignoring the rest of its body. The post tentatively suggests that the field of dispute resolution – without “alternative” – might be considered as a collection of processes for planning, managing,

and/or resolving disputes. This would include litigation and trials – the work of lawyers and judges.

[Houston, We Have a Problem in the Dispute Resolution Field](#). Indisputably (October 30, 2022). Our theoretical concepts and jargon are baffling not only to parties and lawyers but also to many people in the dispute resolution field. The post demonstrates that the common understandings of facilitative and evaluative mediation are misleading. Negotiation lingo includes numerous terms for similar concepts. People often use the BATNA concept incorrectly. This post suggests focusing on the concept of “dispute system design” (discussed in [Section 9](#)) instead of ADR.

[Confusing Dispute Resolution Jargon](#). Indisputably (January 4, 2018). Theoretical concepts can be lenses helping us understand things clearly or blinders distracting us from important things that don’t fit our theories. Like many others, I was confused about the concept of BATNA (best alternative to a negotiated agreement) and related “ATNA”s such as the WATNA (worst ATNA) and MLATNA (most likely ATNA). I thought of them as particular values, such as the expected trial outcome. With help from friends Hiro Aragaki and Sanda Kaufman, I learned that BATNA really is about the *courses of action*, such as going to trial, publicizing damaging information, or enlisting allies, among others. This post also notes problems with concepts in negotiation and mediation theories.

[BATNA May Be Less Important Than You Think – and Teach](#). Indisputably (August 20, 2020). This post riffs on an article by a magistrate judge who has conducted thousands of settlement conferences. He wrote that, while the legal merits are relevant to negotiation, “many factors unrelated to the merits of a dispute ... play a significant role in determining whether and on what terms a dispute will be resolved.”

[BATNA’s Got to Go – and Here’s a Better Idea](#). Indisputably (June 23, 2020). This post argues that people, including dispute resolution experts, are confused by the term “BATNA.” It argues that, instead, we should use the concepts of “litigation interest and risk assessment” (described in [Section 5](#)) and “bottom line.” We are easily distracted and confused by shiny objects like ATNAs. BATNA is only part of the more important focus – *negotiators’ bottom lines*. People often focus on BATNA *values* rather than the challenging *process* of assessing BATNAs.

[What’s a Bottom Line?](#) Indisputably (August 26, 2020). A “bottom line” is a surprisingly complex concept that people often misunderstand. For one thing, it is not a static figure. Rather, people’s assessments of their bottom lines – the least that plaintiffs would accept or the most that defendants would pay – change as they learn about the case and engage in negotiation. In litigated cases, people often focus almost exclusively on the expected court outcome (BATNA value). To calculate their bottom lines (or “walkaway points”), they should adjust this figure by deducting two other elements: (1) the expected future tangible litigation costs and (2) value of intangible interests. Intangible interests include concerns about the time and stress of continued litigation, risk tolerance, and damage to relationships, among many others.

Practitioners can improve clients' decision-making by carefully assessing key elements of their bottom lines and engaging clients in re-assessing them when appropriate.

[**The Legal Profession, Judiciary, and Dispute Resolution**](#). Indisputably (February 28, 2022). The *Dispute Resolution Magazine* conducted a survey of past contributors, and this post uses some of the responses to suggest that the legal profession and judiciary should be considered as part of the dispute resolution field.

[**The Role of Law in Legal Disputes**](#). SSRN (August 8, 2021), 5 pages. In legal disputes, people often assume that “the law” – conceived as the expected court outcome – should be a critical factor in parties' decision-making. Practitioners and parties can use the law in various ways, not only as a BATNA. This post provides a typology of ways that practitioners can discuss the law with clients, including as a critical standard in assessing possible agreements, one standard of fairness, society's default standard of fairness, a presumptive standard for decision, or a decisive standard. Some parties ignore the law as irrelevant in their decision-making.

[**What Theory Do Practitioners Want?**](#) Indisputably (May 30, 2017). This post summarizes the discussion in a program at an ABA Section of Dispute Resolution conference. Some people find our theoretical concepts to be very helpful. For example, negotiation theory can teach people to name things they know (but didn't know what they knew). Some people criticized our theoretical concepts and language. One person said that we are “lost” in our theoretical jargon. The post lists suggestions of theoretical ideas that would help practitioners do their work.

[**Everything I Know About Dispute Resolution is Wrong – Especially What You Say About It**](#). Indisputably (April 25, 2015). This post describes an extremely provocative discussion in a session at the ABA Section of Dispute Resolution conference.

[**Understanding Actual Dispute Resolution Practice and Communicating Clearly About It**](#). Indisputably (June 6, 2019). This post argues that the dispute resolution field should set a top priority to develop clearer common language. It lists potential benefits of developing clearer language and suggests ways to do this.

[**We Need Clearer Dispute Resolution Language**](#). Kluwer Mediation Blog (October 28, 2020). This post proposes to develop clearer dispute resolution language, which could provide numerous benefits for research, practice, teaching, training, and collaboration within our field. Many of the common terms in our field are so general that they don't fit the complexities of reality very well. Instead of focusing on overbroad models of negotiation and mediation, we could communicate more clearly if we focus on component elements of the models using commonly understood words. The [checklists](#) that I later developed illustrate such clearer language.

[**Need for Clear Language Initiative to Un-Babel Our Models**](#). Indisputably (November 2, 2020). We use rotten language to describe our ideas and theories. Theory is important because it guides actions. Concepts are building blocks of theory.

It's a real problem if we use different language for similar concepts or the same terms for different things. Professional jargon is helpful in some fields because it promotes communication between professionals like brain surgeons and rocket scientists. But jargon is extremely problematic for dispute resolution because it confuses and excludes laypeople and other stakeholders. We need some collective action to develop common language most effectively.

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B. Negotiation Theory

Most of my scholarly work in the 2000s focused collaborative law. In that process, parties negotiate from the outset of the dispute resolution process. This flips the deeply embedded norm in litigation of deferring negotiation until discovery is largely completed. Even “alternative” dispute resolution theory focuses primarily on the last stage of the dispute resolution process. Deferring negotiation until late in the process radically decontextualizes the process, treating the earlier stages as practically irrelevant. In real life, the earlier stages are extremely important, setting the stage for the ultimate negotiation or other resolution process. And the earlier stages often are full of negotiations over procedural and substantive issues. Moreover, attorneys negotiate with a wide range of people in addition to the other side. Indeed, attorneys start by negotiating with their clients and may continue negotiating with them throughout a case.

To learn about actual negotiations, I conducted a study by interviewing 32 respected lawyers about their most recent case that their clients settled. This resulted in my article, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, described below. This article challenges traditional negotiation theory as being extremely oversimplified and it proposes disaggregating traditional concepts into smaller and clearer concepts.

This work inspired me to organize a symposium at the University of Missouri entitled, *Moving Negotiation Theory from the Tower of Babel: Toward a World of Mutual Understanding*. The last several entries in this section come from that symposium, which demonstrate widespread dissatisfaction with negotiation theory.

[What is Negotiation, Anyway?](#) Indisputably (January 20, 2017). This post is a preview of [The Definition of Negotiation: A Play in Three Acts](#), 2017 *Journal of Dispute Resolution* 15 (with Andrea Schneider, Noam Ebner, and David Matz), 15 pages. This article reproduces a provocative and humorous conversation by four sharp cookies trying – unsuccessfully – to agree on a definition of negotiation. We considered examples of interactions with deans, judges, bank officers, grocers, drivers, terrorists, and muggers, among others, to try to identify critical elements of negotiation.

[What is Negotiation?, Part 1](#). Indisputably (October 15, 2014). This post analyzes definitions of negotiation in law school texts and commends the following broad definition from one text: “Anytime you deal with someone else, seeking to reach agreement on some matter, you are involved in a negotiation.” This contrasts with conceptions of negotiation involving elements that do not necessarily occur in the process of reaching agreement. For example, some people think of negotiation as involving (1) an exchange of offers occurring close in time to each other, (2) multiple options for handling an issue, (3) an explicit quid pro quo, and/or (4) something different from normal conversation or professional courtesy. This post argues that such overly narrow definitions aren’t helpful.

[What is Negotiation?, Part 2](#). Indisputably (October 29, 2014). Contested legal cases are long streams of related negotiations. For example, way before the final settlement

event, litigators may negotiate about acceptance of service of process, extension of time to file papers, resolution of discovery disputes, and exhibits to use at trial, among other things. Similarly, in transactional negotiations, lawyers may reach agreements about exchange of information and coordination of actions needed before parties are ready to negotiate the ultimate deal. Lawyers also negotiate with lots of people other than the other side. For example, lawyers agree with clients about attorney's fee arrangements and how the lawyer will respond to the other side. Lawyers reach agreements with people such as co-workers in their firms, investigators, court reporters, technical experts, and mediators. Lawyers regularly reach agreements with judges about case management issues such as discovery plans, referral to ADR procedures, and ultimate issues during judicial settlement conferences.

[We Need a Better Consensus about Negotiation Theory.](#) Indisputably (February 13, 2015). This post advocates redefining the scope of negotiation to include the interactions leading up to the final negotiation. Legal matters often involve a stream of negotiations, not merely a single event at the end of a process. It also recommends focusing on the *process of reaching agreement*, not only the process of resolving disputes. This includes processes of reaching agreement where there is little or no dispute. It also suggests disaggregating traditional models and analyzing key variables separately instead of thinking in terms of two discrete, coherent models.

[Problems with the System of Negotiation Models, Part 1.](#) Indisputably (January 31, 2015). This post argues that the generally-accepted understanding of negotiation theory is seriously flawed. The current framework relies primarily on two models – positional and interest-based negotiation. This framework assumes that negotiation involves coherent models of highly-correlated variables, but often that isn't the case. Different negotiators often exhibit different aspects of the models, they may use different elements for various issues, and they may change over time.

[Problems with the System of Negotiation Models, Part 2.](#) Indisputably (February 10, 2015). This part describes two actual negotiations to illustrate problems with the traditional system of two negotiation models. These cases don't fit neatly into either model.

[Taming the Jungle of Negotiation Theories.](#) The Negotiator's Desk Reference (Chris Honeyman & Andrea Kupfer Schneider, eds.) (2017), 21 pages. To identify the range of issues covered in negotiation theory, this chapter surveys negotiation texts from various disciplines including law, business, economics, labor, international relations, and social sciences. This chapter demonstrates that, although there is considerable overlap between the texts, there is little overall coherence and nothing approaching a consensus about the structure and content of negotiation theory or even a definition of negotiation.

[BATNAs and the Emotional Pains from “Positional Negotiation.”](#) Indisputably (July 8, 2020). This post describes the role of BATNAs in the “positional negotiation” game, pains that it causes people in many roles, and some remedies to avoid and reduce these pains. In this “game,” each side seeks to maximize its outcome by starting with

extreme positions and then making a series of stingy counteroffers. Each side concocts stories justifying their positions but everyone knows that these stories are exaggerations at best and fibs at worst.

If you gave truth serum to the lawyers, they would admit that they don't really believe their own arguments. But they do it for many reasons but many don't feel good about it. The process wears on some mediators who stage manage these dramas. Parties suffer the worst. Even when lawyers explain the game to clients, they often anchor their expectations on the negotiation positions. With each new concession, they feel a new loss – an unprincipled loss for no good reason. In the end, they swallow a bitter pill when they settle for a much worse outcome than they expected.

People can reduce or avoid pains of positional bargaining by using what I called “ordinary legal negotiation,” negotiating to change the game, and using wise assessment and communication techniques.

[Jeff Trueman's Study on Nightmares of “Positional” Tactics in Mediation.](#)

Indisputably (October 4, 2020). This post reports on an excellent study by Jeff Trueman about the challenges of lawyers, mediators, and insurance claims professionals in mediation. His findings are consistent with my observations about the emotional pains of positional negotiation. Many of the cases in his study involve insurance, which are supposedly “money-only cases” because the parties generally haven't had a prior relationship and have no interest in a future relationship. But Jeff found that emotions and relationships actually can be very important in these cases – the professionals' emotions and relationships with each other. It includes a link to a video conversation with Jeff about his observations.

[A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation,](#)

16 *Cardozo Journal of Conflict Resolution* 1 (2014), 62 pages. The prevailing negotiation theory tries to fit lots of square pegs into just two round holes – adversarial or cooperative bargaining. In the real world, negotiation comes in many different shapes, not just circles and squares. Analyzing law school textbook definitions of the traditional models, this article demonstrates that the two “round holes” in current negotiation theory are poorly defined. It also presents empirical accounts of actual pretrial negotiations to demonstrate that the theoretical models do not fit some real-life negotiations. It shows that some negotiations fit a third model I called “ordinary legal negotiation.” In this model, lawyers try to reach a reasonable agreement based on shared norms, which usually are the expected outcomes in court or typical agreements in similar cases.

This article argues that it is time to replace the traditional models with a flexible framework that can accommodate virtually all legal negotiations, and it uses cases from this study to illustrate the proposed framework. Instead of focusing only on bundles of characteristics for each theoretical model that are assumed to be highly correlated with each other, the framework unbundles the variables, which permits more accurate description of negotiations. The variables in the framework are: (1) the degree of concern, if any, negotiators have for the other side, (2) the communication process used

in trying to reach agreement, (3) the extent that negotiators create value in the negotiation, (4) the negotiators' tone, (5) the use of power, and (6) the source of norms that negotiators use. These variables are likely to affect achievement of negotiation goals such as efficiency and satisfaction of parties' interests.

[Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding](#), 2017 *Journal of Dispute Resolution* 1, 15 pages. This article synthesizes insights from a [symposium](#) conducted by the University of Missouri Center for the Study of Dispute Resolution. It illustrates Tower of Babel-like confusion about negotiation, including challenges in defining it and the widely (mis)used concepts of integrative and distributive negotiation. It identifies fundamental challenges in developing and improving negotiation theory, including scholars' status quo and confirmation biases. It suggests frameworks that might advance negotiation theory.

[Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding Summary](#). Indisputably (February 6, 2017). This post is the conclusion from the preceding article.

[Published Versions of Tower of Babel Symposium Articles](#). Indisputably (August 23, 2017). This post provides links to the articles in the *Tower of Babel* Symposium.

[Negotiation Symposium Virtual Book Club](#). Indisputably (July 14, 2016). As part of the *Tower of Babel* Symposium, speakers suggested publications providing useful insights about negotiation. I conducted email conversations with the speakers, which are collected in this post.

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C. Mediation Theory

In the mid-1990s, the dispute resolution community was all abuzz about controversies over facilitative, evaluative, and transformative mediation. I never was a big fan of these theoretical models. I summarized my dissatisfaction in [Toward More Sophisticated Mediation Theory](#) (2000 Journal of Dispute Resolution 321, 13 pages). I wrote that there was merit in both facilitative and evaluative mediation approaches but I critiqued them as overly formalistic and rigidly orthodox. Much of my scholarship since then has focused on lawyering and negotiation, but I recently wrote again about mediation theory, elaborating my criticisms and benefitting from empirical research conducted in the interim. Empirical research and practical experience demonstrate that many mediators don't find these models useful. They may completely ignore them or combine elements from various models on an ad hoc basis without careful analysis.

[Lessons From the ABA's Excellent Report on Mediator Techniques](#). Indisputably (November 1, 2017). This post highlights findings from the report of the ABA Section of Dispute Resolution Task Force on Research on Mediator Techniques. The report identified 47 studies that analyzed effects of particular mediator actions on certain mediation outcomes. The Task Force found that none of the categories of mediator actions has clear, uniform effects. Some uncontroversial actions – such as eliciting suggestions, focusing on emotions and relationships, building trust, expressing empathy, praising disputants, and setting agendas – may or may not produce positive effects. Some controversial actions – recommending particular settlements, offering evaluations, and pressing parties to settle – have the potential for both positive and negative effects.

[We Should Replace Mediation Models with a Unified Conceptual Framework](#). Kluwer Mediation Blog (April 6, 2021). This post argues that facilitative-evaluative theory is based on false assumptions and generalizations, and the reality often is a lot more complex than portrayed in these models. The theory implies that merely asking questions can't undermine parties' decision-making and that mediators' expression of opinions necessarily does so. In reality, asking questions can create problematic pressure on parties, and providing assessments can help parties make well-considered decisions. The post advocates using a list of concrete factors that may affect the appropriateness of the interventions at any given moment.

[Real Mediation Systems to Help Parties and Mediators Achieve Their Goals](#). 24 Cardozo Journal of Conflict Resolution 347 (2023), 42 pages. This article provides the rationale for real practice systems theory, beginning by identifying problems with traditional mediation theories, particularly (but not limited to) facilitative and evaluative theory. The reality of mediation practice is a lot more complex and nuanced than suggested by the theoretical definitions or is commonly portrayed. Traditional models are incomplete at best and misleading at worst, providing confusing characterizations of what mediators actually do. For example, facilitative and evaluative models consist of very different actions bundled into each model. Many practitioners ignore traditional models because they are confusing or not helpful. People do not understand the theoretical meanings because the terms are not consistent with commonly-understood

language. Arguments about what is or is not real or good mediation have spawned unhelpful ideological divisions in the field.

[**Bush's and Lande's Differing Perspectives of Mediation Theory**](#). SSRN (May 10, 2023), 4 pages. This article summarizes and contrasts Professor Robert A. Baruch Bush's article, *Beyond the Toolbox: Values-Based Models of Mediation Practice* and my article, *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*. Prof. Bush believes that a system of theoretical models is critically important. I believe that a dispute system design framework enables mediators and mediation stakeholders, especially parties, to more accurately understand and characterize how mediators think and act – and to act accordingly.

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4. Promotion of Party Decision-Making

Parties are – or should be – the primary decision-makers in resolving their disputes. When parties are represented by lawyers, Rule 1.2(a) of the ABA Model Rules of Professional Conduct requires lawyers to “abide by a client's decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter.” Rule 1.4(b) states, “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

In mediation, parties clearly are supposed to be the decision-makers. Standard I.A of the Model Standards of Conduct for Mediators states:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Although some lawyers and mediators do not respect parties' decision-making authority, those actions are deviations from professional norms and fundamental values of the dispute resolution field. This section includes posts describing how lawyers can improve their service to clients, including helping them make decisions.

[Decision-Making as an Essential Element of Our Field](#). Indisputably (June 3, 2020). This post suggests that we think of our work as focused on process design, strategy, and decision-making in managing conflict. Our field seeks to help parties solve problems when parties lack good (or sometimes any) practical dispute resolution options. This post describes such situations and identifies strategies to increase and improve parties' decision-making.

[Concepts That Can Help Practitioners Help Parties Make Decisions in Disputes](#). Indisputably (December 8, 2020). A fundamental purpose of dispute resolution practitioners is to help people make decisions about processes, procedures, and issues in managing their conflicts. This post lists concepts to help people make decisions about the choice of dispute resolution process, specific procedures in a given process, and resolving issues in dispute. In resolving disputes, people should consider the value of plausible options and the future tangible costs and intangible costs and interests of continuing the dispute. The post lists specific cognitions, possible actions, and practitioner interventions promoting good decision-making.

[Focus on Party Decision-Making](#). Indisputably (August 5, 2023). A major motivation in the modern dispute resolution movement has been to increase and improve parties' decision-making in their legal disputes. Parties can participate more effectively in negotiation and mediation if they engage in decision-making early in disputes. This

suggests the importance of good preparation before negotiation and mediation sessions. When parties are well-prepared in advance, they are as knowledgeable, confident, and assertive as possible in making decisions in their cases. Preparation before mediation sessions is discussed in [Section 6](#).

[**Tips for Lawyers Who Want to Get Good Results for Clients and Make Money.**](#)

Indisputably (August 27, 2015). This post suggests that lawyers do the following to help clients achieve their goals: Understand your clients' interests. Pay attention to what's really important in your cases, not just the law or winning. Recognize the importance of emotions – especially yours. Get to know your counterpart lawyer. Make a habit of preparing to resolve matters at the earliest appropriate time. Be prepared to negotiate more than you might expect. Get help from mediators when needed. Be prepared to advocate hard and smart.

[**How Will Lawyering and Mediation Practices Transform Each Other?**](#) 24 Florida State University Law Review 839 (1997), 63 pages. Part III of this article (pp. 857-879) is entitled “approaching the ideal of ‘high-quality consent’” for party decision-making and includes seven indicators for a continuum of high-quality consent. I later changed the term to “high-quality decision-making,” reflecting the fact that parties sometimes decide *not* to reach agreement.

[**Lawyers Are From Mars, Clients Are From Venus – And Mediators Can Help Communicate in Space.**](#) Kluwer Mediation Blog (February 6, 2021). Substantial empirical research shows that lawyers and clients generally live in parallel universes regarding their cases. Martians – the lawyers – often develop routines of focusing only on monetary outcomes based on what the courts might decide and discounting clients' concerns as too “emotional” or “unreasonable.” Litigation, negotiation, and mediation processes often are bewildering to Venusians – the clients – who typically aspire to have a meaningful process and not merely get a favorable monetary outcome. The positional negotiation game can feel particularly jarring. Mediators may be able to help this “inter-planetary” communication, though some mediators have narrow views about the appropriate focus for discussion, similar to lawyers acting as advocates.

[**What Do Litigants Really Want?**](#) Indisputably (September 4, 2018). This post discusses Donna Shestowsky's article, *Inside the Mind of the Client: An Analysis of Litigants' Decision Criteria for Choosing Procedures*. Her study found that subjects most often cited was their lawyers' advice as a decision-making factor. She argues, “Given the extent to which litigants are predisposed to following their lawyers' advice about which procedures to use, lawyers should attempt to understand their clients' interests, values, and objectives before sharing their personal evaluations of procedures to avoid imposing their own views.”

[**Donna Shestowsky's Presentation on Litigants' Views of Court ADR Options.**](#)

Indisputably (October 3, 2020). This post highlights findings from Donna Shestowsky's research finding that (1) litigants seem to be unaware of ADR options, and (2) knowing about these options improves their opinions of the court itself. Surprisingly, litigants

represented by lawyers did not make them more aware of ADR options, even when those options were offered by the court system.

[**Shestowsky's Study Supports Value of Lawyers' Early Education of Clients About Their Procedural Options.**](#) Indisputably (July 28, 2022). This post summarizes parts of Donna Shestowsky's study on parties' expectations about the process used to resolve their cases. She writes, "Our findings suggest the value of educating litigants about legal procedures, helping them develop realistic expectations for what each procedure can entail for their situation, and helping them make informed decisions about whether to attend their procedures."

[**Helping Lawyers Help Clients Make Good Decisions About Dispute Resolution.**](#) 17 Dispute Resolution Magazine 14 (Fall 2010), 4 pages. This article suggests that legal practice communities use dispute system design strategies to help lawyers counsel clients in choosing dispute resolution options. These strategies could include development of protocols for lawyers to assess dispute resolution options with convenient checklists, educational materials for clients, and trainings. These strategies can include rules requiring lawyers to advise clients about dispute resolution options. Dispute system design is discussed in [Section 9](#) and applications in court systems are discussed in [Section 10](#).

[**Helping People Make Hard Decisions – And Making Them Ourselves.**](#) Indisputably (May 29, 2019). This post discusses surgeon Atul Gawande's wonderful book, *Being Mortal: Medicine and What Matters in the End*, which critiques the problematic way that the medical profession often helps elderly patients make decisions. The post notes similarities with lawyers' interactions with clients to help them make decisions in legal cases. It argues that Dr. Gawande's prescriptions for medical practice also are relevant to legal practice. Lawyers generally should do a better job of listening to their clients, providing reasonably clear and accurate information about potential risks and benefits, helping them make hard decisions, and respecting their autonomy.

[**Introversion, the Legal Profession, and Dispute Resolution.**](#) SSRN (June 1, 2022), 12 pages. This article discusses four books dealing with introversion including *The Introverted Lawyer: A Seven-Step Journey Toward Authentically Empowered Advocacy* by Brooklyn Law Professor Heidi K. Brown. Brown writes that good legal practice involves common strengths of introverted lawyers such as empathy, intellectual humility, active listening, fact gathering, researching, analytical thinking, creative problem-solving, legal writing, effective communication, persuasion, and resolving conflicts. To counteract pressures to be extroverted, she recommends a seven-step process including reflection, planning, and action.

[**Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel."**](#) 33 University of La Verne Law Review 107 (2011), 17 pages. Lawyers' relationships with their "opposing counsel" make a big difference in how well they handle their cases. This article suggests techniques for providing effective representation by building good working relationships between counterpart lawyers.

[Mosten and Scully's New Book on Unbundled Legal Services](#). Indisputably (December 24, 2017). This post discusses Forrest (Woody) Mosten and Elizabeth Potter Scully's book, *Unbundled Legal Services: A Family Lawyer's Guide*. Unbundling involves providing specified services to legal clients rather than "full service" representation.

[Len Riskin Pulls It All Together in *Managing Conflict Mindfully*](#). Indisputably (June 18, 2023). This post describes Len Riskin's impressive career and summarizes themes in his book, *Managing Conflict Mindfully: Don't Believe Everything You Think*. He argues that people can wisely manage conflict by learning to use and integrate three sets of ideas and techniques – negotiation, mindfulness, and internal family systems (IFS). You can think of IFS as the conversation or negotiation between different voices in our heads. Rather than conceiving people as having only a single "unitary" self, IFS recognizes the "multiplicity" of our selves.

[Kiser's *Soft Skills for the Effective Lawyer*](#). Indisputably (September 15, 2017). This post describes Randall Kiser's book, *Soft Skills for the Effective Lawyer*. He defines soft skills as including "intrapersonal and interpersonal competencies such as practical problem solving, stress management, self-confidence, initiative, optimism, interpersonal communication, the ability to convey empathy to another, the ability to see a situation from another's perspective, teamwork, collaboration, client relations, business development, and the like." He presents research showing that legal clients especially value these skills in lawyers.

[Randy Kiser's New Book on Professional Judgment for Lawyers](#). Indisputably (November 19, 2023). This post describes Randall Kiser's book, *Professional Judgment for Lawyers*. He defines professional judgment as "the deliberate synthesis of an attorney's knowledge, experience, skills, discernment, and character to ethically advance a client's interest." The book combines empirical research, cognitive and social psychology, organizational behavior, legal ethics, and neuroscience to improve decision-making by attorneys, clients, judges, arbitrators, mediators, and juries.

[New Edition of *Psychology for Lawyers*](#). Indisputably (February 24, 2021). This post describes the second edition of Jennifer Robbennolt and Jean Sternlight's book, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making*. Based on the latest research, it provides insights about perception, memory, judgment, decision making, emotion, persuasion and influence, communication, and the psychology of justice. It applies these insights tasks to daily tasks of lawyering, including interviewing, negotiating, counseling, and conducting discovery.

[Escaping from Lawyers' Prison of Fear](#). 82 UMKC Law Review 485 (2014), 29 pages. Lawyers regularly experience numerous fears endemic to their work. Lawyers' fears can lead them to enhance their performance due to increased preparation and effective "thinking on their feet." Fear is problematic, however, when it is out of proportion to actual threats, is expressed inappropriately, or is chronically unaddressed effectively. It can lead to sub-optimal and counterproductive performance through

paralysis, ritualized behavior, or inappropriate aggression. This article suggests ways that lawyers actually can benefit from their fears and reduce problems caused by them. It concludes with suggestions for lawyers, legal educators, and bar association officials to promote constructive methods of dealing with fears.

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5. Litigation Interest and Risk Assessment

For parties and practitioners to make good decisions about disputes, they need to do a careful analysis of the parties' interests and the risks of continuing the disputes. Traditional interest-based negotiation theory focuses primarily on the parties' interests and considers risks (in the form of unfavorable outcomes of alternatives to negotiation) to set a "trip wire" to end negotiation. Traditional adversarial negotiation focuses primarily on partisan advantages and risks, usually considering parties' interests only at the end of negotiations to "close gaps" between the parties' positions.

Michaela Keet, Heather Heavin, and I wrote a book providing a framework for carefully analyzing both interests and risks from the outset of a dispute – litigation interest and risk assessment (LIRA). Thus it is particularly helpful in early dispute resolution processes described above and throughout legal disputes whenever parties need to make decisions.

[How to Calculate and Use BATNAs and Bottom Lines with LIRA](#). Indisputably (January 27, 2020). This blog post provides an overview of the book, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, which I co-authored with Michaela Keet and Heather Heavin. The book describes how practitioners can (1) avoid common decision-making errors in litigation, (2) anticipate likely court outcomes, (3) communicate with clients about what's most important to them, (4) help them make better decisions, (5) negotiate and mediate more effectively, and (6) learn about technological tools to help make decisions in litigation.

Instead of focusing only on the value of the best alternative to a negotiated agreement (BATNA), the book recommends that parties focus on their bottom lines. Bottom lines are calculated by deducting the future tangible and intangible costs of continued litigation from the expected BATNA value, as described in Section [2.A](#). Practitioners and parties often ignore or discount the parties' intangible costs of disputing. The book includes detailed chapters identifying intangible costs of individuals and organizations and it provides methods for assigning values to them. It also includes detailed appendixes with useful checklists.

[Reality-Testing Questions for Real Life and Simulations – and Ideas for Stone Soup Assignments](#). Indisputably (September 23, 2018). Although litigants and their lawyers may generally recognize that litigants will incur some intangible costs, they often do not consider the numerous intangible ways that litigants can be harmed and do not carefully assess these costs when making litigation decisions. Sometimes litigants' intangible costs are much more important to them than the tangible costs. This post provides detailed descriptions of some of these costs, and includes questions that lawyers and mediators should ask clients to identify and value intangible costs.

[Litigation as Violence](#). Indisputably (February 22, 2015). This post discusses an article entitled, *Litigation as Violence*. It notes that, although the word "violence" sometimes implies physical acts causing injury, some definitions refer to nonphysical acts. The article describes the "litigation response syndrome" – adverse consequences

merely from being engaged in litigation. Sometimes lawyers and law professors treat litigation as if it was just a game, insensitive to the pain it causes to litigants and others swept up in it, possibly including the lawyers themselves. Cardi argues that before proceeding in litigation, lawyers and litigants should be prepared for the toll it may take.

Minimizing Unnecessary Violence in Litigation and Other Dispute Resolution Processes.

Indisputably (February 25, 2015). This post responds to a response to my post, *Litigation as Violence*. My fellow-blogger Jen Reynolds argued, “We in ADR should not undervalue, when analyzing the dispute resolution landscape, the regulatory function of litigation in the United States.” I agreed with Jen’s statement, noting that we sometimes too-glibly criticize the legal system without acknowledging the benefits it produces, which we often take for granted. This post provides a balanced assessment of litigation from Professor Cardi as well as my writing.

The Importance of Quantifying Intangible Litigation Costs. 38 Alternatives to the High Cost of Litigation 17 (2020) (with Michaela Keet and Heather Heavin), 8 pages. This article describes several major intangible costs that businesses incur in litigation, including organizational dysfunction, opportunity costs, and damaged reputations. It suggests ways that lawyers and business clients can quantify such costs so that they can make better litigation decisions!

How Can Practitioners Help Clients Assess Their Interests and Risks in

Litigation? Indisputably (October 25, 2018). This post summarizes the discussion at a Quinnipiac-Yale Dispute Resolution Workshop. It highlights some practical ideas that the audience suggested about clients’ interests, timing of discovery and mediation, possible trial outcomes, legal fees, consequences of litigation, and decision fatigue in “marathon mediations.”

LIRA @ CPR. Indisputably (April 7, 2020). This post summarizes presentations, data collected, and discussion in a program of the International Institute for Conflict Prevention and Resolution (CPR). The authors of the LIRA book conducted a survey of the attendees, and the post presents results of the survey. It provides nuanced discussions about how practitioners calculate BATNA values and bottom lines.

Bad Decisions to Go to Trial. Indisputably (September 18, 2016). This post describes an extreme example of a very common pattern of over-confident litigation risk assessments. Target Corporation was hit with a \$4.6 million verdict after rejecting a \$12,000 demand on behalf of a child who was stuck with a hypodermic needle in a Target parking lot. Target had offered only \$750.

LIRA in Criminal Cases. Indisputably (December 15, 2020). This post describes how the LIRA framework can be adapted in criminal cases and used in plea bargaining. It suggests how to calculate and use bottom lines in these cases.

Transactional Interest and Risk Assessment. Indisputably (October 7, 2020). This post describes how the LIRA can be adapted for transactional negotiations.

[**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.**](#) Indisputably (July 25, 2018). This post provides links to law review articles by Michaela Keet and Heather Heavin that provide the foundation for the LIRA book.

[**LIRA Videos.**](#) Indisputably (July 16, 2020). This post collects lots of videos of presentations I gave about LIRA.

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6. Preparation for Mediation Sessions

Preparation for mediation sessions is an important element of real mediation practice systems. Mediators often engage in routine pre-session activities to tailor the mediation process for each case. This may include educating parties about the process, soliciting submission of documents, and discussing specific aspects of the dispute. Similarly, courts and other organizations sponsoring mediation establish their own protocols to prepare parties before mediation sessions. Unfortunately, in too many mediations, parties are not as well prepared as they should be. This is particularly a problem for self-represented parties. Many entries in other sections of the bibliography discuss preparation for mediation sessions.

[**The Critical Importance of Pre-Session Preparation in Mediation.**](#) SSRN (December 19, 2022), 6 pages. This article describes why pre-session preparation is so important. In mediation, parties and their lawyers, if any, need to be prepared to discuss the facts, law, interests, and/or negotiation approaches etc. Mediation programs and mediators should do whatever they reasonably can before the first mediation session in each case to make the process as productive as possible. This post also describes why we should use the term “pre-session” (or “pre-mediation-session”) instead of “pre-mediation” and why faculty and trainers teaching mediation should cover pre-session preparation.

[**Party Self-Empowerment from Preparation for Mediation Sessions.**](#) Indisputably (June 26, 2023). If parties are well-prepared before mediation sessions, they will be knowledgeable, confident, and assertive so that they can exercise their decision-making authority as well as possible. Well-prepared parties can make decisions before and during mediation sessions rather than simply relying on mediators to promote their self-determination. In other words, they will feel more empowered to participate productively. Depending on the circumstances, mediators, lawyers, courts, and/or mediation programs may help parties get prepared.

[**How You Can Solve Tough Problems in Mediation.**](#) 29 Michigan Dispute Resolution Journal 11 (Fall 2021), 7 pages. This article provides detailed techniques for addressing problems when participants are not well prepared before mediation sessions, have unrealistic expectations, and act very emotionally.

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7. Technology Systems

Technology is part of everyday modern life that we may take for granted, much like the air we breathe. It's increasingly part of legal and dispute resolution practice systems as practitioners seek better and more efficient ways to do their work. Communication is a fundamental part of practice, and common modes of communication now regularly include phone, email, text, social media, and video. The range of communication technologies is likely to expand and improve. In the future, we may view artificial intelligence (AI) systems the way we think about internet search engines today. Practitioners almost certainly will incorporate AI systems in their practices.

[Technology in Real Practice Systems](#). Indisputably (January 21, 2024). This post uses the RPS mediation checklists to illustrate practitioners' great reliance on technology.

[The Next New Normals – in General](#). Indisputably (April 13, 2020). The covid pandemic was a shock wave that reverberated for several years, and we still are feeling the effects. During the crisis period, we developed routines of sheltering in place, physical distancing, communicating electronically, and working from home, among other things. This post speculated about what that new normal might be like in many domains of life after the pandemic ends. It referred to this as the "normal new normal" (NNN) in contrast to the "crisis new normal" (CNN) for the duration of the crisis. It speculated that routines developed during the CNN period may have long-lasting effects during the NNN period. It focused on changes in patterns of social conflict, work, and higher education. It includes links to additional posts about new normals in (1) legal and dispute resolution practice, court procedures, and legal education, (2) communication, privacy, and community, (3) continuing professional education, (4) dispute resolution, and (5) social relationships.

[Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions, Chapter 6](#). (2020). This chapter of the LIRA book discusses tools to help parties develop and use litigation interest assessments. It describes technological tools including decision analysis software and services, model-based analytics, data mining, and internal risk analysis models, as well as other tools such as checklists. It discusses barriers to use of litigation risk assessment programs and services.

[Drop Everything and Read Noam's Masterpiece Right Now](#). Indisputably (February 11, 2017). This post describes Noam Ebner's article, *Negotiation is Changing*. He argues that people's everyday behaviors have changed in recent years, and that "people-as-negotiators, and therefore negotiation itself, have also undergone significant change." He describes how people's bodies are physiologically changing, how we are changing our behaviors, how we are being changed by our new behaviors, and how we are interacting in new ways. He illustrates his thesis by describing changes in behavioral, psychological, and emotional elements of negotiation including attention, communication, empathy, and trust.

[Constructing Good ODR Systems](#). Indisputably (October 10, 2021). This post presents an article by Amy Schmitz and John Zeleznikow, *Intelligent Legal Tech to Empower Self-Represented Litigants*. It helps explain why ODR systems sometimes don't fulfill parties' needs. The article develops a typology of six functions that various ODR systems perform: case management, triaging, advisory, communication, decision support, and drafting. It includes a great appendix listing ODR systems and which of these functions they perform, noting that some systems perform multiple functions. It argues that artificial intelligence and data analytics have the potential to help self-represented litigants and others pursue remedies and justice.

[Moving US Courts Online](#). Indisputably (March 31, 2020). This post provides a summary compiled by Paul Embley of the National Center for State Courts about courts' decisions about moving operations online at the outset of the covid pandemic.

[Study of ODR in Family Cases with Positive Results](#). Indisputably (July 4, 2022). This post summarizes the results of a study finding that parties who used ODR for child custody, parenting time, or child support matters were more likely to reach agreement and to rate their experience more highly than those who declined to use ODR.

[The New Handshake: Using ODR to Create Value for Consumers and Businesses](#). Indisputably (May 7, 2018). This post discusses issues related to the ABA book, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, by Amy Schmitz and Colin Rule. The book is designed to help build consumer protection that will benefit both consumers and merchants. It explains problems with the status quo, suggesting how ODR can improve handling of consumer problems and identifying challenges in implementing ODR systems.

[Dwight Golann on a Year of Zoom Mediations](#). Indisputably (May 11, 2021). This post summarizes Dwight Golann's article, "*I Sometimes Catch Myself Looking Angry or Tired ...*" *The Impact of Mediating by Zoom*. He concludes, "Mediating by Zoom is a much more positive experience than people expected and will be a large part of the field in the future."

[Dilyara Nigmatullina's New Article on Planned Early Dispute Resolution and Technology](#). Indisputably (April 12, 2021). This post summarizes Dilyara Nigmatullina's article entitled, *Planned Early Dispute Resolution [PEDR] Systems and Elements: Experiences and the Promise of Technology*. It investigates actual experiences of companies using PEDR systems and discusses the effect that the companies' shift to PEDR has on law firms. It concludes by exploring how PEDR systems can benefit from the use of technological tools and how the interaction between technology and dispute resolution can affect the future of the legal profession. PEDR is discussed in [Section 8](#).

[A Mediator and a Bot Walk into a Bar ...](#). Indisputably (February 6, 2023). This post presents ChatGPT's decent response to a question about the main models of mediation (or at least much better than what most of my students would have written).

[AI and Empathy](#). Indisputably (February 26, 2023). This post speculates about whether AI systems will be able to replicate human empathy – at least enough to satisfy people interacting with them.

[Easy as Pi](#). Indisputably (September 25, 2023). This post presents some interactions with Pi, an AI system that is more conversational than others. It illustrates that, in the foreseeable future, AI systems almost certainly will become a lot more sophisticated and be incorporated into much of our lives, often in ways we will not notice.

[Avatar Mediation](#). Indisputably (March 5, 2023). This post speculates about how AI systems might mediate (or assist in mediation) in the not-too-distant future.

[Training Your Mediator Bot](#). Indisputably (August 23, 2023). This somewhat tongue-in-cheek post discusses biases in AI systems. Noting that AI bots need to be “trained,” this post suggests that untrained mediator bots may spew out unwanted interventions such as providing undesired evaluations of BATNA values – or failing to provide desired evaluations. So mediators probably will need to co-mediate with their bots for a while to observe and correct its biases. Ironically, bots may produce language that normal humans understand much better than the confusing jargon we habitually use. So the mediator bots may need to train human mediators.

[AI, ADR, and Anxiety](#). Indisputably (March 13, 2023). This post discusses AI generally, growing anxiety about it and modern life generally, and how we can manage this anxiety. Anxiety about AI may be feeding into a more general anxiety about events in the US and around the world. We can address anxiety by focusing on what we actually can control. Regarding AI and ADR, I suggest that the machine mediation “glass” will be partly empty and partly full – as is human mediation. It’s important to recognize our own reactions to and fears about AI, have as accurate and balanced an understanding of what’s happening as possible, acknowledge the uncertainties, and focus on what we can control.

[A Proposal for the Joint Development of Generative AI for the Dispute Resolution Profession](#). Indisputably (April 13, 2023). This post by Gary Doernhoefer proposes the development of a data set for the dispute resolution profession as the basis for AI systems. The ideal model would be for a collaboration in the dispute resolution field to create the refined data set, establish guardrails, and set privacy parameters for the use of the data. This would involve a centralized advisory board to address concerns such as (1) privacy requirements for how the queries are received, stored, and used, (2) the expertise needed to curate additional training materials, (3) shared costs of development, and (4) gaining the cooperation of industry authors whose materials might be included in the training data set. He gives the example of AI applications helping neutrals by generating lists of likely issues to be addressed, potential questions a neutral might ask, or potential proposals to consider.

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8. Planned Early Dispute Resolution

Trying to resolve disputes early in a conflict has many potential benefits. Early resolution minimizes tangible and intangible costs of extended disputing. It also enables parties to maximize their decision-making throughout a dispute instead of waiting until late in the process. Planning helps parties to engage productively and reduce risks of adverse consequences due to lack of planning. There are entries about early dispute resolution in other sections of this bibliography.

[**The Movement Toward Early Case Handling in Courts and Private Dispute Resolution**](#). 24 Ohio State Journal on Dispute Resolution 83 (2008), 51 pages. This article identifies early case handling (ECH) as an important general phenomenon in dispute system design theory and practice, catalogs major ECH processes, and urges practitioners and policymakers to use ECH processes when appropriate. The key element of ECH is that people intentionally exercise responsibility for handling the case from the outset. ECH processes in courts include early case management procedures, differentiated case management systems, and early neutral evaluation. ECH in the private sector includes ADR pledges and contract clauses, early case assessment and ADR screening protocols, settlement counsel, and collaborative and cooperative practice.

[**Survey of Early Dispute Resolution Movements and Possible Next Steps**](#). SSRN (April 22, 2021), 23 pages. This article surveys a set of early dispute resolution (EDR) movements in courts and private dispute resolution that share common values but operate in different contexts. The movements include judges, court administrators, lawyers, and neutrals, and the different movements deal with a wide range of civil cases. This article identifies EDR goals and limitations, and it describes various EDR processes and possible next steps for EDR movements. It includes numerous links to resources with more information.

[**Planning is Critically Important for Early Dispute Resolution**](#). Indisputably (June 11, 2015). This post pushes back against a complaint by lawyers that early mediation is a waste of time. Attempts to settle cases early in litigation can be wasteful if the lawyers haven't properly prepared and planned the process. Some people think that "early" means that lawyers should try to resolve the ultimate issues right after all the parties have appeared in litigation. This post uses the term "early" as a shorthand for "earliest appropriate time." To be ready to settle at the earliest appropriate time, lawyers should promptly learn the parties' interests and the critical facts, reasonably anticipate the likely decision if the case would go to trial, and consider possible agreements that might satisfy both parties' interests. Preparation before mediation sessions is discussed in [Section 6](#).

[**Dispute Prevention and Early Dispute Resolution Framework**](#). Indisputably (April 9, 2020). This post explains how lawyers can help clients use dispute prevention and early dispute resolution procedures, and it provides a general framework including dispute prevention.

Early Dispute Resolution Processes. Indisputably (April 8, 2020). This post describes planned early dispute resolution, lawyering with planned early negotiation, pre-suit mediation, and planned early two-stage and multi-stage mediation.

Taking Advantage of Opportunities in “Litigotiation.” 21 Dispute Resolution Magazine 40 (Summer 2015), 8 pages. Marc Galanter defines “litigotiation” as “the strategic pursuit of a settlement through mobilizing the court process.” Although the purported purpose of pretrial litigation is to prepare for trial, this preparation is inextricably intertwined with negotiation because the anticipated trial decision often affects the ultimate negotiation. When lawyers approach their cases as “litigotiation,” their goal is to plan to reach agreement sooner, cheaper, and better.

Family Lawyering with Planned Early Negotiation: How to Get Good Results for Clients and Make Money. 37 Family Advocate 12 (Winter 2015), 5 pages. This article argues that lawyering with planned early negotiation is just good lawyering. Many lawyers do it routinely, though not as consciously, systematically, and efficiently as they might. A systematic planned early negotiation process begins with an early assessment of the case including (1) the goals and interests of the parties and lawyers, (2) the critical facts, (3) the likely court outcome, and (4) possible agreements that might satisfy both parties.

Overcoming Roadblocks to Reaching Settlement in Family Law Cases. 40 Family Advocate 26 (Winter 2018), 5 pages. In “litigation as usual,” settlement often comes only after people engage in adversarial posturing, the original conflict escalates, the relationships deteriorate, the process takes too long and costs too much, and nobody is really happy with the resolution. This article describes common roadblocks to negotiation and ways to overcome them to reach good settlements, particularly by actively managing cases from the outset of a case. Although some dynamics described in this article are specific to family law cases, most apply in almost any type of litigation.

Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better. 16 Cardozo Journal of Conflict Resolution 63 (2014), 39 pages. This article is based on interviews with 32 lawyers who were selected because of their good reputations. They described how they prepare for both negotiation and trial. They recommend taking charge of their cases from the outset, which includes (1) getting a clear understanding of clients and their interests, (2) developing good relationships with counterpart lawyers, (3) carefully investigating the cases, (4) making strategic decisions about timing, and (5) enlisting mediators and courts when needed. The lawyers overwhelmingly suggested starting negotiation at the earliest appropriate time.

Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money. Second Edition (2015). This book outlines a general approach to practicing law. It describes techniques to (1) build strong relationships with clients, (2) use billing systems promoting interests in early negotiation, (3) develop effective working relationships with counterpart lawyers, (4) minimize unnecessary conflict, (5) manage common problems in negotiation, (6) use mediators effectively, and (7) improve negotiation skills throughout one’s career.

[**Lainey Feingold's Book on Structured Negotiation**](#). Indisputably (October 3, 2016). This post discusses Lainey Feingold's book, *Structured Negotiation – A Winning Alternative to Lawsuits*. Lainey is a disability rights lawyer who uses a process for successfully negotiating cases without filing lawsuits. The book is a nuts-and-bolts guide for using her process.

[**Planning for Good Quality Decision-Making in Mediation Using Two-Stage Mediation**](#). Indisputably (May 9, 2019). This post describes risks of unplanned one-session mediations, planning for two-stage mediation, and benefits and risks of two-stage mediation.

[**The Evolution To Planned Early Multi-Stage Mediation**](#). Kluwer Mediation Blog (August 28, 2020). This post notes that it is an article of faith for many lawyers and mediators that mediations should be conducted in a single day. The pressure to settle cases in one day creates problems, particularly in undermining the quality of parties' decision-making. The covid pandemic disrupted the "one day" norm as people generally shifted to mediating by video. This led to an evolution to planned early multi-stage mediation. Multi-stage mediation requires – and enables – mediators to create value by doing more process design. Freed from the constraints of one-day mediations, mediators can schedule a series of conversations with particular individuals in a sequence that would be most helpful. This also can promote participation by key decision-makers who can participate for short periods as needed.

[**Planned Early Dispute Resolution User Guide**](#). ABA Section of Dispute Resolution (2013) (with Kurt L. Dettman and Catherine E. Shanks), 18 pages. This guide explains the business case for "planned early dispute resolution" (PEDR), describes how to establish a PEDR system, identifies elements of PEDR systems, and includes a bibliography.

[**How Businesses Use Planned Early Dispute Resolution**](#), 34 *Alternatives to the High Cost of Litigation* 49 (2016) (with Peter W. Benner), 9 pages. This article summarizes the results of a study of companies' PEDR systems, identifies elements of PEDR systems, and explains why and how some businesses develop and use them. Lawyers in this study emphasized that the process of developing PEDR systems is a "cultural project" and that PEDR must be integrated into the business culture to be successful.

[**How Your Company Can Develop a Planned Early Dispute Resolution System**](#), 34 *Alternatives to the High Cost of Litigation* 67 (2016) (with Peter W. Benner), 7 pages. This article explains that, despite the fact that PEDR systems offer great value to businesses, proponents of PEDR systems face persistent professional, organizational, and cultural barriers impeding changes. The article offers several recommendations to overcome these barriers. It suggests that for PEDR systems to take hold and endure, organizational cultures must shift from instinctive consideration of conflict as a threat to that of a potential business opportunity. The companies that adopted PEDR systems most effectively did so by making them part of a cultural shift in the way they handle disputes.

[**Why and How Businesses Use Planned Early Negotiation**](#). 13 University of St. Thomas Law Journal 248 (2017) (with Peter W. Benner), 50 pages. This article reports the results of a study analyzing why some businesses adopt PEDR systems, which involve strategic planning for preventing conflict and handling disputes promptly after they arise. It uses in-depth interviews to tell the story of inside counsel at major corporations who designed PEDR systems to satisfy the interests of key stakeholders. One might assume that using a PEDR system should be a “no-brainer” for businesses that regularly litigate because litigation-as-usual undermines many business interests. But this study indicates that PEDR is problematic for some businesses for multiple reasons. The article offers recommendations for more widespread use of PEDR systems, including (1) development of resources to help companies implement PEDR systems, (2) use of dispute system design methods, (3) designation of PEDR counsel to manage the process, and (4) making PEDR a valued part of the corporate culture.

[**Anna Howard’s New Book Examines Why Businesses Don’t Use Mediation – And Other Issues**](#). Indisputably (March 11, 2021). Anna Howard’s book, *EU Cross-Border Commercial Mediation: Listening to Disputants – Changing the Frame; Framing the Changes*, provides valuable insights about business disputing. Her study is based on 21 semi-structured interviews of senior in-house counsel in multi-national companies operating in Europe. It shows that lawyers think about disputes from the outset of problems, not simply at the later stages of cases. The study pays particular attention to why businesses don’t use mediation, highlighting the impact of internal organizational dynamics.

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9. Dispute System Design

Dispute system design (DSD) is the “applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict” instead of handling individual disputes on an ad hoc basis. This definition is from the treatise, [Dispute System Design: Preventing, Managing, and Resolving Conflict](#) by Lisa Blomgren Amsler, Janet K. Martinez, and Stephanie E. Smith. As their book demonstrates, DSD is well established in dispute resolution theory and practice in numerous contexts in the US and around the world. Many publications in other sections of this bibliography rely on DSD principles, particularly in Section [10](#) on applications in court systems.

[Shifting the Central Paradigm to Dispute System Design](#). Indisputably (November 1, 2022). This post argues that instead of identifying our field as ADR, we should use dispute system design as our central theoretical framework. Although people often think of DSD as being used only in large organizations, individuals and small practice groups also handle streams of cases and can use these principles and techniques to improve their case management and dispute resolution procedures. DSD is about tailoring dispute systems to the needs of stakeholders, especially disputing parties. Good designs fit the stakeholders’ context and culture so that the dispute processes produce as much satisfaction of the parties’ procedural and substantive goals as reasonably possible.

[Think DSD, Not ADR](#). 16 New York Dispute Resolution Lawyer 14 (Spring 2023), 4 pages. This article notes the lack of consensus about the name and definition of ADR, reflecting deep conceptual problems in our field. The conventional conception of ADR omits lawyer-advocates, litigation, and judges despite the fact that litigation and modern ADR processes are inseparably intertwined. Using a dispute system design (DSD) frame avoids the illogical and counterproductive exclusion of lawyers and judges from the “ADR” field. Although DSD generally is used by large organizations, individual practitioners and small practice groups also use these procedures. Indeed, ADR practitioners routinely do DSD whether they know it or not.

[Designing Mediation to Satisfy Multiple Stakeholders](#). (September 2022), 11 pages. This describes my experience helping design and operate a child protection clinic is one of the ten systems analyzed in *Real Mediation Systems to Help Parties and Mediators Achieve Their Goals*. The mediation clinic at the University of Arkansas-Little Rock was managed by a consortium of five entities. The stakeholders had overlapping but sometimes conflicting interests – as did some key individuals involved in the system. This piece describes (1) the types of cases and participants in the mediations, (2) common patterns of parties’ goals, interests, and positions, (3) the routine procedures we developed, and (4) challenging situations. The consortium had quarterly meetings to review the program and make adjustments. I reflected on differences in the system designs for this clinic with my private divorce cases.

[An Empirical Analysis of Collaborative Practice](#). 49 Family Court Review 257 (2011), 33 pages. Collaborative took off in the 2000s as a result of a concerted effort by

family lawyers and other family practitioners to develop a new system of practice. This article summarizes empirical research about collaborative practice, the collaborative movement, the operation of local practice groups, its interaction with other parts of the dispute resolution field, and its impact on the ADR field.

[Principles for Policymaking about Collaborative Law and Other ADR Processes.](#)

22 Ohio State Journal on Dispute Resolution 619 (2007), 89 pages. This article articulates a set of principles for policymaking about ADR to promote values of process pluralism, choice in dispute resolution processes, and sound decision-making. It argues that policymakers should use a DSD framework in analyzing policy options. They normally should resist the temptation to regulate ADR by merely or primarily adopting rules governing ADR processes. They should adopt rules only after analyzing the applicable dispute system and considering the benefits and limits of non-regulatory policy options. Non-regulatory approaches include (1) training for disputants and professionals, (2) dispute referral mechanisms, (3) technical assistance for ADR organizations, and (4) grievance mechanisms for parties in ADR processes.

[Impressive Report on Worldwide Dispute System Needs and Design.](#) Indisputably (January 3, 2019). This post highlights a report of the Hague Institute for Innovation of Law, *Understanding Justice Needs: The Elephant in the Courtroom*. It shows how legal service providers and courts could embrace user-centered innovation and delivery of fair solutions.

[Mediate.com Publishes “Seven Keys to Unlock Mediation’s Golden Age.”](#)

Indisputably (June 18, 2020). Mediate.com published a series entitled *Seven Keys to Unlock Mediation’s Golden Age*. The objective is to encourage discussion among stakeholders about navigating mediation’s best future. The seven keys are: Leadership, Data, Education, Profession, Technology, Government and Usage. Descriptions of each “key” has two to four short articles.

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10. Applications in Court Systems

Courts are dispute systems, and mediators' individual practice systems are nested within the courts' dispute systems. Thus principles of dispute system design (discussed in [Section 9](#)) are inherently applicable. Courts' rules and policies influence practitioners' behavior in court-connected mediations and perhaps in other contexts as well.

[Courts Should Make Mediations Good Samaritans Not Frankensteins](#). SSRN (May 10, 2021), 8 pages. This article identifies problems with mandatory mediation. It recommends that courts use dispute system design procedures to help fulfill the goals of mediation as Good Samaritans and to reduce risks of creating Frankensteins – mediation that produces injustices. Courts should review their mediation policies so that parties generally feel that mediation is inviting, non-coercive, and not a threat to their legal rights. Courts ordering parties to attend mediation should protect their rights to a distinct, voluntary negotiation process. Courts may better achieve their goals by using certain policies instead of or in addition to mandatory mediation.

[Procedures for Building Quality into Court Mediation Programs](#). 23 Alternatives to the High Cost of Litigation 17 (2005), 7 pages. This article describes how courts should use dispute system design procedures to promote constructive participation in mediation and reduce the frequency of perceived bad-faith behavior. It suggests policies to increase productive behavior in mediation including (1) education of stakeholders, (2) submission of documents and consultations before mediation sessions, (3) limitations on the amount of time that parties are required to attend mediation, (4) policies about cancellation of mediation sessions, and (5) protections against misrepresentations.

[How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?](#) SSRN (July 27, 2023), 54 pages. Journal of Dispute Resolution (forthcoming 2024). Without incurring substantial additional costs, courts can help parties, attorneys, and mediators prepare for mediation sessions. This would involve reviewing and revising rules, policies, and publications, which are activities that courts routinely do. To assess federal district courts' efforts to promote preparation before mediation sessions, this article analyzes information on the websites of all 94 federal district courts. The article offers recommendations for courts, including using mediation process labels similar to nutrition labels on grocery products. It highlights praiseworthy provisions and materials from some courts. It includes an extensive appendix collecting publications, videos, website materials, and technological materials that parties, attorneys, and mediators can use to make mediations as effective as possible.

[Takeaways From “How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?”](#) SSRN (July 27, 2023), 13 pages. This article highlights key points from “How Can Courts – Practically for Free – Help Parties Prepare for Mediation Sessions?”, noting laudable court rules that courts might adopt or adapt.

[Charting a Middle Course for Court-Connected Mediation](#). 2022 Journal of Dispute Resolution 63, 21 pages. This article describes two theoretical perspectives about

court-connected mediation and sketches a third approach to combine the benefits and reduce the risks of both perspectives. One perspective focuses on the fundamental principle that parties should make decisions in mediation voluntarily, without inappropriate pressure. The second perspective, which I call a “liti-mediation perspective,” is grounded in a concern that without court orders, some parties lose valuable opportunities to mediate and courts spend their limited resources on cases that should appropriately be resolved in mediation. This article outlines the third perspective for courts operating a mandatory mediation program. It involves policies to motivate parties and lawyers to gain the benefits of mediation while protecting parties’ rights to make their own decisions.

[How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice.](#) 2006 Journal of Dispute Resolution 213, 41 pages. This article discusses how the U.S. court system can function optimally considering declining trial rates and courts’ limited resources. It provides background about the federal district courts’ workload and financial situation and then identifies courts’ goals for satisfying litigants’ and society’s interests in the courts. Based in part on input from federal court clerks, this article discusses benefits and problems caused by declining trial rates and it analyzes possible strategies for dealing with those problems. These strategies include (1) ensuring that litigants have a real choice of disputing procedures including trial, (2) routinely collecting and disseminating data on negotiation and settlement, (3) designing court facilities to fit realities of litigation, (4) reforming legal education to reflect the realities of legal practice, (5) making judging more attractive to judges, and (5) expanding courts’ roles in promoting local dispute resolution systems.

[Shifting the Focus from the Myth of “The Vanishing Trial” to Complex Conflict Management Systems, or I Learned Almost Everything I Need to Know About Conflict Resolution from Marc Galanter.](#) 6 Cardozo Journal of Conflict Resolution 191 (2005), 23 pages. This article argues that the “vanishing trial” is a misleading portrayal of empirical reality. It sketches an “ecological” description of our system of managing conflict and the place of trials in that system. It describes a range of goals that communities might adopt for their conflict management systems. It pictures several possible evolutionary paths for the conflict management systems and proposes ways to cultivate healthy systems including a valued place for trials. It suggests celebrating people managing their ecology of conflict rather than celebrating (or demonizing) particular disputing procedures.

[Michael Buenger’s Great Keynote Address at the ABA Court ADR Conference.](#) Indisputably (April 21, 2019). This post discusses the keynote address at the ABA Court ADR Conference, delivered by Michael Buenger, the executive vice-president and chief operating officer of the National Center for State Courts. His talk, *Rethinking the Delivery of Justice in a Self-Service Society*, focused on the changes needed to deal with social and technological changes in the present and future. He described the reality that the courts and “alternative” dispute resolution are becoming increasingly integrated, and he argued that we need to plan better so that this combined system can better serve the public.

[Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs.](#) 50 UCLA Law Review 69 (2002), 74 pages.

This article analyzes good faith requirements in mediation and concludes that rules requiring good-faith participation are likely to be ineffective and possibly counterproductive. Instead, it proposes using dispute system design principles to develop policies satisfying the interests of stakeholders in court-connected mediation programs. These policies include (1) collaborative education about good mediation practice, (2) pre-mediation consultations and submission of documents, (3) a limited and specific attendance requirement, and (4) protections against misrepresentation.

[PEDR \[Planned Early Dispute Resolution\] is Important for Culture Change in Courts.](#) Indisputably (November 1, 2015). This post highlights a report by the Institute for the Advancement of the American Legal System, *Change the System, Change the Culture: Top 10 Cultural Shifts Needed to Create the Courts of Tomorrow*. One of the recommended cultural shifts is “Dig Deep, Earlier: Lawyers need to develop a deep understanding of their case early in the process.”

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11. Applications in Legal Education

For more than a century, a series of blue-ribbon committees have criticized American legal education for inadequately preparing law students to practice law. Although there have been some improvements, the fundamental curricular approach has remained the same. The pervasive “[hidden curriculum](#)” relies primarily on memorizing complex legal rules derived from appellate cases and applying them to abstract fact patterns.

Although it’s important for law students to learn this skill of legal analysis, law schools’ curricular priorities don’t match the needs of new law graduates. Lawyers must be able to work well with their clients, understand their interests (and those of counterparties), communicate effectively, and negotiate agreements acceptable to all the parties. Traditional legal education does not teach students that facts often are contested, some disputes are not best resolved through litigation, parties have strong intangible interests in addition to maximizing their financial outcomes, and emotions play an important role in legal practice.

In recent decades, law schools have offered ADR courses, which provide some remedy for these curricular flaws. These courses teach many of the lessons overlooked in traditional legal education and use experiential pedagogical methods that help students grasp important insights and learn essential skills. Unfortunately, some ADR instruction has institutionalized problematic negotiation and mediation theories as described in Sections [3.B](#) and [3.C](#). These theories are oversimplified at best and misleading at worst. As a result, some ADR courses miss opportunities to teach students critical lessons they will need in practice.

Teaching law students about realistic perspectives and skills for helping clients is important because practitioners often fail to recognize and respect clients’ perspectives and interests. As noted in [Section 4](#), it’s almost as if lawyers (and some mediators) are from Mars and clients are from Venus. Teaching students to work well with clients – and counterparts, among others – can “plant a seed” that may grow when they are in practice and may help them resist some foibles of legal practice.

[Study Finds That Law Schools Fail to Prepare Students to Work with Clients and Negotiate](#). Indisputably (November 4, 2020). This post provides excerpts from the *Building a Better Bar* study about new law school graduates’ unmet instructional needs. The study found that new lawyers were “woefully unprepared” to work with clients. They had difficulty (1) communicating with clients, (2) managing expectations, (3) breaking bad news, (4) coping with difficult clients, (5) negotiating with counterparts and clients, and (5) understanding the “big picture” of client matters.

[Big New Study on Necessary Lawyering Skills](#). Indisputably (July 31, 2016). This post summarizes the “Foundations of Practice” survey of lawyers which identifies “foundations” that lawyers need soon after graduation. These include communication, emotional and interpersonal intelligence, passion, ambition, professionalism, and other qualities and talents. Almost all of the items on the list refer to personal qualities that

law schools don't emphasize in their curricula. By contrast, law schools focus on things that only small proportions of the lawyers think are necessary soon after graduation.

Illusions of Competence. Indisputably (March 25, 2015). This post riffs on BARBRI's "State of the Legal Field Survey" reporting that "71 percent of 3L law students believe they possess sufficient practice skills. In contrast, only 23 percent of practicing attorneys who work at companies that hire recent law school graduates believe recent law school graduates possess sufficient practice skills." Making it personal, I asked readers if they would be confident that a recent law graduate would do a good job in handling a garden-variety legal case of theirs. I wouldn't.

Multi-Stage Simulations. This webpage on the Dispute Resolution Resources for Legal Education website includes descriptions of multi-stage simulations written by my various faculty. It includes "Suggestions for Using Multi-Stage Simulations in Law School Courses."

Great Value of Students Playing Clients in Multi-Stage Simulations. Indisputably (May 14, 2015). This post describes the great results when I used multi-stage simulations in negotiation and family law dispute resolution courses. To simulate real life, I developed several simulations that started from the first client interview. I included other stages, such as (1) negotiating retainer agreements, (2) identifying additional information needed, (3) getting to know counterpart lawyers, (4) researching and negotiating about the law, (5) negotiating dispute resolution clauses, (6) preparing for negotiation with clients and counterpart lawyers, and (7) negotiating the ultimate issues. Students playing lawyers got especially valuable experiences because the students playing clients identified so strongly with their roles.

Simulations Based on Actual Cases – Why Reinvent the Wheel? Indisputably (November 29, 2021). This post describes Debra Berman's use of materials from actual cases for simulations in her negotiation and mediation courses. She provides litigation documents, including the complaint, motions, and other documents such as discovery requests, disclosures, and scheduling orders as well as a short settlement memo that she drafts. She observed dramatic improvements in her students' performance. They were excited to work with real cases and were more prepared.

Letter to Kelly. Indisputably (December 1, 2017). This is a letter I wrote to someone who was about to start law school. I advised keeping focused on their goals and how best to achieve them. I cautioned about portrayals of lawyers on TV and in the movies. I warned about the "hidden curriculum" which creates misimpressions by focusing on appellate cases. I encouraged them to remember what it is like to be a "normal" person, a perspective they may forget after being initiated in the legal tribe. I advised trying to see the world through others' eyes.

A Message for Law Students to Prepare Themselves for Legal Practice.

Indisputably (November 10, 2020). This post includes suggestions to help plan self-directed learning to supplement what students learn in law school. It recommends that students (1) appreciate the values and limitations of the law, (2) recognize the "hidden

curriculum” in law school, (3) understand that “thinking like a lawyer” really is about helping clients achieve their goals, (4) develop a strategic plan for their education, (5) compile a portfolio, (6) take clinical, externship, and practice courses, (7) interview practitioners, and (8) join the ABA and other bar and professional associations.

[Helping Law Students Define and Pursue Success](#). Indisputably (January 29, 2024). This post collects prior posts about how to help law students define and pursue professional success.

[Law Students Can Use Portfolios to Plan Their Practice Systems](#). Indisputably (January 30, 2024). This post describes how law schools can help students plan for successful careers by using Real Practice System self-assessments to guide them in developing individualized portfolios. Portfolios identify students’ learning objectives and experiences designed to achieve them. Portfolios may include a variety of elements such as writing samples, video recordings, grades, faculty evaluations, clinical course journals, and extracurricular experiences.

[The Law Can Be Dangerous to Lawyers’ Mental Health](#). Indisputably (February 17, 2020). The legal system sometimes provides important benefits such as helping people solve difficult problems, making institutions function properly, and promoting justice. But the process needed to achieve these goals often is extremely stressful for litigants. Not only do parties suffer stress, but also do lawyers, law students, and law professors. So we all need to take care of ourselves and others.

[Dealing with Causes as Well as Symptoms of Law Students’ and Lawyers’ Lack of Well-Being](#). Indisputably (August 22, 2017). This post discusses the National Task Force on Lawyer Well-Being’s report, *The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*. The report recommends that faculty “assess law school practices and offer faculty education on promoting well-being in the classroom.” It cites research suggesting that “potential culprits that undercut student well-being includ[e] hierarchical markers of worth such as comparative grading, mandatory curves, status-seeking placement practices, lack of clear and timely feedback, and teaching practices that are isolating and intimidating.” This post notes that legal practice is inherently stressful and recommends changing legal practice culture. Individual practitioners may reduce their stress by adopting a norm of problem-solving in serving clients whenever appropriate.

[What Makes Lawyers Happy? – And How Can You Help?](#) Indisputably (September 21, 2015). This post summarizes Lawrence Krieger and Kennon Sheldon’s impressive study, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*. They write, “[T]he current data show that the psychological factors [related to subjective well-being] seen to erode during law school are the very factors most important for the well-being of lawyers. Conversely, the data reported here also indicate that the factors most emphasized in law schools – grades, honors, and potential career income, have nil to modest bearing on lawyer well-being.”

[My Last Lecture: More Unsolicited Advice for Future and Current Lawyers.](#) 2015 Journal of Dispute Resolution 317, 25 pages. This article advises students to get the most possible benefit from law school by paying attention to what's really important, learning to learn, and not doing dumb things. It advises lawyers to understand themselves and others by focusing on their clients, being careful about making assumptions, recognizing the importance of emotions, and understanding others' perspectives. It also recommends that lawyers (1) develop good judgment and routines, (2) consider what clients need, (3) develop good relationships with counterpart lawyers, (4) try to resolve matters at the earliest appropriate time, (5) negotiate more than they may expect, (6) recognize that they actually are mediating when they represent clients, (7) be creative when dealing with problems, and (8) be prepared to advocate hard and smart as necessary. The article concludes by encouraging lawyers to recognize both the good and harm that they can do as lawyers.

[Message for Students Interested in ADR.](#) Indisputably (August 20, 2017). This post provides suggestions for things that law students interested in ADR might read and do.

[Student Paper Topics.](#) Indisputably (February 15, 2021). Students often have problems deciding what to write about for their course papers. This post collects blog posts with provocative ideas that students might elaborate or critique in their papers.

[Readings and Resources for Teaching.](#) Indisputably (July 18, 2022). This post provides links to resources that instructors can use when teaching dispute resolution.

[Law Schools Should Teach Students to Think Strategically – That's What it Really Means to Think Like a Lawyer.](#) (December 11, 2019), 3 pages. This piece argues that law schools should teach law students to think strategically when representing clients. It recommends that law schools offer courses in strategic case evaluation and management that integrate elements of interviewing, counseling, pretrial litigation, negotiation, and mediation in a coherent practical framework.

[They Should Call It Negotiation School, Not Law School.](#) Indisputably (October 1, 2020). Considering that lawyers spend much more time negotiating than going to trial, I offered suggestions for fundamentally reorganizing law school curricula and policies. This somewhat mischievous thought experiment includes ideas that are too radical for any law school to consider given the deeply entrenched institutionalization of legal education. But it is useful to ponder how law schools generally do a poor job of preparing students for the reality of practice and how schools might reform their curricula to do a better job.

[Where the "Puck" is Going – And What Faculty Should Do to Help Students Get There.](#) Indisputably (June 26, 2016). This post summarizes presentations and discussion at a program of the ABA Section of Dispute Resolution's annual Legal Educators' Colloquium. The conversation addressed anticipated changes that might affect legal and dispute resolution practice, how practice might change as a result, and how these changes could affect people's teaching.

Resources for Using Real Practice Systems Materials in Teaching. Indisputably (December 12, 2022). This post describes how faculty can use ideas and materials from the Real Practice Systems Project to help students get realistic understandings of practice. Although the project has generally focused on the systems that mediators develop and use, it can be adapted to understand the perspectives of lawyers acting as advocates in mediation, negotiators, and in legal practice generally. In addition to requiring or recommending that students read publications about real practice systems, faculty could assign students to write papers such as (1) a Stone Soup interview of a practitioner, (2) a description of students' actual system in simulated or real case(s) in their courses, or (3) a description of students' desired system after they graduate. This post includes templates for assignments that faculty could tailor to their courses.

Stone Soup: Learning How People Actually Prepare for Negotiation and Mediation. Indisputably (December 4, 2017). This post suggests questions in Stone Soup interviews that students can ask lawyers and mediators about how they prepare for negotiation and mediation.

Stone Soup Dispute Resolution Knowledge Project. 2017. The Stone Soup Project developed an extensive set of materials for faculty to help their students get a better understanding of the real world of practice. Most of the assignments involve interviews of practitioners or disputants. This website provides a complete set of documents to plan a Stone Soup assignment. These include (1) guidance in developing assignments, (2) a general model for an interview assignment, (3) suggested interview questions, (4) guidance for students in conducting and summarizing interviews, (5) a model invitation for an interview, (6) a summary of professional ethics rules about confidentiality, (7) a model paper format, (8) sample grading rubrics, (9) suggestions for using Stone Soup in various courses throughout law school, and (10) exemplary student papers. The website also includes faculty's assessments of their Stone Soup assignments and advice based on those assessments.

Teaching Students to Think Like Practitioners. Indisputably (August 2, 2021). This post summarizes ideas from a presentation focused on how to teach students to think like a mediator. This post applies the same logic to thinking like an advocate in mediation or a negotiator. The techniques can be applied in courses teaching practice skills through simulations, externships, and clinical experiences. The post includes possible teaching assignments.

Teaching Students to Focus on Party Decision-Making. Indisputably (August 13, 2023). This post describes why law schools don't teach students very much about helping clients make decisions and suggests techniques for doing so. It suggests (1) focusing on parties' roles throughout relevant courses, (2) including meaningful party roles in simulations and competitions, (3) using simulations focusing solely on preparation, (4) using multi-stage simulations, (5) helping students focus on parties' intangible interests in simulations and Stone Soup interviews, (6) using the terms "pre-mediation-session" or "before mediation sessions," (7) taking advantage of the litigation interest and risk assessment framework and materials, and (8) recommending that schools offer a course on strategic case evaluation and management.

[Resources for Teaching About BATNA, Bottom Lines, and LIRA.](#) Indisputably (June 10, 2020). Practically every negotiation, mediation, and ADR survey course teaches students that they should figure out their BATNA when negotiating or mediating. This is much easier said than done. This post provides lots of resources to help faculty teach students about BATNAs and – more importantly – about bottom lines. For additional publications about these topics, see Sections [3.A](#) and [5](#).

[Merging Mediation Models – And Other Lessons.](#) Indisputably (December 30, 2020). This post offers suggestions for teaching about mediation practice without focusing primarily on the problematic traditional mediation theories described in Section [3.C](#). It suggests that faculty (1) help students understand dynamics related to assessments of court outcomes, (2) teach students to strategically combine elements from the traditional models, (3) teach them how to manage the counteroffer process, (4) include lawyer-client relationships in simulations, and (5) use longer simulations including preparation for mediation sessions.

[Principles for Designing Negotiation Instruction](#) (with Ximena Bustamante, H. Jay Folberg, and Joel Lee). 33 *Hamline Journal of Public Law and Policy* 299 (2012), 28 pages. This article analyzes recommendations in the *Rethinking Negotiation Teaching* series. Since instructors cannot teach everything they would like, this article suggests some general principles for making decisions about what to include and how to conduct these courses. It is valuable to include a widely-taught “canon of negotiation” so that people can have a common “language” of negotiation theory and practice, while also tailoring instruction to the particular circumstances of each course. This article catalogs a wide range of instructional enhancements beyond the traditional canon of negotiation, including various perspectives, theories, assumptions, topics for instruction, teaching methods, and related issues.

[Problems with Teaching “Integrative” Negotiation.](#) Indisputably (November 19, 2020). This post responds to Debra Berman’s piece, *Is Our Over-Emphasis on Integrative Negotiation Pedagogy Falling Short of Reality?* My answer is “yes.” Much – perhaps most – negotiation and mediation of civil cases these days in the US involves a counteroffer process where lawyers focus almost exclusively on allocating money based on a zero-sum assumption. So if our courses focus too much on interests-and-options processes, students get a misimpression about the frequency of what happens in the real world. If we don’t prepare them to operate effectively in practice, they will be in for a rude surprise after they graduate. The problem is not just the over-emphasis but the concept of integrative negotiation itself and our reliance on short simulations. When faculty use longer simulations, especially simulations with students playing clients, students can get a more realistic experience of negotiation.

[Easy Assignment to Promote Law Students’ Apprenticeship of Identity.](#) Indisputably (February 7, 2016). This post describes an assignment in which students were required to review several law firm websites and write a homepage for the kind of practice that they would like to be part of. The post includes the assignment, which faculty are welcome to use or adapt.

[**You Really Should Know About Kris Franklin.**](#) Indisputably (November 8, 2020). This post profiles New York Law School Professor Kris Franklin. She teaches a negotiating, counseling, and interviewing course, which she says really should be called “Client Representation and Case Handling.” Her course on family law practice teaches all the family law doctrine covered in traditional family law courses but she does it exclusively using simulations. In contrast to my suggestion for renaming law school as “negotiation school,” she suggests calling it “legal problem-solving school,” which I think is even better.

[**Teaching Students to Negotiate Like a Lawyer.**](#) 39 Washington University Journal of Law and Policy 109 (2012), 37 pages. This essay describes my ideas for teaching negotiation. It argues that many lawyers engage in “ordinary legal negotiation” (OLN), which is distinct from “romantic” theories of positional and interest-based negotiation that comprise the canon of negotiation theory. OLN primarily involves an exchange of information between counterpart lawyers to jointly figure out an appropriate result based on legal norms. The essay also includes suggestions for using multi-stage simulations, promoting professional behavior by students, debriefing simulations, and designing course requirements.

[**Lessons from Teaching Students to Negotiate Like a Lawyer.**](#) 15 Cardozo Journal of Conflict Resolution 1 (2013), 41 pages. This article discusses my observations from teaching negotiation for the first time and offers suggestions for future efforts to improve legal education.

[**Problem-Resolution Lawyering Across the Twenty-First Century Law Curriculum.**](#) Indisputably (April 15, 2023). This post highlights an article by Kris Franklin and F. Peter Phillips. They argue, “Framing lawyers’ professional role as helping clients resolve problems – and therefore in turn, conceiving law school coursework as preparation for that role – should alter teaching, learning, and law practice in ways that inevitably improves each.” The article includes “exemplars” of ways to shift the legal curriculum to focus on lawyers as problem resolution partners.

[**Incorporating Real-World Legal Practice into Law School Curricula.**](#) SSRN (March 3, 2024) 15 pages. This annotated bibliography includes selected entries from this bibliography related to legal education. It includes three sections, identifying: (1) problems with legal education and licensing, (2) resources for law schools and faculty, and (3) resources for law students. It particularly focuses on teaching skills for helping clients, which is critically important because practitioners often fail to recognize and respect clients’ perspectives and interests.

[**Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice.**](#) 2013 Journal of Dispute Resolution 1, 18 pages. This article synthesizes major points in the University of Missouri’s symposium, [*Overcoming Barriers in Preparing Law Students for Real-World Practice*](#), which included many distinguished scholars. Teaching students to think like a lawyer is necessary but is not sufficient for students to *act like a lawyer* soon after they graduate. The article catalogs a long and

growing list of difficult pressures that law schools must cope with, and it describes options for improving practical education of law students. Reforming legal education to produce more effective lawyers is not only in law schools' self-interest but it also is important to fulfill commitments to our stakeholders.

[The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering.](#) 25 Ohio State Journal on Dispute Resolution 247 (2010) (with Jean Sternlight), 53 pages. This article reviews the long history of critiques of legal education highlighting the failure to adequately prepare students for legal practice. It identifies hurdles that reformers face when trying to reform legal education, and it proposes a modest menu of reforms that faculty and law schools can achieve without investing substantial additional resources. This article emphasizes the special contributions that ADR instruction can provide to legal education as an important corrective to a curriculum that routinely conveys the erroneous implication that litigation is virtually the only dispute resolution process that lawyers use. It argues that the curriculum should not teach ADR only in a few elective skills courses, and that it is even more important to include it as an integral part of core doctrinal courses throughout the curriculum. This article was the impetus for the LEAPS Project.

[The Legal Education, ADR, and Practical Problem-Solving \(LEAPS\) Project: History and Content.](#) SSRN (October 23, 2023), 4 pages. This article describes the history of the LEAPS Project and presents the materials it developed. The project promoted "practical problem-solving" (PPS), which was defined as including interpersonal skills, general lawyering skills, dispute resolution and prevention, and professionalism. The Project developed (1) materials describing various teaching methodologies, (2) suggestions for incorporating PPS in courses, (3) a survey of how schools integrate PPS skills in their curricula, (4) lists of consultants who can help on specific courses, (5) examples of course exercises, (6) approaches to introducing PPS in doctrinal courses, (7) a list of textbooks that incorporate PPS and professional skills development, and (8) links to relevant resources.

[The Coronavirus Crisis Provides an Opportunity to Adopt Better Systems for Licensing Lawyers than the Bar Exam.](#) Indisputably (April 29, 2020). This post discusses an ABA Journal article entitled, *Bar Exam Does Little to Ensure Attorney Competence, Say Lawyers in Diploma Privilege State*. It quotes a former Wisconsin State Bar president saying that "whether [Wisconsin law school graduates] passed a bar exam ... has no bearing on their lawyering abilities or character" or ensures competency. They are "swords of Damocles" hanging over schools' and students' heads. They privilege some doctrinal courses and discourage students from taking practice-oriented courses because those courses will not help them pass the bar exam. Bar exams entrench a pedagogy based on memorization of a lot of complex legal rules. They produce one-shot high-stakes summative assessments of dubious validity based on answering hypothetical exam questions. Bar exams provide binary results – pass or fail – and we can't have confidence in the validity of results within a range above and below the threshold for passing. Other than that, they're terrific.

[Should We Get Rid of the Bar Exam?](#) Indisputably (February 27, 2023). This post discusses an article analyzing empirical data about licensing of lawyers in Wisconsin. Graduates of Wisconsin schools have a diploma privilege and are licensed in that state without taking a bar exam. The article argues that bar exams generally don't fulfill their purpose of protecting the public. They consume tremendous resources of the legal profession, law schools, and law student and divert attention from activities that are likely to be more effective and valuable.

[Taking Advantage of the NextGen Bar to Stimulate Changes in Legal Education.](#) SSRN (October 26, 2023), 7 pages. Starting in July 2026, the NextGen bar exam will include questions about client relationships and management, client counseling, negotiation, and dispute resolution. This should stimulate law schools to modify their curricula to maximize their students' bar passage rates. There is likely to be only a short window of time when schools will make changes related to the new bar exam. To gain maximum advantage from this opportunity, reformers should develop a rigorous theory of change. This article sketches ideas for developing a theory of change to maximize effective instruction about the subjects that will be on the bar. Reformers should develop theories of change both for law schools generally and for individual law schools.

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