They Should Call It Negotiation School, Not Law School

Professor John Lande
University of Missouri School of Law

University of Tennessee College of Law
Alternative Dispute Resolution Course
Today’s Conversation

- We will discuss:
  - Wrong-end-of-telescope view in legal education
  - Problems with traditional negotiation theory
  - Alternative theoretical tools
  - Negotiation tips for practice
  - Practical resources for further learning

- You will get a copy of this PowerPoint with lots of links, so you don’t have to take notes
Every law school’s “hidden” – misleading – curriculum:

- Legal rules are the most important factor in disputes
- Most cases are decided by appellate courts
- “Thinking like a lawyer” is predicting court decisions
- Winning is the only – or most important – thing
- It’s all about the money
- Lawyers and clients have the same perspectives
- Clients are mostly invisible bystanders in their cases
- Negotiation is trivial, barely worth mentioning
Do You Wanna Know the Truth?

- Legal rules often are not the most important factor in resolving disputes
- Most cases are not decided by appellate courts or even trial courts
- “Thinking like lawyer” is focusing on clients’ interests
- Winning often is not the most important client goal
- It’s not all about the money in many cases
- Lawyers and clients often have different perspectives
- Clients are the central actors in lawyers’ work
- Lawyers negotiate all the time, much more than appearing in court
In federal courts, only about 1% of lawsuits go to trial. Tried cases “are typically high-risk, all-or-nothing cases, cases with unusual facts or intransigent parties, cases that defy compromise. Their outcomes, by comparison with ordinary work-a-day settlement cases, are costly, unpredictable, and sometimes bizarre. Because jury trials and jury verdicts are the most visible products of litigation, these extreme and unrepresentative cases distort public perception of the administration of civil justice.” Samuel R. Gross & Kent D. Syverud, Don’t Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. REV. 1, 63 (1996).

Only a fraction of tried cases are appealed and, of those, only a fraction are decided with a written opinion.
How Can You Use This Info?

- Provide context and help you navigate law school.
- Recognize that litigation is essential – and problematic.
- As you read cases in your courses, imagine what really was going on between the parties.
- Since few cases go to trial or are appealed, what was different about those cases?
- Why did lawyers make conflicting legal arguments?
- Lower court judges generally aren’t stupid. Why do their decisions get reversed?
What is Negotiation?

- **Lots of definitions – no consensus**
- My definition: “process of seeking agreement about a course of action”
- Unlike some definitions, this doesn’t require:
  - Dispute
  - Bargaining
  - Exchange of offers
  - Legal “consideration” / quid pro quo
  - Goal of forming a legal contract
- Instead of using these elements in a definition, you can use them to describe different negotiations
Lawyers Negotiate ALL THE TIME

- People often think of negotiation only as process with counterpart lawyer at final stage of a case.
- In fact, lawyers also negotiate throughout cases with:
  - Clients
  - Supervisors
  - Co-workers
  - Experts
  - Court reporters
  - Private dispute resolution professionals
  - Judges
Examples of Lawyers’ Negotiations

Lawyers seeking agreement with:

- Clients about fee arrangements or scope of work
- Counterpart lawyer for extension of deadline
- Supervisors about arguments to include in a brief
- Co-workers about what to order for lunch
- Experts about content of opinion letter
- Court reporters about scheduling
- Mediators about materials to provide
- Judges about discovery schedule

Click here for more examples of negotiation.
Traditional Negotiation “Models”

Negotiation theory describes two “models” – which are confusing and misleading, with various names:

- **Adversarial or positional** – parties try to maximize advantage, starting with extreme positions

- **Cooperative or interest-based** – parties try to satisfy all parties by identifying interests and options for satisfying parties’ interests
Missing Model

Negotiation theory ignores most common pattern, which I call “ordinary legal negotiation” or “norm-based negotiation”:

- Negotiators start with generally-accepted norms and argue for advantageous modifications

Click here for more information about negotiation models – and variables discussed in next slide.
The negotiation models assume that key variables are highly correlated with each other. My research shows that’s often not so.

Instead of models, focus on variables about whether parties:
- Are concerned about other side’s interests
- Exchange counter-offers or use other process
- Seek to “create value” (or “claim value”)
- Use a hostile or friendly tone
- Use power to get their way
- Use law or other norms as basis of argument
LIRA: Three Elements of Cases

- Based on *Litigation Interest and Risk Assessment: Help Your Clients Make Good Litigation Decisions*
- Three-part litigation interest and risk assessment (LIRA) structure to develop bottom line for settlement.
  - Expected value of court outcome (aka BATNA value – best alternative to negotiated agreement)
  - Tangible costs of continuing to litigate
  - Intangible costs of continuing to litigate
LIRA Goals

- **Improve party decision-making**
- Fulfill fundamental ethical obligation of lawyers
- Improve results for parties, courts, and society by:
  - Reducing decision errors in going to trial after rejecting good settlement offer
  - Reducing tangible and intangible costs of litigation
Common Sources of Conflict

- Personality conflicts
- Underlying conflicts
- Large stakes
- Inexperienced lawyers
- Fear of looking weak
- Parties don’t know or trust each other
- Parties don’t know the case yet
- Poor communication, including with clients, counsel
- Concern about setting precedent
- Lawyers want to fight, perform for clients, increase fees
- Differing expectations about trial outcome
Lawyers’ Use of LIRA

Lawyers using LIRA process can help clients:

- Understand their interests and litigation risks
- Identify key legal and factual uncertainties and possible outcomes to estimate court outcomes and develop bottom lines
- Explicitly consider tangible and intangible costs
- Develop wise and effective litigation, negotiation, and mediation strategies
Intangible Costs of Litigation

Litigation imposes serious intangible costs on parties, which often are overlooked or undervalued, e.g.:

- Stress causing physical and psychological harm
- Being stuck in dispute, not getting on with life
- Damaged relationships
- Harm to reputations
- Feelings of unfairness
- Loss of opportunities
Critical Tasks in Negotiation

- In practice, key tasks are to develop good relationships with clients and counterpart lawyers.
- Lawyers and clients often have very different perspectives. It takes careful work to get on the same wavelength.
- Lawyers’ relationships with counterparts generally have a MAJOR impact on how cases work out.
What to Do in Practice

- Develop good relationship with clients. Learn their interests and priorities, which may include:
  - Financial outcome
  - Winning / beating the other side
  - Getting rid of dispute / getting on with life & business
  - Getting respect, apology etc.
  - Lots of other things

- **Strong advice:** At outset of case, [try to develop good relationship with counterpart lawyer](#).
  - If good relationship, case will be much easier.
  - If they aren’t interested, be on guard.
Prepare Wisely

- Make best estimates of expected court outcome:
  - Identify key factual and legal uncertainties
  - Conduct discovery and legal research to reduce uncertainties
  - Recognize range of possible outcomes
- Make realistic estimates of future legal fees and costs of going to trial
- Help client identify and value intangible interests
- Develop bottom line (which will evolve)
- Develop negotiation strategy considering negotiation “models” and especially the variables
Negotiation in the New Normal

- People often will continue to use video even after they feel safe meeting in person.
- Professionals and many laypeople will be comfortable with it and appreciate efficiency.
- People will need patience dealing with communication problems, extra time needed (especially to talk with clients), technology problems.
- Negotiation and mediation may be broken into stages.
What to Do in Competitions

- Always: your goal is to protect your client’s interests
- Recognize that judges have different philosophies
- Try to achieve goals of multiple models
- Use “tit-for-tat” approach
  - Start cooperatively
  - Mirror counterparts’ responses – cooperative or adversarial
- If appropriate, offer “easy way or hard way,” saying you prefer easy way but you can do hard way if they want
- DON’T SAY: My goal is to reach settlement.
- DO SAY: My goal is to reach settlement if we can satisfy both sides’ interests.
Resources

- Post: “Letter to Kelly” advice for law students, espec. 1Ls
- Article: My Last Lecture: More Unsolicited Advice for Future and Current Lawyers
- Article: Good Pretrial Lawyering: Planning to Get to Yes Sooner, Cheaper, and Better
- Book: Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money
- “Stone Soup” interviews for independent study courses
- More information about LIRA
- Indisputably blog
- My email: landej@missouri.edu
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