

Overview of this Book

Chapter 1 analyzes why parties and lawyers are often afraid to negotiate even if they very much want to reach agreement. It describes a “prison of fear” that keeps people paralyzed in adversarial processes even when they want to “change the game” to be more cooperative. It describes “*Nike* lawyers,” for whom PEN is their standard operating procedure: they “just do it.” It also contrasts more systematic PEN processes—Settlement Counsel, Cooperative Practice, and Collaborative Practice—with “litigation as usual,” where negotiation often is unplanned and occurs late in a case. Chapter 1 summarizes how PEN processes can help you and your clients escape from the prison of fear in appropriate cases.

Lawyers generally need to establish good working relationships with clients to negotiate effectively—and, indeed, represent them effectively in any process. Chapter 2 describes typical interests that clients and lawyers have in lawyer-client relationships. Understanding these interests can help you maintain productive and profitable relationships with your clients. Part of your job is to understand clients’ fears and help clients manage them. Chapter 2 shows how you can help clients develop realistic expectations (and thus reduce anxiety) by using “decision analysis,” setting the stage for later negotiations. This chapter also describes how limiting the scope of representation to negotiation, in Settlement Counsel or Collaborative Law processes, can help

you develop good relationships with clients in appropriate cases. Finally, this chapter suggests that you develop a philosophy of practice to help you make difficult decisions, and it offers several examples of such philosophies.

Clients' anxiety about legal bills compounds their worries and can create problems in their relationships with their lawyers. Chapter 3 describes different billing arrangements that give your clients a greater feeling of control as well as provide mutually beneficial incentives, including premium fees, for you to satisfy your clients' interests.

Chapter 4 focuses on lawyers' relationships with "opposing" counsel. Even in adversarial litigation, you have an interest in maintaining a good working relationship with your counterparts who represent the other party. Normally, you have a mutual interest in focusing on the merits of the matter and avoiding unnecessary disputes, delays, and expenses. In an adversarial environment, it is very easy to "get crossways" with your counterparts, and it can take some planning and initiative to prevent unnecessary disputes. The main advice is to develop personal relationships with your counterparts at the outset and reach an understanding that you will consult each other before taking adverse actions. Although this strategy won't always work, it can work more often than you might think. Chapter 4 also addresses the special relationship between Settlement Counsel and Litigation Counsel who are simultaneously representing the same client in a matter. Obviously, there is potential for conflict in these situations, which would harm the clients' interests. This chapter suggests ways to develop good relationships between the respective lawyers.

Chapter 5 provides an overview of key variables and tactics in negotiation. It notes the two traditional models of negotiation (positional and interest-based negotiation) and describes a third model ("ordinary legal negotiation"). It shows that these models are confusing and it focuses instead on six key factors affecting negotiation. It describes three common communication processes—exchange of offers, analysis of interests and options, and applying norms to the facts—and outlines advantages and disadvantages of each of the processes.

Chapter 6 shows how you can plan and conduct planned early negotiations. It discusses the first, critical step of assessing whether negotiation is appropriate. This assessment may be more difficult than you might expect, and this chapter describes how to do such an assessment. If you determine that your client and the other side are interested in using a

PEN process, you should plan the process so that it is likely to be successful. This involves careful preparation of your client and coordination with your counterpart. This chapter sets out procedures for conducting the negotiation and concludes with a description of a successful case.

Chapter 7 analyzes why lawyers regularly have difficulty in negotiation and suggests a general approach for dealing with problems in negotiation, including a checklist of techniques. It then provides suggestions for dealing with uncooperative behavior by your client or the other side. In addition, it suggests ways to deal with lawyers with whom you have recurring problems.

Chapter 8 discusses the use of additional professionals in negotiation, which can be very helpful and sometimes is essential. It addresses some preliminary issues, such as whether to jointly engage neutral professionals and/or separately engage various professionals. It then describes various types of professionals and considerations in engaging them. These include mediators, financial professionals and appraisers, technical experts, mental health professionals, neutral evaluators, private adjudicators, and public adjudicators. This chapter also addresses issues of confidentiality and use of professionals' work product as well as continued engagement after the negotiation ends.

Chapter 9 describes how you can improve the quality of your services to clients. In addition to using procedures discussed in the preceding chapters, lawyers should continue to develop their skills. This includes receiving training, participating in continuing education programs, and getting regular feedback on your performance. This chapter describes various methods for getting feedback, including client surveys or interviews, comments from other professionals with whom you worked on particular cases, and participation in expert or peer consultation groups.

Chapter 10 addresses key ethical issues relevant to planned negotiation. These include diligence and loyalty in representing clients' interests, client decision making and informed consent, discussion of ADR options, screening cases for appropriateness, avoiding impermissible conflicts of interest, confidentiality, and truthfulness to others.

This book is a general guide and not a comprehensive treatise on any of the issues it discusses. A bibliography of useful resources is included so that you may explore these issues in more depth. The appendixes provide forms that you can use or adapt in your practice. Some readers will be familiar

with some parts of the book, but hopefully you will find new material in other parts.

Reviewing this summary of the book, you can see that it analyzes legal practice as a system for handling a continuing series of cases. Borrowing concepts from the field of dispute system design, it suggests an approach for handling individual cases as well as your practice overall. On the individual-case level, it recommends engaging the stakeholders in conducting a careful analysis of the matter, starting with your primary stakeholders—your clients—and including the other lawyer and party, as well as other professionals whom you engage. It suggests jointly selecting and designing a process for handling issues and making periodic adjustments as appropriate. It emphasizes the importance of educating the parties, especially your clients, as appropriate so that they can participate in the process as effectively as possible and get the best possible outcomes.

On the level of your practice overall, it invites you to add planned early negotiation processes to the set of services you offer. To do this, you would implement flexible protocols for effective handling of your cases, receive training in practice theory and skills, get feedback from various sources to assess your performance, and make appropriate adjustments. While this book focuses particularly on incorporating planned early negotiation into your practice, it is really about improving your legal practice generally.

This book is written particularly for lawyers in private practice, although others may find it valuable as well. Corporate and government inside counsel may find it useful in managing their legal dockets. Legal clients may read it to understand lawyers' perspectives and how they can improve their lawyers' work. Law school instructors may find it useful for teaching negotiation and lawyering courses. Law students may want to read it for a practical perspective about how they may work in the future. Professionals who work with lawyers in negotiation, especially mediators, may find it helpful for cases in which they work with lawyers and may want to refer lawyers to the techniques described in this book. Bar associations and courts may use this book in continuing legal education programs to promote good professional behavior.

For simplicity, this book is written as if the reader were a lawyer representing clients in disputes, though most of the same principles would apply to transactional work. It assumes that there are only two parties in the dispute, each with a lawyer, though much of this can be applied in

multiparty cases and even if one or more parties is not represented. The term “client” may include both actual and prospective clients, depending on the context. “Party” may include the party’s lawyer. “Negotiator” may refer to a lawyer or party or both. Similarly, the “other side” may refer to a lawyer or party or both. The terms “Collaborative,” “Cooperative,” “Settlement Counsel,” and “Litigation Counsel” are capitalized when referring to formal processes to distinguish them from the generic uses of these terms.

This book benefits from interviews with practitioners who generously shared their time, experience, insights, and wisdom, for which I am extremely grateful. These include Kathy Bryan, former President and CEO, International Institute for Conflict Prevention and Resolution, New York, New York; Sevilla C.P. Claydon, Of Counsel, Garvey Schubert Barer, Seattle, Washington; Marilyn J. Endriss, Principal/Owner, Sound Conflict Solutions LLC, Edmonds, Washington; Sheldon (Shelly) E. Finman, Attorney at Law and Mediator, Fort Myers, Florida; Eric Galton, Lakeside Mediation Center, Austin, Texas; David A. Hoffman, Mediator, Arbitrator, Attorney, Boston Law Collaborative, LLC, Boston, Massachusetts; James E. McGuire, JAMS, Boston, Massachusetts; Forrest S. (“Woody”) Mosten, Mediator and Collaborative Attorney, Los Angeles, California; Bennett G. Picker, Senior Counsel, Stradley Ronon Stevens & Young LLP, Philadelphia, Pennsylvania; Anne F. Preston, Owner, Garvey Schubert Barer, Seattle, Washington; Douglas C. Reynolds, The New Law Center, LLC, Cambridge, Massachusetts; James R. Skirbunt, Partner, Skirbunt, Skirbunt & Wirtz LLC, Cleveland, Ohio; R. Bruce Whitney, former Chief Litigation Counsel, Air Products & Chemicals, Inc., Allentown, Pennsylvania; Thomas R. Woodrow, Partner, Holland & Knight, Chicago, Illinois; Holly H. Wotherspoon, Attorney, Adams, Romer, Stoeckenius & Wotherspoon LLP, Santa Rosa and San Francisco, California; and P. Marshall Yoder, Attorney & Counsellor at Law, Wharton Aldhizer & Weaver, PLC, Harrisonburg, Virginia. These lawyers have given permission to use the references to them in this book (sometimes without attribution). Other than that, the statements in this book do not necessarily represent their views.

I am grateful for the support of a research fellowship from the University of Missouri School of Law that permitted me to write this book. Steve Lambson and other Law School librarians provided helpful research. I especially appreciate the thoughtful comments and suggestions of Shelly Finman, Holly Wotherspoon, Jim McGuire, Woody Mosten, and Bruce Whitney on a draft of this book.