Kluwer Mediation Blog

The Role of Law in Legal Disputes

John Lande (University of Missouri Center for the Study of Dispute Resolution) · Friday, August 6th, 2021

While it is obvious that law is significant in legal disputes, how the law is used is not so obvious.

This piece uses Oliver Wendell Holmes's famous definition of the law as "prophecies of what the courts will do in fact," rather than rules expressed in statutes, case law etc.

It discusses two aspects of law. First, it compares perspectives about law in litigation, mediation, and collaborative practice. Then it provides a typology of ways that practitioners can discuss the law in any of these processes. It concludes with suggestions about how lawyers and mediators can use the law to help their clients. It focuses on practice in the US, which may be different than in other countries regarding these issues. It is oriented to cases where all parties are represented by lawyers but can apply in cases where some or all parties do not have lawyers.

Perspectives of Law in Different Dispute Resolution Processes

Collaborative practice involves binding agreements between parties that their collaborative lawyers will represent them only in negotiation and not litigation. It is intended to move away from the "shadow of the law" so that parties can benefit from legal counsel without damage from threat-based settlements based on competing claims about the law. Parties always retain the right to litigate, but since collaborative lawyers would not participate in litigation, if parties wanted to litigate with legal representation, they would need to hire new lawyers. The collaborative movement has attracted lawyers concerned about the harm of litigation for their clients and themselves. Collaborative practice can take many forms, typically including (1) a series of joint negotiation sessions with parties and lawyers (and sometimes other professionals), (2) interest-based negotiation, (3) full disclosure of all relevant information, and (4) careful engagement of financial and mental health professionals as appropriate. Most collaborative practice has been concentrated in middle to high-end family law cases.

The structure of collaborative practice focuses on parties' tangible and intangible interests and reflects negative expectations about litigation. Collaborative lawyers have differed about the appropriate way to discuss the law privately with clients and in joint meetings. Some collaborative lawyers believe that it is important to discuss the law in detail privately with clients and, when appropriate, with the other side. Some are wary about having much discussion of the law, concerned that it would distract parties from focusing on their interests and, instead, stimulate counter-productive conflict. Many collaborative lawyers are trained to balance these approaches so that clients make informed decisions with an understanding of the law.

When traditional lawyers negotiate, they often focus primarily or exclusively on court outcomes, and ignore or discount parties' intangible interests. Lawyers often make overly optimistic assessments of the law in favor of their clients because of cognitive and social biases. Given the adversarial structure of litigation, this may make sense (in a way) to maintain clients' confidence and gain partisan advantage in negotiation. This is part of a **common counteroffer process** in which each side seeks to maximize its partisan benefit by starting with extreme positions and making grudging concessions.

As part of this process, each side typically makes disingenuous claims about how it would get extremely favorable results at trial. 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. American lawyers generally are prohibited from lying about material facts, but they are free to make phony legal arguments in negotiation. In the US, with our very low trial rates, the extreme counteroffer process often is especially a charade as the lawyers know that they probably won't go to trial. So their legal arguments are mostly tactics to gain advantage rather than candid assessments.

When mediators facilitate negotiation using this counteroffer process, they typically focus on each side's "prophecies," trying to cajole them to acknowledge more realistic assessments of what courts would decide. Some mediators focus, instead, on parties' interests with less emphasis on the law.

In many cases, lawyers actually do exchange fairly candid assessments of the law, though this generally isn't included in our dispute resolution theory because it is so routine, especially in cases with smaller amounts at stake. I conducted a **study of lawyers' negotiations** and documented a set of cases in which lawyers used what I called "ordinary legal negotiation" (OLN) or "norm-based negotiation." In this approach, lawyers try to reach a reasonable agreement based on shared norms, which typically are the expected court outcomes or typical agreements in similar cases. In these negotiations, lawyers still negotiate, but they don't make extreme unrealistic claims about the law because it would be counterproductive given the amount at stake and the risk of blowing up the negotiation.

Lawyers are more likely to use this approach when (1) they know each other, (2) they believe that their counterparts are experienced and competent, (3) they want to maintain reputations for reasonableness, (4) there is a relatively clear body of applicable legal or other norms, (5) the facts of a case can be readily likened to arguably comparable cases, (6) there is not enough at stake to justify an all-out adversarial battle, and/or (7) using this process is considered a legitimate negotiation method in the particular legal culture. Most, if not all, of these factors are present in collaborative practice. Indeed, collaborative practice exists, in part, to increase the likelihood that these factors will be present.

This brief survey illustrates that lawyers and mediators use the law quite differently in these dispute resolution processes.

Possible Roles of Law in Dispute Resolution

People can use the law as standards in negotiation and mediation in the following ways, as described below:

- Critical standard in assessing possible agreements

- One standard of fairness
- Society's default standard of fairness
- Presumptive standard for decision
- Decisive standard
- No standard

Lawyers generally think of the law as the best alternative to a negotiated agreement (BATNA), arguing that their clients shouldn't get a less favorable result than their BATNA. In these arguments, lawyers often act as if the outcome is fairly certain and favorable to their position when, in fact, it's often very uncertain. Of course, BATNAs should be discounted by the tangible and intangible costs of proceeding to trial. Practitioners often ignore these costs in the heat of the counteroffer process – until they want to finally "close the gap" and try to persuade parties to settle by highlighting the costs of continued litigation and trial.

Focusing on the law as the BATNA assumes that the parties' only or predominant interest is to maximize their partisan interests. Parties often are concerned, at least in part, about the fairness of outcomes. For such parties, practitioners can discuss the law as reflecting one of a number of standards of fairness – and particularly society's default standard of fairness when parties disagree.

Practitioners may consider the law to be the rebuttably presumptive standard for decision-making. This is how lawyers treat the law in OLN. For example, in family law cases, child support schedules specify the presumptive amount of child support based on factors such as the parents' income and number of children. Practitioners and parties may simply accept this amount or use it as the starting point for negotiation. This approach enables people to combine multiple factors in their decision-making such as self-interest and fairness.

In some cases, parties may be completely uninterested in the law when negotiating, wanting to decide solely based on the parties' interests, fairness, or other factors. For example, in one case, a divorcing couple set the amount of spousal support (alimony) as a percentage of the husband's income rather than a fixed amount as the court would order after trial. Lawyers may have ethical duties to provide at least some information about the law so that parties can make informed decisions, as happened in this case.

The law is the decisive standard for decision-making at trial and appellate litigation. Of course, the law in any particular case may be uncertain, reflected by the fact that different courts treat similar cases differently and it's uncertain what evidence will be considered and how decision-makers will react to the evidence or legal arguments.

Conclusion

In the US (and I suspect in most other countries), there are ethical rules requiring lawyers to provide candid advice to clients. Thus, even when lawyers use the law strictly as the basis for biased BATNA arguments with the other side, lawyers should provide candid assessments of the law to their own clients.

Practitioners and parties can use the law in various ways in legal disputes, not only as a BATNA. Lawyers and mediators would benefit their clients by describing different perspectives of the law described above rather than implicitly assuming that law-as-BATNA is necessarily the only perspective or the one that would best serve clients' interests.

Practitioners also should discuss with clients candid assessments of the tangible and intangible costs of litigation. Practitioners can help parties generate **bottom lines** by combining assessments the law and tangible and intangible litigation costs. People should focus primarily on these bottom lines, which are more useful than focusing solely on BATNAs. Ideally, practitioners should initiate these conversations with parties early in the process to incorporate these considerations throughout the negotiation or mediation, not just as an argument at the end to persuade reluctant parties to settle.

It can be tricky to use non-BATNA perspectives when negotiating or mediating with the other side, particularly when lawyers insist on exchanging extreme, unrealistic BATNA claims. One option is a meta-negotiation – a negotiation about the negotiation process – to "change the game" by being more realistic and/or focusing on other decision-making factors. **This post provides an illustration of a successful game changing effort**. This technique doesn't always work and could backfire if the other side interprets it as a sign of weakness and attempts to take advantage. However, confident lawyers aren't afraid to suggest negotiation or mediation and can rebuff such gambits by demonstrating a willingness to litigate if needed.

When appropriate, lawyers should discuss parties' tangible and intangible litigation costs when negotiating and mediating with the other side. This would more accurately reflect parties' interests and possibly facilitate settlement because of reduced expectations.

This piece grows out of a talk I gave to a talk to Woody Mosten and Ron Ousky's **collaborative practice consultation and study group** about how collaborative lawyers could apply concepts from ***Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions***, which I co-authored with Michaela Keet and Heather Heavin. Here's the **powerpoint for the presentation**, which provides more detail.

Thanks to Woody Mosten and Ron Ousky for comments on an earlier draft.

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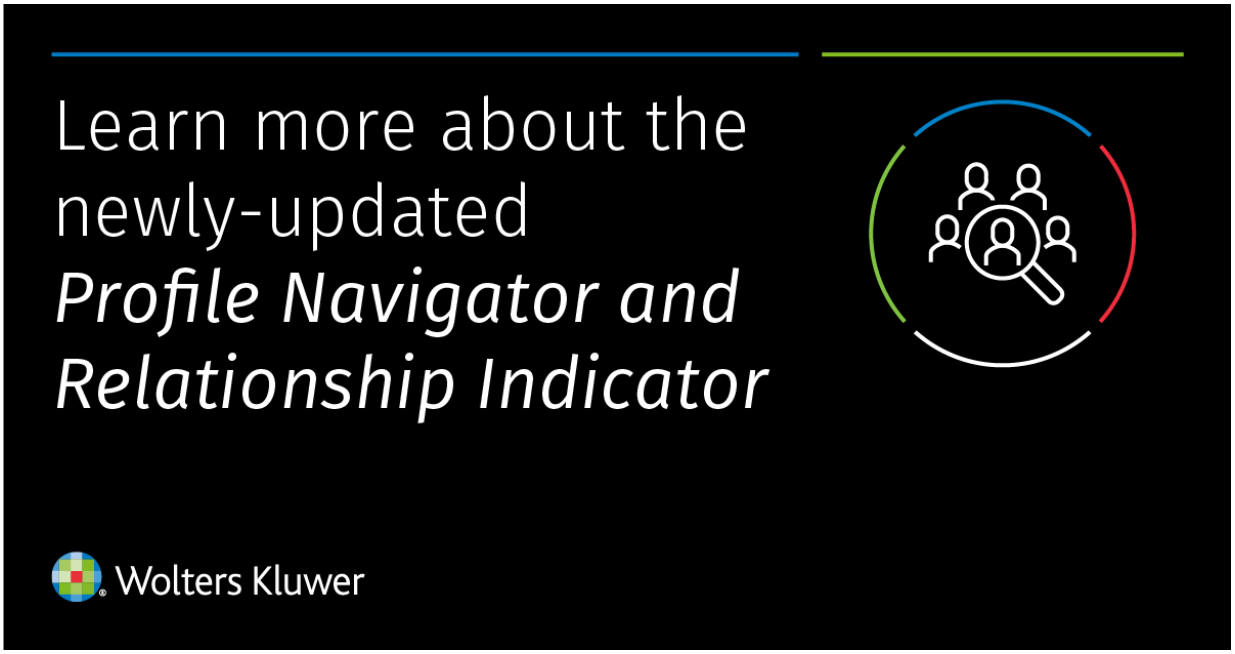

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