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MEDIATION WITH JEFFREY KRIVIS

Responding when the other side doesn't have settlement authority

RECOGNIZE THIS AS THE DEFENSE STRATEGY THAT IT OFTEN IS. HERE ARE TIPS ON HOW TO DEAL WITH IT

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You have now paid thousands of dollars for the privilege of participating in a mediation of a catastrophic-injury case. You have your client worked up over the prospect of settling the case, and you have the right mediator to do it for you. However, when you sit down for the joint session, you notice that the person attending from the insurance company is not the same person you spoke to before suit was filed. In fact, the person across the table looks like he is right out of adjuster college. You are mildly concerned, but figure that an adjuster would not be at the table unless the insurance company planned to settle. You decide to go forward with the thought that you might discuss your concern with the mediator.

As you enter the session, the mediator asks you how much you want to demand. Recognizing that you are here to settle, you now put a reasonable number on the table, expecting a similar response from the insurer. Instead, a few minutes later, the mediator comes back and starts talking to you about everything under the sun except the number you put on the table. You begin to worry that the adjuster might not have the ability to make a decision. You then ask the mediator what the defense is willing to offer. The mediator deflects the question, saying something about the other side still analyzing the case before they make an offer.

It then hits you like a lightning bolt. The adjuster doesn't have the authority to settle. You have been duped. You confront the mediator. The mediator now looks like the insurance company's pawn and confirms your suspicions: The adjuster does not have full authority to settle, or claims not to have such authority.

Why does this happen, and what can you do to manage this dynamic to reach a fair settlement?

Recognize the tactic

You must first recognize that a lack of authority is *not* an accidental approach to settling cases. It is a well-accepted and effective negotiation tactic.

Whether consciously or not, the insurance-carrier negotiator uses an age-old maneuver that forces you closer to the opponent's position. Some negotiators do not have authority because many sophisticated insurance companies understand the financial value of institutionalizing this maneuver within claims departments.

The carrier's tactics are intended to affect an opponent psychologically, causing the opponent to lose confidence and

eventually settle for less than they otherwise would. In short, it is a strategic move that some insurance companies use to improve their bargaining position without training their negotiators in any complex negotiation theory.

This lack-of-authority tactic can take several forms. One is that the adjuster plainly has no authority to offer any amount without first running it by a supervisor. Another is that the adjuster is given limited authority and can only offer what might be perceived as a fairly low figure.

Realizing that lack of authority is one of the most popular and successful gambits used by parties in a negotiation is the first step in overcoming the move. At its core, it is a "trick" designed to take advantage of the fact that one side assumes its counterpart is acting in good faith. Other tricks that fall into a similar category of claiming lack of authority include: making an extreme opening offer; withholding concessions and information; stretching the facts; and playing good guy/bad guy.

Having recognized the tactic, a common response from plaintiff's counsel is something like: "This is going to be a waste of time. I'm out of here." After some gentle nudging by the mediator, the plaintiff decides to stay a bit longer to see what happens, which is good. Understanding the reason the lack-of-authority tactic is used will help overcome it.

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Defendant's point of view

Besides the lack-of-authority tactic impacting your expectations, it is also a simple tool for taking the temperature of opposing counsel to learn how firm they are in their position. This gathered information is important to the defendant. For example, if the plaintiff appears anxious to achieve a quick settlement, defense counsel will recognize that the plaintiff will likely accept less money rather than wait for the negotiator to take plaintiff's demand to a supervisor with higher settlement authority.

The real question to ask yourself is whether you are so hungry that you need to take the bait and forgo the back-and-forth negotiation process to guarantee a settlement that day. Suppose you go through the negotiation process and do not take the bait. In that case, the mediator can diagnose the situation and determine whether the defense will consider asking a supervisor or claims committee to reevaluate their negotiating position and, if appropriate, give the negotiator more settlement authority, i.e., more dollars.

If the mediator senses an opportunity for further settlement authority, you have just won the first round of negotiations. But, on the other hand, if the mediator firmly tells you there will be no more money on the case, then you have a clear decision to make.

The reality is that sometimes the mediation process is the first time the negotiators for the defense have actually looked at the file with an eye toward settlement. Realizing that others might be viewing their work after a deal is cut, they cautiously put a conservative amount of money on the case, while intentionally holding something back.

Overcoming the tactic

When you are working with a resourceful mediator trained in spotting negotiation tactics, you can overcome the tactics quite easily by considering three different approaches that depend on your instincts and mediator advice: 1. Minimize its significance; 2. Use your own tactics; and 3. Merits only. In short, MUM's the word.

1. Minimize its significance: Resist the temptation to reinforce the belief that the lack of authority has meaning to you. Do this by *not* reacting whatsoever to the tactic. This might cause your adversary to become vulnerable by letting on what they are willing to recommend to their principal to settle. This could be to your advantage in that their idea of settlement is sometimes higher than your expectations.

For example, in a catastrophic-injury case where the value of the claim exceeds six figures, the adjuster often must run any recommended settlement up the flagpole before authority is granted. That does not mean the adjuster will not be your advocate for a settlement in the range that the case is worth.

A skillful mediator can assist in having an academic conversation with the adjuster that allows you to give informal messages to the mediator about a settlement amount you would recommend to your client in exchange for the adjuster making appropriate recommendations to the carrier. At the same time, you learn a great deal from the adjuster, as (s)he tells the mediator what (s)he thinks the claims committee might accept.

2. Use your own tactics: An aggressive and often unsuccessful approach is to fight fire with fire. Some lawyers, upon hearing that the adjuster does not have appropriate authority, will storm out of the mediation session to send a message to the other side. This ploy generally results in challenging the relationship with the adjuster such that the adjuster might lose interest in the case and decide not to push it. Consider that the adjuster might have 150-200 other cases in his or her cabinet, some of which can be settled. Going in this direction is dangerous, but it is a common theme among plaintiff's lawyers who are offended by tactics.

Another approach is to try and reverse the authority. If your client is present, simply let the adjuster know that you cannot make any decisions without the client's spouse, and since the spouse is not present, you cannot negotiate. Unfortunately, you might get tangled in a web of deception here that compromises your conscience and ability to sleep at night. Nevertheless, some lawyers prefer this competitive approach because it puts the adjuster on defense.

Finally, consider putting time pressures on the adjuster. For example, if the other side knows that you cannot stay for the entire session, they are more likely to allow the mediator to float numbers and try and get both sides to commit to ranges that will ultimately settle the case.

3. Negotiate on the merits only: The most effective response to overcoming the lack-of-authority tactic is simply to point it out and have the mediator let the defendant know that you would like to negotiate only on the merits of the case. You then have made the lack-of-authority tactic a specific issue in the negotiation, and you can then discuss how you will negotiate the case given this problem. It forces the defense to take an even higher moral ground than they usually would because they will be bending over backward to prove that the lack of negotiating authority is not a tactic. You will improve your relationship with the defense and begin negotiating on the merits after you have decided how to handle the negotiating-authority issue.

A good example occurred in a bad-faith case where the parties were over a million dollars apart during the first mediation session. It was obvious that the defense had no authority to settle. Nevertheless, the parties agreed to spend the session examining the facts as each side saw them and exploring potential ranges where the case could settle "if" the decision makers were present.

When the mediator concluded that both sides agreed on the general range or value of the case, it was recommended that the parties return to the bargaining table with the decision maker present. The defense agreed to brief the decision maker before the next session, along with

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the defense recommendations on value. The next session resulted in the case settling in the seven figures.

Reasons plaintiffs should go forward

Having now decided which strategy to use to overcome the lack-of-authority tactic, there is rarely a disadvantage to going forward with the mediation, even if it is for the limited purpose of setting the stage for a future session. In so doing, you have allowed the defense a chance to work up their claims file in a manner that encourages the claims supervisor or claims committee to put the kind of dollars on the table that the case is worth. This is truly an opportunity for the defense to make commitments, such as returning to another session with a reasonable offer or making one by email or telephone. This settlement opportunity will not likely present itself again, except perhaps on the eve of trial after everyone has more invested in the case.

As well, you continue to play the role of a strong advocate/trial lawyer in front of your client, while the mediator takes the heat as the settlement advocate searching for the exit strategy that fits your settlement objectives. A professional mediator will follow up with both sides, allowing you to keep the conversation going without losing momentum.

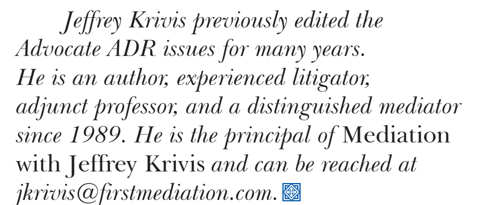
Finally, you might even narrow the issues such that the next conversation is strictly about damages. For example, in a slip-and-fall case where "notice" is always an issue, the discussion might focus on identifying what evidence is available to prove notice. If the adjuster sees that you are confident in your proof, you might have just passed the main threshold that will loosen up the purse strings for the adjuster to get real authority from a supervisor.

From the standpoint of the mediator, the lack-of-authority tactic might be a blessing in disguise. For example, if the demand to settle is out of proportion to the true value of the case, it provides the mediator with the chance to float numbers by asking the defendants if they feel they can get authority if the demand were in a practical range. At the same time, the mediator will ask the plaintiff to commit to a more realistic range so that the next session results in a quick discussion on damages and an obvious settlement.

By giving the mediator options to move forward, you can also reverse the tactic by using the mediator to play good cop/bad cop with the defense. In other words, while the adjuster perceives you as competitive in your position, the mediator becomes the voice of reason who is perceived by the defense as having the ability to convince you to become more realistic.

Conclusion

The tactic of lack of authority is part of the negotiation process and ought to be expected by a shrewd plaintiff's attorney, and, need I say, embraced at times as simply the next step in getting an agreement. But, to overcome the no-authority tactic, remember, MUM's the word!



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