

Lawyers' Negotiation Process Project
Semi-Structured Interview Protocol
Prof. John Lande

Thanks very much for agreeing to talk with me today. As I mentioned in my email, I am interviewing highly-respected lawyers like you who are recognized to be among the top lawyers in our area.

I have interviewed many lawyers in my academic career. Virtually all of them really enjoyed the conversation and I expect that you will too.

The length of our conversation today will depend on how much you want to talk. Do you have any time constraints today I should be aware of?

A reminder that when I write and talk about my research, I will not disclose your name or anyone you might refer to. To further protect confidentiality, please do not mention anyone else's name and, instead, use generic descriptions such as the other lawyer, my client, a manufacturing business, etc.

Do you have any questions before we begin?

1. Let me start by asking a few questions about your background to help me frame my questions.
 - a. In what year did you graduate from law school?
 - b. What is your current position and when did you start there?
 - c. What kinds of matters do you mostly handle?
 - d. I assume that the clients you represent vary in some ways. Can you generalize about your clients, perhaps by describing one or more patterns in your set of clients?
 - e. Approximately how many lawyers are in your firm?
 - f. Does your firm have more than one office? [If so] Approximately how many lawyers are in your office?
 - g. [If they apparently have worked in other legal jobs] What are the other major legal positions you have had since you graduated from law school and what types of matters did you handle in those jobs?
 - h. Is there anything else about your background that would be helpful for me to know?

2. As you know, only a small percentage of cases go to trial and the vast majority are settled. So I want to learn more about how the best lawyers actually negotiate.

All my questions will focus on negotiation of disputes though these may be disputes that are settled without a lawsuit. This interview will NOT ask about negotiations of transactions. All the questions will be about cases where there were only two sides, both sides were represented by lawyers, and there was not a mediation. Note that there may be more than one party on the same side, such as a couple in a suit against another party. Do you have any questions about what kinds of matters that are or are not included for this interview?

- a. First, would you estimate about how many negotiations you completed in 2012 that fit this definition? [If they have a hard time estimating for 2012, ask about a typical month.]
- b. I want to ask you some questions about the last case in which you settled the case in such a negotiation (even if you completed it this year). What was the case was about?
- c. Early in the negotiation, did both sides identify their interests or goals in the negotiation? By interests, I don't mean the specific things they wanted such as a specific amount of money. Instead, I am talking about more general goals such as fair compensation, protecting privacy, reducing litigation costs and risk, getting an apology or acknowledgment of wrongdoing, etc.
- d. What was your main goal to the negotiation? In other words, what were you trying to get the other side to do?
- e. What do you think was the other side's main goal?
- f. At what point in the process did the negotiation begin? For example, did it begin before suit was filed, soon after it was filed, during discovery, after most or all discovery had been completed, or very shortly before the trial date?
- g. Why do you think it started at that point instead of sooner or later?
- h. Who initiated the negotiation?
- i. What did you do to prepare for negotiation?
- j. What did you discuss with your client about the negotiation?
- k. How much input did you get from him or her about the negotiation?

- I. Would you give me an overview of the steps in the negotiation? How did it start and what were the major steps in the process?
- m. How much of the negotiation was by phone, email, letter, or in person?
- n. Was there negotiation about the litigation process itself, such as discovery, timing, information sharing, motions?
- o. Regarding substantive issues, was there a series of offers and counter-offers?
 - i. [If so] What was the first demand or offer by your side?
 - ii. What was the first demand or offer by the other side?
 - iii. About how many times did you exchange offers?
- p. [If there was not a series of offers]
 - i. Why do you think that there was not a series of offers?
 - ii. Did you discuss a number of options for achieving particular goals?
- q. What was the final settlement?
- r. Why do you think people decided on this settlement as opposed to some other possible resolution?
 - i. To what extent, if any, was the resolution based on expectations about the likely result in court or typical settlements in similar cases?
- s. Do you think that the settlement was appropriate? Why or why not?
- t. How satisfied did you feel about the negotiation process? Would you have preferred to handle the negotiation differently?
- u. Is there anything else that would be important to know about the negotiation in this case?
- v. How typical was this negotiation compared with the other two-sided negotiations you have been involved in during 2012?
 - i. [If this was atypical] How was this negotiation different from the typical pattern of your negotiations in 2012?

- w. Based on your experience, have you noticed differences in approaches to negotiation by lawyers from cities and those from smaller communities?

3. Now I am going to ask some questions about negotiation generally.

- a. I'm sure you have heard that sometimes lawyers do not want to suggest negotiation because they worry that they would appear weak to the other side. How often do you think that lawyers would suggest negotiation if they didn't have this worry?
 - i. How often have you been concerned about appearing weak if you suggested negotiation?
- b. Negotiation theorists describe three general approaches to negotiation. In one approach, let's call it "type A," both sides exchange offers, starting with extreme positions, with the goal of getting the best deal they can for their side.

In a second approach, "type B," both sides identify their interests and then try to reach an agreement that satisfies the interests of both sides.

A third approach, "type C," is more like a conversation in which both sides try to reach agreement based on likely outcomes in court or typical settlements in similar cases. In this approach, there may be an exchange of offers and each side is trying to protect its interests, but it does not center around the exchange of offers designed to get the best possible deal. Also, there may be a discussion of goals in passing, but it does not center around an explicit identification of both side's goals and ways to achieve them.

Of course, negotiations are complex and may involve a combination of approaches.

Do you have any questions about what these three approaches are?

- i. In 2012, have you used any general negotiation approach other than these three approaches? [If so] Please describe it.
- ii. Thinking about the negotiations you have done in 2012, please estimate the proportion of your cases that have used each of the three approaches.
 - (1) Type A
 - (2) Type B
 - (3) Type C

4. Now I want to switch gears to ask about the timing of negotiation. As I mentioned earlier, negotiation can start anytime from before a suit has been filed to shortly before the trial date.

a. I would like you to estimate the proportion of your two-party negotiation cases in 2012 where serious negotiation began at one of the following four stages:

- i. before suit was filed
- ii. after suit was filed but before most discovery had been completed
- iii. after most but not all discovery had been completed
- iv. after all discovery had been completed

b. In your cases where serious negotiation started before suit or soon after suit was filed, why do you think it started at that stage?

c. In your cases where serious negotiation started after most or all discovery had been completed, why do you think it started at that stage?

d. In your cases where you negotiated before suit or soon after suit was filed, what led you and your counterpart to start negotiation at that point?

e. In general, what do you think are the most important reasons why lawyers who handle the kind of cases you do start to negotiate after most or all discovery had been completed in their cases?

f. I will list a number of possible reasons why lawyers start to negotiate after most or all discovery had been completed. For each reason, please tell me if you think that it is very uncommon, somewhat common, or very common reason:

- i. incomplete discovery
- ii. lack of confidence in oneself or one's case
- iii. fear of looking weak
- iv. fear of disclosing sensitive information
- v. fear of giving up too much too soon in current case
- vi. fear of developing reputation as settling too easily
- vii. fear that client will lose confidence in the lawyer
- viii. fear of malpractice liability
- ix. desire to earn more fees
- x. habit

- g. Of course, it is not always appropriate to negotiate early in a case. What factors make it appropriate to start negotiation early, in your view?
- h. What advice would you give lawyers to help them to start negotiating early in appropriate cases?

5. Can you suggest other lawyers who practice in your subject area who are particularly effective and trustworthy who might enjoy participating in an interview like this? May I use your name in contacting them?

6. What questions didn't I ask that I should have asked?

Thank you very much for doing this interview. I hope that you enjoyed it.