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John Lande, *Lawyering with Planned Early Negotiation: How you can get good results for clients and make money* (ABA Section of Dispute Resolution, 2011)

Book review by Jan Frankel Schau (ADR Services, jfschau@schaumediation.com)

John Lande takes a refreshing approach to litigation, which perhaps only a mediator would have the audacity to offer. His premise is that by encouraging lawyers to take the initiative to plan for negotiation instead of trial, they will not only likely achieve better results for their clients, but will, at the same time, positively affect their own lives and the lives of their adversary counsel.

At a recent Conference of the Association of Southern California Defense Counsel in Los Angeles, former State Bar Judge Michael Marcus, now a full time neutral, addressed an audience of about 500 Defense lawyers, urging them to at least start engaging in conversations about civility and conducting litigation in a way that would not only better satisfy clients, but also facilitate a better life for lawyers: one where we could sleep at night, take vacations without concern and live longer, better lives than the current practice model predicts. For example, Judge Marcus suggests, why not call the opposing counsel at the outset of the case and go to coffee so that you can develop a professional, polite relationship where you can discuss calendar issues, habits or preferences (e-mail or phone, letter or meetings) and vacation plans, health issues, family matters which may impact your handling of the dispute for the next few months or years. In that way, you can initiate a tone of civility and friendliness which may succeed in coloring the remainder of the handling of the case.

Lande begins the book with an Introduction about his inspiration for writing it. There, he reveals that it grows out of two threads of his research and practice: Alternative Dispute Resolution and teaching lawyering courses to law students at the University of Missouri. Recently, he delivered a lecture at UCLA which he called: "Building good working relationships with opposing counsel in negotiation: even if the parties have extreme positions or the other lawyer is a rascal". Obviously, Lande has observed plenty of poor behavior in the context of litigation, but refreshingly, he offers concrete ways to alter that path.

In the book, Lande examines planned early negotiation (which he refers to as "PEN") from both the client and lawyer's perspective. He acknowledges that the "litigation as usual" strategy typically serves to escalate the original conflict, is time consuming and expensive. What's even more unfortunate, the ultimate settlement in this model is rarely satisfying to either, let alone both parties. It is, as Lande describes it, an adversarial "game" which satisfies only those rare lawyers who enjoy the sport for it's own sake. By teaching young law students in "lawyering", he aims to change that thinking and offer real alternatives to that model.

Alternative dispute resolution offers the prospect of more satisfying outcomes for both lawyer and client: the parties may accept responsibility for their part in the underlying conduct that lead to the legal dispute, they may arrive at a proscription for new and better future interactions and in many instances at least have the chance for face-saving and keeping the disputed matter confidential: a result which is virtually unattainable in a public trial in court. He offers examples of clients who win their trials but remain so dissatisfied because the other side never accepted responsibility for their actions, if the jury aimed to punish their behavior by awarding a verdict in plaintiff's favor.

Lande describes several models for PEN processes, including hiring settlement counsel and explicit written agreements for either a cooperative or collaborative negotiation. It was impressive to see that IAM President-elect, Eric Galton, was interviewed about his work as Settlement Counsel and that IAM Distinguished Fellow David Hoffman was the author of the collaborative negotiation movement which is striving to permeate not only family disputes but civil disputes of all types.

In considering PEN, Lande asks lawyers to look at the basis for why they are hired by their clients. Typically, lawyers are engaged to protect and advocate for client's legal rights in ways in which they were already unsuccessful in advocating on their own behalf. Unfortunately, he notes, in many instances lawyers fail to assess the client's interests beyond "their stated or superficial goals". The default for most lawyers is to proceed with litigation when consulted by a client who has a legal claim that has not been adequately redressed.

Instead of assuming that business as usual is still appropriate and preferable, Lande suggests that advocates take the time at the outset of their engagement to educate clients about both their substantive legal rights and procedural options in an effort to help them to develop realistic expectations for the next few months and years as well as a broad range of possible outcomes. And Lande strongly urges advocates to return to this conversation throughout the life of the dispute: to ensure that choosing one path does not eliminate all other options in the future.

The Chapter on Billing Systems: Managing the Financial Relationship between Lawyers and Clients was, in my opinion, a brave effort to highlight the tension between the client and his lawyer's best interest in terms of financial incentives. It is a challenging and precarious issue which arises in many of my own mediations where I observe that by recommending acceptance or rejection of an offer of settlement, the lawyer has to evaluate his client's best interest which is often at variance from his own. For a Plaintiff lawyer who is handling a matter on a contingency fee and has advanced costs, the risks of losing his investment and costs and the time required to prepare for and successfully try a case to a verdict may color his advice to his client to accept a reasonable offer. On the other hand, the client, literally with "nothing to lose" may want his lawyer to try the case and reject a modest settlement if he has been advised that he can do much better at trial throughout the life of the lawsuit. On the defense side, an early settlement demand means losing hours or months of trial work and a discussion about costs of defense almost always involves a loss of income to the attorneys as a case is resolved before substantial expenditures on legal fees have been made.

Lande offers creative solutions to address these natural but still uncomfortable tensions such as "triggers" or "strike points" for settlement, combining hourly and contingent fees, value billing and even premiums offered for early settlement. The options presented realistic and creative ways to resolve this tension and advance this new paradigm for handling legal disputes in most reasonable and ethical ways.

The Chapter on Negotiation Techniques was worth reading, particularly for lawyers who intend to take on this negotiation without the assistance of outside mediators. There he

discusses theories that include range analysis and ZOPA (the Zone of Potential Agreement), interest based v. positional negotiation and other means of getting an agreement that will satisfy both clients and their advocates.

Forrest Mosten, a well-respected trainer and mediator, is cited as approaching family law issues with the rhetorical question: "How can we solve this together?" Mosten, well known for his approach to legal unbundling, views lawyers as problem-solvers rather than zealous advocates of a single side of a dispute. Indeed, in the context of no-fault divorce, that area is always multi-dimensional with many issues in dispute and a single goal of ending a marriage/partnership.

I particularly appreciated the time, care and depth of Lande's analysis of the ethical issues that will arise when advocates adopt PEN into their practice. Questions of confidentiality, diligence, loyalty and client's control are addressed within the context of the Model Code of Professional Responsibility of the American Bar Association.

The book ends with an extensive Appendix and even a CD-Rom containing forms and checklists for each of these procedures.

Ambrose Bierce, an 18th Century American editorialist, famously observed this about our legal system: "Lawsuit: a machine which you go into as a pig and come out of as a sausage." Perhaps Lande's book will offer the beginning of a new paradigm where lawyers can take their client's best interests and instead of packaging them and casting them into a sausage machine, can instead plant the seeds of a sustainable garden.

By modeling and committing to decent behavior, respectful conduct and a genuine effort to develop good working relationships with both our clients and our opposing counsel, perhaps a new generation of lawyers can positively affect the practice of law and in so doing the life and well being of our fellow lawyers as well as our clients. It won't be easy, but it would certainly appear to be a worthwhile goal—especially if the end result would be, as Lande suggests, getting good results for clients and making money.

Perhaps by the mere act of planning for negotiation instead of trial at the outset of a lawsuit at the very least we would all enjoy a more satisfying professional life—even if the other lawyer is a rascal.