

I KNOW YOU ARE, BUT WHAT AM I?

by MICHAEL G. BALMAGES

This is a tale of two Bobs and the settlement lesson I learned dealing with them. The first was Bob the accountant, whose funeral I attended last week, and the second was Bob the now retired lawyer, who was perhaps the wisest lawyer I ever worked with. Skipping ahead, the lesson is that you are never going to convince the other guy that he is a bad guy.

Bob the accountant was ninety-two when he passed away. I first met him in the late 1970s at Racquetball World when I had been practicing law about five years and he had been practicing accounting about twenty. Bob had founded a mid-size, Orange County accounting firm with many successful business and professional clients. He was a generous and kind man. He referred clients to me and I to him. One client was a partnership of fifteen physicians that owned a medical building where the physicians practiced and shared common services. Like in every bunch, there was one bad apple, a doctor who did not pay his contributions, who was disruptive at meetings and in front of patients, and

who had several malpractice claims pending. The other physicians wanted him out and they turned to Bob, their accountant, to negotiate the ouster. The negotiations went sideways fast and both sides lawyered up, with me as counsel for the partnership and another young attorney as counsel for the doctor.

The other attorney and I agreed to get together with



our clients to see if we could work through the issues and wind up the relationship. We met at my office where Bob and Doctor immediately got into it with recriminations and accusations and bad words flying all around. The other attorney and I watched as settlement possibilities receded faster than a wave at The Wedge in Newport Beach. All of a sudden, I had one of the few epiphanies of my legal career (or, as the late comedian Henny Youngman might have said, “I had an accident; a thought struck me”). I interrupted Bob and Doctor: “Can we agree that Bob thinks that Doctor is a liar and a crook and a bad doctor? And, can we also agree that Doctor thinks that Bob is a liar and a crook and a bad accountant? Let’s agree to that, okay?” There was no response, just everybody staring at me, and I said, “Great, I’ll take the silence to mean that we all agree on those two statements. Now, let’s see what else we can agree on.” About ninety minutes later we had a signed settlement agreement. The lesson I learned is that you are never, ever, going to convince the other guy that he is a bad guy. So, don’t even try. He thinks, believes, and is sure that you are the bad guy and you are never, ever going to talk him out of that either.

This lesson served me well over the next forty years of my law practice and still serves me well in my mediation practice. I must admit though that knowing this rule has not stopped me from occasionally demanding that the other guy admit that he is a bad guy. This is where Bob the lawyer comes in. Many years after I learned this invariable rule, I was in-house General Counsel for Ocean Pacific Sunwear, “Op,” then the world’s largest seller of surfwear. As General Counsel, I hired lawyers to fight our battles for us. I hired Bob the lawyer. This Bob was also about fifteen years older than I, and was wise, funny, and a really good lawyer. He and I met to discuss our settlement demand in a lawsuit in which I felt very good about our chances of prevailing. After working through the monetary and business terms and conditions, I told Bob that I had one more condition—I wanted the other guy to admit that he was a d**khead. Although Bob knew that I was joking, he also knew that I was kind of serious—that I really thought that this guy was a d**khead. Bob, of course told me that it was unlikely that would end up a deal term and it would probably be best if it was not in our term sheet. I knew he was right, but I really wanted to have that in our demand letter. It wasn’t, but it became a standing joke for Bob and me whenever we were negotiating, including times later on when we were opposing counsel.

As a mediator and as a settlement judge, there have been many times when a plaintiff has asked for an apology from the defendant. Most of those times, I have been able to talk the plaintiff out of making that demand, convincing the plaintiff that it will never happen. Occasionally, though, I make that demand on behalf of the plaintiff. I usually first make it without any specifics just to see if it is a possibility. On those cases when it is not immediately and completely rejected, we end up talking about whether the apology will be made public or kept private and what use the plaintiff will make of the apology. If we get past those hurdles, next is the negotiation of the words of the apology. I ask the plaintiff what he or she wants the apology to say and, usually, the plaintiff does not know; they just want an apology. They tell me to let the defendant draft

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the apology. Rarely does this process result in an apology. Most often the plaintiff relents, and the case settles on purely monetary terms.

Related to this is negotiation of the common settlement agreement term of “non-admission of liability.” The term goes something like this: “The Parties acknowledge and agree that this Agreement is not an admission of liability, fault, or improper or unlawful action on the part of either of the Parties.” Plaintiffs who do not get their desired apologies sometimes balk at inclusion of a non-admission clause. Usually, the power of money prevails as I let the plaintiff know that if he or she wants the settlement money, there is going to be a non-admission clause.

Once in a while, a defendant will sort of admit that he is a d**khead, when it leads to a lower settlement amount. In a recent

settlement of a case resulting from a physical fight, the plaintiffs demanded an apology and got one (drafted by defense counsel), “I, (Mr. Defendant), apologize for my actions of (date of incident) with respect to Messrs. (Plaintiff 1, Plaintiff 2, and Plaintiff 3). In retrospect, I would have conducted myself differently and I wish them well.” The settlement agreement contained a non-admission of liability clause and a confidentiality clause. It was a cheap and meaningless out for the defendant as I so noted to him and his lawyer.

A defendant may be a bad person but will never admit that he or she is a bad person. This is because the defendant does not believe that he or she is a bad person and because the defendant’s lawyer will never allow her client to so admit. To do so might open the defendant to other claims or criminal or administrative actions. Defendants will almost always want a non-admission of liability clause and a clause keeping the settlement confidential. They are buying peace.

In settlement, a plaintiff who seeks an apology, an admission of liability, and the right to tell the whole world that the defendant is a bad person, rarely gets any of those. But don’t just take my word for it—others have observed the same maxim. As author Christopher Paolini put it: “[N]o one thinks himself a villain, and few make decisions they think are wrong.” Or, “Everybody believes they’re the good guy.” (Former CIA undercover officer Amaryllis Fox). Author Emily St. John Mandel notes, “No one ever thinks they’re awful, even people who really actually are. It’s some sort of survival mechanism.” And finally, along those same lines, “I know you are. But what am I?” (Pee Wee Herman). 

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