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"Deserve's got nothing to do with it"

Helping clients understand that what they need is not the same as what their cases are worth


Cooper

By Miles B. Cooper

The lawyer sat with his unhappy client at mediation. The defense's final offer: generous in light of trial's risks. But the client was not pleased. "After costs and your attorney's fees, and that medical lien thing you were talking about, there's not enough to take care of me. I need more!" The lawyer started explaining the significant risks that trial posed versus the defense offer. The client said he deserved more. But as Eastwood's Will Munny said in Unforgiven, looking down at Gene Hackman's Little Bill, "Deserve's got nothing to do with it."

Nobody wants to have this conversation with a client. But almost all plaintiffs' lawyers have had it at some point. You want to avoid the need to have it in the first place. And you want tools to address it if it does come up.

Start early

The first meeting – the case evaluation, the intake, whatever you call it – is a great starting place. Clients usually ask what their case is worth. That's a great opportunity to talk about the value tripod – liability, damages, and collectability – and how weaknesses in any one of these factors affect the case. Setting realistic expectations at the beginning sets the tone for later communications.

Always ask the potential client what the client wants. We might assume they are there for money. But I've been surprised at some of the answers I've heard when I've asked this question. I've turned down cases based on the answer. Beware the client who says, "It's not about the money..."

Keep them in the loop

As you work up a case, facts come in. Good facts. Bad facts. Over the months and years it takes to work a case, there are long periods where your client does not need to be involved. Problems arise when you show up at mediation and suddenly data dump the bad news. Better to parse out the information as it comes in over time. A call or email after a significant deposition goes a long way toward client education.

Educate them

An educated client makes better risk assessments. By *educate*, I don't mean formal schooling. I mean schooled in the process – the injury litigation. Very few clients come to the table with past litigation experience. An educated client has effective risk-assessment tools. The upside: The client makes case decisions that meet the client's risk tolerance level. The downside: Clients are not machines. Emotion influences their decision-making, not just risk tolerance. If that emotion overshadows rational risk assessment, you might find yourself trying a case you know is unlikely to turn out well.

Some lawyers avoid this by developing what they call client control. What does that mean? The implication is that the client will do anything you say regarding resolution, even if it is not in the client's best interest. I prefer an educated client to a controlled client.

Random sampling

Sometimes, despite best efforts, clients get stuck in the need phase. Or they feel jurors will overlook a case's issues. One way of realigning valuation, when a focus group is not appropriate, is random sampling. Give the plaintiff 's and defendant's mediation briefs to several different people and ask them for input. This doesn't cost anything. Ask other lawyers, staff, family, friends – anyone who will give you feedback. When you sit down with your client later, you can explain that several people read both sides and found a certain value range.

Trial's high costs

Trial's costs go beyond the monetary. The client has to be there for days or weeks. The client's life and decisions are put under a microscope in the courtroom. This imposes a significant emotional cost. Make sure the client understands this.

You should also demonstrate mathematically the best day and worst day potential outcomes if you go to trial. Clients are sometimes surprised at how little extra money ends up in their pockets even when a trial verdict is significantly higher than the defense's settlement offer.

Paper the file

If, after all the discussions, the client is still interested in taking on trial's risks, make sure the client knows the risks in no uncertain terms. Talking is one thing. But your client's memory of the conversation can cloud after a verdict. The answer: a letter. Make sure it talks about all the risks. If there is a Formal Offer

to Compromise, explain that the client could end up owing the defense. Then have the client sign it.

The outcome

The client insisted on trial. The jury was fair and compensated for what the case was worth. The net result to the client was less than the net would have been from the settlement offer. And thus less than the client needed.

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