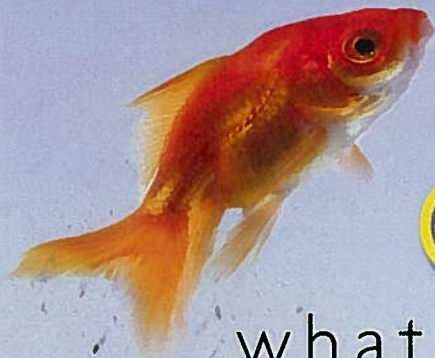


NEW STATE BAR PRESIDENT ED NOVAK (p. 12)

www.myazbar.org

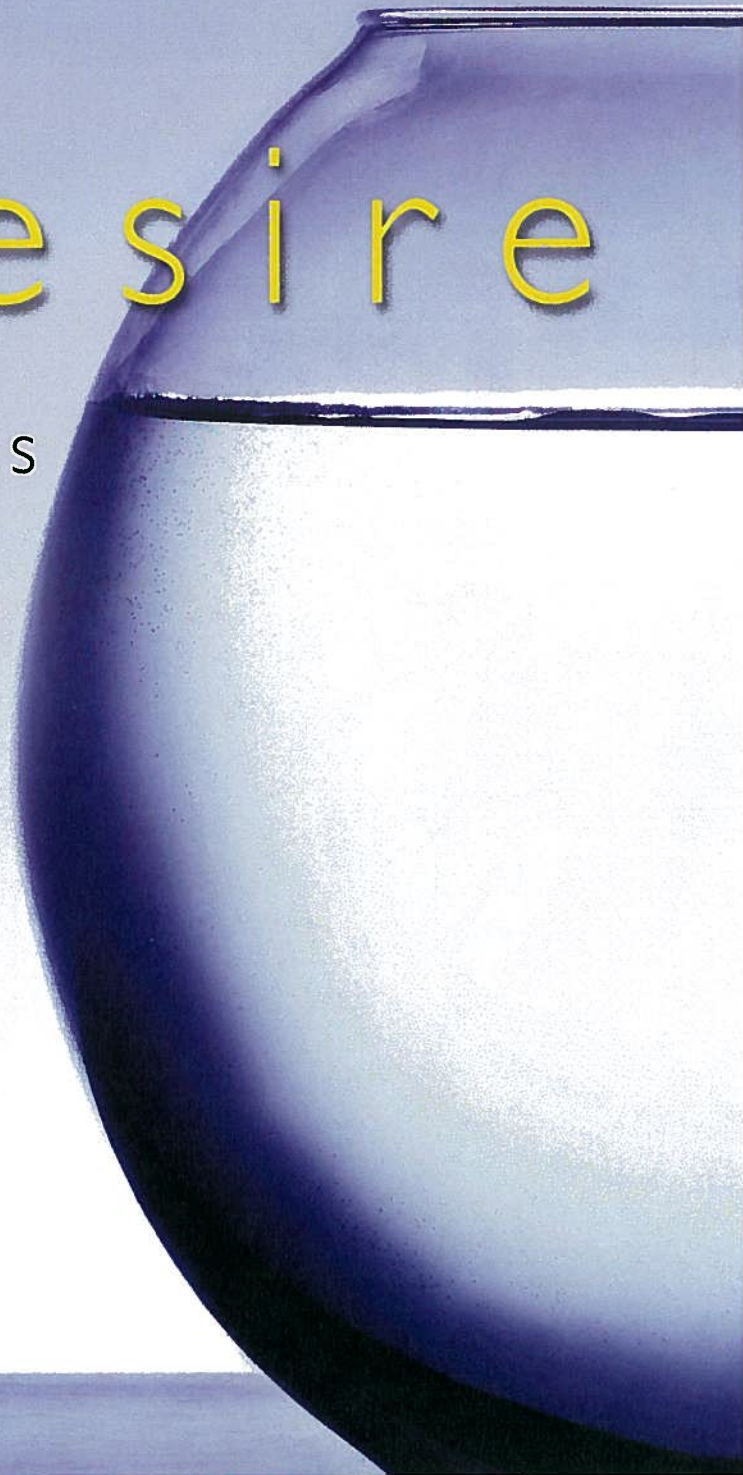
ARIZONA
ATTORNEY

JULY/AUGUST 2008



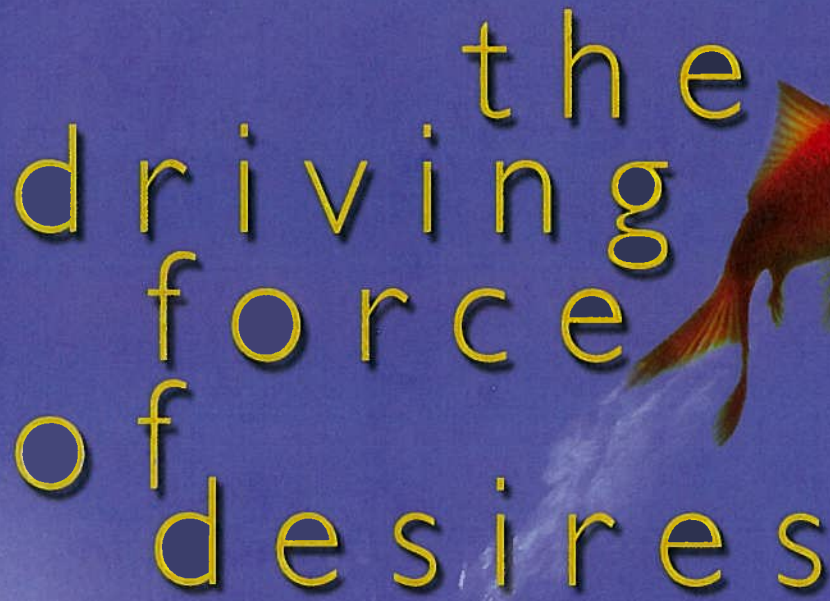
desire

what do
litigants
want?



BY AMY L. LIEBERMAN

the driving force of desires

A goldfish is shown swimming in the upper right quadrant of the page. A stream of water falls from the fish's tail into a large, dark, spherical fishbowl that occupies the lower half of the page. The background is a deep blue gradient.

Reaching Resolution in Mediation

Amy L. Lieberman is an attorney and full-time mediator and arbitrator of employment and commercial disputes. Her firm, Insight Employment Mediation, is based in Scottsdale. She is a member of the American College of Civil Trial Mediators, the "Best Lawyers in America" in ADR, and a designated Advanced Practitioner in Workplace Mediation by ACR.

Parties and their lawyers who come to mediation state what they "want." Frequently, they plan a strategy of negotiating, in order to get what they want. Other times, there is no formal strategy: The person simply steadfastly clings to what he or she wants. And the parties typically assume it's all about money ... getting as much as possible, paying as little as possible.

The genesis of this article stemmed from a lawyer's comment to me in a mediation. "It's *always* about money!" And yet, in my experience, it's not "just numbers."

What I have found as a mediator of employment and commercial disputes is that, though the demand for resolution often is made in terms of money, in reality, different desires underlie the demand and serve as the true motivation, and hence, the "driving force." We are all driven by *Desire*. In mediation, the strongest Desire is the deep underlying need that compels us to push, fight and resist resolution until that need is acknowledged and met. Notably, we may not even be aware of what our strongest desire really is until the process begins and we start speaking about what happened and expressing how we truly feel.

The *Desire for Money* is typically tied to a need for *Compensation* and/or *Financial Security*. An employee or executive who has lost his or her job needs income, as well as, perhaps, insurance and other fringe benefits. There may be a need to be able to obtain new employment. An employer that does not have unlimited financial resources does not want to erode the foundation of its business. A company also wants to

avoid undue publicity that could lead to other employees filing claims and more financial exposure.

The *Desire for Money* is a very real need that exists in many, if not most, cases. Yet there can be, and often are, additional strong Desires that drive the mediation process. Resolution is often blocked until such Desires are addressed.

What follows is a list of nine key Desires that I have seen emerge consistently as the Driving Force in resolution of employment and business conflict. To illustrate, here are some examples from actual mediations.

I. The Desire To Be Heard

Sometimes, an employee is told the reason for adverse employment action such as a transfer, demotion or termination—but feels that he or she was not given a true opportunity to respond. Typically, only non-exempt employees in the government setting have a true "due process" right to both notice and "the opportunity to be heard." There is no corresponding right in the private sector, unless it has been previously negotiated in a contract. Yet it doesn't feel fair if someone just decides we are "out," without hearing our side of the story.

"I just needed them to hear what I had to say. They never even asked me for the explanation. ...I tried to explain but they wouldn't listen."

—A terminated manager

"I complained, but the company didn't take me seriously, and did nothing to change the situation. ...It's been over a year and this is the first time I've had a chance to tell my story."

—A woman who filed a sexual harassment charge because no one would listen to her

Even when a case is in litigation, being deposed may not fulfill the employee's desire to be heard. Answering questions in a stressful "Q&A" environment while under oath and instructed by their lawyer only to answer "yes" or "no" or "I don't recall" is not the same as actually having the ability to speak freely about what happened and how he or she feels.

Everyone has a fundamental need to be "heard." One does not need to be a trained psychologist to know that we all simply feel better when we have the chance to vent, and someone actually listens to us. Where there is a strong desire to be heard, or a need for catharsis, that desire will be the driving force. Resolution is stalled until that need is met.

2. The Desire For Acknowledgment and Apology

"She has no idea of the impact her quitting had on this company. She has no idea of the sacrifice I made in terms of the hours I had away from my family, on airplanes, out of town for weeks on end for a full year!! Cleaning up the mess, figuring things out on my own, hiring a replacement ...I am still dealing with the aftermath."

—A party, suing on a breach of an employment contract

The Desire for Acknowledgment and Apology are closely related, and they follow on the heels of the Desire To Be Heard. Often, one party wants the other to verbally indicate that they "get it"—they *understand*. Most of us believe that if someone who has offended us is made to understand the damage they have caused, that person will apologize.

Two of the most powerful words in the English language, and in mediation, are "I'm sorry." Often one side cannot bring himself to say the words, or he might insist, "I did not do anything wrong, and I am not going to apologize."

The need for apology is so deep, and so universal in conflict, that it is recognized in some states that offer statutory protection for those who extend apologies, such as physicians in malpractice actions. In mediation, such expressions of apology or regret are protected from disclosure in any subsequent proceeding, should the matter not resolve.

"All I wanted was an apology. It's not about the money, truly. If they had only apologized, I never would have brought this lawsuit."—An employee who, denied commissions, finally received the needed acknowledgment. *"I feel better, I truly do."*

The other key point about apologies is this: Apologies typically generate reciprocal behavior. In other words, they generate one of two responses:

- A reciprocal apology: "That's OK, thanks. I, too, apologize for my role in escalating the matter."
- Deep gratitude: "Thanks. I appreciate that."

The apology meets the need for acknowledgment, implicitly asks for forgiveness, and allows the person to grant that forgiveness or incorporate the acknowledgment, and thus, to heal and move on. Once that need is met, the door is opened for resolution.

In a recent case, I sensed that the parties could not move on until they believed the other truly realized the impact on each other's lives of the events of the underlying case. With the lawyers' permission, I asked both parties to meet with me alone, without their lawyers, for a facilitated discussion. Though anxious about doing so, they agreed. Both cried for a good hour, while they explained the impact the other's actions had on their lives. They communicated the frustrations they felt, and each volunteered that in hindsight they would have handled it differently. One apology led to a reciprocal apology, and this allowed the negotiations to begin.



3. The Desire For Fairness

"I'm not looking to get rich. I just want what I am owed. That's only fair."

—An employee who believed he was wrongfully terminated

The employee believed that, had he not been terminated inappropriately, he would have worked at the company for three more months, and had three months of benefits, including insurance and travel expense reimbursement. He believed that was only fair. The fact that the employer had liability arguments and wanted to reduce any amount paid to the employee based on a percentage risk allocation did not impress the employee. He did

not care; he only wanted what was “fair.” However, the legal argument of “mitigation” did resonate with him. Once he learned a court would deduct his actual earnings from his measure of damages, he thought that was “fair.”

“I don’t want their money. I don’t want to start a new job somewhere else. I just want my promotion. I only want what I’ve earned. That’s what’s fair.”

—An employee with a claim for race discrimination

In this case, the employee was the only African American at a manufacturing plant. He was an hourly employee, earning less than \$50,000 a year, with overtime. He had filed several EEOC charges, including one for retaliation. The employer was willing to pay the employee hundreds of thousands of dollars, if the employee would only resign. They valued his performance but did not want to deal with continual claims and charges.

The employee told me he was only a few years away from retiring, and then he and his wife were going to start a business. The money offered him would have enabled him to start that business with a nice cushion. But he was not interested; he just believed he deserved a promotion that went to someone else. He wanted to finish out his years and leave on his terms. He realized there was no guarantee he would be retained for all those additional years, but he just wanted to work. He enjoyed his work and wanted only to continue; he had been there 18 years.

The amount the employer offered kept increasing in the face of the employee’s insistence on retaining his job. However, this was not a strategy by the employee. He kept repeating he did not want money, he did not want to get rich, he did not want hundreds of thousands of dollars that he had not “earned.” His driving force was to obtain what was “fair,” and no more. Ultimately, the matter resolved and he was able to negotiate the promotion.

4. The Desire To Know

This Desire appears when an executive is terminated and not told the true reasons why. The executive is simply told, *“Things are not working out and we want to take the company in a new direction.”* This is the classic “non-reason.” It may be perfectly legal when the employer is not required to provide a reason. Typically, only non-exempt employees in the government setting have a due process right to notice of a reason; in the private sector, only

those with a contractual or union-negotiated right to a “cause” termination may be entitled to notice.

However, the problem with this approach is that there always is a reason. What is it, and why doesn’t the employer want to share it?

Where reasons are not given, employees will often seek legal representation. The lawyer will look for potential illegal reasons—discrimination on the basis of sex, age, disability or perhaps retaliation for engaging in protected activity—and will file a claim.

In one matter, the company did not want to disclose the true reasons to an executive. The reasons were essentially political, and the employer did not want to hurt the executive’s feelings or ability to obtain future employment by putting the reasons on paper, and did not want to have to justify itself. Frustrated at what he perceived was an unjust termination, the executive filed a claim seeking hundreds of thousands of dollars, alleging illegal retaliation.

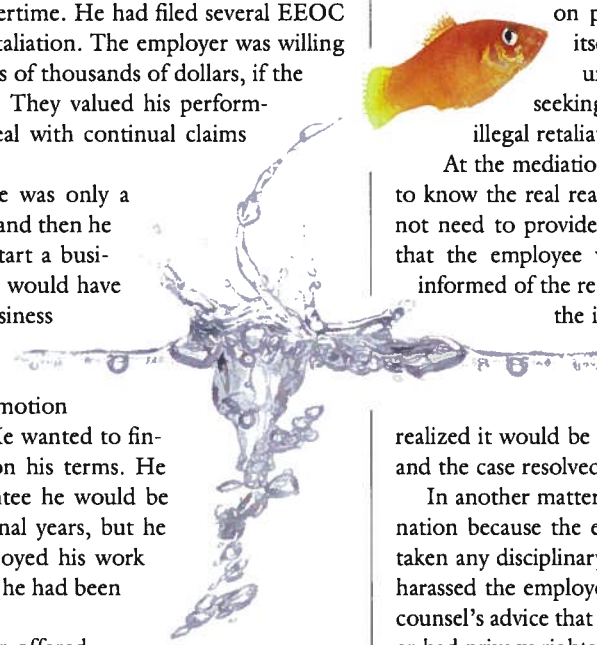
At the mediation, he stated that he was driven by the desire to know the real reason. For hours, the company insisted it did not need to provide one. While true, I informed the company that the employee would not resolve his claim until he was informed of the real reason. The company then chose to reveal the information. Once that occurred, the executive realized that although he could argue against the action, attempting to do so would most likely be futile. He then realized it would be to his advantage to avoid negative publicity, and the case resolved.

In another matter, the employee pursued a claim for discrimination because the employer refused to disclose whether it had taken any disciplinary action against a manager who had sexually harassed the employee. The company refused to do so based on counsel’s advice that there was no “need to know” and the harasser had privacy rights as well. Frustrated, the employee turned to her own lawyer to pursue a claim for discrimination.

For hours during the mediation, the employer refused to disclose what action it had taken. Ultimately, the employer agreed to disclose the information, and the employee learned that extremely serious action had been taken—the company had terminated the harasser. Unfortunately, the employee had quit work after the alleged harassment. She had a claim for lost wages for six months that could have been completely avoided had she learned the manager was gone, as she could have returned to work. Once her need to know was satisfied, the case quickly resolved.

5. The Desire For Dignity

An executive or employee who is fired suffers a deep blow to his or her self-esteem. This is especially true when an employee is summarily fired and escorted off the property, allowed to come back to retrieve personal items only after hours. This occurs even



where the employee has not done anything terribly wrong; the company decides that it is simply better to remove the employee from the premises immediately.

I have known many employees who were truly humiliated by the procedures employed in connection with their termination. One employee told me, *"I curled up in a ball and cried for days. It was weeks before I could get out of bed. I have never had anything like that happen to me before. It was truly awful! I had to see a counselor and take medication for my anxiety and depression."*

Where the employee has not found comparable employment, there is a need to restore the person's dignity so the emotional scars can heal and the person can move forward. In that case, changing the termination to a resignation, deeming the employee "eligible for rehire," and drafting a favorable letter of recommendation provided the dignity the employee needed.

"What about the 16 years I put in with the company? Doesn't that count for anything?"

—A terminated manager whose productivity decreased

Once it was realized that the underlying desire was for departure with dignity, the company shifted its negotiating posture from one based on an analysis of liability and damages, to one based on a severance-type model. This case resolved for one week of salary for each year of service.

6. The Desire For Justice

Put another way, the Desire for Justice (closely related to a Desire for Revenge) is the desire for equal suffering—one party wants the other to hurt, so they can suffer as the other one did. Sometimes this is sought through punishment—a large settlement, verdict or "punitive damages." Other times, it is sought through negative publicity.

In one case, the employer was about to settle two employees' claims for \$1.1 million. The employees did not want to agree to

confidentiality of the settlement—*"We're going public with this!"* They wanted to contact *60 Minutes* and publish a book about their lawsuit and the ultimate result.

This issue was discussed in mediation for many hours. The employees wanted to punish the company for its actions. However, the employer was not about to pay \$1 million in settlement and endure negative publicity, so confidentiality was a critical part of the deal. The employees then had to choose—go public to satisfy the Desire for Justice, or obtain financial compensation for their perceived unjust treatment. Ultimately, they chose the settlement, but it was a true struggle for them.

Most people don't realize that "justice" can often be long in coming and, at best, ephemeral.

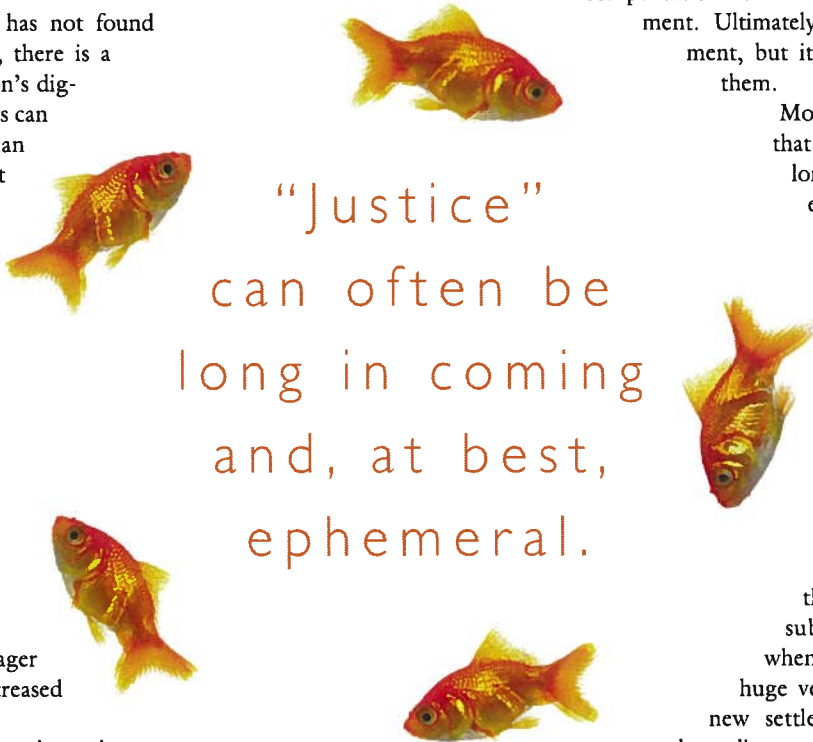
First, "justice" can take years to accomplish. And a big win at trial doesn't equal justice—it brings only the certainty of appeal. The appeal process adds years to the process, as well. In addition, attorneys' fees can eat up a significant part of the proceeds, the judgment may well be subject to taxation, and when all is said and done, the huge verdict can mean simply a new settlement opportunity. And depending on the size of the company, a large verdict may just be another cost of doing business, and easily absorbed.

Finally, negative publicity can certainly hurt an organization. However, unless the company is publicly traded, bad PR only lasts so long.

Recognizing this need and bringing it to light may be important to determining whether this outcome would in fact happen, and whether it truly will bring "justice."

7. The Desire For A Realistic Result

When a party demands millions of dollars, or amounts that bear no resemblance to likely damages, the case will not settle. The same is true if the employer offers what appears to be ridiculously low offer. I often hear, *"If you can just get this into a realistic*





Though a demand is made in terms of money, the desire for money or financial security is not always the strongest motivator.

range....” *“We need a mediator involved because the plaintiff just doesn’t understand why his demand is ridiculous!”* Or, sometimes the lawyer will call me ahead of time and say, *“Look, my client has a good case, but I can’t get him into a realistic range. I need your help.”*

Regardless of the company’s evaluation of the case, when the demand far exceeds even the worst-case damages the company might face, resolution is not possible. And most people recognize that the resolution through mediation and settlement often requires some form of compromise—so a demand for the full risk a company might face won’t help move the process along, either. Similarly, offers of zero or nominal amounts won’t help. The Driving Force here is to get the parties to recognize some risk and get them into a realistic range, even if it appears too high or too low to the parties. Once the demand gets into that range, the case almost always will settle.

8. The Desire To Do Better Than Expected

“We came in less than we planned. I’m declaring victory!!”

—An e-mail sent by in-house counsel to internal executives

Counsel and business executives who appear at mediation are often given certain “authority” ahead of the mediation. Often they learn new information that causes them to make phone calls and see if they can obtain additional authority to pay more money. The mediator typically is not always told the true extent of authority. The parties’ willingness to move often turns on whether they can come in lower than expected. If that’s the case, they look good; they are perceived as good negotiators and congratulated on the result. This Desire can be so strong that the parties will say, “That’s our top dollar,” even when it’s not.

9. The Desire To Be Done

“This litigation has taken such a toll on me. I can’t believe it has taken so long. I am so tired of having to focus on this, and meeting with our attorney, reviewing legal documents and other papers.

...We just want to focus on business and not have this hanging over our head!!”

—A party suing on a breach of a covenant not to compete

Fortunately, the other side had the same strong

feeling, and it was this Driving Force that ultimately brought the parties to resolution.

The Desire To Be Done (aka the Desire to Stop the Bleeding) shows up in two situations: The claim or litigation process has taken too much out of the parties emotionally, and/or too much out of the parties financially. The true stress and strain of litigation were not realized until it seemed the parties were too far along to exit. From one or both parties’ perspective, costs can escalate far more quickly than anticipated, and more than can be easily accommodated.

In one case, an employer spent more than \$25,000 in legal fees for discovery matters in arbitration, and still, the employee had managed to provide essentially no information. Arbitration is supposed to be quicker and more economical than litigation, but in this case, a year and a half had passed and the parties had made virtually no progress in pushing the case forward. The employer was extremely frustrated and sought mediation to stop the bleeding—only to stop the endless flow of money.

In another matter, a party spent \$700,000 in defense costs over three years and was anticipating a loss at trial. Counsel’s primary directive, ultimately achieved, was to “get it settled,” cap the loss, and stop the bleeding.

Conclusion and Learning Points

Often, though a demand is made in terms of money, the desire for money or financial security is not always the strongest motivator. The underlying desires to be heard, to regain one’s dignity, to know the “truth,” to hear an apology, to achieve justice or revenge, or just to be done, may be the true motivators. The true Driving Force is the need that must be addressed for resolution to occur.

The mediator should encourage the parties to share their perspectives fully and let them know that mediation allows for all aspects of one’s views to be considered—legal, financial, emotional, practical, and so forth. Often, we do not know our true motivation until we start speaking. Setting the stage and allowing the opportunity for that realization to occur are crucial. Once the Driving Force is uncovered, acknowledged and addressed, resolution is just around the corner. 