The Mediation Tennis Match: Do I Charge the Net or Do I Volley?

Robert J. Burns, Jr.
PERRY DAMPF DISPUTE SOLUTIONS
721 Government St.
Baton Rouge, La. 70802
(225) 389-9899

I. Settlement is a Likely Outcome

According to the Supreme Court of Louisiana Annual Report 2011, there were a total of 141,047 civil filings in the state district courts in that year. In the same year, the district courts conducted 267 jury trials. In twenty of Louisianaôs parishes, there were no civil jury trials ï none. To put this in perspective, the number of filings in 2011 exceeded the number of jury trials by 140,780. Or stated another way, the number of jury trials in Louisiana was less than 1 percent of the number of civil cases filed in the same year.

To be sure, many cases are dismissed by way of exceptions or dispositive motions. But, the raw numbers suggest that the overwhelming majority of cases filed are resolved by the parties through negotiated settlements. Numbers donôt lie. Therefore, the statistics suggest that of all the civil cases a lawyer handles, the chance that any one case will go to trial is statistically insignificant compared to chance that it will not.

Mediators often wax philosophical about the many reasons to settle disputes: the costs of litigation, the inherent uncertainty of the trial process, the ability to control outcomes, the value of closure, etc. If it is true that most cases settle through some type of negotiated resolution, then it follows that the lawyer dons his ñtrial lawyerò hat far less frequently than the ñnegotiatorò hat he wears to work daily. Yet, we lawyers remain very much trial oriented. We take depositions with an eye toward trial testimony. We propound discovery with an eye toward trial.

We file motions with an eye toward trial. And all the while, as the expenses of the case mount, the likelihood that the case will settle looms large.

The litigator, in modern Louisiana, serves as negotiator far more frequently than she serves as a trial attorney. One thing this paper seeks to explore is how the trial oriented lawyer might adjust her focus to the fact that settlement is not only likely, but in her clientôs interest. Below are some of the difficulties that the lawyer encounters when she serves as negotiator, and hopefully some ideas to assist in dealing with them.

II. Mediation and Tennis

Parties who are unable to resolve matters themselves often turn to mediation as a forum that gives them the best option reach a negotiated resolution. Weôve all heard the phrase, ñthe ball is in your court.ò In a negotiation, the phrase simply refers to the idea that it is ñyour turnò to make an offer. Hokey as it may seem, the tennis analogy is more apropos than first meets the eye. Consider this: the tennis player doesnôt typically sit back on the baseline and return the ball to the other side, unless that is a strategy she has chosen. The goal is to win the match, right? So, if the tennis player deems it advantageous to volley back to her adversary to see what happens next, at least the volley is part of a considered strategy ï not simply a reflex action taken without thought.

Sometimes, the player sees the advantage of charging the net and going for the kill shot. That often happens after several volleys are exchanged, in which the player waits for the right opportunity to volley to a certain spot then move in for the winning shot. Other times, the player sees the chance to move to the net right

away, positioning herself for the chance to win the point. The point is that whether the player volleys or moves in for the kill, her chosen course is part of a strategy.

Not unlike tennis, parties to a mediation often engage in a ñfeeling outò phase where they exchange offers and demands in an effort to size up their adversaries before making a decisive move. They send messages, offers and arguments back and forth to try to narrow the issues and the distance between their bargaining positions. Sometimes the volleys are extensive. Sometimes, one of the parties quits. But most often, parties in a mediation use the volleying process to try to position themselves to make a winning shot at the end of the point.

The exchange is important. After all, each move in a mediation is typically a formal offer to settle the case. If the parties want to demonstrate that they are serious about doing so, their offers should demonstrate a rational and justifiable approach to compromise. Too often, though, parties in a negotiation make offers without considering deeper, more important questions: What message do I want to send to the other side? Should I explain the reasons for my offer? Should I demand that the other side come to a certain point so that the negotiation can continue? Do I want to break off the discussion, or is it worthwhile to continue? These questions, and more, deserve constant attention during a mediation.

So, borrowing from the tennis analogy, here are a few thoughts about when to volley, when to charge the net, and most importantly, why.

III. Preparing for the Negotiation Process

Think, practice. No tennis player enters a match without picking up a racquet and practicing. Preparation for the mediation is much like the practice put in by the athlete ï far more time and energy is spent on the practice court than in the actual match. But, without the hard work on the practice court, the player doesnôt really have much of a chance.

In their widely read book, *Getting to Yes*, authors Roger Fisher and William Ury observe that the ñreason you negotiate with someone is to produce better results than you could obtain without negotiating with that person.ò In the context of civil litigation, they would simply argue that you negotiate a settlement when the negotiated resolution produces a better outcome than what might result after trial. It stands to reason that the negotiator must therefore know what results might obtain if the matter were to go to trial. And, as we know, the process of investigating a civil claim so that likely outcomes can be well understood takes hard work, time and money.

The well-prepared negotiator thus enters the negotiation with some norms in mind. For instance, she will be able to predict (roughly) what expenses her client is likely to incur in the trial process. She will be aware of any jurisprudence that gives guidance on possible outcomes, especially any caselaw that sets out the maximum or minimum tolerable awards for the type of claims being asserted. The reputation of the judge and jury venires will either be known or learned so that overly liberal or conservative outcomes are within the partiesô evaluation. Any claims for special damages must be laid out by the plaintiff, and investigated by the defendant, long before a productive negotiation can take place.

It is often fatal to the mediation process when adequate preparation has not taken place. For instance, if a party appears at the mediation and asserts, for the first time, that she has not worked in several months due to injuries sustained in the accident, and therefore is making a claim for past and future lost wages, the negotiation process is not likely to get off the ground because the defendant has not taken stock of that part of the claim. If lost earnings are a real issue, the negotiation will almost certainly fail.

On the other hand, adequate preparation often means increased expenses. So, the challenge for the litigator (again, wearing his ñnegotiatorò hat) is to undertake as much preparation as is necessary to participate in a meaningful negotiation, but not too much to make the cost of the investigation an obstacle to settlement. Indeed, where litigants expend too much money in the discovery process, their settlement options are often limited because the expenses theyôve incurred make a ñwinò at trial the only rational outcome to justify the expenses theyôve incurred.

How much to prepare for a negotiation is likely to be influenced by the sophistication of the client. If the client is very sophisticated, then it stands to reason that the client will be in a good position to evaluate her negotiating position based on experience and her innate ability. But, for the less sophisticated client, it is sometimes advisable to make certain that the client understands the possible outcomes at trial. It might, for instance, be necessary to retain an expert to explore the clientôs liability theory so that the client can understand the pros and cons from an expert other than her lawyer. Or, it might be advisable to retain an economist to evaluate the sometimes complicated economic components of a claim so that the client can more fully understand the breadth of her claim or defense.

The careful lawyer will discuss with the client the benefit of incurring such expenses so that they can together make a decision that the expense is justified. Here, it is worth a word of caution that there are scattered cases where lawyers have been held liable for failing to investigate sufficiently before recommending a settlement. *See, e.g., Collins ex rel. Collins v. Perrine,* 108 N.M. 714, 778 P.2d 912 (Ct. App. 19889), cert. denied, 108 N.M. 681, 777 P. 2d 1325 (1990).

Once the parties have adequately prepared, they are in a position to bargain for a negotiated resolution. The negotiation process is ready to proceed.

IV. Telling the Truth – the Rules of the Match

As in any game, the players must know the rules. But, in negotiation, the lines are far less clear than a white baseline on a green court. In fact, the negotiator is often on the horns of a difficult dilemma: do I tell the truth and risk an unsuccessful negotiation, or do I lie and risk being found out? This is no small concern, for to be viewed as untruthful can carry serious implications. For the lawyer-negotiator, the risk is great.

Rule 4.1 of the Louisiana Rules of Professional Conduct states that

> In the course of representing a client a lawyer shall not knowingly:
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> (a) make a false statement of material fact or law to a third person; or
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> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Similarly, the introductory paragraph of Louisianaôs ñCode of Professionalismò states: ñMy word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.ò

In the courtroom, the rules are far more straightforward. The lawyer, as an officer of the court, has an obligation of candor toward the tribunal. She is ethically obliged to tell the truth, and any misrepresentation of fact or law carries with it very serious penalties. But, the negotiation process is blurred by competing concerns: on the one hand, the lawyer/negotiator is engaged to represent her client is a successful negotiation; on the other, the lawyer/negotiator owes a duty of candor and honesty to others she encounters in the course of her representation.

One writer has likened the negotiatorôs challenge to a card-game:

> On the one hand, the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways, he must facilitate his opponentôs inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

J. White, ñ*Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation* (Am. B. Found, Research J. 926, 926-935, 938 (1980).

But the lawyer is first a professional ï not just a negotiator. And the temptation to mislead in a negotiation, according to some, doesnôt justify outright misrepresentation. So while the lawyer may feel compelled by the dynamics of a negotiation to engage in such tactics, Judge Alvin B. Rubin argued that the lawyer is nevertheless called to a higher standard. In ñ*A Causerie on Lawyers' Ethics in*

Negotiation,ò 35 La. L. Rev. 577, Judge Rubin points out that the lawyer is more than a mere negotiator, and stands in contrast to his non-lawyer counterpart:

> The lawyer must act honestly and in good faith. Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule.

So, how does the lawyer-negotiator balance these two competing forces? There are no easy answers, but some things are clear. First, it seems to be fairly well-accepted that a lawyer may ethically make a good faith argument, based on an interpretation of the facts or the law, even if she has told her client that the argument may not be persuasive or even correct. This type of advocacy occurs every day in courts around the country. Rather than being viewed as unethical, it seems that it is well-accepted that the lawyer is carrying out her responsibility to be a zealous advocate for the client, even in those instances where she makes arguments that she does not believe are correct or will carry the day.

Slightly more problematic is the situation posed by ñpuffing.ò Where a lawyer negotiates with an adversary by making offers that are exaggerated, even in her evaluation of the case, has she gone too far? What about the situation where she has informed her client that she believes the highest possible value of the claim is ñx,ò then begins a negotiation by asserting a claim for twice that sum? Has she made a ñfalse statementò of material fact or law sufficient to violate the rule? Most writers easily dispense with that notion, as it is expected that the lawyer will inflate the value of her clientôs own case to settle on an acceptable lower amount. Indeed,

it is difficult to believe that in a negotiation, any lawyer would not speak of her case in a light most favorable to her own client. ñPuffingò is therefore expected, and permitted.

But, the line begins to blur in the situation where the lawyer-negotiator is given authority to settle for a certain sum, letôs say $100,000, and is then presented with an offer to resolve the matter within that authority. If the lawyer is asked in that situation, ñWill your client pay $90,000 to settle the case?ò how does she reply? The only truthful answer is ñYes.ò If she says ñNo,ò because she believes that there is a possibility of resolving the matter for something less, she would surely be serving the interests of her client. But, if she does so, she has seemingly misrepresented a material fact ï that her client would resolve the matter for that sum. There is no easy answer to the question. Experienced negotiators seem to speak a language that allows them to maintain candor, but at the same time serve their clientsô interests. For instance, the negotiator might say that ñI think my client might have difficulty paying that sum,ò or ñI think that is a high price to pay.ò In such answers, the negotiator has not (at least in this writerôs opinion) sacrificed her obligation of candor because she has artfully given a truthful answer in both situations while still attempting to carry out a successful negotiation for her client.

From what has been written on the subject, one thing does not appear in doubt: intentional misrepresentations of the facts or the law violate the rule. For example, in a negotiation involving an automobile accident occurring at an intersection, the lawyer who states that she is aware of an independent witness who will testify in her clientôs favor that the light was red, when she knows of no such witness, has clearly crossed the line. Even in the context of a negotiation, such tactics go beyond the pale of behavior that can be tolerated because they involve

an intentional fabrication. Or, if a lawyer represents to her adversary that there are insurance policy limits of $100,000, knowing all the while that an excess insurance policy affords coverage, she has crossed the line of acceptable tactics, even in a negotiation.

The ethics of negotiation therefore take into account that the lawyer-negotiator is expected to argue the facts and the law in the best interests of her client. But, as in many situations where the lawyer serves as advocate, she is cautioned to avoid crossing the line. Underneath most of what is written on the subject seems to be a ñgood faithò requirement. In other words, if the lawyer can assert in good faith that her position is justified, then her position is fair game. If her position is not one that passes the ñgood faithò test, then she is at risk of losing credibility at best, and crossing the line of unethical behavior at worst. Unfortunately, in the context of a negotiation, the line is not always clear.

V. Credibility

If not to simply adhere to the strictures of ethical standards, it may be wise to ñtell the truthò because it serves more pragmatic purposes: truth-telling builds credibility. Consider an example:

> A plaintiff sustained serious injuries in an automobile accident. She incurs medical expenses of $100,000, lost wages of $50,000 and is expected to make a good recovery following a surgery that addressed her physical problem. Countless cases from the jurisdiction have commented on the accepted awards for very similar injuries, and the range expressed in the jurisprudence quite clearly sets the minimum accepted amount at $150,000 for pain and suffering, and $400,000 as the highest amount within the discretion of the trier of fact.

> Including special damages, there is little doubt that the lowest reasonable award would be somewhere around $300,000 and the highest reasonable award could reach to $550,000. Any award much lower or higher than these ranges would likely be corrected on appeal.
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> In the ensuing negotiation, the plaintiffôs attorney makes an opening demand of $850,000. Justifying that demand, she states that ñshe believes that she can convince a jury to make that award.ò The defendant, hearing the plaintiffôs opening demand, questions whether it is made in good faith, pointing out that the jurisprudence clearly sets out the highest award at somewhere around $550,000. The defendant furnishes copies of the cases to the plaintiffôs counsel, asking for assistance to understand why the defendant should pay more than what the jurisprudence justifies as the high-end of the range.

Whatôs the big deal, you say? Every negotiation starts out like this, right? No big surprise that the plaintiff makes a stratospheric opening offer? Perhaps, but not necessarily. Some experienced negotiators disregard such tactics and brush them off as meaningless and expected. Others, though, take each offer seriously and consider their options in a much more deliberative manner. If the latter type of negotiator receives such an offer, the plaintiffôs attorney risks losing credibility at this stage. If she can produce caselaw justifying an award in the range she has demanded, then she will maintain her credibility. If she cannot, all is not lost. In fact, she might well gain an advantage by acceding that the defendantôs ranges are appropriate. Her credibility will be harmed, however, if she holds to her position.

The defense is also at risk of losing credibility. Its tendency will be to respond to a ñstratosphericò opening demand with an unreasonably low offer, say of $50,000. But, how does such a move jive with its argument that the only reasonable ranges are between $300,000 and $550,000? Surely, it will attempt to justify its position by arguing that it is merely responsive to an unreasonably high

demand. But, does taking that position give it an advantage in the negotiation? Not necessarily.

Some writers refer to ñanchoringò as the point at which a party in a negotiation makes an offer that she is not likely to depart from, at least not until her adversary makes a serious offer. Some theorize also that the party that first ñdrops anchorò sets the framework for the negotiation to proceed. Applied to the above example, the party who first makes an offer within the acceptable range is often deemed by his adversary as being sincere in his efforts to resolve the matter, and is sometimes able to negotiate a successful resolution *because* she has been the first one to grab that moral high ground. So for instance, if the plaintiffôs attorney were to acknowledge that the defenseôs ranges are appropriate, she might make an offer of $550,000 and then argue that for several reasons her client demands an award at the upper end of the range. If the defense had previously made an offer of $50,000, and is now faced with an offer that it had previously argued was reasonable, it is difficult for it to reply for anything less than $300,000. If it does not, then its credibility will be lost and the negotiation will either fail or become very difficult. If it does so, then the negotiations will proceed between adversaries who have earned credibility with one another.

By ñtelling the truthò in the above example, the defendantôs attorney revealed a solid foundation for her clientôs analysis of the plaintiffôs case. And, by ñtelling the truthò when she admitted that the range articulated by the defendant was reasonable, the plaintiffôs attorney gained credibility with the defendant and forced its hand to ñput up or shut upò by coming into the reasonable range. The negotiation will likely proceed with a rational discussion of reasons why the matter should resolve near the low or the high ends of the range that each party acknowledges is acceptable. That same negotiation will likely put both sides in a

position of having to make difficult decisions at its conclusion because the parties acknowledge the fact that the alternative of going to trial could produce worse results for either of them than proceeding with the negotiation.

VI. Winning the Match

There is one glaring fault (no pun intended) in the tennis--mediation analogy: in tennis, there is a clear winner and a clear loser. But, in mediation, winning is defined as settling. Everybody wins. The parties win. The lawyers win. The case is over and the matter is dismissed, so the court system wins. There are no losers. Every time a case is resolved, it is because the parties to the settlement have seen that there is wisdom in resolving the matter on their terms, rather than proceeding to a trial and having the outcome decided for a potentially worse outcome by others.

This is a paradigm shift for most lawyers, especially those reared in the days when representing a client meant that the lawyer was asked to win the case at trial. But, given the rarity of civil jury trials in modern Louisiana, todayôs lawyer is far more often a professional negotiator than a trial advocate. And given that negotiating is a part of the everyday task of the modern day litigator, it is at least worth her time to learn the rules of the game, and be ready to advise the client when to volley, and when to charge the net.