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When attorney's fees are 'The Tail That Wags The Dog'

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In many cases, a potential attorney's fees award is more significant than the damages awarded by the jury. Despite the enormous impact of a potential fee award, plaintiff's and defense attorneys often live in their own separate worlds in weighing attorney's fees exposure when mediating a case. This article will provide some guidance for lawyers when mediating cases where attorney's fees are "The Tail That Wags the Dog."

Plaintiffs and defendants bring their own sets of biases when mediating cases with attorney's fees exposure. Plaintiff's attorneys often come to mediation with the belief that defendants should pay in settlement what the judge will award in fees after years of litigation all the way through trial. In essence, they want to get paid in settlement as if they had taken the case to trial and won.

Defense attorneys have their own unrealistic belief system. They often look only at the time the plaintiff's attorneys have incurred up to the mediation without considering the exposure their client faces for an attorney's fees award if the case goes to trial. Defense attorneys also hold out hope that the trial judge will drastically cut both the hours and hourly rate sought by the plaintiff's lawyer.

The challenge in mediation is getting plaintiffs and defendants to start speaking the same language about attorney's fees exposure.

For Plaintiffs to maximize their settlement, the starting point is getting credibility with the defense regarding attorney's fees. I often mediate cases where insurance is involved. Insurance defense lawyers tend to view the hourly rate the judge will award through the lens of their own hourly rate – a number which is far lower than the going rate for non-insurance defense lawyers. Plaintiff's lawyers should come into the mediation with evidence of the hourly rate they have been awarded in other cases. The best evidence is fee awards in cases that have gone to trial or interlocutory fee awards such as awards for discovery sanctions. A prior award of fees gives plaintiff's counsel credibility regarding the hourly rate they are seeking.

The second area where plaintiff's lawyers need to establish credibility is the number of hours plaintiff's counsel has spent to date and anticipates spending through trial. I often hear plaintiff's counsel in contingency fee cases say "I don't keep track of my time. That's why I became a contingency fee lawyer." That attitude will hinder your ability to maximize your recovery in mediation. If you go to trial, your fee motion will have to provide the court with time entries to recover your fees. A mediator is not going to ask you to turn over your time records, but you should be prepared to provide a credible estimate of the time you spent preparing and litigating the case up to the mediation. In the mediator's perfect world, you provide the mediator with contemporaneous billing records. The mediator can tell the defense team "I've seen the plaintiff's time sheets and this is how much time they have spent." I can guarantee you the defense always underestimates the amount of time plaintiff's counsel has spent. Credible evidence of time spent will inure to plaintiff's benefit.

Lastly, plaintiff's attorneys should not demand payment of the fees they anticipate they will incur through trial. Plaintiff's brief can explain to defense counsel what the exposure for a fee award through trial (including prior fee awards they have received), but a settlement demand should reflect a discount because the case has not been tried (or won) yet.

Defense attorneys often come to mediation saying: "I will pay the plaintiff's lawyer for the hours they have incurred to date." That is the wrong analysis. As a defendant, you are weighing the benefit of a settlement over the risk of trial. The risk of trial not only includes an award of damages but also an award of fees. If you settle before trial, you are getting a discount (usually a substantial discount) on the attorney's fees not yet incurred. The discount, however, is not 100%. You are paying to avoid the risk of a future fee award. That means you must pay something to avoid the potential of a large fee award. It may not seem fair to pay plaintiff's counsel for work they have not done, but that payment is simply the cost of buying protection from a much larger fee award. It feels bad to pay plaintiff, e.g., $50,000 for work that has not been done, but paying a $500,000 fee award after trial feels much worse. In that scenario, the $50,000 is a bargain.

Defense attorneys also need to disabuse themselves of the wishful notion that the trial judge will limit the fee award if the damages award is low. Where the fee award is based on a statute designed to protect vulnerable plaintiffs (e.g., 42 U.S.C Section 1983, Unruh Act, FEHA, Labor Code violations or tenant habitability cases under Civil Code Section 1942.4), the court will often award fees well in excess of damages awarded by the jury. (*See*, e.g., *Snoeck v. ExakTime Innovations, Inc.*, 96 Cal.App. 5th 908 (2023) (In a FEHA case, the trial court found a fee award of $1,144,659.36 was appropriate despite damages of only $130,088. The court then reduced the award by 40% due to plaintiff's counsel's incivility during the litigation – a topic of discussion for another day!))

This discussion has ignored a critical person in the mediation – the plaintiff. Where attorney's fees exposure is high, the plaintiff will often net more through settlement than trial. The settlement includes an amount for attorney's fees exposure. If the case goes to trial, the plaintiff loses the attorney's fees exposure money because the actual fee award typically goes to the attorney.

In conclusion, plaintiffs need to come to mediation with more credibility and less bluster where attorney's fees are a factor. Defendants need to look realistically at the potential fee award after trial. Then both sides need to negotiate a fair discount that reflects settlement before trial.