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Helping Lawyers Help Clients Make Good Decisions About Dispute Resolution

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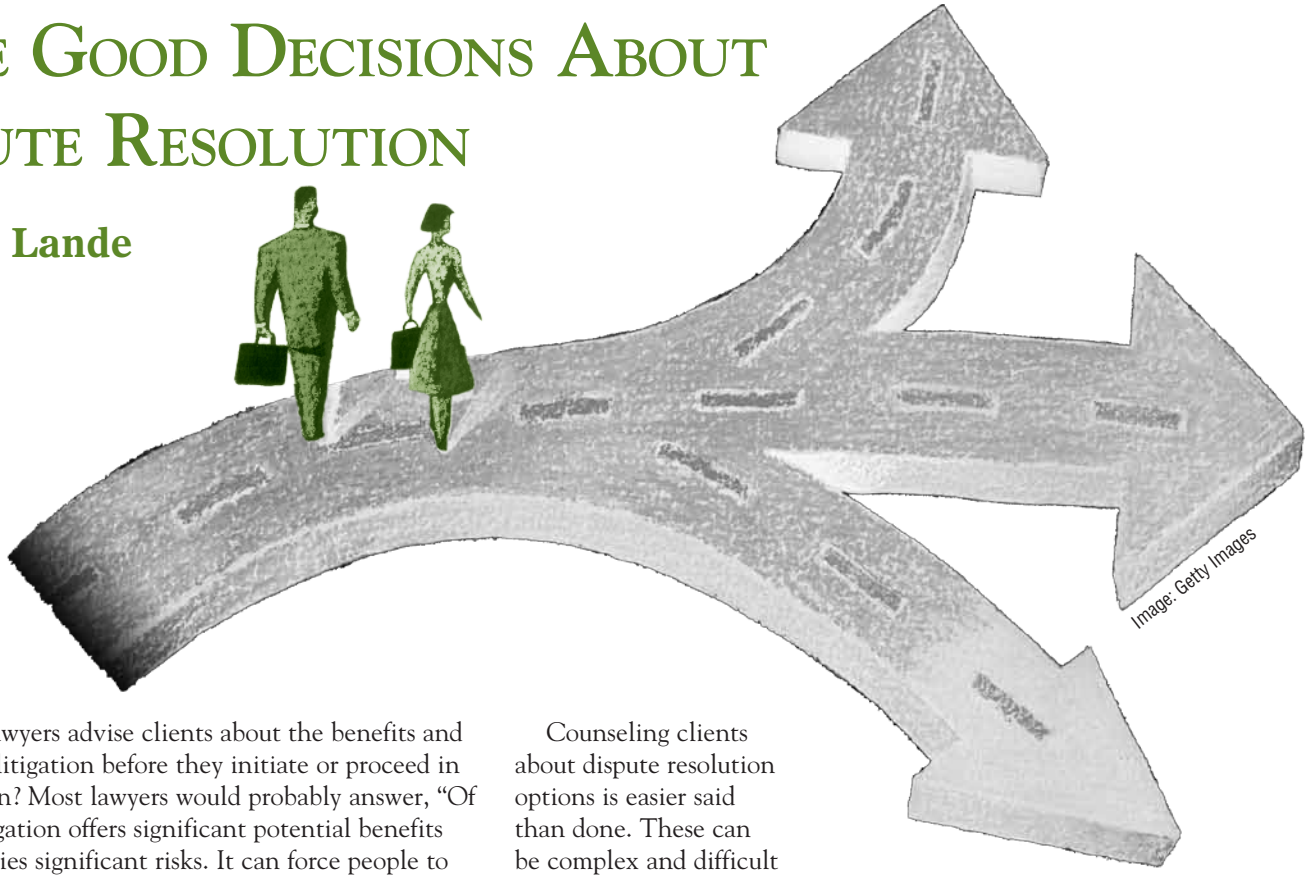

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Should lawyers advise clients about the benefits and risks of litigation before they initiate or proceed in litigation? Most lawyers would probably answer, "Of course." Litigation offers significant potential benefits and also carries significant risks. It can force people to take others' claims seriously, provide information, justify their positions, and comply with court orders enforcing parties' legal rights. It can provide desired publicity and establish reputations and precedents. Litigation offers a particularly important opportunity for neutral adjudication when parties do not trust each other and/or there are important public interests at stake.

Of course, the risks of litigation are well known. Parties can invest enormous sums in legal costs, plaintiffs may recover nothing, defendants can incur huge liability, third parties can be harmed, the process can drag on for years, litigation can divert parties' attention from more profitable or satisfying activities, parties can be publicly humiliated, relationships can be shattered, and so forth. Parties surrender much control over the matter, not only to the courts but also to their adversaries, who can make their lives a living hell. The amount of time and money parties invest is affected to a great degree by their adversaries' decisions about how intensely to fight in litigation.

If litigation were the only way to resolve disputes, parties would not have to (or be able to) decide what dispute resolution process to use. Of course, there are many processes, and dispute resolution professionals are continually developing new processes and variations. Parties have many options to choose from, and these choices can have a huge impact on the process and outcome of the dispute.

Counseling clients about dispute resolution options is easier said than done. These can be complex and difficult decisions, and lawyers may not have appropriate resources to help clients with this task. This article suggests a strategy to help lawyers counsel clients in choosing dispute resolution options.[1] While establishing rules requiring this kind of training may help to remedy this shortcoming, perhaps the most promising involves using dispute systems design (DSD) procedures to establish better ways of training lawyers to counsel clients.

Problems With Rules Requiring Lawyers to Discuss Dispute Resolution Options

For many lawyers, adopting a rule is the default mechanism to solve problems. Rules are our tools. Rules can be very powerful and effective policy instruments. But they are also blunt instruments that may not be effective in motivating people to perform complex tasks that are hard for others to monitor. While rules requiring lawyers to advise clients about dispute resolution options could be a helpful component of a strategy, by themselves, such rules are not likely to be optimally effective.

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The ABA Model Rules of Professional Conduct do not clearly require lawyers to advise clients about dispute resolution options.[2] There is a patchwork of statutes and rules in some states requiring or encouraging lawyers to consult with clients about dispute resolution options. Many of these rules are vague, nonbinding, or apply only when there is an actual negotiation or settlement opportunity.[3] It is not clear how much such rules actually cause lawyers to have careful conversations with clients as people often do not comply with rules. For example, researchers have found that "some lawyers ignore orders to 'confer and report,' some courts ignore statutes requiring them to develop differentiated case management systems, and some executives ignore corporate pledges to consider using ADR."[4]

These rules generally do not require lawyers to do as much as they would need to obtain informed consent, which is defined in the Model Rules of Professional Conduct as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[5] Unlike many rules requiring lawyers to advise clients about DR options, this standard requires communication of "adequate information" and discussion of material risks of the proposed option. Even this standard is understandably vague as it does not specify what information is adequate, what are the material risks, and what are the reasonably available alternatives. Rule-writers need to use such general concepts because they cannot anticipate and evaluate the circumstances in each particular case. As a result, even lawyers who diligently try to follow such rules may not clearly understand how to do so.

This article suggests a strategy to help lawyers counsel clients in choosing dispute resolution options.

In addition, it seems unlikely that the ABA would adopt a model rule in the foreseeable future to require all lawyers to obtain clients' informed consent to use litigation or even advise them about DR options. There was significant resistance in the ABA House of Delegates to the Uniform Collaborative Law Act, which would not impose any requirements on lawyers unless they undertook collaborative cases. So although most lawyers probably would *recommend* that lawyers advise clients about the benefits and risk of litigation and dispute resolution options, it seems unlikely that the ABA would adopt a rule *requiring* all lawyers to do so.

Dispute System Design Approach

Using a DSD approach is likely to be more effective in helping lawyers counsel clients to make good decisions about dispute resolution. People generally use DSD to set up a process for handling a regular flow disputes. For example, a company may use DSD to establish a system for handling employment disputes or a court might use DSD to create a family mediation program.

In DSD, a design team is composed of representatives of stakeholder groups concerned about the relevant issues. The design team consults members of stakeholder communities to identify perceived problems and goals. Then it develops a plan to address the problems and achieve the stakeholders' goals, which normally includes training for key stakeholder groups. The team submits the plan for approval by the necessary authorities. It implements the plan and should periodically review and revise the plan as needed.[6] DSD procedures can be used to develop not only complete dispute systems (such as mediation programs) but also elements of dispute systems, such as protocols for counseling disputants.

One can think of a lawyer's practice as a dispute system, and thus DSD procedures can be used to refine lawyers' procedures. Thus lawyers, clients, and courts could use a DSD process to improve the process of lawyers' consultations with clients about choice of dispute resolution options.

For a DSD process to work, at the outset, key stakeholders would need to perceive significant problems and/or aspire to improve the status quo. In some communities, stakeholders may believe that clients proceed in litigation without careful consideration, causing unnecessary problems. Even if stakeholders believe that the status quo may be generally satisfactory, they may want to improve it. In communities where there is not sufficient interest in changing the status quo, DSD will not work.

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

Bar committees, bench committees, and bench-bar committees are obvious candidates for organizing a DSD project about client counseling regarding legal dispute resolution. Such committees could appoint another committee to manage the project, serving as the "design team" described above. This committee would include representatives of stakeholder groups, particularly those with a strong interest in the project. It is also wise to include potential opponents who can identify potential problems that might be addressed. If their concerns are adequately addressed, they may be convinced to

support—or at least not oppose—the committee's recommendations.

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

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

Possible Strategies

Committees might develop protocols for lawyers to help clients assess dispute resolution options. These might include convenient checklists of questions that lawyers might ask clients to assess the clients' substantive and procedural interests, potential litigation outcomes, risk assessments, and clients' risk preferences, among other factors. For example, based on an analysis of various systems for choosing DR procedures, Frank Sander and Lukasz Rozdeiczer compiled lists of 16 process goals, 9 features of various procedures, and 16 impediments to successful conflict resolution relevant to choice of dispute resolution process.[7] Gregg Herman and I have suggested that factors relevant to parties' choice of dispute resolution procedures also include the parties' capabilities, their attitudes about different types of professional services, and assessments of and preferences about the risks of various procedures.[8] Reviewing these analyses and local needs assessments, a DSD committee might draft a checklist for lawyers tailored to their cases.

Similarly, committees might develop materials to help clients understand the generally available DR options and the benefits and risks. These should be in plain English and readily accessible on the Internet and other appropriate media.

Committees might sponsor trainings or other educational events to help lawyers use tools for client counseling. Risk analysis, using decision trees, can be a helpful tool for lawyers and clients in choosing dispute resolution processes and it would be a particularly good subject for educational programs.

Within the context of a DSD strategy, it may be appropriate for a court, state, or professional association to adopt rules or guidelines requiring (or encouraging) lawyers to counsel clients in choosing DR processes. Such rules or guidelines are likely to be much more effective if they are adopted as part of a larger strategy including development of practical materials and training as described above. Enlisting courts to seriously support such initiatives is likely to be particularly effective, as opposed to simply putting rules "on the books" but generally ignoring them.

The Help From DSD

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

Endnotes

1. This article applies a general approach to policy making described in John Lande, *Principles for Policymaking about Collaborative Law and Other ADR Processes*, 22 Ohio St. J. on Disp. Resol. 619, 629–64 (2007).

2. *See* Marshall J. Breger, *Should an Attorney Be Required to Advise a Client of ADR Options?*, 13 Geo. J. Legal Ethics 427, 428–30, 433–36 (2000).

3. *See* Sara Cole et al., Mediation Law, Policy and Practice § 4:3 (2d ed. 2008).

4. John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*, 24 Ohio St. J. on Disp. Resol. 81, 127 (2008) (citing empirical studies, footnotes omitted).

5. Model Rules of Prof'l Conduct R. 1.0(e) (2007). For example, lawyers are required to obtain clients' informed consent before undertaking a Collaborative representation. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-447, at 3 (2007); John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law*, 25 Ohio St. J. on Disp. Resol. 347, 402–05 (2010).

6. *See* John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. Rev. 69, 112–18 (2002). *See generally* Stephanie Smith & Janet Martinez, *An Analytic Framework for Dispute Systems Design*, 14 Harv. Negot. L. Rev. 123 (2009).

7. *See* Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 Harv. Negot. L. Rev. 1, 7–32 (2006).

8. *See* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280, 285–87 (2004).