Litigation offers many potential benefits. People can use it to solve difficult problems, make relationships and institutions function properly, and promote justice. It enables people to enlist legitimate, independent public officials to resolve disputes when the parties can't resolve the disputes themselves. Indeed, litigation provides mechanisms for structuring dispute resolution processes (such as exchanging information and resolving specific legal issues) that enable most parties to settle disputes themselves, without going to trial. Litigation gives people opportunities to voice their complaints in a public forum so that they can “have their day in court.” Individuals and organizations rely on the rule of law so that they can enjoy their legal rights, protected from illegal behavior. Litigation is essential to enforce the rule of law, deterring potential lawbreakers who would behave with impunity if they had no fear that they would pay a price for acting illegally. It also provides some remedies for parties who have been harmed (some of which can’t be achieved through negotiation, such as declaring the validity of a patent), and it contributes to the development of legal doctrine.

While parties may receive significant benefits from litigation, both individual and organizational parties generally also incur substantial costs in the process. It is a complex, confusing, uncertain, and adversarial process, so many parties feel that they need to hire lawyers to represent them. As a result, they often pay substantial legal fees and litigation expenses. They also can incur substantial intangible costs
over an extended time, including physical and emotional symptoms related to stress, damage to their reputations and relationships, loss of opportunities, and dysfunction in organizations.

Parties settle most cases to avoid or minimize these risks and costs. Reaching a settlement can be a lengthy and difficult process as parties bargain in the “shadow of the law,” which often is unclear. Continuing to litigate (and possibly trying the case) usually is their best alternative to a negotiated agreement (BATNA), and the expected court outcome is the standard that parties and lawyers typically use to evaluate possible settlements. People have a hard time accurately predicting court outcomes, but they typically base litigation decisions—including decisions about negotiation—on their expectations about likely court outcomes.

For example, if a plaintiff is certain to receive $100,000 from a victory at trial, she might wonder why she should accept anything less than that in settlement. Because court outcomes never are certain, there’s always some risk of getting a less favorable decision than expected and of problems and costs in collecting a judgment. In addition, going to trial delays the resolution and generally increases the parties’ tangible and intangible costs. So plaintiffs often are willing to settle for less than they would win if certain of 100% success, and defendants will rarely pay the full amount that plaintiffs are seeking at trial.

While it is easy to understand these general principles, it is very hard to apply them in practice. In our adversarial system, both sides generally want to settle for the most favorable possible result from their partisan perspective. When the main or only issue involves the payment of money, there generally is a zero-sum dynamic in which each side believes that there is a finite amount to be divided so that if one side gets “more,” the other side necessarily gets “less.” The uncertainty about the court outcome and each side’s desire to maximize its partisan advantage contribute to cognitive and motivational biases. Many of these biases lead to over-optimism about the likely net result of a court outcome after considering the costs. When both sides are overly optimistic, it is difficult or impossible to reach an agreement. When parties are represented by lawyers, their training and experience can help them to provide more realistic assessments of the expected court outcome. However, because of low trial rates, many lawyers have little basis for predicting likely court outcomes. Moreover, lawyers often have the same biases as parties and also have a partisan role bias, causing them to share their clients’ perspectives. This is reinforced by social and financial incentives to
create a “conspiracy of optimism” with their clients. Although most parties avoid or overcome these biases and settle their cases, some parties do go to trial. Research shows that for litigants overall, going to trial turned out to be a mistake for one of the parties because the trial decision is worse than the other side’s last offer. Researchers call these “decision errors,” as described in Chapter 1.

Parties and lawyers thus face the challenge of how to make better decisions in litigation. This involves minimizing decision errors by making more realistic assessments of parties’ litigation interests and risks, and developing and implementing better plans throughout litigation. They generally need to obtain and assess relevant information efficiently, try to reach a good settlement as soon as reasonably possible, and minimize adverse consequences of litigation. That is the challenge that this book is designed to help you address.

The Unique Contribution of This Book

The main premise of this book is that lawyers and mediators should help parties make decisions in litigation by combining an assessment of likely court outcomes with a careful consideration of how their interests are likely to be affected if they (continue to) engage in litigation.

This book provides thorough advice about how you can work with your clients to develop “litigation interest and risk assessments” (LIRAs) and help them use these assessments in making decisions about litigation and negotiation. It includes appendixes with specific techniques and questions that you can use to help them make the best possible decisions.

Parties’ interests are their fundamental goals and concerns in a situation, which often are based on deep hopes and fears about the conflict. Sometimes, parties’ interests in litigation involve their identities: what the litigation process reflects about their character as human beings. In some cases, parties have strong interests in standing up for their principles, sometimes causing them to confront powerful adversaries and take on serious risks and costs.

Parties’ interests differ from their positions—what they demand in litigation or negotiation. In most cases, courts can address parties’ substantive interests only by ordering payment of money. However, parties often have substantive interests that cannot be adequately satisfied by one-time monetary payments. For example, plaintiffs may want to get an apology or business opportunity, and defendants may want to provide in-kind compensation or to have non-disclosure
agreements. Courts typically cannot order such outcomes, but dispute resolution professionals can help parties satisfy their substantive interests through negotiation, mediation, and judicial settlement conferences.

The litigation process itself can profoundly affect parties’ interests in ways that they often don’t recognize or consider carefully. For example, litigation can add stress, distract parties from other activities, and harm relationships and reputations, among other things. Sometimes, the litigation process satisfies parties’ interests, such as when plaintiffs seek to publicize defendants’ wrongdoing or defendants take tough positions in litigation to discourage potential plaintiffs from filing suit in the future. Although the litigation process may provide such benefits, parties often suffer from the process. This book refers to effects of the litigation process as “intangible costs” to be deducted from calculations of expected court outcomes. When parties benefit from the process, these benefits should be added in these calculations.

This book describes techniques for considering likely court outcomes, tangible costs (legal fees and expenses), and intangible costs in a single, integrated assessment—a “litigation interest and risk assessment,” or LIRA. This includes a range of tools to mathematically estimate the likely court outcome. Some practitioners find these mathematical tools to be helpful, while others do not. Even if you prefer to use traditional legal analysis instead of these tools, you can use LIRA techniques to systematically assess parties’ interests and risks from proceeding to trial or settling. Thus this book explains how you can help your clients use these assessments to make good decisions in litigation—as well as negotiation, mediation, and judicial settlement conferences.

What’s a good litigation decision? This book argues that parties generally make better decisions when they carefully consider their interests and the risks of proceeding in litigation and other dispute resolution procedures. There is no guarantee that a thorough process will produce better results in any given case as compared with a process in which a party makes casual decisions without careful consideration. However, in general, parties are likely to get results that better satisfy their interests if they carefully assess their interests and the risks that they face. In addition, using a careful LIRA process is a positive value in itself, giving parties greater control over and confidence in their decisions. Parties vary in many ways, and you should tailor your services to the specific context and characteristics of your clients in each case.

The LIRA techniques described in this book can help you and your clients carefully assess and—most importantly—discuss clients’
interests and risks. This book is oriented primarily to lawyers, but mediators and settlement conference judges can apply many of the same ideas and techniques. For simplicity, it refers to cases at the pretrial stage of civil litigation, but people can use LIRA techniques in decisions before someone files suit or during appellate litigation. It uses examples of cases with only two parties, but people can use LIRA techniques in cases with multiple parties. It assumes that lawyers are involved in the assessment of the case, but self-represented parties can use these techniques too. LIRA techniques work best in cases with monetary claims, but parties and practitioners can adapt them in cases with non-monetary issues as described in Chapter 5.

What You Will Learn from This Book

The book is divided into three parts. The first part describes the need for lawyers to conduct LIRAs. Chapter 1 explains why lawyers and parties often make errors in their LIRAs. It reviews empirical research showing that in a large majority of cases going to trial, one side makes a decision error, and the chapter identifies cognitive and motivational biases that contribute to parties’ and lawyers’ errors. It also describes social pressures between lawyers and clients, as well as poor communication practices that can contribute to making suboptimal decisions. Chapter 2 sets out ethical rules requiring lawyers to help clients make informed decisions as well as requirements for neutrals to help clients make uncoerced decisions.

Part 2 of the book describes how to conduct LIRAs. To assess clients’ interests and risks in making decisions about litigation and negotiation, you must consider three elements: (1) the range and likelihood of possible court outcomes, (2) the tangible costs of continuing litigation (legal fees and litigation expenses) rather than settling, and (3) intangible costs of continuing litigation resulting from the litigation process itself. Chapters 3 and 4 describe intangible costs, which lawyers and parties often overlook or don’t consider carefully. Chapter 3 provides a detailed description of litigation stress, which can cause serious physical and emotional harm to individual parties. This chapter includes suggestions for identifying and mitigating these harms. Chapter 4 addresses intangible costs that organizations experience, including internal dysfunction, loss of opportunities, and damage to public image, and it suggests ways to identify and value these costs.

Chapter 5 presents a simple framework for a two-stage LIRA process. In the first stage of a claim involving monetary damages,
you determine the “probability-adjusted” court outcome by identifying major risk factors, assessing the probability of each factor, and multiplying the probability of liability by the estimated damages. In a claim seeking a non-monetary remedy, you assess the probability of achieving possible court outcomes and weigh them against the tangible and intangible costs of trying to achieve the outcomes. In the second stage, you help clients develop the best estimates of the net value of the case, considering the risks from the first stage as well as the value of the tangible and intangible costs of proceeding to trial.

Some lawyers use other techniques for estimating court outcomes when conducting LIRAs, as described in Chapter 6. These include using detailed checklists, formal decision tree analysis, statistical models, databases of trial decisions and settlements, and customized risk analysis models. Each of these methods has advantages and disadvantages, as described in Chapter 6.

Part 3 of the book describes how lawyers, mediators, and settlement conference judges can help parties use LIRAs to make good decisions in litigation. Chapter 7 notes that lawyers should tailor their lawyer–client relationships to each client. In developing good decisions based on LIRAs, you need to use good communication skills, respond to clients’ emotions, and help them consider potential intangible costs of litigation.

Chapter 8 describes how you can use LIRAs to help clients develop good negotiation strategies. The strategies vary depending on whether the process involves exchanges of offers, focuses on parties’ interests and options, or uses norms as the basis of negotiation.

Chapter 9 cites empirical research about the benefits, risks, and desirability of various mediation techniques to help parties assess their cases. Neutrals use various techniques to help each side make more realistic LIRAs, which may differ based on the neutrals’ practice philosophy, local practice norms and policies, and lawyers’ and parties’ preferences, among other things. In many contexts, there is a norm of trying to settle cases in a single session, sometimes leading to marathon mediation sessions that last well into the evening. These single-session mediations can impose excessive pressure on parties and undermine good decision-making. Chapter 9 describes a planned early two-stage mediation procedure that can help parties avoid these problems and make good decisions.

The conclusion summarizes the ideas and techniques described in this book.
Concise Description of Widely Applicable Ideas and Techniques

Two of the authors are from Canada and one is from the United States. We have written this book with audiences in both countries in mind, though we hope that it will be of interest to people in other countries as well. Chapter 2 includes references to provisions from ethical codes from both countries, and this book includes quotes from practitioners on both sides of the border. Writing this book has been a cross-cultural educational experience as we learned about some strong differences of perspective regarding what techniques are appropriate or not.

Practitioners have differing philosophies of lawyering, negotiation, and mediation, and some have strong feelings that certain techniques are or are not appropriate. This book is intended to provide general information and advice so that readers of all persuasions can use or adapt these ideas to fit their views. Practice norms vary widely based on national and regional practice culture, type of case, urban or rural settings, and the amount at stake, among other things. This book is based on a general understanding of contemporary norms in North America, recognizing that litigation, negotiation, and mediation processes and techniques are so complex and varied that it is impossible to identify any procedures that can be empirically proven to produce superior results. So you are advised to adjust the techniques described in this book to fit your philosophy and the circumstances in particular cases.

This book is informed by our own and others’ empirical research in some of our prior publications about risk analysis and lawyering with planned early negotiation. To keep the citations to a minimum, we cite these prior publications where readers can find more detail and the sources we relied on. We include some language from our prior publications without specifically noting it. The book includes many practical forms as well as a bibliography for those who want to read further. This book focuses specifically on helping parties to make good decisions considering their interests and risks in litigation, and it is not a general guide to client interviewing and counseling, negotiation, or mediation. See the bibliography for references to such general guides, which address a wide range of issues not discussed in this book.

This book was written to be as concise and easy to read as possible. The primary audience includes lawyers, mediators, and judges.
conducting settlement conferences. The techniques described in this book can help corporate inside counsel, outside counsel, and executives improve their communication and decision-making about litigation and negotiation.

We hope that law school instructors, students, and scholars will also find value in it. Instructors may use some of the appendixes as guides for students as they do case simulations. Instructors may use this book in connection with Stone Soup Dispute Resolution Knowledge Project assignments. Students might use ideas from this book as the basis of interviews and observations about how practitioners do or don’t apply these ideas and the consequences resulting from their actions. Scholars and students can pursue ideas in this book, including from sources cited in the endnotes and bibliography, for research and scholarship.

We want to thank the participants in our presentations about the topics in this book and the subjects of our studies. We are indebted to a few people in particular, whose input helped shape this research in the early years of the project, including David Keet, Michael Palmer, and Gordon Tarnowsky. We also acknowledge the research funding we received in those earlier years, The Foundation for Legal Research, and the Canadian Institute for the Administration of Justice. Along the way, others became engaged in our work in meaningful ways, and we also want to express our thanks to them: Kimberly Cork, Marjorie Corman Aaron, Shawna Sparrow, Deanne Sowter, and Marc Victor. Thanks also to Peter Benner, Sarah Cole, Chris Draper, Noam Ebner, Brian Forkas, Lainey Feingold, Rafael Gely, Justice John Gill, Dwight Golann, Justice Rob Graesser, David Hoffman, Charlie Irvine, Heather Scheiwe Kulp, Léa Lapointe, Michael Leathes, Jim Levin, Lela Love, Paul Manicotti, Jennifer Mathis, Bernie Mayer, Craig McEwen, Jim McGuire, Kim Miller, Larry Mills, Jill Morris, Chris Nolland, Spencer Punnett, Michael Schafler, Andrea Schneider, Donna Shestowsky, John Sturrock, Doug Van Epps, John Wade, Justice Jim Williams, Doug Yarn, and Susan Yates for comments on an earlier draft of this book. Thanks to Bonnie Hughes for help in editing the manuscript. Thanks to Sarah Craig for her editorial advice and support throughout the process of writing this book.

Note

1. Stone Soup Dispute Resolution Knowledge Project, University of Missouri School of Law Center for the Study of Dispute Resolution, law.missouri.edu/csdr/stone-soup/.