

Lande's Disconcertingly Excellent Book

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It is a cause of dismay, in a way, that the ABA has published John Lande's superb book, *Lawyering with Early Planned Negotiation: How You Can Get Good Results for Clients and Make Money*.

More than a generation since Frank Sander espoused the "Multi-Door Courthouse," and Jim Henry founded CPR Institute, and Roger Fisher and Bill Ury published "Getting to Yes," one would think that the concept had been mainstreamed into American Law – that there was no longer a need for persuasive advocacy designed to urge lawyers to help their clients to resolve disputes using sophisticated negotiation to attain their interests.

Yet here we are with perhaps the definitive articulation of the argument for lawyers to plan for and engage in negotiation early in a dispute in order to conclude it on terms that are acceptable to their clients, and with minimal waste and acrimony.

In all fairness, few scholars are as eloquent as Lande, and few have the extraordinary overview of the mechanics of the legal profession and of problem-solving as Lande possesses. Perhaps even if the practice were broadly observed by now, the book would be needed just as inspiration.

Lande charts how frequently "litigation as usual" results in expensive, time-consuming and wasteful events such as discovery motion practice, when the direct way to serve the client is almost always to make reasonable discovery demands and to comply with them. Unprofessional and anti-collegial competition and antagonism between counsel too often creates barriers to their clients' getting what they need from a dispute, and Lande's suggestion that opposing counsel have lunch together early in the process is so obvious in its tactical wisdom that it seems almost quaint.

This should be shooting ducks in a barrel. In New Jersey, last year, 102,937 civil cases were resolved, 1,964 by trial. That means that fewer than 2% of cases went to verdict. A book espousing negotiated resolution ought to be received like a book teaching you how to make water wet. Yet clients reward attorneys who prepare for trial, while not rewarding them for preparing for the inevitable non-judicial resolution of the dispute.

Lande does not merely advocate; he teaches. He provides instructions, resources, anecdotes, authoritative personal testimony, and step-by-step explanations of how to draft a collaborative agreement; how to propose engagement terms that provide incentives for lawyers to achieve early settlement; how and when to bring experts into the negotiation process; how to use decision trees and other methods assist clients to

determine the optimal strategy to manage the conflict; how to conduct an early assessment of the claim; how to improve negotiation skills throughout one's career; and so on. It is a very good book indeed.

But here we come to the second depressing fact: The book is published by the American Bar Association, implying that its target audience is lawyers who handle disputes. I am dedicated to the ABA, and am honored to serve the Association in many capacities. But this is a book on conflict management. The skills need to be understood by those managing enterprises, not by those trained to "fight for" their clients in a courtroom. Nothing that Lande says in this book takes place in a courtroom, and practically everything he describes happens in the client's office.

Rather than encouraging more lawyers to read Lande's piece, is it too much to hope that the NAM, the US Chamber of Commerce or the AMA might pick it up and circulate it to its membership? And despite its clear utility in law schools, could we not hope that this volume would be read in a course in risk management for future MBAs?