

8-15-2015

The Intersection between Legal Risk Management and Dispute Resolution in the Commercial Context

Garrick Apollon

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/drlj>



Part of the [Commercial Law Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Garrick Apollon, *The Intersection between Legal Risk Management and Dispute Resolution in the Commercial Context*, 15 Pepp. Disp. Resol. L.J. 267 (2015)

Available at: <https://digitalcommons.pepperdine.edu/drlj/vol15/iss2/2>

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu, anna.speth@pepperdine.edu.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The Intersection between Legal Risk Management and Dispute Resolution in the Commercial Context

Garrick Apollon*

I. INTRODUCTION

Good things don't happen by coincidence. Every dream carries with it certain risks, especially the risk of failure. But I am not stopped by risks. Suppose a great person takes the risk and fails. Then the person must try again. You cannot fail forever. If you try ten times, you have a better chance of making it on the eleventh try than if you didn't try at all.

-Arnold Schwarzenegger

This quote from Arnold Schwarzenegger, a man who has taken many smart risks in his professional life and not too smart ones in his personal life, illustrates that if risk management is often synonymous with a wise and diligent character, fear of risk-taking or a “zero risk” attitude in life should perhaps be interpreted as an expression of “zero results,” “zero self-confidence,” and “zero trust” in others and our future.¹ Therefore, the

* Garrick Apollon is a corporate lawyer of the Bar of Ontario, Canada (2004); he is also a part-time professor at the University of Ottawa's Faculty of Law and Telfer School of Management in the

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

chance of loss and the expectation of net benefit are inescapably linked in risk activity.² If lawyers pride themselves on being diligent people, they also often tend to be creatures of habit and risk adverse people.³ As a result,

undergraduate, MBA, and Executive MBA programs. Garrick Apollon has earned the following degrees: J.D., 2003, University of Ottawa; L.L.B. (Civil Law), 2000, l'Université Laval; LL.M. (Master of International Law), 2002, l'Université Laval; and LLCM (Master of Comparative Law), 2012, University of Pennsylvania Law School. The views expressed in this article are solely those of the author.

1. WILLIAM LEISS & CHRISTINA CHOCIOLO, *RISK AND RESPONSIBILITY* 49 (McGill-Queen's University Press 1994) (theorizing on the risk and responsibility and explaining the proclivity for under-assessing risk).

2. *Id.* at 11.

3. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplant*, 43 AM. J. COMP. L. 489, 499 (1995) (discussing a new approach to study legal transplant and the natural tendency of lawyers to act as politically conservative creatures of habit). Lawyers often lack what Clifford Geertz called "legal sensibility." See JAMES W. ST. G. WALKER, "RACE," RIGHTS AND THE LAW IN THE SUPREME COURT OF CANADA 44 (1997). Geertz describes legal sensibility as "both a set of normative ideas and a structure of decision procedures, for pervading sensibilities and broad principles must work themselves through an actual case in a real court. Law is a cultural system, a frame of mind a framework. 'Legal facts' he went on, 'are made, not born, are socially constructed'; facts are not 'discovered' somewhere out of their nature but are produced by in a legal system" (and also by the legal sensibilities of the jurists within that legal system). *Id.* The concept of legal sensibility illustrates the paradox to transplant "risk management" to the practice of law because this transplant aims to bring a more "scientific" approach to law. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 14 (3d ed. 1983) (explaining the complexity of construction of the law by asserting that "to understand anything at all about the Life of the Mind, and this can be accomplished without prejudice to the idea that human thinking has its own constraints and its own constancies"). However, lawyers must keep their "legal sensibility" to avoid becoming robots and losing their professional and moral discretion to comply with the Rule of Law; see also Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1910 (2006) (asserting that by altering compliance incentives, risk management technologies can prevent as well as promote risk-taking and loss-causing behavior). Alfieri argues that the widespread adoption of risk management mechanisms (for example, in-house advisors and

268

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

lawyers often fail to properly communicate the legal risks or emphasize that the very definition of risk means not just to consider the legal threats, but to also consider the opportunities associated with a legal risk.⁴ In other words, a lawyer needs to accept the premise that the practices of commercial law work on the basis that business benefits often outweigh the legal risks. More importantly, efficient legal risk identification, communication, and overall management are crucial for a commercial lawyer to avoid being perceived as a necessary evil or even as a roadblock to the achievement of the client's goals.⁵ Consequently, lawyers must strategically prioritize the management of the most significant legal risks for the effective allocation of time and resources in order to remain efficient and practical.⁶ The struggle for business people to ensure the cost efficiency of legal fees and the practicality of legal advice vis-à-vis the legal risks they face often contributes to the fact that lawyers are often viewed as an annoying transactional cost or a necessary evil:

internal controls, outside consultants and external audits, conflicts of interest protocols, and continuing legal education training) actually diminishes the appreciation of the moral choices facing lawyers in practice and the other-regarding obligations of lawyers in society. *Id.*

4. LEISS & CHOCIOŁKO, *supra* note 1, at 11.

5. Victor Fleischer, *Deals: Bringing Corporate Transactions Into The Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 497 (2002) (asserting that businesspeople are usually smart enough to see when their lawyers do not put the clients best interests first).

6. Tobias Mahler & Jon Bing, *Contractual Risk Management in an ICT Context—Searching for a Possible Interface Between Legal Methods and Risk Analysis*, 49 SCANDINAVIAN STUDIES L. 339, 349 (2006) (Legal risk management in commercial context “focuses mainly on the identification and evaluation of risks, based on transaction cost economics and the default norms of risk allocation. . . . The contractual allocation of risks has always been central in contract literature, and will be a central element of contractual risk management.”); *see also* William H. Fortune & Dulaney O’Roark, *Risk Management for Lawyers*, 45 S.C. L. REV. 617 (1993).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Business lawyers are seen at best as a transaction cost, part of a system of wealth redistribution from clients to lawyers; legal fees represent a tax on business transactions to provide an income maintenance program for lawyers. At worst, lawyers are seen as deal killers whose continual raising of obstacles, without commensurate effort at finding solutions, ultimately causes transactions to collapse under their own weight.⁷

This on-going issue in the practice of law has contributed to the rise of legal risk management.⁸ Legal risks depend on the environment and three basic determinants of risk, namely lack of power and control, lack of information, and lack of time.⁹ The traditional paper based and technology adverse approach to the management of legal risks for lawyers of relying on their experience and judgement in a primarily event driven, reactive manner is quickly becoming outdated.¹⁰ As Susskind's best-selling book *The Future of the Law*¹¹ mentions, the next generation of lawyers will have to embrace a proactive perspective focused on dispute prevention rather than dispute

7. Fleischer, *supra* note 5, at 487.

8. Kevin Johnson & Zane Swanson, *Quantifying Legal Risk: A Method for Managing Legal Risk*, 9 MANAGEMENT ACCT. Q. 22, 27 (2007) ("The definition of 'success' from managing legal risk must ultimately be subjective because the nature of legal risk is subjective. This is not to say there are no common causes and drivers of legal risk, just as there are common causes and drivers of cost, but how these causes and drivers affect a specific organization and its activities can be defined only by the [organization]."). While the financial benefits of legal risk management—reduced litigation and legal service costs—can be quantified, it is harder to value the effects of minimizing any negative legal, corporate, financial, ethical and reputational consequences of losing in court, or advancing a corporate decision on the basis of a weak legal position.

9. LEISS & CHOCIOLO, *supra* note 1, at 12 (theorizing on the relation between components and determinants of risk).

10. RICHARD E. SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* (Oxford: Clarendon Press, 1996) (theorizing on the future of the law in face of the technological evolution of the world).

11. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

resolution, as well as legal risk management rather than legal problem-solving.¹² Susskind's message for lawyers remains a stark one: in order to guarantee a stake in the legal system of the future, lawyers must adapt their work practices or die.¹³ Therefore, the importance of effective legal risk management has risen to the top of the list of priorities of many law firms and in-house legal departments.¹⁴ Both partners and general counsel are directed to supervise the implementation of mandatory Legal Risk

12. *Id.*

13. *Id.*

14. Matthew Whalley et al., *A Framework for Legal Risk Management: Insights from General Counsel*, BERWIN LEIGHTON PAISNER LLP (Oct. 30, 2012), <http://www.blplaw.com/expert-legal-insights/articles/legal-risk-management-framework/> (presenting a cross-industry survey on legal risk management). The authors of this survey explained:

We reviewed best practice and identified issues General Counsels come across when they implement legal risk management frameworks. The General Counsels surveyed agreed that the first step to effective legal risk management is to clearly define legal risk. To ensure lawyers and business teams are clear about the scope of the risks they need to manage, [legal risk] definitions need to be specific to the commercial application of the law. To instill an effective risk management culture, lawyers and business teams must receive good levels of support. A good legal risk framework brings clarity of purpose, encourages senior level buy-in and enables the lawyers 'on-the-ground' to make the best possible, commercial, risk-reward decisions.

Id. Legal scholars often neglect to include the perspective of practitioners in their work to ensure its practical relevance. However, Professor William Ewald's "comparative jurisprudence" model teaches that legal scholarship must aim to understand the ideas that inform the law. See William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?* 143 U. PA. L. REV. 1889, 2111 (1995). William Ewald exhorts comparative lawyers to follow his "comparative jurisprudence" model to transcend the simple dichotomy between law in books and law in action and to focus on what he calls "law in minds". *Id.* Ultimately, law in minds is a crucial part of law in action: There are no legal acts without human actors, and laws in turn do not exist apart from human interpretation.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Management (LRM) frameworks.¹⁵ Accordingly, for instance, many large “law firms” like the Department of Justice Canada have established a mandatory and comprehensive LRM framework for litigation; legislative and advisory files are now in place.¹⁶ This LRM framework is mandatory and supports the everyday practice of law of Department of Justice Canada legal counsel across the Government of Canada.¹⁷

If risk management is not yet widespread to the practice of law, risk management has long been an integral part of the practice of medicine.¹⁸ Risk management helps physicians to identify and better manage health risks for their patients and avoid malpractice risk.¹⁹ Medical schools use case studies in the field of the principle of autonomy and patient-based care to illustrate the challenges associated with medical risk management to future clinicians.²⁰ Many of these medical case studies are easily transposable to

15. *Id.*

16. *Legal Risk Management in the Department of Justice*, CANADA DEPARTMENT OF JUSTICE, <http://www.justice.gc.ca/eng/tp-pr/cp-pm/eval/rep-rap/08/lrm-grj/p2.html> (last modified Jan. 7, 2015) (presenting the legal risk management initiative and an overview of legal risk management today within the Government of Canada).

17. *Id.*

18. Gerald B. Hickson et al., *Patient Complaints and Malpractice Risk*, 287 J. AM. MED. ASS’N 2951 (2002) (presenting that risk management is linked to medical practice since long time to help physicians to prevent malpractice risk); *see also* Daniel Finkelstein et al., *When a Physician Harms a Patient by a Medical Error: Ethical, Legal, and Risk-management Considerations*, 8 J. CLINICAL ETHICS 330 (1997) (asserting that errors that harm patients are infrequently brought to the attention of these patients).

19. Hickson, *supra* note 18.

20. *See* Sandra J. Taylor, *Doing Right: A Practical Guide to Ethics for Physicians and Medical Trainees*, 156 CAN. MED. ASS’N J. 417 (1997) (book review). For this reference, *see* PHILIP C. HÉBERT, *DOING RIGHT: A PRACTICAL GUIDE TO ETHICS FOR MEDICAL TRAINEES AND*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the practice of law. Cases usually start by explaining that in modern medicine, the right thing to do requires incorporating patient values and wishes into medical decision making. Similarly to the practice of law, the question is not whether, but how best to do so.²¹

The following case represents the challenge of risk communication and can be easily transposed to the practice of law. The case presents a forty-nine-year-old man who smokes, is overweight, and has poorly controlled hypertension, as well as a family history of heart disease.²² The doctor has worked a year with this patient to try to get him to change his ways, but to no avail.²³ Weight loss is followed by weight gain, exercise by non-exercise, periods of abstinence from chain smoking (patient claims it is easy to quit smoking and says, “I’ve done it hundreds times!”).²⁴ Despite being cautioned and exposed to all medical risks to his health, he refuses to change his ways and take medications.²⁵ “Doc,” he states, “I gotta do this on my own! I swear. See me in six months. I’ll be a new man”.²⁶ This type of non-compliant patient can make health professionals think about changing careers.²⁷ The patient is an adult, possesses decision-making capacity, but

PHYSICIANS 30-34 (Oxford University Press, 2d ed., 2009) (presenting logical and ethical risk communication approaches and case studies for healthcare practitioners).

21. HÉBERT, *supra* note 20, at 30 (presenting the autonomy and patient-based principle in modern medicine).

22. *Id.* at 30-31 (presenting a case study exposing the challenge of risk communication between physician-patient).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. HÉBERT, *supra* note 20, at 30-31.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

exercises it poorly and in a self-destructive way.²⁸ It would be easy for the doctor to say that he is mature, he is autonomous, and to let him be, or to see his decision making as a product of some mental malady.²⁹ However, physicians are trained to do more than give up on their patients; they are trained to reconsider what might be wrong with the doctor-patient communication.³⁰ Indeed, risk communication of health risks is a root issue for many non-compliant patients.³¹ Rather than acting out of alarm or abandoning the patient, physicians are trained to try to better understand what the patient's fears and concerns are.³² As it turns out in this case, the patient, like many others, was worried about side effects from medication.³³ His previous doctor had put him on pills two years ago that gave him erectile problems and swollen ankles; and as he says: making feel like an old man.³⁴ He stopped taking them and never went back to that doctor.³⁵ He is in a new relationship now and wants nothing to do with pills that might interfere with his sex life.³⁶ Once these issues were addressed, the patient was willing to work at lifestyle changes and to try some alternative medications.³⁷ This case illustrates that better risk communication between patient and doctor through alternative dispute resolution (ADR) techniques—such as the art of

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. HÉBERT, *supra* note 20, at 30-31.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

uncovering real issues and interests at play by probing and by incorporating the patient's wishes (patient-driven and respect for autonomy approach) with best medical risk responses—resolved the problem.³⁸

This case also illustrates that risk management is a shared responsibility between the patient and physician. In the LRM context, the shared responsibility is between the lawyer and the client. In accordance with the Code of Professional Responsibility of his bar association,³⁹ the lawyer is in charge of identifying, assessing, and proposing responses to legal risks that his client is facing or might be facing; and on the other hand, the client—as the person who bears the legal risk—is responsible for providing all necessary information to the lawyer to make a proper assessment and the client to select the proper risk response.⁴⁰ The client is also responsible for selecting—using his or her decision-making discretion—the proposed risk responses.⁴¹ This is why non-compliant clients can drive lawyers crazy! The main purpose of LRM is to help clients better identify and overall manage legal risks, and, therefore, the lawyer needs to respect client

38. *Id.*

39. The Legal Information Institute (LII), Cornell University Law School, The Lawyer's Code of Professional Responsibility, available at https://www.law.cornell.edu/ethics/ny/code/NY_CODE.HTM (last visited Apr. 2, 2015) (explaining that “lawyers, as guardians of the law, play a vital role in the preservation of our democratic society”).

40. See Camille A. Gear, *The Ideology of Domination: Barriers to Client Autonomy in legal ethics scholarship*, 107 YALE L.J., 2473, 2473-74 (1998) (asserting that while the lawyer must respect clients' autonomy, the attorney-client relationship must also be a battle of moral visions); see also Christina R. Salem, *The New Mandate of the Corporate Lawyer after the Fall of Enron and the Enactment of the Sarbanes-Oxley Act*, 8 FORDHAM J. CORP. & FIN. L. 765, 766 (2003) (discussing the rise of professional and ethical accountability of lawyers of corporate lawyers in light recent corporate scandals and the enactment of Sarbanes-Oxley Act).

41. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

autonomy and his or her decision making.⁴² However, what should be done when the lawyer feels like the clients do not understand the probability and strength of the legal position and the consequences associated with a legal risk? Clients do not understanding a legal risk assessment when communication is recurrent in the practice of law, and this is why risk communication is a root for many non-compliant clients for lawyers. Like doctors, lawyers should—rather than acting out of alarm or abandoning their clients—try to better understand their interests, fears, and concerns.⁴³ This is why this article argues that there is a natural intersection or point of locus between LRM and dispute resolution—because ADR techniques should be utilized in legal risk communication: first, to avoid miscommunications and disputes between lawyers and clients by favoring open communication and consultation; and second, to improve the overall management of legal threats that the client is facing. The intersection between LRM and dispute resolution is natural because the practice of law revolves around conflict.⁴⁴ In practical words, LRM serves to manage conflicts and ADR techniques serves to guide LRM. In managing a legal file, a lawyer needs to not just resolve conflict that his client is facing with others, but also to manage conflict with his client based on his client’s expectations, interests, fears, concerns, etc. vis-à-vis his or her legal advice.

42. *Id.*

43. *Id.*

44. Bruce Kahn, *Applying the Principles and Strategies of Asian Martial Arts to the Art of Negotiation*, 58 ALB. L. REV. 223 (arguing that martial arts principles can be applied to dispute resolution, particularly negotiation, because of the similar combative nature that underlies both).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Traditionally in the commercial context, the lawyer's main responsibility is to negotiate commercial deals and resolve disputes.⁴⁵ Managing legal risk in commercial negotiations and disputes is a stressful and complex job for commercial lawyers and LRM can help.⁴⁶ This article reinforces that commercial negotiations and disputes are composed of two of fundamental components: 1) substantive matters (i.e. commercial environmental and legal facts, issues, risks, etc.); and 2) non-substantive matters or emotional and relational matters.⁴⁷ This article explains the key advantages and challenges of using LRM to help lawyers managing substantive matters related to the commercial negotiations and disputes, and the key advantage of using ADR techniques for the management of non-substantive matters related to commercial negotiations and disputes. This article overall demonstrates that LRM can complement dispute resolution and vice versa. This article also demonstrates how LRM can be utilized in commercial negotiations and mediations.

45. See James J. White, *The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation*, 19 J. LEGAL EDUC. 337 (1966) (discussing the role of lawyer as negotiator, dealmaker and conflict manager for his client).

46. See James J., Alfini et al., *Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective*, 10 J.L. & HEALTH 61 (1995) (discussing the eternal problem of stress management in the legal profession); see also Marjorie A. Silver et al., *Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship*, 19 TOURO L. REV. 847 (2004) (discussing stress realities related to lawyer-client relationship).

47. ROGER FISHER & WILLIAM L. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 81-95 (3d ed. 2011) [hereinafter *GETTING TO YES*] (presenting that negotiation and dispute resolution are made of substantive (objective) and non-substantive (subjective) matters, and asserting that it is fundamental for negotiators to insist on using objective criteria).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

II. LINKING DISPUTE RESOLUTION AND LRM

First, what is negotiation and dispute resolution in the commercial context? There is a multitude of definitions for negotiation; a simple definition is the art and science of getting what you want and what you need in bargaining or disputes on basis of power, interest, and right-based approaches.⁴⁸ It is also important to understand that risk is one of the most powerful concepts in our society because it is linked with fear and power-based negotiation.⁴⁹ Therefore, risk, fear, and anxiety are among the greatest motivational factors for human behaviors because there are both rational and irrational processes.⁵⁰ We negotiate all the time. It is estimated that managers spend more than 50% of their time negotiating and resolving disputes.⁵¹ Therefore, if our clients spend so such much time negotiating, it should be a natural aspiration for commercial lawyer to become experts in negotiation. Firstly, negotiation and dispute resolution for commercial lawyers in the context of LRM should be defined as firstly getting your client to perceive what you want them to perceive in terms of legal risks and

48. See WILLIAM URY, JEANNE M. BRETT & STEPHEN GOLDBERG, GETTING DISPUTES RESOLVED 3-19 (1988) (discussing the three approaches to resolving disputes: Interests, Rights, and Power).

49. *Id.*

50. See Lola L. Lopes, *Between Hope and Fear: The Psychology of Risk*, 20 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 255 (1987) (theorizing that the balance between hope and fear of risk of losing and the top prize money are the core motivational factors in economic content).

51. NANCY J. ADLER, INTERNATIONAL DIMENSIONS OF ORGANIZATIONAL BEHAVIOR 210 (South-Western, 4th ed. 2002) (asserting business people and lawyers spend on average more than 50% of their time in formal and informal negotiations).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

priorities.⁵² Secondly, getting the other side to perceive what you want them to perceive in terms of legal risks and priorities of your client.⁵³ This task is not easy and requires great communication, negotiation, and dispute resolution skills of the lawyer.

Second, what is LRM in the commercial context? The word risk generally connotes the notion of potential loss, injury, or hazard. This is why risk usually has a negative connotation to managers—because risk is not always defined in parallel with the expectation of net benefit.⁵⁴ The commonly accepted modern definition of risk is “the effect of uncertainty on objectives” with the first component of likelihood or probability and the second component of impact(s) or consequence(s).⁵⁵ Risk management is a

52. This definition is based on the fact that organizational behavior and psychology demonstrate that risk perception can be negotiated because risk perception can be influenced, controlled and manipulated. See Hans-Peter Erb et al., *Choice Preferences Without Inferences: Subconscious Priming Of Risk Attitudes*, 15 J. BEHAV. DECISION MAKING 251 (2002).

53. *Id.*

54. LEISS & CHOCIOŁKO, *supra* note 1, at 3-4 (affirming that “risk” is one of the most powerful concepts in modern society and that “risk” always has a negative connotation, since it refers to the chance of avoiding an unwanted outcome); see also Anthony Giddens, *Risk and Responsibility*, 62 MOD. L. REV. 1 (1999).

55. According to the International Standard Organization (ISO) 31000, risk is the “effect of uncertainty on objectives” and an effect is a positive or negative deviation from what is expected. See *ISO 31000 - Risk Management*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), <http://www.iso.org/iso/home/standards/iso31000.htm> (last visited Feb. 8, 2015). When I train corporate lawyers in the field of LRM and compliance, I often use the example of the advisory services of PricewaterhouseCoopers (PwC) in the field of risk consulting (e.g. enterprise and financial risk management, compliance and regulatory risk management, supply chain resilience, privacy and data protection, corporate governance). PwC offers these services to private and public sector organizations. *Risk Consulting*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/ca/en/consulting/risk.jhtml> (last visited April 9 2015). This example illustrates the practical relevance of LRM and compliance for the practice of corporate law. PwC is one of the

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

technical phrase generally understood as a set of coordinate activities directing and controlling an organization with respect to “risks” of a nature to be specified.⁵⁶ Therefore, legal risks are only one type of risk that an organization must manage.⁵⁷ Risk management cannot be practiced effectively in silos.⁵⁸ As a result, integrated risk management promotes a continuous, proactive, and systematic process to understand, manage, and

top multinational professional services in the world. *See id.* Therefore, the fact that PwC has an established risk consulting advisory practice dedicated to integrated risk management with many partners, like myself, who specialize in ISO 31000 leads corporate lawyers that I am training to realize the practical relevance of LRM and compliance. Most importantly, as Professor William Ewald at the University of Pennsylvania Law School noted, I use this example to illustrate that the practice of law should focus on matters that concern practicing attorneys, but unlike accountants and business consultants, corporate lawyers often fail at this task. *See also* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplant*, 43 AM. J.COMP. L. 489, 509 (1995) (discussing the tendency of many lawyers to act as “politically conservative creatures of habit”); *see also* William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try a Rat?*, 143 U.PA. L.REV. 1889, 1894, 2111 (1995) (discussing a proposal for comparative lawyers that transcends the simple dichotomy between law-in-books and law-in-action, or law-in-economical or law-in-sociological-statistics); *see also* Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, 13 PEPP. DISP. RESOL. L.J. 385, 391 (2013) (discussing Ewald’s theory “law-in-minds”).

56. *Id.*

57. *Guide to Integrated Risk Management*, TREASURY BOARD OF CANADA SECRETARIAT, <http://www.tbs-sct.gc.ca/tbs-sct/rm-gr/guides/girm-ggir03-eng.asp> (last modified Oct. 17, 2012) (reinforcing the strategic importance of managing risks from a systemic and holistic perspective for an organization like the Government of Canada). Risk management does not operate in isolation but needs to be built into existing decision-making structures and processes in order to support planning, priority setting, program management, financial reporting, audits and evaluations, development of corporate business plans, business continuity, operations and performance assessment, and other key functions throughout an organization at the departmental, branch and program levels. *Id.* Embedding risk management into an organization’s structures and programs using a consistent risk management process creates a cohesive integrated risk management environment. *Id.*

58. *Id.*

280

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

communicate risk from an organization-wide perspective in a cohesive and consistent manner.⁵⁹ Organizations usually have a risk management framework to deal with their corporate, operational, health and safety, financial, media or reputational, corporate social responsibility, ethical, legal risk, etc.⁶⁰ Practically speaking, this means that in a legal risk assessment, it should be mandatory for the lawyer to integrate all pertinent and determinable⁶¹ non-legal consequences such as corporate, financial, media or reputational, corporate social responsibility, ethical consequences, etc. for the organization. Many lawyers will say that they are not experts in management, accounting, finance, or communication and that their mandate should be strictly limited to the law. I argued in my training on LRM to colleagues that this argument is weak for three main reasons. First, common law teaches us that law must be defined and practised in a social context.⁶²

59. *Id.*

60. Mahler & Bing, *supra* note 6, at 349-350 (presenting legal risk management, different legal risks and consequences).

61. The client is often best suited than the lawyer to identify and assess non-legal consequences of a legal risk and this task should always be done in consultation with the client. There are situations where it is obvious and the commercial lawyer can make an assessment of certain non-legal consequences without consulting his client. I often use these two examples in LRM training: first, the case of a multi-million financing agreement without any (or with a weak) indemnity provision to protect the financier against unwanted liabilities. In this case, it is obvious that there are high financial consequences. Second, I also use the case of a conflict of interest in procurements for an employee in a governmental organization or publically traded company, which can cause high reputational consequences and distrust of taxpayers or stockholders in the honest, transparent and efficient management of the funds of the organization.

62. Comparative law scholarship has for a long time included a vibrant debate over the validity of the "mirror theory of law" (the theory that law is the mirror of cultural and social forces) external to the law. See Garrick Apollon, *Sino-American Contract Bargaining and Dispute Resolution*, 13 PEPP. DISP. RESOL. L.J. 385 (2013). The debate has led us to realize that the law is

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

This means that a technical assessment of the law confines the law to a narrow and linear perspective while the very nature of the law is to not see the black or white, but various shades of gray.⁶³ Second, as mentioned, risk management must be practiced from an integrated perspective and legal risks are not the only risks for an organization.⁶⁴ Third, LRM is a shared responsibility between the lawyer-client and maintaining an integrated perspective on legal risks by considering the non-legal consequences of a legal risk improve client intake management and also client satisfaction.⁶⁵ Lawyers deal with important issues and clients are often under tremendous pressure. A lot of complaints to bar associations are in relation to the failure of lawyers to communicate or engage their clients properly.⁶⁶ Therefore,

the product of factors which are both internal and external factors to the law. Therefore, “inspir[ed] from Montesquieu’s *Spirits of the laws*, [the author] argue[s] that *l’état de droit est un état d’esprit* (rule of law is a rule of mind).” *Id.* at 385-86.

63. See GEORGE P. FLETCHER & STEVE SHEPPARD, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* 10 (2005) (“Experience has shown us [professors of law] that the lawyer who can see the subtleties, the gaps, and the unexpected in the law will be of much better service to clients than the lawyer who merely parrots old cases and statutes.”).

64. *Integrated Risk Management Framework*, TREASURY BOARD OF CANADA SECRETARIAT, <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=12254#appA> (last modified Apr. 1, 2001) (discussing shared leadership-suggested roles and responsibilities in risk management).

65. Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 *GEO. J. LEGAL ETHICS* 95, 100 (2008) (“A prime example illustrating how risk management systems can operate to accomplish all of these objectives when effectively implemented—and avoid the kinds of risks that all too frequently arise in the absence of such systems and of an appropriately supportive culture—is client intake management.”).

66. See Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 *GEO. L.J.* 1015 (1981) (discussing conflict between lawyer-client are often based on lack of communication and engagement from the lawyer towards his client).

282

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

LRM can improve the communication, consultation, and satisfaction of clients.⁶⁷

Finally, when drafting legal risk assessments it is important for the lawyer to always use the proper terminology and not step outside the boundaries of his legal mandate. A lawyer should never talk about financial or media risks in his legal opinions, but stick to the concept of non-legal consequences, such as the financial or media consequences of a legal risk. Some lawyers will argue that this is playing with words, but there is a semantic difference from a causality perspective between the legal risk itself that constitutes the cause and the legal and non-legal consequences that are produced by the legal risk, which constitute the effect.⁶⁸

A. *The Key Advantages and Challenges of Using LRM to Help Lawyers Manage Substantive Matters Related to Commercial Negotiations and Disputes*

First, what are substantive matters? Substantive in opposition to non-substantive matters such as emotional or relational matters means using and developing objective criteria to guide the negotiation and dispute

67. Risk management is linked with effective communication because risk perception is also formed by irrationalities and subjective human factors, such as fear, anxiety, pleasure, greed, emotions, and political games. See Paul Slovic et al., *Risk as Analysis and Risk as Feelings: Some Thoughts About Affect, Reason, Risk, and Rationality*, 24 RISK ANALYSIS 311 (2004).

68. See V. T. Covello & J. Mumpower, *Risk Analysis and Risk Management: An Historical Perspective*, 5 RISK ANALYSIS 103 (1985) (presenting comprehensive methods for establishing causality in risk management context).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

resolution.⁶⁹ This concept is based on principled negotiation as developed in the celebrated book *Getting to Yes* and at the Harvard Negotiation Project.⁷⁰ For instance, substantive matters means negotiating and resolving commercial disputes based on what a court will decide, such as precedent, market value, cost, financial or technical audit, scientific judgement, and professional standards.⁷¹ LRM fosters the use and development of objective criteria because it focuses on objectifying the legal issues at stake by identifying and managing legal risks proactively.⁷² LRM is mainly associated with strategic management, therefore, the key advantage of LRM for clients in negotiation and dispute resolution is that it promotes strong corporate governance for the client organization by reducing the negative impacts of legal risk across the organization, gives access to better insurance, enables the client to make informed decisions and avoid surprises, accomplishes its corporate policies and objectives using more objective and reliable information, improves client's engagement and intake management vis-à-vis legal issues for a better working relationships between lawyer-client, reduces monetary and other possible impacts of litigation, improves

69. GETTING TO YES, *supra* note 47, at 81-95 (emphasizing on the importance of using objective criteria in negotiation and dispute resolution).

70. *Id.*

71. *Id.* at 81 (affirming that deciding on the basis of will (subjective criteria) is costly).

72. Davis, *supra* note 65, at 98-99 (“‘Risk’ [is defined] to be as broad and all-encompassing as possible. It extends far beyond the risk of malpractice claims, and includes criminal prosecution (of individual lawyers and law firms collectively), professional discipline, claims for disgorgement of fees, malicious prosecution, sanctions, and other allegations of wrongful conduct in the course of law practice, and even law firm dissolution. . . . ‘Risk Management’ means the establishment of institutional (i.e., firm or practice-wide) policies, procedures, or systems (sometimes referred to as risk management ‘tools’) designed to minimize risk [for both the lawyer (and his law firm) and the client].”).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

cost control and cost effectiveness of legal fees, assists in taking “calculated” or smart risks that are balanced against possible benefits, fosters necessary controls and due diligence, promotes better business planning, and generally enhances decision making from an organization-wide perspective.⁷³

The advantages for lawyers are that LRM improves the overall quality and objectivity of their legal services,⁷⁴ improves ethics in the practice of law,⁷⁵ protects lawyers by ensuring that all key legal risks are documented and communicated to both the management of their law firms or legal departments as well as their clients, gives access to better professional insurance,⁷⁶ enables the use of a common language in communicating risks among colleagues from the same law firm or legal department, and increases efficiency by saving time and effort through avoiding the duplication of work because LRM is about effective business intelligence, business

73. *Id.* at 100-129 (distilling the benefits of legal risk management). The advantage of integrated risk management (i.e. managing financial, legal and other risks that an organization is facing) is the main driver in practice for the implementation of an ISO 31000 legal risk management system into an organization. *See also* Lee L. Colquitt et al., *Integrated Risk Management and The Role of The Risk Manager*, 2 RISK MANAGEMENT AND INSURANCE REVIEW, 43, 43-61 (1999) (explaining the historical link between risk management for insurance and reinsurance markets and risk management for corporations that are insured). In my LRM training I often use the analogy that a LRM and compliance system for a company should be viewed as an alarm system for your house. Just like your house alarm system detects security risks, your LRM system will works to detect, deter, and prevent the occurrence of legal risks in an organization.

74. Davis, *supra* note 65, at 100-129.

75. *Id.* For the contrary view, see also Alfieri, *supra* note 3.

76. Davis, *supra* note 65, at 99 (demonstrating that “the adoption of [legal] risk management [framework] gives law firms enhanced access to [] professional liability insurance”).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

analytics, and electronic file management—more generally referred to as law practice management and technology.⁷⁷

The key challenges of LRM can be distilled as follows: while it assists in objectifying and standardizing legal practice, LRM is not an exact science. If used in a purely scientific manner without the proper assessment of non-legal consequences, such as ethical consequences, the legal risk assessment can lead to immoral and illegal decision making, such as the historic case of the Ford Pinto.⁷⁸ In this case, Ford used an unethical and criminal legal risk assessment and actuarial cost-benefit analysis to compare the cost of settlements for consumer deaths or injuries versus the cost of paying for a recall and safer redesign of the million Pinto cars already sold.⁷⁹

77. SUSSKIND, *supra* note 10.

78. Davis, *supra* note 65; *see also* Alfieri, *supra* note 3 (distilling the disadvantages and challenges of legal risk management).

79. *See* John R. Danley, *Polishing Up The Pinto: Legal Liability, Moral Blame, and Risk*, 15 BUS. ETHICS Q. 205, 205-36 (2005) (discussing the Pinto case in the contexts of fault and liability in tort, criminal liability, and product liability). The document known as the Ford Pinto Memo was exposed to the world. *Id.* at 228-229. This document was focused on the cost of reducing deaths from fires resulting from rollovers, rather than the rear-end collision fires associated with Pinto's gasoline tank design. *Id.* The Pinto case "trial attracted national attention and remains a landmark case in corporate criminal law." *Id.* at 210; *see also* FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND (Anderson eds., 1987); Harold C. Barnett, *Corporate Capitalism, Corporate Crime*, 27 CRIME & DELINQUENCY 4 (1981) (presenting the Ford Pinto case as a corporate crime). Hence, lawyers must always obey the Rule of Law and show ethical leadership; otherwise, legal risk management, like in the Ford Pinto case, may be used to facilitate corporate crimes. Like a criminal lawyer, a business lawyer also has to be careful not to provide legal advice on breaching the law. For this matter, *see* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Also, the LRM approach is a flexible one that relies on the legal virtuosity of the lawyer to identify and manage the legal risks for his or her client, but the lawyer needs the on-going support and collaboration of the client. A challenge is that LRM remains a shared responsibility, but with an uncooperative client, the lawyer will have a hard time to fulfil his mandate.⁸⁰

Furthermore, LRM is relatively new in the legal profession—as with anything new, a period of adjustment is expected, and senior management of law firms and legal departments must support the implementation of an LRM framework in their organizations.⁸¹ This means change management is required, especially since lawyers usually do not like to be managed and told what to do.⁸²

B. Linking LRM Processes and Tools with ADR in the Commercial Context

LRM helps lawyers to rationalize and objectify (i.e. use and develop objective criteria for negotiation and dispute resolution) their risk

80. *Integrated Risk Management Framework*, *supra* note 64.

81. Davis, *supra* note 65, at 100 (“Almost by definition, lawyers are generally hostile both to being managed and to accepting management responsibility. The normative refrains from lawyers are: ‘No one is going to tell me how to practice law,’ and ‘I didn’t go to law school in order to become a manager.’ As a result, in order to get general acceptance within law firms and among lawyers of the principles of risk management, it is important to be able to demonstrate that it is in their individual and collective self-interest to do so. Accordingly, all risk management systems, policies, and procedures need to be designed and implemented in ways which actively assist lawyers in providing professional services and which, to the greatest extent possible, demonstrably improve efficiency and profitability.”).

82. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

assessments and strategies in legal files.⁸³ The main LRM processes and tools listed below should be linked to negotiation and dispute resolution in the commercial context. First, all law firms should have an comprehensive LRM framework based on *ISO 31000:2009*, Risk management – Principles and Guidelines, *which* provides principles, a framework, a process, and standard vocabulary for managing risk.⁸⁴ Based on the ISO model and LRM process from the Department of Justice Canada, risk management can be viewed as a five step approach that can be illustrated in LRM by the following graphic⁸⁵:

83. Just as physicians are vulnerable to subjective and poor decision-making in exercising their profession, lawyers are too. Researchers in the medical profession have demonstrated that no methods exist for eliminating biases in medical decision making, but there is some evidence that the adoption of an evidence-based medicine approach or the incorporation of formal decision analytic tools such as **risk management** can improve the quality of doctors' reasoning. Brian H. Bornstein & A. Christine Emler, *Rationality in Medical Decision Making: A Review of the Literature on Doctors' Decision-Making Biases*, 7 J. EVALUATION CLINICAL PRAC. 97, 97 (2001) ("No surefire methods exist for eliminating biases in medical decision making, but there is some evidence that the adoption of an evidence-based medicine approach or the incorporation of formal decision analytic tools can improve the quality of doctors' reasoning. Doctors' reasoning is vulnerable to a number of biases that can lead to errors in diagnosis and treatment, but there are positive signs that means for alleviating some of these biases are available.").

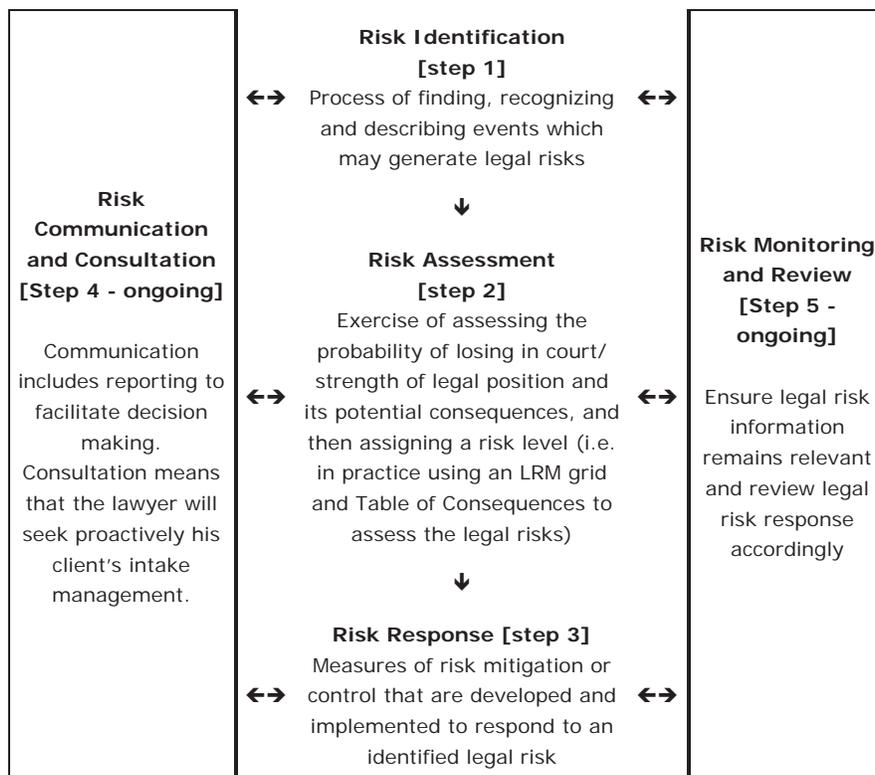
84. See *ISO 31000 - Risk Management*, *supra* note 55; see also *ISO Guide 73:2009 Risk management – Vocabulary*, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), http://www.iso.org/iso/catalogue_detail?csnumber=44651 (last visited Apr. 1, 2015).

85. See *ISO 31000 - Risk Management*, *supra* note 55; see also Patrick Vézina, *Ministry of Justice of Canada (Ottawa, Canada): Implementation of Strategies and Methods for Managing the Legal Risks in State Institutions*, SKOPJE LEGAL RISK MANAGEMENT 2014 (Oct. 21 2014), <http://akademikconference.mk/conference/2014/Program>; see also LEGAL RISK MANAGEMENT, DEPARTMENT OF JUSTICE CANADA, available at <http://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/08/lrm-grj/p0.html> (last visited Apr. 2, 2015).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL



[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

This five step approach based on the seven step approach of ISO is not always sequential and linear and is often more circular.⁸⁶ This means the lawyer often has to go back to re-identify and reassess the legal risks if the environment and facts change, which is why the risk communication and consultation step and risk monitoring and review step are on-going tasks for the lawyer.⁸⁷ For instance, when conducting an interview with one of Canada's top commercial litigators, Todd Burke⁸⁸—Partner in Gowlings' Ottawa office focusing on complex commercial litigation and risk management—states that this ability is what distinguishes average commercial lawyers from star ones.⁸⁹

In commercial litigation or arbitration, it may be easier to identify the legal risks because the parties exchange documents (i.e. pleadings, etc.) that facilitate the legal risk assessment. The non-legal consequences of the probability of losing a case are easier to foresee. For instance, this is why contingency plans with funds are created when an organization anticipates losing a case in court.⁹⁰ Also, the legal risk already exists and cannot be

86. *ISO 31000 - Risk Management*, *supra* note 55 (discussing that risk management is an on-going process that must be conducted from an integrated risk management perspective).

87. *Id.*

88. See Todd Burke, GOWLINGS, <http://www.gowlings.com/OurPeople/todd-burke> (last visited Feb. 9, 2015).

89. Interview with Todd Burke, Partner, Gowlings, in Ottawa, Canada (Sept. 20, 2013).

90. Kenneth E Harrison et al., *Judging The Probability of a Contingent Loss: An Empirical Study*, 5 CONTEMP. ACCT. RES. 642, 643 (1989) (theorizing that in public accounting for publically traded companies or governmental organizations, contingency financial planning, such as litigation contingency, is vital for an organization as long as the thresholds between the "remote" and "reasonably possible" criteria and between the "reasonably possible" and "probable" criteria are acceptable from an auditor's point of view). Legal risk management is also widely used by financial companies providing third party litigation funding. See Jason Lyon, *Revolution In Progress: Third-*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

ignored. However, in advisory context such as commercial bargaining and dealmaking, the work of the commercial lawyer is preventive by nature and is all about strengthening the legal position of the client. Advisory work is, therefore, more fact driven and things can change rapidly, making the lawyer-client shared responsibility of risk communication and consultation and risk monitoring and review even more crucial. Furthermore, commercial litigation and arbitration offer a more structured and predictable environment to assess the legal risks because of the procedural law of litigation and arbitration. Conversely, the advisory context is more fluid and unpredictable because no specific procedures must be followed. This is why LRM is more used in the commercial litigation context than the advisory environment. For example, the Department of Justice Canada, considered the largest law firm in the country with more than 2,500 lawyers across Canada,⁹¹ is the only large “law firm” in Canada currently operating with a comprehensive legal risk management framework harmonized, cohesive and consistent for its litigation and advisory legal services.⁹² A LRM framework for an organization should offer a LRM toolbox with an LRM Assessment Matrix and Table of Consequences to help the lawyer assessing the legal risks in a holistic and systemic manner by assessing the non-legal impacts

Party Funding of American Litigation, 571 UCLA L. REV. 58 (2010). If the likelihood of winning the case and the strength of the legal position are not strong, they will not invest in a lawsuit. *See id.* at 592 n.150.

91. *See* OFFICE OF THE AUDITOR GENERAL OF CANADA, 2007 MAY REPORT OF THE AUDITOR GENERAL OF CANADA (2007), available at <http://www.oag-bvg.gc.ca/internet/docs/20070505ce.pdf> (stating that with approximately 2,500 lawyers work for Justice Canada. Since our last audit in 1993 the annual cost of the Department’s legal services has more than tripled to over \$600 million); *Legal Risk Management in the Department of Justice*, *supra* note 16.

92. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

and consequences, such as financial, business, ethical, and reputational concerns.⁹³ Here is an example of an LRM Matrix below composed of the Legal Assessment Matrix and Table of Consequences (the LRM Matrix works is the main tool for lawyers to assess a legal risk⁹⁴:

93. See *ISO 31000 - Risk Management*, supra note 55; see also THE ISO RISK MANAGEMENT TOOLBOX, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO), http://www.iso.org/iso/home/news_index/news_archive/news.htm?Refid=Ref1585 (last visited Apr. 2, 2015). A LRM Matrix is a tool to calculate the legal risk level on basis of the two fundamental components of a legal risk (i.e. likelihood x consequences). First, the lawyer assess if the legal risk is low, medium or high (or if the legal position is weak, moderate or strong) on basis of the facts and the law. Therefore, the legal risk will first be situated in the low, medium or high range boxes and the highest consequences will determine the overall legal risk level. For instance if the legal risk is medium based on the facts and the law, but the highest consequence is high (e.g. financial consequences are high), the legal risk level will be high. However, if the legal risk is medium but the highest consequence is medium, the legal risk will be high (the highest level of consequence determines the final level of consequence for the legal risk). It is important for a lawyer to always assess all legal risks separately because consequences are often different. For instance, in a tort liability legal risk assessment for the operation of Waterpark, a Counsel will not be able to assess the overall risk level for tort liability, the Counsel will have to separate all the legal risks of tort liability. Everybody will agree that the potential financial and reputational consequences of the legal risk of damages to personal property for the operation of the Waterpark are different and separate from the ones for the legal risk of personal injury.

94. See the Risk Management framework of the Southern Cross University (SCU) in Australia, noting the Risk Likelihood and Consequence Descriptors. *Welcome to Risk Management at SCU*, SOUTHERN CROSS UNIVERSITY, http://scu.edu.au/risk_management/index.php/4 and Risk Matrix (last visited Apr. 10, 2015); *Risk Rating*, SOUTHERN CROSS UNIVERSITY, http://scu.edu.au/risk_management/index.php/5 (last visited Apr. 10, 2015).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Legal Assessment Matrix						
HIGH CONSEQUENCES	Medium Risk 7	High Risk 8		High Risk 9		
MEDIUM CONSEQUENCES	Low Risk 4	Medium Risk 5		High Risk 6		
LOW CONSEQUENCES	Low Risk 1	Low Risk 2		Medium Risk 3		
	The lawsuit is almost certain to fail/ The legal position is extremely strong	It is very probable that the lawsuit will fail/ The legal position is very strong	It is more probable than not that the lawsuit will fail/ The legal position is moderate and has some vulnerabilities	It is more probable than not that the lawsuit will succeed/ The legal position is less than moderate and closer to being weak/ The legal position is vulnerable	The lawsuit has high probabilities to succeed/ The legal position is very weak	The lawsuit has high probabilities to succeed or is almost certain to succeed/ The legal position is extremely weak
	0-10%	11-30%	31-49%	50-70%	71-90%	91-100%
PROBABILITY OF LOSING IN COURT AND STRENGTH OF LEGAL POSITION						
Low/Strong		Medium/Moderate		High/Weak		
0-30%		31-70%		71-100%		

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Table of Consequences					
	Legal Consequences: Regulatory breach; Directors or officers liability breach of duty of care, duty of loyalty or fiduciary duty, etc.); breach of contractual or tort obligations; or criminal liability for the corporation or directors or officers.	Corporate consequences: Business planning, horizontal impact on the organization (e.g. in the multinational all the subsidiaries are affected), resources and operations affected.	Financial Consequences: Fine, award, penalty, legal fees, loss of business customers and investors, stock devaluation, overall profitability and productivity reduced.	Ethical consequences: Breach of the ethical code of conduct of the organization and corporate social responsibility practices questioned internally and externally, lack of ethical leadership causing recurrence of unethical behaviors. Legitimacy of the corporate decision-making questioned.	Reputational consequences: Loss of respect of the investors and public, loss of trust of employees, Reputation or brand affected, external relations with stockholders and stakeholders affected, scare away potential partners or buyers for mergers and acquisitions or strategic alliances.
HIGH CONSEQUENCES	High	High	High	High	High
MEDIUM CONSEQUENCES	Medium	Medium	Medium	Medium	Medium
LOW CONSEQUENCES	Low	Low	Low	Low	Low

Other LRM tools could comprise a guide for LRM assessment techniques.⁹⁵ Such could include a glossary for LRM standard vocabulary as well as a guide with frequently asked questions (FAQ).⁹⁶

95. See Matthew Leitch, *ISO 31000: 2009—The New International Standard on Risk Management*, 30 RISK ANALYSIS 887, 892 (2010) (explaining that while the new standard supports a new, simple way of thinking about risk and risk management and is intended to begin the process of resolving the many inconsistencies and ambiguities that exist between many different approaches

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

C. *The Key Advantages and Challenges of Using ADR Techniques to Help Lawyers Manage Non-Substantive Matters (i.e. emotional and relational matters in commercial negotiations and disputes)*

ADR techniques help reach more efficient and durable agreements and settlements by uncovering fears, concerns, and interests of the parties in a mutually beneficial way.⁹⁷ ADR techniques can also serve to improve risk communication and management for better outcomes.⁹⁸ In other words, if LRM is viewed more as a scientific approach to achieving legal problem prevention instead of focusing mainly on problem-solving,⁹⁹ negotiation and

and definitions, it does create challenges for those who use languages and approaches that are unique to their area of work, but are different from the new standard and guide).

96. *Id.*

97. ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (Penguin Books, 2006) [hereinafter *BEYOND REASON*] (“We cannot stop having emotions any more than we can stop having thoughts. The challenge is learning to simulate helpful emotions in those with whom we negotiate- and in ourselves.”).

98. Research shows that a lawperson does not always trust a risk assessment or report from an expert; therefore, risk communication based on ADR techniques in order to build trust is vital. *See* Paul Slovic, *Perceived Risk, Trust, and Democracy*, 13 *RISK ANALYSIS* 675, 675 (1993) (“Risk management has become increasingly politicized and contentious. Polarized views, controversy, and overt conflict have become pervasive. Risk-perception research has recently begun to provide a new perspective on this problem. Distrust in risk analysis and risk management plays a central role in this perspective. According to this view, the conflicts and controversies surrounding risk management are not due to public ignorance or irrationality but, instead, are seen as a side effect of our remarkable form of participatory democracy, amplified by powerful technological and social changes that systematically destroy trust. Recognizing the importance of trust and understanding the ‘dynamics of the system’ that destroys trust has vast implications for how we approach risk management in the future.”).

99. SUSSKIND, *supra* note 10.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

ADR can be viewed as an art.¹⁰⁰ However, it must be noted that risk management is not a science because risk is emotionally, socially, culturally, and politically constructed, perceived, and managed.¹⁰¹

For example, the probability of a commercial risk occurring relies mostly on human behavior—people are not robots and are often unpredictable. Nevertheless, risk management remains rigorously and systematically scientific in its approach.¹⁰² This is why actuaries are highly praised (and paid) as the top expert risk managers in the commercial world—because of their mathematical ability to evaluate the probability of events and quantify the contingent outcomes in order to minimize the impact of financial losses associated with uncertain and undesirable events.¹⁰³ Actuaries use skills primarily in mathematics, particularly calculus-based probability, and mathematical statistics, but also economics, computer science, finance, and management to help organizations assess the risk of certain events occurring and to formulate corporate policies that minimize the cost of that risk.¹⁰⁴ Therefore, risk management frameworks for

100. See Kahn, *supra* note 44, at 223, 234 (1994).

101. See K. Dake, *Myths of Nature: Culture and the Social Construction of Risk*, 48 J. SOC. ISSUES, 21, 21 (1992) (“Most research on the perception and communication of risk has focused on possible harms, largely ignoring the cultural contexts in which hazards are framed and debated, and in which risk taking and risk perception occur. This article argues that, while individuals perceive risks and have concerns, it is culture that provides socially constructed myths about nature—systems of belief that are reshaped and internalized by persons, becoming part of their worldview and influencing their interpretation of natural phenomena.”).

102. Andreas Klinke & Ortwin Renn, *A New Approach to Risk Evaluation and Management: Risk-Based, Precaution-Based, and Discourse-Based Strategies*, 22 RISK ANALYSIS 1071 (2002).

103. See ALEXANDER J. MCNEIL ET AL., *QUANTITATIVE RISK MANAGEMENT: CONCEPTS, TECHNIQUES, AND TOOLS* (2010).

104. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

business, financial, insurance, medical, and governmental organizations are principally influenced by actuarial science.¹⁰⁵ Risk management, however, is not a science and as a result, this is not only a rational and calculative enterprise, but also a social and emotional one.¹⁰⁶ Especially in the medical or legal profession, risk management requires doctors and lawyers alike to be emotionally intelligent in order to manage their own emotions and the emotions of their patients/clients.¹⁰⁷ These main ADR techniques should be linked to LRM in the commercial context.

1. Managing Emotions

Negotiation scholarship demonstrates that in managing a dispute, the negotiator should separate the non-substantive matters (i.e. personal, emotional, or relational problems) from the substantive matters.¹⁰⁸ Emotions in negotiation and dispute resolution are powerful, always present and hard

105. *Id.*

106. Dake, *supra* note 101 (theorizing on the fact that risk management is not a science because risk is a social construction).

107. Hui-Ching Weng et al., *Doctors' Emotional Intelligence and The Patient-Doctor Relationship*, 42 MED. EDUC. 703 (2008) (concluding that emotional intelligence coaching for doctors and interdisciplinary collaboration among clinicians are needed to optimise the efficient and therapeutic function of the patient-doctor relationship for patients). For the legal profession, see Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y, & L. 1173 (1999).

108. GETTING TO YES, *supra* note 47, at 17-40 (discussing the importance to separate the people from the problem (or non-substantive matters) from substantive matters (or objective criteria)).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

to manage.¹⁰⁹ LRM is primordial because negotiations and disputes are formed by rational arguments based on the law and facts.¹¹⁰ However, in negotiation and dispute resolution, there is always more than rational argument based on the law and facts present because human beings are not computers or robots that can be programmed.¹¹¹ Even though LRM exists to objectify and rationalize the practice of law, we cannot stop having emotions any more than we can avoid all risks at all times.¹¹² Both emotions and risks

109. BEYOND REASON, *supra* note 97, at 5 (explaining that emotions are powerful, always present and hard to handle); *see also* Clark Freshman, Adele Hayes, & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know about How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1 (2002).

110. GETTING TO YES, *supra* note 47, at 81-95 (asserting that successful negotiations are based on objective criteria).

111. BEYOND REASON, *supra* note 97, at 9-10 (affirming from the perspective of psychology that this is impossible to stop having emotions).

112. *Id.* at 9-10 (affirming from the perspective of psychology that this is impossible to stop having emotions); *see* L. Sjöberg, *Emotions and Risk Perception*, 9 RISK MGMT. 223 (2007) (“Emotions do indeed play an important role in risk perception and related attitudes. In one study, it was found that interest in a hazard (a positive emotion) was positively correlated with perceived risk. Interest was an important explanatory factor in models of demand for risk mitigation. Much recent work on emotions and attitudes suggests a three-step process, where initial cognitive processing gives rise to emotions, which in turn guide the further, more elaborate, cognitive processing. The notion of the primacy of a primitive initial emotional reaction governing belief contents is rejected. Risk communication based on such a simplistic neurophysiological model is likely to fail.”). This research supports the argument that risk communication influenced the risk perception and that the initial emotional reaction towards a risk can be modified. This research also supports the author’s definition of negotiation and dispute resolution in LRM context (as first getting your client to perceive what you want them to perceive in terms of legal risks and priorities, and second, getting the other side to perceive what you want them to perceive in terms of legal risks and priorities of your client).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

are inevitable and tend to be interconnected.¹¹³ In fact, the greater the risk of losing, the greater the anxiety and emotions involved.¹¹⁴ Emotions affect our bodies, thinking, and behaviours.¹¹⁵ Although, commercial law is traditionally litigation and transactional-based,¹¹⁶ even wise “old school” or “hard-nosed” commercial lawyers are starting to have a positive perception of ADR.¹¹⁷ Astute lawyers understand that using ADR techniques are not an exercise of sensitivity, but rather an exercise of strategic necessity.¹¹⁸ Emotions can be an obstacle to negotiation and dispute resolution.¹¹⁹ Emotions can divert attention from substantive matters and effective LRM;

113. BEYOND REASON, *supra* note 97.

114. *Id.*

115. *Id.* at 3-15 (explaining the impact of emotions on negotiation and dispute resolution process).

116. Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989) (asserting that in all modern liberal economies commercial law is constantly evolving to assist commercial transactions). In other words, commercial law assists commercial dispute prevention and resolution (litigation). The emergence of economic law comes from the influential legal scholar and economist Richard A. Posner. See Richard A. Posner, *Economic Approach to Law*, 53 TEX. L. REV. 757 (1974) (asserting that there was even in 1974 a growing interest among both economists and academic lawyers in using the theories and characteristic empirical methods of economics to increase our understanding of the legal system).

117. John Lande, *Getting The Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137 (2000) (asserting that business executives and lawyers believe in commercial mediation).

118. *Id.*; see also ROBERT GREENE, *THE 33 STRATEGIES OF WAR* 169 (Penguin Books, 2007) (discussing the importance to view adaptation not as an exercise of sensitivity but as an exercise of strategic necessity for winning wars).

119. BEYOND REASON, *supra* 91, at 5 (asserting that emotions can be obstacle to negotiation and dispute resolution).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

emotions can damage a relationship and can be used to exploit you.¹²⁰ What to do with emotions then? Instead of getting caught up in the very emotion that you and others are feeling, ADR techniques teach one to focus his or her attention on what generates these emotions.¹²¹ Far from trying to become a psychologist, lawyers at least need to understand the core concerns that stimulate emotions in a commercial negotiation or dispute. Although money talks and drives people in the business world, it is simplistic to think that money (profit or cost saving) is the sole motivation that generates behind risk perception and emotions.¹²²

Most people have learned the pioneer theory in social psychology of Maslow's hierarchy of needs.¹²³ On this basis, the influential co-author of *Getting to Yes*,¹²⁴ Roger Fisher, along with Daniel Shapiro from the Harvard Negotiation Project, have established the Five Core Concerns that stimulate

120. *Id.*

121. *Id.* at 15.

122. See Russell W. Belk & Melanie Wallendorf, *The Sacred Meanings of Money*, 11 J. ECON. PSYCHOL. 35 (1990) ("Contemporary money retains sacred meanings, as suggested in expressions such as 'the almighty dollar' and 'the filthy lucre.' Drawing on ethnographic data, the authors find that the interpretation of money as either sacred or profane depends on its sources and uses and that traversing the boundaries between the sacred and the profane is possible only with attention to proper context and ritual. In order to better understand people's use of money, it is necessary to consider the non-economic sacred functions that money may well have originally served and often continues to serve in modern economies. The thesis that modern money can be sacred and that it is sacralized by certain processes offers insight into some of the more puzzling ways in which people behave toward money.").

123. See Mark E. Koltko-Rivera, *Rediscovering the Later Version of Maslow's Hierarchy of Needs: Self-Transcendence and Opportunities for Theory, Research, and Unification*, 10 REV. GEN. PSYCHOL. 302 (2006) (theorizing that Maslow's hierarchy of needs still relevant for modern psychology).

124. GETTING TO YES, *supra* note 47.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

emotions in negotiation and dispute resolution.¹²⁵ Similar to Maslow's pyramid of needs, these Five Core Concerns are 1) appreciation, 2) affiliation, 3) autonomy, 4) status, and 5) role.¹²⁶

The risk for a lawyer of focusing solely on substantive legal matters and ignoring these Five Core Concerns can cause the client or the other party to feel unappreciated (breaches the concern of appreciation), treated as an adversary (breaches the concern of affiliation), feel subjugated or alienated (breach of autonomy), or feel like his or her status is being put down (breach of status) or that his or her role is trivialized and restricted (breach of role).¹²⁷ The resulting emotions of these breaches can make a client or other party involved in a negotiation or dispute uncooperative, vindictive, act deceptively, angry, disgusted, guilty, ashamed, anxious, envious, jealous, or sad.¹²⁸

On the other hand, the power of meeting these Five Core Concerns can make a client or the other party feel cooperative, creative, enthusiastic, affectionate, happy, proud, hopeful, or calm.¹²⁹ Unlike Maslow's hierarchy of needs, which is represented as a pyramid with the more basic needs at the bottom and more complex needs as the top (i.e. physiological, safety, love/belonging, esteem, self-actualization), the Five Core Concerns offer these concerns as a lens to see a situation more clearly and to diagnose it.¹³⁰

125. BEYOND REASON, *supra* 91, at 15.

126. *Id.*

127. *Id.* at 19.

128. *Id.*

129. *Id.*

130. *Id.* at 20.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In other words, neither a negotiation nor a dispute can be generalized or viewed as universal; they should remain unique and situational.¹³¹

When preparing, conducting, and reviewing a negotiation or dispute, the lawyer should try to determine what concerns are at stake in a particular situation.¹³² Also, lawyers should consider that because risk perception and interpretation are influenced by culture,¹³³ the importance of emotions and concerns can change dramatically in a cross-cultural context.¹³⁴ For instance, one of the predominant criticisms of Maslow's pyramid of needs is the order in which the hierarchy is arranged. Placing self-actualization as the highest need has been criticized as being ethnocentric because in individualistic societies (like Canada or the United States), people tend to be more self-centered or self-focused, whereas in collectivistic societies (such as Mexico, China or Japan), the needs of acceptance and community will outweigh the needs for freedom, individuality, and self-achievement.¹³⁵

131. See RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* xvi-xvii (Penguin Books, 2d ed. 2006) (demonstrating that experienced negotiators know that there are too many situational and personal variables for a single strategy to work in all cases and should aspire to transcend the dual-orientation between "win-win" versus "win-lose" orientation in negotiation).

132. *BEYOND REASON*, *supra* 91, at 15.

133. See Patrick M. Kreiser et al., *Cultural Influences on Entrepreneurial Orientation: The Impact of National Culture on Risk Taking and Proactiveness in SMEs*, 34 *ENTREPRENEURSHIP THEORY & PRAC.* 959-983 (2010) (explaining the influence of risk on entrepreneurial behaviors).

134. For instance, appreciation and affiliation will be more important for collectivist cultures such as Argentina, China or Japan. See GEERT HOFSTEDE, GERT JAN HOFSTEDE & MICHAEL MINKOV, *CULTURES AND ORGANIZATIONS, SOFTWARE OF THE MIND, INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL* 89-134 (McGraw-Hill, 3d ed. 2010) (offering an empirical classification and theoretical comparison between Individualist and Collectivist cultures).

135. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

In sum, the core concerns are human wants, fears, and motivations that are crucial to almost everyone in virtually every negotiation and dispute resolution. It is vital to uncover the core concerns that stimulate emotions and the perception of legal risks.¹³⁶ The Five Core Concerns are simple enough to be used immediately, yet sophisticated enough to be utilized in complex negotiations and disputes.¹³⁷ As mentioned previously, both the medical and legal profession have discovered that the promotion of emotional intelligence is core to the effectiveness for their professionals and can improve their relation with their patient or client and increase satisfaction with work, relationships, and themselves.¹³⁸

2. Cross-Cultural Understanding

A deeper understanding of risk and the role of risk perception for risk management requires integrating the results of psychological, sociological, and cultural studies.¹³⁹ Cross-cultural research studies contribute to existing theories of national culture by suggesting that the various dimensions of cultural values and several of the institutions that are representative of national culture impact the willingness of entrepreneurial firms to display risk taking and proactive behaviors.¹⁴⁰ Virtually all current theories of choice under risk or uncertainty are cognitive and consequentialist.¹⁴¹

136. BEYOND REASON, *supra* note 97, at 20.

137. *Id.* at 21.

138. *See supra* note 109.

139. *See* ORTWIN RENN & BERND ROHRMANN, EDS., *CROSS-CULTURAL RISK PERCEPTION: A SURVEY OF EMPIRICAL STUDIES* (Springer 2000).

140. *See* Kreiser et al., *supra* note 133, at 959-83.

141. *See* George F. Loewenstein et al., *Risk as Feelings*, 127 *PSYCHOL. BULL.* 267 (2001).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

People assess the desirability and probability of possible outcomes of choice alternatives and integrate this information through some type of expectation-based calculus to arrive at a decision.¹⁴²

For example, in empirical studies, the risk judgments of respondents from Hong Kong and Taiwan were more sensitive to the magnitude of potential losses and less mitigated by the probability of positive outcomes.¹⁴³ Research also shows that the cultural biases of Hierarchy, Individualism, and Egalitarianism are predictive of distinctive rankings of possible dangers and preferences for risk taking at the societal level.¹⁴⁴ The four layers of the “laws-in-minds” and “software of the mind” of a negotiator involved in a negotiation or dispute developed by Garrick Apollon¹⁴⁵ illustrate this holistic perspective on the influence of culture:

142. *See id.*

143. *See* Robert N. Bontempo et al., *Cross-Cultural Differences in Risk Perception: A Model-Based Approach*, 17 RISK ANALYSIS 479 (1997).

144. *See* Karl Dake, *Orienting Dispositions in the Perception of Risk an Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCHOL. 61 (1991).

145. *See* Apollon, *supra* note 62, at 393 nn.37 & 39.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution
PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL



In sum, this graphic shows that many other factors come into play in risk perception, such as the individual's personality and professional culture,

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

which must be linked with his or her national culture and organizational culture in order to determine the cultural biases.¹⁴⁶

3. Measuring Outcomes

In the field of LRM, as well as negotiation and dispute resolution, research that measures outcomes typically focuses on objective economic measures of performance.¹⁴⁷ However, social-psychological measures are also important because lawyers do not have the information necessary to accurately judge the legal risks of the bargaining or dispute resolution situation.¹⁴⁸ A lawyer's ability to complete an accurate legal assessment may be dampened by several factors, such as lack of information, lack of time, situational constraints based on resources or power, and self-selection processes.¹⁴⁹ The lawyer and the client's judgments are biased, and biases are associated with inefficient performance.¹⁵⁰ In other words, dispute resolution theory and research have traditionally focused on objectifying and rationalizing conflict management strategies in compliance with the

146. *Id.* at 392-93 (explaining that cross-cultural contract negotiations should be discussed in terms of four hierarchical and interdependent influences: (1) national culture, (2) organizational culture, (3) professional legal culture, and (4) the negotiator's personality). Similarly, risk management should be discussed in terms of these four hierarchical and interdependent influences.

147. For negotiation and dispute resolution, see Leigh Thompson, *Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues*, 108 *PSYCHOL. BULL.* 515 (1990).

148. *Id.*

149. LEISS & CHOCIOLO, *supra* note 1, at 12 (theorizing on the relation between components and determinants of risk).

150. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

transactional perspective of cost effectiveness and productivity.¹⁵¹ Far less attention, however, has been devoted to subjective or “soft” outcomes, including satisfaction of the parties (i.e., of the lawyer, client and other parties), loyalty and commitment in the lawyer-client relationship and turnover intentions (i.e., if the client will retain another lawyer or in the case of in-house counsel, simply not consult the lawyer anymore), or the client’s relationships with other parties in relation to overall individual and organizational health and well-being.¹⁵²

This state of affairs is unfortunate because it isolates dispute resolution theory and research from the fact that social-psychological measures such as “soft” outcomes—and not just transactional or economic measures—are necessary for lawyer-client relationships when managing commercial legal risks for the negotiation or resolution of commercial disputes.¹⁵³ Lawyers are usually client-driven, often focusing only on “hard” outcomes—such as providing comprehensive and factual legal risk assessments and legal opinions—but may forget that we live in an imperfect world where legal realism shows that lack of power and control, lack of information, and lack of time are the three basic determinants of risk as mentioned at the beginning.¹⁵⁴ Practically speaking, this means that because of the basic determinants of risk, both LRM and dispute resolution must be practiced on the premise that a perfect legal risk assessment or legal opinion to guide our

151. See Carsten K. W. De Dreu & Bianca Beersma, *Conflict in Organizations: Beyond Effectiveness and Performance*, 14 EUR. J. WORK & ORGANIZATIONAL PSYCHOL. 105, 105-06 (2005).

152. *Id.*

153. *Id.*

154. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

clients is something impractical and unrealistic.¹⁵⁵ While the lawyer has the ethical duty to deploy his or her best efforts to offer detailed, diligent, ethical, and practical legal opinions and risk assessments, ADR techniques can improve the “soft” outcomes because social-psychological measures are also primordial in the practice of law to achieve client satisfaction.¹⁵⁶

4. Getting Better Outcomes

Negotiation between two individuals is a common task that typically involves two goals: maximize individual outcomes and obtain an agreement.¹⁵⁷ However, research on the simplest negotiation tasks demonstrates that, although naïve subjects can be induced to improve their performance, negotiators are often no more likely to achieve fully optimal solutions.¹⁵⁸ Negotiators often think that they are more efficient and effective than they really are.¹⁵⁹ Many negotiations provide opportunities for integrative agreements in which parties can maximize joint gains without

155. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990) (arguing that the traditional model of legal ethics is premised on formalist assumptions about the constraining power of legal rules). Specifically, that model assumes that “the bounds of the law” provide objective, consistent, and legitimate system of legal analysis. *Id.* However, this article demonstrates that the law is imperfect and as a result legal ethics is crucial.

156. See Tiziana Casciaro & Miguel Sousa Lobo, *Competent Jerks, Lovable Fools, and the Formation of Social Networks*, 83 HARV. BUS. REV. 92 (2005) (asserting that for some managers deem like-able people’s “soft” contributions as less important than technical expertise and skills or effectiveness).

157. See Leigh Thompson & Reid Hastie, *Social Perception in Negotiation*, 47 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 98 (1990).

158. *Id.*

159. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

competing for resources in a direct win-lose fashion. Negotiators, however, often settle for suboptimal compromise agreements rather than search for mutually beneficial or integrative agreements.¹⁶⁰ Therefore, ADR techniques serve to help lawyers master the art of negotiation and dispute resolution.

Are happy, optimistic, and nice lawyers (both with their clients and in relation to the other side) more likely to be cooperative and successful negotiators? The answer is yes. Based on empirical research, the old saying that “you can catch more flies with honey than with vinegar” appears to be true.¹⁶¹ Experiments have found that both good and bad moods had a significant mood-congruent effect on people’s thoughts and plans as well as on their negotiation strategies and outcomes in both interpersonal and intergroup bargaining; and further that the mood of the opposition also produced more mood-congruent bargaining strategies and outcomes.¹⁶² This goes back to the fact that emotions are—somewhat like a virus—contagious.¹⁶³

However, experiments have shown that mood effects have a limited impact on people scoring high on Machiavellianism and the need for approval, such as in power distance and process-oriented bureaucratic settings.¹⁶⁴ Because a lot of people score highly on Machiavellianism and are process-oriented (especially in political organizations such as public

160. GETTING TO YES, *supra* note 47, at 58-59.

161. See Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY & SOC. PSYCHOL. 565 (1998).

162. *Id.*

163. *Id.*

164. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

sector organizations or large Multinational Corporations), being nice and cooperative (win-win) is not always the answer in negotiation and dispute resolution.¹⁶⁵ Lawyers who score highly on Machiavellianism and who are process-oriented can manipulate the legal risk communication and assessments to get their client to perceive what they want them to perceive for the benefit of their own unethical agendas, such as overbilling or raising their profiles by ranking legal risks high when they are in reality medium or low.

In an organization where an LRM framework is established, however, it is harder for lawyers to manipulate their clients because these governance structures objectify the practice of law.¹⁶⁶ For instance, if a lawyer says a legal risk is a high risk and will necessitate a lot of billable hours to his client and colleagues, that lawyer will be held accountable based on the framework to explain why. Clients who score highly on Machiavellianism and who are process-oriented can also manipulate the risk information they need to provide to the lawyer.¹⁶⁷ This is why lawyers need to use disclaimers, such as “based on the information available and that you provided me,” when starting their legal opinions.

Finally, depending on the client and situation, an astute lawyer should also consider a mix of collaborative and competitive bargaining strategies in

165. See Katja Funken, *The Pros and Cons of Getting to Yes-Shortcomings and Limitations of Principled Bargaining in Negotiation and Mediation*, ZEITSCHRIFT FÜR KONFLIKTMANAGEMENT (2001).

166. See Forgas, *supra* note 161.

167. *Id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

the LRM process in order to avoid being taken advantage of or duped by Machiavellian or process-oriented clients.¹⁶⁸

III. HOW TO USE LRM IN COMMERCIAL NEGOTIATIONS

LRM is all about scanning the environment to proactively manage legal threats and find opportunities.¹⁶⁹ LRM helps to determine the bargaining strategy (the formation of the contract) and the contractual relationship. For example, a significant portion of federal public spending in Canada—approximately \$37 billion every year—is transferred through grant and contribution agreements to organizations of various types, including businesses and other governments that undertake actions consistent with the federal government's goals.¹⁷⁰ The federal grants and contribution agreements (also called financing agreements) range from health research and employment programs to investments in R&D and innovation.¹⁷¹ A 2012 Report of the Auditor General of Canada focusing on grant and contribution programs showed that despite the recent efforts of the Canadian

168. *Id.*; see Garrick Apollon, MMA NEGOTIATION, 15 U. DENV. SPORTS & ENT. LAW J. 3, 3-83 (2013) (discussing the limitations of win-win or integrative negotiation and dispute resolution and inviting negotiator to adopt a more holistic way to negotiate deals and disputes).

169. See *ISO 31000 - Risk Management*, *supra* note 55.

170. See generally FROM RED TAPE TO CLEAR RESULTS, TREASURY BOARD OF CANADA SECRETARIAT (2006), <http://publications.gc.ca/collections/Collection/BT22-109-2007E.pdf> (explaining that in 2006 “nearly \$27 billion spent every year on more than 800 grant and contribution programs operated across Canada by more than 50 federal departments and agencies”). “[T]hese various transfer payment programs are an important expression of the Canadian federal government's role in society, and together they represent some 13 per cent of total federal spending.” *Id.*

171. *Id.* at 92 (presenting R&D programs in the largest thirty grant and contribution programs).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

federal government to streamline the administrative and reporting burden on grant and contribution recipients, red tape still compromises the effectiveness of the delivery of the federal programs.¹⁷² The overall solution proposed by the Auditor General of Canada is a better risk management approach.¹⁷³

The audit gives the example of the University of Victoria in Canada, which sought funding from the federal government for a research project to install a hybrid power system in a marine vessel.¹⁷⁴ This project was considered to have high potential in R&D and innovation; and, as a recipient of federal funds for the past eleven years based on past performance and successful completion of previous projects, the University of Victoria had been ranked low risk.¹⁷⁵ The University's researchers have complained, however, that reporting requirements and overall red tape, even for a low risk venture, were still affecting their ability to do less paper work and focus instead on the successful completion of the project.¹⁷⁶ This example demonstrates the fundamental importance of developing an integrated risk management framework and approaches that are more sensitive to the environment. In this case, a zero risk approach means zero trust in the recipient and fewer results.¹⁷⁷ The grant agreement should have included a

172. See OFFICE OF THE AUDITOR GENERAL OF CANADA, REPORT OF THE AUDITOR GENERAL OF CANADA TO THE HOUSE OF COMMONS, CHAPTER 2: GRANT AND CONTRIBUTION PROGRAM REFORMS 3-4 (2012), available at http://www.oag-bvg.gc.ca/internet/docs/parl_oag_201210_02_e.pdf.

173. *Id.* at 21.

174. *Id.* at 10.

175. *Id.* at 10.

176. *Id.*

177. See *id.*

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

general audit provision to verify the financial and technical performance of the recipient if necessary—such provision will be exercised only if the mid-review report and final report are not satisfactory.

All corporate lawyers are familiar with contractual rights that are not enforced by their client or worse—non-binding agreements. Lawyers often ask themselves, “What good is a contract if it cannot be enforced?” Research conducted by a professor of Harvard University and Northwestern University demonstrated that behavioral and perceptual data suggest that non-binding contracts lead to personal attributions for cooperation; and, thus, may provide an optimal basis for building interpersonal trust in a variety of situations.¹⁷⁸

IV. HOW TO USE LRM IN COMMERCIAL MEDIATION

The role of a lawyer before a commercial mediation should always be to provide a legal risk assessment about the client’s probability of losing the case and the overall strength of the client’s legal position. The legal risk assessment will determine what overall strategy the client should favor for the dispute settlement.¹⁷⁹ If the probability of losing is high and the strength

178. See Deepak Malhotra & J. Keith Murnighan, *The Effects of Contracts on Interpersonal Trust*, 47 ADMIN. SCI. Q. 534, 534 (2002) (finding that when binding contracts that were previously allowed were no longer allowed or no longer chosen, trust dropped significantly; and that removal of non-binding contracts led to considerable cooperation, reducing trust less than removing binding contracts).

179. GETTING TO YES, *supra* note 47, at 81-128 (asserting the importance of using objective criteria and develop your BATNA—Best Alternative to a Negotiated Agreement—in negotiation and dispute resolution). This article asserts that the use of a legal risk assessment in the practice of negotiation and dispute resolution means negotiating with objective criteria in favor better outcomes. This article also asserts that a legal risk assessment helps to determine the strength of the BATNA

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

of the legal position is weak, the client should focus on compromising and finding a mutually agreeable settlement.¹⁸⁰ Conversely, if the probability of losing is low and the strength of the legal position is strong, the client might offer less compromise.¹⁸¹

The mediation process includes observation, interpretation, and conclusions about a negotiation or dispute resolution.¹⁸² LRM helps client preparation by contributing to the exploration of issues (concerns, fears, interests, etc.), probing for underlying interests, testing with objective criteria, identifying bargaining options, developing negotiation strategy, and improving the overall communication between lawyer-client and the other party. Risk communication between lawyer and client, and with the other party, is key to a successful commercial mediation because it contributes to defining both the substantive and non-substantive issues and interests, generating options, and working on a more durable and efficient settlement agreement.

V. CONCLUSION

This article demonstrates the intersection of LRM and dispute resolution, and reinforces that disputes are composed of two fundamental components. First, lawyers assess a legal risk on the basis of their knowledge of the facts and substantive law based on the constitution, case

(i.e. going to court as plan B instead to reach a settlement agreement out of court as plan A) for a party involved in a legal dispute.

180. *Id.*

181. *Id.*

182. See Laurence Boulle & Allan Rycroft, *Mediation: Principles, Process, Practice*, J. S. AFR. L. 167 (1998).

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

law, legislation, and contract. Second, lawyers also need to consider that a legal risk is also composed of non-substantive or more subjective matters such as social, political, personal, emotional, relational, or cultural issues. LRM helps lawyers manage substantive matters related to commercial negotiations and disputes. On the other hand, ADR techniques can contribute to more effective management of non-substantive matters related to commercial negotiations. LRM can complement ADR and vice versa. LRM relies both on objective and subjective assessment of the negotiation and dispute resolution context. It is non-practical to insulate a legal risk assessment without considering its social context and all its consequences because risk is socially constructed and influenced by an emotional, cultural, political, and social process.¹⁸³ All lawyers rely on their legal experience and judgment to simplify complex and uncertain information.¹⁸⁴ However, as Susskind's best-selling book *The Future of the Law*¹⁸⁵ stresses, this article invites lawyers to change their practice of commercial law by complementing LRM with ADR techniques and vice versa. This new approach will lead lawyers to embrace a more proactive perspective that is focused on dispute prevention rather than dispute resolution.¹⁸⁶ As well, this new approach invites lawyers to move away from reactive legal problem-

183. See *supra* note 103; see K. Dake, *Myths of Nature: Culture and the Social Construction of Risk*, 48 J. SOC. ISSUES 21, 21 (1992) (“[W]hile individuals perceive risks and have concerns, it is culture that provides socially constructed myths about nature—systems of belief that are reshaped and internalized by persons, becoming part of their worldview and influencing their interpretation of natural phenomena.”).

184. See *supra* note 183.

185. SUSSKIND, *supra* note 10.

186. SUSSKIND, *supra* note 10, at 218-22.

[Vol. 15: 267, 2015]

Legal Risk Management and Dispute Resolution

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

solving to proactive legal risk management.¹⁸⁷ As Jimmy Johnson, former Dallas Cowboys head coach once said, “Do you want to be safe and good, or do you want to take a risk and be great?”¹⁸⁸

187. *Id.*

188. DR. PURUSHOTHAMAN, WORDS OF WISDOM 82 (2014).