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How You Can Solve Tough Problems in Mediation

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By John Lande

The State Bar of Michigan ADR Section and Washtenaw County Bar Association ADR Section recently sponsored my presentation, "Help Your Clients Make Good Litigation Decisions with LIRA."[1] I summarized key points from *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, co-authored by Michaela Keet, Heather Heavin, and me.[2] Ed Sikorski previously provided an excellent summary of the book in this Journal.[3]

In my presentation, I asked the audience to describe what was frustrating in their mediations. Many complained about lawyers' and parties' lack of preparation for mediation, their unrealistic expectations, and their emotional behavior. This article suggests techniques described in the LIRA book to address these problems. It is primarily directed to mediators, though mediation advocates can benefit from some of these techniques as well. It assumes that all parties are represented by counsel, but these suggestions can be adapted if some or all parties are self-represented.[4]

DEALING WITH LACK OF PREPARATION

Communication Before Convening Mediation. Mediators should contact lawyers well before the scheduled mediation date and specify what lawyers need to do.

Instead of asking lawyers to provide everything in writing, you may get better responses by asking them to provide a concise summary of basic matters in writing and also discuss important issues confidentially by phone or video.

It might make sense to get a written summary before talking with lawyers. Unfortunately, some lawyers don't provide written statements at all or they provide them so soon before the mediation that they aren't helpful. So it may be more effective to talk with the lawyers first, which may stimulate them to provide timely and useful written statements.

You can decide how far in advance to initiate the call, which can focus lawyers' attention when there is enough time to take action in response to your questions. You might talk with lawyers about how you could be most helpful in mediation, strengths and weaknesses of the legal case, potential barriers to agreement, issues that are or are not negotiable, and intangible interests that might prompt parties to accept a less favorable financial settlement.[5]

You might ask lawyers to provide in writing information such as the identity of all important individuals or entities involved (especially those expected to attend mediation), nature and amount of damages, key legal issues, disputed and undisputed facts, status of discovery, and prior negotiation efforts, if any.[6]

In smaller cases, it may not make sense for lawyers to invest the time to prepare written statements. If you talk with lawyers, you can discuss whether it would be useful to do so and, if so, what to include.

For parties to be fully prepared, lawyers should have thorough conversations with their clients before the mediation. The conversations should describe the mediation process, issues to be discussed, mediator's role, and mediation strategy. Many clients have not been in a mediation and thus won't know what to expect, so you may need to have more detailed conversations in these cases.

The American Bar Association Section of Dispute Resolution developed helpful guides to help prepare parties generally[7] as well as guides specifically for family cases[8] and complex civil cases.[9] You can provide these guides to lawyers and encourage them to use them to prepare with their clients before mediation. This should be a process of mutual education between clients and their lawyers about the facts, clients' interests, range of plausible court outcomes, and mediation strategy.

Using Multiple Mediation Sessions. Despite mediators' best efforts to stimulate effective preparation, some lawyers and parties will not be well prepared when they arrive at mediation sessions. So you might experiment by planning for multiple video mediation sessions.

You can plan for the possibility of two-session mediations, using the first session to prepare for a second session if needed. If parties settle at the first session, they don't need a second session.

If people need more information and time to be ready to settle than in a single mediation session, you could use the first session to help them identify what they would need to be ready. Based on an initial mediation session, the lawyers could plan "homework" before the second session to (1) complete specifically-needed discovery; (2) obtain expert opinions, narrowly-focused arbitration awards, or court rulings on critical legal issues; and/or (3) consult with important individuals or entities relevant to the dispute.

If the parties participate in a second mediation session, it is likely to be more productive, efficient, and consensual than typical mediation sessions. People would not need to repeat all the work from the first session and they could start by focusing on the pivotal issues.

To maximize the benefits of two-stage mediation, participants need to change their expectations about how mediation would work. You should provide information to parties and lawyers when you schedule mediations – and preferably well before then. Indeed, if you have a website, you could post information on your website explaining the process.

Many savvy parties and lawyers would be happy to take a little more time before resolution to get a more deliberate, predictable, and possibly more efficient process. Indeed, you might enjoy managing a two-stage process and providing these benefits to clients.[10]

Now that mediators and lawyers have become accustomed to mediating by video because of the Covid pandemic, you can take advantage of the convenience of video to break mediation into multiple sessions. You can schedule a series of conversations with particular individuals in a sequence that would be most helpful. In consultation with the parties and/or lawyers, you can plan several steps that might unfold over a specified period, such as a week. For example, you might plan to talk with one side on Monday and the other side on Tuesday, and then plan later conversations as appropriate. This process avoids having parties wait for long periods while you are caucusing with the other side. When parties and lawyers are not meeting with you, they can collect information and consult with others so that they can be more effective when they do meet with you and/or the other side.

Using a multi-stage process also can help solve the frequent problem of lack of participation by decision-makers in large organizations. People with authority to settle, such as high-level executives, usually aren't willing to invest the time to travel to a mediation and endure a lengthy process where their input isn't needed for most of the time. In a multi-stage process conducted by video, you could engage these decision-makers for the limited, critical times when their input is necessary. This would be especially helpful toward the end of the process when parties need to make hard decisions, though it might also be helpful at early stages to help them understand the context.[11]

MANAGING UNREASONABLE EXPECTATIONS

Lawyers routinely use a counteroffer negotiation process in which each side starts with extreme positions and makes grudging concessions trying to end up with a favorable settlement. They base their positions on disingenuous claims about the likely court outcome. 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 fully believe their own arguments.[12]

Unfortunately, mediators don't have truth serum to give to lawyers, who can convince themselves of the merits of their arguments. Part of the problem is that court outcomes are hard to predict and may be affected by many factors such as the personalities of parties, lawyers, and witnesses; availability of persuasive evidence; and attitudes of judges and juries.

To address these problems, you can cite scientific evidence that many people take huge risks going to trial and often get bad results. Although most cases are settled, people who do go to trial generally do a poor job of anticipating trial results, often getting a worse result than if they had settled. A series of studies showed that in at least 69% of cases, one side got a worse result at trial than the other side's last offer. Researchers found that plaintiffs made these "decision errors" in at least 50% of trials and defendants made decision errors in at least 19% of trials. In some studies, the error rates were as high as 65% for plaintiffs and 29% for defendants.[13] Although defendants made these errors less frequently than plaintiffs, defendants' errors – the amount that trial verdicts exceed the plaintiffs' last demand – are much bigger than the comparable plaintiffs' errors.[14]

When lawyers make unrealistic claims about the likely court outcome, you can cite this research and ask some, or all, of the following questions:

- Research shows that many parties and lawyers are overly optimistic and so they get worse results at trial than they could have settled for, with less time and expense. I assume that you want to make the most realistic assessment you can of your client's interests and the risks of going to trial so that you don't lose the opportunity to reach a good settlement. Is that right?
- How would you and your client feel if you got a worse result at trial than the other side's offer in mediation?
- To win at trial, you would need to establish certain facts and defeat the other side's arguments. You may be virtually certain that you can convince a judge or jury about some issues and much less certain about others. Which elements of your case do you think that there is some risk of losing? This might be because of the way the law is interpreted or the availability and strength of the evidence supporting your argument.
- Realistically, what is the percentage probability that the judge or jury would decide against you on XYZ issue?
- Parties often struggle to prove XYZ. In your case, do you think that you might have a problem with this issue? What do you think that the other side will argue about XYZ? How would you address that?
- At trial, many judges or juries would have questions about XYZ. What makes you think that the judge or jury will see this issue the same way that you do?
- How sure are you about your assumptions about what would happen in court? What would you need to do to increase your confidence that you would win?[15]

Some mediators and lawyers use decision analysis to quantify trial risks, producing "decision trees." Decision analysis involves: (1) identifying all the significant uncertainties in a legal case that may affect the finding of liability and the amount of damages, (2) determining the reasons for the finding for each uncertainty, and (3) estimating the probability of the outcome for each identified uncertainty. Decision trees produce an expected court outcome. They graphically display this analysis, showing the various contingencies, probabilities, and expected outcomes of the contingencies.[16] T*he Litigation Interest and Risk Assessment* book provides a simplified framework for calculating the expected court outcome using a similar logic.[17]

Consider whether using decision analysis would help lawyers and parties make more realistic assessments of likely court outcomes. Some find it very helpful in systematically analyzing the issues. Others don't like to use it because they are skeptical about the assumptions they need to make, and they worry that this analysis may cause people to entrench their positions rather than become more flexible.[18]

The counteroffer process often focuses only on expected court decisions without considering the tangible and intangible litigation costs of going to trial. This is problematic for two reasons. First, the parties actually experience the net results after deducting these costs, not just the trial decision. Second, it may be easier to reach agreement by explicitly including calculations of these costs. For example, if a plaintiff believes that the likely trial decision would be a $100,000 verdict but it would cost an extra $15,000 in litigation costs to get the verdict, she would benefit by any settlement more than $85,000. She may feel that it's worth accepting $10,000 less to avoid the stress, risk, and time of continuing to trial. If so, her bottom line really is $75,000 as she would be better off accepting any settlement more than that amount.[19] So you might focus more on bottom lines than just the component of the expected court outcome.

Mediators and lawyers often consider these costs at the end of the process to "close the gap." You might find it helpful to start discussing these factors early in the process. Your clients might respond better to this approach than if you raise it only at the end, which they may experience as your trying to pressure them to settle.

If both sides make only slow, small concessions over a long period, you might have a conversation about the process to "change the game." You might describe the process and ask the lawyers if they would like to use a more efficient and realistic approach. You might discuss this with lawyers individually or together (but possibly not in the presence of the parties).[20]

DEALING WITH STRONG EMOTIONS

Mediators often struggle when parties and lawyers express strong emotions.[21] Sometimes parties or lawyers cannot process information and communicate effectively or make reasonable decisions. If they cannot perform these functions, you should end the mediation.

If you determine that parties can perform these functions, you should try to figure out why they are expressing strong emotions. These are important clues about what's important to them. Use good listening techniques to understand, empathize, and acknowledge parties' feelings and concerns. If parties feel that they are being heard and their concerns are valued, they are less likely to have disturbing emotional outbursts in mediation. This is especially true for parties who are mediating for the first time but also for some "repeat players" and lawyers.

Causes and Consequences of Litigation Stress. Conflict and the litigation process almost always are stressful for parties. Accusations by the other side can be extremely painful to hear and can undermine people's self-image. Parties are supposed to disclose sensitive information, which may damage their case. They may be asked to provide detailed accounts of traumatic events, which they may have had to recount many times. This can keep them focused on the past and prevent them from moving forward. Parties may feel stuck in a process that they can't control. Lack of control of the time itself can be very stressful. Some parties feel the process takes too long and others feel that it moves too fast. Their lawyers may have given optimistic assessments at the outset of their case, and the lawyers' assessments often become more pessimistic and uncertain over time.

Litigation stress can impair people's cognitive functioning because it depletes mental resources, stimulates fight-or-flight reactions, and increases the risk of cognitive biases. This can reduce the quality of parties' decision-making especially when they are emotionally exhausted over an extended period. When people have strong emotions, they may act impulsively, deciding to go to trial rather than settle a dispute. In particular, when people feel angry or emotionally threatened, they may be more likely to go to trial even when it may harm their interests.[22]

When organizations are parties, their representatives may experience similar and additional stresses. As a result of litigation, their organizations may suffer organizational dysfunction, reputational damage, and lost opportunities. The representatives may worry about threats to their status, job, career, and personal finances.[23]

In mediation, mediators and lawyers often focus primarily or exclusively on the likely court decision and pay little, if any, attention to the emotional costs of litigation, which can be quite substantial. Failure to acknowledge parties' concerns can, in itself, trigger strong emotional reactions because the parties feel that mediators are ignoring important concerns.

Parties may feel great pressure to reduce their expectations as they repeatedly make concessions that seem unrelated to the facts and that seem unfair. After an extended struggle, they may grieve the loss of their hopes for a satisfying outcome. If parties seem to have these reactions, you might ask them how they are feeling about the process and what might be done to help them. You might validate their feelings, telling them that their reactions are common and understandable. This acknowledgment may help them work through the process, making the best decisions they can to achieve their goals under the circumstances.

Preventing and Managing Problematic Expressions of Emotion. Obviously, it would be helpful to address parties' concerns from the outset so that they are less likely to make problematic outbursts such as raising their voices, using inappropriate language, or taking threatening actions. The techniques for doing so are consistent with good mediation techniques generally.

You should start by developing a good rapport with parties. Show that you want to help them deal with their conflict, not just terminate their case.

In initial caucuses, ask about their experiences, goals, and concerns about their case. Parties generally find legal procedures more satisfying when they feel they have some control over the process. Educate them so they know what to expect, which can give them a sense of control. Some mediators rush through introductions because they and the lawyers have mediated many times. However, it's generally a good idea to have a careful conversation with clients about the process, especially for first-time parties but also for repeat-players.

You might ask about some or all of the following issues, which can reveal issues that might trigger strong responses in mediation. Some questions are more appropriate in early caucuses, and you might ask others later in mediation. You might ask about the cause of the dispute and past efforts to resolve it, if any. You should ask what's most important to the parties, which may not be getting the most favorable financial outcome. Ask about parties' goals that might be affected by continued litigation and trial. This might include effects on relationships and reputations, time constraints, and distraction from other activities. You might ask how much it is worth to avoid the risk and stress of trial. For example, you might ask a plaintiff if he might get $X at trial but might also get nothing, how much would he accept now to avoid the risk of losing. Or if a defendant is willing to pay a trial verdict of $X in a year, how much would she be willing to pay now to avoid the stress and distraction of continued litigation.[24]

When working with organizational representatives, you should ask about how litigation would affect the organization. You might ask how it would affect the organization's ability to focus on other goals and opportunities. How much time and energy will be required of directors, executives, and employees in litigation? How might litigation affect the organization's reputation and relationship with stakeholders such as customers, suppliers, contractors, or lenders? How much it would it be worth to avoid these problems? Would a favorable or unfavorable trial outcome affect the representative's position in the organization or career?[25]

CONCLUSION

Mediation is hard. Conflict is stressful for everyone. Litigation aggravates stress and can stimulate counter-productive reactions. Lawyers are busy. They may not have the time or inclination to prepare themselves or their clients to mediate productively.

So it's completely foreseeable that you will confront challenging situations due to lack of preparation, unrealistic expectations, and strong emotions. The techniques described above can help you successfully manage these challenges.

About the Author

John Lande is the Isidor Loeb Professor Emeritus at the University of Missouri School of Law and former director of its LLM Program in Dispute Resolution. He earned his J.D. from Hastings College of Law and Ph.D in sociology from the University of Wisconsin-Madison. He began practicing law and mediation in California in 1980, and he directed a child protection mediation clinic in the 1990s. The American Bar Association published his book, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money, and Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions (co-authored with Michaela Keet and Heather Heavin). His website, where you can download his publications, is www.law.missouri.edu/lande. *Thanks, with the usual disclaimers to Dan Berstein, Brian Farkas, Lisa Okasinski, and Spencer Punnett for comments on an earlier draft.*

Endnotes

[1] Help Your Clients Make Good Litigation Decisions with LIRA, available at http://indisputably.org/wp-content/uploads/Lande-Mediating-with-LIRA-Michigan-Washtenaw-final.pdf.

[2] MICHAELA KEET, HEATHER HEAVIN & JOHN LANDE, LITIGATION INTEREST AND RISK ASSESSMENT: HELP YOUR CLIENTS MAKE GOOD LITIGATION DECISIONS (2020).

[3] Edmund J. Sikorski, Jr., *Book Review: Litigation Interest and Risk Assessment, Michigan Dispute Resolution Journal* (Spring / Summer 2020), at 8.

[4] Unlike book-length references, this article cannot provide a comprehensive guide to address these issues. The American Bar Association has published excellent practical guides including GARY FRIEDMAN, INSIDE OUT: HOW CONFLICT PROFESSIONALS CAN USE SELF-REFLECTION TO HELP THEIR CLIENTS (2014); DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE TECHNIQUES TO RESOLVE CASES, (2d ed. 2021); J. ANDERSON LITTLE, MAKING MONEY TALK: HOW TO MEDIATE INSURED CLAIMS AND OTHER MONETARY DISPUTES (2007); RONDA MUIR, BEYOND SMART: LAWYERING WITH EMOTIONAL INTELLIGENCE (2017); BENNETT G. PICKER, MEDIATION PRACTICE GUIDE: A HANDBOOK FOR RESOLVING BUSINESS DISPUTES (2d ed. 2004); SPENCER PUNNETT, REPRESENTING CLIENTS IN MEDIATION: A GUIDE TO OPTIMAL RESULTS BASED ON INSIGHTS FROM COUNSEL, MEDIATORS, AND PROGRAM ADMINISTRATORS (2013).

[5] Keet et al., *supra* note 2, Appendix H.

[6] ID.

[7] American Bar Association Section of Dispute Resolution, Preparing for Mediation, available at http://indisputably.org/wp-content/uploads/ABA-Mediation-Guide-general.pdf.

[8] American Bar Association Section of Dispute Resolution, Preparing for Family Mediation, available at http://indisputably.org/wp-content/uploads/ABA-Mediation-Guide-family.pdf.

[9] American Bar Association Section of Dispute Resolution, Preparing for Complex Civil Mediation, available at http://indisputably.org/wp-content/uploads/ABA-Mediation-Guide-complex-civil.pdf.

[10] John Lande, *Planning for Good Quality Decision-Making in Mediation Using Two-Stage Mediation*, INDISPUTABLY BLOG (May 9, 2019), http://indisputably.org/2019/05/planning-for-good-quality-decision-making-in-mediation-using-petsm/.

[11] John Lande, *The Evolution To Planned Early Multi-Stage Mediation*, KLUWER MEDIATION BLOG (Aug. 28, 2020), http://mediationblog.kluwerarbitration.com/2020/08/28/the-evolution-to-planned-early-multi-stage-mediation/?doing_wp_cron=15986.

[12] John Lande, *BATNAs and the Emotional Pains from "Positional Negotiation*," INDISPUTABLY BLOG (July 8, 2020), http://indisputably.org/2020/07/batnas-and-the-emotional-pains-from-positional-negotiation/.

[13] KEET ET AL., *supra* note 2, at 3-4.

[14] *See, e.g.*, Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 551, 566 (2008), https://www.blakemcshane.com/Papers/jels_settlement.pdf (defendants' average error was $1,140,000 compared with plaintiffs' average error of $43,100).

[15] KEET ET AL., *supra* note 2, Appendix G.

[16] Id. at 86-89, Appendixes D, E. For a detailed guide to decision trees, see MARJORIE CORMAN AARON, 'RISK AND RIGOR: A LAWYER'S GUIDE TO ASSESSING CASES AND ADVISING CLIENTS (2019), https://www.riskandrigor.com/risk-and-rigor-the-book.

[17] KEET ET AL., *supra* note 2, Chapter 5.

[18] See John Lande, LIRA @ CPR (April 7, 2020), Indisputably Blog, http://indisputably.org/2020/04/lira-cpr/.

[19] *See* John Lande, What's a Bottom Line? (August 26, 2020), Indisputably Blog, http://indisputably.org/2020/08/whats-a-bottom-line/.

[20] *See* Lande, supra note 12.

[21] Litigation also is very stressful for lawyers and you may need to ask them about the causes of their reactions. John Lande, *Canaries in the Litigation Coal Mine*, (August 17, 2021), INDISPUTABLY BLOG, http://indisputably.org/2021/08/canaries-in-the-litigation-coal-mine/. Although lawyers express strong emotions at times, this discussion focuses on parties' emotions. When lawyers express such emotions, you should generally use similar techniques to understand and address lawyers' concerns.

[22] KEET ET AL., *supra* note 2, Chapter 3.

[23] ID., Chapter 4.

[24] ID., Appendixes A, G.

[25] ID.