Behind the Curtain

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Let's start with the obvious: We all want to settle our cases as quickly as possible, for as much as possible. It does not take a brain surgeon to figure that out. The tough part is how to do it. As a Plaintiff, the goal of early recovery is part of our DNA. We all know, however, that it takes two to tango. We cannot force early settlement. We can only takes steps to try and get there.

Several years ago I wrote an article talking about the "need for speed". I emphasized that we can only move the file to a tipping point where settlement is possible by understanding the needs of our adversary. Until we get them the right information, there will be no settlement. As Subrogation Professionals, we need to find out what the defense needs to be able to discuss resolution. Today I want to focus on the messages we receive from the other side and how much stock we should put in them. We just settled a large property case against a party who constantly told us how bad our case was and how many different ways they had available for the Judge to dismiss the matter. Our recovery was a seven figure amount obtained at mediation. So, were they lying to us about their view of the case? Were they trying to psych us out? Did their evaluation change significantly as the discovery on the case progressed?

The answer is: I will never know. That is the point. You may know from some counsel or claims people you deal with what they really think. However, on most claims, you really will not know what is going on in the background. You only really know what your case is all about. You should, know your strengths and weaknesses. You should also know your opponent's issues.

You can also try to listen carefully to any clues you get from your adversary. They may tell you that your case is terrible, but then suggest the matter be mediated as soon as possible. They may tell you that you have a lousy case but that we should talk before we spend a fortune on depositions of experts. These are "tells" that suggest there may be a different message hiding behind the swagger.

Your message to the defense may make a difference, as well. Some opposing parties need to know you are really prepared to go the distance before they get serious. This can be a challenge when you have a mediocre case and do not want to spend the time and money to go to trial with a low potential of winning.

A lot of this posturing has come to pass because of mediation. No one wants to give up anything knowing that mediation is probable. In today's litigation world, it is often difficult to have any idea what the defense will do until the mediation occurs. I am also finding that on larger cases, multiple mediations are becoming the norm.

The bottom line is that we control our own cases and have to make our own evaluations as to what should happen. We use our experience to forecast what the opposition will do and to determine when the right time is to push our cases towards settlement. We will likely never know what the defense is really thinking or what is going on behind the curtain.

This article appeared in the Spring/Summer 2014 issue of the NASP *Subrogator*