Settlement talks—It's not over until the foreperson sings

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As printed in Plaintiff Magazine, September 2011

We knew the case was tough. Taking on *the* employer in a tiny county is difficult. Our case made that look easy. The witnesses seemed to be going in well though. Granted, our client was hit with a couple (read significant) inconsistencies. But the defense lawyer's approach—scorched earth—seemed to alienate a few members of the jury. Given the evidence, the all-star defense witness line-up and the onslaught of terribles they rained down on our client, we hoped for the best but expected a defense verdict. We finished closing and learned the defense was concerned as well. They moved for new trial the next morning while the jury was out. The basis? We changed our theory of the case during closing.

"Trial tactics," replied the judge. "Denied."

The suggestion to discuss settlement came next. And we found ourselves on the horns of a dilemma.

Caseus interruptus[1]

Any trial lawyer, if asked, will tell you about the absolute confidence that lawyer has in the case. And that lawyer will also tell you about undying self-confidence. I'll liken it to a gunslinger walking out the saloon doors onto the dusty main street. After the decision is made to go out there the last thing one wants to see is the guy running out saying, "We can solve this without guns." While it might have some appeal, neither the gunslinger nor the trial lawyer cop to the heart palpitations or the sweaty palms. It might, to say the least, interfere with the imminent action at hand. One cannot state publically that the confidence can, on occasion, waver. But it does. At any moment before the hammer comes down or the verdict is read.

A discussion

Once a case is underway, pulling that gunslinger back from the brink is exceedingly difficult. Our ego is involved. Not to mention our life's blood, translated into the 3 am nights through trial. A difficult place from which to talk détente. But through the course of our discussion we've failed to talk about one person. *The person*. The client.

While the verdict means a great deal to us, the verdict is the next stop on the potentially unending litigation freight train the client has ridden from the beginning. Appeals. Collections. Who knows. And as much as we like trial, our job is to obtain resolution. We engage in gunfights, trials, because it is our job. The civilians just want them to be over and move on.

So we must disengage. But how?

Always remember the client and the client's goals. We must take a strong position going into trial. But the more jingoistic and extreme a position we communicate to opposing counsel, the more difficult it is to meaningfully discuss the case. We've known people in our community to have another lawyer—the negotiator—stay involved so the potential for dialogue can continue. This can be a person in the firm or the mediator. So we never discount our trial stance. But a settlement dialogue can continue without impacting the trial lawyer's focus.

A negotiated resolution

So why—and how—should we engage in settlement talks at the end of trial? The why? Because we've seen how some of these cases go, even when we mistakenly believe we're winning. The how? Based on the dialogues and relationships we set up in the beginning of the case.

The first relationship is with the other side. That initial call with the adjuster—treat the adjuster as a friend and offer all the information you can provide. A friend of mine quotes his father, an Inner Circle of Advocates member, who says, "Never piss off the banker." Let the adjuster and opposing counsel know that you will hold your own, i.e. you will try your case, but you're also open to discussion.

The second is with your client. Keep the client informed about the risks and benefits of trial. Continue to do so during trial. Sometimes, the offer that comes during trial can be beneficial for your client but not for you. For example, a job offer in an employment case where the client badly wants to return to work. Again, setting aside your ego and your interests—financial or otherwise—is paramount.

The outcome

As the jury deliberated, we sat down and talked with the other side. An offer emerged that gave our client exactly what he wanted—something he could not get from a verdict. As well as compensation to make the case worthwhile if not a money-maker for him. We could have received a lot more in attorneys' fees if we won. We spoke with the jury and learned that they were about an hour away from a verdict. In our favor. Given the verdict would never have given the client what he got in settlement, we left that day, got in our car, and never questioned whether we made the right choice.

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[1] Non-existent Latin for the feeling of dismay when one has to end a case without a verdict.