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Family Lawyering with Planned Early Negotiation

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Before you negotiate, anticipate how the court likely would decide your case. *This is a critical factor in deciding whether to recommend settlement or trial to your client*

Whether you know it or not, you may already be using planned early negotiation (PEN). As the term suggests, this process involves planning to negotiate your cases at the earliest appropriate time. Normally you can be ready to negotiate long before you are ready for trial.

This article summarizes PEN procedures based on interviews with excellent lawyers about how they handle their cases. For example, one lawyer said that he "prepares for settlement from day one of the lawsuit" and that he engages in a "constant process of evaluating the claim" throughout the litigation. Planning to negotiate from the outset makes a lot of sense considering that parties settle most cases and few cases go to trial. This article describes how you and your clients can benefit from these procedures.

Begin by assessing your case, including: (1) the goals and interests of both parties and your counterpart lawyer, (2) the critical facts, (3) the likely outcome if the case were decided in court, and (4) possible agreements that might satisfy both parties (especially your client's interests). In other words, lawyering with PEN really is just good lawyering. Many lawyers do these things routinely, though not as consciously, systematically, and efficiently as they might.

The critical first step is to understand your clients' goals and help the client develop reasonable expectations. Even though you may have handled many similar cases in your career, remember that each client and each situation is different and requires an individualized assessment of the case. You and your client will be more successful if you are on the same wavelength from the start.

To negotiate intelligently, you must get enough information to evaluate your case. The other side will not negotiate until they get the necessary information as well. You can negotiate appropriately, however, without all the documentation and details you would need for trial. In many cases, the necessary information is obvious, and there is no need to conduct an expensive investigation for hidden assets or other possible secrets. Indeed, many family lawyers routinely exchange information without formal discovery. If you like, you can informally exchange documents and other information with the same affidavits you use in formal discovery responses.

You may need information from experts such as appraisers, financial professionals, mental health professionals, vocational rehabilitation experts, and others. Often, each side retains its own experts, which can be helpful, though also can lead to expensive and risky "battles of the experts." To reduce this expense and risk, consider hiring joint neutral experts.

Before you negotiate, anticipate how the court likely would decide your case. This is a critical factor in deciding whether to recommend settlement or trial to your client. This is not the only factor, however, as you will want to consider such things as the additional financial and emotional costs of going to trial, the effects of prolonging the case on children and other family members, the risk of losing, and the risk tolerances of all parties and lawyers.

After your assessment, you should have a pretty good idea as to what both sides would be willing to agree on and what would be most favorable to your client. In most cases, it is appropriate to negotiate at that point, though you should consider whether at least one party or lawyer is not yet ready and able to negotiate reasonably.

Planning negotiation

It is worth investing some time in planning the negotiation. Everyone, including the lawyers, may have a substantial emotional investment in the case, and negotiations can blow up unnecessarily, wasting a lot of time and money. In preparing to negotiate, review the situation with your client, and provide an accurate analysis of the facts and likely court results. Equally important is helping your client review his or her goals and understand what realistically can be expected at trial and through negotiation. In particular, help your client consider possible negotiated arrangements that courts would not order after trial.

Then discuss the negotiation process with your counterpart lawyer. Will you meet in person, negotiate by phone, or exchange offers in writing? If you meet in person, will the parties attend? Lawyers often prefer to negotiate without their clients so that they can be more candid with each other. On the other hand, sometimes it is helpful for the parties to be present to work out specific arrangements. Likewise, clients may be more willing to reach agreement if they participate directly.

To make the process go as smoothly as possible, make sure that both sides have all the information foreseeably needed before starting negotiations. Then, even if specific additional information is needed later in the process, getting it will not be too disruptive because you have exchanged all other pertinent information beforehand.

It may also help to plan an agenda for the negotiation, especially if the parties will participate. Start by identifying areas of agreement and issues that are likely to be resolved easily. Be aware, however, that the resolution of some issues (such as what will happen to the family home) may affect other decisions in the case. If the parties will participate, talk in advance with your counterpart lawyer about any "hot buttons" that each side should avoid to prevent the negotiation from going south.

A good relationship with your counterpart

One of the most effective things you can do to get good results for your client is to develop a good working relationship with your counterpart lawyer. Although "opposing counsel" may battle each other vigorously at times, they often cooperate, at least on procedural matters.

> If you have a good relationship, you are more likely to be able to exchange information informally, readily agree on procedural matters, take reasonable negotiation positions that recognize both parties' legitimate expectations, 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.

LANDE, LAWYERING WITH PLANNED EARLY NEGOTIATION, at 48.

When counterpart lawyers have a good relationship, they are more likely to give candid assessments, trust each other's statements, and take reasonable risks without worrying that the counterpart will take advantage. For example, lawyers who trust each other are more likely to informally test out possible areas of agreement. If counterparts have a good relationship, they are less likely to take advantage of each other and get away with misrepresentations because they know how to "read" each other.

If you haven't worked previously with your counterpart in a case, take the initiative to develop a good relationship. In your first phone call, spend a few minutes learning about each other's backgrounds, practices, and shared interests, among other things. Even better, suggest getting together for coffee or lunch.

Although there is some risk in developing good working relationships with counterparts, it probably is less than you think. Some lawyers with reputations for being unreasonable might surprise you by responding constructively to your invitation to develop a good working relationship. If counterparts reject your invitations, this is useful information about their motivations, which would lead you to be especially vigilant in protecting your client.

Getting good results

Good listening is critical for effective negotiation. This is difficult for many lawyers because we are trained primarily to argue, not so much to listen. Indeed, lawyers essentially act as mediators between their clients and the other side. Lawyers sometimes have difficulty working with their own clients, which can happen if clients feel their lawyers are not really hearing what they feel and want. Considering that an agreement requires consensus, it is essential to understand the other side's perspective as well.

Even if you accurately understand what others are saying, it also is important that they *feel* you understand and respect them even when you disagree. Part of good listening involves a respectful *demonstration* of your understanding. When people really feel "heard," they are more likely to take reasonable positions in negotiation.

Family law cases often involve multiple issues, which provide multiple opportunities for agreement. The key to reaching the best possible agreement is figuring out what each party values and trading things that one party values more than the other (i.e., "creating value"). For example, in dividing two items of property that have equal market value, but the parties value them differently, you can create value by giving each party what he or she values most. Even for

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supposedly "zero-sum" issues, where the parties value the item equally (such as the amount of child support), there often are other issues that can be linked and traded based on how much the parties value the respective issues. These issues might be directly related (such as who will pay for certain items for the children) or not (such as property division).

An effort to satisfy both parties may seem too cooperative for some lawyers or some cases. If both sides are taking extreme, rigid positions, trying to force the other side to capitulate, PEN may not work. Using PEN may even backfire if the other side interprets it as a sign of weakness and tries to take advantage.

However, trying to get a settlement by forcing concessions from the other side also has risks. It can escalate a cycle of conflict, killing any chance to reach a deal in both sides' interests. Out of anger or spite, people may reject otherwise acceptable agreements when they feel the other side is being unreasonable. This can increase the cost and time required to resolve the case and expose the parties to the risk of losing at trial. Even if the parties eventually settle after an adversarial negotiation, they may damage family relationships and undermine cooperation they will need in the future.

When your counterparts take unreasonable positions or act disrespectfully, give them a choice. Tell them you can handle the case the easy way or the hard way. You and your client prefer the easy way, but if the other side wants to proceed the hard way, you are prepared to respond accordingly. If your counterpart lawyers believe that attempts to intimidate you will be ineffective or counterproductive, they may become more reasonable.

PEN compared with collaborative and cooperative law

Collaborative law and cooperative law are specialized forms of lawyering with PEN in which both sides agree to negotiate from the outset. In collaborative law, the parties sign a participation agreement specifying their negotiation process. The agreement includes a "disqualification" clause, in which the lawyers are disqualified from representing the parties if they engage in contested litigation.

Cooperative law also involves an agreement to negotiate at the outset of a case but does not include a disqualification clause. Lawyers in these cases can try to negotiate, represent their clients in court if needed, such as at a hearing for a temporary order, and then negotiate afterwards.

Both collaborative and cooperative law processes can produce very positive results for clients, but some parties and lawyers are reluctant to use them. Some parties are uncomfortable with the disqualification clause in collaborative law because they fear losing their lawyers if the other side refuses to accept a reasonable agreement. Parties and lawyers may be wary of making a cooperative law agreement at the outset of a case, before they know whether the other side will act reasonably.

Lawyers (in consultation with their clients) can use a PEN approach unilaterally. Instead of initially agreeing to cooperate with the other side, lawyers can work efficiently and cooperatively to encourage the other side to cooperate. If both sides cannot manage to negotiate at the earliest appropriate time, they always have the option of litigation.

Conclusion

No process, including litigation and planned early negotiation, will work well in every case. In most cases, the risks and expense of trial outweigh the benefits. Considering that parties settle more often than they go to trial, it usually is in their interests to settle sooner, rather than later. PEN is a general approach designed for lawyers and clients who want to negotiate at the earliest appropriate time. This process can produce good results for clients with much less risk.

PEN can increase lawyers' professional satisfaction, generate additional referrals, relieve some stress in the practice of family law, and generate more money. Making more money through PEN may seem paradoxical, i.e., settling a case more efficiently generally means fewer billable hours. However, PEN is likely to increase client satisfaction and thus the client's willingness to pay your fees. Fewer hours of unpaid work increase your *effective* billing rate. What's not to like? **FA**

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