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Taking Advantage of Opportunities in Litigotiation

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Taking Advantage of Opportunities in 'Litigotiation'

By John Lande

When discussing negotiation of litigated cases, practitioners and academics often ignore the pretrial litigation activities, treating them as if they are unrelated to the negotiation of the ultimate issues (such as the amount of money that a defendant will pay a plaintiff). Interactions leading up to the final settlement event often are considered merely preparation for the endgame, if they are considered at all. For example, a review of popular law school negotiation texts shows that most of the texts virtually ignore pretrial activities as if they are largely irrelevant in negotiation.[1]

This narrow conception of negotiation in litigated cases misses critical parts of the dispute resolution process and thus leads to misconceptions about how it really works and what lawyers really do. In reality, lawyers don't just litigate or negotiate, they normally "litigotiate" throughout a case, as described below.

Of course, the final settlement events conducted to resolve the ultimate issues are very important and deserve serious attention. But to understand these settlement events, usually it is also important to understand the interactions leading up them.

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This article is partially based on a study in which I interviewed respected lawyers about their negotiation processes in pretrial litigation. I asked these lawyers about their negotiation procedures generally, and I asked them to describe the last case they settled, starting with the first interaction with their clients in the matter.[2] Although this article focuses on negotiation in the litigation context, some lawyers presumably use analogous procedures in transactional matters.

Getting to OK

Based on accounts of actual negotiations in my study, I define negotiation simply as a process of seeking agreement. Some people include other elements in their definitions, such as attempts to resolve disputes or exchanges of offers. Of course, some negotiations involve difficult situations where parties take sharply differing positions and exchange counteroffers. But much pretrial activity involves undramatic interactions leading to agreements, and we miss important parts of the process if we ignore them.

Consider that people often reach agreements when there is no manifest dispute. For example, criminal defendants often accept plea bargains offered by prosecutors without making counteroffers. Many divorcing couples reach agreement about issues such as parenting plans or child support with little or no disagreement. Businesses sometimes reach agreement through discussion of legal and business norms without exchanging offers.

Thus, parties reach agreement in routine "Getting to OK" interactions as well as dramatic "Getting to Yes" events. Are the "Getting to OK" conversations negotiations? I would say so. This broad conception of negotiation describes lawyers' actual behavior better than the narrower, conditional conceptions of negotiation.[3] Indeed, managing situations so that

people reach agreement without argument can take substantial negotiation skill.. So it makes sense to consider these interactions as negotiations.

Continuing Stream of Negotiations

In addition to seeking agreement to resolve the ultimate issues in a case, lawyers typically negotiate about a myriad of other issues. For example, well before the final settlement event, litigators may negotiate about acceptance of service of process, extension of time to file papers, conditions during the pendency of the litigation, discovery schedules, resolution of discovery disputes, and exhibits used at trial, among many other things.

People often don't think of these preliminary interactions as negotiations because the lawyers work out agreements with little or no difficulty. But the agreements are critical events. Lawyers can — and often do — argue about all of these things in some cases. Indeed, sometimes lawyers even argue — and negotiate — about whether to negotiate. If they didn't reach these agreements about these preliminary matters, the cases generally would be longer, more expensive, and more contentious. Moreover, the existence (or absence) of these preliminary agreements can profoundly affect the process and outcomes of the ultimate negotiations.

In addition to negotiating with the other side, lawyers also negotiate with many others during a case. For example, lawyers agree with clients about the tasks that each will perform, how the lawyer will to respond to the other side at various times during the case, and attorney's fee arrangements. Lawyers reach agreements with people such as coworkers in their firms, process servers, investigators, court reporters, technical experts, financial professionals, and mediators. Lawyers regularly reach agreements with judges about case management issues (such as discovery plans and referral to ADR procedures) as well as the ultimate issues during judicial settlement conferences.

Of course, some communications in pretrial litigation are not oriented toward reaching agreement, such as most preparation for and argument in court, and thus are not negotiation. But there are a lot more communications oriented toward reaching agreement than most people realize. Indeed, many cases involve continuing streams of negotiations.

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Litigotiation

In litigated cases, we should think of negotiation as what University of Wisconsin Professor Marc Galanter calls "litigotiation," which he defines as "the strategic pursuit of a settlement through mobilizing the court process."[4] He writes that "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."[5] Although few people use the term "litigotiation," most lawyers know that they are likely to settle most of their cases and act accordingly.

Viewed from this perspective, most pretrial activity is oriented toward negotiation. For example, we don't normally think of formal discovery as part of negotiation, but it generates information used in the ultimate negotiations and affects the bargaining dynamics. Of course, lawyers regularly reach agreements about discovery. These include initial agreements about what information to exchange as well as resolution of discovery disputes.

In practice, negotiation is routinely infused in litigation throughout a case. Although the purported purpose of pretrial litigation is to get ready for trial, this preparation is inextricably intertwined with negotiation because the anticipated trial decision often affects the ultimate negotiation.

Indeed, many lawyers continuously consider how pretrial activities affect negotiation. One lawyer in my study said that he "prepares for settlement from day one of the lawsuit" and that there is a "constant process of evaluating the claim throughout the litigation." Another lawyer said that he "always has an eye toward settling," taking care of matters as quickly and inexpensively as possible and minimizing clients' risk. A third lawyer said, "It is all negotiation from the time suit is filed. You are constantly negotiating or setting up the negotiation. It doesn't just happen. You are negotiating from the outset, setting up where you want to go. You are judging [the other side], and they

are judging you." He elaborated, "Negotiations don't occur in a week or a month. They occur in the entire time of the lawsuit. If anyone tells you they aren't negotiating, they really are. Every step in the process is a negotiation. You don't call it negotiation but in effect, that's what it is."[6]

Planning to Get to Yes (or OK) Sooner, Cheaper, and Better

When lawyers approach their cases as "litigotiation," their goal is to plan to get to yes (or OK) sooner, cheaper, and better. They take control of their cases and prepare to negotiate at the earliest appropriate time. This involves understanding the clients' interests, the interests of the other side, the relevant facts and law; using neutrals and courts as appropriate; and making strategic decisions about timing of the process. One lawyer described it this way:

> 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.[7]

Before lawyers can address the ultimate issues in a final negotiation with the other side, they need to clearly understand their clients' interests, i.e., where their clients are "coming from."[8] Because one can reach agreement only if the other side is willing to agree, it is important to understand the opponents' interests and perspectives.

Lawyers in the study emphasized the importance of developing good relationships with their counterparts. Some take the initiative to do so at the outset of a case, preferably in a face-to-face conversation. With a good relationship with the opposing counsel, lawyers can promote communication, trust, candor, cooperation, efficiency, and good outcomes that create value for the parties. When lawyers have a difficult relationship, this can create numerous problems for the lawyers and parties and make a case one's own private hell.

Lawyers need to exchange information efficiently so that both sides are ready to negotiate. As one lawyer put it, "people can't negotiate until the cards are on the table."[9] But they *can* negotiate with substantially less information than they would need for trial. So they can agree on what information they need to negotiate and exchange additional information later if needed.

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Lawyers decide the appropriate time for negotiation. The lawyers in the study generally believe that negotiating early in a case — instead of after completing discovery or on the courthouse steps — is better. The lawyers I interviewed believe that negotiating relatively early in a case is appropriate when parties communicate well, want to maintain (or avoid damaging) their relationship, reasonably evaluate the likely trial decision, can't tolerate adversarial trial tactics, are ready to "move on" from the dispute, and/or can't afford to go to trial. Early negotiation may not be appropriate if parties or lawyers have strong emotions that they can't control, have extremely unreasonable expectations, or are too stubborn to negotiate until they face an imminent trial.

Mediators and settlement judges can be very helpful, even for lawyers who are skilled and experienced negotiators. The neutrals can diagnose barriers to settlement, coach the parties and lawyers to be more effective negotiators, and help close large "gaps" between the parties' positions.

Of course, using these techniques will not guarantee a fast, cheap, or better negotiation in every case. But the lawyers in my study generally use them, believing that they increase the likelihood of improving the process and outcomes.

Opportunities for Lawyers, Clients, Neutrals, Scholars, and Teachers

Lawyers and Clients

Lawyers who diligently use these techniques should increase their effectiveness as litigotiators, getting good settlements while being prepared to vigorously litigate and try cases if needed. This should lead to better service to clients, which can increase lawyers' professional satisfaction, produce goodwill, and relieve stress from unnecessary conflict. By using fee arrangements that reward efficiency and client satisfaction, lawyers can reduce the amount of their uncollectable fees and increase their effective billing rates.[10]

Some lawyers aren't interested in planning for early negotiation because of their general philosophy of lawyering, habit, procrastination, lack of diligence, or heavy caseloads. So some counterparts will not be open to this approach in some or all of their cases. But lawyers may be surprised about how much cooperation they can elicit from their counterparts. I describe some in my study as "Nike lawyers" because litigotiation is their standard operating procedure: they "Just do it." If they develop good relationships with their counterparts in a case, the counterparts may litigotiate whether they know it or not.

Clients benefit when lawyers use these procedures diligently. As noted above, this involves developing good relationships with clients and clear understanding of their interests. Lawyers can then advise clients about how to satisfy their interests efficiently through negotiation if possible and trial if necessary.

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The ABA Section of Dispute Resolution's Planned Early Dispute Resolution Task Force produced a User Guide designed for businesses to help them prevent disputes and manage them efficiently when they do arise. By John Lande, Kurt L. Dettman, and Catherine E. Shanks, *Planned Early Dispute Resolution User Guide* (2014) is available at http://www.americanbar.org/groups/dispute_resolution/resources/planned_early_dispute_resolution_pedr.html.

Neutrals

By recognizing the dynamics of litigotiation, neutrals can offer a broad range of services to help manage the process more efficiently. Most neutrals now work only on the final, dispute resolution stage of cases. In addition to assisting with the ultimate resolution of a case, neutrals can promote good working relationships between counsel, exchanges of information and documents, planning for attendance of particular individuals (including experts), preparation of parties, scheduling and logistics, and documentation of procedural agreements. Neutrals can offer these services more economically than the lawyers, give assurances about the fairness of the procedural arrangements, and fairly allocate the case management costs between the parties.[11]

Scholars and Teachers

The broader conception of negotiation can open new scholarly agendas. Dispute resolution scholars, who previously might have focused only on final settlement events, can develop more realistic understanding of how lawyers negotiate throughout litigation.

Some law school faculty teach about the dynamics of litigotiation and provide students with more realistic understandings of how lawyers actually work. For example, some faculty in civil procedure and pretrial litigation courses teach that the goal of lawyers' pretrial strategy normally should be to produce the most favorable possible settlement, not merely to win in court. Faculty can emphasize that when lawyers

interview clients, conduct discovery, and litigate motions, they should do so considering how these activities may help in the ultimate negotiations.

Of course, lawyers typically do prepare for trial, though often this is a maneuver to gain leverage in negotiation. Thus, faculty can highlight how litigation tactics might affect negotiation as well as trial.

Law schools can consider supplementing traditional pretrial litigation courses by focusing particularly on strategic case evaluation and management. Schools might offer this as a new elective course and/or incorporate material to supplement existing courses such as dispute resolution survey and client interviewing and counseling courses. A stand-alone course might cover topics such as: (1) conducting initial client interviews, (2) developing legal theories, (3) planning investigation, including discovery, (4) developing a good relationships with counterpart lawyers, (5) working with experts as consultants and/or witnesses, (6) analyzing likely court outcomes, (7) planning negotiation strategies, and (8) using neutrals to advance clients' interests. Indeed, some faculty already teach pretrial litigation courses that begin with client interviewing and end with negotiation.[12]

Faculty teaching negotiation courses also can help students understand that negotiation and litigation are closely intertwined. They can emphasize that critical factors in legal negotiation normally start at the outset of a case, not just before the ultimate negotiation. Just as courses focusing on pretrial litigation can instruct students that litigation strategy is often designed to prepare for negotiation, negotiation courses can teach students to consider how the pretrial litigation dynamics affect the final negotiation.[13]

People with insight and initiative can take advantage of the great opportunities offered by understanding the realities of litigotiation. ■

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Endnotes

1 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, 3-4 (2014).

2 *Id.*; *see also* John Lande, *Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better*, 16 Cardozo J. Conflict Resol. 63 (2014).

3 *See* Lande, *supra* note 1, for further discussions of varying definitions of negotiation.

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

5 *Id.*

6 Lande, *supra* note 2, at 66.

7 *Id.* at 74.

8 *Id.*

9 *Id.* at 90-91.

10 John Lande, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money 39-49 (2d. ed. 2015).

11 John Lande, *How Neutrals Can Provide Early Case Management of Construction Disputes*, JAMS Global Construction Solutions at 6 (Spring 2011).

12 *See Dispute Resolution Syllabi*, Center for the Study of Dispute Resolution, University of Missouri, available at http://law.missouri.edu/drle/syllabi/adr-survey/.

13 For materials on teaching litigotiation as part of a negotiation course, see John Lande, Teacher's Manual, Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money (2015).