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ETHICAL COMPASS

...because it's not just about money

By Professor Elayne E. Greenberg

Is Settlement Just About Money?

In our professional lives, we often observe myopic lawyers and mediators who misperceive that most disputes are just about money. According to this skewed view, justice is measured by dollar signs.



From the vantage point of these shortsighted colleagues, the negotiation metaphor “expanding the pie,” in which negotiating parties make low-cost high-benefit trades that actually enhance the value of a their settlement, is misinterpreted to be just an academic smokescreen that obscures the real issue: money. Furthermore, the metaphorical settlement pie is incorrectly seen to be a fixed dollar amount whose apportionment is about how much of the fixed pie the winner will get and how much of the fixed settlement pie the payor will lose. After all, clients are just concerned about money. Right?

Offering a more enlightened perspective, the recent negotiated settlement reached between the family of Samuel DuBose and the University of Cincinnati reinforces the message that it is not all about money.¹ For those unfamiliar with the case, let me share the undisputed facts that were captured on a body-cam. In July 2015, a University of Cincinnati officer stopped Samuel DuBose, an unarmed black male, because the car DuBose was driving was missing its front license plate. When DuBose turned on his car, the officer reached into the car and fatally shot DuBose in the head.

A comprehensive settlement between the DuBose family and the University of Cincinnati was reached in January 2016. As part of the negotiated settlement the University of Cincinnati agreed to pay the DuBose family \$4.85 million cash settlement.² Recognizing their culpability, the University apologized for this tragic occurrence. The University also agreed to provide a free college education for each of DuBose’s twelve children. In addition, the University will establish a memorial for DuBose. Of importance to the family, the DuBose family will participate in the retraining of officers to help prevent this from ever happening to others in the future.

Al Gerhardstein, the civil rights lawyer who represented the DuBose family, talked about the value of non-

monetary compensation to wronged parties in helping to restore their dignity:

Well, I’ve been doing civil rights cases for 39 years, and I learned very early that these families who lose a loved one want more than money. Sure, they want fair compensation, but they want dignity for their loved one. So we have done apologies. We’ve done new-officer training and policies. We’ve done monuments and plaques. We’ve done shared experiences, where the victim can confront the perpetrator. And we do these things in order to meet this broader goal of restoring dignity to the family after such a horrible event.³

The President of the University of Cincinnati, Santa J. Ono also acknowledged that this comprehensive settlement that included more than a monetary settlement is “part of the healing process not only for the family but also for our university and Cincinnati communities.”⁴

Even though many of you might agree that the compelling facts in this case warranted a settlement that was not just about money, you may still distinguish this case from the other cases such as those involving commercial, bankruptcy, sports,⁵ divorce, intellectual property and personal injury disputes that you vehemently believe are just about money. You may even try to justify your point of view by pointing to the sophisticated and dispassionate business person or insurance representative, for whom you are convinced the settlement of a dispute is just about money, the cost of doing business.

However, astute attorneys and mediators appreciate that all people, including sophisticated business people and seemingly detached insurance representatives, are also human beings. Attorneys and mediators who understand that their clients are also human beings also appreciate that from their clients’ perspectives, justice may take many forms based on each client’s personal values and individual sense of fairness. Clients measure justice, not by money alone, but by the quality of the settlement that they hope to achieve. Moreover, for some defendants and plaintiffs, money might not be a responsive remedy for the wrong that they seek to be righted.

Offering further justification that settlement is not just about money, Fisher and Shapiro, in their groundbreaking-

ing book *Beyond Reason: Using Emotions as You Negotiate* remind us that there are five core concerns that each human being in a negotiation needs to have addressed to help preserve clients' dignity and help them get the justice they seek.⁶ The five core concerns are: the need to appreciate each person's contribution, the need for affiliation that recognizes the group's commonality, the need to be respected for each participant's autonomy, the need to select a fulfilling role, and the need to be acknowledged for each participant's status.⁷

Skillful negotiators understand that these core concerns are an integral, albeit sometimes unspoken, part of a comprehensive settlement.

The Ethical Mandates Reinforce That It Is Not Just About Money

The NY Rules of Professional Conduct reinforce that it is the client's decision to seek settlements that are not just about money. Moreover, when advising her client, a lawyer may consider the client's other interests beyond just a monetary resolution.

Specifically, Rule 1.2 (a) provides:

Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation.⁸

Rule 2.1 provides:

...In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.⁹

The Model Standards of Conduct for Mediators also emphasize a client's right to determine the dimensions of a settlement beyond just money. Standard IA states in relevant part:

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to...outcome. Parties may exercise self-determination at any stage of the mediation process including...outcomes.¹⁰

However, many lawyers and mediators may find it challenging to enforce these client-centered mandates when their own long-held beliefs remain that settlement is just about money. If you are among the group of lawyers and mediators whose beliefs collide with your client's more comprehensive view of settlement,¹¹ relax, you are still entitled to hold onto your beliefs. Yet, despite your personally held beliefs, you still have to advocate for your client's interest in a more comprehensive settlement.

Rule 1.2 (b) reassures that:

A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.¹²

Thus, the ethical rules reinforce that representing your client's interest in a comprehensive settlement does not mean you personally adopt that point of view. Nevertheless, putting personal views aside, ethical lawyers still need to understand and advocate for the interests that the client values.

Conclusion

When lawyers represent their clients in party-decided dispute resolution processes such as negotiation or mediation, lawyers have a unique opportunity to work with their clients to help shape a comprehensive settlement beyond just a monetary settlement. This is an opportunity to address the client's human and core concerns and to help their client secure their personalized sense of justice. However, lawyers and mediators who myopically seek to resolve every legal conflict by just monetary resolution are akin to the carpenter who sees everything as a nail because the only tool available is a hammer. This column invites you to expand your perspective to help your clients achieve the interests they value most, not just the money.

Endnotes

1. See <http://www.npr.org/2016/01/20/463740319/university-of-cincinnati-reaches-settlement-with-family-of-samuel-dubose>.
2. *Id.*
3. *Id.*
4. *Id.*
5. *But, c.f.*, In January, 2016 the Mets left fielder Yoenis Cespedes renewed his playing contract with the Mets even though it was a less lucrative monetary offer than other offers, because Cespedes felt loyal to the team and wanted to remain in New York.
6. Roger Fisher and Daniel Shapiro, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).
7. *Id.*
8. NY ST RPC Rule 1.2(a) (McKinney) (2015).
9. NY ST RPC Rule 2.1 (McKinney) (2015).
10. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, SM090 ALI-ABA 1759, 1762.
11. See, e.g. Elayne E. Greenberg, *What Sally Soprano Teaches Lawyers About Hitting the Right Ethical Note in ADR Advocacy*, 6 NYSBA New York Dispute Resolution Lawyer (Fall 2013) 18.
12. NY ST RPC Rule 1.2(b) (McKinney) (2015).

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