

Get better results: Plan for negotiation, not trial

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John Lande takes a refreshing approach to litigation, which perhaps only a mediator would have the audacity to offer. His premise is that by encouraging lawyers to take the initiative to plan for negotiation instead of trial, they will not only likely achieve better results for their clients, but will at the same time positively affect their own lives

and the lives of opposing counsel.

Lande begins by explaining his inspiration for writing the book. It grew out of two threads of his research and practice: alternative dispute resolution and teaching lawyering courses at the University of Missouri Law School. Lande examines planned early negotiation (PEN) from both the client and lawyer's perspectives. He acknowledges that the "litigation as usual" strategy typically escalates the original conflict, is time consuming and expensive. What's even more unfortunate, the ultimate settlement in this model is rarely satisfying to either, let alone both, parties. It is, as Lande describes it, an adversarial game that satisfies only those lawyers who enjoy the sport for its own sake. By teaching young law students "lawyering," he aims to change that thinking and offer real alternatives.

Alternative dispute resolution offers the prospect of more satisfying outcomes for both lawyer and client: the parties may accept responsibility for their part in the underlying conduct that lead to the legal dispute; they may arrive at a prescription for new and better future interactions; and in many instances, at least have the chance for face-saving and keeping the disputed matter confidential, which is virtually unattainable in a public trial. He offers examples of clients who win their trials but remain highly dissatisfied because the other side never accepted responsibility for their actions.

Lande provides several models for PEN processes, including hiring settlement counsel and explicit written agreements for either a cooperative or collaborative negotiation. It was impressive to see that IAM President-elect Eric Galton was interviewed about his work as settlement counsel and that IAM Distinguished Fellow David Hoffman is the author of the collaborative negotiation movement, which is striving to permeate not only family disputes but civil disputes of all types.

In considering PEN, Lande asks lawyers to look at why they are hired by their clients. Typically, lawyers are engaged to protect and advocate for clients' legal rights in ways in which the clients were already unsuccessful in advocating on their own behalf. Unfortunately, he notes, in many instances lawyers fail to assess the client's interests beyond "their stated or superficial goals." The default for most lawyers is to proceed with litigation when consulted by a client who has a legal claim that has not been adequately redressed.

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encouraging lawyers to take the initiative to plan for negotiation instead of trial, they will not only likely achieve better results for their clients, but will at the same time positively affect their own lives and the lives of opposing counsel.

Instead of assuming that business as usual is appropriate and preferable, Lande suggests that advocates take the time at the outset of their engagement to educate clients about both their substantive legal rights and procedural options in an effort to help them develop realistic expectations for the next few months and years, as well as a broad range of possible outcomes. And Lande strongly urges advocates to return to this conversation throughout the life of the dispute to ensure that choosing one path does not eliminate all other options in the future.

Lande's chapter on billing systems is a brave effort to highlight the tension between clients' and lawyers' best interests in terms of financial incentives. It is a challenging and precarious issue that arises in many of my mediations, where by recommending acceptance or rejection of an offer of settlement, the lawyer has to evaluate his client's best interest, which is often at variance from his own.

For a plaintiffs' lawyer on a contingency fee, the risk of losing plus the time required to prepare and litigate a case may color his advice to his client. On the other hand, a client with dreams of a big jackpot who is not paying his attorney fees may want to keep litigating regardless of the reasonableness of the offer. On the defense side, early settlement often means losing months if not years of billable work.

Lande offers creative solutions to address these natural but still uncomfortable tensions, such as "triggers" or "strike points" for settlement, combining hourly and contingent fees, value billing and even premiums offered for early settlement. The options present realistic and creative ways to defuse this tension and advance a new paradigm for handling legal disputes in reasonable and ethical ways.

The chapter on negotiation techniques is particularly worth reading for lawyers who intend to negotiate without the assistance of outside mediators. Lande discusses theories that include range analysis and ZOPA (the Zone of Potential Agreement), interest-based v. positional negotiation and other means of getting an agreement that will satisfy both clients and their advocates.

Lande notes that "[a]lthough collegial lawyers often can successfully manage a dispute resolution process without professional assistance, sometimes parties can benefit from using mediators." The conclusion that Lande seems to draw is that in a perfect process, lawyers agreeing to use PEN would not need outside mediators, and it is only where that old adversarial dynamic creeps in that a mediator is critical. Otherwise, he seems to suggest that mediators may be useful to the parties, but not necessary for newly indoctrinated lawyers. On the other hand, he highlights instances in which a professional mediator has hindered the process, frustrating both the framework and the outcome for the parties.

I particularly appreciated the time, care and depth of Lande's analysis of the ethical issues that may arise when advocates adopt PEN into their practice. Questions of confidentiality, diligence, loyalty and client control are addressed within the context of the American Bar Association's Model Code of Professional Responsibility. The book ends with an extensive appendix and includes a CD of forms and checklists for the procedures presented.

By modeling and committing to decent behavior, respectful conduct and a genuine effort to develop good working relationships with both clients and opposing counsel, perhaps a new generation of lawyers can positively affect the practice of law and in so doing the life and well-being of both lawyers and clients. It won't be easy, but it would certainly appear to be a worthwhile goal - especially if the end result would be, as Lande suggests, both good results for clients and making money.