

load and related case law. In a nutshell, Ziade calls the challenges to ICSID's independence "unfounded" and he describes the inner-workings of ICSID which certainly seem to help prove his case. He also explains that the "dramatic growth in its caseload since 1997" has caused ICSID to restructure itself internally to handle the increased work.

Three of the four final chapters recommend insightful variations on a multilateral approach to international investment law, to bring some type of global uniformity to a system that currently exists in the form of thousands of individual investment agreements and bilateral investment treaties. A multilateral system exists to an extent in the international trade regime, with, for example, the World Trade Organization that entered into force in 1995. But as each of the authors detail, extensive efforts to bring multilateral organization to international investments have failed. Dunning and Lundan, who focus on the importance of the human element in the international investment regime, remark that "[t]his is primarily because Foreign Direct Investment, unlike trade, implies the actual presence in one country of a firm that is owned and controlled by nationals residing in another country."

Geiger's "modest approach" to establishing a multilateral system recommends "codification of international law; establishment of a permanent facility for adjudication of investment disputes; creation of a facility to provide advice for treaty negotiators, and support for the prevention and/or management of investment disputes."

Zhan, Weber and Karl recommend the "very bold" approach of renewing efforts towards drafting a single multilateral investment instrument. Fully recognizing that some will call this goal "unrealistic," they nevertheless make a passionate plea on the basis that "a lot of common ground has already been built during the last decades...[and] a multilateral undertaking can gradually be built on this common ground."

The venerable Brigitte Stern refreshingly grounds the reader by describing the "so called crisis of international investment law and policy system" as a "*crise de croissance*—a teenager's crisis." And in her estimation: "Investment arbitration has created a very successful arbitration system." But she also calls for a keen focus on a balanced approach in the international arbitration system that takes into account not only protection of the investment, but also the state's capacity to regulate in the general interest.

Part III: Report of the Rapporteur

The Vale Columbia Center on Sustainable International Investment held the Second Columbia International Investment Conference on October 30-31, 2007. The core of the book consists of original contributions that the authors prepared and presented at the Conference,

which they subsequently finalized in light of the open discussions at the event. Andrea Bjorklund acted as the Rapporteur for the Conference, and in Part III of the book she provides an excellent summary of the open dialogue between the speakers/authors, also adding her own perspective. She notes the friendly banter and sometimes lively disagreements between the esteemed participants, as well as the areas of general consensus. The narrative of Part III is a fitting conclusion to the book, which I recommend to anyone who is interested in the basic underpinnings of this rapidly emerging area of the law.

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

By John Lande (ABA Publishing 2011)

Reviewed by Margaret M. Huff

Professor John Lande wants to liberate litigators from unplanned late negotiations. In *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money* ("*Lawyering with PEN*"), Lande shows us how. Not limited by an "ivory tower" approach to the subject, Lande includes suggestions from practicing attorneys interviewed for the book. He supplies detailed forms to anchor key negotiation theory points in a "real world" context. At the same time, he outlines a general client-centered approach to practicing law that seeks to meet client interests.

Planned Early Negotiation (PEN)

Clients typically do not benefit from acrimonious relationships among the parties, combative lawyers, or protracted discovery followed by settlement on the courthouse steps. To address these and other issues related to costly litigation, many corporations and their law firms have pledged to use ADR.¹ But actual practice does not always meet aspirational goals.²

Applying his expertise in dispute systems design, Professor Lande shows how lawyers can improve the way they handle disputes for their clients. He proposes satisfying clients' interests (the *Getting to Yes* mantra) through a system he calls Planned Early Negotiation (PEN). He believes PEN should lead to more of what lawyers

want—client referrals, repeat business, income (through mutually profitable fee arrangements as well as increased fee collection), and job satisfaction. His goal is to provide practical forms and techniques to use PEN skillfully and systematically during the entire life of a case.

Following an introductory chapter on PEN's benefits, Lande covers several stages where negotiation comes into play in a case: 1) developing productive relationships with clients, 2) billing systems such as contingency fees with triggers and premiums for early settlement, 3) developing good relationships with the other side in a dispute, 4) planning and conducting negotiation effectively, 5) dealing with impasse, 6) engaging other professionals, including cost-effective joint retention of neutral experts, and 7) improving the quality of negotiations through further education, client surveys, self-assessment, and revising case management and negotiation procedures within a firm and in court programs. He concludes with a short discussion of PEN-related ethics issues.

Lande's main focus is on three PEN processes—settlement counsel, cooperative negotiation, and collaborative negotiation.³ Traditional litigation counsel can adapt several of the techniques and forms related to these processes, in order to improve their law practice. For example, regardless of whether a client hires separate settlement counsel or not, a litigator may adopt a practice philosophy that routinely includes approaching opposing counsel at the front end to negotiate their relationship in the case. That relationship will later foster effective negotiations to set up a discovery plan tailored first to access key, settlement-relevant information in the case, followed by early case evaluation with the client and reasoned settlement negotiations.

Lande supplements his concise ten chapters (about 160 pages) with an extensive bibliography and a treasure trove of forms—more than 100 pages of checklists, client questionnaires, contracts, and other forms duplicated on a CD included with the book, with most forms in Word format for easy adaptation. For example, Lande provides retainer agreement addenda, a conflict analysis form for clients, a chart of factors that affect appropriateness of mediation, collaborative law and cooperative law procedures, a letter to the other party inviting negotiation, and a checklist to prepare clients for the first negotiation session.

The book's concluding chapter on selected ethics issues briefly addresses diligence and loyalty, client informed consent, discussing ADR options with clients, screening cases for appropriate use of collaborative law processes, conflicts, confidentiality, truthfulness to others, conflicts with collaborative practice norms, advertising and membership in a negotiation practice organization, and withdrawal from representation. The discussion should inspire lawyers to learn more on the ethical dilemmas and malpractice risk management issues that arise in connection with PEN processes.

Assessment

Clients are demanding more cost-effective ways to resolve disputes. Traditional litigation systems were not designed to achieve a satisfactory negotiated result, even though settlement is the most typical outcome.

In *Lawyering with Planned Early Negotiation*, Lande posits that lawyers are imprisoned by the fear of negotiation, such as the fear of appearing weak, the fear of leaving too much on the table, and the fear of malpractice risk if settlement occurs before full discovery. He suggests overcoming these fears by planning systematic incorporation of negotiation at each stage of a case, if appropriate, and with client informed consent.

Planned Early Negotiation should increase the likelihood of client satisfaction: rather than engage in ad hoc negotiations, attorneys can implement a plan to integrate negotiation in the representation of the client, using the forms, strategies and practical suggestions in *Lawyering with PEN*. Law professors might consider using *Lawyering with PEN* for lawyering, negotiation, or ADR courses. Sophisticated clients interested in managing their lawyers to control costs will draw insights from the book.

In a chapter on handling problems in negotiation (so-called "impasse" issues), *Lawyering with PEN* does offer general tips, plus ideas for dealing with clients, the other side, and relationships with difficult lawyers. That chapter would have benefited from more information on the psychology of negotiation as it relates to impasse, with endnotes directing the reader to the key literature on the subject.

The "make money" part of the book's two-part subtitle, "How You Can Get Good Results for Clients and Make Money," may suggest more than it intends to deliver. Indeed, Professor Lande has noted elsewhere that early case handling (ECH) "could be problematic for some lawyers, especially those paid on an hourly basis, because using ECH could cause them to 'lose' substantial revenue when cases are not handled as litigation-as-usual."⁴ *Lawyering with PEN* suggests various fee arrangements that might be mutually beneficial for clients and lawyers interested in implementing Planned Early Negotiation, and reasonably suggests that satisfied clients are more likely to pay their fees and refer business. We need more empirical research and debate on ADR practice development and management.

Conclusion

Lawyering with PEN is a "how to" book—an organized, helpful blueprint for attorneys who wish to add settlement counsel, collaborative law, or cooperative law negotiation to their law practices. Advocates in litigation, clients, and law professors will welcome this well-written, practical book on effective planned early negotiation.

Endnotes

1. *E.g.*, more than 1,500 law firms have signed a CPR ADR pledge:

We recognize that for many disputes there may be methods more effective for resolution than traditional litigation. Alternative dispute resolution (ADR) procedures—used in conjunction with litigation or independently—can significantly reduce the costs and burdens of litigation and result in solutions not available in court.

In recognition of the foregoing, we subscribe to the following statements of policy on behalf of our firm. First, appropriate lawyers in our firm will be knowledgeable about ADR. Second, where appropriate, the responsible attorney will discuss with the client the availability of ADR procedures so the client can make an informed choice concerning resolution of the dispute.

CPR Law Firm Policy Statement on Alternatives to Litigation, International Institute for Conflict Prevention and Resolution (CPR) Pledges to use ADR at <http://cpradr.org/About/ADRpledge/LawFirmPledgeSigners.aspx> (last visited May 31, 2011).

2. John Lande, “The Movement Toward Early Case Handling in Courts and Private Dispute Resolution,” 24 Ohio St. J. on Disp. Res. 83, 109 n. 157 (2008) (citing studies that found “no connection between corporate ADR policy and actual ADR usage”).
3. In the Settlement counsel process, the client retains a lawyer to negotiate, while typically also hiring separate litigation counsel. Cooperative negotiation is a process where all parties explicitly agree to use a planned negotiation process, with the lawyers able to also represent their clients if the matter goes to litigation. Collaborative negotiation is a process where all parties explicitly agree to use a planned negotiation process, with the added feature that the collaborative lawyers are disqualified from representing their clients if the matter goes to litigation.
4. *Supra* n. 2, 24 Ohio St. J. on Disp. Res. at 87. In the same article, Lande cites a study of a law firm using a process with early exchanges of information and structured negotiations. The first 40 cases “typically were completed in 1-3 months and...fees averaged \$16,760 per case compared with 3-9 months in traditional litigation and average fees of \$63,323.” *Id.* at 125.

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Mediation Ethics

Ellen Waldman, Editor

Reviewed by Kathleen M. Scanlon

Mediation Ethics makes a unique contribution to the field of ADR ethics. The editor, Professor Ellen Waldman of Thomas Jefferson School of Law, offers a text that combines both theory and practice in an engaging and thoughtful manner.

Professor Waldman has gathered together some of the leading mediators in the field to write, together with them, 12 chapters on specific ethical issues that mediators can expect to face at some point in their careers—e.g., power imbalances, unrepresented party, confidentiality dilemmas, conflicts of interest, diminished capacity of participant, role of ADR provider organizations. Also included at the beginning of the text is an extensive overview chapter by the editor on mediation ethics. This chapter addresses a range of topics that influence how mediators approach ethics. It also generally identifies relevant model standards of conduct for mediators.

The most dynamic parts of the text are the hypotheticals contained in each of the chapters focusing on a specific ethical issue. The text contains over 24 hypotheticals, all of which have an authentic quality about them. Each hypothetical is followed by a thoughtful analysis either by the editor alone, or two guest commentators followed by an editor’s summary. The guest commentators include leading mediators from backgrounds in the academic, public and private sectors. This format, which is followed in each of the 12 topic-specific chapters, infuses the text with life. Because of the high quality of the contributors, and the careful analysis of issues by them, the commentaries provide powerful guidance.

The other portions of the text pale in comparison to the hypotheticals-commentaries sections. However, this is not meant as a criticism but rather a testimony to the outstanding use of scenarios and commentaries throughout the book. Besides these sections, each chapter begins with an overview of select issues that the hypotheticals will highlight. These portions provide the reader with a broad summary of relevant theory and authorities. These overview sections help prepare the reader for the hypotheticals and commentaries to follow. For example, the chapter on confidentiality provides an overview of confidentiality protections through the lens of mediation codes and legislation. This portion also addresses aspects of theory underlying confidentiality in mediation.

While reading the text, I did find myself wishing that a different footnote layout was used. The footnotes are tucked away at the end of the text and I found myself doing a fair amount of hunting to find them, which interrupted my reading and ability to learn. I also found myself wishing that there was an appendix that listed all of the numerous codes referenced throughout the text. For example, an appendix fleshing out the references provided in footnote 1 in Chapter Eleven (Conflicts of Interest) or a reproduction of Appendix A referred in footnote 17 of that chapter.

I suggest the audiences that will most benefit from this text are mediators as opposed to counsel participating as advocates in mediation. It is a book that seasoned mediators will find very helpful. For mediators with less experience, it provides the framework to walk them