

How Lawyers and Clients Can Benefit from Planned Early Negotiation

1

**What Do Litigators Do?
Getting Trapped in a Prison of Fear
Planned Early Negotiation Processes
Escaping the Prison of Fear**

Careful Case Assessment
Planned Exchange of Information
Protection from Exploitation
Escape Hatches
Protection against Legal Malpractice
Appropriate Compensation for Legal Services

Although most legal disputes eventually settle without trial, the negotiation process usually is not a pretty picture. If negotiation was always easy, we would never need trials—or even careful negotiation strategies. Negotiation often *is* very hard, even when parties and lawyers sincerely want to be reasonable. Cognitive biases lead people to systematically misjudge the facts and merits of a dispute. Disputes often touch deeply held beliefs and values, and they stimulate strong emotions. Conflict—and how it is handled—can affect people’s perceptions of their identity, casting them as worthy of sympathy or condemnation. The mere process of disputing can compound the original conflict by adding new grievances based on the way that the lawyers and parties interact with each other. Sometimes lawyers aggravate conflicts for various reasons, including expectations about their role as vigorous advocates, desires to maintain clients’ confidence by fighting for them, aggressive personalities and habits, and interests in increasing their fees. If one person perceives that the other side has acted offensively, the offended individual can justify a retaliatory reaction, which can set off a cycle of escalation.

In an all-too-common pattern in “litigation as usual,” settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties’ relationship deteriorates, the process takes a long time and costs a lot of money, and none of the parties is particularly happy with the settlement. Lawyers can fight over virtually everything and refuse to negotiate seriously. Some lawyers try to gain advantage by bullying the other side. Even when lawyers act reasonably, the litigation process can be so excruciating for parties that they give up rather than continuing to endure it. Although some lawyers enjoy litigation as usual and make a good living from it, many would prefer to use a more productive and efficient process, but they feel stuck in playing the adversarial “game.”

The New Law Center’s Doug Reynolds says that “the much-maligned lawyers aren’t as bad as some people think. In some situations, they get goaded into being adversarial. If the other side starts out adversarial, they feel they have to respond in kind.” This happens even for lawyers who use negotiation whenever possible. For example, Marshall Yoder, of Wharton Aldhizer & Weaver, who does Collaborative Law as well as litigation, says that he “can get pulled into an adversarial mode really easily if someone else starts it.”

Of course, it doesn't always happen this way. Sometimes the process is relatively cooperative, quick, and easy, and the parties are satisfied with the results. But litigation isn't designed to produce a satisfying negotiation process, and often this isn't the result.

Lawyers and other dispute resolution experts have been working for decades to create "a better way" to resolve legal disputes, in the words of former Chief Justice Warren Burger. The alternative dispute resolution (ADR) field reflects a continuing effort to improve dispute resolution processes and provide more options for parties and their lawyers to "fit the forum to the fuss." Historically, ADR has involved alternatives to litigation, such as arbitration, mediation, and neutral evaluation, as well as improving negotiation within the litigation process. ADR processes, including negotiation, offer many potential benefits for parties, including better results, less time and cost invested in disputing, protection of privacy, satisfaction with the process and results, and an opportunity to choose and shape dispute resolution processes to fit their needs. Although parties do not always realize these benefits from using ADR processes, they often do find them to be very valuable.

Kathy Bryan, former president of the CPR Institute and former head of worldwide litigation for Motorola, says that when disputes occur in businesses, "groupthink" or conventional wisdom takes over. People think, "We're good. The other side is bad. We have a good case, so 'Lawyers, you go beat them over the head.'" Her reading of research about negotiation as well as her own experience in litigation indicates that taking polar positions and trying to "stick it to the other side" generally is the least successful strategy. People generally are more successful when they offer things to the other side and create a reciprocal desire to offer something back. But by and large, lawyers normally use an adversarial approach.

Even when you win at trial, this doesn't necessarily satisfy your clients. One lawyer described an extreme example illustrating this. She represented the plaintiff in a sexual harassment suit. Her client (who I will call Jane Smith) was one of only two women in the workplace in a field traditionally dominated by men. Smith had been subjected to egregious sexual harassment: a co-worker "leaned up against her" a number of times, employees watched pornographic movies depicting violent rapes, and there were pinup posters in the workplace. The parties engaged in a fruitless negotiation where they "weren't even in the same country, let alone the same ballpark."

After a three-week trial, the jury found for the plaintiff on all counts, and although there were no economic damages, the jury returned a huge verdict for emotional distress. After the trial, jurors came out and hugged Smith. The verdict was front-page news, and the local newspaper ran an editorial chastising the employer. Smith's lawyer said that this was the best day in court that any plaintiff could have. Several years later, Smith's lawyer asked her if she would go to trial if she had to do it all over again. Smith said she would have settled instead. She compared it to when she was a little girl and her mother would tell her to apologize to her sister. She would apologize, but it was a hollow apology because it wasn't sincere. Even though Smith won at trial, she never had the feeling that the employer took responsibility for its actions, which was what she really wanted. Although plaintiffs don't always get that satisfaction from negotiation, well-conducted negotiations and mediations sometimes produce remarkable results (for both plaintiffs and defendants) that would be impossible to achieve at trial.

This case suggests that lawyers can do a valuable service for their clients by helping them consider what is most important to them and anticipate how they would feel about different results. Even if you get a blowout win in court, it may not satisfy your client. And, of course, you aren't going to get a blowout win in court in every case. You can often satisfy your clients' interests better in negotiation while eliminating the risk of an unfavorable trial result, saving time and money from additional litigation and protecting their privacy. Most cases eventually settle without trial anyway, so why not try to settle early in a case, or even before filing suit?

What Do Litigators Do?

Before we discuss early negotiation, let's talk about what litigators do. They negotiate. All the time. Actually, they also do some other things, like arguing in court, but they negotiate much more than most people think. Indeed, much of lawyers' work in litigation is designed to gain advantage in negotiation.

Professor Marc Galanter coined the term, "litigotiation," which he defines as "the strategic pursuit of a settlement through mobilizing the court process."¹ He says that "negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There

are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals.”²

Lawyers know that their cases are likely to settle but, for many reasons, they often litigate extensively before trying to negotiate the ultimate resolution. This is considered the normal way to resolve disputes in our legal culture, so law firms and clients expect it. Litigation is a commonly accepted process for gathering information and managing cases. This process can provide leverage to get a more favorable settlement in negotiation. It’s also what litigators do to gain more professional satisfaction, advancement, and income.

Although some people think of negotiation as limited only to situations when people seek to resolve substantial disputes—typically about the ultimate issues in a case—I think it is more helpful to define it as the process of seeking agreement regardless of the issue and whether there is a substantial dispute. With this broad definition, it is clear that lawyers *do* negotiate practically all the time. Although sometimes it is helpful to focus on the process of resolving disputes, ignoring all the other situations when lawyers seek agreement can lead you to overlook much of lawyers’ everyday work.

Lawyers not only negotiate about the ultimate issues, such as how much a defendant will pay a plaintiff, but they also negotiate about substantive issues during litigation, such as interlocutory orders, as well as a myriad of procedural issues. Lawyers regularly reach numerous agreements with many different people on the path toward resolving their cases. Most obviously, they regularly negotiate with each other about procedural matters, such as acceptance of service of process, extension of filing deadlines, scheduling of depositions, and discovery disputes. Throughout litigation, they agree with clients about how they will handle the case. They reach agreements with people such as co-workers in their firms, process servers, investigators, court reporters, technical experts, financial professionals, and mediators. They reach agreements with judges about case management issues such as discovery plans and schedules, referral to ADR procedures, and ultimate issues during judicial settlement conferences.

In most of these situations there is no significant dispute, and lawyers reach agreement so easily that they don’t even think of the process as negotiation. But they could dispute all of these issues, and sometimes lawyers vigorously argue about all of them. From this perspective of

negotiation as the process of reaching agreement, negotiation really is inextricably intertwined in litigation. Lawyers negotiate throughout litigation, and not only in the single, dramatic settlement event to resolve the ultimate issues in a case. Thus litigation is a constant stream of negotiations that normally leads to numerous agreements, usually including settlement of the ultimate issues.

Getting Trapped in a Prison of Fear

Although people often like the idea of negotiation in theory (conceived as the dramatic, final settlement event), many are afraid to use it in their own situations. Parties who have a conflict may have unsuccessfully tried to work out problems on their own, leading them to doubt the other side's sincerity and to feel unsure that they can negotiate a satisfactory resolution. If a corporate transactional lawyer unsuccessfully tries to negotiate, the client and litigation counsel might feel that there is no point in trying further negotiation.

Sometimes people worry that merely *suggesting* negotiation would make them look weak and cause the other side to try to take advantage. Sometimes people doubt that the other side would negotiate honestly, so they are afraid to explore this possibility. Parties often hire lawyers to protect themselves from the risks of negotiating for themselves. These actions can reinforce fears by the other side and justify adversarial approaches, leading to a cycle of escalating conflict.

When people first consult lawyers about a dispute, they often have an adversarial mind-set and want the lawyers to act tough to protect them from the other side, which they typically perceive as being unreasonable. Lawyers often feel that they can get the best results for clients by starting with an extreme position and later making concessions as necessary. Although lawyers may mention negotiation in an initial consultation, they often do so as part of a discussion that demonstrates their loyalty and willingness to fight if needed. They may fear—sometimes quite accurately—that if they seem too interested in negotiation, prospective clients will not retain them or will worry whether the lawyers will really protect them.

Some lawyers may fear that an early negotiation process will force them to resolve their cases before they are ready to negotiate. Litigators are used to collecting as much information as they can and analyzing it over a period

of time. Some may worry that an early negotiation process would require them to make hasty decisions based on partial information, potentially jeopardizing their clients' interests. Anne Preston, of Garvey Schubert Barer, said that some lawyers are reluctant to negotiate early in a case because the process would force them get to the core of the case before they know "what's going on," and they would worry about the information they would never get to see.

These are all parts of a "prison of fear" that keeps parties and lawyers from negotiating early in a dispute. In an atmosphere of fear and mistrust, it can be hard to get people to consider negotiation, especially early in a case. Although lawyers know that most cases will eventually settle, they often feel powerless to steer clients toward a more productive path.

Table 1 describes the prison of fear and ways to escape from it, which are discussed in more detail below.

Table 1. Getting Trapped in—and Escaping from—the Prison of Fear

Lawyers' Fears of Negotiation	Ways to Deal with the Fears
The other side will think that you are negotiating because you don't have a good case.	Tell the other side that you routinely consider negotiation whenever it might be appropriate.
The other side will assume you are weak and will try to take advantage of you.	Carefully assess the benefits and risks of negotiation and proceed only if the potential benefits outweigh the risks.
The other side will not share information or be honest.	Negotiate only when you have some confidence that the other side will provide necessary information. Use mechanisms to provide confidence that you have sufficient and accurate information before settling.
Your story will not be heard and validated.	Negotiate only when you have some confidence that the other side will seriously consider your perspective and interests.
You will "give away" too much to the other side.	Assert your legitimate interests, don't "give away" too much to the other side, and be prepared to use an "escape hatch" if necessary.
Your client will lose confidence in you and the other side will not respect you as an aggressive advocate.	You can negotiate powerfully and also communicate to your clients and the other side that you and your client are prepared to litigate vigorously if necessary.*
You will risk malpractice liability if you settle without full discovery.	Much discovery has little value, and your malpractice risk will not increase if you get your client's informed consent for settlement.
You will lose revenue if you negotiate early in a case.	You can maintain or increase your revenue by using creative compensation arrangements and generating goodwill by satisfying clients' interests in negotiation.

* In Settlement Counsel and Collaborative Law processes described below, Settlement Counsel and Collaborative lawyers would not represent clients in litigation, but the clients should be prepared to litigate if necessary.

People sometimes express these fears indirectly. They may sincerely believe in the value of negotiation or ADR generally, and their firms may have even signed a pledge to regularly consider it, but somehow their cases generally don't seem quite right for it—at least not until late in litigation. They think that they might be ready after the next event in litigation, such as completing the next deposition, getting a ruling on a discovery or summary judgment motion, or finding a “smoking gun.” Although these may be valid considerations in particular cases, this general pattern reflects an underlying fear about losing something important in negotiation.

This book is designed to help you help your clients to avoid getting trapped in a prison of fear and to handle disputes effectively. If you and your clients can overcome the fear of entering negotiation, you stand a good chance of reaching an agreement satisfying your clients’ interests. Instead of reacting defensively out of fear, you can build trust with the other side so that you can negotiate with more confidence. Instead of relying only on ad hoc negotiation processes (which are initiated and developed for each case), you can also provide procedures that have general structures so that you don’t have to “re-invent the wheel” for each negotiation, but that are also flexible and can be adapted for each case. Instead of waiting until both sides are worn down by litigation before suggesting negotiation, you can offer a negotiation process at the beginning of a case—a planned early negotiation (PEN). This book describes how you can design a PEN process to fit the parties’ needs and interests.

Planned Early Negotiation Processes

In general, any lawyer can use PEN procedures. After consultation with their clients, lawyers can use a PEN approach unilaterally or by agreement with the other side.

Many lawyers regularly use PEN procedures without identifying them as such. These lawyers might be considered as “Nike” lawyers: they just do it, considering them to be good lawyering practices. One lawyer gave the following pithy rationale for PEN:

Sooner or later, you will need to negotiate. You need to get out in front, get the facts, and get the client on board. Try to prepare a settlement letter. . . . This drives the case in the right direction.

If you wait, you just get sucked into a pile of mud. If the other lawyer sends the letter, then you have to catch up.

One lawyer said that she “works” at starting negotiation early. Another lawyer said that it is “a great time to settle” early in litigation because cases generally get worse over time and clients want to settle their cases with minimal inconvenience. Another said that he “prepares for settlement from day one of the lawsuit” and that he engages in a “constant process of evaluating the claim” throughout the litigation. Another said, “It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn’t just happen. You are negotiating from the outset, setting up where you want to go.” For the many lawyers like these, PEN is their standard operating procedure and is so internalized that they probably don’t think very much about whether to do it. They just do it.

There are also some more self-conscious and explicit PEN processes: Settlement Counsel, Cooperative Law, and Collaborative Law. One party in a dispute can unilaterally use a Settlement Counsel without agreement with (or even knowledge of) the other side. A Settlement Counsel is hired solely to negotiate, and the party may (or may not) simultaneously retain Litigation Counsel. If Settlement and Litigation Counsel are involved simultaneously, they operate in parallel with each other. This arrangement permits both Settlement and Litigation Counsel to focus on their respective tasks without confusion of goals of negotiation and litigation.³ Sometimes lawyers serve as private negotiation advisors, without disclosure to Litigation Counsel and/or the other side. In these situations, the lawyers do not represent the clients in negotiation, and this activity is not covered in this book.

Cooperative Law involves an explicit agreement between the parties to use a planned negotiation process. Typically, this occurs at the beginning of a case, and the lawyers focus exclusively on negotiation. If needed, the lawyers can represent the parties in litigation and later return to negotiation. In a Cooperative Law process, lawyers focus on only one procedure at a time—negotiation or litigation.⁴ They may use a process agreement that includes a procedure for resolving disputes, such as mediation or arbitration.

Collaborative Law involves a written agreement to negotiate, typically at the outset of a matter. The distinctive feature of Collaborative Law is the “disqualification” provision in the agreement, which precludes the Collaborative lawyers from representing parties in litigation. If the parties decide to litigate the matter, the Collaborative lawyers must withdraw

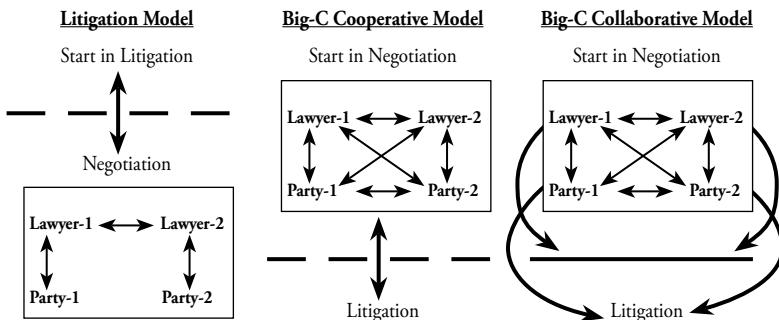
from the case, and if the parties want legal representation, they must hire Litigation Counsel. You can think of Collaborative Law as a process in which both parties agree to hire Settlement Counsel and refrain from contested litigation during negotiation.⁵

Figure 1 compares general patterns of negotiation in Cooperative and Collaborative Law and litigation. In a common pattern of litigation, the parties begin in the litigation process and may negotiate after some period of litigation. In this situation, the lawyers typically negotiate directly with each other, conveying messages between the parties, who may never meet to negotiate. In Collaborative Law, virtually all of the negotiation is done in joint meetings with the parties and lawyers together. Cooperative lawyers selectively use joint meetings based on whether they think it would be productive. Cooperative lawyers can participate in litigation, but Collaborative lawyers cannot.

Figure 1. Negotiation in Litigation, Cooperative, and Collaborative Models of Lawyering.

Negotiation in Litigation, Cooperative, and Collaborative Models of Lawyering

The following charts represent general patterns of negotiation in three models of lawyering. In practice, there are variations in each model. “Big-C” refers to formal, planned models of lawyering as opposed to (“small-c”) informal, *ad hoc* models. In litigation, parties may or may not negotiate. In Cooperative and Collaborative models, parties may or may not litigate.



© John Lande 2009. Permission to copy granted if copyright notice is retained for credit. Thanks to Paula Young for her suggestions about this graphic.

In practice, there are variations in each model. For example, the negotiation processes may involve mediators and other professionals to help resolve disputes. In litigation, parties may or may not participate directly in negotiation. In Cooperative and Collaborative cases, parties may or may not litigate. Moreover, some parties negotiate in ways not shown in Figure 1, such as without lawyers, without filing suit, or in mediation.

The three formal PEN processes focus primarily on negotiation, using different mechanisms to separate negotiation and potential litigation procedures. Many of the procedures and dynamics are similar for all three processes, and thus much of this book would apply to any of them, though it will note differences when relevant. Each process has advantages and disadvantages, and your clients may prefer one over another in a given case.

Collectively, these processes have been used in virtually every type and size of civil case. These include family, business, employment, environmental, intellectual property, product liability, professional negligence, personal injury, insurance, and many other issues. Clients range from working-class couples with low-asset divorces to huge corporations in business disputes with more than \$100 million at stake. They are particularly appropriate when your clients want to protect their privacy, such as in family, business, and law firm dissolutions; employment matters; probate cases; and other cases involving sensitive information.

David Hoffman of the Boston Law Collaborative says that the most robust predictor of success in negotiation is not the choice of process, but rather the intentions, skill, and chemistry of parties and counsel. This book describes ways you can improve your chance of success by focusing on each of these elements.

Escaping the Prison of Fear

Planned early negotiation processes include safeguards that can help you escape from the prison of fear. The following descriptions sketch key features in the processes, which are described at greater length in the rest of the book.⁶

Careful Case Assessment. In every case in which you consider negotiating, you should help your clients decide whether the investment in negotiation is worth the risk of failing to settle. When you first consult with clients, you should help them carefully assess their situation, including all of their interests, as well as possible methods for dealing with the matter. You should routinely discuss the range of plausible dispute resolution options, including negotiation.

You can explain to prospective clients that you routinely do this assessment in every case, regardless of the strength of the case. Although most cases eventually settle, you can convey that you are prepared to litigate vigorously if necessary. Some lawyers negotiate very aggressively, so the mere fact that you may negotiate doesn't mean that you are necessarily going to "give away the store." Kathy Bryan says that she didn't have any trouble in suggesting negotiation. She says that just talking and listening doesn't indicate that you are necessarily going to give anything away.

Presented in this way, you can avoid the perception that you are afraid to strongly advocate for clients, including in court. Indeed, even if you use a PEN process and work hard to reach a reasonable settlement, you should be prepared to recommend going to trial if negotiation does not seem likely to satisfy your client's interests. During a PEN process, you and your clients can periodically consider whether it makes sense to continue the negotiation if you have doubts that it would be productive.

A critical part of the initial assessment is an analysis of the other side's interests (as they perceive them) and whether they might be interested in a reasonable negotiation process and outcome. To some extent, this is a function of the parties' relationship, although sometimes it is possible to conduct a productive negotiation even when their relationship is strained. Indeed, lawyers often function as "agents of cooperation" precisely when parties would benefit from negotiation but would have a hard time negotiating directly.⁷ Thus, lawyers can promote productive negotiations even when the parties aren't getting along very well. Of course, sometimes lawyers bring counterproductive attitudes of their own, which can make negotiation more difficult. So it is essential to assess the lawyers' perspectives as well as those of the parties.

In general, people should use a PEN process only if they think that everyone is willing to listen to others, consider their views, and take reasonable positions in negotiation—or can be effectively coached to do so. In making this assessment, you should carefully look beneath the surface of the parties' statements and consider whether, if approached properly, they might be good candidates for a PEN process. If you raise the idea of using a PEN process with the other side and get a skeptical response, you might ask why they are responding that way, what might make negotiation attractive to them, and how they suggest handling the issues.

Appendix B provides the Early Case Assessment guidelines developed by the International Institute for Conflict Prevention and Resolution (CPR), which can help you analyze your cases.

Planned Exchange of Information. PEN processes provide for mutual exchange of information. Eric Galton, of Lakeside Mediation Center, says that the process should be designed so that everyone can fairly evaluate the case. Voluntarily sharing information signals that the parties feel confident and interested in negotiating a fair agreement. In some cases, such as divorce cases, the parties may agree to provide each other all relevant information. In large, complex civil cases, parties may start with an agreement to exchange basic information initially and, if additional information is needed, agree to exchange the specific information needed to make good decisions and resolve the matter.

In unplanned negotiations, parties and lawyers often rely on information provided through formal discovery processes, which includes declarations under penalty of perjury. These declarations give some assurance that parties can rely on the information and provide legal remedies in case of deception. In PEN processes, parties can also provide information under penalty of perjury if desired. If a case is in litigation, parties can use formal discovery to obtain information from people who are not parties in the dispute. If the parties settle a dispute, lawyers can include language in settlement agreements making representations about material facts that could be the basis for remedies for fraud.

Thus PEN processes can provide you with confidence in the accuracy of the information you use in negotiation. No procedure, including litigation, can provide total assurance that you will get all the relevant and accurate information you want. Unless you suspect that the other side is willing to deceive you and your clients are willing to spend a lot of time and money in discovery, a PEN process can provide reasonable assurance at a reasonable cost.

Protection from Exploitation. A PEN process offers several ways to counter fears of being taken advantage of. One lawyer deals with ideas that his invitation to negotiate is a sign of weakness by indicating that he is quite willing to fight in court if needed. He says, “It is pretty well known that I can take this the whole way. If there is an angle, I will use it. I don’t want you

to think I am soft here. I know the rules and where the court is. If nothing comes of [negotiation], I am prepared to fight in court.” Along the same line, retired Judge Robert Alsdorf says, “Being willing to negotiate doesn’t make you look weak. Being *afraid* to negotiate makes you look weak.” Thus, despite the common fear of suggesting early negotiation, lawyers can negotiate reasonably successfully if they take control of their cases and are prepared to litigate vigorously in court if necessary.

Much (and perhaps all) of the information exchanged in a PEN process would be legally discoverable, so both sides presumably would have to provide the information even if they end up going to trial. You may worry that you would expose your clients to some risk by disclosing some non-discoverable information, such as their interests or priorities, as the other side could use this knowledge to demand greater concessions. For example, in a divorce negotiation, if a wife indicates that she really wants certain provisions in a parenting plan for the couple’s young children, the husband could offer to accept her parenting plan only if she agrees to accept less child support or alimony than she might otherwise receive. Other examples of information that may not be discoverable include business trade secrets, potential commercial opportunities, plans, insurance coverage, etc.⁸

But even when discussing these matters, there are ways you can protect your clients from exploitation. You can limit your disclosures—at least at first—to legally discoverable information that the other side would eventually get anyway. You can agree in writing that the information provided in the process is to be used only for settlement, and you can stamp documents “For settlement purposes only” to protect against use in litigation.

You can exchange information at the same time so that neither side gets an advantage over the other. You can hold off disclosing sensitive information about clients’ interests until the middle of a process, after each side has had a chance to assess the other side’s motives and trustworthiness, based in part on whether the other side has made appropriate disclosures. Such a process would enable you to build trust with each other by making a series of such exchanges, withholding the most sensitive or detailed information until later in the process. If you believe that the other side is trying to take advantage of such disclosures, you can decline to provide sensitive information unless and until you receive adequate assurances from the other side.

You can take advantage of rules protecting the confidentiality of settlement negotiations, such as Federal Rule of Evidence 408 and state

counterparts. You can also use a mediator and share sensitive information privately in “caucus,” so that the mediator manages the exchange of certain information while protecting the confidentiality of other information. If you use mediation, communications in the process may be protected from use in litigation by privilege or other statutory provisions in your jurisdiction. Some states have enacted the Uniform Collaborative Law Act, which restricts use of certain communications in Collaborative negotiations.

Doug Reynolds, of The New Law Center, says that people ask him whether the other side takes advantage of his clients’ disclosure of their interests. He says, “The answer is no. If they did, I would know, and I would say that this isn’t going to work. I would say that to the other side and to my client.” He said, “Being transparent about my clients’ interests is easy, because it is usually obvious. If their interests are not obvious, it is helpful to tell the other side because it signals to them what is important. I can’t think of a case where the other side didn’t know what my client’s interests were. In my practice, being clear about my settlement role and my clients’ real interests has not been used against my clients or me.”

On the other hand, Anne Preston doesn’t buy the argument that there are no surprises in litigation anymore because of liberal discovery. She notes that some lawyers don’t do their “homework” very well, and the other side could sacrifice strategic advantages by using early negotiation. If the parties try a PEN process, don’t settle, and then go to trial, the lawyers can better assess which arguments are likely to be “winners” or “losers” and thus present their best cases at trial. From a societal perspective, this should improve the quality of trials and court decisions. From an individual litigant’s perspective, however, it would not be a good result if the other side is in a stronger position at trial.

Many lawyers probably overestimate the frequency of gaining significant strategic advantages in discovery or at trial from pivotal “Perry Mason” moments, when they dramatically present some “smoking gun” evidence that completely turns the case around. An experienced lawyer described finding a “smoking gun” in one case, which he said was “addictive,” and he got “hooked” into looking for them in other cases. He never found any others—and even in the case where he found one, he would have won without it.

Spending large sums hunting for smoking guns usually is not the best way to serve clients. More often, you can help your clients thoughtfully

weigh the relative advantages and risks of early negotiation and extensive litigation. This should help clients decide the likely benefits and risks of each approach and which one best serves their key interests and values.

Escape Hatches. PEN processes include “escape hatches” so that you can leave the process at any time. Of course, if you unilaterally use a PEN procedure, there is nothing to escape from because you haven’t made any commitments to the other side. If you determine that they will not respond appropriately to your reasonable actions, you can litigate vigorously at any time. Similarly, in a Cooperative negotiation, you can stop negotiating and proceed in litigation.

In a Settlement Counsel or Collaborative Law process, parties can end the negotiation process (and the Settlement Counsel’s or Collaborative lawyer’s services) and proceed in litigation. In a Settlement Counsel process, the parties may have previously retained Litigation Counsel to begin litigation or be available if needed. In a Collaborative case, parties may have contacted Litigation Counsel who may be available on “stand-by,” or they may need to start looking for counsel if a Collaborative negotiation ends without agreement.

The shift from negotiation to litigation may require additional time and expense. Of course, this routinely occurs in “litigation as usual” (LAU), when parties negotiate but do not settle. The fact that parties’ failure to settle would add to the time and cost required in a Settlement Counsel or Collaborative process (as well as developing new lawyer-client relationships) creates incentives to settle to avoid the additional time and expense of litigation.

Protection against Legal Malpractice. While most of the preceding fears are relevant to both lawyers and parties, lawyers may have some special concerns about using a PEN process. Some lawyers might fear increasing their exposure to malpractice liability by engaging in early negotiation and settlement. Although such fear is understandable, there should be no additional risk if you handle the case properly. You might worry about settling cases before completing all discovery for fear of missing some critical information that might give the other side an advantage in court—and thus negotiation. As described above, however, a good planned negotiation will involve appropriate exchanges of information and assurances about the

accuracy of information provided. If you need to use litigation procedures to obtain certain information from third parties, this could be arranged within the context of a planned negotiation.

Parties may wish to settle without obtaining all the information that they would otherwise collect in an adversarial litigation process. Doing so can be a very prudent decision, balancing the time, expense, and other costs of obtaining additional discovery against the possibility of a more favorable outcome of the dispute due to the additional discovery. Parties and lawyers regularly make these decisions in litigation, and there is no reason why lawyers are at greater risk in helping clients make such decisions in a PEN process. In any case where parties decline to pursue potential discovery, it is good practice to help clients weigh the advantages and disadvantages of the options and to document their decision-making process.

Appropriate Compensation for Legal Services. PEN processes can save parties a lot of legal fees while producing results that may be as good as or better than what they might have received in LAU. As a matter of fairness and practicality, it is appropriate for lawyers to receive a portion of the savings achieved through a PEN process. If you use your negotiation skills to produce good, efficient results for clients, it is fair that you receive appropriate compensation for your good work. And as a practical matter, you may not be willing to offer a PEN process if you would receive a lot less compensation than you would have received in a LAU process. Of course, clients should not be expected to pay the full amount they would have paid in a LAU process.

When there are likely to be substantial legal fees in LAU, there is a lot of room for you and your clients to negotiate alternative compensation arrangements that would benefit you both. Clients would pay less in total than the LAU fees (while presumably getting a result at least as good as in LAU in a shorter time), even though the effective hourly rate may be higher than in LAU. They would also probably incur less wear and tear on themselves and their relationship with the other party. They are especially likely to be satisfied with your services if you agree on a fee structure providing incentives for you to achieve their goals rather than simply bill for as much time as you spend on a case.

In addition, the collection rate is likely to be much higher for skilled negotiators than for lawyers in a LAU process. Satisfied clients usually pay

their bills promptly. In a PEN process, the legal fees are paced somewhat uniformly throughout the process, which allows clients to plan how they will pay their fees. By contrast, in LAU, the fees can fluctuate greatly and increase sharply as you gear up for and go to trial. You may have a hard time collecting bills when your clients experience a loss, a less-than-hoped-for “win,” or a last-minute settlement to avoid trial. In these situations, clients may demand large write-offs or simply refuse to pay.

If your practice includes PEN, you should be able to receive a higher effective hourly rate for a smaller number of hours in a case by working on other matters during the time you would have spent in a LAU process. In this situation, you should receive greater (or at least equal) total compensation over a period of time. In addition to receiving greater income, you are likely to accrue greater goodwill, which can lead to repeat business and increased referrals from satisfied clients. Thus, providing your clients with the best possible attorney fee options can increase your professional satisfaction and business success.

This model may not work well for law firms that rely on maximizing the number of billable hours, especially of a large team of associates. Although some firms can continue with this business model, it is becoming increasingly difficult as clients demand greater value and efficiency in the face of economic pressures and competition. Paradoxically, firms using PEN processes may achieve greater success as the market for civil legal services evolves to meet changing conditions. Offering PEN, in addition to LAU, can position law firms to take the lead in these market conditions instead of lagging behind. This may require law firms to shrink somewhat to be successful, but the market is pressing law firms in that direction anyway.

There are many possible compensation arrangements that lawyers and clients can agree on. These include setting ranges for total billing and premiums for achieving specified goals within specified time periods. Chapter 3 describes these options in more detail.

Endnotes

1. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).
2. *Id.* (emphasis in original).
3. For more information about Settlement Counsel, see William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367 (1999); John Lande, *The*

Movement Toward Early Case Handling in Courts and Private Dispute Resolution, 24 OHIO ST. J. ON DISP. RESOL. 81, 112–17 (2008).

4. For more information about Cooperative Practice, see John Lande, *Practical Insights from an Empirical Study of Cooperative Lawyers in Wisconsin*, 2008 J. DISP. RESOL. 203. My website includes numerous other articles about Cooperative Practice. See <http://law.missouri.edu/lande/publications/#lawyering>.

5. There is an extensive literature on Collaborative Law. See the bibliography.

6. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

7. For a more detailed analysis of lawyers' prison of fear, see John Lande, *Escaping Lawyers' Prison of Fear*, 82 UMKC L. REV. 485 (2014).

8. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 423 (1997).