

Kluwer Mediation Blog

Not About The Money?

Charlie Irvine (University of Strathclyde) · Wednesday, December 11th, 2019



Twice today I've found myself responding to mediator reflections in these terms: *the money's not about the money*. Both cases involved financial negotiation, even haggling, but that's deceptive. The key to settlement lay not in the realm of calculation and rationality but in the more opaque social world of face, punishment, justice and emotion. In this blog I examine the meaning of money in disputes. The conclusion? Money is a symbol; and, as our ancient ancestors discovered, a useful one.

The cases

One involved a breakdown of trust between lawyer and client. While the presenting issue was an outstanding fee, the mediators' reflection included the following words: "*offended, loss of trust, abandoned, agitated, frustrated, stressed, tone of emails.*" Turning points included speaking face-to-

face, expressions of empathy and humanity and “*mediators’ punctuation and reinforcement of expressions of hurt and recognition/appreciation/apology.*” The settlement involved an offer to pay either half the fee OR 1.5 times the fee to a charity (the lawyer chose the former). If ever a client wanted to demonstrate that it’s ‘not about the money’ this was it.

The second case was a business software dispute. After rejecting it as unsuitable the purchaser had inadvertently used the software, triggering a significant bill. This time the parties were amicable and businesslike, yet the mediators’ reflection recorded: “*Plenty of space for talking, listening and negotiating, presenting issues on white board, respecting and reflecting frustration and individual perspectives, considering costs of ongoing dispute*”. Again the matter settled, following a period of haggling in private session, for just over one third of the sum sought.

Money as a symbol

As early as 9,000 years ago people traded animals and plants to represent wealth. By 3,000BCE they began to use precious metals and the first instance of state-backed currency seems to come from Cappadocia in 2,150BCE (Davis and Davis, [A Comparative Chronology of Money](#)). Money still has symbolic force: in 1980’s Thatcherite Britain, comedian Harry Enfield waved a thick pile of banknotes with the catchphrase “[Look at my wad](#)”.

What does money symbolise in court disputes? In some cases, money. A claimant seeking compensation for loss of earnings really does need the money; lenders collecting debts want their balance sheet restored. But non-fiscal factors lurk behind even these apparently straightforward transactions. A debtor negotiating time to pay will often cite hard times and difficult circumstances; the lender may accept this less because of the balance sheet than because of human connection in a face-to-face encounter. Mediators often see loss of earnings claims being moderated following a display of empathy and attention.

Money can symbolise other things too. In the first case above the fee reduction probably symbolised acknowledgement and implicit apology. In the software dispute both parties compromised. The reduced demands probably symbolised an acceptance of joint failings (in this instance a vague contract).

Speaking of divorce mediation, Benjamin and Irving list: “*money as power, money as security, money as painkiller or revenge, money as compensation, money as closure*” (‘Money and Mediation: Patterns of Conflict in Family Mediation of Financial Matters’ (2001) 18 *Mediation Quarterly* 349.) In her 2007 study of Canadian medical negligence cases, Relis found plaintiffs’ aims included: “*admit fault (59%), ‘never again’ (59%), answers (53%), retribution (41%), apology (41%), acknowledging harm (35%), punishing (24%)*” (“It’s Not About the Money!”: A Theory on Misconceptions of Plaintiff’s Litigation Aims’ 68 *University of Pittsburgh Law Review* 701, 723).

Money as punishment

This warrants a category of its own. I often hear lawyers express scepticism about the idea of clients wanting anything other than money. In their well-worn phrase, “It’s all about the money.” I agree and

disagree. Money does matter, but not quite in the way we think. Money as enrichment can be important, but it's not the whole story, particularly when a legal dispute concerns less than life-changing amounts.

During my research into small claims mediation parties, one interviewee told me the amount at stake was less than half his hourly rate. Yet he committed hours if not days to the dispute, scuppering the mediation by offering one pound. His motive? He felt a tradesman had insulted him, making this a "point of principle." It's not that he wanted to be enriched, but rather to ensure that the other was made poorer. Money thus symbolised vindication and justice.

Money as fungible

Money has another quality making it particularly suited to dispute resolution: it can be divided up. In a conflict over a precious heirloom, neither party is likely to relinquish it even for many times its value. It is unique and irreplaceable. With money, on the other hand, one pound or euro or dollar is pretty much the same as any other. As long as I get paid I care little about which particular piece of your wealth I receive.

This fungibility has another consequence: calibration. Unlike heirlooms or apologies, I can receive a proportion of what I seek. I claim for £50,000. If I go home with £30,000 it's certainly not nothing. I may or may not be content, but that probably depends on other factors: how inflated was my initial demand, how far did the other party move, how much time do I want to commit? This is why the "haggling" phase of a negotiation is so important and deserves to be treated with respect. Parties are fine-tuning the practical and emotional components of their dispute. Negotiation over money may act as a form of emotion regulation, enabling highly aroused people to become calmer and more able to think. In my divorce mediation practice I often found parents who had dealt with financial issues could return to the topic of their children in a spirit of constructive problem-solving.

To take one more example, I've written before about the [Scottish Legal Complaints Commission's scheme](#) for mediating complaints against legal practitioners. The scheme is pretty successful, with a take-up rate of over a third and a success rate of some 70% (always including a financial element). One source of puzzlement has been the difficulty in setting up similar schemes for complaints against health professionals in the UK. Perhaps it is as simple as this: they're not fungible. Possible outcomes include apologies, explanations, practice restrictions, even striking off. However important these are, they can't be haggled over. You can't ask for a partial apology, or 2/3 of an apology. And you don't see the health professional suffer as you reject the initial offer, then she or he digs deep to find extra money. Money lets negotiators fine-tune the outcome until the pain, the sense of injustice and the hassle is shared in acceptable measure.

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In Martin Brest's fabulous 1988 road comedy, *Midnight Run*, Charles Grodin goads his captor Robert de Niro: "*You're all about the ****ing money.*" It's tempting for mediators and lawyers to experience similar feelings about people who seem stubborn, irrational or downright acquisitive. This blog suggests we treat money with a little more respect. Pause and ask yourself what it symbolises. Is it enrichment? Or punishment? Or much more besides? And then enjoy the haggling. Remember, sometimes the

money is “not about the money.”

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