

# Alternatives

TO THE HIGH COST OF LITIGATION

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## ADR Skills

### How Advocates Can Manage Cases Better, And Get Good Results, With 'Planned Early Negotiation'

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This article describes how lawyers can manage their cases more efficiently and profitably by preparing to negotiate the cases from the outset.

But this is not just about negotiation—it describes a general approach to lawyering.

In an all-too-common pattern that arises in typical litigation, settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original

conflict, the parties' relationship deteriorates, and the process takes a long time.

Perhaps worst of all: It costs a lot of money, and none of the parties is particularly happy with the settlement. Almost any disagreement can lead to an escalation of the conflict that diverts energy away from the critical tasks needed to resolve disputes efficiently.

Although some lawyers enjoy this process and make a good living from it, many people would prefer to use a more constructive and efficient process. They know that most cases eventually will settle—often only after a process that takes too long and costs too much—and they feel powerless to steer clients toward a more productive path.

They are often trapped in a "prison of fear" that locks them into unnecessarily long and expensive litigation. They fear that the

other side would interpret the mere suggestion of negotiation as a sign of weakness and an invitation to take advantage of their clients.

Logically, this is absurd because even parties and lawyers with strong cases should have an interest in an early settlement under favorable terms.

But this fear still grips much of the legal profession.

Lawyers also sometimes worry that they will lose revenue if they negotiate early in a case. Many lawyers are still afraid to suggest anything but the traditional hourly billing system, which incentivizes inefficiency.

#### ESCAPING THE PRISON

Lawyers sometimes escape from their prison of fear. They help clients assess the benefits and risks of negotiation, let the other side know of their interest in negotiation—but willingness to litigate if necessary—and cooperate with the other side in a constructive planned early negotiation, or "PEN."

Even when they aren't sure that they can trust the other side, they may decide that trying early negotiation is better than the alternatives, such as litigation-as-usual or capitulation.

PEN can be particularly helpful in complex civil cases, where there often are multiple parties, complicated organizational relationships,

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numerous claims and counterclaims, and complex technical issues. Without continuing cooperation, it is easy for everyone to get caught up in an escalating conflict that gets resolved only after lengthy, bitter, and expensive litigation.

In PEN processes, lawyers can maintain or increase their revenue by offering creative compensation arrangements that satisfy both clients' and lawyers' interests. They can design fee arrangements that provide bonuses for achieving clients' goals and resolving matters relatively quickly. Sharp lawyers can generate efficiencies, share the savings with clients, and thus increase their effective hourly rates. See, e.g., Mark D. Wolf, "Update: How Value Billing Helps Both the Client and the Law Firm," 28 *Alternatives* 1 (2010).

PEN is not appropriate in every case but when it is, it is a useful tool for lawyers to satis-

fy many clients and make money by using their time more efficiently. Lawyers should routinely do an "early case assessment" to analyze what procedures would be most appropriate in each case. The CPR Institute's Early Assessment Toolkit provides an especially good protocol. (See [www.cpradr.org/Resources/ADRTools/EarlyCaseAssessmentGuidelines.aspx](http://www.cpradr.org/Resources/ADRTools/EarlyCaseAssessmentGuidelines.aspx); CPR publishes this newsletter.)

This article highlights key points from my book, "Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money" (ABA 2011), which describes how lawyers take the initiative to manage cases efficiently from the outset and plan a reasonable negotiation process when appropriate. The book includes advice from interviews of outstanding lawyers who handle all kinds of cases.

### LAYING THE FOUNDATION

How can lawyers build an escape hatch from their prison of fear? One option is to work with

their counterpart lawyers to jointly plan and manage the dispute resolution process and can keep it on track.

Building confidence in the process can be especially helpful at the outset, when the parties may be especially afraid and distrustful.

Effective lawyers begin by developing good working relationships with their counterparts. Arranging a face-to-face meeting at the outset, perhaps over a meal, can help lawyers get to know each other as individuals, not merely as "opposing counsel."

At these initial meetings, they may spend much of their time getting to know each other, not just discussing the details of the case. When lawyers have such personal connections, they are more likely to resolve problems in a case than if they merely maintain a professional arms-length relationship.

Lawyers can reassure their clients that they have little to lose by exploring negotiation as they can stop the process at any time. If they

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decide to proceed in litigation, they probably will not have lost very much considering that most of the information they will provide is probably legally discoverable.

Indeed, even if an early case management process does not result in agreement, it can help the parties focus on the key issues and avoid wasteful procedures when they do litigate.

Early in the case, lawyers can talk with each other to identify the information that each side needs to reasonably evaluate the matter. By voluntarily sharing information, they can demonstrate that they have a high degree of confidence in their case and an interest in negotiating a fair agreement.

Lawyers can manage the process of exchanging information to minimize the risk of exploitation. For example, they can arrange for each side to begin by exchanging basic information that is clearly necessary and discoverable. Following these initial exchanges, they can decide what specific additional information would be necessary.

Lawyers can also help arrange assurances about the accuracy and completeness of information. Each side can provide information under penalty of perjury, providing similar assurances as in formal discovery.

Moreover, they can agree to limited formal discovery to obtain information from people who are not parties in the dispute. If the parties settle a case, lawyers can include language in settlement agreements making representations about material facts that could be the basis for remedies for fraud.

Sometimes, the critical information needed to promote settlement involves facts that are not legally discoverable, such as the parties' key interests, settlement priorities, business plans, or future expectations. If the lawyers have developed a good working relationship, they may be able to discuss sensitive issues with greater confidence.

If the parties mediate, each side can provide such information confidentially to the mediator, with assurances that it will be used carefully and without disclosure except as authorized.

In complex disputes, experts' analyses are often critical elements in negotiation and litigation strategies. Lawyers can help parties avoid expensive and risky "battles of the ex-

perts" by hiring joint neutral experts. This substantially reduces the cost and risk of using separate partisan experts for each side.

In hiring joint neutral experts, lawyers should decide what information will and will not be provided to the experts, what analyses that the experts will provide, whether they could be called as witnesses in litigation, or whether their work-product could be introduced in evidence.

Arrangements for engaging neutral experts might include provisions for obtaining additional

## Being Prepared

**The topic:** Case management.

**How is this different?** Structure. Early intervention. Assertive resolution tactics long before a court or even a client demands them.

**How does this work?** It focuses on negotiation, not cases or rules. It's about getting in there early with a path to resolution—with fees that reflect success, not endless litigating.

expert input under certain circumstances, such as if the results are outside a specified range.

If each side retains its own experts, lawyers can convene a meeting with the experts to identify areas of real agreement and disagreement. Based on this discussion, they can develop a procedure to resolve critical issues that the experts disagree about.

Considering all the tasks that may be involved leading up to the dispute resolution phase of the process, lawyers can jointly schedule various steps in the process, considering any critical-path sequencing issues.

Lawyers can also help design multistep dispute resolution processes so that parties start with negotiated processes like mediation, and arrange for adjudicative processes like arbitration if they do not reach agreement within a specified period.

If parties do adjudicate the dispute, lawyers can narrow the issues to be argued, identify expert witnesses to be called, share exhibits, and generally inform each other of their plans. Lawyers can also commit to focus their arguments

on the merits of the dispute and avoid tactics that unnecessarily aggravate the conflict.

## ROBUST ROLE FOR NEUTRALS

Ideally, lawyers would initiate early negotiation without engaging a third party to manage the process in every case. But sometimes a neutral may be necessary or very helpful.

Of course, neutrals participate directly in the ultimate dispute resolution process itself by providing services such as mediation, evaluation, and arbitration. They can also undertake a robust role in managing cases as described below. Mediators are most likely to do this case management, though evaluators or arbitrators might do so in appropriate cases.

For example, neutrals can set the stage for the dispute resolution process. They can manage the logistics in arranging for suitable space, audio-visual technology, refreshments, and related matters. In some cases, key individuals may not be able to attend in person and the neutrals can arrange for video, or teleconferences if appropriate.

More substantively, neutrals can orchestrate the exchange of information and documents specifically needed for the process, attendance—and, possibly, non-attendance—of particular individuals, participation of experts, preparation of the parties to have realistic expectations about the process, scheduling of the meetings or hearings, and facilitating procedural agreements about the process, as appropriate.

In coordinating with counsel before the mediation or hearing convenes, neutrals can specifically discuss potential problems in the process, ideas for making it work successfully, and an agenda or schedule. In mediations, neutrals may help lawyers prepare by discussing the parties' substantive concerns.

If parties are concerned that the other side might take advantage in the process of exchanging information, they can use mediators to serve as "discovery escrow agents" to protect each side with simultaneous exchanges of information.

Mediators also can arrange for the lawyers to coordinate the drafting of boilerplate language for a settlement agreement before convening the mediation session. This can help avoid last-minute blowups over issues that were supposedly not controversial.

If these issues are not addressed in advance, they may arise very late in a mediation, when everyone is tired and wants to go home. Some-

times lawyers take a memorandum of agreement from a mediation and plan to draft a full settlement, but disputes over boilerplate lead to extensive delays and even kill some deals.

Negotiating the boilerplate in advance can help parties start the mediation session with a positive expectation of settlement. If lawyers negotiate the boilerplate language before the mediation session and identify disputes over the language, the mediator can help resolve the disputes in a timely way as part of the mediation.

Obviously, neutrals should be appropriately compensated for case management and resolution services. Parties can save money as neutrals may be able to provide case management services more economically than the parties' lawyers.

Moreover, having neutrals provide these services gives greater assurance that no one

will try to gain some advantage from making the procedural arrangements. And it also permits a fair allocation between the parties of the case management costs.

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Lawyers can help their clients and make money by using planned early negotiation whenever it is appropriate. Savvy lawyers know that increasingly, sophisticated clients will not finance litigation-as-usual solely using the hourly billing system.

By offering clients a PEN process when appropriate, lawyers can help clients avoiding getting trapped in a prison of fear. Instead of reacting defensively out of fear, lawyers can build trust with the other side so that they can negotiate with more confidence.

Instead of relying only on ad hoc negotiation processes initiated and developed for each case, lawyers can use general procedures that can be adapted for each case.

Instead of waiting until both sides are worn down by litigation before suggesting negotiation, lawyers can offer a PEN process at the beginning of a case.

Instead of investing in unnecessary and counterproductive litigation procedures, lawyers can manage cases more efficiently and share the savings with their clients.

By using PEN, lawyers can become more effective, increase their professional satisfaction, generate good will, relieve stress, and increase their income. 

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