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Planned Early Negotiation

Please accept the following hypotheses, at least for the duration of this chapter:

- Most divorce cases are settled rather than litigated.
- Few cases involve the complexities of a Donald Trump divorce.
- At the beginning of a case, experienced lawyers generally have a pretty good idea of the range of likely results.
- The litigation process can be harmful to the relationship of the parties, which may scar their ability to coparent children in the future.
- If the parties could reach the same result on Day 1 that they could reach on Day 1,001, they should do so.

Such hypotheses make it easy to accept “planned early negotiation” (PEN), a concept explained by John Lande, law professor, in his book, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*.¹ The idea behind PEN is a simple one. If the likely end results can be recognized early on as falling within a narrow range, why not get there quickly?

1. JOHN LANDE, *LAWYERING WITH PLANNED EARLY NEGOTIATION: HOW YOU CAN GET GOOD RESULTS FOR CLIENTS AND MAKE MONEY 2* (ABA Section of Dispute Resolution 2011).

Prison of Fear

Lande noted that although the use of PEN makes sense, many lawyers shy from using it:

In an all-too-common pattern in "litigation as usual," settlement comes only after the lawyers engage in adversarial posturing, the litigation process escalates the original conflict, the parties' relationship deteriorates, the process takes a long time and a lot of money, and none of the parties is particularly happy with the settlement. Although some lawyers enjoy this process and make a good living from it, many would prefer to use a more productive and efficient process, but they feel stuck in playing the adversarial "game."²

Lande attributed much of the reluctance to engage in an early negotiations process to lawyers' fear: fear that a client will not retain them, fear that the case may be resolved before sufficient information is available, or other fears. He called this a "prison of fear."³ To escape this prison of fear, Lande suggested, among other things, a careful-case assessment, a planned exchange of information, "escape hatches," and appropriate compensation.⁴

Careful Case Assessment

The careful case assessment may be the most important facet of the process. After all, if you can choose the right cases for PEN—and avoid the wrong ones—at the beginning, the rest should be easy. According to Lande, a PEN process should be used only when it appears that "everyone is willing to listen to others" and "take reasonable positions in negotiation."⁵ After all, if extreme positional negotiating has to be involved, the "early" part of PEN will be lost.

Planned Exchange of Information

Similarly, the planned exchange of information is necessary for the "early" part of PEN to be accomplished. If extensive discovery is necessary, the time consumed will defeat the purpose. Therefore, a voluntary, open exchange of information is a necessary component.⁶

2. *Id.*

3. *Id.* at 5.

4. *Id.* at 10–17.

5. *Id.* at 11.

6. *Id.* at 12.

Escape Hatch

The escape hatch is an easy suggestion to accept. This process does not require anything to be approved by the court, unlike a collaborative divorce agreement. Therefore, if either party changes its mind and decides that early resolution is not in the best interests of that party, the process will resume a normal scheduling routine. Other than, perhaps, hurt feelings, nothing is lost.⁷

Appropriate Compensation

Appropriate compensation is a different matter. Most divorce lawyers charge strictly by the hour, which creates a potential conflict between the client's best interests and the lawyer's financial interest. Although most lawyers are highly professional, the fact remains that the longer the case drags on, the worse it is for the client. After all, hourly rates compensate lawyers solely for the time spent on the case. Therefore, unlike personal injury lawyers whose contingency agreements put the lawyer's financial interest in harmony with that of the client, divorce lawyers benefit by the exact opposite of the benefit to the client. However, since contingency fees are considered mostly unethical for family law attorneys, most attorneys feel that they have little choice but to charge by the hour.

Lande, noting the disparity between the lawyer's financial interest and the best interests of the client in shortening the process,⁸ suggested a variety of solutions.⁹ It is not in the purview of this book to examine specific alternative billing strategies, but lawyers who seek to engage in PEN should explore some creative, nonhourly billing methods to avoid the lawyer-client financial conflict. Some ideas include offering a flat fee if the case settles and a higher rate if any portion of the case litigates, or offering a base rate and then a subjective bonus if the case settles early and both parties agree that such a bonus is warranted.

PEN: Positives and Negatives

PEN makes a great deal of sense. After all, if you needed surgery, would you prefer a lengthy, drawn-out process or one that resolves all issues quickly? Lawsuits, like surgery, should be handled as expeditiously and bloodlessly as possible. Thus, if a case can be settled early

7. *Id.* at 14-15.

8. *Id.* at 16-17.

9. *Id.* at 35-45.

with the same results as it could be settled later, it is better for the clients to settle early. Of course, that is a big if.

There are several factors that conspire against PEN. One major factor that resonates in divorce cases and makes this concept questionable in many cases is, as mentioned frequently elsewhere in this book, the emotional levels inherent in family dissolution, which frequently prohibit getting to "yes" until the smoke has cleared. For example, one of the parties may still be resisting the very concept that the marriage is over; or one party may be bent on retaliation, or punishing the other spouse, for the divorce—or, worse yet, for misdeeds (perceived or real) during the marriage. Another factor is timing, a topic to which a whole chapter is devoted in this book (see chapter 5, "Timing"). Timing is everything when it comes to settlement: sometimes an early resolution is not possible due to the inability to get appraisals and other discovery completed quickly. In these cases, which may be the vast majority, PEN is simply not going to work.

Yet, for the right case, this technique is worth considering and keeping in an attorney's arsenal of available tools. It should be relatively easy to sell to clients, who are always interested in saving money. In the appropriate case, it is worth trying to sell the idea to opposing counsel as well.

Summary

Most experienced divorce lawyers can surmise the eventual resolution of a case very early in the process. In such a case, it may be worth proposing the PEN process as a means of minimizing the financial and emotion destruction of divorce on the parties.