Bookmark: All about doing well while doing good

By James E. McGuire

Most cases settle. From the filing of the complaint to final disposition, fewer than 1 case in 20 will result in a trial before a judge or a judge and jury. In the federal courts, where 98 percent reach resolution without a trial, the odds are even longer. Litigation costs money. Virtually every day a case is in litigation, both parties are spending money that is usually not recoverable, and the longer a case is in the litigation process, the more money will be spent on legal fees, discovery, and, in some cases, expert witnesses. Early negotiation saves money: The earlier the settlement process begins, the higher the reduction in transactional costs.

Lawyers who learn and apply these truths, which are the heart of professor John Lande’s book, “Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money” (ABA Publishing 2011), can do just what the title says.

When I graduated from law school in 1974, I proudly announced to any and all listeners that I was a trial lawyer, even before I had joined a firm and become a member of the “trial department.” Then I learned that our actual practice was the litigation process, a process that had a life of its own and rarely resulted in a trial. (In time, to reflect this reality, most trial departments have become litigation departments.) Starting in the late ’80s, I carved out a new path in the emerging field of ADR. In 1990, I had my first official engagement as settlement counsel, an engagement restricted solely to settling that dispute, while a different law firm was engaged as litigation counsel. For nearly a decade, I considered my approach to be something like a trade secret, convinced that when others found out how satisfying it was, the field would become very crowded. When I started speaking and writing about settlement counsel, I realized quickly that my concerns were not well-founded. Sometimes, good ideas take time — a long time — to catch on.

Another decade later, settlement counsel, commercial collaborative law, and cooperative lawyering are still fresh ideas, used only by a few “early” adapters. To my knowledge, John Lande’s is the first full-length book on this topic.

Professor Lande starts with identifying the obstacles to broader implementation of Planned Early Negotiation, or PEN. In discussing the “prison of fear,” he identifies many concerns that prevent lawyers from advocating early negotiation to their partners, clients, and opposing counsel. To one who has explained the concepts of settlement counsel to many people for many years, these fears are the FAQs we face in promoting this practice approach: If I propose early negotiation and exploring settlement, won’t the client think I am afraid to try the case? If I propose early negotiations, won’t the other side think we have a weak case? How can we intelligently discuss settlement before we have completed discovery? And finally, the off-the-record question: If I promote early settlement, won’t I be losing fees that I would otherwise earn in litigation?

There are, of course, good answers to each of these questions, and Lande provides them in an introductory quick reference table and in greater detail in each of the ensuing chapters. Establishing Good Lawyer-Client Relationships is both the title of the second chapter and the bedrock for successful implementation of any PEN approach. Central to this step is determining the client objectives and helping frame those into realistic goals to be realized from early negotiation. Among other tools that help this process, Lande covers the use of risk analysis or decision-tree analysis. While not a complete primer on the topic, the discussion provides a useful starting point. An important topic—how to be paid for this work—gets its own chapter.

Each following chapter helps guide the reader through the process of using a PEN approach to the practice of law: establishing good working relations with the other side (and with litigation counsel when acting as settlement counsel), planning for an early negotiation event, information exchanges in lieu of formal discovery, dealing with obstacles in the negotiation process, and ethical considerations that arise in the negotiation process. In preparing this book, professor Lande conducted numerous interviews, all of which help make the text both practical and interesting.

John Lande’s book can help any lawyer or law student learn how to apply the concepts of early negotiation. More than just a general introduction, the book provides a practical step-by-step guide for actual practice, including suggested engagement letters for clients, sample letters to opposing counsel inviting early negotiations, and checklists for evaluating cases. The appendix materials are thoughtfully included in an accompanying DVD, with more than 150 pages of documents in both Word and PDF formats.

This book is a contribution to the ADR field, providing support for all of us who promote interest-based negotiation and mediation as appropriate forms of dispute resolution. It reinforces the wisdom of Abraham Lincoln: “Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will still be business enough.”

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