

# **How to Combine “Positional” and “Interest-Based” Negotiation and “Facilitative” and “Evaluative” Mediation**

**Professor John Lande  
University of Missouri School of Law**

**University of California-Hastings  
Center for Negotiation and Dispute Resolution  
October 28, 2020**

# Hello

- **Thanks to Hastings Center for Negotiation and Dispute Resolution for sponsoring this conversation**
- **Feel free to put questions and comments in the chat and we will get to them after I finish my talk – and you can speak in our conversation at that time**
- **This powerpoint has links to publications with more detail, and we will provide a copy to you**

# **We Need Good Language for Good Theory**

- **Theory is important because it guides actions**
- **Concepts are building blocks of theory**
- **It's a 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**
- **Jargon is problematic for dispute resolution because it confuses and excludes laypeople and other stakeholders**

# Benefits of Clearer Language

**Clearer language could:**

- **Improve communication with disputants and other stakeholders**
- **Help students navigate worlds of practitioners, clients, and faculty**
- **Promote collaboration between researchers and practitioners**
- **Provide standard keywords for research**

# Our Field is a Tower of Babel

- Answering student questions often tripped me up
- Review of negotiation texts reveals confusion about negotiation models and even definition of negotiation
- University of Missouri “Tower of Babel” symposium provides more detail
- ABA Mediation Research Task Force demonstrates confusion about mediation models

# Babbling Negotiation Models

**Negotiation texts refer to two models with various names:**

- **“distributive,” “competitive,” “adversarial,” or “positional” negotiation**
- **“integrative,” “problem-solving,” “cooperative,” or “interest-based” negotiation**

**Completely overlook very common pattern, which I call “norm-based” or “ordinary legal” negotiation**

# Better to Focus on Variables

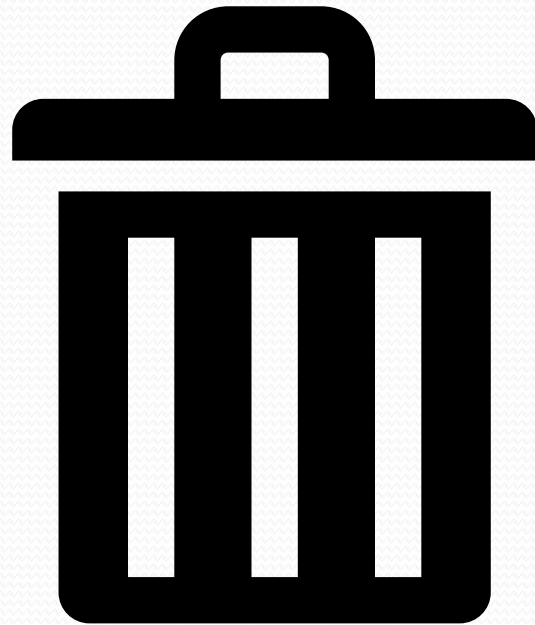
- Negotiation models are based on variables assumed to be highly correlated, e.g., adversarial model:
  - goal of maximizing negotiators' results
  - zero-sum assumptions
  - treating the other side as hostile opponents
  - using counter-offer process
  - focusing on BATNA outcome
  - using various hard-bargaining tactics
- My study of actual negotiations shows that negotiators use different models for different issues or different models at different times in a case
- [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).

# Babbling Mediation Models

- Most common mediation models are “facilitative” and “evaluative”
- Riskin’s original concept combined very different variables
- [ABA Mediation Quality Task Force](#) survey of mediators found different views about actions helpful in most cases:
  - give case analysis, including strengths and weaknesses: 66%
  - recommend specific settlement: 38%
  - make prediction about likely court results: 36%
  - apply some pressure to accept specific solution: 30%



# What to Do With Our Models



# Helpful LIRA Framework

My book co-authored with Michaela Keet and Heather Heavin, *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*, provides a useful three-part structure:

- Expected value of options (aka alternatives to negotiated agreement)
- Tangible costs
- Intangible costs and interests

Negotiation and mediation can focus on these factors

# Decision-Making About Disputes

- We help parties make decisions, often when they lack good (or any) practical dispute resolution options
- We help parties:
  - choose a process, e.g., negotiation, mediation, arbitration, or litigation
  - design the process by making procedural agreements
  - make decisions in a case about specific issues

# Focus on Specific Variables, Not General Models

The following slides illustrate some variables to describe cases, which may change during a case. Some variables are related to others in some -- but not all -- cases.

Variable	Examples
<b>Parties' and Lawyers' Cognitions and Actions Relating to Counterparts</b>	
Goals	partisan advantage, joint gain, fairness
Assumptions	zero-sum, positive-sum, negative-sum
Attitude toward counterpart	hostile, polite, friendly
Relevant norms	law, parties' interests, normal practice
Communication process	counteroffer, interest-and-options, norm-based
Tactics	dirty tricks, sharing information, and more

# Variables About Professionals' Actions re Clients

Variable	Examples
<b>Lawyers' and Mediators' Actions Relating to Clients</b>	
<b>Listen</b>	<b>amount and quality of attention and understanding</b>
<b>Help parties assess case</b>	<b>if help is offered; amount and quality of help</b>
<b>Assess options</b>	<b>if assessment is given; amount, quality, and confidence of assessment</b>
<b>Predict outcomes</b>	<b>if prediction is given; quality and confidence of prediction</b>
<b>Give advice</b>	<b>if advice is given; amount, quality, and confidence of advice</b>
<b>Apply pressure</b>	<b>if pressure is applied; nature, intensity, and effect of pressure</b>

# Variables About Issues

Variable	Examples
<b>Types of Decisions</b>	
Dispute resolution process	negotiation, mediation, trial
Procedures in process	information sharing, logistics, timing
Resolution of issues	issues parties are concerned about
<b>Factors to Consider in Resolving Issues</b>	
Value of options	expected court outcome, profit from deals
Tangible costs	legal fees and expenses
Intangible costs and interests	stress, relationships, reputation, loss of opportunities, and lots more

# How Should We Deal with Babel?

- **The ABA Mediation Research Task Force recommended “development of more uniform definitions and measurements of mediator actions and mediation outcomes”**
- **Replace babbling “models” with clearer, concrete language**
- **Test: “Explain it to me like I’m a five (or fifteen) year old”**
- **This should not be limited to mediation**

# Ideas for Clear Language Initiative

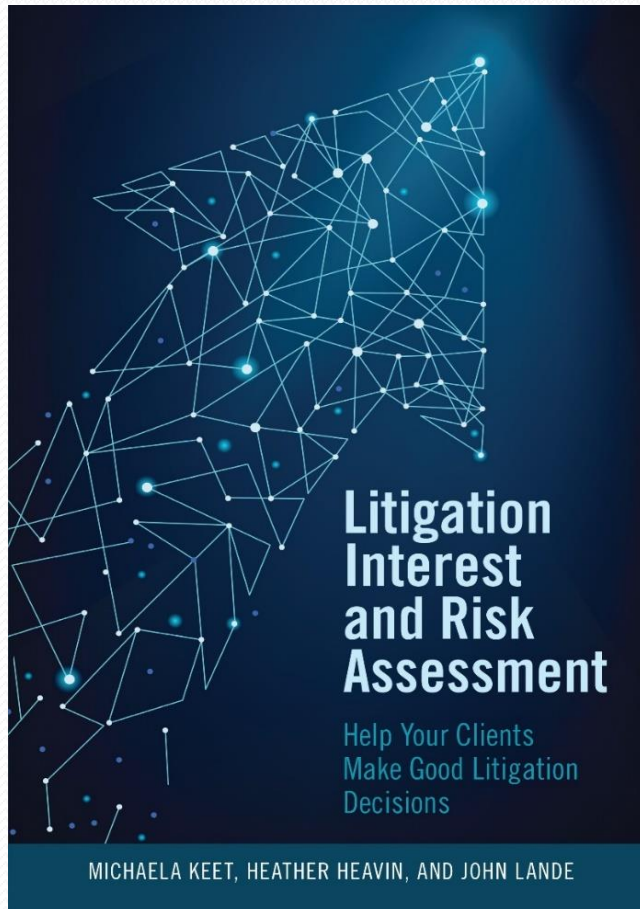
- Agreement about important terms would improve communication
  - Of course, people could use any language they want
- This initiative might include:
  - review of academic and practice literature
  - discussion by experts
  - focus groups with academics, practitioners, and disputants
  - public forums and comments
- Can use different language than suggested here
- For more detail, see [We Need Clearer Dispute Resolution Language](#)





**What Do You Think?**

# Information about the Book



For description of book and link to order, go to [tinyurl.com/ybc5ou68](https://tinyurl.com/ybc5ou68).

For 25% discount, use code 25LIRRA.