

Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money

Prof. John Lande
University of Missouri Law School

**Advanced Alternative Dispute Resolution
Texas Bar CLE
January 26, 2018**

Goals for My Presentations

- You learn things from me you can use
- We all learn from each other
- We have a good time together

Stone Soup Knowledge Project

- University of Missouri “Stone Soup Dispute Resolution Knowledge Project”
- Goal: promote collaboration by academics & practitioners to learn about actual practice
- One way: learn from CLEs like this

Stone Soup Process

- I will ask about your techniques and perspectives
- Notetaker will type answers without your name
- I will summarize responses and post the summary on the Indisputably blog after the training
- If you don't want your statements to be included, let notetaker know (or don't answer questions)
- For more information, see handout
- Questions?

Agenda

- Learn about each other
- Overview of lawyering with planned early negotiation
- Benefits of this approach
- Handling potential problems
- After lunch: how mediators can help early case management

Feel free to ask questions throughout.

About Me

- Retired law professor
- Practiced law and mediation starting 1980
- Have PhD in sociology
- Have done many empirical studies
- Interviewed lawyers and mediators for my book, **Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money**

About You

By show of hands:

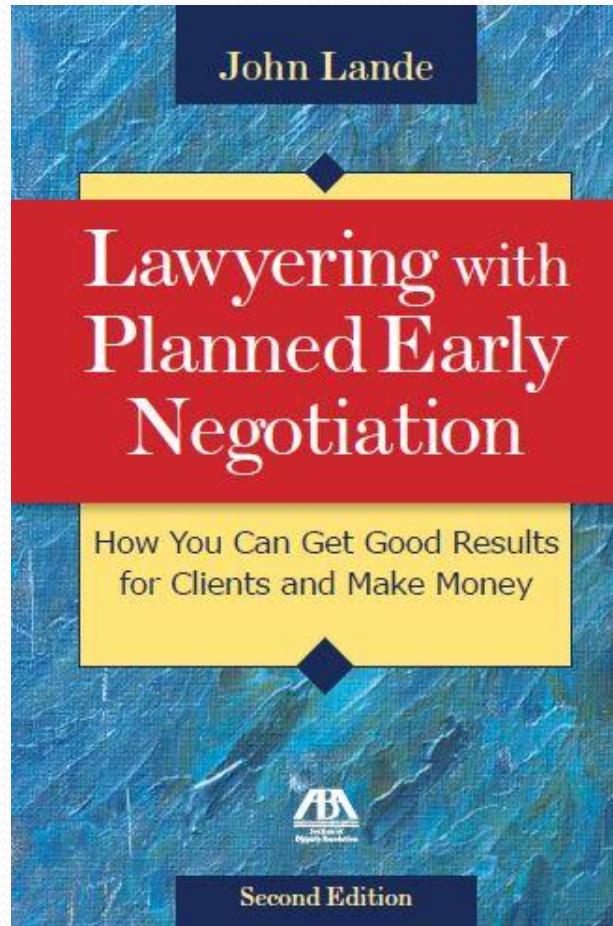
- **How many work as advocates but not neutrals?**
- **How many work as neutrals but not advocates?**
- **If both, how many spend more time as advocate?**
- **How many spend more time as neutral?**

More About You

How many handle (as advocate or neutral):

- Torts
- Family cases?
- Employment cases
- Business cases
- Other civil
- Other?

Ideas Summarized in my Book



**You Can Get a
Discount Thru
March 31**

See Flyer

Major Points

- You probably do some of this already
- Might be called simply “good lawyering”
- You may not do this as much as desirable
- Not for every case –need to assess each case
- Don’t give up too easily

What Do Clients Want?

Value for the
money they pay you
to help solve their problems

What's the Point?

- Remember: in the old Model Code of Professional Conduct, the purpose of zealous advocacy was to advance the client's interests
- What if the client wants to:
 - engage in professional, respectful negotiation?
 - maintain good relationship with other side?
 - get fair, not one-sided, result?
 - reduce time, expense, and risk of litigation?

What is Planned Early Negotiation?

- Flexible approach to lawyering
- Alternative to litigation-as-usual, ie, unplanned, late negotiation
- Goal to reach agreement satisfying most important interests of all parties – especially yours
- Usually *Nike* lawyering – just do it

General PEN Approach

- Start with early case assessment
- Develop good attorney-client relationship
- Develop good relationship between lawyers
- Decide if negotiation is appropriate
- If so, start with exchange of information

Overview of PEN

- Assess appropriateness and interest in PEN w client
- Discuss procedural plans with counterpart lawyer
- Plan for exchange of information
- Discuss need for experts, mediators, or other profs.
- Set up meetings and prepare clients
- Focus on parties' interests as much as appropriate

How is PEN Different than Litigation and Mediation?

- Planned
- Early
- Lawyers exercise primary responsibility for managing cases
- Use informal process as much as possible
- Engage clients more, as appropriate and desired

Potential Benefits

- Focus on satisfying clients' interests
- Save time and money for clients
- Increase effective billing rate
- Generate good will and repeat business

Why Don't Lawyers Use PEN More Often?

They are trapped in a **prison of fear**:

- Other side will think you don't have good case
- Other side will take advantage of you
- Other side will not be honest
- Your client will lose confidence in you
- You will risk malpractice
- You will lose income

How Can You Escape the Prison of Fear?

- Tell other side you routinely consider negotiation
- Proceed only if potential benefits outweigh risks
- Use mechanisms to assure accurate information
- Assert client's legitimate interests
- Don't "give away" too much – and be willing to "walk"
- Keep client informed and get consent
- Use billing systems rewarding good, early settlement

Developing Good Client Relationships

Help clients assess their interests, eg,

- What do they really want?
- Desire for validation of their concerns
- Fears and risk tolerance
- Concerns about relationships and/or publicity
- Time and money willing to invest in case
- Ancillary consequences (eg, tax, new or lost opportunities, creditor perceptions, timing)

Lawyers' Dilemma with Clients

Lawyers can have a hard time simultaneously:

- Maintaining confidence as strong advocate
and
- Considering potential benefits of negotiation

Lawyers' Solution

- Demonstrate that you care about clients – and will do your best to help them
- Assure clients that you are willing to:
 - Negotiate assertively, as appropriate
 - Reach reasonable settlement, if possible
 - Advocate vigorously in litigation, if needed

Lawyers' Dilemma re Other Side

- Parallel to dilemma with clients
- Lawyers can have a hard time simultaneously:
 - Exploring possible negotiation
and
 - Convincing other side that they will vigorously protect their clients' interests

Lawyers' Solution

- **Develop personal relationship with opposing counsel, eg, have lunch at beginning of case**
- **Offer “the easy way or the hard way”**
 - **You prefer easy way**
 - **You’re willing to use hard way if needed**

What Makes You Look Weak?

- Being willing to negotiate doesn't make you look weak.
- Being *afraid* to negotiate makes you look weak.

--Judge Robert Alsdorf (ret.)

What Are Problems for You in Negotiation?

Solving Problems in Negotiation

- The book lists 49 techniques
- A few unconventional techniques:
 - Thank the other side for anything you appreciate
 - Ask what you can do to help them
 - Ask about other side's perspectives and interests
 - Ask what information would help them assess case
 - Ask “what can we do differently”?
 - Share a meal and don't talk about the case

Using Mediation

- General points now. More after lunch.
- In general, assertive lawyers should consider using mediation if they think it would help. Duh.
- Be assertive in suggesting and planning mediation
- Coordinate with parties, counterparts, and mediator