

**SETTLEMENT OR BUST!**  
***Ethical Implications of Late Night Settlements***

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*The willingness . . . in general to work excessive hours, while admirable, raises serious questions when it jeopardizes job performance, particularly when critical . . . decisions are at stake.*<sup>i</sup>

- The Presidential Commission on the Space Challenger Accident

The Virginia State Bar values alternatives to litigation so highly that it requires lawyers to discuss the subject with each client.<sup>ii</sup> This makes tremendous sense. Settlements protect the parties' privacy, allow for terms which are often beyond the Court's statutory remedies, and keep legal fees down. Another upside is that lawyers typically have more satisfied clients compared to when a case is fully litigated.

Lately, there is a growing trend to negotiate or mediate family law cases to settlement in one session – no matter how long that session takes. These sessions can go late into the night, often past midnight and well past everyone's regular bedtimes. The question becomes whether these sessions are going so late that the clients' decision-making capacity becomes impaired. If the case is being mediated, there is also the risk of these all-nighters violating a mediator's duty to the disputants.

The Science of Sleep Deprivation<sup>iii</sup>

Everyone has their own sleep pattern and functions differently on lack of sleep, which is probably at the root of many college roommate problems. Behavioral and neuroscientists have long been fascinated by the effects of sleep deprivation on human behavior. Early research studied the degree to which sleep deprivation impairs memory, speech and motor function.<sup>iv</sup>

More recently, the focus has turned to the effects of sleep deprivation on decision-making and moral judgment. A 2000 review of the literature of sleep deprivation concluded that sleep-deprived subjects "coped well with convergent tasks (when the solution could be arrived at by logical deduction), whereas innovative thinking and the generation of spontaneous ideas deteriorated markedly."<sup>v</sup>

A 2011 study on the effects of sleep deprivation on decision-making had the subjects play games where the probability of winning or losing was equal.<sup>vi</sup> The subjects tended to exaggerate the positive aspects of winning and minimize the negative consequences of losing as they became more sleep deprived. Essentially, sleep deprivation caused the subjects to take greater risks.

Equally fascinating are the findings of a study on the effects of sleep deprivation on moral judgment. The subjects were asked to judge a person's behavior in different morality situations as either "appropriate" or "inappropriate." As the subjects became more sleep deprived, they found similar situations more morally appropriate than they did when they were well rested. The researchers concluded that, in certain situations, people may become more morally lenient or permissive with the less sleep they have.<sup>vii</sup> Many of these researchers are quick to point out that while their findings are informative, their studies are recent and need to be duplicated to increase their reliability.

### Lawyer's Duty to Client

Many seasoned lawyers may defend late-night settlements. They believe that getting one or both of the parties into a "softened up" decision-making or moral state is almost a prerequisite to settlement. Otherwise, the clients would remain as defiant and steadfast in their positions as when the process began. At what point, though, does this breaking down of a client's mental abilities and will power lead to a potential violation of the Rules of Professional Conduct to protect a client?

Rule 1.14(a) (Client with Impairment) provides that "when the lawyer reasonably believes that the client has diminished capacity . . . and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action . . . ." The lawyer's ability to protect the client can sometimes mean acting contrary to what the client is requesting. In Legal Ethics Opinion 1816<sup>viii</sup>, the committee concluded that, even though a client had been cleared by a forensic psychologist, this did not free him from impairment with regard to decision making. The attorney could disregard the client's directive if the attorney found that the client could not make "adequately considered decisions."

Family law clients are often under tremendous stress in settlement conferences. This is understandable since these settlements have far-reaching consequences for clients and their children. When parties have met for hours on end and are making progress, the prevailing sentiment is for everyone to keep going until a full settlement is reached. Sometimes, if everyone is still fresh enough to continue, this makes sense. At other times, especially late at night, this could be unwise if the client's decision-making ability has begun to erode. Thus, the lawyer is in the position of continually evaluating the client's ability to continue.

This is a difficult task due to a number of competing factors. First, the lawyer's own ability to assess the situation may be blunted from lack of sleep. Second, the client may want to continue, but not recognize his or her own inability to concentrate and make good decisions. Third, parties often do not meet to discuss settlement until trial is right around the corner. This naturally interferes with time to prepare for trial if the case does not settle, putting both the lawyer and client in a "must settle" mode. Finally, clients often realize late in the process that they may not be up to the rigors of a trial putting their life on public display, thus making settlement seem like the only option.

Asking that negotiations cease before the case has been settled may be unwelcome news at almost any stage. The lawyer may appear uncommitted to the process or lacking in physical stamina. Nevertheless, there are simply times when the client is too exhausted to make important family decisions. The lawyer must recognize this and insist on reconvening when everyone is refreshed, even if the client does not agree. Does this run the danger of a settlement falling through? Of course it does. It also tends to reduce the chances of getting a "morning after" email where an angry client is unhappy about a settlement agreement signed after a 15-hour settlement conference.

### Mediator's Duty to the Parties

A central pillar of mediation is self-determination. The Virginia Supreme Court, Standards of Ethics and Professional Responsibility for Certified Mediators provides that mediation "is based on the principle of self-determination by the parties. Self-determination is the act of coming to a voluntary, uncoerced decision."<sup>ix</sup>

This concept is echoed in the Rules of Professional Conduct and The Virginia Code. Rule 2.11 (Mediator) discusses the lawyer-mediator's duty not to interfere with the parties' right to self-determination.<sup>x</sup> Virginia Code § 8.01-581.24 provides that a mediator "may encourage and assist the parties in reaching a resolution of their dispute, but may not compel or coerce the parties into entering into a settlement agreement."

A mediator is faced with an equally daunting challenge as the parties' lawyers when mediation goes too late. Sleep deprivation seems antithetical to self-determination since parties are typically unable to act in their own best interest if their mental capacities are diminished. At some point, the parties' cognitive abilities are dimmed to the point that they are beyond self-determination. While a mediator may be tempted to encourage the parties and counsel to press on into the night until settlement is reached, this may end up violating Virginia Code § 8.01-581.24 if a party feels excessive pressure to continue the process.

A mediator must put the parties' ability to determine their own fate above the possibility that a settlement may fail if the mediation is brought to a close for the night. It is not a successful mediation if the parties have a fully executed mediated agreement, but feel they were forced into settlement. It is presumptuous to think that the parties will not sign a settlement agreement at a subsequent settlement conference after proper rest. In all likelihood, an agreement signed after a good night's sleep is less susceptible to attack based upon the ground that it was not signed voluntarily due to a party's sleep deprivation<sup>xi</sup>.

### Balancing Settlement and Possible Impairment

There is no bright line indicating when a client can no longer make clear-headed decisions. The lawyer or mediator must determine when one or both parties are past this point and take appropriate action. In the end, the decision requires balancing the need to get the case settled against the ethical duty to protect the client and preserve the integrity of the settlement or mediation process.

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<sup>i</sup> Page G-5 - Volume 2: Appendix G - Human Factor Analysis

<sup>ii</sup> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, *a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives.* (emphasis added) *Scope of Representation.*, Prof. Conduct Rule 1.2 (2000). See also, Comment 1 to Rule 1.4, and Comment 2 of Rule 2.1.

<sup>iii</sup> The discussion involving sleep deprivation studies is meant to be merely illustrative and not exhaustive of the existing body of research on the subject.

<sup>iv</sup> *Effects of Sleep Deprivation on Performance: A Meta-Analysis*, Pilcher and Huffcutt, SLEEP, 1996 May;19(4):318-26.

<sup>v</sup> *The Impact of Sleep Deprivation on Decisions Making: A Review*, Harrison and Horne, Journal of Experimental Psychology, Vol. 6, No3, 236 at page 238 (2000).

<sup>vi</sup> *Sleep Deprivation Biases the Neural Mechanisms Underlying Economic Preferences*, The Journal of Neuroscience, March 9, 2011, 31(10), pp. 3712-3718.

<sup>vii</sup> *The Effect of 53 Hours of Sleep Deprivation on Moral Judgment*, Kilgore et al., SLEEP, Vol. 30, No. 3. 2007, 345 – 352.

<sup>viii</sup> LE Op. 1816 – Must an Attorney Comply with the Client's Request Not to Present a Defense.

<sup>ix</sup> Office of the Executive Secretary of the Supreme Court of Virginia, Standards of Ethics and Professional Responsibility for Certified Mediators (adopted at the Judicial Council of Virginia, April 5, 2011).

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<sup>x</sup> Rule 2.11 of the Rules of the Supreme Court of Virginia states: “A lawyer-mediator may offer evaluation of, for example, strengths and weaknesses of positions, assess the value and cost of alternatives to settlement or assess the barriers to settlement (collectively referred to as evaluation) only if such evaluation is incidental to the facilitative role and does not interfere with the lawyer-mediator's impartiality or the self-determination of the parties.” *Mediator.*, Prof. Conduct Rule 2.11 (2000)

<sup>xi</sup> Virginia Code § 20-151 provides that an agreement is not enforceable if a “person did not execute the agreement voluntarily.”