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COMMENTARY

Mediation Avoids That Immutable Line in the Sand

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I recently retired after 15 years on the bench, with a decade spent in the Civil Part. I settled hundreds into the thousands of cases. I had to. Sitting in a politically ignored southern New Jersey county, we never had a sufficient number of judges.

Settlement was an act of judicial survival. Those experiences have taught me that a settlement is preferable to the risks of trial and that mediation is preferable to a settlement conference with the trial judge. Some judges engaged in settlement conferences; others did not. I, wholeheartedly, did.

Now I mediate. This process has two components that a settlement conference before trial does not. First, in mediation the parties are more invested emotionally and financially. They come somewhat predisposed to settle. They are willing to spend some money to save more money by way of reduced costs to achieve a known certainty. Second, the mediator can speak directly to the parties in an unfettered fashion. While a judge in court may have an on-the-record discussion with litigants concerning a settlement, its formality lessens its impact.

I have often thought of trial lawyers as gladiators preparing for battle. That can make it difficult when the lawyer suggests a settlement. The client may perceive his or her gladiator as suddenly suggesting surrender. This is where a mediator can be invaluable in persuading the client that the lawyer has battled to achieve the offer, and is still ready to do battle, but that a negotiated peace or settlement is the best outcome.

Another observation is that mediations often start with each side taking an extreme initial stance. Then, during mediation the case is analyzed, taking into consideration the range of value of the plaintiff's case and a discounting of that range by some percentage because of the risk of not prevailing on liability. This objective analysis usually results in each side adjusting its offer. Then at some point, each attorney draws "a line in the sand," plaintiff makes a final demand and the defendant a final offer.

The derivation of that expression has particular significance in the legal context. It dates to March 1836 at the Battle of the Alamo, when Colonel William Travis, confronted with a demand to surrender by General Santa Anna, gathered his troops and with his sword drew a line in the sand. Then he asked his soldiers to step over it and join him in facing an inevitable death. Over time, the historical reference has been forgotten and the expression simply means taking a final or irreversible position.

There is an irony when each party draws his or her line in the sand and makes a take-it-or-leave-it ultimatum. The irony is that the process has caused each side to evaluate its case and come up with a new position that leaves the parties very close to a resolution, but with it still undone. For example, a case that started out with a six- or seven-figure demand has been reduced to each side quibbling over some low five-figure amount. Then things bog down because the act of drawing a line in the sand is an arbitrary one.

At this point it is unreasonable for the parties to walk away. Common sense dictates that the plaintiff should accept the defendant's offer, but the same common sense dictates the defendant should accept the plaintiff's demand. Often, a disproportionate amount of time is spent resolving this last hurdle where the mediator persuades the parties (again using the battle analogy) to surrender and step over the other's line in the sand or engage in some face-saving by redrawing a mutually compatible new line in the sand.

When I was a judge I always spoke to the jury after the trial. I did it because I felt basic courtesy required more than some pro forma thank you in front of a distraught litigant. The juries appreciated my speaking with them, but in truth I got more than I gave, because I gained insights that made me a better judge.

Those talks confirmed my belief that letting a jury draw the line in the sand is little more than a gamble. I learned it is not unusual for the jury to dislike the plaintiff or counsel, yet render a verdict more favorable than either plaintiff's demand or the defendant's offer. Conversely, the jury can be entirely sympathetic to plaintiff's plight and dismiss the case or award damages less than the

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defendant's offer.

As a judge, and now a mediator, I have enjoyed the settlement process, discussing and analyzing the strengths and weaknesses of each side's position. I even enjoy the haggling at the end over those last few dollars, because I believe that resolving a case before trial makes sense. Settling a matter through mediation is the best opportunity for litigants to control the outcome. Once the matter proceeds to a verdict, the jury draws its immutable line in the sand. Then, inevitably, the prevailing party applauds the jury's wisdom and the losing party bemoans losing to the jury's whim. ■