A legal note from Marshal Willick on the basic concept of settlement negotiations, and how some lawyers are not doing any service for their clients, or the courts, by adopting positions outside the scope of rationally possible results.

Previously, these notes have discussed the desirability of settlements that could avoid years or decades of legal proceedings ultimately serving the interest of no one, and have encouraged counsel to settle disputes where possible. See legal note No. 26 – "Carmona and the Wisdom of Settlement," posted at http://www.willicklawgroup.com/newsletters. This note discusses the flip-side: settlement made impossible by the actual intentions, short-sightedness, or lack of skill of counsel.

I. WHAT ARE THEY SMOKING? THREE SETTLEMENT OFFERS

In family law, the great majority of cases can, do (and should) settle. Some "settlement offers" are so head-shakingly absurd, however, as to be counterproductive – not only moving the parties further apart than they had been, but causing doubt that the lawyers involved comprehend the concept of negotiated settlement, what they might reasonably do to reach one, or why. Sketches of the facts in three examples:

In one annulment action, the "wife" entered into a short-term marriage (producing one infant child), knowing that she was still married to someone else. To boot, during the proceedings, she was arrested for domestic violence (DV) against the baby's father.

To avoid incurring fees, the father offered joint custody, although the statutes gave him a fair likelihood of receiving primary custody (as he wished), based on the mother's DV. See NRS 125.480(6). And while he could have obtained child support from the mother if he had obtained primary custody, or at least a set-off in support if by agreement or order custody was joint (see *Wesley v. Foster*, 119 Nev. 110, 65 P.3d 251 (2003)), he volunteered to pay guideline child support despite joint custody, with no set-offs. Finally, even though the mother was barred from seeking any kind of spousal support on these facts (see *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004)), he offered her a few thousand dollars as incentive to finish the case.

Her attorney responded, demanding primary physical custody, hundreds more per month than guideline child support would be if she ***could*** somehow get such custody, double the cash that had been offered – in the form of legally-impossible "spousal support," plus attorney's fees.

A second case, involving post-divorce wrangling over a pension division, involved similarly immoderate demands. The decree (drafted per joint petition by a now-disbarred incompetent) gave the wife far more per month out of the husband's pension than she was legally entitled to receive under the Nevada "time rule" for pension divisions.

In the current proceedings, the judge, unable to replicate any math that could explain the obviously-wrong order, found that the wife's story (that there had been "a deal" to over-compensate her) was just as likely as the husband's explanation (that the attorney had just made up a percentage). The court therefore refused to reduce the monthly payments to what the spouse was actually entitled to

receive under law, but locked the sum to the exact division set out in the botched decree to give her the precise benefit of her bargain – no more and no less – and thus with no future cost of living adjustments (COLAs).

The husband offered to ***give*** the wife COLAs for life, as a protection against inflation, if she would conform the award to what she was actually legally entitled to under the law governing pension divisions.

The wife responded that she would "settle" for ***more*** than the judge had awarded her at the hearing, ***plus*** COLAs.

Those two head-scratchers were bad enough. But it was a third that most inspired this legal note. The husband in that divorce case was a true whack-a-doodle, who had behaved so abysmally toward the wife and children that by the time of trial he was on supervised visitation; the outsourced evaluator found prospects "poor" that he would ever do the things required to have more child contact (essentially, lengthy therapy, rehabilitation, and reunification).

The husband's antics caused huge delays and required multiple trial days, as he refused to stipulate to even the most basic facts or testimony, or even provide financial information; he so abused the litigation process that the otherwise-unremarkable divorce case took more than a year and exceeded six figures in cost. After demanding that everything be proven at trial, the husband was (finally) found in contempt on multiple counts, was in the process of serving 20 days in jail – with another 100 days suspended if he would behave prospectively – and had been fined thousands of dollars. Matters of final custody orders, child custody, child support, and attorney's fees were taken under advisement.

At ***that*** stage of the case, the husband's lawyer actually had the chutzpah (classic definition: "that quality enshrined in a person who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." *Williams v. Georgia*, 190 S.E.2d 785 (Ga. 1972) (*quoting* Leo Rosten, *The Joys of Yiddish*)) to send a post-trial "settlement proposal" by which all contempt would be forgiven, all jail time waived, all fines expunged, no psychological exams or therapy for the husband would be required, visitation would be unsupervised, he would never pay any child support or otherwise contribute economically toward the children, and no attorney's fees would be payable.

II. WHAT COULD POSSIBLY EXPLAIN THESE FATUOUS PROPOSALS?

Reviewing these offers, one staff member suggested that there has been a sudden increase in illicit drug consumption by various members of the Nevada Bar. In the absence of evidence of such, what could possibly explain these communications?

All of the offers mentioned above were for terms that could not possibly be achieved by their clients in court in any universe approximating the one we appear to inhabit. On all three occasions, we were unable to fathom any basis upon which our opponents might actually believe that our clients could or would accept the terms proposed. Casting about for an explanation, there are only a few possible

explanations – and none of them very flattering.

It is possible that our opponents had no actual desire to serve their clients' interests by settling cases, but were interested solely in churning additional fees while doing nothing that might actually resolve the disputes.

Or, it is possible that we were dealing with counsel honestly unable to perceive the realities of their legal positions, or understand the range of reasonably probable outcomes.

Or, perhaps, we were dealing with lawyers with so gross a lack of client control that they would communicate ***any*** request/demand from their clients, no matter how asinine or outside the scope of the possible, thus wasting the time and money of everyone involved for no real reason, and transmogrifying the lawyers from "counselors at law" to "couriers of the absurd."

What was clear in the three cases described above – and increasingly in others – is that we were ***not*** dealing with counsel sufficiently interested in, and having willingness and ability to make, any actual effort toward actual resolution of legal disputes outside of litigation.

III. THE BASIC CONCEPT OF "SETTLEMENT"

There is no "cure" for bad-faith refusal to settle in favor of case-churning. Nor for counsel's lack of ability to perceive law and facts and probabilities. Nor for attorneys lacking the skill and backbone to perceive and tell their clients unpleasant truths, and guide them to reasoned results.

But to the extent that there may actually be attorneys in practice within reach of these notes who really are not aware of what the process of settlement might rationally look like, a pencil-sketch is provided, for whatever good might come of it.

First, an offer should usually be within the range of possible outcomes that would result if everyone went to court on the matter. A good sanity and reality check is the same as that for determining whether a judge has committed error in determining the value of property – valuation is not an abuse of discretion "so long as the value placed on the property falls within a range of possible values demonstrated by competent evidence." *Alba v. Alba*, 111 Nev. 426, 892 P.2d 574 (1995).

The question is whether the terms offered are within the reasonable bounds of results that could be achieved in court. The concept is akin to that of "fair market value" – "The price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." *United States v. Cartwright*, 411 U.S. 546, 93 S. Ct. 1713, 1716-17, 36 L. Ed. 2d 528 (1973); 26 C.F.R. § 20.2031-1(b).

In other words, before an attorney submits ***any*** offer to another, if he or she wants to be taken seriously, the offer should include terms within the possible range of what a court might actually order, presuming the judge had not just taken complete leave of his senses.

Making, or evaluating, settlement offers requires counsel to lend some objectivity to the analysis of the facts and applicable law (that being the "counselor at law" part of the job). Evaluating a position not by wishful thinking, not as if unpleasant facts or negative considerations did not exist, but ***really*** what is within the range of "probable possible."

This has been explained as a bell-curve, where 90+ percent of instances fit within – neither above nor below – the extreme edges of the curve. So it is a good way of thinking to evaluate any legitimate offer as not being beyond, and usually not at the extreme maximum (or minimum) limit of where a determination might go.

For example, if a house was valued by two equally competent appraisals at $125,000 and $145,000, demanding $150,000 is *per se* unreasonable (except perhaps where being traded off for some offsetting valuation in the other direction on another point). And it is not much better of a settlement position to insist on either the highest or lowest number. If there is no competent evidence making one of the numbers more likely to be true (or believed to be true) than the other, then anything looking like a ***settlement*** offer should be somewhere ***between*** the possible polar values.

Further, any reasoned offer of settlement should as objectively as possible consider the "transactional costs" of proceeding. In the above example, even if counsel is persuaded that the court is more likely to find the house worth $145,000 than $125,000, the client does no better at the end of the day if it takes $10,000 in litigation costs to get to that result than if $135,000 was promptly agreed to in settlement.

And no matter ***how*** convinced counsel might be of the righteousness (or at least likelihood of prevailing) of the client's position, some circumspection (i.e., doubt) is appropriate. The late, great litigator Mort Galane taught that when discussing settlement in evaluating the probability of prevailing on appeal, a good lawyer should ***always*** start with a 10% chance of the opposite of the predicted result occurring, just to account for the randomness involved in any enterprise conducted by people. Even if counsel does not want to include that essentially cynical corrective into the calculation, it is worth keeping in mind that there is a measure of unpredictability to the universe that cannot be excluded from any reasoned evaluation of probabilities.

Where the actual choices faced by a client, from that client's perspective, are "bad" and "worse," it does the client no actual good to shield him or her from that reality, as part of trying to achieve the least bad outcome. Counsel making (or receiving) settlement proposals should harken back to the Multistate, or the SAT, and choose the "most correct" solution among the choices that actually exist. Those frozen in the litigator's posture of conceding no point are not serving their clients' enlightened self-interest, which is usually only visible when the client is made to remain in touch with reality, the other side's perspective is understood, and the costs of going forward are considered.

In short, negotiations intended to actually achieve settlement require each party to come to the table with an offer that is ***less*** (from their client's perspective) than the best that they might rationally expect to achieve in court should a case proceed to litigation. A "settlement offer" containing terms in ***excess*** of what might be achieved in court is usually a simple waste of time and money.

That being said, there could be times where the parties' psychology or practical position is itself a component of a negotiation. In one case, the husband, having prevailed on the legitimacy of an oppressive premarital agreement, made clear his intention to kick his spouse of 20 years to the curb with less than she required to live on. While his settlement position was "rational," the wife's response was necessarily toward the high end of the spread of possible outcomes, rather than the mid-point, because it was necessary for her long-term existence, making any other resolution less desirable (to her) than rolling the dice at trial and hoping for the maximum possible results.

In such a case, the positions and motivations of the parties are themselves components of the settlement calculation, and only the party with real-world flexibility for post-settlement survival can be reasonably expected to compromise further.

IV. COMPONENTS OF AN OFFER; ALGEBRA

Many counsel are loathe to reveal their entire trial strategy at negotiations, and some texts on negotiations indicate that parties do ***less*** well in the long run when they seek to include the entirety of their argument for every position with their opening negotiating position, because doing so encourages the opponent to come up with every possible objection upon review, and can lead to intransigence.

Fair enough, but it is incumbent upon any lawyer making an offer intended to be considered seriously to include some possible basis for a requested position beyond "my client ***wants*** it." If wishes were fishes, we'd all eat for free, and counsel should suggest some conceivably plausible reason as to why the requested term might possibly make sense.

In the examples recounted above, how could the prevaricating and violent mom make a straight-faced claim for primary custody out of anything but wishful thinking? How could the former spouse already getting way more than she was legally entitled to receive ask for even ***more*** out of anything except naked greed? In what universe could a fellow already doing time after the expensive trial he insisted on ask everyone to pretend that none of it ever happened? If counsel cannot at least suggest some plausible bases for such requests, they probably should not make them the focus of "settlement" offers.

And every offer should include comprehensible terms, on each point in contention, susceptible to being accepted, rejected, or countered. We've noticed an increase in "settlement offers" that are primarily steam-venting exercises, with little in the way of actually understandable terms to which a response could be made.

In short, any offer intended by proffering counsel to be viable should be the result of careful consideration following the general lines of: [actually possible outcome per law and facts] x [percentage of increase or decrease to achieve "probable possible" results] - [increase/decrease in number to take account of "transactional cost" of litigation] +/- [parties' motivational/positional perceived necessity] x [randomness factor]. Any offer outside of such a calculation would not appear actually intended to settle a case.

Even counsel who do all their negotiating by "gut instinct" necessarily do much the same calculation, if unconsciously. Any attorney intending to actually advance his or her client's position in negotiations must do so from some reasoned understanding of the probable range of results if settlement is ***not*** reached, and of the costs of that failure to all concerned.

V. CONCLUSIONS

To some, settlement negotiations is an art. To others, a science. Either way, settlement is either pursued as a legitimate goal of client asset and emotional well-being-preservation, or it is not. Where it is not, in favor of litigation, that course may either be an end in itself (by either lawyer or client), or be compelled for reasons going beyond the merits of the disputed issues.

For all the reasons set out previously, settlement should be pursued wherever possible – but settlement offers should be based in reality, and have some connection with the possible range of rationally plausible results, taking into account the real-world needs and abilities of the litigants.

VI. QUOTES OF THE ISSUE

"Trying to meet some folks half way is apt to make you wonder if they understand fractions."
– Mark Twain, attrib.

"About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."
– Elihu Root, 1845-1937 (quoted by J. Richard Posner in *Hill v. Norfolk & Western Railway Co.*, 814 F. 2d 1192 (7th Cir. 1987)).

"True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures.... There is little of all that we can do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state."
– John W. Davis, U.S. lawyer (1946)

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