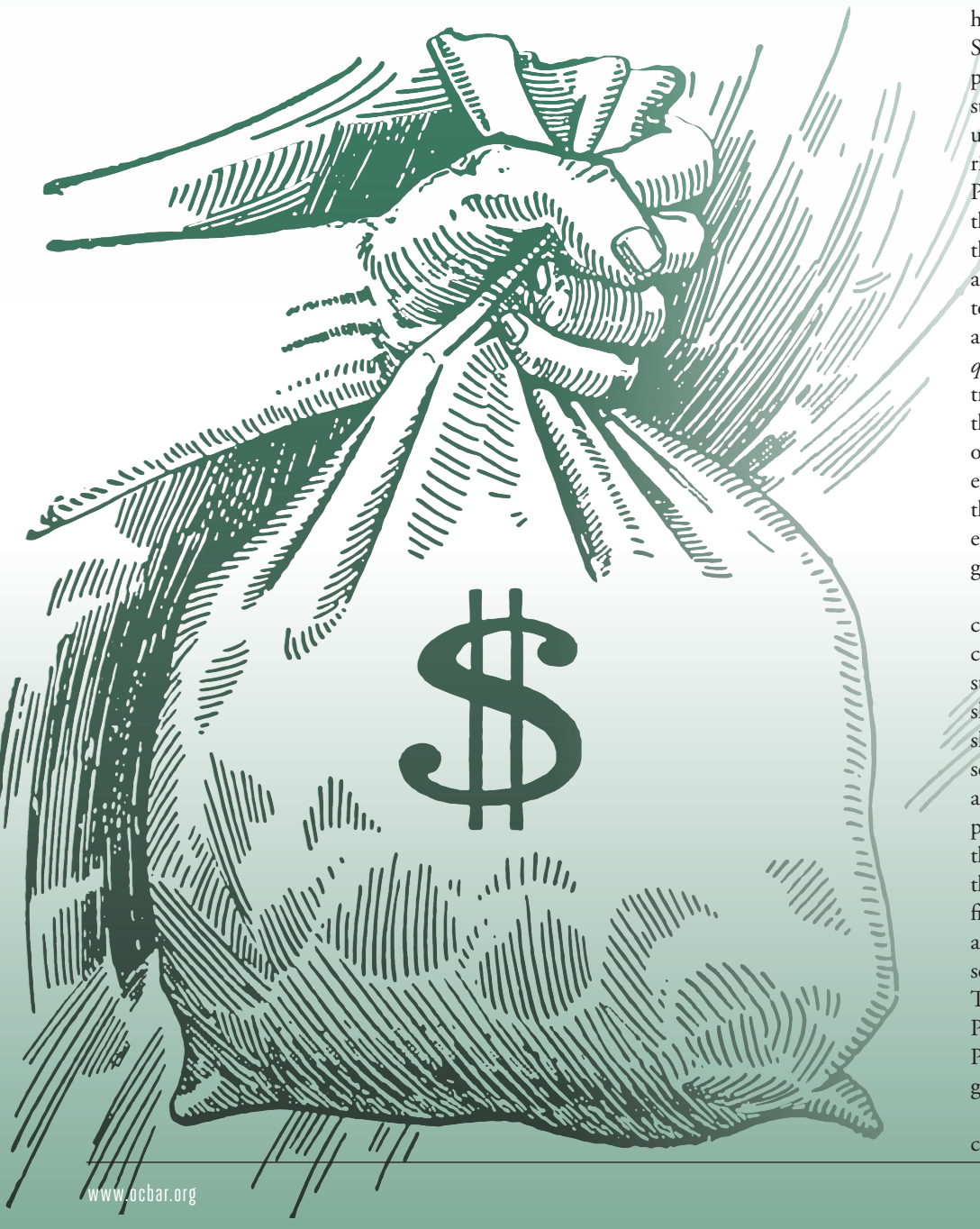
CASH ON THE BARRELHEAD

by MICHAEL G. BALMAGES

"Virtue has never been as respectable as money." ~ Mark Twain

"The story you are about to see is true. The names have been changed to protect the innocent." Announcer, *Dragnet* television show (1951-1959).



My three clients in a case I defended in the 1990s were not nice people. They were co-owners of a small and highly successful construction business. There were about forty employees besides the three owners. About thirty men worked in the field and ten women in the office who did the scheduling, the billing, the collecting, and the other adminstrative work. The owners were in their early 40s but, like many men, they had never psychologically matured beyond teenagers when it came to sexual innuendos and jokes. The place was *Animal House* but without a house mother or a Dean Vernon or the charm. Sexual harassment was the *sine qua non* of the place; its *raison d'etre*. Sure, there were the stereotypical *Playboy* centerfold posters stapled up near the timeclock and the employee's rights posters but that was the tamest stuff. Photocopies of the owner's genitalia also graced the walls, and you should have seen some of the companywide emails that were circulated, a method they discovered was an efficient way to gross out everyone at the same time. It was all hostile-environment harassment, not the *quid pro quo* kind of stuff. They weren't into trading sexual favors for job advancement or threatening termination for failure to put out. Nope, they were just having "fun." No employee ever complained to HR because there was no HR; just the owners. Finally, an employee asked them to tone it down and, you guessed it, she got fired; and she sued.

I was not the first defense attorney on the case. My predecessor was a friend and former colleague who was a very experienced and successful employment specialist. She was no shrinking violet. She was a lawyer, after all, and she had worked with me for years handling sexual harassment cases. She had seen it all and heard it all. Plaintiff's counsel was a high-powered partner in a major Los Angeles firm that normally only represented employers, but this case was just too good to turn down. Pre-filing, the lawyers for both sides negotiated and defendants offered $1.495 million to settle. Yup, $1.495 million in 1990s dollars. That's how bad the defendants had behaved. Plaintiff turned down that offer and filed suit. Plaintiff and her counsel knew they had a great case, and very solvent defendants.

Defense counsel, my friend and former colleague, found herself getting grossed out by

her clients and felt life was too short to put up with them. She looked for a lawyer to sub in who had a high tolerance for gross behavior and she called me. I accepted.

Shortly after I subbed in, plaintiff's counsel suggested mediation. We agreed on a retired Orange County Superior Court Judge as mediator, a person I knew well. Shortly before the mediation, I had an accident; that is, a thought struck me. I realized that there is no case on earth that would not immediately settle for a bag of $100 bills if the bag was big enough. I thought and thought, "what size bag of $100 bills would I have to lay on the table at mediation that would be irresistible to the plaintiff?" A bag so big that she would immediately pick it up and go home? I do not exactly recall how I arrived at that number, but I eventually decided that $500,000 would do it. I guess I figured it would be very difficult for a fired employee to turn down a half a million bucks staring her in the face in a conference room. Now, I really wanted my clients to bring $500,000 in cash to the mediation but there were some logistical problems with that and possibly some legal ones also, so I asked my clients to bring cashier's checks to the mediation totaling $500,000. They did.

At the mediation, the mediator spoke to opposing counsel and me together. Then, separately spoke to plaintiff's counsel. The mediator then came to see me and my clients and told us that the demand was $3.5 million. I responded with the $500,000 and the mediator was kind of shocked and annoyed. He confirmed that my clients had offered $1.495 million pre-filing and asked how did we expect the plaintiff to now settle for $500,000? I pulled the $500,000 in cashier's checks out of an envelope and asked the mediator to hand them to plaintiff and tell her that she can walk out of the mediation today with this $500,000, no waiting, no depositions, no reliving the events, no trial, just half a million dollars, today. The mediator said the plaintiff would never accept it. She did. My clients were delighted. I had just saved them $1,000,000 (but see below).

That is not the only "cash is king" mediation moment that I have had. I have done a lot of Americans with Disabilities Act mediations. Very often they settle for amounts that sound small to you and me, but not so small to the mom-and-pop store owners who pay. One such case had a larger than usual bottom line demand by plaintiff: $20,000. Defendants told me that they would not go above $9,000, that was all they could afford. It was late in the afternoon, and I asked defense counsel (there were two of them) if their client could hurry to a bank and get $9,000 in cash, again feeling that the plaintiff would not turn down cash on the table. Unfortunately, it was too late for that. Fortunately, one of the defense lawyers had $9,000 in cash on him! (Who carries that much cash?) The case settled for $9,000 in cold, hard cash delivered at the mediation.

In a FEHA case where the plaintiff was stuck at $60,000 and my client, the defendant, was stuck at defense costs of $25,000, I again made the cash suggestion, i.e., that my client send its CFO to the bank to get $25,000 in cash, with me practically guaranteeing my client that the case would settle for $25,000 if he did that. He did, and it did.

I sat as the temporary judge on a Mandatory Settlement Conference (MSC) in a case involving the youngest of five brothers: he was 62, suing the eldest of the five brothers who was 77. All four of the older brothers had done very well in real estate. The youngest brother not so well. He was suing his oldest brother for approximately $35,000,000 that he claimed was owed him as a partner in a very profitable real estate partnership. The oldest brother said that he had given his youngest brother a well-paying job to help him out and there was never a partnership. Youngest brother was at the MSC with his much younger girlfriend who was urging him to not settle for less than the $35,000,000 he was owed. At the MSC, in the cafeteria, the oldest brother wrote his youngest brother a check for $9,000,000 and handed it to me to give to his baby brother to settle the case. Against the protestations of his girlfriend, baby brother took it.

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A close second to cash on the barrelhead, is delivery of a check the next day. I have mediated many cases where the final gap was bridged by a promise to pay the next day, or by Friday, or by next week. The converse, of course, is that defendants will often agree to pay more than they otherwise might if payment can be delayed a few months or even years.

A follow-up on the $500,000 in cashier's checks case. I felt proud of myself for engineering that settlement. I'd saved my clients from themselves and almost $1,000,000. Now, after three decades of consciousness raising, I might not feel as proud. I would still probably do the same thing but just not be as proud of it! My retainer agreement provided that I was entitled to charge a "reasonable bonus fee" if I was able to achieve a substantially better settlement for the clients than the $1,495,000 they had already offered to pay. My final billing included the agreed-upon hourly rate for the time I had spent and "a reasonable bonus fee" of $50,000, five percent of the million dollars that I had saved them. Instead of payment, the response I got was a four-page letter from a lawyer detailing what a poor job he claimed I had actually done; that the case against my clients was meritless, and was not worth anything close to the $500,000 that I had allegedly forced them to pay; and that my services were not even worth the approximately $16,000 in hourly fees I had charged. I responded to each of the allegations with the facts, almost all of which were covered in my retainer agreement, but I did not pursue it further. If I had, I would have settled for a couple thousand bucks . . . in cash.

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