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Maria Cudowska
University of Bialystok, Poland
ORCID: 0000-0002-8907-4211
m.cudowska@uwb.edu.pl

A Compassionate State of Mind: How Michigan Personal Injury Lawyers Think about Non-Monetary Goals and Interests?*

Współczujący stan umysłu. W jaki sposób prawnicy zajmujący się sprawami związanymi ze szkodą na osobie w stanie Michigan ewaluują cele niepieniężne klientów?

ABSTRACT

The article is a result of a qualitative empirical study designed to reveal whether personal injury lawyers in the State of Michigan implement compassionate counseling practices. The study contributes to a well-established body of research pertinent to the development of soft skills in legal practice, whilst also attempting to proliferate and highlight the benefits of out-of-court settlements. The research was designed to study the nature of compassionate counseling practices and its effect on mediated settlements. Consequently, the research analyzed how lawyers evaluate intangible and

CORRESPONDENCE ADDRESS: Maria Cudowska, PhD, Assistant Professor, University of Bialystok (Bialystok), Faculty of Law, Department of Commercial Law, Adama Mickiewicza 1, 15-234, Bialystok, Poland.

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non-monetary interests of clients and whether those play a role on the dispute resolution continuum. The paper also elaborates on what lawyers do and do not do well in assessing intangible interests of clients. The study posits that if lawyers attend to those intangible interests, it is a form of compassionate practice. Therefore, the study has both theoretical and practical implications for lawyers and mediators. Last, the study suggests that alternative dispute resolution mechanisms, such as mediation, attribute to a speedier resolution of personal injury disputes.

Keywords: compassion; lawyers; alternative dispute resolution; personal injury; mediation

Pain is the first proper step to real compassion.
D. Whyte[1]

INTRODUCTION

If 21st-century lawyers live in an era of retreating lawsuits,[2] why do the same lawyers tackle similar problems, but in an alternate universe of alternative dispute resolution (ADR)?[3] Benefits of early settlements[4] may be obvious[5] to modern lawyers. Thus, what are the challenges of delivering good[6] results for clients in a non-adversarial setting? If counsel subconsciously transposes litigation techniques

[1] D. Whyte, *Consolations: The Solace, Nourishment and Underlying Meaning of Everyday Words*, Edinburgh 2019.

[2] J. Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, 24.7.2017, https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572 (access: 5.3.2023).

[3] "Alternative dispute resolution (ADR) techniques should be refined and utilized more often in tort cases. (…) perhaps lawyers in the future will come to resemble peacemakers more than gladiators. But we must also guard against the pollution of the ADR system by disingenuous insurers and unethical and money-driven mediators, who sometimes do not help to deliver juster justice as they should" (A. Linden, *American Tort Law: Shining Beacon?*, "Pepperdine Law Review" 2011, vol. 38(2), pp. 215–230).

[4] J. Lande, *How Advocates Can Manage Cases Better, and Get Good Results, with Planned Early Negotiation*, "Alternatives to the High Cost of Litigation" 2011, vol. 29, p. 161.

[5] Studies suggest potential benefits to early settlement offers made by lawyers and insurance companies representatives that clients can generate substantial savings on both sides of the litigation spectrum. See J. O'Connell, P. Born, *The Cost and Other Advantages of an Early Offers Reform for Personal Injury Claims against Business, Including for Product Liability*, "Columbia Business Law Review" 2008, no. 2, pp. 423–426.

[6] A young attorney pointed to the importance of reassuring clients that they are making a good decision, especially if the offer on the table is good: "We always try to reassure the clients that they are making a good decision, if the offer is good" (Interview, A4). What constitutes a "good" settlement offer has not been specified.

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to ADR processes,[7] such behavior may result in bad-faith bargaining.[8] Seemingly, clients are also likely to misuse amicable processes, which would then lead to settlement delays and other disappointments.[9] Counsel mismanages ADR processes only later to fully embrace mediation as the only appropriate dispute resolution venue.[10] Also, one practical problem is that although teaching ADR has been gaining in popularity, a collaborative and compassionate "problem-solving" mindset is still not the norm. The paradox seems to be that only after experiencing the adversarial environment, one can appreciate the advantages of mediation and commit to an ADR-based practice, as evidenced by research performed for this study.

Even though most personal injury (PI) cases seem to be legitimate,[11] in some communities PI litigants are looked down on and criticized for fostering overly litigious behavior. Intangible interests and non-monetary goals of parties often coincide with intangible injuries.[12] Indescribable, intangible "things" often motivate litigation.[13] Thus, in the realm of personal injury disputes, legal remedies may not always suffice. As far as injuries are concerned, there is a stark contrast between what can be seen, and that, which cannot. Seemingly, as far as clients' awareness is concerned the same type of contrast may exists between tangible and intangible injuries. Therefore, intangible and non-monetary considerations are the focal point of this study.

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[7] J.M. Nolan-Haley (*Lawyers, Clients, and Mediation*, "Notre Dame Law Review" 1998, vol. 73, p.1369) raised the question of how lawyers should adapt in and switch gears in a mediation setting two decades ago, arguing for an implementation of problem-solving approaches. Also, litigation experiences brought into mediation do damage to the process. See J. Mason, *How Might the Adversarial Imperative Be Effectively Tempered in Mediation*, "Legal Ethics" 2012, vol. 15(1), p. 111.

[8] M.A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, "Indiana Law Journal" 2001, vol. 76(3), p. 591.

[9] E.J. Hickling, E.B. Blanchard, M.T. Hickling, *The Psychological Impact of Litigation: Compensation Neurosis, Malingering, PTSD, Secondary Traumatization, and Other Lessons from MVAS*, "DePaul Law Review" 2005, vol. 55(2), p. 617.

[10] "Mediation is probably the number one retirement avenue for about every lawyer" (Interview, A18).

[11] The Michigan Department of Insurance and Financial Services (DIFS) Fraud Investigation Unit, *2021 Annual Report*, https://www.michigan.gov/documents/difs/FIU_Annual_Report_2021_730217_7.pdf (access: 5.3.2023). The report suggests that most fraudulent claims by type of insurance coverage are auto/no-fault claims (*ibidem*, p. 5).

[12] S. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, "California Law Review" 1985, vol. 73(3), p. 772.

[13] See D.M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, "Law & Society Review" 1984, vol. 18(4), p. 551. The paper is a study on social perceptions of personal injury litigation in a small rural community in Illinois. An excerpt from the article reads: "A lot of people who are resentful for it, because (…) he chose to sue. There's been, you know, not hard feelings, just some strange intangible things (…)".

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The study investigates whether counsel focuses on intangible interests and, if so, does that reflect compassion.[14] A reason why lawyers would have a different level of compassion about clients' non-monetary interests in mediated cases, as opposed to non-mediated cases, is because mediated cases are more likely to be strongly disputed or else, they would be resolved without mediation. In this paper, I will argue that it is important to investigate, through empirical research, how counsel addresses intangible interests of clients. Research suggests that everyday decisions can be subject to a lot of "noise", which is an undesirable variability in judgment of the same problem. Thus, it may be that lawyers are impacted by such noise and as a result they do not communicate with their clients about intangible interests, simply because they have been repeating the same pattern of communication practices.[15] There needs to be more empirical research on the matter of intangible and non-monetary interests in legal disputes and lawyer-client communication. With more data there could be a better understanding of why communication breakdowns between counsel and clients occur, and if those breakdowns can be attributed to lack of compassionate communication.

Further, a better understanding of intangible interests in personal injury litigation may help counsel utilize compassion in a more conscious and meaningful way. As P. Bloom notes: "Compassion is biased, and even cost-benefit reasoning is biased. Even when we try hard to be fair, impartial, and objective, we nonetheless tend to tilt things to favor the outcome that benefits ourselves".[16] Although this study suggests that lawyers use compassion intuitively, the main goal is to present what lawyers do and do not do well in dealing with client's intangible interests. Although the intersection of compassion and tort law has been analyzed from an

[14] Some of the benefits of empathy that are applicable to law are: greater efficiency and accuracy in the client interview, increased client satisfaction, higher rates of settlement and lower stress and healthier practitioners. See E.J. Gould, *The Empathy Debate: The Role of Empathy in Law, Mediation, and the New Professionalism*, "Vermont Bar Journal" 2010, vol. 36(3), p. 23. The idea of running an empathy-based practice stems from education. Training students in compassion is a quest that may go beyond traditional pedagogy. Teaching the language of compassion that not only helps to communicate with others but also helps to get in touch with oneself may be an essential part of successful lawyering and some even say, a happy life. See J. Cho, K. Gifford, *The Anxious Lawyer: An 8-week Guide to a Joyful and Satisfying Law Practice through Mindfulness and Meditation*, New York 2016.

[15] Examples of areas and situations that are mostly affected by noise are medicine, child custody cases, forecasts, asylum decisions, personnel decisions, bail decisions, forensic science, decisions to grant patents. See D. Kaheman, O. Sibony, C.R. Sunstein, *Noise: A Flaw in Human Judgement*, New York 2021, pp. 6–7.

[16] P. Bloom, *Against Empathy: The Case for Rational Compassion*, London 2016. There are differing opinions suggesting that empathy may also be a negative and unnecessary interruption that may cloud our moral judgment. Bloom argues that compassion may be a better way out of situations that may require, or traditionally involve, an emphatic response.

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angle that focuses primarily on jury trials and judicial empathy,[17] taking a new perspective of counsel may be valuable to multiple actors on the personal injury conflict spectrum.[18]

METHODOLOGY OF THE RESEARCH

Interviewees were first recruited through the biggest defense and plaintiff organizations in the State of Michigan, such as the Michigan Association of Justice and Michigan Defense Trial Attorneys Association, as well as the ADR and Negligence Sections of the State Bar of Michigan.[19] Interviews were then scheduled on a snowball-referral system that asks the interviewees to suggest other lawyers who would like to participate in the study. The present study and findings are based on 18 interviews.[20] Each interview started with an introduction and an explanation

[17] A significant portion of tort scholarship focuses on the empathetic, compassionate, and sympathetic components of the decision-making process, advocating for greater use of emotion-based judgments and decisions. For example, see R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, "Tennessee Law Review" 1997, vol. 65(1). Also, the scholarship investigating the connection between legality and empathy argues for a greater use of human story narrative that reflects the difficulty in making moral choices and an overall responsibility of decision makers. See L.N. Henderson, *Legality and Empathy*, "Michigan Law Review" 1987, vol. 85(7), p. 1574. On judicial empathy, see T.B. Colby, *In Defense of Judicial Empathy*, "Minnesota Law Review" 2012, vol. 96, p. 1944; R. Delgado, J. Stefancic, *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, "Case Western Reserve Law Review" 2019, vol. 70(1), p. 23; B. Fissell, *Modern Critiques of Judicial Empathy: A Revised Intellectual History*, "Michigan State Law Review" 2016, no. 3, p. 817.

[18] The protocol involved many complex questions that did not produce complete and accurate answers. The main challenge of the study was to inquire about specific, non-monetary interests and intangible goals of the clients that were designed to reveal whether those subjects were empathic towards their own clients and their counterpart's clients. Having acknowledged that the inquiry of empathy and compassion is subject to a multitude of cognitive bias, I opted to ask about the "intangibles" instead. The original research idea was to divide plaintiff and defense attorneys and juxtapose their answers. However, since most of the participants of the study were acting both as counsel and mediators, their perspective was in fact a holistic assessment of all of their experiences.

[19] The organization that responded to the research request was the ADR Section of the State Bar of Michigan. At the later stage of the research, I relied on the snowball sampling process. I would like to thank the Chair of the ADR Section of the State Bar, Mrs. Betty Widgeon, for her assistance and support.

[20] Originally, having interviewed 22 practitioners, I have excluded four from the study as their primary focus was not PI work. Instead, it comprised of a mixed practice area; a small practice that included, but was not limited to domestic relations, divorce, probate and estate, tax and workers compensation. One insurance adjuster was labeled as A17, however statements from that interview do not appear in the paper. Some of the mediators interviewed for the project have had a mixed practice with some elements of PI cases. The shortcoming of the study is that most of the lawyers interviewed had a mixed practice, with only three focused only on PI dispute resolution.

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of Human Rights Protection measures regulated by Michigan State University.[21] First, participants were asked several questions about their background and practice. Most participants already established careers as either plaintiff or defense attorneys. Over half of the participants also moved into a partial or full ADR practice acting as full-time facilitators or mediators.[22] Majority of the interviewed participants had over 30 years of practice. Only two younger lawyers had a minimum of one year of experience.

Questions focused on mediated personal injury disputes, including disputes that were mediated before lawsuits were filed. Participants were asked about cases in which they represented a party, and not cases in which they were mediators.[23] Unfortunately, incidental statements of pre-suit settlements have been reported and for that reason the paper is not "stage specific". Background questions were designed to solicit information such as length of practice, practice area, and to provide some general consideration about their clients: (1) estimate how many mediations they participate in a typical month, and (2) how they establish a good working relationship with their clients. The primary focus of the investigation was for the interviewees to tell a story about a case they settled most recently in mediation.[24] Interviewees described a personal injury case that settled in mediation, which party they represented, how the case unfolded, and what that respective client's goals or interests[25] were in the case.[26] Participants were also offered a set of questions

[21] The interviews were conducted via ZOOM. The participants were instructed about the goal of the research, and informed about the measures that ensured confidentiality. They were instructed about the voluntariness of the interview process, data collection and data retainer. To further protect confidentiality, the participants were instructed not to mention anyone else's name and, instead, use generic descriptions such as the other lawyer, my client, a manufacturing business, etc. The interviews usually went on for an hour to up to two hours.

[22] One of the major challenges of the research was also that almost all of the interviewees were men, with only three female attorneys being interviewed, two of whom were also mediators. The study does not fully reflect on the diverse population of lawyers and mediators in the State of Michigan, which certainly has an impact on some of the considerations presented in the paper. Conversely, lawyers did reflect on a diverse pool of clients they represent: "I have clients who are poor as church mice and are reasonably wealthy. African American, Indian, Middle Eastern; not a lot of Asian clients, hardworking blue-collar clients".

[23] As some of the participants no longer acted as counsel, the final version of the paper also includes considerations from mediators.

[24] Interviewees were asked to elaborate on their most recent mediations. However, some invoked examples of mediated personal injury cases from the past, as their practice was only focused on mediation.

[25] The majority of lawyers agreed that intangible interests are present in most cases. The main challenge identified by the attorneys was whether those interests played a significant role in the dispute resolution process.

[26] The question of whether the participant's client had any non-monetary goals or interests was somewhat problematic for some of the interviewees. However, when explained that those may involve, but are not limited to – a desire to express their feelings about unfairness, to receive an apology or feel

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concerning the legitimacy of their own clients and their counterpart's clients' interests.[27] All lawyers who participated in the study were based in Michigan. Thus, they elaborated on dispute resolution differences present in large urban areas, such as Detroit, Ann Arbor, Grand Rapids, as well as smaller, rural areas of Michigan.[28]

Mediation in PI disputes is like a boomerang[29] in a sense that parties are offered multiple opportunities to settle. Thus, ADR appears as soon as discovery is completed. Parties proceed either (1) to facilitation or mediation at their own discretion at any stage of the process or are redirected to (2) case evaluation or court-ordered

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vindicated, avoid the stress of litigation, get on with their lives or business, avoid setting a precedent, or other interests. When explained in this manner, the interviewees had no problems identifying the issues that were relevant to the study. The interviewees were also asked specifically what they did do or say to achieve those non-monetary interests: "What did you do, if anything, to try to achieve your client's non-monetary interests? [Was it successful? Why not?] To what extent, if any, were your client's non-monetary interests satisfied in this case?". The interviewees emphasized that in that specific instance, those non-monetary interests were simply not possible to achieve, but they knew "where the parties were coming from".

[27] In most case studies analyzed, the participants discussed the "other side", which was often an insurance company, and the interests were clear-cut getting the case dismissed, not paying the full amount of what was available under the policy, etc. It cannot be unequivocally stated that attorneys offer any empathy to the other side. There was little-to-no evidence on account of compassion or empathy; rather, the attorneys communicated that they understood the position that the other side had taken.

[28] Also, lawyers were asked to elaborate on a case where the mediator did a good job expressing concern about the clients' non-monetary interests. The participants were asked to specifically elaborate on an instance where the mediator did a poor job of expressing concern about their client's interest as well. Finally, the interviewees were asked to generalize as to why some mediators are concerned about parties' non-monetary interests and others are not. The challenge might not be the case that some are concerned about the non-monetary issues and others are not, but that the same mediator might express a concern in some cases, but not in others. The final question presented an opportunity for the interviewees to speak their minds freely on whatever issue they deemed appropriate (Is there something I didn't ask that I should have asked?).

[29] Under the court rules, the judge may submit a case-to-case evaluation in any civil action in which the relief sought is primarily money damages or division of property. Case evaluation panels shall be composed of three persons. The procedure for selecting case evaluation panels is as provided in MCR 2.404. A judge may be selected as a member of a case evaluation panel, but may not preside at the trial of any action in which he or she served as a case evaluator. A case evaluator may not be called as a witness at trial. During the interviews, the participants reflected upon the need to reassess the necessity of the existence of case evaluation, as it does not reflect the monetary reality of settlements and may create an obstacle in the resolution process. The benefits of the so-called "Michigan Mediation Model" that was developed in the 1980's are such that the parties have numerous opportunities to settle. Under the court rules, judges can make their own scheduling orders and order mediation before case evaluation or after. It is at complete discretion of the court wherein the case is pending whether the matter is ordered to case evaluation; in the event it is ordered, the court rules provide the attorneys the ability to stipulate to removing the matter from the case evaluation process and go through mediation in lieu of the previously ordered case evaluation hearing. As of 1 January 2022, the court rules have removed all sanctions associated with rejection of a case evaluation award; as such, many attorneys have sought mediation in lieu of case evaluation.

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mediation. Mediation in Michigan (or facilitation) of personal injury cases resembles shuttle diplomacy.[30] Therefore, Michigan lawyers are knowledgeable and comfortable in various alternative dispute resolution processes. Lawyers find out about intangible and non-monetary goals (1) at early stages of a case or (2) when a trial date is approaching. Therefore, it has been determined that ADR processes are what help settle most PI disputes. Yet, in personal injury disputes, cases usually settle through case evaluation, which is a method that most interviewed lawyers express much discontent about. Interviewees agreed that case evaluation is ineffective due to time constraints and inequality of evaluation panels.

WHAT LAWYERS DO WELL?

There are several things that lawyers do well in personal injury disputes. However, there are also many roadblocks that can affect compassionate communication negatively. All lawyers focus on legal issues relevant to a client's case, such as the applicable law, the strength of the evidence, and the overall merits of the case. Often, clients want nothing more than (1) to receive compensation for their injuries or wrongs they suffered and (2) to settle the matter quickly. Other times, however, clients may have additional issues that they want to have addressed. These could be things like making sure the other side fully understands the harm they have suffered, admits responsibility, offers an apology, receives some form of punishment, or agrees to adopt measures to prevent future injuries from occurring. Personal injury clients seem to have those additional issues that they may want to address. However, there are two difficulties associated with additional client issues.

Lawyers seem to identify additional issues too late. Even if such intangible interests exist, clients do not seem to be aware that they are equally as important as monetary ones. For example, if a client is injured in a car accident, their non-monetary interest is to get back to normal (to get back to the same state before the accident happened). However, a client may never get back to their condition from before the accident and that feeling of not being compensated fairly can linger and cause further damage on the client's well-being. Therefore, attending to client's mental state is of tremendous importance and could be an example of an intangible

[30] The *modus operandi* of personal injury settlement processes, especially those that arise from an auto-vehicle accident, is that it separates the injured party from the process. The process model usually involves the plaintiff, the defendant's attorney representing (sometimes the insurance company itself is the named defendant), the claims adjuster, as well as the mediator. "Michigan litigators are most comfortable with an all-caucus-all-the-time model managed by an evaluative mediator who shuttles back and forth between rooms" (S.J. Stark, *Making the Most of Mediation: 10 Tips for Maximizing Results in the Process*, https://www.starkmediator.com/wp-content/uploads/sites/4/2013/10/2013_Article_Making_the_Most_of_Mediation.pdf, access: 5.3.2023).

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interest. One lawyer observed: "That [not being aware where the client is at mentally] can really hurt your client if you are not cognizant of where they are at".[31] Further, it is also important to remember that PI clients may live with pain in one form or another every day, which requires a lawyer to be especially alert to their client's interest.[32] Thus, approaching clients requires a special type of alertness, which if done appropriately, can help properly identify intangible interests. What can stand in the way of such alertness is the significant workload of both plaintiff and defense counsel.[33] PI cases may have repetitive fact patterns, but PI clients are almost never repeat customers. So, there seems to be less incentive for lawyers to spend an equal amount of time on interests other than monetary goals. However, clients value the feeling of camaraderie and working towards a mutual goal. One lawyer made the following observation on the matter: "At least for the duration of the case, she felt like she had a friend in our team. She felt heard by both our team and the other side as she was able to get a monetary settlement, which was also a goal of hers. However, at least for the duration of her case, my client felt she had a voice and was able to prove the insurance company's flimsy liability defense wrong through the court system".[34]

Permanent disability of clients, elongated settlement processes, repetitive claims, and incidental nature of lawyer-client relationships are a few contributing factors that may effectively block compassionate communication. Further, repetitiveness of claims may elicit a form of an automatic response or a communication pattern from counsel, who may or may not be compassionate. With crucial roadblocks being identified, it is important to focus on what good lawyers do to address intangible and non-monetary interests.

1. Good lawyers communicate using emotions

First, communicating with someone who sustained an injury may cause difficulties to counsel. It seems that the injury stands before the person. Thus, injuries are repeatedly scrutinized and evaluated, perpetuating mental and physical exhaustion of clients. Yet, emotions can have an impact on case value. One attorney noted: "I guess I'll say this. I tend to put more value on the case than I otherwise would have if that same person came to me and said I've got X, Y, and Z injuries. They said all the same things but didn't have an emotional response about the accident".[35] It is

[31] Interview, A21.

[32] K. William Gibson, *Keeping Personal Injury Clients Happy*, "Law Practice Management" 1998, vol. 24, p. 50.

[33] Some lawyers, both on the plaintiff and defense sides, indicated that they operate around 100 files. Interview, A20.

[34] Interview, A20.

[35] Interview, A11.

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standard defense practice to cast doubt on real life-changing effects of an accident on a person's life,[36] but with an appropriate emotion management process, a case may move forward faster and settle for a higher amount. It seems that what may help is a team effort of the lawyer and the client. Designing the narrative of a case so that it gives emotions a legitimate place in the conversation could be beneficial and help appropriately assess the value of a case.[37]

2. Good lawyers explain the process

Next, while some lawyers understand the importance of alertness to emotions in the settlement process, others put more emphasis on education as an element of establishing trust: "I think in establishing that relationship, I also have to be very frank with them [clients]. And then finally, I have to be an educator.[38] I have to tell them the truth because that brings trust always. I have to be honest with them. Here's what I think of your case. Here's what you're going to have to do. Here's what's going to be involved. Probably you won't like it. Anyhow, it's going to be a lot of stress, both emotional and economic. And you may not get the result you want. I think those things are establishing trust. Learning about the client and their objectives, and educating them are tools that I've used to build good client relationships and then build them fairly".[39] The trust-building strategy coincides with Rule 1.4 of the Michigan Rule of Professional Conduct.[40]

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[36] See Mich. Comp. Laws Ann. § 500.3135(5)(c) It affects the injured person's general ability to lead his or her normal life, meaning it has had an influence on some of the person's capacity to live in his or her normal manner of living. Although temporal considerations may be relevant, there is no temporal requirement for how long an impairment must last. This examination is inherently fact and circumstance specific to each injured person, must be conducted on a case-by-case basis, and requires comparison of the injured person's life before and after the incident. To demonstrate a "serious impairment of body function", as used in Michigan's no-fault law as threshold for the recovery of non-economic damages, a plaintiff must show that an accident-related injury had an influence on some of the person's capacity to live in his or her normal manner of living; this inquiry necessarily requires a comparison of the plaintiff's life before and after the incident. See Mich. Comp. Laws Ann. §§ 500.3135(1), 500.3135(5); *Lopez-Garcia v. United States*, 207 F. Supp. 3d 753 (E.D. Mich. 2016); 2A Mich. Civ. Jur. Automobiles and Motor Vehicles § 439.

[37] For example, see P.T. Hoffmann, *Valuation of Cases for Settlement: Theory and Practice*, "Journal of Dispute Resolution" 1999, no. 1; G. Herman, *How to Value Case for Negotiation and Settlement*, "Montana Lawyer" 2005, vol. 31(3).

[38] Counsel may also appreciate clients that already have information on an important topic relevant to their case: "It's important to educate yourself, so I can appreciate when they [clients] are educated; it's important for me to recognize that they may be right or they may be wrong and they may have read something improperly (…)" (Interview, A21).

[39] Interview, A19.

[40] Rule 1.4 "Communication", in relation to mediation explicitly states: "A lawyer who receives an offer of settlement or a mediation evaluation in a civil controversy (…), must promptly inform the

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Of course, honesty helps shield clients from future disappointments and has a trust-building capacity. In sum, a stand-alone good practice is for lawyers to inform clients about strengths and weaknesses of their case in an appropriate fashion: "Lawyers are talking about how good their case is and how terrible the other cases are (…) and particularly in personal injury cases, oftentimes the injured people will be unsophisticated. And so they're sitting there and having a lawyer tell him how terrible their case is, and I just don't think that's productive".[41] Additionally, giving clients an opportunity to vent is also a trust-inducing tool: "Getting your clients to trust you, I think, is being able to whine, listen to them, listen to their side of it, empathize with them about their side of it, and understand where they're coming from and what they're dealing with".[42] The question then becomes what parties really want, and how those wants and needs translate into measurable relief (and equitable) relief. Turns out, being compensated for the harm is as equally important as fixing the system.[43]

Finally, lawyers agree that developing relationships with all parties that are involved in a dispute is also important: "I will spend much more time trying to develop a relationship with the insurance adjuster (…) insurance adjusters by and large are suspicious of lawyers, not only the mediators, but also their own lawyers. So, on both sides, I think people who do as many mediations as I do will make that effort on both sides".[44]

3. Good lawyers talk about money

Next, no lawyer wants to waste time or money: "(…) the person is seeking financial compensation and one of the jobs is to get the most money that we get and put that money in their pocket. Part of facilitation,[45] (…) is that it reduces costs. Trials can be between $10,000 and $20,000, and mediation can be between $500 and a $1,000. One of the main points that I explain to clients is that at the end of the day, what we are trying to do is settle your case. And this way, it is cheaper than going to trial. And you will put more money in your pocket. Because the way

client of its substance. Also, the adequacy of communication depends in part on the kind of advice or assistance involved. In litigation, a lawyer should explain the general strategy and prospect of success and ordinarily should consult the client on tactics (…), on the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and consistent with the client's overall requirements as to the character of representation".

[41] Interview, A22.

[42] Interview, A14.

[43] Interview, A7.

[44] Interview, A22.

[45] Lawyers participating in the study referred to alternative resolution processes interchangeably using the terms "facilitation" and "mediation".

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my fee structure is set, I take one third of the awarded settlement as well as cost. So, there are fewer costs or money in their [clients] pockets".[46]

Therefore, a steady flow of personal injury cases incentivizes settlements for lawyers, both from a financial and public relations perspective. Further, it has been emphasized that avoiding transactional costs is another reason why ADR became such a common tool resolving PI disputes as one lawyer suggests: "One of the reasons why there is a proliferation of the use of ADR is that clients want to avoid transactional costs. (…) There is a psychological aspect to it, as nobody wants to walk around with a case in their mind (…) still, there are clients who still enjoy the game of litigation".[47]

There may be a flaw in the system that directs lawyers to take a more pecuniary view of most personal injury cases. Because of that, lawyers omit intangible interests and goals in personal injury cases. One lawyer now mediator observed: "Whether you slip, or someone hits you in the head, the system should say: we will provide you a safety net; if someone does it intentionally – it could be a crime. The tort system is based on fault and insurance, premiums and people making a living out of the system. Lawyers make a living out of the injured – because the system says that is the only way you will get paid".[48] Thus, it may seem that lawyers who work on a contingency fee do take a much more hard-boiled pecuniary view of their obligations.

Moreover, based on the interviews, it seems that lawyers rarely compare results with each other based on non-monetary goals. However, lawyers use some form of non-monetary analysis in evaluating cases. Lawyers may analyze angles such as "whether somebody's empathetic or antagonistic. Is somebody going to get the benefit of the doubt? Is the delay in getting your money going to hurt somebody? Some people have plans for the money they're going to get (…) it includes a whole variety of (…) what are the jurors liked in this county".[49] Thus, non-monetary considerations are present, but the extent to which these play a role is unclear. There are lawyers (now mediators) that acknowledge the existence of non-monetary considerations in virtually all cases.[50] Others believe "there are virtually no cases, 0 cases where there was not a substantial overriding interest that was nonmonetary, it's all about the money".[51]

In sum, addressing monetary and non-monetary concerns can have procedural and monetary value. It appears to be a good practice for lawyers to address monetary

[46] Interview, A21.
[47] Interview, A16.
[48] Interview, A7.
[49] Interview, A9.
[50] *Ibidem*.
[51] Interview, A23. It has been the only interview in the process where counsel expressed such a statement.

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concerns first, followed by a discussion on non-monetary interests and goals. The study suggests that lawyers may not compare case results based on non-monetary considerations. When lawyers explain how mediation and a settlement process operate, it can benefit clients both from an economic and psychological standpoint. In doing so, lawyers may disburse cases faster and put money in client's pockets faster.

4. Good lawyers talk about intangible interests

Clients may have unreasonable expectations entering mediation. Clients can overvalue their claims, and one lawyer in the study illustrated the dilemma with the following question: "In order to answer the question of what a broken arm is worth it ultimately depends on whether it's your arm or mine".[52] Yet not all lawyers dismiss the importance of non-monetary goals and interests. Some even think that it is unethical not to: "I think it is inappropriate and unethical for lawyers not to consider those non-economic aspects of cases; I've been making this argument for 30 years – I have not gotten much traction".[53]

So, it seems that perspective taking could help better understand why a client puts a high value on an intangible interest. As much as some people would like to see personal injury litigation from the lens of money, reality is not that simple: "In some personal injury cases I handle, the client is not necessarily concerned about receiving large sums of money, sometimes the client just wants to be heard – whether that be by the defendant or a jury. Focusing on these matters at the beginning of the case allows your client to 'buy into' what you are doing as the person representing the claimant. For the first time in their life, people are being taken care of, for the first time someone asks them. (…) People don't want this to end. Why are we here? We are here to talk about my case".[54] It seems that some clients enjoy the attention that litigation or mediation offer. Apparently, some do not even want that to end. Other experienced defense attorneys noted that: "Plaintiffs are needy, and especially catastrophically injured people, can be high maintenance clients, requiring more care and attention".[55] Therefore, personal injury clients do have special needs that may require more attention from lawyers.

Next, one lawyer in the study speculated that "most plaintiffs could have some measure of a non-monetary goal in mind when they bring a case in, while most plaintiff lawyers do not. When lawyers are negotiating, it seems they seldom talk about non-economic damages. What matters instead is to achieve goals that you can deposit in a bank account. When lawyers talk about a broken arm, they never

[52] Interview, A19.
[53] *Ibidem*.
[54] Interview, A10.
[55] Interview, A23.

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discuss non-monetary aspects. Comparatively speaking, in a malpractice context, non-monetary considerations, such as reputation, non-disparagement provisions, and confidentiality, matter. To a negligent driver, property, or dog owner, that non-monetary consideration does not matter very much. The owner of the dog does not want to be reported to the humane society, nor do they want their dog to be put down. That is why those cases settle for more than the injuries are worth, because it has a non-monetary consideration".[56] Yet, interviewees emphasized that there are lawyers that address intangible interests, and that's a good thing.[57] For example, in a case involving a child who has suffered brain damage and was going to need a lot of care for the rest of his life, in the context of non-monetary value, the lawyer explained: "Non-economic acquired intangible interests were basically to secure the future and whatever medical needs that could have been inclusive, non-monetary. It allowed the mom and dad to have peace and closure because they knew they had now provided for their child. And so, I had the opportunity to chat with them (…) it was incredible to see the emotion. They had done the best they could for the child. That was really heartwarming".[58] The goals were monetary, but they were going to compensate for the non-monetary goal, which was long-term care.

In conclusion, evidence suggests that even though clients may have unreasonable expectations at the outset of the case, lawyers can use perspective taking to understand why that may be the case. If the lawyer is attentive and in tune with the client's needs and recognizes that the client's goal is to be heard then it is up to the lawyer to suggest an appropriate venue of resolving the dispute, one that preferably does not include litigation. Finally, if present in a case, intangible interests of clients can determine a higher settlement outcome.

5. Good lawyers address intangible interests creatively

Creative solutions may help to move a case forward. A former defense attorney, now mediator, described a case where they represented a man who fatally struck a young child in an auto vehicle accident. In the case, the client was driving down the street, not going fast. The child had darted into the street, making it impossible for the driver to stop. As a result, the child had been fatally struck. The lawyer emphasized that: "(…) the mother was just, as you can imagine, just devastated". The issue was that the client did not have a lot of money on his insurance policy, yet the insurance company offered the entire amount of the policy without any questions. The underlying issue of the case, which is the non-monetary goal of the mother of the child, was that she wanted for the defendant to pay out of pocket.

[56] Interview, A19.
[57] Interview, A22.
[58] Interview, A19.

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What settled the case was a donation that was made to a cause that the parents of the child were involved in. The money donated was for a charitable cause, which was a scholarship that was made under the deceased child's name. Although the relief was monetary in nature, the scholarship got the case settled.[59] The lawyer noted that the settlement arrangement was unusual, but it surely is an example of out-of-the-box thinking, and a benefit of mediation where parties are in an environment where their ideas can be discussed freely.

However, creative solutions may not even be discussed. For instance, a lawyer's bias may influence their objectivity, the overall monetary and non-monetary assessment of the claim and effectively "roadblock" the option-generating process. One lawyer observed that: "(…) but I do suspect sometimes that, and maybe my own inherent systemic bias factors into this. That sometimes if it's an old white lady crying versus a young black man crying, I might have a different reception to the claim (…)". The lawyer continued: "I am ashamed to say it, but I wonder sometimes whether I'm being objective or if I have some sort of social systemic bias that is impacting my objectivity. I think more people from socioeconomically depressed areas are more likely to engage in insurance fraud because there's a necessity and economic necessity. The history of our country has resulted in more people of color have ended up in more socioeconomically depressed situations. So, then you start to wonder, am I being objective?".[60]

6. Good lawyers collaborate with good mediators

The case involved a client getting into an accident while driving his golf cart.[61] The client used the golf cart to get around the small town in which he lived. On the day of the accident the client was looking at a construction site on the main street, and without warning was hit by an object, ejected from the golf cart, and hit his head on the pavement. The client was knocked unconscious, broke a leg, an arm, suffered a brain injury, and had a fractured pelvis. It seemed important for the lawyer to pay attention to details and to make sure clients knew they were being taken care of, allowing them to open up and get more personal: "Well, they [clients] have them [non-monetary goals] and I found out about it, but just by sitting in their living room and drinking coffee. (…). You not only get to ask them, what are the facts that brought you to hire a lawyer? You're able to ask them the more meaningful question, which is: why did you hire a lawyer? And that's a question, you only answer truthfully".[62] The client wanted an acknowledgment that this was

[59] Interview, A5.
[60] Interview, A9.
[61] Interview, A19.
[62] *Ibidem*.

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not their fault and that he spent most of his life providing for his wife and children. The client owned an independent car repair facility and had the mentality of providing for others. The accident was going to deprive him of the ability to provide for his family. The lawyer noted that "the simple things such as the ability to pick up the check at a restaurant for a family celebration, or anybody's birthday party, as well as giving his daughter who was struggling" was important to the client. The client needed and wanted to provide for the family and was so concerned that the injuries he suffered in the crash would prevent him from doing so. The client had difficulty to process what had happened. The client needed to know that the accident was not his fault.

The case had been filed in a conservative county of the state. The striking driver had a low limit insurance policy of $50,000.00, and the injured party had an underinsured motorist policy with her own insurance company in the amount of $300,000.00; thereby providing a total of $300,000.00 in insurance coverage available to the injured party.[63] It was a comparative negligence claim. The issue has been that his vehicle was probably illegal, even though it had lights. Because the client lost his conscience after hitting the pavement, he did not remember what happened. The case went to mediation. The lawyer defending the golf cart driver said that by far the most effective aspect of mediation was picking the right mediator. Choosing someone respected, someone whose opinion will move the other side was key. In the lawyers' opinion, former defense lawyers or former vice presidents for claims are the best mediators.

[63] With automobile injury claims, a person can elect to voluntarily pay a higher premium for additional coverage in the event an at-fault driver injures them, and the at-fault party's insurance coverage does not suffice to compensate the injured party for their life changes and pain and suffering. Under the circumstances of this case, the injured party paid for $300,000.00 in underinsured motorist coverage, meaning that if someone had a lower limit then $300,000.00, the injured party could then turn to their own insurance company for damages in excess of the underlying policy. However, the injured party's total claim against their own insurance company would be reduced by the amount of money contained on the at-fault party's insurance policy. Therefore, in the above fact pattern, the injured party could only claim $250,000.00 (maximum) as against their own insurance company. With automobile injury claims, a person can elect to voluntarily pay a higher premium for additional coverage in the event an at-fault driver injures them and the at-fault party's insurance coverage does not suffice to compensate the injured party for their life changes and pain and suffering. This is not a mandatory requirement for holding automobile insurance in Michigan; in Michigan, the No-Fault Act mandates that drivers must hold a minimum amount of insurance if they intend to drive on the public roadways. See Mich. Comp. Laws Ann. § 500.3101(1). Under the circumstances of this case, the injured party paid for $300,000.00 in underinsured motorist coverage, meaning that if someone had a lower limit then $300,000.00, the injured party could then turn to their own insurance company for damages in excess of the underlying policy. However, the injured party's total claim against their own insurance company would be reduced by the amount of money contained on the at-fault party's insurance policy. Therefore, in the above fact pattern, the injured party could only claim $250,000.00 (maximum) as against their own insurance company.

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After the clients consult with their lawyers, good mediators come in to conclude the process. Good mediators will use techniques that reflect the intangible interests best. Active listening, as well as emphasizing the strengths and weaknesses of the case, is vital. Repetition of facts and expressions of empathy are key mediation skills. Also, the right atmosphere of feeling understood and heard is what ultimately adjusts different points of view. If one has an unqualified willingness and enthusiasm for trying the case, chances are the other side will be less likely to do the same.[64] Mediators have a difficult task of balancing competing interests and goals. When they intervene at the right moment and are in fact mediating between lawyers, there is a higher chance of reaching a settlement.

WHAT LAWYERS DO NOT DO WELL?

1. They do not address emotions

In general, lawyers recognize quite early on that clients are driven by emotions. Clients are looking to hurt somebody as much as they have been hurt. When attorneys or mediators ask for parties to explain the non-monetary issue further, it is apparent that clients are asking for a lawsuit, but they do not really want one. What clients are looking for in reality is an affirmation or an apology that they never got, or some kind of recognition from other people.[65] Sometimes at-fault parties do not want to admit that they did something wrong, especially in cases of car accidents. For instance, in a case where an elderly woman struck a young man in a fatal car crash, she was not able to compute what had happened to her; she physically could not get past that. The lawyer for the at-fault driver identified factors such as physical and emotional distress as significant impediments to resolving the case. Yet, the lawyer said: "The court does not care about your sad little heart, the court wants the case moved and resolved".[66] So, even if lawyers attempt to address emotions, there is still an issue of a higher authority, such as the court, that does not care about emotions at all. Lawyers have an opportunity to explain that to the parties, which may lead to a more productive settlement process, one which does not involve a direct court intervention.

Also, lawyers need to manage their own emotions. Throughout the study when lawyers were describing cases, they did signal emotions as evidenced by language

[64] Interview, A19.
[65] Interview, A15.
[66] Interview, A10.

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such as: "There was nothing like it"[67] or "It was horrible".[68] Events described by clients can impact lawyers, influence representation, and may also lead to vicarious trauma. Emotions can humanize the dispute resolution process. Counsel may see benefits and drawbacks in empathizing with clients.

Seemingly, lawyers also need to manage client's expectations, which are critically intertwined with feelings. Clients want the person who hit them in a car accident to be put in jail for causing the accident. The clients believe that their case is worth more because the at-fault driver has been drinking. The clients think that the doctor should lose his medical license followed by jail time. One of the ways to bypass those expectations is to explain the purpose of retaining a lawyer: "My job is to pursue civil damages. I do not have the power to put the dog down. I have no ability to revoke the doctor's medical license and I can't put the person in jail for drinking and driving".[69] While being limited in their capacity as counsel, lawyers have an opportunity to utilize and practice skills, such as active listening,[70] which can help address emotions without any cost.

2. They take unnecessary risks

In a case where a young woman was struck by a drunk driver and as a result suffered a permanent back injury, emotions were running high.[71] The woman was angry and needed some space to vent. The injured woman and the at-fault driver were put in a room, without their counsel or the mediator. The lawyer noted that when you run a busy practice you are focused on a "putting out fires". In consequence, lawyers can become short-sided and not creative in their solutions. Lawyers have a lot at risk when they give clients an opportunity to speak freely in an environment that is not overlooked by some type of authority or support system.

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[67] Interview, A9.

[68] Interview, A1.

[69] Interview, A21.

[70] Attorney-client dialogue should recognize the power imbalances that flow from the different spaces occupied by attorney and client and the physical space of the law office. It should also put the lawyer on notice that the interview occurs not in a vacuum, but in the locations – social, political, and affective – occupied by the client and the lawyer. See P. Margulies, *Re-Framing Empathy in Clinical Legal Education*, "Clinical Law Review" 1999, vol. 5(2), pp. 605–617. Also, active listening may be dangerous for several reasons including those that endanger the entire investigation of what has happened in a case. Asking open-ended questions poses some risk, such as "response by the lawyer offers empathy for the client's difficulty, the promise of extrinsic reward for his improving, and the force of expectations (implied in the question, 'what else did he say?') to elicit more information from the client. But the techniques that prompt a faulty memory and uncover accurate facts may also lead the client to begin, even without any conscious intention to distort, to invent new 'memories'" (S. Ellmann, *Lawyers and Clients*, "UCLA Law Review" 1987, vol. 34, p. 717, 742–43).

[71] Interview, A5.

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Those types of solutions can, and sometimes do, produce good outcomes. Some mediators and lawyers are comfortable with not controlling their clients at all stages of the dispute, but risks of leaving clients unattended seem to outweigh the benefits of a potential earlier settlement.

Although not an immediate threat, befriending clients can also be a risk in the context of a personal injury claim. In an auto vehicle case,[72] the lawyer for the plaintiff believed that the client's non-monetary interest was being heard and proving her family member was not at fault for the accident. After the case has been resolved, the client told the lawyer that she considered him and his legal assistant to be her friends. The client explained that she did not have many friends and had really been through a lot after her accident. She was lonely and felt as though the insurance company that covered the at-fault party discounted what she had been through solely because she had chronic neck problems before the accident. Thus, it seems that managing emotions in a personal injury case and setting boundaries are also important features of compassionate advocacy.

3. They don't know how to manage the apology process

Giving and receiving apologies is a form of art,[73] but apology dilemmas are endless: Should they be in writing or in person? What about liability? Thus, it is not uncommon for lawyers to negotiate terms of apologies.[74] However, in personal injury cases, apologies are almost never given. In the event an apology is offered – it is given by the lawyers, or the insurance company, and almost never by the actually involved parties.

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[72] Interview, A20.

[73] See H. Lerner, B. Brown, *I'm Sorry: How To Apologize & Why It Matters*, 6.3.2020, https://brenebrown.com/podcast/harriet-lerner-and-brene-im-sorry-how-to-apologize-why-it-matters (access: 5.3.2023). On the importance of apology in mediation, see Z. Afrassiab, *Why Mediation & Sorry Make Sense: Apology Statutes as Catalyst for Change in Medical Malpractice*, "Journal of Dispute Resolution" 2019, no. 2; J.K. Robbennolt, *The Power of an Appropriate Apology*, "Dispute Resolution Magazine" 2021, vol. 27(3).

[74] The remark was made on account of systems that the courts have in place to reduce their case backlog. Washtenaw County Circuit Court had a system in place that helped to preserve the parties' right at the advent of a significant change in the law, which could have significantly affect the parties' rights. The lawyers underwent a program that was designed to resolve malpractice cases and that was one of the areas where the extent of apologies played a significant role. Also, cases that involved the use of excessive force by law enforcement often had an apology aspect to it as well (Interview, A5). It also happens that "party's draft apology letters to each other: 'We're terribly sorry about what happened. This was nobody's idea of an outcome. We don't think it was malpractice but let us share with you what we think happened and please let us know if we've got it wrong because we don't want to hurt anybody else'. As a result, after 90 days the attorney responded that the client wants to talk to the surgeons and apologize for the way he treated him after the incident happened. To maximize his recovery (…), he asked the surgeon: 'Will you take me back as a patient?' (Interview, A1).

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A person seeking relief is generally angry and wants more than just money. Plaintiffs want acknowledgment that harm was done.[75] Again, it is rare for a defendant to apologize, as it may be treated as an admission of liability. Yet, it seems that injured parties must be given an opportunity to vent: "(…) to have an outlet and to be able to explain to a neutral person what has happened to them and how they have suffered; this goes along with the money".[76] Therefore, the presence of a mediator has the unquestionable benefit that an injured party will be given the opportunity to be heard.

Also, mediators can empathize with parties better. One lawyer noted that: "We can empathize with that [the situation of the client] (…), but we can't just drop ourselves in there and exactly know what their feelings are. (…) maybe we sympathize, but it takes a real toll on people to go through a criminal case or a civil case, it just takes a lot out of you".[77] Another lawyer made an observation that: "I have not been in the same situation, it is difficult for me to say I feel your pain – I can be outraged, but I can't say – I feel your pain".[78] There are many reasons why empathy or perspective taking may not serve lawyers well. Vicarious trauma and other mental health disorders are reasons why lawyers shield themselves from empathizing with clients. Nonetheless, lawyers can and do a lot of acting*:* "It is hard to separate if they feel it or is it situational and I don't believe for a minute that they feel it inside – this is part of their advocacy because it gets them a better result".[79] Acting out emotions is not uncommon for lawyers. However, mediation is a more organic and authentic dispute resolution process, so lawyers have to be mindful of how to manage emotions so that it serves the client's best interests.

Another case[80] does not illustrate a mismanaged apology process, but it sheds some light on how challenging it may be to manage client's expectations. A mom and a child went for a basic dental cleaning. The doctors read the chart wrong and the medical staff wrongfully determined that the patient had a temporary crown that had to be taken out. The mix-up was caused by the wrong name appearing in the office paperwork and the dental assistant and dentist proceeded with the tooth extraction; the mother was not called in until it was too late. The lawyer noted that the case seems like a borderline assault case, as the doctors have cracked the tooth and injured the young patient. The mother demanded an apology from the dental team, which can be labeled as an intangible interest. Further, the mother demanded

[75] Interview, A7.
[76] Interview, A23.
[77] Interview, A2.
[78] Interview, A7.
[79] *Ibidem*.
[80] Interview, A4.

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that the doctors admit fault that they were responsible for the accidental attempt to remove a tooth and caused this injury.

When parties went to facilitation, it was more about getting monetary compensation rather than the doctors admitting fault for the incident. The lawyer who was involved in the case admitted that the mother had a difficult time understanding the mediation process, where apologies would not be a part of the negotiation. However, the lawyer admitted that expressing compassion and sympathy towards the mother was beneficial and had a positive impact on her. The lawyer acknowledged that it was terrible what happened to the client's daughter. Next, the dynamics of pre-suit settlements were carefully explained, with an emphasis that defendants in medical malpractice cases often do not want to admit fault, as it can taint their reputation. Finally, the lawyer admitted that it was important to always check on clients and make sure they are doing well. Apologies appear as one of the intangible goals and interests of parties in the negotiation process. Thus, it seems that managing apology expectations must be carefully considered by counsel at the outset of a case.

4. They do not carefully assess party's interests

Some lawyers become mediators in the settlement processes, especially when a dispute involves multiple plaintiffs that are related to each other. It is challenging to demarcate the exact line where the role of counsel ends, and the role of a mediator begins. A case of a fatal car accident[81] illustrates the difficulty of stepping outside the role of counsel to reach a settlement between conflicted family members. A woman, sober at the time of the accident, was walking across the street when a young man hit and killed her. It was late fall, and as described by the lawyer, the woman would be unlikely to cross against the light with the car coming. The young man was at the opposite sign of the street at the intersection where he should have stopped if there was a red light. He claimed that she walked against the light.

The lawyer had to manage the case, but also the conflict between family members of the deceased woman. The father wanted it "over", and the economic consideration of what he considered the human life would be. The daughters wanted an admission of guilt and an apology from who they considered to be the at fault driver. The lawyer noted: "As a lawyer in that case I became a mediator. I had to mediate between the daughters and father". Clearly, their objectives were different. For the daughters, it was not just about the money. The daughters were not happy with the amount offered, which presented the "buyers and sellers remorse" dilemma. It seemed that the familial relationship was somehow distorted. Ultimately, the case went to mediation mid-trial when a witness stated that there were two people in the car, and one fled the scene. That testimony tainted the defendant's position

[81] Interview, A16.

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and ultimately led to the resolution of the case. Regardless of the outcome, what became a major concern for the lawyer was that the family members had competing interests in the case. Thus, it seems that there may be some danger when lawyers multitask. Operating in a gray area of being a counselor and a mediator may be necessary, but can also have an impact on the parties and how they view their case. When parties have competing interests, it may be beneficial to address some of the concerns with a neutral mediator.

5. They don't address intangible interests creatively

In a dog-bite case, the client[82] was not looking for monetary compensation, but peace of mind. The client did not object to receiving money from the defendant's insurance company. Yet, the client's main non-monetary goal was having the defendants held accountable and that a fence on the property owned by the defendant be installed. The client wanted to continue running her route with peace of mind, knowing the defendant's dogs would be contained in an enclosure. After the client's deposition, the lawyer for the plaintiff attempted to discuss the possibility of the defendants resolving this matter by putting up a fence. The lawyer for the plaintiff made the request knowing the defense attorney was going to say her clients would not agree to that. Also, the defendant's lawyer was being paid for by the homeowner's insurance company, which could indicate that regardless of the result of the negotiations, there was not much that could have been done. Under the terms of the policy, there is only so much the insurance company is obligated to do or perform under its contract. The lawyer for the plaintiff was of the opinion that for the defendants could feasibly have agreed to putting up a fence, but they have no obligation to and the court system cannot obligate the defendants to do that either. As the lawyer explained: "You find yourself in a spot where you cannot really provide the client with the true outcome they desire".[83]

DISPUTE RESOLUTION CULTURE IN MICHIGAN

"Lawyers don't talk to each other anymore, they need a middle person [the mediator]".[84] There are different kinds of lawyers on both sides of the spectrum, both on the defense and the plaintiff side. There are collaborative lawyers, as well as "hard-nosed lawyers". You can find them up north and you could find them in

[82] Interview, A20.
[83] *Ibidem*.
[84] Interview, A10.

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Detroit.[85] The differences stem from the nature of the relationships between the lawyers rather than the venue of the jurisdiction.[86] The socio-economic considerations, as well as demographics, continue to have a polarizing effect on the personal injury cases at hand. The insights offered by lawyers and mediators alike demarcate the State based on attorney kinship, cordiality, ethics, case scrutiny as well as differing goals.[87] The northern part of the State was generally labeled as more conservative and less flexible in terms of proposed mediated settlements, and the west was more business oriented in general. One lawyer observed that: "(…) in Detroit, they see so many people, I guess kind of always rushing this [settlements]. All right, we got our facts straight. Let's do this and then you move on. Now, in the outer counties, there's a lot more scrutiny to the case. There is a lot more timespan and analysis really with what goes on".[88]

Also, throughout the study it has been determined that the smaller the community, the better the relationship between the lawyers. It seems that within smaller communities one can observe a faster settlement process and a more amicable relationship that translates into future referrals. One attorney noted: "The smaller the community, the more it matters that you have a high quality relationship with the lawyer; unfailing courteous and respectful – not necessarily friendly. (…) if you do not have that you have to build it; you have to find places to be respectful – it is something as simple and obvious as accommodating schedule, but also that you admired the advocacy on the motion (even though they lost); that you enjoyed the community and that you are respectful of the work that they're doing – those kinds of gestures to create a relationship matter much. Lawyers who are of the older generation and practiced in smaller communities, they were able to resolve the matters more effectively".[89] However, there is an obvious limitation on what lawyers can get away with. It takes a lifetime to build a reputation and one can lose it fast. In smaller towns, the community knows how you practice law.[90]

Lawyers commented on the nature of mediation and how the negotiation process differs from one part of state to the other. For instance, in medical malpractice cases, on the west side of the state, the lawyers who represent hospitals are less likely to negotiate. One lawyer noted: "Those lawyers may have a more binary view of the world of right or wrong. They do not embrace the idea that: 'let's do some business, let's talk'. In contrast, on the east side of the state well, looks like a fraud, seems like a fraud, but let's see if we can negotiate".[91] There seems to be

[85] Interview, A7.
[86] Interview, A5.
[87] An assessment of all interviews.
[88] Interview, A21.
[89] Interview, A19.
[90] Interview, A9.
[91] Interview, A10.

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evidence that in the metropolitan areas, attorneys appear to behave more hostile toward each other, with some exception to the Grand Rapids area. On the one hand, an interesting observation was made that some counties have something that was described as a "culture of politeness", like Kent County. That culture of politeness was described as a net positive for the Michigan Bar. On the other hand, larger urban areas such as Southeast Michigan, in the Wayne, Oakland, Macomb County regions create a more hostile environment, where there is very little politeness, little actual courtesy, and minimal suitability. One lawyer observed that the hostility creates a favorable environment for negotiations and mediators: "Lawyers more often need mediators to become intermediaries to communicate to the side [clients]. In consequence they [lawyers] less often resolve cases that they would otherwise be able to resolve. I think that that's an enormous difference in terms of dispute resolution potential".[92]

Even though there are different models of bargaining and negotiation another lawyer observed that "unfortunately, there's a lot of modeling after the wrong types of lawyers out there".[93] Again, another ex-lawyer, now mediator, emphasized that the differences have more to do with the relationships between the lawyers than it is about the venue or the jurisdiction.[94] It has been emphasized that history, population size, and economic considerations play a significant role in terms of case preparation. Areas that have more poverty usually have high verdicts. Detroit was one of the highest verdict centers in the country for years.[95] What is an important aspect of PI cases is that there are general caps on recovery that are either imposed by statute or insurance policy limits. Caps on recovery in traditional personal injury cases are subject to the general policy limits. Still, there may be the temptation of a lottery mentality in a state without any kind of cap on recovery.

The cases may settle for a little higher in Southeastern Michigan then they would in Western Michigan, as Western Michigan is a more conservative jurisdiction.[96] Trying a case in a more conservative jurisdiction poses a higher risk for the plaintiff of getting a less-favorable settlement. Mapping out and identifying different pockets in the State that are more conservative versus those that are more liberal,[97] can serve as a useful tool for junior lawyers, who may be unaware of such differences playing a role in settlement negotiations. There are also benefits to such knowledge to foreign lawyers and lawyers that are out of State. In conclusion, (1) in a smaller community one needs to maintain a reputation (with counsel and with

[92] Interview, A19.
[93] Interview, A5.
[94] *Ibidem*.
[95] Interview, A2.
[96] Interview, A10.
[97] For example, see D. Weigel, L. Tierney, *The Six Political States of Michigan*, 9.8.2020, https://www.washingtonpost.com/graphics/2020/politics/michigan-political-geography (access: 5.3.2023).

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the judges), (2) depending on the type of injury, and which entities are involved, the negotiation culture may differ.

Finally, the greater the respect a lawyer has, the more clients are willing to listen and seriously consider the other side's point of view. Considering the other side's point of view is also based on sincere respect for: the lawyers, the bona fide for the other side, and the facts. As one lawyer points out: "Any of those three components can forge a resolution".[98] Moreover, a mediation that works, is a one where the client is available, but not an active participant in the process. That premise is based on the definitive choice model – what is the last best offer the other side will make, and then, presenting that to the clients and finally presenting them with a recommendation: "Clients hire me to be their negotiators. Clients do not have enough patience, they are too willing to talk to fill the silence, jump to conclusions, etc. At the same time, clients often care less about the money than their lawyers do. However, there are a few defendants who want to negotiate about something more than money".[99]

CONCLUSIONS

There can be many challenges to compassionate practices in the realm of personal injury disputes. Clients value the "human touch",[100] and often have non-monetary goals as evidenced by this study. In most personal injury cases clients' overriding non-monetary interests were wishes to receive recognition or an affirmation that they have been wronged. Pursuing client's intangible goals and interests demonstrates a compassionate practice. Some lawyers believe that perspective taking can have little or no effect on the settlement, while others see great benefits to active listening and honest communication that helps manage expectations and delivers better results for clients. However, issues such as repetitive claims, high maintenance, and incidental clients are some of the challenges to a compassion-driven personal injury practice.

Lawyers need to be trained more in of human emotions, as evidenced by statements such as: "It almost feels like you're trying to do a job without being trained in it",[101] and: "In order to be a good plaintiff attorney you must have patience, empathy and compassion".[102] Without a doubt, the established practice of mediating

[98] Interview, A19.

[99] *Ibidem*.

[100] N. Ebner, *The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation and Mediation*, [in:] *Online Dispute Resolution: Theory and Practice*, eds. D. Rainey, E. Katsh, M. Abdel Wahab, New York 2021.

[101] Interview, A15.

[102] Interview, A23.

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personal injury claims is beneficial for the parties and the judicial system. To fill the existing void in empirical research dedicated to compassion in the legal profession, the recommendation is to perform similar research and to look for intangible interests in other types of disputes and areas of law.

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ABSTRAKT

Artykuł jest wynikiem jakościowego badania empirycznego mającego na celu analizę, czy prawnicy zajmujący się sporami związanymi ze szkodą na osobie w stanie Michigan wdrażają praktyki poradnictwa prawnego opartego na współczuciu. Opracowanie stanowi wkład w dobrze ugruntowane badania dotyczące rozwoju umiejętności miękkich w praktyce prawniczej, a jednocześnie jest próbą rozpowszechnienia i podkreślenia korzyści płynących z pozasądowych metod rozwiązywania sporów. Celem było zbadanie charakteru tzw. współczujących praktyk i ich wpływu na ugody zawierane w drodze mediacji. W związku z tym przeanalizowano, w jaki sposób prawnicy oceniają niematerialne i niepieniężne interesy klientów oraz czy odgrywają one rolę na kontinuum rozwiązywania sporów. Ponadto omówiono zalety i wady praktyki prawniczej związanej z oceną niematerialnych interesów klientów. W badaniu założono, że prawnicy zwracający uwagę na niematerialne interesy klientów stosują formę współczującej praktyki. Dlatego opracowanie zawiera zarówno teoretyczne, jak i praktyczne implikacje dla prawników i mediatorów. Wreszcie wyniki badania sugerują, że alternatywne mechanizmy rozwiązywania sporów, takie jak mediacja, przyczyniają się do szybszego rozwiązywania sporów dotyczących szkód na osobie.

Słowa kluczowe: współczucie; prawnicy; alternatywne metody rozwiązywania sporów; szkoda na osobie; mediacja