

January 2016

Looking for the Non-Monetary Reward or Bargaining Chip

The overwhelming majority of cases that are mediated boil down to money, but that does not mean there cannot be other non-economic terms negotiated in a settlement. There are a host of situations where this may occur.

For example, in defamation and privacy torts, employment claims or other claims involving injury to reputation, the plaintiff may be more inclined to settle with a retraction, a positive employment reference, some agreed-upon documentation in a personnel file or some public announcement. In cases involving the death of a minor or elder abuse, a heartfelt apology from the tortfeasor may be a necessary emotional ingredient for a client to accept a reasonable settlement.

Some plaintiffs use the litigation to get attention due to psychological trauma or unresolved issues relating to family members or spouses. If that is the case, it behooves you to figure out how to create a substitute for the spotlight of litigation and meet those needs with the help of family or even mental health professionals. Sometimes a deal requires a letter to neighbors in an HOA bulletin or someone agreeing to change the content on a website. It may be hugely important to the plaintiff, and it may cost little or nothing for the defendant to provide tangential benefits or things of value that are not considered obtainable in court as part of the litigation.

There are times when plaintiffs seek a verdict in order to validate the injury and claim to a spouse or loved one, and you need to be mindful that your client's refusal to accept a reasonable or even generous settlement may be for reasons he or she does not explain or fully understand. Again, in such

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situations you may need help unbundling the psychological impediments to settlement.

Claims involving serious injury or death to a child may require that you explore with defense counsel some non-economic deal terms that require the defendant to do things differently so "this does not happen again." In premises cases, signage may be needed. Be careful not to dismiss unusual requests as silly or irrelevant. Figure out what the underlying drive or need is behind that request, and endeavor to meet that need in an acceptable way. Silly or outrageous non-economic terms will reveal needs that have to be addressed on some level, even if it is just allowing people to vent.

The key practice pointer is to meet with opposing counsel well in advance of the mediation to flush out what may be unarticulated demands, wants and needs. Discuss the anatomy of the deal. What are its pieces and parts? If you wait until the day before mediation to start exploring non-monetary "must haves" or desires, you may find yourself unable to resolve the non-economic deal terms. Discussion may reveal psychological and practical impediments, or emotional, third-party-related barriers to settlement that can be more compelling and take far more time to resolve than the economics. What may not seem important to you may be a valuable "chip" to offer in achieving a deal. If you are short on money, look for other solutions to offer the opposing side. Lawsuits settle for a variety of reasons; money is not the only currency.

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