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## My Last Lecture: More Unsolicited Advice for Future and Current Lawyers

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# My Last Lecture: More Unsolicited Advice for Future and Current Lawyers

*John Lande\**

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## I. INTRODUCTION

I am deeply honored by the invitation to write this essay on the occasion of my retirement, following in the footsteps of my former colleague, Steve Easton.<sup>1</sup> Steve wrote a wonderful article, *My Last Lecture: Unsolicited Advice for Future*

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\* Isidor Loeb Professor Emeritus and Senior Fellow, Center for the Study of Dispute Resolution, University of Missouri School of Law. Thanks, with the usual disclaimers, to Steve Easton, Noam Ebner, Doug Frenkel, Rafael Gely, Michelle Heck, and S.I. Strong for helpful comments on an earlier draft.

1. It is more accurate to say that I am semi-retiring. See John Lande, *The First Day of the Rest of My Life*, INDISPUTABLY (April 30, 2015), <http://www.indisputably.org/?p=7009>.

and Current Lawyers.<sup>2</sup> University of Missouri law students are required to read it for the first day of class in our Lawyering course, which all students take in their first semester. I taught that course every year since its inception in 2004. So I re-read that article every year and I continue to be impressed by Steve's wisdom and candor.

I begin this article by incorporating by reference 100% of his advice (including his advice to be careful about accepting unsolicited advice).<sup>3</sup> My first piece of advice is to read Steve's article and take it to heart. I particularly emphasize the following passage:

When you encounter a potential dispute with one of your opponents, be it large or small, do not fight with your opponent over that issue until you first determine whether it is important to fight about it. If it is, fight hard, fight smart, fight with conviction, passion, and perseverance, and fight to win. If it is not worth fighting about, concede that issue to your opponent, or find a compromise that is acceptable to you, your client, your opponent, and your opponent's client.<sup>4</sup>

I realize that it may be surprising that, as a dispute resolution scholar publishing an article in the *Journal of Dispute Resolution*, I suggest that you ever fight. Conversely, you might think that lawyers should always fight "zealously" and settle only when they have weak cases. In fact, virtually all lawyers need to cooperate and clash with others at times. In general, I think it is better to try to cooperate before battling. But sometimes, it is necessary and appropriate for lawyers to engage in vigorous conflict. And contested adjudication is an important form of dispute resolution. I elaborate on these ideas throughout this article, particularly in Part IV.H.<sup>5</sup>

For quite a while, I have been writing and teaching to prepare students realistically for legal practice. This article distills my thinking into a concise presentation. I wrote this article primarily for law students as they contemplate their careers, but I hope it will be of value to lawyers as well. Hopefully, it will whet

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2. Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229 (2004). Professor Easton is still actively teaching, now at the University of Wyoming. He wrote his article as if it was his last lecture.

3. Part of Steve's warning was to consider the source of advice and potential biases of the source. For more information about my background and perspective, see John Lande, *Where I'm Coming From . . . And Want to See Us Go*, INDISPUTABLY (Oct. 1, 2014), <http://www.indisputably.org/?p=5914>.

4. Easton, *supra* note 2, at 236-37. I recently exchanged emails with Steve and I mentioned that this was my favorite passage in his article. He responded as follows:

Do you remember the Woody Allen movies when the words "Authors Message" would flash on the screen? You have found the "author's message" for that article. To me, figuring out what is, and more importantly what is not, worth fighting about is the key to enjoying the practice of law and being successful at that endeavor.

E-mail from Professor Stephen D. Easton, University of Wyoming College of Law, to John Lande, Isidor Loeb Professor Emeritus & Senior Fellow, Univ. of Mo. Sch. of Law (Dec. 26, 2013, 5:13 PM CST) (on file with author).

5. This article focuses primarily on lawyers' work in litigation, though the same principles generally can be adapted to transactional work. Although lawyers struggle with each other a lot in litigation, they also cooperate a lot. See *infra* Part IV.C. On the other hand, lawyers representing parties in transactional negotiations generally try to cooperate but they can get involved in intense conflict.

your appetite to pursue these ideas more deeply by reading some of the sources cited in the footnotes.<sup>6</sup>

## II. GET THE MOST POSSIBLE BENEFIT FROM LAW SCHOOL

### A. *Pay Attention to What is Really Important in Your Career and Don't Think About Grades Too Much*

New lawyers are sailing into what Professor A. Benjamin Spencer calls a “perfect storm”:

The value of a law degree is being questioned given the deterioration of the traditional legal job market and the substantial and growing size of the student loan debt of recent graduates. Further, law schools are being charged with failing to prepare their graduates adequately for practice. Thus, we have what appears to be a perfect storm in legal education: Law school graduates are under-employed, over-indebted, and under-prepared for practice.<sup>7</sup>

So you are likely to face a tough job market and you may not be well prepared to find a good job. Unless you already have a commitment for a job you want, you should plan for your career *now*, even if you are a 1L. The career development office at your school probably will be happy to help you, both out of sincere interest as well as your school’s interest in demonstrating high placement rates.

Many law students have unrealistic understandings about what lawyers actually do in practice. Entertainment and news media typically exaggerate the sensational parts of legal work. Law school courses typically exaggerate the focus on appellate litigation and legal rules. If you don’t understand what different types of lawyers really do, you may be frustrated because the actual work in your first jobs won’t fit your idealization of it. As a result, you may feel desperate to switch jobs, a problem you might avoid if you understand the realities of legal practice.

Consider the size and type of law office you want to work in. Do you want to be in private practice and, if so, what kinds of clients do you want to work for? Do you want to practice criminal law, either as a prosecutor or defense counsel? What about working in a government agency or as an in-house counsel of a business or non-profit organization? Are you more interested in litigation or transac-

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6. I particularly suggest two of my publications, which were based on interviews with respected lawyers. One is an article that summarizes lawyers’ views and approaches to negotiation. See John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 CARDOZO J. CONFLICT RESOL. 63 (2014) [hereinafter *Good Pretrial Lawyering*]. The other is my book, which provides detailed guidance about practicing law, including many forms and checklists. See JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY* (2d ed. 2015) [hereinafter LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION*]. See also HENRY W. EWALT & ANDREW W. EWALT, *THROUGH THE CLIENT’S EYES: NEW APPROACHES TO GET CLIENTS TO HIRE YOU AGAIN AND AGAIN* (3rd ed. 2008); JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* (2012).

7. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1951-53 (2012) (footnotes omitted).

tional work? Would you like a career in which your law degree is helpful but not necessary, such as business, journalism, or consulting? Consider these and many other questions about your career. Develop several career options, recognizing the difficulties of finding jobs and the fact that it is hard to anticipate what will be available and what you will like.

Analyze what knowledge and skills you would need to get a job and perform it well. It is important to have a basic foundation in understanding legal rules and concepts, but you will probably learn the particular rules and procedures you will need on the job. Many legal skills are transferrable to various settings and require a lot of practice, so focus on developing your skills.

The landmark “MacCrate Report” identified the following fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas.<sup>8</sup> Which skills are your strengths and which ones do you want to develop more?

Create a “portfolio” to strategically plan to get the knowledge and skills you are likely to need.<sup>9</sup> Your plan should involve taking appropriate courses (especially clinical courses) and getting relevant jobs or externship placements. You can also do this through competitions and volunteering. Make a list of your goals, identify ways to accomplish them, periodically review your list to assess your progress, and make any needed adjustments to your plan.

Take the initiative to get several mentors. Find at least one or two faculty who you “click” with and get to know them. Also plan to meet practitioners, perhaps by attending meetings of local bar association committees. Many students feel too shy to do this, but lawyers need to be assertive and this is a relatively easy way to practice your skills and learn from the experiences of faculty and practitioners. You will need references to get jobs and people can give much better references if they know you.

Regularly prepare for and attend class, pay attention, and participate. A surprising number of law students do not do so. Forgive me for being so blunt, but this is pretty dumb. You are investing a lot of time and money in law school and the job market is dicey these days. Although there is room for improvement in our legal education system, you have a strong interest in taking advantage of what it offers. You may think that some material may not be valuable to you, but experienced educators have decided otherwise. Normally, you should have a strong presumption that they are right. If you don’t see the value, the problem may not be a lack of value but rather your failure to recognize it.

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8. See *Legal Education and Professional Development—An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. PUB. L. ED. & ADMISSION BAR 1, [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf), (commonly known as the “MacCrate Report”) (includes detailed listing of components of each fundamental skill). See also Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620, 629-30 (2011) (listing 26 skills identified as important for lawyers to be effective).

9. See generally Deborah Jones Merritt, *Pedagogy, Progress, and Portfolios*, 25 OHIO ST. J. ON DISP. RESOL. 7 (2010) (describing nature and value of law student portfolios).

Classes can seem boring, especially compared with texting your friends, surfing the internet, or checking your Facebook page, but usually you will get some value by paying attention. Put away your laptop unless you really are going to use it to take thoughtful notes. You can fool yourself into thinking you are learning by simply transcribing the professors' statements without thinking about them. You can easily get distracted if you check email or surf the web and you can also distract your classmates and professors. In addition, it is very insulting to your professors.

Take advantage of class to practice speaking in public, especially if you are shy. After graduation, you will have to face scarier situations when you have a lot more on the line.

Don't focus too much on grades. Everyone cares about how they are rated, especially in a competitive environment like law school, where grades can affect your career opportunities. Grades measure some important skills and can provide some useful feedback. If you get good grades, congratulations! Try to figure out how you did it so that you can continue doing so. But remember that grades are imperfect measures of a fraction of the things that people need to be good lawyers. In particular, they generally do not measure the communication and practical problem-solving skills that clients really need. So don't assume that you will be a good lawyer just because you get good grades.

By the same token, if you don't get good grades, don't beat yourself up as being a failure. Try to figure out why you weren't able to provide the analysis that your professors were looking for. In any case, keep in mind all the things you will need to develop a successful career and remember that your GPA is only one of those things—and probably not the most important thing for most students.

This advice is supported by recent research showing that external motivations, such as “grades, honors, and potential career income, have nil to modest bearing on lawyer well-being” (or “happiness”) but that you are likely to be significantly happier if your job satisfies your internal motivations for being a lawyer.<sup>10</sup>

### *B. Learn to Learn Because You Are Going to Need to Keep Learning Throughout Your Career*

Considering the importance of continuing to learn throughout your career, you should concentrate on learning to learn. You might assume that you already know this because you have been learning all your life. But some people learn better and faster than others. You can develop the skill of learning.

Lawyers have always needed to keep learning. Each client brings new facts. The courts and legislatures continue to produce new law. Procedures and techniques evolve. Lawyers' ongoing need to learn is reflected in continuing legal education requirements you may need to comply with. So you need to be a learning machine.

You would need to continue to learn in these ways even if the social environment remains the same. But the world is constantly changing, which makes it

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10. See Lawrence S. Krieger with Kennon M. Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 560, 562, 576-80 (findings based on large-scale survey of lawyers).

all the more important that you recognize relevant changes. Pick an area of law such as intellectual property, criminal law, business law, family law, or almost any other, and you will find that the context of the legal regimes have been shifting like tectonic plates. Moreover, technological changes have a major effect on the way that people live, work, and communicate. You may not detect changes moment to moment, but you are likely to see dramatic changes during your career.<sup>11</sup>

The legal profession itself is undergoing significant transformation. There used to be a fairly stable structure in the legal profession. Big law firms would hire associates and, under the “up-or-out” system, associates would either be promoted to become partners or leave their firms.<sup>12</sup> Over time, the system evolved so that firms retain some associates as senior associates or non-equity partners, hire lawyers on a contract basis, and sub-contract work to other firms.<sup>13</sup> The explosion of electronic communications and the need for e-discovery led firms to hire armies of low-paid lawyers and/or technology firms to review large volumes of documents.<sup>14</sup> Big firms have undergone great turmoil as firms merge, split up, and collapse at a remarkable pace.<sup>15</sup>

The 2008 recession had a major impact on the hiring of new graduates. According to Professor Bernard Burk, “over half of all the full-time, long-term Bar Passage Required jobs that were lost between the Class of 2007 and the Class of 2011 were lost out of BigLaw alone.”<sup>16</sup> This contraction had a ripple effect throughout the profession as graduates who previously would have been hired in big firms are now taking jobs that less well-credentialed graduates would have gotten. As a result, “the least employable candidates, who generally occupied the least-sought-after Law Jobs, get pushed out of Law Jobs altogether into less- or non-law-related positions or unemployment.”<sup>17</sup>

Burk argues that the legal job market is not likely to revert to prior levels as the economy improves.<sup>18</sup> He contends that there have been structural changes in the legal market as big-firm clients have learned that lawyers can operate more efficiently in various ways.<sup>19</sup> So clients are not likely to accept a return to less-efficient services.<sup>20</sup>

Of course, there have been other changes in addition to those due to transformations of big-firm practice. For example, hiring of lawyers in government agencies fluctuates with the amount of funding that federal, state, and local governments are willing to invest. Some businesses are increasing hiring in their legal departments to increase efficiency and control of their legal matters, particularly as they need to manage regulatory requirements.<sup>21</sup> It is becoming more common

11. For example, there have been dramatic changes in family law rules and procedures during my lifetime and I expect that this transformation will continue. See John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411 (2012).

12. Bernard A. Burk, *What’s New about the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 FLA. ST. U. L. REV. 541, 587 (2014).

13. *Id.* at 584-85, 588-89, 596-97.

14. *Id.* at 583.

15. See generally Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (2010) (economic analysis of downsizing of large law firms).

16. Burk, *supra* note 12, at 576.

17. *Id.* at 577-78.

18. *Id.* at 597-99.

19. *Id.* at 583.

20. *Id.*

21. *Id.* at 585.

for lawyers to work for “secondment firms” (which provide lawyers to work for clients on a temporary basis), firms that provide both law and business advice, “accordion firms” (which help other firms to meet short-term staffing needs), “virtual law firms,” whose lawyers work from home, and other innovative firms.<sup>22</sup>

Current law students may have better job prospects than recent graduates because of dramatic declines in law school enrollment.<sup>23</sup> But don’t become complacent about the possible improvement in the legal job market. You should be chastened by the sudden changes in the legal profession and recognize that they probably reflect underlying dynamics that will continue for the foreseeable future.

Carefully study the profession, anticipate possible developments, and prepare yourself to survive in a challenging professional environment. Even as you plan for possible professional futures, recognize that, as the noted economist Yogi Berra said, “It’s tough to make predictions, especially about the future.”<sup>24</sup> So plan to adapt to many different possible futures by learning generic skills and knowledge that would be useful in many different circumstances.

Focus on your personal learning objectives, pay attention to what you find particularly hard, and concentrate on how you can overcome those difficulties. This is important both to gain particular knowledge and skills as well as to develop the skill of professional learning. Candidly write out your self-assessments of the process, noting both what worked well and what was hard. It is tempting just to think about this, but you are likely to be more thorough and develop more insights if you do this in writing.<sup>25</sup>

You should also plan to get feedback from other sources, as they will be able to tell you things you may not notice about yourself. If you have supervisors or co-counsel, ask them for candid feedback at appropriate times. Although it may feel scary to ask clients for feedback, this can be very helpful and they will probably appreciate your interest. Soon after you finish a case, you can call your clients to “check in” and see how they are doing. You can ask them how they thought the case went, what you did well, and what you might do differently in the future. If you want more detailed feedback, you can arrange for a formal interview or ask them to complete a survey.<sup>26</sup>

In some cases, you might even ask your counterpart lawyer or the judge for feedback about how you handled a case. Depending on your relationships with them, this may not feel appropriate. But in some cases, they will respect you for asking and will give you very helpful feedback.

An option that is less risky and more systematic is to participate in a peer consultation group that meets regularly in a confidential environment to learn

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22. See Joan C. Williams, Aaron Platt & Jessica Lee, *Disruptive Innovation: Disruptive Models of Legal Practice* 2 (2015) <http://worklifelaw.org/wp-content/uploads/2015/09/Disruptive-Innovations-New-Models-of-Legal-Practice-webNEW.pdf>.

23. Burk, *supra* note 12, at 599-605.

24. Yogi Berra *Quotes*, GOODREADS, [http://www.goodreads.com/author/quotes/79014.Yogi\\_Berra](http://www.goodreads.com/author/quotes/79014.Yogi_Berra). (last visited Oct. 4, 2015).

25. See, e.g., LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6, at 287-90 (self-assessment forms).

26. See *id.* at 146-48, 291-97. See also DOUGLAS STONE & SHEILA HEEN, THANKS FOR THE FEEDBACK: THE SCIENCE AND ART OF RECEIVING FEEDBACK WELL (EVEN WHEN IT’S OFF-BASE, UNFAIR, POORLY DELIVERED AND FRANKLY, YOU’RE NOT IN THE MOOD) (2014).



from challenging experiences.<sup>27</sup> Unfortunately, such groups are probably rare for lawyers and you might need to take the initiative to start such a group.

It is impossible for you to learn in law school everything you will need to know to be a good lawyer. So consider this as just the beginning of a lifetime of learning about lawyering.

C. *Don't Do Dumb Things—Especially Electronically*

Lawyers need to have good judgment and discretion because people expect lawyers to protect the confidentiality of their sensitive matters. So don't produce things that could raise doubts about your judgment by potential employers and clients. Imagine how they might react to an indiscreet email or photo of you. They might not invite you for an interview if they Google you and find something that raises doubts about your judgment.

So before you send an email or text or you post something on Facebook or any other electronic medium, imagine how potential employers might react if they saw it. Develop a "red flag" system so that if you have the feeling that something might be problematic, wait before sending the email, posting something on Facebook, etc. Take time to consider if you want to do it at all or if you could change the communication. Good lawyers develop this mindset as second nature and are very cautious about putting things in writing. Sometimes it makes sense to communicate sensitive matters by phone or in person to reduce the risk of disclosure and misinterpretation.

Be careful about posing for photos, especially if you are nude and/or intoxicated. This caution should be obvious, but many people are careless and create avoidable problems that are extremely embarrassing. While it might seem fun in the moment, especially if you are drunk, you may regret it for a long time. I suggest not posing for such photos so that you never have to worry about it. Although you might assume that employers would never see embarrassing messages or photos, this is a foolish assumption when electronic communication is so easy.

Don't do or say anything that might come back to haunt you. Lawyers' reputations are invaluable. Once you develop a bad reputation, you will have a hard time rehabilitating it. Your legal reputation starts in law school. Your professors may not give you good references and your classmates may not give you referrals or say good things about you based on how you acted in law school. In addition to the intrinsic value of treating others well and obeying the rules, you have a very practical self-interest in having others think highly of you.

III. UNDERSTAND YOURSELF AND OTHERS AND BE RESPECTFUL

A. *Focus on Your Clients and Really Understand Them*

This suggestion seems obvious, but it is actually much harder than it might seem. There are many reasons why lawyers sometimes do not give their clients the attention and respect that they deserve. For one thing, lawyers in popular culture usually are the stars of the show and the clients are bit players—cardboard

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27. See LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION*, *supra* note 6, at 148.

characters who are mere foils in the lawyers' drama. Most law students and lawyers probably absorb this image, often without being aware of it.

When clients seek legal services, they typically have a significant legal problem and they need lawyers' expertise to help solve those problems. Since clients typically use lawyers only when they feel that the issues are really important, clients generally are more emotionally vulnerable than their lawyers. Over time, lawyers may handle many similar cases and believe that they know better than the clients about the best way to handle the matter. Indeed, sometimes lawyers do have better judgment than their clients about the best strategy.

Even so, there are many reasons why it is critically important for you to listen carefully to your clients' perspectives and desires. First, it is a matter of basic courtesy and respect for those who you are hired to represent. Clients *really hate* when their lawyers don't listen to them or respond to them, which may lead them to fire the lawyers.<sup>28</sup> Second, you have an ethical duty to communicate effectively with your clients.<sup>29</sup> Third, you will do a better job if you listen carefully and patiently because clients are more likely to provide sensitive information. Each client's goals are different, so don't assume that the only thing that a client wants is to get the most money or pay the least money.<sup>30</sup> Fourth, you are more likely to get repeat business and referrals of other clients if your clients feel that you listened carefully. Of course, just because you listen doesn't mean that you should always agree with clients. Your job is to give them the best advice you can, even if you need to deliver "bad news" that they won't want to hear. Doing so effectively requires you to see the world through their eyes and help them understand and accept that things may not work out as they would like.<sup>31</sup>

It sounds obvious that you should understand your clients. In practice, it is surprisingly hard. The facts often are complicated and clients may have a hard time communicating them accurately. Their understandings are almost always incomplete and a reflection of common self-serving biases. Although lawyers sometimes complain that clients lie to them, I suspect that clients generally do not

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28. See Clark D. Cunningham, *What Do Clients Want from Their Lawyers?*, 2013 J. DISP. RESOL. 143, 143-51 (2013) (collecting empirical research demonstrating clients' frustrations with their lawyers).

29. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a), 1.4 (2015).

30. Clients may have a wide variety of interests in a case:

In virtually any kind of case, the parties may have an interest in being treated respectfully and fairly, minimizing the cost and length of the process, freeing time to focus on matters other than the dispute, reducing the emotional wear and tear caused by continued disputing, and protecting privacy and reputations. Even when the parties do not expect to have continuing relationships, they may have interrelated interests other than negotiating the immediate payment of money. For example, plaintiffs may have interests beyond maximizing direct recoveries, such as obtaining favorable tax consequences, getting non-monetary opportunities (such as employment, business, or insurance opportunities), receiving explanations or apologies from defendants, changing an employee's title or working conditions, receiving favorable references for future employment, preventing future harms, and arranging contributions to charities, among others. Defendants may have interests such as receiving vindication or other acknowledgments about the lack of merit of some charges, making payments in kind instead of money, stretching payments over a period of time, sharing liability with other defendants, preventing ancillary harm (such as loss of credit rating or business or professional opportunities), receiving favorable tax consequences, obtaining non-disclosure agreements, and avoiding future lawsuits.

LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6, at 24.

31. See MARJORIE CORMAN AARON, CLIENT SCIENCE: ADVICE FOR LAWYERS IN COUNSELING CLIENTS THROUGH BAD NEWS AND OTHER REALITIES (2012).

intend to deceive their lawyers. More likely, their distorted accounts usually reflect their sincere but imperfect efforts to communicate. Often, clients are confused and ambivalent about their legal problems, are afraid of their lawyers' disapproval, and their perspectives change over time. One of the most valuable things you can do is to help them understand their situation and what is most important to them.

The appellate cases you read in most of your classes imply that the lawyers and clients are "on the same page" throughout the case. Lawyers often have more difficulty communicating with their clients than with the lawyers representing the other side ("counterpart lawyers").<sup>32</sup> In my courses using realistic extended simulations, students were twice as likely to have problems working "behind the table" (i.e., with their own client or lawyer) than "across the table" (i.e., with the other side).<sup>33</sup> Students playing lawyers often were very frustrated in dealing with their "clients" and vice versa.

Unlike counterpart lawyers, who "speak the same language" and have a common understanding of the legal system, lawyers and clients don't "speak the same language." An important part of your job is to fit your clients' situations into legal categories and lawyers often struggle to translate legal concepts and rules into plain English.<sup>34</sup> Because lawyers tend to focus only on facts that are legally relevant to a cause of action, you may be tempted to ignore facts that aren't legally relevant. This can alienate your clients, for whom these facts may be of paramount importance. So you need to understand your clients and help them understand the law.

### B. *Be Careful About Making Assumptions*

It is tempting to assume that you can quickly learn all you need to know and apply the law to the facts to produce the "right" answer. There are many reasons you should resist that temptation.

First, the facts often aren't clear, especially when you first get a case. Even after you complete discovery (or complete a due diligence investigation in transactional matters), you won't know everything about the case. The facts may be susceptible to different interpretations and you may go to trial precisely because of plausible differences about the facts.

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32. People often refer to lawyers representing different parties in a matter as "opposing counsel." This is a misnomer.

These lawyers often do oppose each other, sometimes quite vigorously. Often, however, they cooperate with each other. In the normal course of litigation, lawyers need to cooperate on many procedural matters. In some cases, the lawyers also cooperate to achieve their respective clients' substantive interests. It is not unusual for "opposing counsel" to believe that both of their clients are taking unreasonable positions that prevent them from negotiating an agreement that would advance both of their interests. These lawyers may work together to craft such an agreement and try to convince their clients to accept it. Thus the term "opposing counsel" therefore distorts the complex relationship between lawyers for different parties.

John Lande, *Getting Good Results for Clients by Building Good Working Relationships with "Opposing Counsel"*, 33 U. LA VERNE L. REV. 107, 107 n.1 (2011). See *infra* Part IV.C. (for further discussion of developing good relationships with counterpart lawyers).

33. John Lande, *Great Value of Students Playing Clients in Multi-Stage Simulations*, INDISPUTABLY (May 14, 2015), <http://www.indisputably.org/?p=7083>.

34. See ROBBENOLT & STERNLIGHT, *supra* note 6, at 141-70, 187-251 (providing analysis and suggestions).

Second, the law often isn't clear. Many people—including many law students—assume that “the law” has obvious answers to all legal questions. That's true for some routine cases, but sometimes there are conflicting authorities, the rules are ambiguous, or there is no clear law “on point.” The law is also subject to multiple interpretations so that different judges or juries may reach different legal conclusions about the same case. Lawyers often want to know who will be the judges in their cases and how they generally rule on particular issues.

Third, as a human being, you are subject to many biases that are likely to impair your judgment. In particular, lawyers develop strong loyalties to their clients, so it is easy to give the benefit of the doubt to their clients and to deny it to the other side. According to Professors Douglas Frenkel and James Stark, “egocentric, partisan and role biases can hinder [lawyers'] ability to provide objective advice to clients, lead to overly optimistic forecasts about the probability of future events, and promote ‘we-they’ thinking that can exacerbate and prolong conflicts, imposing substantial costs on both clients and society.”<sup>35</sup>

In a stunning large-scale study, researchers found that in 85.5% of cases, parties went to trial when one of the parties would have been better off to accept the other side's last offer. Plaintiffs received an award less than or equal to the defendant's last offer in 61.2% of the cases and defendants were ordered to pay more than the plaintiff's last demand in 24.3% of the cases.<sup>36</sup> Reviewing a wide range of social science research, Frenkel and Stark argue that people can counteract biases to some extent by anticipating others' perspectives and considering opposing alternative scenarios.<sup>37</sup> In other words, you should analyze situations carefully instead of thoughtlessly jumping to conclusions.

Fourth, acting on assumptions without inquiry or reflection is disrespectful and may prompt people to react negatively to you. It is particularly maddening when your assumptions are incorrect. Making assumptions is especially problematic when clients feel that their lawyers “aren't listening to them.” Such clients may not be cooperative, fire you, and harm your reputation with others. Similarly, when you make unwarranted assumptions about the other side, they may take offense and be less cooperative in all aspects of a case.

### C. *Recognize the Importance of Emotions—Especially Yours*

Many law students seem afraid of emotions. They assume that the law is only about rational analysis of the law and the facts. To them, emotions are messy and get in the way of good legal representation and decision-making. They wish that people—especially their clients—would just put their emotions “to the side” and just be more rational. Professor Melissa Nelken captured this dynamic nicely in the

35. See Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?*, 20 HARV. NEGOT. L. REV. (Forthcoming 2016).

36. See Randall L. Kiser et al., *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 J. EMPIRICAL LEGAL STUD. 551, 566 (2008). This analysis compared only the amounts of offers and verdicts. The outcomes in tried cases were not discounted to reflect the value lost due to time diverted from more productive activities, damaged relationships and reputations, increased risks, and loss of peace of mind as a result of going to trial.

37. See Frenkel & Stark, *supra* note 35. Extrapolating from this research, the authors suggest that lawyers who get mediation training are less likely to make errors due to biases. See *id.* See ROBBENOLT & STERNLIGHT, *supra* note 6, at 67-84 (providing an excellent discussion of “judgment shortcuts” and de-biasing techniques).

subtitle of an article, *If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*.<sup>38</sup> With some introspection, these students would probably realize that this reaction reflects *their own emotional discomfort* in dealing with others' emotions.

I try to counteract this perspective by assigning students to read a short article, *Emotions in Negotiation: Peril or Promise?*<sup>39</sup> It does a great job of explaining that people can't avoid emotions and that it's foolish to try. Emotions provide a lot of valuable information, such as what is particularly important.

I particularly encourage you to focus on fear, which pervades law school and legal practice. In law school, students speak what seems like a foreign language, may endure humiliating Socratic questioning, often are graded solely based on a final exam, and have career opportunities affected by their grades. Half of the class will have below-average GPAs, which is a rude shock for many students who had always been at the top of their class before law school. This all can be pretty scary. It's no wonder that law students often feel anxious and afraid.

As scary as your experience in law school may be, you are likely to face much more intimidating situations in legal practice, where there is a long list of things that lawyers fear.<sup>40</sup> Law firm partners, clients, adversaries, and judges can be a lot more terrifying than your professors. You will realize that law school hasn't prepared you to practice law very well, yet you may be "thrown in the [legal] pool" and expected to swim. Your mistakes will affect the lawyers in your firm and your clients, possibly damaging your career prospects.

I encourage you to read my article, *Escaping from Lawyers' Prison of Fear*.<sup>41</sup> It shows that fear is a normal—and often helpful—emotion, but it can lead to serious problems. It cites studies showing that although "law students generally are socially confident (or at least project confidence outwardly), some research suggests that this image may be a social mask hiding feelings of inadequacy, uncertainty, and nervousness in some students. Several studies have found that law students "consistently report more anxiety than the general population."<sup>42</sup> My article also summarizes

[a]n especially well-designed study [which] found that, as a group, law students experience serious distress in law school that continues afterward. Professor G. Andrew H. Benjamin and his colleagues surveyed students shortly before they entered law school and found that the proportion who were depressed was comparable to the normal population.

During law school, however, symptom levels are elevated significantly when compared with the normal population. These symptoms include obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation).

38. Melissa Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420 (1996).

39. Daniel L. Shapiro, *Emotions in Negotiation: Peril or Promise?*, 87 MARQ. L. REV. 737 (2004). See also ROBBENOLT & STERNLIGHT, *supra* note 6, at 45-66 (dealing with emotions in legal practice).

40. John Lande, *Escaping from Lawyers' Prison of Fear*, 82 UMKC L. REV. 485, 485-91 (2014) (footnotes omitted).

41. *Id.*

42. *Id.* at 503.

Elevations of symptom levels significantly increase for law students during the first to third years of law school. Depending on the symptom, 20-40% of any given class reports significant symptom elevations. Finally, further longitudinal analysis showed that the symptom elevations do not significantly decrease between the spring of the third year and the next two years of law practice as alumni.<sup>43</sup>

Indeed, lawyers often do suffer problems related to fear and anxiety throughout their careers. In one study, researcher Connie Beck and her colleagues found that “throughout their career span, a large percentage of practicing lawyers are experiencing a variety of significant psychological distress symptoms well beyond that expected in a normal population.” Beck estimates that “[a]pproximately 70% of the lawyers in the sample are likely to develop alcohol problems over their lifetime.” Some of the causes of these problems may be related to aspects of legal practice including frequent deadline pressures, heavy workload, interpersonal and political conflicts in law offices, competition with other lawyers and law offices, financial pressures, ambivalence about their obligation of loyalty to clients regardless of the effect on others, and the competitive nature of adversary representation. In particular, the adversarial legal system predictably leads some lawyers “to suspect everyone of ulterior motives, and encourages secretiveness, manipulativeness, and selfishness.”<sup>44</sup>

You have chosen a path full of highly stressful situations and you should plan strategies to deal with them effectively. These include stress management techniques like meditation, diligent preparation in school and legal practice, mental rehearsals, practice in simulated settings, positive self-talk, getting advice from mentors, and getting mental health services when needed.<sup>45</sup> In practice, you can reduce stress by managing your cases cooperatively whenever appropriate.<sup>46</sup> In addition, following the suggestions in this article is likely to help you manage stress.

#### *D. Understand Others' Perspectives and Treat Them Respectfully*

We live in a diverse world where people have widely different experiences and perspectives. When people are in legal conflicts, cultural differences may be particularly significant. Culture does not refer only to values, norms, and practices of different national, ethnic, religious groups etc. It also refers to more general assumptions about the “right” way to handle a situation—“that’s the way everyone (I know) always does things.” Legal practice norms may involve such things as degree of formality, expression of emotion, sensitivity to time, and goals for dispute resolution.<sup>47</sup> People often are unconscious of these assumptions but feel strongly about them.

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43. *Id.* (footnotes omitted).

44. *Id.* at 505 (footnotes omitted).

45. *Id.* at 506-10. *See also* ROBBENOLT & STERNLIGHT, *supra* note 6, at 417-60 (advice for being “productive, successful, and happy”).

46. *See generally* LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6 (advice for practicing law efficiently and cooperatively when appropriate).

47. *See generally* Jeswald W. Salacuse, *Ten Ways that Culture Affects Negotiating Style: Some Survey Results*, 14 NEGOT. J. 221 (1998) (identifying cultural differences in negotiating styles).

People sometimes make generalizations based on national origin (e.g., “Japanese tend to be cooperative.”). This is dangerous because it overlooks important individual differences within the “same” culture. Even if a generalization is valid for a group, it almost certainly is not valid for *every member* of the group. And even if it is valid for an individual, many people feel offended if others stereotype them. So, while you should be alert to general cultural patterns of particular groups, you can get yourself into big trouble if you assume that people are typical members of particular groups.

Culture is particularly significant in law school and legal practice settings. Different schools have different cultures, e.g., especially competitive or friendly. This is also true in legal practice as the “local legal culture” differs in metropolitan areas and smaller communities, in particular communities, and in different areas of law. There are even cultural assumptions about the best ways for lawyers to communicate, such as in person, by phone, or electronic devices.<sup>48</sup>

So be prepared to deal with people with different assumptions than you about the “right” way to do things. You might ask about others’ perspectives and preferences. Acknowledge and respect their perspectives unless this would cause a problem for you or your client. You don’t have to agree with their perceptions or positions just because you acknowledge understanding them.

This is particularly important when representing clients. It is easy to assume that you are right and the other side is wrong about virtually everything. Try to imagine what the world looks like from their perspective. Indeed, you may ask them about this with a genuine spirit of curiosity and not simply as a partisan tactic. This can help you identify points of agreement and disagreement, enabling you to represent your clients more effectively. And it may prompt the other side to be more open to learning your perspective.

When people have a dispute, often there is an implicit tension about identity. Everyone may feel like a victim being abused by the villains on the other side.<sup>49</sup> Sometimes you will believe that the other side is very unreasonable and you should advocate hard to win.<sup>50</sup>

Even in these situations, however, it may be counterproductive to treat the other side disrespectfully because it can set off a chain reaction of hostile actions that can hurt your client. Sometimes people unintentionally send harsh messages about the respectability of the other side, which can aggravate the conflict. Often the situation is summed up in the words of the Dave Mason song, “[t]here ain’t no good guy, there ain’t no bad guy. There’s only you and me and we just disagree.”<sup>51</sup> Reasonable people can sincerely—and respectfully—disagree. Treating the other side respectfully not only has practical benefits, but I think it also is a good way to act as a human being.

This advice may seem naive and unrealistic, particularly if you are involved in intense litigation and emotions are running high. Your counterparts may take unreasonable positions and insult you to get you to lose your cool. Given the

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48. See Lande, *Good Pretrial Lawyering*, *supra* note 6, at 80-85.

49. See DOUGLAS STONE, BRUCE PATTON & SHEILA HEEN, *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 111-28 (1999) (providing an excellent discussion of the “identity conversation” in disputes).

50. See *infra* Part IV.H.

51. DAVE MASON, *WE JUST DISAGREE* (Columbia 1977).

model of lawyers as take-no-prisoners warriors, you may worry that you will get beaten if you don't act tough.

You should always protect your clients' interests, but you don't have to treat the other side disrespectfully. Indeed, the ethical rules prohibit lawyers from taking actions "that have no substantial purpose other than to embarrass, delay, or burden a third person."<sup>52</sup> Some of the best—and toughest—lawyers demonstrate their toughness precisely by being unflappably polite and respectful in the face of fierce opponents.

#### IV. DEVELOP GOOD LAWYERING JUDGMENT AND ROUTINES

##### A. *Pay Attention to What's Really Important in Your Cases, Not Just the Law or Winning*

Law school and legal practice are oriented to making the best possible argument and winning in litigation or transactional negotiations. In general, it's good to show the law is "on your side," get favorable agreements, and win at trial.

Remember, however, that these are means to your clients' ends and they shouldn't be ends in themselves. As noted above, clients are likely to have multiple interests and your job should be to help them achieve their highest-priority goals.<sup>53</sup> You are likely to feel better about yourself if you can make arguments that persuade others and win trials. That's often how lawyers measure success and get good reputations. It's certainly fine to take pride in your work and want to get recognition for it. But always remember that your first priority should be your clients' interests, not yours.

##### B. *Consider What Help Clients Needs and Wants (or Not)*

People often think of lawyer-client relationships in which lawyers handle everything, often with little involvement of the clients. Many lawyers and clients want this kind of relationship and it can work quite well. On the other hand, some clients want to represent themselves but also want specific legal assistance. Offering limited services is called "unbundling" or "discrete task representation."<sup>54</sup> It is an intermediate approach between parties representing themselves without any legal services and retaining lawyers to provide a full range of services. Some parties want unbundled services to minimize legal expenses, maintain control over their affairs, or both.

A comment to a Missouri ethical rule illustrates the wide range of specific services lawyers can provide:

a) Give legal advice through office visits, telephone calls, facsimile (fax), mail or e-mail

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52. MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2015).

53. See *LAWYERING WITH PLANNED EARLY NEGOTIATION* *supra* text accompanying note 30.

54. See *generally* FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000) (manual published by the ABA Law Practice Management Section); ABA Standing Comm. on the Delivery of Legal Services, *Unbundling Resources*, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html) (last visited Oct. 11, 2015) (collecting listings of articles, books and reports, cases, court rules, ethics opinions, and information about self-service centers).



- b) Advise about alternate means of resolving the matter including mediation and arbitration
- c) Evaluate the client's self-diagnosis of the case and advise about legal rights and responsibilities
- d) Review pleadings and other documents prepared by you, the client
- e) Provide guidance and procedural information regarding filing and serving documents
- f) Suggest documents to be prepared
- g) Draft pleadings, motions and other documents
- h) Perform factual investigation including contacting witnesses, public record searches, in-depth interview of you, the client
- i) Perform legal research and analysis
- j) Evaluate settlement options
- k) Perform discovery by interrogatories, deposition and requests for admissions
- l) Plan for negotiations
- m) Plan for court appearances
- n) Provide standby telephone assistance during negotiations or settlement conferences
- o) Refer you, the client, to expert witnesses, special masters or other attorneys
- p) Provide procedural assistance with an appeal
- q) Provide substantive legal arguments in an appeal
- r) Appear in court for the limited purpose of \_\_.<sup>55</sup>

This list identifies various services that clients may or may not want even if parties retain lawyers to provide the full scope of services. For example, lawyers and their clients may have strong interests in the goals, amount, and timing of discovery. Because discovery often is expensive and time-consuming, it is particularly appropriate to consult with clients about such issues.

#### C. DEVELOP GOOD RELATIONSHIPS WITH COUNTERPART LAWYERS<sup>56</sup>

Contrary to the image of lawyers as zealous warriors, lawyers routinely cooperate with their counterparts.<sup>57</sup> Sometimes, when required by the courts or clients, they do so grudgingly. Often, they cooperate because they believe that it is appropriate behavior for professionals and it serves their clients' interests by promoting efficiency and cooperation from the other side. Many lawyers deal with each other repeatedly and want to maintain good relationships and reputations for reasonableness.

You are likely to find that it is usually in your interest and your clients' interest for you to have a good relationship with your counterpart lawyer.

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55. MO. SUP. CT. R. 4-1.2 cmt. 2 (2008). This issue is related to an ethical rule because unbundling is considered as a "limited scope representation," which requires clients' informed consent. *Id.* See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2015).

56. LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6, at 51-66.

57. Because "opposing counsel" often cooperate with each other, it is more accurate to refer to them as "counterparts." See *supra* text accompanying note 32.

If you have a good relationship, you are more likely to be able to exchange information informally, discuss issues candidly, readily agree on procedural matters, take reasonable negotiation positions that recognize both parties' legitimate expectations, trust each other, take reasonable risks, resolve matters efficiently, satisfy your clients, and enjoy your work. . . . On the other hand, if you have a bad relationship with opposing counsel, a case can become your own private hell. Your counterpart may decline to grant routine professional courtesies (such as extensions of deadlines to file court papers), bombard you with excessive and unjustified discovery requests, file frivolous motions, make outrageous negotiation demands, yell and scream at you, and generally behave badly. You may feel that you are fighting over everything and that you need to be more guarded than usual, communicate only in writing, and document every conversation. The time and cost involved is likely to skyrocket, and your clients may feel forced to accept unreasonable results if they cannot withstand the other side's nasty tactics.<sup>58</sup>

If you are confident and competent, you have little to lose by developing a good working relationship with your counterparts. This does not require you to sacrifice your clients' interests, which you should never do regardless of your relationship. If your counterpart wants something you can't recommend to your client, you and your counterpart can discuss options satisfying both clients.

At the beginning of a case, find out about your counterparts by reading their websites, Googling them, and asking other lawyers. Unless you have reason to believe that initiating a cooperative relationship with your counterparts is particularly risky, consider doing so. The norm of reciprocity is very powerful, and they are likely to reciprocate with cooperation.

Some lawyers routinely try to develop personal relationships with their counterparts in phone calls or over coffee or lunch. You might spend most of the time talking about yourselves, your work, hobbies, etc. Some lawyers prefer not to get to know their counterparts or spend much time doing so. You can decide how much time you spend getting to know each other and how much you spend discussing the case.

As a new lawyer "going up against" experienced counterparts, you may worry that they will realize that you aren't highly competent and they may try to take advantage of you. Assess this risk and decide whether to pursue the relationship. You may be surprised that many senior lawyers will be sympathetic to you, remembering their early experiences and wanting to help a new member of the "club." They won't sacrifice their clients' interests, but they may not be as tough as with some other lawyers. If you unsuccessfully try to develop a good working relationship, you will get important information about the counterparts' real motivations and you can act accordingly.

During a case, if your counterparts take an adversarial approach, you can say that you can handle the case together the "easy way or the hard way." You and your client prefer the easy way, but you can do it the hard way if necessary. If you convey this message appropriately, they are likely to respond constructively.

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58. LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION*, *supra* note 6, at 52.

If you have a good working relationship with your counterparts, they (and you) are less likely to jump to conclusions and take actions like sending a nasty email. You can suggest that if a problem arises, each will call the other before taking action such as filing a motion. This is the “golden rule” of lawyering (treating your counterparts the way you would want them to treat you). If the other side may react badly to a development in a case, they may be upset, but are likely to appreciate if you tell them directly and promptly. This can promote a relationship of trust, helping your clients in the long run.

Clients may worry when “opposing” lawyers seem too friendly. So avoid doing so in the clients’ presence, which could signal that your relationships with your counterparts are more important than your relationships with your clients. Explain to your clients at the outset of the case that having a good relationship with your counterparts can help them and that you will always protect their interests, regardless of your relationship with your counterparts.

*D. Make a Habit of Preparing to Resolve Matters at the Earliest Appropriate Time*

There are good reasons why lawyers delay moving ahead in some cases, but you should generally resist the temptation to procrastinate. Lawyers with a lot of open cases need to manage their time, so they do triage to decide which matters are most critical to handle right away.<sup>59</sup> Sometimes lawyers appropriately delay taking action, anticipating that things may happen that would make it wasteful.

On the other hand, many lawyers delay because they get trapped in what I call a “prison of fear.”<sup>60</sup> Litigators are trained to collect as much information as they can and analyze it over an extended period of time. They may worry about harming their clients if they settle before completing all possible discovery. In particular, they may worry about missing a “smoking gun” that would lead to a great victory at trial.

Most lawyers know that the vast majority of cases settle without going to trial, but they often feel powerless to steer clients toward negotiation.<sup>61</sup> Lawyers (and their clients) often worry that merely *suggesting* negotiation would make them look weak, leading the other side to try to take advantage. Indeed, parties often hire lawyers precisely because they don’t trust the other side and need lawyers to protect themselves. Lawyers may fear that if they seem too interested in early resolution, clients may doubt that the lawyers will really protect them. Lawyers often feel that they can get the best results for clients by delaying negotiation as long as possible and eventually start negotiating from extreme positions. Unfortunately, this can prompt the other side to use adversarial approaches, leading

59. Some lawyers worry about maintaining enough business to meet their financial commitments, recognizing that the demand for their services often ebbs and flows. If you are chronically overbooked, this is a problem both for your clients and you. This adds to your stress and probably isn’t good for your long-term mental health and relationships with friends and family. See *supra* text accompanying note 44.

60. See LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6, at 6-20.

61. See John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 4 n.9 (2014) (citing research studies showing that federal district court trial rates declined from 11.5% to 1.8% between 1962 and 2002 and that the trial rate in 22 states declined from 36.1% to 15.8% between 1976 and 2002).

to a cycle of escalating conflict. These are all parts of a “prison of fear” that keeps lawyers from negotiating early in a dispute.

Confident lawyers can “escape” from this prison of fear. As retired judge Robert Alsdorf says, “Being willing to negotiate doesn’t make you look weak. Being *afraid* to negotiate makes you look weak.”<sup>62</sup> Good lawyers take control of their cases by understanding their clients and their interests, following the norms in their legal community, developing good relationships with counterpart lawyers, identifying key issues, investigating the facts, exchanging information efficiently, making strategic decisions about timing of negotiation, and enlisting mediators’ and courts’ help when appropriate.<sup>63</sup>

Some lawyers think that early resolution means that lawyers should try to resolve the ultimate issues right after all the parties have appeared in litigation. I think of “early” as shorthand for “earliest appropriate time.” In most cases, lawyers need to do some factual investigation and take other steps before they are ready to resolve a matter. But they don’t need to complete all the discovery required for trial. So I suggest that you generally get ready to resolve matters at the earliest appropriate time. As one lawyer told me:

Sooner or later, you will need to negotiate. You need to get out in front, get the facts, get the client on board. Try to prepare a settlement letter. . . . This drives the case in the right direction. If you wait, you just get sucked into a pile of mud. If the other lawyer sends the letter, then you have to catch up.<sup>64</sup>

*E. Be Prepared to Negotiate Much More than You May Expect*<sup>65</sup>

Of course lawyers who “do deals” negotiate all the time but so do litigators. Actually, litigators also do some other things, like argue in court, but they negotiate much more than you might think. Indeed, much of litigators’ work is designed to gain advantage in negotiation.

Professor Marc Galanter coined the term “litigotiation,” which he defines as “the strategic pursuit of a settlement through mobilizing the court process.”<sup>66</sup> He says “negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation. There are not two distinct processes, negotiation and litigation; there is a single process of disputing in the vicinity of official tribunals.”<sup>67</sup>

Lawyers engage in extensive pretrial activity before negotiating the ultimate resolution for many reasons. It is considered the normal way to handle cases in our legal culture, so law firms and clients expect it. It provides a process to gather information and manage cases. Especially important, it can create leverage to get

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62. E-mail from Robert H. Alsdorf, Retired Judge, Alsdorf Dispute Resolution, to John Lande, Isidor Loeb Professor Emeritus, Univ. of Mo. Sch. of Law (May 07, 2012, 11:15 CST) (on file with author) (emphasis in original).

63. Lande, *Good Pretrial Lawyering*, *supra* note 6, at 74-95.

64. *Id.* at 74 (footnote omitted).

65. See generally LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION*, *supra* note 6, at 4-5.

66. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

67. *Id.*

a better settlement. Pretrial work provides litigators professional satisfaction, recognition, advancement, and income. And sometimes they are trapped in a “prison of fear” that keeps them focused on continuing to litigate.<sup>68</sup>

Although some people think of negotiation as limited to the ultimate resolution of disputes, such as how much a defendant will pay a plaintiff, it is more helpful to define it as the process of seeking agreement regardless of the issue and whether there is a substantial dispute. Given this broad definition, lawyers clearly *do* negotiate virtually all the time. Of course, it is important to focus on the process of resolving disputes. But you will miss much of lawyers’ everyday work if you ignore all the other situations when lawyers seek agreement.

In addition to negotiating final resolution of disputes, lawyers also negotiate with each other about substantive and procedural issues during litigation. For example, lawyers regularly negotiate about acceptance of service of process, extension of deadlines, scheduling of depositions, and discovery disputes. They also regularly reach agreements with many other people as they handle their cases. Of course, they agree with clients about fee arrangements and how to handle cases. They reach agreements with co-workers in their firms, process servers, investigators, court reporters, technical experts, financial professionals, and mediators. They also reach agreements with judges about case management issues such as discovery plans and schedules, referral to ADR procedures, and ultimate issues during judicial settlement conferences.

In most of these situations there is no dispute, and lawyers reach agreement so easily that they don’t even think of the process as negotiation. So, considering negotiation as the process of reaching agreement, lawyers negotiate throughout litigation, and not only in a single, dramatic settlement event to finally resolve a case. Indeed, by following the preceding advice—such as being cautious about making assumptions, understanding others’ perspectives, treating them respectfully, and developing good relationships with counterparts<sup>69</sup>—you are likely to reach many agreements effortlessly, with relatively few disputes. From this perspective, litigation is a constant stream of negotiations that normally leads to numerous agreements, usually including an ultimate settlement.

Negotiation is more complicated than what is usually taught in law schools.<sup>70</sup> Typically, students are taught that there are two negotiation models. One model sometimes is called positional, zero-sum, distributive, competitive, adversarial, or hard negotiation. In the extreme version, negotiators exchange offers trying to get the best possible outcome for their clients, assume that one side’s gain is necessarily the other side’s loss, make legal arguments to gain partisan advantage, act tough, and use hard-bargaining tactics to gain advantage over their adversaries.

The other model is called interest-based, win-win, integrative, cooperative, problem-solving, or principled negotiation. In the ideal version of this model, negotiators seek outcomes benefitting both parties, explicitly identify their interests, generate options that might satisfy the parties’ interests, consider various factors in negotiation (such as the parties’ interests, values, and the law), and promote cooperative relationships.

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68. See *supra* text accompanying notes 58-59.

69. See *supra* Parts III.B, III.D, & IV.C.

70. See generally LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6, at 67-86.

Based on my own and others' empirical research, I identified a third model, which I call "ordinary legal negotiation." In this model, counterpart lawyers work together to produce a good result for both parties based on typical negotiation and trial outcomes. The lawyers use respectful conversation rather than exchanging offers or analyzing the parties' interests and potential options.<sup>71</sup>

My research shows that the theoretical models are confusing and do not fit many real-life negotiations very well. For example, the classic positional model assumes that negotiators are likely to act in a tough manner when, in practice, lawyers exchanging offers often are quite respectful. Similarly, some people consider friendly negotiations to be interest-based even when there is little or no discussion of interests or options. Considering the problematic assumptions of these models, it is better to consider separate elements of the models and specific techniques you might use.

*F. Recognize that You Actually Are Mediating When You Represent Clients*

Some law students want to mediate as part of their careers. Mediation has become a desirable and lucrative part of the dispute resolution field, attracting experienced lawyers and retired judges. Mediators often find it fulfilling to help parties reach an agreement that satisfies both sides. Mediation is a competitive field with relatively few opportunities to mediate litigated cases. Lawyers handling large civil cases often have "short lists" of a few mediators they repeatedly use because they often want mediators with a lot of litigation experience who can analyze likely court results. Over time, you may be able to regularly mediate civil cases, though that's less likely early in your career.

Although it is hard to get work in the "alternative dispute resolution" (ADR)<sup>72</sup> field right out of law school, it is possible. Professor Alyson Carrel developed a website collecting stories of people whose first jobs were in ADR.<sup>73</sup> Some of the jobs were as neutrals providing ADR services and others were administrative positions in ADR organizations. To pursue this path, you should learn about the mediation field, take relevant courses, work hard to develop your skills, be active in the mediation community, and be patient and persistent.

Even if you don't work formally as a mediator, when you negotiate for your clients, you essentially serve as a mediator between your clients and the other side. In this role, you help the other side understand your clients' perspective and help your client understand the other side. Working with your counterpart lawyer, you can develop solutions satisfying both sides. So you may be able to satisfy a desire to promote constructive dispute resolution as an advocate in negotiation or mediation, not only as a neutral.

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71. See Lande, *supra* note 61, at 36-46.

72. The term "ADR" is confusing because it implies that court adjudication is the primary, default resolution process for handling disputes even though most lawsuits are resolved without trial or appellate decision. See *supra* text accompanying note 61. For our purpose, I will use the term "ADR" to mean processes other than what is considered as a traditional litigation process (i.e., which does not involve private third parties such as mediators or arbitrators).

73. See generally, ADR AS A FIRST CAREER, <http://adras1stcareer.blogspot.com/> (last visited Sept. 21, 2015) (website compiles interview stories of people whose first career is in the ADR field).

G. *Be Patient, Persistent, and Creative When Dealing with Problems*

Your career will consist of a continuing flow of problems for you to solve. Sometimes you will do this by trying to persuade a court to rule in your favor. As described above, however, you will spend a lot of time negotiating.<sup>74</sup> Courts expect lawyers to try to resolve disputes on their own and may get impatient if lawyers run to court without trying to work things out together.

You can avoid many problems by following the advice in this article. But you are likely to run into some problems even when you do so. As reasonable as you may be, you will have cases in which there is a lot at stake, people have strong feelings, and there is no easy solution.

Solving problems requires a combination of patience, persistence, ingenuity, skill, and determination, among other things. Sometimes you will have a harder time persuading your own clients to be reasonable than the other side.<sup>75</sup> This may involve difficult conversations with your clients in which, after listening carefully to their concerns, you have to explain that their expectations and preferred strategies may be unrealistic. If you develop good relationships with your counterparts, you can warn each other about your respective clients' "hot buttons" that, if pushed, could send the case into a tailspin.

When you run into problems with your clients or the other side, be patient, persistent, and creative. I developed a list of 49 techniques you can consider.<sup>76</sup> Just taking a break can be surprisingly effective. You can review each party's interests to see if there is a solution that satisfies both parties. You can change the configuration of individuals involved in the process. You can engage a variety of third parties to help resolve all or part of the problem. Of course, there are many more things you can try.

Don't give up until you are pretty sure that you can't think of something that might work or that it really is not worth trying any further. You don't have to try every possible technique if it is clear that the parties will not be able to resolve the problem together. But if you give up too easily, you may fail to advance your clients' interests.

H. *Be Prepared to Advocate Hard and Smart, with Conviction, Passion, and Perseverance, and to Win*

At the outset of this article, I endorsed Professor Easton's advice that if you determine that an issue is important to fight about, you should "fight hard, fight smart, fight with conviction, passion, and perseverance, and fight to win."<sup>77</sup>

Let me elaborate about how I interpret this advice. First, even if you determine that an issue is very important to your client, it is *important to fight about it only after* you have unsuccessfully explored ways to satisfy your client's interests without fighting. This involves the problem solving described in the preceding Part.

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74. See *supra* Part IV.E.

75. See *supra* Part III.A.

76. LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, *supra* note 6, at 113-17.

77. See *supra* text accompanying note 4.

Also, I would define “fight” in this context to mean “advocate” because the word “fight” has many counterproductive connotations. Although no one suggests that lawyers should engage in physical altercations, “fight” connotes trying to harm the other person. People often think that lawyers fight in unnecessarily nasty ways, so it is better to avoid this connotation. Lawyers need to advocate effectively, sometimes exercising power in negotiation and court.

With these qualifications, I encourage you to advocate hard, advocate smart, advocate with conviction, passion, and perseverance, and advocate to win. As described above, I recommend acting respectfully, even when your counterparts do not do so.<sup>78</sup> Contributing to a spiral of obnoxious behavior in negotiation probably will not help you achieve your clients’ goals. You can calmly describe the problems with the other side’s behavior and if they do not become more reasonable, you can withdraw from the negotiation. When arguing in court, judges are likely to credit you for acting appropriately and not mirroring inappropriate behavior of your counterparts.

Of course, taking my advice about vigorous advocacy presupposes that you feel self-confident. If you are too afraid of hostilities from your counterparts, you may respond in kind or just give in. So it’s important to deal with your fears effectively. This involves taking control of your cases as much as you can by preparing diligently.<sup>79</sup> If you convey your willingness and ability to advocate effectively, counterparts who might fight may act more reasonably. If you give them the choice of handling the case the easy way or the hard way and they believe you are ready to do it the hard way, they may prefer the easier way.

## V. CONCLUSION

You are learning how to use very powerful tools that can cause both great good and great harm. Your clients and those involved in their legal matters will feel the direct effects of your work. Hopefully, you will be able to improve your clients’ situations (or minimize their harm) most of the time. And, hopefully, you will be able to do so in ways that minimize the harm to others or even improve their situations while you are helping your clients.

As a lawyer, you will play a larger role in society due to your legal authority as a licensed professional as well as our social norms about lawyers. Because of American political history, structure, and culture, we generally rely on the legal system to regulate matters that Europeans typically manage through executive government action.<sup>80</sup> Our legal system provides opportunities for discovery and publication of important facts, facilitation and enforcement of private settlements, development of legal rules and precedents, and structural transformation of our institutions.<sup>81</sup> So, even when you are representing a particular client, your work may have a larger social significance and you may contribute to advancement in our society.

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78. *See supra* Part III.D.

79. *See supra* Part III.C and text accompanying note 59.

80. Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 *LAW & SOC. INQUIRY* 1, 7-15 (1994).

81. *See* David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619, 2622-26 (1995).



Also beware of the dark side of the law. As Professor Vincent Cardi points out, litigation causes “violence,” noting that violence sometimes refers to harm caused by nonphysical acts such as “coercion, compulsion, constraint, duress, [and] pressure.”<sup>82</sup> Merely by engaging in litigation, parties may suffer “critogenesis” (“litigation-caused emotional injury”) and “litigation response syndrome,” which can cause symptoms including “stress, anxiety, depression, irritability, difficulties in concentration, loss of motivation, loss of social involvement, loss of enjoyment and pleasure in life, aches and pains, low self-esteem, feelings of detachment or estrangement from others, exaggerated startle response, and recurring thoughts relating to litigation.”<sup>83</sup> Unfortunately, this “relates to the intrinsic and often inescapable harms caused by the litigation process itself, even when the process is working exactly as it should.”<sup>84</sup> And, as noted above, you also may be harmed in the process.<sup>85</sup>

So please take great care as you exercise the great powers you are receiving from your legal education and authority to take legal actions. As you diligently represent your clients, do as much good as you can and minimize the harm, including the harm to the other side.<sup>86</sup>

Finally, let me end as Steve Easton ended his article, by wishing that, in addition to making the world a better place, you find that being a lawyer “make[s] your life a richer experience.”<sup>87</sup> Lawyering is a service profession that can provide you with great fulfillment as you help people who desperately need what you are learning to provide. This can be among the peak experiences in your life and I hope you get to enjoy them.

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82. Vincent Cardi, *Litigation as Violence*, 49 WAKE FOREST L. REV. 677, 678 (2014). See also John Lande, *Litigation as Violence*, INDISPUTABLY (Feb. 22, 2015), <http://www.indisputably.org/?p=6488> (describing harms sometimes resulting from litigation).

83. Cardi, *supra* note, 82, at 680.

84. *Id.* at 682 (quoting psychologist Dr. Thomas Gutheil).

85. See *supra* Part III.C.

86. See John Lande, *Minimizing Unnecessary Violence in Litigation and Other Dispute Resolution Processes*, INDISPUTABLY (Feb. 25, 2015), <http://www.indisputably.org/?p=6518>.

87. Easton, *supra* note 2, at 273.