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Negotiating in the 'Red Zone'

Lawyers should take special care to advise clients in a timely and meaningful way, faithfully follow client instructions, and document their actions when negotiating settlements, particularly when a demand and offer fall within the client's stated acceptable range – that is, the client's red zone.

by **Russell M. Ware**

A popular way of measuring a football team's skill is to ask how the team performs in the *red zone*. This refers to a situation in which a team has the football inside the other team's 20-yard line, with a quick score within reach. Developing and executing a sound strategy in the red zone often leads to a touchdown, while making a mistake (a fumble or interception) can have disastrous and game-changing consequences.

Being in the red zone might also be used to describe a situation that lawyers representing clients in settlement negotiations may be called on to handle. Sometimes settlement negotiations will unexpectedly enter a stage during which an excellent result is well within reach, but also in which an error in developing or executing a strategy for further negotiations could spell disaster for the client – and therefore for the client's lawyer.



This article reviews the duties of lawyers when conducting settlement negotiations and describes the special care lawyers should exercise when negotiations enter the client's red zone.

Lawyer's Duty During Settlement Negotiations

General rules concerning a lawyer's duty – and a client's prerogatives – during settlement negotiations. A lawyer is required to use reasonable care, skill, judgment, and diligence in representing a client. A lawyer who fails to do so is subject to liability to the client for resulting harm.¹ This rule applies to lawyers who handle settlement negotiations on behalf of clients in litigated matters.² While a

lawyer's task is to advance the client's legitimate objectives when conducting negotiations, it is the client who defines those objectives.³ The client defines the goals to be pursued when bringing or defending a claim,⁴ sets the dollar range for an acceptable settlement,⁵ and reserves the right to decide when to settle a claim with finality.⁶

Any lawyer engaged in settlement negotiations on behalf of a client must report to the client settlement proposals from other parties⁷ and must notify the client of any settlement or negotiation decisions the client needs to make.⁸ For example, a lawyer must keep the client reasonably informed about the status of the matter⁹ and must explain the situation to the client to the extent reasonably necessary to enable the client to make an informed decision as to the response to a settlement proposal.¹⁰ The content of the required reasonable explanation will depend on the client's sophistication, past lawyer-client consultations, and past directions given by the client.¹¹ Once the appropriately informed client has given direction to the lawyer as to settlement strategy, the lawyer is duty-bound to follow the client's wishes.¹²

Lawyers who fail to comply with these duties to the client, such as by failing to timely advise the client of an opponent's settlement proposal¹³ or by failing to follow the client's postconsultation directions,¹⁴ may therefore be subject to liability to the client for the loss of a settlement opportunity.¹⁵ Damages sought by the client in a subsequent legal malpractice action may include the difference between the once-attainable settlement terms and the less favorable outcome achieved after further negotiations or after trial.¹⁶

However, there are situations in which lawyers handling settlement negotiations must be even more careful. This is when the negotiations are taking place in the client's red zone.

Defining Red-zone Negotiations

In some litigated matters, the parties may remain far apart even after numerous proposals and counterproposals have been shared. Both parties have confidentially given their lawyer figures at which they would settle, but of course neither side has disclosed to the opponent its own target figure. For example, a plaintiff's latest official demand may be far above the amount the plaintiff is secretly willing to accept, and the defendant's latest official offer may be far less than the

Typical Red-zone Negotiation Scenarios

Red-zone situations can be faced by lawyers representing either a plaintiff or a defendant during negotiations. The following describes how those situations might be presented.

How a Plaintiff's Lawyer May Encounter a Red-zone Scenario. The plaintiff has instructed her lawyer that she will settle if \$50,000 is offered and has given authority to her lawyer to negotiate toward that goal. Negotiations between the lawyers started with a demand of \$90,000 and an offer of \$15,000, but the gap has narrowed. In response to the plaintiff's latest demand for \$62,500, the defense has offered \$50,000 – which places the offer within the

defendant is secretly prepared to offer if necessary to settle the case. No proposal by either side has come close to the opponent's secret target figure, so both sides may believe settlement prospects are bleak.

Sometimes, however, a lawyer and his or her client encounter the fortunate situation in which the opponent's settlement proposal has come within the range the client identified for the lawyer as acceptable, and in which it appears that further negotiations – and further concessions from the opponent – may be possible. When this occurs, the negotiations have entered the client's red zone: An acceptable deal is right there for the taking, but the chance exists that if further negotiations are attempted but not handled correctly, this settlement opportunity still might be lost.

A lawyer who has received from the opponent a proposal the lawyer knows is already within the client's red zone should be especially vigilant to meet his or her obligations to the client. This is because, although the lawyer's duties of care, competence, and faithfulness do not change when negotiations have entered the client's red zone, clients claiming to have been the victim of their lawyer's malpractice during red-zone negotiations may find it easier to prove the essential causation element of a legal

plaintiff's red zone. Defense counsel has not stated this is a final offer.

How a Defendant's Lawyer May Encounter a Red-zone Scenario:

This is the flip side of the scenario described above. The defendant has told his lawyer that he will pay up to \$50,000 to settle the plaintiff's claim and has given defense counsel authority to offer \$50,000 if necessary to reach a settlement. The plaintiff's original demand was \$90,000 and the defendant's original offer was \$15,000. The lawyers have exchanged further proposals and counterproposals. In response to the defendant's latest offer of \$37,500, the plaintiff's counsel has now demanded \$50,000 to settle the case, which places the demand within the defendant's red zone. The plaintiff's counsel has not indicated the demand is a final, rock-bottom figure.

What should a lawyer do when the opponent offers a proposal that is within the client's red zone? Should a lawyer hearing such a red-zone proposal immediately announce to the opposing lawyer that the case is now settled and start preparing closing papers? In the first scenario above, should the plaintiff's lawyer immediately counter with a \$57,500 demand in the hope of bringing back to the plaintiff a pleasant surprise in the form of a settlement well above the \$50,000 target figure? In the second scenario, should the defense lawyer promptly counter the plaintiff's \$50,000 demand with a new offer of \$42,500 in the hope of saving something off the \$50,000 of settlement authority the defendant extended?

Even when acting with the best of intentions, a lawyer choosing to negotiate in the face of an opponent's proposal that is within the client's red zone without first checking with the client runs the risk that the unthinkable may happen: during the further negotiations, while the lawyer tries to obtain an even better outcome, the opponent's proposal is suddenly withdrawn, the red-zone settlement opportunity is lost, and ultimately the matter is resolved on terms outside the client's red zone. A client may be unhappy enough to assert a professional liability claim against the

malpractice action against their lawyer. Such clients may find it easier to establish lawyer liability than will clients who claim to have been ill-served by their lawyers in non-red-zone cases.

lawyer because of the loss of the settlement opportunity.¹⁷

Meeting the Lawyer's Standard of Care in Red-zone Negotiations

This article is not meant to propose negotiation strategies to obtain an even better red-zone deal. It is meant instead to describe how a lawyer should proceed, once a proposal in the client's red zone has been received, so as to avoid any professional liability to the client. Here are things the lawyer should do in regard to consulting the client and following the client's direction after receiving a proposal in the client's red zone.

Of course, the legal rules set forth above concerning the duty of a lawyer to consult with and to follow the client's directions during settlement negotiations have full applicability to red-zone negotiations. The lawyer must fully inform the client about the status of these negotiations and about the alternative courses of action, so the client can make an informed decision about the appropriate response.¹⁸ Thereafter, the manner in which a lawyer should respond on behalf of the client to the opponent's red-zone proposal should be governed entirely by the direction the client has given the lawyer after such due notice and adequate consultation.¹⁹

Adequacy of the Consultation. In determining the extent of the needed consultation, a standard of "reasonableness under all the circumstances" will be applied.²⁰ The precise content of the required client consultation will vary from case to case, and the lawyer must tailor the consultation to the precise facts of the particular red-zone matter at hand. However, some general observations applicable to such consultations can be made.

Because red-zone negotiations are by their very nature sensitive and carry enhanced risks and benefits to the client, when consulting with the client to develop a response to the opponent's red-zone proposal, the lawyer should make sure the client is given all facts known by the lawyer that can help the client predict whether the opponent will either improve the settlement proposal, on one hand, or withdraw it, on the other. The lawyer should transmit to the client more than just the amount of the opponent's proposal. If a defense offer falling in the plaintiff's red zone is accompanied by words from the defense counsel like "this is about it" or "I don't know if there is anymore there," the plaintiff must be informed directly of these qualifying statements. Similarly, if plaintiff's counsel has made a demand within the defendant's red zone and has said "we are at the bottom line here" or "I don't think we will want to go any lower," the defendant must be aware of these cautionary words that accompanied the new demand. If the proposal has a stated time limit, this must of course be disclosed to the client. If the opposing lawyer suggests when the proposal is presented that the proposal is being made against counsel's advice or is being made only reluctantly or grudgingly, the client must be so notified; such statements may indicate a heightened risk that a red-zone proposal will be

withdrawn if not accepted promptly.

Consultation concerning a pending red-zone proposal from the opponent also must include a clear description of the legal effect of making any counterproposal seeking an even better deal. The client should be told that any counterproposal represents a rejection of the red-zone proposal as a matter of law²¹ and that the opponent will have no legal duty to reinstate the red-zone proposal once it has been rejected through a counterproposal.

In addition, any meaningful red-zone consultation must include a realistic description of adverse consequences, including the amount of additional litigation expenses, that may result if the now-present opportunity to settle at once is accidentally lost during further negotiations. Further, the risk of a less favorable settlement or trial outcome (that is, one outside the red zone) must be fully explained to the client.

Following the Client's Postconsultation Directions. In some red-zone situations, the client will direct the lawyer to promptly accept the opponent's red-zone proposal. However, if the client, after being adequately informed as to the risks and potential benefits of pursuing an even better settlement, decides to pursue further negotiations, the lawyer should then carefully obtain specific client direction before conducting further negotiations. Again, because of the inherently sensitive nature of red-zone negotiations, such direction should cover not only the dollar amount of the counterproposal to be conveyed but also the timing of such counterproposal, the form (written or oral) of the counterproposal, and even the way in which the proposal is to be phrased when presented to the opposing lawyer. Whether further negotiations at this sensitive stage are to be pursued with boldness or with caution should be the client's decision. The client should decide on the level of risk with which the client is comfortable once a red-zone proposal is on the table.

Advisability of Documentation. A lawyer should document both the content of the client consultation and the details of the client's direction in red-zone cases. Because a red-zone proposal from an opponent is by definition something of great value to the client, a client will likely demand a full explanation if a red-zone opportunity is lost. A lawyer therefore should be prepared to demonstrate to the client that all the risks and benefits of the agreed-on strategy were covered during the consultation and that the lawyer did not deviate from the agreed-on red-zone strategy during further negotiations.²²

Causation Rules in Legal Malpractice Cases Arising from Failed Red-zone Negotiations

Lawyers are more vulnerable to professional liability when a settlement opportunity is lost in red-zone situations than in non-red-zone cases. This is because clients alleging their lawyer mishandled negotiations will have a much easier time proving the crucial causation element in a legal malpractice action if the mishandled negotiations took place within the client's red zone. Here is why.

In any legal malpractice action, the plaintiff must prove that the lawyer's actions or inactions were a cause of the plaintiff's harm.²³ In some lost-settlement-opportunity

cases, the plaintiff may have great difficulty proving such a causal connection. This is because courts have ruled that the plaintiff's proof must consist of more than mere speculation that the lawyer's negligence may have caused harm; the plaintiff must affirmatively and convincingly prove that "but for" the lawyer's negligence, a specific favorable settlement would have been achieved.²⁴

For example, a malpractice suit by a claimant alleging the lawyer failed to timely inform the client of an opponent's settlement proposal will fail if the client cannot present evidence that can convince a trier of fact that the client would have actually accepted that settlement proposal.²⁵ Such required proof that the client would have accepted the opponent's proposal must be persuasive.²⁶ Indeed, testimony from a client-turned-plaintiff that the client might have accepted the opponent's proposal has been held insufficient as a matter of law to establish a causal connection between a lawyer's failure to tell the client of a pretrial offer and the harm sustained when a less favorable outcome occurs at trial.²⁷

The case of *Bauza v. Livingston*²⁸ is instructive on the causation issue. In that legal malpractice action, the plaintiffs (husband and wife) claimed that the defendant lawyer, while representing them in a prior lawsuit, had negligently failed to tell them of the opponent's \$1 million pretrial settlement offer. In fact, they claimed they learned of the \$1 million pretrial offer only after the jury had made an award of only \$330,000. The strongest proof the plaintiffs could muster on the causation issue, however, was the testimony of the plaintiff wife that she was "pretty sure" she would have accepted \$1 million had she been aware of the offer. Such proof was held insufficient as a matter of law to meet the plaintiffs' burden to prove the lawyers' alleged negligence was a proximate cause of the claimed damages.²⁹

The defendant lawyer in a lost-settlement-opportunity case may do more than just challenge the legal sufficiency of the plaintiff's testimony on the causation issue. Lawyers who allegedly failed to transmit an opponent's settlement proposal may possess strong affirmative evidence on the all-important causation issue. Freed of the duty to keep client confidences,³⁰ the lawyer will be able to throw open the client's file and may demonstrate through correspondence, memoranda, or the lawyer's own recollections precisely what the client's approved settlement range really was. By so doing, the lawyer may be able to show the client would in fact have rejected the opponent's proposal even if it had been timely transmitted. A defendant lawyer also may endeavor to demonstrate that, even if the client had not established a range of acceptable settlements, the particular untransmitted settlement proposal was on its face patently ridiculous, notwithstanding the client's present claim – now with the benefit of self-serving hindsight – that the proposal would have been accepted.³¹

Red-zone cases are different. In red-zone cases, the client will have no difficulty establishing the all-important causal link between the lawyer's negligence and the client's harm. By definition, in red-zone cases the opponent's proposal is within the range that (as a matter of uncontested fact) the client has already told the lawyer will be acceptable to the client. The lawyer who has neglected to tell the client about the opponent's red-zone proposal can hardly suggest that the client probably would have rejected it anyway. A client's claim that the client would have accepted the opponent's proposal cannot be attacked by the lawyer as speculative or fanciful or inconsistent with the client's previous statements about settlement goals. Any

attempt by the lawyer to dismissively challenge the client's claim as one based on self-serving, unprovable statements as to the client's settlement position, or to suggest the client is unfairly trying to rewrite history by engaging in hindsight, will be unavailing.

Given the clear path a client may have to proving causation in some red-zone cases, a lawyer receiving from the opponent a proposal within the client's red zone must make doubly sure to comply with the requisite standard of care in further consultation with the client and communications with the opponent: The red-zone proposal must be timely transmitted, the consultation with the client to develop further strategy must be adequate, and any agreed-on plan for additional negotiations must be followed faithfully.

The Lawyer's Duty of Truthfulness

A lawyer has a professional duty to deal truthfully with nonclients, including opponents and opponents' lawyers. Specifically, a lawyer is prohibited from knowingly making a false statement of a material fact to nonclients.³²



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Does this ethical prohibition limit what a lawyer can say to the opponent to seek further concessions when the negotiations are already taking place in the client's red zone? For example, if a lawyer suggests during further negotiations that the lawyer's client is very dissatisfied with the negotiations, and may terminate negotiations if the proposal is not improved (when in fact the client has told the lawyer exactly the opposite), is the lawyer subject to professional discipline for making an untrue statement of material fact to the opponent?

In reality, it is unlikely that a lawyer will run afoul of this ethical rule when so negotiating for further concessions in the red zone. In fact, it has been recognized that in the context of settlement negotiations, back-and-forth statements as to a party's intentions about what will be an acceptable settlement of the claim are not ordinarily considered to be statements of material fact covered by the rule.³³

However, in extreme situations, certain statements during red-zone negotiations nevertheless may have unfortunate consequences for the lawyer. A lawyer's litigation file might be subject to discovery in a subsequent action, such as in a legal malpractice action. In such a situation, a revelation that statements made to opposing counsel during red-zone negotiations were simply untrue may cause considerable embarrassment to a lawyer and may result in a serious loss of credibility in the legal community, even if not made the subject of any professional disciplinary proceedings.

Conclusion

Lawyers must fulfill their duties to clients at all stages of a representation. However, counseling a client in the wake of an opponent's settlement proposal that falls within the client's red zone should be done with a special amount of attention and caution. Such situations present the potential of both high risk and high reward. Wise lawyers will therefore redouble their efforts to advise the client in a timely and meaningful way, to faithfully follow client instructions, and to accurately document their actions.

Endnotes

¹*Helmbrecht v. St. Paul Ins. Co.*, 122 Wis. 2d 94, 362 N.W.2d 118 (1985); *Gustavson v. O'Brien*, 87 Wis. 2d 193, 274 N.W.2d 627 (1979); *Denzer v. Rouse*, 48 Wis. 2d 528, 180 N.W.2d 521 (1970); *Duffy Law Office S.C. v. Tank Transport Inc.*, 194 Wis. 2d 674, 535 N.W.2d 91 (Ct. App. 1995). The standard jury instruction in Wisconsin in legal malpractice actions is Wis. JI-Civil 1023.5; see also Restatement Third, The Law Governing Lawyers §§ 16, 52(1); 7 Am. Jur. 2d *Attorneys at Law* § 203.

²For a discussion of how the duties of care, skill, judgment, and diligence have been applied to lawyers engaging in settlement negotiations, see 4 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 32:41, at 740 (2011 ed.).

³Restatement Third, *supra* note 1, § 16.

⁴*Id.* cmt. c., at 147.

⁵Restatement Third, *supra* note 1, § 22(1) & cmt. c., at 181.

⁶*Id.*, § 22(1). Note that lawyers in Wisconsin have an ethical duty to abide by a client's decision whether to settle a matter. SCR 20:1.2. However, a violation of these rules does not by itself subject a lawyer to civil liability to a client. *Peck v. Meda-Care Ambulance Corp.*, 156 Wis. 2d 663, 457 N.W.2d 538 (Ct. App. 1990).

⁷Restatement Third, *supra* note 1, § 20(3) & cmt. e., at 172. See, e.g., *Miller v. Byrne*, 916 P.2d 566 (Colo. Ct. App. 1995). As to a lawyer's ethical duties to communicate with and reasonably inform a client, see the Wisconsin Supreme Court Rules, specifically SCR 20:1.4.

⁸Restatement Third, *supra* note 1, § 20(3).

⁹*Id.*, § 20(1).

¹⁰*Id.*, § 20(3) & cmt. e., at 172.

¹¹*Id.*, § 20(3), cmt. c., at 171.

¹²Restatement Third, *supra* note 1, §§16, 22(1). For a case in which a defense lawyer was subject to liability for not using settlement authority in a manner directed by the client, see *Lysick v. Walcom*, 65 Cal. Rptr. 406 (Ct. App. 1968).

¹³For a discussion of cases in which a lawyer failed to inform the client of existing settlement offers, see 4 Mallen & Smith, *supra* note 2, § 32:44, at 774; see also *Bauza v. Livingston*, 836 N.Y.S.2d 645 (2007); *Moore v. Greenburg*, 834 F.2d 1105 (1st Cir. 1987) (applying Maine law).

¹⁴*Lysick*, 65 Cal. Rptr. 406.

¹⁵For a general discussion of a lawyer's responsibility for negligent handling of settlement negotiations and for causing a client to lose a settlement opportunity, see 4 Mallen & Smith, *supra* note 2, §§ 32:44, 32:46.

¹⁶See, e.g., the legal malpractice action of *Miller v. Byrne*, 916 P.2d 566 (Colo. Ct. App. 1995) (client claimed lawyer failed to advise client of settlement opportunity, and sought as damages the far-higher amount client was later required to pay). For a discussion of damages that may be sought when a lawyer's negligence leads to the loss of the opportunity for a favorable settlement, see 3 Mallen & Smith, *supra* note 2, § 21:8.

¹⁷See 4 Mallen & Smith, *supra* note 2, § 32:46, for a discussion of how an alleged "lost settlement opportunity" is a recurring subject of legal malpractice claims. See also Annotation, "Legal Malpractice in Settling or Failing to Settle a Client's Case," 87 A.L.R. 3d 168 (1980).

¹⁸See authorities cited in notes 6, 7, 8, 9, 10, 11, *supra*.

¹⁹See *supra* note 12.

²⁰Restatement Third, *supra* note 1, § 20 & cmt. c., at 171.

²¹Restatement Second, The Law of Contracts, § 38(1); 17 Am. Jur. 2d *Contracts* § 82.

²²Note that a red-zone situation might occur at a mediation. The lawyer still must accomplish a timely transmittal of the opponent's proposal, a reasonable client consultation, and a careful adherence to the client's informed direction – even if in a compressed time period and with some participation by a mediator.

²³*Helmbrecht*, 122 Wis. 2d 94; *Lewandowski v. Continental Casualty Co.*, 88 Wis. 2d 271, 276 N.W.2d 284 (1979); Restatement Third, *supra* note 1, § 53. For a general discussion of the need to prove the litigation lawyer's errors were a cause of the client's harm, see 4 Mallen & Smith, *supra* note 2, § 32:6. See also 7 Am. Jur. 2d *Attorneys at Law* § 201.

²⁴For cases specifically analyzing the "but-for" test in lost-settlement opportunity cases, see *Bauza*, 836 N.Y.S.2d 645, and *Leder*, 819 N.Y.S.2d 26. See also 4 Mallen & Smith, *supra* note 2, § 32:44, at 776. For a statement of the but-for test of causation to be used in Wisconsin in malpractice cases involving the handling of litigated matters, see *Glamann v. St. Paul Fire & Marine Insurance Co.*, 144 Wis. 2d 865, 424 N.W. 2d 924 (1988), and *Lewandowski*, 88 Wis. 2d 271.

²⁵4 Mallen & Smith, *supra* note 2, § 32:44, at 776; *Bauza*, 836 N.Y.S.2d 645; *Leder*, 819 N.Y.S.2d 26. See also *Miller*, 916 P.2d 566, in which ambiguities in the offer made it unclear whether the client's acceptance would really have resulted in an enforceable agreement.

²⁶4 Mallen & Smith, *supra* note 2, § 32:44, at 776.

²⁷*Bauza*, 836 N.Y.S.2d 645.

²⁸*Id.*

²⁹For another case in which a client's proof on the causation issue in a lost-settlement case was held insufficient, see *Leder*, 819 N.Y.S.2d 26. There, the court found the mere conclusory and otherwise unsupported statement by the client that the offer would have been accepted but for the lawyer's erroneous advice about trial prospects was inadequate to support a malpractice claim as a matter of law.

For a case involving not the negligent loss of a settlement offer but an allegedly negligent delay in effectively seeking a settlement, see *Schlomer v. Perina*, 169 Wis. 2d 247, 485 N.W. 2d 399 (1992). Note that the intermediate appellate court in *Schlomer* had used words like "abstract" and "hypothetical" to describe the clients' attempt to prove that an acceptable settlement could have been achieved years earlier but for the attorney's negligence. *Schlomer v. Perina*, 163 Wis. 2d 708, 473 N.W. 2d 6 (Ct. App. 1991).

³⁰When a client asserts a professional liability claim against the lawyer, the lawyer may thereafter reveal information relating to the representation, to the extent necessary to establish a defense on the lawyer's behalf. SCR 20:1.6(c)(4). See also ABA Model Rules for Professional Conduct, Rule 1.6(b)(4).

As part of the lawyer-client privilege, a client has the right to prevent a lawyer from testifying as to confidential communications between the client and lawyer made to facilitate the rendition of legal services. Wis. Stat. § 905.03(2), (3). There is no lawyer-client privilege, however (and therefore no right to prevent a lawyer from testifying), as to communications that are relevant to an issue of breach of duty by the lawyer. Wis. Stat. § 905.03(4)(c).

³¹See *Moore*, 834 F.2d 1105 (applying Maine law). In *Moore*, the lawyer asserted unsuccessfully that the claimed inadequacy of the offer was a legal excuse for not even transmitting the proposal to the client in the first place.

³²SCR 20:4.1(a)(1); ABA Model Rules for Professional Conduct, Rule 4.1(a)

³³ABA Model Rules of Professional Conduct, Rule 4.1, cmt. [2].

Wisconsin Lawyer