Inspirations for this Book

This book grows out of two threads of my work: (1) my research and practice about (alternative) dispute resolution, and (2) my teaching a lawyering course to law students.

I received my first mediation training in 1982 and then had a solo practice in Oakland, California, for several years where I practiced both mediation and representation. I found that mediation was generally very satisfying for me and my clients. We were able to focus sharply on both parties' interests and usually find ways to efficiently satisfy them. (This is called "interest-based negotiation," or IBN, and is described in Chapter 5.) Freed from the adversarial structure of litigation, my clients often felt comfortable, and even liberated, to speak openly, respectfully, and caringly to each other. In many cases, they were more than just comfortable, they felt *wonderful* about the mediation. It gave them the chance to act like the good people they were and affirm the worth of the other at the same time. It helped them tailor their agreements to work well for both parties. It also felt natural for me to care about both parties in mediation and help them find a solution they both would feel comfortable with.

In the mid-1990s, I directed a child protection mediation program at the University of Arkansas–Little Rock. Despite very challenging situations, I was able to manage a mediation process where all the participants were respected. In many cases, people made very good decisions that would not have been possible without it.

As a law professor, I have studied mediation, watching with pride as it became widely accepted in many parts of the United States and around the world. I never believed that mediation is a panacea or that it should be used in all cases, but I knew that it offers great potential benefits for parties, professionals, and society. I was also well aware that mediation is imperfect, like all human processes.

Like many others in the dispute resolution field, I had mixed feelings about court-ordered mediation. On one hand, these orders forced lawyers to try mediation, and many found that they really liked it. Without the mandates, many lawyers would have remained unduly skeptical, and the mediation field would not have grown as much as it has.

On the other hand, I was uneasy about courts ordering parties to participate in a process that was supposed to be voluntary (even though the parties did not have to settle in mediation). Moreover, the mandates that forced lawyers to participate in mediation led them to dominate the process and focus on legal issues, often ignoring parties' interests. In some places, mediation became a normal part of the litigation process, which I called "liti-mediation."[1] Many lawyers valued mediation as a way to end litigation, but only late in the process, usually after discovery had been completed. Although many lawyers appropriately embraced the benefits of mediation, others viewed it as just another venue for adversarial contest, and they learned how to "game" the system. In an article on bad-faith negotiation in mediation, I quoted a lawyer who described his approach to mediation:

> [I]f . . . I act for the Big Bad Wolf against Little Red Riding Hood and I don't want this dispute resolved, I want to tie it up as long as I possibly can, and mandatory mediation is custom made. I can waste more time, I can string it along, I can make sure this thing never gets resolved because . . . I know the language. I know how to make it look like I'm heading in that direction. I make it look like I can make all the right noises in the world, like this is the most wonderful thing to be involved in when I have no intention of ever resolving this. I have the intention of making this the most

> expensive, longest process but is it going to feel good. It's going to feel so nice, we're going to be here and we're going to talk the talk but we're not going to walk the walk.[2]

Thinking about how to deal with abuse of mediation, I focused on the field of "dispute system design" (DSD). I thought that rules punishing alleged "bad faith" in mediation were likely to make the problem worse. If people didn't want to be in mediation, the big-bad-wolf lawyers could still find ways to abuse the system, including abusing the rules prohibiting bad faith. Rather than trying to force them to behave properly in mediation, I suggested that court planners use DSD methods to reduce problems by designing court mediation programs so that the parties and lawyers would generally *want* to use the process.

DSD involves analyzing a system for handling an ongoing series of disputes. Planners convene a group of stakeholders interested in the system, analyze how well it is working, and agree on how to improve it. To make a system work well, participants need appropriate education and training, and the system needs to be reviewed periodically to make any needed adjustments. DSD is an incredibly flexible set of techniques that has been applied to a wide range of situations, including systems in businesses, government agencies, nonprofit organizations, and many others. This book applies DSD concepts to legal practice.

My thinking was also influenced by serving on the Task Force on Improving Mediation Quality of the ABA Section of Dispute Resolution. The Section created the task force to develop a strategy for promoting quality as an alternative to certification, as there has been a long-standing, unresolved controversy within the mediation field about whether certification of mediators would improve mediation quality. In addition, the issue of quality is related to the controversy about whether it is appropriate for mediators to express their opinions and pressure the parties to settle. Mediators define this issue as whether mediators can be "evaluative" (i.e., express opinions) or must be "facilitative" (i.e., only ask questions and not express opinions). Informed by focus groups and surveys of experienced mediators and lawyers who used mediation in civil cases, the task force recommended careful advance planning of mediation to tailor the process in each case to fit the needs of the parties. It finessed the facilitative-evaluative debate by analyzing various types of opinions that mediators might express and by encouraging parties, lawyers, and mediators to have explicit discussions

about what mediator interventions were or were not desired. Rather than making general recommendations of best practices based on particular models of mediation, the task force recognized that people had different conceptions of mediation quality and thus recommended that parties and professionals establish their own standards of quality by customizing the mediation process in each case.

I have also studied Collaborative Practice, which has many features addressing problems of mandatory mediation. Collaborative Practice involves an agreement between lawyers and parties to use interest-based negotiation, typically from the outset of a matter. Thus it represents a marked contrast with much mediation, which often occurs late in a case and where lawyers continue to rely on adversarial and legal approaches to negotiation. Moreover, in the Collaborative process, the lawyers have the professional responsibility to initiate and manage the negotiation process, whereas with mediation, the lawyers often wait until they are ordered to mediate. In the mediation process itself, they typically respond to the mediator's moves rather than take the initiative.

The "disqualification agreement" (DA) is an essential feature of Collaborative Practice; a process isn't considered Collaborative without it. The DA is a provision in a "participation agreement," which parties sign at the beginning of a case to establish procedures for negotiation. The DA provides that if the parties decide to litigate the matter, the Collaborative lawyers are disqualified from representing the parties in litigation. If the parties want to be represented in litigation, they must hire new lawyers to do so. The DA creates incentives for the parties and lawyers to remain in negotiation, considering that termination of the process would mean that parties would presumably incur additional expense in hiring new lawyers and Collaborative lawyers would stop receiving fees when the Collaborative process ended. The DA also helps everyone focus on negotiation, since the lawyers wouldn't think about what they would do if the case wouldn't settle and the parties don't worry that the Collaborative lawyers will become their adversaries in litigation. Research and anecdotal reports suggest that the DA often produces these effects.

Although I could see the benefits of the DA, I was also concerned that it creates risks that parties would get stuck in a Collaborative process in some cases because they had invested too much money in it, or that one party could abuse the process to take advantage of the other. There is evidence

that these risks are real, though it is not clear how often they materialize. Considering the risks, I recommended that lawyers experiment with what is called "Cooperative" Practice, which is similar to Collaborative Practice but does not involve the DA. Ethical rules require that lawyers get clients' informed consent to use a Collaborative process, part of which involves consideration of reasonable alternatives (as described in Chapter 10). I believe that offering both Collaborative and Cooperative processes would increase clients' choice and enhance the quality of their decision making.[3]

Thus my practice and research led me to focus on encouraging lawyers to *generally* take the initiative to manage cases from the outset rather than wait to negotiate until late in a negotiation process, often in response to initiatives by courts or mediators. Given the proliferation of dispute resolution processes, clients now have more choices. To be most effective in representing clients, lawyers must understand the different processes and be competent in advising about and representing clients in the processes. In a recent article, I noted a variety of initiatives in the courts and private practice encouraging lawyers to take more responsibility for early handling of cases rather than rely on litigation as usual or unplanned late negotiation.[4]

The second experience informing this book is my teaching a course on lawyering since 2004. This is a required course for University of Missouri first-semester law students, and it prompts me to consider what I think is essential for law students to know about the profession they are preparing to enter. Over the years, I have focused primarily on what the 2007 "Carnegie Report" calls the "apprenticeship of professional identity and purpose," which complements "apprenticeships" of intellect and skills.[5] The course leads students to consider the following questions:

- What is the lawyer's job?
- What should be the relationship between lawyers and their clients?
- How should the fact that only a small fraction of cases go to trial (let alone go up on appeal) affect how lawyers handle legal disputes?
- What interests do clients have in addition to protecting their financial positions?
- How can lawyers assess and protect their clients' interests?
- How can lawyers most effectively represent clients in negotiation and mediation?

- How can lawyers help clients choose and shape appropriate dispute resolution processes?
- Regardless of the kinds of cases they want to handle, what kind of lawyer do they want to be?[6]

This course teaches students about traditional and client-centered approaches to lawyering (regarding the balance of decision making between lawyers and clients), positional and interest-based approaches to negotiation (described in Chapter 5), and facilitative and evaluative approaches to mediation. I firmly believe that there is no single correct approach for dealing with any of these issues. Instead, I teach that all lawyers should reflect on their own general philosophies and, most important, be open to their various clients' preferences about these issues. I believe that lawyers should consider that clients often have important non-monetary interests, that they are likely to ultimately settle most of their cases, and that litigation itself is often expensive, time-consuming, frustrating, and sometimes the cause of new problems. This does not mean that clients should *always* engage in early negotiation or settle their cases. But I do teach that lawyers should carefully assess cases early in an engagement and discuss with clients whether negotiation or some other process would best serve the clients' interests. In some cases, clients wisely choose to pursue litigation full-steam ahead. Choosing to litigate is a better decision if clients have first carefully considered their real interests and options for satisfying them.

Endnotes

1. John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?,* 24 Fla. St. U. L. Rev. 839, 846 (1997).

2. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs,* 50 UCLA L. Rev. 69, 70-71 (2002) (quoting Julie Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program,* 2002 J. Disp. Resol. 241, 267).

3. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering,* 64 Ohio St. L.J. 1315 (2003); John Lande & Forrest S. Mosten, *Collaborative Lawyers' Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients' Informed Consent to Use Collaborative Law,* 25 Ohio St. J. on Disp. Resol. 437 (2010).

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

5. William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007).

6. The syllabus is available at http://www.law.missouri.edu/aalsadr/Syllabi/lande_syllabus_lawyering.htm.