

THREE RULES TO SLASH THE GORDIAN KNOT

By Robert J. Burns, Jr.

In the year 333, Alexander the Great is said to have united his armies at Gordias, the seat of the empire once ruled by King Midas. There, he found a famous chariot fixed to a tree by a rope with an intricate knot, known as the Gordian knot. For over a hundred years, many tried to loosen the knot and failed. None could figure it out. Legend had it that whoever untied the knot would rule the world. When Alexander took to the knot, he couldn't loosen it either. So, after a while, he drew his sword and slashed through the cord, freeing the chariot.

Lawyers' interactions fall into three different categories: those with the Court, with clients and with third parties. In all of their dealings, lawyers are required to be truthful. With the Court, lawyers may not make a "false statement of fact or law." (Rule 3.3 of the Rules of Professional Conduct). Where third parties are concerned, the lawyer may not make a "false statement of *material* fact or law." (Rule 4.1 of the Rules of Professional Conduct) And, of course, in their dealings with clients, lawyers are required to render "candid" advice. (Rule 2.1 of the Rules of Professional Conduct). The common thread is that lawyers, in their dealings with everyone, should honor the truth.

But mediations involve negotiating, and negotiations often involve puffing – spinning the facts a certain way, exaggerating, stretching the bounds of credibility. It is obvious that negotiating and "the truth" are not necessarily congruent. In fact, in this context, there is an inherent tension: the accepted truths of the case are what they are, but the advocate's puffing sometimes strains the bounds of credulity.

The Code of Professionalism, adopted by the Louisiana State Bar Association in 1992, begins with a profound statement: "My word is my bond." In other words, "what I say is a truthful statement." How, then, does the lawyer negotiate within the guidelines of the Code of Professionalism? How can he "puff" while at the same time maintain his credibility, not to mention avoid violating the rules of professional

conduct? How can he exaggerate or spin the facts while at the same time adhering to the principle that his “word is his bond?”

Rule #1: Prepare the Client as Well as Yourself

Mediation, as we all know, is a process by which parties come together in an effort to resolve their disputes. That process is by now well-known to lawyers and one in which they are very comfortable. Lawyers expect a negotiation to ensue, and have often gone to great lengths to prepare themselves for a successful negotiation. But if they have not prepared the client as well, the negotiation may not only be unsuccessful, but counterproductive and do more harm than good in the long run.

A lawsuit is often the client’s Gordian knot. Litigants, by definition, dispute something. Whether it is fault, causation, damages, the proper interpretation of a statute, or anything else, the one thing that defines every litigated matter is that it involves parties who disagree about something. To the lawyer, the dispute might be simple. Lawyers are trained to analyze problems and give objective advice. But, clients don’t often see the world as lawyers do. Clients are far more prone to see only the problem – that is why they retained counsel in the first place.

Those problems can sometimes be life-changing. And without the assistance of the lawyer, the client sometimes feels powerless in the face of a court system that is fraught with procedural hurdles, delays, and extraordinary expenses. The client’s perspective can also be skewed by emotional attachments that makes the matter seem impossible to resolve.

Take, for example, a personal injury matter. The injured plaintiff typically knows a lot about the extent of her injuries, but very little about how much in compensatory damages she might reasonably expect to receive, or even what might be within the discretion of a rational jury to decide. At mediation, many lawyers make outrageously high opening demands to begin a negotiation, hoping that this will give them “room to bargain.” In the mind of the well-prepared lawyer, it is easy to come down because he knows that the demand is unreasonably

high. But, what about the client? If the client has not been adequately prepared for the negotiation, she might believe that the opening demand is fair. After all, her counsel has passionately argued to the mediator that if the case does not settle at mediation, he will ask the jury for that much or more.

Another example illustrates the point. A small business owner hires counsel to represent her company in a business dispute, then finds herself in a protracted and expensive legal battle. At mediation, her counsel has told the mediator that he expects the jury to award full contractual damages, plus reimbursement of all of the attorney's fees that have been incurred to date. In fact, he has opined to the mediator that his chances of obtaining this result are "90% or better."

Or, how about the defendant in a sexual harassment action whose counsel, at mediation, argues to the mediator that unless the matter settles for a low number at mediation, his client will prevail on a motion for summary judgment at very little expense, resulting in a complete dismissal of the plaintiffs' claims.

In each of these examples, the lawyer has certainly done nothing wrong. He is simply negotiating. But, what about the client? If the client has a poor understanding that these comments amount to puffery, then they might unwittingly inflate the client's expectations, causing significant problems in the negotiation.

Therefore, as important as it is for the lawyer to prepare for the mediation, it is equally important that the client be prepared. Explain the process of mediation, and that there will be occasions for lawyer and client to speak confidentially, but there will also be occasions during the mediation when advocacy is necessary. It is critically important for the client to recognize that the lawyer's efforts to advocate are in her best interests, but that they should be viewed as nothing more. Her expectations should be formed by a realistic, reasonable approach to settlement – one that takes stock of the strengths and weaknesses of the matter – and that she should remain open minded and engaged in the dialogue. Most importantly, the client should be prepared to listen to the position of the opponent so that she can make informed decisions about whether settlement is a good idea.

Part of the preparation process requires that the client understand what the disputed issues really are. The challenge for the lawyer is to help bring an analytical framework to the dispute. Whereas litigants often see only the fray, the lawyer adds a much-needed sense of order to help the client understand that the battle, in the eyes of the law, is much narrower than the morass it might seem. The entire case might hinge on the resolution of a single fact, or the interpretation of a particular statute. It might come down to the credibility of a particular witness. Whatever it is, the lawyer is trained to identify the issues in dispute. Make sure that the client understands the issues, as well. By doing so, what once was a messy knot of problems becomes more manageable – and resolution seems within reach.

As part of the meeting with the client to prepare for the mediation, it is important that the client understand that the real battleground is often much smaller than it might seem. If the client understands before the mediation where the real dispute lies, the dialogue at mediation will make sense. She will be prepared to address the issues that will advance the dialogue, and not be confused or surprised by them. She will also have had the chance to consider her strengths on those fronts and be prepared to defend her position in the event that becomes necessary.

Even in matters in which there are no disputes except as to damages, it is important that the client fully understand that there are ranges of recovery that are reasonable, and those that are not. If before the mediation the client has no understanding of the reasonable ranges, she may have difficulty accepting that proposition during a tense negotiation.

Rule #2: “Be Honest and Choose Your Words Carefully.”

Credibility is everything in mediation. For one, credibility is simply another way of holding true to the Code of Professionalism’s mandate that “My word is my bond.” If the lawyer makes a statement during a mediation that is called into question by known facts or law, then he has failed to live up to that standard. Second, if the opponent does not believe that the opposing lawyer’s statements are true, because he has

made a statement that does not hold water, his negotiating strength is seriously weakened.

Take the following hypothetical, for example. Lawyer A tells his opponent (through the mediator) that his client has “never made a prior claim for personal injury” when, in fact, the adversary has information that proves that statement to be untrue. Even if Lawyer A was unaware of the prior claim, his credibility is lost. He has made a statement that is false. During any negotiation that might ensue, the adversary will justifiably question Lawyer A’s truthfulness. Distrust has devastating impact on a negotiation. There is very little the lawyer can do to restore his credibility once it has been called into question.

On the other hand, if Lawyer A had said what he meant: that he was “unaware that my client has ever made a prior claim for personal injury,” that simple caveat would have allowed him to keep his credibility in tact. His opponent would not be caused to question the lawyer’s credibility (although he might question the client’s). In this example, Lawyer A has carefully stated his belief – as opposed to making an absolute statement of fact – that might be easily refuted. This subtle distinction makes a world of difference.

Because of the importance of maintaining one’s credibility, experienced lawyers avoid traps like the one in the preceding paragraph. Instead of speaking in absolutes, they resort to language that subtly conveys a point without painting themselves into a corner. Instead of saying “my client will not,” the lawyer might resort to “I can’t see my client doing that.” Or, the lawyer might choose to say that he “won’t recommend” that his client make an offer above a certain figure in order to give himself leeway that, if the client chooses to do so, he hasn’t caused his credibility to be questioned.

Candor is equally important when dealing with the mediator. In a negotiation, two opposing parties (at least) frequently wade into the negotiating waters cautiously; neither wants to reveal their settlement position unless they feel there is a good chance of resolution. So, the mediation might move slowly at first while the parties feel out the position of the other side. As the parties make progress toward a deal, they grow more confident in expressing their true settlement position

to the mediator. This is true with the mediator, as well. Where the parties are making progress toward what she believes might be a deal, she will grow more confident that the mediation will result in a compromise agreement. She will likely encourage the parties to remain engaged and open minded to a compromise. But, if one of the parties is unwilling to let the mediator know what he wants, there comes a point when the mediator loses confidence in the chances of a successful negotiation. And, if the mediator is convinced that the dialogue is futile, she will likely call an impasse.

So, how does the lawyer give the mediator a peek into what his client wants? Some state their position candidly and straightforwardly. Others drop subtle hints: "I think if we got the other side to do this, we might be able to make some progress." Or, "I could recommend that my client do this deal if I knew it would get it resolved." The methods are endless. But, the larger point is that the mediation, on some level, requires that the parties tell the mediator, if not one another, what they really want. And if the mediator believes that with some effort they can get there, or close enough, the negotiation will likely end well. But if the parties can't bring themselves to be candid with the mediator, they deprive themselves of a good opportunity to measure whether they can achieve a good compromise.

Rule #3: Be Alexander the Great – Slash the Gordian Knot

Too often, lawyers look to the mediator for the solution when they, in fact, hold it in their hands. Think of it this way: the client chose the lawyer to represent her for a reason. Hopefully, the representation has gone well and a level of trust has developed between them such that the client believes that the lawyer has her best interest at heart. This is, in fact, far more often the case than not, in this writer's experience. By the time that the mediation takes place, there have likely been a few clashes in the litigation. Perhaps the lawyer has taken a few depositions where vigorous cross-examination was necessary. Perhaps a court appearance or two were hotly contested. Perhaps the client's deposition became heated and a stern rebuke was warranted. Whatever the case, in our adversarial system, lawyers often are called to champion their client's cause.

And something happens in that process that makes compromise more difficult. The same lawyer who had to stand up for his client in battle is now being asked to concede something. The two notions don't go together, well. So, the lawyer agrees to mediation and takes the view that the case might settle, as long as the mediator does her job.

This is a recipe for failure. The mediator is at an unfair disadvantage. She hasn't had the opportunity to develop a relationship with the client and, if the lawyer doesn't want to compromise, the case is not likely to settle. As difficult as it is to switch roles, the lawyer is called to be both advocate and counselor: and in mediation, both roles are necessary. Where the lawyer wants only to be his client's champion, and let the mediator talk sense to his client, the case is likely doomed from the start.

A successful mediation requires buy-in from all of the people in the decision loop that are important. Lawyers are most often key to the decision making process. So, the lawyer must find a way to advocate, but also counsel, if the mediation is to succeed. In other words, the lawyer who sees himself as his client's champion is sometimes required to step back and let his client settle where a good compromise is at hand.

So, Rule #3 is to be Alexander the Great. We lawyers have a unique opportunity to help people break free of the intricate problems they sometimes create. A successful mediation sometimes means that the lawyer has to subjugate his own desires, his own interests, to those of his client. Yes, it is a difficult thing to do. And while settling doesn't mean that you're likely to go on to conquer the world, you will have helped a client get past a problem they couldn't solve without you.